MUNICIPAL LIABILITY: TENSIONS IN THE TENTH CIRCUIT

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ABSTRACT

Municipal liability is important to parties but complicated to litigate, with multiple types of claims falling within the municipal liability realm. This Article is a roadmap for litigators and judges in municipal liability cases in the Tenth Circuit. It clarifies the pleading requirements and elements for various types of municipal liability claims. It also highlights some unresolved issues in municipal liability litigation and tensions within the Tenth Circuit and among the other circuits.

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INTRODUCTION

When plaintiffs bring claims against municipal actors for a violation of their constitutional rights under 42 U.S.C. § 1983, they often assert claims against the municipalities that employ those actors. The Supreme

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Court paved the way for municipal liability claims in its landmark 1978 decision, *Monell v. Department of Social Services of the City of New York*,[1] which held that a municipality may be responsible for an injury caused by an employee if the employee was acting pursuant to a municipal policy or custom.[2] In *Monell* and subsequent decisions, the Supreme Court has clarified that to bring a municipal liability claim, a plaintiff generally must establish (1) the existence of a policy or custom; (2) that the policy or custom caused the injury; and (3) that the municipality had a culpable state of mind.[3]

Since the *Monell* decision, the contours of municipal liability claims have gradually evolved. Municipalities have been held liable for both affirmative acts, such as an official policy that violates a plaintiff's rights, and omissions or failures to act, such as failing to train police officers on the proper use of force.[4] Depending on the type of claim asserted, a plaintiff may have to prove different elements or provide a certain type of evidence to achieve success. Due to the variety of claims and their different requirements, parties often struggle to properly assert their claims, especially when the municipal liability claims overlap or involve multiple actors. The fact-intensive nature of § 1983 cases also makes it difficult for parties to demonstrate to courts that the elements for the respective municipal liability claim are satisfied.

This Article is intended as a roadmap for litigators and judges to help clarify the pleading requirements and elements for various types of municipal liability claims. It will also highlight some unresolved issues in municipal liability litigation and tensions within the Tenth Circuit and among the other circuits.

Part I provides a basic background of municipal liability. Part II summarizes the types of municipal liability claims and related areas of tension. It first covers affirmative acts, then omissions or inactions, and finally describes some unique issues within omission claims.

I. THE MUNICIPAL LIABILITY LANDSCAPE

Under 42 U.S.C. § 1983, a plaintiff may seek redress for a constitutional or statutory harm caused by certain government actors.[5] Enacted as part of the Civil Rights Act of 1871, § 1983 provides in relevant part:

> 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

1. Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658, 690–91 (1978).
2. *Id.* at 694–95.
3. Schneider v. City of Grand Junction Police Dep't, 717 F.3d 760, 768–69 (10th Cir. 2013).
4. *See, e.g.*, Pembaur v. City of Cincinnati, 475 U.S. 469, 484 (1986); Garner v. Memphis Police Dep't, 8 F.3d 358, 364–65 (6th Cir. 1993).
5. 42 U.S.C. § 1983 (2022).

> 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.[6]

Section 1983 is not a source of substantive rights—rather, it serves as a vehicle for injured persons to receive compensatory damages or to prevent continuing harm.[7] When bringing a § 1983 claim, a plaintiff must identify which constitutional or statutory right has been deprived.[8]

In its 1978 case, *Monell v. Department of Social Services*, the Supreme Court held that "municipalities and other local government units" qualify as "persons" that are subject to liability for violations under § 1983.[9] The Court explained that because "municipalities through their official acts could, equally with natural persons, create the harms intended to be remedied by [§ 1983] . . . there is no reason to suppose that municipal corporations would have been excluded from the sweep of [§ 1983]."[10] Although the *Monell* Court noted that the "plain meaning" of § 1983 shows that "local government bodies were to be included within the ambit of the persons who could be sued,"[11] the Court primarily relied on the legislative history of the Civil Rights Act of 1871 to support its conclusion that municipalities are "persons" for § 1983 purposes.[12] First, the Court determined that statements by legislators "corroborated that Congress, in enacting [§ 1983], intended to give a broad remedy for violations of federally protected civil rights" and that the statute should therefore be "broadly construed."[13] Next, the Court highlighted excerpts from the congressional debates that demonstrated the enacting legislators intended for § 1983 to apply to municipalities.[14] For instance, Representative John Bingham of Ohio stated that "he had drafted [§ 1983] with the case of *Barron v. Mayor of Baltimore*, [] especially in mind."[15] Representative Bingham explained that in *Barron*, the city of Baltimore had taken a citizen's private property for public use without compensation and at the time, "there was no redress for the wrong."[16] The *Monell* Court concluded that Representative Bingham's remarks "clearly indicate his view that such takings by cities, as had occurred in *Barron*, would be redressable under [§ 1983]."[17] Finally, the *Monell* Court determined that at the time the Civil

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6. *Id.*
7. Sheldon Nahmod, *Damages and Injunctive Relief Under Section 1983*, 16 URBAN LAWYER 201, 201–02, 210 (1984) (discussing the forms of relief available under § 1983).
8. *Id.* at 202.
9. 436 U.S. at 690.
10. *Id.* at 685–86.
11. *Id.* at 688–89.
12. *Id.* at 690; Pembaur v. City of Cincinnati, 475 U.S. 469, 479 (1986).
13. *Monell*, 436 U.S. at 685–86.
14. *Id.* at 685–88.
15. *Id.* (citing 32 U.S. 243 (1888)).
16. *Id.* (emphasis omitted).
17. *Id.* at 686–87. In his dissent, then-Justice Rehnquist questioned the *Monell* majority's conclusion that Representative Bingham's remarks were directed at § 1983 of the Civil Rights Act. *See*

Rights Act of 1871 was passed, "it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis."[18] While the Court acknowledged its early precedent did not treat corporations as persons,[19] the Court explained that this position was "unhesitatingly abandoned" in the 1844 decision of *Louisville, Cincinnati, & Charleston Railroad Company v. Letson*,[20] which held that a corporation "is to be deemed to all intents and purposes as a person . . . ."[21] As the *Monell* Court pointed out, the "*Letson* principle was automatically and without discussion extended to municipal corporations" just two years before the congressional debates on the Civil Rights Act of 1871.[22] Based on this legislative history[23] and the contemporaneous treatment of corporations as persons, the Supreme Court concluded that when passing the Civil Rights Act of 1871, "Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies."[24]

While the *Monell* Court opened the door for municipal liability, it strictly curtailed the circumstances under which such liability would be imposed. The Court made it clear that "a municipality cannot be held liable *solely* because it employs a tortfeasor," explicitly rejecting a *respondeat*

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id. at 721. (Rehnquist, J., dissenting) ("The general remarks from the floor on the liberal purposes of [§ 1983] offer no explicit guidance as to the parties against whom the remedy could be enforced. As the Court concedes, only Representative Bingham raised a concern which could be satisfied only by relief against governmental bodies. Yet he never directly related this concern to [§ 1983]. Indeed, Bingham stated at the outset, 'I do not propose now to discuss the provisions of the bill in detail,' . . . and, true to his word, he launched into an extended discourse on the beneficent purposes of the Fourteenth Amendment. While Bingham clearly stated that Congress could 'provide that no citizen in any State shall be deprived of his property by State law or the judgment of a State court without just compensation therefor,' he never suggested that such a power was exercised in [§ 1983].") (internal citations omitted).

