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CONSTITUTIONAL TORTS, OVER-DETERRENCE AND
SUPERVISORY LIABILITY AFTER *IQBAL*

by
*Sheldon Nahmod**

In Ashcroft v. Iqbal, the Court conditioned supervisory liability under § 1983 and Bivens on direct constitutional violations by supervisors. This decision conflicts with the causation approach, under which supervisory liability could be based on the causal link between the supervisor's knowledge of unconstitutional conduct by the supervisor's subordinates and the plaintiff's constitutional injuries—which was conceded by the defendants in Iqbal and was the prevailing standard in the circuits prior to the decision in that case. In this Article, I explore the Court's growing concern with over-deterrence of government officials in § 1983 and Bivens cases, and describe how it led to this substantive change in the law of supervisory liability. I discuss the standard in the circuits prior to Iqbal and explain why the constitutional approach adopted in Iqbal is the better one based on the language and legislative history of § 1983, as well as relevant policy considerations. I also address the deficiencies of the Iqbal decision and argue that the constitutional approach may not improve the over-deterrence problem. Finally, I analyze the inconsistencies between Iqbal and other § 1983 cases, but conclude that, in spite of its flaws, Iqbal got supervisory liability right.

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I. INTRODUCTION

*Ashcroft v. Iqbal*¹ is obviously an extremely important federal pleading decision. But it is significant for another, perhaps less obvious, reason: the Court’s conditioning of supervisory liability under both § 1983² and *Bivens*³—*Iqbal* involved *Bivens*-type claims—on constitutional violations by supervisors themselves. This substantive limitation, which I here call the “constitutional approach,”⁴ was seemingly the product of little or no legal analysis and was, moreover, created by the Court without briefing and argument. Also, it flew in the face of a concession on the record by the defendants in *Iqbal*—former U.S. Attorney General John Ashcroft and

¹ *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

² 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 Congress 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). Section 1983 is the subject of my three-volume treatise. SHELDON H. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983* (4th ed. 2009) [hereinafter *CIVIL LIBERTIES LITIGATION*].

³ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (Court held that a Fourth Amendment damages action was available against federal law enforcement officers).

⁴ In an early article on this topic, I called this approach the “Fourteenth Amendment approach.” Sheldon H. Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 IOWA L. REV. 1, 15 n.93 (1982) [hereinafter *Nahmod, Constitutional Accountability*]. I use the same terminology in *Civil Rights and Civil Liberties Litigation*. 1 *CIVIL LIBERTIES LITIGATION*, *supra* note 2, § 3:97. But here I call it the “constitutional approach” because it covers *Bivens* actions as well as § 1983, and is therefore broader than the Fourteenth Amendment standing alone.

F.B.I. Director Robert Mueller—that supervisory liability could be based on the causal link between their actual knowledge of, and deliberate indifference to, the unconstitutional conduct of their subordinates and the plaintiff's constitutional injuries.⁵ I call this the “causation approach,”⁶ the prevailing standard in the circuits for supervisory liability before *Iqbal* was handed down.⁷

The precise substantive issue decided by the Court in *Iqbal* can be illustrated by the following hypothetical. Suppose that employees in a state or local government licensing office regularly discriminate on racial grounds in the awarding of licenses. Suppose further that their supervisors are actually aware of this racial discrimination but are deliberately indifferent to it and therefore do little or nothing to stop it. It is clear that the employees have violated equal protection and are therefore liable under § 1983, but what of the supervisors?

According to the Court in *Iqbal*, the supervisors can only be liable under § 1983 if it is proved that they themselves had the purposeful discriminatory intent required for an equal protection violation.⁸ Their actual knowledge and deliberate indifference may be relevant to an evidentiary finding of purposeful discrimination, but, if purposeful discrimination is not proved, then the supervisors have not themselves violated equal protection and are therefore not liable under § 1983

⁵ The lack of briefing and argument, together with defendants' concession, is noted and discussed by Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, in his dissent. *Iqbal*, 129 S. Ct. at 1956–57. I contend later that the Court nevertheless got it right when it adopted the constitutional approach. See discussion *infra* Part IV.

⁶ I call this the “causation approach” because it is grounded on the causal link between a supervisory defendant's deliberate indifference—a state of mind not based on any particular constitutional provision—and the subordinate's violation of the plaintiff's constitutional rights. In *Constitutional Accountability*, I similarly called it the “causation approach.” Nahmod, *Constitutional Accountability*, *supra* note 4, at 15.

However, in §§ 3:98 and 6:50 of *Civil Rights and Civil Liberties Litigation*, I called it, perhaps misleadingly, the “negligence/causation approach.” 1 & 2 CIVIL LIBERTIES LITIGATION, *supra* note 2, §§ 3:98, 6:50. This latter terminology was based on the concurring opinion of Justice Brennan, joined by Justices Marshall and Blackmun, in *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), a local government failure to train decision handed down before *City of Canton v. Harris*, 489 U.S. 378 (1989), discussed below. In *Tuttle*, Justice Brennan maintained that there could be local government liability for failure to train for “a policy or custom that would foreseeably and avoidably cause an individual to be subjected to deprivation of a constitutional right.” *Tuttle*, 471 U.S. at 832. This is classic negligence language. Subsequently, in *Harris*, the Court as a matter of § 1983 statutory interpretation rejected negligence as the state of mind for local government failure to train liability and instead settled on deliberate indifference. *Harris*, 489 U.S. at 388. See *infra* text accompanying notes 14–16.

⁷ It must be emphasized that the constitutional and causation approaches are matters of statutory interpretation with respect to § 1983, and are matters of federal common law with respect to *Bivens*.

⁸ *Iqbal*, 129 S. Ct. at 1949.

under the constitutional approach.⁹ This departed from the causation approach consensus in the circuits that deliberate indifference together with actual knowledge was enough for supervisory liability, assuming that the subordinates violated the Constitution.¹⁰ In a very real sense, the theoretical difference between the constitutional approach and the causation approach is all about the source of the fault required for supervisory liability: is that source *exclusively* the relevant constitutional provision or is it *also* § 1983 itself?

I propose to situate *Iqbal* in the context of § 1983 and *Bivens* jurisprudence and to describe how the Court's increasing concern with over-deterrence¹¹ of government officials in § 1983 and *Bivens* litigation has led in the past several decades to major pro-defendant changes in such litigation. This concern has migrated from its traditional location, the affirmative defense of individual immunities (absolute and qualified immunity),¹² through the constitutional merits, and now to pleading itself. Furthermore, *Iqbal's* adoption of the constitutional approach suggests that the same concern with over-deterrence is responsible for this substantive change in the law of supervisory liability under § 1983 and *Bivens*.¹³

The Court's constitutional approach to supervisory liability in *Iqbal* is one that I initially advocated over twenty-five years ago for both supervisory liability and local government liability.¹⁴ This was seven years before the Court handed down *City of Canton v. Harris*, which announced a deliberate indifference standard for local government liability for failure to train as a matter of § 1983 interpretation.¹⁵ *Harris* explicitly adopted the causation approach, contrary to my earlier position.¹⁶ Prompted by *Iqbal*, I revisit that position here but again conclude that the

⁹ *Id.*

¹⁰ See *infra* Part III.B.

¹¹ By "over-deterrence" I mean the more than optimal deterrence of, and interference with, the independent decision-making of state and local government officials as well as federal officials. Where there is optimal deterrence, only unconstitutional conduct is deterred; where there is over-deterrence, constitutional conduct is deterred as well. For a good example of the application of economic analysis to individual immunities, see Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1118 (1981). See generally Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000) (criticized in Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903, 904 (2001)).

¹² See generally 2 CIVIL LIBERTIES LITIGATION, *supra* note 2, chs. 7–8 (on absolute immunity and qualified immunity, respectively).

¹³ As discussed later, this concern will not invariably be advanced under the constitutional approach. See *infra* Part IV.B.

¹⁴ Nahmod, *Constitutional Accountability*, *supra* note 4, at 21–32.

¹⁵ *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

¹⁶ After *Harris* was handed down, I acknowledged in earlier editions of my treatise that it was contrary to the constitutional approach I advocated. See 1 CIVIL LIBERTIES LITIGATION, *supra* note 2, §§ 3:99, 6:50 (on supervisory liability and local government liability, respectively).

constitutional approach to supervisory liability remains the better one. For all its process flaws, *Iqbal* got supervisory liability right.

This Article is divided into the following parts. In Part II, I survey relevant aspects of the law of § 1983 and *Bivens*. Painting with a broad brush and for the most part descriptively, I maintain that the Court's concern with over-deterrence has increasingly dominated constitutional torts. In Part III, I address the relevance of that concern for supervisory liability, set out what the Court said about supervisory liability in *Iqbal*, and very briefly summarize the pre-*Iqbal* circuit consensus on supervisory liability. In Part IV, I delve more deeply into the nature of supervisory liability and conclude that the Court, although without any real analysis, reached the correct result in *Iqbal*. Section 1983's legislative history, its language, and, especially, policy considerations all cut in favor of the constitutional approach under which it is the relevant constitutional provision that supplies the requisite state of mind, or fault. However, to the extent that *Iqbal's* adoption of the constitutional approach to supervisory liability was motivated by a concern with over-deterrence, I argue that this concern will not necessarily be advanced. It all depends on the particular constitutional violation.

Finally, I address the glaring inconsistency between *Iqbal's* constitutional approach and *Harris's* deliberate indifference standard for § 1983 local government liability for failure to train.¹⁷ The Court in *Harris* explicitly and incorrectly grounded this standard on the causation approach under which the requisite state of mind, or fault, is supplied by § 1983.¹⁸ Local government liability under § 1983 must, of course, be based on an official policy or custom which, when implemented by local government officials or employees, causes a constitutional deprivation.¹⁹ But the official policy or custom requirement is really all about constitutional accountability and should instead have been grounded on the constitutional approach.²⁰

¹⁷ The Court may one day have to confront this inconsistency. See discussion *infra* Part IV.D.

