

# *Iqbal* and Constitutional Torts

## *Iqbal* and Supervisory Immunity

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In determining the reach of constitutional tort liability, the Supreme Court has traditionally balanced the goals of deterring constitutional misconduct and compensating those whose rights have been violated against the governmental interest in ensuring that public officials are not unduly inhibited in the performance of their duties.<sup>1</sup> I have previously argued that those competing interests are best accommodated by holding supervisory government officials liable for the constitutional misdeeds of their subordinates so long as the supervisors themselves were personally culpable—that is, at least negligent—and so long as their negligence caused the deprivation of constitutional rights.<sup>2</sup> Although this question has generated some controversy in academic circles,<sup>3</sup> lower court decisions prior to *Ashcroft v. Iqbal*<sup>4</sup> generally acknowledged the concept of supervisory accountability, though differing on the appropriate standard of liability.<sup>5</sup>

In *Ashcroft v. Iqbal*, the Supreme Court disagreed, of course, apparently rejecting the notion of supervisory liability for both *Bivens* and § 1983 suits.<sup>6</sup> Specifically, the Court held that constitutional tort liability hinges on proof that each defendant, “through the official’s own individual actions, has violated the Constitution.”<sup>7</sup> The sole rationale the Court offered for this decision was its desire to avoid vicarious liability—to ensure that all government officials, their “title notwithstanding,” are responsible only for their “own misconduct” and not for “the misdeeds of their agents.”<sup>8</sup> The Court’s cursory treatment of

1. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 807, 814 (1982) (noting that while “an action for damages may offer the only realistic avenue for vindication of constitutional guarantees . . . , there is the danger that fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties’”) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)); *Owen v. City of Independence*, 445 U.S. 622, 650-56 (1980).

2. See Kit Kinports, *The Buck Does Not Stop Here: Supervisory Liability in Section 1983 Cases*, 1997 U. ILL. L. REV. 147.

3. See Sheldon H. Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 IOWA L. REV. 1, 12 (1982) (taking the position that § 1983 requires that a supervisor “must personally violate the constitution as well as cause [the plaintiff’s] constitutional deprivation through [a subordinate’s] intervening unconstitutional conduct”).

4. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

5. See Kinports, *supra* note 2, at 153-56. For further discussion of this case law, see *infra* notes 15-20 and accompanying text.

6. *Iqbal*, 129 S. Ct. at 1948-49. The suit was filed against federal officials pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), but consistent with its traditional view that *Bivens* claims are the “federal analog to suits brought against state officials” under § 1983, the Court indicated that its discussion of supervisory liability applied to both *Bivens* and § 1983. *Iqbal*, 129 S. Ct. at 1948, 1949 (quoting *Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006)).

7. *Iqbal*, 129 S. Ct. at 1948.

8. *Id.* at 1949.

this issue, without the benefit of briefing or oral argument,<sup>9</sup> seems to make an unwarranted leap from the importance of personal culpability to the conclusion that government officials may not be held liable for constitutional injuries inflicted by their subordinates.

The same competing policy concerns animate the Supreme Court jurisprudence governing the qualified immunity defense.<sup>10</sup> It is therefore tempting to criticize *Iqbal*'s analysis of supervisory liability on the grounds that qualified immunity sufficiently addresses the relevant governmental interests and protects high-ranking public officials. But that objection is itself subject to challenge given the complications that arise in applying the qualified immunity defense to supervisors.<sup>11</sup> In such cases, the relationship between the substance of the particular constitutional right violated by the subordinate official and the supervisory liability standard creates confusion as to precisely what must be "clearly established" in order to immunize a supervisory defendant. This article explores the difficulties surrounding the qualified immunity inquiry as it applies to supervisors, evaluating whether they help justify limits on the scope of supervisory liability.

Initially, however, Part I of the article critiques *Iqbal*'s discussion of supervisory liability, responding to the Court and those who have defended its ruling and arguing that there is no justification for abandoning the doctrine of supervisory liability. Part II then turns to the qualified immunity defense and the federal courts' analysis of immunity issues in litigation involving supervisory officials. In the end, the article is critical of the bifurcated approach to qualified immunity adopted by some courts, which immunizes a supervisor unless both the subordinate's constitutional violation and the supervisor's liability for that violation are clearly established. The interests underlying the immunity defense are adequately accommodated, the article concludes, if qualified immunity is

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9. See *id.* at 1955-57 (Souter, J., dissenting) (noting in addition that "the parties agreed as to a proper standard of supervisory liability," given the concession by Ashcroft and Mueller that "they would be subject to supervisory liability if they 'had actual knowledge of the assertedly discriminatory nature of the classification of suspects . . . and they were deliberately indifferent to that discrimination'" (quoting Brief for Petitioners at 50); Gary S. Gildin, *The Supreme Court's Legislative Agenda to Free Government from Accountability for Constitutional Deprivations*, 114 PENN ST. L. REV. 1333 (2010) (pointing out that *Iqbal* is the most recent in a series of Supreme Court decisions which have adopted limits on constitutional tort remedies that were never argued by the parties).

10. See *Harlow v. Fitzgerald*, 457 U.S. 800, 807, 813-14, 818 (1982) (defining qualified immunity to protect public officials unless they violated "clearly established" rights); see also *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009); *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

11. See Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability After Iqbal*, 14 LEWIS & CLARK L. REV. 279, 304 (2010) (commending *Iqbal* for "simplif[y]ing what would otherwise be a complicated qualified immunity inquiry").

denied to a supervisor who is deliberately indifferent to a subordinate's violation of clearly established constitutional law. Finally, Part III assesses the impact of the *Iqbal* decision on efforts to hold supervisors accountable for constitutional wrongdoing, explaining that the Court may not have intended a wholesale reworking of the doctrine of supervisory liability.

## I. *IQBAL* AND SUPERVISORY LIABILITY

### A. *The Law Before Iqbal*

Prior to last year's ruling in *Iqbal*, the only time the Supreme Court had spoken directly on the subject of supervisory liability for constitutional torts was its 1976 opinion in *Rizzo v. Goode*.<sup>12</sup> One of the Court's rationales for reversing the injunction issued against the mayor of Philadelphia and other high-ranking city officials in that case was the absence of "an affirmative link" between the individual acts of police misconduct alleged by the plaintiffs and "the adoption of any plan or policy by [the supervisors]—express or otherwise—showing their authorization or approval of such misconduct."<sup>13</sup> Two years later, in holding that § 1983 was not intended to impose respondeat superior liability on cities, the Court in *Monell v. Department of Social Services* observed that *Rizzo* "appear[ed]" to reject the argument that § 1983 liability can be premised on "the mere right to control without any control or direction having been exercised and without any failure to supervise."<sup>14</sup>

Following the Supreme Court's pronouncements in these two decisions, the federal courts unanimously took the position that supervisory government officials could not be held liable for their subordinates' constitutional misdeeds on a respondeat superior basis.<sup>15</sup> Rather, the courts interpreted *Rizzo*'s requirement of an "affirmative link" between the supervisory official and the constitutional violation

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12. *Rizzo v. Goode*, 423 U.S. 362, 366 (1976) (discussing complaint alleging a "pervasive pattern of illegal and unconstitutional mistreatment by police officers" in Philadelphia).

13. *Id.* at 371.

14. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 n.58 (1978).

15. *See, e.g.*, *Preschooler II v. Clark County Sch. Bd. of Trs.*, 479 F.3d 1175, 1182 (9th Cir. 2007); *Serna v. Colo. Dep't of Corr.*, 455 F.3d 1146, 1151 (10th Cir. 2006); *Estate of Davis v. City of North Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005); *Ottman v. City of Independence*, 341 F.3d 751, 761 (8th Cir. 2003); *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003).

committed by her subordinate as the touchstone for supervisory liability.<sup>16</sup>

Nevertheless, the courts of appeals disagreed as to the appropriate standard of liability to be applied in constitutional tort cases filed against supervisory officials. In many cases, the courts indicated that a supervisor could be held responsible for the constitutional wrongdoing of her subordinates if she acted recklessly or with deliberate indifference to the plaintiff's constitutional rights.<sup>17</sup> At times, the courts seemingly spoke in more demanding terms, requiring evidence that the supervisor knew of and acquiesced in the constitutional violation.<sup>18</sup> Finally, at least one court appeared willing to impose liability based only on a finding of gross negligence on the part of the supervisor.<sup>19</sup>

Although language appears in some of these opinions that ostensibly foreshadows *Iqbal*'s holding that the supervisor must herself violate the Constitution, these courts did not view that requirement as inconsistent with the doctrine of supervisory liability. Rather, they took the position that a supervisor *did* act in violation of the Constitution by satisfying the standard of supervisory liability.<sup>20</sup> Despite differences in

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16. See, e.g., *Serna v. Colo. Dep't of Corr.*, 455 F.3d 1146, 1151 (10th Cir. 2006); *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994).