18. *Id.* at 687 (majority opinion).

19. *Id.* (citing Bank of U.S. v. Deveaux, 9 U.S. 61, 85–86 (1809)).

20. *Id.* at 687–88; Louisville, Cincinnati, & Charleston R.R. Co. v. Letson, 43 U.S. 497 (1844).

21. *Letson*, 43 U.S. at 558.

22. *Monell*, 436 U.S. at 688 (citing Cowles v. Mercer County, 74 U.S. 118, 121 (1869)).

23. As several contemporary scholars have noted, the *Monell* Court's extensive reliance on legislative history and cursory treatment of the statutory text would likely not pass muster under the modern Court's interpretive practices. *See* Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857, 871, 873 (2017) ("In cases from the 1960s and 1970s [such as *Monell*], the Court often gave itself up to wholly unrestrained reliance on legislative history and statutory purpose, scouring congressional reports far more closely than statutory text. . . . The Supreme Court does not do this kind of thing today. Instead, statutory text is far more prominent on the Court's interpretive agenda. The Court consults legislative history, but does not bathe in it for dozens of pages."); Jesse D.H. Snyder, *How Textualism Has Changed the Conversation in the Supreme Court*, 48 U. BALT. L. REV. 413, 418–19 (2019) (describing *Monell* as an "often-maligned case by those who now disfavor extratextual considerations"). *See also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 376–78 (2012) ("[T]he use of legislative history to find 'purpose' in a statute is a legal fiction that provides great potential for manipulation and distortion. . . . Judge Harold Leventhal of the District of Columbia Circuit once likened its use to entering a crowded cocktail party and looking over the heads of the guests for one's friends. Moreover, because there are no rules about which categories of statements are entitled to how much weight, the history can be either hewed to as determinative or disregarded as inconsequential—as the court desires.").

24. *Monell*, 436 U.S. at 690; Pembaur v. City of Cincinnati, 475 U.S. 469, 479 (1986) ("Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts.").

superior or vicarious theory of liability.[25] To receive monetary, declaratory, or injunctive relief against a municipality, a plaintiff must establish that a municipal policy or custom directly caused the complained-of harm.[26] The *Monell* Court arrived at this conclusion after examining the text of the statute and its legislative history. The first sentence of § 1983 imposes a causation requirement for liability—the statute expressly states that a "person" is subject to liability only if that person "subjects, or causes to be subjected" any other person to a deprivation of any rights, privileges, or immunities secured by the Constitution or a federal statute.[27] The Supreme Court interpreted this causation requirement as precluding vicarious liability.[28] The Court also explained that Congress's rejection of the Sherman Amendment to the Civil Rights Act of 1871—which would have obligated local governments to "keep the peace"[29] and subjected local governments to liability if "persons riotously and tumultuously assembled," harmed a person, or destroyed their property—indicates that Congress did not intend for a local government to be sued under § 1983 "for an injury inflicted solely by its employees or agents."[30] The Court therefore held that it is only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."[31]

In the years following the *Monell* decision, the Supreme Court elaborated on what types of municipal policies and customs can subject a local government to § 1983 liability. More recently in the Tenth Circuit, we catalogued the variety of § 1983 claims that a plaintiff may bring against a local government.[32] Those claims include civil rights injuries caused by:

> (1) "a formal regulation or policy statement"; (2) an informal custom "amoun[ting] 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."[33]

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25. *Monell*, 436 U.S. at 691.
26. *Id.* at 690–91.
27. 42 U.S.C. § 1983.
28. *Monell*, 436 U.S. at 692.
29. *Id.* at 679–80.
30. *Id.* at 664, 694.
31. *Id.* at 694.
32. *See* Bryson v. City of Okla. City, 627 F.3d 784, 788 (10th Cir. 2010).
33. *Id.* (alteration in original) (quoting Brammer–Hoelter v. Twin Peaks Charter Acad., 602 F.3d 1175, 1189–90 (10th Cir. 2010)).

In separate cases, the Tenth Circuit has also recognized that municipal liability may be imposed based on "other alleged supervisory shortcomings" such as "failing to adequately screen job applicants . . . ."[34]

As will be demonstrated, the elements for municipal liability claims are generally well-established, but there are some crucial distinctions between the different types of claims. Broadly, the three elements that must be satisfied for all municipal liability claims are: (1) official policy or custom—which can take one of the following forms described above; (2) causation; and (3) state of mind.[35] These elements are of course in addition to the requirement of an underlying constitutional or statutory violation, necessary for all § 1983 claims.[36] Most of the difficulties plaintiffs face arise from the causation and state of mind requirements. But there are some tougher theoretical intricacies that have important implications for plaintiffs.

Typically, if an individual official is found not to have committed a constitutional violation, then a municipal liability claim based on the alleged constitutional violation will fail. But there are some circumstances where a municipal liability claim will survive even when an individual official is not found liable. A municipality, for instance, may be liable under *Monell* when a constitutional violation is caused by a group of officials rather than a single individual. A municipality may also be liable when the underlying violation is not clearly established, even though the individual official is immune from liability in such circumstances.

II. TYPES OF MUNICIPAL LIABILITY CLAIMS AND AREAS OF TENSION

As previously explained, there are multiple types of municipal liability claims. These can generally be divided into two broad categories: the first is affirmative acts, the second is omissions or inaction.

A. Affirmative Acts

One category of municipal liability arises from affirmative municipal actions. These claims are based on formal policies, governmental custom, ratification by a final policymaker, or action by a final policymaker.

1. Formal Policy

In terms of elemental complexity, a municipal liability claim based on a formal policy is perhaps the simplest claim to assert. To bring a claim, the plaintiff must allege and ultimately prove (1) the existence of an offi-

34. Waller v. City & Cnty. of Denver, 932 F.3d 1277, 1284 (10th Cir. 2019) (citing Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 410–12 (1997)).

35. Schneider v. City of Grand Junction Police Dep't, 717 F.3d 760, 768–69 (10th Cir. 2013); *Brown*, 520 U.S. at 405 ("In any § 1983 suit, however, the plaintiff must establish the state of mind required to prove the underlying violation.").

36. *Brown*, 520 U.S. at 404–05.

cial policy, (2) a direct causal link between the policy and the alleged constitutional violation, and (3) a culpable state of mind.[37] In *Monell*, the Supreme Court noted that an official policy may manifest in the form of "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by [a local governing] body's officers."[38] An official policy "often refers to rules or understandings . . . that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time."[39] These policies are "often but not always committed to writing . . . ."[40] *Monell* itself dealt with a formal, written policy. In that case, plaintiffs alleged that the City of New York had a written rule that "compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons."[41]

When an official policy is facially unconstitutional, a § 1983 plaintiff will often face little difficulty establishing that the official policy caused the alleged constitutional violation.[42] For instance, in *Anaya v. Crossroads Managed Care Systems, Inc.*,[43] the City of Trinidad, Colorado, had a written policy that required police officers to seize any person "who exhibits any potential of intoxication."[44] The plaintiffs were individuals who had been seized while in various states of intoxication and detained in a detoxification facility, sometimes for several days.[45] The plaintiffs sued the City of Trinidad under § 1983, alleging that the seizures "violated their Fourth Amendment rights not to be seized without probable cause to believe they

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37. *Id.* at 404–05; *Schneider*, 717 F.3d at 768–69.

