

Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post-*Iqbal/Connick* World

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ABSTRACT

Prior to 2009, federal courts recognized that supervisors could be held accountable under 42 U.S.C. § 1983 for their wrongdoing. In that statute, Congress expressed its intent to safeguard constitutional and federal statutory rights by providing a cause of action against any person who “under color of state law deprives or causes a person to be deprived” of federal rights. Two recent Supreme Court decisions have eroded this safeguard. In Ashcroft v. Iqbal, the Court held that supervisors could not be liable for the constitutional wrongdoing of their subordinates, even if they know of and acquiesce in that wrongdoing. Two years later, in Connick v. Thompson, the Court held that a district attorney’s office could never be held liable based on a single Brady violation, even where the district attorney conceded that Brady training in his office was inadequate. This Article proposes an objective deliberate indifference standard in all supervisory “failure to” cases and recommends a narrow interpretation of Connick, under which supervisors and government entities would be held liable for the constitutional wrongdoing of their subordinates where violations are a “highly predictable consequence” of their failure to train or supervise, even without evidence of a pattern of violations.

I. INTRODUCTION

High-ranking government officials are charged with the important task of overseeing our jails, schools, and criminal justice system. Prior to 2009, most federal appellate courts held that supervisors could be held liable under § 1983¹ for constitutional violations committed by their subordinates either

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¹ Section 1983 reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Con-

when the supervisor personally participated in the constitutional violation or when there was a causal connection between the supervisor's actions and the alleged constitutional violation.² The causal connection required by the statutory text could be established by showing either that the supervisor "directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so."³

Congress intended § 1983 to safeguard our constitutional and federal statutory rights by specifically providing a cause of action against any person who "under color of state law deprives or causes a person to be deprived" of federal rights.⁴ Nonetheless, in two recent decisions, the Supreme Court significantly eroded this safeguard and erected novel, unwarranted barriers that threaten to leave victims of constitutional wrongdoing without a remedy.

Contrary to the statutory text and universal understanding of § 1983, the Supreme Court in *Ashcroft v. Iqbal*⁵ held that "the term 'supervisory liability' is a misnomer"—"[supervisors] may not be held accountable for the misdeeds of their agents."⁶ "Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."⁷ Justice Souter, in dissent, cautioned that the majority's words not only narrowed the scope of supervisory liability, but actually eliminated it entirely.⁸

Incredibly, Javaid Iqbal did not even sue under § 1983. Rather, he brought his claim against federal officials as a *Bivens* action, which permits suits against federal officials directly under the Constitution based on federal common law, not statutory law.⁹ Because *Bivens* provides a judicially implied right of action, the Court should not have equated supervisory liability in a *Bivens* federal common law action with supervisory liability under § 1983, which expressly creates a statutory right to relief against those who "cause" constitutional rights violations.¹⁰

gress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2006).

² See *infra* Part II.A.

³ See, e.g., *Dalrymple v. Reno*, 334 F.3d 991, 995 (11th Cir. 2003). There were variations on this standard, but all versions of this test permitted some supervisory liability under § 1983. See *infra* notes 61–63, 95 and accompanying text. As explained below, the majority in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), clearly ratcheted up the existing tests for supervisory liability.

⁴ *Monroe v. Pape*, 365 U.S. 167, 180 (1961), *overruled in part by* *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

⁵ 556 U.S. 662 (2009).

⁶ *Id.* at 677.

⁷ *Id.* at 676.

⁸ *Id.* at 698 (Souter, J., dissenting).

⁹ *Id.* at 668.

¹⁰ See *infra* notes 26–27 (explaining how implied causes of action are disfavored).

Iqbal's unfortunate ruling has led some federal courts to mandate personal participation by a supervisor in a subordinate's wrongdoing for § 1983 liability and to reject claims based on knowledge and acquiescence, or condonation.¹¹ Most federal courts have reasoned that, at a minimum, when the subordinate's constitutional violation requires "intent," plaintiffs must prove that the supervisor acted with discriminatory animus.¹² Both approaches ignore the statutory text of § 1983 and the Supreme Court's earlier interpretation of that text in its municipal liability decisions.¹³

Two years later, in 2011, the Supreme Court further eroded the concept of government accountability by ruling in *Connick v. Thompson*¹⁴ that the New Orleans District Attorney's Office could not be held liable under § 1983 for failing to train its prosecutors based on a single *Brady* violation, even where the District Attorney conceded that *Brady* training was inadequate.¹⁵ In his concurrence, Justice Scalia stated that bad faith, knowing violations of constitutional rights "could not possibly be attributed to lack of training."¹⁶ Justice Stevens challenged this statement in a later public address, opining that it ignores the fact that in the real world, bad faith, knowing violations of constitutional rights may sometimes be attributed to the failure of supervisors to do their jobs.¹⁷

This Article critiques these two decisions and offers suggestions on how to establish supervisory, as well as entity, liability for failing to train, supervise, or discipline subordinates in a post-*Iqbal/Connick* world. Drawing on the Supreme Court's well-established interpretation of § 1983's "causation" requirement in municipal liability cases, this Article proposes an objective deliberate indifference standard in all supervisory "failure to" cases. It argues that it is counterintuitive to base supervisory liability on which constitutional right the subordinate has violated, when the supervisor's same culpable "failure to" train, supervise, or correct wrongdoing causes the violation. Further, this Article urges a narrow interpretation of *Connick*, leaving intact the general rule that supervisors and government entities may be held liable for the constitutional wrongdoing of their subordinates where

¹¹ See *infra* notes 101, 115 and accompanying text.

¹² See *infra* note 104 and accompanying text.

¹³ See *infra* Part II.B.

¹⁴ 131 S. Ct. 1350 (2011).

¹⁵ *Id.* at 1356. In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Court held that due process requires the prosecution to turn over exculpatory evidence that is material to the accused's guilt or punishment.

¹⁶ *Connick*, 131 S. Ct. at 1369 (Scalia, J., concurring).

¹⁷ These remarks were delivered at the Equal Justice Initiative Dinner honoring retired Justice Stevens on May 2, 2011. He urged the Court to correct its misinterpretation of § 1983 and to adopt the common law doctrine of *respondeat superior*, which reflects "the intent of the Congress that enacted § 1983." See Eileen Malloy, *Civil Rights—Actionable Wrongs: DA's Office Shouldn't Be Let Off Hook for Prosecutor's Misconduct*, *Stevens Says*, 79 U.S.L.W. 2500, May 10, 2011.

the harm is a “highly predictable consequence” of their failure to train or supervise, even without evidence of a pattern of violations.¹⁸

When supervisors act with deliberate indifference to their subordinates’ constitutional wrongdoing, the statutory causality requirement of § 1983 has been satisfied.¹⁹ The Court has long recognized that supervisory liability is critical to preserving the core purpose of § 1983, namely to “protect the people from unconstitutional action under color of state law,” both by deterring wrongdoing and by providing a remedy for those injured by such conduct.²⁰ Although the *Iqbal* Court emphasized that government officials should be held liable only for their own constitutional wrongdoing, supervisors who fail to train, supervise, or discipline subordinates have breached their constitutional duty. In addition, when supervisors “cause the deprivation” of federal rights by improperly training, supervising, or disciplining their subordinates, their wrongdoing is an abuse of government power that violates substantive due process.²¹

Supervisors should be held accountable in order to create an incentive for those in power to prevent their subordinates’ constitutional wrongdoing. As Professor Bodensteiner has argued, “a judgment against a supervisor is more likely to lead to a change in the municipal culture, customs, practices or policies that facilitated the challenged conduct that led to the judgment.”²² Further, accountability better serves § 1983’s remedial goal. Supervisors are more likely to have resources to satisfy judgments than low-level officials who commit wrongdoing.²³

Part II provides an explanation of pre-*Iqbal/Connick* § 1983 doctrine, setting forth the objective deliberate indifference test the Court adopted as the standard for meeting the statutory causation language. Part III describes *Iqbal* and the confusing progeny its new “state-of-mind” requirement has generated in the lower federal courts. Part IV describes how the Court in *Connick* preserved § 1983’s statutory objective deliberate indifference test, but then imposed a new obstacle to establishing entity liability where policymaking supervisors are charged with failing to train subordinates. Part V proposes that supervisory liability should follow the same interpretation of causality and culpability that the Supreme Court acknowledged in § 1983 government liability cases, although recognizing and incorporating the immunity defense for individuals.²⁴

¹⁸ 131 S. Ct. at 1361; *see also infra* Part IV.C.

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

²⁰ *Owen v. City of Independence*, 445 U.S. 622, 651 (1980); *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

²¹ *See infra* notes 125–28 and accompanying text.

²² Ivan E. Bodensteiner, *Congress Needs to Repair the Court’s Damage to § 1983*, 16 *TEX. J. C.L. & C.R.* 29, 51 (2010).

²³ *Id.*

²⁴ The second prong of the proposed test—that the underlying constitutional right be clearly established—recognizes that supervisors, unlike government entities, enjoy absolute or qualified immunity from damages. *See infra* notes 201–16 and accompanying text.

II. SUPERVISORY LIABILITY PRE-*IQBAL*/CONNICK

This Article contends that the Supreme Court in *Iqbal* erred in equating *Bivens* and § 1983 constitutional tort claims, and in ignoring established precedent governing supervisory and entity liability under § 1983. This Part explores the history of *Bivens* and the development of § 1983 law on supervisory and government entity liability.

At the outset, it is important to note the difference between *Bivens* claims and § 1983 claims. The Supreme Court in 1971 invoked federal common law to recognize a cause of action against federal agents who violate constitutional rights.²⁵ Because no federal statute creates such a cause of action, and because federal common law has a contentious pedigree,²⁶ it is perhaps not surprising that the Court has recently reined in *Bivens* actions.²⁷ The supervisory liability question in *Bivens* may be characterized as whether one has an implied constitutional remedy against a supervisor for the deliberately indifferent supervision of a subordinate who intentionally discriminates. In *Iqbal*, the Court refused to extend *Bivens* to the unique context of a suit against the highest-ranking U.S. officials who were responding to 9/11.²⁸

In contrast to controversial *Bivens* claims, § 1983 expressly creates a federal statutory cause of action against persons, including supervisors, who “cause” constitutional rights violations. Causation can be established whenever a supervisor’s failure to train, supervise, or discipline demonstrates deliberate indifference to constitutional wrongdoing. Although deliberate indifference does not appear to inform the causation decision, the Supreme Court has long interpreted the statutory language in § 1983 to add this “gloss,” both in addressing supervisory liability and municipal liability.²⁹

²⁵ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392–95 (1971).

²⁶ See *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (“Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability ‘to any new context or new category of defendants.’” (citations omitted)); *Wilkie v. Robbins*, 551 U.S. 537, 568 (2007) (Thomas, J., concurring) (asserting that *Bivens* is outdated); *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (“*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreasing them to be ‘implied’ by the mere existence of a statutory or constitutional prohibition.”).

²⁷ See Erwin Chemerinsky, *Closing the Courthouse Doors: Transcript of the 2010 Honorable James R. Browning Distinguished Lecture in Law*, 71 MONT. L. REV. 285, 290 (2010) (describing the demise of *Bivens* in recent Supreme Court decisions); See generally Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2007 CATO SUP. CT. REV. 23 (2007) (lamenting that the *Bivens* remedy has been gradually undermined and endangered).

²⁸ *Iqbal*, 556 U.S. at 682–83.

²⁹ See *infra* Part II.B.

A. *Pre-Iqbal Supervisory Liability Under § 1983*

The Supreme Court first addressed § 1983 supervisory liability in its 1976 ruling in *Rizzo v. Goode*.³⁰ The Court reversed an injunction issued against the mayor of Philadelphia and other high-ranking city officials for allegedly permitting a “pervasive pattern of illegal and unconstitutional mistreatment by police officers.”³¹ The Court reasoned that the plaintiffs failed to establish “an affirmative link” between the individual acts of police misconduct and “the adoption of any plan or policy by [the defendants]—express or otherwise—showing their authorization or approval of such misconduct.”³² Two years later, the Court observed that *Rizzo* had rejected § 1983 liability based on “the mere right to control without any control or direction having been exercised and *without any failure to supervise*.”³³ Thus, the Court implicitly acknowledged that supervisors who fail to discharge their constitutional duties may be held liable, provided their failure can be affirmatively linked to the subordinates’ constitutional wrongdoing.³⁴

Based on these decisions, the federal courts have recognized three basic ways to establish supervisory liability under § 1983. First, if the supervisor is present at the scene and somehow participates in the wrongdoing, or stands by and does nothing when subordinates violate constitutional rights, the supervisor may be held liable.³⁵ These cases generally involve Fourth

³⁰ 423 U.S. 362 (1976).

³¹ *Id.* at 366.

³² *Id.* at 371.

³³ *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 n.58 (1978) (emphasis added).

³⁴ Even before *Monell*, appellate courts readily adopted this interpretation of supervisory liability. *See, e.g.*, *Duchesne v. Sugarman*, 566 F.2d 817, 832 (2d Cir. 1977) (“Where conduct of the supervisory authority is directly related to the denial of a constitutional right, it is not to be distinguished as a matter of causation, upon whether it was action or inaction.”); *Sims v. Adams*, 537 F.2d 829, 832 (5th Cir. 1976) (holding that *Rizzo* did not affect pre-existing principles imposing liability on supervisory defendants, with no notice of subordinates’ past culpable conduct, who failed to prevent recurrence in violation of a state statutory duty).

³⁵ *See, e.g.*, *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (finding that the district court erred in dismissing plaintiff’s supervisory claim against the county sheriff, who sought to recover damages for injuries sustained when he was attacked by a deputy, while other deputies stood by and watched); *Keating v. City of Miami*, 598 F.3d 753, 762–65 (11th Cir. 2010) (holding that supervisory liability may be imposed on a police chief who approved orders permitting police to advance while beating unarmed demonstrators and discharging projectiles and tear gas, on the deputy chief who made the decision to utilize “herding techniques” to corral the demonstrators, and on the captain who directed the police lines to begin discharging weapons at unarmed demonstrators; and that failing to stop the unlawful actions of their subordinates, even though they were less than one hundred feet away from the skirmish line with an unrestricted view of the constitutional wrongdoing, established the causal connection required to link supervisors to their subordinates’ constitutional rights violations); *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 49–51 (1st Cir. 2009) (holding that allegations against two defendants who were directly involved in the decision to transport an arrestee to the hospital for a rectal examination and a procedure to remove a foreign object were sufficient to impose liability where one defendant affirmatively “set[] in motion acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury,” and another was a primary violator because he insisted at the hospital that the doctors perform this medical procedure).

