FAILURE TO SUPERVISE AS MUNICIPAL CUSTOM

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Recovering damages from municipalities has proven a vexing challenge for civil rights litigators. Scholars have demonstrated a range of doctrinal and practical challenges, chief among them the demands of the "policy or custom" standard imposed by the Supreme Court in *Monell*. In previous work, coauthor Leong has argued that the theory of municipal failure to supervise offers an underexplored and promising avenue for recovery. This Article offers an empirical examination of the claim that a municipality failed to supervise its employees as a means to establish policy or custom. It provides a novel and comprehensive survey of every failure-to-supervise case decided since 1980 in each of the twelve federal appellate circuits, exploring opportunities and challenges for litigants in each jurisdiction. In addition to providing an important resource for judges and litigators confronting the failure-to-supervise theory, it also highlights variation among (and occasionally within) jurisdictions and offers practical and concrete advice for successful litigation of such claims.

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INTRODUCTION

Many scholars have found that municipalities are rarely held accountable for constitutional violations caused by their employees.[1] Some reasons for this difficulty are doctrinal. In contrast to private sector employers,[2] municipalities may not be held liable on the ground that they employed an individual who violates the Constitution.[3] 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.[4]

1. *See, e.g.*, Joanna C. Schwartz, *Municipal Immunity*, 109 VA. L. REV. 1181 (2023) [hereinafter Schwartz, *Municipal Immunity*]; Nancy Leong, *Civil Rights Liability for Bad Hiring*, 108 MINN. L. REV. 1 (2023) [hereinafter Leong, *Bad Hiring*]; Nancy Leong, *Municipal Failures*, 108 CORNELL L. REV. 345 (2023) [hereinafter Leong, *Municipal Failures*].

2. *See, e.g.*, PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 499–500 (W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen eds., 5th ed. 1984) [hereinafter PROSSER & KEETON]; 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).

3. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 694 (1978).

4. *Id.* at 694.

The Supreme Court has established four ways that plaintiffs may prove policy or custom: (1) an express law or policy authorizing the constitutional violation;[5] (2) a final decision by a person with policymaking authority;[6] (3) a widespread pattern of conduct;[7] or (4) a municipal failure to act, such as a failure to adequately screen, train, or supervise municipal employees.[8] In previous work, Professor Nancy Leong, a coauthor of this Article, has referred to claims in this final category as "municipal failure claims," and we adopt that phrasing here.[9]

The municipal policy or custom requirement has prompted criticism from both judges[10] and legal scholars.[11] Scholars have argued both analytically and empirically that the policy or custom requirement is "virtually prohibitive to recovery for plaintiffs."[12] Yet the fact remains

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

6. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123–24 (1988) (plurality opinion); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483–84 (1986) (plurality opinion).

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

8. *City of Canton v. Harris*, 489 U.S. 378, 388–89 (1989); *Bd. of the Cnty. Comm'rs v. Brown*, 520 U.S. 397, 410–12 (1997); *Connick*, 563 U.S. at 61–62.

9. *See* Leong, *Municipal Failures*, *supra* note 1, at 349. Others have called these "failure to" claims. *See, e.g.*, Karen M. Blum, *Making Out the* Monell *Claim Under Section 1983*, 25 TOURO L. REV. 829, 830 (2009) [hereinafter Blum, *The* Monell *Claim*] ("[T]he *City of Canton* method of demonstrating liability" arises "when plaintiffs point to a failure to 'blank': a failure to train, failure to supervise, a failure to discipline, a failure to adequately screen, etc.").

10. *See, e.g.*, *Brown*, 520 U.S. at 430–31 (Breyer, J., dissenting); *Pembaur*, 475 U.S. at 487 (Stevens, J., concurring in part and concurring in the judgment); *Vodak v. City of Chicago*, 639 F.3d 738, 747 (7th Cir. 2011) (Posner, J.) ("For reasons based on what scholars agree are historical misreadings . . . 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.").

11. *See, 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").

12. Leong, *Municipal Failures*, *supra* note 1, at 350; *see also* Blum, *Section 1983 Litigation*, *supra* note 11, at 916, 922 (describing challenges of pleading and proof); Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil*

that litigators often must navigate the policy or custom requirement to have any hope of recovering against a municipality. Against this backdrop, Leong previously argued that failure-to-supervise claims hold promise that has not yet been fully explored by litigators.[13]

To build on Leong's prior work, this Article presents a comprehensive survey of municipal failure-to-supervise claims in the federal appellate courts. Based on an analysis of every failure-to-supervise claim considered by a federal appellate court between 1980 and 2023, this Article elaborates on federal courts' treatment of the failure-to-supervise theory of municipal liability.[14] The Article evaluates how federal appellate panels analyze failure-to-supervise theories and identifies relevant trends unique to each federal circuit court. The result is a repository of information that we hope will be of use to scholars, judges, and perhaps most of all litigators.

Every federal appellate court has recognized the existence and validity of failure-to-supervise theories of municipal liability. However, courts are inconsistent in their treatment of failure-to-supervise claims, often ignoring or melding them with other municipal failure claims. Further, there are numerous failure-to-supervise tests used among the federal appellate courts, which contributes to the uncertainty surrounding these claims. Despite the variability of approaches to failure-to-supervise claims, this Article shows that these claims are not only valid routes of municipal liability but that they are winnable.

While municipal failure-to-supervise claims are not a magic bullet, this Article suggests that such claims offer an underused opportunity to establish municipal liability in suits under § 1983—a goal that is particularly important given the stalemate frustrating efforts to reform qualified immunity as an obstacle to individual liability.[15] The lack of tenable options available to civil rights lawyers in many cases warrants close scrutiny of every available alternative. Further, we advocate that

Rights Enforcement, 116 NW. U. L. REV. 737, 754–55 (2021) ("[T]he Supreme Court's limitation on municipal liability operates as a significant barrier to relief for those injured by unconstitutional conduct."); Smith, *supra* note 11; Schwartz, *Municipal Immunity*, *supra* note 1; Leong, *Bad Hiring*, *supra* note 1.

13. Leong, *Municipal Failures*, *supra* note 1, at 352.

14. The circuit survey took several months to complete. The cases were gathered by first searching ["fail*" /s "supervis*" AND Monell] on Lexis. Cases without a failure-to-supervise theory of municipal liability were then eliminated. This first round of eliminations mostly consisted of two types of cases: (1) where a plaintiff only asserted a failure-to-supervise theory against a defendant in their *individual* capacity; and (2) where the case was included in the search results only because the reviewing court referenced other sources (for example, in many cases involving only a failure-to-train claim, the court quoted controlling precedent in which the preceding case involved a failure to train and supervise).

15. Leong, *Municipal Failures*, *supra* note 1, at 352.

the failure-to-supervise theory should be evaluated more closely by courts.

Greater attention to the failure-to-supervise theory is critical for three reasons. First, the theory offers an opportunity for plaintiffs at a time when opportunities are rare. Municipalities are not entitled to qualified immunity, so a plaintiff can recover against a municipality even when no individual officer can be held liable due to qualified immunity or other obstacles.[16] Moreover, in contrast to many proposals for addressing the challenges of municipal liability,[17] the failure-to-supervise theory is consistent with current precedent in the Supreme Court and all twelve appellate courts.[18] An enhanced role for failure-to-supervise claims can expand opportunities for plaintiffs to recover with no or few modifications to current doctrine.

Second, the failure-to-supervise theory often provides an accurate and common-sense description of what a municipality did wrong. In many instances, the problem in question would not have been rectified with other types of municipal interventions, such as explicit written policies, more or different training, or enhanced screening of employees prior to hiring.[19] Rather, a municipal shortcoming is best characterized as a failure to adequately supervise employees—that is, the failure-to-supervise theory is simply the best fit.[20]

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16. *See Horton ex rel. Horton v. City of Santa Maria*, 915 F.3d 592, 604 (9th Cir. 2019); *see also infra* notes 42–44 and accompanying text.

17. *See, e.g.*, Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 791 (1999) (arguing for vicarious liability against municipalities in lawsuits under § 1983); Jeffries, *supra* note 11, at 209, 263 (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 rights were "*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 for "(1) a pattern or practice of local government police misconduct, and (2) isolated instances where a local police department 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 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, 1959–66 (2018) (explaining why it is highly unlikely that either the Supreme Court or Congress will abolish qualified immunity).

18. *See infra* Section II.B.

19. *See* Leong, *Municipal Failures*, *supra* note 1, at 399.

20. *Id.*

Finally, the failure-to-supervise theory not only offers plaintiffs an additional avenue for recovery but also prompts examination of institutional structures and cultures that enable constitutional violations. By focusing judicial and social attention on institutional level failures that result in constitutional violations, the failure-to-supervise theory can help to counteract the notion that most wrongdoing is the fault of a "few bad apples," which has too frequently overtaken conversations about police liability and distracted from overarching institutional reform.[21]

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 the federal appellate courts. It presents an original and comprehensive survey to develop an account of the way municipal failure-to-supervise claims are litigated and decided. Part III concludes with preliminary recommendations for litigating and adjudicating the failure-to-supervise theory.

I. BACKGROUND

Congress enacted 42 U.S.C. § 1983 as part of the Ku Klux Klan Act of 1871 with the purpose of both compensating victims of civil rights violations and deterring future violations.[22] After its passage, 42 U.S.C. § 1983 lay largely dormant for decades.[23] But following the 1961 Supreme Court decision in *Monroe v. Pape*,[24] which held that government officials could be held liable under § 1983 for official conduct even when that conduct was not directed or authorized by state law,[25] the Court ushered in a new era in civil rights litigation. In subsequent years, the number of cases increased exponentially.[26]

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21. *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/Y6X3-FJP8] (June 6, 2020, 5:01 AM) (transcript of conversation with Paul Butler).

22. *See, e.g.*, *Monroe v. Pape*, 365 U.S. 167, 171–80 (1961) (recounting legislative history of § 1983); *Robertson v. Wegmann*, 436 U.S. 584, 590–91 (1978); *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.").

23. One researcher located only twenty-one cases decided under § 1983 between 1871 and 1920. Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951).

24. 365 U.S. 167 (1961).

25. *Id.* at 181–87.

26. As Leong has previously reported, federal district courts considered more than two thousand lawsuits brought under § 1983 during each *month* of the year 2020. *See* Leong, *Municipal Failures*, *supra* note 1, at 355.

Despite the commendable aims of 42 U.S.C. § 1983, few individuals who suffer constitutional violations caused by government employees ever receive compensation for their injuries.[27] The obstacles to compensation are myriad and range from justiciability requirements[28] to jurisdictional requirements[29] to qualified and other immunities[30] to difficulty securing representation.[31]

Qualified immunity has received the greatest attention as an obstacle to recovery, with many commentators and activists focusing on qualified immunity and arguing that the defense should be abolished to enable recovery for injured plaintiffs.[32] Recent research by Joanna Schwartz has found that qualified immunity is relatively rarely the formal reason that an individual officer escapes liability for damages,[33] but the doctrine still serves as an obstacle to recovery by plaintiffs.[34] Yet the defense is likely to remain available 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.[35]

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27. *See generally* ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE (2017).

28. Sunita Patel, *Jumping Hurdles To Sue the Police*, 104 MINN. L. REV. 2257, 2271 (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.").

29. *See, e.g.*, Fallon, *supra* note 11, at 933, 957–59 (discussing the Supreme Court's "increasing hostility to constitutional tort claims").

30. *See, 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 the need to show "clearly established law"); Chen, *supra* note 17, 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) (summarizing critiques of qualified immunity).

31. Nancy Leong, Katelyn Elrod & Matthew Nilsen, *Pleading Failures in* Monell *Litigation*, 73 EMORY L.J. 801, 843–44 (2024).

32. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 88 (2018) (arguing that the Supreme Court's justifications for qualified immunity fail for historical, conceptual, and doctrinal reasons); Schwartz, *supra* note 30, at 1800 (arguing that the Supreme Court should end qualified immunity).

33. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 46 (2017) (presenting data from a docket analysis showing that "qualified immunity is rarely the formal reason that Section 1983 cases are dismissed").

34. Alexander Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 492–93 (2011) (noting 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).

35. Chen, *supra* note 17, at 1959–66 (explaining why it is highly unlikely that either the Supreme Court or Congress will abolish qualified immunity).

With the debate over qualified immunity at an impasse, some commentators have advocated for increased attention to liability against government entities themselves.[36] In *Monell v. Department of Social Services*,[37] the Supreme Court held that municipalities may be sued directly under § 1983,[38] overruling a portion of *Monroe* that held that municipalities did not qualify as "persons" within the meaning of § 1983.[39] The Court relied on both the legislative history of the statute and the common law understanding that municipal corporations were susceptible to suit.[40]

Municipal liability presents a number of important advantages. First, a municipality provides a source of recovery even when an individual officer is judgment-proof.[41] 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.[42] As the Ninth Circuit has explained, constitutional violations sometimes

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36. *See, e.g.*, Fallon, *supra* note 11, at 994–96 (advocating for increased attention to entity liability within constitutional litigation); Schwartz, *Municipal Immunity*, *supra* note 1, at 1184; Leong, *Municipal Failures*, *supra* note 1.

37. 436 U.S. 658 (1978).

38. *Id.* at 701.

39. *Monroe v. Pape*, 365 U.S. 167, 189–92 (1961).

40. *Monell*, 436 U.S. at 664–95.

41. *See, e.g.*, Fisk & Chemerinsky, *supra* note 17, at 796 ("Even when individual officers cannot succeed with an immunity defense, they are unlikely to have the resources to pay a judgment. The deeper pockets of municipalities tremendously increase the likelihood that an injured person will be compensated."). To some extent, municipalities already satisfy judgments against their employees through indemnification: Joanna Schwartz has shown that government employers almost always indemnify their employees either statutorily or by contract. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 936–37 (2014) (finding that police officers are indemnified for 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations against them). However, indemnification is not always certain in advance, and some municipalities leverage that uncertainty to plaintiffs' disadvantage. *Id.* at 931–36.

42. *See, e.g.*, *Horton ex rel. Horton v. City of Santa Maria*, 915 F.3d 592, 604 (9th Cir. 2019); *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."); *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.").

occur "'not . . . as a result of actions of the individual officers, but as a result of the collective inaction' of the municipal defendant."[43] That is, a municipality can still be liable if a plaintiff shows that it caused a violation of their 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."[44] Municipal 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. And finally, municipal liability serves an important discursive function by forcing recognition of the role that institutional—rather than merely individual—actors play in contributing to constitutional violations.[45]

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 respondeat superior, "a municipality can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue."[46] The plaintiff must therefore show that the municipality's "policy or custom" caused the violation.[47]

The Supreme Court has established four avenues for plaintiffs to demonstrate a municipal policy or custom.[48] One possibility is to show the existence of an explicit municipal law or policy that resulted in a deprivation of the plaintiff's constitutional rights.[49] A second option is to demonstrate that the injury resulted from a decision by a person who is a "policymak[er]," meaning that they are entrusted with final decision-making authority.[50] A third option is to show a widespread practice that is so long-standing and well-settled that it constitutes a "'custom or

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43. *Horton*, 915 F.3d at 604 (quoting *Fairley v. Luman*, 281 F.3d 913, 917 (9th Cir. 2002)).