38. Monell v. Dep't Soc. Servs. of New York, 436 U.S. 658, 690 (1978). In a later case, *Pembaur v. Cincinnati*, the Supreme Court explained that *Monell*'s definition of an official government policy is consistent with dictionary definitions of "policy":

> For example, Webster's defines the word as "a specific decision or set of decisions designed to carry out such a chosen course of action." Webster's Third New International Dictionary 1754 (1981). Similarly, the Oxford English Dictionary defines "policy" as "[a] course of action adopted and pursued by a government, party, ruler, statesman, etc.; any course of action adopted as advantageous or expedient." VII Oxford English Dictionary 1071 (1933). See also, Webster's New Twentieth Century Dictionary 1392 (2d ed. 1979) ("any governing principle, plan, or course of action"); Random House Dictionary 1113 (1966) ("a course of action adopted and pursued by a government, ruler, political party, etc.").

475 U.S. 469, 481 & n.9 (1986).

39. *Pembaur*, 475 U.S. at 480–81. While an official policy usually "establish[es] fixed plans of action to be followed under similar circumstances consistently and over time," the Supreme Court made it clear in *Pembaur* that a "single decision" by a municipality "unquestionably constitutes an act of official government policy," regardless of whether "that body had taken similar action in the past or intended to do so in the future . . . ." *Id.*

40. *Id.* at 480.

41. *Monell*, 436 U.S. at 660–61.

42. *See Brown*, 520 U.S. at 404–05 (1997) ("Where a plaintiff claims that a particular municipal action itself violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straightforward. . . . In any § 1983 suit, however, the plaintiff must establish the state of mind required to prove the underlying violation. Accordingly, proof that a municipality's legislative body or authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably.").

43. 195 F.3d 584 (10th Cir. 1999).

44. *Id.* at 589 (emphasis omitted).

45. *Id.* at 587.

were a danger to themselves or others."[46] The Tenth Circuit agreed with the plaintiffs and held that "such arrests are appropriate only with probable cause to believe the arrestee is a danger to himself or others."[47] The court explained that "by creating an official policy of detaining any person exhibiting 'any potential of intoxication,' the city basically instructed law enforcement officers to conduct unreasonable seizures."[48] The Tenth Circuit held the City of Trinidad liable for the seizures that occurred pursuant to this unconstitutional policy.[49]

Because unconstitutional policies expose municipalities to § 1983 suits, municipalities sometimes argue that the existence of a constitutional policy should shield them from suit.[50] But the Supreme Court has soundly rejected this proposition.[51] For instance, in *City of Canton v. Harris*,[52] the city had a facially constitutional policy regarding medical treatment for pretrial detainees.[53] The policy stated that the city jailer "shall . . . have [a person needing medical care] taken to a hospital for medical treatment, with permission of his supervisor . . . ."[54] When police officers failed to provide necessary medical care to a detainee, the city argued that its constitutional policy should protect it from the detainee's § 1983 claims against the municipality.[55] The Supreme Court refused to accept the city's position that "only unconstitutional policies are actionable" under § 1983, explaining that "if a concededly valid policy is unconstitutionally applied by a municipal employee, the city is liable if the employee has not been adequately trained and the constitutional wrong has been caused by that failure to train."[56] Indeed, most *Monell* cases do not arise based on a municipality's codified unconstitutional practices and are instead based on an informal custom or omission.[57] If this were not the case, then "a municipality's leaders would have the very strange incentive to flout their own

46. *Anaya*, 195 F.3d at 587.
47. *Id.* at 590.
48. *Id.* at 593 (internal citation omitted).
49. *Id.*; *see also* Christensen v. Park City Mun. Corp., 554 F.3d 1271, 1279 (10th Cir. 2009) (holding that the plaintiff plausibly pleaded his municipal liability claim because he alleged that the city's ordinances as applied to him violated his constitutional right to display and sell his artwork in public places).
50. *See, e.g.*, Canton v. Harris, 489 U.S. 378, 386 (1989); Garcia v. Salt Lake Cnty., 768 F.2d 303, 306 (10th Cir. 1985) ("Salt Lake County contends that a municipality may only be liable for a 42 U.S.C. § 1983 violation when an officer or subordinate executes or implements a municipal policy which is constitutionally deficient; that where subordinates do not strictly follow or conform to jail policies, the municipality has no liability under § 1983 . . . . [W]e disagree with the County's conclusion."); Cordova v. Aragon, 569 F.3d 1183, 1194 (10th Cir. 2009) ("If the city promulgates a constitutional policy but trains its officers to violate that policy, however, a facially constitutional policy will not shield the city from liability and a causal connection could be established.").
51. *Harris*, 489 U.S. at 387.
52. 489 U.S. 378 (1989).
53. *Id.* at 386.
54. *Id.* at 386–87.
55. *Id.* at 386.
56. *Id.* at 387; *see also infra* Subsection II.B.1.
57. Matthew J. Cron, Arash Jahanian, Qusair Mohamedbhai, & Siddhartha H. Rathod, *Municipal Liability: Strategies, Critiques, and a Pathway Toward Effective Enforcement of Civil Rights*, 91 DENV. L. REV. 583, 589 (2014) ("Claims proceeding under a formal policy theory of municipal liability are relatively unusual . . . ."); *see infra* Section II.B.

policies[]" or "perhaps even enact policies with the deliberate purpose of disregarding them."[58] As then-Judge Gorsuch noted in a 2007 case, "While the law is often subtle and sometimes complex, it is rarely so unreasonable."[59]

An area of tension regarding formal policies is the state of mind requirement.[60] In *Board of County Commissioners of Bryan County v. Brown*,[61] the Supreme Court held that in any § 1983 suit, "the plaintiff must establish the state of mind required to prove the underlying violation."[62] In the municipal liability context, the state of mind requirement is relatively easy to satisfy when the "municipality's legislative body or authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right" or when "the action taken or directed by the municipality or its authorized decisionmaker itself violates federal law . . . ."[63] But in other cases where the municipality's policy or custom is not itself unconstitutional, the state of mind requirement is more difficult to prove.[64]

In one case, *Schneider v. City of Grand Junction Police Department*,[65] the Tenth Circuit explained that the "prevailing state-of-mind standard for a municipality is deliberate indifference regardless of the nature of the underlying constitutional violation,"[66] relying on the Supreme Court's decision in *Brown*.[67] But as some scholars have noted, the Tenth Circuit may have "overstated the Supreme Court's holding in *Brown*."[68] In *Brown*, the Court held only that deliberate indifference is required for challenges to a "facially lawful municipal action."[69] But when a § 1983 claim is based on a facially unconstitutional policy, a plaintiff need only show that the municipality "acted culpably."[70] As the Supreme Court points out, this requirement is easily satisfied in such cases:

> Where a plaintiff claims that a particular municipal action *itself* violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straightforward. . . . [P]roof that a municipality's legislative body or authorized decisionmaker has

58. Simmons v. Uintah Health Care Special Dist., 506 F.3d 1281, 1283 (10th Cir. 2007) (holding the district court erred in concluding that a political subdivision is liable only when employee actions violating civil rights are taken in compliance with official government policy).
59. *Id.*
60. *See* Bd. of Cnty. Comm'rs. v. Brown, 520 U.S. 397, 405 (1997).
61. 520 U.S. 397 (1997).
62. *Id.* at 405.
63. *Id.*
64. *See infra* Section II.B.
65. 717 F.3d 760 (10th Cir. 2013).
66. *Id.* at 770–71, 771 n.5, 780–81 (holding the city was not deliberately indifferent to the risk that a police officer with a history of committing sexual assault would sexually assault the plaintiff).
67. *Id.* at 770 (citing *Brown*, 520 U.S. at 407).
68. Cron et al., *supra* note 57, at 587 n.19.
69. *Brown*, 520 U.S. at 407.
70. *Id.* at 404–05.

> intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably.[71]

But where a municipality's policy or custom is facially valid, plaintiffs face the more difficult burden of proving that the municipality acted with deliberate indifference, as explained in further detail below.[72]

2. Custom

In addition to formal policies, local government entities may be subject to § 1983 liability based on a governmental custom.[73] To bring a claim based on a custom, the plaintiff must allege (1) a custom has the force of law, (2) a direct causal link between the custom and the alleged constitutional violation, and (3) a culpable state of mind.[74]

In *Monell*, the Court referred to a custom for § 1983 purposes as a "practice" that is "not authorized by written law" but is "so permanent and well settled as to constitute a 'custom or usage' with the force of law."[75] Unlike an "official" municipal policy, a custom is typically not codified or authorized through a formal process. In *Garcia v. Salt Lake County*,[76] the Tenth Circuit concluded there was "proof that the Salt Lake County jail personnel implemented the policy or custom of admitting to the jail persons in an unconscious condition who were suspected of being intoxicated" despite the lack of a formally enacted policy condoning the conduct.[77] Although the county had a written policy requiring the transportation of intoxicated persons to a medical facility, a former sheriff testified that "there was a policy . . . that unconscious individuals who were suspected of being intoxicated were admitted to the jail."[78] A medical technician also testified that the "jail physician[] was also aware of the practice of admitting to jail unconscious people suspected of being intoxicated."[79]

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71. *Id.*
72. *See infra* Section II.B.
73. Monell v. Dep't of Soc. Serv. of New York, 436 U.S. 658, 690–91 (1978) ("[L]ocal governments, like every other § 1983 'person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels."); *see also* Adickes v. S.H. Kress & Co., 398 U.S. 144, 167 (1970) ("Congress included customs and usages . . . in § 1983 because of the persistent and widespread discriminatory practices of state officials . . . .").
74. *See Monell*, 436 U.S. at 690–91; *see also* Schneider v. City of Grand Junction Police Dep't, 717 F.3d 760, 768–69 (10th Cir. 2013).
75. *Monell*, 436 U.S. at 691 (quoting *Adickes*, 398 U.S. at 167–68); *see also id.* at 691 n.56 (quoting Nashville, C. & St. L. RY. v. Browning, 310 U.S. 362, 369 (1940)) ("It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law.").
76. 768 F.2d 303 (10th Cir. 1985).
77. *Id.* at 307.
78. *Id.* at 306.
79. *Id.*

The Tenth Circuit concluded that this testimony supported the jury's conclusion that the county had a policy of depriving unconscious persons of constitutionally adequate medical care.[80]

To rise to the level of a custom, the municipal practice must be "widespread and pervasive."[81] For that reason, remote or random acts of an individual government official will rarely, if ever, amount to a "custom" for § 1983 purposes.[82] For example, in *Starrett v. Wadley*,[83] the Tenth Circuit concluded that Creek County, Oklahoma, did not have a custom of sexually harassing employees.[84] The plaintiffs alleged that the pervasive nature of the defendant's acts of sexual harassment constituted an official policy of the County.[85] The evidence, however, showed that the defendant supervisor "engaged in isolated and sporadic acts of sexual harassment directed at a few specific female members of his staff," and that "[t]here is no indication that sexual harassment by others in the office was tolerated or occurred."[86] The court concluded that the individual defendant's acts of harassment toward the plaintiffs "were personal in nature without any indicia of being 'officially sanctioned or ordered'" and therefore "did not rise to the level of official County 'policy.'"[87]

Liability sometimes arises when a municipality repeals or modifies an unconstitutional formal policy, but government officials continue to follow the prior policy. In these situations, the repealed formal policy may still function as a custom. In *Anaya*, for example, the Tenth Circuit concluded there were triable issues of fact as to whether a new policy had the intended effect of altering a municipal custom of unlawful seizures.[88] The court suggested that the plaintiffs may face a "more difficult burden" in establishing a municipal custom "in light of a contrary policy," but the court concluded that summary judgment in favor of the municipality was nonetheless inappropriate.[89]

3. Ratification by Final Policymaker

To establish a *Monell* claim based on a ratification theory, a plaintiff must show (1) approval of both the basis and the act of the government official who committed a constitutional violation (2) by a final policymaker.[90] A ratification theory may apply even where the initial act was not

80. *See id.* at 308.
81. Starrett v. Wadley, 876 F.2d 808, 820 (10th Cir. 1989).
82. *See id.*
83. *Id.* at 808.
84. *Id.* at 819–20.
85. *Id.* at 818–19.
86. *Id.* at 820.
87. *Id.* (quoting Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986)).
88. Anaya v. Crossroads Managed Care Sys, Inc., 195 F.3d 584, 593 (1999).
89. *Id.*
90. City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988) ("If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final."); Heinrich v. Casper, 526 F. App'x 862, 864 (10th Cir. 2013) ("Without a final policymaker, there can be no ratification.").

authorized by an official policy and could not be attributed to the municipality—the municipality assumes responsibility for the act via ratification.[91] Courts turn to state law to determine which government officials constitute official policymakers, as discussed in further detail below.

The policymaker must specifically ratify the act alleged to be a constitutional violation attributable to the municipality. If a government official commits a constitutional violation and later receives a promotion or commendation, this is not sufficient to show ratification. Similarly, a failure to discipline an official who commits a constitutional violation does not constitute ratification.[92] Instead, the plaintiff must show that the policymaker knew of the constitutional violation and specifically approved of the action.[93] In *Bryson v. City of Oklahoma City*,[94] a city employee violated the plaintiff's constitutional rights when she falsified test results and hid exculpatory evidence in his criminal trial.[95] The city later promoted her and commended her for "dedication and professionalism" in "contributing to the judicial process."[96] But this could not have constituted ratification by her supervisor because there was no evidence he referenced or even knew of her unconstitutional acts.

Plaintiffs may have difficulty satisfying the causation element of a municipal liability claim based on ratification because the ratification necessarily occurs *after* the constitutional violation has occurred.

4. Final Policymaker Action

To prevail under an act-by-policymaker theory, a plaintiff must show that an official government policymaker took an unconstitutional action. For example, if a city council passed a law disallowing a convention by a particular political party based on the content of the speech, it used the authority of the municipality to violate the Constitution.[97] Thus, it may be held liable.

An unconstitutional act by a policymaker can expose the municipality to *Monell* liability even if the unconstitutional act is isolated.[98] The act

91. *Heinrich*, 526 F. App'x at 863 (citing Brammer–Hoelter v. Twin Peaks Charter Acad., 602 F.3d 1175, 1189 (10th Cir. 2010)) ("[A] city employee with 'final policymaking authority' who ratifies unconstitutional conduct by his subordinates is said to articulate official policy and so open the municipality to liability.").