Amendment violations, and supervisory liability is apparent. This follows the broader doctrine that even non-supervisors, i.e., rank-and-file police officers, may be held liable for violating the Fourth Amendment when they stand by and do nothing while fellow officers use excessive force in effectuating an arrest.³⁶ These cases further demonstrate that in “direct participation” Fourth Amendment claims, the requisite state of mind for the supervisor is that for the underlying constitutional rights violation, namely objective unreasonableness.³⁷

Second, supervisors may be held liable for establishing or condoning unlawful policies or practices that cause the constitutional rights violation, even if they do not directly participate in the wrongdoing. The Supreme Court has held that municipal liability may be imposed under § 1983 when a policymaker “knowingly ignore[d] a practice that was consistent enough to constitute custom.”³⁸ This same logic applies when a plaintiff sues the supervisor who promulgates, implements, or possesses responsibility for the continued operation of a policy or custom that itself violates federal law.³⁹ For example, in *Roe v. Elyea*,⁴⁰ inmates alleged that a prison’s medical director “knowingly instituted a protocol for the diagnosis and treatment of hepatitis C that fell below constitutionally accepted standards of medical care for inmates.”⁴¹ In this type of case, it is the supervisor’s misconduct that causes the constitutional rights violation. Thus, the only issue is whether the director acted with deliberate indifference to the inmate’s rights in violation of the Eighth Amendment.⁴²

³⁶ See, e.g., *Krout v. Goemmer*, 583 F.3d 557, 565–66 (8th Cir. 2009) (holding that there was sufficient evidence for a reasonable jury to conclude that three officers had a constitutional obligation to intervene where they observed other officers using excessive force and they had an adequate opportunity to intervene and stop it); *Fogarty v. Gallegos*, 523 F.3d 1147, 1162 (10th Cir. 2008) (explaining that an officer who fails to intervene to prevent a fellow officer’s excessive use of force may be held liable under § 1983); *Velazquez v. City of Hialeah*, 484 F.3d 1340, 1342 (11th Cir. 2007) (stating that an officer who fails to intervene to stop the use of excessive force may be held liable for a violation of the Fourth Amendment even though he did not strike the plaintiff); cf. *Bletz v. Gribble*, 641 F.3d 743, 754 (6th Cir. 2011) (acknowledging that a police officer may be responsible for another officer’s use of excessive force even without active participation if the officer supervised the subordinate who used excessive force or “owed the victim a duty of protection against the use of excessive force,” but finding that the officer lacked sufficient time to intervene and prevent the use of excessive force, and thus should have been granted summary judgment).

³⁷ *Torres-Rivera v. O’Neill-Cancel*, 406 F.3d 43, 50–52 (1st Cir. 2005) (asserting that the “objectively reasonable” standard of the Fourth Amendment, rather than the “shock the conscience” standard applicable to substantive due process claims, governs a claim that an officer failed to intervene in the excessive use of force).

³⁸ *City of St. Louis v. Prapotnik*, 485 U.S. 112, 127 (1988).

³⁹ See *Dodds v. Richardson*, 614 F.3d 1185, 1196 n.5 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 2150 (2011).

⁴⁰ 631 F.3d 843 (7th Cir. 2011).

⁴¹ *Id.* at 847.

⁴² *Id.* at 857–58; see also *Vance v. Rumsfeld*, 653 F.3d 591, 599–605 (7th Cir. 2011) (holding that the plaintiff’s pleadings alleging that Secretary of Defense Rumsfeld not only failed to stop the torture of detainees by subordinates, but was also personally responsible for authorizing interrogation techniques that amount to torture, were sufficient to survive summary

The third way to establish supervisory liability, which is the focus of this Article, is a subcategory of the second. The Supreme Court has held that causation under § 1983 exists if a municipality or one of its policymakers adopts a policy or practice that, although not itself unlawful, is the “moving force of the constitutional violation.”⁴³ The supervisor has not “directly” participated in the subordinates’ constitutional rights violation.⁴⁴ However, the challenged policy is one of failure to act—failure to supervise, failure to train, or failure to discipline subordinates. If particularly egregious, such failures may constitute an abuse of government power and thus a violation of substantive due process.⁴⁵ Even if the failure to act does not rise to the level of constitutional culpability, the failure may still trigger liability, if it can be *causally linked* to the constitutional rights violation committed by subordinates.⁴⁶

Admittedly, in recent years the Supreme Court has expressed its disdain for “failure to” cases,⁴⁷ as reflected in *Iqbal*’s rejection of supervisory liability based on merely “knowledge and acquiescence” in a subordinate’s wrongdoing.⁴⁸ More broadly, the Court has interpreted the Constitution as

judgment); *Dodds*, 614 F.3d at 1199–1205 (reasoning that it suffices that the sheriff admitted there was a policy of not allowing felony arrestees to post lawfully set bail after hours, or until they had seen a judge, and that it was this policy that caused the plaintiff to be detained, even where a county sheriff may not have personally informed a suspect that he could not post the preset bail until he had seen a judge, and the sheriff may not have actually known of his subordinates’ enforcement of this policy with regard to the plaintiff); *Harper v. Lawrence Cnty.*, 592 F.3d 1227, 1236 (11th Cir. 2010) (recognizing that supervisory liability may be imposed where there is widespread abuse that puts the responsible supervisor on notice of the need to correct an alleged deprivation of rights and she fails to do so, or where the “supervisor’s custom or policy . . . results in deliberate indifference to constitutional rights,” or where the supervisor knows “that subordinates would act unlawfully and yet fails to stop them from doing so”; here, the plaintiff sufficiently alleged supervisory liability against the defendants, “who were responsible for the management and administration or oversight of the jail,” and who had “customs or policies of improperly screening inmates for alcohol withdrawal, improperly handling inmates addicted to alcohol or drugs, delaying medical treatment and restricting access to outside medical providers in order to save money”); *cf. Thomas v. Cook Cnty. Sheriff’s Dep’t*, 604 F.3d 293, 306–07 (7th Cir. 2010) (holding that a sheriff could not be held liable for a pretrial detainee’s death from pneumococcal meningitis based on his alleged policy of understaffing the county jail, as there was no causal link between this policy and the pretrial detainee’s death; although individual deputies employed as correctional officers were shown to have known of and ignored the detainee’s medical needs, there was no evidence that this inaction was due to understaffing; government policies must be the moving force behind the constitutional violation in order to impose liability).

⁴³ *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978).

⁴⁴ *But see Dodds*, 614 F.3d at 1195 (“A plaintiff could establish the defendant-supervisor’s personal involvement by demonstrating his ‘personal participation, his exercise of control or direction, or his failure to supervise.’” (citations omitted)).

⁴⁵ See *infra* notes 125–28 and accompanying text.

⁴⁶ See *infra* notes 53–55 and accompanying text.

⁴⁷ See, e.g., *Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 411 (1997) (holding that liability may be imposed for a failure to screen applicants only where the specific constitutional wrong was “the plainly obvious consequence of the decision to hire”).

⁴⁸ See *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009).

barring only government action, not inaction.⁴⁹ However, in these “failure to” cases, plaintiffs allege that supervisors have, by default, adopted a policy or custom of inadequate training or supervision or discipline. Although the Court has held that government officials have no legal obligation to protect persons from private violence,⁵⁰ supervisors do have a constitutional obligation to protect individuals from subordinates who engage in constitutional wrongdoing. The Supreme Court in *Rizzo* recognized a cause of action against a supervisor based on “inaction” in the face of a duty to act,⁵¹ but it has more fully developed the “causation for failing to act” standard in the context of municipal liability cases.

B. *Canton’s Deliberate Indifference Test for Municipal Liability*

In *City of Canton v. Harris*,⁵² the Supreme Court rejected the city’s argument that a municipal policy must itself be unconstitutional. Instead, the Court concluded that “there are limited circumstances in which an allegation of a ‘failure to train’ can be the basis for liability under § 1983.”⁵³ The Court explained that a policy of inadequate training may satisfy the statutory causation requirement of § 1983, but only where “the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.”⁵⁴ In such cases, courts presuppose that subordinates possess the required state of mind for the constitutional rights violation—be it intent for the Equal Protection Clause, deliberate indifference for the Eighth Amendment, or unreasonableness for the Fourth Amendment. When the policymakers’ deliberate indifference to this misconduct “causes” or is “the moving force” behind the constitutional rights violation, the statutory culpability standard has been met.⁵⁵ The Court in *Canton* specifically noted that “[t]he ‘deliberate indifference’ standard [it] adopt[ed] for § 1983 ‘failure to train’ claims does not turn upon the degree of fault (if any)

⁴⁹ See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 565 (4th ed. 2011) (referencing the “deeply entrenched belief that the Constitution is a charter of negative liberties—rights that restrain the government—and not a creator of affirmative rights to government services”).

⁵⁰ Cf. *Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (holding that a town and its police department could not be sued under 42 U.S.C. § 1983 for failing to enforce a restraining order, which had led to the murder of a woman’s three children by her estranged husband); *DeShaney v. Dep’t of Soc. Servs.*, 489 U.S. 189, 195 (1989) (holding that there is no affirmative duty under the Due Process Clause for the government to protect people from private wrongdoing); see also Rosalie Berger Levinson, *Reining-In Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 536–41 (2008) (opining that the expansion by the appellate courts of the *DeShaney* rule insulates official misconduct by refusing to find a duty of care even in the context of residential public schools and other “voluntary” state programs).

⁵¹ See *supra* notes 32–34 and accompanying text.

⁵² 489 U.S. 378 (1989).

⁵³ *Id.* at 387.

⁵⁴ *Id.* at 388.

⁵⁵ *Id.* at 389 (citing *Polk Cnty. v. Dodson*, 454 U.S. 312, 326 (1981); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978)).

that a plaintiff must show to make out an underlying claim of a constitutional violation.”⁵⁶

Further, the Supreme Court in *Canton* adopted an objective, not subjective, deliberate indifference standard.⁵⁷ It reasoned that a city may be held liable where its policymakers have actual or *constructive* notice that they need to remedy “omissions” in training or supervision in order to avoid the violation of constitutional rights, and yet they act with deliberate indifference to that knowledge or turn a blind eye to the problem.⁵⁸ As the Court explained elsewhere, mere negligent misconduct will not satisfy § 1983’s “causation” requirement, nor do policymakers have a duty to discover constitutional violations.⁵⁹ However, when faced with actual or constructive knowledge that subordinates likely will violate or are violating constitutional rights, policymakers may not adopt a policy of inaction.⁶⁰

Prior to *Iqbal*, most federal courts applied a deliberate indifference test in determining supervisory liability. Following *Canton*’s interpretation of § 1983’s causality requirement, federal judges recognized that supervisors could be liable for their subordinates’ actions even in cases where they did not personally participate in the constitutional violation or promulgate unlawful policies or practices. Rather, government officials were held accountable where they failed to supervise, discipline, or train subordinates acting with deliberate indifference to the possibility that the deficiency in performance of their duties could and in fact did cause a civil rights violation.⁶¹ Under *Canton*’s analysis, the causal connection required by § 1983

⁵⁶ *Id.* at 388 n.8.

⁵⁷ *Id.* at 389–90.

⁵⁸ *Id.* at 390; *see also* Price v. Sery, 513 F.3d 962, 973 (9th Cir. 2008) (stating that constructive notice satisfies the *Canton* deliberate indifference standard if the risk of constitutional violations caused by a failure to train is obvious).

⁵⁹ Bd. of Cnty. Comm’rs v. Brown, 520 U.S. 397, 407 (1997) (acknowledging that “[a] showing of simple or even heightened negligence will not suffice”). The appellate courts have similarly rejected negligence in the context of supervisory liability claims. *See, e.g.*, Zarnow v. City of Wichita Falls, 614 F.3d 161, 169–70 (5th Cir. 2010) (holding that a supervisor may be liable for unconstitutional searches conducted by his subordinates only if he demonstrated deliberate indifference to plaintiff’s constitutionally protected rights, which requires more than negligent oversight, but less than purposeful harm); Doe v. City of Roseville, 296 F.3d 431, 441 (6th Cir. 2002) (discussing standards of supervisory liability among the circuits and acknowledging that “[n]egligence is not enough to impose § 1983 liability on a supervisor”).

⁶⁰ *See, e.g.*, Jones v. Horne, 634 F.3d 588, 601–02 (D.C. Cir. 2011) (explaining that, although proving causation “is an objective standard, it involves more than mere negligence. It does not require [that the government] take reasonable care to discover and prevent constitutional violations”; however, when “faced with actual or constructive knowledge that its agents will probably violate constitutional rights, [policymakers] may not adopt a policy of inaction.” (quoting Warren v. District of Columbia, 353 F.3d 36, 39 (D.C. Cir. 2004))).

⁶¹ *See, e.g.*, Sanchez v. Pereira-Castillo, 590 F.3d 31, 48–49 (1st Cir. 2009) (recognizing that because supervisory officials may be held liable based on their own acts or *omissions*, plaintiffs could assert a claim against administrative defendants “premised on the theory that those defendants failed adequately to train the correctional defendants who were implicated in the surgery itself”); Gallagher v. Shelton, 587 F.3d 1063, 1069 (10th Cir. 2009) (applying the pre-*Iqbal* standard that supervisory liability may be imposed if there is an affirmative link “between the constitutional deprivation and either the supervisor’s personal participation, his

was established whenever the supervisor had the duty and the ability to prevent or stop a constitutional violation by exercising her supervisory authority, and yet failed to do so.⁶² The dual requirements of deliberate indifference and “an affirmative link” ensured that supervisory liability was not being imposed based on a theory of *respondeat superior*.⁶³

What divided the federal courts, however, was whether the *Canton* objective deliberate indifference/constructive knowledge test, or a subjective deliberate indifference test, should control. The *Iqbal* defendants raised this exact certiorari question, by conceding that they could be held liable if they actually knew of and acquiesced in their subordinates’ constitutional wrongdoing, but challenging the applicability of a “constructive notice” standard.⁶⁴

C. Subjective Versus Objective Deliberate Indifference

The Supreme Court defined subjective deliberate indifference in the context of assessing an Eighth Amendment challenge to conditions of confinement in *Farmer v. Brennan*.⁶⁵ To establish constitutional wrongdoing in such a case, an inmate must prove that a defendant had actual subjective knowledge of an objectively substantial risk of serious harm to the inmate, and then acted with deliberate indifference to that knowledge.⁶⁶ Akin to the test of recklessness in criminal law, this requires a showing that prison officials were subjectively aware of facts from which an inference of a substantial risk of harm could be drawn, and that they actually drew that inference.⁶⁷

exercise of control or direction, or his failure to supervise”); *Shomo v. City of New York*, 579 F.3d 176, 184 (2d Cir. 2009) (holding that, although the plaintiff’s failure to allege the supervisors’ personal involvement in the alleged Eighth Amendment violations supported the district court’s dismissal of claims, the plaintiff should be given leave to remedy the pleadings if there is evidence that the supervisors were made aware of constitutional violations and “acted or failed to act in a way that caused any constitutional violations”).

⁶² *City of Canton*, 489 U.S. at 390; see also *Harper v. Lawrence Cnty.*, 592 F.3d 1227, 1236–37 (11th Cir. 2010) (explaining that causality may be established where “a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so” or where the supervisor “knew that the subordinates would act unlawfully and failed to stop them from doing so” (citing *Cottone v. Jenne*, 326 F.3d 1352, 1360–61 (11th Cir. 2003))).

⁶³ The Supreme Court in *Monell v. Department of Social Services*, 436 U.S. 658, 690 (1978), clearly rejected *respondeat superior* as contrary to the “causation” language in § 1983. See also *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). But see *Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 430–37 (1997) (Breyer, J., dissenting) (arguing that *Monell* should be re-examined and that the Court should adopt a vicarious liability standard to better serve the goals of § 1983).

⁶⁴ Petition for Writ of Certiorari, *Iqbal*, 556 U.S. 662 (No. 07-1015); see also *infra* note 97 and accompanying text.