¹⁸ *Harris*, 489 U.S. at 388.

¹⁹ *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91, 694 (1978) (according to the Court, what is required for § 1983 local government liability is that the “execution [by local government officials] of a government’s policy or custom, whether made by its law makers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury”).

²⁰ See Nahmod, *Constitutional Accountability*, *supra* note 4, at 24–29. See also 2 CIVIL LIBERTIES LITIGATION, *supra* note 2, § 6:50.

II. CONSTITUTIONAL TORTS AND AVOIDING OVER-DETERRENCE

A. *Avoiding Over-Deterrence Has Increasingly Become a Major Factor in § 1983 and Bivens Jurisprudence*

Constitutional tort litigation has, from the beginning, been animated by various factors.²¹ From a plaintiff's perspective, compensation and deterrence factors are inherent in the primary purpose of § 1983 as a matter of statutory interpretation: the enforcement of the Fourteenth Amendment through damages liability.²² These are also inherent in the birth of *Bivens* claims against federal officials.²³ So, too, is the punitive factor in the § 1983 and *Bivens* settings, at least as to individual liability.²⁴ Structural considerations are similarly implicated in § 1983 and *Bivens* litigation: federalism in the one case and separation of powers in the other. Federalism is implicated in § 1983 litigation because it is federal courts that, through damages liability, enforce this federal legislation and the Fourteenth Amendment against state and local government officials and local governments (but not states), thereby intervening in, second-guessing, and affecting their decision-making processes. Separation of powers is implicated in *Bivens* litigation because federal courts, in the absence of legislation and through their own creation of *Bivens* damages

²¹ See generally 1 CIVIL LIBERTIES LITIGATION, *supra* note 2, §§ 1:5–1:9.

²² Section 1983 began as § 1 of the Ku Klux Klan Act of 1871, enacted by Congress pursuant to Section 5 of the Fourteenth Amendment. Its purpose appears in the title: “An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.” Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (2006)).

The Supreme Court explained in *Mitchum v. Foster*: “The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law, ‘whether that action be executive, legislative, or judicial.’” *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880)).

²³ As the Court stated in *Bivens*: “That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty. Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But ‘it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.’ The present case involves no special factors counseling hesitation in the absence of affirmative action by Congress.” *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395–96 (1971) (citations omitted) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

²⁴ See *Smith v. Wade*, 461 U.S. 30, 48–49 (1983) (setting out a reckless or callous indifference standard for punitive damages liability; malice or evil intent is not required). However, local governments are not liable for punitive damages. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981). See generally 1 CIVIL LIBERTIES LITIGATION, *supra* note 2, §§ 4:39–4:63 (on § 1983 punitive damages).

remedies, are enforcing the constitution against federal officials (typically executive officials).²⁵

From a defendant's perspective, two additional factors—conserving federal judicial resources and avoiding trivializing constitutional rights—emerge particularly in connection with the threshold inquiry into whether a § 1983 or *Bivens* plaintiff has even stated a cause of action. This is especially apparent in the substantive due process and Eighth Amendment areas where the Court has used state of mind requirements to perform an important gatekeeper function of keeping what it considers to be trivial constitutional claims out of court.²⁶ To the extent that this also means that § 1983 and *Bivens* should not become fonts of tort law, federalism and separation of powers are implicated here as well.²⁷

Of particular relevance for present purposes is avoiding over-deterrence of individuals. This factor made an early § 1983 appearance in *Tenney v. Brandhove*,²⁸ an absolute legislative immunity decision handed down a decade before the seminal decision in *Monroe v. Pape*.²⁹ Avoiding over-deterrence in the absolute immunity setting, meaning minimizing not only the costs of liability but the costs of defending (including discovery), has also become prominent in the qualified immunity setting, particularly since 1982 when the Court handed down *Harlow v. Fitzgerald* and significantly changed qualified immunity jurisprudence.³⁰

²⁵ As Justice Harlan, concurring in *Bivens*, observed: “the question is whether the power to authorize damages as a judicial remedy for the vindication of a federal constitutional right is placed by the Constitution itself exclusively in Congress’ hands.” *Bivens*, 403 U.S. at 400–02.

²⁶ For example, in *County of Sacramento v. Lewis*, the Court ratcheted up the state of mind required for law enforcement officer liability in high-speed pursuit cases from deliberate indifference to purpose to cause harm. 523 U.S. 833, 836 (1998). The Court did the same in the Eighth Amendment area when it ratcheted up the state of mind required for liability of corrections officials in prison security cases from deliberate indifference to malicious and sadistic intent to harm. *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986). It should be noted that the Court was also concerned with over-deterrence in these cases. See discussion *infra* at Part II.C.

²⁷ Ensuring that § 1983 does not become a “font of tort law” is a familiar trope. See, e.g., *Paul v. Davis*, 424 U.S. 693, 701 (1976).

²⁸ 341 U.S. 367 (1951) (discussed in 2 CIVIL LIBERTIES LITIGATION, *supra* note 2, § 7:3). *Tenney* interpreted § 1983 against a background of common law immunity. *Id.* at 372, 376.

²⁹ 365 U.S. 167 (1961).

³⁰ 457 U.S. 800 (1982). *Harlow*, a *Bivens* case, eliminated the subjective part of the qualified immunity test and set out an objective unreasonableness test, so as to eliminate what the Court called “frivolous” or “insubstantial” claims and to minimize over-deterrence. *Id.* at 808. See 2 CIVIL LIBERTIES LITIGATION, *supra* note 2, §§ 8:4–8:5 (for an analysis of *Harlow*).

B. *Individual Immunities: The Traditional Location for Avoiding Over-Deterrence*

There are three categories of privileged § 1983 and *Bivens* individual defendants who are, by virtue of both common law immunity rules and policy considerations, absolutely immune from damages liability: legislators for the performance of legislative functions, judges for the performance of judicial functions, and prosecutors for the performance of advocative functions.³¹ When an individual defendant successfully asserts absolute immunity, he or she is out of the case at that point even if all of the allegations in the complaint are taken as true (that the defendant violated the plaintiff's constitutional rights and caused harm). The primary policy concern is that the functions performed are so very important that we do not want this defendant—often high profile—to be worried about the possibility of being sued rather than focusing on making the difficult decisions that he or she is supposed to make. In other words, the primary policy concern is the avoidance of over-deterrence of the individual defendant. This goes well beyond a concern with the chilling effect of *potential liability* on individual decision-making (the costs of liability): it extends to the chilling effect of the very *possibility of being sued* on individual decision-making (the costs of defending) and, as such, is a quite powerful affirmative defense. To repeat, absolute immunity protects the individual even though all would agree that the plaintiff's constitutional rights were violated.³²

This concern with the chilling effect that the possibility of being sued has on decision-making—and thus with the costs of defending (including discovery)—now drives not only absolute immunity but qualified immunity as well. Originally, qualified immunity had both an objective and subjective part and protected solely against liability.³³ It was, in most respects, a conventional affirmative defense. However, beginning

³¹ See generally 2 CIVIL LIBERTIES LITIGATION, *supra* note 2, §§ 7:11–7:41, 7:42–7:62 (on judicial immunity and prosecutorial immunity, respectively). The President of the United States is the only executive official who is absolutely immune from damages liability for his unconstitutional official conduct. *Nixon v. Fitzgerald*, 457 U.S. 731, 757 (1982).

³² Absolute immunity, when applied to a defendant's unconstitutional conduct, means that the plaintiff has to bear the costs of his or her constitutional injury. I have argued elsewhere that this result is often inconsistent with corrective justice, a concept that is Aristotelian in origin and means the remedying of harm caused to one person by the wrongful conduct of another. Corrective justice also has Kantian aspects insofar as it is based on the equal dignity of persons. See Sheldon Nahmod, *From the Courtroom to the Street: Court Orders and Section 1983*, 29 HASTINGS CONST. L.Q. 613, 613, 615–16, 638–40 (2002) [hereinafter Nahmod, *Courtroom to Street*]. See also Dauenhauer & Wells, *supra* note 11; Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992); Richard W. Wright, *The Principles of Justice*, 75 NOTRE DAME L. REV. 1859 (2000). See generally PHILOSOPHICAL FOUNDATIONS OF TORT LAW (David G. Owen ed., 1995) (on corrective justice).

³³ See, e.g., *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

in 1982 with *Harlow v. Fitzgerald*,³⁴ continuing through *Mitchell v. Forsyth*³⁵ in 1985, and culminating in *Pearson v. Callahan*³⁶ in 2009, the Court gradually transformed qualified immunity into the functional equivalent of absolute immunity. *Harlow* eliminated the subjective part of qualified immunity and instructed courts to decide qualified immunity (whether raised by motion to dismiss or for summary judgment) before discovery.³⁷ Thereafter, the Court modified the final judgment requirement for appeals and, in *Mitchell*, allowed interlocutory appeals from district court denials of qualified immunity defense motions for summary judgment, at least on issues of law.³⁸ Finally, the Court in *Pearson* retreated from its prior insistence that district courts deciding qualified immunity motions must always rule on the constitutional merits first.³⁹ The Court restored the flexibility of district courts to decide cases for defendants on qualified immunity grounds, if they wished to do so.

In these qualified immunity cases and others, the Court made clear that it was particularly concerned with the costs of defending against frivolous or insubstantial § 1983 and *Bivens* claims, and with weeding out such claims before discovery and trial.⁴⁰ And whatever one thinks of this transformation of qualified immunity into the functional equivalent of absolute immunity, it must be acknowledged that the traditional location of a concern with avoiding over-deterrence is indeed in the individual immunity-affirmative defense setting. This is where the interest of society in independent decision-making by government officials—an instrumental consideration analytically distinct from the constitutional merits—has been taken account of in § 1983 and *Bivens* jurisprudence. As it turns out, though, the concern with avoiding over-deterrence under

³⁴ 457 U.S. 800 (1982).