44. *Id.* (quoting *Fairley*, 218 F.3d at 917 n.4); *see also Owen v. City of Independence*, 445 U.S. 622, 650 (1980) (holding that municipalities are not entitled to qualified immunity and may not assert good faith as a defense to liability).

45. Leong, *Municipal Failures*, *supra* note 1, at 354; *see also supra* note 21 and accompanying text.

46. *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* legal acts.'" (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986))).

47. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

48. *See, e.g.*, *Connick*, 563 U.S. at 60–62 (articulating paths to establish municipal policy or custom); *Jackson v. City of Cleveland*, 925 F.3d 793, 828 (6th Cir. 2019).

49. *Connick*, 563 U.S. at 61 ("Official municipal policy includes the decisions of a government's lawmakers . . . .").

50. *Id.* ("Official municipal policy includes . . . the acts of [government] policymaking officials."); *see also Pembaur*, 475 U.S. at 481–84 (plurality opinion); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123–27 (1988) (plurality opinion).

usage' with the force of law."[51] The fourth and final option is to demonstrate that the municipality should be liable as a result of its *failure* to take some action.[52] Such claims most frequently point to a failure on the part of the municipality to adequately train its employees,[53] 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.[54]

The Supreme Court has emphasized that a municipal failure claim must be held to stringent standards of fault and causation.[55] As the Court articulated in *Board of the County Commissioners v. Brown*,[56] "a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights."[57]

The culpability analysis requires plaintiffs to show that the municipal defendant was "deliberately indifferent to a known or obvious risk."[58] This "stringent standard . . . requir[es] proof that a municipal actor disregarded a known or obvious consequence of his action."[59] The inquiry is whether "city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights"; if so, "the city may be deemed deliberately indifferent if the policymakers choose to retain that

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51. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 168 (1970); *see also Connick*, 563 U.S. at 61 ("Official municipal policy includes . . . practices so persistent and widespread as to practically have the force of law.").

52. *City of Canton v. Harris*, 489 U.S. 378, 387 (1989); *Connick*, 563 U.S. at 61–62.

53. *E.g.*, *Harris*, 489 U.S. at 387.

54. *See, e.g.*, *Bd. of the Cnty. Comm'rs v. Brown*, 520 U.S. 397, 409–11 (1997); *Connick*, 563 U.S. at 61–62.

55. *Connick*, 563 U.S. at 61 (quoting *Brown*, 520 U.S. at 410).

56. 520 U.S. 397 (1997).

57. *Id.* at 404.

58. *Brown*, 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." (quoting *Harris*, 489 U.S. at 388)). For contemporaneous commentary on the deliberate indifference standard and the issues it raises, see 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).

59. *Brown*, 520 U.S. at 410. In Eighth Amendment claims, the showing of a municipality's deliberate indifference to prove the § 1983 claim is *in addition to* the separate requirement of a showing of the element of deliberate indifference necessary to prove an Eighth Amendment violation. For an examination and critique of the modern deliberate indifference standard in the Eighth Amendment context, see Nicole B. Godfrey, *Institutional Indifference*, 98 OR. L. REV. 151, 165–74 (2020) (describing the Eighth Amendment deliberate indifference standard).

program."[60] The standard allows for government officials to make mistakes.[61] For example, if "an otherwise sound program has occasionally been negligently administered," a plaintiff's lawsuit will not necessarily result in liability.[62] Not all federal circuits analyze deliberate indifference in precisely the same way: Some have developed idiosyncratic analyses,[63] while others simply restated the general deliberate indifference standard articulated by the Supreme Court.[64]

In the context of a failure-to-*train* claim, the Court previously held that "a pattern of injuries [is] ordinarily necessary to establish municipal culpability and causation."[65] But the Court has not ruled out the possibility that a plaintiff can establish deliberate indifference based on a single constitutional violation.[66] The Court said in *City of Canton*:

> [It] 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 . . . can reasonably have been said to have been deliberately indifferent to the need [for further action].[67]

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 complete this task."[68]

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

61. *Harris*, 489 U.S. at 390–91.

62. *Id.* at 391.

63. The Second and Third Circuits, for example, generally apply a three-part analysis: "(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); *Cash v. County of Erie*, 654 F.3d 324, 334 (2d Cir. 2011) (discussing nearly identical test).

64. *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 deliberate indifference standard).

65. *Bd. of the Cnty. Comm'rs v. Brown*, 520 U.S. 397, 409 (1997); *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 *Brown*, 520 U.S. at 409)).

66. *See, e.g.*, *Brown*, 520 U.S. at 409.

67. *Harris*, 489 U.S. at 390; *see also* Blum, *The* Monell *Claim*, *supra* note 9, at 842–47 (discussing municipal failure to act in the face of an obvious need).

68. *Harris*, 489 U.S. at 390 n.10. In *Connick v. Thompson*, the Court held that single-incident liability for failure to train was not available in cases involving *Brady* violations. 563 U.S. at 64 ("[Such failures] do[] not fall within the narrow range of *Canton*'s hypothesized single-incident liability."). But the Court has not ruled out the

To show causation, the plaintiff must prove that the inadequate supervision was the "moving force" behind the constitutional violation.[69] 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 [the] plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident."[70] 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.[71] 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.[72]

"Among the various sub-theories of municipal failure, failure to train is by far the most litigated in the federal courts."[73] 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 (*City of Canton v.*

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possibility of single-incident liability as a general matter. Leong, *Municipal Failures*, *supra* note 1, at 361–62, 375.

69. *Harris*, 489 U.S. at 389 (1989) (first quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978); and then quoting *Polk County v. Dodson*, 454 U.S. 312, 326 (1981)).

70. *Harris*, 489 U.S. at 392 (citing *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985) (plurality opinion)).

71. *See, e.g.*, *Cash v. County of Erie*, 654 F.3d 324, 342 (2d Cir. 2011) ("moving force" 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.") (citations omitted) (quoting PROSSER & KEETON, *supra* note 2, § 30, at 165)).

72. *Harris*, 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 . . . ." (footnote omitted)); *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 *Bd. of the Cnty. Comm'rs v. Brown*, 520 U.S. 397, 406, 410 (1997)).

73. Leong, *Municipal Failures*, *supra* note 1, at 363.

Harris,[74] *Oklahoma City v. Tuttle*,[75] and *Connick v. Thompson*[76]) and failure to screen (*Brown*[77]).

Conceptually, there is an important difference between the theories of failure to train and 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.[78] 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 employees do,[79] providing regular evaluations of employees,[80] and taking complaints from the public seriously and addressing them promptly with appropriate investigation, retraining, and discipline.[81]

Against this doctrinal backdrop, Leong's prior empirical examination of failure-to-supervise cases found that the theory offers promise yet is seldom used.[82] That article presented two data sets, one containing every municipal liability case decided in 2019, and the other including every case involving a failure-to-supervise claim during the twelve years from 2010 through 2021.[83] Leong found that failure-to-supervise claims are rarely litigated: For example, just fifteen such

74. 489 U.S. 378, 391 (1989).

75. 471 U.S. 808, 823 (1985) (plurality opinion).

76. 563 U.S. 51, 54 (2011).

77. *Bd. of the Cnty. Comm'rs v. Brown*, 520 U.S. 397, 409 (1997).

78. 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 retraining 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 retraining 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.

79. *See, e.g.*, *Forrest v. Parry*, 930 F.3d 93, 108 (3d Cir. 2020) (finding evidence supported failure to supervise claim when officers "engaged in illicit conduct . . . knowing that they were not being supervised"); *Covington v. City of Madisonville*, 812 F. App'x 219, 226–28 (5th Cir. 2020) (finding allegations supported failure-to-supervise claim when police chief ignored warnings of future misconduct).

80. *See, e.g.*, *Wright v. City of Euclid*, 962 F.3d 852, 881 (6th Cir. 2020) (finding evidence supported failure-to-supervise claim where "officers' performances were never evaluated").

81. *See, e.g.*, *Est. of Roman v. City of Newark*, 914 F.3d 789, 799–801 (3d Cir. 2019) (finding evidence supported failure-to-supervise claim where city ignored complaints and did not discipline officers for "sustained allegations of misconduct").

82. Leong, *Municipal Failures*, *supra* note 1, at 352.

83. *Id.* at 364.

claims were adjudicated by the federal appellate courts in 2019, most in a cursory fashion.[84] Yet between 2010 and 2021, plaintiffs prevailed on the theory in seven circuits, in several instances winning large jury verdicts.[85]

Given the small number of municipal failure-to-supervise claims located in Leong's prior work, further research was needed to arm litigators with the tools and context necessary to make the most of the failure-to-supervise theory. Building on the doctrinal foundation in this Part, therefore, the next Part describes how municipal failure to supervise claims play out in the federal appellate courts.

II. Failure To Supervise in the Federal Appellate Courts

This Part surveys federal appellate litigation of municipalities' failure to supervise their employees over the past forty-plus years. Section II.A frames the discussion with some generalizations about the litigation of municipal failure-to-supervise claims in the federal courts. Section II.B then presents the results of an original survey of failure-to-supervise litigation in the federal courts since 1980. It articulates trends within circuits and notes variation among the circuits. Throughout, we emphasize the path dependency—and corresponding lack of close analysis—in much of failure-to-supervise litigation.

A. Overall Observations

Federal appellate courts sometimes fail to analyze failure-to-supervise claims as a distinct method of establishing municipal policy or custom. Nonetheless, failure to supervise is a widely recognized theory of liability. Since 1980, we identified over 150 failure-to-supervise or synonymous claims against municipalities that were adjudicated by the federal appellate courts.[86] Yet courts often group the failure-to-supervise claim together with other claims, even when those claims are analytically distinct. Only about one in three failure-to-supervise claims we identified were considered independently from other asserted municipal failure claims, such as failure to train and failure to screen. Most often, failure-to-supervise claims are conflated with—or entirely swallowed by—failure-to-train claims.

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84. *Id.* at 365–69.

85. *Id.* at 369–72; *see, e.g.*, *Cash v. County of Erie*, 654 F.3d 324, 327 (2d Cir. 2011) ($500,000 jury verdict).

86. Claims that a municipality failed to investigate, discipline, and/or act were included under the failure-to-supervise umbrella when the claims were grounded in supervisory failures akin to those commonly cited in explicit failure-to-supervise claims. Unless otherwise specified, when failure-to-supervise claims are referenced in this Article, this includes the synonymous claims.

When failure-to-supervise claims are combined with failure-to-train claims, the appellate panels generally conduct an analysis in one of three ways. Some courts employ a "generalized combination" approach, clearly utilizing evidence pertaining to each claim, yet attributing the evidence to one combined claim.[87] This approach leaves future litigants guessing as to which evidence was advanced in support of which theory and raises questions about the failure-to-supervise claim's viability on its own. Other courts adopt an "erasure" approach: They only discuss evidence and legal standards pertaining to training inadequacies and then baldly state their conclusion regarding both claims, and may even label the section as "Failure to Train or Supervise."[88] Finally, some panels use an "ignorance" approach: They simply do not analyze an asserted failure-to-supervise claim even when the plaintiff has raised it.[89] A few panels have actually injected training-related evidence into an independent analysis of a failure-to-supervise claim.[90]

Despite the varied approaches appellate courts take in evaluating allegations of a municipality's failure to supervise, the basic components necessary to sufficiently assert a failure-to-supervise claim are fairly consistent throughout the circuits. Consistent with the discussion in Part I, successful failure-to-supervise claims generally have three components: (1) identification; (2) attribution of culpability; and (3) causation.

First, most circuits require plaintiffs to establish that there is a "policy" or "custom" of inadequate supervision pursuant to *Monell*.[91] Some circuits do not explicitly require a plaintiff to classify the failure as a policy or custom under *Monell*, but plaintiffs still must identify specific inadequacies in the municipality's supervision which led to their injury.

Second, plaintiffs must show that the municipality was deliberately indifferent to the plaintiff's rights. This is universally recognized in the appellate courts as the standard of culpability necessary to hold

87. *See, e.g.*, *infra* notes 108–12 and accompanying text (analyzing *Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir. 1989)); *Wright v. City of Euclid*, 962 F.3d 852, 881–82 (6th Cir. 2020); *Gold v. City of Miami*, 151 F.3d 1346, 1350–52 (11th Cir. 1998).

88. *See, e.g.*, *Hansell v. City of Atlantic City*, 46 F. App'x 665, 667 (3d Cir. 2002); *Jackson v. Valdez*, 852 F. App'x 129, 136–37 (5th Cir. 2021).

89. *See, e.g.*, *Goodman v. Harris County*, 571 F.3d 388, 394–96 (5th Cir. 2009); *Zavatson v. City of Warren*, 714 F. App'x 512, 526–27 (6th Cir. 2017); *Carr v. Castle*, 337 F.3d 1221, 1221, 1228, 1232 (10th Cir. 2003); *Trammel v. Paxton*, 322 F. App'x 907, 911 (11th Cir. 2009).

90. *See Buchanan v. County of Humboldt*, 50 F. App'x 343, 345 (9th Cir. 2002); *Thompson v. Sheriff*, 542 F. App'x 826, 828–29 (11th Cir. 2013).

91. Generally, municipal "policies" are statements or regulations officially adopted by policymakers, and "customs" are practices which are so widespread and well-settled that they represent official policy. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978).

municipalities liable for failures to supervise.[92] In order to be deliberately indifferent to the failures in supervision, a municipality must have notice of the failures. Notice is usually proven by either (1) a prior pattern of similar constitutional violations and/or injuries or (2) if the plaintiff cannot demonstrate a sufficient pattern, a showing that, without more or better supervision, the violation at issue was essentially inevitable (*i.e.*, the rare "single-incident" exception).[93] A few federal appellate courts have used the three-part deliberate indifference test articulated by the Second Circuit in *Walker v. City of New York*.[94]

Third, plaintiffs must show that the deliberately indifferent failure to supervise proximately caused the injury at issue. The municipality's failure to supervise must be the moving force behind the constitutional violation, more so than the individual actor's conduct.[95]

Plaintiffs who provide evidence of a pattern of similar constitutional violations and/or injuries are more likely to successfully assert a failure-to-supervise theory in the federal appellate courts. Indeed, many of the failure-to-supervise claims that fail at the motion to dismiss or summary judgment phase do so because a plaintiff cannot show a history of unchecked conduct comparable to that at issue.