⁶⁵ 511 U.S. 825, 837–38 (1994).

⁶⁶ *Id.* at 834.

⁶⁷ *Id.* While insisting on a subjective deliberate indifference test in *Farmer*, Justice Souter’s majority opinion clarified that sometimes actual knowledge can be established through circumstantial evidence: “Whether a prison official had the requisite knowledge of a substantial risk is a question of fact . . . and a factfinder may conclude that a prison official knew of a

The Court reasoned that “[i]t is not enough merely to find that a reasonable person would have known or that the defendant should have known.”⁶⁸

The difference between the subjective and objective deliberate indifference tests is crucial. The Court rejected constructive notice for Eighth Amendment claims. Instead, application of the Eighth Amendment requires proof that a sheriff or warden was *actually* aware, not just that she had constructive notice, that harmful conditions of confinement were psychologically damaging to inmates or detainees—a standard that has proven to be insurmountable in most cases.⁶⁹ Further, a few courts have imposed this actual knowledge test to assess constitutional wrongdoing outside the context of inmates and detainees.⁷⁰

substantial risk from the very fact that the risk was obvious.” *Id.* at 842. However, most appellate courts require that the defendant subjectively believes there is a high probability that a fact exists or that the defendant takes deliberate actions to avoid learning of that fact, and thus the standard is significantly higher than *Canton*’s objective deliberate indifference test. *See* Pourmoghani-Esfahani v. Gee, 625 F.3d 1313, 1317–18 (11th Cir. 2010) (holding that pretrial detainee must show that the prison guard had “subjective knowledge of a risk of serious harm, disregard[ed] that risk, and display[ed] conduct that goes beyond gross negligence”); Schoelch v. Mitchell, 625 F.3d 1041, 1046–48 (8th Cir. 2010) (reasoning that to show an unconstitutional failure to protect an inmate from battery by another inmate, the pretrial detainee must show that defendant was “aware of facts from which the inference could be drawn that a substantial risk of serious harm existed and that he must also draw the inference” (citing *Farmer*, 511 U.S. at 837)); *Simmons v. Navajo Cnty.*, 609 F.3d 1011, 1017–20 (9th Cir. 2010) (reasoning that the plaintiff must have evidence that officials were aware of facts from which the inference could be drawn that there was a substantial risk that the detainee would commit suicide and that this inference was actually drawn); *Minix v. Canarecci*, 597 F.3d 824, 831–34 (7th Cir. 2010) (holding that a detainee must both show that he suffered an objectively serious harm, presenting a substantial risk to his safety, and that the defendants were deliberately indifferent to that risk, requiring both that the defendants subjectively knew the prisoner was at substantial risk of committing suicide and that they intentionally disregarded that risk).

⁶⁸ *Farmer*, 511 U.S. at 843 n.8.

⁶⁹ *Caiozzo v. Koreman*, 581 F.3d 63, 70–72 n.4 (2d Cir. 2009) (adopting the position of the First, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits, the Court ruled that the *Farmer* test (which governs convicted prisoners’ claims of deliberate indifference to serious medical needs or other threats to the health and safety of those in custody) applies equally to pretrial detainees and, thus, even where there is evidence that prison officials should have been aware that a detainee was in immediate danger of alcohol withdrawal, it was insufficient absent evidence that defendants were actually aware, in a subjective sense, of that danger); *see also* David C. Gorlin, *Evaluating Punishment in Purgatory: The Need to Separate Pretrial Detainees’ Conditions-of-Confinement Claims from Inadequate Eighth Amendment Analysis*, 108 MICH. L. REV. 417, 425–28 (2009) (discussing how the application of this more stringent test can make a difference in some cases); Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test*, 13 CHAP. L. REV. 307, 329–31 (2010) (opining that most appellate courts have adopted the more stringent Eighth Amendment subjective indifference test in pre-trial detainee cases).

⁷⁰ *Compare* *Tamas v. Dep’t of Soc. & Health Servs.*, 630 F.3d 833, 844–46 (9th Cir. 2010) (finding that the district court erred in holding that liability could be imposed based on evidence that caseworkers were aware of facts that would have led reasonable persons to know or suspect that a father was abusing his child, and reasoning that the standard for deliberate indifference was the same as that which governs prisoner cases, including both subjective and objective components), *with* *Battista v. Clarke*, 645 F.3d 449, 452–53 (1st Cir. 2011) (holding that the district court erred in applying the Eighth Amendment *Farmer* test to a person civilly confined as “sexually dangerous” after serving a prison sentence for rape, instead of the deliberate indifference to medical needs standard the Supreme Court established in *Youngberg v.*

Significantly, the Court in *Farmer* specifically distinguished the objective deliberate indifference standard established in *Canton*, to hold governmental entities civilly accountable for constitutional torts committed by city employees, from the subjective deliberate indifference standard required for individual defendant liability under the Eighth Amendment in prisoner cases.⁷¹ Further, in *Connick*, the Court confirmed that the statutory objective deliberate indifference test continues to govern claims of government liability brought under § 1983.⁷²

III. IQBAL AND ITS PROGENY

As discussed in Part II, *Iqbal* arose as a constitutional tort *Bivens*⁷³ action. The plaintiff sought damages against high-ranking federal government officials for an alleged post-9/11 policy of first classifying Arab Muslim detainees as subjects of “high interest” because of their race, religion, or national origin, and then subjecting them to exceptionally harsh treatment.⁷⁴ *Iqbal* was a Pakistani immigrant who was rounded up during the post-9/11 sweep for alleged immigration violations.⁷⁵ He was held for more than 150 days under a “hold until cleared” policy.⁷⁶ His complaint alleged that Attorney General John Ashcroft and FBI Director Robert Mueller were the architects of a purposefully discriminatory plan.⁷⁷ He challenged the conditions of his confinement in a maximum security facility where he was kicked, punched, dragged across the cell, held in solitary confinement, subjected to unnecessary and abusive strip- and body-cavity searches, and refused his right to pray.⁷⁸ *Iqbal*’s complaint asserted that both Ashcroft and Mueller planned and approved the policy of holding post-9/11 detainees of “high interest” in such extremely egregious conditions of confinement.⁷⁹ In a

Romeo ex rel. Romeo, 457 U.S. 307 (1982), which was a “more plaintiff-friendly standard” and only required evidence that the defendant failed to exercise a reasonable professional judgment in denying the plaintiff hormone therapy to address his gender identity disorder).

⁷¹ *Farmer*, 511 U.S. at 84; see also *Duvall v. Dallas Cnty.*, 631 F.3d 203, 209–10 (5th Cir. 2011) (acknowledging that the standard of deliberate indifference for the underlying constitutional violation, which requires evidence of subjective deliberate indifference on the part of a particular municipal employee who committed the acts or omissions, is more stringent than the standard necessary to show a municipal liability “custom or policy” where objective deliberate indifference suffices); *Gibson v. Cnty. of Washoe*, 290 F.3d 1175, 1188 n.8 (9th Cir. 2002) (“As opposed to the *Farmer* standard, which does not impose liability unless a person has actual notice of conditions that pose a substantial risk of serious harm, the *Canton* standard assigns liability even when a municipality has constructive notice that it needs to remedy its omissions in order to avoid violations of constitutional rights.”). Arguably, this distinction makes sense because a government entity cannot act with “subjective” deliberate indifference.

⁷² See *infra* Part IV.

⁷³ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

⁷⁴ *Ashcroft v. Iqbal*, 556 U.S. 662, 667 (2009).

⁷⁵ *Id.* at 667.

⁷⁶ *Id.*

⁷⁷ *Id.* at 669.

⁷⁸ *Id.*

⁷⁹ *Id.*

highly controversial five-to-four ruling, the Court created a new restrictive rule for supervisory liability to govern both *Bivens* and § 1983 litigation.⁸⁰

Defendants Ashcroft and Mueller conceded that they could be held personally liable if they actually knew of, and acted with, deliberate indifference to their subordinates' use of discriminatory criteria.⁸¹ Instead, they contested liability based on "constructive knowledge." Rather than address this issue, the Supreme Court broadly rejected the theory that "a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution."⁸²

Although the case did not involve § 1983, the Court extended its ruling to assert that in both *Bivens* and § 1983 actions, "the term 'supervisory liability' is a misnomer"—supervisors "may not be held accountable for the misdeeds of their agents."⁸³ "Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."⁸⁴ That is, because Iqbal claimed invidious discrimination in violation of the First and Fifth Amendments, his complaint had to allege facts establishing that Ashcroft and Mueller themselves engaged in purposeful discrimination—it was insufficient to show that they had knowledge of, and acquiesced in, the discriminatory animus of their subordinates.⁸⁵ Professor Nahmod has referred to this as the "constitutional" approach to supervisory liability.⁸⁶

Iqbal actually pleaded in his complaint that the defendants "'knew of, condoned, and willfully and maliciously agreed to subject [him]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race and/or national origin.'"⁸⁷ He alleged that "Ashcroft was the 'principal architect'" of this invidiously discriminatory policy and "that Mueller was 'instrumental' in adopting and executing it."⁸⁸ But the Supreme Court determined that these were "bare assertions" that amounted to "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim."⁸⁹ Justice Kennedy concluded that Iqbal's "complaint

⁸⁰ *Id.* at 676–78.

⁸¹ *Id.* at 690 (Souter, J., dissenting).

⁸² *Id.* at 677.

⁸³ *Id.* at 676–77.

⁸⁴ *Id.*

⁸⁵ *Id.* at 677.

⁸⁶ Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability After Iqbal*, 14 LEWIS & CLARK L. REV. 279, 279 (2010) (arguing that the Court was correct in adopting a "constitutional" approach to supervisory liability whereby plaintiffs must prove that supervisors acted with the same state of mind required to make out the constitutional violation). For further discussion and a critique of this approach, see *infra* note 132.

⁸⁷ *Iqbal*, 556 U.S. at 680 (quoting First Amended Complaint and Jury Demand, *Elmaghraby v. Ashcroft*, No. 04-CV-1809(JG)(JA) (E.D.N.Y. Sept. 30, 2004), 2004 WL 3756442).

⁸⁸ *Id.* at 680–81.

⁸⁹ *Id.* at 681 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

does not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind."⁹⁰ This Article does not discuss this conclusion. Dozens of law review articles have already addressed the highly controversial pleading aspect of the case and its negative effect on civil rights litigants.⁹¹ Rather, this Article focuses on the Court's decision in *Iqbal* to reverse decades of precedent imposing supervisory liability under § 1983.

Four dissenting Justices lamented the *Iqbal* majority's rejection of the prevailing knowledge/acquiescence standard for supervisory liability.⁹² Justice Souter explained, "[I]est there be any mistake, in these words the majority is not narrowing the scope of *Bivens* supervisory liability; it is eliminating supervisory liability entirely"⁹³—and this applied to § 1983 as well.⁹⁴ Justice Souter proceeded to list the various tests for supervisory liability established in the appellate courts, including: actual or constructive

⁹⁰ *Id.* at 683.

⁹¹ See, e.g., Arthur Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 30–31 (2010) (presenting 2009 data from the Federal Judicial Center refuting the Supreme Court's assumption that new pleading rules were necessary to address excessive discovery costs and coerced settlements, describing the "confusion and disarray among judges and lawyers," and lamenting that the subjectivity inherent in a "plausibility" standard leads to "inconsistent rulings on virtually identical complaints"); Alexander A. Reinert, *The Cost of Heightened Pleading*, 86 IND. L.J. 119, 120 (2011) (finding no correlation between a complaint's merit and its factual detail); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 570 (2010) (arguing that plaintiffs in civil rights and employment cases will be more likely to have their claims dismissed and will be deterred from filing in federal courts); Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U. ILL. L. REV. 215, 215 (2011) (arguing, contrary to Professor Epstein, that the *Iqbal* standard is likely to be procedurally revolutionary in employment cases and marks the effective death of *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002)); Howard M. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157 (2010) (arguing that *Iqbal* cuts off discovery and confers too much discretion on federal judges to subjectively decide what are conclusory allegations; and forecasting that the case will significantly decrease the enforcement and vindication of federal constitutional and civil rights where plaintiffs cannot know or plead essential information with particularity at the outset without the benefit of discovery); Nancy A. Welsh, *I Could Have Been a Contender: Summary Jury Trial as a Means to Overcome Iqbal's Negative Effects Upon Pre-Litigation Communication, Negotiation and Early, Consensual Dispute Resolution*, 114 PENN ST. L. REV. 1149 (2010) (seeking to reconcile the tension between the notice function normally attributed to Rule 8 and the plausibility rule that serves as a gatekeeper preventing frivolous and expensive discovery); cf. Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473 (2010) (contending that the plausibility standard fits within the traditional insistence that factual inferences be reasonable and that it does not preclude discovery during the pendency of the motion to dismiss); Martin H. Redish & Lee Epstein, *Bell Atlantic v. Twombly and the Future of Pleading in the Federal Courts: A Normative and Empirical Analysis* (Northwestern Univ. Sch. of Law, Pub. Law & Legal Theory Series, Paper No. 10-16, 2008) (arguing that *Iqbal* simply returned pleading rules to what the notice pleading standard was always intended to be and that "plausibility" strikes the appropriate balance between the extremes of fact pleading and "lax" pleading).

⁹² *Iqbal*, 556 U.S. at 691 (Souter, J., dissenting).

⁹³ *Id.* at 693.

⁹⁴ *Id.* at 676 ("Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant through the official's own individual actions, has violated the Constitution.").

knowledge and acquiescence; condonation or “turning a blind eye”; gross negligence; and recklessness in supervising subordinates.⁹⁵ None of the appellate courts hinted that the state-of-mind requirement for the underlying constitutional rights violation affected supervisory liability. Because the defendants in *Iqbal* conceded that they could be held liable under a knowledge/acquiescence theory, and challenged only use of a constructive notice standard, the issue was not even briefed.⁹⁶ Specifically, the second question presented in the defendants’ certiorari petition asked “[w]hether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.”⁹⁷ Instead of resolving this issue, the Supreme Court *sua sponte* decided to broadly restrict the scope of supervisory liability for all civil rights litigants, including those bringing suit under § 1983.⁹⁸

A. *Iqbal’s Aftermath*

There has been considerable disagreement as to the breadth and meaning of *Iqbal’s* ruling on supervisory liability, among both scholars⁹⁹ and federal judges.¹⁰⁰ *Iqbal’s* holding led some federal courts to mandate personal par-

⁹⁵ *Id.* at 693–94 (Souter, J., dissenting) (citations omitted); see *Dodds v. Richardson*, 614 F.3d 1185, 1196 n.5 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 2150 (2011) (citing pre-*Iqbal* cases from the circuits); see also Karen M. Blum, *Supervisory Liability After Iqbal: Misunderstood but Not Misnamed*, 43 URB. LAW. 541, 544–45 nn.15–18 (2011) (providing a comprehensive compilation of cases reflecting the various standards used to establish supervisory liability based on a failure to train, supervise, or discipline subordinates prior to *Iqbal*).

⁹⁶ *Iqbal*, 556 U.S. at 694 (Souter, J., dissenting).

⁹⁷ Petition for Writ of Certiorari, *Iqbal*, 556 U.S. 662 (No. 07-1015).

⁹⁸ *Iqbal*, 556 U.S. at 676–77.