³⁵ 472 U.S. 511 (1985).

³⁶ 129 S. Ct. 808 (2009).

³⁷ *Harlow*, 457 U.S. at 808. *Harlow* was slightly modified with respect to discovery in *Anderson v. Creighton*. 483 U.S. 635, 646 (1987) (discussed at 2 CIVIL LIBERTIES LITIGATION, *supra* note 2, § 8:12).

³⁸ *Mitchell*, 472 U.S. at 527.

³⁹ *Pearson*, 129 S. Ct. at 820–22. The Court had so insisted in cases such as *Saucier v. Katz*, 533 U.S. 194 (2001).

⁴⁰ The Court explained in *Harlow* as follows: “We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Reliance on the objective reasonableness of an official’s conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.” *Harlow*, 457 U.S. at 818 (citations omitted).

In *Constitutional Damages and Corrective Justice: A Different View*, I argued that *Harlow*’s shift to objective reasonableness was based almost exclusively on instrumental considerations and that § 1983 liability should be grounded on the wrongdoing or fault inherent in the underlying constitutional violation. Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997, 1004–06 (1990) [hereinafter Nahmod, *Constitutional Damages*].

§ 1983 and *Bivens* has migrated to constitutional analysis, particularly where § 1983 and *Bivens* damages liability is implicated, and now, in *Iqbal*, to pleading.

C. *The Constitutional Merits*

It has been clear for some time now that the possibility of damages liability under § 1983 and *Bivens*, and its feared impact on the independence of public official decision-making, have affected the scope of certain constitutional provisions. A good early example is *Parratt v. Taylor*, a § 1983 prisoner case seeking damages for lost property, which held, as a matter of procedural due process, that where the challenged negligent conduct is random and unauthorized, there is no procedural due process violation so long as there is an adequate state post-deprivation remedy.⁴¹ *Parratt* was later overruled in part by *Daniels v. Williams*, another prisoner case—this one involving personal injury—which held that negligence was not enough for a “deprivation” of liberty and ratcheted up the state of mind required for *all* due process violations to “abuse of [government] power.”⁴² Both *Parratt* and *Daniels* modified due process law for *everyone*, but they were motivated in large measure by the Court’s concern that prison officials would otherwise be over-deterred by excessive § 1983 prisoner litigation.⁴³

The Court has even more explicitly manipulated state of mind requirements out of a concern with over-deterrence in § 1983 substantive due process high-speed police chase cases. Thus, the Court held in *County of Sacramento v. Lewis* that the state of mind required for a substantive due process violation is not deliberate indifference but rather “purpose to cause harm.”⁴⁴ In this setting, where police officers do not have time to deliberate, only the purpose to do harm constitutes conscience-shocking conduct, according to the Court.⁴⁵ Similarly, in the § 1983 Eighth Amendment setting the Court declared in *Whitley v. Albers* that while the typical state of mind requirement for an Eighth Amendment violation by prison officials in connection with conditions of confinement is deliberate indifference,⁴⁶ in prison security cases the state

⁴¹ 451 U.S. 527, 543 (1981), *overruled in part* by *Daniels v. Williams*, 474 U.S. 327, 330–31 (1986). *Cf.* *Paul v. Davis*, 424 U.S. 693, 701 (1976) (Court, concerned with making § 1983 a “font of tort law,” held that an individual’s interest in reputation, standing alone, is not a liberty interest for procedural due process purposes).

⁴² *Daniels*, 474 U.S. at 332.

⁴³ That *Parratt* limited procedural due process protection for everyone was troublesome if the Court’s motivation was to minimize the over-deterrence of prison officials. Note that the latter goal is now implemented by the Prison Litigation Reform Act of 1995, which significantly limits § 1983 claims by prisoners. Pub. L. 104-134, 110 Stat. 1321-66 (1996) (codified in scattered sections of 11, 18, 28 & 42 U.S.C.)

⁴⁴ 523 U.S. 833, 836 (1998) (discussed in 1 CIVIL LIBERTIES LITIGATION, *supra* note 2, § 3:52).

⁴⁵ 523 U.S. at 853.

⁴⁶ 475 U.S. 312, 327 (1986).

of mind required is “unnecessary and wanton infliction of pain.”⁴⁷ The Court explained that in such cases prison officials needed to act quickly and that they needed a margin for error in order to promote independent decision-making.⁴⁸

But two recent § 1983 public employment cases are even more striking than the preceding examples. The Court, concerned with over-deterrence, has used a categorical approach to exclude altogether the applicability of the relevant constitutional provisions, in one case the First Amendment and in the other the Equal Protection Clause. In *Garcetti v. Ceballos*, the Court revisited a thirty-year old precedent and ruled that the First Amendment is inapplicable to employer discipline directed at public employees for speech arising from their employment duties.⁴⁹ And in *Engquist v. Oregon Department of Agriculture*, the Court unpersuasively distinguished a prior decision holding that class-of-one equal protection claims are actionable, and held that the Equal Protection Clause simply does not apply where a public employee, attempting to make such a class-of-one claim, alleges that an employer discriminated against him or her arbitrarily or capriciously.⁵⁰ In both cases, the Court used a categorical balancing approach and gave great weight to what it considered the adverse impact of judicial intervention, potential liability, and the costs of defending on independent decision-making in public employment.⁵¹

D. Pleading and *Iqbal*

Against this background it should not be surprising that *Iqbal* extended the new “plausibility” pleading standard of *Bell Atlantic Corp. v.*

⁴⁷ *Id.*; see also *Estelle v. Gamble*, 429 U.S. 97 (1976). Thereafter, *Farmer v. Brennan* declared that deliberate indifference in the Eighth Amendment setting means subjective criminal recklessness. 511 U.S. 825, 839–40 (1994) (discussed in 1 CIVIL LIBERTIES LITIGATION, *supra* note 2, § 3:32).

⁴⁸ *Whitley*, 475 U.S. at 320.

⁴⁹ 547 U.S. 410, 426 (2006). For analysis, see Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561 (2008).

⁵⁰ 128 S. Ct. 2146, 2153–55 (2008) (this case distinguished *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam)).

⁵¹ *Garcetti*, 547 U.S. at 422–23; *Engquist*, 128 S. Ct. at 2154. The deep question of whether, and under what circumstances, it is appropriate to take over-deterrence and other instrumental factors into account in constitutional interpretation is a complex one, well beyond the scope of this Article. I have attempted to be descriptive about the extent to which the Court has done so in the § 1983 and *Bivens* settings. Richard Fallon has argued that it is entirely appropriate to take such considerations into account for the purpose of implementing the Constitution and that the Court has frequently done so. See RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001).

I have some doubts about the soundness of emphasizing over-deterrence in connection with § 1983 and *Bivens* causes of action against individuals because, among other things, it amounts to double-counting: once for the constitutional merits and again for the individual immunity inquiry.

*Twombly*⁵² beyond antitrust to include § 1983 and *Bivens* claims. Even though *Iqbal* applies to all federal court pleading, I want to note in particular the Court's emphasis in *Iqbal* on the heavy burden of discovery on defendants in constitutional tort litigation and its adverse effect on independent decision-making by government officials.⁵³ Recall that this burden has traditionally played (and still plays) a prominent role in a quite different setting—the affirmative defenses of absolute and qualified immunity. In marked contrast, the Court in *Iqbal* emphasized this concern with over-deterrence in order to justify the creation of what is effectively a heightened pleading requirement in § 1983 and *Bivens* cases (although the Court refused to call it that).⁵⁴ In my view, it is likely that *Iqbal*'s “plausibility” pleading standard will be applied with extra bite in constitutional tort cases against individual defendants. Indeed, that is precisely the message that *Iqbal* was intended to send to district courts and the circuits. This is so even if it turns out that *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, which rejected a heightened pleading requirement for § 1983 claims against local governments (which are not protected by qualified immunity), remains good law.⁵⁵

Iqbal, of course, did much more than this to § 1983 and *Bivens* claims. It also declared that supervisory liability could not be based on supervisors' actual knowledge of unconstitutional conduct and deliberate indifference to it.⁵⁶ Rather, the Court insisted, as a matter of statutory interpretation under § 1983, and of federal common law under *Bivens*, that a supervisor himself or herself must violate a plaintiff's constitutional rights in order to be liable for damages.⁵⁷ It did so primarily because of its concern with over-deterrence and the costs of defense, including the burden of discovery.⁵⁸

⁵² 127 S. Ct. 1955, 1965–66 (2007).

⁵³ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

⁵⁴ *Id.* at 1953–54.

⁵⁵ *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166, 168 (1993) (discussed at 2 CIVIL LIBERTIES LITIGATION, *supra* note 2, § 6:15).

⁵⁶ *Iqbal*, 129 S. Ct. at 1948.

⁵⁷ *Id.* at 1949.

⁵⁸ “If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed.” *Id.* at 1953. While this statement was made in connection with pleading, concern with the over-deterrence of “high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties” permeates the entire decision. *Id.* at 1954.