While all federal appellate courts agree on the three basic elements required in a failure-to-supervise claim, no two courts share an identical test. The main differences emerge in the formulations of the courts' deliberate indifference standard. There are at least six variations of the deliberate indifference standard throughout the federal appellate courts.[96]

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92. *See Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir. 1989); *Vann v. City of New York*, 72 F.3d 1040 (2d Cir. 1995); *Forrest v. Parry*, 930 F.3d 93 (3d Cir. 2019); *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987); *Edwards v. City of Balch Springs*, 70 F.4th 302, 307–08 (5th Cir. 2023); *Ellis ex rel. Pendergrass v. Cleveland Mun. Sch. Dist.*, 455 F.3d 690 (6th Cir. 2006); *Sornberger v. City of Knoxville*, 434 F.3d 1006 (7th Cir. 2006); *Doe v. Fort Zumwalt R-II Sch. Dist.*, 920 F.3d 1184 (8th Cir. 2019); *Jackson v. Barnes*, 749 F.3d 755 (9th Cir. 2014); *Waller v. City & County of Denver*, 932 F.3d 1277 (10th Cir. 2019); *Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160 (11th Cir. 2001); *Lane v. District of Columbia*, 887 F.3d 480 (D.C. Cir. 2018).

93. *Shadrick v. Hopkins County*, 805 F.3d 724, 753 (6th Cir. 2015); *Armstrong v. Ashley*, 60 F.4th 262, 277 (5th Cir. 2023); *Woodward v. Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917, 929 (7th Cir. 2004).

94. 974 F.2d 293, 297–98 (2d Cir. 1992); *see, e.g.*, *Carter v. City of Philadelphia*, 191 F.3d 339, 357 (3d Cir. 1999); *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 490 (11th Cir. 1997); *Valdez v. Macdonald*, 66 F.4th 796, 816–17 (10th Cir. 2023).

95. If a plaintiff establishes that a pattern of similar violations put the municipality on notice, that may satisfy the initial identification requirement. For example, a pattern of similar violations will often indicate that the municipality's failure to supervise is so well-settled and widespread that it constitutes a custom. Similarly, if a plaintiff successfully demonstrates deliberate indifference with the single-incident exception, courts will often infer causation. *See, e.g.*, *Walker*, 974 F.3d at 300.

96. Panels in the First, Seventh, and Ninth Circuits all have stated that municipalities are deliberately indifferent if there is a pattern of inadequate

Differences also emerge in the ways that federal appellate courts categorize failures to supervise as a source of municipal liability. The Third Circuit does not require plaintiffs to prove the existence of an unconstitutional municipal policy or custom.[97] It instead considers municipal failures as distinct "failure-or-inadequacy claims."[98] The Fifth Circuit sometimes conflates individual supervisory liability with municipal liability for failures to supervise and therefore may not always require plaintiffs to prove the existence of a policy or custom of failure.[99] The Ninth, Eleventh, and D.C. Circuits only subject municipalities to liability if a "policy" of inadequate supervision exists.[100] In contrast, the Eighth Circuit considers failures to supervise actionable under *Monell* if the failure constitutes a "custom."[101]

Finally, some circuits display *intra*-circuit disagreement about the appropriate standards applicable to failure-to-supervise claims. Often this happens when one panel derives its failure-to-supervise standard solely from failure-to-train precedents, and another alters those tests to better fit supervisory failures.[102] We will discuss these inconsistencies in more detail below.

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training/supervision or if inadequate training/supervision will lead to the obvious consequence of constitutional violations. *See, e.g.*, *Bordanaro*, 871 F.2d at 1159; *DiRico v. City of Quincy*, 404 F.3d 464, 469 (1st Cir. 2005); *Jenkins v. Bartlett*, 487 F.3d 482, 492 (7th Cir. 2007); *Jackson*, 749 F.3d at 763. Panels in the Second, Third, and Eleventh Circuits use the deliberate indifference standard articulated in the Second Circuit *Walker* case. *See, e.g.*, *Walker*, 974 F.2d at 297–98; *Carter*, 181 F.3d at 357; *Sewell*, 117 F.3d at 490. Other panels in the Second, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits have a deliberate indifference standard more tailored to failure-to-supervise claims alone. *See, e.g.*, *Vann*, 72 F.3d at 1049; *Amnesty Am. v. Town of West Hartford*, 361 F.3d 113, 127 (2d Cir. 2004); *Spell*, 824 F.2d at 1389–91; *Armstrong*, 60 F.4th at 277; *Ellis*, 455 F.3d at 700–01; *Perkins v. Hastings*, 915 F.3d 512, 521 (8th Cir. 2019); *Barney v. Pulsipher*, 143 F.3d 1299, 1307–08 (10th Cir. 1998). The Fourth Circuit has indicated that there are different deliberate indifference standards for *policies* of inadequate supervision, rather than customs. *Spell*, 824 F.2d at 1389. Some panels in the Seventh Circuit indicate that failures to act in the face of repeated complaints may constitute deliberate indifference to inadequate supervision. *Sornberger*, 434 F.3d at 1029–30. The D.C. Circuit has a somewhat vague deliberate indifference standard, which seems less dependent on plaintiffs satisfying specific requirements and more on the facts of the case. *See Lane*, 887 F.3d at 487.

97. *See, e.g.*, *Forrest*, 930 F.3d at 106.

98. *Id.*

99. *See infra* note 227 and accompanying text.

100. *See Jackson*, 749 F.3d at 763; *Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160, 1172 (11th Cir. 2001); *Lane*, 887 F.3d at 487.

101. *See Perkins v. Hastings*, 915 F.3d 512, 523 (8th Cir. 2019). The remaining federal appellate courts have indicated that municipalities may be liable for either a policy or custom of inadequate supervision.

102. Within the Second Circuit, *compare Walker v. City of New York*, 974 F.2d 293, 297–98 (2d Cir. 1992), *with Vann v. City of New York*, 72 F.3d 1040, 1049 (2d Cir. 1995), *and Amnesty Am. v. Town of West Hartford*, 361 F.3d 113, 128 (2d Cir. 2004). Within the Seventh Circuit, *compare Sornberger v. City of Knoxville*, 434 F.3d

B. Circuit Survey

To assess the federal courts' standards and trends regarding failure-to-supervise theories of municipal liability, we read and coded all federal appellate cases decided between 1980 and 2023 involving a failure-to-supervise claim under § 1983. If the plaintiff asserted a failure-to-supervise theory of municipal liability, the case was included in the survey. This includes instances where plaintiffs alleged a failure-to-supervise claim explicitly, plaintiffs alleged a synonymous municipal failure claim which was factually based on supervisory failures,[103] and plaintiffs alleged a general "failure to act" theory of municipal liability which involved supervisory failures or omissions. Cases were coded based on which claims were asserted under a municipal liability theory.[104] Because many plaintiffs and reviewing courts conflate or combine failure-to-supervise claims with other municipal failure claims, we coded each case according to *how* the court addressed the failure-to-supervise theory.[105] Finally, we coded the cases on the basis of their outcome.[106]

1. First Circuit

A plaintiff asserting a failure-to-supervise theory of municipal liability in the First Circuit must show: (1) the existence of a policy of failure or deficiency; (2) attribution of the failure to the municipality

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1006, 1029–30 (7th Cir. 2006), *with Jenkins v. Bartlett*, 487 F.3d 482, 492 (7th Cir. 2007).

103. This includes failure-to-discipline and failure-to-investigate claims of municipal liability rooted in supervisory omissions or failures.

104. For example, cases where the plaintiff alleged that the municipality failed to train and supervise its officers were coded differently from those where the plaintiff only alleged that the municipality failed to supervise its officers. Cases were coded within one of the following seven categories of claims: (1) explicit failure to supervise only; (2) synonymous claim only; (3) both failure-to-supervise and failure-to-train; (4) synonymous claim and failure-to-train claim; (5) failure-to-supervise claim and separate synonymous claim; (6) failure-to-supervise, synonymous, and failure-to-train claims; and (7) other (*e.g.*, "failure to act").

105. The categories were: (1) combined failure to supervise with failure to train; (2) separately analyzed failure-to-supervise claim; (3) ignored failure-to-supervise claim entirely; (4) analyzed a claim based on municipal supervisory failures without identifying the claim explicitly as a failure-to-supervise or synonymous claim; and (5) no analysis on the merits of any failure claim (*e.g.*, if the court rejected the theory of municipal liability because there was not an underlying constitutional violation).

106. Cases were coded as "favorable" outcomes if the court ruled for the plaintiff on the failure-to-supervise theory. Many cases were at pretrial stages, so those cases were coded as "favorable" if the court concluded that the claim was successfully alleged under the relevant standards. Cases were coded as "unfavorable" if the court ruled in favor of the municipal defendant(s) regarding the failure-to-supervise theory of liability. Cases were coded as "no outcome on the merits" when the court's holding was based on factors other than the merits of the failure-to-supervise claim.

(*i.e.*, that the municipality was deliberately indifferent); and (3) the causal link between the policy of failure and the deprivation of constitutional rights.[107] The plaintiffs in *Bordanaro v. McLeod*[108] alleged that a group of officers beat the unarmed plaintiffs.[109] Bordanaro died as a result of the beatings, and other plaintiffs were severely injured.[110] The First Circuit panel affirmed the jury verdict in the plaintiffs' favor, finding the municipality's deficient recruitment, training, supervision, and discipline of officers constituted deliberate indifference to their rights.[111] The court cited numerous facts which informed the finding against the municipality, including that past discipline had been haphazard, failures to update police standards for over thirty years, delays in investigating and disciplining the officers at issue, and failing to act despite notice that the deficiencies would lead to harm.[112]

The First Circuit generally combines the analysis of failure-to-supervise claims with failure-to-train claims. Since *Bordanaro*, the First Circuit has continued to endorse the practice of combining failure-to-supervise claims with other municipal failure claims.[113] Despite the apparent circuit-wide approval, no First Circuit panel has articulated why it is appropriate to combine municipal failure claims into one analysis.[114]

The only time the First Circuit separated its analysis of a failure-to-supervise claim from a failure-to-train claim was in *DiRico v. City of Quincy*.[115] The plaintiff in *DiRico* alleged that he was beaten by the officer who arrested him for a traffic violation.[116] DiRico asserted that the City was deliberately indifferent in its supervision, training, and discipline of officers regarding use of force.[117] The appellate court

107. *Bordanaro v. McLeod*, 871 F.2d 1151, 1159–63 (1st Cir. 1989).

108. 871 F.2d 1151 (1st Cir. 1989).

109. The plaintiffs alleged that one plaintiff had a physical altercation with an off-duty officer and then that off-duty officer called on-duty officers to the motel to attack the plaintiffs as a group. The officers broke into the motel office, threatened and assaulted the staff, shot through the motel room door, then forcibly entered plaintiffs' room. The officers then beat plaintiffs until they were either unconscious or barely conscious. *Id.* at 1153–54.

110. *Id.* at 1154.

111. *Id.* at 1158, 1169.

112. *Id.* at 1159–63.

113. *See, e.g.*, *Young v. City of Providence*, 404 F.3d 4, 31–32 (1st Cir. 2005) (referring to the combined analysis of claims in *Bordanaro* as "appropriate" in some cases).

114. However, the court in *Young* indicated that its analysis may be partially informed by how the plaintiff asserts the claims. *Id.* (noting that the plaintiff consistently argued the training, hiring, and discipline claims separately).

115. 404 F.3d 464, 469 (1st Cir. 2005).

116. *Id.* at 465–66.

117. *Id.* at 468.

affirmed the dismissal of the municipal liability claims.[118] The separation of the analyses in *DiRico* was subtle at best, and likely a response to the plaintiff's specific supervision-related allegation.[119]

The plaintiff's failure-to-discipline claim in *DiRico* was combined with the failure-to-supervise claim and analyzed under a deliberate indifference standard.[120] However, the First Circuit has suggested that failure-to-discipline and failure-to-investigate claims could be analyzed under a ratification or acquiescence standard.[121]

Plaintiffs often lose on their failure-to-supervise claims if they do not prove a history of similar unconstitutional conduct.[122] However, in *Wierstak v. Heffernan*,[123] the plaintiff did not prove a pattern of police misconduct in advancing his theory of inadequate training and supervision, yet the court affirmed the jury verdict against the City.[124] The decision in *Wierstak* was not based on the "single incident" exception; rather, the panel cited evidence that the City failed to supervise its officers "in a number of key areas of law enforcement" and that it failed to adequately investigate the incident at issue.[125] The court's decision in *Wierstak* indicates that plaintiffs in the First Circuit may not have to allege that other similar *injuries* have been caused by the failure-to-supervise, but may instead show a pattern of failures indicative of municipal policy.[126]

The First Circuit has not ruled for a plaintiff on a failure-to-supervise claim since it decided *Bordanaro* in 1989. The court has ruled

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118. Though the court concluded that no underlying constitutional violation occurred (and therefore the municipal liability claim necessarily failed), it briefly analyzed the merits of the municipal liability claim as well. *Id.* at 469.

119. The court concluded that the City's failure to increase supervision over an officer after a "single, unsubstantiated allegation of use of excessive force" did not constitute deliberate indifference. *Id.*

120. *Id.* at 468–69.

121. *See Santiago v. Fenton*, 891 F.2d 373, 382 (1st Cir. 1989) (holding that the failure to discipline an officer in a specific instance was insufficient to establish municipal acquiescence); *see also Kibbe v. City of Springfield*, 777 F.2d 801, 809 n.7 (1st Cir. 1985).

122. *See, e.g.*, *Hill v. Walsh*, 884 F.3d 16, 24 (1st Cir. 2018); *Meehan v. Town of Plymouth*, 167 F.3d 85, 92 n.8 (1st Cir. 1999).

123. 789 F.2d 968 (1st Cir. 1986).

124. *Id.* at 975. The court referenced both "gross negligence" and deliberate indifference in analyzing the plaintiff's failure-to-train and failure-to-supervise claims. *Id.* at 974.

125. *Id.* at 975. This evidence was in addition to other evidence which supported the plaintiff's failure-to-train claim. Though the plaintiff pleaded both failure to supervise and failure to train, the court combined the two claims and focused primarily on the latter. *Id.* at 974–75.

