Article

Civil Rights Liability for Bad Hiring

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Suppose that a municipality hires a police officer, teacher, corrections officer, or other official with an extensive record of past misconduct—someone the municipality should have known better than to hire. When such an employee causes a violation of constitutional rights, the injured party often brings a civil rights suit under 42 U.S.C. § 1983, arguing that the municipality failed to screen the wrongdoer prior to hiring. Yet little is known about how such lawsuits play out on the ground.

In the first empirical study of municipal liability for bad hiring, this Article demonstrates that municipalities enjoy de facto immunity for failing to screen employees with poor records. Only one federal appellate court in the past twenty-five years has upheld § 1983 liability against a municipality for its deficient hiring practices. Analysis of hundreds of district court dockets tells the same story: among all § 1983 cases initiated in 2019, just three courts nationwide ruled in favor of a plaintiff when

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presented with a bad hiring claim on a motion, and no plaintiff won a final judgment against a municipality for bad hiring. The reasons for plaintiffs' lack of success include both the demanding doctrinal standards applicable to municipal liability claims and the surprisingly poor quality of lawyering in these municipal liability cases.

Because liability for bad hiring is so rare, municipalities have little incentive to screen employees carefully. These lackluster screening practices result in dubious hiring decisions and enable the serial job-hopping of municipal employees who are fired or resign under threat of termination for misconduct. The result is that the public is endangered by powerful officials who likely should not have been hired in the first place. But all is not lost for civil rights advocates: this Article concludes with a suite of interventions both within and beyond litigation that can combat the problem of bad hiring.

TABLE OF CONTENTS

INTRODUCTION

Robert Weismiller had a history of preying on children.[1] In the 1970s, he taught gym and driver's education at a public high school in Prince George's County, Maryland. There, he had sex with two students. He persuaded a sixteen-year-old girl to have sex with him both on and off school property.[2] He also had sex with a seventeen-year-old girl, whom he would take to a motel while supposedly teaching her how to drive. After the second girl's parents found out, they demanded a response from the principal. In 1978, Weismiller stopped working at that high school.

In the 1980s, Weismiller got another job as a teacher, this time at a public middle school in Prince William County, Virginia.[3] There, in 1984, he sexually assaulted two eighth grade students. After Weismiller was transferred to the students' high school, the abuse continued into their ninth-grade year. In 1986, the students filed a lawsuit against Weismiller, several other school officials, and the Prince William County School Board. Weismiller was fired as a result of the lawsuit.

Despite his history, in the 1990s, Weismiller was hired at a public middle school in Fairfax County, Virginia.[4] One of the

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1. Unless otherwise specified, the facts in the first six paragraphs of this Article are drawn from the opinion in *Blue v. District of Columbia*, 811 F.3d 14 (D.C. Cir. 2015). To facilitate both accuracy and ease of reading, I occasionally use the same phrasing as the D.C. Circuit while omitting quotation marks. For purposes of this Article, I treat the allegations as though they are true—the same posture in which the D.C. Circuit considered them, given that the case was litigated on appeal from the district court's grant of a motion to dismiss—but I am not making any representations about the truth of those allegations.

2. Second Amended Complaint & Jury Demand ¶ 24, Blue v. District of Columbia, 850 F. Supp. 2d 16 (D.D.C. 2012) (No. 10-1504).

3. According to Google Maps, the two counties are fewer than 60 miles apart, or a 90-minute drive in normal traffic. *From Prince William County, Virginia to Prince George's County, Maryland*, GOOGLE MAPS, http://google.com/maps [https://perma.cc/MSK4-KTFX] (searching for "Prince George's County, M.D.," select "Directions," and enter "Prince William County, V.A." as the starting point).

4. Fairfax County is between, and adjacent to, Prince George's County and Prince William County. You would drive through Fairfax County to get from Prince George's County to Prince William County. The National Capitol Planning Commission, established by Congress in 1924, describes all three counties as part of the "National Capital Region." *See National Capital Region Map,* NAT'L CAP. PLAN. COMM'N, https://www.ncpc.gov/maps/national-capital-region [https://perma.cc/B8FT-7SLV].

plaintiffs in the 1986 lawsuit happened to be working at the school. When she saw Weismiller at a school function, she notified human resources about the previous lawsuit and was told Weismiller would be terminated immediately. Weismiller stopped working for the school system that year.

One might think it would be impossible for Weismiller to get a job as a teacher ever again. Over a thirty-year period, he accumulated a record of sexual misconduct involving four different students in three different public-school systems, all within an hour's drive of Washington D.C.[5] Officials in all three school systems knew about his behavior. Two of his victims had even sued him, naming his school district as a co-defendant and resulting in his firing.

Yet in the 2000s, the District of Columbia public school system not only hired Robert Weismiller but also assigned him to teach at the Transition Academy at Shadd, a school for students with emotional issues. There, he met Ayanna Blue, an eighteen-year-old student. Blue had faced challenges throughout her education, but she was only a year away from graduating from high school.

Then Weismiller started coming on to her. "If I were 30 years younger, I would marry you," he told her. He winked at her in class. He kissed her when no one else was around. They started having sex in his classroom during the lunch hour, in his car after school, and at her house. Eventually Blue became pregnant and gave birth to a daughter. She had to restart twelfth grade due to time off for the pregnancy.[6] A paternity test revealed that Weismiller was the father of the child.

Ayanna Blue subsequently brought suit against both Weismiller and the District of Columbia under 42 U.S.C. § 1983,

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5. Google Maps lists all three school districts as being within a 60-minute drive of D.C. *From Prince William County, Virginia to Washington, District of Columbia*, GOOGLE MAPS, http://google.com/maps [https://perma.cc/5D6D-ALZ7] (search for "Washington D.C.," select "Directions," and enter "Prince William County, V.A." as the starting point); *From Prince George's County, Maryland to District of Columbia, Washington*, GOOGLE MAPS, http://google.com/maps [https://perma.cc/3DJS-4EL9] (search for "Washington D.C.," select "Directions," and enter "Prince William County, V.A." as the starting point); *From Fairfax County, Virginia to District of Columbia, Washington*, GOOGLE MAPS, http://google.com/maps [https://perma.cc/RAG2-4BPL] (search for "Washington D.C.," select "Directions," and enter "Prince William County, V.A." as the starting point).

6. Second Amended Complaint & Jury Demand, *supra* note 2, ¶ 44.

alleging a violation of her Due Process right to bodily integrity.[7] To hold a municipality such as the District of Columbia liable for a constitutional violation committed by one of its employees, the Supreme Court's seminal decision in *Monell v. Department of Social Services* requires a plaintiff to demonstrate that a policy or custom of the municipality caused the violation.[8] Plaintiffs can establish a policy or custom from an explicit written policy; an action by a final policymaker; an informal custom that occurs so frequently that it rises to the level of policy; or a failure to act, such as a failure to train, supervise, or screen employees.[9] This Article will refer to a claim of policy or custom based on a municipality's failure to screen its employees as a either a "failure-to-screen" claim or a "bad hiring" claim.[10]

Blue proceeded under the failure-to-screen theory, arguing that the District of Columbia had a "custom, policy or practice of failing to adequately investigate the backgrounds of its teachers before hiring them."[11] Her complaint included allegations about Weismiller's decades of misconduct and the schools who were aware of it.[12] Yet the district court granted the District of Columbia's motion to dismiss.[13]

"[O]ne might think that this case is relatively easy," wrote Judge Tatel of the D.C. Circuit Court of Appeals when Blue's lawsuit came before the court.[14] The D.C. Circuit's opinion

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7. Blue reached a settlement with Weismiller prior to appeal. Blue v. District of Columbia, 811 F.3d 14, 18 (D.C. Cir. 2015).

8. *Monell* established the plaintiffs could sue local government entities under 42 U.S.C. § 1983. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 688–89 (1978). The Supreme Court uses the term "municipality" to refer to a local government entity such as a city or county. *Id.* at 690–701 (referring to "municipalities" and "local governments" interchangeably). The causation requirement is derived from *Monell*, which interprets 42 U.S.C. § 1983's "subjects, or causes to be subjected" language to mean that a municipality cannot be liable in the absence of a policy or custom that resulted in the constitutional violation. *Id.* at 692. For further discussion of *Monell*'s causation requirement, *see infra* notes 90–153 and accompanying text.

9. *See, e.g.*, Connick v. Thompson, 563 U.S. 51, 60–61 (2011) (articulating the four theories). *See also infra* note 95 and accompanying text (discussing variation in articulating theories of municipal liability).

10. Courts commonly use both phrasings, as well as several others. *Cf. infra* notes 154, 188, and 196 (listing terms used to locate failure-to-screen cases).

11. Second Amended Complaint & Jury Demand, *supra* note 2, ¶ 82.

12. *Id.* ¶¶ 23–28.

13. Blue v. District of Columbia, 850 F. Supp. 2d 16, 16 (D.D.C. 2012).

14. Blue v. District of Columbia, 811 F.3d 14, 18 (D.C. Cir. 2015).

acknowledged Weismiller's "history of preying on children" in nearby school districts.[15] "Given this background," the court observed, "most people would reasonably assume that Blue should have an opportunity to prove her case."[16]

Yet the D.C. Circuit affirmed the dismissal of Blue's claim, concluding she had not met the challenging standard the Supreme Court articulated in its decision in *Board of Commissioners of Bryan County v. Brown*.[17] There, the Court held that a plaintiff attempting to establish § 1983 municipal liability on the basis of bad hiring must be held to "rigorous standards of culpability and causation . . . to ensure that the municipality is not held liable solely for the actions of its employee."[18] As to culpability, a plaintiff must show that the municipal defendant was deliberately indifferent to a "known or obvious" risk[19]—a "stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action."[20] And as to causation, the plaintiff must prove that the inadequate screening was the "moving force" behind the constitutional violation[21]—a standard courts have equated to proximate cause.[22]

According to the D.C. Circuit, Blue had met neither standard. The court agreed that "the complaint suggests that the District made a serious mistake in hiring Weismiller" and that Blue's allegations would be "distressing if true."[23] Yet this was not enough to establish either that the District had acted with

15. *Id.*

16. *Id.*

17. Bd. of the Cnty. Comm'rs v. Brown (*Bryan County*), 520 U.S. 397, 405 (1997); *see also* Connick v. Thompson, 563 U.S. 51, 51–52 (2011).

18. *Bryan County*, 520 U.S. at 405.

19. *Id.* 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 City of Canton v. Harris, 489 U.S. 378, 388–89 (1989))).

20. *Bryan County*, 520 U.S. at 410.

21. *Canton*, 489 U.S. at 389 (quoting Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978)); Polk County v. Dodson, 454 U.S. 312, 326 (1981).

22. *See, e.g.*, Harper v. City of Los Angeles, 533 F.3d 1010, 1026 (9th Cir. 2008) (noting that "moving force" is tantamount to proximate cause); Smith v. District of Columbia, 413 F.3d 86, 102 (D.C. Cir. 2005) ("We have equated moving force with proximate cause. Proximate cause 'includes the notion of cause in fact,' and requires an element of foreseeability." (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 165 (5th ed. 1989))).

23. Blue v. District of Columbia, 811 F.3d 14, 20 (D.C. Cir. 2015).

deliberate indifference or that its bad hiring practices were the cause of the alleged violation of Blue's constitutional rights.[24]

Ayanna Blue's circumstances are not unique. Like other employers, municipalities often make questionable hiring decisions. Some involve the job-hopping of employees like Robert Weismiller: it's relatively common for municipal employees who are fired or resign under threat of termination to successfully seek similar employment in a nearby jurisdiction.[25] In law enforcement, the phenomenon is so common that officers who jump jurisdictions are nicknamed "wandering officers."[26] In education, the term "passing the trash" has emerged in reference to school districts' practice of allowing employees who sexually abuse students to quietly resign and then seek employment at other schools.[27]

In addition to applicants who were previously fired from a similar job, municipalities also hire applicants with troubling criminal records or other red flags, such as prior on-the-job misconduct.[28] Such a story makes the news nearly every week. Quite recently, we learned that Demetrius Haley—one of the Memphis police officers who beat Tyre Nichols to death—was previously employed by the Shelby County Corrections Department, where

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24. *Id.*

25. *See infra* text accompanying notes 67–89; Erin B. Logan, *Without Warning System, Schools Often 'Pass the Trash'—and Expose Kids to Danger*, NPR (Apr. 6, 2018), https://www.npr.org/sections/ed/2018/04/06/582831662/schools-are-supposed-to-have-pass-the-trash-policies-the-dept-of-ed-isn-t-tracki [https://perma.cc/7VTS-28BQ] (describing a "cycle [of] abuse, dismissal, rehire and abuse again . . . that experts and researchers say is far too common across the nation").

26. *See, e.g.*, Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676, 1682 (2020).

27. Richard Fossey & Todd A. DeMitchell, *"Let the Master Answer": Holding Schools Vicariously Liable When Employees Sexually Abuse Children*, 25 J.L. & EDUC. 575, 595 (1996). Another source suggests that repeat-offending teachers are sometimes called "mobile molesters." Noah Menold, Comment, *"Passing the Trash" in Illinois After* Doe-3 v. McLean County Unit District No. 5*: A Proposal for Legislation to Prevent School Districts from Handing Off Sexually Abusive Employees to Other School Districts*, 34 N. ILL. U. L. REV. 473, 475 n.7 (2014).

28. Sometimes the municipality is simply reckless or careless. In other instances, the municipality may make a questionable hire because they have few applicants from which to choose. *See infra* text accompanying notes 63–64.

he was named in a lawsuit by an inmate who alleged that Haley punched him.[29]

What happens when a municipality is sued for bad hiring under § 1983? Consistent with Ayanna Blue's experience, case law and commentary has suggested that such liability is hard to establish.[30] Yet no prior research has examined systematically how failure-to-screen claims fare under this challenging legal standard, nor have scholars considered what factors affect whether plaintiffs win or lose.

This Article offers the first comprehensive empirical examination of failure-to-screen claims in federal court. My research reveals that municipal liability for bad hiring is extraordinarily rare. An exhaustive survey of all federal appellate opinions available on Westlaw revealed just *one* case in which a plaintiff succeeded in recovering in a § 1983 action against a municipality on the basis of failure to screen.[31] Similarly, a survey of nearly 400 federal district court dockets uncovered only three plaintiffs who prevailed on a failure-to-screen claim at any stage of litigation—for example, by surviving a motion to dismiss.[32] No plaintiff in any case represented by these dockets won a judgment against a municipality on the basis of the failure-to-screen theory.[33]

My research reveals two broad categories of causes for plaintiffs' losses. The first set of causes is imposed by case law: the elements of the failure-to-screen theory are difficult to establish,

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29. Doha Madani & Tim Stelloh, *'Hope That Those Officers Get What They Deserve,' Says Man Who Accused Ex-Offender in Tyre Nichols Case of 2015 Jailhouse Assault*, NBC NEWS (Jan. 26, 2023), https://www.nbcnews.com/news/us-news/hope-officers-get-deserve-says-man-accused-ex-officer-tyre-nichols-cas-rcna67628 [https://perma.cc/29N9-PZU2].

30. *See, e.g.*, *Bryan County*, 520 U.S. 397, 405 (1997) (stating that hiring claims are subject to "rigorous standards of culpability and causation . . . to ensure that the municipality is not held liable solely for the actions of its employee."); Young v. City of Providence, 404 F.3d 4, 30 (1st Cir. 2005) ("It is much harder for a *Monell* plaintiff to succeed on a hiring claim than a failure to train claim." (citing *Bryan County*, 520 U.S. at 409)); Karen M. Blum, *Making Out the* Monell *Claim Under Section 1983*, 25 TOURO L. REV. 829, 849 (2009) ("The standard from *Bryan County* is a tough one for plaintiffs to satisfy.").

31. Griffin v. City of Opa-Locka, 261 F.3d 1295, 1298 (11th Cir. 2001). The methodology of this survey will be discussed in Part II.A. *See infra* text accompanying notes 154–86.

32. The methodology of this survey will be discussed in Part II.C. *See infra* text accompanying notes 194–224.

33. *See infra* Part II.C.

and these substantive challenges are amplified by procedural challenges such as the pleading standard imposed by *Ashcroft v. Iqbal*.[34] The second set of causes relates to the way that cases are litigated on the ground: my review of dockets shows that poor lawyering plays a role in some plaintiffs' lack of success. Many plaintiffs' complaints were pled so badly that they *could not* have won, no matter how egregious the underlying facts or how compelling the evidence the plaintiff could have marshalled.

From these data, I conclude that municipalities enjoy de facto immunity in federal civil rights litigation from liability for their hiring decisions. Such immunity raises serious concerns. In particular, we should worry that when it comes to hiring, § 1983 is not fulfilling its intended functions of deterrence and compensation.[35] That is, municipalities have no incentive to hire carefully, and plaintiffs will remain uncompensated if municipalities hire badly. These concerns might be alleviated if other legal remedies provided an adequate substitute for § 1983, but, as this Article will show, currently they do not.[36] Mechanisms such as indemnification, state statutory law, and common law tort provide limited recourse for certain injuries, but leave many more unaddressed.[37] The result is that in many jurisdictions there are few checks on municipalities' hiring behavior and significant incentives to screen prospective employees superficially.

To improve municipal accountability for poor hiring practices, this Article describes several measures that civil rights activists can pursue both within and beyond litigation. First, plaintiffs' lawyers should look beyond the failure-to-screen claim in seeking compensation for their clients. As I have advocated in other work, the claim that a municipality failed to *supervise* its employees may be more successful than a claim that it failed to

34. 556 U.S. 662, 678 (2009) (describing the plausibility standard required for pleadings).

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

36. *See infra* text accompanying notes 275–95.

37. *See infra* text accompanying notes 275–95.

screen them.[38] Beyond litigation, civil rights advocates should also consider measures such as improving the quality of civil rights lawyering, enhancing compensation for civil rights attorneys, legislatively creating databases containing the employment records of government officials, and imposing disclosure obligations on municipal job applicants' prior employers.

The balance of the Article is organized in four parts. Part I describes the causes and consequences of municipalities' poor hiring practices, drawing from both scholarly sources and news accounts. It also provides doctrinal background on litigation under 42 U.S.C. § 1983, municipal policy and custom, and the theory of municipal failure to screen. Part II presents the results of an original empirical examination of failure-to-screen litigation since *Bryan County*. It surveys federal appellate opinions, district court opinions, and district court dockets to show that, for all practical purposes, municipalities are immune from liability under federal law for their hiring decisions. Part III analyzes the data to uncover the primary causes for this de facto immunity, which include doctrinal challenges, the plausibility pleading standard, and poor lawyering by plaintiffs' lawyers. Finally, Part IV considers the broader implications of the Article's empirical findings and suggests ways forward.