17. See, e.g., *Preschooler II v. Clark County Sch. Bd. of Trs.*, 479 F.3d 1175, 1182 (9th Cir. 2007); *Serna v. Colo. Dep't of Corr.*, 455 F.3d 1146, 1151 (10th Cir. 2006); *Estate of Davis v. City of North Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005); *Ottman v. City of Independence*, 341 F.3d 751, 761 (8th Cir. 2003); *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003); *Doe v. City of Roseville*, 296 F.3d 431, 439 (6th Cir. 2002); *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 216 (3d Cir. 2001); *O'Neill v. Baker*, 210 F.3d 41, 47 (1st Cir. 2000).

18. See, e.g., *Morfin v. City of East Chicago*, 349 F.3d 989, 1001 (7th Cir. 2003) (requiring that supervisory defendants "'must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see'") (quoting *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988)); *Doe v. City of Roseville*, 296 F.3d 431, 440 (6th Cir. 2002).

19. See, e.g., *Poe v. Leonard*, 282 F.3d 123, 140 (2d Cir. 2002). But cf. *id.* (noting that "[w]e have often equated gross negligence with recklessness").

20. See, e.g., *Serna*, 455 F.3d at 1151 (requiring that "the plaintiff must establish 'a deliberate, intentional act by the supervisor to violate constitutional rights,'" but going on to explain that "[i]n order to establish a § 1983 claim against a supervisor for the unconstitutional acts of his subordinates, a plaintiff . . . must show an 'affirmative link' between the supervisor and the violation, namely the active participation or acquiescence of the supervisor in the constitutional violation by the subordinates") (quoting *Jenkins v. Wood*, 81 F.3d 988, 994-95 (10th Cir. 1996) (quoting *Woodward v. City of Worland*, 977 F.2d 1392, 1399 (10th Cir. 1992))); *Estate of Davis v. City of North Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005) (holding that "[p]laintiffs must show that the conduct of the supervisors denied Davis his constitutional rights," but then recognizing that "[w]hen, as here, a plaintiff alleges a failure to train or supervise, 'the plaintiff must show that: (1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference'") (quoting *Smith v. Brenoettsy*, 158 F.3d 908, 911-12 (5th Cir. 1998)); *Gonzalez v. Reno*, 325 F.3d

the precise standard of liability, then, the courts of appeals unanimously were of the view that high-ranking public officials could be held accountable for the constitutional misdeeds of their subordinates.

*B. The Supreme Court's Reasoning in Iqbal*

In calling into question this prevailing wisdom (without as much as even citing to *Rizzo*), the Supreme Court tied its reservations about

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1228, 1234 (11th Cir. 2003) (noting that the “first step . . . is to determine whether the factual allegations in the complaint, if true, establish a constitutional violation” by the supervisory defendants, but finding that requirement satisfied if the plaintiff’s rights were violated and “the defendants’ supervisory actions caused the alleged deprivations”); *Doe v. City of Roseville*, 296 F.3d 431, 439 (6th Cir. 2002) (observing that the relevant “inquiry . . . is whether [the plaintiff] has alleged the deprivation of a constitutional right by [the supervisory] defendants,” but then reasoning that “[b]ecause the plaintiff sought to hold school administrators individually liable for constitutional injury caused directly by someone else, . . . ‘supervisory liability’ standards apply to resolve the claims”) (quoting *Doe v. Claiborne County*, 103 F.3d 495, 513 (6th Cir. 1996)); *Poe v. Leonard*, 282 F.3d 123, 145, 140 (2d Cir. 2002) (requiring that a supervisor have “notice that his actions or omissions rose to the level of a constitutional violation,” but holding that “a supervisor may be found liable for his deliberate indifference to the rights of others by his failure to act on information indicating unconstitutional acts were occurring or for his gross negligence in failing to supervise his subordinates who commit such wrongful acts”); *Bator v. Hawaii*, 39 F.3d 1021, 1029 (9th Cir. 1994) (pointing out that “[a] supervisor who has been apprised of unlawful harassment . . . should know that her failure to investigate and stop the harassment is itself unlawful” under the Equal Protection Clause).

Moreover, a number of lower courts prior to *Iqbal* did not speak at all in terms of a supervisor violating the plaintiff’s rights herself; they thought it sufficient that the supervisory official caused the constitutional violation committed by her subordinate. *See, e.g., Thompson v. Upshur County*, 245 F.3d 447, 459 (5th Cir. 2001) (“A sheriff not personally involved in the acts that deprived the plaintiff of his constitutional rights is liable under section 1983 if: 1) the sheriff failed to train or supervise the officers involved; 2) there is a causal connection between the alleged failure to supervise or train and the alleged violation of the plaintiff’s rights; and 3) the failure to train or supervise constituted deliberate indifference to the plaintiff’s constitutional rights.”); *Blyden v. Mancusi*, 186 F.3d 252, 264 (2d Cir. 1999) (“Given the lack of respondeat superior liability under Section 1983, a supervisor’s liability is not for the use of excessive force . . . but for distinct acts or omissions that are a proximate cause of the use of that force.”); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 456 (5th Cir. 1994) (en banc) (“Although supervisory officials cannot be held liable solely on the basis of their employer-employee relationship with a tortfeasor, they may be liable when their own action or inaction, including a failure to supervise that amounts to gross negligence or deliberate indifference, is a proximate cause of the constitutional violation.”); *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994) (“We have set forth three elements necessary to establish supervisory liability under § 1983: (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed ‘a pervasive and unreasonable risk’ of constitutional injury to citizens like the plaintiff; (2) that the supervisor’s response to that knowledge was so inadequate as to show ‘deliberate indifference to or tacit authorization of the alleged offensive practices,’ and (3) that there was an ‘affirmative causal link’ between the supervisor’s inaction and the particular constitutional injury suffered by the plaintiff.”).

supervisory liability to the long-established principle that *Bivens* and § 1983 were not meant to impose respondeat superior liability. “Because vicarious liability is inapplicable,” the *Iqbal* Court held, “a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.”<sup>21</sup> In constitutional tort litigation, “where masters do not answer for the torts of their servants,” the Court continued, “the term ‘supervisory liability’ is a misnomer.”<sup>22</sup>

As Justice Souter pointed out in dissent, however, the majority’s conclusion “rests on the assumption that only two outcomes are possible here: respondeat superior liability . . . or no supervisory liability at all.”<sup>23</sup> But that “dichotomy is false,” the four dissenters succinctly noted.<sup>24</sup> A supervisor who is held accountable because she was deliberately indifferent to her subordinate’s constitutional wrongdoing (or because she was aware of and acquiesced in it) is not being punished on a theory of vicarious respondeat superior liability.<sup>25</sup> Rather, she is being held responsible for *her own* misdeeds—i.e., her failure to properly supervise her subordinates.

### C. Section 1983’s Language and Legislative History

A more thorough defense of the majority’s position in *Iqbal* has been offered by Sheldon Nahmod. Professor Nahmod takes a brief stab at defending *Iqbal* based on the language and legislative history of § 1983.<sup>26</sup> But even he acknowledges that the terse statute—consisting of only some eighty words<sup>27</sup>—is “not conclusive”<sup>28</sup> and that at best *Iqbal*’s discussion of supervisory liability is “not inconsistent” with the statutory language.<sup>29</sup>

Section 1983 expressly imposes liability on “[e]very person” acting under color of state law who either “subjects” the plaintiff to a deprivation of rights, *or* who “causes [the plaintiff] to be subjected” to

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21. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009).

22. *Id.* at 1949.

23. *Id.* at 1958 (Souter, J., dissenting).

24. *Id.*

25. *Cf. Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978) (defining respondeat superior liability as holding a city responsible “solely because it employs a tortfeasor”).

26. Although these statutory interpretation tools are directly relevant only to § 1983 claims and not to *Bivens* suits, the Court has traditionally interpreted § 1983 and *Bivens* to provide parallel causes of action against state and federal officials. *See supra* note 6.

27. 42 U.S.C. § 1983 (2006). The word count excludes the final clause pertaining to injunctive suits filed against judicial officers, which was added in 1996 to overturn the Court’s ruling in *Pulliam v. Allen*, 466 U.S. 522 (1984).