126. *Id.* at 975; *see also Bordanaro v. McLeod*, 871 F.2d 1151, 1159 (1st Cir. 1989) (quoting *Wierstak*, 789 F.2d at 975).

favorably in only two of the eleven cases in which a plaintiff asserted a failure-to-supervise claim.[127]

2. Second Circuit

The existence of a policy or custom of inaction in the Second Circuit is proven through a showing of deliberate indifference.[128] Although failure-to-supervise claims are commonly reviewed in the Second Circuit, the court's deliberate indifference analysis has been largely inconsistent in failure-to-supervise contexts. Regardless of the panel's deliberate indifference approach, though, plaintiffs must always show that the policy or custom of a failure to supervise was the moving force behind the constitutional violation at issue.[129]

Some panels use the *Walker* standard to review failure-to-supervise claims. In *Walker v. City of New York*,[130] the plaintiff was incarcerated for nineteen years after police and prosecutors withheld exonerating evidence and committed perjury in an effort to obtain a conviction.[131] The plaintiff sufficiently alleged that the municipality's failure to supervise and train prosecutors on their *Brady* obligations amounted to deliberate indifference.[132] The panel derived its standard for both the failure-to-train and failure-to-supervise claims from the Supreme Court's analysis in *City of Canton v. Harris*.[133] Under the *Walker* standard, a plaintiff must show (1) "that a policymaker knows 'to a moral certainty' that her employees will confront a given situation";[134] (2) "that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation";[135] and (3) "that the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights."[136]

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127. *Bordanaro*, 871 F.2d at 1169; *Wierstak*, 789 F.2d at 975.

128. *Vann v. City of New York*, 72 F.3d 1040, 1049 (2d Cir. 1995).

129. *Cash v. County of Erie*, 654 F.3d 324, 333 (2d Cir. 2011) (quoting *Roe v. City of Waterbury*, 542 F.3d 31, 37 (2d Cir. 2008)).

130. 974 F.2d 293 (2d Cir. 1992).

131. *Id.* at 295.

132. *Id.* at 300.

133. *Id.* at 297–98.

134. *Id.* at 297 (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989)).

135. The court noted that such difficult choices may be those which demand more from employees than mere common sense. *Id.* In *Walker*, the court found that the *Brady* standard was not "so obvious or easy to apply" that prosecutors did not need supervision or training on their obligations. This conclusion was largely based on the fact that *Brady* was decided only seven years before the events at issue. *Id.* at 300.

136. *Id.* at 298.

Other panels use the *Vann* standard, which is specifically tailored to apply to failure-to-supervise theories of municipal liability. In *Vann v. City of New York*,[137] the plaintiff alleged that an off-duty officer collided with his vehicle, and then that the officer threatened and severely beat him.[138] The officer at issue had a long history of violent, destructive, and racist conduct toward citizens, and he had been disciplined, psychologically evaluated, and put on restricted duty multiple times throughout his career.[139] However, after being reinstated to full duty status, he was virtually unsupervised.[140] The plaintiff in *Vann* based his municipal inaction claim on a failure-to-supervise theory alone.[141] The deliberate indifference standard articulated in *Vann* requires a plaintiff to show that (1) "the need for more or better supervision to protect against constitutional violations was obvious" and (2) the municipality made "no meaningful attempt" to investigate or prevent further violations.[142] Applying that standard to the above-mentioned facts, the panel in *Vann* vacated the district court's judgment in favor of the municipality and remanded the case.[143]

In *Amnesty America v. Town of West Hartford*,[144] the court elaborated further on the failure-to-supervise standard set forth in *Vann*. The plaintiffs in *Amnesty* alleged that police used excessive force against them at two anti-abortion demonstrations.[145] The police chief was present during both demonstrations.[146] During the first incident, the chief allegedly merely watched the officers use excessive force on the plaintiffs. During the second incident, however, the chief allegedly participated in the brutality as well as witnessing it.[147] The plaintiffs alleged that the Town failed to supervise the officers during both demonstrations.[148] While the need for more supervision in *Vann* was made obvious by the officer's problematic history, the court in *Amnesty* clarified that such a history is not a necessary showing to survive

137. 72 F.3d 1040 (2d Cir. 1995).

138. *Id.* at 1041–42.

139. *Id.* at 1042–45.

140. *Id.* at 1050 ("[A]fter a problem officer was restored to full-duty status, the Department's supervisory units paid virtually no attention to the filing of new complaints against such officers even though such filings should have been red-flag warnings of possibly renewed and future misconduct.").

141. *Id.* at 1041.

142. *Id.* at 1049.

143. *Id.* at 1051.

144. 361 F.3d 113 (2d Cir. 2004).

145. *Id.* at 118–20.

146. *Id.* at 119–20.

147. *Id.*

148. *Id.* at 124. The plaintiffs also asserted a failure-to-train claim, which will be explored further *infra*.

summary judgment.[149] A municipality may be put on notice of the need for more supervision based on a single, especially egregious, incident.[150] Further, as in *Amnesty*, the court noted that a policymaker's alleged witnessing of (and participation in) blatantly unconstitutional conduct could constitute deliberate indifference, even without a pattern of similar conduct.[151]

The *Vann/Amnesty* standard directs focus toward whether a municipality has failed to take adequate remedial action after being put on notice that more supervision is needed. The *Walker* standard, modeled after the failure-to-train theory of municipal liability, focuses on whether a municipality has failed to take preventative measures at all.

The Second Circuit panel in *Amnesty* concluded that deliberate indifference in the context of a failure-to-supervise theory is "distinct" from that of a failure-to-train theory.[152] The panel in *Amnesty* explained that the two allegations "emphasize different facts and require different showings"; therefore, "they must be analyzed independently, rather than evaluated collectively."[153] Despite that reasoning, the panel repeatedly combines the two claims in its analysis in subsequent cases. Since *Amnesty*, the Second Circuit has decided eight cases involving both a failure-to-supervise claim and a failure-to-train claim.[154] The court combined the analyses in seven of the eight cases.[155]

An allegation that a municipality failed to adequately investigate misconduct is not generally pleaded or analyzed as a standalone claim. Instead, failures to investigate may be used to show the extent to which a municipality failed to supervise employees.[156] For example, the plaintiff in *Fiacco v. City of Rensselaer*[157] alleged officers used excessive force and injured her after her arrest pursuant to the municipality's "policy of

149. *Id.* at 128–29.

150. *Id.*

151. *Id.*

152. *Id.* at 127.

153. *Id.*

154. *Feaster v. City of New York*, 2021 WL 4597766, at *2 (2d Cir. Oct. 7, 2021); *McCray v. Caparco*, 761 F. App'x 27, 31–32 (2d Cir. 2019); *Greene v. City of New York*, 742 F. App'x 532, 536 (2d Cir. 2018); *Nunez v. City of New York*, 735 F. App'x 756, 760 (2d Cir. 2018); *Phelan ex rel. Phelan v. Mullane*, 512 F. App'x 88, 90–91 (2d Cir. 2013); *Simms v. City of New York*, 480 F. App'x 627, 630–31 (2d Cir. 2012); *Wray v. City of New York*, 490 F.3d 189, 195–96 (2d Cir. 2007); *Jenkins v. City of New York*, 478 F.3d 76, 94–95 (2d Cir. 2007). The list above excludes cases in which there was no decision on the merit of the failure-to-supervise claim or cases in which the claim was ignored completely.

155. The only post-*Amnesty* separate failure-to-supervise analysis was conducted by the panel in *Phelan*. 512 F. App'x at 90–91.

156. If the *Vann/Amnesty* standard is used, a municipality's failure to investigate is essentially the second prong of the test.

157. 783 F.2d 319 (2d Cir. 1986).

nonsupervision."[158] To establish municipal fault, the plaintiff relied in part on the City's failure to adequately investigate citizen complaints of excessive force.[159] The Second Circuit concluded that it was reasonable for the jury to infer from the City's failure to investigate complaints that the City had a policy of nonsupervision amounting to deliberate indifference.[160]

Failure-to-discipline claims are not often pleaded or analyzed independently from failure-to-supervise or failure-to-train claims.[161] When a failure-to-discipline claim is analyzed independently of other municipal failure claims, though, the court has used a ratification or condonation theory of municipal liability to analyze the claim.[162]

In *Cash v. County of Erie*,[163] the Second Circuit elaborated on the failure-to-supervise standard in cases where the municipal defendants have an affirmative duty to protect.[164] The plaintiff in *Cash*, a pretrial detainee at the time, alleged that she was raped by a guard.[165] Since state law dictated that the municipality had an affirmative duty to protect those in its custody from sexual abuse, the court concluded that the municipality was on notice of the risk.[166] In light of evidence of prior instances of sexual misconduct at the facility, the panel noted that the municipality's "mere reiteration of the proscriptive [sexual conduct] policy" was inadequate.[167] Without taking further preventative measures, like prohibiting one-on-one contact between male guards and female inmates, the municipality's response evidenced deliberate indifference to its affirmative duty to protect.[168] So, while plaintiffs alleging a failure to supervise must still sufficiently plead a policy of deliberate indifference, a municipal defendant's affirmative duty to act may alter the court's analysis.

The Second Circuit has ruled in favor of the plaintiff in only six of the twenty-two cases in which the plaintiff pleaded a failure-to-supervise

158. *Id.* at 321–23.

159. Investigation into complaints of misconduct involved the chief informally talking to the officer, and nothing more. *Id.* at 331.

160. *Id.* at 332.

161. *See, e.g.*, *Simms v. City of New York*, 480 F. App'x. 627, 630–31 (2d Cir. 2012) (combining plaintiff's failure-to-train, -supervise, and -discipline claims into a single analysis).

162. *See Batista v. Rodriguez*, 702 F.2d 393, 399 (2d Cir. 1983).

163. 654 F.3d 324 (2d Cir. 2011).

164. *Id.* at 335.

165. *Id.* at 328.

166. *Id.* at 335.

167. *Id.* at 339.

168. *Id.*

claim.[169] In half of those favorable-outcome cases, the plaintiff did not plead a failure-to-train claim along with the failure-to-supervise claim.[170]

3. Third Circuit

The Third Circuit's failure-to-supervise standard is unique among the federal appellate courts. A plaintiff who asserts a failure-to-supervise theory of municipal liability does not need to prove that individual actors were acting pursuant to a municipal policy or custom.[171] The court recently labeled the two avenues of municipal liability "policy-or-custom claims" and "failure-or-inadequacy claims."[172] Plaintiffs alleging a failure to supervise must (1) sufficiently allege a failure in the municipality's supervision and then (2) show that the failure "amounts to deliberate indifference to the constitutional rights of those affected."[173] In *Carter v. City of Philadelphia*,[174] the Third Circuit adopted the Second Circuit's *Walker* three-part deliberate indifference test.[175]

Typically, the Third Circuit analyzes failure-to-supervise claims in combination with other "failure-or-inadequacy" claims. Recently, one panel explicitly endorsed this method.[176] About six months later, though, the panel in *Forrest v. Parry*[177] reviewed a failure-to-supervise claim independently from the failure-to-train claim.[178] In *Forrest*, the plaintiff alleged that police beat him, threatened him, and framed him for drug possession.[179] The plaintiff offered evidence of a history of mishandled officer supervision, a backlog of internal affairs complaints, and third party reports of supervisory failures.[180] The district court "unilaterally

169. *Fiacco v. City of Rensselaer*, 783 F.2d 319, 332 (2d Cir. 1986); *Ricciuti v. NYC Transit Auth.*, 941 F.2d 119, 124 (2d Cir. 1991); *Walker v. City of New York*, 974 F.2d 293, 300 (2d Cir. 1992); *Vann v. City of New York*, 72 F.3d 1040, 1051 (2d Cir. 1995); *Amnesty Am. v. Town of West Hartford*, 361 F.3d 113, 127–28 (2d Cir. 2004); *Cash v. County of Erie*, 654 F.3d 324, 339 (2d Cir. 2011).

170. *Fiacco*, 783 F.2d at 321; *Vann*, 72 F.3d at 1041; *Cash*, 654 F.3d at 331.

171. *Forrest v. Parry*, 930 F.3d 93, 105 (3d Cir. 2019) ("[A]n unconstitutional municipal policy or custom is necessary for the former [municipal policy or custom] theory, but not for the latter, failure or inadequacy theory.").

172. *Id.* at 106. Failure-to-supervise claims fall within the latter category.

173. *Id.*

174. 181 F.3d 339 (3d Cir. 1999).

175. *Id.* at 357.

176. *Est. of Roman v. City of Newark*, 914 F.3d 789, 799 n.7 (3d Cir. 2019) ("We consider allegations of failure to train, supervise, and discipline together because they fall under the same species of municipal liability.").

177. 930 F.3d 93 (3d Cir. 2019).

178. *Id.* at 108.

179. *Id.* at 99. The officers at issue eventually pled guilty to charges of conspiracy to deprive individuals of their civil rights and admitted to falsifying police reports, planting drugs, and perjury. *Id.* at 100.

180. *Id.* at 101–04.

divided" the wealth of evidence between the municipal failure theories in its analysis, then granted summary judgment in favor of the City.[181] The Third Circuit panel reversed the lower court's granting of summary judgment on the failure-to-supervise theory based on the restricted analysis.[182] In doing so, the court (perhaps inadvertently) illustrated the value in separating failure-to-supervise claims from failure-to-train claims. For example, the court cited evidence of citizen complaints in both the failure-to-supervise section and the failure-to-train section, but the evidence was used to support the former claim and reject the latter claim.[183]

Nevertheless, the Third Circuit has never instructed the separation of failure-or-inadequacy claims explicitly. *Forrest* is one of only three cases in the Third Circuit in which a failure-to-supervise claim was analyzed on its own.[184]

In the Third Circuit, evidence of a municipality's failure to discipline may lend support to policy-or-custom claims,[185] but the failure-to-discipline theory itself is categorized as a failure-or-inadequacy claim.[186] Accordingly, the court uses the deliberate indifference standard to analyze failure-to-discipline claims.[187]

The Third Circuit ruled in favor of the plaintiff in four out of eleven cases in which a failure-to-supervise theory of municipal liability was alleged.[188]

4. Fourth Circuit

Compared to most of its sister circuits, the Fourth Circuit has not reviewed many failure-to-supervise claims. However, the Fourth Circuit did thoroughly detail its approach to municipal failure theories of liability

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181. *Id.* at 104–05.

182. *Id.* at 108–09.

183. *Id.*

184. The other two cases are *Kobrick v. Stevens*, 763 F. App'x 216, 219–20 (3d Cir. 2019), addressing the plaintiff's failure-to-investigate claim separately from the failure-to-train claim, and *Tobin v. Badamo*, 78 F. App'x 217, 219–20 (3d Cir. 2003), addressing the plaintiff's solo failure-to-supervise claim.

185. *See Beck v. City of Pittsburgh*, 89 F.3d 966, 974 (3d Cir. 1996) (noting that failures to discipline may support a custom-or-policy claim if those failures "perpetuate the City's custom of acquiescing" to officers' unconstitutional conduct).