I. BACKGROUND

This Part sets the stage for an examination of municipal liability for failure to screen. Part I.A offers an overview of the incentives that influence municipalities' hiring practices, while Part I.B demonstrates that current municipal hiring processes often fail to screen out applicants who have a significant record of past misconduct. Part I.C then outlines the civil rights liability regime for bad hiring.

A. OVERVIEW OF MUNICIPAL SCREENING

This Section briefly surveys the considerations that influence municipal screening. With the understanding that relevant circumstances may vary from one municipality to the next, I will highlight elements common to most municipal employers—first

38. Nancy Leong, *Municipal Failures*, 108 CORNELL L. REV. 345, 368 tbl.2 (2023) (showing that plaintiffs prevailed in 13.3% of failure-to-supervise claims adjudicated before federal appellate courts in 2019).

those that encourage them to screen carefully, then those that result in inadequate screening.

1. Incentives for Careful Screening

Municipalities have several incentives to screen prospective employees carefully. First and most obviously, municipalities want to hire employees who are well-suited for the jobs they must do, which may encourage a municipal employer to engage in a robust screening process that would uncover and appropriately consider past misconduct.[39]

Concern about the expenses of litigation and the potential for a settlement or judgment also provide incentives for municipalities to screen prospective employees carefully.[40] On this point, the conditions of municipal insurance policies may affect municipal incentives.[41] As John Rappaport has shown, municipalities are sensitive to pressure from insurance providers.[42] Even if a particular level of screening is not required by law, and even if there is no liability for not achieving a particular level of screening, insurers can still shape municipal behavior by communicating that poor hiring is problematic.[43] On the other hand, if insurance companies perceive a very low risk that failure-to-screen claims will be litigated successfully, they may see little reason to press municipalities to reform their practices.[44]

A final incentive for careful screening is that municipalities want to avoid negative publicity resulting from a poor hiring choice, particularly in jurisdictions where the bad publicity

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39. Stephen F. Befort, *Pre-Employment Screening and Investigation: Navigating Between a Rock and a Hard Place*, 14 HOFSTRA LAB. L.J. 365, 367–68 (1997).

40. *See, e.g.*, Margaret M. Clark, *How to Address Negligent Hiring Concerns*, SOC. FOR HUM. RES. MGMT. MAG. (Feb. 27, 2019), https://www.shrm.org/hr-today/news/hr-magazine/spring2019/pages/how-to-address-negligent-hiring-concerns.aspx [https://perma.cc/2JKV-D6MH] ("It's every HR professional's worst nightmare: An episode of workplace violence occurs on his or her watch and is closely followed by a negligent hiring claim.").

41. For a full discussion of municipal insurance, see generally John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539 (2017).

42. *Id.* at 1573–94.

43. *Id.* at 1574–75.

44. *Id.* As I will discuss, the *actual* risk of liability for failure to screen is very low, but it is unclear whether and to what extent municipalities and their insurers understand this. *See infra* text accompanying notes 187–224.

implicates elected officials or other government officials whose continued employment depends on public approval.[45] In such situations, a municipality may be concerned about hiring someone who will generate bad publicity even if they are not concerned about their liability in litigation for having failed to screen that person.[46] With that said, the concern about publicity has limits: for most of the millions of interactions between local government officials and their constituents, there is no publicity at all, and therefore no disincentive arising from bad publicity.

2. Explanations for Inadequate Screening

The incentives to screen prospective employees conscientiously are offset by several countervailing factors. First, municipal bureaucracy may result in less-than-thorough background checks. Particularly in small, remote, or under-resourced jurisdictions, not all personnel records are readily available, particularly those going back many years; likewise, under-resourced jurisdictions also may have less ability or less desire to engage in diligent screening.[47] Further, not all municipal employees will necessarily comply with the letter of the law governing employee hiring, either because they don't know what the law requires, or because they are insufficiently motivated to comply.[48]

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45. *See, e.g.*, Staci M. Zavattaro, *Municipalities as Public Relations and Marketing Firms*, 32 ADMIN. THEORY & PRAXIS 191 (2010) (describing how municipalities control their public image).

46. For example, Timothy Loehmann, the police officer who shot and killed twelve-year-old Tamir Rice in Cleveland, subsequently obtained employment as a law enforcement officer in Tioga, Pennsylvania, but left the position just two days after his start date due to public outcry. Christine Chung, *Cleveland Officer Who Killed Tamir Rice Swiftly Exits New Police Job*, N.Y. TIMES (July 7, 2022), https://www.nytimes.com/2022/07/07/us/tamir-rice-timothy-loehmann-pennsylvania.html [https://perma.cc/9S7M-B8DR].

47. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2137 (2017) ("Poor communities are more likely to hire 'gypsy cops,' officers with spotty work histories who have been fired elsewhere, because their resource constraints make it more difficult for them to discriminate between good and bad officers.").

48. Elizabeth Emens has described what she calls "desk-clerk law"—the idea that the requirements of any law are mediated through low- and mid-level bureaucrats, often resulting in imperfect compliance with the requirements of a particular legal regime. Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 824 (2007).

Second, a prospective employee's prior employer has legal reasons not to disclose information about that employee during a background check. Courts have held that a municipality that "blacklists" a terminated employee by attempting to block her future employment may be liable for both substantive and procedural due process violations.[49] Similarly, a prior employer may be concerned that providing negative information about an employee will result in a defamation claim; even if the claim is unfounded, the municipality will still face expensive and time-consuming litigation.[50] By contrast, nondisclosure carries less legal risk: courts have held that there is no tort liability for failing to confirm even the fact of a past employee's employment, let alone whether that employee engaged in misconduct.[51] For many municipalities, it may seem a safer bet simply to say nothing about an employee who performed poorly or engaged in wrongdoing.[52]

Third, municipalities face legal constraints during the hiring process that cut against rigorous screening.[53] For example, a municipality may be concerned that a rejected applicant will bring a claim of discrimination under federal, state, or municipal law.[54] Some jurisdictions also have "off-duty conduct" laws that prohibit an employer from considering aspects of an employee's behavior away from work in determining whether to hire them.[55] The broadest versions of such statutes prohibit consideration of *any* lawful conduct away from work;[56] more narrow versions only

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49. *See, e.g.*, Coclough v. District of Columbia, No. 19-2317, 2020 WL 5569947, at *10 (D.D.C. Sept. 16, 2020) (denying defendants' motion to dismiss where municipality that terminated employee allegedly blacklisted her).

50. Katherine A. Peebles, *Negligent Hiring and the Information Age: How State Legislatures Can Save Employers from Inevitable Liability*, WM. & MARY L. REV. 1397, 1402–03 (2012) (explaining that past employers are often unwilling to provide useful information to prospective employers due to defamation concerns).

51. *See, e.g.*, Nichols v. Pray, Walker, Jackman, Williamson & Marler, 144 P.3d 907, 912 (Okla. Civ. App. 2006). Employers, including municipal employers, are also governed by so-called "blacklist statutes," which legislatively prohibit employers from forming agreements with other employers not to hire particular employees. *See, e.g.*, IDAHO CODE § 44-201(1) (2023) ("It is unlawful for any employer to maintain a blacklist . . . .").

52. Peebles, *supra* note 50, at 1402.

53. *See, e.g.*, Befort, *supra* note 39, at 379–411 (outlining legal regime governing employers during screening process).

54. Peebles, *supra* note 50, at 1409–14.

55. *Id.* at 1414–16.

56. *See, e.g.*, CAL. LAB. CODE § 98.6 (West 2016).

proscribe consideration of specific conduct, such as consumption of alcohol or cigarettes.[57] These legal constraints may deter municipalities from attempting to learn too much about employees—for example, by googling them[58]—even though such research could also uncover undeniably relevant information.[59]

Relatedly, the rise of ban-the-box laws, also known as fair chance laws, constrain municipalities in many jurisdictions from asking about an applicant's criminal history on an initial application. Thirty-seven states, the District of Columbia, and over 150 municipalities have adopted some form of a ban-the-box law.[60] Some research indicates that ban-the-box laws help those with previous convictions secure employment,[61] and in principle, such laws are entirely consistent with rigorous screening: they don't prevent consideration of a prospective employee's record, including their arrest record; rather, they merely delay consideration of that record until after an initial application.[62] But employers who already wish to minimize resources spent on screening may cite ban-the-box laws as a reason to screen less thoroughly.

Finally, municipalities may screen employees less than rigorously due to the ongoing pandemic labor shortage. One nationwide survey conducted in 2021 found that policing agencies filled

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57. *See, e.g.*, 820 ILL. COMP. STAT. ANN. 55/5 (2019); MINN. STAT. § 181.938 (2022); MO. REV. STAT. § 290.145 (2022).

58. *See, e.g.*, Peebles, *supra* note 50, at 1409–18 (explaining why employers "risk enormous liability" if they engage in pre-hire Internet searching).

59. For example, some prospective employees may have engaged in prior misconduct that made the local news; others may have publicly posted troubling social media content.

60. Beth Avery & Han Lu, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT'L EMP. L. PROJECT (Oct. 1, 2021) https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide [https://perma.cc/B2VQ-4JKX] (surveying ban-the-box laws).

61. *See, e.g.*, Daniel Shoag & Stan Veuger, *Ban-the-Box Measures Help High-Crime Neighborhoods*, 64 J.L. & ECON. 85, 86 (2021) (finding that ban-the-box laws "increase the employment of residents of the top quartile of high-crime neighborhoods by as much as 4 percent").

62. Ban-the-box laws vary as to how long they delay inquiry into an applicant's criminal record. *Compare* CONN. GEN. STAT. § 31-51i (2017) (prohibiting inquiry into criminal record only on application itself), *with* HAW. REV. STAT. § 378-2.5(b) (2015) (delaying inquiry into criminal record until conditional job offer is extended).

only 93% of available positions,[63] and in some jurisdictions the shortage is even more critical.[64] Particularly in small or under-resourced jurisdictions, municipalities that are attempting to hire police or other municipal officers may find themselves confronted with a limited applicant pool.[65] In some instances, there may be only one applicant for a position, or even the best applicant in a pool may have an employment history that raises concerns.[66] Faced with a choice between leaving a position unfilled or hiring an applicant who raises some concerns, a municipality may decide to set aside its concerns and hire the applicant.

We live in a world where many circumstances encourage municipalities to screen prospective employees carelessly. The next Section examines the results of these incentives.

B. WRONGDOERS AS GOVERNMENT OFFICIALS

A record of criminal convictions, misconduct, or even previous firing from government employment does not necessarily preclude someone from working for the government. Robert Weismiller—the former teacher whose misconduct is described in the Introduction to this Article—demonstrates that even a job applicant with a decades-long record of disturbing misconduct may slip through local government hiring processes and get a job.[67] Predictably, once hired, some employees with past records of misconduct go on to engage in the same type of behavior.[68]

Recent events have drawn attention to the phenomenon of "wandering officers"—law enforcement officers who "are fired or who resign under threat of termination and later find work in

63. *Survey on Police Workforce Trends*, POLICE EXEC. RSCH. F. (June 11, 2021), https://www.policeforum.org/workforcesurveyjune2021 [https://perma.cc/AH24-8TQX].

64. Allison Sherry, *After Police and Sheriffs Deputies Left Agencies in Droves in 2021, Democratic Leaders Try to Stem the Tide*, CPR NEWS (Jan. 13, 2022), https://www.cpr.org/2022/01/13/colorado-law-enforcement-hiring-attrition [https://perma.cc/SUK3-U2MG] (stating that in Colorado, more than 2,400 police officers quit or were forced out of positions in 2021, while only 1,700 officers were hired to replace them).

65. *Id.*

66. *Cf.* Alan Gionet, *Nederland to Lose Its Last Police Officer*, CBS COLO. (Aug. 23, 2022), https://www.cbsnews.com/colorado/news/nederland-last-police-officer [https://perma.cc/Y3FZ-HPZC].

67. *See supra* text accompanying notes 1–6.

68. *See supra* text accompanying notes 1–6.

law enforcement elsewhere."[69] These incidents have found their way into the public consciousness through high profile examples such as Timothy Loehmann, the Cleveland police officer who shot twelve-year-old Tamir Rice while Rice was playing with a toy gun.[70] Prior to shooting Rice, Loehmann was allowed to resign—rather than be fired—from an Independence, Ohio, police department after suffering a "dangerous lack of composure" during firearms training.[71] Despite this red flag, the Cleveland Police Department hired Loehmann and armed him with a weapon.[72] Even after Loehmann shot Rice, he was later rehired as a police officer—first by the small Ohio village of Bellaire in October 2018, and then by the borough of Tioga in rural Pennsylvania in July 2022.[73]

Recent research establishes that wandering officers pose serious risks to those they serve.[74] Ben Grunwald and John Rappaport analyzed a data set including the records of 98,000 law

69. Grunwald & Rappaport, *supra* note 26. Such officers are also known as "recycled cops." Craig Cheatham & James Leggate, *I-Team: 'Recycled Cops' Move from Department to Department Despite Discipline Issues*, ABC 9 WCPO CINCINNATI (Dec. 12, 2018), https://www.wcpo.com/longform/i-team-recycled-cops-move-from-department-to-department-despite-discipline-issues [https://perma.cc/XKF2-UC8A].

70. William H. Freivogel & Paul Wagman, *Wandering Cops Move from Department to Department*, AP NEWS (Apr. 28, 2021), https://apnews.com/article/michael-brown-police-reform-503ba8bdc02157230e20b964ee84a98f [https://perma.cc/LLH8-83E9].

71. *Id.*

72. *Id.*

73. Chung, *supra* note 46. Loehmann is not an outlier. For another example, consider Myles Cosgrove, the officer who was terminated from the Louisville Metro Police Department in January 2021 for firing sixteen rounds into the home of Breonna Taylor and for failing to activate his body camera. Mark Morales & Caroll Alvarado, *Officer Who Fired Fatal Shot in Breonna Taylor Botched Raid Hired by a Nearby County Sherriff's Office*, CNN (Apr. 25, 2023), https://www.cnn.com/2023/04/24/us/breonna-taylor-officer-hired/index.html [https://perma.cc/2QV8-D2QR]. Cosgrove was rehired as an officer by the Carroll County Sheriff's Office on April 20, 2023. *Id.* It did not take long for Cosgrove to again attract negative public attention: in October 2023, he reportedly rammed a truck with his police cruiser and pointed his gun at a civilian during an arrest. Andrew Wolfson, *Myles Cosgrove, Officer Who Killed Breonna Taylor, Rams Car, Pulls Gun, Witnesses Say*, LOUISVILLE COURIER J. (Oct. 20, 2023), https://www.courier-journal.com/story/news/2023/10/18/myles-cosgrove-who-killed-breonna-taylor-carroll-county-deputy/71233893007 [https://perma.cc/WE6C-BHZN].

74. *See, e.g.*, Grunwald & Rappaport, *supra* note 26, at 1676 ("[T]hese results suggest that wandering officers may pose serious risks . . . .").

enforcement officers employed by nearly 500 different agencies in Florida over a thirty-year time period.[75] They found that wandering officers are fairly common: in any given year in Florida, about 1,100 officers working for a law enforcement agency previously had been fired from a different agency, amounting to about 3% of all officers.[76] They also found that officers who were fired from one job were "far more likely" to be fired or to receive a complaint for a "moral character violation[]" than were officers who had never been fired.[77] The risks posed by wandering officers are especially acute for poor communities, who may be more likely to hire such officers because they often have fewer applicants from whom to choose.[78]

The phenomenon of public employees who are fired or resign under threat of termination and who then obtain similar employment in another jurisdiction is well-known with respect to law enforcement officers.[79] But other municipal employees also fit the pattern. There are many documented instances of K–12 teachers who engage in misconduct, are subsequently fired or resign under threat of termination, and then successfully seek employment at other schools.[80] Many such repeat offenders have

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75. *Id.* at 1686.

76. *Id.* at 1687.

77. *Id.*

78. Bell, *supra* note 47; *see also* Timothy Williams, *Cast-Out Police Officers Are Often Hired in Other Cities*, N.Y. TIMES (Sept. 10, 2016), https://www.nytimes.com/2016/09/11/us/whereabouts-of-cast-out-police-officers-other-cities-often-hire-them.html [https://perma.cc/7D5K-NZR8] ("Criminologists and police officials said smaller departments and those that lack sufficient funding or are understaffed are most likely to hire applicants with problematic pasts if they have completed state-mandated training, which allows departments to avoid the cost of sending them to the police academy.").

79. *See, e.g.*, Freivogel & Wagman, *supra* note 70 ("In St. Louis, wandering police are so common that there is a name for it - the Muni-Shuffle."); Cheatham & Leggate, *supra* note 69 (explaining that the "officer shuffle," "moving from one agency to another after getting in trouble," is "prevalent").

80. *See, e.g.*, Menold, *supra* note 27, at 473–76 (explaining that school administrators often allow school personnel accused of sexual misconduct to leave their employment without restrictions, allowing them to continue their conduct at other schools); Karen J. Krogman, Comment, *Protecting Our Children: Reforming Statutory Provisions to Address Reporting, Investigating, and Disclosing Sexual Abuse in Public Schools*, 2011 MICH. ST. L. REV. 1605, 1607–08 (2011) (recounting an incident in which a teacher was accused of sexually abusing a student and was subsequently able to find employment at a different school, and stating that instances like this are occurring at an alarming rate); Logan, *supra* note 25.

a record of sexual misconduct involving students.[81] Indeed, the phenomenon is so common that it is informally termed "passing the trash."[82]

Likewise, many corrections officers who are fired from one facility soon find employment at another.[83] Some are transferred or allowed to resign in lieu of firing or criminal prosecution.[84] In other instances, we see the same pattern as with wandering police officers: "staff who resign or are even fired are often rehired in other correctional environments, potentially importing their predatory behavior with even more vulnerable populations."[85] The pattern is particularly noticeable with respect to male guards who sexually assault female inmates: researchers have documented instances in which a guard is simply told that he is not allowed to work with female inmates in lieu of a more significant intervention designed to *ensure* that the guard cannot work with female inmates.[86] Research on California's juvenile facilities found that cases involving complaints about staff by juveniles generally resulted in staff being placed on limited duty, being allowed to resign, or having the charges dropped.[87] In the rare instances in which a staff member was fired, the State

81. *See, e.g.*, Menold, *supra* note 27; Krogman, *supra* note 80; CHAROL SHAKESHAFT, POL'Y AND PROGRAM STUD. SERV., U.S. DEP'T OF EDUC., DOC. NO. 2004-09, EDUCATOR SEXUAL MISCONDUCT: A SYNTHESIS OF EXISTING LITERATURE 18 (2004) (stating that, as of the time of the study, more than 4.5 million students were subjected to sexual misconduct by a school employee sometime between kindergarten and twelfth grade).

