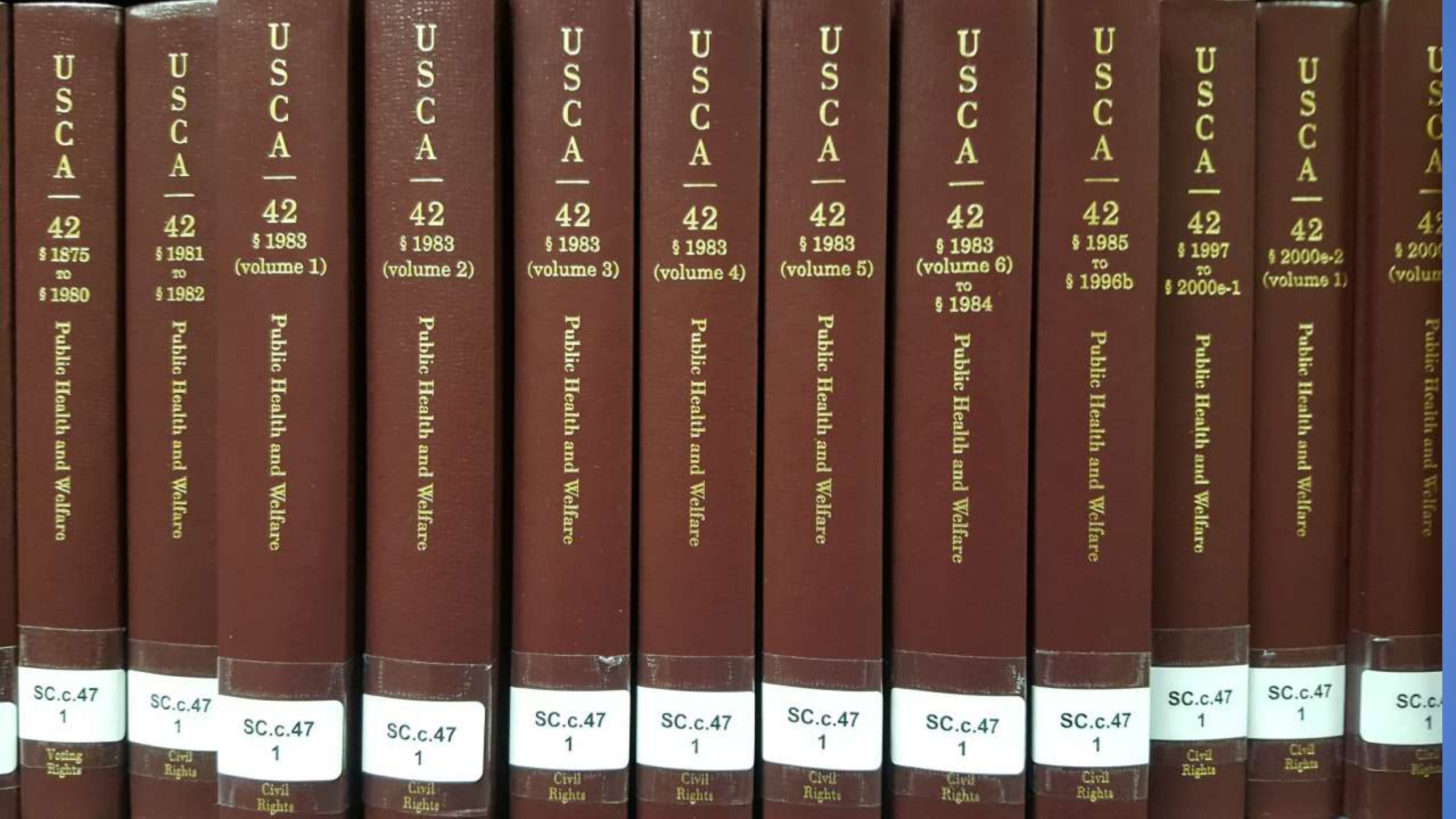
Monell Liability Under 42 U.S.C. § 1983

Standards, Issues, and Trends

42 U.S.C. § 1983

- 42 U.S.C. § 1983 part of the Civil Rights Act of 1871
- 42 U.S.C.A. § 1983 takes up 6 volumes of the USCA, most of which are annotations.
- Allows for “constitutional tort” claims to be filed against, inter alia, “municipalities” and certain “individual governmental employees”.