III. *IQBAL*, OVER-DETERRENCE AND SUPERVISORY LIABILITYA. *The Iqbal Decision*

Once the Court in *Iqbal* finished addressing the pleading issue in the abstract, it turned to the precise case before it. The plaintiff, alleging purposeful discrimination on the basis of race, religion, and ethnic origin in connection with the conditions of his confinement, claimed that defendants, Ashcroft and Mueller, actually knew that their subordinates engaged in such discrimination and were deliberately indifferent to it.⁵⁹ Finding that the plaintiff's allegations of such actual knowledge and deliberate indifference were insufficient for supervisory liability under *Bivens*, the Court simply asserted that inasmuch as respondeat superior liability was not permitted under either § 1983 or *Bivens*—a recurring theme in § 1983 jurisprudence—supervisory liability required more than these allegations.⁶⁰ “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.”⁶¹ In short, applying the constitutional approach, the Court declared that a plaintiff claiming supervisory liability had to allege and prove that the defendants personally violated the plaintiff's constitutional rights. “Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.”⁶²

Consequently, because the constitutional violations asserted against Ashcroft and Mueller in *Iqbal* required *their own* purposeful discrimination based on race, religion, and national origin, the plaintiff's pleadings alleging only actual knowledge and deliberate indifference on their part were insufficient to withstand a motion to dismiss. According to the Court, which thereby rejected the causation approach, supervisory liability was “a misnomer”: what was crucial for supervisory liability was the requisite state of mind for the underlying constitutional violation, namely, invidious purposeful discrimination by the two supervisors.⁶³ As justification for its determination that purposeful discrimination was required for supervisory liability and that plaintiff's allegations were insufficient, the Court once more emphasized the costs of discovery and

⁵⁹ *Id.* at 1944.

⁶⁰ *Id.* at 1948. The Court's continuing rejection of § 1983 respondeat superior liability stems from the seminal decision of *Monell v. Dep't of Social Services*, which adopted an official policy or custom requirement for local government liability. 436 U.S. 658, 694 (1978). For criticism of the *Monell* Court's reliance on § 1983's “subjects, or causes to be subjected” language for its rejection of respondeat superior liability for local governments, see 2 CIVIL LIBERTIES LITIGATION, *supra* note 2, §§ 6:5–6:6. As observed there, this is a question of Congressional intent, not Congressional power under Section 5 of the Fourteenth Amendment. *Id.* § 6:6 & n.9.

⁶¹ *Iqbal*, 129 S. Ct. at 1948.

⁶² *Id.* at 1949.

⁶³ *Id.*

its adverse impact on the decision-making of high-ranking executive officials.⁶⁴ It also rejected the case-management approach that had been suggested by the Second Circuit in *Iqbal* as a method of addressing the concern with over-deterrence.⁶⁵

Justice Souter, the author of *Twombly*, dissented at some length, joined by Justices Stevens, Ginsburg and Breyer.⁶⁶ He criticized the majority for the way it applied *Twombly*.⁶⁷ But he appeared to be equally distressed by the Court's approach to supervisory liability.⁶⁸ Indeed, he contended that the Court had effectively eliminated supervisory liability under *Bivens*: "Lest there be any mistake, in these words ['the term "supervisory liability" is a misnomer'] the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely."⁶⁹ He complained that the defendants had conceded on the record that supervisory liability could be based on actual knowledge of unconstitutional conduct and deliberate indifference to that conduct.⁷⁰ What the Court did was thus unfair to the plaintiff because of the absence of any opportunity to address the supervisory liability issue. In addition, he maintained that there was a plausible middle position between respondeat superior liability and the constitutional approach, as demonstrated by the consensus in the circuits.⁷¹ The Court had not seriously considered this possibility because it did not have the benefit of briefing and argument on the proper standard of supervisory liability.⁷²

Justice Souter went on to suggest that the Court would have reached the same result—that plaintiff did not state a *Bivens* supervisory liability claim against the defendants—even under an actual knowledge and deliberate indifference standard for supervisory liability.⁷³ In all likelihood, he was attempting to render as dicta the Court's discussion and adoption of the constitutional approach to supervisory liability.

B. Pre-Iqbal Law in the Circuits

Whatever one thinks should be the proper standard for supervisory liability, it is surprising from a process perspective that the Court announced that it was adopting the constitutional approach to

⁶⁴ *Id.* at 1953.

⁶⁵ *Id.*

⁶⁶ *Id.* at 1954–61 (Souter, J., dissenting).

⁶⁷ *Id.* at 1955.

⁶⁸ *Id.* at 1955–57.

⁶⁹ *Id.* at 1957. Interestingly, Justice Souter's discussion implied that the Court's adoption of the constitutional approach to supervisory liability did not necessarily apply to § 1983, despite the fact that the Court repeatedly discussed § 1983 and *Bivens* together.

⁷⁰ *Id.* at 1956.

⁷¹ This middle position is the causation approach under which supervisory liability can be based on actual knowledge and deliberate indifference. *Id.* at 1958.

⁷² *Id.* at 1957.

⁷³ *Id.* at 1958.

supervisory liability under circumstances of no briefing and no argument. This is particularly troubling because the circuits for the most part adopted the causation approach. At the very least, the Court should have explained itself much more than it did.

As Justice Souter indicated in his dissent, the circuits staked out a position on supervisory liability somewhere between respondeat superior liability and *Iqbal*'s constitutional approach. Most, perhaps all, of the circuits agreed that actual knowledge of unconstitutional conduct by subordinates and deliberate indifference to it were sufficient for supervisory liability.⁷⁴ Some went further and appeared to allow supervisory liability for gross negligence even in the absence of actual knowledge.⁷⁵ But those decisions allowing supervisory liability for gross negligence are questionable even under the causation approach. They are inconsistent with the Court's local government liability for failure to train decision in *City of Canton v. Harris*, which set out a deliberate indifference standard for local government failure to train liability as a statutory matter.⁷⁶ As the Third Circuit reasoned two decades before *Iqbal*, it was confident that after *Harris* "the standard of individual liability for supervisory public officials will be found to be no less stringent than the standard of liability for the public entities that they serve."⁷⁷ In both

⁷⁴ *E.g.*, *Blyden v. Mancusi*, 186 F.3d 252, 262 (2d Cir. 1999); *Johnson v. Martin*, 195 F.3d 1208, 1219–20 (10th Cir. 1999); *Boyd v. Knox*, 47 F.3d 966, 968 (8th Cir. 1995); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 453 (5th Cir. 1994); *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994); *Manarite v. City of Springfield*, 957 F.2d 953, 957 (1st Cir. 1992); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1479–80 (3d Cir. 1990). *See generally* 1 CIVIL LIBERTIES LITIGATION, *supra* note 2, §§ 3:100–3:103 (listing a collection of cases from the various circuits regarding supervisory liability).

⁷⁵ This was noted by Justice Souter in his dissent, *Iqbal*, 129 S. Ct. at 1958. In *Iqbal*, the plaintiff pleaded at least actual knowledge on the part of the defendants who allegedly "knew of, condoned, and willfully and maliciously agreed to subject plaintiff to these conditions of confinement as a matter of policy, solely on account of [his] religion, race and/or national origin for no legitimate penological interest." *Iqbal v. Hasty*, 490 F.3d 143, 175 (2d Cir. 2007).

However, the Second Circuit had previously declared that gross negligence was one of five ways of showing supervisory liability. *Hernandez v. Keane*, 341 F.3d 137 (2d Cir. 2003). It restated this in *Iqbal v. Hasty*, 490 F.3d at 152. To the extent that gross negligence has an objective "should have known" component, it could be understood as constructive notice, thereby explaining the Court's concern in *Iqbal* with potential respondeat superior liability and the Court's rejection of the causation approach. Indeed, the second Question Presented in the *Iqbal* defendants' Petition for Writ of Certiorari was the following: "Whether 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." Petition for Writ of Certiorari at 3, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015) (emphasis added).

⁷⁶ 489 U.S. 378, 388 (1989).

⁷⁷ *Sample v. Diecks*, 885 F.2d 1099, 1118 (3d Cir. 1989).

cases, the proper standard was “deliberate indifference to the plight of the person deprived.”⁷⁸

As it turns out, the differences in real world impact of the two supervisory liability standards—the constitutional and causation approaches—are not as straightforward as the Court and even Justice Souter made them out to be in *Iqbal*. But before turning to that, it is necessary to analyze § 1983 (and *Bivens*) supervisory liability at a theoretical level.

IV. THE NATURE OF SUPERVISORY LIABILITY

A. *Constitutional Duty, Causation, and Fault: The Personal Involvement Requirement*

It is clear that in order for any defendant, individual or governmental, to be liable under § 1983 and *Bivens*, there must be a constitutional duty imposed on the defendant that runs to the plaintiff and that is breached by the defendant. This follows from § 1983’s “deprivation of any rights, privileges, or immunities secured by the Constitution” language as well as from the constitutional violation required in *Bivens* actions. The breach of constitutional duty is also normative in that it supplies the requisite threshold fault for § 1983 and *Bivens* liability.⁷⁹ Next, this breach of constitutional duty must have *caused* the plaintiff’s constitutional injury. The causation requirement follows not only from the “subjects, or causes to be subjected” language of § 1983 but, like fault, from the very notion of tort liability and responsibility as a normative matter.⁸⁰

Over the years, the Court has put a gloss on causation in § 1983 and *Bivens* cases and has characterized it as imposing a personal involvement requirement that precludes respondeat superior liability. This personal involvement requirement apparently includes some notion of affirmative conduct constituting fault. The Court put it this way in an important footnote in *Monell v. Dep’t of Social Services*: “[W]e would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability.”⁸¹ According to the Court, then, the mere

⁷⁸ *Id.* See also *Schneider v. Simonini*, 749 A.2d 336, 356 (N.J. 2000) (in a decision examining § 1983 supervisory liability doctrine, the New Jersey Supreme Court adopted what it called the “intermediate” standard of “recklessness or deliberate indifference”).

⁷⁹ See generally, Nahmod, *Constitutional Damages*, *supra* note 40.

⁸⁰ Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHL-KENT L. REV. 407, 408 (1987).