82. *See, e.g.*, Menold, *supra* note 27.

83. *See, e.g.,* Grunwald & Rappaport, *supra* note 26 (listing examples of police officers who were fired or resigned under threat of termination and later found work elsewhere).

84. Elana M. Stern, Comment, *Accessing Accountability: Exploring Criminal Prosecution of Male Guards for Sexually Assaulting Female Inmates in U.S. Prisons*, 167 U. PA. L. REV. 733, 755 (2019).

85. Brenda V. Smith & Jaime M. Yarussi, *Prosecuting Sexual Violence in Correctional Settings: Examining Prosecutors' Perceptions*, 3 CRIM. L. BRIEF 19, 21 (2008); *see also* Beth A. Colgan, *Public Health and Safety Consequences of Denying Access to Justice for Victims of Prison Staff Sexual Misconduct,* 18 UCLA WOMEN'S L.J. 195, 206 (2012).

86. Stern, *supra* note 84 (discussing an incident in which a prison guard accused of sexually abusing an inmate was fired and then reinstated with the sole stipulation that he not work with female inmates).

87. Colgan, *supra* note 85; *see also* Katherine A. Heil, *The Fuzz(y) Lines of Consent: Police Sexual Misconduct with Detainees*, 70 S.C. L. REV. 941, 947–48 (2019) (noting that existing laws regarding sexual contact between guards and prisoners "have proven to be largely ineffective").

Personnel Board eventually reinstated those staff members to regular employee status.[88] More serious sanctions are exceedingly rare, even when the behavior in question is extreme.[89]

When confronted by inadequate screening practices and poor hiring choices that result in constitutional violations, federal civil rights law is the obvious place to turn. The next Section discusses the doctrine in that area.

C. FEDERAL CIVIL RIGHTS LIABILITY

Congress enacted 42 U.S.C. § 1983 in 1871 to address violence against Black people in the South.[90] The statute offers a remedy against any "person"—a term the Supreme Court has held to include municipalities in *Monell v. Department of Social Services*—who causes a violation of constitutional rights.[91]

In contrast to private entities, which can be held liable for the acts of their employees on the basis of respondeat superior, municipalities cannot be held liable simply because they employed someone who violated the Constitution.[92] Rather, "a municipality can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue"[93]—a standard that the Supreme Court polices by requiring plaintiffs to prove that a municipality's "policy or custom" caused the violation.[94]

The Supreme Court has established four avenues for plaintiffs to demonstrate a municipal policy or custom: (1) an express municipal law or policy; (2) a final decision by a municipal

88. Colgan, *supra* note 85.

89. *See, e.g.*, Taylor Mirfendereski, *Corrections Officer in Clallam County Kept Job for Decades, Despite Violations*, KING-TV (Apr. 13, 2022), https://www.king5.com/article/news/investigations/clallam-county-prison-guard-repeated-misconduct/281-a1c463a5-9d3d-4ae4-8cb1-d811ce42eaa9 [https://perma.cc/T2KT-S8PP] (describing how an officer who sexually assaulted many inmates continued to work in corrections for twenty-four years, despite at least two dozen complaints and other instances of reprimand).

90. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 665 (1978) (explaining the legislative considerations of 42 U.S.C. § 1983).

91. *Id.* at 690.

92. *Id.* at 691.

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

94. *Monell*, 436 U.S. at 694.

policymaker; (3) a practice that is so widespread that it has the force of law; or (4) a municipal failure to act.[95] With respect to the final option, plaintiffs most frequently allege a failure to train,[96] but it is not uncommon to see claims of failure to supervise, investigate, discipline, or screen.[97] This Article will collectively refer to this final category of claims as "municipal failure" claims.[98]

The Supreme Court recognized the municipal failure theory in 1989 with its decision in *City of Canton v. Harris*.[99] In that case, a woman—Geraldine Harris—was arrested after her car was pulled over and she became "uncontrollably upset and uncooperative."[100] She was driven to the police station, where the shift commander found her lying on the floor of the police vehicle.[101] During booking, she repeatedly fell out of a chair and onto the floor; eventually, the police left her lying on the floor to avoid injury.[102] After being held at the city jail for about an hour, Harris was released and taken by her family to the hospital, where

95. *See, e.g.*, *Connick*, 563 U.S. at 61–62 (articulating paths to establish municipal policy or custom); Jackson v. City of Cleveland, 925 F.3d 793, 828 (6th Cir. 2019) ("There are four methods of showing the municipality had . . . a policy or custom . . . ."); Blum, *supra* note 30, at 829–30 (articulating the four theories). In addition to these four theories, some federal appellate courts have also indicated the existence of a separate "ratification" theory. *See, e.g.*, Waller v. City & County of Denver, 932 F.3d 1277, 1283–84 (10th Cir. 2019) (articulating a separate theory of "ratification" in addition to the four theories described above). But other case law suggests that in practice this theory collapses back into the second theory because courts have required a showing of a final decision by a policymaker. *See, e.g.*, Brown v. Chapman, 814 F.3d 447, 462 (6th Cir. 2016) ("This theory of municipal liability . . . applies only when the ratification was carried out by an official with final decision-making authority.").

96. Leong, *supra* note 38, at 359 ("Such claims are most frequently framed as a failure to train, 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." (footnotes omitted)).

97. *Id.*

98. *Id.* at 349.

99. City of Canton v. Harris, 489 U.S. 378, 380 (1989).

100. Harris v. Cmich, 798 F.2d 1414, 1414 (6th Cir. 1986) (unpublished table decision) (holding, in lower court action naming both individual officer and municipality, that the district court did not err in submitting inadequate training claim to jury), *vacated sub nom.* City of Canton v. Harris, 489 U.S. 378 (1989) (affirming viability of failure-to-train theory while remanding for further proceedings consistent with the holding).

101. *Canton*, 489 U.S. at 381.

102. *Id.*

she was diagnosed as suffering from a number of mental health issues.[103]

Harris filed suit against the City of Canton under 42 U.S.C. § 1983, alleging an unconstitutional deprivation of medical care in violation of her due process rights.[104] She further alleged that the city had a policy or custom of inadequately training its law enforcement officers to provide medical care.[105] In support of the latter theory, she introduced the city's police regulations, which gave the shift commander sole discretion to determine the necessity of medical treatment, and further introduced evidence that shift commanders were provided with only basic first aid training.[106]

At trial, a jury found in favor of Harris on her claim against Canton, the district court entered judgment, and the Sixth Circuit affirmed the verdict.[107] The Supreme Court granted certiorari to clarify the standard applicable to such claims.[108]

All nine members of the Court agreed that in some circumstances a municipality could incur liability for inadequate training of an employee.[109] Writing for the majority, Justice White's opinion explained that plaintiffs must show both that the municipality acted with deliberate indifference and that the municipality's actions caused the violation of the plaintiff's rights.[110] The Court concluded that when a need for training is obvious and the lack of training is likely to result in a violation of constitutional rights, "the policymakers of the city can reasonably be said to have been deliberately indifferent to the need" for more

103. *Id.*

104. *Id.*

105. *Id.* at 383.

106. *Id.* at 381–82.

107. *Id.* at 381–83.

108. *Id.* at 383.

109. *Id.* at 387–89 ("[W]e conclude, as have all the Courts of Appeals that have addressed this issue, that there are limited circumstances in which an allegation of a 'failure to train' can be the basis for liability under § 1983." (footnote omitted)); *id.* at 393 (O'Connor, J., concurring in part) ("I thus agree that where municipal policymakers are confronted with an obvious need to train city personnel to avoid the violation of constitutional rights and they are deliberately indifferent to that need, the lack of necessary training may be appropriately considered a city 'policy' subjecting the city itself to liability under our decision in *Monell* . . . .").

110. *Id.* at 387–89 (majority opinion).

or different training.[111] Likewise, the "identified deficiency" in the training program must be "closely related to the ultimate injury"—that is, it must be the cause of the injury.[112] These requirements—the deliberate indifference requirement and the causation requirement—were necessary to prevent the imposition of de facto respondeat superior liability on municipalities and to avoid "second guessing [of] municipal employee training programs" by the federal courts.[113] The Supreme Court ultimately did not determine the fate of Harris's claim but rather remanded for the Sixth Circuit to apply the newly-articulated standard in the first instance.[114]

In the years following *Canton*, a number of plaintiffs found success on municipal failure claims, including the failure-to-screen claim.[115] But this string of successes was soon tempered by the first—and, to date, only—Supreme Court adjudication of a failure-to-screen claim: *Board of Commissioners of Bryan County v. Brown*, which the Court decided in 1997.[116] In that case, Sheriff B. J. Moore hired his great-nephew Stacy Burns for a deputy sheriff position.[117] Sheriff Moore ran a background check but "had not closely reviewed" the results, which revealed that Deputy Burns "had a record of driving infractions and had pleaded guilty to various driving-related and other misdemeanors, including assault and battery, resisting arrest, and public drunkenness."[118]

During the events that gave rise to litigation, Jill Brown was a passenger in a car, driven by her husband, that turned away

111. *Id.* at 390.

112. *Id.* at 391.

113. Michael T. Burke & Patricia A. Burton, *Defining the Contours of Municipal Liability Under 42 U.S.C. § 1983:* Monell *Through* City of Canton v. Harris, 18 STETSON L. REV. 511, 544 (1989) (alteration in original) (quoting *Canton*, 489 U.S. at 392); 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, 129 (1990).

114. *Canton*, 489 U.S. at 392.

115. *See, e.g.*, Doe v. Hillsboro Indep. Sch. Dist., 81 F.3d 1395 (5th Cir. 1996) (win on failure to screen); Javid v. Scott, 913 F. Supp. 223 (S.D.N.Y. 1996) (win on failure to screen); Viavant v. Steiner, No. 91-4184, 1992 WL 59387 (E.D. La. Mar. 12, 1992) (win on failure to screen).

116. *Bryan County*, 520 U.S. 397 (1997).

117. *Id.* at 401.

118. *Id.*

from a highway checkpoint.[119] Deputy Burns pursued Brown's vehicle in a chase reaching speeds of 100 miles per hour.[120] After Brown's husband pulled over, Deputy Burns twice ordered Brown out of the car.[121] When she did not comply, he pulled her from the car and threw her to the ground, seriously injuring her knees, which subsequently required corrective surgery.[122]

Brown filed suit against Deputy Burns, Sheriff Moore, and the county.[123] Her case was tried before a jury, which answered several interrogatories in order to resolve her claims.[124] The jury concluded that Burns had violated Brown's constitutional rights by arresting her with excessive force and without probable cause.[125] It also concluded that the "hiring policy" and the "training policy" of Bryan County were "so inadequate as to amount to deliberate indifference to the constitutional needs of the Plaintiff."[126] The District Court entered judgment for Brown, and, following an appeal by the county, the Fifth Circuit affirmed.[127]

In reversing the judgment against Bryan County, the Supreme Court emphasized that a municipal failure claim must be held to demanding standards of fault and causation.[128] The plaintiff must show that the municipal defendant was "deliberately indifferent" to a known or obvious risk[129]—a "stringent

119. *Id.* at 400.

120. *Id.*

121. *Id.*

122. *Id.* at 400–01.

123. *Id.* at 401.

124. *Id.* at 402.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 404 ("[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."); *see also* Connick v. Thompson, 563 U.S. 51, 75 (2011) (Scalia, J., concurring) ("[T]o recover from a municipality under 42 U.S.C. § 1983, a plaintiff must satisfy a 'rigorous' standard of causation . . . ." (quoting *Bryan County*, 520 U.S. at 405)).

129. City of Canton v. Harris, 489 U.S. 378, 389 (1989) ("Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality . . . can a city be liable for such a failure under § 1983."); *see also Bryan County*, 520 U.S. at 407 ("[A] plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences." (quoting *Canton*, 489 U.S. at 388–89)).

standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action."[130] Likewise, the plaintiff must prove that the municipal failure was the "moving force" behind the constitutional violation[131]—a standard subsequent courts have interpreted to require a showing of proximate cause.[132]

In particular, the Court distinguished between a situation in which a municipal failure, such as the training program considered in *Canton*, was "necessarily intended to apply over time to multiple employees," and a situation involving liability predicated on a single incident of unconstitutional conduct, such as the hiring of Deputy Burns.[133] The Court cautioned: "[w]here a claim of municipal liability rests on a single decision, not itself representing a violation of federal law and not directing such a violation, the danger that a municipality will be held liable without fault is high."[134] While the Court left open the possibility of liability based on a single incident in *Canton*,[135] it concluded that such liability could not be automatically extended to the hiring situation presented by *Bryan County*.[136]

The Court did not rule out the possibility of liability based on a single instance of faulty screening, noting that it was "assuming without deciding" that such liability could attach for

130. *Bryan County*, 520 U.S. at 410.

131. *Canton*, 489 U.S. at 389 (quoting Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978)); Polk County v. Dodson, 454 U.S. 312, 326 (1981).

132. *See, e.g.*, Harper v. City of Los Angeles, 533 F.3d 1010, 1026 (9th Cir. 2008) (implying that "moving force" is tantamount to proximate cause); Smith v. District of Columbia, 413 F.3d 86, 102 (D.C. Cir. 2005) ("We have equated moving force with proximate cause. Proximate cause 'includes the notion of cause in fact,' and requires an element of foreseeability." (citations omitted)).

133. *Bryan County*, 520 U.S. at 407. The Court emphasized that it would not automatically import standards applicable to one type of municipal failure claim into the adjudication of another, calling the "proffered analogy" between training and screening "not persuasive." *Id.* at 409.

134. *Id.* at 408.

135. *Id.* at 409 ("In leaving open in *Canton* the possibility that a plaintiff might succeed in carrying a failure-to-train claim without showing a pattern of constitutional violations . . . .").

136. *Id.* at 410 ("Where a plaintiff presents a § 1983 claim premised upon the inadequacy of an official's review of a prospective applicant's record, however, there is a particular danger that a municipality will be held liable for an injury not directly caused by a deliberate action attributable to the municipality itself.").

purposes of its discussion.[137] But it emphasized that "[a] plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision."[138] As a result, "a finding of culpability . . . . must depend on a finding that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff. The connection between the background of the particular applicant and the specific constitutional violation alleged must be strong."[139] So, for example, a municipality's failure to screen for and discover that a police officer had a long record of shoplifting and petty theft would not demonstrate that the municipality was deliberately indifferent to the likelihood that the officer would engage in excessive force against a civilian. The propensity to shoplift is not sufficiently predictive of the propensity to use excessive force that it would have placed the municipality on notice that hiring the officer risked a constitutional violation.[140]

In *Bryan County* itself, the Court concluded that Brown had not shown that Deputy Burns's inadequate screening "reflected a conscious disregard for a high risk that Burns would use excessive force," and therefore that Bryan County could not be liable.[141] The Court remanded the case so that the appellate court could apply the legal standard in the first instance.[142]

The demanding failure-to-screen doctrine that the Court has articulated is highly consequential for plaintiffs. Although an injured civilian could, and often does, sue the government official directly, municipal liability has a number of advantages. First,

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137. *Id.* at 412.

138. *Id.* at 411.

139. *Id.* at 412.

140. Courts are disinclined to adopt the view that a *general* tendency to engage in lawbreaking and misconduct is a red flag that an official will subsequently engage in a *particular* type of misconduct. *See, e.g.*, Morris v. Crawford County, 299 F.3d 919, 924–26 (8th Cir. 2002) (holding that—where an officer had a track record including slapping an inmate, mishandling money, mouthing off to fellow deputies and inviting them to fight, talking about knocking "that bitch" out when disobeying a nurse, and restraining orders taken out against him by both his ex-wife and ex-girlfriend following accusations of intimate partner violence—the background was not sufficiently similar that the hiring municipality was deliberately indifferent to the likelihood that the officer would use excessive force against a jail detainee).

141. *Bryan County*, 520 U.S. at 415–16.

142. *Id.* at 416.

individual employees may be entitled to qualified immunity, whereas the defense is unavailable to municipalities.[143] Second, a municipality is a potential deep pocket—a source of monetary recovery when an individual officer is judgment-proof.[144] To some extent, municipalities already satisfy judgments against their employees through indemnification: Joanna Schwartz has shown that many government employers indemnify their employees either statutorily or by contract.[145] But in some instances municipalities do not indemnify their officers; moreover, indemnification is not always certain in advance, and some municipalities leverage that uncertainty to plaintiffs' disadvantage.[146] Third, a plaintiff who seeks redress directly from a municipality may recover regardless of whether an individual employee is held liable for a constitutional violation, and the prospect of municipal liability can substantially increase plaintiffs' leverage for settlement.[147] Municipal liability therefore offers an alternative

143. Owen v. City of Independence, 445 U.S. 622, 624–25 (1980) (holding that municipalities are not entitled to qualified immunity and may not assert good faith as a defense to liability).

144. *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, 796 (1999) ("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.").

145. Schwartz's research revealed that police officers are indemnified for 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations against them. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 936–37 (2014).

146. *Id.* at 931–36 (observing that the threat of withholding an indemnification decision can discourage plaintiffs from proceeding and provide leverage to defendants in settlement negotiations and the damages portion of trial).