USCA | 42 § 1875 to § 1980 Public Health and Welfare
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USCA | 42 § 1983 (volume 6) to § 1984 Public Health and Welfare
SC.c.47 1 Civil Rights
USCA | 42 § 1985 to § 1996b Public Health and Welfare
SC.c.47 1 Civil Rights
USCA | 42 § 1997 to § 2000e-1 Public Health and Welfare
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Voluminous Litigation

- Litigation ongoing over major issues, including, but not limited to:
  - Who are state actors?
  - Qualified immunity under various causes of action, i.e., 4th Amendment excessive force claims (objectively reasonable); 8th Amendment "deliberate indifference" claims (for correctional officers and medical staff working in jails).
  - What is clearly established law for purposes of the qualified immunity analysis?
  - Whether municipal liability under *Monell* can be imposed if there were no underlying constitutional torts committed by individuals. *Los Angeles v. Heller*, 475 U.S. 796 (1986) (seems to have said no, but now split in Circuit Courts over this issue in Monell claims).
  - What is the proper standard for detainees (as opposed to inmates) under the Fourteenth Amendment? Kingsley v. Henderson, 135 S.Ct. 2466 (2015) (not completely resolved – see dissent).

Issues Focused on for this Presentation

Is there such a thing as “single incident” *Monell* liability (SIML)?

Can *Monell* liability be imposed on a municipality for a single incident of a constitutional violation?

Split of authority applying various theories / concepts to this idea that has persisted since *City of Canton (Ohio) v. Harris*, 489 U.S. 378, 389 and footnote 10 (1989).

How does SIML affect the “deliberate indifference” standard inquiry regarding single incident *Monell* liability (SIML)?

How can the municipality be “aware” of and therefore “disregard” the constitutional violation if it is the single incident of which it is being made aware of at that moment?

Cognizable Causes of Action Under § 1983

- Section 1983 "is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred." *Baker v. McCollan,* 443 U.S. 137, 139-140, 144, and n. 3 (1979).

- The first step is to identify the specific constitutional right allegedly infringed upon. *Id.* at 140. See also *Graham v. Connor,* 490 U.S. 386, 394 (1989); *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

- A "cognizable" cause of action under § 1983 must be tethered to an underlying constitutional right – and typically one found in the Bill of Rights, i.e., Fourth Amendment (unreasonable search and seizure, excessive force, false arrest, false imprisonment), Eighth Amendment ("cruel and unusual punishment" clause). Baker, 443 U.S. at 140 (to state a cause of action under 42 U.S.C. § 1983, the plaintiff must first demonstrate "deprivation of rights, privileges, or immunities secured by the Constitution….").

Cognizable Causes of Action Under § 1983

- "No freestanding constitutional right to be free from malicious prosecution exists. We must insist on clarity in the identity of the constitutional violations asserted. *Castellano v. Fragozo*, 352 F.3d 939, 945 (5th Cir. 2003).

- For short, although it is an imperfect moniker, I will refer to "cognizable" 42 U.S.C. § 1983 claims as "constitutional torts".

What is *Monell* Liability?

- *Monell v. New York City Dep't of Soc. Serv.,* 436 U.S. 658 (1978)
  - Established the concept that a municipality could be liable for a "constitutional tort" under 42 U.S.C. § 1983, apart from the acts of its individual employees and/or agents.
  - There can be no *respondeat superior* liability; the municipal entity cannot be liable for the torts of its employees /agents.
  - Since this decision, litigation has continued to explore the limits of pure municipal liability, as opposed to liability for constitutional torts committed by individual governmental employees.

Major Elements of *Monell* Claim

- Identifying a policy, practice, custom or procedure (PPCP).
- Identifying the municipal actor – policymaker – decisionmaker.
- Identifying causation between the policy, custom, practice or procedure and the constitutional harm.
- Identifying, determining, and applying the “municipal constitutional tort” standard”, i.e., “deliberate indifference”

Major Elements Explained

- A Monell claim can be established where proof exists that execution of a policy, practice, custom, or procedure, 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 42 U.S.C. § 1983. *Monell*, 436 U.S. at 694.