28. Nahmod, *supra* note 11, at 299.

29. Nahmod, *supra* note 3, at 18.

such a deprivation.<sup>30</sup> The statutory language thus envisions that a supervisor who can be said to have “caused” a constitutional violation may be held liable. By providing that constitutional tort liability extends to a government official who “causes” a deprivation of constitutional rights, the statute as written requires only that plaintiffs demonstrate culpability on the part of each defendant, as well as a causal link between that defendant and the constitutional violation.<sup>31</sup> Thus, as Nahmod points out, “section 1983’s causation language, on its face, admittedly does not require that [the defendant] must personally violate [the plaintiff’s] constitutional rights.”<sup>32</sup>

Nahmod likewise concedes that the sparse legislative history surrounding a bill that was passed quite hurriedly<sup>33</sup> “does not explicitly address the issue.”<sup>34</sup> Although he maintains that § 1983’s history is “at least suggestive” of the approach adopted in *Iqbal*,<sup>35</sup> the evidence he cites in support demonstrates only that the statute was enacted in order to enforce the Constitution and provide a remedy for constitutional violations—goals that are also (and arguably more fully) accomplished by a meaningful doctrine of supervisory liability.<sup>36</sup> Moreover, the immediate impetus for § 1983, originally § 1 of the Ku Klux Klan Act of 1871, was the rampant violence committed by groups like the Klan, even though the statute was “not directed at the perpetrators of these deeds as much as at the state officials who tolerated and condoned them.”<sup>37</sup> Imposing liability on government actors who “tolerate” and “condone” their subordinates’ constitutional misconduct certainly does not seem inconsistent with this history.<sup>38</sup> As with many of the issues that arise in

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30. 42 U.S.C. § 1983 (2006).

31. Cf. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 692 (1978) (interpreting this language as “plainly impos[ing] liability on a [municipal] government that, under color of some official policy, ‘causes’ an employee to violate another’s constitutional rights”).

32. Nahmod, *supra* note 3, at 18.

33. See *Monell*, 436 U.S. at 665 (observing that the bill was passed within three weeks of its introduction and was “the subject of only limited debate”).

34. Nahmod, *supra* note 11, at 298.

35. *Id.*

36. See *infra* notes 40-41 and accompanying text.

37. *Owens v. Okure*, 488 U.S. 235, 250 n.11 (1989); see also *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 611 n.25 (1979) (“The Act of 1871, known as the Ku Klux Klan Act, was directed at the organized terrorism in the Reconstruction South led by the Klan, and the unwillingness or inability of state officials to control the widespread violence.”); *Mitchum v. Foster*, 407 U.S. 225, 240 (1972) (documenting Congress’ concern that “state courts were being used to harass and injure individuals,” and citing Rep. Perry’s famous statement: “[s]heriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices”) (quoting Cong. Globe, 42d Cong., 1st Sess., App. 78 (1871)).

38. I am indebted to Gary Gildin for this insight.



§ 1983 litigation, then, Congress apparently left to the courts the task of developing the law governing supervisory liability as a matter of policy.<sup>39</sup>

#### D. Policy Considerations

As I have previously argued, the twin goals of constitutional tort remedies, compensating victims of constitutional wrongs and deterring future violations,<sup>40</sup> are best achieved by affording plaintiffs a remedy against supervisory officials.<sup>41</sup> Those individuals tend to have the power and resources required to implement the reforms necessary to curb additional wrongdoing, and exposing them to liability furnishes the incentive to do so.

Professor Nahmod likewise agrees that supervisory liability “clearly further[s] [the] compensatory and loss-spreading functions” of constitutional tort liability.<sup>42</sup> Nevertheless, his central policy thesis is that the *Iqbal* decision “provides a better fit between § 1983’s policy considerations and damages liability for Fourteenth Amendment violations,” “neither over- nor under-protect[ing]” constitutional rights.<sup>43</sup> When supervisory liability is limited to situations where the supervisors themselves violated the plaintiff’s constitutional rights, Nahmod explains, “the supervisory defendant’s fault is derived from the Constitution alone and not from § 1983 or federal common law.”<sup>44</sup>

Although, as Professor Nahmod rightly points out, the Supreme Court has said that § 1983 does not itself “provide for any substantive rights,” but merely supplies a remedy for rights guaranteed by the Constitution,<sup>45</sup> the supervisory liability doctrine in effect prior to *Iqbal* did not create any substantive rights. Rather, consistent with the Supreme Court’s reading of § 1983, it merely gave those who were deprived of their constitutional rights a remedy, not only against the

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39. Cf. Seth F. Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. PA. L. REV. 601, 603 (1985) (describing § 1983 as “[l]aconically drafted” and “a blank canvas upon which the federal courts must sketch the details of a cause of action”); Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983’s Asymmetry*, 140 U. PA. L. REV. 755, 760 (1992) (calling § 1983 “almost entirely a judicial construct”).

40. See, e.g., *Owen v. City of Independence*, 445 U.S. 622, 651 (1980); *Carey v. Piphus*, 435 U.S. 247, 255-56 (1978).

41. See Kinports, *supra* note 2, at 185-88 (concluding that constitutional tort jurisprudence is “somewhat aberrational” compared to other areas of law “in that it has created barriers making it difficult to sue *both* public employers and supervisory officials”).

42. Nahmod, *supra* note 3, at 22.

43. Nahmod, *supra* note 11, at 303, 304.

44. *Id.* at 295-96.

45. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979).

subordinate official who violated those rights directly but also against any supervisor who could be deemed responsible for the constitutional wrongdoing. The doctrine of supervisory liability did not “alter [§ 1983’s] procedural character”<sup>46</sup> any more so than the Court’s municipal liability decisions, which impose § 1983 liability when constitutional injury results from either a city’s “official policy or custom”<sup>47</sup> or from a failure to train municipal employees that “amounts to deliberate indifference” to the plaintiff’s rights.<sup>48</sup>

The final justification Nahmod offers in support of the *Iqbal* decision relates to the relationship between qualified immunity and supervisory liability. That issue is the subject of the next section.

## II. SUPERVISORY LIABILITY AND QUALIFIED IMMUNITY

A major theme running through the decision in *Iqbal* is the Court’s desire to protect high-ranking government officials so they are “neither deterred nor detracted from the vigorous performance of their duties.”<sup>49</sup> “Litigation, though necessary to ensure that officials comply with the law,” the Court explained, “exact[s] heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.”<sup>50</sup> These very same concerns have historically informed the Court’s qualified immunity jurisprudence.

As articulated in *Harlow v. Fitzgerald*, the qualified immunity defense protects executive-branch officials from liability so long as “their conduct does not violate clearly established statutory or

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46. *Id.*

47. *See* Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 694 (1978) (holding that “it is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983”). Professor Nahmod views *Monell*’s official policy requirement as “equivalent, for constitutional accountability purposes,” to “the personal involvement requirement for individual liability.” Nahmod, *supra* note 11, at 308. But that begs the question as to precisely how the “personal involvement” requirement is properly satisfied for supervisory officials.

48. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (refusing to limit municipal liability to cases involving unconstitutional city policies). *See* Karen Blum, *Qualified Immunity: The Constitutional Analysis and Its Application*, 20 *TOURO L. REV.* 643, 670 (2004) (observing, prior to *Iqbal*, that “supervisory liability cases . . . are decided . . . in very much the same way as *City of Canton* liability against an entity is handled”); Nahmod, *supra* note 11, at 305-08 (acknowledging the discrepancy between *City of Canton* and *Iqbal*). *But cf.* Kinports, *supra* note 2, at 162-69 (arguing that courts need not blindly apply the rules governing municipal liability to cases brought against supervisors, and instead can justifiably impose a stricter standard of culpability on supervisors, given the protections afforded to individual defendants by the qualified immunity defense).

49. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009).

50. *Id.* at 1953.

constitutional rights of which a reasonable person would have known.”<sup>51</sup> The constitutional right asserted by the plaintiff, the Court subsequently explained in *Anderson v. Creighton*, must have been “clearly established” in a “particularized” and “fact-specific” sense: “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”<sup>52</sup>

The qualified immunity defense was initially created,<sup>53</sup> and over the years has been reformulated<sup>54</sup> and refined,<sup>55</sup> for the express purpose of “shield[ing] [government officials] from undue interference with their duties and from potentially disabling threats of liability.”<sup>56</sup> Moreover, the Court has interpreted the immunity defense with an eye towards “permit[ting] the defeat of insubstantial claims without resort to trial,”

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51. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

52. *Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987). Although the language quoted in this paragraph (and similar language appearing in other qualified immunity decisions) speaks in terms of an individual defendant’s actions violating the Constitution, these cases did not raise the question of supervisory liability that came before the Court in *Iqbal*—and certainly the *Iqbal* majority did not claim that its earlier decisions settled the issue.