⁹⁹ Compare Blum, *supra* note 95, at 555 (arguing that supervisory liability may be imposed where supervisors act with “actual subjective knowledge of a subordinate’s wrongdoing and a failure to prevent, remedy, or address the problem”), with Nahmod, *supra* note 86, at 279 (arguing that the Court was correct in adopting a “constitutional” approach to supervisory liability whereby plaintiffs must prove that supervisors acted with the same state of mind required to make out the constitutional violation).

¹⁰⁰ See *Arnett v. Webster*, 658 F.3d 742, 757 (7th Cir. 2011) (“The landscape of [supervisory] claims after *Iqbal* remains murky”); *Dodds v. Richardson*, 614 F.3d 1185, 1198 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 2150 (2011) (“Much has been made about [the supervisory liability] aspect of *Iqbal*, but consensus as to its meaning remains elusive.”). Even in the context of *Bivens* claims, the full meaning of *Iqbal* is unclear. For example, in *al-Kidd v. Ashcroft*, 580 F.3d 949, 952–53 (9th Cir. 2009), *rev’d on other grounds*, 131 S. Ct. 2074 (2011), a post-9/11 detainee alleged that Attorney General John Ashcroft developed, implemented, and set in motion a policy of using the federal material witness statute pretextually to arrest and detain terrorism suspects for whom there was insufficient evidence of probable cause to arrest on criminal charges in violation of the Fourth Amendment. The Ninth Circuit found that liability could be imposed if Ashcroft knowingly “fail[ed] to act in the light of even unauthorized abuses.” *Id.* at 975–76. The Attorney General sought a rehearing en banc alleging that, under *Iqbal*, knowledge and acquiescence is no longer sufficient to impose supervisory liability. The court of appeals declined to hear the case en banc, and, although the Supreme Court granted certiorari, it declined to address the supervisory liability claim. *Id.*,

ticipation by the supervisor in a subordinate's wrongdoing, either by ordering or directly participating in the constitutional violation,¹⁰¹ or by creating a policy or custom under which the unconstitutional practices occurred.¹⁰² Many have relied on *Iqbal* to reject supervisory claims based on a failure to train or supervise.¹⁰³ Most courts have reasoned that, at a minimum, *Iqbal*

reh'g en banc denied, 598 F.3d 1129 (9th Cir. 2010), *cert. granted in part*, 131 S. Ct. 415 (2010).

¹⁰¹ See *Arnett*, 658 F.3d at 757 (construing supervisory liability as only available against "an individual for wrongs he personally directed or authorized his subordinates to inflict"); *Reynolds v. Dormire*, 636 F.3d 976, 981 (8th Cir. 2011) (dismissing a prisoner's complaint against the warden because it did not allege personal involvement in an accident that allegedly occurred due to the deliberate indifference of two correctional officers to prisoner's safety); *Jones v. Horne*, 634 F.3d 588, 602 (D.C. Cir. 2011) (holding that a pretrial detainee could not survive a motion to dismiss by the acting warden because the complaint failed to allege that the warden had any personal involvement in the decision to transfer him to the segregation unit or to expose him to adverse conditions of confinement); *Santiago v. Warminster Twp.*, 629 F.3d 121, 130–34 (3d Cir. 2010) (explaining that to state a claim of supervisory liability against senior police officials for their subordinates' alleged use of excessive force that triggered plaintiff's heart attack, she must present plausible evidence that officials directed subordinates to violate her rights and that their direction was the proximate cause of the violation, such that supervisors gave directions that they "knew or should reasonably have known would cause others to deprive the plaintiff of her constitutional rights" (citing *Conner v. Reinhard*, 847 F.2d 384, 397 (7th Cir. 1988))); *Porro v. Barnes*, 624 F.3d 1322, 1327–28 (10th Cir. 2010) (holding that "plaintiff must establish a deliberate, intentional act" on the part of the sheriff "to violate plaintiff's rights" and, in the context of a due process challenge regarding the use of excessive force against a detainee, it is insufficient to show that the supervisor behaved knowingly or with deliberate indifference that a constitutional violation would occur at the hands of his subordinate; plaintiff's claim failed because there was no evidence that the defendant directly participated in the use of force, was present when the force was applied, or that he gave any advance approval to the use of a taser on the plaintiff (citing *Serna v. Colo. Dep't of Corr.*, 455 F.3d 1146, 1151 (10th Cir. 2006))); *Simmons v. Navajo Cnty.*, 609 F.3d 1011, 1020–21 (9th Cir. 2010) (reasoning that supervisory liability is a misnomer after *Iqbal* because each government official is liable only for her own misconduct; to survive summary judgment plaintiffs must have evidence that government officials themselves acted or failed to act unconstitutionally with regard to detainee who committed suicide, not merely that a subordinate did). *But see Dodds*, 614 F.3d at 1195 (acknowledging that "[d]efendant's argument implicates important questions about the continuing vitality of supervisory liability under § 1983 after the Supreme Court's recent decision in *Ashcroft v. Iqbal*," but, relying on the "causes to be subjected" language of § 1983, concluding that personal involvement does not require direct participation in the constitutional violation).

¹⁰² See, e.g., *Wernecke v. Garcia*, 591 F.3d 386, 401 (5th Cir. 2009) (reasoning that a supervisory official is liable only if she affirmatively participates in the acts that caused the constitutional deprivation or implements unconstitutional policies that causally result in constitutional injury; although plaintiff claimed that the supervisor affirmatively participated in the seizure of children from their homes without a warrant, the supervisor was neither the ultimate decisionmaker, nor was she actively involved in the decision to remove the children).

¹⁰³ See, e.g., *Carnaby v. City of Houston*, 636 F.3d 183, 189 (5th Cir. 2011) (holding that the supervisor could not be held liable for failure to supervise his subordinates on the scene because, after *Iqbal*, "a government official can be held liable only for his own misconduct"); *Whitson v. Stone Cnty. Jail*, 602 F.3d 920, 927–28 (8th Cir. 2010) (holding that a claim against a supervisor for failure to properly supervise and train officers who failed to protect plaintiff from sexual assault by a male prisoner could proceed only if the supervisor personally displayed deliberate indifference to the risk that plaintiff would be assaulted by other inmates, and *Iqbal* ruled that officers are liable only for their own misconduct and not for misdeeds of agents under a broad supervisory liability theory); cf. *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (holding that even after *Iqbal*, the causal connection between a supervisor's wrongful conduct and the constitutional violation can be established based on the supervisor's "own

means that the supervisor must have the requisite state of mind for the underlying constitutional rights violation.¹⁰⁴ Because *Iqbal* alleged discriminatory treatment in violation of the Fifth Amendment, which mandates a showing of intent, he was required to prove that Mueller and Ashcroft acted with the intent to discriminate.¹⁰⁵

On the other hand, where the subordinates' underlying constitutional violation requires only "objective reasonableness" (as in Fourth Amendment claims)¹⁰⁶ or deliberate indifference (as in Eighth Amendment or substantive due process cases involving arrestees and detainees),¹⁰⁷ many courts have held that plaintiffs need only plead and prove the less culpable state of mind that triggers violation of those constitutional provisions. For example, several circuits have used the less rigorous deliberate indifference standard in post-*Iqbal* cases alleging supervisory liability for Eighth Amendment violations.¹⁰⁸ They have refused to read *Iqbal* as overturning longstanding case

culpable action or inaction in the training, supervision, or control of his subordinates"); *Langford v. Norris*, 614 F.3d 445, 460–61 (8th Cir. 2010) (holding that supervisors may incur liability either for their personal involvement in a constitutional violation or when their corrective inaction amounts to deliberate indifference to, or tacit authorization of, the unconstitutional conduct).

¹⁰⁴ See, e.g., *Dodds*, 614 F.3d at 1197–99 (holding that, after *Iqbal*, a plaintiff may establish supervisory liability only by demonstrating that: "(1) [T]he defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional violation"; knowledge and acquiescence would no longer suffice "unless that is the same state of mind required for the constitutional violation alleged"); see also Blum, *supra* note 95, at 543 n.12 (citing numerous federal district court decisions applying the "constitutional" approach to limit supervisory liability); Karen M. Blum, *Section 1983 Litigation: Post-Pearson and Post-Iqbal*, 26 *TOURO L. REV.* 433, 454–56 (2010) (citing circuit cases that have followed the "constitutional approach"); Nahmod, *supra* note 86, at 296–98 (presenting the argument in favor of the constitutional approach and citing cases).

¹⁰⁵ *Ashcroft v. Iqbal*, 556 U.S. 662, 676–77 (2009).

¹⁰⁶ See *Graham v. Connor*, 490 U.S. 386, 399 (1989) (holding that the constitutionality of the use of force during an arrest, investigatory stop, or other "seizure" is judged by an objective reasonableness standard under the Fourth Amendment).

¹⁰⁷ See *supra* notes 65–66 and accompanying text (discussing *Farmer v. Brennan*, 511 U.S. 825, 937–38 (1994)). Note, however, that the standard under the Eighth Amendment mandates subjective, not just objective, deliberate indifference. *Farmer*, 511 U.S. at 937–38. The state of mind for substantive due process claims brought by arrestees and detainees varies from circuit to circuit, but the majority of the circuits follow the Eighth Amendment analysis. See *supra* note 69 and accompanying text; see also Levinson, *supra* note 50, at 565–71 (discussing the circuit split on how substantive due process claims brought by detainees, who have not yet been convicted of wrongdoing, should be adjudicated).

¹⁰⁸ See *Vance v. Rumsfeld*, 653 F.3d 591, 599–605 (7th Cir. 2011) (reasoning that unlike for *Iqbal*'s discrimination claim, Secretary of Defense Donald Rumsfeld could be held liable either for promulgating policies leading to plaintiffs' mistreatment or for his deliberate indifference in "failing to act to stop the torture of U.S. citizen detainees despite actual knowledge of reports of detainee abuse," contrary to substantive due process); *Dodds*, 614 F.3d at 1204 (concluding that after *Iqbal*, supervisory liability cannot be based on deliberate indifference "unless that is the same state of mind required for the constitutional deprivation he alleges"); *Whitson*, 602 F.3d at 927–28 (holding that a claim could proceed against jail supervisors for failing to protect the plaintiff from sexual assault by a male prisoner if the supervisors personally displayed deliberate indifference to the risk that the plaintiff would be assaulted by fellow inmates); *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 49 (1st Cir. 2009) (holding that supervisory

law on deliberate indifference claims against supervisors in Eighth Amendment/conditions-of-confinement cases where it sufficed to demonstrate that the supervisor breached a duty to the plaintiff which was the proximate cause of the injury: “The requisite causal connection can be established by setting in motion a series of acts by others or by knowingly refusing to terminate a series of acts by others which the supervisor knew or reasonably should have known would cause others to inflict a constitutional injury.”¹⁰⁹ This means that a supervisor can be liable for her own culpable action or inaction in the training, supervision, or control of her subordinates, or for conduct that shows a reckless or callous indifference to the rights of others.¹¹⁰ Similarly, some courts have retained the deliberate indifference standard in assessing supervisory liability where the subordinates have committed a substantive due process violation.¹¹¹

Arguably, *Iqbal*'s rejection of “knowledge and acquiescence” as a basis for establishing supervisory liability should be limited to discrimination claims.¹¹² At one point, the Court explained that “purpose rather than knowledge is required to impose . . . liability for unconstitutional discrimination.”¹¹³ Further, it asserted that its analysis of *Bivens* was contextual, i.e., dependent on the constitutional provision at issue.¹¹⁴ Nonetheless, many federal courts have broadly applied *Iqbal*'s mantra that supervisory liability is a

officials may still be held liable for correctional defendants' wrongdoing on the basis of their own acts or omissions, where they act “with deliberate indifference toward the possibility that deficient performance of the task may contribute to a civil rights deprivation”).

¹⁰⁹ *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (holding that the district court erred in dismissing plaintiff's supervisory claim against the county sheriff, which sought to recover damages for injuries sustained when he was attacked by a deputy while other deputies stood by and watched; unlike *Iqbal*'s claim of unconstitutional discrimination, a claim of unconstitutional conditions of confinement is actionable on a theory of deliberate indifference).

¹¹⁰ *Id.*; see also *Parrish v. Ball*, 594 F.3d 993, 1001–02 (8th Cir. 2010) (holding that although *Iqbal* mandates that a government official must, through her own individual acts, have violated the Constitution, liability can arise from a failure to supervise and train with regard to the treatment of detainees where there is evidence of notice regarding a pattern of unconstitutional acts, deliberate indifference, or tacit authorization of these offensive acts, failure to take sufficient remedial action, and evidence that the failure proximately caused the injury).

¹¹¹ See, e.g., *Sandra T.E. v. Grindle*, 599 F.3d 583, 591 (7th Cir. 2010) (holding that *Iqbal* did not change the rule that when a state actor's deliberate indifference deprives someone of a protected liberty interest, contrary to substantive due process, that actor violates the Constitution regardless of whether it is a supervisor or a subordinate).

¹¹² See *Argueta v. U.S. Immigration & Customs Enforcement*, 643 F.3d 60, 72 (3d Cir. 2011) (assuming, without deciding, that the district court properly used “actual knowledge and acquiescence” standard where the plaintiffs claim that supervisors failed to halt Fourth Amendment violations of their subordinates); *Starr*, 633 F.3d at 1196 (“We therefore conclude that where the applicable constitutional standard is deliberate indifference, a plaintiff may state a claim for supervisory liability based upon the supervisor's knowledge of and acquiescence in unconstitutional conduct by others.”); *Colvin v. Caruso*, 605 F.3d 282, 292 (6th Cir. 2010) (holding that to impose supervisory liability, there must be evidence that the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it or “at least authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers”).

¹¹³ *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009).

¹¹⁴ *Id.* at 1948 (“The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue.”).

“misnomer” to hold that knowledge and acquiescence in a subordinate’s wrongdoing is insufficient to establish supervisory liability absent personal participation.¹¹⁵

In short, *Iqbal* left the question of supervisory liability in a state of disarray,¹¹⁶ and it led many lower courts to ratchet up the standard for holding supervisors liable under § 1983,¹¹⁷ and to question supervisory liability in “failure to” cases.¹¹⁸ The text of § 1983 was interpreted pre-*Iqbal* to provide harmed individuals a remedy when a supervisor acted with such deliberate indifference to the subordinates’ deprivation of constitutional rights that the failure to act could be said to have “caused” the constitutional rights deprivation. This Article contends that this same approach should be followed post-*Iqbal*. Once a court determines that a subordinate has violated

¹¹⁵ See *Arnett v. Webster*, 658 F.3d 742, 757 (7th Cir. 2011) (construing post-*Iqbal* supervisory liability law to mean that “mere knowledge and acquiescence is not sufficient to impose such liability”); *Arocho v. Nafziger*, 367 F. App’x 942, 947 n.4 (10th Cir. 2010) (“After *Iqbal*, circuits that had held supervisors liable when they knew of and acquiesced in the unconstitutional conduct of subordinates have expressed some doubt over the continuing validity of even that limited form of liability.” (citations omitted)); *Bayer v. Monroe Cnty. Children & Youth Servs.*, 577 F.3d 186, 191 n.5 (3d Cir. 2009) (asserting that after *Iqbal*, proof of a supervisor’s personal knowledge of subordinate’s constitutional violations is insufficient to support liability); *Bellamy v. Mount Vernon Hosp.*, No. 07 Civ. 1801(SAS), 2009 WL 1835939, at *6 (S.D.N.Y. June 26, 2009) (acknowledging that *Iqbal* abrogated several of the categories of supervisory liability previously recognized in the Third Circuit—namely situations where the supervisor knew of and acquiesced in a constitutional violation committed by a subordinate); see also *SHELDON NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF § 1983* § 3:100 (4th ed. 1997 & Supp. 2011) (“[T]he Supreme Court in *Ashcroft v. Iqbal* . . . appears to have ruled that even deliberate indifference with actual knowledge [of subordinates’ unconstitutional conduct] may not be sufficient in every case for supervisory liability.” (citations omitted)).