186. *Forrest v. Parry*, 930 F.3d 93, 106 & n.9 (3d Cir. 2019).

187. *See, e.g.*, *Est. of Roman v. City of Newark*, 914 F.3d 789, 800 (3d Cir. 2019); *Forrest*, 930 F.3d at 108.

188. *Carter v. City of Philadelphia*, 181 F.3d 339, 342 (3d Cir. 1999); *Robinson v. Fair Acres Geriatric Center*, 722 F. App'x 194, 199 (3d Cir. 2018); *Est. of Roman*, 914 F.3d at 793; *Forrest*, 930 F.3d at 108.

in *Spell v. McDaniel*.[189] The basic standard requires plaintiffs to establish: (1) a specific unconstitutional policy or custom; (2) attribution of fault to the municipality (*i.e.*, deliberate indifference); and (3) a causal link which shows that the specific violation is essentially inevitable.[190] The court in *Spell* further detailed two municipal failure theories, one rooted in "policy" and the other rooted in "custom."[191] Plaintiffs alleging "policy" failures and those alleging "custom" failures must satisfy different pleading standards under the first two prongs of the *Spell* standard.[192] The court analyzed the failure-to-supervise claim in *Spell* under the "custom" theory of municipal liability, so we will address that theory first.

The Fourth Circuit's "custom" theory is grounded in the idea of municipal condonation. Under the "custom" theory, a municipality that fails to stop or correct a widespread pattern of unconstitutional conduct subjects itself to liability because it condoned the conduct.[193] Specific customs which satisfy the first *Spell* prong are those practices which are not necessarily designed or implemented by policymakers, yet are sufficiently widespread as to indicate municipal condonation.[194] To attribute fault to municipalities for alleged customs, the plaintiff must show (1) the municipality had actual or constructive knowledge of a pattern of unconstitutional conduct and (2) that it was deliberately indifferent by failing to correct or stop the conduct.[195]

The plaintiff in *Spell*, after being arrested for driving under the influence and possession of a controlled substance, alleged that he was assaulted by police in custody, causing injuries that required surgery and resulted in sterility.[196] Pursuant to his failure-to-supervise claim, the plaintiff evidence that the municipal policymakers deliberately covered

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189. 824 F.2d 1380, 1389 (4th Cir. 1987) (noting that the Fourth Circuit had not previously articulated the bounds of the "failure" theories of municipal liability).

190. *Id.*

191. *Id.* What this Article calls "failure" theories in this context are described by the *Spell* court as theories of municipal liability "where fault and causation cannot be laid to a municipal policy 'itself unconstitutional.'" *Id.*

192. *Id.* at 1389–91.

193. *Id.* at 1391. The Fourth Circuit also identifies this theory as a "condoned custom or usage" theory. *Id.*

194. For example, policymakers regularly ignoring complaints of unconstitutional behavior is not a "program" designed by policymakers but is instead a widespread practice that indicates condonation of ignorance. *Carter v. Morris*, 164 F.3d 215, 219 (4th Cir. 1999).

195. *Spell*, 824 F.2d at 1391. It is important to note that the *Spell* court indicated that the "causal link" requirement for custom and policy theories is essentially the same. *Id.* ("[A]s in the case of deficient training policy, failure to correct the known practices must be such as to make the specific violation 'almost bound to happen, sooner or later,' rather than merely 'likely to happen in the long run.'").

196. *Id.* at 1384.

up, disregarded, and encouraged uses of excessive force by officers.[197] For example, current and former officers testified that officers regularly used excessive force, and the police chief either actively encouraged the practice or simply failed to deter it.[198] The Fourth Circuit concluded that the evidence sufficiently demonstrated a municipal custom of condonation based on failures to supervise and discipline.[199] Accordingly, the Fourth Circuit panel affirmed the jury verdict in the plaintiff's favor on his municipal failure-to-supervise (and discipline) claim.[200]

The Fourth Circuit's "policy" theory of municipal liability is not often used in advancing or analyzing failure-to-supervise claims.[201] The court in *Spell* noted that "the design and implementation of training programs and the follow-up supervision of trainees[] is necessarily a matter of policy."[202] Deficient policies must result from a municipality's deliberate indifference to the constitutional rights of citizens.[203] Such policies are sufficiently deficient under *Spell* if, for example, they encourage or authorize (expressly or tacitly) unconstitutional conduct.[204] Arguably, then, a plaintiff could satisfy the *Spell* three-prong test if they established that: (1) a municipality designed and/or implemented a

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197. The plaintiff introduced testimonial evidence of officers and lay witnesses who described the practices of city officers as well as internal department records which corroborated the testimonial evidence. *Id.* at 1393–95.

198. *Id.* at 1393–95. One former officer testified that the police chief "wanted 'supercops' tougher than the soldiers at nearby Ft. Bragg." *Id.* at 1393. Another officer testified that the lack of discipline or acknowledgement of excessive uses of force created an "effective 'code of silence' within the department." *Id.*

199. Specifically, the court concluded that the evidence sufficiently supported the jury's findings that there were widespread uses of excessive force known to the policymakers responsible for supervision and discipline; that the Chief's actions signaled condonation of uses of excessive force; that the municipality's deliberate indifference to the rights of citizens caused the condonation; and that the officer at issue injured the plaintiff pursuant to the condoned custom. *Id.* at 1395.

200. *Id.* The court also affirmed the jury verdict for the plaintiff on his failure-to-train claim, which was analyzed as a municipal policy of deficient training. *Id.*

201. *See id.* (characterizing plaintiff's failure-to-train theory as a "policy" claim); *see also Randall v. Prince George's County*, 302 F.3d 188, 193 n.4, 210–11 (4th Cir. 2002) (choosing to analyze the plaintiff's failure-to-train and failure-to-supervise claims under the "custom or usage" theory, even though plaintiff alleged that the officers at issue were "operating under unconstitutional customs, policies and practices" of the County).

202. *Spell*, 824 F.2d at 1389.

203. *Id.* at 1390. As explained previously, deficient policies subject municipalities to liability because the municipality was responsible for designing and/or implementing the relevant procedures. *Id.* This makes the second prong of the *Spell* standard arguably easier to satisfy for plaintiffs alleging "policy" theories, rather than "custom" theories of municipal liability.

204. *Id.* Another example of a deficient policy under the *Spell* standard is a municipality's failure to adequately "prohibit or discourage readily foreseeable conduct in light of known exigencies of police duty." *Id.*

program of supervising officers which was deficient; (2) the deficiency resulted from the municipality's deliberate indifference; and (3) the deficient supervision made the specific injury almost inevitable.[205] However, courts most often review failure-to-supervise claims under the "custom" theory.[206]

The court in *Spell* went to great lengths to explain the differences between the "policy" and "custom" municipal liability theories.[207] Some Fourth Circuit panels have followed suit and separately addressed "policy" and "custom" theories.[208] However, it seems that specific claims of failures to supervise or failures to train sometimes get lost in the court's policy and/or custom analysis. For example, the plaintiffs in *Randall v. Prince George's County*[209] alleged that officers were "operating under unconstitutional customs, policies and practices" of the County, and that "the County had failed to properly train and supervise" officers.[210] The court addressed the former allegation but did not mention the latter in its municipal liability analysis.[211]

As noted above, the Fourth Circuit in *Spell* considered deficient training and "follow-up supervision of trainees" together as one "deficient training policy" theory.[212] Though we argue that a combined analysis of failure-to-supervise and failure-to-train claims is generally lacking, the Fourth Circuit's "deficient training policy" approach is not necessarily inconsistent with our argument. In terms of policies designed and implemented by a municipality, a program of trainee supervision could reasonably be part of a larger training program. As stated above, however, the Fourth Circuit does not consistently address claims under the "policy" theory of municipal liability independently from claims under the "custom" theory. The result, it seems, is a tendency to combine failure-to-supervise and failure-to-train claims pursuant to the "policy" theory in *Spell* and then analyze the claims together as one "custom."[213] The confusion illustrated in the Fourth Circuit regarding failure-to-

205. This example is a modification of the *Spell* court's analysis of Spell's failure-to-train claim under the "policy" theory. *See id.* at 1395.

206. *See, e.g.*, *id.*; *Carter v. Morris*, 164 F.3d 215, 219 (4th Cir. 1999).

207. *See Spell*, 824 F.2d at 1386.

208. *See, e.g.*, *Washington v. Hous. Auth.*, 58 F.4th 170, 183–84 (4th Cir. 2023); *Carter*, 164 F.3d at 219. *But see Randall v. Prince George's County*, 302 F.3d 188, 210 (4th Cir. 2002) (describing plaintiffs' claim as a "contention that the County maintained an unofficial policy" and then analyzing the claim under the "custom" theory of municipal liability).

209. 302 F.3d 188 (4th Cir. 2002).

210. *Id.* at 194 n.4.

211. The court's section concerning municipal liability does not mention a failure to supervise or failure to train but instead focuses on the general theory of a municipality's unconstitutional custom. *Id.* at 210.

212. *Spell*, 824 F.2d at 1389–91.

213. *See supra* note 201 and accompanying text.

supervise claims may be the result of the *Spell* court providing a detailed analysis on how failure-to-train claims fit into its standard, but failing to do the same for failure-to-supervise claims.[214]

The Fourth Circuit has issued favorably for the plaintiff in two of the seven cases in which the plaintiff alleged a failure-to-supervise theory of municipal liability.[215]

5. Fifth Circuit

The Fifth Circuit's most recent articulation of the failure-to-supervise standard requires plaintiffs to show that: (1) the municipality failed to supervise the officers; (2) there is a causal link between the alleged failure and the constitutional violation; and (3) the failure to supervise constituted deliberate indifference to the plaintiff's rights.[216] Like in many other circuits, plaintiffs in the Fifth Circuit can demonstrate deliberate indifference by showing that either (a) the municipality was on notice of a pattern of similar violations or (b) the violation at issue was the "highly predictable consequence" of the failure to supervise (*i.e.*, the single-incident exception).[217]

The proof-by-pattern method to prove a deliberately indifferent failure to supervise has been wholly unsuccessful in the Fifth Circuit.[218] Though the Fifth Circuit has described the single-incident exception as "a narrow one, and one that we have been reluctant to expand,"[219] the few successful failure-to-supervise claims have been based on single-incident theories. In *Covington v. City of Madisonville*,[220] the plaintiff was falsely arrested after her former spouse (an officer) conspired against her for personal reasons.[221] Though the court found the "various alleged infractions and instances of wrongdoing by other officers" unpersuasive in establishing a widespread practice, the plaintiff's single-incident

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214. This could also explain why synonymous claims (*i.e.*, failure to discipline, failure to investigate) are rarely seen in this circuit.

215. *Washington v. Hous. Auth.*, 58 F.4th 170, 184 (4th Cir. 2023); *Spell*, 824 F.2d at 1405.

216. *Edwards v. City of Balch Springs*, 70 F.4th 302, 312 (5th Cir. 2023).

217. *Armstrong v. Ashley*, 60 F.4th 262, 277 (5th Cir. 2023).

218. *See, e.g.*, *Lewis v. Pugh*, 289 F. App'x 767, 772–73 (5th Cir. 2008) (concluding that, since the City only knew about the officer's prior incidents of excessive force, not that he had previously sexually assaulted multiple women, the City was not on notice of the risk that he would sexually assault plaintiff and therefore not liable); *Jackson v. Valdez*, 852 F. App'x 129, 135–36 (5th Cir. 2021) (concluding that "two incidents of strip searches and four incidents of sex-based classifications of two transgender people in a span of five years" did not constitute a pattern sufficient to establish municipal liability).

219. *Burge v. St. Tammany Parish*, 336 F.3d 363, 373 (5th Cir. 2003).

220. 812 F. App'x 219 (5th Cir. 2020).

221. *Id.* at 220–21.

theory survived dismissal.[222] The plaintiff in *Covington* alleged that other officers had reported the conspiracy to the police chief, and that he failed to prevent the events that followed.[223] The court noted that the "obvious likely consequence" of the police chief's failure to investigate the conspiracy "is that the plot works as planned."[224]

In *Doe v. Taylor Independent School District*,[225] the Fifth Circuit held that the "legal elements" of individual supervisory liability and municipal liability are "similar enough that the same standards of fault and causation should govern."[226] The Fifth Circuit has effectively conflated theories of individual supervisory liability and theories of municipal liability stemming from (at least) failures to supervise and failures to train. Many panels analyze failure-to-supervise and failure-to-train theories of municipal liability under standards derived from individual supervisory liability.[227] Other panels examine failure-to-supervise claims to determine whether the evidence illustrates a widespread custom amounting to municipal policy.[228]

Whether a Fifth Circuit panel will analyze a failure-to-supervise claim independently is unpredictable. Of the eighteen cases in which a plaintiff alleged both a municipal failure-to-supervise and failure-to-train claim, the court combined the analyses nine times. The court separated the analysis of the claims in six cases and wholly ignored the failure-to-supervise claim in four cases. There is some indication that panels reviewing municipal failure-to-supervise claims using the standard derived from the individual supervisory liability may be more inclined to separately analyze the claim.[229] The Fifth Circuit's decision to effectively

222. *Id.* at 226–27.

223. *Id.* at 227.

224. *Id.* at 228.

225. 15 F.3d 443 (5th Cir. 1994).

226. *Id.* at 453. For example, both claims require deliberate indifference and proximate cause. *See id.* at 456.

227. *See, e.g.*, *Livezey v. City of Malakoff*, 657 F. App'x 274, 278 (5th Cir. 2016) (citing *Smith v. Brenoettsy*, 158 F.3d 908, 911–12 (5th Cir. 1998) (involving individual supervisory liability, not municipal liability)); *Lewis v. Pugh*, 289 F. App'x 767, 771–72 (5th Cir. 2008) (involving both claims); *Posos v. City of San Antonio*, 463 F. App'x 303, 305 (5th Cir. 2012) (involving only a municipal liability claim).

228. *See, e.g.*, *Jackson v. Valdez*, 852 F. App'x 129, 136 (5th Cir. 2021) (indicating that deliberately indifferent municipal failures to train or supervise constitute official policy); *Covington*, 812 F. App'x at 226.

