MUNICIPAL FAILURES

Nancy Leong†

Calls for reforming the civil rights enforcement regime often focus on individual government officers. Recent years have brought demands to abolish qualified immunity—a defense that protects individual officers from liability so long as they did not violate clearly established law—and to end indemnification—a practice in which government employers satisfy judgments against their employees.

This Article focuses instead on liability directly against municipalities and draws attention to a promising avenue for recovery: the theory of municipal failure to supervise. It presents two original data sets—one including every municipal liability case decided by the federal appellate courts in 2019, and the other comprised of more than a decade of federal appellate cases involving failure-to-supervise claims. Using these data, the Article develops a quantitative and qualitative account of failure-to-supervise claims in the federal appellate courts. Failure-to-supervise claims are rarely litigated: just fifteen such claims were adjudicated by the federal appellate courts in 2019, most in a cursory fashion. Yet all twelve circuits have confirmed that the theory is a viable way of establishing municipal policy or custom, and failure-to-supervise claims are in fact feasible to win. Between 2010 and 2020, plaintiffs prevailed on the theory in seven circuits, in several instances winning large jury verdicts.

On the basis of this new empirical information, the Article concludes that the failure-to-supervise theory offers plaintiffs a valuable opportunity at a time when they face considerable

† William M. Beaney Memorial Research Chair and Professor of Law, University of Denver Sturm College of Law. This Article was much improved by feedback I received at the faculty colloquia of the California Western, University of North Carolina, University of Utah, and University of Wisconsin Schools of Law. I also appreciate the helpful comments I received from Rebecca Aviel, Alan Chen, Anuj Desai, Charlotte Garden, Erica George, Carissa Hessick, Danielle Jefferis, Sam Kamin, Christina Koningisor, Tammy Kuennen, Margaret Kwoka, Holning Lau, Alex Reinert, Joanna Schwartz, Miriam Seifter, Fred Smith, Daniel Tokaji, Matt Tokson, Nina Varsava, Erika Wilson, and Robert Yablon, and apologize to anyone who I ve inadvertently omitted. I am grateful for first-rate research assistance from Genna Carver, Katelyn Elrod, Andrew Ferland, and Matthew Nilsen. Finally, I am indebted to the editors of the Cornell Law Review for their careful, thorough, and kind editing, especially Danielle Dominguez, Lucas Carter, Charlene Hong, Benjamin Sugarman, Emily Rivera, Claire Piorkowski, Marilyn Vaccaro, Sarah Marshall, Andrew Lee, and Andrew Gelfand.

challenges. The failure-to-supervise theory provides plaintiffs with an avenue to recover against municipalities even when no individual officer can be held liable due to qualified immunity or other obstacles. Moreover, the failure-to-supervise theory is uniquely well-suited to capturing municipal culpability for constitutional harms that result from a municipality's lax oversight or unresponsiveness to complaints. The theory correctly focuses courts' attention on institutional cultures that foster and enable constitutional violations, countering the misleading view that constitutional violations are caused by a "few bad apples," and advances the remedial goals of compensation and deterrence. The Article therefore contends that civil rights lawyers should advance the failure-to-supervise theory more vigorously and that courts should evaluate the theory more closely.

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INTRODUCTION

Jennifer and Megan suffered from addictions and were convicted of crimes that led to their incarceration at the Polk County Jail in northwest Wisconsin between 2011 and 2014.[1] During that time, both women were repeatedly sexually assaulted by Daryl Christensen, a guard at the jail.

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[1] Unless otherwise specified, the facts in this Introduction are drawn from J.K.J. v. Polk County, 960 F.3d 367, 371–76 (7th Cir. 2020) (en banc). In recounting the facts, I have occasionally used the language of the opinion while omitting quotation marks for ease of reading. I have also used the names "Jennifer" and "Megan" for J.K.J. and M.J.J., both for ease of reading and to humanize them, even though these are not, so far as I know, their real names. The en banc Seventh Circuit opinion on which I primarily rely is the result of a protracted litigation. *See* J.K.J. v. Polk County, 928 F.3d 576, 582 (7th Cir. 2019), *reh'g granted*, 960 F.3d 367 (7th Cir. 2020) (en banc); J.K.J. v. Polk County, No. 15-cv-428-wmc, 2018 WL 708390 (W.D. Wisc. Feb. 5, 2018); J.K.J. v. Polk County, No. 15-cv-428-wmc, 2017 WL 28093 (W.D. Wisc. Jan. 3, 2017).

Christensen began by commenting on the two women's appearances—remarks like "nice ass" and "you're looking good." These remarks escalated to explicit sexual requests, kissing, groping, oral sex, digital penetration, and sexual intercourse. Although Jennifer could not remember how many times Christensen sexually assaulted her, she recalled that during a two-month period in the summer of 2012, he insisted on sexual contact every time he was on duty. Megan estimated that Christensen engaged in sexual contact with her between twenty-five and seventy-five times.

Christensen plainly knew that what he was doing was wrong. He always took Jennifer and Megan to hidden areas to engage in sexual contact and told both women that they could not tell anyone about the sexual conduct because he could lose his job and family. While they were incarcerated, Jennifer and Megan remained silent about the sexual abuse they suffered. The reasons for their silence are familiar ones: they were ashamed, they worried that no one would believe them, and they feared retaliation.

After their release, Jennifer and Megan filed suit under 42 U.S.C. § 1983 against both Christensen and his employer, Polk County, alleging violations of the Eighth and Fourteenth Amendments. Christensen admitted Jennifer and Megan's allegations, and the jury imposed a total judgment against him of $11,500,000,[2] which both the district court and the Seventh Circuit upheld.

One might expect that Jennifer and Megan could obtain a similar result in the litigation against Polk County. After all, the two women were incarcerated by Polk County in a Polk County facility and were sexually assaulted by a guard employed by Polk County. The two women could also point to Polk County's troubling record on sexual misconduct. At the Polk County jail, guards frequently commented on the physical appearances of female inmates. Christensen himself had made lewd comments over the jail's intercom about female inmates' attire.[3] An inmate had previously complained in writing that one of Christensen's fellow guards had touched her rear and had made sexual comments to and about her, yet Polk County supervisors issued only a written reprimand to the guard, which they said was not a "major deal." The supervisors took

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2 *J.K.J.*, 960 F.3d at 375 (describing jury verdict of $2 million in compensatory damages to each plaintiff against both Christensen and Polk County, and $7.5 million in punitive damages against Christensen).

3 *J.K.J.*, 2018 WL 708390, at *4.

no subsequent measures to remind guards of relevant laws and policies. At trial, an expert witness testified about the many ways that Polk County could have improved the safety of its jail and the behavior of its guards, including by providing a safe and confidential channel for reporting abuse. And the jury agreed with Jennifer and Megan, awarding each plaintiff a verdict of $2,000,000 against Polk County.

Yet a panel of the Seventh Circuit reversed the judgment, holding that Polk County was not liable for Christensen's conduct because Jennifer and Megan had not sufficiently demonstrated that the County was responsible for the violation of their rights. The problem for Jennifer and Megan, the court held, is that Polk County didn't *do* anything—it had policies that clearly forbade all sexual contact with inmates, and Christensen simply didn't follow them. Although Jennifer and Megan argued that the municipality did not adequately train its guards against sexual assault, the court held that more training would not have prevented the assault. Therefore, the Seventh Circuit panel held, Polk County could not be held liable for the jury verdict.[4]

Jennifer and Megan's case reflects the difficulties that plaintiffs face in obtaining a remedy for violations of their constitutional rights. Unlike many individual defendants, Christensen was not entitled to qualified immunity, a broad defense that protects "all but the plainly incompetent or those who knowingly violate the law" from damages liability.[5] Still, Christensen is unlikely to personally satisfy the $11,500,000 judgment against him, especially given that he is currently serving a thirty-year prison sentence for the sexual assaults.[6] Sometimes individual defendants are indemnified[7] by government employers, but Christensen was not: Polk County claimed, and the district court agreed, that applicable law did not require indemnification of Christensen because he was acting outside the scope of his employment.[8] And even where municipalities indemnify employees, this prospect is not a guarantee of recov-

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4 *J.K.J.*, 928 F.3d at 595–99. The Seventh Circuit panel opinion was later vacated and the jury verdict reinstated by the Seventh Circuit sitting en banc. For a discussion of the en banc result, see *infra* notes 199–210.

5 Malley v. Briggs, 475 U.S. 335, 341 (1986).

6 *J.K.J.*, 928 F.3d at 582.

7 Indemnification is the practice of an employer satisfying a judgment against its employee, generally either as the result of statute or contract. *See* PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 85 (1983).

8 J.K.J. v. Polk County, No. 15-cv-428-wmc, 2017 WL 28093, at *13 (W.D. Wisc. Jan 3, 2017).

ery for plaintiffs, and the lack of certainty can affect plaintiffs' ability to secure counsel and to litigate in their own best interests.[9]

An alternative path is to hold the municipality itself liable. Unlike most private employers, who are liable in respondeat superior,[10] municipalities are not liable simply because they employ an individual who violates the Constitution.[11] Rather, a plaintiff seeking to impose liability on a municipality under § 1983 must show that the constitutional violation was caused by a municipal policy or custom.[12] The Supreme Court has established four ways that plaintiffs may prove policy or custom: an express law or policy authorizing the constitutional violation,[13] a final decision by a person with policymaking authority,[14] a widespread pattern of conduct,[15] or a municipal failure to act, such as a failure to adequately screen, train, or supervise municipal employees.[16] Collectively, I will call the claims in this final category "municipal failure claims."[17]

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9 *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 949–51 (2014) [hereinafter Schwartz, *Police Indemnification*] ("Anecdotal evidence suggests that government attorneys may use the possibility that officers will not be indemnified to their advantage during settlement negotiations, trial, and post-trial proceedings.").

10 W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 500–01 (5th ed. 1984) (defining respondeat superior as the principle that "[t]he losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business"); Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 569–70 (1988) ("[Respondeat superior] ensures that any judgment against the employee will be paid to the limit of the combined assets of the employer and the employee.").

11 Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 691, 694 (1987).

12 *Id.* at 694.

13 Connick v. Thompson, 563 U.S. 51, 61 (2011).

14 City of St. Louis v. Praprotnik, 485 U.S. 112, 123–24 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986) (plurality opinion).

15 Adickes v. S.H. Kress & Co., 398 U.S. 144, 167–68 (1970).

16 City of Canton v. Harris, 489 U.S. 378, 380 (1989); Bd. of the Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S 397, 409–10 (1997); *Connick*, 563 U.S. at 61.

17 Others have called these "failure to" claims. *See, e.g.*, Karen M. Blum, *Making Out the* Monell *Claim Under § 1983*, 25 TOURO L. REV. 829, 830 (2009) [hereinafter Blum, *Making Out the* Monell *Claim*] ("[T]he *City of Canton* method of demonstrating liability . . . occurs when plaintiffs point to a failure to 'blank': a failure to train, a failure to supervise, a failure to discipline, a failure to adequately screen, etc.").

The municipal policy or custom requirement has prompted criticism from both judges[18] and legal scholars.[19] Many have argued that the policy or custom requirement is virtually prohibitive to recovery for plaintiffs.[20] And among policy and custom claims, commentators have contended—without empirical support—that claims based on a municipal failure are both the

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18 *E.g.*, *Bryan County*, 520 U.S. at 433 (Breyer, J., dissenting) ("*Monell*'s basic effort to distinguish between vicarious liability and liability derived from 'policy or custom' has produced a body of law that is neither readily understandable nor easy to apply."); *Pembaur*, 475 U.S. at 487 (Stevens, J., concurring in part and concurring in judgment) ("[Difficulty] arises from the problem of obtaining a consensus on the meaning of the word 'policy'—a word that does not appear in the text of 42 U.S.C. § 1983, the statutory provision that we are supposed to be construing."); Vodak v. City of Chicago, 639 F.3d 738, 747 (7th Cir. 2011) ("For reasons based on what scholars agree are historical misreadings (which are not uncommon when judges play historian), the Supreme Court has held that municipalities are not liable for the torts of their employees under the strict-liability doctrine of respondeat superior, as private employers are." (citations omitted)).

19 *E.g.*, Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 937 (2019) ("Taken as a whole, the Court's pattern [with respect to constitutional tort actions] does not reflect a principled conception of the judicial role as much as hostility to awards of monetary relief against the government and its officials."); John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 208 (2013) ("The proliferation of inconsistent policies and arbitrary distinctions renders constitutional tort law functionally unintelligible."); Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 913–14 (2015) [hereinafter Blum, *Section 1983 Litigation*] ("There is a growing consensus among practitioners, scholars, and judges that Section 1983 is no longer serving its original and intended function as a vehicle for remedying violations of constitutional rights, that it is broken in many ways, and that it is sorely in need of repairs."); Fred O. Smith, Jr., *Beyond Qualified Immunity*, 119 MICH. L. REV. ONLINE 121, 131 (2021) (explaining that the policy or custom requirement "has been widely critiqued as atextual, ahistorical, and an unnecessary exacerbation of the rights-remedies gap").

20 *E.g.*, Blum, *Section 1983 Litigation*, *supra* note 19, at 916, 922 (describing challenges of pleading and proof); Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U.L. REV. 737, 754–55 (2021) ("[T]he Supreme Court's limitation on municipality liability operates as a significant barrier to relief for those injured by unconstitutional conduct."); Smith, *supra* note 19, at 131 (noting limitations on recovery created by municipal liability doctrine after *Monell*).

most common[21] and virtually nonexistent.[22] Authorities have also suggested that municipal failure claims are nearly impossible to win.[23]

In particular, claims that a municipality failed to *supervise* its employees have received very little specific attention, both in general and as distinct from other municipal failure claims.[24]

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21 *E.g.*, G. Flint Taylor, *Municipal Liability Litigation in Police Misconduct Cases from* Monroe *to* Praprotnik *and Beyond*, 19 CUMB. L. REV. 447, 452 (1989) [hereinafter Taylor, *Municipal Liability Litigation*] (claiming, without evidence, that "[t]he most popular policy quickly became one that was defined as encouraging the use of deadly or excessive force by one or more of the matrix of municipal failures—failure to properly hire, train, discipline, supervise, control, or investigate[ ]"); G. Flint Taylor, *A Litigator's View of Discovery and Proof in Police Misconduct Policy and Practice Cases*, 48 DEPAUL L. REV. 747, 750 (1999) [hereinafter Taylor, *A Litigator's View*] (claiming that "these 'failure to' claims are the most commonly employed *Monell* claims in police misconduct cases" but citing nothing); Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 43–44 (2000) (claiming "[i]t is no wonder, then, that the 'failure to [blank]' model has become the most attractive vehicle for municipal liability among civil rights lawyers" (alteration in original) (citing Taylor, *Municipal Liability Litigation*, *supra*, at 452) and "[t]empted by the promise of *Harris*, § 1983 plaintiffs now almost automatically assert that the constitutional deprivation they suffered at the hands of a law enforcement officer resulted from the municipality's failure to train, transfer, or otherwise supervise that officer," but citing nothing for this second assertion).

22 *E.g.*, Mize v. Tedford, 375 F. App'x 497, 500 (6th Cir. 2010) ("This 'failure to supervise' theory of municipal liability is a rare one. Most agree that it exists and some allege they have seen it, but few actual specimens have been proved.").

23 *E.g.*, Connick v. Thompson, 563 U.S. 51, 61 (2011) ("A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train."); Blum, *Making Out the* Monell *Claim*, *supra* note 17, at 849 ("The [failure to screen] standard from *Bryan County* is a tough one for plaintiffs to satisfy.").

24 The Supreme Court has never adjudicated a claim of municipal policy or custom based on a failure to supervise. It has decided four municipal failure cases: three involved the failure to train (City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985) (plurality opinion); City of Canton v. Harris, 489 U.S. 378 (1989); *Connick*, 563 U.S. 51) and one involved the failure to screen (Bd. of the Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S 397 (1997)). I could not find any law review article that focuses on municipal failure to supervise as a way of establishing municipal policy or custom under *Monell*. A number of articles have discussed failure to supervise in connection with other topics. *E.g.*, Michelle Adams, *Causation, Constitutional Principles, and the Jurisprudential Legacy of the Warren Court*, 59 WASH. & LEE L. REV. 1173, 1176, 1191–96 (2002) (discussing the deliberate indifference standard in failure-to-supervise claims as an example of the Burger and Rehnquist Courts' "rigidly-applied causation" standards); Susan Bandes, *Not Enough Blame to Go Around: Reflections on Requiring Purposeful Government Conduct*, 68 BROOK L. REV. 1195, 1195 (2003) (discussing municipal failure claims in relation to the argument that municipal liability is based more on blame than on responsibility); Blum, *Making Out the* Monell *Claim*, *supra* note 17, at 842–48 (describing the elements of municipal failure claims); Rosalie Berger Levinson, *Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post-*Iqbal/Connick *World*, 47 HARV. C.R.-C.L. L. REV. 273 (2012) (discussing obstacles to supervisory liability for individual officers); Amit Singh, *Accountability Matters: An Examination of Municipal*

No research has previously attempted to evaluate failure-to-supervise claims empirically or to consider them systemically.

This Article begins to address this omission with an empirical account of municipal failure-to-supervise claims in the federal appellate courts. It presents two original data sets—one including every municipal policy or custom claim decided by the federal appellate courts in 2019, and the other consisting of more than a decade of failure-to-supervise claims decided by the federal appellate courts. These data reveal that, before the federal appellate courts, failure-to-supervise claims are both infrequently litigated and feasible to win.[25] This is so even though a qualitative examination of both data sets reveals that failure-to-supervise claims are often underdeveloped—both objectively and relative to other municipal failure claims.

This Article therefore contends that the municipal failure-to-supervise theory offers a promising avenue to establish municipality liability in suits under § 1983—a goal that is particularly important given that calls for reforming qualified immunity have not yet yielded significant change. The failure-to-supervise theory should be advanced more vigorously by civil rights lawyers and evaluated more closely by courts.