147. *See, e.g.*, Horton *ex rel.* Horton v. City of Santa Maria, 915 F.3d 592, 604 (9th Cir. 2019) ("[M]unicipal defendants may be liable under § 1983 even in situations in which no individual officer is held liable for violating a plaintiff's constitutional rights."); 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

avenue for achieving § 1983's goal of compensating injured plaintiffs even when no individual officer can be held liable. Fourth, a plaintiff who files suit against a municipality may be able to seek a considerably broader scope of discovery.[148] Fifth, juries may be willing to award higher damage amounts against municipalities than against individuals.[149] Finally, and perhaps most importantly, suing a municipality calls attention to the idea that constitutional harm is not only or primarily caused by "a few bad apples" but rather is the result of broader structural conditions.[150]

Municipalities are thus attractive targets for civil rights enforcement. Yet commentators have suggested that *Bryan County* creates a challenging standard for plaintiffs seeking to prevail on a claim of municipal liability for bad hiring.[151] One judge described the standard as "intentionally onerous for plaintiffs."[152] Another observed that *Bryan County* has created an "exceedingly high practical and theoretical bar to municipal liability."[153]

Despite these claims, no research has previously examined how the failure-to-screen standard plays out in practice. The next Part reports the results of the first empirical survey to examine the litigation of failure-to-screen claims.

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under section 1983 for causing a violation of the plaintiff's Fourteenth Amendment rights.").

148. For example, courts will allow broader discovery of information about municipal hiring records in order to establish a policy or custom of inadequate hiring. *See, e.g.*, Graber v. City & County of Denver, No. 09-01029, 2011 WL 3157038, at *4 (D. Colo. July 27, 2011) (holding that a request for a police officer's performance reviews and disciplinary records for all officers was "reasonably calculated to lead to the discovery of admissible evidence" (quoting FED. R. CIV. P. 26(b)(1))).

149. *See* Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep-Pockets" Hypothesis*, 30 L. & SOC'Y REV. 121 (1996). Although the research focused on corporate entities, MacCoun suggested that the same might hold true for a government: "[p]erhaps jurors find it easier to impose costly sanctions against an aggregate, impersonal entity—either a corporation or a government—than against a real, flesh-and-blood individual." *Id.* at 140.

150. *See, e.g.*, Leong, *supra* note 38, at 395–97 (discussing the "bad apples" narrative, which blames police brutality and other harms on a few bad actors rather than institutional failures).

151. *See, e.g.*, Blum, *supra* note 30 ("The standard from *Bryan County* is a tough one for plaintiffs to satisfy.").

152. Gold v. City of Miami, 151 F.3d 1346, 1351 n.10 (11th Cir. 1998).

153. Arrington v. Jenkins, No. 04-2274, 2005 WL 8157966, at *5 (N.D. Ala. May 19, 2005).

II. THE DATA

To learn how failure-to-screen cases are litigated in the federal courts, I assembled and coded three datasets. First, I identified every federal appellate opinion that has adjudicated a claim of failure to screen since the Supreme Court's 1997 decision in *Bryan County v. Brown*. Second, I gathered district court opinions that adjudicated a claim of failure to screen during the year 2019. Finally, I compiled a set of dockets for cases filed in 2019 that raised a claim of failure to screen. This Part describes each dataset.

A. APPELLATE OPINIONS

As a first step in studying the litigation and adjudication of the failure-to-screen theory after *Bryan County*, I developed a search query to find every federal appellate opinion that adjudicated a claim of municipal liability based on that theory.[154] Such opinions are relatively rare. In the 25 years since *Bryan County* was decided, the federal courts of appeals have adjudicated only 34 claims of failure to screen—fewer than 2 per year on average.[155] A full summary of the information I gathered about these cases is available in Appendix A.[156]

Eighteen of these cases were published, while 16 were unpublished. The cases were clustered in a few circuits. Ten were found in the Fifth Circuit (4 published, 6 unpublished), 5 were found in the Third Circuit (all unpublished), and 5 were found in the Sixth Circuit (2 published, 3 unpublished). In both the

154. I searched in the Westlaw database for cases that cited either *Bryan County* or *Monell* or both and, within those cases, ran the following query: "(fail! inadequate! negligent! improper! wrongful! adequate!) /10 (screen! hir!)." That search yielded a total of 247 cases, which I reviewed individually to identify the 34 cases that adjudicated a failure-to-screen claim.

155. I included a case in my data set if the court considered a claim of failure to screen and ruled on its merits. I included cases in the data set even if the discussion of the failure-to-screen claim was extremely cursory or the court adjudicated all the *Monell* claims together without discussing any individual claim. *See, e.g.*, Kuerbitz v. Meisner, No. 17-2284, 2018 WL 5310762, at *4 (6th Cir. July 11, 2018) (holding, without elaboration, that pro se plaintiff "made no . . . allegations" that would support a claim of "negligent hiring and failure to train"); Gaylor v. Brazos County, 34 F. App'x 962, at *4 (5th Cir. 2002) (stating only that plaintiffs "failed to offer evidence establishing" municipality liability).

156. Appendices are available at https://minnesotalawreview.org/v108-leong-appendix.

Second Circuit and the Fourth Circuit, there has been no failure-to-screen adjudication resulting in a written opinion in the 25 years since *Bryan County v. Brown*. Table 1 presents information about the number and publication status of failure-to-screen cases in each circuit.

Table 1. Appellate Adjudications, by Publication Status

Circuit	Published	Unpublished	Total
1	2	0	2
2	0	0	0
3	0	5	5
4	0	0	0
5	4	6	10
6	2	3	5
7	2	0	2
8	1	0	1
9	2	1	3
10	3	0	3
11	1	1	2
D.C.	1	0	1
All	18	16	34

Twenty opinions resulted from an appeal from a ruling on a motion for summary judgment (11 published, 9 unpublished). Ten opinions resulted from an appeal of a ruling on a motion to dismiss (4 published, 6 unpublished). Three opinions followed an appeal from a jury verdict (all published) and one from a motion for judgment as a matter of law at the close of evidence (unpublished).

The Fourth Amendment was the most common underlying basis for the litigation, with 16 opinions adjudicating municipal liability for such a claim.[157] Notably, 8 of the 34 cases involved

157. Crete v. City of Lowell, 418 F.3d 54 (1st Cir. 2005); Young v. City of Providence *ex rel.* Napolitano, 404 F.3d 4 (1st Cir. 2005); Livezey v. City of Malakoff, 657 F. App'x 274 (5th Cir. 2016); Gaylor v. Brazos County, 34 F. App'x 962 (5th Cir. 2002); Gros v. City of Grand Prairie, 34 F. App'x 150 (5th Cir. 2002); Siler v. Webber, 443 F. App'x 50 (6th Cir. 2011); Fox v. DeSoto, 489 F.3d 227 (6th Cir. 2007); Anderson v. Warner, 451 F.3d 1063 (9th Cir. 2006); Williams v. DeKalb County, 327 F. App'x 156 (11th Cir. 2009); Gomez v. Galman,

sexual assault and other forms of sexual misconduct, which were typically classified under the heading of due process.[158]

In 33 of the 34 cases, the court ruled in favor of the defendant on the failure-to-screen issue. The plaintiff prevailed in just one case. It is worth lingering on that case—*Griffin v. City of Opa-Locka*,[159] decided by the Eleventh Circuit in 2001—to emphasize what the *Bryan County* standard requires of plaintiffs.

In the events leading up to the litigation in *Griffin v. City of Opa-Locka*, Angelita Griffin, the plaintiff, was subjected to a barrage of egregious sexual harassment by her boss, Earnie P. Neal, the City Manager for the City of Opa-Locka.[160]

> He summoned her to work with him on the first day by demanding that the "big tit" or "big breasted" girl be sent to his office. Immediately, he began asking her a series of personal questions regarding where she lived, who she lived with, who cared for her child, whether she was married, whether she had a boyfriend, and where was her child's father. The next day, Neal telephoned Griffin and asked her to guess what the "P" in his name stood for. Griffin testified that Neal was referring to his penis and that he would not get off of the phone until she guessed. Neal told her that he was looking for a girlfriend and wondered whether she could help him with that. He also told her that he did not like where she was sitting and wanted her to sit in front of him so that he could see her.[161]

Neal's behavior did not improve with time. He constantly demanded hugs from Griffin; he suggested that he and Griffin "dance close together" at a work function; he told Griffin that he would have to replace her if she did not cook for him, tell him how good he looked, and take care of him; he commented on how she should wear her hair and told her that she was gaining too

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18 F.4th 769 (5th Cir. 2021); Robles v. Ciarletta, 797 F. App'x 821 (5th Cir. 2019); Crepea v. Cochise County, 667 F. App'x 605 (9th Cir. 2016); Dougherty v. City of Covina, 654 F.3d 892 (9th Cir. 2011); Waller v. City & County of Denver, 932 F.3d 1277 (10th Cir. 2019); Snyder v. Trepagnier, 142 F.3d 791 (5th Cir. 1998); Aguillard v. McGowen, 207 F.3d 226 (5th Cir. 2000).

158. Crepea v. Cochise County, 667 F. App'x 605 (9th Cir. 2016); Blue v. District of Columbia, 811 F.3d 14 (D.C. Cir. 2015); Schneider v. City of Grand Junction Police Dep't, 717 F.3d 760 (10th Cir. 2013); Wilson v. Cook County, 742 F.3d 775 (7th Cir. 2014); Dougherty v. City of Covina, 654 F.3d 892 (9th Cir. 2011); Doe v. Magoffin Cnty. Fiscal Ct., 174 F. App'x 962 (6th Cir. 2006); Gros v. City of Grand Prairie, 34 F. App'x 150 (5th Cir. 2002); Barney v. Pulsipher, 143 F.3d 1299 (10th Cir. 1998).

159. Griffin v. City of Opa-Locka, 261 F.3d 1295 (11th Cir. 2001).

160. *Id.* at 1298–1300. Throughout the description of *Griffin*, I have drawn facts from the Eleventh Circuit's opinion partially upholding the jury verdict.

161. *Id.* at 1299 (footnote omitted).

much weight, causing Griffin to start dieting for fear that she would lose her job; he rubbed his knee against her buttocks; he put his hand on her hip; he made a habit of looking down her shirt; he told her she received a larger raise than her coworkers because of him and that she should go out to dinner with him as a result.[162] Finally, Griffin gave notice so that she could get away from Neal.[163] At a City function that took place after Griffin gave notice but before her last day, Neal insisted on driving her home and carrying some of her equipment upstairs, after which he followed her into her apartment and raped her.[164]

Several months after leaving her job, Griffin filed suit against the City of Opa-Locka, alleging, among other things, that the city was liable for sexual harassment and sexual assault on the basis of its failure to screen Neal prior to hiring him.[165] A jury awarded her $500,000 for sexual harassment and $1.5 million for sexual assault.[166]

The Eleventh Circuit concluded that "the evidence was sufficient for a finding that the City's inadequate screening of Neal's background was so likely to result in sexual harassment that the City could reasonably be said to have been deliberately indifferent to Griffin's constitutional rights."[167] Taking all facts and inferences in the light most favorable to Griffin, the record reflected that Neal was hired as City Manager "without a resume, interview, background check, or any discussion of his qualifications."[168] While the city was considering whether to hire Neal, it was "inundated with articles, faxes, and mail, warning of Neal's problems with sexual harassment and dealings with women."[169] Some faxes listed the previous sexual harassment accusations against Neal, while others included "explicit warnings" that hiring Neal would lead to "a sexual harassment and/or sexual assault problem."[170] Many witnesses testified that Neal was a "known womanizer," whose nickname among the Mayor,

162. *Id.* at 1299–1300. This list is only a partial accounting of Neal's conduct as described in the Eleventh Circuit's opinion.

163. *Id.* at 1300.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 1313.

168. *Id.*

169. *Id.* at 1313–14.

170. *Id.* at 1314.

Commissioners, and others was "Earnie 'Penis' Neal."[171] Other testimony indicated that various city officials knew that Neal had sexually harassed city employees after he was appointed acting City Manager but before his final confirmation as permanent City Manager.[172] A citizen who attempted to raise some of these allegations at a City Commission meeting and a concerned City Commissioner who requested more information on Neal's background were both disregarded.[173] Even a cursory examination of Neal's employment file would have revealed that during his prior employment with Florida City, there were sexual harassment complaints against him, and the Mayor of Florida City testified that if anyone from the City of Opa-Locka had contacted him he would have told them about the sexual harassment complaints against Neal.[174]

In light of these red flags in Neal's background, the Eleventh Circuit concluded that Opa-Locka acted with deliberate indifference to the possibility that, if hired, he would engage in sexual harassment.[175] The court therefore upheld the $500,000 verdict for sexual harassment.[176] But the court found it a "more difficult question" whether Opa-Locka could be liable for sexual assault on the facts presented.[177] Ultimately, however, the court held that it did not have to confront this challenging issue because the jury had not rendered an express finding as to whether Opa-Locka had a policy or custom of deliberate indifference to sexual assault.[178]

Although the plaintiff in *Griffin* won, the case is not exactly cause for optimism among future plaintiffs. *Griffin* involves allegations of serious wrongdoing—sexual harassment and sexual assault—and an unusually clear showing that the defendant municipality had notice of its employee's previous misconduct.[179] If comparable facts are what is required, it is unsurprising that no other plaintiff in the past 25 years has prevailed.

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171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 1312.
178. *Id.*
179. *Id.* at 1306–12.

In most of the cases heard by federal appellate courts, the plaintiff's loss at the appellate level was preceded by a loss on the failure-to-screen claim before the district court. In 34 cases, defendants prevailed on the failure-to-screen claim, 31 times at the district court level.[180] Of the 3 cases in which the plaintiffs had won before the district court—*Aguillard v. McGowen*, *Griffin v. City of Opa-Locka*, and *Snyder v. Trepagnier*—all 3 resulted from a jury verdict in favor of plaintiffs, rather than a ruling by a judge. *Aguillard* reversed a $4 million jury verdict for plaintiffs,[181] and *Snyder* reversed a $2 million jury verdict for plaintiffs.[182] *Griffin* was the only case that upheld any favorable decision for plaintiffs: as stated above, that case upheld a $500,000 verdict holding the city liable for sexual harassment but reversed a $1.5 million verdict holding the city liable for rape.[183]

In 15 of the 33 losses, courts held that plaintiffs had not established deliberate indifference at the requisite level for the procedural posture, while in just 1 case the court based its decision on the plaintiff's inability to show that the municipality's failure to screen caused the violation.[184] In 3 cases the court held that the plaintiff could not establish any of the elements of the failure-to-screen claim.[185] In the remaining 14 cases, the court's reasoning was unclear or did not fit into any of the previous categories.[186]

The federal appellate opinions reveal that the failure-to-screen claim almost never succeeds in that forum, and, by extension, that there is little appellate precedent available for plaintiffs to rely on in arguing that a municipality is liable for failure to screen. But federal appellate cases do not capture all of the

180. *See* Appendix A. Appendices are available at https://minnesotalawreview.org/v108-leong-appendix.

181. Aguillard v. McGowen, 207 F.3d 226, 228 (5th Cir. 2000).

182. Snyder v. Trepagnier, 142 F.3d 791, 794 (5th Cir. 1998).

183. *Griffin*, 261 F.3d at 1300, 1316.

184. *See* Appendix A. Appendices are available at https://minnesotalawreview.org/v108-leong-appendix. The one case that failed on causation was *Covington v. City of Madisonville*. 812 F. App'x 219, 226 (5th Cir. 2020) ("[Plaintiff's] assertions fail to establish any connection between [the] hiring practice deficiencies and the constitutional violations she suffered, much less the 'moving force' direct causation that is required.").

185. *See* Appendix A. Appendices are available at https://minnesotalawreview.org/v108-leong-appendix.

186. *See id.*

litigation involving failure-to-screen claims. For example, such cases might be won or lost in the district court and not appealed, or, alternatively, they might be litigated in cases that eventually were settled. To learn more about failure-to-screen litigation, I next examined district court opinions.

B. DISTRICT COURT OPINIONS

District court opinions offer a snapshot of failure-to-screen outcomes at an earlier stage in litigation. Preliminary exploration, using the Westlaw database and common search terms, yielded only a few published opinions resulting in an outcome favorable to the plaintiff in the years since *Bryan County*.[187] This initial exploration convinced me that such opinions are relatively rare, but I wanted to learn more about exactly *how* rare they are.

I therefore undertook a more systematic analysis. Using the Westlaw database, I identified a set of 53 federal district court opinions that adjudicated failure-to-screen claims during the year 2019.[188] A list of these opinions and the information I gathered about them is available in Appendix B.[189]

I coded the opinions according to whether the plaintiff or defendant prevailed at the relevant stage of adjudication—for example, if the opinion held that a plaintiff's case survived a motion to dismiss, I counted this as "prevailing." Of the opinions I reviewed, the plaintiff prevailed in 9, while the defendant

187. Doe v. Beaumont Indep. Sch. Dist., 615 F. Supp. 3d 471 (E.D. Tex. 2022); Watson v. Boyd, 447 F. Supp. 3d 924 (E.D. Mo. 2020), *rev'd,* 2 F.4th 1106 (8th Cir. 2021); B.W. v. Career Tech. Ctr. of Lackawanna Cnty., 422 F. Supp. 3d 859 (M.D. Pa. 2019); Kesler v. King, 29 F. Supp. 2d 356 (S.D. Tex. 1998).

188. Unlike the survey of federal appellate cases described in Part II.A, my survey of district court cases did not attempt to find every case decided since *Bryan County* in which a failure-to-screen claim was adjudicated. Rather, I focused on a single year—2019—and identified every case that cited *Bryan County v. Brown* and was returned by the same query I used for federal appellate cases: "(fail! inadequate! negligent! improper! wrongful! adequate!) /10 (screen! hir!)." That search returned 173 results. Within that set of cases, I identified 53 cases that adjudicated a failure-to-screen claim, which comprise the data set presented here. This search likely includes almost every district court opinion that adjudicated a failure-to-screen claim. It also would likely include every opinion that discussed the claim in detail, as it would be difficult to discuss the claim in detail without citing *Bryan County*, the leading Supreme Court case.