92. *See* Erickson v. City of Lakewood, 489 F. Supp. 3d 1192, 1207 (D. Colo. 2020) (collecting cases).

93. *See id.* at 1200.

94. 627 F.3d 784 (10th Cir. 2010).

95. *Id*. at 787, 790.

96. *Id.* at 790 (brackets omitted).

97. Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986) ("No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body—whether or not that body had taken similar action in the past or intended to do so in the future—because even a single decision by such a body unquestionably constitutes an act of official government policy.").

98. *Id.* at 481 ("[W]here action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly.").

need not involve formal policy, as in the case of the state legislature. Instead, any decision by a state policymaker within the policymaker's zone of authority qualifies, even if it is a one-time decision specific to a particular situation.[99] For example, a school board's decision to ban a student from wearing a particular t-shirt, based on the content of the speech displayed, could constitute an act by a policymaker sufficient to incur *Monell* liability.

Whether an official has policymaking authority is a question of state and local law.[100] Courts should look to the text of state statutes to determine who has legal power to set policy.[101] It is not relevant that an official exercises de facto policymaking authority—an official is a policymaker for the purposes of a *Monell* inquiry only if a state statute gives the official the authority to make policy.[102] A state statute may grant an official policymaking authority if the official: (1) is not "meaningfully constrained" by policies set by others, (2) has final decision-making authority, and (3) has authority over the policy decision at issue.[103]

Where an official policymaker acts within the policymaker's authority, that act is an act of the municipality. Thus, subjecting the municipality to liability for such an act fulfills the purposes of *Monell* without imposing *respondeat superior* liability.

B. Omission/Inaction Claims

Municipalities are not only subject to liability for violating rights through their actions; they are also exposed to liability if their inaction violates certain rights. The first omission claim recognized by the Supreme Court was for a municipality's failure to train its employees.[104] But since recognition of the failure-to-train claim, the omission-based claims category has greatly expanded. These claims, at their core, fault municipalities for creating, through inaction, situations that result in constitutional injuries.

These claims provide plaintiffs with unique challenges. For one, these claims require a showing of deliberate indifference.[105] Second, some of these claims interact uniquely with claims of individual liability.[106] Third, the causation standard for inaction claims is rigorous, requiring the municipality's deliberate conduct be the moving force behind the alleged

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99. Randle v. City of Aurora, 69 F.3d 441, 447 (10th Cir. 1995).
100. *Pembaur*, 475 U.S. at 483.
101. Brammer–Hoelter v. Twin Peaks Charter Acad., 602 F.3d 1175, 1189 (10th Cir. 2010).
102. *Id.*
103. *Randle*, 69 F.3d at 448.
104. City of Canton v. Harris, 489 U.S. 378, 387 (1989).
105. Jenkins v. Wood, 81 F.3d 988, 993 (10th Cir. 1996) (Claims comprising of a failure to act require plaintiffs to "demonstrate the municipality's inaction resulted from 'deliberate indifference to the rights' of the plaintiff.") (quoting *Harris*, 489 U.S. at 389).
106. Crowson v. Washington Cnty., 983 F.3d 1166, 1191 (10th Cir. 2020) (affirming dismissal of a failure-to-train claim against a municipality because the plaintiff failed to demonstrate an underlying constitutional violation by an individual employee).

injury and that there be a direct causal link between the municipal inaction and the deprivation of rights.[107] Fourth, some cases suggest that only violations of clearly established constitutional rights suffice for certain municipal inaction claims.[108]

1. Failure to Train

One of the most common municipal inaction claims is for failure to train.[109] The Supreme Court dealt with such a claim in *City of Canton v. Harris*.[110] There, the Court noted that "the failure to provide proper training" leads to municipal liability where the "failure to train reflects a 'deliberate' or 'conscious' choice" and "it actually causes injury."[111] The Court refused to "adopt lesser standards of fault and causation," instead requiring the deficiency in training to "be closely related to the ultimate injury."[112] In other words, a failure to train leads to liability only when there is sufficient causation, injury, and deliberate indifference.

The notice requirement for deliberate indifference provides a high bar. "A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train."[113] There is a rare and "narrow range of circumstances" where a plaintiff need not prove a pattern of similar violations to demonstrate deliberate indifference, such as when a municipality fails to train police officers for situations that can happen frequently and where an officer lacking the specific tools to handle the situation may use deadly force.[114] To illustrate, in *Connick v. Thompson*,[115] the majority concluded that a failure to train prosecutors about their *Brady* obligations did not fall within that narrow, single-incident liability exception.[116] Deliberate indifference—like the other elements of failure to train claims—is much easier to demonstrate when there is a pattern of violations. In a recent Tenth Circuit case originating from Oklahoma, the court concluded a reasonable

107. Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 405 (1997) ("Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee.").

108. Contreras *ex rel.* A.L. v. Dona Ana Cnty. Bd. of Cnty. Comm'rs, 965 F.3d 1114, 1123–24 (10th Cir. 2020) (Carson, J., concurring) (per curiam) (requiring the violation of a clearly established right by an individual employee to hold a municipality liable for failure to train).

109. *See, e.g.*, Triplett v. LeFlore Cnty., 712 F.2d 444, 444, 446 (10th Cir. 1983) (alleging liability for employer failing to train a jail guard); Harte v. Bd. of Comm'rs of Cnty. of Johnson, 864 F.3d 1154, 1166–67 (10th Cir. 2017) (alleging liability for creating a custom in which officers used faulty evidence to get a search warrant); Novitsky v. City of Aurora, 491 F.3d 1244, 1248 (10th Cir. 2007) (alleging liability for maintaining an unconstitutional policy where officers can apply certain physical force); Lindsey v. Hyler, 918 F.3d 1109, 1112 (10th Cir. 2019) (alleging liability for failing to train officers for high-speed pursuits).

110. *Harris*, 489 U.S. at 387.

111. *Id.* at 389–90.

112. *Id.* at 391.

113. Connick v. Thompson, 563 U.S. 51, 62 (2011) (quoting Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 409 (1997)).

114. *Id.* at 63.

115. *Id.* at 51.

116. *Id.* at 68.

jury could determine that Carter County's deliberately indifferent failure to medically train jail employees caused the death of a pretrial detainee.[117] It is instructive in demonstrating how the deliberate indifference, causation, and injury elements can be met. There, the court required the plaintiff to allege facts that—if taken as true—established there was a failure to train, it was done with deliberate indifference, and the failure was the "moving force" behind the injury.[118]

The court first found the county failed to properly train employees because "multiple employees testified that they received no meaningful medical training," and some employees who participated in trainings testified they were "administered tests on which they were encouraged to cheat using provided answer keys."[119] This failure, along with others, was closely related to the detainee's death because his failure to receive medication, delays in medical treatment, and untimely transport to the emergency room caused his death.[120] And finally, a jury could conclude there was deliberate indifference because there had been a pattern of similar harm from the same failures: three other inmates died in the three years prior to this incident.[121]

2. Failure to Supervise

Municipal liability through inaction can also be incurred through a failure to supervise.