229. This inclination has been largely apparent in reviews of summary judgment. *See, e.g.*, *Edwards v. City of Balch Springs*, 70 F.4th 302, 307–08 (5th Cir. 2023); *Livezey*, 657 F. App'x at 277–78; *Lewis*, 289 F. App'x at 771–73. Notably, no Fifth Circuit panel seemingly has analyzed a failure-to-supervise claim separately from a failure-to-train claim at the motion to dismiss stage. *See, e.g.*, *Henderson v. Harris County*, 51 F.4th 125, 129 (5th Cir. 2022); *Armstrong v. Ashley*, 60 F.4th 262, 277 (5th Cir. 2023); *Jackson*, 852 F. App'x at 136–37; *Jordan v. Brumfield*, 687 F. App'x 408, 415 (5th Cir. 2017); *Culbertson v. Lykos*, 790 F.3d 608, 625 (5th Cir. 2015).

conflate the municipal failure-to-supervise theory with individual supervisory liability theory could explain why some courts are more likely to analyze the claim separately from failure-to-train or other municipality-specific claims. A few panels have wholly ignored failure-to-supervise claims, choosing to conduct the municipal liability analysis using a standard focusing on adoption of training policy.[230]

Failure-to-discipline and failure-to-investigate claims are often grouped with failure-to-supervise claims.[231] However, if a plaintiff advances theories of inadequate discipline or investigation in support of a ratification claim, the theories are not considered as failure-to-supervise claims.[232] Ratification is an entirely separate theory of municipal liability in the Fifth Circuit.[233]

Out of the twenty-one cases in which a plaintiff asserted a failure-to-supervise (or synonymous) theory of municipal liability, the Fifth Circuit found for the plaintiffs in two.[234]

6. Sixth Circuit

In order to establish a custom or policy for a failure-to-supervise claim, the Sixth Circuit requires the plaintiff to prove: "(1) the . . . supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury."[235] Deliberate indifference can be found in situations where either (a) the municipality "fails to act in response to repeated complaints of constitutional violations by its officers" or (b) it was "inherently foreseeable" that the violation could result from a lack of supervision (*i.e.*, the single-incident theory).[236]

Plaintiffs who attempt to prove deliberate indifference through evidence of a municipality's failure to respond to repeated complaints must contextualize the evidence. In *Ellis ex rel. Pendergrass v. Cleveland Municipal School District*,[237] the plaintiff cited ten reports of prior

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230. *See Hicks-Fields v. Harris County*, 860 F.3d 803, 811 (5th Cir. 2017); *Jordan*, 687 F. App'x at 415; *Jackson*, 852 F. App'x at 135.

231. *See Edwards*, 70 F.4th at 307, 313; *Armstrong*, 60 F.4th at 277.

232. *See Lewis*, 289 F. App'x at 771, 774–75.

233. *See, e.g.*, *Peterson v. City of Fort Worth*, 588 F.3d 838, 848 (5th Cir. 2009); *Piotrowski v. City of Houston*, 237 F.3d 567, 578 n.18 (5th Cir. 2001).

234. *Covington v. City of Madisonville*, 812 F. App'x 219, 228 (5th Cir. 2020); *Brown v. Bryan County*, 219 F.3d 450, 453 (5th Cir. 2000).

235. *Ellis ex rel. Pendergrass v. Cleveland Mun. Sch. Dist.*, 455 F.3d 690, 700 (6th Cir. 2006).

236. *Id.* at 700–01 (quoting *Brown v. Shaner*, 172 F.3d 927, 931 (6th Cir. 1999)).

237. 455 F.3d 690 (6th Cir. 2006).

corporal punishment by teachers in a two-year period to show that the municipality was deliberately indifferent to substitute teacher abuse toward students.[238] Yet the court found only two detailed incidents sufficiently similar to the incident at issue.[239] The two similar reports did not establish the municipality's deliberate indifference because the reports did not put the municipality on notice of an existing problem.[240] The Sixth Circuit highlighted that the plaintiff failed to prove that two incidents over two years was an "excessive number" in context of the school district's size or as compared to what a "normal number of incidents would be."[241]

Like in many other circuits, proving deliberate indifference based on the single-incident theory of liability stems from the constitutional violation's "high degree of predictability."[242] For example, if a municipality's supervision (or lack thereof) merely presents an officer with the opportunity to violate a plaintiff's rights, that alone is insufficient to establish deliberate indifference under the single-incident theory.[243] Conversely, in situations where there is an obvious need for supervision to prevent highly predictable constitutional violations, yet no supervision exists, the court may find that a municipality was deliberately indifferent based on a single incident.[244]

The court in *Ellis* based the above-mentioned failure-to-supervise standard on the Sixth Circuit's analysis of a failure-to-train claim in *Russo v. City of Cincinnati*.[245] It is therefore unsurprising that the two claims are often combined by the court in analysis. Out of the fourteen cases in which the court considered both a failure-to-supervise and a failure-to-train claim, the court combined the analyses in ten cases. However, in some cases where failure-to-supervise claims were analyzed, an interesting trend has appeared: The only evidence offered

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238. *Id.* at 701.

239. The other eight detailed "more mild punishment." *Id.*

240. *Id.*

241. *Id.*

242. *Ouza v. City of Dearborn Heights*, 969 F.3d 265, 289 n.10 (6th Cir. 2020) (quoting *Bd. of the Cnty. Comm'rs v. Brown*, 520 U.S. 397, 409–10 (1997)).

243. *See Mize v. Tedford*, 375 F. App'x 497, 501 (6th Cir. 2010) (rejecting the single-incident theory of deliberate indifference since the department did not have reason to suspect that putting the officer on patrol duty would lead to him raping the plaintiff).

244. *See Shadrick v. Hopkins County*, 805 F.3d 724, 741–42 (6th Cir. 2015) (finding the municipality liable for an inmate's death when none of the relevant parties took responsibility for supervising the medical staff and it was clear that the staff was unequipped to deal with medical emergencies of inmates).

245. *Ellis*, 455 F.3d at 700 (citing *Russo v. City of Cincinnati*, 953 F.2d 1036, 1046 (6th Cir. 1992)).

of the failure to supervise was a lack of performance evaluations.[246] The court in one such case explained that a municipality's failure to monitor the performance of employees may constitute a failure to supervise, but only if the absence of a review process is the result of "deliberate indifference for the constitutional violations that may occur as a result."[247]

The Sixth Circuit has also articulated a generalized "inaction" theory of municipal liability. A plaintiff alleging municipal liability based on a "custom or policy of inaction" must establish: (1) a "clear and persistent pattern" of constitutional violations by municipal employees; (2) the municipality was on notice (actual or constructive); (3) the municipality tacitly approved the unconstitutional conduct, such that the deliberately indifferent failure to act amounts to an official policy of inaction; and (4) the municipality's custom was the "moving force" behind the constitutional violation.[248] In *Doe v. Claiborne County*,[249] the plaintiff alleged that she was sexually harassed, abused, and raped by a teacher while she was a student.[250] Doe claimed that the school board was deliberately indifferent to the sexual abuse of students based on its failure to remove the teacher from student contact and its decision to rehire him, despite knowing he had been investigated for sexually abusing other students.[251] The Sixth Circuit panel concluded that the school board's failure to independently investigate the allegations further did not constitute a policy of inaction.[252]

The Sixth Circuit has explicitly separated municipal liability claims based on "the existence of a policy of inadequate training or supervision" from those based on "a custom of tolerance or acquiescence of federal

246. *See, e.g.*, *Amerson v. Waterford Township*, 562 F. App'x 484, 492 (6th Cir. 2014); *Ouza*, 969 F.3d at 289; *Wright v. City of Euclid*, 962 F.3d 852, 881 (6th Cir. 2020).

247. *Amerson*, 562 F. App'x at 492. The court in *Amerson* illustrated such deliberate indifference by citing a district court case in which a city was on notice (from citizens and other commanding officers) of the need to supervise the lead detective, yet never conducted a performance evaluation of him and only reviewed open cases at the detective's request. *Id.*

248. *See Doe v. Claiborne County*, 103 F.3d 495, 505, 508 (6th Cir. 1996).

249. 103 F.3d 495 (6th Cir. 1996).

250. *Id.* at 501.

251. A Department of Human Services investigation before the incident at issue concluded that four of nine allegations of child sexual abuse against the teacher in Doe were founded. The Department, however, agreed not to press criminal charges, put the teacher's name in its registry, or seek to suspend his license. The school board knew about the allegations, but failed to investigate them further, with board members assuming the allegations were unfounded or that the teacher had been exonerated. *Id.* at 502–03.

252. The court explained that the failure to act in this case did not indicate that there existed a custom of failing to act when confronted with employees' obviously unconstitutional conduct. *Id.* at 508.

rights violations."[253] Failures to discipline and failures to investigate are considered under ratification theories of municipal liability.[254]

Out of the nineteen cases in which a Sixth Circuit panel reviewed a failure-to-supervise theory of municipal liability, the court has ruled against the plaintiff in fifteen. Of the four favorable outcomes on failure-to-supervise claims, two involved failures in supervising medical staff in jails.[255] In the other two cases with favorable outcomes, the evidence supporting the failure-to-supervise claim was a failure to conduct performance evaluations; the failure-to-supervise claims in these two cases were only successful in combination with the evidence supporting the failure-to-train claims.[256]

7. Seventh Circuit

The Seventh Circuit's approach to cases involving inadequate supervision is somewhat inconsistent. The Seventh Circuit infrequently addresses failure-to-supervise claims by that name. Instead, the court designates claims involving inadequate supervision as "failure-to-act" theories of municipal liability. While the familiar requirements of a policy or custom, notice, and causation are all present in the Seventh Circuit's relevant decisions,[257] the analyses vary in cases involving inadequate supervision. Most Seventh Circuit panels agree that municipal liability based on a "failure" theory must still amount to a policy or custom under *Monell*.[258]

The panel in *Jenkins v. Bartlett*,[259] addressing failure-to-supervise and failure-to-train claims, relied on the Supreme Court's decisions in

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253. *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013).

254. *See, e.g.*, *Wright v. City of Euclid*, 962 F.3d 852, 882 (6th Cir. 2020).

255. *See Helphenstine v. Lewis County*, 60 F.4th 305, 323 (6th Cir. 2023); *Shadrick v. Hopkins County*, 805 F.3d 724, 729 (6th Cir. 2015).

256. *See Wright*, 962 F.3d at 881; *Ouza v. City of Dearborn Heights*, 969 F.3d 265, 289 (6th Cir. 2020).

257. *See, e.g.*, *Doe v. Vigo County*, 905 F.3d 1038, 1044–45 (7th Cir. 2018) (explaining that, to establish a claim of "a custom or practice of failing to prevent or respond to employees' sexual misconduct," the custom must be "widespread and well settled" and the plaintiff must show "both officials' 'aware[ness] of the risk created by the custom' and their 'fail[ure] to take appropriate steps to protect' her from it." (quoting *Thomas v. Cook Cnty. Sheriff's Dep't*, 604 F.3d 293, 303 (7th Cir. 2010) (alterations in original)).

258. However, the court in *Alexander v. City of South Bend* implied that establishing a policy or custom may not be necessary. 433 F.3d 550, 557 (7th Cir. 2006) ("*Monell* requires him to show that South Bend adopted a policy or had a custom of poor training or inadequate supervision. Alternatively, Alexander could show that South Bend's failure to train or supervise its officers amounted to deliberate indifference to the rights of people with whom the police came in contact." (citation omitted)).

259. 487 F.3d 482 (7th Cir. 2007).

City of Canton and *Brown* in creating its standard.[260] The court's articulated legal standards of establishing deliberate indifference in *Jenkins* related only to training inadequacies.[261] Consequently, the court in *Jenkins* focused only on the failure-to-train claim in its analysis.[262]

The panel in *Sornberger v. City of Knoxville*,[263] also addressing both failure-to-supervise and failure-to-train claims, articulated a different standard which created a somewhat clearer path for failure-to-supervise theories.[264] In *Sornberger*, the court identified two types of proof of deliberate indifference which can establish municipal liability based on inadequate training or supervision: "(1) failure to provide adequate training in light of foreseeable consequences; or (2) failure to act in response to repeated complaints of constitutional violations by its officers."[265] The plaintiffs in *Sornberger*, a husband and wife, spent months in jail awaiting trial for a robbery they had not committed.[266] The wife alleged that she was coerced into giving a confession by the officers threatening to call child services to take her children away unless she confessed.[267] She offered expert testimony which indicated that, based on complaints lodged against the City, child services was "deliberately indifferent to a pattern of use of coercive threats, including threats to misuse [its services], by its officers."[268] The court indicated that this evidence raised triable issues under the "failure-to-act" theory of municipal liability based on the "refus[al] to correct complained-of behavior."[269]

Though the court's wording in *Sornberger* indicates that the single-incident theory of municipal liability is only available if the plaintiff asserts a failure-to-train claim, other panels have refuted that assumption. For example, in *Woodward v. Correctional Medical Services of Illinois, Inc.*,[270] the lower court found that the jail condoned a custom of failing to act in the face of clear policy violations and that the condonation/failure caused the employees to be deliberately indifferent to the suicidal decedent's health needs.[271] The court in *Woodward*

260. *Id.* at 492.

261. *Id.*

262. *Id.* at 493.

263. 434 F.3d 1006 (7th Cir. 2006).

264. *Id.* at 1029–30.

265. *Id.*

266. *Id.* at 1009.

267. *Id.* at 1011–12.

268. *Id.* at 1030.

269. *Id.* It is unclear from the appellate decision what exactly the plaintiffs in *Sornberger* claimed regarding municipal liability, but the court addressed failure-to-train and failure-to-supervise claims within its municipal liability analysis. *See id.* at 1029.

270. 368 F.3d 917 (7th Cir. 2004).

271. *Id.* at 920.

concluded that, though the suicide at issue was the first in the jail, it was a "highly predictable consequence" of the failure to act, and therefore the jail was liable under the single-incident exception.[272] The "failure-to-act" theory of municipal liability was successful because of the history of "repeated failures" and the "culture that permitted and condoned violations of policies."[273]

When a plaintiff alleges a failure to investigate and/or discipline in addition to a failure to supervise, the Seventh Circuit has addressed the allegations separately.[274] However, when addressing the broader failure-to-act theories of municipal liability, inadequacies in investigation and discipline seem to be analyzed along with inadequacies in supervision in support of the failure-to-act claim.[275]

The Seventh Circuit has decided favorably in six of the twelve cases in which plaintiffs asserted failure-to-supervise claims.[276] This unusually positive reception could be the result of the wide net the circuit casts by permitting failure-to-supervise theories as well as broader failure-to-act theories.[277]

8. Eighth Circuit

The Eighth Circuit requires a plaintiff alleging municipal liability to prove that municipal policy or custom was the moving force behind a constitutional violation. The Eighth Circuit has expressed distaste with plaintiffs who "use the terms 'policy' and 'custom' interchangeably when conducting a *Monell* analysis."[278] Accordingly, the court has outlined rigid requirements plaintiffs must satisfy to prove the existence of

272. *Id.* at 929 (quoting *Bd. of the Cnty. Comm'rs v. Brown*, 520 U.S. 397, 409 (1997)).