53. *See Pierson v. Ray*, 386 U.S. 547, 554 (1967) (interpreting § 1983 to allow police officers to raise the common-law defense that they “acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid,” reasoning that “[a] policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does”). *But cf.* James E. Pfander, *Iqbal, Bivens, and the Role of Judge-Made Law in Constitutional Litigation*, 114 PENN ST. L. REV. 1387 (2010) (pointing out that the creation of immunities was a congressional function in the nineteenth century, not a judicial one).

54. *See Harlow v. Fitzgerald*, 457 U.S. at 816-17 (explaining the decision to abandon the subjective element of the prior two-pronged definition of qualified immunity by noting that “substantial costs attend the litigation of the subjective good faith of government officials,” “questions of subjective intent so rarely can be decided by summary judgment,” and “[j]udicial inquiry into subjective motivation . . . may entail broad-ranging discovery” that “can be peculiarly disruptive of effective government”).

55. *See, e.g., Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009) (justifying the decision to backtrack from the requirement set out in *Saucier v. Katz*, 533 U.S. 194, 201 (2001), that courts ruling on qualified immunity motions must first address the “threshold” issue whether the plaintiff has alleged a constitutional violation, in part on the grounds that “*Saucier*’s two-step protocol ‘disserve[s] the purpose of qualified immunity’” by “forc[ing] the parties to endure additional burdens of suit . . . when the suit otherwise could be disposed of more readily”) (quoting Brief for National Ass’n of Criminal Defense Lawyers as Amicus Curiae at 30); *Anderson v. Creighton*, 483 U.S. at 640-41 (adopting a “particularized,” “fact-specific” approach to qualified immunity because a standard applied at a high “level of generality” would enable plaintiffs “to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights”).

56. *Harlow v. Fitzgerald*, 457 U.S. at 806.

thus safeguarding public officials not only from damages awards but also from “the costs of trial” and “the burdens of broad-reaching discovery.”<sup>57</sup>

Given the substantial protections already afforded public officials—including supervisors—by the qualified immunity defense,<sup>58</sup> *Iqbal* is open to criticism on the grounds that going further and limiting the reach of supervisory liability is unnecessary and strays too far from an equitable balance of competing interests. Nevertheless, Professor Nahmod defends the *Iqbal* Court’s treatment of supervisory liability on the grounds that it “simplifies what would otherwise be a complicated qualified immunity inquiry.”<sup>59</sup> Under the supervisory liability rules endorsed by the lower courts prior to *Iqbal*, he continues, “the qualified immunity inquiry must take account not only of the constitutional norm applicable to the subordinate but also the deliberate indifference of the supervisor.”<sup>60</sup> By contrast, under the *Iqbal* Court’s approach, the question is “whether the supervisor violated clearly established constitutional law at the time of his or her conduct,” thus focusing exclusively—and “appropriately” in his view—on “the constitutional norm applicable to the defendant’s conduct.”<sup>61</sup> As detailed below, however, the lower courts’ experience applying the doctrine of qualified immunity in cases involving supervisors does not substantiate Nahmod’s concerns.

Prior to *Iqbal*, some federal appellate courts that expressly addressed the relationship between supervisory liability and qualified immunity applied “a bifurcated ‘clearly established’ inquiry—one branch probing the underlying violation, and the other probing the supervisor’s

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57. *Id.* at 817; see also *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (noting that “[t]he basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including ‘avoidance of disruptive discovery’”) (quoting *Siebert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)).

58. See, e.g., Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 692 (2009) (finding, in random sample of qualified immunity opinions decided by federal courts between 1988 and 2006, that immunity was denied in only about 20% to 30% of the cases); Greg Sobolski & Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of Pearson v. Callahan*, 62 STAN. L. REV. 523, 546 (2010) (reporting that qualified immunity was denied in about one-third of a random sample of nine hundred § 1983 decisions issued by the federal appellate courts between 1976 and 2006). But cf. Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 845 (2010) (finding that only two percent of the *Bivens*-claim dismissals in five federal districts between 2001 and 2003 were due to qualified immunity).

59. Nahmod, *supra* note 11, at 304; see also Nahmod, *supra* note 3, at 22 (criticizing supervisory liability on the grounds that it “inevitably tends to confuse the section 1983 prima facie case with the qualified immunity test”).

60. Nahmod, *supra* note 11, at 304.

61. *Id.* at 304-05 (emphasis omitted).

potential liability.”<sup>62</sup> Under this approach, a supervisory official was denied qualified immunity only if both “(1) the subordinate’s actions violated a clearly established constitutional right, and (2) it was clearly established that a supervisor would be liable for constitutional violations perpetrated by his subordinates in that context.”<sup>63</sup> Picking up on *Anderson v. Creighton*’s instructions, these courts required that both prongs of the bifurcated immunity standard be applied in a “particularized” and “fact-specific” manner.<sup>64</sup> As a result, a supervisory official did not lose qualified immunity simply because the standards governing supervisory liability were clearly established as an abstract matter—that is, the court’s precedents imposed liability on supervisors who were deliberately indifferent to the constitutional misdeeds of their subordinates. Rather, a supervisor could take advantage of the qualified immunity defense unless it was clearly established that her failure to supervise the offending subordinate satisfied the deliberate indifference standard on the facts of the particular case.<sup>65</sup>

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62. *Camilo-Robles v. Hoyos*, 151 F.3d 1, 6 (1st Cir. 1998). For the Third Circuit’s contrary view, see *infra* note 72 and accompanying text.

63. *Camilo-Robles v. Hoyos*, 151 F.3d at 6; see also *Poe v. Leonard*, 282 F.3d 123, 134 (2d Cir. 2002) (requiring that “both laws were clearly established to lay the predicate for demonstrating that [a supervisor] lacked qualified immunity: the law violated by [her subordinate] and the supervisory liability doctrine under which [the plaintiff] wishes to hold [the supervisor] liable”); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 455 (5th Cir. 1994) (en banc) (“Under the shield of qualified immunity, [the supervisory officials] cannot be held liable under § 1983 unless (1) Jane Doe’s liberty interest under the substantive due process component of the Fourteenth Amendment, and (2) [the supervisors’] duty with respect to Jane Doe’s constitutional right were ‘clearly established’ at the time these events took place.”); *Shaw v. Stroud*, 13 F.3d 791, 801 (4th Cir. 1994) (holding that Sergeant Stroud was entitled to qualified immunity unless “(1) it was ‘clearly established’ at the time of [Officer] Morris’ conduct that Stroud could be held liable under § 1983 for constitutional violations committed by Morris; (2) it was ‘clearly established’ at the time Stroud was supervising Morris that the degree of force that Stroud knew that Morris was using against arrestees was unconstitutional; (3) a reasonable person in Stroud’s position would have known that his actions were unlawful”).

64. *Anderson v. Creighton*, 483 U.S. 635, 640–41 (1987).

65. See, e.g., *Poe v. Leonard*, 282 F.3d at 140–41 (observing that “we must determine whether it has been clearly established that Leonard’s failure to supervise Pearl more closely would violate Poe’s rights in the particularized context of the facts at hand”); *Camilo-Robles v. Hoyos*, 151 F.3d at 7 (noting that “the qualified immunity analysis here turns on whether, in the particular circumstances confronted by each appellant, that appellant should reasonably have understood that his conduct jeopardized [the plaintiff’s] rights”); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d at 456 (finding that “[t]he plaintiff in this case has adduced clear summary judgment evidence of deliberate indifference by defendant Lankford toward her constitutional rights”); *Shaw v. Stroud*, 13 F.3d at 802 (“In light of the clearly established standard governing supervisory liability, a reasonable person in Stroud’s position would unquestionably believe that his conduct violated clearly established law regarding the contours of supervisory liability.”).

The balance the Supreme Court's qualified immunity decisions have struck between compensating plaintiffs who have suffered constitutional injury, on the one hand, and protecting public officials from the costs of litigation, on the other, emphasizes the importance of giving government officials notice when they are exposing themselves to liability and thus protecting them from being held accountable for "reasonable mistakes."<sup>66</sup> As the Court indicated in defining the "fact-specific" and "particularized" approach it endorsed in *Anderson v. Creighton*, "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent."<sup>67</sup> Likewise, the Court noted in *Harlow v. Fitzgerald* that the qualified immunity defense "focuses on the objective legal reasonableness of an official's acts" but "provide[s] no license to lawless conduct."<sup>68</sup>

The Court's notice concerns would be implicated if supervisors were held liable on a respondeat superior basis for their subordinates' constitutional wrongs, or if they were denied qualified immunity simply because their subordinates violated clearly established constitutional norms. Therefore, it makes sense to perform a separate qualified immunity analysis for each individual defendant, assessing whether they all had "fair warning that their conduct violated the Constitution."<sup>69</sup> As the Second Circuit noted in *Poe v. Leonard*, "[j]ust as [a supervisory official's] liability depends in part upon his actions and choices, his eligibility for immunity must depend upon those same choices."<sup>70</sup> But the bifurcated approach to qualified immunity stacks the decks too heavily in the defendant's favor, protecting supervisory officials who clearly were on notice that their failure to supervise had constitutional

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66. *Saucier v. Katz*, 533 U.S. 194, 205 (2001); *see also Anderson v. Creighton*, 483 U.S. at 641 (observing that "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and . . . in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable").