189. Appendices are available at https://minnesotalawreview.org/v108-leong-appendix.

prevailed in 44.[190] The 9 opinions in which plaintiffs prevailed were issued in 8 separate cases.[191] Two of those 8 cases were companion cases, involving different plaintiffs alleging harms that arose from the same series of events.[192] The 9 opinions resolved 7 motions to dismiss, 1 motion for judgment on the pleadings, and 1 motion for summary judgment.[193]

In cases where an opinion ruled in plaintiffs' favor on a failure-to-screen claim, I then recorded the case's subsequent history. Again, the major takeaway is that plaintiffs never or virtually never obtained a favorable result related to the failure-to-screen claim. None of the cases in which the court issued an opinion ruling in favor of a plaintiff on a failure-to-screen claim were ultimately litigated to a favorable judgment on a failure-to-screen claim. Moreover, none of the cases in which the court issued an opinion ruling in favor of a plaintiff on a failure-to-screen claim ultimately resulted in a favorable judgment for the plaintiff on *any* issue. In 3 cases, the case settled at some point after the plaintiff obtained a favorable ruling on the failure-to-

190. The cases in which plaintiff prevailed were: Goodwin v. Village of Oakview, No. 19-00009, 2019 WL 1344727 (W.D. Mo. Mar. 25, 2019); B.W. v. Career Tech. Ctr. of Lackawanna Cnty., 422 F. Supp. 3d 859 (M.D. Pa. 2019); Doe v. Edgewood Indep. Sch. Dist., No. 16-01233, 2019 WL 1118516 (W.D. Tex. Mar. 8, 2019); Quinn v. US Prisoner Transp. Inc., No. 18-00149, 2019 WL 257980 (D. Me. Jan. 17, 2019); Kirksey v. Ross, 372 F. Supp. 3d 256 (E.D. Pa. 2019); Brickles v. Village of Phillipsburg, No. 18-00193, 2019 WL 3555511 (S.D. Ohio Aug. 5, 2019); Brickles v. Village of Phillipsburg, No. 18-00193, 2019 WL 4564743 (S.D. Ohio Sept. 20, 2019); Suzuki v. County of Contra Costa, No. 18-06963, 2019 WL 3753223 (N.D. Cal. Aug. 8, 2019); Thompson v. Village of Phillipsburg, No. 18-214, 2019 WL 6609218 (S.D. Ohio Dec. 5, 2019). For a list of all cases, see Appendix B.

191. There were two separate opinions in *Brickles v. Village of Phillipsburg*, No. 18-00193 (S.D. Ohio), which adjudicated the defendants' motion to dismiss the plaintiff's First Amended Complaint. First, the magistrate judge wrote an opinion, 2019 WL 3555511 (S.D. Ohio, Aug. 5, 2019), which was later partially accepted and partially rejected by the district court, 2019 WL 4564743 (S.D. Ohio Sept. 20, 2019). Both opinions met the criteria for inclusion in my data set, so I have counted them both as "wins" for the plaintiff. But one might reasonably argue that the number of plaintiff wins was only eight because these two are not only from the same case, but also resolve the same motion.

192. The two companion cases were *Brickles v. Village of Phillipsburg*, No. 18-00193 (S.D. Ohio Aug. 5, 2019), and *Thompson v. Village of Phillipsburg*, No. 18-214 (S.D. Ohio Dec. 5, 2019). The judge in *Thompson* treats *Brickles*'s resolution of the failure-to-screen issue as instructive, if not binding. *See Thompson*, 2019 WL 6609218.

193. *See* Appendix B. Appendices are available at https://minnesotalawreview.org/v108-leong-appendix.

screen claim, but the failure-to-screen claim was never the *only* municipal liability claim remaining in the case at the point of settlement, so it was difficult to assess, what, if any, effect the failure-to-screen claim had on settlement. Further, even if a failure-to-screen claim does contribute to a favorable settlement, that settlement does not create caselaw on which future plaintiffs could rely. One failure-to-screen claim is still being litigated as of August 1, 2023. Table 2 summarizes the results.

Table 2. Ultimate Disposition of District Court Cases Resolving a Failure-to-Screen Claim in Favor of the Plaintiff

Case	**Procedural posture of favorable failure-to-screen adjudication**	**Subsequent history of failure-to-screen claim**
Brickles v. Village of Phillipsburg	Motion to dismiss	Plaintiff lost after district court held that all of plaintiff's claims failed on summary judgment.
Quinn v. US Prisoner Transport Inc.	Motion to dismiss	Settled.
Kirksey v. Ross	Motion to dismiss	Plaintiff lost on summary judgment when failure-to-screen claim was held to be barred by statute of limitations.
B.W. v. Career Technology Center of Lackawanna County	Motion to dismiss	This case has entered discovery. A summary judgment motion was filed in November 2022 and responsive filings are still pending as of August 1, 2023.
Goodwin v. Village of Oakview	Motion to dismiss	Settled.
Thompson v. Village of Phillipsburg	Motion to dismiss	Settled.
Suzuki v. County of Contra Costa	Motion for judgment on the pleadings	Plaintiff lost after appellate court held no constitutional violation had taken place.
Doe v. Edgewood Independent School District	Motion for summary judgment	Plaintiff lost after district court reversed its summary judgment ruling on a motion to reconsider. The ruling against the plaintiff was affirmed on appeal.

The Westlaw surveys of federal appellate and district court opinions provide important information about failure-to-screen litigation that results in a written opinion. This information tells

us what precedent is available to plaintiffs trying to win on a failure-to-screen claim and to municipal defendants trying to defeat a failure-to-screen claim. The opinions available on Westlaw also provide some information about how frequently a failure-to-screen claim results in municipal liability specifically for that claim.

But surveying written opinions also leaves some questions unanswered. Specifically, written opinions alone cannot tell us about (1) cases where a plaintiff wins a verdict but there is no opinion; (2) cases resulting in a settlement due in part to the failure-to-screen theory; (3) cases decided prior to verdict or settlement—for example, on a motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment—with no written opinion; (4) situations in which an individual suffers a wrong but a failure-to-screen claim—potentially meritorious or no—was never filed. To gain more insight into the first three of these circumstances, I turned to docket analysis.

C. DISTRICT COURT DOCKETS

I surveyed a full year of cases filed in federal district court using the Bloomberg Law database.[194] I selected all federal district court cases initiated during the year 2019 that plaintiffs labeled using the term "Other Civil Rights," nature-of-suit code 440.[195] Using similar terms to my Westlaw searches, I then searched for claims in which plaintiffs alleged a claim of failure to screen.[196] This process yielded dockets for 392 cases. The

194. Bloomberg Law is frequently used by scholars studying federal litigation through docket analysis. *See, e.g.*, Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 21 (2017).

195. Every complainant in federal court must choose a "Nature of Suit" (NOS) code on the "Civil Cover Sheet," also known as Form JS 44. *See* Robert Timothy Reagan, *The Hunt for Sealed Settlement Agreements*, 81 CHI.-KENT L. REV. 439, 452 n.71 (2006). Code 440 designates "Other Civil Rights" actions, excluding specific categories related to voting, employment, housing, disabilities, and education, which typically include cases litigated under civil rights statutes specific to those areas. *JS 44 Civil Cover Sheet*, U.S. CTS. [hereinafter *Civil Cover Sheet*], https://www.uscourts.gov/sites/default/files/js_044.pdf [https://perma.cc/234H-QX72].

196. I used the search query: "(1983 Monell "municipal liability" "official capacity") & (fail! inadequate! negligent! improper! wrongful! adequate!) & (screen! hir!)." I considered, but ultimately rejected after testing, the idea of using the same queries I used in the Westlaw surveys. The reason is that many

information I gathered about these dockets is available in Appendix C.[197]

For each docket, I first determined whether the plaintiff had in fact raised a failure-to-screen claim. If the plaintiff had, I then determined whether the court had adjudicated the claim and, if so, how the case had been resolved. I describe the methodology and findings for each of these determinations in more detail below.

I concluded that in 93 out of the 392 dockets I reviewed, the plaintiff had "raised" a failure-to-screen claim. I used a generous definition of what it meant to "raise" a claim. I read the complaint and all amended complaints available on Bloomberg. If the plaintiff included a claim identified as a § 1983 claim against a municipality, a *Monell* claim, a municipal policy or custom claim, or an official capacity suit against an individual government officer (which is treated as a suit against the entity, with the same requirements); and if I could discern anything in the complaint about faulty screening or hiring as a basis for liability; then I concluded that the plaintiff had "raised" the claim. I counted even very cursory references to hiring liability in the claims, unaccompanied by any more specific facts, as "raising" the § 1983 claim.

This threshold for "raising" a claim is considerably lower than the "plausibility standard" that a plaintiff must plead to survive a motion to dismiss under *Ashcroft v. Iqbal*.[198] I chose to use the more generous standard because it included all claims in which the plaintiff attempted to establish municipal liability on the basis of shortcomings in hiring—even if the plaintiff had no chance of prevailing based on the statements in the complaint.

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complaints that allege failure-to-screen claims do not cite either *Monell* or *Bryan County*, which would lead to undercounting cases in searches within the Bloomberg database. It is conceivable that the search query I used here might overlook some cases in which a plaintiff tried to plead a failure-to-screen claim, but unlikely that it would overlook cases in which the plaintiff pled a failure-to-screen claim in a manner that would survive a motion to dismiss. Therefore, if anything, the query I have used overstates the percentage of plaintiffs who succeed on such a claim after having attempted it.

197. Appendices are available at https://minnesotalawreview.org/v108-leong-appendix.

198. 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

The remainder of the analysis in this section concentrates on the 93 cases in which the plaintiff "raised" a failure-to-screen claim. I first analyzed whether the failure-to-screen claim was adjudicated. A failure-to-screen claim was "adjudicated," for purposes of my analysis, if the court resolved the claim in favor of either the plaintiff or defendant. I included "adjudication" of the failure-to-screen claim both when the court explicitly considered the failure-to-screen claim and when the court resolved all municipal liability claims together with a more general statement about their outcome.[199]

As I did with the district court opinions, I coded an adjudication as a "win" for the plaintiff if the plaintiff prevailed on the failure-to-screen theory at *any* stage of the proceedings. For example, if the court denied a defendant's motion to dismiss, I counted that as a "win" for the plaintiff, even if the plaintiff later lost on a motion for summary judgment. I adopted this approach because prevailing on the failure-to-screen claim at any stage of the proceedings means that the plaintiff achieved a tangible level of success on the theory, increasing the likelihood of a favorable outcome of some kind.[200]

In the 93 cases in which a failure-to-screen claim was raised, the outcome of the failure-to-screen claim was as follows:[201]

- In 57 cases, the case was concluded without an adjudication of the claim.
- In 25 cases, the court adjudicated the failure-to screen claim on the merits and the defendant won.
- In 3 cases, the court adjudicated the failure-to-screen claim on the merits and the plaintiff won.
- In 8 cases, the failure-to-screen claim has not been adjudicated as of August 1, 2023.

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199. For example, sometimes the court resolved all the *Monell* claims together by stating in a single sentence that none of them stated a claim.

200. In cases where the defendant did not file a motion to dismiss, I did not count it as a win for either plaintiff or defendant. One reason the defendant might have chosen not to file such a motion is that they conceded that the plaintiff failed to state a claim, although there are many other reasons as well (inattention to deadlines, belief that entering discovery would wear down the plaintiff more effectively, and so on).

201. See Appendix C for the complete list of failure-to-screen cases initiated in 2019, classified by outcome type. Appendices are available at https://minnesotalawreview.org/v108-leong-appendix.

I discuss the causes and significance of each category of outcome in detail below.

First, 57 cases were concluded without an adjudication of the failure-to-screen. This outcome resulted for a variety of reasons. Sometimes the case settled before the court considered the claim.[202] Sometimes the court disposed of the claim without adjudicating its merits—for example, it held that it did not need to address any municipal liability claims because there was no constitutional violation.[203] And in some cases the court intentionally or unintentionally ignored the claim.[204]

The defendant prevailed in 25 adjudications of the failure-to-screen claim. In these 25 adjudications, the defendant won 20 times on a motion to dismiss and 5 times on a motion for summary judgment.[205]

As of August 1, 2023, therefore, the plaintiff "won" in just 3 failure-to-screen adjudications in cases initiated during the year 2019. The small number of cases in which a plaintiff won does not allow for much generalization, but I describe them here:

In *Hutchins v. City of Vallejo*, the plaintiff alleged that the defendant had failed to "hire, train, instruct, monitor, supervise, evaluate, investigate, and discipline" its employees, and further stated that unconstitutional actions were "approved, tolerated,

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202. *See, e.g.*, Gabilly v. City of New York, No. 1:19-cv-11884 (S.D.N.Y. dismissed Oct. 20, 2021) (failure-to-screen claim raised but case settled before adjudication of claim); Zeman v. City of Farrell, No. 2:19-cv-01637 (W.D. Pa. dismissed Aug. 19, 2020) (same); *see also* Appendix C. Appendices are available at: https://minnesotalawreview.org/v108-leong-appendix.

203. *See, e.g.*, C1.G. v. Siegfried, 477 F. Supp. 3d 1194, 1216 (D. Colo. 2020) (holding no First Amendment violation and therefore no need to adjudicate whether school district failed to screen).

204. A representative example is *White v. City of Winnfield*, in which plaintiff pled a policy or custom based on "[t]he hiring and retention of officers who are unqualified for their employment positions" amid a long list of allegations in a single *Monell* count. Complaint with Jury Demand ¶ 40, White v. City of Winnfield, No. 1:19-cv-01410 (W.D. La. Oct. 6, 2022). The plaintiff also discussed insufficient hiring practices in other motions. Plaintiff's Opposition Response to the Motion for Summary Judgment at 24–25, White v. City of Winnfield, No. 1:19-cv-01410 (W.D. La. Oct. 6, 2022). But the plaintiff did not discuss hiring in a separate count or cite *Bryan County*. The Court ultimately analyzed *Monell* based only on written policy, informal custom, and failure-to-train theories, and simply did not address the failure to screen. White v. City of Winnfield, No. 19-01410, 2022 WL 5288878, at *8–12 (W.D. La. Oct. 6, 2022).

205. Appendix C, available at https://minnesotalawreview.org/v108-leong-appendix. Additional detail about these cases is on file with the author.

and/or ratified."[206] The court denied the defendants' motion to dismiss with respect to municipal liability without reference to or analysis of any specific theory of liability.[207] The case went on to settle without any specific discussion of failure to screen.[208]

In *Walker v. City of Newark*, the plaintiff alleged "failure to hire, supervise, train, instruct and control" law enforcement officers on the part of the City of Newark.[209] The court denied the defendants' motion to dismiss, although it did not address any specific theory.[210] Although some counts against individual officers survived a motion for summary judgment, the case was administratively dismissed pending mediation.[211]

In *Poer v. City of Commerce City*, the plaintiff alleged "deliberately indifferent hiring practices" as a separate count, brought against a sheriff in his official capacity and therefore functioning as a suit against the municipality.[212] In a detailed opinion, the court denied the defendants' motion for summary judgment.[213] In the same motion, the court denied qualified immunity to the individual officers.[214] The officers filed and subsequently withdrew an interlocutory appeal of the denial of qualified immunity,

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206. Complaint for Damages, Declaratory and Injunctive Relief, and Demand for Jury Trial ¶¶ 63–64, Hutchins v. City of Vallejo, No. 4:19-cv-05724 (N.D. Cal. dismissed July 28, 2021).

207. Order Denying Defendant City of Vallejo's Motion to Dismiss at 2, Hutchins v. City of Vallejo, No. 4:19-cv-05724 (N.D. Cal. dismissed July 28, 2021).

208. News reports state that the case settled for $270,698. *Vallejo to Pay $270,698 to Settle Excessive Force Lawsuit Against Off-Duty Police Officer*, CBS NEWS BAY AREA (July 2, 2021), https://www.cbsnews.com/sanfrancisco/znews/vallejo-police-settlement-excessive-force-lawsuit-david-mclaughlin-santiago-hutchins [https://perma.cc/S7T6-YZ4T].

209. Complaint & Jury Demand at 15, Walker v. City of Newark, No. 2:19-cv-16853 (D.N.J. May 16, 2023).

210. Order Denying Motion to Dismiss at 8–10, Walker v. City of Newark, No. 2:19-cv-16853 (D.N.J. May 16, 2023). More recently, the court granted the defendant city's motion for summary judgment without discussing failure to screen. Walker v. City of Newark, No. 19-16853, 2023 WL 3478465, at *9–11 (D.N.J. May 16, 2023).

211. Order Appointing Mediator, Walker v. City of Newark, No. 2:19-cv-16853 (D.N.J. May 31, 2023).

212. Second Amended Complaint & Demand for Jury Trial at 11–12, Poer v. City of Commerce City, No. 1:19-cv-01088 (D. Colo. filed Sept. 6, 2019).

213. Order Denying Motion for Summary Judgment 28–36, Poer v. City of Commerce City, No. 1:19-cv-01088 (D. Colo. June 21, 2022).

214. *Id.* at 10–28.

such that the case is pending at the trial court as of August 1, 2023.[215]

In no federal case initiated in 2019, therefore, has the plaintiff won a final judgment on the basis of the failure-to-screen claim.[216] I also did not find any evidence that a plaintiff settled a case entirely or partially on the basis of a failure-to-screen claim.[217] It is possible that the failure-to-screen claim is playing a role in some settlement negotiations—for example, those in which the case settled before the failure-to-screen claim was adjudicated—although the docket survey did not provide any express evidence that this was happening. In *Hutchins*, the one case that settled after the failure-to-screen claim survived a motion to dismiss, it is unclear whether and to what extent the failure-to-screen claim played a role in that settlement because a number of other theories of municipal liability also survived the motion to dismiss.[218]

Finally, as of August 1, 2023, 8 cases remain in which a failure-to-screen claim was raised but has not yet been adjudicated.[219] This feature of the research showcases a reality of civil

215. Notice of Withdrawal of Notice of Appeal, Poer v. City of Commerce City, No. 1:19-cv-01088 (D. Colo. Dec. 8, 2022); Courtroom Minutes for Telephonic Status Conference, Poer v. City of Commerce City, No. 1:19-cv-01088 (D. Colo. Aug. 3, 2023) (stating that parties have reached a settlement agreement in principle and ordering either dismissal papers or a Joint Status Report by Sept. 15, 2023).

216. Anecdotally, nearly all cases brought under § 1983 that are filed in state court are removed to federal court, although it is possible that some § 1983 claims were also adjudicated by a state court. The Bloomberg database does not include comprehensive coverage of state court dockets. *See Dockets Coverage & Outages*, BLOOMBERG L., https://www.bloomberglaw.com/dockets/coverage?United%20States=true&State=true [https://perma.cc/PDU9-AN32] (showing that only 1,070 out of 2,137 state dockets are available on the Bloomberg database).

217. For each case, I searched for specific evidence of failure to screen presented in a pre-settlement motion that was not resolved at the time of settlement. I also searched for any suggestion of bad hiring practices in media coverage of the case. I did not find any such evidence.