- "[M]unicipal liability under § 1983 attaches where - and only where- a deliberate choice to follow a course of action is made from among various alternatives" by city policymakers.

- The municipality itself must be the "cause" of the injury; in other words, its policy, practice, custom, or procedure must have been (generally) the moving force behind the constitutional violation. *Monell*, *supra*.

Policies, Practices, Customs and Procedures

- **Policy –** Requiring a policy ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality. *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403-404 (1997).
- **Custom –** An act performed pursuant to a custom that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law. *Id*.

Policymakers, Legislative Bodies and Decisionmakers

- **Policymakers –** A municipality can be held liable for a single decision by municipal policymakers, if the decision to adopt a particular course of action is directed by those who establish government policy. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).
- **Legislative Body** – Board of Commissioners, etc.
- **Authorized Decisionmaker or Supervisor** – a person with final authority to act for the municipality in the matter that leads to the Monell claim. Bryan County, 520 U.S. at 408 (county sheriff and his hiring decision).

Causation

- There is Monell liability if there is proof that an employee acted in accordance *with the employer's policy or custom*; that is, the policy or custom effectuated (that is was the moving force behind) the constitutional violation. See Monell, 436 U.S. at 694;

Causation

- Monell liability requires a showing that through its deliberate conduct, the municipality was the "moving force" behind the injury alleged. *Bryan County*, 520 U.S. at 404.

- That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights. *Id*.

“Deliberate Indifference”

- Now that we’ve discussed the elements of Monell liability what is the ”standard” of conduct? Deliberate indifference.
- The “genesis” of “deliberate indifference” as the standard to be applied to the municipal liability claim is *Canton v. Harris*, 489 U.S. 378 (1989), but the concept is taken directly from the Eighth Amendment cases applying the individual “deliberate indifference” standard.
- "We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.” *Canton*, supra.

State of Mind – “Deliberate Indifference”

- 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.
- Similarly, the conclusion that the action taken or directed by the municipality or its authorized decisionmaker itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains.

Canton, 489 U.S. at 389

- “[M]unicipal liability under § 1983 attaches where— and only where—a deliberate choice to follow a course of action is made from among various alternatives” by city policymakers. See also Oklahoma City v. Tuttle, 471 U.S., at 823, 105 S.Ct., at 2436 (opinion of REHNQUIST, J.). Only where a failure to train reflects a “deliberate” or “conscious” choice by a municipality—a “policy” as defined by our prior cases—can a city be liable for such a failure under § 1983.

“Deliberate Indifference”

- In the context of Monell liability the term “deliberate indifference” carries with it two concepts.
- “deliberateness” = intent or purpose of action – the institution, employment, deployment, enforcement, methods, practices, standards, etc.; and
- “indifference” = ignoring consequences in spite of knowledge of them, or being put on “notice”, i.e., notice of pattern of recurring incidents.

There is No "Single Incident" Monell Liability (SIML)

- In *Tuttle v. Oklahoma*, 471 U.S. 808 (1985), the Court held municipal liability under *Monell* cannot be established on the basis of a "single incident".
- *Tuttle* addressed whether a single, unusually excessive use of force could give rise to an inference of inadequate training or supervision amounting to "deliberate indifference" on the part of the officials in charge without actual evidence of a policy of inadequate training.
- The Court held a single incident of unconstitutional activity is not sufficient to impose liability under Monell, and regardless of the egregiousness of the incident, evidence is always required to demonstrate the failure to train. Liability must be premised on evidence of inadequate training that rises to the level of deliberate, and therefore culpable, indifference.

No SIML

- “Proof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the incident includes *proof* that it was caused by an *existing, unconstitutional municipal policy*, which policy can be attributed to a municipal policymaker. Otherwise the existence of the unconstitutional policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, *considerably more proof than the single incident* will be necessary *in every case* to establish both the requisite fault on the part of the municipality, and the causal connection between the “policy” and the constitutional deprivation. *Tuttle*, supra at 823-824 (emphasis added).