67. *Anderson v. Creighton*, 483 U.S. at 640; *see also Saucier v. Katz*, 533 U.S. at 202 ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.").

68. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982); *see also Crawford-El v. Britton*, 523 U.S. 574, 591 (1998) (noting that "[w]hile there is obvious unfairness in imposing liability—indeed, even in compelling the defendant to bear the burdens of discovery and trial—for engaging in conduct that was objectively reasonable when it occurred, no such unfairness can be attributed to holding one accountable for actions that she knew, or should have known, violated the constitutional rights of the plaintiff").

69. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

70. *Poe v. Leonard*, 282 F.3d 123, 135 (2d Cir. 2002).

implications. A supervisor whose subordinate has violated clearly established law and who herself satisfies the pre-*Iqbal* standard of supervisory liability—because she was deliberately indifferent to that violation, or knew of and acquiesced in it—cannot be said to have simply made a “reasonable mistake.” Under those circumstances, a reasonable supervisory official would have realized that her conduct would “cause[] [the plaintiff] to be subjected to a constitutional violation” within the meaning of § 1983<sup>71</sup> and immunity can fairly be denied without undermining any of the policies underlying the defense. Thus, the Third Circuit had the better view in *Carter v. City of Philadelphia* in deciding that qualified immunity is unavailable to supervisors in cases where the plaintiff can establish the deliberate indifference required to satisfy the standard of supervisory liability.<sup>72</sup>

Making a second-level “clearly established” inquiry by asking whether the supervisory liability standard is clearly met gives high-ranking public officials yet another bite at an apple that in many cases is already pretty well masticated.<sup>73</sup> It is the plaintiff’s constitutional rights that must be clearly established, not the supervisor’s deliberate indifference or the law governing the standard of supervisory liability.<sup>74</sup>

Moreover, the notion that a supervisor can be deliberately indifferent to a subordinate’s violation of clearly established law and at the same time can act in “objective legal reasonableness” or make a “reasonable mistake” is incongruous on its face.<sup>75</sup> Rather, it is much

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71. 42 U.S.C. § 1983 (2006).

72. *Carter v. City of Philadelphia*, 181 F.3d 339, 356 (3d Cir. 1999) (holding that “[i]f [the plaintiff] succeeds in establishing that the [supervisory] defendants acted with deliberate indifference to constitutional rights—as [he] must in order to recover under section 1983—then *a fortiori* their conduct was not objectively reasonable” as required for qualified immunity).

73. See *Saucier v. Katz*, 533 U.S. 194, 214 (2001) (Ginsburg, J., concurring in the judgment) (arguing that “an officer whose conduct is objectively unreasonable under [the Fourth Amendment standard for excessive force claims] should find no shelter under a sequential qualified immunity test,” and criticizing the majority’s view to the contrary as “[d]ouble counting ‘objective reasonableness’”); Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers’ Misconduct*, 87 YALE L.J. 447, 460 (1978) (maintaining that “[s]urely [an] officer could not *reasonably* believe that there was probable cause for an unlawful arrest, for an unlawful arrest is by definition an arrest for which a prudent police officer could not reasonably believe there was probable cause”).

74. See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 640–41 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Blum*, *supra* note 48, at 668. But cf. *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 468 (5th Cir. 1994) (en banc) (Garwood, J., dissenting) (seemingly taking the position that qualified immunity is appropriate if it is not clearly established that the defendant was acting “under color” of state law within the meaning of § 1983).

75. See *Camilo-Robles v. Hoyos*, 151 F.3d 1, 9 (1st Cir. 1998) (noting “the awkwardness of the conceptual fit” in assuming that “deliberate indifference cases are

more accurate to say that “the unlawfulness [was] apparent” to the supervisory official and thus to deny her immunity. Perhaps it is not surprising, then, that the lower courts’ qualified immunity analysis in cases involving supervisors has been hopelessly tied to the merits of the supervisory liability standard.<sup>76</sup> Opinions evaluating whether it was clearly established that supervisors were deliberately indifferent to the plaintiff’s constitutional rights have been analytically indistinguishable from those assessing whether they were in fact deliberately indifferent.<sup>77</sup>

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amenable to standard qualified immunity analysis”). Cf. Blum, *supra* note 48, at 657-58 (citing conflicting case law on this issue); John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 277 (2000) (observing that “qualified immunity becomes functionally irrelevant” with respect to constitutional rights that “require[] a motivation widely understood to be reprehensible”).

76. See Camilo-Robles v. Hoyos, 151 F.3d at 7 (pointing out that “deliberate indifference . . . is customarily a merits-related topic,” and therefore “discerning whether a particular [supervisor’s] behavior passes the context-specific test of objective legal reasonableness to some extent collapses the separate ‘qualified immunity’ and ‘merits’ inquiries into a single analytic unit”); see also Hartley v. Parnell, 193 F.3d 1263, 1270 (11th Cir. 1999) (admitting that “the matter is not without nuance” because “[a]fter all, where there is an appeal from the denial of . . . qualified immunity . . . , we can and do review the underlying merits issue that is swept along in the appeal,” but rejecting the concurring judge’s view that granting qualified immunity “where no wrong has been committed [by the supervisor] . . . is a non sequitur” and therefore summary judgment should be awarded in such cases “on the merits, not on qualified immunity grounds”); Mark R. Brown, *Qualified Immunity and Interlocutory Fact-finding in the Courts of Appeals*, 114 PENN ST. L. REV. 1317 (2010) (predicting that *Iqbal* will “encourage more interlocutory fact-finding on appeal”).

The First Circuit goes on in *Camilo-Robles* to suggest, however, that the overlap is “more apparent than real” given that different standards apply at the qualified immunity and merits stages, and therefore “rights-violating conduct that a factfinder could conclude supports a determination of liability nonetheless may fall within the wider band of objective legal reasonableness (and thus would support a judicial determination of qualified immunity).” *Camilo-Robles v. Hoyos*, 151 F.3d at 7 n.4. While this observation might be true in cases where the qualified immunity inquiry focuses on whether a particular substantive constitutional right was clearly established, it is less apt when qualified immunity turns on the objective reasonableness of deliberate indifference.

77. Many of the appellate court cases discussed elsewhere in this article could be cited here; opinions disposing of qualified immunity claims advanced by supervisory officials tend to read no differently from merits decisions on supervisory liability. Compare *Hernandez v. Keane*, 341 F.3d 137, 145 (2d Cir. 2003) (explaining that doctor who supervised prison medical staff was entitled to post-trial motion for judgment as a matter of law because there was “no evidence that [he] had notice of, instituted, or became aware of any unconstitutional policy, practice or act, or that he was grossly negligent in supervising his subordinates”), with *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 255 (2d Cir. 2001) (denying qualified immunity to school superintendent and principal, reasoning that the plaintiffs alleged that the supervisors “were aware that [a teacher] had assaulted students on four previous occasions” and nevertheless “failed to act on these reports so as to prevent future occurrences”). Compare also *Preschooler II v. Clark County Sch. Bd. of Trs.*, 479 F.3d 1175, 1183 (9th Cir. 2007) (denying motion to dismiss, noting on the merits that the complaint alleged the defendants “fail[ed] to train special education teachers, or to hire qualified individuals to work in special education classrooms,” and “abdicated their duty to report and discipline



This overlap further demonstrates that the bifurcated approach to qualified immunity is unwarranted.

Accordingly, a supervisory official's qualified immunity claim ought to be defeated if her subordinate violated the plaintiff's clearly established rights and the supervisor herself was deliberately indifferent to those rights. But even the bifurcated approach to qualified immunity, while overprotecting supervisory officials in situations where they clearly are on notice that they face constitutional tort liability, is an improvement over the complete abandonment of supervisory accountability. The bifurcated approach may be somewhat awkward, redundant, and "complicated,"<sup>78</sup> but the courts seem to have no trouble applying it—and it has not hindered them from routinely dismissing suits filed against supervisory officials on qualified immunity grounds.<sup>79</sup> By calling into question the doctrine of supervisory liability and requiring proof that each government defendant independently violated the plaintiff's rights, the *Iqbal* opinion threatens to gift high-ranking government officials with a defense that more closely resembles absolute immunity.<sup>80</sup> The next section attempts to gauge how serious that threat is

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LiSanti when they first became aware of the alleged abuses"), *with id.* (finding that complaint adequately alleged violation of clearly established rights by charging that the supervisors "demonstrated disregard of their responsibilities in hiring, training, supervising, disciplining and reporting abuses committed by LiSanti").