Greater attention to the failure-to-supervise theory is critical for three reasons. First, at a time when civil rights advocates face daunting obstacles in both the Supreme Court and Congress, the theory offers a valuable opportunity for plaintiffs. Because municipalities are not entitled to qualified immunity, a plaintiff can recover against a municipality even when no individual officer can be held liable due to qualified immunity or other obstacles.[26] Moreover, unlike many proposals for reforming the doctrine of municipality liability,[27] the failure-to-

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Liability in § 1983 Actions, 47 U. PAC. L. REV. 105, 125–29 (2015) (arguing that the deliberate indifference standard for municipal failure claims should be replaced with the conscious disregard standard); Gilles, *supra* note 21, at 41–48 (discussing the "failure to [blank] model" without distinguishing among different forms of municipal failure claims); Anthony D. Schroeder, Note, City of Canton v. Harris*: The Deliberate Indifference Standard in 42 U.S.C. § 1983 Municipal Liability Failure to Train Cases*, 22 U. TOL. L. REV. 107 (1990) (examining municipal liability in light of the Supreme Court's recent decision in *Canton*).

25 *See infra* notes 116–153 and accompanying text. This finding is in tension with some commentators' claims about the frequency of municipal failure claims. *See* Taylor, *Municipal Liability Litigation*, *supra* note 21, at 452; Gilles, *supra* note 21, at 43–44.

26 Horton *ex rel.* Horton v. City of Santa Maria, 915 F.3d 592, 603–04 (9th Cir. 2019); *see also infra* notes 58–60 and accompanying text; *infra* notes 184–189 and accompanying text.

27 *E.g.*, Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL

supervise theory is consistent with current precedent in the Supreme Court and all twelve appellate courts.[28] In contrast to most other proposals for reforming municipality liability, therefore, an enhanced role for failure-to-supervise claims can expand opportunities for plaintiffs to recover without any modification to current doctrine.

Second, the failure-to-supervise theory is frequently best suited to describe wrongful municipal conduct. Consider the facts with which I began this Article. Should Polk County have more clearly instructed Christensen not to commit sexual assaults? Maybe—but it's hard to argue that more training would have changed Christensen's behavior, especially when he testified at trial that he was aware that his conduct was illegal and against policy.[29] By contrast, expert testimony in the case indicted that Polk County "inadequately addressed prevention and detection" of sexual assault and abuse.[30] This testimony and other evidence introduced at trial suggested that better *supervision* could have made a difference: for example, ensuring that guards were not alone with inmates, taking added care with job assignments, and providing a safe and confidential way for inmates to report abuse.[31] And the critique of

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RTS. J. 755, 755 (1999) (arguing for vicarious liability against municipalities in lawsuits under section 1983); Jeffries, *supra* note 19, at 270 (arguing for a single § 1983 liability rule for both individuals and municipalities, with a single defense involving a reformulation of the current qualified immunity rule to a question of whether the defendant's conduct was "clearly unconstitutional" rather than whether a right was "clearly established"); Avidan Y. Cover, *Revisionist Municipality Liability*, 52 GA. L. REV. 375, 385 (2018) (proposing replacing the municipal policy or custom requirement with a legislative framework in which municipalities could be liable (1) for having a pattern or practice of constitutional violations; or (2) in isolated instances where the municipality lacks a policy and there is a national consensus that a policy is necessary to prevent a particular constitutional harm); Edward C. Dawson, *Replacing* Monell *Liability with Qualified Immunity for Municipal Defendants in 42 U.S.C. § 1983 Litigation*, 86 U. CIN. L. REV. 483, 487–88 (2018) (advocating for replacing policy or custom doctrine with respondeat superior liability while allowing municipalities to invoke the same qualified immunity defenses available to individual officers). While these proposals have much to recommend in them, each one would also require overturning Supreme Court precedent or passing federal legislation, both of which are highly unlikely in the near term. *Cf.* Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937 (2018) (explaining why it is highly unlikely that either the Supreme Court or Congress will abolish qualified immunity).

28 *See infra* notes 116–117 and accompanying text. In work primarily focused on the administrative law context, one scholar has also argue that there is a constitutional duty to supervise. Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1842 (2015).

29 J.K.J. v. Polk County, 928 F.3d 576, 583 (7th Cir. 2019), *reh'g granted*, 960 F.3d 367 (7th Cir. 2020) (en banc).

30 *J.K.J.*, 960 F.3d at 375.

31 *Id.*

Polk County is not an outlier. In many instances, a municipal shortcoming is best described as a failure of supervision, not of training.[32]

Finally, the failure-to-supervise theory furthers § 1983's remedial goals of compensation and deterrence. The theory promotes compensation because in many instances it is the most accurate characterization of a municipality's wrongful conduct. Thus, it is more likely to persuade a jury, a judge, or an appellate panel, meaning that a plaintiff is more likely to receive compensation for their injuries. Further, the failure-to-supervise theory is better suited to prevent constitutional violations because it prompts a hard look at institutional structures and cultures that engender constitutional harm. The failure-to-supervise theory will also more effectively deter constitutional violations by focusing attention on their root causes. And it will improve discourse regarding constitutional violations in particular by counteracting the claim that a "few bad apples" are largely responsible for wrongdoing—a claim that has infected many conversations about police liability and stymied broader institutional reform.[33]

This Article proceeds in three parts. Part I provides background on litigation under 42 U.S.C. § 1983, municipal policy and custom, and claims predicated on a theory of municipal failure. Part II examines the way that municipal failures play out in practice. I present original quantitative and qualitative research to develop an account of the way municipal failure-to-supervise claims are litigated and decided by the federal appellate courts. Part III argues that the theory of municipal failure to supervise is both underused and well-suited to capturing municipal culpability for constitutional violations.[34] The the-

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32 *See infra* notes 154–185 and accompanying text.

33 *See, e.g.*, PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 6 (2017) ("The problem is not bad apple cops. The problem is police work itself."); Sean Illing, *Why the Policing Problem Isn't About "a Few Bad Apples,"* VOX, https://www.vox.com/identities/2020/6/2/21276799/george-floyd-protest-criminal-justice-paul-butler [https://perma.cc/YV4W-CP8U] (last updated June 6, 2020) (transcribing a conversation with Paul Butler addressing the "bad apple" argument).

34 This Article does not address failure to supervise as a theory of *individual* governmental liability. While courts for many years recognized that individual governmental officials might be liable for their subordinates' constitutional violations if they failed to supervise them, some courts and scholars have suggested that this theory of liability has been seriously undercut by *Ashcroft v. Iqbal*. *E.g.*, Levinson, *supra* note 24, at 292 ("*Iqbal* left the question of supervisory liability in a state of disarray, and it led many lower courts to ratchet up the standard for holding supervisors liable under § 1983, and to question supervisory liability in 'failure to' cases"). *But see* Alexander A. Reinert *Supervisory Liability and* Ashcroft v. Iqbal, 41 Cardozo L. Rev. 945, at 947–48 (2020) (surveying federal appellate

ory offers several doctrinal advantages, and its expansion would serve § 1983's goals of compensation and deterrence. Part III concludes with several recommendations to promote more robust articulation of the failure-to-supervise theory.

I
BACKGROUND

Congress enacted 42 U.S.C. § 1983 as part of the Ku Klux Klan Act of 1871, which responded to widespread violence against Black people in the South.[35] Legislators had two purposes in enacting the statute: they wanted to provide a mechanism for compensating those whose civil rights were infringed, and they wanted to deter future violations.[36]

Despite the laudable goals of the legislation, 42 U.S.C. § 1983 lay largely dormant for decades. One researcher located only twenty-one cases brought under the statute between 1871 and 1920.[37] This changed in 1961 with *Monroe v. Pape*, in which the Supreme Court launched a new era in constitutional litigation by holding that government officers could be held liable under § 1983 for official conduct even when that conduct was not directed or authorized by state law.[38] In subsequent years, the number of cases increased exponentially: during each *month* of the year 2020, for example, federal district courts considered two thousand lawsuits brought under § 1983.[39]

In principle, 42 U.S.C. § 1983 provides a remedy to anyone whose constitutional rights are violated by a government offi-

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case law to conclude that courts are *not* applying the supervisory liability standard differently, but that *Iqbal*'s heightened pleading standard has made it more difficult for plaintiffs to succeed). This Article takes no position on the merits or effects of *Iqbal*, but, to the extent that *Iqbal* has eliminated or limited *individual* liability for failure to supervise, an expanded theory of *municipal* liability has a particularly important role to play in compensating victims of civil rights violations and deterring future violations.

35 Monroe v. Pape, 365 U.S. 167, 171–80 (1961) (recounting legislative history of § 1983).

36 *See* Robertson v. Wegmann, 436 U.S. 584, 590–91 (1978) ("The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law."); Valenzuela v. City of Anaheim, 6 F.4th 1098, 1102 (9th Cir. 2021) ("Section 1983's goals include compensation for those injured by a deprivation of federal rights and deterrence to prevent future abuses of power.").

37 Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951).

38 *Monroe*, 365 U.S. at 187.

39 This conservative estimate was derived from Westlaw by searching for "Monell" and serially restricting the date range to each month of 2020.

cial. Yet individuals who suffer constitutional violations at the hands of government employees often remain uncompensated.[40] Legal scholars have documented the many doctrinal and practical challenges that make it increasingly unlikely that a plaintiff who suffered injury at the hands of the government will ever find recourse: increasingly onerous standing and other justiciability requirements,[41] limits on the kinds of cases federal courts can hear,[42] prevalence of qualified immunity,[43] and limits on eligibility for many remedies.[44]

In critiquing the existing regime of recovery for constitutional harms, many commentators and activists have focused on qualified immunity, arguing that the defense should be abolished to enable recovery for injured plaintiffs.[45] Qualified immunity insulates government officials sued in their individual capacities from liability for damages so long as they have not violated "clearly established law" of which a reasonable officer in their position would have known.[46] The Supreme Court has described the doctrine as a robust defense that shields "all but the plainly incompetent or those who knowingly

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40 *See, e.g.*, ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE x (2017) ("[T]he Supreme Court, through a series of doctrines and decisions, has closed the federal courthouse doors to those whose rights have been violated . . . . My vision . . . is that the federal courts should be available to all who claim a violation of their constitutional rights.").

41 *E.g.*, Sunita Patel, *Jumping Hurdles to Sue the Police*, 104 MINN. L. REV. 2257, 2271–76 (2020) ("Today, standing is a particularly difficult hurdle when plaintiffs seek an injunction to prevent constitutional harm resulting from an unwritten policy or to require departmental reform to prevent future injury.").

42 *E.g.*, Fallon, *supra* note 19, at 933, 951–61 (describing the Supreme Court's narrowing of *Bivens* and general hostility to constitutional torts).

43 *E.g.*, Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 TOURO L. REV. 633, 653–56 (2013) (describing challenges posed by need to show "clearly established law"); Chen, *supra* note 27, at 1948–51 (describing confusion about how similar a prior decision must be to satisfy the "clearly established" standard); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018) [hereinafter Schwartz, *The Case Against Qualified Immunity*] (summarizing critiques of qualified immunity).

44 *E.g.*, John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1421 (2007) (explaining the current Court's opposition to structural injunctions); Fallon, *supra* note 19, at 951–61 ("Normatively, a majority of the Justices have set themselves against what they clearly regard as excessive and burdensome liability rules. But the prevailing majority has not so far articulated a guiding, affirmative vision of the constitutional remedies that a rule-of-law regime out to provide.").

45 *E.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Schwartz, *The Case Against Qualified Immunity*, *supra* note 43.

46 Pearson v. Callahan, 555 U.S. 223, 231 (2009).

violate the law."[47] Although recent research by Joanna Schwartz has found that qualified immunity is relatively rarely the formal reason that an individual officer escapes liability for damages,[48] the doctrine still serves as an obstacle to recovery for some plaintiffs.[49] And qualified immunity is likely to remain available as a defense for the foreseeable future: the Supreme Court shows no signs of reconsidering the doctrine, Congress does not seem inclined to eliminate it statutorily, and recent state efforts to remove qualified immunity do not affect claims brought under § 1983.[50]

With the debate over qualified immunity at a standstill, some commentators have advocated increased attention to liability against government entities.[51] In *Monell v. Department of Social Services*, the Supreme Court held that municipalities may be sued directly under 42 U.S.C. § 1983,[52] overruling the portion of *Monroe* that held that municipalities did not qualify as "persons" within the meaning of 42 U.S.C. § 1983.[53] The Court relied on both the legislative history of the statute and the common understanding that municipal corporations were susceptible to suit.[54]

Municipality liability therefore offers a critical opportunity for plaintiffs. First, a municipality is a potential deep pocket—a source of recovery when an individual officer is judgment-proof.[55] To some extent, municipalities already satisfy judgments against their employees through indemnification: Joanna Schwartz has shown that many government employers indemnify their employees either statutorily or by contract;[56]

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47 Malley v. Briggs, 475 U.S. 335, 341 (1986).

48 Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 25–46 (2017).

49 Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 491–94 (2011) (noting that interviews with lawyers who litigate *Bivens* actions reveal that some would-be plaintiffs never file suit because they cannot find a lawyer willing to navigate the doctrinal and practical obstacles of qualified immunity).

50 Chen, *supra* note 27, at 1963–66.

51 *E.g.*, Fallon, *supra* note 19, at 994–96.

52 436 U.S. 658, 700–01 (1978).

53 Monroe v. Pape, 365 U.S. 167, 187–92 (1961).

54 *Monell*, 436 U.S. at 664–95.

55 Fisk & Chemerinsky, *supra* note 27, at 796.

56 In a groundbreaking empirical study, Schwartz found that police officers are indemnified for 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations against them. Schwartz, *Police Indemnification*, *supra* note 9, at 936–37. In the period between 2006 and 2011, Schwartz found that in forty-four of the seventy largest law enforcement agencies across the country, individual police officers paid just 0.02% of the dollars awarded to plaintiffs in lawsuits alleging civil rights violations by police officers, and officers in

however, indemnification is not always certain in advance, and some municipalities leverage that uncertainty to plaintiffs' disadvantage.[57] Second, a plaintiff who seeks redress directly from a municipality may recover regardless of whether an individual employee is held liable for a constitutional violation.[58] As the Ninth Circuit has explained, constitutional violations sometimes occur "not . . . as a result of actions of the individual officers, but as a result of the collective inaction" of the municipal defendant.[59] That is, a municipality can still be liable if a plaintiff shows that it caused a violation of his constitutional rights, even if individual officers are not held liable "on the basis of qualified immunity, because they were merely negligent, or for other failure of proof."[60] And third, a lawsuit directly against a municipality can potentially expand the scope of discovery, allowing a plaintiff access to municipal records regarding officer conduct beyond his own case. Municipality liability therefore offers an alternative avenue for achieving § 1983's goal of providing redress for injured plaintiffs even when no individual officer can be held liable.

Yet plaintiffs face considerable challenges in holding municipalities liable. In contrast to private entities, which can be held liable for the acts of their employees on the basis of re-

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thirty-seven small and mid-size law enforcement agencies did not pay *any* of the dollars awarded. *Id.* Officers were indemnified even for punitive damages awards against them: in twenty lawsuits resulting in $3.9 million in punitive damages, just one officer paid a punitive damages award totaling $300. *Id.* at 918.

57 *Id.* at 931–36.

58 Horton *ex rel.* Horton v. City of Santa Maria, 915 F.3d 592, 604 (9th Cir. 2019); *see also* Barrett v. Orange Cnty. Hum. Rts. Comm'n, 194 F.3d 341, 350 (2d Cir. 1999) ("[M]unicipal liability for constitutional injuries may be found to exist even in the absence of individual liability, at least so long as the injuries complained of are not solely attributable to the actions of named individual defendants."); Fagan v. City of Vineland, 22 F.3d 1283, 1292 (3d Cir. 1994) ("[A]n underlying constitutional tort can still exist even if no individual police officer violated the Constitution. . . . If it can be shown that the plaintiff suffered [an] injury, which amounts to deprivation of life or liberty, because the officer was following a city policy reflecting the city policymakers' deliberate indifference to constitutional rights, then the City is directly liable under section 1983 for causing a violation of the plaintiff's Fourteenth Amendment rights."); Anderson v. City of Atlanta, 778 F.2d 678, 686 (11th Cir. 1985) ("*Monell* and its progeny do not require that a jury must first find an individual defendant liable before imposing liability on local government." (citation omitted)); 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.").

59 Fairley v. Luman, 281 F.3d 913, 917 (9th Cir. 2002) (per curiam); *Horton*, 915 F.3d at 604.

60 *Fairley*, 281 F.3d at 917 & n.4; *Horton*, 915 F.3d at 604 (quoting *Fairley*); *see also* Owen v. City of Independence, 445 U.S. 622, 624–25 (1980) (holding that municipalities are not entitled to qualified immunity and may not assert good faith as a defense to liability).

spondeat superior, "a municipality can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue."[61] The plaintiff must therefore show that the municipality's "policy or custom" caused the violation.[62]

The Supreme Court has established four avenues for plaintiffs to demonstrate a municipal policy or custom.[63] One possibility is to show the existence of an express municipal law or policy that, when enforced, resulted in a deprivation of the plaintiff's constitutional rights.[64] Another possibility is to demonstrate that the injury resulted from a decision by a person who is a policymaker—that is, a person entrusted with final decision-making authority.[65] A third is to establish the existence of a widespread practice that, although not authorized by written law or express policy, is so long-standing and well-settled that it constitutes "custom or usage with the force of law."[66] The fourth and final option is to demonstrate that the municipality should be liable as a result of its *failure* to take some action.[67] Such claims are most frequently framed as a failure to train,[68] but can also appear as claims that a municipality failed to supervise, screen, investigate, discipline, or take some other action in relation to its employees.[69]

The Supreme Court has emphasized that a municipal failure claim must be held to stringent standards of fault and causation.[70] As the Court articulated in *Bryan County v. Brown*, "[A] plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demon-

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61 City of Canton v. Harris, 489 U.S. 378, 385 (1989); *see also* Connick v. Thompson, 563 U.S. 51, 60 (2011) ("[U]nder § 1983, local governments are responsible only for 'their *own* illegal acts.'" (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986)).