⁸¹ *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 n.58 (1978) (citing *Rizzo v. Goode*, 423 U.S. 362 (1976)). As further support for its conclusion, the Court in *Monell* analyzed § 1983’s “subjects, or causes to be subjected” language as precluding respondeat superior liability. It reasoned that the two primary policy justifications for

failure to act, standing alone, is not enough for § 1983 and *Bivens* liability even where there is a causal relation between the failure to act and the constitutional injury. The Court's primary concern was, and continues to be, the avoidance of respondeat superior liability.⁸²

The Court in *Iqbal* thus articulated a new personal involvement requirement for supervisory liability under *Bivens* when it declared as a matter of federal common law that a *Bivens* defendant must personally have violated the plaintiff's constitutional rights in order to be liable, even in a supervisory capacity.⁸³ Causation accompanied by a state of mind that is less than the constitutional minimum is insufficient personal involvement for supervisory liability. Moreover, in explaining why *Iqbal* also applied to § 1983 (which the Court said it did), the Court simply asserted, as it had in *Monell* with regard to local government liability thirty years earlier,⁸⁴ that the "subjects, or causes to be subjected" language precludes respondeat superior liability and therefore means that the supervisory § 1983 defendant must personally have violated the plaintiff's constitutional rights.⁸⁵

In short, the Court in *Iqbal*, adopting the constitutional approach, interpreted federal common law and § 1983 to require for supervisory liability the same state of mind as that for the underlying constitutional violation.⁸⁶ This constitutionally required state of mind, rather than actual knowledge and deliberate indifference, now constitutes the personal involvement requirement for supervisory liability. Under the constitutional approach of *Iqbal*, then, the supervisory defendant's fault is

such liability, accident reduction and loss-spreading under an insurance approach, had been rejected in the legislative debates on § 1983. *Id.* at 691–94.

In *Constitutional Accountability in Section 1983 Litigation*, I argued that the official policy or custom requirement for § 1983 local government liability is the functional equivalent of the personal involvement requirement for § 1983 individual liability. Nahmod, *Constitutional Accountability*, *supra* note 4, at 24–29. More generally, I argued that § 1983 local government liability and individual liability raise constitutional accountability questions, the first involving institutional accountability, the second involving individual accountability. *See id.*; discussion *infra* at Part IV.D.

⁸² This is parallel to the Court's decision in *DeShaney v. Winnebago County Department of Social Services*, which held as a constitutional matter that there is generally no affirmative substantive due process duty to protect others from private harm: "[N]othing in the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." 489 U.S. 189, 195 (1989).

⁸³ That *Iqbal* is a personal involvement case involving supervisors is clear from the Court's description of the defendants' motion to dismiss "for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1944 (2009).

⁸⁴ *Monell*, 436 U.S. at 691–92.

⁸⁵ *Iqbal*, 129 S. Ct. at 1948. The constitutional approach obviously poses no problem in the typical § 1983 and *Bivens* non-supervisory liability case where government officials are sued in their individual capacities for what they have themselves done "hands-on" and personally to the plaintiff.

⁸⁶ This means that the scope of the § 1983 duty and the *Bivens* federal common law duty is the same as the scope of the underlying constitutional duty.

derived from the Constitution alone and not from § 1983 or federal common law. In contrast, under the causation approach rejected in *Iqbal*, the supervisory defendant's fault is derived from § 1983 or federal common law.⁸⁷

The Court almost surely thought that this new personal involvement requirement, based on the underlying constitutional provision, would limit the individual damages liability of supervisors generally, and thereby reduce over-deterrence not only in equal protection cases like *Iqbal* but also in cases involving other constitutional violations. Conversely, Justice Souter in his dissent complained that the Court had effectively eliminated supervisory liability.⁸⁸ However, neither position adequately captures the real world impact of the choice between the constitutional approach and the causation approach, or the theoretical complexity of the issue.⁸⁹

B. *Real World Impact: Other Hypotheticals*

Equal Protection. What is at stake in terms of real world impact in *Iqbal*'s constitutional approach to supervisory liability and the competing causation approach may be illustrated by the following. Recall from the first hypothetical at the beginning of this Article that under *Iqbal*, even where subordinates have violated a plaintiff's constitutional rights, the supervisor can only be liable in damages where that supervisor acted with the same constitutionally required state of mind. So if, as alleged in *Iqbal*, subordinates have violated equal protection—which requires purposeful discrimination—the supervisor is only liable if the failure to supervise was accompanied by purposeful discrimination as well. Actual knowledge and deliberate indifference are now not enough even though the circuits adopted the causation approach pre-*Iqbal*. Implicit in *Iqbal* is the assessment that the causation approach *over-protected* constitutional rights. It was probably for this reason that the requisite state of mind for supervisory liability was ratcheted up in *Iqbal*.

Fourth Amendment. Suppose, though, that supervisors are sued under § 1983 for their failure to supervise police officers in making arrests where the underlying conduct by subordinates is the use of excessive

⁸⁷ Under the causation approach there must therefore be a constitutional violation by a subordinate.

⁸⁸ *Iqbal*, 129 S. Ct. at 1957.

⁸⁹ In contrast to the hypotheticals in Part IV.B, there is little difficulty where a subordinate executes what turns out to be a supervisor's unconstitutional order but does not himself or herself violate the plaintiff's constitutional rights. Suppose, for example, that a supervisor, acting on the basis of an impermissible racial motivation, directs a subordinate to fire the plaintiff, and the subordinate, without knowing or having any reason to suspect the supervisor's motive, simply follows orders. Here, it is only the supervisor, not the subordinate, who violated the plaintiff's equal protection rights and would be liable under § 1983 or *Bivens*. Both the constitutionally required state of mind (or fault) and causation are directly traceable to the supervisor, even though the subordinate's conduct also played a causal role.

force in violation of the Fourth Amendment. The constitutionally applicable state of mind is objective unreasonableness.⁹⁰ Under *Iqbal* the supervisors should be liable if they acted in an objectively unreasonable way in failing to supervise. Before *Iqbal* they would have been liable only if they acted with deliberate indifference, thereby arguably *under-protecting* Fourth Amendment rights. Because objective unreasonableness is a lower and less culpable state of mind than deliberate indifference, *Iqbal* may have *expanded* the scope of supervisory liability in the Fourth Amendment setting by adopting the constitutional approach and rejecting the causation approach, a result the Court may not have foreseen and almost certainly did not intend.⁹¹

It is, of course, possible—it may even be likely—that the Court, if confronted with this situation, would impose a very strict proximate cause requirement for supervisory liability, just as it did for local government liability for hiring decisions in *Board of County Commissioners v. Brown*.⁹² Consider the *Brown* proximate cause requirement:

Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the *plainly obvious consequence* of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute "deliberate indifference."⁹³

Even though the Court articulated this strict proximate cause requirement in the context of hiring decisions by local governments, it turns out that it has been applied by the circuits in other local government liability cases going well beyond hiring.⁹⁴ If applied to the Fourth Amendment hypothetical, this strict proximate cause requirement could similarly condition supervisory liability on whether the particular Fourth Amendment violation was the plainly obvious consequence of the supervisor's own objective unreasonableness.

Eighth Amendment and Substantive Due Process. Regardless of the Court's eventual proximate cause analysis in supervisory liability cases involving Fourth Amendment violations by subordinates, it should be noted that there are situations where the choice between *Iqbal*'s constitutional approach and the causation approach may not make much real world difference. For example, suppose that supervisors are sued for

⁹⁰ *Graham v. Connor*, 490 U.S. 386, 388 (1989).

⁹¹ Note, however, that this result is not *over-protective* of Fourth Amendment rights, because there is a perfect fit (apart from immunities) between the supervisor's Fourth Amendment fault and the supervisor's damages liability. To put this in another way, the constitutional approach neither under-protects nor over-protects constitutional rights.

⁹² 520 U.S. 397 (1997).

⁹³ *Id.* at 411 (emphasis added).

⁹⁴ See generally 2 CIVIL LIBERTIES LITIGATION, *supra* note 2, §§ 6:44–6:48 (listing a collection of federal and state cases addressing sufficiency of evidence for failure to train, supervise, or hire).

the Eighth Amendment or substantive due process violations of their subordinates. If the constitutionally required state of mind for both of these underlying constitutional violations by the subordinates is deliberate indifference, it should make no difference to the outcome whether the constitutional approach or the causation approach is followed.⁹⁵ Supervisory liability still would require deliberate indifference by the supervisors, whether it is the constitutional or causation approach that is applied, in conjunction with the unconstitutional deliberate indifference of the subordinates.

C. *The Constitutional Approach: Legislative History, the Language of § 1983, and Policy Considerations*

The choice between the constitutional approach and the causation approach is not one of Congressional power.⁹⁶ Congress surely has the power under Section 5 of the Fourteenth Amendment to enact a statute such as § 1983 that incorporates the causation approach. The question is one of Congressional intent with regard to supervisory liability: does § 1983 create a Fourteenth Amendment damages action that is strictly limited to the scope of the Fourteenth Amendment (including incorporated provisions of the Bill of Rights) such that a supervisory defendant must always himself or herself violate the Fourteenth Amendment in order to be liable in damages? Or does it create a damages action that, while requiring a constitutional violation by a subordinate, nevertheless provides for the damages liability of a supervisory defendant causally (and somehow culpably) responsible for a subordinate's constitutional violation irrespective of the underlying constitutional provision?