218. Complaint for Damages, Declaratory and Injunctive Relief, and Demand for Jury Trial ¶¶ 61–66, Hutchins v. City of Vallejo, No. 4:19-cv-05724 (N.D. Cal. dismissed July 28, 2021).

219. I considered and ultimately decided against assembling a data set in which every failure-to-screen claim was resolved. To do so would require selecting a considerably earlier time frame—probably one in which no case was initiated later than 2015. This approach would risk compiling outdated information.

litigation: not only have some cases initiated in 2019 not reached final judgment by 2023, but also, in these 8 cases, the failure-to-screen claim has been raised but has not been adjudicated even once.[220] Based on recent docket entries, some of the cases seem likely to settle soon without adjudication of the failure-to-screen claim, but others are moving ahead with trials currently scheduled as far in advance as March 2024.[221] It is possible that some of these cases could result in a win on the failure-to-screen claim at one or more stages of litigation or that the presence of the failure-to-screen claim could influence a settlement in the plaintiff's favor, although there is no evidence that pending cases are more likely to be resolved in favor of the plaintiff than the cases in which the failure-to-screen claim has already been adjudicated.[222]

Moreover, including pending cases highlights how many claims remain unresolved approximately three years after their filing date—information that is valuable to plaintiffs and defendants as they calculate the cost of litigating a case.

220. *See, e.g.*, Morens v. Dunkin, No. 3:19-cv-00126 (E.D. Ark. Apr. 25, 2019) *Court Dockets: Morens v. Dunkin et al*, BLOOMBERG L., https://www.bloomberglaw.com/product/blaw [https://perma.cc/6PQ4-WPPB] (choose "Court Dockets" from dropdown next to search bar; then search "3:19-cv-00126"; then, under "Filters" and "Courts," click the box next to "U.S. District Court for the Eastern District of Arkansas"; then follow the hyperlink for "Morens v. Dunkin et al" under "Docket Number Matches") (showing repeated requests for extensions by the parties resulted in six amendments to the court's scheduling order).

221. *See, e.g.*, *Court Dockets: Figueroa v. Kern County et al*, BLOOMBERG L., https://www.bloomberglaw.com/product/blaw [https://perma.cc/F58B-QH89] (choose "Court Dockets" from dropdown next to search bar; then search "1:19-cv-00558"; then, under "Filters" and "Courts," click the box next to "U.S. District Court for the Eastern District of California"; then follow the hyperlink for "Figueroa v. Kern County et al" under "Docket Number Matches"); Figueroa v. Kern County, No. 1:19-cv-00558 (E.D. Cal. Apr. 29, 2019) (showing that as of August 2023, settlement is scheduled for November 2023 and trial scheduled for March 2024).

222. One could hypothesize that a case that is taking longer to adjudicate might be more likely to result in a win on the failure-to-screen claim—perhaps the plaintiff is refusing to settle because their case is strong, or perhaps discovery is taking longer because there is more to find. I did not find any express evidence either to support or to discredit this hypothesis. Moreover, there is no pattern evident from the three cases in which plaintiffs "won" on the failure-to-screen theory, in which the time from date of filing to date of "win" on failure-to-screen claim varied considerably at 5 months (*Hutchins*), 8 months and 10 days (*Walker*), and 2 years, 2 months, and 9 days (*Poer*). Hutchins v. City of Vallejo, No. 4:19-cv-05724 (N.D. Cal. Sept. 11, 2019) (showing docket with

My methodology has important limitations. Some are associated with the Bloomberg Law database. Running a search query in the database does not search every document for every case because not every document associated with a case is available on Bloomberg.[223] So, it is possible that a docket might not be returned by my search query but might nonetheless involve a plaintiff who raises a failure-to-screen claim, and possibly an adjudication of that claim as well. It is also possible that a few cases seeking to hold a municipality liable on the basis of its failure to screen might have been coded with a nature-of-suit code other than 440 if the case also involved other categories of claims.[224]

Despite the limitations I have described, it is unlikely that a significant number of failure-to-screen claims has escaped analysis. The overall number of such claims that I found, using several different approaches, is very small. Nothing that I saw in my docket analysis suggests that a significant number of municipalities have been held liable under federal civil rights law for failing to screen an employee.

III. WHY PLAINTIFFS LOSE

My research reveals two overlapping explanations for why municipalities enjoy near-complete immunity from liability based on their failure to adequately screen employees. The first explanation, which I discuss in Section A, consists of the challenging substantive and procedural standards that plaintiffs

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complaint filed on Sept. 11, 2019 and order denying motion to dismiss filed on Feb. 11, 2020); Walker v. City of Newark, No. 2:19-cv-16853 (D.N.J. Aug. 19, 2019) (showing docket with amended complaint filed on Aug. 14, 2020 and denial in part of motion to dismiss on Apr. 29, 2021); Poer v. City of Commerce City, No. 1:19-cv-01088 (D. Colo. Apr. 12, 2019) (showing docket with complaint filed Apr. 12, 2019 and order denying amended motion for summary judgment on June 21, 2022).

223. According to Bloomberg, the search engine searches all litigation documents available via PACER. Email from Michael Whitlow, Reference Libr., Univ. of Denver Sturm Coll. of L., to author (Aug. 8, 2022, 10:58 MDT) (on file with author).

224. For example, it is possible that a case would raise both an employment claim (NOS 442) and a § 1983 claim involving failure to screen, or an education claim (NOS 448) and a § 1983 claim involving failure to screen. *Civil Cover Sheet*, *supra* note 195. But conversations with plaintiffs' attorneys indicated that if a case involved a § 1983 claim they would always use NOS 440. I also undertook a partial review of the results associated with NOS 442 and 448 and did not find any case coded with NOS 442 or 448 that included a failure-to-screen claim under 42 U.S.C. § 1983.

must satisfy to establish municipal hiring liability. The second explanation, which I investigate in Section B, is the low quality of some plaintiffs' lawyers' filings.

A. THE LEGACY OF *MONELL*

As an initial matter, we should not lose sight of the reason that plaintiffs are litigating over hiring practices in the first place: the Supreme Court held in *Monell* that municipalities cannot be liable on the basis of respondeat superior.[225] Both judges[226] and scholars[227] have extensively criticized the policy or custom requirement, and some have argued that respondeat

225. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978); Joanna C. Schwartz, *Municipal Immunity*, 109 VA. L. REV. 1181, 1185–86 (2023).

226. *See, e.g.*, *Bryan County*, 520 U.S. 397, 433 (1997) (Breyer, J., dissenting) ("*Monell*'s basic effort to distinguish between vicarious liability and liability derived from 'policy or custom' has produced a body of law that is neither readily understandable nor easy to apply."); Pembaur v. City of Cincinnati, 475 U.S. 469, 487 (Stevens, J., concurring in part and concurring in judgment) ("[Difficulty] arises from the problem of obtaining a consensus on the meaning of the word 'policy'—a word that does not appear in the text of 42 U.S.C. § 1983, the statutory provision that we are supposed to be construing."); Vodak v. City of Chicago, 639 F.3d 738, 747 (7th Cir. 2011) ("For reasons based on what scholars agree are historical misreadings (which are not uncommon when judges play historian), the Supreme Court has held that municipalities are not liable for the torts of their employees under the strict-liability doctrine of respondeat superior, as private employers are." (citations omitted)).

227. *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) ("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"). *See generally* Schwartz, *supra* note 225 (summarizing *Monell*'s shortcomings).

superior is the correct approach as a matter of both history and policy.[228]

Monell's policy or custom requirement is also the reason that the Supreme Court developed the complex and demanding *Bryan County* standard for establishing liability for bad hiring.[229] As discussed in more detail in Part I.A, this standard imposes "rigorous standards of culpability and causation . . . to ensure that the municipality is not held liable solely for the actions of its employee."[230] In particular, the plaintiff must prove that the municipality acted with "deliberate indifference," meaning that "adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right."[231] Further, "a finding of culpability . . . . must depend on a finding that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff," with a "strong" connection "between the background of the particular applicant and the specific constitutional violation."[232]

The demanding *Bryan County* standard is one reason that municipal liability for hiring practices is exceedingly rare. In my appellate data set, I found that the deliberate indifference standard was the most common reason that courts dismissed a complaint, resolved a motion for summary judgment in defendants' favor, or reversed a jury verdict against a municipality.[233] In 15 of 34 cases in the appellate data set, for example, the court explicitly cited the deliberate indifference standard as the reason the plaintiff's case fell short.[234] Courts were particularly likely

228. *See, e.g.*, Fisk & Chemerinsky, *supra* note 144 (arguing in favor of respondeat superior).

229. *See Bryan County*, 520 U.S. at 404–06 (addressing the question of whether, under *Monell*, "a single hiring decision . . . can be a 'policy' that triggers municipal liability").

230. *Id.* at 405.

231. *Id.* at 411.

232. *Id.* at 412.

233. *See* Appendix A. Appendices are available at https://minnesotalawreview.org/v108-leong-appendix.

234. *See, e.g.*, Snyder v. Trepagnier, 142 F.3d 791, 796–97 (5th Cir. 1998) (reversing jury verdict against city because evidence of two non-violent offenses was "insufficient" under *Bryan County* to establish deliberate indifference). For a complete list of cases that fell in this category, see Appendix A. Appendices are available at https://minnesotalawreview.org/v108-leong-appendix.

to reject a plaintiff's allegations that the municipal employer was deliberately indifferent to the likely consequences of hiring the officer on the ground that prior incidents of misconduct in the officer's background were insufficiently similar to misconduct toward the plaintiff to constitute "deliberate indifference."[235]

Review of the cases makes clear that plaintiffs often failed due to the deliberate indifference standard rather than the facts. Many plaintiffs struggled to plausibly allege deliberate indifference at the pleading stage.[236] Courts frequently acknowledged that a municipality had not used good hiring practices but then concluded that those hiring practices had not risen to the level of deliberate indifference.[237] For example, in *Morris v. Crawford County*, the court considered a challenge to the hiring of a prison guard who had previously slapped an inmate, mishandled inmates' money and property, "mouth[ed] off" to two fellow deputies and invited them to go the gym "to take care of it," disobeyed a nurse and commented that "he was going to knock that bitch out," generally acted insubordinate at work, and had restraining orders filed against him by both his ex-wife and ex-girlfriend for violent conduct and threats.[238] The guard went on to assault an inmate by dragging him into a cell and dropping his full weight behind his knee into the inmate's back, severing the inmate's intestine.[239] The court held that Crawford County's decision to hire the guard despite his long history of violence and threats was not

235. *See, e.g.*, Gomez v. Galman, 18 F.4th 769, 778 (5th Cir. 2021) (acknowledging that police officer's conduct in two prior incidents was "egregious," but that "these incidents are too unlike [the officer's] conduct [toward the plaintiff] to establish 'deliberate indifference' on the City's part"); Aguillard v. McGowen, 207 F.3d 226, 230–31 (5th Cir. 2000) (holding that officer's prior record of misconduct fell short of what is required to prove deliberate indifference on the part of a municipality).

236. *See, e.g.*, *Gomez*, 18 F.4th at 777–79 (holding that plaintiff has not met plausibility threshold with respect to deliberate indifference).

237. *See, e.g.*, Kobrick v. Stevens, 763 F. App'x 216, 221 (3d Cir. 2019) (acknowledging that school district could have conducted a "more thorough" investigation into background of band director who had a relationship with a seventeen-year-old student and had a prior record of similar misconduct, but "mere negligence does not constitute deliberate indifference to the risk of harm to students"); *Aguillard*, 207 F.3d at 230 ("[W]hile all of this may indicate that [the officer] was 'an extremely poor candidate' for the County's police force, the record shows not one shred of solid evidence foreshadowing [the officer's unjustified shooting of a civilian]." (quoting *Bryan County*, 520 U.S. 397, 414 (1997))).

238. Morris v. Crawford County, 299 F.3d 919, 924–26 (8th Cir. 2002).

239. *Id.* at 920–21.

sufficient to establish deliberate indifference: while the guard's "record may have made him a poor candidate for a position as a detention center deputy . . . it would not have [led] a reasonable supervisor to conclude that there was an obvious risk that he would use excessive force if hired."[240] The court concluded that "a plaintiff must point to prior complaints in an applicant's background that are nearly identical to the type of misconduct that causes the constitutional deprivation," observing, "[t]his is a rigorous test to be sure."[241]

The data suggest a further explanation for plaintiffs' lack of success: failure-to-screen claims never win because they never win. That is, because plaintiffs almost never prevail on failure-to-screen claims, there is no precedent on which future plaintiffs can rely. Among all federal appellate cases, I found just one unusual case in which the plaintiff won at any stage of litigation,[242] and my extensive investigation of the district courts yielded only a few published decisions in which plaintiffs prevailed at any stage of litigation.[243] These scattered victories offer little fodder for analogy by future plaintiffs,[244] and as more time passes without victories by plaintiffs, courts are likely to see the increasingly sparse precedent as an increasingly significant obstacle.

B. THE FAILURES OF PLAINTIFFS' LAWYERS

The challenging legal standards arising from *Monell* and *Bryan County* partially explain why municipalities are so seldom held liable for hiring. But my research shows that some plaintiffs' lawyers also contribute to the claim's low rate of success.[245]

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240. *Id.* at 925–26 (citation and internal quotation marks omitted).

241. *Id.* at 924.

242. Griffin v. City of Opa-Locka, 261 F.3d 1295 (11th Cir. 2001); *see also supra* text accompanying notes 154–86.

243. *See supra* text accompanying notes 187–92.

244. *See, e.g.*, Memorandum of Points and Authorities in Opposition to District Defendants' Motion to Dismiss Second Amended Complaint at 15–16, Blue v. District of Columbia, 850 F. Supp. 2d 16 (D.D.C. 2012) (No. 10-1504), *aff'd* 811 F.3d 14 (D.C. Cir. 2015) (stating that "numerous courts" have held municipalities liable under § 1983 for failing to screen employees for prior acts of sexual abuse, but citing only 1 federal appellate case and 3 district court opinions (2 unpublished) from different circuits).

245. In other work, I present in more detail empirical data showing that poor lawyering in municipal liability claims is not limited to the failure-to-screen theory. My coauthors and I found that, in a data set comprising 108 cases

My review of dockets included many examples of stellar civil rights lawyering—on behalf of both plaintiffs who won and plaintiffs who lost. Yet I also found that many instances in which lawyers filed complaints that contained significant legal errors.[246] Some did not even articulate the basic elements of the hiring theory (let alone plead those elements in a manner that came anywhere near satisfying the requirements of plausibility under *Iqbal*), while others did not allege any facts that would support the theory.[247] The filings of represented plaintiffs were sometimes no better than those of plaintiffs who were proceeding pro se, and represented plaintiffs were not afforded the somewhat more generous construction of their complaints granted to unrepresented plaintiffs.[248]

Some complaints bore evidence that the lawyer who drafted them did not understand the basic architecture of constitutional litigation under 42 U.S.C. § 1983. For example, a few complaints indicated that municipalities were subject to respondeat superior liability for constitutional violations caused by their employees.[249] Other complaints did not distinguish between supervisory liability, which is a theory of liability against a government official in their individual capacity, and failure to supervise, which

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alleging municipal liability under § 1983 for a constitutional violation, the attorneys representing the plaintiff failed to articulate the elements of *any* theory of municipal liability in 56.5% of the complaints. That is, more than half of the complaints alleging municipal liability should not have survived a motion to dismiss. Unsurprisingly, pro se plaintiffs fared worse, with 72.7% complaints in cases alleging municipal liability failing to plead the elements of theory of municipal liability. Nancy Leong et al., *Pleading Failures in* Monell *Litigation*, EMORY L. J. (forthcoming 2024) (manuscript at 1, 24).

246. *Id.* at 6.

247. *Id.* at 26–27.

248. This is not to say that pro se plaintiffs travel an easier road. Rather, they face unique significant obstacles that are virtually insurmountable. *See, e.g.*, Joanna C. Schwartz, *Civil Rights Without Representation*, 64 WM. & MARY L. REV. 641, 663–94 (2023) (describing the experiences of exemplary pro se plaintiffs).

249. *See, e.g.*, Complaint ¶¶ 39–42, Estate of Kamal v. Township of Irvington, No. 2:15-cv-08008 (D.N.J. Nov. 10, 2015) (listing fourth cause of action as "VIOLATION OF 42 USC § 1983 SUPERVISORY LIABILITY RESPONDENT [sic] SUPERIOR"); Complaint ¶¶ 197, 200, 202, Kelly v. Conner, No. 3:13-cv -00636 (W.D.N.C. Nov. 21, 2013) (listing respondeat superior as a basis for liability for violations of the U.S. Constitution under "COUNT ONE: FALSE ARRESTS").

is a theory of liability establishing policy or custom against a municipality.[250]

Many complaints showed no indication that the lawyer who drafted them was aware that there are different theories of municipal liability rather than merely a general "policy or custom" requirement, or that different theories of municipal liability require the plaintiff to prove different elements.[251] For example, it was common for complaints to combine all theories of municipal liability into a single count in such a way that it was difficult or impossible to parse the different theories of liability.[252] The amalgamation of theories was particularly common with municipal failure theories, despite the Supreme Court's explicit statement that plaintiffs may not automatically analogize between the requirements of one failure claim and another.[253] For example, many plaintiffs simply recited a list of bare allegations that a defendant municipality failed to train, supervise, screen, discipline, or investigate its employees, without any differentiation between these theories of municipal failure.[254] When a complaint alleges a laundry list of municipal failings and other allegedly unconstitutional policies that include a claim of failure to screen,

250. *See, e.g.*, First Amended Complaint ¶¶ 77–84, Medina v. City of Philadelphia, No. 2:19-cv-05092 (E.D. Pa. Dec. 10, 2019) (asserting a count labeled "42 U.S.C. § 1983 Supervisory Liability" against both the municipality and officers in their official and individual capacities).

251. *See, e.g.*, Complaint for Damages ¶¶ 76–112, Mahoe v. Westlake Imps., Inc., No. 2:19-cv-05867 (C.D. Cal. July 9, 2019) (jumbling a list of facts, liability theories, and elements spread over three counts).

252. *See, e.g.*, Complaint ¶ 87, Lang v. City of Mount Vernon, No. 7:19-cv -06959 (S.D.N.Y. Jul. 25, 2019) (alleging "policy/practice/custom/failure to train/failure to supervise/failure to discipline/failure to adequately screen" in a single count, which did not survive defendant's motion to dismiss).