78. Nahmod, *supra* note 11, at 304.

79. See, e.g., *Estate of Davis v. City of North Richland Hills*, 406 F.3d 375, 378 (5th Cir. 2005) (concluding that supervisors of police officer involved in fatal use of force were entitled to immunity despite district court's finding of evidence "indicating that [Officer] Hill fired his weapon on three occasions during training exercises when the scenarios did not call for the firing of a weapon; a background investigation report indicating that Hill had a tendency to act too aggressively; and testimony of Randy Cole, a citizen who was pulled over by Hill for a traffic violation, indicating that Hill behaved 'like a psycho' and was 'going to kill somebody'"); *Poe v. Leonard*, 282 F.3d 123, 147, 143, 127 (2d Cir. 2002) (granting qualified immunity to police captain responsible for supervising trooper who secretly videotaped a woman participating in a police training video while she was undressing, though acknowledging that "the lingering shot of the victim's upper thighs in the static crime scene might concern some supervisors" and the trooper's personnel file showed a "troubled past" and a "problematic history," including an incident before the captain took command where the trooper received "an unsatisfactory performance evaluation report for photographing several young women in swimsuits in a private bedroom while filming a public safety announcement").

80. See Michael C. Dorf, *Iqbal and Bad Apples*, 14 LEWIS & CLARK L. REV. 217, 227 (2010) (arguing on the facts of *Iqbal* that "[i]t is hardly fantastical or even implausible to think that [the Attorney General and F.B.I. Director] would have ordered prison officials to 'take the gloves off' when interrogating Arab and Muslim men"); see also *Arar v. Ashcroft*, 585 F.3d 559, 619 (2d Cir. 2009) (en banc) (Parker, J., dissenting) (pointing out that "[r]arely, if ever, will a plaintiff be in the room when officials formulate an unconstitutional policy later implemented by their subordinates," even though "it is this kind of executive overreaching that the Bill of Rights sought to guard against, not simply the frolic and detour of a few 'bad apples'"); *Carter v. City of Philadelphia*, 181 F.3d 339,

and precisely what impact the *Iqbal* decision was intended to have on the nature of supervisory liability.

### III. *IQBAL'S IMPACT*

The Supreme Court's opinion in *Iqbal* characterized supervisory liability as a "misnomer," requiring evidence that "each Government-official defendant, through the official's own individual actions, has violated the Constitution."<sup>81</sup> The dissenters objected that the majority opinion was thereby "eliminating *Bivens* supervisory liability entirely"<sup>82</sup> (although elsewhere they seemed to hedge their bets a bit).<sup>83</sup> Nevertheless, while the post-*Iqbal* record in the courts of appeals is still inconclusive, there is reason to hope that the Court did not, in three quick paragraphs, work a sea change in the rules governing supervisory liability.

#### A. *Limiting the Damage*

On the facts before it, the Supreme Court concluded, *Iqbal* "must plead sufficient factual matter to show that [Attorney General Ashcroft and F.B.I. Director Mueller] adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin."<sup>84</sup> If this language was meant to apply across the board—to limit supervisory liability to cases where plaintiffs can demonstrate both that the supervisor acted purposely and also that the subordinate who directly violated their rights was simply carrying out directives "adopted and implemented" by the supervisory defendant—then *Iqbal* does indeed go a long way towards withdrawing any constitutional tort remedy against high-ranking government officials. But there are three reasons to hesitate before giving the Court's opinion such an expansive reading.

First, while the Court certainly refused to impose liability on a supervisor who did not act with the state of mind necessary to violate the substantive constitutional right in question, the requisite state of mind—as the Court expressly acknowledged in *Iqbal*—"will vary with the constitutional provision at issue."<sup>85</sup> Thus, *Iqbal*'s claim that he suffered

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358 (3d Cir. 1999) (observing that a plaintiff "cannot be expected to know, without discovery, exactly what training policies were in place or how they were adopted").

81. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 1948 (2009).

82. *Id.* at 1957 (Souter, J., dissenting) (discounting the possibility that the majority was simply "narrowing the scope of supervisory liability").

83. *See id.* at 1955, 1958 (speaking in more equivocal terms, using qualifiers like "apparently" and "presumably").

84. *Id.* at 1948-49 (majority opinion).

85. *Id.* at 1948.

“invidious discrimination in contravention of the First and Fifth Amendments” necessitated proof that each defendant “acted with discriminatory purpose,” a requirement that could not be satisfied, the Court said, by arguing that “a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amount[ed] to the supervisor’s violating the Constitution.”<sup>86</sup> But the reason the Court rejected that proposition was linked to the underlying constitutional claim, which required “purpose rather than knowledge” in order to impose liability on either “the subordinate for unconstitutional discrimination” or the “official charged with violations arising from his or her superintendent responsibilities.”<sup>87</sup>

Thus, while the Court clearly mandated that the supervisory defendant must share the state of mind required to prove a violation of the constitutional provision at issue, that mental state requirement fluctuates depending on the particular right in question. As a result, *Iqbal*’s reference to discriminatory intent does not support requiring proof of purpose, for example, in cases involving claims that police used excessive force in making an arrest, which are governed by the Fourth Amendment standard of “objective reasonableness,”<sup>88</sup> or in suits, like those based on the Eighth Amendment, where the constitutional provision requires proof of deliberate indifference.<sup>89</sup>

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86. *Id.*

87. *Id.* at 1949. *Cf.* Sandra T.E. v. Grindle, 599 F.3d 583, 589 (7th Cir. 2010) (denying principal’s request for qualified immunity on summary judgment on the ground that a jury “could reasonably infer” (even though “it would not be required” to do so) that the principal engaged in purposeful gender discrimination in violation of the Equal Protection Clause because the evidence “would allow a jury to conclude that [the principal] knew about [the teacher’s] abuse of the girls and deliberately helped cover it up by misleading the girls’ parents, the superintendent, and other administrators”).

88. *Graham v. Connor*, 490 U.S. 386, 388 (1989); *see also* *Scott v. Harris*, 550 U.S. 372, 383 (2007) (noting that Fourth Amendment claims require the Court to “slosh our way through the factbound morass of ‘reasonableness’”). *But cf.* *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989) (“Violation of the Fourth Amendment requires an intentional acquisition of physical control,” and therefore “a Fourth Amendment seizure [occurs] . . . only when there is a governmental termination of freedom of movement *through means intentionally applied*.”).

89. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Though Professor Nahmod is critical of the lower courts’ pre-*Iqbal* approach to supervisory liability and interprets *Iqbal* as adopting an alternative model, he agrees that the impact of the Court’s decision may be limited. *See* Nahmod, *supra* note 11, at 280-82. In fact, he maintains that *Iqbal* “may have expanded the scope of supervisory liability” in cases where a violation of the substantive constitutional right at issue requires proof of a state of mind less culpable than deliberate indifference. *Id.* at 297. For example, Nahmod concludes that *Iqbal* would impose liability in a Fourth Amendment case on a supervisor who “acted in an objectively unreasonable way in failing to supervise” the offending police officer—a standard of culpability more favorable to the plaintiff than the deliberate indifference standard widely used prior to *Iqbal* in assessing supervisory liability. *Id.* Likewise, he believes the Court’s ruling “may not make much real world difference” in

Admittedly, the fact that the Justices in the *Iqbal* majority viewed proof of the requisite state of mind as a necessary condition for liability does not mean they also believed it was sufficient. Moreover, the Court's opinion does not expressly assert that evidence of the relevant mental state, coupled with a failure to supervise, suffices to establish a supervisor's culpability for constitutional injuries inflicted by a subordinate. But the second reason to pause before assuming the Court meant to foreclose this argument is that, borrowing from criminal law terminology, the Court's clear focus in *Iqbal* was on the mens rea component of the plaintiff's case and not the actus reus half of the equation. While the Court's reference, in the language quoted above, to detention policies "adopted and implemented" by Attorney General Ashcroft and F.B.I. Director Mueller may have been intended to describe the actus reus burden *Iqbal* had to satisfy, it was tied to the specific allegations of his complaint.<sup>90</sup> Therefore, this language cannot justifiably be read as broadly limiting supervisory liability to cases with a comparable level of supervisory involvement.