¹¹⁶ See *Argueta*, 643 F.3d at 70 (observing the “uncertainty as to the viability and scope of supervisory liability after *Iqbal*” (citations omitted)); *Dodds v. Richardson*, 614 F.3d 1185, 1209–10 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 2150 (2011) (Tymkovich, J., concurring) (bemoaning the fact that *Iqbal* “muddled further these already cloudy waters” and “unfortunately did not provide a unified theory for the variety of supervisory liability cases we face”).

¹¹⁷ *Sandra T.E. v. Grindle*, 599 F.3d 583, 588 (7th Cir. 2010) (holding that, although prior to *Iqbal* the plaintiff would have been permitted to recover from a supervisor based on her “deliberate indifference” towards a subordinate’s purposeful discrimination, “after *Iqbal* a plaintiff must also show that the supervisor possessed the requisite discriminatory intent”); *Mann v. Taser Int’l, Inc.*, 588 F.3d 1291, 1308 (11th Cir. 2009) (observing that the standard for holding a supervisor liable for actions of a subordinate is extremely rigorous and will be imposed only where the supervisor personally participates in the alleged constitutional violation or where there is a causal connection between the supervisor’s actions and the alleged constitutional violation); see also *supra* notes 100–01.

¹¹⁸ See *Parrish v. Ball*, 594 F.3d 993, 1001–02 (8th Cir. 2010) (holding that *Iqbal* mandates that a government official must, through his own individual acts, have violated the Constitution, and liability can arise from a failure to supervise and train only if there is evidence of notice regarding a pattern of unconstitutional acts committed by subordinates, deliberate indifference, or tacit authorization of the offensive acts, as well as failure to take sufficient remedial action, and evidence that the failure proximately caused the injury); *al-Kidd v. Ashcroft*, 580 F.3d 949, 976 & n.25 (9th Cir. 2009) (acknowledging the dissent’s contention that the “knowing failure to act” standard of supervisory liability did not survive *Iqbal*, but refusing to reach the issue); *Diaz-Bernal v. Myers*, 758 F. Supp. 2d 106, 132 (D. Conn. 2010) (“Courts are split over whether a failure to train claim can be the basis for supervisory liability post-*Iqbal*.” (collecting cases)).

the Constitution with the requisite state of mind, the supervisor's culpability for that violation based on her failure to train, supervise, or discipline the subordinates should be tested by the same standard—namely, whether the supervisor knew or should have known constitutional rights violations were occurring, or were about to occur, and yet took no action to address the problem.

B. *Iqbal's Flawed State-of-Mind Requirement*

Much of the lower courts' confusion arises because the Supreme Court has conflated "causation" with "state of mind." The Court has ruled that § 1983 itself imposes no state-of-mind requirement.¹¹⁹ However, in the context of holding government entities liable for the constitutional wrongdoing of low-level officials, the Court has interpreted the statutory causation requirement to require proof that policymaking officials acted with "deliberate indifference" to their subordinates' constitutional wrongdoing.¹²⁰ Assuming plaintiffs can do so, the statutory prerequisite for liability has been met.¹²¹

As to the "constitutional" prerequisite, it is clear that § 1983 merely provides the cause of action, and thus plaintiffs must plead all of the elements necessary to establish a violation of the underlying constitutional right.¹²² For example, in *Iqbal*, plaintiffs could not proceed against the subordinates individually for violating the Fifth Amendment absent evidence that they acted with the intent to discriminate. *Iqbal* correctly mandates that supervisors be held accountable only for their own wrongdoing.¹²³ However, the Court in *Iqbal* ignored that, independent of the subordinates' constitutional wrongdoing, those who breach their duty and abuse their position of power by failing to train, supervise, or discipline subordinates have themselves violated the constitutional guarantee of substantive due process.

This Article focuses on the express statutory text of § 1983 and argues that the "causes to be subjected" language provides a firm statutory basis for holding supervisors liable for constitutional rights violations committed by their subordinates.¹²⁴ However, a more liberal interpretation of substantive due process, reflected in earlier Supreme Court rulings, intimates that supervisors in this context should be held accountable for their own unconstitutional misconduct, as required by *Iqbal*.

¹¹⁹ *Parratt v. Taylor*, 451 U.S. 527, 534 (1981).

¹²⁰ *See supra* Part II.B.

¹²¹ *See, e.g., Young v. City of Providence ex rel. Napolitano*, 404 F.3d 4, 29 (1st Cir. 2005) (holding that the deficiency in training officers to recognize off-duty police demonstrated deliberate indifference that could be causally linked to the shooting of an off-duty officer).

¹²² IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, *STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY* § 1:1 (2011).

¹²³ *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978) (rejecting vicarious liability).

¹²⁴ *See infra* Part V.

The Supreme Court has held that government officials who act with deliberate indifference to constitutional rights violate the core of substantive due process, which is “protection against arbitrary action.”¹²⁵ It has recognized that prison guards who are deliberately indifferent to the medical needs of pretrial detainees¹²⁶ and personnel at a state mental institution who fail to provide minimally adequate training and habilitation to those who are involuntarily committed¹²⁷ may be held liable for a substantive due process violation.¹²⁸

A few appellate courts have recognized that supervisors who act with deliberate indifference to actions by their subordinates that violate constitutional rights may be held accountable for their *own* constitutional wrongdoing, regardless of the state of mind required to prove that the subordinates violated the Constitution. For example, the Ninth Circuit asserted that “[w]hen a supervisor is found liable based on deliberate indifference, the supervisor is being held liable for his or her own culpable action or inaction, not held vicariously liable for the culpable action or inaction of his or her subordinates.”¹²⁹ Similarly, the Seventh Circuit held that a school principal who concealed reports of a teacher’s sexual abuse of students and created an “atmosphere that allowed abuse to flourish” may be held liable under a substantive due process theory for her own misconduct: “When a state actor’s deliberate indifference deprives someone of his or her protected liberty interest in bodily integrity, that actor violates the Constitution, regardless of whether the actor is a supervisor or subordinate, and the actor may be held liable for the resulting harm.”¹³⁰

If the Supreme Court were to recognize this broad understanding of substantive due process, supervisors could be held directly liable for depriving persons of federal rights when they breach their duty and fail to act with deliberate indifference to constitutional wrongdoing. This arguably would

¹²⁵ *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998); *cf. Daniels v. Williams*, 474 U.S. 327, 328 (1986) (holding that because due process violations require an abuse of government power, mere negligence is not sufficient).

¹²⁶ *Lewis*, 523 U.S. at 849–50.

¹²⁷ *Id.* at 852 n.12 (citing *Youngberg v. Romeo ex rel. Romeo*, 457 U.S. 307, 319–25 (1982)).

¹²⁸ The Supreme Court in *Lewis* did hold that in situations where officials have no time to deliberate, such as high-speed police chases or prison riots, only intent to harm will give rise to liability under substantive due process. *Lewis*, 523 U.S. at 854. In these situations, it is highly unlikely that plaintiffs will be able to establish that subordinates violated clearly established federal rights, which this Article argues is necessary to trigger supervisory liability, *see infra* notes 201–07 and accompanying text, or that any constitutional wrongdoing could be attributed to “failure to” misconduct of the supervisor. The point in invoking this line of cases is simply to illustrate that substantive due process prohibits the abuse of power, which is central to the supervisory liability doctrine. *See Levinson, supra* note 50, at 530.

¹²⁹ *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011); *see also Ammons v. Dep’t of Soc. & Health Servs.*, 648 F.3d 1020, 1033–34 (9th Cir. 2011) (holding that a hospital administrator, who failed to exercise professional judgment in supervising subordinates to ensure that they adequately monitored patient and staff relationships, could be held liable for his own conduct, which violated the Fourteenth Amendment).

¹³⁰ *Sandra T.E. v. Grindle*, 599 F.3d 583, 590–91 (7th Cir. 2010).

provide a basis for holding supervisors liable for their subordinates' wrongdoing in both *Bivens* and § 1983 litigation. Unfortunately, the Court in recent years has eviscerated the efficacy of substantive due process as a limitation on executive power by holding that only government official misconduct that "shocks the conscience" violates substantive due process.¹³¹

The "constitutional" approach adopted in *Iqbal*, which mandates that the supervisor act with the state of mind required to establish the subordinate's constitutional violation,¹³² has three major flaws. First, it leads to logically inconsistent results and will exacerbate the lack of uniformity among the circuits as to the standard for supervisory liability.¹³³ Under the "constitutional" approach, plaintiffs presumably will be most likely to establish supervisory liability where subordinates violate the Fourth Amendment. These claims are adjudicated under an objective unreasonableness test that is more lenient than the deliberate indifference test that governed pre-*Iqbal* supervisory liability cases.¹³⁴ However, applying a reasonableness standard to establish Fourth Amendment supervisory liability conflicts with the Supreme Court's interpretation of § 1983's causation language in the context of municipal liability claims. In those cases, the Court ruled that policymaking officials must act with deliberate indifference towards their

¹³¹ See Levinson, *supra* note 69, at 341–43 (arguing that the Supreme Court took a wrong turn in 1988 when it adopted this draconian standard). Further, many appellate courts have adopted the Eighth Amendment subjective standard of criminal recklessness as the state of mind required for substantive due process claims. *Id.* at 329–31.

¹³² Professor Nahmod contends that the "constitutional approach" adopted by the Court in *Iqbal* best reflects the legislative history and text of § 1983. Nahmod, *supra* note 86, at 298–300. First, he relies on the Supreme Court precedent establishing that § 1983 itself has no state-of-mind requirement and thus the requisite state of mind should "be grounded on the relevant constitutional provision." *Id.* at 302. This makes sense where the supervisor is directly involved in the constitutional violation, but this Article contends that a supervisor's failure to train, supervise, or discipline subordinates in the face of constitutional wrongdoing constitutes an abuse of power whenever the "failure" manifests deliberate indifference. Thus, the "requisite state of mind" in all supervisory liability cases should be the same, and should not depend on the state of mind required to prove that subordinates violated constitutional rights. See *supra* notes 55–56 and accompanying text. Second, although Professor Nahmod concedes that both the statutory language and legislative history are inconclusive, he argues that "causes" should be interpreted to target only defendants who "either personally, or through intervening actors, causally bring about constitutional deprivations." Nahmod, *supra* note 86, at 301. The term "causes," however, can be interpreted in various ways. Professor Kinports argues that negligence should satisfy the causation requirement for supervisory liability. See Kit Kinports, *The Buck Does Not Stop Here: Supervisory Liability in Section 1983 Cases*, 1997 U. ILL. L. REV. 147 (1997). In the context of municipal liability cases, several Justices have argued that *respondeat superior* best reflects the tort principle of causation. See *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 430–31 (1997) (Breyer, J., dissenting); see also Malloy, *supra* note 17 (discussing retired Justice Stevens's assertion that *respondeat superior* best reflects congressional intent). This Article urges a more modest approach, suggesting simply that the Court apply the same deliberate indifference standard to satisfy causality that it has adopted in municipal liability decisions. See *infra* Part V.

¹³³ *Dodds v. Richardson*, 614 F.3d 1185, 1198 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 2150 (2011) ("Much has been said about [the supervisory liability] aspect of *Iqbal*, but consensus as to its meaning remains elusive.").

¹³⁴ See *supra* note 106 and accompanying text.

subordinates' deprivation of constitutional rights.¹³⁵ Not surprisingly, some post-*Iqbal* courts appear to ignore the "constitutional" approach when it comes to Fourth Amendment supervisory liability claims, rejecting the Fourth Amendment's "unreasonable" standard in favor of the statutory deliberate indifference test.¹³⁶ More fundamentally, supervisory culpability should not turn on which constitutional right the subordinate has violated when it is the supervisor's same unconstitutional failure to train, supervise, or correct wrongdoing of subordinates that causes the civil rights violation.¹³⁷

Further, analyzing supervisory liability based on the state of mind required to establish the subordinates' constitutional rights violation will lead to myriad different and uncertain standards for supervisory liability, because the state of mind for constitutional rights violations often varies depending on the circumstances and the circuit. For example, the general rule for Eighth Amendment claims challenging conditions of confinement is deliberate indifference, in the sense of subjective criminal recklessness, whereas in the case of prison security, the required state of mind is ratcheted up to malice and sadism for the very purpose of causing harm.¹³⁸ Similarly, sub-

¹³⁵ See *supra* notes 54–55 and accompanying text.

¹³⁶ For example, the Fifth Circuit ruled that parents, who claimed that the supervisor of the Texas Department of Protective Services violated their Fourth Amendment rights by "approving" the removal of their children from the home, had to establish that the supervisor acted with subjective deliberate indifference—not just objective unreasonableness—in order to impose supervisory liability. *Wernecke v. Garcia*, 591 F.3d 386, 401 (5th Cir. 2009); see also *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2082–83 (2011) (holding that, provided plaintiff's seizure under the federal material witness statute was objectively reasonable, as the Fourth Amendment requires, plaintiff could not pursue a *Bivens* claim on the theory that the Attorney General condoned seizures based on a pretextual, subjective purpose).

¹³⁷ The constitutional approach may also lead to artful pleading. The facts in *Iqbal* portray extremely harsh conditions of confinement, whether or not motivated by discrimination. As a pretrial detainee, *Iqbal* could have brought his claim under substantive due process where the state of mind required is deliberate indifference, not intent. Some appellate courts have reasoned that the supervisory liability standard becomes less difficult depending on the state of mind required to establish the subordinates' constitutional wrongdoing. See *supra* notes 106–11. The Supreme Court's holding entices a plaintiff like *Iqbal* to abandon his central grievance—the discriminatory treatment of Arab Muslims—to enhance his chances of meeting a less stringent supervisory liability test. Cf. *Sandra T.E. v. Grindle*, 599 F.3d 583, 590 (7th Cir. 2010) (reasoning that supervisory liability could be established for teacher's abuse of girls only if the supervisor had the purpose of discriminating against girls based on gender in violation of the Equal Protection Clause, but that the supervisor's conduct in concealing reports of abuse and creating an atmosphere that allowed abuse to flourish demonstrated the deliberate indifference necessary to support a claim of substantive due process). Although the Supreme Court has clarified that substantive due process may not be invoked where the right asserted falls under a more explicit constitutional mandate, *Graham v. Connor*, 490 U.S. 386, 394 (1989), *Grindle* demonstrates that sometimes an official's misconduct may violate two independent constitutional rights.