62 Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658, 694 (1978).

63 *Connick*, 563 U.S. at 61–62 (articulating paths to establish municipal policy or custom); Jackson v. City of Cleveland, 925 F.3d 793, 838 (6th Cir. 2019).

64 *Connick*, 563 U.S. at 61.

65 *Id.*; *see also Pembaur*, 475 U.S. at 480; City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988).

66 *Connick*, 563 U.S. at 61.

67 City of Canton v. Harris, 489 U.S. 378, 380 (1989); *Connick*, 563 U.S. at 61–62.

68 *E.g.*, *Canton*, 489 U.S. at 387–89.

69 *E.g.*, Bd. of the Cnty. Comm'rs of Bryan County v. Brown, 520 U.S. 397, 404–08 (1997) (failure-to-screen claim); *Connick*, 563 U.S. at 61–62 (failure-to-train claim); *see also* Blum, *Making Out the* Monell *Claim*, supra note 17, at 830 ("[T]he *City of Canton* method of demonstrating liability . . . occurs when plaintiffs point to a failure to 'blank': a failure to train, a failure to supervise, a failure to discipline, a failure to adequately screen, etc.").

70 *Bryan County*, 520 U.S. at 404, 410; *Connick*, 563 U.S. at 61, 70.

strate a direct causal link between the municipal action and the deprivation of federal rights."[71]

With respect to culpability, the Supreme Court has held that plaintiffs must show that the municipal defendant was "deliberately indifferent" to a known or obvious risk.[72] Deliberate indifference is a "stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action."[73] The deliberate indifference standard functions partly as a notice requirement: under the failure-to-train theory, for example, "when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program."[74] Still, municipalities need not be perfect.[75] It could be the case that "an otherwise sound program has occasionally been negligently administered," and "plainly, adequately trained officers occasionally make mistakes."[76] Some circuits have developed more specific analyses for evaluating deliberate indifference,[77] while other circuits simply proceed from the general deliberate indifference standard articulated by the Supreme Court.[78]

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71 *Bryan County*, 520 U.S. at 404.

72 *Canton*, 489 U.S. at 390; *see also Bryan County*, 520 U.S. at 407 ("[A] plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences." (citation omitted)); *id.* at 411 ("A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision."). For contemporaneous commentary on the deliberate indifference standard, see Schroeder, *supra* note 24.

73 *Bryan County*, 520 U.S. at 410. When litigating Eighth Amendment claims, the showing of a municipality's deliberate indifference is *in addition to* the requirement of a showing of deliberate indifference necessary to prove an Eighth Amendment violation. For an examination and critique of the deliberate indifference standard in the Eighth Amendment context, see Nicole B. Godfrey, *Institutional Indifference*, 98 OR. L. REV. 151, 165–74 (2020).

74 *Connick*, 563 U.S. at 61.

75 *Canton*, 489 U.S. at 391.

76 *Id.*

77 The Second and Third Circuits, for example, generally apply a three-part analysis: it must be shown that "(1) municipal policymakers know that employees will confront a particular situation, (2) the situation involves a difficult choice or a history of employees mishandling, and (3) the wrong choice by an employee will frequently cause deprivation of constitutional rights." Forrest v. Parry, 930 F.3d 93, 106 (3d Cir. 2019); *see also* Cash v. County of Erie, 654 F.3d 324, 334 (2d Cir. 2011) (citing Walker v. City of New York, 974 F.2d 293, 297–98 (2d Cir. 1992)).

78 *See, e.g.*, Wright v. City of Euclid, 962 F.3d 852, 881–82 (6th Cir. 2020) (holding that plaintiff could show, for purposes of summary judgment, that mu-

Notice sufficient to establish deliberate indifference can be established in two ways. First, the Supreme Court has held, in a failure-to-train case, that a "pattern of injuries [is] ordinarily necessary to establish municipal culpability and causation."[79] Second, the Court has left open the alternative possibility that a plaintiff can establish a municipal failure claim based on a single constitutional violation. The Court said in *Canton*:

> [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, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.[80]

The Court gave the example of failing to train police officers on the use of deadly force, even though municipalities "know to a moral certainty that their police officers will be required to arrest fleeing felons" and have "armed [them] with firearms, in part to allow them to accomplish this task."[81] While the Court in *Bryan County v. Brown* questioned whether single-incident liability could apply in failure-to-screen cases,[82] and in *Connick v. Thompson* held that single-incident liability predicated on a

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nicipality failed to train and supervise without specifically analyzing the deliberate indifference standard).

79 Bd. of the Cnty. Comm'rs of Bryan County v. Brown, 520 U.S. 397, 409; *see also Connick*, 563 U.S. at 62 ("A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train." (quoting *Bryan County*, 520 U.S. at 409)).

80 *Canton*, 489 U.S. at 390; *see also Bryan County*, 520 U.S. at 409 ("In *Canton*, we did not foreclose the possibility that evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability."); Blum, *Making Out the* Monell *Claim*, *supra* note 17, at 843–47 (discussing municipal failure to act in the face of an obvious need).

81 *Canton*, 489 U.S. at 390 n.10.

82 *Bryan County*, 520 U.S. at 409–12. The Court emphasized that "predicting the consequence of a single hiring decision, even one based on an inadequate assessment of a record, is far more difficult than predicting what might flow from the failure to train a single law enforcement officer as to a specific skill necessary to the discharge of his duties." *Id.* at 410. A single instance of inadequate screening that precedes a constitutional violation is insufficient to show deliberate indifference without more: "[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" has the plaintiff made an adequate showing of deliberate indifference. *Id.* at 411. In other words, the inadequate screening must reflect indifference to the possibility of a violation of a *particular* right, not just any right—that "*this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff." *Id.* at 412. The Court made clear that it was "assuming without deciding that proof of a single instance of inadequate screen-

theory of failure to train was unavailable for *Brady* violations,[83] the Court in those cases did not contest the viability of single-incident liability as a general matter.[84]

To show causation, the plaintiff must prove that the inadequate supervision was the "'moving force' [behind] the constitutional violation."[85] The Court has been clear that but-for causality is not sufficient: "In virtually every instance where a person has had his or her constitutional rights violated by a city employee . . . a plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident [in question]."[86] Rather, in considering whether a municipality's failure was the "moving force" behind a constitutional violation, federal appellate courts have required a showing of proximate cause.[87] This requirement can be challenging for plaintiffs to fulfill in failure-to-train claims because it is often difficult to show that more or different training would have produced a different outcome.[88] To return to the narrative that

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ing could ever trigger municipal liability" and held that the plaintiff had not made that showing in the case before it. *Id.*

83 *Connick*, 563 U.S. at 64 (holding that failure to disclose *Brady* information did not "fall within the narrow range of *Canton*'s hypothesized single-incident liability"). Justice Thomas's majority opinion emphasized that lawyers already receive extensive training and indeed are required to be well-versed in *Brady* in order to serve as prosecutors. *Id.* at 64–67. He went on to distinguish the *Brady* violation at issue in *Connick* with the deadly force example hypothesized by the court in *Canton*. *Id.*

84 *Id.* at 63–64 (quoting *Bryan County*, 520 U.S. at 409).

85 *Canton*, 489 U.S. at 389 (alteration in original) (quoting Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 694 (1978) and Polk County v. Dodson, 454 U.S. 312, 326 (1981)).

86 *Id.* at 392 (quoting City of Oklahoma City v. Tuttle, 471 U.S. 808, 831 (1985)).

87 *See, e.g.*, McCabe v. Life-Line Ambulance Serv., Inc., 77 F.3d 540, 543–44 (1st Cir. 1996) (noting that the city policy that "proximately caused an actionable deprivation" was "moving force" behind that deprivation); Cash v. County of Erie, 654 F.3d 324, 342 (2d Cir. 2011) ("moving force" is tantamount to proximate cause); Harper v. City of Los Angeles, 533 F.3d 1010, 1026 (9th Cir. 2008) (same); Smith v. District of Columbia, 413 F.3d 86, 102 (D.C. Cir. 2005) ("We have equated moving force with proximate cause. Proximate cause 'includes the notion of cause in fact,' and requires an element of foreseeability." (citation omitted)).

88 *Canton*, 489 U.S. at 391 ("Thus in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers' indifference to her medical needs. Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect? Predicting how a hypothetically well-trained officer would have acted under the circumstances may not be an easy task for the factfinder . . . ."); *see also Connick*, 563 U.S. at 70 ("[P]roving that a municipality itself actually caused a constitutional violation by failing to train the offending employee presents 'difficult problems of proof,' and we must adhere to a 'stringent standard of fault,' lest municipal liability under § 1983 collapse into respondeat superior." (quoting *Bryan County*, 520 U.S. at 406, 410)).

began this Article, for example, it is difficult to show that additional training would have changed the behavior of Darryl Christensen, the guard who committed the sexual assault: he knew that what he did was against policy, and he did it anyway.[89] As the Seventh Circuit panel put it: "Christensen—not a failure to train—was the moving force behind the deprivation of plaintiffs' federal rights."[90]

Among the various sub-theories of municipal failure, failure to train is by far the most litigated in the federal courts.[91] The Supreme Court has never considered a claim of failure to supervise. Its jurisprudence around municipal failure, therefore, is shaped by the fact that the four cases in which it has addressed an issue of municipal failure on the merits arose in the context of failure to train (*Canton v. Harris*,[92] *City of Oklahoma City v. Tuttle*,[93] and *Connick v. Thompson*[94]) and failure to screen (*Bryan County v. Brown*[95]).

Conceptually, there is an important difference between the theories of failure to train and failure to screen, on the one hand, and the theory of failure to supervise on the other. Screening and training are largely discrete responsibilities: municipal employers must screen at the point of hiring and train employees before they begin working. Supervision, by contrast, is an ongoing responsibility: municipal employers must, on a continuous basis, supervise their employees in order to ensure that they are behaving in a manner consistent with the law.[96] While the nature of adequate supervision will vary from one job environment to another, at a minimum, such supervision will likely involve observing or monitoring what

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89 J.K.J. v. Polk County, 928 F.3d 576, 597 (7th Cir. 2019), *reh'g granted*, 960 F.3d 367 (7th Cir. 2020) (en banc); *see also supra* notes 1–2 and accompanying text.

90 *J.K.J.*, 928 F.3d at 597.

91 *See infra* text accompanying note 106 and Table 2.

92 489 U.S. 378 (1989).

93 471 U.S. 808 (1985) (plurality opinion).

94 563 U.S. 51 (2011).

95 520 U.S. 397 (1997).

96 There is some conceptual overlap in the duty to train and supervise insofar as employers must continuously assess the need for *re*-training. Situations that counsel re-training might include a change in the law (for example, a new Supreme Court decision on police use of force), a change in the circumstances of a job (for example, a job that goes online during a pandemic), or a shift in job responsibilities (for example, a promotion or reassignment). The duty to *identify* the need for re-training is ongoing and could include situations in which a municipality learns of misconduct. Still, the obligation to train concerns a specific moment in time—in contrast to the obligation to supervise, which covers every moment that an employee is doing their job.

employees do;[97] providing regular evaluations of employees;[98] and taking complaints from the public seriously and addressing them promptly with appropriate investigation, retraining, and discipline.[99]

Building on the doctrinal foundation I have established in this section, the next Part develops a quantitative and qualitative empirical account of the way that municipal failure claims play out in practice.

II
AN EMPIRICAL SURVEY OF MUNICIPAL FAILURES

Although courts and commentators widely recognize the municipal failure theory as a way of establishing municipal policy or custom, there is little empirical information about the way the theory is litigated in practice. To learn more about the way municipal failures are litigated on the ground, I compiled two data sets comprised of available cases and other litigation materials.

First, I read and coded every federal appellate case decided in 2019 that cited *Monell* ("*Monell* Survey"). These results are presented in subpart II.A. As I will explain in more detail, the *Monell* Survey yielded only a small number of failure-to-supervise cases. Therefore, to learn more about failure-to-supervise cases, I read and coded a set of federal appellate cases decided from 2010 through 2020 that both cited *City of Canton v. Harris* and adjudicated a failure-to-supervise claim ("Failure to Supervise Survey"). To supplement the federal appellate opinions, I also read the complaint and appellate briefs for each case. The quantitative and qualitative information derived from the Failure to Supervise Survey is described in subpart II.B.

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97 *See, e.g.*, Forrest v. Parry, 930 F.3d 93, 108 (3d Cir. 2019) (finding a failure to supervise when officers "engaged in illicit conduct . . . knowing that that [sic] they were not being supervised"); Covington v. City of Madisonville, 812 F. App'x 219, 226 (5th Cir. 2020) (finding sufficient allegation of failure to supervise when a police chief ignored warnings of future misconduct).

98 *See, e.g.*, Wright v. City of Euclid, 962 F.3d 852, 881 (6th Cir. 2020) (noting that there was a failure to supervise where "officers' performances were never evaluated").

99 *See, e.g.*, Estate of Roman v. City of Newark, 914 F.3d 789, 799–800 (3d Cir. 2019) (finding sufficient allegation of failure to supervise where city ignored complaints and did not discipline officers for "sustained allegations of misconduct").

A. *Monell* Survey

The *Monell* Survey identified and coded all 215 federal appellate cases that cited *Monell* during the year 2019.[100] Of these cases, 107 referenced *Monell* but did not address the litigation of a claim involving municipal policy or custom. In most of these cases, either the court only mentioned *Monell* in a citation or the plaintiff had brought a *Monell* claim at trial but not on appeal.[101] These cases were excluded from the dataset.

The 108 cases that adjudicated a *Monell* claim were coded according to the type of municipal policy or custom claim(s) the case involved. Tracking the categories articulated by the Supreme Court,[102] the claims were coded as: (1) policymaker statements or actions; (2) written municipal policies or documents; (3) widespread patterns of conduct; and (4) municipal failures. Thirty cases (27.8%) involved policymaker statement or action, eleven (10.2%) involved a written document or policy; seventy-four (68.5%) involved a widespread pattern of conduct; and thirty-three cases (30.6%) involved a municipal failure. The percentages here and throughout this section total more than 100% because some cases involved multiple types of policy or custom claims—for example, a written policy claim and a failure-to-train claim.[103]

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100 The list of cases was obtained by searching "Monell & da(aft 12/31/2018) & da(bef 01/01/2020)" on Westlaw. Each case was coded for: (1) type of *Monell* claim; (2) type of municipal failure claim in cases involving a municipal failure; (3) winner; and (4) whether the case was published. The coding did not address many interesting and important questions. For example, future work might profitably investigate the underlying substantive claim(s) litigated, whether the plaintiff also filed suit against one or more individual officers, the procedural posture in which claims were litigated, whether the plaintiff was represented by counsel, and circuit-by-circuit trends.

101 *E.g.*, Naumovski v. Norris, 934 F.3d 200, 221 n.83 (2d Cir. 2019) (citing *Monell* to explain that respondeat superior is not a viable basis for Section 1983 liability); Procopio v. Wilkie, 913 F.3d 1371, 1380 n.7 (Fed. Cir. 2019) (citing *Monell* regarding the application of stare decisis); Anderson v. City of Rockford, 932 F.3d 494, 513 (7th Cir. 2019) (holding the plaintiff's municipal liability argument to be waived since it was not raised on appeal); Blight v. City of Manteca, 944 F.3d 1061, 1065 n.5 (9th Cir. 2019) (explaining that plaintiff did not appeal trial court's determination that municipality was not liable under *Monell*).

102 *See supra* notes 63–69.

103 *E.g.*, Smith v. Township of Clinton, 791 F. App'x 363, 367–68 (3d Cir. 2019) (addressing the plaintiff's claims alleging *Monell* liability based on a policy or custom of arresting everyone in a stolen vehicle and a failure to train); Robles v. Ciarletta, 797 F. App'x 821, 832–34 (5th Cir. 2019) (addressing the plaintiff's claims alleging *Monell* liability based on ratification by a policymaker, a pattern or practice, and municipal failure). I note that in many instances courts did not disaggregate their treatment of different claims within a case—for example, when ruling against many claims at once. *See, e.g.*, Calgaro v. St. Louis County, 919 F.3d 1054, 1058 (8th Cir. 2019) ("Calgaro's conclusory assertion that the County

Across all *Monell* claims, plaintiffs won on at least one claim in twenty-three out of 108 cases (21.3%). Plaintiffs won on nine out of thirty claims involving policymaker statements (30.0%); five out of eleven claims involving a written policy (45.5%); twelve out of seventy-four claims involving a widespread pattern of conduct (16.2%), and four out of thirty-three claims involving a municipal failure (12.1%). The number of claims in each subcategory totals more than twenty-three because some cases involved more than one type of claim. Table 1 depicts the frequency of each type of *Monell* claim with the win rate for that type.

I report the incidence and win rate for each type of *Monell* claim in the interest of publicizing the available quantitative information, but it is critical to interpret these data in light of the qualitative account in section II.B.2. As I will explain, qualitative analysis of failure-to-supervise claims in the federal appellate courts reveals that in many cases plaintiffs do not vigorously advocate for municipal failure claims in general and failure-to-supervise claims in particular. Therefore, the somewhat lower win rate for municipal failure claims does not necessarily warrant a conclusion that such a claim is in fact less likely to succeed.

TABLE 1: TYPE OF *MONELL* CLAIM BY FREQUENCY AND PLAINTIFF WIN RATE.