253. *See, e.g.*, *Bryan County*, 520 U.S. 397, 409–10 (1997) (explaining that analogy between failure to train and failure to screen is inapt).

254. *See, e.g.*, First Amended Complaint for Violations of Civil Rights (42 U.S.C. § 1983) and State Laws ¶ 58, Lewis v. County of San Diego, No. 3:13-cv -02818 (S.D. Cal. Aug. 25, 2014) (alleging "practices and habits of improper and inadequate hiring, training, retention, discipline and supervision" by municipal employees); Plaintiffs' First Amended Complaint ¶ 105, Estate of Romain v. City of Grosse Pointe Farms, No. 4:14-cv-12289 (E.D. Mich. June 10, 2014) (alleging that the city "failed to enforce proper hiring standards and practices, failed to adequately train and supervise their employees, and failed to enforce the proper disciplinary procedures"); Complaint ¶ 270, Kelly v. Conner, No. 3:13-cv-00636 (W.D.N.C. Nov. 21, 2013) (alleging that city "implemented a custom and/or policy of grossly failing to screen, hire, train, and retain their law enforcement officers and other agents properly").

the court will almost certainly dismiss the failure-to-screen claim because the plaintiff has not pled the specific elements of the theory.

Even where complaints made clear that they were relying on the failure-to-screen theory to establish municipal policy or custom, they often failed to allege basic elements of the claim. Many did not mention either the deliberate indifference requirement or the requirement of a causal connection between the failure to screen and the eventual constitutional violation.[255] Even a plaintiff's attorney who had read literally nothing other than *Bryan County* would know that it is necessary to allege deliberate indifference and causation. And even where plaintiffs nominally articulated every element associated with the claim (for example, by stating the words "deliberate indifference"), they often failed to allege any facts at all beyond the bare words of the legal standard, let alone sufficient facts to satisfy the standard of plausibility.[256]

A significant number of complaints met the definition of a "shotgun complaint"—one that "fails to articulate claims with sufficient clarity to allow the defendant to frame a responsive pleading."[257] Such complaints create significant difficulties for

255. First Amended Complaint ¶¶ 57–60, Lewis v. County of San Diego, No. 3:13-cv-02818 (S.D. Cal. Aug. 25, 2014) (no reference to causation in relation to hiring); First Amended Complaint ¶¶ 103–106 Estate of Romain v. City of Grosse Pointe Farms, No. 4:14-cv-12289 (E.D. Mich. July 16, 2014) (no allegation of deliberate indifference).

256. *See, e.g.*, Memorandum Opinion at 13–14, Deemer v. City of Oil City, No. 1:19-cv-00380 (W.D. Pa. Sept. 24, 2021) ("Here, Mr. Deemer has identified nothing in the background of any of the Defendant officers that should have lead [sic] the City to conclude that hiring them would deprive a citizen of constitutional rights.").

257. *In re* SCANA Corp. Sec. Litig., No. 3:17-cv-2616, 2019 WL 1427443, at *5 (D.S.C. Mar. 29, 2019). As the Eleventh Circuit has explained:

> The most common type—by a long shot—is a complaint containing multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint. The next most common type . . . is a complaint that does not commit the mortal sin of re-alleging all preceding counts but is guilty of the venial sin of being replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action. The third type of shotgun pleading is one that commits the sin of not separating into a different count each cause of action or claim for relief. Fourth, and

judges, who struggle to assemble coherent theories from the mélange of facts.[258] Former federal appellate judge Emmett Ripley Cox calls shotgun complaints "a legal version of 'Where's Waldo?'" that require the judge to hunt through the plaintiff's complaint in an attempt to find facts to substantiate a vaguely articulated theory.[259]

In my data set, nearly every complaint containing multiple counts began each count by adopting the allegations of all preceding counts, with the effect that the final count was a combination of everything in the complaint.[260] In a related but distinct trend, many complaints failed to connect facts and law with any specificity: for example, many complaints with multiple counts mentioned deficient screening or hiring practices in the factual section of the complaint, but then did not connect that allegation to any cause of action.[261] In some instances, the lack of clear

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> finally, there is the relatively rare sin of asserting multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against.

Weiland v. Palm Beach Cnty. Sheriff's Off., 792 F.3d 1313, 1321–23 (11th Cir. 2015) (footnotes omitted).

258. *See, e.g.*, Jacobs v. Credit Suisse First Bos., 2011 WL 4537007 (D. Colo. Sept. 30, 2011) ("[A shotgun] pleading contains several counts or causes of action, each of which incorporates by reference the entirety of its predecessors. As a result, each successive claim is supported by the accumulation of all of the preceding factual and legal averments, even though many—or even most—of those previous averments are irrelevant to the current claim. . . . Essentially, the shotgun pleader foists off one of the pleading lawyer's critical tasks—sifting a mountain of facts down to a handful of those that are relevant to a given claim—onto the reader." (citation omitted)).

259. Emmett Ripley Cox, *Thirty-Two Years on the Federal Bench: Some Things I Have Learned*, 66 FLA. L. REV. 1685, 1691 (2014).

260. *See, e.g.*, Amended Complaint ¶¶ 116–173, Estate of the Unborn Child of Jawson v. Milwaukee County, No. 2:19-cv-01008 (E.D. Wis. Nov. 22, 2019) (realleging the entire preceding complaint in each count, which consisted of 170 previous paragraphs for the final count). Some complaints only realleged the factual matter at the beginning of the complaint for each count, although this practice also can be problematic if it is insufficiently specific. *See, e.g.*, First Amended Complaint ¶¶ 39–140, Escamilla v. City of Santa Ana, No. 8:19-cv -02229 (C.D. Cal. Dec. 10, 2019) (realleging paragraphs 1–38 at the beginning of each of the First Amended Complaint's fourteen counts).

261. *See, e.g.*, Complaint ¶¶ 22, 32–55, Johnson v. City of Los Angeles, No. 2:19-cv-00105 (C.D. Cal. Jan. 7, 2019) (stating in factual section that "[d]efendants . . . negligently, carelessly, recklessly with deliberate indifference and/or in any other actionable manner hired, employed, retained, trained, supervised,

pleading of the failure-to-screen claim likely led to its dismissal.[262] The disconnect between facts and theories of liability led to a surprising number of instances in which a court simply *ignored* (intentionally or accidentally) the failure-to-screen claim without resolving it in favor of either party.[263] One might argue that this is the judge's fault, but one could just as easily argue that it is the lawyer's job to ensure that a theory is pled with sufficient clarity that a judge cannot ignore it.

Why is the quality of lawyering so poor? A few possibilities come to mind. First, in fairness to the lawyers, much of the bad lawyering would not matter if not for the complex policy or custom requirement imposed by *Monell* and its progeny, such as *Bryan County*, in conjunction with the heightened pleading standard imposed by *Iqbal*.[264] If municipalities could be held liable in respondeat superior, errors in pleading deliberate indifference and causation might not doom their clients' cases. But

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assigned, controlled, and failed to adequately supervise, manage and discipline," but then alleging two causes of action that do not mention hiring, including a *Monell* claim "by all plaintiffs against all defendants").

262. In one case, the Amended Complaint stated that "it was the policy and/or custom of the [police department] to inadequately hire, train, supervise, discipline, and/or terminate its officers, staff agents, and employees, thereby failing to adequately discourage further constitutional violations on the part of their officers, staff, agents, and employees." Amended Complaint ¶ 121, Edwards v. Boone, No. 2:19-cv-00513 (E.D. Va. Nov. 15, 2019). The court granted the defendants' motion to dismiss, explaining that "the Amended Complaint fails in its endeavor to connect" the incident involving the plaintiff "to a systemic issue" with the police. Memorandum Opinion and Order 9, Edwards v. Boone, 2:19-cv-00513 (E.D. Va. Feb. 7, 2019).

263. *See supra* text accompanying notes 203–15. The failure-to-screen claim was only adjudicated in 29 of the claims in which it was raised. While in many of these cases it was not adjudicated for reasons other than the plaintiff's skill at lawyering, poor pleading seems to have played a role in at least some cases. A representative example is *White v. City of Winnfield*, in which the plaintiff pled a policy or custom based on "[t]he hiring and retention of officers who are unqualified for their employment positions" amid a long list of allegations in a single *Monell* count. Complaint ¶ 40, White v. City of Winnfield, No. 1:19-cv-01410 (W.D. La. Nov. 6, 2019). The plaintiff also discussed insufficient hiring practices in other motions. Opposition to Motion for Summary Judgment at 24–25, White v. City of Winnfield, No. 1:19-cv-01410 (W.D. La. Apr. 4, 2019). But the plaintiff did not discuss hiring in a separate count or cite *Bryan County*. The Court ultimately analyzed *Monell* based only on the theories of written policy, informal custom, and failure to train, and simply did not address the failure to screen. Ruling at 9–12, White v. City of Winnfield, No. 1:19-cv-01410 (W.D. La. Oct. 6, 2022).

264. *See supra* notes 225–42.

this is only a limited explanation for the poor quality of litigation: many areas of law are complex, and I am skeptical that the marginal quality of complaints is present across all these areas of law.

Another possibility is that some lawyers who bring civil rights claims are not specialists in civil rights litigation, let alone litigation under 42 U.S.C. § 1983.[265] Lawyers without expertise in § 1983 litigation may underestimate the difficulty of bringing cases in this area and may be unaware of some of the obstacles to doing so.[266]

Indeed, existing incentives may diminish the likelihood that lawyers with civil rights expertise are willing to accept § 1983 cases. Any § 1983 case comes with significant obstacles to recovery, which include both the municipal liability issues I have discussed here as well as other doctrinal obstacles such as qualified immunity.[267] Attorneys' fees for litigation under 42 U.S.C. § 1983 are governed by 42 U.S.C. § 1988, which the Supreme Court has gradually cabined over the past three decades to limit the situations in which fees are available.[268] These obstacles likely affect an experienced lawyer's calculation about what a

265. Leong et al., *supra* note 245, at 6 ("[A]bout 30% of the lawyers who filed complaints in our dataset appeared to have no experience litigating civil rights cases.").

266. *See id.* at 6–7.

267. A vast literature has examined qualified immunity as a defense to individual officer liability in § 1983 actions, generally concluding that qualified immunity diminishes plaintiffs' chances of success. *See, e.g.*, Alexander A. Reinert, *Asymmetric Review of Qualified Immunity Appeals*, 20 J. EMPIRICAL LEGAL STUD. 4 (2023); Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065 (2018).

268. *See, e.g.*, Evans v. Jeff D., 475 U.S. 717, 742–43 (1986) (holding that a district court has the power to approve a settlement that is conditioned on a waiver of attorneys' fees for the plaintiff); Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 598 (2001) (holding that attorneys' fees under § 1988 are unavailable unless plaintiff has received a judgment on the merits or a court-ordered consent decree); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 205–08 (2003) (describing incentives created by decision under § 1983); Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL'Y 1, 4 (2008) (explaining that case law limiting 42 U.S.C. § 1988 as a source of attorneys' fees has "destroyed section 1983 as a remedy for civil rights plaintiffs with only modest damages").

civil rights case is worth,[269] with the result that such lawyers are less willing to litigate cases under § 1983 because they know it is difficult to achieve a favorable result and obtaining fees is less certain.[270] By contrast, lawyers who are inexperienced with § 1983 may not be fully aware of the extent of these challenges, with the result that they are more willing to take such cases.[271] Thus, the challenges associated with § 1983 litigation may create perverse outcomes: lawyers with civil rights expertise may make an informed decision to decline riskier cases, leaving prospective plaintiffs in those cases no choice but to rely on less skilled or less experienced lawyers.[272]

A final possibility is that some lawyers—even those who would describe themselves as specialists in civil rights litigation—are simply not performing competently in § 1983 litigation. Scholars have documented poor work by some plaintiffs' lawyers in other civil rights cases, including employment discrimination cases[273] and disability discrimination cases.[274] One explanation may be that the training lawyers receive or internalize during law school does not result in competent litigation in the realm of § 1983 litigation. Many of the pleading failures I have identified reflect pure misunderstandings of doctrine,

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269. Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U. L. REV. 1101, 1131 (2020) ("[Q]ualified immunity appears to cause some lawyers to reduce the number of civil rights cases they bring and discourage other attorneys from filing any civil rights cases."). Schwartz also found, however, that some lawyers said that they did not take qualified immunity into account in determining whether to accept cases. *Id*. at 1138–43.

270. Schwartz, *Civil Rights Without Representation*, *supra* note 248, at 641.

271. *Cf. id*. at 663 (noting that the Supreme Court "evaporated" incentives for those that could command larger fees).

272. Because *Evans v. Jeff D.* made attorneys' fees much harder to recover for plaintiffs' lawyers, the lawyers who do end up taking cases with a low dollar value may be less sophisticated lawyers. *Cf.* Reingold, *supra* note 268, at 21 ("Congress's efforts to improve the market for legal services for civil rights plaintiffs was undone by *Evans*, because it put civil rights cases on the same footing as conventional tort cases, in which fee-shifting was not available.").

273. Scott A. Moss, *Bad Briefs, Bad Law, Bad Markets: Documenting the Poor Quality of Plaintiffs' Briefs, Its Impact on the Law, and the Market Failure It Reflects*, 63 EMORY L.J. 59, 80–94 (2013) (describing errors by plaintiffs' attorneys in employment discrimination litigation).

274. Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL'Y 383, 398–402 (2019) (cataloging "pleading failures" in litigation under ADAAA).

signaling the importance of classes that teach students how to think critically about doctrinal problems, how to determine whether more legal research is needed, and how to distinguish a doctrinally complicated case from a straightforward one. Perhaps more emphasis on such classes is needed during law school, both for lawyers who hope to litigate civil rights cases and for law students in general.

Regardless of the precise blend of explanations, it is clear that the quality of representation in failure-to-screen claims falls below what one would hope. Although the high standards established by the doctrine are partly to blame for plaintiffs' near-inability to prevail on a failure-to-screen claim, poor lawyering is also a contributing cause.

IV. ANALYSIS AND IMPLICATIONS

In this Part, I examine the implications of the data I have collected. Section A considers other potential avenues for recourse against municipalities that fail to screen, concluding that these alternatives—indemnification, state statutory law, and state common law—are an inadequate substitute for municipal liability under § 1983. But plaintiffs and civil rights advocates should not lose hope. Section B outlines how interventions within and beyond litigation can both help to improve municipal hiring practices and provide recourse when those practices fall short.

A. THE INADEQUACY OF ALTERNATIVE AVENUES

My research demonstrates that municipalities are not subject to a significant level of liability under 42 U.S.C. § 1983 for failing to screen employees before hiring. But what about other remedial avenues? This section examines whether other mechanisms effectively hold municipalities liable for their poor hiring practices.

One possibility is that municipalities may face indirect liability because they indemnify their employees via state statute, employment contract, or voluntary practice. Joanna Schwartz has shown that individual police officers who violate the Constitution are almost always indemnified: in a study of 44 large jurisdictions between the years 2006 and 2011, officers were indemnified for 99.98% of the dollars awarded to plaintiffs; in 37 small and mid-sized jurisdictions, officers *never* contributed to

settlements or judgments against them.[275] Officers did not contribute even when the municipality was not obligated to indemnify the officer by contract or law.[276] At least with respect to police officers, Schwartz's work suggest municipalities usually end up footing the bill for settlements and judgment against their employees.[277] So one could argue that municipalities have incentives to establish rigorous hiring practices even without failure-to-screen liability.

But as scholars (including Schwartz) have argued, indirect liability via indemnification is not a substitute for *Monell* liability for several reasons.[278] First, in a relatively small but important subset of lawsuits, municipalities do refuse to indemnify their employees.[279] Indeed, refusals may be more likely to occur when the employee's wrongdoing is especially egregious because in such situations a municipality can argue that the employee in question was not acting within the scope of their employment.[280] If a municipality refuses to indemnify an employee and the employee is judgment-proof, the plaintiff will be unable to recover.

Second, liability via indemnification is not equivalent to *Monell* liability because municipalities can be held liable in some situations in which no individual employee can be held liable. For example, municipalities are not entitled to the qualified immunity defense,[281] and they also can be held liable where the identities of individual wrongdoers are unknown or

275. Schwartz, *supra* note 145.

276. *Id.* at 918–25.

277. Although I know of no formal research on this point, litigators have told me that they believe that some municipalities have tightened their indemnification requirements within the last few years.

278. *See, e.g.*, Schwartz, *supra* note 225, at 1227 (arguing that despite the availability of indemnification, "the difficulties of proving *Monell* claims compromise the compensation and deterrence goals of Section 1983").

279. *See, e.g.*, J.K.J. v. Polk County, No. 15-cv-428 and 15-cv-433, 2017 WL 28093, at *11 (W.D. Wis. Jan. 3, 2017) (holding that the county was not required to indemnify a jail guard who sexually assaulted inmates because the guard was not acting within the scope of his employment).

280. *See id.*

281. Owen v. City of Independence, 445 U.S. 622, 638 (1980) (holding that municipalities are not entitled to qualified immunity and may not assert good faith as a defense to liability).

unknowable.[282] Therefore, municipalities provide a source of liability even when any lawsuit against an individual officer would fail.[283]

Third, holding a municipality directly liable has consequences for litigation because it broadens the scope of discovery that courts will allow. For example, multiple practitioners have shared with me that, in a lawsuit against an individual employee, it is practically impossible to obtain any employment records other than those of the individual municipal employee wrongdoer. By contrast, in a lawsuit against a municipality, the policy or custom requirement may allow a plaintiff to obtain discovery of records and policies beyond the individual municipal employee wrongdoer. The availability of municipal liability for bad hiring may be essential to discovery seeking items such as entity-wide employment records or information about hiring practices.

Fourth, some evidence suggests that holding a municipality directly liable may matter to the size of a jury verdict. Jurors who hesitate to impose a large verdict on an individual employee may be more willing to do so against a municipality: for example, one study found that mock jurors imposed larger verdicts against corporations than against individuals when their wealth was described identically.[284]

Fifth, indemnification does not matter to plaintiffs who are primarily or exclusively seeking injunctive relief. Such relief is critical to plaintiffs who wish to change local government practices in the future—for example, those who wish to reform a local government's deficient hiring practices. While the Supreme Court's standing requirements for plaintiffs seeking injunctive

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282. *Cf.* Teressa Ravenell, *Unidentified Police Officers*, 100 TEX. L. REV. 891, 891 (2022) (arguing that § 1983 creates joint liability).