¹³⁸ See *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (justifying the stricter standard where prison officials need to respond quickly and should be given more deference); see also *Battista v. Clarke*, 645 F.3d 449, 453 (1st Cir. 2011) (holding that the lower court erred in applying an Eighth Amendment deliberate indifference standard in which prisoners must show "a wanton disregard sufficiently evidenced by denial, delay, or interference with prescribed health care" because the case involved civil confinement, which is governed by the Due Process Clause,

stantive due process claims mandate deliberate indifference, but in cases where there is no time to deliberate, the Supreme Court has ratcheted up the standard to require intent to cause harm.¹³⁹ In addition, as to substantive due process, the circuits are hopelessly split as to the state of mind required to establish a violation for claims brought by various plaintiffs, such as detainees, students, landowners, and government employees.¹⁴⁰ Thus, under the constitutional approach, supervisory liability will vary with the type of claim, the type of claimant, and the circuit in which the claim is brought.

The Court's error in *Iqbal* is in confusing the state of mind required to prove the underlying constitutional rights violation of the subordinate with the wrongdoing of the supervisor who is accused not of participating in or directly ordering the subordinate's misconduct but of failing to train, supervise, or discipline under circumstances that demonstrate deliberate indifference and causality. Once the subordinate's state of mind for the constitutional rights violation has been established, one uniform standard, which tracks the Supreme Court's interpretation of causality under § 1983, should govern supervisory liability.¹⁴¹

The second major flaw in the Court's *Iqbal* analysis is that, even in cases where the underlying constitutional claim does require intent, a supervisor's knowledge of and acquiescence in that intentional discrimination should suffice to establish liability. *Iqbal* sought to hold officials at the highest level liable for constitutional violations of guards and jailers in the days after 9/11 when national security concerns were at their apex.¹⁴² Rejecting supervisory liability as to these officials in this unique context under an implied-cause-of-action theory may be more understandable.¹⁴³ Consider instead the case of a school principal who fails to supervise a coach or schoolteacher who commits sexual assault or who sexually harasses students in violation of the Equal Protection Clause. A principal who acts with deliberate indifference to actual or constructive knowledge of this constitutional wrongdoing has "caused" a person to be subjected to a constitutional rights violation within the meaning of § 1983. She should, therefore, be held accountable for her own wrongdoing without proof that she herself acted or failed to act with sexually discriminatory intent. Under these circumstances, the principal has egregiously abused her position of power and should be

mandating a more "plaintiff-friendly" standard—namely "whether the defendant failed to exercise a reasonable professional judgment" (internal citations omitted)).

¹³⁹ See *supra* note 128 (discussing *Cnty. of Sacramento v. Lewis*, 523 U.S. 833 (1998)).

¹⁴⁰ See Levinson, *supra* note 50, at 567–70.

¹⁴¹ Professor Blum suggests that uniformity be achieved by imposing a "subjective" deliberate indifference test. Blum, *supra* note 95, at 555. Although this reflects the current majority position among the circuits, this Article proposes that an objective deliberate indifference standard best comports with the statutory underpinnings of § 1983. See *infra* Part V.

¹⁴² See *supra* notes 74–77 and accompanying text.

¹⁴³ See also *Argueta v. U.S. Immigration & Customs Enforcement*, 643 F.3d 60, 75–76 (3d Cir. 2011) (acknowledging the difficulty of holding high-ranking federal officials liable in a *Bivens* action for failing to supervise the enforcement of federal law throughout the country).

held liable under the statutory objective deliberate indifference standard adopted by the Supreme Court to adjudicate “failure to” cases.¹⁴⁴

Third, and perhaps most critically, the Court’s adoption of a “constitutional test” frustrates the deterrent and remedial goals of § 1983 by making it extremely difficult for supervisory liability claims to succeed. This is already becoming evident in the lower federal courts.¹⁴⁵ Victims of constitutional wrongdoing are being denied a remedy, contrary to the historic purposes of § 1983. After reviewing its legislative history, the Supreme Court, in *Monroe v. Pape*, concluded that Congress, in enacting § 1983, “meant to give a remedy to parties deprived of constitutional rights . . . by an official’s abuse of his position.”¹⁴⁶ Supervisory liability is critical to ensuring this promise.

IV. CONNICK REAFFIRMS CANTON’S OBJECTIVE DELIBERATE INDIFFERENCE STANDARD BUT REJECTS LIABILITY IN SINGLE-INCIDENT CASES

In *Connick v. Thompson*,¹⁴⁷ the Supreme Court addressed the question of whether a prosecutor’s office could be held liable for failure to train based on a single incident of not disclosing exculpatory *Brady* evidence.¹⁴⁸ Thompson sued the District Attorney in his official, not individual, capacity for damages under § 1983, seeking relief against the Office of the District Attorney.¹⁴⁹ Although the Court’s decision focused on entity liability, the case also has significant implications for supervisory liability. More specifically, the Court’s reasoning supports the argument that the causality standard for supervisory liability under § 1983 should be *Canton*’s objective, not sub-

¹⁴⁴ Note, however, that some post-*Iqbal* courts have applied a subjective deliberate indifference, rather than an “intent to discriminate,” standard for these claims. See, e.g., *Doe v. Flaherty*, 623 F.3d 577, 584 (8th Cir. 2010) (holding that school official may be held liable for coach’s sexual abuse of student only where plaintiffs can prove she had actual notice of a pattern of unconstitutional acts by the coach, that she showed deliberate indifference to those acts, that she failed to take sufficient remedial action, and that such failure proximately caused injury to the student); *Doe v. Sch. Bd. of Broward Cnty.*, 604 F.3d 1248, 1266–67 (11th Cir. 2010) (rejecting supervisory liability of a principal who was on notice of two incidents of sexual harassment involving a particular teacher where the court determined that the complaints did not rise to the level of “obvious, flagrant, rampant” violations of constitutional rights required to trigger any responsibility on the part of the principal to act; the court reasoned that a subordinate’s history of abuse must be widespread and of continued duration and that, even if the principal’s acts and omissions reflected serious deficiencies sufficient to impose Title IX liability, they did not establish supervisory liability under § 1983; after *Iqbal*, a plaintiff cannot establish supervisory liability without evidence that a supervisor personally participated in the sexual assault, was on notice of a history of the perpetrator’s widespread abuse of female students, or had a policy in place permitting such assaults).

¹⁴⁵ See *supra* notes 101–03, 115, 117–18.

¹⁴⁶ *Monroe v. Pape*, 365 U.S. 167, 184 (1961).

¹⁴⁷ 131 S. Ct. 1350 (2011).

¹⁴⁸ *Id.* at 1355.

¹⁴⁹ *Id.* An individual capacity suit would likely have been dismissed under absolute immunity. See *infra* notes 210–12 and accompanying text.

jective, deliberate indifference.¹⁵⁰ On the other hand, the case erodes the principle that a finding of deliberate indifference may be based on a single incident of wrongdoing.¹⁵¹

In *Connick*, the District Attorney's Office in New Orleans conceded that its prosecutors violated *Brady* in failing to disclose a crime lab report that should have been turned over to Thompson's attorneys.¹⁵² This evidence, taken from the scene of the robbery, would have established Thompson's innocence.¹⁵³ Because of this *Brady* violation, Thompson was convicted of robbery. Subsequently, Thompson was charged with murder in an unrelated case, and, because he did not want the robbery conviction to be disclosed, he felt compelled not to testify at his murder trial.¹⁵⁴ He was found guilty and sentenced to death.¹⁵⁵ He spent eighteen years in prison, fourteen of them isolated on death row.¹⁵⁶ One month before his scheduled execution, his attorneys hired a private investigator, who found the report in the crime lab archives identifying the robber's blood type as "B."¹⁵⁷ Because Thompson's blood type was "O," this proved his innocence of the robbery.¹⁵⁸ The court issued a stay of execution, and following a retrial of the murder charges, a jury found Thompson not guilty of those as well.¹⁵⁹

In his § 1983 suit, Thompson alleged that the deputy attorneys' *Brady* violation could be charged to the District Attorney's Office because it was caused either by an unconstitutional policy of the office or by the District Attorney's deliberate indifference to an obvious need to train prosecutors to avoid *Brady* violations.¹⁶⁰ Although Thompson could not produce a pattern of similar *Brady* violations as required to prove an unconstitutional policy, he could establish liability if the need to train prosecutors in this context was "obvious."¹⁶¹ The district court applied an extremely stringent liability standard, asserting that Thompson could meet the deliberate indifference standard only by proving that "the D.A.'s office knew to a moral certainty that assistant [district attorneys] would acquire *Brady* material, that without training it is not always obvious what *Brady* requires, and that withholding *Brady* material will virtually always lead to a substantial violation of constitutional rights."¹⁶² Nonetheless, the jury found that Thompson met this standard, and it awarded him \$14 million in damages. The decision was

¹⁵⁰ See *infra* Part V.A.

¹⁵¹ *Connick*, 131 S. Ct. at 1356.

¹⁵² *Id.* at 1355.

¹⁵³ *Id.* at 1356. A blood-stained swatch of fabric taken from a victim's pants disclosed that the perpetrator had blood type B. *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1357.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 1358.

affirmed by a panel of the Fifth Circuit, but ultimately vacated by a divided en banc court.¹⁶³ In a five-four opinion, the Supreme Court rejected the failure-to-train liability theory and affirmed the Fifth Circuit's en banc ruling, vacating the jury's award.¹⁶⁴

The Supreme Court began its opinion by reiterating the well-established test for proving liability under a failure-to-train theory: (i) The policymaker for the District Attorney's Office (Connick) was deliberately indifferent to the need to train prosecutors about *Brady*; and (ii) this lack of training caused the *Brady* violation in this case.¹⁶⁵ Connick argued that Thompson failed to prove that Connick had "actual or constructive notice" of a need to train, as required to satisfy the deliberate indifference standard.¹⁶⁶ Similarly, the Supreme Court, while reiterating that "a municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train,"¹⁶⁷ nonetheless described *Canton*'s deliberate indifference standard as mandating only that "city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights."¹⁶⁸

Ultimately, the Court ruled that the District Attorney's Office could not be held liable for its failure to train deputies based on a single *Brady* violation.¹⁶⁹ It acknowledged that *Canton* left open the possibility that deliberate indifference could be established without a pattern of similar violations where the city policymakers disregard the "highly predictable consequence" that a failure to train will result in constitutional rights violations.¹⁷⁰ It emphasized, however, that this situation would be rare and liability should be imposed only where the unconstitutional consequences of the failure to train are "patently obvious."¹⁷¹ The Court drew upon *Board of Commissioners of Bryan County v. Brown*,¹⁷² reasoning that entities could be held liable for

¹⁶³ *Id.* at 1355–56.

¹⁶⁴ *Id.* at 1356.

¹⁶⁵ *Id.* at 1358.

¹⁶⁶ *Id.* (emphasis added).

¹⁶⁷ *Id.* at 1359. The rationale is that because a failure to train is not itself facially unlawful, to establish a direct causal link to the constitutional injury, plaintiffs must show the action was taken with deliberate indifference to its known or obvious consequences. *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 409 (1997).

¹⁶⁸ *Connick*, 131 S. Ct. at 1360 (emphasis added).

¹⁶⁹ *Id.* at 1354.

¹⁷⁰ *Id.* at 1361.

¹⁷¹ *Id.*; see also *Bryson v. City of Oklahoma City*, 627 F.3d 784, 789 (10th Cir. 2010) (holding that former inmate wrongfully convicted of kidnapping and rape, who spent seventeen years in prison, could not seek relief against the city based on its chemist's conduct in concealing exculpatory evidence and falsifying test reports because such acts were not a "highly predictable or plainly obvious" consequence of her having received only nine months of on-the-job training and no supervision by an individual with a background in forensic science); *Brown v. Callahan*, 623 F.3d 249, 255 (5th Cir. 2010) ("Proof of deliberate indifference normally requires a plaintiff to show a pattern of violations and that the inadequate training or supervision is obvious and obviously likely to result in a constitutional violation." (citations omitted)).

¹⁷² 520 U.S. 397 (1997).

their policymaker's failure to adequately screen applicants for police department positions only where "the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right."¹⁷³ The majority concluded that "failure to train prosecutors in their *Brady* obligations does not fall within [this narrow exception]."¹⁷⁴

The Court's rationale for rejecting liability under an "obvious" need-to-train theory rested on the unique circumstances of this case. Justice Thomas explained that, unlike most subordinates, "[a]ttorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment."¹⁷⁵ Because attorneys not only receive training in law school, but must also pass substantive bar examinations and, in most jurisdictions, satisfy continuing education requirements, supervisors may presume that their subordinates have been trained to recognize *Brady* evidence.¹⁷⁶ Further, prosecutors train on the job with experienced attorneys, and they are instructed in ethical rules, including the unique ethical obligation of prosecutors to produce *Brady* evidence for the defense.¹⁷⁷ According to Justice Thomas, in the absence of a pattern of violations, the District Attorney was entitled to rely on his subordinates' professional training and ethical obligations—"showing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability."¹⁷⁸

In short, the majority rejected as insufficient Thompson's argument that prosecutors would confront *Brady* issues at the District Attorney's Office, that inexperienced prosecutors should not be expected to understand *Brady*'s

¹⁷³ *Id.* at 411. *Brown* was a failure-to-screen case, and the Court asserted that it was necessary to ratchet up the causality standard in hiring cases. However, many appellate courts have applied its stringent language to failure-to-train and failure-to-supervise cases. See, e.g., *Peterson v. City of Fort Worth*, 588 F.3d 838, 850 (5th Cir. 2009) (holding that a city could be liable under a "failure to supervise" theory, only if it was obvious that "the highly predictable consequence" of the specific deficiency in supervision was that officers would apply force in such a way as to violate the Fourth Amendment). *City of Canton v. Harris*, 489 U.S. 378, 390 (1989) held that plaintiffs must prove deliberate indifference to an "obvious" need to train, whereas *Brown*, 520 U.S. at 411, required proof that the specific constitutional rights violation was the "plainly obvious" consequence of failing to properly screen an applicant. The Supreme Court's citation in *Connick to Brown*'s "obvious consequence" test, *Connick*, 131 S. Ct. at 1360, appears to confirm its applicability to failure-to-train cases. Although this extension may be criticized as lacking support in the Court's analysis, the key point here is that "obviousness" may provide a substitute for the pattern of violations normally necessary to establish liability.

¹⁷⁴ *Connick*, 131 S. Ct. at 1361.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1361–62.

¹⁷⁷ *Id.* at 1362.