273. *Id.*

274. *See Johnson v. Cook County*, 526 F. App'x 692, 695–96 (7th Cir. 2013); *Robles v. City of Fort Wayne*, 113 F.3d 732, 734, 737 (7th Cir. 1997).

275. *See J.K.J. v. Polk County*, 960 F.3d 367, 382–83 (7th Cir. 2020).

276. This includes cases in which the plaintiff asserted a general failure-to-act claim involving inadequate supervision. *Sledd v. Lindsay*, 102 F.3d 282, 289 (7th Cir. 1996); *Lanigan v. Village of East Hazel Crest*, 110 F.3d 467, 480 (7th Cir. 1997); *Woodward*, 368 F.3d at 929; *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1030 (7th Cir. 2006); *Thomas v. Cook Cnty. Sheriff's Dep't*, 604 F.3d 293, 297 (7th Cir. 2010); *J.K.J.*, 960 F.3d at 381 (affirming the jury verdict for plaintiffs on "failure to act" theory of municipal liability).

277. Our survey suggests that the Seventh Circuit is especially receptive to failure-to-supervise claims at the motion to dismiss stage. In *Lanigan v. Village of East Hazel Crest*, the court held that the plaintiff sufficiently pleaded a municipal policy of inadequate supervision and training, despite his complaint largely consisting of boilerplate allegations. 110 F.3d 467, 480 (7th Cir. 1997); *see also Sledd*, 102 F.3d at 289. While these cases preceded *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Seventh Circuit's receptiveness to the claims may survive as a general principle.

278. *Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir. 1999).

municipal policies and customs. The Eighth Circuit considers only "deliberate choice[s] of a guiding principle or procedure" by municipal policymakers to be official policies.[279] Municipal customs, on the other hand, require showings of: (1) "a continuing, widespread, persistent pattern of unconstitutional misconduct" by municipal employees;[280] (2) "[d]eliberate indifference to or tacit authorization of such conduct" by the municipality "after notice to the officials of that misconduct"; and (3) "[proof] that the custom was the moving force behind the constitutional violation."[281] The Eighth Circuit has indicated that, in municipal liability cases, failure-to-supervise claims are analyzed as customs.[282]

In *Liebe v. Norton*,[283] the Eighth Circuit panel disagreed with the plaintiff's assertion that "the failure to supervise claim is distinct and separate from the failure to train claim."[284] The court reasoned that since the two claims are governed by the deliberate indifference standard, they can be analyzed as one.[285] However, the plaintiff did not offer identical evidence to support both claims. For example, she argued that county policies, like the requirement that a guard must check the holding cell every fifteen minutes, were inadequate in preventing inmate suicides, and therefore the County failed to adequately train guards.[286] Similarly—but not identically—the plaintiff offered evidence that intervals between checks of the holding cell "often exceeded fifteen minute[s]" to support her failure-to-supervise claim.[287] Nevertheless, the court concluded that "if these actions do not constitute deliberate indifference for a failure to train claim, they cannot constitute deliberate indifference in the present failure to supervise claim."[288] Subsequent panels in the Eighth Circuit

279. *Id.*

280. *But see Doe v. Fort Zumwalt R-II Sch. Dist.*, 920 F.3d 1184, 1189 (8th Cir. 2019) (leaving the door open for plaintiffs to assert a failure-to-supervise claim where deliberate indifference is premised on "obviousness" without requiring a pattern (quoting *Farmer v. Brennan*, 511 U.S. 825, 841 (1994))).

281. *Mettler*, 165 F.3d at 1204 (last alteration in original) (quoting *Doe v. Special Sch. Dist.*, 901 F.2d 642, 646 (8th Cir. 1990)).

282. *See Perkins v. Hastings*, 915 F.3d 512, 523 (8th Cir. 2019) (explaining that failure-to-supervise claims require a showing of deliberate indifference or tacit authorization and that notice of a pattern of similar unconstitutional conduct is generally required).

283. 157 F.3d 574 (8th Cir. 1998).

284. *Id.* at 579. The plaintiff in *Liebe*—the administrator of the decedent's estate—alleged that the municipality was liable for Robert Liebe's death. Liebe, after being arrested and processed into the jail, was classified as a suicide risk. During a twenty-minute period in which Liebe was not checked on, he hanged himself with his long-sleeved shirt. *Id.* at 576.

285. *Id.* at 579.

286. *Id.* at 579.

287. *Id.*

288. *Id.* at 579–80.

have endorsed the court's combination of the two claims.[289] Independent analyses of failure-to-supervise claims only occur in the absence of a failure-to-train analysis.[290]

Like failure-to-supervise claims, failure-to-investigate claims are analyzed as municipal customs in the Eighth Circuit and are effectively combined in analysis with failure-to-supervise and failure-to-train claims. For example, in *Perkins v. Hastings*,[291] the plaintiff's son was shot and killed in his car by an officer.[292] The officer at issue, Hastings, was flagged multiple times by the department's "Early Intervention System," which was designed to track patterns of misconduct.[293] The department repeatedly exonerated Hastings after conducting investigations.[294] The plaintiff in *Perkins* asserted failure-to-investigate, failure-to-supervise, and failure-to-train claims against the municipality.[295] Though the panel initially separated the failure-to-investigate analysis from the combined failure-to-train-or-supervise analysis, it concluded that the analysis in the former informed the analysis for the latter.[296]

The Eighth Circuit has addressed and analyzed failure-to-supervise theories of municipal liability in twelve cases and has found for the plaintiff in three.[297]

9. Ninth Circuit

The Ninth Circuit categorizes failure-to-supervise claims as "inaction cases" of municipal liability.[298] A plaintiff alleging municipal liability through inaction must show (1) a policy which amounts to deliberate indifference of their constitutional right and (2) "that the policy caused the violation, in the sense that the municipality could have prevented the violation with an appropriate policy."[299] To establish

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289. *See, e.g.*, *Atkinson v. City of Mountain View*, 709 F.3d 1201, 1216 (8th Cir. 2013).

290. *See, e.g.*, *S.M. v. Lincoln County*, 874 F.3d 581, 585 (8th Cir. 2017); *Mettler v. Whitledge*, 165 F.3d 1197, 1204–05 (8th Cir. 1999) (addressing the plaintiff's failure-to-investigate claim, but failing to address the failure-to-train claim).

291. 915 F.3d 512 (8th Cir. 2019).

292. *Id.* at 518.

293. All of the alerts for Hastings were based on his frequent use-of-force incidents. *Id.* at 515–17.

294. *Id.* at 516–17.

295. *Id.* at 521, 523.

296. *Id.* at 523.

297. *See S.M. v. Lincoln County*, 874 F.3d 581, 589 (8th Cir. 2017); *Harris v. City of Pagedale*, 821 F.2d 499, 505–06 (8th Cir. 1987); *Herrera v. Valentine*, 653 F.2d 1220, 1225 (8th Cir. 1981).

298. *See Jackson v. Barnes*, 749 F.3d 755, 763 (9th Cir. 2014).

299. *Id.* (quoting *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1143 (9th Cir. 2012)).

deliberate indifference under the first prong, a plaintiff must show that the municipality was "on actual or constructive notice that its omission would likely result in a constitutional violation."[300]

Though the Ninth Circuit uses a more generalized standard, caselaw illustrates how the "inaction" standard applies to failure-to-supervise claims specifically. One such case is *Jackson v. Barnes*,[301] involving a plaintiff who was wrongfully convicted of first degree murder based on inculpatory statements he made during an un-Mirandized interrogation.[302] Jackson alleged that the municipality had a "policy of inaction" based on its failure to supervise officers regarding *Miranda* warnings.[303] Jackson asserted that the officer at issue admitted to "routinely declin[ing] to read *Miranda* warnings" as a "'ploy' to elicit confessions" and that the frequency of the officer's conduct put the municipality on notice.[304] The Ninth Circuit concluded that, at the motion to dismiss stage, Jackson had adequately stated a claim of a policy of inaction.[305] The court elaborated further, stating that Jackson's specific failure-to-supervise claim, as opposed to a claim implicating the general policies or inactions of the department, satisfied the pleading requirements.[306]

When plaintiffs assert both failure-to-supervise and failure-to-train theories of municipal liability, the Ninth Circuit often combines the two in its analysis. One especially concerning combination of the two theories occurred in *Buchanan v. County of Humboldt*,[307] in which the plaintiff only asserted a failure-to-supervise theory of municipal liability.[308] Though she claim was based on supervision only, the court concluded that "the extensive training [the County] provided belies the concept of 'deliberate indifference.'"[309] Though the *Buchanan* case is unpublished, the Ninth Circuit has yet to explicitly instruct the separation or conflation of the two theories of liability, so courts are not barred from using evidence of training to dispose of failure-to-supervise claims.

The "policy of inaction" approach to municipal liability does, however, seem to mitigate some of the analytical flaws in combined municipal failure analyses. For example, in *Scanlon v. County of Los*

300. *Id.* (quoting *Tsao*, 698 F.3d at 1145).

301. 749 F.3d 755 (9th Cir. 2014).

302. *Id.* at 758–59.

303. *Id.* at 763.

304. *Id.* at 763–64.

305. The "critical factual allegation" that the officer admitted to the conduct "render[ed] his complaint specific" enough to survive dismissal. *Id.* at 764.

306. *Id.*

307. 50 F. App'x 343 (9th Cir. 2002).

308. The plaintiff worked at a county-run shelter and was injured by a "dangerous child" admitted to the facility. Her theory of liability was that the County's failure to supervise its employees resulted in her injury. *Id.* at 345.

309. *Id.*

Angeles,[310] the court addressed plaintiff's claim that child services had "an unofficial policy" of insufficiently preparing petitions for child removal.[311] The Ninth Circuit panel in *Scanlon* noted that, although the agency's training and policies facially were constitutionally compliant, the policies were "insufficient *in practice* to protect the constitutional rights of parents like these."[312] Though the claim in *Scanlon* was labeled as a "policy of inaction" rather than a failure to supervise, the fundamental basis for the claim was recognized as distinct from any training or official policies.[313]

As evidenced in *Jackson*, the Ninth Circuit has a fairly low threshold regarding pleading requirements at the motion to dismiss stage of a municipal liability case. In *Lee v. City of Los Angeles*,[314] the court noted that municipal liability claims may survive motions to dismiss "even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice."[315]

The Ninth Circuit has reviewed the merits of twelve cases in which a plaintiff has alleged either a failure to supervise or a policy of inaction, finding for the plaintiff in five of those cases.[316]

10. Tenth Circuit

The failure-to-supervise theory of municipal liability in the Tenth Circuit is one of many ways of establishing official policy or custom

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310. 92 F.4th 781 (9th Cir. 2024).

311. *Id.* at 811. The plaintiffs in *Scanlon* were the parents of two children, one of which was autistic. A medical professional recommended that the parents begin medical marijuana therapy to help with behavioral issues. Child services, following an anonymous tip, was issued a warrant to remove the children. The warrant application omitted material information about the situation. *Id.* at 790–91. The plaintiffs alleged that the agency had "an unofficial policy for encouraging its social workers to omit exculpatory information from warrant applications" which caused the plaintiffs' children to be removed from their custody. The court also, separately, addressed plaintiffs' claim that social workers were inadequately trained in their constitutional obligations. *Id.* at 811.

312. *Id.* at 813.

313. *Id.*; *see also Chew v. Gates*, 27 F.3d 1432, 1445–46 (9th Cir. 1994) (concluding that plaintiff's injury via police-dog bite was "caused by the city's failure to engage in any oversight whatsoever" of the practice of using canine force, but also noting that a separate failure-to-train theory was potentially viable for different reasons).

314. 250 F.3d 668 (9th Cir. 2001).

315. *Id.* at 682–83 (quoting *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 624 (9th Cir. 1988)).

316. *Scanlon*, 92 F.4th at 813; *Castro v. County of Los Angeles*, 833 F.3d 1060, 1077–78 (9th Cir. 2016); *Jackson v. Barnes*, 749 F.3d 755, 767 (9th Cir. 2014); *Lee*, 250 F.3d at 682–83; *Chew*, 27 F.3d at 1445, 1462.

pursuant to *Monell*.[317] The requirements for the Tenth Circuit's failure-to-supervise claim are familiar; plaintiffs must: (1) demonstrate the failure to supervise; (2) show the direct causal link between the failure and the injury; and (3) show that the failure occurred because of the municipality's deliberate indifference to the known or obvious risks of such a failure.[318] Plaintiffs may satisfy the third prong by showing either (a) an existing "pattern of tortious conduct" or (b) that the violation was a "highly predictable" or "plainly obvious" consequence of the failure to supervise.[319]

The Tenth Circuit panels vary on their approaches to failure-to-supervise claims. The court may take its cues from plaintiffs in determining the depth of its failure-to-supervise analysis. In *Waller v. City & County of Denver*,[320] the court's analyses into plaintiff's failure-to-train, failure-to-investigate, and failure-to-discipline claims are robust, while the failure-to-supervise analysis is a mere three sentences.[321] The court in *Waller* noted that the plaintiff's allegations regarding the inadequacy of the supervision and the municipality's notice of it lacked factual support.[322] In *Schneider v. City of Grand Junction Police Department*,[323] however, the court exhaustively analyzed the plaintiff's failure-to-supervise claim along with four other municipal failure

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317. The full list of forms a municipal policy or custom may take is as follows:

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

Waller v. City & County of Denver, 932 F.3d 1277, 1283 (10th Cir. 2019) (quoting *Bryson v. City of Oklahoma City*, 627 F.3d 784, 788 (10th Cir. 2010)).

318. *Waller*, 932 F.3d at 1284.

319. *Barney v. Pulsipher*, 143 F.3d 1299, 1307–08 (10th Cir. 1998). Both (a) and (b) sufficiently indicate that a municipality was on notice (actual or constructive) that a failure to supervise was "substantially certain to result in a constitutional violation" and that it deliberately disregarded the risk. *Id.*

320. 932 F.3d 1277 (10th Cir. 2019).

321. *Id.* at 1285–91.

322. *Id.* at 1288–89. The plaintiff's opening brief is also illustrative of the court's approach to analysis when faced with multiple "failure" claims. The plaintiff's failure-to-supervise argument largely consisted of evidence relevant to the failure-to-investigate and failure-to-discipline claims, save for a passage from an independent report which urged the City to reform the supervisory structures of the department. Appellant's Opening Brief at 36–41, *Waller*, 932 F.3d 1277 (No. 17-1234), 2018 WL 2096082.