Claims of this sort can cause confusion because claims against a supervisor can lead to personal and municipal liability, claims with different elements.[122] Individual liability—also called supervisory liability—requires a plaintiff to demonstrate that a supervisor was responsible for a policy that violated a constitutional right.[123] But the plaintiff must also show an "affirmative link" between the supervisor and the constitutional violation.[124] And supervisors sued in their individual capacity are entitled to qualified immunity.[125]

For claims against supervisors in their official capacity for failure to supervise—that is, against the municipality—the plaintiff must meet the typical municipal liability elements: "that (1) an official policy or custom (2) caused the plaintiff's constitutional injury and (3) that the municipality enacted or maintained that policy with deliberate indifference to the risk

117. Prince v. Sheriff of Carter Cnty., 28 F.4th 1033, 1038 (10th Cir. 2022) (alleging liability for failures in providing medical care to a detainee).
118. *Id.* at 1049 (quoting *Brown*, 520 U.S. at 405).
119. *Id.*
120. *Id.* at 1051.
121. *Id.* at 1050–51.
122. George v. Beaver Cnty., 32 F.4th 1246, 1252–53, 1255 (10th Cir. 2022) (plaintiff brought claims against the sheriff in his individual and official capacity alleging liability for failure to train officers to prevent a jail suicide).
123. *Id.* at 1255.
124. *Id.* (quoting Est. of Booker v. Gomez, 745 F.3d 405, 435 (10th Cir. 2014)).
125. *See id.* at 1255–56.

of that injury occurring."[126] Plaintiffs should take care to note the difference in elements when bringing a claim against a supervisor in his individual capacity and official capacity. There are some rare circumstances, however, where the elements for individual and municipal liability are the same.[127]

Municipalities are not entitled to qualified immunity, but strict causation standards still make failure-to-supervise cases difficult to prove. In *Bryson*, the Tenth Circuit concluded a plaintiff who had been wrongly convicted through faulty evidence did not sufficiently prove deliberate indifference for a municipality's failure to supervise.[128] Without deciding whether the city failed to supervise the forensic chemist who improperly testified about the DNA in the case, the court found that the city could not have been deliberately indifferent because the city "had not yet received any complaints or criticisms of any of its forensic chemists' work at the time [the forensic chemist] concealed exculpatory evidence and falsified her test reports."[129]

3. Inadequate Hiring

Claims of inadequate hiring against municipalities typically charge them with failing to properly screen candidates. Like with other omission claims, the requirements of deliberate indifference and sufficient causation make this a difficult claim for plaintiffs.

In *Waller v. City & County of Denver*,[130] a pretrial detainee, Mr. Waller, sued a sheriff's deputy and the City and County of Denver after a deputy allegedly used excessive force against him.[131] Among other things, he alleged Denver was liable because it had inadequate hiring processes when it hired the deputy.[132] To state a claim for inadequate hiring, the court noted he was required to demonstrate that (1) Denver had inadequate hiring processes, (2) Denver was deliberately indifferent to his rights, and (3) a direct causal link existed between the inadequate hiring processes and the violation of rights.[133] The court concluded the Mr. Waller's claim failed because he failed to plausibly allege a "direct causal link . . . between the violation of [his] constitutional rights and the hiring of any deputies other than [one deputy]."[134] And even though Mr. Waller alleged one deputy was hired

126. *George*, 32 F.4th at 1253.

127. Burke v. Regalado, 935 F.3d 960, 999 (10th Cir. 2019) ("[T]he elements for supervisory and municipal liability are the same *in this case*.") (emphasis added) (alleging a sheriff "maintained a policy or custom of insufficient medical resources and training, chronic delays in care, and indifference toward medical needs at the jail, and that he did so knowing of an urgent need for reform.").

128. 627 F.3d 784, 789 (10th Cir. 2010).

129. *Id.*

130. 932 F.3d 1277 (10th Cir. 2019).

131. *Id.* at 1280–81 (alleging liability for hiring an officer who used excessive force).

132. *Id.* at 1281.

133. *Id.* at 1283–84.

134. *Id.* at 1285 (quoting Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 404 (1997)).

because of nepotism and without a background check, he failed to demonstrate that Denver was deliberately indifferent, which could have been demonstrated here through "a pre-existing pattern of violations" or where the "unconstitutional consequences . . . are highly predictable or patently obvious."[135]

Causation can be difficult to prove in inadequate hiring cases because "[e]very injury suffered at the hands of a municipal employee can be traced to a hiring decision in a 'but-for' sense: But for the municipality's decision to hire the employee, the plaintiff would not have suffered the injury."[136] Given this inherent problem, the Supreme Court has expressed particular concern about inadequate hiring claims: "To prevent municipal liability for a hiring decision from collapsing into *respondeat superior* liability, a court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged."[137] In that case, it was not enough that the sheriff did a cursory and inadequate background check on a deputy he hired.[138] Rather, the Court noted the failure to adequately scrutinize an applicant's background constitutes deliberate indifference "[o]nly where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right."[139]

4. Failure to Investigate

Claims for a failure to investigate typically fault municipalities for allowing constitutional violations to occur by failing to investigate previous violations. As discussed below, they are closely related to claims for failure to discipline.

Recall that in *Waller*, the plaintiff sued Denver for the alleged use of excessive force.[140] One of his claims against Denver was for its failure to investigate.[141] In particular, he alleged that Denver created an environment where excessive force was likely to occur by failing to investigate misconduct by deputies.[142] Mr. Waller based his factual allegations on a report from the Office of the Independent Monitor that reviewed Denver Police and Sheriff disciplinary processes.[143] The court concluded the factual allegations were insufficient to state a claim for failure to investigate because (1) all but one claim dealt with police misconduct generally, not excessive use of force, and (2) some of the investigations in the report may have

135. *Id.* at 1284–85 (internal quotations omitted) (quoting Connick v. Thompson, 563 U.S. 51, 63–64 (2011)).
136. *Brown*, 520 U.S. at 410.
137. *Id.*
138. *Id.* at 411.
139. *Id.*
140. Waller v. City & Cnty. of Denver, 932 F.3d 1277, 1280–81 (10th Cir. 2019).
141. *Id.* at 1289.
142. *Id.*
143. *Id.*

occurred after the incident involving Mr. Waller.[144] And the one allegedly deficient investigation dealing specifically with excessive force was of the deputy who used force against Mr. Waller for that same incident.[145] The court reasoned that investigation was irrelevant because, logically, the excessive use of force could not have been caused by a deficient investigation of the very incident after it occurred.[146] In sum, the court concluded the factual allegations failed to "establish the requisite direct causal link between the municipal action and the deprivation of federal rights."[147] Mr. Waller also alleged Denver failed to properly discipline deputies for prior acts of excessive force, thus giving rise to a custom or policy of excessive force within the department.[148] But the court found conclusory the allegations that Denver "ha[d] not imposed appropriate discipline for the egregious use of excessive force by any officer of the [Denver Sheriff Department]."[149] The only specific allegation of lenient discipline was of the deputy who used force against him, which, as noted previously, could not have caused his injury.[150]

In another illustrative case, *Finch v. Rapp*,[151] the plaintiff alleged the municipality was liable for its inadequate investigative and disciplinary processes following police-involved shootings.[152] The plaintiff took issue with the police department's "use of interviews and evidence conducted by the District Attorney's Office."[153] But, in that case, the plaintiff could at best demonstrate the department reused evidence from criminal investigations in its administrative investigations and imposed relatively minor discipline, which were insufficient for municipal liability.[154] The court reasoned that the failure to respond to minor policy violations was far too removed from more serious violations like excessive force (police shooting) cases.[155] Accordingly, the plaintiff failed to meet the rigorous standards of culpability and causation necessary to prove a municipal liability claim.[156]