¹⁷⁸ *Id.* at 1363. The Court in *Connick* did not address whether the District Attorney's Office could be held liable under a different "failure to" theory, such as a failure to supervise new inexperienced deputies or a failure to discipline them, where the unique law school education might not be as significant a factor. Compare the remand in *Brown* where, after the Supreme Court rejected liability on a failure-to-screen theory, the lower courts reinstated the judgment against the county based on its failure to train officers regarding the use of excessive force. *Brown v. Bryan Cnty.*, 219 F.3d 450, 453 (5th Cir. 2000).

requirements, that *Brady* had gray areas that made for difficult choices, and that erroneous decisions regarding *Brady* evidence caused by lack of training could result in constitutional violations.¹⁷⁹ Instead, it ruled that, without a series of *Brady* violations, Thompson could not “show that Connick was on notice that, absent additional specified training, it was ‘highly predictable’ that the prosecutors in his office would be confounded by those gray areas and make incorrect *Brady* decisions as a result.”¹⁸⁰

The four dissenting Justices argued that the evidence in this case was sufficient to establish an “obvious need” for further training.¹⁸¹ Connick conceded that *Brady* training in his office was inadequate,¹⁸² and according to the dissent, the evidence demonstrated that “Connick’s cavalier approach to his staff’s knowledge and observation of *Brady* requirements contributed to a culture of inattention to *Brady* in Orleans Parish.”¹⁸³ The dissent also pointed to a survey of assistant district attorneys, conducted soon after Connick retired, which revealed that more than half the attorneys felt they “had not received the training they needed to do their jobs.”¹⁸⁴ Based on this evidence, a jury “could reasonably conclude that inattention to *Brady* was standard operating procedure” in the office,¹⁸⁵ and that “[h]ad *Brady*’s importance been brought home to prosecutors, surely at least one of the four” assistant district attorneys would have revealed the lab report that would have proved Thompson’s innocence.¹⁸⁶ In light of the record in this case, it is difficult to understand the majority’s finding that Thompson did not satisfy the objective deliberate indifference test it purportedly applied. But even though it applied the test stringently, the Court maintained the traditional objective deliberate indifference test in determining § 1983’s causality requirement.

¹⁷⁹ *Connick*, 131 S. Ct. at 1365.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 1377, 1387 (Ginsburg, J., dissenting).

¹⁸² *Id.* at 1379.

¹⁸³ *Id.* at 1382.

¹⁸⁴ *Id.* at 1380.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* For a thorough critique of the majority’s analysis, see generally Susan A. Bandes, *The Lone Miscreant, the Self-Training Prosecutor, and Other Fictions: A Comment on Connick v. Thompson*, 80 *FORDHAM L. REV.* 715 (2011). Professor Bandes challenges the assumption that Thompson’s constitutional rights violation stemmed from a single incident, as well as the Court’s conception of training and its “atomistic” vision of § 1983. *Id.* at 716–17. Claims of misconduct by prosecutors in the New Orleans District Attorney’s Office recently returned to the Supreme Court. In *Smith v. Cain*, 132 S. Ct. 627, 630–31 (2012), the Court determined that the failure of the office to produce exculpatory evidence before trial violated the defendant’s right to due process because the information was material to the defendant’s guilt. In his brief, Smith asserted that appellate courts have overturned four Orleans Parish death sentences cases for *Brady* violations and eight non-capital cases where *Brady* violations caused reversals. Brief for Petitioner, *Smith*, 132 S. Ct. 627 (No. 10-8145), 2011 WL 3608728, at *32. The *Smith* brief lambasted Connick’s office for having “developed an unrivaled reputation for its disregard of *Brady*’s requirements.” *Id.*

V. LIABILITY FOR CONSTITUTIONAL WRONGDOING IN A
POST-*IQBAL/CONNICK* WORLD

This Article proposes that the Supreme Court's well-established interpretation of § 1983's causation requirement, which requires evidence of objective deliberate indifference to a subordinate's constitutional wrongdoing, should govern claims of supervisory liability in "failure to" cases. Concededly, even prior to *Iqbal*, some courts applied a subjective deliberate indifference test to assess claims of supervisory liability. These courts adopted the Supreme Court's test for adjudicating Eighth Amendment claims, which requires proof of actual, not just constructive, knowledge of wrongdoing in prisoner cases.¹⁸⁷ However, as discussed in Part II, the Supreme Court specifically distinguished *Canton*'s statutory objective deliberate indifference test, which defines causality under § 1983, from the constitutional standard required to prove an Eighth Amendment violation.¹⁸⁸ Nonetheless, many circuits, perhaps guided by the Supreme Court's clear expression of disdain for supervisory liability in *Iqbal*, now impose a subjective deliberate indifference standard on plaintiffs seeking to hold supervisors liable for failing to address their subordinates' constitutional wrongdoing.¹⁸⁹ Use of a subjective

¹⁸⁷ See, e.g., *Wernecke v. Garcia*, 591 F.3d 386, 401 (5th Cir. 2009) (reasoning that supervisory liability can be established only where the official acted with subjective deliberate indifference—"the equivalent of reckless disregard for a substantial risk"; failure to alleviate a significant risk that should have been, but was not, perceived is insufficient); *Palmer v. Marion Cnty.*, 327 F.3d 588, 594 (7th Cir. 2003) (requiring the plaintiff to establish that the sheriff knew plaintiff was assigned to a particular cell block and actually inferred that this assignment would create a substantial risk of serious harm); *Boyd v. Knox*, 47 F.3d 966, 968 n.1 (8th Cir. 1995) (rejecting plaintiff's argument that supervisory liability may be based on a "knew or should have known" standard, and instead citing *Farmer* and applying the subjective test of deliberate indifference, which requires proof of supervisors' actual knowledge of the violations to support liability).

¹⁸⁸ See *supra* note 71 and accompanying text.

¹⁸⁹ See, e.g., *Am. Fed'n of Labor & Cong. of Indus. Org. v. City of Miami*, 637 F.3d 1178, 1188–89 (11th Cir. 2011) (holding that supervisory liability requires evidence that the supervisor actually knew that constitutional rights were being violated and yet failed to intervene); *Doe v. Flaherty*, 623 F.3d 577, 584–86 (8th Cir. 2010) (holding that school official could not be held liable under § 1983 for a coach's sexual harassment of a student unless there was evidence that the school official had actual notice of the sexual harassment and then showed deliberate indifference to that abuse by failing to take sufficient remedial action); *Brown v. Callahan*, 623 F.3d 249, 255–57 (5th Cir. 2010) (holding that "[d]eliberate indifference implies an official's actual knowledge of facts showing that a risk of serious harm exists as well as the official's having actually drawn that inference," and here the sheriff "did not have the subjective knowledge required for deliberate indifference and imputation of liability"); *Trentadue v. Redmon*, 619 F.3d 648, 652–53 (7th Cir. 2010) (holding that to succeed on a gender discrimination claim against a supervisor of a male instructor who sexually abused a student, the plaintiff had to have evidence that the supervisor actually knew about the instructor's "sexual misconduct and facilitated, approved, condoned, or turned a blind eye to it"); *Dodds v. Richardson*, 614 F.3d 1185, 1196 n.5 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 2150 (2011) (in assessing whether the defendant acted with deliberate indifference, plaintiffs were required to show supervisor had actual subjective knowledge of the risk of constitutional injury and disregarded that risk). *But see* *Santiago v. Walls*, 599 F.3d 749, 758–59 (7th Cir. 2010) (arguing that where a warden is charged with failing to protect inmates from violence at the hands of fellow prisoners it suffices, at the pleading stage, to allege that the warden "knew

deliberate indifference test confuses the state of mind for constitutional wrongdoing under the Eighth Amendment with the statutory causation language of § 1983.¹⁹⁰ The Court has explained that subjective deliberate indifference is required under the Eighth Amendment because the Amendment bans only cruel and unusual punishment, and “[i]f the pain inflicted is not formally meted out as punishment . . . some mental element must be attributed to the inflicting officer before it can qualify.”¹⁹¹ Further, those who are convicted of a crime lose some protection from constitutional wrongdoing, and prison officials are traditionally given greater leeway.¹⁹² There may be good reasons to impose a stringent culpability test under the Eighth Amendment, but there is no reason to make this the culpability standard for supervisory liability when the Supreme Court has interpreted § 1983’s causality text to impose liability for objective deliberate indifference to constitutional wrongdoing. In these cases the subordinate’s constitutional violation has already been adjudicated. The only remaining question is statutory: Whether the supervisor’s failure to act “caused” the violation.

Subjective deliberate indifference will, of course, govern whether a subordinate has violated the Eighth Amendment, but once this determination is made, supervisory liability should be analyzed under the same objective deliberate indifference test that defines the “causation” language of § 1983 for policymakers. Notably, this means that supervisors will be liable for their own violation of the Eighth Amendment only if the subjective deliberate indifference standard is met, whereas they can be held liable for a failure to train, supervise, or discipline under an objective deliberate indifference test. Although at first blush this may appear incongruous, the key difference is that in the former situation, subjective deliberate indifference is necessary to establish the constitutional rights violation, whereas in the latter, it is assumed a violation has occurred and the only question is causation under § 1983, for which *Canton* provides the working definition. Similarly,

or should have known” that inmate was dangerous because this states a claim that the warden “actually knew or consciously turned a blind eye toward an obvious risk,” and thus district court should not have dismissed this claim); *Sandra T.E. v. Grindle*, 599 F.3d 583, 588 (7th Cir. 2010) (holding that even though “there is no theory of respondeat superior for constitutional torts, supervisors can violate the Constitution themselves if they know about the unconstitutional conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see”).

¹⁹⁰ While condoning the “constitutional” approach to supervisory liability, Professor Nahmod concedes that it cannot be reconciled with the Supreme Court’s interpretation of causality in *Canton*. See Nahmod, *supra* note 86, at 283 (noting the “glaring inconsistency between *Iqbal*’s constitutional approach and *Harris*’s deliberate indifference standard for § 1983 local government liability for failure to train”). Professor Nahmod argues that *Canton* was wrongly decided and should be revisited, whereas this author contends that *Canton* should be preserved and used to support supervisory liability based on omissions in training, supervision, or discipline that can be causally linked to subordinates’ wrongdoing.

¹⁹¹ *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (extending the subjective deliberate indifference test to Eighth Amendment claims alleging unconstitutional conditions of confinement).

¹⁹² See, e.g., *Sandin v. Conner*, 515 U.S. 472, 485 (1975) (holding that when the state punishes convicted prisoners, this does not violate fundamental liberty interests protected by the Due Process Clause).

whereas a supervisor can be held liable for an Equal Protection violation only if intent to discriminate is established, she should be held accountable for the discriminatory conduct of her subordinates where she knows of, or should know of, and acquiesces in this wrongdoing.¹⁹³

A. *Why Connick's Rationale for a Statutory Objective Deliberate Indifference Test Should Govern Supervisory Liability Claims*

As discussed in Part IV, the Court in *Connick* acknowledged that objective deliberate indifference to the need to address a deficient training program satisfies the “causality” requirement of § 1983.¹⁹⁴ It explains why the appropriate test for supervisors should also be objective, not subjective, deliberate indifference. The concern in municipal liability cases is the same concern regarding supervisory liability, that is, that *respondeat superior* should not be a basis for liability.¹⁹⁵ In failure-to-train cases seeking government liability, the Court closely examines what the policymaker knew or should have known because the government entity is deemed responsible for the actions of its policymakers.¹⁹⁶

The *Connick* majority acknowledged that a policymaker’s “continued adherence to an approach that they know *or should know* has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequence of their action—the ‘deliberate indifference’—necessary to trigger municipal liability.”¹⁹⁷ That is, a policy of inaction despite notice that a program will cause constitutional violations “is the functional equivalent of a decision by the city itself to violate the Constitution.”¹⁹⁸ Regardless of whether a particular supervisor is a policymaker, this statement establishes the standard that should guide all supervisory liability adjudications, because it defines § 1983’s “causation” requirement. Some appellate courts, including the First, Second, Fourth, Ninth, and Eleventh Circuits, followed this constructive notice approach to supervisory liability before *Iqbal*,¹⁹⁹ but it remains to be seen whether any will continue to do so.²⁰⁰ The

¹⁹³ See *supra* note 144 and accompanying text.

¹⁹⁴ *Connick v. Thompson*, 131 S. Ct. 1350 (2011).

¹⁹⁵ *Id.* at 1360.

¹⁹⁶ See, e.g., *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484–85 (1986) (holding that government entities may be held liable for a single decision made by someone who has the authority to and who is acting as the final decisionmaker for that entity); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978) (holding that conduct of those “whose edicts or acts may fairly be said to represent official policy” are binding on a municipality).

¹⁹⁷ *Connick*, 131 S. Ct. at 1360 (citing *Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 407 (1997)) (emphasis added).

¹⁹⁸ *Id.* (citing *City of Canton v. Harris*, 489 U.S. 378, 395 (1989)) (O’Connor, J., concurring in part and dissenting in part).

¹⁹⁹ See, e.g., *Blankenhorn v. City of Orange*, 485 F.3d 463, 486 (9th Cir. 2007) (holding that the Police Chief could be held liable for a deputy’s use of excessive force due to his failure to effectively discipline regarding previous complaints, thus justifying a rational factfinder to conclude that chief reasonably should have known the deputy would cause constitutional injuries like the ones plaintiff suffered); *Poe v. Leonard*, 282 F.3d 123, 140–42 (2d Cir. 2002)

Court's admonition in *Iqbal* that supervisory liability is a misnomer is difficult to reconcile with its previous broad interpretation of § 1983 to remedy "failure to" misconduct.

B. *Qualified and Absolute Immunity from Supervisory Liability*

Supervisor liability and entity liability do raise distinct policy questions. As articulated in *Iqbal*, a supervisor's personal liability will deter and detract law enforcement officials "from the vigorous performance of their duties."²⁰¹ This concern, however, is already addressed by awarding government officials absolute or qualified immunity—a defense that is unavailable to government entities.²⁰² The Supreme Court has ruled that § 1983 did not abrogate common law immunity defenses that shield government officials from personal damage liability.²⁰³ Qualified immunity protects officials

(acknowledging the Second Circuit's understanding that supervisory liability may be based on a supervisor's "gross negligence in failing to supervise his subordinates who commit such wrongful acts, provided that the plaintiff can show an affirmative causal link between the supervisor's inaction and her injury", and affirming that a "knew or should have known" or "constructive notice" standard applies); *Carter v. Morris*, 164 F.3d 215, 221 (4th Cir. 1999) ("A plaintiff must show actual or constructive knowledge of a risk of constitutional injury, deliberate indifference to that risk, and 'an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.'" (quoting *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994))); *Camilo-Robles v. Hoyos*, 151 F.3d 1, 7 (1st Cir. 1998) ("[S]upervisory liability does not require a showing that the supervisor had actual knowledge of the offending behavior; he 'may be liable for the foreseeable consequences of such conduct if he would have known of it but for his deliberate indifference or willful blindness.'" (citing *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 582 (1st Cir. 1994))); *Greason v. Kemp*, 891 F.2d 829, 836–37 (11th Cir. 1990) (following the Supreme Court's analysis in *City of Canton* and determining that supervisory official could be liable for deliberate indifference to an inmate's psychiatric needs if his failure to adequately train and supervise subordinates demonstrated deliberate indifference to the inmate's needs, if "a reasonable person in the supervisor's position would know that this failure to train and supervise reflected deliberate indifference," and if the conduct could be causally linked to the constitutional infringement).

²⁰⁰ See cases cited *supra* note 189 (adopting a subjective deliberate indifference test for supervisory liability post-*Iqbal*); *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011) (reasoning that just as a failure to train may amount to a policy of deliberate indifference that triggers municipal liability, so too a failure to supervise that is sufficiently inadequate that it amounts to deliberate indifference triggers supervisory liability); *Starr v. Baca*, 652 F.3d 1202, 1207–08 (9th Cir. 2011) ("The requisite causal connection can be established . . . by setting in motion a series of acts by others or by knowingly refusing to terminate a series of acts by others which the supervisor knew or reasonably should have known would cause others to inflict a constitutional injury."); *Alicea v. Wilcox*, No. 09-CV-12231-RGS, 2011 WL 1625032, at *1 (D. Mass. Apr. 28, 2011) (applying the First Circuit's constructive notice rule that "even if a supervisor lacks actual knowledge of censurable conduct, he may be liable for the foreseeable consequences of such conduct if he would have known of it but for his deliberate indifference or willful blindness, and if he had the power to alleviate it"); *Hill v. Robeson Cnty.*, 733 F. Supp. 2d 676, 688 (E.D.N.C. 2010) (acknowledging post-*Iqbal* that in the Fourth Circuit supervisory liability may be established if "the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury," and yet acted with deliberate indifference thereto).