No SIML

- This stems from the framework of Monell elements.
- First, there has to be an evident policy, practice, custom or procedure (PPCP) – proof of a standard to which employees adhere (or are supposed to adhere but do not) in their day-to-day duties.
- Second, from this, it can then be determined whether a pattern of constitutional violations *because of* this PPCP is occurring, and the claimant injured thereby can bring a Monell claim.
- Third, only if there is a PPCP and a pattern of violations can it be proved that the municipality acted with the requisite "deliberate indifference" – the intent, purpose of action, coupled with knowledge or notice of the incidents and continued "indifference" thereto.

Inroads

- In *Canton v. Harris*, 489 U.S. 378, 390, n. 10 (1989), the Court stated in a cryptic footnote that "[i]n limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to a level of an official government policy for purposes of § 1983." **A failure to implement policy or a lack of a policy.**
- The Court later stated that this stood for the proposition that for some undefined "narrow range of circumstances, a pattern of similar violations might not be necessary to show deliberate indifference." *Connick v. Thompson*, 563 U.S. 51, 61-64 (2011). See also *Bryan Cty*, *supra* at 409. **A single incident might suffice.**
- As the Court in *Connick* rationalized, *Canton* "sought not to foreclose the possibility, however rare, that the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations." *Connick*, *supra* at 64. **The Court has never applied this to any case.**

Inroads

- The Supreme Court has apparently left open the possibility of single-incident *Monell* liability (SIML) in "failure to train" scenarios. See Canton, Bryan County, and Connick.
- In other words, in some circumstances a single incident resulting in a constitutional violation could give rise to municipal liability under 42 U.S.C. § 1983 (single-incident *Monell* liability (SIML)).

Inroads

- In *Bryan County*, *t*he Court reiterated its formulation of this "single-incident *Monell* liability" (SIML): "[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious…that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Bryan Cty.*, *supra*.
- This "so obvious" language is being used to allow substitution of the PPCP with expert evidence, and even a "single incident" is being claimed to be sufficient to show that the failure of the municipality (according to the expert) led to the constitutional violation.
- This happened in our Fahner case (a jail inmate upon inmate assault case), and Richko (a detainee upon detainee assault) - both resulted in deaths to the inmate / detainee, respectively.

Inroads

- But, footnote 10 was in the specific factual context of a municipality's police officers using excessive force due to a lack of training.
- **The Court has never held there can be "de facto" SIML under 42 U.S.C. § 1983 for a "failure to train" or a "failure to screen" in the institutional correctional setting.**
- **In fact, the Court has never approved of or applied footnote 10 to any scenario.**
- But, its continual recitation of the footnote has led to many diverse issues and divergent views and theories being interjected into 42 U.S.C. § 1983 claims against municipalities.

Issues on SIML

- What can substitute for the ordinary requirement of “actual or constructive” notice of the constitutional violations to the municipality ordinarily required under the “deliberate indifference” analysis – if there is no pattern of similar violations?
- What evidence or proof is needed to show the obviousness of a preexisting risk in the absence of prior incidents with respect to which the municipality can formulate a PPCP of inaction or indifference?
- Can expert evidence be used to second guess a municipality’s lack of a policy, which can then be used as a substitute for the “deliberate indifference” requirement, even where there is a single violation – see Fahner (supplemental brief provided) and Richko Petition (also provided).

Issues on SIML

- Does the “limited circumstance” extend to an alleged failure to train professionals? *Connick, supra seems* to say no.
- Does the “limited circumstance” extend to non-action, or a de facto policy of not requiring a certain action, i.e., the de facto policy of not requiring review of mental health records / failure to require screening, or inadequate screening of incoming detainees in Richko v. Wayne County, 819 F.3d 907 (2016)? (Cert petition provided).

Issues on SIML

- We have identified and argued these issues in Fahner (see supplemental brief provided). Settled.
- Richko Cert. Petition – pending, but settled, and will be withdrawn.
- County of Los Angeles argued it in their petition, which was denied.
- The Glisson v. Indiana Dep't of Corrections Case that just came out, en banc, has the potential to go up on several of these issues. A strong dissent was case in that decision. See Opinion provided with materials.
- I am consulting on another detainee upon detainee death case in a county jail which is at the federal district court level and may go up on appeal.