323. 717 F.3d 760 (10th Cir. 2013).

claims.[324] In *Schneider*, the plaintiff was sexually assaulted by an officer and offered evidence that she was not the first to have been sexually assaulted by that officer.[325] Schneider supported her allegations with distinct facts specific to each claim, and the court's analysis illustrated this. For example, the court did not fall into the pattern many others have in conflating inadequate policies and inadequately *applied* policies in its failure-to-supervise analysis.[326]

If a failure to supervise is claimed along with a failure to train, the court often combines the two in some way, likely influenced by the fact it pairs the two together as one category of municipal policy and custom.[327] Perhaps for the same reason, theories of ratification are analyzed separately from "failure" claims, as they are categorized as a separate form of municipal policy and/or custom.[328]

The Tenth Circuit uses the same basic standard when reviewing other municipal failure claims, even going so far as to imply that inadequacies in investigation and discipline are supervisory practices.[329] However, failure-to-investigate and failure-to-discipline theories of municipal liability are almost always addressed separately from failure-to-supervise theories.

The Tenth Circuit has apparently never ruled favorably on the merits of a failure-to-supervise theory of municipal liability.

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324. *See id.* at 771–80.

325. Specifically, Schneider alleged that the Department had a custom of silence regarding sexual assault allegations against officers, and, because of that, the new (at the time) supervisors were not aware that the officer had a previous sexual misconduct complaint. Schneider also presented evidence that the Department failed to conduct an adequate background investigation into the officer, who was the subject of another sexual misconduct complaint five days before starting work as a Denver officer. *Id.* at 763–66.

326. *Id.* at 778–79. The court ultimately determined the claim failed on the causation element, reasoning that there was no evidence that additional supervision would have prevented the assault. *Id.* at 779–80.

327. *See, e.g.*, *Whitewater v. Goss*, 192 F. App'x 794, 797 (10th Cir. 2006) ("We treat allegations of failure to supervise (which often may be indistinguishable from failure to train) the same way."); *Bryson v. City of Oklahoma City*, 627 F.3d 784, 789 (10th Cir. 2010) (addressing plaintiff's failure-to-supervise and failure-to-train claims together).

328. Further, ratification claims of municipal liability require the plaintiff to prove that a policymaker "ratifie[d] an employee's specific unconstitutional actions, as well as the basis for these actions." *Bryson*, 627 F.3d at 790.

329. *See Waller v. City & County of Denver*, 932 F.3d 1277, 1284 (10th Cir. 2019) (outlining the standards for plaintiff's failure to train, supervise, discipline, and investigate claims and combining the latter three as "other supervisory practices," then analyzing the claims separately).

11. Eleventh Circuit

A plaintiff asserting a failure-to-supervise theory of municipal liability in the Eleventh Circuit must show that: (1) the municipality inadequately supervised its employees; (2) the failure to supervise is an official policy; and (3) the policy caused the employees to violate the plaintiff's constitutional rights.[330] A recognized need for supervision, followed by a municipality's deliberate inaction, is necessary to establish a policy of inadequate supervision.[331] Such a need is proven through evidence that (a) employees face situations involving the constitutional duties so often that the need is obvious or (b) there is a pattern of violations which put the municipality on actual or constructive notice of a need for more or better supervision.[332]

The Eleventh Circuit has historically analyzed failure-to-supervise claims in combination with failure-to-train claims. In *Kerr v. City of West Palm Beach*,[333] the court explicitly discarded any analysis of plaintiff's failure-to-supervise claim.[334] The plaintiffs in *Kerr* were all seriously injured (in separate incidents) while being apprehended by the police department's canine unit.[335] The plaintiffs alleged that the excessive injuries they suffered were the result of (1) the City's failure to adequately "train the municipality's canine unit in the constitutional use of canine force" and (2) the City's failure to adequately "supervise the performance of members of the canine unit to ensure that both misbehaving dogs and officers exhibiting bad judgment in the use of canine force received corrective training."[336] Though the plaintiffs asserted two distinct theories of municipal liability, the court chose to "focus on the element common to both claims: the alleged failure to train."[337] Because of this conflation, the court failed to include certain evidence in its analysis, like the fact that the Department was likely failing to review the performance of those on the canine unit "whose actions had resulted in an excessive number of complaints."[338] In other words, the panel in *Kerr* chose to focus on whether the training itself was causing the violations—which, in part, was true—but consequently ignored how the municipality's responses, or lack thereof, contributed to its liability. The Eleventh Circuit continues to conflate failure-to-

330. *See Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160, 1173 (11th Cir. 2001); *Gold v. City of Miami*, 151 F.3d 1346, 1350 (11th Cir. 1998).
331. *Thomas*, 261 F.3d at 1173.
332. *Id.*
333. 875 F.2d 1546 (11th Cir. 1989).
334. *Id.* at 1555.
335. *Id.* at 1551–52.
336. *Id.* at 1555.
337. *Id.*
338. *Id.* at 1551, 1556.

supervise and failure-to-train claims, even in cases where a plaintiff did not assert a failure-to-train claim.[339]

Failures to discipline and/or investigate are often combined in analysis with failure-to-supervise claims. In *Vineyard v. County of Murray*,[340] the court noted that a record of complaints and the inadequate manner in which the complaints were investigated illustrated a "policy of deliberate indifference" which supported the plaintiff's failure-to-supervise, -discipline, and -train claims.[341]

The Eleventh Circuit has not ruled in favor of a plaintiff on a municipal failure-to-supervise claim since 1993.[342] Apart from cases in which the theories of liability are based on mere conclusory allegations, most of the recent unfavorable outcomes are based on a lack of a pattern of similar violations.[343]

12. D.C. Circuit

The D.C. Circuit has held that a municipal failure to supervise can be the basis of municipal liability if the failure amounts to deliberate indifference.[344] Though the court has not articulated a rigid deliberate indifference standard, it has held that deliberate indifference exists "when the need for training [and, presumably, supervision] reaches a level of moral certainty and the constitutional consequences become obvious."[345]

When plaintiffs assert failure-to-supervise and failure-to-train claims, the D.C. Circuit has generally combined the claims into one deliberate indifference analysis.[346] The court's analysis in *Daskalea v.*

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339. In *Thompson v. Sheriff*, the plaintiff was tased during his arrest and alleged that the municipality was liable for the excessive force used based on its failure to supervise officers. The court, in its analysis of the solo failure-to-supervise claim, cited evidence of "adequate written policies" and that "deputies receive training" on taser usage. 542 F. App'x 826, 827–29 (11th Cir. 2013).

340. 990 F.2d 1207 (11th Cir. 1993).

341. *Id.* at 1212; *see also Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160, 1175 (11th Cir. 2001) (combining plaintiff's allegations of failures to supervise, investigate, and discipline).

342. *See Vineyard*, 990 F.2d at 1212.

343. *See, e.g.*, *Daniel v. Hancock Cnty. Sch. Dist.*, 626 F. App'x 825, 834–35 (11th Cir. 2015); *Knight ex rel. Kerr v. Miami-Dade County*, 856 F.3d 795, 820 (11th Cir. 2017).

344. Along with failure-to-train, failure-to-act, and failure-to-discipline claims. *See Lane v. District of Columbia*, 887 F.3d 480, 483, 487 (D.C. Cir. 2018) (failure to train and supervise); *Daskalea v. District of Columbia*, 227 F.3d 433, 441–42 (D.C. Cir. 2000) (failure to act); *Parker v. District of Columbia*, 850 F.2d 708, 713 (D.C. Cir. 1988) (failure to train, supervise, and discipline).

345. *Lane*, 887 F.3d at 487.

346. This is also true when failure-to-discipline and failure-to-investigate claims are alleged along with either one or both of the other "failure" claims. *See Carter v. District of Columbia*, 795 F.2d 116, 122 (D.C. Cir. 1986).

District of Columbia,[347] regarding a general failure-to-act theory of municipal liability, illustrates the inadequacies in conflating supervisory failures with training failures. The plaintiff in *Daskalea*, an inmate in the D.C. jail, was forced to take part in an ongoing practice, facilitated by guards, wherein inmates stripped, danced, and were groped by inmates and staff as others watched.[348] Daskalea alleged that the District was liable for its deliberately indifferent failure to act in light of the constitutional violations occurring in the jail.[349] The court affirmed the verdict against the District, concluding that the municipality had sufficient notice of the constitutional violations and therefore was deliberately indifferent in failing to implement a training program or take "any other corrective measure."[350] Specifically, the court referenced: (1) a federal district court order issued seven months before the "forced striptease" in which the district court "noted a failure to train officers" to prevent sexual abuse and harassment of female inmates by officers; (2) Daskalea's complaints and letters about the abuse; and (3) the "open and notorious nature" of the abuse.[351] The court in *Daskalea* demonstrated how a municipality's persistent failure to train its officers can develop into a separate, more sweeping municipal failure.

The D.C. Circuit has only reviewed the merits of three failure-to-supervise (or synonymous) claims and has found for the plaintiff twice.[352]

III. PRACTICAL IMPLICATIONS

Given the breadth and detail of the empirical survey presented in this Article, we save for future work the important task of developing a comprehensive set of recommendations for scholars, policymakers, judges, and attorneys. In this brief final Part, we simply offer some high-level practical recommendations for attorneys who litigate § 1983 claims against municipalities and are considering proceeding on a failure-to-supervise theory. We follow these suggestions with recommendations for courts tasked with adjudicating such claims.

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347. 227 F.3d 433 (D.C. Cir. 2000).

348. *Id.* at 439. Before this incident, Daskalea was regularly subjected to threats, physical attacks, and attempted sexual assaults by jail staff and inmates alike. Daskalea filed numerous complaints, none of which resulted in change or intervention. *Id.* at 438.

349. *Id.* at 440–41.

350. *Id.* at 441–42.

351. *Daskalea*, 227 F.3d at 442. In *Women Prisoners v. District of Columbia*, the district court ordered the District "to take all action necessary to remedy and prevent" the sexual harassment of female prisoners. 877 F. Supp. 634, 679 (D.D.C. 1994).

352. *See Parker v. District of Columbia*, 850 F.2d 708, 712–13 (D.C. Cir. 1988); *Daskalea*, 227 F.3d at 441.

A. Recommendations for Attorneys

First, we recommend that attorneys plead the failure-to-supervise claim as a standalone claim. In drafting complaints and briefs, attorneys should avoid using subheadings such as "Failure to Train and/or Supervise" because they may indicate to the court that the claims are one and the same. Instead, attorneys should separate the claims in format and content as much as possible. When attorneys assert another municipal failure claim in addition to failure to supervise, they should aim to utilize distinct facts in each supporting argument, or to clearly restate facts where they are applicable to both theories. As we have previously noted, there may be some overlap in municipalities' *duties* to train and supervise,[353] meaning there may be evidence which is relevant to both municipal failure claims. If that is the case, attorneys should take special care in how they use that evidence within each claim to avoid conflation and maximize clarity.[354]

Second, when attorneys cite prior incidents to establish that municipalities were deliberately indifferent, we encourage them to contextualize the incidents. When attorneys use such incidents to support the notice requirement of deliberate indifference, numbers alone may not be sufficiently persuasive.[355] Rather, it is important to prioritize establishing the *similarity* of the prior incidents in order to ensure that courts will agree the municipality had prior notice such that the failure to supervise indeed provided evidence of deliberate indifference.

Third, we note that failure-to-investigate and failure-to-discipline claims may be utilized more effectively as evidence of failures to supervise, rather than asserting these theories independently. Disciplinary and investigatory failures are often, above all, supervisory failures.[356] Further, many federal appellate courts combine the claims regardless of whether they are pleaded separately.[357] By pleading micro-

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353. *See supra* note 78 and accompanying text.

354. *See, e.g.*, *Daskalea*, 227 F.3d at 442–43 (explaining how both the District's initial failure to train prison guards and its failure to act to remedy that initial failure subjected it to liability).

355. *See, e.g.*, *Robinson v. Fair Acres Geriatric Ctr.*, 722 F. App'x 194, 199–200 (3d Cir. 2018) (holding that plaintiff sufficiently pleaded his municipal failure claims by alleging that the state-owned nursing home's thirty citations by state and federal regulators put it in the ninety-seventh percentile for deficiencies); *Chew v. Gates*, 27 F.3d 1432, 1445 (9th Cir. 1994) (holding that evidence that dogs bit suspects more than forty percent of the time they were used was indicative of a failure to supervise amounting to deliberate indifference); *Sledd v. Lindsay*, 102 F.3d 282, 287, 289 (7th Cir. 1996) (holding that, at the motion to dismiss stage, plaintiff's complaint stated a claim for failure to supervise by illustrating that only five percent of the annual total of filed complaints were investigated).

356. *See supra* note 86 and accompanying text.

357. *See supra* notes 86–90 and accompanying text.

targeted claims, plaintiffs may deprive themselves of the opportunity to show systemic failures that collectively demonstrate inadequate municipal supervision.

B. Recommendations for Courts

First, and parallel to our recommendation to civil rights attorneys, we recommend that courts treat the failure-to-supervise claim as a standalone theory of liability when they encounter it. Although courts have often made a habit of discussing failure-to-train and failure-to-supervise claims together, conceptually these claims are distinct.[358] Evaluating them separately will allow measured consideration of the alleged municipal shortcoming and whether it satisfies the *Monell* standard.

Second, we recommend that courts always carefully consider *why* a particular violation took place. While it might be tempting to conclude that a particular violation was the result of a lone bad actor's choices, in many instances the municipal environment enabled that actor by providing insufficient oversight or unchecked responsibilities. Thinking about the municipality as an institution, rather than as merely a collection of independent actors, will provide a richer understanding of the conditions that facilitate constitutional violations.[359]

CONCLUSION

Our hope is that the research and recommendations in this Article, as well as the doctrinal raw material—our original almost-fifty-year survey—offer a new lens for attorneys and courts to construct or consider a claim that a municipality's failure to supervise its employees led to a constitutional violation. The fundamental municipal responsibility of supervision deserves greater attention as a source of liability.

Moreover, the doctrine of failure to supervise offers important lessons for municipal liability litigation—and municipal liability litigators—more broadly. Given the significant headwinds that plaintiffs already face, for any municipal liability claim to succeed, plaintiffs' lawyers must carefully differentiate each theory of liability from the next, ensuring that they do not confusingly or erroneously blend elements in a way that will cause a court to reject a claim on the ground that it is insufficiently pled or proven. Understanding the distinctions among theories is a complex endeavor that is not amenable to shortcuts. Both with respect to failure to supervise and more broadly, it is critical that plaintiffs' attorneys take the initiative to familiarize themselves with the

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358. Leong, *Municipal Failures*, *supra* note 1, at 363–64.

359. *See supra* note 21 and accompanying text.

overarching trial theories as well as the body of law on which they intend to rely. Section 1983 litigation is not to be taken lightly, and attorneys must budget sufficient time and other resources to ensure that they can adequately represent their clients' interests in this complex body of law.

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