5. Systemic Failure

One claim of omission for municipal liability is that of so-called systemic failure. At its core, a claim for systemic failure is a different name for an omission claim that does not rely on a single officer's violation for

144. *Waller*, 932 F.3d at 1289.
145. *See id.*
146. *See id.*
147. *Id.* (internal quotation marks omitted).
148. *Id.*
149. *Id.* at 1290.
150. *Id.*
151. 38 F.4th 1234 (10th Cir. 2022).
152. *Id.* at 1244.
153. *Id.*
154. *Id.* at 1245–46.
155. *Id.* at 1246.
156. *Id.* at 1245–46.

municipal liability.[157] Generally, omission claims require a plaintiff to demonstrate that a municipality was responsible for a constitutional violation committed by an individual officer.[158] For example, in *City of Canton*, the plaintiffs were required to demonstrate that the municipality's failure to train an officer was closely linked to the individual officer's unconstitutional use of force.[159]

But systemic failure claims do not require an individual officer to have committed a constitutional violation. Instead, the theory is that a municipality failed so egregiously in implementing proper policies, training, supervision, discipline, or hiring that it caused a constitutional violation.[160] Thus, even if no individual officer committed a constitutional violation, the collective negligence of the individual officers caused by the municipality's egregious failures would suffice for municipal liability. Of course, the plaintiff would still need to make a proper showing for an actual injury, causation, and deliberate indifference.

One recent case demonstrates how these elements can be met. In *Prince v. Sheriff of Carter County*, the Tenth Circuit found a reasonable jury could conclude that the county's systemic failures—failure to medically train jail employees, adequately staff the jail, and provide timely medical attention—caused the decedent's death.[161] After recounting a series of failures, the court concluded the "[s]heriff had actual knowledge of the numerous and systemic problems . . . ."[162] In particular, he knew (1) the staff had minimal training, (2) the jail did not employ a licensed physician in violation of its own written policy, and (3) three other deaths attributed to inadequate medical attention had occurred in the three years prior to this death.[163] What is more, the court concluded a jury could find the requisite causation because "a Sheriff's 'continuous neglect' of medical conditions similar to those in this case could lead a reasonable fact finder to infer causation . . . ."[164] Note, however, the court found that a jury could reasonably conclude a nurse employed at the jail was individually liable.

And in another similar case, *Crowson v. Washington County*,[165] a pretrial detainee suffered serious medical problems after jail medical staff

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157. *See* Garcia v. Salt Lake Cnty., 768 F.2d 303, 310 (10th Cir. 1985) ("*Monell* does not require that a jury find an individual defendant liable before it can find a local governmental body liable.").

158. Crowson v. Washington Cnty., 983 F.3d 1166, 1191 (10th Cir. 2020) ("In most cases . . . the question of whether a municipality is liable [is] dependent on whether a specific municipal officer violated an individual's constitutional rights.").

159. City of Canton v. Harris, 489 U.S. 378, 389 (1989).

160. *Garcia*, 768 F.2d at 310 ("Although the acts or omissions of no one employee may violate an individual's constitutional rights, the combined acts or omissions of several employees acting under a governmental policy or custom may violate an individual's constitutional rights.").

161. Prince v. Sheriff of Carter Cnty., 28 F.4th 1033, 1038 (10th Cir. 2022).

162. *Id.* at 1050.

163. *Id.* at 1050–51.

164. *Id.* at 1051.

165. 983 F.3d 1166 (10th Cir. 2020).

failed to provide him with timely medical care.[166] He filed suit against (1) a nurse and doctor for deliberate indifference to his serious medical needs and (2) the county for failing to train the staff and for systemic failures.[167] The court found the nurse did not violate Mr. Crowson's rights, and, accordingly, the county was not liable for a failure to train.[168] Although the court assumed without deciding that the doctor violated Mr. Crowson's rights, it noted he did not allege the county failed to train the doctor, so that assumed constitutional violation could not serve as the basis for municipal liability.[169] The county's liability, however, was not foreclosed because the theory based on a systemic failure of medical policies and procedures was still alive.[170] But the court did not evaluate the merits of the systemic failure claim because it lacked jurisdiction to review it on appeal.[171]

Although this theory of liability appears to make plaintiffs' burdens lighter, in reality the claim is just a recognition that in some rare cases an injury can be caused by a group of officials, rather than by a single one.[172] Whether an individual violation is required for municipal liability turns on the facts of the case, not the framing or name of the claim.

C. Challenges with Omission Claims

Municipal liability claims generally have well-defined elements. Although some of these elements are fact intensive, they provide no unique challenges. Some of the omission-based municipal claims, however, have complex (and some unresolved) issues.

1. Qualified Immunity

One unresolved issue involves the interaction between municipal liability and qualified immunity for individual officers. "The doctrine of qualified immunity shields officers from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[173] Plainly incompetent officers and those who knowingly violate the law are not entitled to qualified immunity.[174] Qualified immunity "is available only in suits against officials sued in their personal capacities," not in suits against municipalities or employees sued in their official capacities.[175]

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166. *Crowson*, 983 F.3d at 1173, 1176 (alleging liability for systemic failures leading to a detainee's medical injuries).
167. *Id.* at 1176.
168. *Id.* at 1192.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 1191.
173. Tahlequah v. Bond, 142 S. Ct. 9, 11 (2021) (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)).
174. *Id.*
175. Cox v. Glanz, 800 F.3d 1231, 1239 n.1 (10th Cir. 2015) (quoting Starkey *ex rel.* A.B. v. Boulder Cty. Soc. Servs., 569 F.3d 1244, 1263 n.4 (10th Cir. 2009)).

The general rule with *Monell* claims is that municipalities—unlike individual officers—may not assert a qualified immunity defense.[176] Recent opinions have raised the question of whether this is categorically the case. Some opinions suggest there are limited and narrow circumstances where municipal liability can be avoided if an individual officer has qualified immunity.

One case raising this issue in the Tenth Circuit is *Contreras ex rel. A.L. v. Dona Ana County Board of County Commissioners*.[177] In *Contreras*, a juvenile was physically assaulted and injured at a juvenile detention facility after protective measures put in place by corrections officers failed.[178] His mother, Kathy Contreras, sued three corrections officers and the detention center.[179] In a per curiam decision—and over a partial dissent—the panel concluded the officers were entitled to qualified immunity and that the municipality did not commit a constitutional violation.[180]

176. Leatherman v. Tarrant Cnty., 507 U.S. 163, 166 (1993) ("[U]nlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983.").
177. 965 F.3d 1114 (10th Cir. 2020) (per curiam).
178. *Id.* at 1115.
179. *Id.*
180. *Id.*

	Chief Judge Tymkovich	Judge Carson	Judge Baldock
Individual Constitutional Violation?	No.[181]	Unanswered.[182]	Yes.[183]
Clearly Established Right?	No.[184]	No.[185]	Yes.[186]
Municipal Constitutional Violation?	No, because the plaintiff's municipal liability theory required an individual violation.[187]	No, because the plaintiff's municipal liability theory required a *clearly established* individual violation.[188]	Yes, because the plaintiff survived summary judgment on an individual constitutional violation and a pattern of unlawful behavior put the municipality on notice.[189]