Type of *Monell* Claim	**# of Cases**	**Plaintiffs Won**
Policymaker statements	30 (27.8%)	9 (30.0%)
Written law or policy	11 (10.2%)	5 (45.5%)
Custom	74 (68.5%)	12 (16.2%)
Failure	33 (30.6%)	4 (12.1%)
Total Cases	**108**	**23 (21.3%)**

The majority of cases that adjudicated an issue of municipal policy or custom did not involve a municipal failure claim.

acted based on a policy or custom is insufficient to state a claim, and the district court correctly granted judgment on the pleadings."); Ortiz v. Case, 782 F. App'x 65, 68 (2d Cir. 2019) ("Ortiz failed to show, or even plead, the existence of facts supporting his municipal liability claims."); Carter v. Coe, 769 F. App'x 379, 380 (7th Cir. 2019) ("Nothing in the complaint suggests that Wexford (through its contract with Illinois) maintained an unconstitutional policy or custom that violated Carter's rights."); Stewart v. Parkview Hosp., 940 F.3d 1013, 1016 (7th Cir. 2019) ("Because Stewart makes no argument that the City had an unconstitutional policy, practice, or custom, his claim against the City for the police officers' conduct likewise fails.").

Seventy-five cases (69.4%) did not involve any municipal failure claim, while thirty-three cases (30.6%) adjudicated at least one claim of municipal failure.[104]

The thirty-three cases that included one or more municipal failure claims were then further coded into three categories: (1) failure to screen, (2) failure to train, and (3) failure to supervise. Claims were coded as municipal failure claims when the court used the respective "failure to" phrases. Cases were also coded as these subtypes of municipal failure claims when the decisions included synonymous concepts or phrases.[105]

Of the thirty-three municipal failure cases decided in 2019, thirty-two (97%) involved a claim of failure to train, fifteen (45.5%) involved a claim of failure to supervise, and three (9.1%) involved a claim of failure to screen. (The percentages add up to more than 100% because some cases involved multi-

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104 Here and throughout this section, I draw a distinction between cases that "raised" a municipal failure issue and cases that "adjudicated" a municipal failure issue. The former includes cases where the plaintiff raised a municipal failure claim but the claim was determined to be waived, *e.g.*, Barnes v. City of Centralia, 943 F.3d 826, 832 (7th Cir. 2019), and cases where the plaintiff raised a municipal failure claim but the court resolved the case on an alternative basis without reaching the merits of the municipal failure claim, *e.g.,* Baker v. City of Trenton, 936 F.3d 523, 535 (6th Cir. 2019). Eleven cases in the *Monell* survey raised but did not adjudicate a municipal failure claim for one of these reasons.

Cases were categorized as "adjudicating" a municipal failure claim if they resolved one or more municipal failure issues on the merits. The cases that adjudicated a municipal failure issue were coded using the methodology outlined above and include cases that explicitly reference a municipal failure to train, screen, supervise, and so forth, as well as cases where the court used synonymous language. In many of these cases the plaintiff(s) also brought claims involving one or more non-failure theories of municipal liability.

105 Claims were categorized as "failure to screen" when they referenced claims associated with municipal hiring practices, such as conducting background checks for new employees or contacting an applicant's professional references. Claims were coded as "failure to supervise" when at least one of the allegations against the defendant municipality involved a deficiency in or lack of supervision. Therefore, cases were coded as a failure to supervise in three circumstances: (1) The case contained express language such as "failed to supervise;" (2) The appellate court's opinion did not mention a failure to supervise but addressed the plaintiff's *Monell* claims, which the district court had previously identified as alleging a failure to supervise. For example, in *Jones v. Eder*, 778 F. App'x 327 (5th Cir. 2019), the appellate court broadly affirmed the district court's decisions, including its decision on the *Monell* claim, without analyzing each claim. *Id.* at 328–29. However, the district court had previously addressed the plaintiff's claim that "defendant Fort Bend County maintained a policy of inadequately training, supervising, and/or disciplining its officers." Jones v. Eder, No. H-15-2919, 2019 WL 1300494, at *1 (S.D. Tex. Mar. 21, 2019); (3) The case referenced a claim alleging a failure to investigate, discipline, or take some other action closely akin to failure to supervise. Cases of the last category were coded as failures to supervise, despite not containing express "failure to supervise" language, in order to err on the side of identifying cases adjudicating a claim of failure to supervise.

ple theories of municipal failure.) Seventeen (51.5%) cases involved a claim of *only* failure to train, just one (3.0%) involved a claim of *only* failure to supervise, and zero cases involved a claim of *only* failure to screen.[106] Twelve (36.4%) cases involved both failure to train and failure-to-supervise claims, and two (6.0%) cases involved claims of failure to screen, train, and supervise. These findings are depicted in Table 2.

TABLE 2: TYPE OF MUNICIPAL FAILURE CLAIM BY FREQUENCY AND WIN RATE.

Type of Municipal Failure	**# of Cases**	**Plaintiffs Won**
Train total	32 (96.9%)	4 (12.5%)
Supervise total	15 (45.5%)	2 (13.3%)
Screen total	3 (9.1%)	0 (0.0%)
Train only	17 (51.5%)	2 (11.8%)
Supervise only	1 (3.0%)	0 (0.0%)
Screen only	0 (0.0%)	0 (0.0%)
Train and supervise	12 (36.4%)	2 (16.7%)
Screen and train	1 (3.0%)	0 (0.0%)
Train, supervise, and screen	2 (6.0%)	0 (0.0%)
Total Cases	**33**	**4 (12.1%)**

Of the fifteen failure-to-supervise claims, thirteen contained language expressly referencing a "failure to supervise,"[107] and two referenced a failure to investigate, discipline, or take other action regarding a matter.[108] In only one case

106 Failure-to-screen cases were both rare and rarely won. I found only one federal appellate case in which a plaintiff prevailed on a failure-to-screen claim. Griffin v. City of Opa-Locka, 261 F.3d 1295, 1315–16 (11th Cir. 2001) (following the sexual harassment and rape of a city employee by the former City Manager, the United States Court of Appeals for the Eleventh Circuit found that a jury could have reasonably found that the City of Opa–Locka's inadequate screening of the former City Manager's background was likely to result in sexual harassment). I will explore municipal liability for failure to screen in future work.

107 Some of these cases contained both express language alleging a failure to supervise and language alleging a failure to investigate, discipline, or take action addressing a matter. *E.g.*, Waller v. City & County of Denver, 932 F.3d 1277, 1284 (10th Cir. 2019) (addressing claims of inadequate hiring, failure to train, failure to supervise, failure to investigate, and failure to discipline). Cases such as these were only included in the "express language" category.

108 One of the two cases mentioned a failure to investigate. Kobrick v. Stevens, 763 F. App'x 216, 220 (3d Cir. 2019). The other referenced a failure to discipline. Robles v. Ciarletta, 797 F. App'x 821, 832 (5th Cir. 2019). I chose to characterize

containing a failure-to-supervise claim did the plaintiff not *also* allege a failure to train.[109]

Plaintiffs won in four out of the thirty-three municipal failure cases (12.1%).[110] This included two victories in cases that raised only failure-to-train claims and two victories in cases that raised both failure-to-train and failure-to-supervise claims.[111] In the twelve cases involving both failure to train and failure to supervise, it was sometimes difficult to discern whether the plaintiff(s) won on the failure-to-train theory, the failure-to-supervise theory, or independently on either theory. The primary point, therefore, is not the precise win rates. It is that municipal failure claims—particularly claims of failure to supervise—are relatively rarely adjudicated by the federal appellate courts. The overall likelihood of success is thus challenging to evaluate.

B. Failure to Supervise Survey

To learn more about failure-to-supervise claims, I read and coded a set of federal appellate cases decided during the years 2010 through 2020 that both cited *City of Canton v. Harris* and adjudicated a failure-to-supervise claim ("Failure to Supervise Survey"). I gathered additional information about the way failure-to-supervise claims are litigated by reading the complaint and the appellate briefs for each case in which a failure-to-supervise claim was adjudicated.[112]

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these claims as failure-to-supervise claims because investigation and discipline are reasonably described as components of supervision.

109 Ruiz-Cortez v. City of Chicago, 931 F.3d 592, 598 (7th Cir. 2019).

110 Cases were counted as a "win" for the plaintiffs if the court reversed, or reversed and remanded, any district court decision in favor of the defendants on a *Monell* claim or if the court affirmed any district court decision ruling in favor of the plaintiffs on a *Monell* claim. Thus, cases were coded as wins when the court reversed the district court's grant of a motion to dismiss or a motion for summary judgment. Cases were also coded as wins regardless of the specificity of the court's decision in analyzing the individual claims. Therefore, a few plaintiffs "won" on their *Monell* claims even where the court did not individually analyze the municipality's specific policy, custom, or failure. Even if a plaintiff achieved a favorable result for purposes of the data presented here, it is possible that the plaintiff did not ultimately achieve a favorable judgment or settlement.

111 The two cases involving wins on both failure-to-train and failure-to-supervise claims were Forrest v. Parry, 930 F.3d 93, 108, 110 (3d Cir. 2019), and Estate of Roman v. City of Newark, 914 F.3d 789, 805–06 (3d Cir. 2019). In *Forrest*, the court held in favor of the plaintiff with respect to most of the plaintiff's claims against the city of Camden; the court ruled against the plaintiff with respect to the claims that the defendants failed to train certain officials. *Forrest*, 930 F.3d at 108, 110.

112 These materials were available from Westlaw, Bloomberg Law or, in a few instances, from PACER.

A few takeaways emerge from the Failure to Supervise Survey. First, despite their infrequency, failure-to-supervise claims provide a viable avenue to establish policy or custom. Second, at the appellate level, failure-to-supervise claims are neglected by both plaintiffs and courts. Plaintiffs often fail to litigate the claims aggressively. And even when they do, courts often do not adjudicate failure-to-supervise claims carefully, frequently because they are instead focused on claims of failure to train. This section discusses these issues.

1. *Quantitative Information*

The Failure to Supervise Survey sought to learn more about the way the failure-to-supervise theory is litigated and adjudicated. The goal of the Survey was not to perform an exhaustive search, but rather to look in detail at a relevant subsample. To assemble this subsample, the Survey identified and coded 274 federal appellate cases that cited *City of Canton v. Harris* during the years 2010 through 2020.[113] *Canton* was chosen because it is the seminal municipal failure case and preliminary investigation revealed that most cases that analyze the failure-to-supervise claim cited *Canton* at least once.[114]

Within this set of cases, the federal appellate courts adjudicated a failure-to-supervise claim in seventy-three cases. The plaintiffs won on the failure-to-supervise theory ten times (13.7%).[115]

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113 The list of cases was obtained by searching "canton & (fail! /10 supervis! Or investigat! Or disciplin!) or (inadequate! /10 supervis! Or investigat! Or disciplin!) & DA(aft 01/01/2010) & DA(bef 01/10/2021)" on Westlaw, which produced 274 results, and then eliminating cases that did not adjudicate a failure-to-supervise claim. The terms "investigate" and "discipline" were incorporated into the search query because it was observed that they were sometimes used in cases where the fundamental issue was one of supervision. Each case was coded for whether it raised a failure-to-supervise claim, whether it involved other failure claims, the outcome of the adjudication, and depth of treatment. Similar to the *Monell* survey, future work might profitably code for other variables as well. *See supra* note 100.

114 Although undoubtedly some cases adjudicated a municipal failure claim without citing *Canton*, searching within the subset of cases that cited *Canton* produced a set of cases that was likely to contain municipal failure claims.

115 The ten cases in which plaintiffs won on a failure-to-supervise claim are: Cash v. County of Erie, 654 F.3d 324 (2d Cir. 2011); Forrest v. Parry, 930 F.3d 93 (3d Cir. 2019); Robinson v. Fair Acres Geriatric Ctr., 722 F. App'x 194 (3d Cir. 2018); Covington v. City of Madisonville, 812 F. App'x 219 (5th Cir. 2020); Shadrick v. Hopkins County, 805 F.3d 724 (6th Cir. 2015); Wright v. City of Euclid, 962 F.3d 852 (6th Cir. 2020); Ouza v. City of Dearborn Heights, 969 F.3d 265 (6th Cir. 2020); Estate of Roman v. City of Newark, 914 F.3d 789 (3d Cir. 2019), J.K.J. v. Polk County, 960 F.3d 367 (7th Cir. 2020) (en banc); S.M. v. Lincoln County, 874 F.3d 581 (8th Cir. 2017).

A failure-to-supervise claim was usually accompanied by a failure-to-train claim. In fifty-eight of the seventy-three cases involving a failure-to-supervise claim, plaintiffs also brought a failure-to-train claim (79.5%). In the fifty-eight cases where failure to supervise and failure to train were litigated together, plaintiffs won on the failure-to-supervise claim seven times (12.1%). By comparison, in the nine cases in which failure-to-supervise claims were litigated *without* failure to train claims, plaintiffs won two times (22.2%). Table 3 summarizes the composition of failure-to-supervise claims along with the rate at which plaintiffs won.

TABLE 3: FAILURE-TO-SUPERVISE CLAIMS BY FREQUENCY AND WIN RATE.

Type of Supervise Claim	**# of Cases**	**Plaintiffs Won**
Supervise only	9 (12.3%)	2 (22.2%)
Supervise w/ train	58 (79.5%)	7 (12.1%)
Supervise w/ screen and train	6 (8.2%)	1 (16.7%)
Total Supervise Cases	**73 (100.0%)**	**10 (13.7%)**

As with the *Monell* survey, the small numbers of cases in the Failure to Supervise Survey prompt caution about generalizations, particularly given the cursory manner in which failure-to-supervise claims are often litigated. Yet, from these limited data, there is no indication that failure-to-supervise claims fare *worse* than other types of failure claims. More importantly, the Failure to Supervise Survey reveals ample case law on which plaintiffs can base future claims. The next section examines these cases qualitatively.

2. *Doctrinal Viability*

The Supreme Court has never adjudicated a failure-to-supervise claim,[116] but all twelve federal appellate courts have indicated that failure to supervise is a viable theory of municipal liability.[117] Between 2010 and 2020, plaintiffs won on fail-

116 *Cf.* City of Canton v. Harris, 489 U.S. 378 (1989) (failure to train); City of Oklahoma City v. Tuttle, 471 U.S 808 (1985) (plurality opinion) (failure to train); Connick v. Thompson, 563 U.S. 51 (2011) (failure to train); Bd. of the Cnty. Comm'rs of Bryan County v. Brown, 520 U.S. 397 (1997) (failure to screen).

117 *E.g.*, Jones v. City of Boston, 752 F.3d 38, 59 (1st Cir. 2014) (acknowledging failure-to-train theory while ruling against plaintiff); *Cash*, 654 at 344 (affirming jury verdict for plaintiff on failure-to-supervise theory); *Estate of Roman*, 914 F.3d at 805–06 (holding that the plaintiff survives motion to dismiss on failure-to-supervise theory); Spell v. McDaniel, 824 F.2d 1380, 1389 (4th Cir.

ure-to-supervise claims ten times in seven different circuits.[118] Courts have indicated that some of the standards the Supreme Court has articulated in relation to the failure-to-train theory translate directly to the failure-to-supervise theory.[119] The Second Circuit, for instance, has indicated that claims of inadequate training and inadequate supervision are parallel, and that some Supreme Court principles regarding inadequate training may be imported into cases involving inadequate su-

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1987) (acknowledging that one way of establishing municipal liability "locates fault in deficient programs of police training and supervision which are claimed to have resulted in constitutional violations by untrained or mis-trained police officers"); *Covington*, 812 F. App'x at 229 (finding that the plaintiff stated failure-to-supervise claim sufficient to survive motion to dismiss); Trammell v. Fruge, 868 F.3d 332, 344–45 & n.11 (5th Cir. 2017) (acknowledging viability of failure-to-supervise theory); *Shadrick*, 805 F.3d at 729 (reversing summary judgment ruling in favor of municipality for "failure to train and supervise"); *J.K.J.*, 960 F.3d at 381, 386 (affirming jury verdict for plaintiffs on what the court calls "failure to act"); *S.M.*, 874 F.3d at 589 (affirming jury verdict for plaintiff on failure-to-supervise theory); Jackson v. Barnes, 749 F.3d 755, 763–64 (9th Cir. 2014) (reversing the lower court's dismissal of plaintiff's failure-to-supervise theory); Waller v. City and County of Denver, 932 F.3d 1277, 1288–89 (10th Cir. 2019) (acknowledging viability of failure-to-supervise theory while ruling against plaintiff); Daniel v. Hancock Cnty. Sch. Dist., 626 F. App'x 825, 833–35 (11th Cir. 2015) (ruling against the plaintiff but not contesting viability of failure-to-supervise theory).

118 Plaintiffs won on failure-to-supervise claims in the First, Second, Third, Fifth, Sixth, Seventh, and Eighth Circuits. Cash v. County of Erie, 654 F.3d 324 (2d Cir. 2011); Forrest v. Parry, 930 F.3d 93 (3d Cir. 2019); Estate of Roman v. City of Newark, 914 F.3d 789 (3d Cir. 2019); Robinson v. Fair Acres Geriatric Ctr., 722 F. App'x 194 (3d Cir. 2018); Covington v. City of Madisonville, 812 F. App'x 219 (5th Cir. 2020); Shadrick v. Hopkins County, 805 F.3d 724 (6th Cir. 2015); Wright v. City of Euclid, 962 F.3d 852 (6th Cir. 2020); Ouza v. City of Dearborn Heights, 969 F.3d 265 (6th Cir. 2020); J.K.J. v. Polk County, 960 F.3d 367 (7th Cir. 2020) (en banc); S.M. v. Lincoln County, 874 F.3d 581 (8th Cir. 2017). Coding J.K.J. v. Polk County involved a judgment call. There, the en banc Seventh Circuit held that the plaintiff could establish municipality liability through a showing of "failures—both the prevention and detection gaps in its written policies and the absence of training." *J.K.J.*, 960 F.3d at 381. This language was evocative of a supervision claim, so I classified it as such but describe in detail how the claim could have been strengthened considerably by explicit reference to supervision. *See infra* notes 206–212.