Legislative History. Although the legislative history of § 1983 does not explicitly address the issue, it is at least suggestive of the constitutional approach. Section 1983 is described as a statute that “reenact[s] the Constitution” by Senator Edmunds.⁹⁷ Representative Bingham, the author of Section 1 of the Fourteenth Amendment, states that the

⁹⁵ A caveat: “deliberate indifference” may mean different things depending on the particular constitutional provision involved and on who is violating it. According to the Court in *Farmer v. Brennan*, deliberate indifference of *individuals* for Eighth Amendment purposes is subjective criminal recklessness as used in criminal law, while deliberate indifference of *local governments* for failure to train liability is objective in nature because it focuses on the state of mind of a governmental entity. 511 U.S. 825, 839–42 (1994). However, in light of the Court’s references to abuse of government power and “the element of arbitrary conduct shocking to the conscience” in *County of Sacramento v. Lewis*, deliberate indifference of *individuals* for substantive due process purposes will likely turn out to be similar, if not identical, to the subjective criminal recklessness of *Farmer* in cases not involving high-speed police chases. 523 U.S. 833, 836, 845–46 (1998).

⁹⁶ Just as Congressional power to impose respondeat superior liability on local governments was not at issue in *Monell*. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 662–64 (1978). See *infra* note 117 and accompanying text.

⁹⁷ CONG. GLOBE, 42d Cong., 1st Sess. 569 (1871).

purpose of § 1983 is “the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic . . . to the extent of the rights guaranteed [sic] to him by the Constitution.”⁹⁸ Senator Thurman, a critic, describes § 1983 as “authoriz[ing] any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal Courts.”⁹⁹ These portions of the legislative history support the constitutional approach to the extent that they can plausibly be read for the proposition that § 1983’s scope is identical to the scope of the Fourteenth Amendment.¹⁰⁰

This interpretation of the legislative history is consistent with the Court’s seminal decision in *Monroe v. Pape*, which determined that § 1983’s “color of law” language was not narrower in scope than the Fourteenth Amendment’s state action requirement.¹⁰¹ More directly, the Court in *Lugar v. Edmondson Oil Co.* observed: “The history of the Act is replete with statements indicating that Congress thought it was creating a remedy as broad as the protection that the Fourteenth Amendment affords the individual.”¹⁰²

Statutory Language. Similarly, the relevant language of § 1983 tends to support the constitutional approach, although it, like the legislative history, is not conclusive. This language renders liable in damages any person who “subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.”¹⁰³ In support of the constitutional approach, the “subjects, or causes to be subjected” language is intended simply to cover those situations in which defendants either personally, or through intervening actors, causally bring about constitutional deprivations. It has no other meaning than this. Indeed, earlier examples of this usage indicate that this was all that was intended by such language.¹⁰⁴

⁹⁸ CONG. GLOBE, 42d Cong., 1st Sess. app. at 81 (1871).

⁹⁹ CONG. GLOBE, 42d Cong., 1st Sess. app. at 216 (1871).

¹⁰⁰ On the other hand, they can also be read as indicating only that § 1983 is not narrower in scope than the Fourteenth Amendment, which is consistent with the causation approach. See Nahmod, *Constitutional Accountability*, *supra* note 4, at 18–19 (discussing portions of the legislative history and related considerations).

¹⁰¹ 365 U.S. 167, 172 (1961).

¹⁰² 457 U.S. 922, 934 (1982).

¹⁰³ 42 U.S.C. § 1983 (2006).

¹⁰⁴ Preliminary research into this and similar statutory language has uncovered the following examples which indicate that § 1983’s “causes, or subjects to be caused” language was intended solely as a formal matter to include both personal, hands-on causation and causation through intervening actors.

(1). The debates of the 39th Congress, leading to the passage of the Civil Rights Act of 1866, contained this section 8:

Sec. 8. *And be it further enacted*, That any person who, under color of any State or local law, ordinance, police, or other regulation or custom, shall, in any State or district in which the ordinary course of judicial proceedings has been interrupted by the rebellion, *subject or cause to be subjected*, any negro, mulatto, freedman, refugee, or other person, on account of race or color, or any previous

condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or for any other cause, *to the deprivation* of any civil right secured to white persons, or to any other or different punishment than white persons are subject to for the commission of like acts or offenses, shall be deemed guilty of a misdemeanor, and be punished by fine not exceeding \$1,000, or imprisonment not exceeding one year, or both

CONG. GLOBE, 39th Cong., 1st Sess. 211 & 318 (1866) (second and third emphasis added).

(2). Later in that same congressional session, Senator James Doolittle of Wisconsin, introduced a bill pursuant to Section 2 of the 13th Amendment. That bill contained the “subject, or cause to be subjected” language, along with several other instances of “or cause to be”:

Sec. 3. *And be it further enacted*, That any person who shall unlawfully, and in violation of the said thirteenth amendment to the Constitution, and of the provision of this act, *restrain, or cause to be restrained* of his or her liberty, with intent to *subject, or cause to be subjected*, or to *hold, or to cause to be held*, to service as a slave, or involuntary servant, any person, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by fine not exceeding \$1,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Sec. 4. *And be it further enacted*, That any person who shall unlawfully, and in violation of the provisions of the said thirteenth amendment to the Constitution and the provisions of this act, *restrain or cause to be restrained* of his or her liberty, with intent to hold or cause to be held to service as a slave or involuntary servant, any person who has heretofore been held to slavery or involuntary servitude under the laws of any State or Territory, and has been emancipated by the said thirteenth amendment to the Constitution, commonly called a freedman, shall, in addition to the pains and penalties provided in the last preceding section of this act, be liable to be prosecuted by the person injured, who shall be entitled to recover the sum of \$1,000

CONG. GLOBE, 39th Cong., 1st Sess. 1805 (1866) (second, third, and fifth emphasis added).

This wording was likely intended to be parallel to an 1806 House Bill prohibiting the importation of slaves into the United States and Territories. This bill may be the first appearance of the “or cause to be” language in federal legislation, and is similarly related to the issue of slaves and freedmen. (For what appears to be the first appearance of the “or cause to be” language in state legislation, see *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 543–44 (1842), which discusses a 1780 Pennsylvania statute entitled “An act for the gradual abolition of slavery.”). The relevant portion of the Bill read:

And if any person or persons shall, after the said thirty-first day of December, *transport or bring, or cause to be transported or brought* into the United States, or the territories thereof, any negro, mulatto, or person of color, contrary to the true intent and meaning of this act, every person or persons, so offending, shall be guilty of high misdemeanor, and being convicted before any Court having competent jurisdiction shall suffer imprisonment not more than ten, nor less than five years.

16 ANNALS OF CONG. 231–32 (1806) (emphasis added).

(3). The phrase “or cause to be” was used by legislators beginning in 1775. This may indicate that it was imported into the Civil Rights Act of 1866, and then the Civil Rights Act of 1871 (and § 1983), simply as a matter of form. The following are some

Of course, it could be argued in support of the causation approach that the clause “or causes to be subjected” was specifically intended to cover those defendants such as supervisors who do not personally and in a hands-on way violate a plaintiff’s constitutional rights *and* to subject them to a state of mind, or fault, requirement different from that imposed on defendants who do so personally.¹⁰⁵ But this statutory

representative examples (with emphasis added) of when the phrase “or cause to be” was used:

- (a) In the Secret Committee Minutes of Proceedings of October 25, 1775, the document used the phrase “*sell or cause to be sold.*” *Secret Committee Minutes of Proceedings* (Oct. 25, 1775), in 2 LETTERS OF DELEGATES TO CONGRESS 253, 254 (Paul H. Smith ed. 1775).
- (b) In the Instruction to the commanders of private ships or vessels of war authorizing them to capture British vessels and cargos, there was stated what to do with captured documents: “you shall *deliver, or cause to be delivered,* to the judge or judges, all passes, sea-briefs, charter-parties, bills of lading, cockets, letters, and other documents and writing found on board . . .” *Instructions to the commanders of private ships or vessels of war* (1776), in 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 253, 254 (Worthington Chauncey Ford ed., 1906).
- (c) Following the reception of two letters from General Washington, the Continental Congress passed a resolution for the safety council of Pennsylvania requesting in part, “That the Secret Committee be directed to appoint one or more trusty persons, to proceed immediately to the eastern states, and see that the cloathing [sic] and stores, which have been ordered to be purchased for the army, be collected and forwarded to the army, with all possible despatch [sic]; and that the said person, or persons, have power to *purchase, or cause to be purchased,* such necessary cloathing as can be procured in those states, and to have them forwarded to the army.” Resolution of Dec. 1, 1776, in 6 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 997.
- (d) The Committee on Deserters of 1777 issued a report for the Continental Congress’s consideration on a resolution authorizing “any constable, freeholder, or Keeper of any public ferry within the United States, to *apprehend or cause to be apprehended,* any person being a deserter, and cause such person to be brought before any Justice of the peace . . .” *Report of Committee on Deserters* (1777), in 7 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 115–16.
- (e) A letter from Pennsylvania appointing delegates to the Continental Congress stated, “We, reposing especial Trust and Confidence in your Prudence, Integrity, and Abilities, do by these presents constitute and appoint you . . . to be our Counsellors [sic] and Agents . . . Hereby ratifying and confirming all and whatsoever you our said Counsellors, Agents and Solicitor shall lawfully *do or cause to be done,* touching or concerning the said Cause between the said States of Pennsylvania and Connecticut.” *Pennsylvania’s Credentials of Delegates* (1782), in 22 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 345, 346 (Gaillard Hunt ed., 1914).
- (f) In the years following, the phrase was used mostly in connection with payment (“pay or cause to be paid”) or delivery (“deliver or cause to be delivered”).

¹⁰⁵ See Kit Kinports, *The Buck Does Not Stop Here: Supervisory Liability in Section 1983 Cases*, 1997 U. ILL. L. REV. 147 (1997). Kit Kinports has argued in favor of the causation approach (she did not call it that) with negligence as the requirement for supervisory liability. She contended that my constitutional approach is not justified by

language on its face addresses only causation and says nothing about any supervisory liability state of mind requirement. In contrast, under the constitutional approach this omission is not problematic if “or causes to be subjected” is interpreted together with § 1983’s “deprivation of any rights, privileges, or immunities secured by the Constitution” language. It is the underlying constitutional provision that supplies the requisite state of mind, or fault, for all § 1983 defendants, whether supervisors or other individuals, regardless of whether any of them personally violated a plaintiff’s constitutional rights or, through intervening actors, caused that constitutional violation.