²⁰¹ *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009).

²⁰² See *Owen v. City of Independence*, 445 U.S. 622, 650–57 (1980).

²⁰³ *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974).

from damage liability so long as “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”²⁰⁴ In addition, the constitutional right must have been “clearly established” in a particularized and “fact-specific” sense.²⁰⁵

In the context of supervisory liability, Professor Kinports has persuasively argued that concerns about overdeterrence and distraction of supervisory government officials are assuaged by mandating that the supervisor act with deliberate indifference to a subordinate’s violation of clearly established law.²⁰⁶ Further, under this standard, supervisors who ignore their subordinates’ violation of clearly established law will be “on notice” that they can be held personally accountable for their subordinates’ wrongdoing, but not for their “reasonable mistakes.”²⁰⁷

Absolute immunity raises more difficult questions. There may be instances where absolute immunity insulates government officials, who are accused of failing to perform certain supervisory functions, from damages. The Supreme Court has ruled that judges performing judicial functions, prosecutors performing prosecutorial functions, legislators performing legislative functions, or other executive officials performing those functions enjoy absolute immunity from damage liability under § 1983.²⁰⁸ In most instances, supervisors who fail to train, supervise, or discipline subordinates are acting in an administrative capacity, and thus their conduct would not trigger absolute immunity. For example, the Supreme Court ruled that absolute immunity does not extend to personnel decisions made by a judge because these are not judicial in nature, but instead are indistinguishable from similar actions taken by executive branch officials, who enjoy only qualified immunity.²⁰⁹

²⁰⁴ Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

²⁰⁵ Anderson v. Creighton, 483 U.S. 635, 640–41 (1987); see also BODENSTEINER & LEVINSON, *supra* note 122, § 2:8.

²⁰⁶ See Kit Kinports, *Iqbal and Supervisory Liability*, 114 PENN. ST. L. REV. 1291, 1300–08 (2010). Professor Kinports carefully deconstructs the argument that *Iqbal*’s treatment of supervisory liability is justified on grounds that it avoids a complicated qualified immunity inquiry. She rejects the approach followed by some courts that, in addition to proving the subordinate’s actions violated clearly established constitutional rights, plaintiffs must also prove that it was clearly established that the supervisor would be held liable for the constitutional violations. *Id.*

²⁰⁷ *Id.* at 1304–05. Professor Kinports states:

[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” 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.

Id. at 1305.

²⁰⁸ See BODENSTEINER & LEVINSON, *supra* note 122, §§ 2:2–2:5. In fact, legislators are even shielded from suits for injunctive relief. See *id.* § 2:3.

²⁰⁹ See Forrester v. White, 484 U.S. 219 (1988); see also Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011) (applying qualified, not absolute, immunity in analyzing whether the former U.S. Attorney General may be subject to suit for damages on a claim that he instructed his subordi-

Nonetheless, absolute immunity may be a barrier to some claims of supervisory liability. Two years ago, the Supreme Court held that a district attorney accused of failing to adequately train and supervise prosecutors as to their constitutional obligation to provide defense attorneys with impeachment evidence enjoys absolute immunity from damage liability in her individual capacity.²¹⁰ The Court explained that prosecutors have only qualified immunity when performing investigative or administrative tasks, but that conduct related to trial preparation, including training and supervising subordinates as to “how and when to make impeachment information available at trial,” is insulated by absolute immunity.²¹¹ The official is granted absolute immunity regardless of whether she participated in the unconstitutional conduct, or failed to stop it through better training or supervision.²¹²

Applied to the facts in *Connick*, had the District Attorney been sued for damages in his individual capacity for violating Thompson’s *Brady* rights, Supreme Court precedent would have provided him absolute immunity from supervisory liability. To avoid the immunity doctrine, Thompson sued Connick in his official capacity, seeking damages against the District Attorney’s Office.²¹³ *Connick*, however, involved a unique claim seeking damages against a prosecutor for performing *prosecutorial* functions. Absolute immunity will not shield prosecutors acting in an *investigatory* capacity. Like all other executive officials, they will be shielded only by the qualified immunity defense.²¹⁴

Thus, while supporting, where appropriate, an award of injunctive relief against government officials who fail to perform their duties,²¹⁵ this Article

nates to use the federal material witness statute as a pretext to detain terrorist suspects preventively).

²¹⁰ *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 859–65 (2009).

²¹¹ *Id.* at 860–63.

²¹² *Id.* at 862–63.

²¹³ *Connick v. Thompson*, 131 S. Ct. 1350, 1355 (2011). Although the Supreme Court does not reference this incongruity in its opinion, permitting a suit against Connick as a policymaker in his official capacity when he would be absolutely insulated from liability in his individual capacity might have given some Justices pause. However, earlier Supreme Court cases explain why entities cannot partake in the immunities afforded officials sued in their personal capacity under § 1983. In *Owen v. City of Independence*, 445 U.S. 622, 650–57 (1980), the Court examined the legislative history of § 1983 and concluded that no good faith defense existed at common law for government entities, and that policy considerations favored liability. The Court stressed that imposing liability would encourage more careful decision-making, and that government should err on the side of protecting rights. *Id.* at 651–52. Further, the Court relied in part on the protected status of officials to hold that government entities should be held liable so that victims of civil rights violations are not left without a remedy. *Id.* at 651. The majority in *Connick* ignored this concern, and, in fact, left Thompson without a remedy. See Vivian Berger, Opinion, *No Recompense for John Thompson’s Stolen Years*, NAT’L L.J., June 20, 2011.

²¹⁴ See BODENSTEINER & LEVINSON, *supra* note 122, § 2:5.

²¹⁵ *Argueta v. U.S. Immigration & Customs Enforcement*, 643 F.3d 60, 77 (3d Cir. 2011) (holding that, although *Iqbal* barred a damage action against high-ranking INS officials, plaintiffs were “still free to pursue their official capacity claims for injunctive relief against any further intimidation or unlawful entry into their home”); cf. *City of Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983) (holding that a plaintiff does not have standing to seek injunctive relief

incorporates in its proposal for supervisory liability the requirement that a subordinate's conduct must violate clearly established law for a damages award.²¹⁶ This means that supervisory liability under § 1983 would be imposed whenever (i) a supervisor's policy or custom of failing to train, supervise, or discipline subordinates reflects objective deliberate indifference to an underlying constitutional rights violation, (ii) the underlying constitutional rights violation was clearly established, and (iii) the supervisor's conduct is causally related to the constitutional infringement by the subordinate.

C. *Confining Connick's Rationale*

The Supreme Court in *Connick* further eroded the prophylactic and remedial goals of § 1983 by rejecting government liability for its officials' constitutional wrongdoing. The majority opinion in *Connick* reflects the view of some of the Justices that § 1983 liability should never be imposed based on a failure to train.²¹⁷ Justice Scalia and Justice Alito, in their concurring opinion, assert that where a subordinate engages in a bad-faith, knowing violation of the law, this "could not possibly be attributed to a lack of training."²¹⁸ At minimum, the majority opinion will likely make it more difficult to impose liability in "failure to" cases absent a pattern of violations.²¹⁹ Nonetheless, the Court leaves intact the basic principle that liability may be imposed for a failure to train, supervise, or discipline, and that, at

absent evidence that he himself would again be subjected to unconstitutional misconduct). *Lyons* has been used extensively in the federal courts of appeals to preclude injunctive relief. See BODENSTEINER & LEVINSON, *supra* note 122, § 2:31.

²¹⁶ This approach sufficiently insulates supervisors from liability because they will be protected unless they act with deliberate indifference to their subordinates' violation of clearly established rights and their failure to act is causally linked to the violation. On the other hand, it has been noted that courts generally are "less willing to grant qualified immunity to supervisory officials than they are to street-level officials." Teresa E. Ravenell, *Blame It on the Man: Theorizing the Relationship Between § 1983 Municipal Liability and the Qualified Immunity Defense*, 41 SETON HALL L. REV. 153, 196 (2011) (arguing that because qualified immunity is based on whether a reasonable official in the defendant's position would know the conduct was illegal, higher-ranking officials are less likely to enjoy qualified immunity since they should know more than subordinates and they are usually better equipped to determine the legality of their behavior, at least with regard to knowledge of the relevant legal rules). However, it is also more likely that, in the event damages are awarded, government entities will indemnify high-ranking officials who have greater political clout. *Id.* at 196–97.

²¹⁷ *City of Canton v. Harris*, 489 U.S. 378, 396 (1989) (O'Connor, J., concurring in part and dissenting in part).

²¹⁸ *Connick v. Thompson*, 131 S. Ct. 1350, 1369 (2011) (Scalia, J., concurring). For retired Justice Stevens's response to this statement, see Malloy, *supra* note 17 and accompanying text.

²¹⁹ See, e.g., *Conn v. City of Reno*, 572 F.3d 1047 (9th Cir. 2009), *opinion amended & superseded on denial of reh'g en banc*, 591 F.3d 1081 (9th Cir. 2010), *vacated*, *City of Reno v. Conn*, 131 S. Ct. 1812 (2011) (asking the Ninth Circuit to reconsider its denial of summary judgment to a city charged with failing to train police officers and failing to implement written policies on suicide prevention in a case involving the officers' failure to report to jail officials that the detainee had attempted to choke herself with a seatbelt in a paddy wagon and had threatened to kill herself before arriving at the jail).

least in “rare” circumstances, this can be established without showing a pattern of violations.²²⁰

Prior to *Connick*, many appellate courts imposed liability when police departments failed to offer minimal basic training despite an obvious need to do so. The courts recognized that the deliberate indifference standard could be met absent a pattern of unconstitutional behavior.²²¹ For example, a department’s failure to offer training as to how off-duty officers can avoid “friendly fire shootings,”²²² failure to train officers on how to respond to domestic violence situations,²²³ failure to train jail officers to recognize and appropriately handle detainees who suffer from obsessive compulsive disorder,²²⁴ and failure to train officers on the use of hobble restraints²²⁵ have all been held to state actionable claims without proof of a series of violations. Indeed, prior to *Connick*, the Sixth Circuit ruled that because “the police have a duty to preserve and turn over to the prosecutor evidence that police recognize as having exculpatory value or where the exculpatory value is apparent, [*Canton*] dictates that the City has a corresponding obligation to adequately train its officers in that regard.”²²⁶ None of these holdings should be affected by *Connick*’s narrow ruling.

Justice Thomas, writing for the Court in *Connick*, carefully distinguished the failure to train police officers from the failure to train prosecutors, who have already completed three years of intensive training in law school and passed a bar exam.²²⁷ Further, he stressed that most attorneys will have complied with mandatory post-law school continuing legal education.²²⁸ As Justice Thomas acknowledged, “[t]here is no reason to assume that police academy applicants are familiar with the constitutional constraints on the use of deadly force.”²²⁹ Thus, it should be easier to demonstrate the “patently obvious” need for some form of training outside the unique context of prosecutors trained in the law.²³⁰ Although the majority’s presumption about the legal training of attorneys may be disingenuous,²³¹ the case should not be expanded beyond this unique situation.

²²⁰ *Connick*, 131 S. Ct. at 1361.

²²¹ In *Canton*, Justice O’Connor cited the example of failing to train officers as to the constitutional limits on the use of deadly force, despite the obvious need to do so. *Canton*, 489 U.S. at 390 (O’Connor, J., concurring in part and dissenting in part).

²²² See *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 4, 27–29 (1st Cir. 2005).

²²³ See *Okin v. Vill. of Cornwall-On-Hudson Police Dep’t*, 577 F.3d 415, 440–41 (2d Cir. 2009).

²²⁴ See *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1318–20 (10th Cir. 2002).

²²⁵ See *Cruz v. City of Laramie*, 239 F.3d 1183, 1191 (10th Cir. 2001).

²²⁶ *Moldowan v. City of Warren*, 578 F.3d 351, 393 (6th Cir. 2009).

²²⁷ *Connick v. Thompson*, 131 S. Ct. 1350, 1361–62 (2011).

²²⁸ *Id.* at 1362.

²²⁹ *Id.* at 1361.

²³⁰ *Id.*

²³¹ *Id.* at 1379 (Ginsburg, J., dissenting) (“*Connick* acknowledged[] many of his prosecutors ‘were coming fresh out of law school,’ and . . . attorneys with little experience . . . advance[d] quickly to supervisory positions.”).

The appellate courts have long recognized that it is difficult, if not impossible, to meet § 1983's causation requirement absent a history of widespread abuse,²³² but the "obviousness" exception is critical to ensuring that supervisors be held accountable for their own wrongdoing. The Court's decision in *Connick* should be limited to its unique facts, and its narrow holding should be understood to leave intact the appellate court decisions that base supervisory liability on a failure to train where it is *obvious* that such is necessary to avoid constitutional rights violations.²³³

VI. CONCLUSION

Where supervisors are charged with maintaining a policy or custom of failing to train, supervise, or discipline subordinates, and this omission "causes" a violation of clearly established constitutional rights, liability under § 1983 should be imposed. If supervisors have actual knowledge that subordinates are committing constitutional rights violations, and yet they act with deliberate indifference to those violations, they are abusing their power contrary to the constitutional guarantee of substantive due process. Thus, supervisory liability should be imposed. Further, where supervisors should know, i.e., they have constructive notice, that constitutional rights violations are occurring or will occur, and they breach their obligation to ensure that subordinates do not violate clearly established rights, the deliberate indifference standard is met.

Imposing the state-of-mind requirement for the underlying constitutional rights violation makes no sense in light of § 1983's statutory text and the Court's interpretation of that text. The state-of-mind requirement for all "failure to" supervisory liability claims should be the same objective deliberate indifference standard that governs liability based on a policymaker's failure to act. Providing a uniform theory for supervisory liability in "failure to" cases will eliminate the uncertainty and confusion in the lower federal courts. More significantly, it will ensure that the supervisors of our jails and prisons and our public schools and universities cannot avoid liability by turning a blind eye to the constitutional wrongdoing of their subordinates. The drafters of § 1983 sought to "protect the people from unconstitutional action under color of law" both by deterring wrongdoing and by providing a remedy for those injured by abuse of power.²³⁴ Supervisory liability is not a "misnomer"—it is critical to realizing the purposes and goals of this historic provision.

²³² See, e.g., *Parrish v. Ball*, 594 F.3d 993, 1000–02 (8th Cir. 2010) (holding that supervisory liability may arise from a failure to supervise and train only if there is evidence of a pattern of unconstitutional acts committed by subordinates); *Bryant v. Jones*, 575 F.3d 1281, 1299–1300 (11th Cir. 2009) (acknowledging that normally supervisory liability can be established only where there is a history of widespread abuse, rather than "isolated occurrences").

²³³ See *supra* notes 221–26 and accompanying text.

²³⁴ See *supra* note 20 and accompanying text.