119 In *S.M. v. Lincoln County*, for example, the Eighth Circuit wrote:

> The issue is whether, "in light of the duties assigned to specific officers or employees the need for more or different training [or supervision] is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need"

and "In resolving the issue of a city's liability, the focus must be on adequacy of the [supervision] in relation to the tasks the particular officers must perform" (alterations in original). 874 F.3d at 585. The court's insertion of supervision into language from *Canton*, a failure-to-train case, leads to an inference that the two are parallel in at least some respects.

pervision.[120] While one judge has hypothesized that failure-to-supervise claims are relatively uncommon,[121] none has concluded that the theory is untenable.[122]

As described in Part I, a municipal failure claim requires a showing of both fault and causation.[123] The Failure to Supervise Survey offers an opportunity to examine how courts actually adjudicate these elements. This section will turn first to fault, then to causation.

The required level of fault is "deliberate indifference," a "stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action."[124] Some circuits have developed a more specific analysis for evaluating deliberate indifference. The Second and Third Circuits, for example, generally apply a three-part analysis: it must be shown that "(1) municipal policymakers know that employees will confront a particular situation, (2) the situation involves a difficult choice or a history of employees mishandling, and (3) the wrong choice by an employee will frequently cause deprivation of constitutional rights."[125] Other circuits simply proceed from the general deliberate indifference standard articulated by the Supreme Court.[126]

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120 *Cash*, 654 F.3d at 338.

121 In *Mize v. Tedford*, Judge Sutton, writing for the Sixth Circuit, remarked: "[t]his 'failure to supervise' theory of municipal liability is a rare one. Most agree that it exists and some allege they have seen it, but few actual specimens have been proved." Mize v. Tedford, 375 F. App'x 497, 500 (6th Cir. 2010); *see also* Amerson v. Waterford Township, 562 F. App'x 484, 491 (6th Cir. 2014) ("Few published opinions thoroughly discussed the law on failure-to-supervise claims, especially as distinct from failure-to-train claims."). Judge Sutton's claim that the failure-to-supervise theory is rare contrasts with that of other commentators who have claimed that it is common, although he also does not support his claim with empirical evidence. *Compare Mize*, 375 F. App'x at 500, *with* Taylor, *A Litigator's View* supra note 21, at 750; Gilles, *supra* note 21, at 43–44.

122 In *Mize*, Judge Sutton wrote: "It appears to relate to two more common theories of municipal liability: an inadequate-training theory, or an 'acquiesce[nce] theory.'" *Mize*, 375 F. App'x at 500 (alterations in original) (citations omitted). In a later case, however, he indicates that failure to supervise is a valid theory, while also noting that "[t]he duty to supervise is not a duty to micromanage. A municipality does not open itself up to liability every time it delegates power to employees." Pesci v. City of Niles, 674 F. App'x. 544, 547 (6th Cir. 2017).

123 *See supra* notes 72–90.

124 Connick v. Thompson, 563 U.S. 51, 61 (2011) (quoting Bd. of the Cnty. Comm'rs of Bryan County v. Brown, 520 U.S. 397, 410 (1997)).

125 *See* Forrest v. Parry, 930 F.3d 93, 106 (3d Cir. 2019); *see also Cash*, 654 F.3d at 334.

126 *See, e.g.*, Wright v. City of Euclid, 962 F.3d 852, 881–82 (6th Cir. 2020) (holding that plaintiff could show, for purposes of summary judgment, that municipality failed to train and supervise without specifically analyzing the deliberate indifference standard).

The Failure to Supervise Survey reveals that the deliberate indifference standard is demanding but not prohibitive. Three main insights emerge from a close analysis of the cases. First, courts will find deliberate indifference when plaintiffs show facts revealing a lack of day-to-day oversight. A typical case is *S.M. v. Lincoln County*, in which a drug diversion program staffer sexually assaulted several drug program participants; the Eighth Circuit found deliberate indifference when the staffer took program members out of jail for smoke breaks or to a McDonalds and "walked past jail staff as they exited the prison."[127] Likewise, a lack of performance evaluations or feedback can demonstrate deliberate indifference to the need for adequate supervision.[128] Failure to discipline officers for engaging in misconduct can also demonstrate the lack of day-to-day oversight that amounts to day-to-day supervision.[129] And finally, a lack of designated personnel and other apparatus necessary to provide day-to-day oversight can demonstrate deliberate indifference.[130]

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127 S.M. v. Lincoln County, 874 F.3d 581, 586, 588–89 (8th Cir. 2017) (upholding jury verdict against municipality where shared involvement of Drug Court and Sheriff "resulted in significant confusion and ignorance regarding who was supervising [officer who sexually assaulted several women in drug treatment program] on a day-to-day basis" and that a "jury could reasonably infer that even a modest level of active supervision would have successfully deterred [the officer's] repeated misuse of his authority for the purpose of sexual abuse").

128 *See, e.g.*, Shadrick v. Hopkins County, 805 F.3d 724, 739–42 (6th Cir. 2015) (finding deliberate indifference in case involving inmate who died under the care of jail medical provider where supervisors "did not give feedback or regular evaluations to let [nurses] know whether they performed appropriately"); *Wright*, 962 F.3d at 881 (holding that reasonable jurors could find the city's training and supervision deficient where training on the use of force "seems to consist initially of simply reading the use-of-force policy to the officers at rollcall until 'it is believed that all the officers have heard it'" and "officers' performances were never evaluated"); Ouza v. City of Dearborn Heights, 969 F.3d 265, 286 (6th Cir. 2020) (holding, in an excessive force case, that plaintiffs had established deliberate indifference for purposes of summary judgment where it was undisputed that police department "never conducts performance evaluations for its police officers and does not otherwise supervise or monitor its officers' conduct").

129 *See, e.g.*, Estate of Roman v. City of Newark, 914 F.3d 789, 800, 805–06 (3d Cir. 2019) (finding deliberate indifference when the city "did not discipline officers for 'sustained allegations of misconduct,' including 'prior violations' and other 'aggravating factors'" and disregarded public complaints about improper searches and false arrests).

130 *See, e.g.*, *Shadrick*, 805 F.3d at 740–41 (noting that the on-site nursing manager admitted "she was not familiar with the . . . policies she was specifically designated to enforce," and "[t]wo high-level supervisors disclaimed any responsibility for training and supervising the . . . nurses"); *S.M.*, 874 F.3d at 586–88 (noting that it was unclear who was supposed to be overseeing the personnel who committed the constitutional violations).

The second insight relates to the function of the deliberate indifference standard as a notice requirement. The Supreme Court explained in *Connick* that "when city policymakers are on actual or constructive notice that a particular omission . . . causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program."[131] Actual or constructive notice may be proven in two ways. One is through a "pattern of injuries," which the Supreme Court has held is "ordinarily necessary to establish municipal culpability and causation."[132] Alternatively, in some instances only a single incident is necessary to show that "the need for more or better supervision to protect against constitutional violations was obvious."[133] For single-incident liability, the Supreme Court has held that the constitutional violation must be a "highly predictable consequence" of a municipal failure to act.[134]

In cases where courts found deliberate indifference based on a pattern of prior conduct, they accepted evidence relating both to the overall workplace and to the specific offending employee. A record of complaints or other documentation of concerns about employee behavior can establish such a pattern: courts often found deliberate indifference where a workplace ignored or mishandled complaints, rarely disciplined employees who were the subject of complaints, or allowed a large complaint backlog to accumulate.[135] The pattern of conduct giving rise to notice does not need to involve identical conduct. In *Cash v. County of Erie*, for example, the Second Circuit considered a lawsuit brought by a pretrial detainee who was sexu-

131 Connick v. Thompson, 563 U.S. 51, 61 (2011).

132 Bd. of the Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 409; *Connick*, 563 U.S. at 62 ("A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train." (quoting *Bryan County*)).

133 Vann v. City of New York, 72 F.3d 1040, 1049 (2d Cir. 1995); *see also Bryan County*, 520 U.S. at 409 ("In *Canton*, we did not foreclose the possibility that evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability." (citing City of Canton v. Harris, 489 U.S. 378, 390 (1989)); *Connick*, 563 U.S. at 64 (noting possibility, "however rare," of single-incident liability).

134 *Bryan County*, 520 U.S. at 409.

135 *E.g.*, Forrest v. Parry, 930 F.3d 93, 108–09 (3d Cir. 2010) (holding that a police department was on notice that constitutional violations could occur when it had a long history of officer supervision being mishandled, a large complaint backlog, and a history of complaints rarely leading to discipline); Estate of Roman v. City of Newark, 914 F.3d 789, 806 (3d Cir. 2019) (pattern sufficient to establish notice where "the public filed formal complaints about improper searches and false arrests that were disregarded almost wholesale").

ally assaulted by a guard.[136] The court held that a prior incident in which an inmate reported sexual contact with several different guards was sufficient to put the prison on notice of a risk of sexual assault.[137] Notice of prior sexual *assaults* was not required, because all sexual contact between guards and inmates was prohibited under the same New York Statute and were uniformly "deemed non-consensual due to the inherent power differential between guards and prisoners."[138]

Alternatively, courts have found a pattern giving rise to notice based on the prior problematic behavior of the offending employee. In *S.M. v. Lincoln County*, the Eighth Circuit considered a claim brought by Drug Court participants who were sexually assaulted by a program monitor.[139] The program monitor made "derisive sexual comments" about participants under his supervision, "under-reported hours and trips in his patrol car to the plaintiffs' homes," and was "widely perceived" as devoting attention to young and attractive participants in the program.[140] The repeated conduct of a person, the Eighth Circuit held, can establish a "pattern" for purposes of the deliberate indifference standard: "This is not an 'isolated incident' case, even though [the program monitor] was the only Drug Court tracker."[141] In short, courts are open to establishing a

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136 Cash v. County of Erie, 654 F.3d 324, 328 (2d Cir. 2011).

137 *Id.* at 336–37.

138 *Id.* at 337. Even if officials had no knowledge of prior sexual assaults, the prison supervisor "knew or should have known" that guards "were engaging in proscribed sexual contact with prisoners," therefore demonstrating that the statute alone was not sufficient to prevent such contact and that more supervision was needed. *Id.*

139 874 F.3d 581, 584 (8th Cir. 2017).

140 *Id.* at 588.

141 *Id.* at 588–89; *see also* Forrest v. Parry, 930 F.3d 93, 108 (3d Cir. 2019) (finding deliberate indifference where "the particular officers at issue engaged in illicit conduct—often consisting of false arrest and excessive force—knowing that that [sic] they were not being supervised, and that there were a few incidents that should have alerted the officers' superiors, but did not"). A few federal appellate courts minimized past misconduct, finding even repeated incidents insufficient to establish a pattern. *E.g.*, Mize v. Tedford, 375 Fed. App'x 497, 500–01 (6th Cir. 2010) (finding pattern insufficient where officer had four to five complaints against him, even characterizing officer as "maintaining a good reputation and a clean record"); Davis *ex rel.* McCully v. City of North Richland Hills, 406 F.3d 375, 382 (5th Cir. 2005) (finding pattern insufficient similar to establish deliberate indifference on part of supervising officers when officer subject of complaint was described as a "'rogue' cop [who] behaved 'like a psycho' and was 'going to kill somebody'"; exposed himself so frequently that he acquired the nickname "Penie"; and the background check revealed a history of violence); Brooks v. Scheib, 813 F.2d 1191, 1193 (11th Cir. 1987) (holding that ten past citizen complaints about a specific officer were insufficient to place a city on notice because plaintiff did not show complaints were founded).

pattern through a broad range of conduct, both at the workforce level and at the individual level.

Belying conventional wisdom about the difficulty of showing deliberate indifference without a prior pattern of wrongdoing,[142] several plaintiffs in the Failure to Supervise Survey found success by proving a single incident of conduct that gave rise to a constitutional violation.[143] A typical incident arose in *Covington v. City of Madisonville*, in which the Fifth Circuit found deliberate indifference based on a single incident when a police officer framed his ex-wife by planting methamphetamine under her car, which caused her temporarily to lose custody of their children.[144] Although there was no history of previous drug-planting incidents by any officer, the court held that the municipality had been deliberately indifferent: all members of the police department knew about the custody battle; two officers had previously reported to the police chief that the officer intended to frame his ex-wife; the police chief made no effort to investigate whether the reports were accurate; and the officer saved audio and video recordings of his efforts to frame his ex-wife.[145] In *Covington* and other single-incident liability cases, courts often emphasized the lack of basic oversight procedures establishes that the municipality was deliberately indifferent to a known risk.[146]

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142 *See, e.g.*, Waller v. City and County of Denver, 932 F.3d 1277, 1284 (10th Cir. 2019) (describing the "stringent 'deliberate indifference' standard of fault" for claims of failure to train, supervise, and screen); Valle v. City of Houston, 613 F.3d 536, 549 (5th Cir. 2010) ("Proof of deliberate indifference is difficult, although not impossible, to base on a single incident. The 'single incident exception' is extremely narrow; 'a plaintiff must prove that the *highly predictable consequence* of a failure to train would result in the specific injury suffered, and that the failure to train represented the moving force behind the constitutional violation.'" (citation omitted)); Shadrick v. Hopkins County, 805 F.3d 724, 754 (6th Cir. 2015) (Griffin, J., dissenting) ("[T]he single-incident theory of liability described in *Canton* applies only rarely outside the use-of-deadly-force-training example that *Canton* provided.").

143 *E.g.*, Covington v. City of Madisonville, 812 F. App'x 219, 227 (5th Cir. 2020); *Shadrick*, 805 F.3d at 751; Wright v. City of Euclid, 962 F.3d 852, 881 (6th Cir. 2020); Ouza v. City of Dearborn Heights, 969 F.3d 265, 289 (6th Cir. 2020).

144 *Covington*, 812 F. App'x at 220–21.

145 *Id.* at 227.

146 *E.g.*, *Shadrick*, 805 F.3d at 740–43 (discussing single-incident liability for death of inmate resulting from untreated MRSA infection where nurses were almost entirely unsupervised and untrained); *Wright*, 962 F.3d at 881 (noting that single incident liability is possible where training consisted of "simply reading the use-of-force policy to the officers at rollcall" and "the officers' performances were never evaluated"); *Ouza*, 969 F.3d at 289 (holding that single incident liability is possible where a woman was injured as a result of overly tight handcuffing and the police department did not conduct performance evaluations or otherwise review or monitor its officers and did not provide any training on handcuffing).

Contrary to Supreme Court precedent, a few courts transformed the *presumption* that a plaintiff must prove a pattern in a municipal failure claim to a *requirement* that the plaintiff must do so.[147] But these outliers notwithstanding, precedent explicitly confirming the availability of single-incident liability exists in every circuit.[148]

The Failure to Supervise Survey also yielded information about the way that courts interpret the causation element of a failure-to-supervise claim. Plaintiffs must prove causation by showing that the municipality was the "moving force" behind the violation, which courts have held is equivalent to showing that the municipality was the proximate cause.[149] One way to

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147 The Eighth Circuit, for example, held in *Perkins v. Hastings* that plaintiff's claim of failure to train on excessive force failed because she "has not shown a pattern of underlying constitutional violations." 915 F.3d 512, 523 (8th Cir. 2019); *see also* Parrish v. Luckie, 963 F.2d 201, 206 (8th Cir. 1992); Lewis v. Pugh, 289 F. App'x 767, 772 (5th Cir. 2008) ("Proof of more than a single instance of lack of supervision causing a violation of constitutional rights is required before such lack of training can constitute deliberate indifference."); *see also* Blum, *Making Out the* Monell *Claim*, *supra* note 17, at 847 n.133 (discussing circuits that, as of the writing of the article, had not acknowledged single-incident liability).

148 *E.g.*, Bordanaro v. McLeod, 871 F.2d 1151, 1161 (1st Cir. 1989) (holding, in a case concerning a single incident, that jury "was well within its discretion in finding that the recruitment, training, supervision or discipline of . . . police officers was grossly or flagrantly deficient"); Berg v. County of Allegheny, 219 F.3d 261, 276 (3d Cir. 2000) (noting that single incident liability is possible); Estate of Jones v. City of Martinsburg, 961 F.3d 661, 671–72 (4th Cir. 2020) (same); *Covington*, 812 F. App'x at 229 (ruling for plaintiff on single incident theory); *Ouza*, 969 F.3d at 287–88 (noting that single incident liability is possible); Flores v. City of South Bend, 997 F.3d 725, 733 (7th Cir. 2021) (same); Szabla v. City of Brooklyn Park, 486 F.3d 385, 393 (8th Cir. 2007) (same); Kirkpatrick v. County of Washoe, 843 F.3d 784, 794 (9th Cir. 2016) (same); Brown v. Gray, 227 F.3d 1278, 1284, 1286 (10th Cir. 2000) (upholding jury verdict for plaintiff on failure-to-train claim using single incident theory); Favors v. City of Atlanta, 849 F. App'x 813, 821 (11th Cir. 2021) (noting that single incident liability is possible); Atchison v. District of Columbia, 73 F.3d 418, 423 (D.C. Cir. 1996) ("Moreover, [plaintiff's] complaint is adequate even though it alleges only one instance of unconstitutional conduct."). I was unable to find a Second Circuit case establishing the single-incident theory, but several district court cases held that the theory was viable. *E.g.*, Boston v. Suffolk County, 326 F. Supp. 3d 1, 23 (E.D.N.Y. 2018) ("The Plaintiff has not introduced any evidence of '[a] pattern of similar constitutional violations' as is 'ordinarily necessary to show deliberate indifference for purposes of failure to train.' However, in the Court's opinion, he has introduced sufficient evidence of deliberate indifference based on a single-incident theory." (alteration in original) (citation omitted)); Chamberlain v. City of White Plains, 986 F. Supp. 2d 363, 392 (S.D.N.Y. 2013) ("The District Court in *Wereb* provides a thorough and well-reasoned analysis of the *Connick* decision's effect on the single-incident theory, and in the absence of guidance from the Second Circuit on this issue, I agree that the theory is still a viable one in limited circumstances." (citation omitted)).