After all, these defendants are all suable “persons” within the meaning of § 1983’s “Every person . . . shall be liable” language. Everyone would agree that the fault of an individual defendant—a “person”—who personally violates a plaintiff’s constitutional rights is derived from the underlying constitutional provision. Why should supervisors be treated differently in this regard?¹⁰⁶ There is no persuasive justification for having different standards of fault for different “persons” that are dependent on the causal manner in which they were responsible for the constitutional violation.

Moreover, *Parratt v. Taylor*¹⁰⁷ has conventionally been interpreted as holding that § 1983 has no state of mind requirement for the prima facie case as a matter of statutory interpretation.¹⁰⁸ True, the Court could simply have announced in *Iqbal* that deliberate indifference is the state of mind required for supervisory liability, just as it did—incorrectly, in my view—in connection with local government liability for failure to train in *City of Canton v. Harris*.¹⁰⁹ But there is no sound reason to do so in light of § 1983’s legislative history and, especially, its language: the requisite state of mind, or fault, can readily be grounded on the relevant constitutional provision, as it is under the constitutional approach. This is a straightforward resolution of the statutory interpretation issue because

the causation language of § 1983. She also maintained that the constitutional approach effectively “moots” supervisory liability where subordinates violate a plaintiff’s constitutional rights. *Id.* at 161 n.71. As to § 1983’s language, my analysis appears in the text and accompanying footnotes. As to mooted supervisory liability, I demur. The issue in dispute is where the state of mind requirement, or fault, comes from: from the relevant constitutional provision or from § 1983 itself. Under the constitutional approach, supervisory liability is still with us.

¹⁰⁶ Or, for that matter, local governments. *See* discussion *infra* at Part IV.D.

¹⁰⁷ 451 U.S. 527 (1981).

¹⁰⁸ *See, e.g., Daniels v. Williams*, 474 U.S. 327, 329–30 (1986); *Greenwich Citizens Comm., Inc. v. Counties of Warren*, 77 F.3d 26, 30 (2d Cir. 1996); *Pink v. Lester*, 52 F.3d 73, 74 (4th Cir. 1995).

¹⁰⁹ 489 U.S. 378, 388 (1989). In *Harris* the Court, effectively adopting the causation approach, determined as a matter of statutory interpretation that deliberate indifference (together with causation) is required for local government liability for failure to train. *See* discussion *infra* at Part IV.D.

the fit between the constitutional violation, fault, and damages liability is perfect.¹¹⁰

Of course, this argument from the legislative history and language of § 1983 in favor of the constitutional approach does not apply to *Bivens* actions. Strictly speaking, then, the Court was free in *Iqbal* to adopt the causation approach to supervisory liability as a matter of federal common law. However, the Court did not do so; instead, it adopted the constitutional approach for *Bivens* supervisory liability claims. At the same time, it made clear that *Iqbal* governs § 1983 supervisory liability as well.¹¹¹

Policy Considerations. Many have extensively discussed the policy considerations underlying § 1983 elsewhere.¹¹² I will therefore be terse. Simply put, I submit that the constitutional approach provides a better fit between § 1983's policy considerations and damages liability for Fourteenth Amendment violations.

The primary policies underlying § 1983 damages liability are compensation and deterrence.¹¹³ Because the causation approach seems to expand the scope of supervisory liability more than the constitutional approach, and therefore beyond the scope of the Fourteenth Amendment itself (although a constitutional violation by a subordinate is always required), it would appear that § 1983's compensation and deterrence policies are better promoted by the causation approach.

However, it may not be that simple. Recall the earlier hypotheticals. To the extent that the causation approach tends to expand the scope of supervisory liability to cover cases involving constitutional provisions requiring more than deliberate indifference (as in *Iqbal* itself), then the compensation and deterrence policies of § 1983 are promoted. Indeed, the *Iqbal* Court would probably characterize this as over-protecting constitutional rights. On the other hand, the causation approach may tend to limit the scope of supervisory liability in cases involving constitutional provisions requiring less than deliberate indifference,

¹¹⁰ Apart from immunities, of course.

¹¹¹ Recall that Justice Souter in his *Iqbal* dissent did his best to treat the Court's supervisory liability discussion as grounded on *Bivens* and not § 1983. See *supra* note 69 and accompanying text. Thus, *Iqbal* could conceivably be limited to supervisory liability *Bivens* actions. But it is difficult to believe, particularly in light of the Court's repeated assertions in *Iqbal* and elsewhere that the jurisprudence of *Bivens* and § 1983 is fundamentally the same (except for § 1983 local government liability), that the Court would ever buy into such a dual view of *Bivens* and § 1983 supervisory liability actions.

¹¹² See, e.g. Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1 (1985); John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461 (1989); Nahmod, *Courtroom to Street*, *supra* note 32; Nahmod, *Constitutional Damages*, *supra* note 40; Sheldon H. Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5 (1974); Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225 (1986). See also 1 CIVIL LIBERTIES LITIGATION, *supra* note 2, §§ 1:5–1:9.

¹¹³ There is also a punitive function with regard to individual defendants who can be liable for punitive damages. See *supra* note 24.

especially in Fourth Amendment cases, thereby possibly *under-protecting* them. In such cases, then, where plaintiffs are not able to prove deliberate indifference, plaintiffs will lose against the supervisors under the causation approach whereas they would have won under the constitutional approach if they could prove objectively unreasonable behavior, a lesser requirement, on the part of supervisors.¹¹⁴

In contrast to these instances of possible over- and under-protection of constitutional rights under the causation approach, the constitutional approach neither over- nor under-protects. The requisite constitutional state of mind, or fault, is intimately connected to the potential damages liability (apart from immunities) for violating the underlying constitutional provision. The constitutional approach thus directly promotes § 1983's policies of compensation and deterrence for Fourteenth Amendment violations.¹¹⁵ It situates the state of mind, or fault, requirement in the underlying constitutional provision itself, which is appropriate for a statute that was enacted under § 5 of the Fourteenth Amendment to enforce § 1.

Finally, another advantage of the constitutional approach for supervisory liability is that it simplifies what would otherwise be a complicated qualified immunity inquiry. Consider that, under the causation approach, the qualified immunity inquiry must take account not only of the constitutional norm applicable to the subordinate but also the deliberate indifference of the supervisor. The First Circuit described it this way:

When a supervisor seeks qualified immunity in a section 1983 action, the "clearly established" prong of the qualified immunity inquiry is satisfied when (1) the subordinate's actions violated a clearly established constitutional right, and (2) it was clearly established that a supervisor would be liable for constitutional violations perpetrated by his subordinates in that context. In other words, for a supervisor to be liable there must be a bifurcated "clearly established" inquiry—one branch probing the underlying violation, and the other probing the supervisor's potential liability.¹¹⁶

In contrast, under the constitutional approach, the first part of the qualified immunity inquiry focuses on whether the supervisor violated the plaintiff's constitutional rights. The second part of the qualified immunity inquiry focuses on whether the supervisor violated clearly established constitutional law at the time of his or her conduct. Both

¹¹⁴ Of course, even apart from or in addition to supervisory liability, a plaintiff can also sue the subordinate who violated his or her constitutional rights personally under § 1983 or *Bivens*.

¹¹⁵ See Nahmod, *Constitutional Accountability*, *supra* note 4, at 19–22.

¹¹⁶ *Camilo-Robles v. Hoyos*, 151 F.3d 1, 6 (1st Cir. 1998) (citations omitted).

parts appropriately are inquiries into the *constitutional norm* applicable to the defendant's conduct, though at different times.¹¹⁷

For all of these reasons, then—§ 1983's suggestive legislative history, its "or causes to be subjected" language, relevant policy considerations, the straightforward nature of the constitutional approach, and the ease of application of the constitutional approach for qualified immunity purposes—the Court's adoption of the constitutional approach for supervisory liability in *Iqbal* was sound. This is so despite the fact that the Court did this without briefing and argument and in the face of defendants' concession to the contrary.

However, there is one more issue to address, and it is a serious one. In *Harris*, the Court expressly adopted the causation approach to local government liability for failure to train.¹¹⁸ Can this be squared with its adoption of the constitutional approach to supervisory liability in *Iqbal*?

D. The Constitutional Approach: Iqbal's Inconsistency with § 1983 Local Government Liability for Failure to Train

The Court got supervisory liability right in *Iqbal* when it adopted the constitutional approach. In contrast, the Court incorrectly addressed local government liability for failure to train in the seminal decision of *City of Canton v. Harris*.¹¹⁹ In *Harris*, the Court did not even nod in the direction of *Parratt v. Taylor*,¹²⁰ which, it will be recalled, declared that § 1983 contains no state of mind requirement for the prima facie case as a matter of statutory interpretation.¹²¹ It also paid little attention to statements in prior cases indicating that local government liability was premised on the unconstitutional conduct of the local government

¹¹⁷ It should also be noted that the constitutional approach to supervisory liability simplifies the policymaker inquiry for local government liability purposes. In *Monell v. Dep't of Social Services*, the Court declared that local government liability requires that the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." 436 U.S. 658, 694 (1978) (emphasis added). Suppose that a high-ranking official, identified as a policymaker (a matter of state and local law), is a supervisor. Under the constitutional approach, it is only when he or she is found to have engaged in unconstitutional conduct that the conduct is properly attributed to the local government for local government liability purposes (even though the policymaker may also be liable personally). See *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121–22 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). See generally 2 CIVIL LIBERTIES LITIGATION, *supra* note 2, §§ 6:23–6:31 (analysis of Supreme Court cases on § 1983 and policymakers).