Moreover, this language implicitly assumes that the Court's requirement of constitutional misconduct on the part of each defendant was not meant to be taken literally—to absolve a high-ranking public official from liability simply because she was not on the scene actually participating in the constitutional violation. Presumably, therefore, a supervisor who ordered or instructed a subordinate to act in an unconstitutional manner, or who, in the words of the *Iqbal* Court, "adopted and implemented the . . . policies" being carried out by the subordinate,<sup>91</sup> would not escape liability simply because she was in the office catching up on paperwork when her directives were carried out.<sup>92</sup>

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Eighth Amendment litigation because the same deliberate indifference on the part of the supervisor is required by the pre-*Iqbal* standards governing supervisory liability and, post *Iqbal*, by virtue of the Eighth Amendment itself. *Id.* (As he points out, however, *see id.* at 298 n.95, the "objective" definition of deliberate indifference used in the context of municipal failure-to-train cases, *see supra* note 48, is less strict than the "subjective" definition the Supreme Court has applied in Eighth Amendment cases. *See Kinports, supra* note 2, at 160-61.)

90. *See Iqbal*, 129 S. Ct. at 1942 (noting that "[a]s to these two petitioners, the complaint alleges that they adopted an unconstitutional policy that subjected respondent to harsh conditions of confinement on account of his race, religion, or national origin"); *see also id.* at 1944 ("The pleading names Ashcroft as the 'principal architect' of the policy, and identifies Mueller as 'instrumental in [its] adoption, promulgation, and implementation.'") (quoting First Amended Complaint at ¶¶ 10-11).

91. *Id.* at 1949.

92. For examples of such cases, *see, e.g., Keating v. City of Miami*, 598 F.3d 753, 765 (11th Cir. 2010) (denying qualified immunity where plaintiffs alleged that supervisory police officials "violated the Protesters' First Amendment rights in their supervisory capacities by directing the subordinate officers to use less-than-lethal weapons to disperse a large crowd of allegedly peaceful demonstrators and by failing to

Continuing the criminal law analogy, a supervisor who “adopted and implemented” the policies being enforced by the subordinate directly responsible for violating the plaintiff’s rights would have committed a sufficient act to make her accountable for her subordinate’s wrongdoing on an accomplice liability theory. But so would the supervisor who failed to act in the face of a legal duty, i.e., who inadequately supervised the offending subordinate and thereby neglected her job responsibilities.<sup>93</sup> Just as the actus reus requirement for accomplice liability would be satisfied in both situations—by the supervisor’s voluntary act in one and by her culpable omission in the other—so constitutional tort liability is appropriate in both cases.<sup>94</sup> Given that *Iqbal*’s brief reference to the plaintiff’s actus reus burden focused on the specific allegations before it, therefore, the Court’s opinion should not be read as denying a remedy against supervisors based on a finding that they failed to fulfill their “superintendent responsibilities.”<sup>95</sup>

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stop the subordinate officers from doing the same”); *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 50 (1st Cir. 2009) (concluding that police sergeant was not entitled to qualified immunity in Fourth Amendment case alleging that another officer, “acting pursuant to ‘orders imparted by [the sergeant],’ pressured the doctors to conduct a medical procedure to remove the illusory cell phone from plaintiff’s bowels”); *al-Kidd v. Ashcroft*, 580 F.3d 949, 976, 969 (9th Cir. 2009) (rejecting qualified immunity defense where plaintiff alleged that former Attorney General Ashcroft “purposely instructed his subordinates to bypass the plain reading of the [material witness] statute” and accordingly that “he was arrested without probable cause pursuant to a general policy, designed and implemented by Ashcroft”); *Lawrence v. Bowersox*, 297 F.3d 727, 732-33 (8th Cir. 2002) (explaining that the jury likely found search team leader liable because he ordered another prison guard to use pepper spray on the plaintiffs).

93. See WAYNE R. LAFAVE, CRIMINAL LAW § 13.2(a), at 673 (4th ed. 2003) (observing that “one may become an accomplice by not preventing a crime which he has a duty to prevent”). The more difficult hurdle in a criminal case would be to satisfy the mens rea requirement for accomplice liability—to establish that the supervisor’s failure to act was purposeful, “with intent to promote or facilitate the crime.” *Id.* at 673 n.47. In the constitutional tort context, *Iqbal* makes clear that the particular constitutional provision at issue supplies the necessary mental state. See *Iqbal*, 129 S. Ct. at 1948.

94. The analogy to criminal law is not perfect given that constitutional tort litigation is more interested in compensating for losses and less focused on punishing and assessing blame (although both share a deterrent purpose). See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267-68 (1981). While it may therefore be appropriate to impose a higher burden on prosecutors trying to establish criminal culpability, at minimum public officials should not be held to a lower standard than criminal defendants. Cf. 18 U.S.C. § 242 (2000) (criminal counterpart to § 1983 requires proof that the defendant acted “willfully”). But cf. *Hope v. Pelzer*, 536 U.S. 730, 739-40 (2002) (holding that government officials sued under § 1983 have “the same right to fair notice” as those prosecuted under § 242, and rejecting the position that criminal defendants are “entitled to a degree of notice ‘substantially higher than the ‘clearly established’ standard used to judge qualified immunity’”) (quoting *United States v. Lanier*, 520 U.S. 259, 263 (1997) (quoting *United States v. Lanier*, 73 F.3d 1380, 1393 (6th Cir. 1996))).

95. *Iqbal*, 129 S. Ct. at 1949.

Third, and finally, prior to *Iqbal*, some courts of appeals equated the standards governing supervisory liability with constitutional misconduct on the part of the supervisor herself.<sup>96</sup> If the Supreme Court intended to endorse this line of reasoning, requiring proof of constitutional wrongdoing by each defendant would not undermine the lower courts' pre-*Iqbal* approach to supervisory liability (assuming, of course, that *Iqbal*'s mental state requirements are satisfied as to every defendant).<sup>97</sup>

*B. The Post-Iqbal Record*

The record in the federal courts of appeals since *Iqbal* is somewhat sparse, and does not yet reliably indicate how expansively the courts will interpret the Supreme Court's ruling. In the most highly publicized of these decisions, the Ninth Circuit in *al-Kidd v. Ashcroft* cited its pre-*Iqbal* precedents and concluded that "[a]ny one of these bases [of supervisory liability] will suffice to establish the personal involvement of the defendant in the constitutional violation."<sup>98</sup> The court of appeals likewise rejected former Attorney General Ashcroft's contention that the plaintiff was required to demonstrate that Ashcroft "actually instruct[ed] his subordinates to bypass the plain text of the [material witness] statute," reasoning that the plaintiff's complaint sufficiently alleged facts to support both the theory that Ashcroft "knowing[ly] fail[ed] to act in the light of even unauthorized abuses" and that he "purposely used the material witness statute to preventatively detain suspects."<sup>99</sup> Writing

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96. See *supra* note 20. See also Nahmod, *supra* note 3, at 12 n.74 (assuming that a supervisor who has the state of mind necessary to prove a constitutional violation and whose "negligent conduct causes [a subordinate] to act unconstitutionally" will be exposed to liability on the grounds that the supervisor "both violated the constitution and, through [the subordinate], caused the constitutional deprivation").

97. For post-*Iqbal* cases illustrating this point, see *Sandra T.E. v. Grindle*, 599 F.3d 583, 591 (7th Cir. 2010) (noting, in a case alleging child sexual abuse in violation of due process, that when a supervisory defendant satisfies the circuit court's pre-*Iqbal* standard of supervisory liability, that "actor's deliberate indifference deprives someone of his or her protected liberty interest in bodily integrity [and] that actor violates the Constitution, regardless of whether the actor is a supervisor or subordinate"); *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1032 (N.D. Cal. 2009) ("A person deprives another of a constitutional right where that person 'does an affirmative act, participates in another's affirmative acts, or omits to perform an act which [that person] is legally required to do that causes the deprivation of which the complaint is made.'") (quoting *Hydrick v. Hunter*, 500 F.3d 978, 988 (9th Cir. 2007), *vacated*, 129 S. Ct. 2431 (2009) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978))).

98. *al-Kidd v. Ashcroft*, 580 F.3d 949, 965 (9th Cir. 2009) (discussing complaint alleging that plaintiff was detained in violation of the Fourth Amendment pursuant to former Attorney General Ashcroft's policy of misusing the federal material witness statute "to arrest and detain terrorism suspects about whom they did not have sufficient evidence to arrest on criminal charges but wished to hold preventively or to investigate further").