149 *E.g.*, Harper v. City of Los Angeles, 533 F.3d 1010, 1026 (9th Cir. 2008) (equating proximate cause with moving force for purposes of *Monell* liability);

establish proximate cause is to show that the municipality failed to investigate plausible information about potential future wrongdoing. Such a case arose in *Covington v. City of Madisonville*, in which the Fifth Circuit concluded that a foreseeable consequence of failure to investigate a warning that a police officer is planning to plant drugs is that the officer does in fact do so, with the result that the framed person is arrested and prosecuted.[150] Courts also accepted a general lack of oversight as the proximate cause of wrongdoing—for example, in the case of an unsupervised drug program monitor who sexually abused program participants.[151] And finally, the failure to exercise oversight in response to reports of wrongdoing could also lead to a finding that a municipality was the moving force behind the violation.[152] In a case involving a department-wide pattern of Fourth Amendment violations, the Third Circuit emphasized the compounding effect of failing to correct violations: "The result was a 'complete lack of accountability' and of 'record keeping,' leading to a culture in which officers 'knew there would be no professional consequences for their action[s].'"[153] In other words, tolerating wrongdoing creates a culture in which more wrongdoing will occur—and therefore such toler-

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McCabe v. Life-Line Ambulance Serv., Inc., 77 F.3d 540, 543–44 (1st Cir. 1996) (referring variously to a city policy that "proximately caused an actionable deprivation" and that policy being the "moving force" behind the deprivation); Cash v. County of Erie, 654 F.3d 324, 342 (2d Cir. 2011) (noting that "moving force" is tantamount to proximate cause); Smith v. District of Columbia, 413 F.3d 86, 102 (D.C. Cir. 2005) ("We have equated moving force with proximate cause. Proximate cause 'includes the notion of cause in fact,' and requires an element of foreseeability." (citations omitted)).

150 In *Covington*, the Fifth Circuit explained that proximate cause is satisfied when the municipality "caused the violation by not timely employing appropriate supervisory measures in order to prevent reasonably anticipated unlawful conduct by a city employee." 812 F. App'x at 228. The court explained, "[H]ad Chief May investigated the reports[,] . . . a reasonable inference can be drawn—especially given the allegations regarding the number of persons aware of [the officer's] plan—that [plaintiff's] arrest, criminal charges, and loss of child custody would have been prevented or at least promptly remedied." *Id.*

151 S.M. v. Lincon County, 874 F.3d. 581, 589 (8th Cir. 2017). Here, even though the "plaintiffs failed to identify specific supervisory procedures that should have been instituted," the court concluded that "the jury could reasonably infer that even a modest level of active supervision would have successfully deterred [the drug court monitor's] repeated misuse of his authority for the purpose of sexual abuse." *Id.*

152 In *Estate of Roman v. City of Newark*, where the city did not "discipline officers for 'sustained allegations of misconduct,' including 'prior violations' and other 'aggravating factors,'" the Third Circuit concluded that "one could reasonably infer that the City's inaction . . . contributed to the specific constitutional violations alleged in the amended complaint." 914 F.3d 789, 800 (3d Cir. 2010).

153 *Id.* at 800–01 (alterations in original) (citations omitted).

ance is the "moving force" behind future constitutional violations.

The Failure to Supervise Survey shows that failure-to-supervise claims are viable, that the theory is firmly established in all twelve circuits, and that plaintiffs sometimes prevail. Yet plaintiffs often do not develop these claims on appeal, and even when they do, courts often give them little attention. The next section takes up this observation in more detail.

3. *Practical Neglect*

The Failure to Supervise Survey revealed ample case law that a plaintiff could use to establish municipal policy or custom based on the failure-to-supervise theory. Yet plaintiffs frequently fail to advance the failure-to-supervise theory as vigorously as they could. This shortfall is amplified by courts, who compound plaintiffs' neglect with their own, or in some instances are dismissive of the failure-to-supervise theory even when plaintiffs have pressed it vigorously.

The available evidence suggests that, at all stages of litigation, plaintiffs are not making the most of the failure-to-supervise theory. Some plaintiffs do not raise the theory in their complaint or raise it in such a cursory fashion that it stands no chance of surviving a motion to dismiss.[154] Others combine it with failure to train, even though—as discussed in Part I—the two are conceptually different.[155] Still others raise the theory in their complaints but neglect it in briefing, sometimes devoting just a few sentences or a subsection heading to it.[156] Plaintiffs also fail to make the most of available precedent when contending that a municipality failed to supervise its employees: for example, the Failure to Supervise Survey reveals that plaintiffs could do more to emphasize that they do not need to show a pattern of wrongful conduct to prevail, even though this argument is clearly available under Supreme Court precedent and the precedent of all twelve circuits.[157] An examination of cases in which plaintiffs won reveals that this shortfall is par-

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154 *E.g.*, Complaint at 21–22, Arsan v. Keller, 784 F. App'x 900 (6th Cir. 2019) (No. 18-3858) (devoting just three sentences to the failure-to-supervise claim, which duplicate language in the failure-to-train claim);

155 *Cf.* Parrish v. Ball, 594 F.3d 993, 996–97 (8th Cir. 2010) (treating failure-to-train and failure-to-supervise claims together); *see also supra* notes 96–99 and accompanying text.

156 *E.g.*, Complaint at 18–19, Doe v. Fort Zumwalt R-II Sch. Dist., 920 F.3d 1184 (8th Cir. 2019) (No. 18-2093) (discussing failure to train and failure to supervise together).

157 *See supra* note 148.

ticularly costly in cases where the conduct is unprecedented but obviously unconstitutional: courts are open to holding that a plaintiff should not need to show a *pattern* of sexual assaults or unprovoked brutality to prove a municipal failure.[158] While the failure-to-supervise theory is not a magic bullet, plaintiffs can do a great deal more with the precedent already on the books.

Courts also fail to analyze failure-to-supervise claims independently and thoroughly. This tendency is on display when courts consider both a failure-to-train claim and a failure-to-supervise claim in the same case. In many instances, courts consider the claims together without distinguishing between the two.[159] A typical example is *Doe v. Fort Zumwalt R-II School District*, a suit brought against a school district for the conduct of a fifth grade teacher who secretly videotaped children in the nude during an overnight camp.[160] The district's supervision seemed notably lacking, given that the teacher was able to be alone with students for extended periods of time and that the district relied exclusively on teenage camp counselors to report possible wrongdoing.[161] Training, meanwhile, seems a less plausible theory: few if any teachers would need training to know that videotaping students in the nude is illegal. Yet the Eighth Circuit considered training and supervision together throughout the opinion and did not consider potentially critical differences between the two theories.[162] The court ultimately concluded that the "failure to provide more supervision and training did not rise to the level of a constitutional violation."[163]

In other instances, courts analyze the failure-to-train theory and then mention the failure-to-supervise theory as an afterthought. In *Trammell v. Fruge*, which involved an intoxi-

158 *E.g.*, Shadrick v. Hopkins County, 805 F.3d 724, 740–44 (6th Cir. 2015) (sick inmate who died in prison due to inadequate medical care); Cash v. County of Erie, 654 F.3d 324, 344 (2d Cir. 2011) (pretrial detainee raped by guard).

159 *E.g.*, Doe v. Fort Zumwalt R-II Sch. Dist., 920 F.3d 1184, 1189 (8th Cir. 2019); Daniel v. Hancock Cnty. Sch. Dist., 626 F. App'x. 825, 829 (11th Cir. 2015); Atkinson v. City of Mountain View, 709 F.3d 1201, 1214 (8th Cir. 2013); Estate of Nunez v. County of San Diego, 381 F. Supp. 3d 1251, 1257 (S.D. Cal. 2019); Stephens v. City of Tarrant, No. 2:16-CV-274-KOB, 2017 WL 34829, at *3 (N.D. Ala. Jan. 4, 2017); Bennett v. Serpas, No. 15-3087, 2017 WL 2778109, at *1 (E.D. La. June 26, 2017); Estate of Kamal v. Township of Irvington, 790 F. App'x 395, 398 (3d Cir. 2019); Jones v. Eder, 778 F. App'x 327, 328 (5th Cir. 2019) (per curiam); Arsan v. Keller, 784 F. App'x 900, 915 (6th Cir. 2019); Vartinelli v. Aramark Corr. Servs., LLC, 796 F. App'x 867, 872 (6th Cir. 2019).

160 *Doe*, 920 F.3d at 1188.

161 *Id.* at 1190.

162 *See id.*

163 *Id.* at 1191.

cated man who was arrested by several officers, the Fifth Circuit first rejected the plaintiff's failure-to-train claim, and then stated: "Because a failure-to-supervise claim is evaluated in the same way as a failure-to-train claim, we do not address [the plaintiff]'s claims as to supervision and training separately."[164] Similarly, in *J.K.J. v. Polk County*—the case whose facts began this article—a panel of the Seventh Circuit set aside a jury verdict for plaintiffs, who were inmates who had been sexually assaulted by a guard.[165] After analyzing the plaintiffs' failure-to-train claim, the court stated, without additional analysis, that "[a] failure-to-supervise claim fails for the same reasons."[166] In other cases, courts acknowledge that the plaintiff presented both failure-to-train and failure-to-supervise theories, yet they only explicitly address the alleged deficiency in training.[167] A clear pattern emerges from these cases: when courts consider failure-to-train and failure-to-supervise claims without distinguishing between the two, plaintiffs are unlikely to prevail on either one.[168]

In many instances, courts adjudicated a claim under a theory of failure-to-train when the facts present a better match for a theory of failure-to-supervise. In *Parrish v. Ball*, the Eighth Circuit held that a county was not liable under § 1983 when one of its deputies, Joseph Stephen Fite, arrested a woman who had declined to go on a date with him and informed her that he would not have arrested her if she had agreed to go out with him.[169] Fite then told the woman that he

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164 868 F.3d 332, 344 n.11 (5th Cir. 2017) (citation omitted).

165 960 F.3d 367, 371 (7th Cir. 2020) (en banc).

166 J.K.J. v. Polk County, 928 F.3d 576, 595 (7th Cir. 2019), *reh'g granted*, 960 F.3d 367 (7th Cir. 2020) (en banc). While the panel opinion in *J.K.J.* was later vacated and the jury verdict reinstated after rehearing en banc, four judges dissented from the portion of the opinion imposing liability on the municipality. *J.K.J.*, 960 F.3d at 386 (Easterbrook, J., dissenting in part); *id.* at 389 (Brennan, J., dissenting in part) (joined by Judges Bauer and Sykes).

167 *E.g.*, Jordan v. Brumfield, 687 F. App'x 408, 410, 416 (5th Cir. 2017) (noting that plaintiff "asserts municipal liability against the City for failure to supervise and failure to train" yet concluding only that plaintiff "cannot show a causal connection between any alleged failure to train and a violation of his rights").

168 I found only one federal appellate case since 2010 in which a court discussed failure to train and supervise entirely together and the plaintiff prevailed. That case is *Shadrick v. Hopkins County*, 805 F.3d 724 (6th Cir. 2015), in which the court reversed the district court and held that there were fact issues precluding summary judgment in favor of defendant medical provider in case brought by survivors of inmate who alleged that inadequate training and supervision led to his death. The court discusses "failure to train and supervise" throughout, with some evidence supporting each theory. *Id.* at 737–44.

169 594 F.3d 993, 996 (8th Cir. 2010). For a similar case, see Andrews v. Fowler, 98 F.3d 1069, 1075–77 (8th Cir. 1996) (finding there was no need to train

could reduce her fines if she showed him her breasts, and, after she reluctantly complied, he "grabbed [her] exposed breast."[170] The Eighth Circuit adjudicated the claim exclusively as one of failure to train and rejected the plaintiff's claim. It concluded: "we do not believe that there is a patently obvious need to train an officer not to sexually assault women" and pointed out that Fite himself admitted that he knew it was impermissible to sexually assault the plaintiff.[171]

Yet the harm the plaintiff suffered is more readily characterized as the result of a failure to supervise. The court itself pointed out that the county had not done a good job at supervising the deputy. It observed that "Sheriff Ball permitted Fite to operate as an almost completely unsupervised Road Deputy"[172] and noted that Fite "stated that he would not have pressured [plaintiff] to expose herself, nor grabbed her breast, if Sheriff Ball had been at the jail that day."[173] In other words, an extremely inexperienced deputy was left to operate without supervision, and that deputy himself acknowledged that more supervision would have prevented him from violating the Constitution. If supervision would have prevented the violation of constitutional rights where training would not, it is unclear why the claim was litigated and adjudicated under the rubric of failure to train.

The court in *Parrish* does not say explicitly why it adjudicated the claims exclusively under a training theory rather than a supervision theory. One possibility is that the plaintiffs themselves focused more on training than on supervision in their complaint, spending several paragraphs on the former and a scant two sentences on the latter.[174] Another possibility is that Fite was, in fact, poorly trained: he had not yet attended the mandatory Law Enforcement Training Academy, his only training consisted of two days of riding with the deputy whom he was hired to replace, and he was given a policy manual but was not required to read it and in fact did not read it.[175] Perhaps it was this seriously deficient training that drew the

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an officer not to commit sexual assault despite actual knowledge of deviant behavior).

170 *Parrish*, 594 F.3d at 996.

171 *Id.* at 999.

172 *Id.* at 996.

173 *Id.* at 997.

174 *See* Second Amended Complaint at 4–5, 27–28, Parrish v. Ball, 594 F.3d 993 (8th Cir. 2010) (No. 06-6024).

175 *Parrish*, 594 F.3d at 996.

court's attention, even though the facts overall lend themselves more to a theory of supervision.

Another case in which the court adjudicated a case under the failure-to-train theory even though the failure-to-supervise theory seems more appropriate is *Kobrick v. Stevens*, in which the Third Circuit held that a school district was not liable for failing to train staff to recognize that a music teacher was conducting a sexual relationship with a seventeen-year-old high school senior.[176] The school knew that the student spent a lot of time in the band room and the principal once witnessed the student with her arms around the teacher's waist.[177] Allowing the student and teacher to continue to spend a lot of time alone together seems like a "failure to supervise" on the part of the school. Yet the student-turned-plaintiff claimed not that the schools had failed to supervise the teacher, but rather that the schools had failed to train *other* school employees to recognize "'grooming' behavior"; the school districts ultimately prevailed.[178]

In some instances, courts frame a case as solely one of deficient training even when the plaintiff has also included evidence that would support a claim of inadequate supervision. In *Murphy v. City of Tulsa*, a case involving police officers who threatened suspects during interrogations, the Tenth Circuit concluded that plaintiff inadequately presented her claims of failure to supervise, even though she titled part of her opening brief "Deliberately Indifferent Failure to Train or Supervise" and presented evidence that a supervising officer "fail[ed] to ask his subordinates about the methods that they had used to obtain confessions" and that the police department "fail[ed] to discipline the interrogators for threatening civilians during interrogations."[179] Indeed, the court itself summarized the plaintiffs' evidence as "address[ing] shortcomings in individual officers' training and supervision."[180] *Murphy* is not alone: a number of other cases also attempt to shoehorn the facts leading to the dispute into a theory of failure to train, when failure to supervise is a better fit.[181]

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176 763 F. App'x 216, 218 (3rd Cir. 2019).

177 *Id.* at 220.

178 *Id.*; *see also* Kobrick v. Stevens, No. 3:13-CV-2865, 2017 WL 3839946, at *9–12 (M.D. Pa. Sept. 1, 2017).

179 950 F.3d 641, 651–52 & n.14 (10th Cir. 2019).

180 *Id.* at 652.

181 For example, in *Jackson v. City of Cleveland*, the Sixth Circuit adjudicated a wrongful conviction claim in which Cleveland police officers did not fulfill their *Brady* obligations, leading to decades-long prison sentence for three innocent

Courts and litigants sometimes fail to recognize assorted municipal deficiencies as a collective failure of supervision. In *Waller v. City and County of Denver*, the Tenth Circuit considered claims flowing from a deputy's assault of a pretrial detainee during a court hearing under five different theories: failure to screen, train, supervise, investigate, and discipline.[182] Yet this framing ignores that investigation and discipline can be framed as particular facets as supervision, and that raising the theories separately dilutes the strength of the claim. For example, the court considered whether the city's failure to follow up on "grievances that allege serious deputy misconduct" constituted failure to investigate, and whether the failure to impose "appropriate discipline for the egregious use of excessive force" constituted failure to discipline.[183] Yet the court does not consider whether, cumulatively, the failure to investigate allegations of misconduct and to impose appropriate discipline on those who engage in it created an environment in which a deputy would feel free to assault a detainee without provocation. Nor did the court consider whether the environment that facilitated the constitutional violation is, cumulatively, the product of a failure to supervise.

Waller is not an outlier: it is not unusual for cases to discuss ad hoc or one-off theories of liability in municipal failure cases that could be considered under the rubric of failure to supervise. Ironically, plaintiffs sometimes find success in these cases, with the result that some of the best municipal failure cases for plaintiffs advance idiosyncratic theories that do not readily translate to future cases.[184] Occasionally courts correct this error: in *Forrest v. Parry*, the Third Circuit held that the district court erred when it "unilaterally divided [the plaintiff's] claim into three separate theories it devised," which wrongly resulted in a grant of summary judgment to the defen-

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men. 925 F.3d 793, 803–05 (6th Cir. 2019). The failure-to-train theory seems apt, given that the Cleveland Division of Police failed to update its police manual after *Brady* was decided and may not have offered any formal training on *Brady*. *Id.* at 803. But failure to supervise seems, if anything, equally appropriate, given that the police department also does not seem to have taken any measures to assess whether, on an ongoing basis, officers were following their *Brady* obligations. *See id.* at 834–37. For another case in which failure to supervise was a plausible theory that the plaintiff did not advance, see Garza v. City of Donna, 922 F.3d 626, 634–38 (5th Cir. 2019).