TABLE 1. *Summary of* Contreras *Findings*

As Table 1 demonstrates, the court's findings were split, and the judges' controlling votes relied on different reasoning. One of the concurrences concluded municipal liability for a claim for failure to train was precluded because an individual officer had not violated a clearly established right.[190] That concurrence relied solely on its analysis that the right was not clearly established without deciding whether the individual officer had violated a constitutional right.[191]

The concurrence reasoned that whether a municipality can be liable for "deliberate indifference to a constitutional right that has not yet been established . . . depends on the type of claim alleged against the municipality."[192] For a claim "based on a municipality's failure to properly train its employees," the municipality's liability "stems from [its] failure to teach its employees not to violate a person's constitutional rights."[193] And because that claim requires plaintiffs to demonstrate that the "failure to train its employees caused the employee's violation *and* that the city cul-

181. *Contreras*, 965 F.3d at 1120.
182. *Id.*at 1123.
183. *Id.* at 1132–34.
184. *Id.* at 1115, 1122.
185. *Id.* at 1123.
186. *Id.* at 1134, 1136–37.
187. *Id.* at 1115 n.1.
188. *Id.* at 1124.
189. *Id.* at 1139.
190. *Id.* at 1123–24.
191. *Id.* at 1123.
192. *Id.* at 1124.
193. *Id.*

pably declined to train its employees" to deal with such situations, municipalities cannot be deliberately indifferent unless the violated right was clearly established.[194] In short, there would be no obvious potential for such a violation from the failure to train unless the municipality had notice (i.e., the right is clearly established) that a certain injury violates the Constitution.

The other concurrence did not reach this question.[195] Instead, it resolved the question of municipal liability through the other prong of qualified immunity. The fact "that no [individual] constitutional violation occurred . . . foreclose[d] municipal liability entirely."[196]

The dissent, on the other hand, disagreed with both concurrences. It reasoned the individual officer was not entitled to qualified immunity, and there was a genuine dispute as to whether the municipality was liable.[197] It also casted doubt on the idea that municipal liability for failure-to-train claims requires that the asserted right was clearly established.[198] In its view, not all claims for failures to train require that the violation be obvious.[199] Rather, municipal policymakers are put on notice when there is a pattern of constitutional violations.[200] It is likely only when the plaintiff bases his claim for failure to train on a single incident that a municipality needs notice that a violation of federal rights is a highly predictable or plainly obvious consequence of its inaction.[201] It unequivocally noted that claims for failure to train based on a pattern of violations do not require the right be clearly established.[202] But it left open the possibility that liability for claims of failure to train based on a single incident may require the right be clearly established.[203]

2. When Individual Violations Are Necessary

The relationship between individual and municipal violations has caused other difficulties. One such difficulty arises when determining whether an individual constitutional violation is necessary for municipal liability. This question is fundamentally about causation. As a reminder, municipalities are only liable if their policies or customs are "the moving force [behind] the constitutional violation,"[204] and their inaction must be

194. *Id.*
195. *Id.* at 1115–22.
196. *Id.* at 1115 n.1.
197. *Id.* at 1132, 1134, 1139.
198. *Id.* at 1139.
199. *Id.*
200. *Id.* at 1139–40.
201. *Id.* at 1139.
202. *Id.* at 1140.
203. *Id.* ("Perhaps requiring the violated right to be clearly established is the proper approach when dealing with deliberate-indifference claims premised on an isolated constitutional violation. On the other hand, maybe not.").
204. City of Canton v. Harris, 489 U.S. 378, 389 (1989) (alteration in the original) (quoting Polk Cnty. v. Dodson, 454 U.S. 312, 326 (1981)).

"closely related to the ultimate injury."[205] And the causation standards for claims of inaction, among others, are also tightened by the stringent standard of fault imposed by deliberate indifference.[206]

Much of the confusion around this issue stems from the many ways a municipality can cause an injury. Understanding causation in cases of municipal action is simple: a municipality takes an action (e.g., enacting an official policy, ratifying a subordinate's action, or informally encouraging certain actions), and that action directly results in an injury.[207] In those cases, there is no dispute about causation. But in cases where an injury occurs through a municipality's inaction, the causal chain is more attenuated.

In *Crowson*, for example, the Tenth Circuit mostly resolved this issue and harmonized most of its decisions, some of which appeared contradictory.[208] In that decision, the court clarified that, with respect to the relationship between individual and municipal liability, there are two sorts of claims.[209] First, "[t]he general rule . . . is that there must be a constitutional violation, not just an unconstitutional policy, for a municipality to be held liable."[210] In those cases, "[T]he question of whether a municipality is liable [is] dependent on whether a specific municipal officer violated an individual's constitutional rights."[211] And second, there is a "limited exception" to the general rule "where the alleged violation occurred as a result of multiple officials' actions or inactions."[212] In deciding municipal liability in *Crowson*, the court dealt with two claims: one for failure to train, and the other for systemic failure.[213] It concluded there was no municipal liability for the failure-to-train claim because the individual officer who allegedly caused the injury did not violate the plaintiff's rights, but municipal liability for the systemic failure claim was not precluded because it did not depend on an individual violation.[214]

CONCLUSION

Municipal liability claims fall into two major categories: (1) affirmative acts and (2) omissions. Each affirmative claim generally requires a government action that causes a constitutional harm. Each omission claim generally requires a constitutional violation, causation, and deliberate indifference. But there are nuances within each type of claim. This Article

205. *City of Canton*, 489 U.S. at 391.
206. Connick v. Thompson, 563 U.S. 51, 61 (2011).
207. *See id.* at 75 (Scalia, J., concurring).
208. Crowson v. Washington Cnty., 983 F.3d 1166, 1186–91 (10th Cir. 2020).
209. *Id.* at 1185.
210. *Id.* at 1191.
211. *Id.*
212. *Id.*
213. *Id.* at 1191–92.
214. *Id.* at 1192.

is intended to provide a starting point for litigators bringing municipal liability claims within the Tenth Circuit and a useful reference for judges attempting to categorize and resolve various municipal liability claims.

APPENDIX 1: MUNICIPAL LIABILITY FLOWCHART

Affirmative Acts

1. Formal Policy
   1) Existence of an official policy
   2) Causal link between policy and constitutional violation
   3) Culpable state of mind
      a. Intent for facially unconstitutional policies
      b. Deliberate indifference for facially constitutional policies

2. Custom
   1) Custom that has the force of law
   2) Causal link between custom and constitutional violation
   3) Culpable state of mind

3. Final Policymaker Ratification
   1) Approval of a government official's action that resulted in constitutional violation
   2) By a final policymaker
   3) Culpable state of mind

4. Final Policymaker Action
   1) Unconstitutional action
   2) By a final policymaker
   3) Culpable state of mind

Omissions

Elements
   1) Alleged omission or inaction
   2) Causation
   3) Deliberate indifference

Examples of Omissions or Inactions
   1) Failure to train
   2) Failure to supervise
   3) Inadequate hiring
   4) Failure to investigate
   5) Failure to discipline
   6) Systemic failure

Challenges with Omission Claims
   1) Qualified immunity
   2) When individual violations are necessary