99. *Id.* at 975-76.

separately, however, one judge thought it “doubtful” that the circuit court’s prior supervisory liability standards “survived *Iqbal*.”<sup>100</sup> In support, he relied on *Iqbal*’s statement that “Ashcroft could not be held liable for his ‘knowledge and acquiescence’ in his subordinates’ alleged unconstitutional discrimination against Muslim men after 9/11,” but instead that “[p]urpose rather than knowledge” was required in order to impose liability in that case.<sup>101</sup> The *al-Kidd* majority found it unnecessary to determine “whether the [*Iqbal*] Court’s comments relate solely to discrimination claims which have an intent element,” given their conclusion that *al-Kidd* “plausibly pleads ‘purpose’ rather than just ‘knowledge’” on the part of the former Attorney General.<sup>102</sup>

Petitioning for rehearing en banc in *al-Kidd*, the Attorney General urged a broad reading of *Iqbal*, interpreting the Supreme Court’s opinion as articulating a general rule that “‘knowledge and acquiescence’ is insufficient to impose supervisory liability,” and criticizing the Ninth Circuit’s opinion on the grounds that it “mistakenly characterized *Iqbal* as requiring only that the supervisor ‘was *involved* in the constitutional deprivation.’”<sup>103</sup> Although the court of appeals declined to hear the case en banc, the author of the panel opinion wrote a separate concurrence which included the puzzling assertion that “[u]nder *Iqbal*, *al-Kidd* had to ‘plead sufficient factual matter to show that [Ashcroft] adopted and implemented the detention policies at issue’ not for some neutral, lawful reason but for an unlawful purpose”<sup>104</sup>—even though the panel had declined to decide whether *Iqbal*’s intent requirement extended to Fourth Amendment cases like *al-Kidd*.<sup>105</sup>

Mirroring the confusion evident from the *al-Kidd* opinions, several other courts of appeals have cautioned that *Iqbal* “may call into question” the lower courts’ standards governing supervisory liability, though ultimately finding it unnecessary to resolve that issue.<sup>106</sup> Others

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100. *Id.* at 992 n.13 (Bea, J., concurring in part and dissenting in part).

101. *Id.* (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)).

102. 580 F.3d at 976 n.25 (therefore declining to decide whether the Ninth Circuit’s pre-*Iqbal* standard of supervisory liability and the *Iqbal* Court’s reference to “knowledge and acquiescence” are “distinct” standards).

103. Petition for Rehearing en Banc at 19, *al-Kidd v. Ashcroft*, 598 F.3d 1129 (9th Cir. 2010) (en banc) (No. 06-36059) (quoting *al-Kidd v. Ashcroft*, 580 F.3d at 974 n.23).

104. *al-Kidd v. Ashcroft*, 598 F.3d 1129, 1136 (9th Cir. 2010) (Smith, J., concurring in denial of rehearing en banc) (quoting *Iqbal*, 129 S. Ct. at 1948-49).

105. See *al-Kidd v. Ashcroft*, 580 F.3d at 976 n.25.

106. *Maldonado v. Fontanes*, 568 F.3d 263, 275 n.7 (1st Cir. 2009) (citing *Iqbal*’s requirement that each defendant must violate the Constitution, but declining to reach the issue because the plaintiffs had not satisfied even the pre-*Iqbal* supervisory liability standard); see also *Bayer v. Monroe County Children & Youth Servs.*, 577 F.3d 186, 190 n.5 (3d Cir. 2009) (warning that *Iqbal* makes it “uncertain whether proof of . . . personal knowledge, with nothing more, would provide a sufficient basis” for supervisory liability).

have cited their pre-*Iqbal* supervisory liability rules as if they were still authoritative without expressly trying to reconcile them with the Court's decision<sup>107</sup>—although one of these cases involved allegations that the supervisory defendants were responsible for ordering their subordinates to act in an unconstitutional manner, which presumably would support liability even under an expansive reading of *Iqbal*.<sup>108</sup>

It remains to be seen, then, how the doctrine of supervisory liability will fare in the wake of *Iqbal*. But absent further clarification from the Supreme Court, the decision need not be interpreted as a wholesale rejection of the lower courts' approach to supervisory liability.

#### IV. CONCLUSION

The Supreme Court has shown surprisingly little interest in the questions surrounding government supervisors' liability under a constitutional tort regime that otherwise has attracted a good deal of attention from the Court. Only two Supreme Court opinions—*Rizzo v. Goode*<sup>109</sup> and now *Ashcroft v. Iqbal*<sup>110</sup>—have addressed this important and widely litigated issue, and then only briefly and in passing. Equally surprising, the Court in its most recent foray into this arena saw fit to call into question decades of uniform lower court practice in a cursory three-paragraph analysis that relied exclusively on the misguided assumption that the doctrine of supervisory liability is indistinguishable from respondeat superior. By referring to supervisory liability as a

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in a procedural due process case, but finding it unnecessary to address that question given the court's conclusion that qualified immunity would protect the defendant "whether his alleged liability under § 1983 were to derive from his own conduct or from his knowledge of [his subordinate's] conduct").

107. See *Sandra T.E. v. Grindle*, 599 F.3d 583, 590 (7th Cir. 2010) (concluding that plaintiffs who alleged that principal "actively conceal[ed] reports of [child sexual] abuse and creat[ed] an atmosphere that allowed abuse to flourish" were "seek[ing] to do no more than hold [the principal] liable 'for . . . her own misconduct,'" and thus "their substantive due process theory is not foreclosed by *Iqbal*") (quoting *Iqbal*, 129 S. Ct. at 1949); *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 48-51 (1st Cir. 2009) (relying on pre-*Iqbal* standards of supervisory liability, though ultimately dismissing the claims against the supervisors because the complaint contained "precisely the type of 'the-defendant-unlawfully-harmed-me' allegation that the Supreme Court has determined should not be given credence when standing alone") (quoting *Iqbal*, 129 S. Ct. at 1949).

108. See *Keating v. City of Miami*, 598 F.3d 753, 762 (11th Cir. 2010). Cf. *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1034 (N.D. Cal. 2009) (denying motion to dismiss filed by former Deputy Attorney General John Yoo, and distinguishing *Iqbal* on the grounds that the plaintiff "alleges with specificity that Yoo was involved" in constitutional wrongdoing—i.e., that he "personally recommended Mr. Padilla's unlawful military detention as a suspected enemy combatant and then wrote opinions to justify the use of unlawful interrogation methods against persons suspected of being enemy combatants").

109. *Rizzo v. Goode*, 423 U.S. 362 (1976).

110. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).



“misnomer”<sup>111</sup> and mandating that plaintiffs prove a constitutional violation on the part of each government defendant, the *Iqbal* Court arguably retreated from the lower courts’ unanimous view that supervisors can be held accountable if they were deliberately indifferent to, or knew of and acquiesced in, the constitutional wrongs inflicted by their subordinates.

Nevertheless, the opinion, stripped to its essential holding, does not inexorably lead to the conclusion that the Court meant to fundamentally change the landscape of constitutional tort jurisprudence without the benefit of briefing or oral argument. The Court’s attention was directed to the mental state required to impose liability on a high-ranking government official, and its references to discriminatory purpose and supervisory policy-making were linked to the specific allegations contained in *Iqbal*’s complaint. Moreover, following the lead of some federal appellate courts, the Court may have assumed that supervisory officials do violate constitutional norms when they act with the state of mind required to violate the constitutional provision in question and fail to adequately supervise the subordinate who inflicted constitutional injury. Such a failure to act in the face of a legal duty would suffice to establish criminal culpability on an accomplice liability theory, and public officials should at the very least be expected to live up to that standard. Hopefully, it will not take another thirty years for the Court to revisit this issue and clarify the scope of its holding. In the meantime, courts and litigants need not assume that *Iqbal* was intended to work a sea change in the rules governing supervisory accountability for constitutional torts.

If the Court does take another—and a serious—look at the question of supervisory liability, it should acknowledge, as have the lower courts, that the compensatory and deterrence goals underlying *Bivens* and § 1983 call for a meaningful remedy against those responsible for injury who are best able to institute the reforms needed to prevent further infringement of constitutional rights. Moreover, if the Court does reconsider this issue, the complications that arise in applying the qualified immunity defense afford no justification for abandoning the doctrine of supervisory liability. But instead of the redundant and overly protective bifurcated approach to qualified immunity adopted by some federal courts in cases involving supervisory public officials, the policy concerns underlying qualified immunity are best accommodated by making the defense unavailable to supervisory officials who are deliberately indifferent to (or know of and acquiesce in) their subordinates’ violation of clearly established constitutional law. Under

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111. *Id.* at 1949.

such circumstances, supervisors do not act in an “objectively reasonable” manner,<sup>112</sup> the “unlawfulness” of their conduct is “apparent,”<sup>113</sup> and a fair balance of the competing policy interests therefore mandates a denial of immunity.

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112. Crawford-El v. Britton, 523 U.S. 574, 591 (1998).

113. Anderson v. Creighton, 483 U.S. 635, 640 (1987).