182 932 F.3d 1277, 1284 (10th Cir. 2019).

183 *Id.* at 1289–90.

184 *E.g.*, Horton *ex rel.* Horton v. City of Santa Maria, 915 F.3d 592, 604–05 (9th Cir. 2019) (indicating, in a case involving attempted suicide of detainee, that "fail[ure] to ensure compliance" and "fail[ure] to assure proper monitoring" are possible ways of establishing municipal liability).

dant municipality on failure-to-train and failure-to-supervise claims.[185] Ultimately, the plaintiff in *Forrest* won. But more often courts simply adjudicate the claims piecemeal without considering that collectively they may add up to an overarching failure to supervise.

Collectively, the cases in the Failure to Supervise Survey show that many plaintiffs are not making the most of the failure-to-supervise theory and that many courts are not giving the theory adequate consideration. Yet despite this shortfall, significant precedent has emerged that would allow plaintiffs to litigate the theory more successfully and for courts to consider it more thoroughly. The next Part describes how an amplified treatment of the failure-to-supervise theory will further § 1983's remedial goals.

III
IN FAVOR OF SUPERVISION

Building on the empirical information described in Part II, this Part describes how a more robust theory of municipal failure to supervise will further the remedial goals of 42 U.S.C. § 1983. Subpart III.A shows that the failure-to-supervise theory furthers § 1983's remedial goal of compensation by allowing injured plaintiffs to recover directly from municipalities. Subpart III.B turns to § 1983's goal of deterrence. Focusing on municipal supervision correctly locates blame at the institutional level in addition to the individual level. This direct accountability encourages municipalities to improve their practices and promotes a more productive legal and social discourse about responsibility for constitutional harms. Finally, subpart III.C initiates a conversation about the ways that plaintiffs' lawyers and courts can make better use of the municipal failure-to-supervise claim to further § 1983's remedial goals.

A. Compensation

The failure-to-supervise theory provides a promising avenue to afford compensation to injured plaintiffs. One set of reasons is doctrinal: under existing precedent, expanding the scope of situations in which plaintiffs can sue a municipality directly would provide a remedy for more injured plaintiffs. A second set of reasons is practical: municipalities frequently can satisfy judgments that individual defendants cannot. A final

185 930 F.3d 93, 98, 104–05 (3d Cir. 2019).

set of reasons is conceptual: in many instances, the blameworthy municipal conduct consists of a lack of oversight, and the failure-to-supervise theory allows plaintiffs to describe this conduct in a way that is accurate and therefore compelling to juries and judges.

Doctrinally speaking, suing and holding municipalities liable directly poses a number of advantages for plaintiffs. Chief among these is that municipalities are not entitled to qualified immunity or other forms of immunity, nor may they assert their employees' immunity defenses.[186] When a plaintiff sues a municipality, therefore, the municipality may be liable even when the individual officer is not held liable for a constitutional violation.[187] That is, a municipality can still be liable if a plaintiff shows that it caused a violation of his constitutional rights, even if individual officers are not held liable "on the basis of qualified immunity, because they were merely negligent, or for other failure of proof."[188] Municipality liability therefore offers an alternative avenue for achieving § 1983's goal of providing

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186 Owen v. City of Independence, 445 U.S. 622, 624–25 (1980).

187 *Horton*, 915 F.3d at 604; *see also* Barrett v. Orange Cnty. Hum. Rts. Comm'n, 194 F.3d 341, 350 (2d Cir. 1999) ("[M]unicipal liability for constitutional injuries may be found to exist even in the absence of individual liability, at least so long as the injuries complained of are not solely attributable to the actions of named individual defendants."); Fagan v. City of Vineland, 22 F.3d 1283, 1292 (3d Cir. 1994) ("[A]n underlying constitutional tort can still exist even if no individual police officer violated the Constitution. . . . If it can be shown that the plaintiff suffered [an] injury, which amounts to deprivation of life or liberty, because the officer was following a city policy reflecting the city policymakers' deliberate indifference to constitutional rights, then the City is directly liable under section 1983 for causing a violation of the plaintiff's Fourteenth Amendment rights."); Anderson v. City of Atlanta, 778 F.2d 678, 686 (11th Cir. 1985) ("*Monell* and its progeny do not require that a jury must first find an individual defendant liable before imposing liability on local government." (citation omitted)); Garcia v. Salt Lake County, 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 [under section 1983]."). In the context of failure-to-train claims, Joanna Schwartz has documented a trend in which four federal appellate courts have held that if an officer receives qualified immunity, a municipality cannot be held liable on a theory of failure to train because municipalities cannot train officers about law that is not clearly established. Joanna C. Schwartz, *Backdoor Municipal Immunity*, 132 YALE L.J.F. 136 (2022). While the elision of qualified immunity and municipal liability in the context of the failure-to-train theory is troubling, it does not necessarily implicate the failure-to-supervise theory: the Court made clear in *Bryan County* that the municipal failure theories are not automatically parallel, Bd. of the Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 409 (1997), and a municipality's supervision of an employee could be deficient regardless of whether the law in question was clearly established.

188 Fairley v. Luman, 281 F.3d 913, 917 n.4 (9th Cir. 2002); *Horton*, 915 F.3d at 604 (quoting *Fairley*); *see also Owen*, 445 U.S. at 624–25 (holding that municipalities are not entitled to qualified immunity and may not assert good faith as a defense to liability).

redress for injured plaintiffs even when no individual officer can be held liable.

The opportunity to advance municipal liability even when individual officers are not held liable is particularly valuable in disputes where the law is unclear or rapidly evolving. For example, disputes involving new or emerging technology often concern areas of Fourth Amendment law for which there is little law on the books.[189] Suppose that a police department acquires a new robot dog that can detect contraband—the first of its kind in the nation.[190] The department trains its officers how to operate the dog but does not require them to report the way they use the dog in the field or oversee their usage of the dog, and the dog eventually malfunctions and causes extensive damage to property. Because the dog is new, there is likely no clearly established law governing its use, and the individual police officer defendants will be entitled to qualified immunity. But the qualified immunity defense is not available to municipalities.[191] If a court finds that the use of the robot dog in fact violated constitutional rights, and that the violation resulted from a deliberately-indifferent municipal failure to supervise the officers, then the municipality could be liable even though the individual officers are not.[192]

From a practical perspective, the failure-to-supervise theory also facilitates compensation by offering an avenue to recover from an entity with financial resources. Municipalities often have the means to satisfy judgments when individual defendant government officials cannot.[193] Although many already satisfy judgments against their employees through in-

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189 *See* United States v. Lee, 359 F.3d 194, 224–25 & n.24 (3d Cir. 2004) (McKee, J., dissenting) (explaining that plaintiffs "must first establish that legal requirements in a given situation would have been clear to a reasonable officer. The speed of technology's advance will often make that an insurmountable hurdle to a . . . plaintiff challenging the government's warrantless use of a new technology" (citation omitted)); Aaron Sussman, *Shocking the Conscience: What Police Tasers and Weapon Technology Reveal About Excessive Force Law*, 59 UCLA L. REV. 1342, 1387 (2012) ("The second qualified immunity question, whether the unreasonableness of the force was clearly established, further disadvantages plaintiffs because of the constantly evolving nature of taser technology.").

190 *Cf.* Mihir Zaveri, *N.Y.P.D. Robot Dog's Run Is Cut Short After Fierce Backlash*, N.Y. TIMES, https://www.nytimes.com/2021/04/28/nyregion/nypd-robot-dog-backlash.html [https://perma.cc/53SZ-GJ3E] (last updated May 11, 2021).

191 *Owen*, 445 U.S. at 622 (1980).

192 *Cf.* Schwartz, *supra* note 187.

193 Fisk & Chemerinsky, *supra* note 27, at 796.

demnification,[194] in some cases they do not,[195] and in any event the uncertainty can pose challenges for plaintiffs' attorneys attempting to gauge what a case is worth. Municipalities are aware of these challenges, and anecdotal evidence suggests that some leverage the uncertainty to plaintiffs' disadvantage.[196]

And finally, the failure-to-supervise theory promotes compensation of injured plaintiffs because it accurately and persuasively describes municipal blameworthiness. As the data gathered in Part II demonstrate, many opinions do not frame municipal wrongdoing as a failure to supervise even when that theory provides the best description of the relevant harm.[197] Consider the narrative of prison sexual assault that began this Article, drawn from the litigation of *J.K.J. v. Polk County*.[198] The Seventh Circuit considered the plaintiff's claims as challenges to the prison's sexual assault policies and its failure to train.[199] Yet the prison's sexual assault policies were perfectly clear: they prohibited all forms of sexual contact between guards and inmates.[200] And further, it is difficult to argue that if Polk County had instituted more or different training it would have deterred Darryl Christensen, the abusive prison guard, from his conduct—especially given his testimony that he knew his conduct was illegal and against policy, and further that "he did not require more training to know his conduct was a crime."[201]

Even though the plaintiffs in *J.K.J.* eventually won on rehearing en banc,[202] the Seventh Circuit was closely divided, with four justices dissenting.[203] The en banc majority opinion demonstrates an overly optimistic view on training about sexual assault, which, it says, "is important because it can educate and sensitize guards as well as shape and reinforce institutional values, bringing to life words that otherwise exist

194 Schwartz, *Police Indemnification*, *supra* note 9, at 936–37.

195 One example in which a municipality did not indemnify the offending official is *J.K.J. v. Polk County*, from which the narrative of sexual assault that began this Article is drawn. *See supra* notes 1–8.

196 Schwartz, *Police Indemnification*, *supra* note 9, at 931–36.

197 *See supra* text accompanying notes 159–185.

198 *See supra* text accompanying notes 1–8.

199 J.K.J. v. Polk County, 928 F.3d 576, 587–99 (7th Cir. 2019), *reh'g granted*, 960 F.3d 367 (7th Cir. 2020) (en banc).

200 *Id.*

201 *Id.* at 583.

202 *J.K.J.*, 960 F.3d at 371.

203 *Id.* at 386 (Easterbrook, J., dissenting in part); *id.* at 389 (Brennan, J., dissenting in part) (joined by Judges Bauer and Sykes).

only on paper."[204] While these claims about sexual assault training may be true, they also do not address the dissenters' charge that more training would not have altered Christensen's behavior.[205] Indeed, the court itself seems uncomfortable with the failure-to-train theory, drifting from a description of the wrongful municipal behavior as "failing to use training" to the more ambiguous "mitigating risk" or "failure to act."[206] At times, its analysis evokes failure to supervise: the jury heard expert testimony "about the importance of a policy that does not wait for reports of sexual abuse to trigger an institutional response, but instead contains measures both to prevent the wrongdoing in the first instance and to detect it if it does occur."[207] As the dissents to the en banc opinion convincingly argue, neither the claim that the prison's policy was defective nor the claim its training was inadequate is entirely persuasive, because neither entirely captures what the prison did wrong.[208]

The opinion would have proceeded more logically as an analysis of the municipality's inadequate supervision as the "moving force" behind the sexual assault, and its failure to supervise the guards as an instance of "deliberate indifference to a known or obvious risk."[209] Better training would not have stopped Darryl Christensen, but perhaps better supervision—as the majority itself says, "closer monitoring, more frequent guard rotations, or a policy preventing male officers from being alone with female inmates"—would have prevented the abuse.[210]

Beyond *J.K.J. v. Polk County*, the theory of municipal failure to supervise often provides the best fit for allegations of obvious and egregious constitutional violations. In such situa-

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204 *Id.* at 379 (majority opinion).

205 *See id.* at 386–87 (Easterbrook, J., dissenting in part); *id.* at 391 (Brennan, J., dissenting in part) (joined by Judges Bauer and Sykes).

206 *Id.* at 379–80 (majority opinion). The concurrence likewise characterizes the conduct as "failure to monitor its guards" and "failure to provide effective channels for complaints"—deficiencies that fit more comfortably within the rubric of failure to supervise. *Id.* at 386 (Hamilton, J., concurring).

207 *Id.* at 378–79 (majority opinion).

208 *See id.* at 387 (Easterbrook, J. dissenting in part) ("The Jail made sure that every guard knew [about the rule against intimate relations between guards and inmates.] What training is required to get guards to grasp it?"); *id.* at 390 (Brennan, J., dissenting in part) (disagreeing with majority's conclusion that training was inadequate by pointing out that "no federal appellate court has held that specialized training is required for an employee to know that rape is wrong").

209 To the extent that policies would have decreased the likelihood of sexual assault, it is because they would have led to better supervision.

210 *Id.* at 374–75, 385 (majority opinion).

tions, a claim of failure to supervise is more likely to prove fruitful than a failure-to-train claim. As Karen Blum has noted, the failure-to-train theory presents a paradox: "If a violation was too obvious, it was not a lack of training that caused the problem."[211] The more flagrantly conscience-shocking a particular violation is—sexual assault, unprovoked brutality—the *less* likely it is that the municipality needed to train officers not to commit the violation and was deliberately indifferent by not doing so.[212]

The failure-to-supervise theory is much better suited to capture the role of municipalities in enabling conduct that is obviously unconstitutional and tends to be carried out in secret. This category includes many forms of sexual misconduct, including sexual assault.[213] Municipal employees are less likely to have the opportunity to engage in such violations if they are better supervised. By contrast, such situations are unlikely to be addressed by better training.[214] Some employees will be inclined to commit sexual assaults no matter how well they are trained, but better supervision—video cameras, reporting channels, monitoring of employees, and regular performance evaluations—would prevent some instances of harassment and detect others at an early stage. Further, the concept of adequate supervision is administrable: many courts have already adopted the practice of comparing a municipal-

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211 Blum, *Making Out the* Monell *Claim*, *supra* note 17, at 844.

212 *See, e.g.*, Connick v. Thompson, 563 U.S. 51, 78 (2011) (Scalia, J., concurring) ("[S]ince [a particular *Brady* violation] was a bad-faith, knowing violation, [it] could not possibly be attributed to lack of training."); Waller v. City and County of Denver, 932 F.3d 1277, 1288 (10th Cir. 2019) (finding municipality not liable under failure-to-train theory in case where deputy launched unprovoked assault on pretrial detainee at a hearing because "[e]ven an untrained law enforcement officer should have been well aware that any use of force in this situation . . . was inappropriate. This case does not involve technical knowledge or ambiguous 'gray areas' in the law . . . ."); Hernandez v. Borough of Palisades Park Police Dep't, 58 F. App'x 909 (3d Cir. 2003) (finding no obvious need to train police officers not to rob the houses they were patrolling); Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992) (finding no obvious need to train policy officers not to lie on the stand).

213 A number of plaintiffs in the Failure to Supervise Survey found success on claims of failure to supervise in the context of sexual assault by government officials. *E.g.*, J.K.J. v. Polk County, 928 F.3d 576 (7th Cir. 2019), *reh'g granted*, 960 F.3d 367 (7th Cir. 2020) (en banc); Cash v. County of Erie, 654 F.3d 324 (2d Cir. 2011); S.M. v. Lincoln County, 874 F.3d 581 (8th Cir. 2017).

214 Courts are skeptical that better training would prevent sexual assault. *E.g.*, Barney v. Pulsipher, 143 F.3d 1299, 1308 (10th Cir. 1998) ("Specific or extensive training hardly seems necessary for a jailer to know that sexually assaulting inmates is inappropriate behavior."); Andrews v. Fowler, 98 F.3d 1069, 1077 (8th Cir. 1996) ("In light of the regular law enforcement duties of a police officer, we cannot conclude that there was a patently obvious need for the city to specifically train officers not to rape young women.").

ity's practices to the standard of care in similar facilities, informed by expert testimony.[215] While municipal failure to supervise is not a viable theory for all claims, it is an underused, intuitive, and potentially helpful avenue for many plaintiffs and will improve the overall likelihood of compensation for plaintiffs who suffer constitutional harms.

B. Deterrence

A greater focus on municipal culpability for failure to supervise would also further section 1983's goal of deterring constitutional violations.[216] First, entities are in the best position to prevent constitutional violations, and the failure-to-supervise theory provides them with more incentive to do so. As a threshold matter, individual government officials do not exist in isolation, nor do they emerge fully formed. Rather, municipal entities shape and enable individual behavior: a rich literature has shown that workers absorb their ideas, habits, practices, and values from the environment in which they work.[217] As Barbara Armacost puts it: "individuals who are embedded in organizations do not make choices solely as individuals."[218] The failure-to-supervise theory acknowledges that many constitutional violations are fostered and enabled by institutional culture, and lays liability for those violations at the doorstep of the institution.[219]

Moreover, unlike their employees, municipalities have the power to institute reforms across the entire workplace. Even

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215 *E.g.*, *J.K.J.*, 960 F.3d at 375.

216 While a full exploration of the relationship between compensation and deterrence is beyond the scope of this Article, research shows that the two remedial objectives overlap in scope. *See, e.g.*, Russell M. Gold, *Compensation's Role in Deterrence*, 91 NOTRE DAME L. REV. 1997, 1997 (2016) (explaining, in the context of tort class actions, that "[c]ompensation affects the amount of reputational harm that class actions inflict on defendants, and anticipating that reputational harm provides a source of deterrence"). In some instances, therefore, assessing damages against municipalities would *both* compensate injured plaintiffs and deter future violations.