¹¹⁸ *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

¹¹⁹ *Id.* Before *Harris* was handed down, I argued in favor of the constitutional approach to the official policy or custom requirement for local government liability. Nahmod, *Constitutional Accountability*, *supra* note 4, at 24–29.

¹²⁰ See *Harris*, 489 U.S. 378.

¹²¹ *Parratt v. Taylor*, 451 U.S. 527, 543 (1981).

itself.¹²² Instead, the Court unambiguously declared in *Harris* that the deliberate indifference requirement for local government failure to train liability is a matter of statutory interpretation, independent of the underlying constitutional violation.¹²³ In other words, the state of mind required of the local government, or fault, comes from § 1983 itself.

In so doing, the Court was able to finesse the question of the state of mind required for the underlying substantive due process violation, namely, the alleged failure by police officers to provide medical care to the plaintiff while she was in police custody. In addition, the Court may have had a difficult time in conceptually wrapping its collective mind around local government liability where a failure to train is alleged: after all, how can a failure to train constitute an official policy or custom?¹²⁴

¹²² For example, in *Owen v. City of Independence*, which held that local governments are not protected from § 1983 damages liability by qualified immunity, the Court referred to injuries being occasioned by a local government's "unconstitutional conduct," and held that local governments have "no immunity from damages liability flowing from their constitutional violations." 445 U.S. 622, 650, 657 (1980). And in *Polk County v. Dodson*, the Court held that allegations of unconstitutional conduct against a county and its board of supervisors did not make out a prima facie § 1983 claim because the plaintiff did not allege "any policy that arguably violated his rights under the Sixth, Eighth, or Fourteenth Amendments. . . . [A] policy of withdrawal from frivolous cases would not violate the Constitution." 454 U.S. 312, 326 (1981). However, neither of these pre-*Harris* cases involved failure to train liability, which could explain why the Court did not mention them in this connection.

¹²³ *Harris*, 489 U.S. at 388. The Court declared: "We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* In a footnote, the Court explained: "The 'deliberate indifference' standard we adopt for § 1983 'failure to train' claims does not turn upon the degree of fault (if any) that a plaintiff must show to make out an underlying claim of a constitutional violation." *Id.* n.8.

In *Board of County Commissioners v. Brown*, the Court read *Harris* as follows: "We held that, quite apart from the state of mind required to establish the underlying constitutional violation—in that case, a violation of due process—a plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences. A showing of simple or even heightened negligence will not suffice." 520 U.S. 397, 407 (1997) (citation omitted).

Ironically, Justice Kennedy, the author of *Iqbal*, read *Harris* the same way. *See County of Sacramento v. Lewis*, 523 U.S. 833, 856 (1998) (Kennedy, J., concurring).

¹²⁴ Failure to train cases are not pure failure to act cases but rather cases in which *inadequate training* is alleged to have brought about a constitutional violation by local government officials or employees. Inadequate training can thus constitute either an *official policy*—the inadequate training program itself is adopted by the local government—or a *custom* of inadequate training apart from what is formally set out by the local government regarding training. Similarly, failure to supervise cases are not pure failure to act cases but rather cases in which *inadequate supervision* is alleged to have brought about a constitutional violation by local government officials or employees. Thus, inadequate supervision can also constitute an *official policy* or *custom* of the local government.

Most of all, the Court imposed a statutory deliberate indifference requirement in *Harris* because it was worried about the specter of § 1983 respondeat superior liability for local governments, just as it was to be worried two decades later in *Iqbal* about respondeat superior liability for supervisors. Why deliberate indifference in particular? Probably because this state of mind occupies a middle position between strict liability at one extreme and a malicious intent or purpose to cause harm requirement at the other.¹²⁵ Strict liability, and even negligence or gross negligence with its accompanying second-guessing by a fact-finder, would come dangerously close to respondeat superior liability, which is anathema to the Court. And a generally applicable malicious intent or purpose to cause harm requirement would be contrary to the Court's *Monroe v. Pape* "background of tort liability" approach to § 1983 statutory interpretation.¹²⁶ It would also seriously undermine the core purpose of § 1983: the enforcement of the Fourteenth Amendment through compensation and deterrence.¹²⁷

In the local government failure to train setting, deliberate indifference thus serves a gatekeeper function similar to that served by the various constitutionally required states of mind described above.¹²⁸ Indeed, in further demonstration of this gatekeeper function and the continuing judicial aversion to respondeat superior liability in the local government liability setting, consider *Board of County Commissioners v. Brown*, which involved a hiring decision by a policymaker.¹²⁹ Here, the Court interpreted its *Harris* deliberate indifference standard as incorporating a very strict proximate cause requirement—the plaintiff's particular constitutional injury must be the "plainly obvious consequence" of a city's inadequate hiring decision—than was contained in *Harris* itself.¹³⁰ This led the dissenters to argue that the Court had so over-reacted to potential respondeat superior liability, and had made

In order for an official policy or custom to be actionable under the constitutional approach through § 1983, I have contended that it must be unconstitutional either on its face or as applied by the local government's officials or employees. See Nahmod, *Constitutional Accountability*, *supra* note 4, at 24–29; 2 CIVIL LIBERTIES LITIGATION, *supra* note 2, § 6:50.

¹²⁵ Compare this with *New York Times Co. v. Sullivan*, 376 U.S. 254, 278–80 (1964), where the Court, after considering the chilling effect of common law defamation rules—including strict liability—on print media, held that public official plaintiffs suing print media for defamation in connection with their official conduct had to allege and prove at least knowing or reckless falsehood.

¹²⁶ 365 U.S. 167, 187 (1961) (the Court's rationale for rejecting a specific intent requirement for the § 1983 prima facie case was that it "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions").

¹²⁷ In contrast, the Court interpreted substantive due process—the relevant constitutional provision itself—as requiring purpose to cause harm in the high-speed police pursuit setting. *Lewis*, 523 U.S. at 853–54. See also *supra* Part II.A.

¹²⁸ See Part II.C, *supra*.

¹²⁹ 520 U.S. 397, 411 (1997).

¹³⁰ *Id.*

§ 1983 local government liability doctrine so arcane, that the Court should reconsider its rejection of such liability made in *Monell v. Dep't of Social Services*.¹³¹

Whatever the Court's reasons for deciding *Harris* as it did, thereby adopting the causation approach for local government failure to train liability, the Court got it wrong. First, as argued earlier, the legislative history and language of § 1983, while not conclusive, tend to support the constitutional approach, as do the relevant policy considerations.¹³² Second, the causation approach, unlike the constitutional approach, does not provide the best fit between the local government's fault and its damages liability for the plaintiff's constitutional deprivation.¹³³

Furthermore, there is no persuasive justification for applying the constitutional approach to all *individuals*, including supervisors, while at the same time applying the causation approach to *local governments*. This improperly bifurcates § 1983: both individuals and local governments are "persons" for § 1983 liability purposes and are subject to the same prima facie case requirement with regard to the underlying constitutional violation.¹³⁴ As I have argued elsewhere at length, the official policy or custom requirement for local government liability should be considered the equivalent, for constitutional accountability purposes, of the personal involvement requirement for individual liability.¹³⁵ Both the official policy or custom requirement and the personal involvement requirement call for a constitutional violation by the local government or individuals (including supervisors) sued under § 1983.

The Court may one day have to confront *Iqbal's* inconsistency with *Harris's* adoption of the causation approach. As things now stand, the constitutional approach governs § 1983 and *Bivens* individual liability while the causation approach governs § 1983 local government failure to train liability.

V. CONCLUSION

I have focused on two aspects of *Iqbal* in revisiting the choice between the constitutional approach and the causation approach. The first is the Court's increasing concern with over-deterrence in the § 1983 and *Bivens* setting, a concern that has moved from individual immunities—where it has traditionally been located—through the underlying constitutional provisions, and has culminated in the

¹³¹ *Brown*, 520 U.S. at 430–31 (Breyer, J., joined by Stevens, J. and Ginsburg, J., dissenting) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978)).

¹³² See *supra* Part IV.C.

¹³³ See the discussion at Part IV.B of the real world fit between fault and damages liability in the supervisory liability setting. I suggested there that the fit is better under the constitutional approach.

¹³⁴ Immunities are a different matter.

¹³⁵ See Nahmod, *Constitutional Accountability*, *supra* note 4, at 24–29. See also 2 CIVIL LIBERTIES LITIGATION, *supra* note 2, § 6:50.

imposition of a “plausibility” requirement for notice pleading that will inevitably be applied to plaintiffs’ complaints with considerable bite in § 1983 and *Bivens* cases.

The second is the Court’s adoption in *Iqbal* of the constitutional approach for supervisory liability—one that I previously advocated and that I still believe to be sound—and the Court’s rejection of the causation approach for supervisory liability. Even though *Iqbal* inadequately analyzed the issue, in the end the Court reached the correct result for § 1983 and *Bivens* supervisory liability. It brought supervisory liability in line with other kinds of individual liability under § 1983 and *Bivens*. Yet the causation approach is the very one that the Court incorrectly adopted in *Harris* for § 1983 local government failure to train liability.¹³⁶ This inconsistency is unfortunate.

Simply put, § 1983 creates a Fourteenth Amendment damages action against state and local government officials and against local governments themselves. It is the Fourteenth Amendment’s constitutional norms that establish the state of mind, or fault, required of “[e]very person” for the § 1983 prima facie case. And it is the content of those constitutional norms that should be the threshold consideration in addressing the § 1983 prima facie case.

¹³⁶ And, by implication, for failure to supervise. *See supra* note 119 and accompanying text.