Circuit Court Splits on SIML

- Circuit Court treatment varies as to whether a "failure to train" or a "failure to enforce a policy" requires a showing of a recurring constitutional violation. If it does not, as suggested by the cryptic (and never actually applied) footnote 10 in *Canton*, which continues to survive, despite some speculation of its eventual demise, then a single tragic incident can provide the necessary notice to the municipality of its constitutionally deficient policy or custom (or lack thereof) and at the same time subject it to liability. See Karen Blum, et. al., Municipal Liability and Liability of Supervisors: Litigation Significance of Recent Trends and Developments, 29 Touro L. Rev. 93 (2012).
- This seems to run contrary to Oklahoma v. Tuttle, 471 U.S. 808 (1985) (holding that a single incident of a constitutional harm cannot give rise to municipal liability under *Monell*)

Circuit Court Splits on SIML

- Presumably, that "single incident" must at least be an "obvious" result of the municipality's constitutional deficiencies. See, e.g.., *Peterson v. City of Fort Worth*, 588 F.3d 838, 850 (5th Cir. 2009) (a city could be liable for a single incident of objectively unreasonable excessive force under a "failure to supervise" theory, if it was obvious that "the highly predictable consequence" of the specific deficiency in supervision was that officers would apply force in such a way as to violate the Fourth Amendment).
- This "substitutes" for the showing of PPCP (unless you agree that the absence of PPCP is itself a PPCP) and for the showing of deliberate and conscious disregard (unless the municipality believes ignorance is bliss).

Circuit Court Splits on SIML

- Courts have also substituted the “pattern or practice” and “actual or constructive notice requirement” of the “deliberate indifference” inquiry for “expert testimony”, the latter of which *can only* proffer that a municipality and its policymakers “*knew* or *should have known*” that its deficiencies, presumably being pointed out to it for the first time in the litigation, would eventually cause the single constitutional harm being complained of.

Circuit Courts for SIML

- “The high degree of predictability [in a single-incident case] may also support an inference of causation — that the municipality's indifference led directly to the very consequence that was so predictable." The causation inquiry — "[p]redicting how a hypothetically well-trained officer would have acted under the circumstances" — "may not be an easy task for the factfinder, particularly since matters of judgment may be involved." Canton, 489 U.S. at 391. Nonetheless, "judge and jury, doing their respective jobs, will be adequate to the task.” *Thomas v. Cumberland Cty*., 749 F.3d 217, 226 (3rd Cir. 2014), citing Bryan Cnty., 520 U.S. at 409-10.

Circuit Courts for SIML

- The risk must be "so predictable that failing to train the [municipal personnel] amounted to conscious disregard" for the injured party's rights. But the record in this case contains no proof, whether in the form of expert evidence or otherwise, that the extraction of mentally ill inmates from jail cells requires specialized training. There is no suggestion, for example, that any other municipality in the United States provides such specialized training to detention officers. Plaintiff-Appellant's evidence therefore does not demonstrate the same level of "patently obvious" risks of "recurring constitutional violations" that may occur, as hypothesized by the Supreme Court in Canton, 489 U.S. at 390, and Connick, 131 S. Ct. at 1361-63, in instances where a municipality sends "armed officers into the public to capture fleeing felons without training the officers in the constitutional limitation on the use of deadly force." Kitchen v. Dall. Cty. 759 F.3d 468, 485 (5th Cir. 2014).

Circuit Courts for SIML

- A plaintiff can establish "a single violation of federal rights, accompanied by a showing that [the municipal defendant] has failed to train its employees to handle recurring situations presenting an obvious potential" for a constitutional violation. *Bryan Cnty*., 520 U.S. at 409. This second mode of proof is available "in a narrow range of circumstances" where a federal rights violation "may be a highly predictable consequence of a failure to equip [employees] with specific tools to handle recurring situations." *Shadrick v. Hopkins County*, 805 F.3d 724, 739 (6th Cir. 2015). There is subsequent history in this case where they tried to flesh the SIML issue out, but ultimately were unsuccessful. Richko was Sixth Circuit also.

Circuit Courts for SIML

- A plaintiff can properly rely on the single incident if there is other evidence of inadequate training. See *Vineyard v. County of Murray*, 990 F.2d 1207, 1212-14 (11th Cir.), cert. denied 510 U.S. 1024, 126 L. Ed. 2d 594, 114 S. Ct. 636 (1993); *Russo,* 953 F.2d at 1041, 1046-48; *Bordanaro v. McLeod*, 871 F.2d 1151, 1159-63 (1st Cir.), cert. denied 493 U.S. 820 (1989); *Grandstaff v. City of Borger*, 767 F.2d 161, 169-72 (5th Cir. 1985). By providing direct evidence of inadequate training, as discussed above, plaintiff provided sufficient evidence.