217 *See, e.g.*, V. Lee Hamilton & Joseph Sanders, *Responsibility and Risk in Organizational Crimes of Obedience*, 14 RSCH. ORGANIZATIONAL BEHAV. 49, 49 (1992) ("[T]he harm that humans do to others increasingly takes place in or originates in organizations."); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 507–14 (2004) (summarizing literature showing that organizational culture matters in shaping individual behavior); Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 644–53 (2005) (providing examples of the way that workplace culture distributes attitudes and enables discrimination).

218 Armacost, *supra* note 217, at 509.

219 *Cf.* Bandes, *supra* note 24, at 1211 (emphasizing the importance of holding municipalities responsible for collective failures).

the best-intentioned employee cannot implement many categories of reforms. Anything that requires money, for example, must be handled by municipal-level decisionmakers. If additional personnel would have reduced the likelihood of a violation, the municipality itself, through its authorized decisionmakers, must budget funds to hire them.[220] Likewise, the way that legal requirements are transmitted to line employees is a matter of municipal decisionmaking: for example, new federal or state case law or statutory requirements are filtered down to employees from above.[221] And municipal level authority is necessary to ensure that workers who want to improve workplace culture are not mocked, harassed, or shouted down—that is, the workers who want obey the Constitution need municipal authority to shield them from those who don't. By holding municipalities directly accountable, the failure-to-supervise theory provides incentives for categories of change that only the municipality itself can implement.

Second, the failure-to-supervise theory provides the entity with information that it can use to prevent constitutional violations from happening in the future. A lawsuit alleging that inadequate municipal supervision contributed to a constitutional violation is an opportunity to expose information about a municipality's policies, practices, and culture. The scope of available information is broader than what would come to light if only individual officers were at stake, as well as what would come to light through discovery related only to the municipality's training practices. While some commentators have complained about "time consuming and expensive discovery about the city's policies, practices, and patterns beyond the events that are the basis of a particular case,"[222] the process of excavating the workplace surrounding a particular violation provides specific insights into the way that an institution's failure to exercise oversight enables constitutional harm.

A lawsuit involving a claim of failure to supervise may expose information of which decisionmakers for the municipality were not aware. In a discussion of discovery more generally, Diego Zambrano observes that in a system that relies heavily on private litigants to enforce civil rights, "discovery is the

220 *See, e.g.*, J.K.J. v. Polk County, No. 15-cv-428-wmc, 2017 WL 28093, at *6 n.9 (W.D. Wis. Jan. 3, 2017) (noting Polk County's decision not to hire additional personnel so as to have one male and one female guard on duty at all times, and describing dispute over cost of such personnel).

221 *See, e.g.*, *id.* at *4–6 (describing the implementation of the Prison Rape Elimination Act on the ground).

222 Dawson, *supra* note 27, at 488, 511–15.

lynchpin of private enforcement."[223] He describes the regulatory effect of discovery: "By forcing parties to disclose large amounts of information, the discovery system deters harmful behavior, structures the regularized production of information . . . and, most importantly, shapes the primary behavior of regulated entities."[224] Both discovery and litigation more generally, then, prompt what Joanna Schwartz describes as "introspection through litigation."[225] Information comes to light during litigation of which institutional decisionmakers might otherwise be unaware.[226] She observes, for example, that most police departments "do not require officers to report incidents that do not involve force," meaning that departments do not automatically learn when their officers search illegally or enter homes without warrants—but such information can come to light through litigation.[227] While information about internal operations of a municipality can also come to light through lawsuits against individual officers, a failure-to-supervise lawsuit against the municipality itself can prompt discovery specifically directed to the municipality's day-to-day practices and can reveal where those practices fell short.

Existing failure-to-supervise doctrine already lends itself to an inquiry that furthers deterrence of constitutional violations. Courts frequently compare a municipality's practices to those of other institutions, informed by testimony from experts regarding the standard of care in a particular institutional environment.[228] In cases involving prison sexual assault, for

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223 Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71, 75 (2020).

224 *Id.* While Zambrano primarily focuses on private entities such as corporations, many of his insights regarding the regulatory value of discovery translate readily to the context of municipal liability.

225 Joanna C. Schwartz, *Introspection Through Litigation*, 90 NOTRE DAME L. REV. 1055, 1057 (2015) [hereinafter Schwartz, *Introspection Through Litigation*] ("Introspection through litigation combines the recognized value of organizational introspection with the observed power of litigation to unearth information.").

226 *See* Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 845 (2012) [hereinafter Schwartz, *What Police Learn from Lawsuits*] (discussing a study of five police departments which revealed that "lawsuits have notified officials of misconduct allegations that did not surface through . . . other reporting systems").

227 Schwartz, *Introspection Through Litigation*, *supra* note 225, at 1062; *see also* Schwartz, *What Police Learn from Lawsuits*, *supra* note 226, at 862–74 (detailing how litigation helps police departments uncover information about misconduct allegations that does not surface through civilian complaints or use of force reports).

228 *E.g.*, Russo v. City of Cincinnati, 953 F.2d 1036, 1047 (6th Cir. 1992) ("Especially in the context of a failure-to-train claim, expert testimony may prove the sole avenue available to plaintiffs to call into question the adequacy of . . . training procedures."); Shadrick v. Hopkins County, 805 F.3d 724, 743 (6th

instance, experts have testified to standard practices that municipal defendants failed to adopt: for example, municipalities can prohibit guards from interacting with prisoners one-on-one and hire more guards if necessary;[229] institute a mechanism for inmates to report abuse they suffered without fear of repercussions—perhaps "something as simple as a lockbox available to inmates;"[230] and educate inmates about sexual misconduct "since they may come from life experiences that have blurred the lines of abnormal and normal relationships."[231] Expert testimony can also guide courts and municipalities away from supervisory mechanisms that run up against other constitutional concerns—for example, video cameras in prisons may seem like a useful way of supervising guards and inmates, but they risk infringing inmates' other constitutionally protected privacy interests.[232] This information about the standard supervisory practices for a particular type of institution provides a road map for improving the institution, which in turn will deter future constitutional violations.

Finally, the failure-to-supervise theory promotes informed public discourse about responsibility for constitutional violations. In particular, the emphasis on municipal blameworthiness challenges the idea that constitutional violations are primarily the result of isolated individual wrongdoing—the "bad apples" theory of constitutional harm that some courts have adopted.[233] Scholars and other commentators have argued that the "bad apples" framing is inaccurate because it

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Cir. 2015) (relying on plaintiff's expert witness); J.K.J. v. Polk County, 960 F.3d 367, 375 (en banc) (relying extensively on expert testimony).

229 *E.g.*, J.K.J. v. Polk County, No. 15-cv-428-wmc, 2017 WL 28093, at *6 n.9 (W.D. Wis. Jan. 3, 2017) (noting Polk County's decision not to hire additional personnel to have one male and one female guard on duty at all times and describing the parties' dispute over the marginal cost of personnel); Cash v. County of Erie, 654 F.3d 324, 331 ("'[G]ood and accepted practice' is to pair a female officer with a male officer whenever direct interaction with a female prisoner is required.").

230 *J.K.J.*, 960 F.3d at 379.

231 *Id.* at 375.

232 *See* Jennifer A. Brobst, *The Metal Eye: Ethical Regulation of the State's Use of Surveillance Technology and Artificial Intelligence to Observe Humans in Confinement*, 55 CAL. W.L. REV. 1, 87–99 (2018) (contending that some surveillance mechanisms in prison raise Fourth, Eighth, and Fourteenth Amendment concerns).

233 *See, e.g.*, City of Oklahoma City v. Tuttle, 471 U.S. 808, 821 (1985) (plurality opinion) (holding insufficient a jury instruction that would allow imposition of liability "simply because the municipality hired one 'bad apple'"); Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1294 (11th Cir. 2004) ("When rights are systematically violated on a near-daily basis, such abuses are sufficiently egregious to warrant supervisory liability, even if it is a single 'bad apple' engaging in the repeated pattern of unconstitutional behavior.").

offers a view of individual wrongdoing artificially divorced from the municipal environment in which it takes place.[234] Further, even if it were true that wrongdoing originates with individual bad actors, surely the municipality is still obligated to take reasonable measures to oversee a potential bad apple and to extract him if his rot becomes apparent.

An intervention into the mythology of individual wrongdoing is particularly timely. In relation to recent discussions of police brutality, for example, one line of resistance to institutional change posits that law enforcement agencies are not in need of sweeping reform because both the agencies themselves and nearly all law enforcement officers who work for them are beyond reproach; any wrongdoing is caused by a small number of wrongdoers.[235] Scholars have long disputed this view of police wrongdoing.[236] Barbara Armacost, for instances, questions whether the issue is one of "rotten apples or a rotten barrel."[237] She emphasizes that efforts at improving policing with a focus on individual officers is "missing an important component: the role of the police organization in shaping attitudes and influencing decision making."[238]

Litigation under the failure-to-supervise theory addresses this line of argument by providing an opportunity to expose the way that institutional culture, rather than individual bad actors, contributes to constitutional violations. Both within police departments and other municipal entities, subjecting the institution itself to scrutiny via the failure-to-supervise theory will lead to improved conditions and diminish the likelihood of future violations. And beyond municipalities themselves, the

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234 *E.g.*, Armacost, s*upra* note 217, at 457.

235 *See* Chiraag Bains, *"A Few Bad Apples": How the Narrative of Isolated Misconduct Distorts Civil Rights Doctrine*, 93 IND. L.J. 29 (2018) (surveying instances of the narrative of isolated misconduct in doctrine and discourse).

236 *E.g.*, BUTLER, *supra* note 33, at 6 (explaining that black men suffer harm from the police as the result of systemic forces, "not bad apple cops"); Gilles, *supra* note 21, at 31–32 ("[W]here liability falls solely on individual officers, municipalities have little incentive to develop comprehensive responses to rampant unconstitutional practices. . . . Holding the municipality itself liable for injuries caused by its officials makes it more difficult to take refuge in the 'bad apple theory' and more likely that the municipality will take steps to remedy the broader problems."); Susan A. Bandes, *The Lone Miscreant, the Self-Training Prosecutor, and Other Fictions: A Comment on* Connick v. Thompson, 80 FORDHAM L. REV. 715, 721 (2011) ("The story of a few bad apples in an otherwise pristine barrel is both comforting and seductive."); Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1481–82 (1993) (writing shortly after the Rodney King beating and questioning the "Bad Apples vs. Bad Department" dichotomy).

237 Armacost, *supra* note 217, at 457 (alterations in capitalization omitted).

238 *Id.* at 459.

failure-to-supervise theory engages other institutions in the project of deterring constitutional violations. Information about a municipality's failure to supervise its employees can escape from the sphere of litigation into the public domain through the work of professional journalists. Once such information is broadly available, it can reach both activists and the general public, which can prompt calls for institutional reform. Municipal decisionmakers, particularly elected officials, are sensitive to public discourse and public pressure. Discussion of constitutional harm—not only as caused by individual officers, but as enabled by municipalities themselves—can encourage constructive institutional reform and deter future constitutional violations.

C. Toward Supervision

As the data in Part II reveal, plaintiffs often fail to bring failure-to-supervise claims or give them only cursory treatment in their briefs. The evidence I have presented here suggests that a deeper engagement is worth plaintiffs' time. While the current doctrine of municipal liability has drawn critique, most proposals to improve upon it would impose dramatic revisions. For example, scholars have proposed holding municipalities liable under respondeat superior rather than requiring proof of policy or custom, which would require overruling *Monell* itself,[239] or reworking both individual and municipal liability in ways that would require overruling Supreme Court precedent, passing federal legislation, or both.[240]

By contrast, while the Supreme Court has never adjudicated a failure-to-supervise claim, the theory is available to plaintiffs under current law. The theory of failure to supervise has been recognized by all twelve circuits—either with a ruling in favor of plaintiffs, or with a discussion that accepts the viability of the theory.[241] And as section II.B.2 demonstrates, there is ample precedent on which plaintiffs can model a successful failure-to-supervise claim.[242] The *Monell* Survey and Failure to Supervise Survey reveal that, in some instances, inadequate presentation of a failure-to-supervise claim is the result of plaintiff's briefing.[243] In other instances, it is the

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239 *E.g.*, Fisk & Chemerinsky, *supra* note 27, at 796.

240 *See supra* note 27 (collecting scholarly proposals).

241 *See supra* note 117 and accompanying text.

242 *See supra* notes 116–153 and accompanying text.

243 In some cases, the district or appellate court did not consider the municipal failure claim because it was not adequately raised in the complaint or on appeal. *E.g.*, Murphy v. City of Tulsa, 950 F.3d 641 (10th Cir. 2019) (declining to

product of judicial framing.[244] The overall effect, however, is that many plaintiffs who might succeed in showing municipal policy or custom on a theory of failure to supervise miss the opportunity to do so.[245]

Plaintiffs are not yet making the most of the failure-to-supervise theory. While a comprehensive blueprint for litigating municipal failure-to-supervise claims is beyond the scope of this Article, I offer three suggestions here as a foundation for future inquiry and discussion. First and most obviously, plaintiffs can make more of the failure-to-supervise theory by pursuing failure-to-supervise claims vigorously at all stages of litigation.[246] They should clearly articulate those claims separate from claims based on other theories of municipal liability, including other municipal failure claims. Further, they should make clear that more specific failures of oversight in the workplace—failure to investigate, failure to discipline, and so forth—are really subspecies of failure to supervise, and that these sub-claims are best aggregated to create an overall picture of a constitutionally deficient workplace.[247]

Second, plaintiffs who survive a motion to dismiss can build out the standard by which adequate supervision is measured by using expert testimony. Courts are often receptive to expert testimony about how a particular institution or workplace fell short; they are then more willing to conclude that the shortfall amounted to deliberate indifference to the risk of the

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discuss supervision where plaintiff has a heading in her brief saying supervision but does not discuss it); Powell v. Med. Dep't Cuyahoga Cnty. Corr. Ctr., No. 18-3783, 2019 WL 3960770 (6th Cir. Apr. 8, 2019) (dismissing failure claim because it was not raised in complaint); Barnes v. City of Centralia, 943 F.3d 826, 832 (7th Cir. 2019) (noting that plaintiff failed to raise failure to train and supervise before district court and stating that in any event these claims would fail). Many civil rights claims are brought by lawyers who are not experts in civil rights litigation. Unsurprisingly, this sometimes results in subpar litigation. For example, the complaint in *J.K.J. v. Polk County* initially proposed recovery on a theory of respondeat superior. Complaint at 15–17, J.K.J. v. Polk County, 960 F.3d 367 (7th Cir. 2020) (No. 15-cv-428). The fact that most civil rights cases are litigated at the trial level by lawyers and law firms who do not deal primarily with civil rights cases is a topic I will examine in future work.

244 *See supra* notes 160–185.

245 *Id.*

246 While this Article focuses on federal appellate cases, my review of the complaints associated with those cases suggests that many claims are underdeveloped at the trial level as well.

247 *Cf.* Waller v. City and County of Denver, 932 F.3d 1277, 1284 (10th Cir. 2019) (addressing separately claims of inadequate hiring, failure to train, failure to supervise, failure to investigate, and failure to discipline).

deprivation of constitutional rights.[248] Enhanced use of experts to prove failure to supervise is also the antidote to the comments of judges who are loathe to engage in the minutia of the municipal workplace. Looking to expert testimony, however, is not micromanaging. Rather, it is appropriate deference through established rules of evidence and procedure.[249]

Third and finally, plaintiffs should consider using the failure-to-supervise theory—either instead of or in addition to the failure-to-train theory—any time an egregious and obvious constitutional wrong takes place in the workplace. In such cases, the failure-to-train theory often falls short because of the difficulty in arguing that a municipality should have done more to train a government official not to do something that anyone, including the official themselves, would have known is blatantly wrong. In such situations, failure to supervise is a much stronger conceptual fit. It is easier to argue that a municipality should have better supervised a guard who raped a prisoner or a police officer who robbed a house while on duty than it is to argue that such offenders should have been better trained. The superior conceptual fit provided by the failure-to-supervise theory will enhance plaintiffs' likelihood of success.

Courts, too, can play a part in developing the failure-to-supervise theory by analyzing the claims carefully and seriously, even—or especially—when the plaintiff ends up losing. Trial courts can help to frame failure-to-supervise claims by clearly articulating the evidence that implicates training versus supervision in ruling on motions, or, later, in jury instructions. Both trial and appellate courts can adjudicate failure to train and failure to supervise as separate theories, analyzing carefully whether the failure in question flowed from the failure to train at the beginning of employment or the failure to exercise ongoing oversight. And even where courts eventually deny the plaintiff's claim, more careful attention to failure to supervise as a conceptual matter can lead to greater clarity and coherence in the doctrine, which is currently fragmented into many different theories. Finally, courts who are concerned about im-

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248 Of course, expert testimony can be quite costly, with the result that it is available mostly to well-resourced plaintiffs, but for this subset of plaintiffs it can be a valuable tool.

249 *Cf.* Sheldon Nahmod, *The Long and Winding Road from* Monroe *to* Connick, 13 LOY. J. PUB. INT. L. 427, 433 (2012) ("[W]hat is on trial in failure to train cases is the local government's training program itself. A plaintiff must prove what adequate training is and why the training offered was inadequate. This requires federal courts to carefully evaluate every aspect of that training in order to decide whether the plaintiff's claim can go forward.").

posing crippling municipal liability should not lose sight of the fact that municipalities, too, can benefit from more careful litigation of failure-to-supervise claims. Adherence to the standard of care in similar workplaces will help municipalities understand what is expected of them, and to prevent constitutional violations before they happen.

CONCLUSION

As a theory of municipality liability, failure to supervise is both underdeveloped and a promising avenue for recovery. To further § 1983's goals of compensating of injured plaintiffs and deterring future wrongdoing, the failure-to-supervise theory deserves a prominent role in constitutional litigation. Plaintiffs, courts, and municipalities themselves should address municipal failures by litigating the failure-to-supervise theory vigorously, adjudicating it thoroughly, and, ultimately, striving toward better supervision.