283. Although Schwartz has found that four circuits have imposed a qualified-immunity-like requirement that plaintiffs show a pattern of constitutional violations before liability is possible—what she dubs "backdoor municipal immunity"—in other circuits the inapplicability of qualified immunity to municipalities leaves open the opportunity for some plaintiffs to recover from municipalities. Joanna C. Schwartz, *Backdoor Municipal Immunity*, 132 YALE L.J.F. 136 (2022).

284. MacCoun, *supra* note 149. While jurors may see municipalities as distinct from corporations because judgments against municipalities are ultimately satisfied by taxpayers, the research offers some evidence that jurors are willing to impose larger judgments against entities than against individuals.

relief are extremely difficult to meet,[285] for plaintiffs who can satisfy the standard, municipal liability is a critical tool.

Finally, municipal liability contributes to a discourse that takes account of structural factors that cause constitutional injury. When a municipality indemnifies an employee, it communicates that constitutional wrongdoing is the result of bad behavior by "a few bad apples"[286]—particularly if the indemnification takes place out of the public view. By contrast, examining municipal culpability openly in litigation focuses attention on the institutional practices that contributed to a plaintiff's injury, such as faulty hiring practices that fail to screen out employees with significant records of misconduct. Current indemnification practices therefore do not create a functional equivalent to municipal liability under § 1983 for failure to screen.

Scholars have also recently emphasized the potential for state law to serve as a mechanism for protecting constitutional rights.[287] Such liability could either be directly tied to federal constitutional law—for example, if a state law provides liability when federal constitutional rights are violated—or indirectly—for example, when state law provides liability in a way that protects the same substantive scope of rights as does federal constitutional law.[288]

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285. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) (holding that standing to receive injunctive relief requires a "likelihood of substantial and immediate irreparable injury" (quoting O'Shea v. Littleton, 414 U.S. 488, 502 (1974))).

286. For critiques of the "bad apples" narrative, see, for example, PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 6 (2017) (explaining that Black men suffer harm from the police as the result of systemic forces, "not bad apple cops"); Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 32 (2000) ("Holding the municipality itself liable for injuries caused by its officials makes it more difficult to take refuge in the 'bad apple theory' and more likely that the municipality will take steps to remedy the broader problems.").

287. *See, e.g.*, Alexander Reinert et al., *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737 (2021) [hereinafter Reinert et al., *New Federalism*] (describing the possibilities for civil rights enforcement by state and local officials).

288. *Id.* at 757–58. State law also offers the opportunity to remove other barriers to liability—for example, some states, such as Colorado, have removed qualified immunity in some circumstances. COLO. REV. STAT. § 13-21-131 (2021); *accord* Reinert et al., *New Federalism*, *supra* note 287, at 770. While state law thus presents a promising avenue, relatively few states have made significant changes to their civil rights regimes. *See id.* at 759–60.

Currently, however, state law offers only limited recourse. Just 8 states have created a statutory mechanism analogous to § 1983 for litigation of constitutional violations, while another sixteen have recognized an implied right of action for at least some constitutional violations.[289] Yet these state law § 1983 analogs are not full equivalents to their federal counterpart. Some are limited to certain categories of government officials,[290] while others do not extend civil rights liability to municipalities.[291]

In some jurisdictions, state tort law also offers the possibility of recourse for a municipality's failure to screen. In other work, I have discussed the state tort liability for some municipal wrongdoing.[292] While some states statutorily immunize municipalities against tort actions, the negligent hiring theory is at least theoretically available against municipalities for plaintiffs in several states.[293] In many states, the tort comes with significant limitations: for example, in some states, municipalities and their employees have immunity for "discretionary" functions but can be held liable for negligent hiring (or another tort) for functions that are not discretionary.[294] Similarly, attorneys' fees are often unavailable in state court to the same extent as in federal court because of the lack of an analog to § 1988 or another

289. Reinert et al., *New Federalism*, *supra* note 287, at 759–60. These states are Arkansas, California, Colorado, Connecticut, Maine, Massachusetts, New Jersey, and New Mexico. *Id.* at 760 n.93.

290. For example, Colorado's § 1983 analog is limited to "peace officers," while § 1983 applies to all government officials. *See* COLO. REV. STAT. § 13-21-131(1) (2021). *See also* Reinert et al., *New Federalism*, *supra* note 287, at 809.

291. *See, e.g.*, Ditirro v. Sando, 520 P.3d 1203, 1209 (Colo. App. 2022) (interpreting Colorado's § 1983 analog to apply only to "peace officers," not municipalities).

292. *See* Nancy Leong, *Constitutional Accountability for State Tort Law*, WIS. L. REV. (forthcoming 2023).

293. *Id.*

294. *See, e.g.*, Lane v. City & Borough of Juneau, 421 P.3d 83, 88, 93 (Alaska 2018) (interpreting ALASKA STAT. ANN. § 09.65.070 to mean that municipalities receive immunity for "planning" decisions (i.e., policymaking) and do not receive immunity for "operational" decisions (i.e., day-to-day implementation of policy)); Doe 1 v. Westport Bd. of Educ., X06UWYCV185025451, 2020 WL 3487679, at *19 (Conn. Super. Ct. May 27, 2020) (interpreting CONN. GEN. STAT. § 52-557n(a)(2)(B) to immunize municipalities against liability for hiring practices that involve discretion, but not for those that simply involve fulfilling a statutory mandate ("ministerial acts")).

attorneys' fees provision.[295] Although state tort law claims are a potentially worthwhile addition to the complaint of an injured plaintiff, they fall considerably short of a substitute for municipal liability under § 1983.

As this overview has revealed, other mechanisms do not compensate for the lack of § 1983 hiring liability for municipalities under federal law. The exact level of substitute liability varies depending on the remedies available in individual states and municipalities. But in most jurisdictions, we can conclude that concern about liability in litigation provides municipalities with only limited incentives to screen prospective employees prior to hiring them.

B. STRATEGIES FOR CIVIL RIGHTS ADVOCATES

Liability against a municipality for bad hiring is currently a remote possibility, and the Supreme Court seems unlikely to reconsider the major features of its § 1983 jurisprudence in the near future.[296] Yet we also know from scholarly research and media reports that problematic municipal hiring practices are a serious and ongoing problem.[297] Civil rights advocates should therefore reevaluate the strategies they use to address harm caused by poor hiring.

Because this Article has focused primarily on liability in § 1983 litigation, Subsection 1 will describe an avenue for plaintiffs that offers promise for better results in such litigation: the failure-to-supervise theory. Then, Subsection 2 will briefly describe four measures outside of litigation that civil rights advocates can use to address deficient hiring.

1. Failure to Supervise

Even if the overall litigation environment remains relatively stable, plaintiffs will find more success by relying on doctrinal

295. Reinert et al., *New Federalism*, *supra* note 287, at 761–62 (describing limitations on attorneys' fees availability in many states' civil rights enforcement regimes).

296. While some scholars have called for overruling *Monell* and instituting vicarious liability in its place, *see* Fisk & Chemerinsky, *supra* note 144, at 758, there is no indication that the Supreme Court is inclined to revisit *Monell* doctrine. If anything, the Court has signaled hostility to § 1983 litigation in recent years. *Cf.* Vega v. Tekoh, 142 S. Ct. 2095, 2106 (2022) (holding that *Miranda* violations are not enforceable under § 1983).

297. *See supra* text accompanying notes 67–89.

avenues other than § 1983 failure-to-screen claims to hold municipal employers accountable for their hiring practices. One possibility, as I have advocated in prior work, is municipal liability for failure to *supervise* employees.[298] Like the failure-to-screen theory, the failure-to-supervise theory is also a municipal failure theory, but several key factors distinguish it as a more promising alternative.

First, plaintiffs' lawyers may wish to rely more heavily on the failure-to-supervise theory because every federal appellate court already has precedent establishing failure-to-supervise liability as an avenue for recovery.[299] In recent work I have argued that, based on empirical evidence, the failure-to-supervise theory is both promising and underused.[300] On the basis of both logic and policy, advocates and jurists should consider the failure-to-supervise claim as a plausible mechanism for accomplishing some of what we might wish the failure-to-screen claim to accomplish—that is, adequate protection of the public from employees whose backgrounds raise concerns.

Second, the Supreme Court has never decided a failure-to-supervise case, and therefore it has not imposed *Bryan County*'s challenging culpability and causation standards on the failure-to-supervise theory.[301] In *Bryan County*, the Supreme Court emphasized that the various failure theories are not automatically parallel, stating that "[t]he proffered analogy between failure-to-train cases and inadequate screening cases is not persuasive."[302] Rather, the failure-to-screen claim requires courts to "carefully test the link between the policymaker's inadequate decision and the particular injury alleged" in order to determine whether the specific violation that happened was such a "known or obvious consequence" that the municipality was deliberately indifferent in disregarding it.[303] As this Article has shown, these features

298. Leong, *supra* note 38, at 345. This recommendation is compatible with the argument of other scholars that there is a constitutional *duty* to supervise. Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1844–45 (2015) (describing a "constitutional duty to supervise" with reference to both judicial and administrative proceedings).

299. *See, e.g.*, Leong, *supra* note 38, at 371.

300. *Id.* at 354.

301. *Id.* at 371.

302. *Bryan County*, 520 U.S. 397, 409 (1997).

303. *Id.* at 410.

are one reason that the failure-to-screen claim is so difficult to win.

Yet the Court's insistence that the failure-to-train and failure-to-screen theories are distinct allows an inference that failure-to-supervise is *also* distinct, and potentially easier to satisfy. For example, the responsibility to supervise adequately is continuous throughout an employee's term of employment—unlike both screening and training, which are discrete and limited in duration.[304] The continuous nature of the responsibility may counsel for more expansive grounds for liability.

A third reason supporting failure-to-supervise liability is that the theory has intuitive appeal. A lack of supervision frequently lies behind constitutional violations: municipal employees are unlikely to conduct illegal searches, prey upon high school students, or abuse inmates if they are properly supervised.[305] And in many cases better supervision will prevent a constitutional violation where better training or screening will not. Consider *J.K.J. v. Polk County*, in which a guard who sexually assaulted two inmates testified that he understood that his conduct was illegal.[306] In situations where the conduct at issue is particularly egregious and the employee understands that what they are doing is wrong, it is unlikely that more training would have prevented the violation. If the employee's record is ambiguous or unavailable at the time of hiring, it is also unlikely that more stringent screening practices would have prevented the harm.[307] But better supervision might have prevented the constitutional violation in *J.K.J.* and similar cases by dissuading the potential wrongdoer from his course of action.[308] Liability for failure-to-supervise is therefore a promising avenue for plaintiffs.

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304. Leong, *supra* note 38, at 363.

305. *See id.* at 392–93.

306. J.K.J. v. Polk County, 960 F.3d 367, 418 (7th Cir. 2020) (en banc).

307. *See, e.g.*, Waller v. City & County of Denver, 932 F.3d 1277, 1288 (10th Cir. 2019) (finding the municipality not liable under the failure-to-train theory in a case where a deputy launched an unprovoked assault on a pretrial detainee at a hearing because "[e]ven an untrained law enforcement officer should have been well aware that any use of force in this situation . . . was inappropriate"); Hernandez v. Borough of Palisades Park Police Dep't, 58 F. App'x 909, 916 (3d Cir. 2003) (finding no obvious need to train police officers not to rob the houses they were patrolling); Walker v. City of New York, 974 F.2d 293, 301 (2d Cir. 1992) (finding no obvious need to train policy officers not to lie on the stand).

308. Leong, *supra* note 38, at 392–93.

The relationship between screening and supervision bolsters the argument for failure-to-supervise liability. If a municipality chooses to hire a candidate despite some concerning elements in their employment history, then it is reasonable to expect that the municipality will supervise the employee in a way that mitigates any risk to the public indicated by their background. The failure-to-supervise theory therefore allows plaintiffs and their attorneys to take account of concerns about bad hiring while litigating under a theory of bad supervision.

The failure-to-supervise doctrine is also attractive because it is compatible not only with the letter of ban-the-box laws, but also with the broader rationale of providing a second chance for prospective employees who have a criminal record or other negative employment history. Advocates have documented the challenges that such job applicants face and have compellingly argued that such history should not be used as a reason for an absolute veto of such candidates for all employment.[309]

Consider how the failure-to-supervise framework might play out for Robert Weismiller, the quadruple-offending teacher whose record began this Article, and the District of Columbia, who hired him to teach. One might argue that the District should have been able to exercise its discretion to hire even someone with his record. After all, many years had elapsed between the violations (at least those described in Blue's complaint). Perhaps Weismiller had reformed his conduct and deserved a chance at employment.

Even so, Ayanna Blue could argue that the school should be held to a high standard with respect to its *supervisory* practices given what it knew, or readily could have learned, about Weismiller's history. Perhaps Weismiller should have been assigned to a position with no student contact, or perhaps the school should have made an explicit rule that he could not spend time alone with students and created mechanisms to ensure that the rule would be followed. Either of these measures would have

309. *See supra* notes 60–62 and accompanying text. Of course, I am not advocating that everyone should be eligible for every job. For example, in positions where misconduct poses a great risk to public safety (e.g., police officers, prison guards) it may be reasonable to consider a history of violent offenses as disqualifying.

allowed Weismiller an opportunity for employment while preventing his abuse of Blue.[310]

To be sure, the failure-to-supervise theory is not a magic bullet. But given that the theory is underused and feasible to win, it may offer an opportunity for civil rights litigators whose clients will struggle to prevail on the failure-to-screen theory.

2. Systemic Reforms

Rather than limiting themselves to litigation in specific cases, advocates can also benefit from considering measures that would produce more systemic reform. Here, I briefly mention four.[311] First, the poor lawyering of many failure-to-screen claims invites the question of whether better lawyering would improve outcomes for litigants.[312] While it is impossible to determine how many cases would have resulted in a favorable outcome if litigated proficiently, at the margins lawyering skill may make a difference. Advocates can consider measures during and after law school to improve the quality of lawyering in § 1983 litigation.[313] In the area of disability discrimination, where academics have similarly noted the poor quality of lawyering,[314] stakeholders have created a post-graduate education program that they are working to implement.[315] Something similar might be beneficial in the § 1983 context as well.

Second, advocates can promote better compensation for lawyers who litigate § 1983 cases. This measure would attract attorneys with expertise in civil rights litigation and increase the number of plaintiffs who can secure competent representation. As I described in Part III.B, the Supreme Court has imposed

310. I do not mean to imply that Weismiller, or someone like him, would be a good candidate for another chance. My goal is simply to illustrate the expectations we would have of the school if another chance was given.

311. I elaborate on these non-litigation measures in a work in progress. Nancy Leong, Civil Rights Beyond Litigation (2023) (unpublished manuscript) (on file with author).

312. *See supra* notes 245–72 and accompanying text.

313. *See supra* notes 272–73 and accompanying text.

314. *See* Porter, *supra* note 274.

315. *See* Kevin Barry et al., *Pleading Disability After the ADAAA*, 31 HOFSTRA LAB. & EMP. L.J. 1, 3 (2013) (advocating for a "high quality continuing education"); THE ADA PROJECT, http://www.adalawproject.org [http://perma.cc/TLH2-U3TY].

significant limitations on the availability of fees through § 1988.[316] Scholars have proposed a range of alternative compensation arrangements that might make § 1983 claims, including failure-to-screen claims, a more financially feasible endeavor for lawyers with expertise in civil rights.[317] Further, state analogs to § 1988—but without the limitations imposed by the Supreme Court—can make civil rights litigation financially feasible for a greater number of skilled and experienced attorneys.[318]

Third, advocates may see favorable results from legislation establishing "police registries": databases that compile information related to police conduct, potentially including information about termination of officers, complaints against officers, civil judgments against officers, and other information relating to employment history.[319] The registries would make information relevant to failure-to-screen litigation more accessible to injured plaintiffs and their attorneys.[320] Moreover, by making such information more accessible to police departments or by requiring examination of the information in the registry, police registries may reduce the number of instances of police officers who are wrongfully hired and go on to cause constitutional violations. While until now registries containing information about public employees have focused on police officers, there is no reason that they could not be expanded to include prison guards, teachers, and other officials.

Finally, either federal or state legislation could target the obligation of a *prior* employer to disclose relevant information in the hiring process, rather than that of a prospective employer to screen properly. This measure would overcome the incentives for prior employees to withhold information about misconduct that I discussed in Part I.A.2.[321] Scholars have argued that in some

316. *See supra* notes 265–70 and accompanying text (discussing attorneys' fees under § 1988).

317. *See, e.g.*, Reingold, *supra* note 268, at 21–29.

318. *See* Reinert et al., *New Federalism*, *supra* note 287, at 757, 759–62 (noting the absence of attorneys' fees as a limitation on the effectiveness of state statutory and tort remedies as mechanisms for civil rights enforcement).

319. *See, e.g.*, 44 PA. CONS. STAT. §§ 7308–7311 (2021) (Pennsylvania legislation requiring the creation of an electronic registry of hiring reports and separation records for law enforcement officers).

320. *Cf.* Schwartz, *supra* note 225 (describing evidentiary challenges in municipal liability litigation).

321. *See supra* text accompanying notes 49–52.

situations a prior employer should have a legal duty to disclose certain information about an employee who was fired or resigned under termination.[322] Requiring prior employers to disclose such information would give a hiring municipality access to the information it needs to screen out a problematic employee—and, if the hiring municipality chooses to ignore the information, it would bolster the future case of an injured party bringing a failure-to-screen claim under § 1983.

CONCLUSION

Deficient municipal screening practices lead to the hiring of employees with records of wrongdoing, endangering the public and sometimes resulting in constitutional violations. Yet the empirical research I have presented here shows that municipalities enjoy de facto immunity from § 1983 liability for their hiring practices and have few other incentives to hire carefully. The time is ripe, therefore, for policymakers and advocates to consider how to encourage and enforce proper screening measures to hold government accountable for keeping its constituents safe.

322. *See, e.g.*, Krogman, *supra* note 80, at 1641–48 (arguing for state statutory law mandating disclosure of certain types of sexual misconduct by teachers); *cf.* Menold, *supra* note 27, at 496–505 (proposing legislation designed to curtail the problem of "passing the trash").