Circuit Courts for SIML

- The case before us is within the "narrow range of circumstances" recognized by Canton and left intact by Brown, under which a single violation of federal rights may be a highly predictable consequence of failure to train officers to handle recurring situations with an obvious potential for such a violation. *Allen v. Muskogee*, 119 F.3d 837, 845 (10th Cir. 1997).
- Over the dissent, which cited *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24, 85 L. Ed. 2d 791, 105 S. Ct. 2427 (1985) (“Proof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which . . . can be attributed to a municipal policymaker."). *Id*. at 846.

Circuit Courts for SIML

- Some courts also allow liability for a single incident on the basis of a municipality's failure to have a policy, or lack of a policy. *Peterson v. City of Fort Worth*, 588 F.3d 838, 850 (5th Cir. 2009) (a city could be liable for a single incident of objectively unreasonable excessive force under a "failure to supervise" theory, if it was obvious that "the highly predictable consequence" of the specific deficiency in supervision was that officers would apply force in such a way as to violate the Fourth Amendment).

Circuit Courts Against SIML

- Clarity of the municipal obligation is important in this context, because "[w]ithout some form of notice to the city, and the opportunity to conform to constitutional dictates both what it does and what it chooses not to do, the failure to train theory of liability could completely engulf *Monell*, imposing liability without regard to fault." *Szabla v. City of Brooklyn Park*, 486 F.3d 385, 393 (8th Cir. 2007).
- *Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d 87, 94, n.10 (1st Cir. 1994) (observing that because there were "no clear constitutional guideposts as to the precise nature of the obligations that the Due Process Clause places upon the police . . ., it is difficult to conclude that the failure to train officers to recognize the need for medical treatment in the first instance, in and of itself, reflects callous or reckless indifference to constitutional rights.") (emphasis added).

Circuit Courts Against SIML

- Some courts have rejected SIML where there is an alleged “lack of a policy”, similar to the “de facto” “unwritten” policy “not to require” something to be done.
- These courts correctly recognize that institutional awareness of risk is key to the imposition of institutional liability.
- There simply cannot be notice (actual or constructive) and thus the “deliberate” indifference to the *possibility* of constitutional harm. See, e.g., *Holloman v. Markowski*, No. 15-1878, 2016 U.S. App. LEXIS 18268, at *4-5 (4th Cir. Oct. 7, 2016) (“[w]hile we can infer both knowledge and deliberate indifference from the extent of an employee’s misconduct, sporadic or isolated violations of rights will not give rise to *Monell* liability; only widespread or flagrant violations will.”), quoting *Owens v. Baltimore City State's Attorney's Office*, 767 F.3d 379, 402 (4th Cir. 2014) (internal citations omitted).

Glisson v. Indiana Dep't of Corr., 813 F.3d 662, 667-68 (7th Cir. 2016)

- Most recent case.
- The circuit court originally rejected a prisoner's Eighth Amendment claim for lack of medical care against a private health care provider (deemed to be equivalent to a municipality) holding there is a requirement to demonstrate a "series" of incidents.
- However, on 2/21//2017, the Circuit Court reversed en banc, as to the precise issue of whether there is a requirement to demonstrate more than a single incident. See 2016 U.S. App. LEXIS 9557 (May 24, 2016), it issued its opinion. (Opinion provided).

Glisson v. Indiana Dep't of Corr., 813 F.3d 662, 667-68 (7th Cir. 2016)

- Note the majority and dissent fully explain Monell liability, and the nuances in imposing SIML, both in the context of how that affects the "deliberate indifference" standard, and whether or not there is a requirement to show a series of incidents.
- The majority adopts SIML theory from Canton's footnote.
- The dissent says doing so is exactly what Supreme Court says you cannot, Monell liability without evidence of corporate fault or causation.
- It also criticizes the majority holding that a "gap" in official policy should not be treated as an actual policy, i.e., the lack of policy is a PCPP actionable under 42 U.S.C. § 1983.

Questions / Comments

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