SUPERVISORY LIABILITY IN THE CIRCUIT COURTS AFTER *IQBAL*

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INTRODUCTION

The Supreme Court effected two earthquakes in *Ashcroft v. Iqbal*.[1] Often lost in the tremors of the Court's holding on pleading standards[2] were the tremors from the Court's holding on supervisory liability. At the time, commentators thought this second holding shook loose the doctrinal foundations of supervisory liability under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[3] Standing eight years removed, now is the time to assess how *Iqbal* has, in fact, changed supervisory liability doctrine—and how it has not. For these purposes, we will focus on exemplary decisions made by the Third Circuit on culpability, the Ninth Circuit on the municipal liability parallel, the First and Sixth Circuits on causation, and the Second Circuit on personal involvement.

It is important that we first establish the contours of supervisory liability under § 1983 and *Bivens*. As the Court emphasized in *Iqbal*, supervisory liability is a misnomer.[4] It does not impose vicarious liability on a supervisor for her subordinate's actions.[5] Nor does it impose *respondeat superior* liability

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1 556 U.S. 662 (2009).

2 *See* Adam Steinman, *Ever Wonder Which SCOTUS Cases Have Been Cited the Most?*, LAW PROFESSORS BLOGS NETWORK: CIV. PROC. & FED. CTS. BLOG (Sept. 21, 2016), http://lawprofessors.typepad.com/civpro/2016/09/ever-wonder-which-scotus-cases-have-been-cited-the-most.html (noting that *Iqbal* and its sister case, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), are the third and fourth most cited Supreme Court decisions).

3 403 U.S. 388, 397 (1971) (holding that a plaintiff can seek redress for an injury caused by federal official's deprivation of a constitutional right).

4 *See Iqbal*, 556 U.S. at 676 (recogizing that government officials cannot be held liable in a *Bivens* action for the conduct of subordinates under a theory of *respondeat superior*).

5 *See Vicarious Liability*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The vicarious liability of an employer for torts committed by employees should not be confused with the liability an employer has for his own torts." (quoting KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 181 (2d ed. 2002))).

on the theory that an employer is liable for her employee's wrongful acts within the scope of her employment.[6] Rather, supervisory liability imposes liability on a supervisor for her actions, or her failures to act, which were the proximate cause of a plaintiff's injury.[7] In other words, supervisory liability is imposed on a supervisor for her own role in causing her subordinate to commit a tort. Recurring theories of supervisory liability, addressed in different ways from circuit to circuit, include: (1) presence at the scene or direction to take a challenged action, (2) failure to train subordinates, (3) violation of statutory duty, (4) failure to discipline or control subordinates with a history of misbehavior, and (5) the creation of, or the failure to correct, unconstitutional policies, practices, or conditions.[8]

Two procedural vehicles are available for plaintiffs seeking to impose supervisory liability for constitutional violations. For actions against state officials, plaintiffs may bring their claims under 42 U.S.C. § 1983. For actions against federal officials, plaintiffs may bring their claims as *Bivens* actions.[9] Neither vehicle is "a source of substantive rights" but rather a "method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution."[10] While the Supreme Court has "never expressly held that the contours of *Bivens* and § 1983 are identical,"[11] it has repeatedly applied particular doctrinal features identically to both *Bivens* and § 1983 actions.[12]

Section 1983 imposes liability on "[e]very person" acting under color of state law who either "subjects, or cause to be subjected" another person to a deprivation of her constitutional rights.[13] The "causes . . . to be subjected" language of the text explicitly envisions liability for supervisors who cause constitutional deprivations.[14] Indeed, § 1983 was passed as section one of the

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6 *See* Lenz v. Wade, 490 F.3d 991, 995 (8th Cir. 2007) (reiterating that a prison official may not be held liable under § 1983 for the alleged Eighth Amendment violations of a subordinate based on *respondeat superior*); *see also* Santiago v. City of Phila., 435 F. Supp. 136, 148 (E.D. Pa. 1977) (noting that, unlike the master-servant relationship envisioned by *respondeat superior*, a supervisor and subordinate are coworkers).

7 MICHAEL AVERY ET AL., POLICE MISCONDUCT: LAW AND LITIGATION § 4:3 (3d ed. 2018).

8 *Id.* § 4:6.

9 *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (holding that a plaintiff can seek redress for injuries caused by a federal official's deprivation of a constitutional right).

10 Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979).

11 Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 82 (2001) (Stevens, J., dissenting).

12 *See* William N. Evans, Comment, *Supervisory Liability After* Iqbal*: Decoupling* Bivens *from Section 1983*, 77 U. CHI. L. REV. 1401, 1404–05 (2010) (noting that "[t]he Supreme Court has repeatedly reinforced the idea that *Bivens* and § 1983 are coextensive.")

13 42 U.S.C. § 1983 (2012).

14 *But see* Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability After* Iqbal, 14 LEWIS & CLARK L. REV. 279, 299 n.104 (2010) (arguing that the "causes . . . to be subjected" language is mere surplusage and does not give rise to supervisory liability).

Ku Klux Klan Act of 1871[15] and it "was not directed at the perpetrators of these deeds as much as at the state officials who tolerated and condoned them."[16] By contrast, *Bivens* is based in federal decisional law and claims under it were only recognized a hundred years after § 1983. Indeed, since 1983, the Court has repeatedly disfavored *Bivens* actions.[17] Because of the additional levels of "strenuousness" analysis that they require a plaintiff to prove, moreover, *Bivens* remedies tend to be awarded less frequently than remedies under § 1983.[18]

As a policy matter, supervisory liability serves several functions. It better provides for victim compensation by imposing liability on supervisory officers, who are more likely to be able to satisfy judgments against them than line officers are.[19] It deters future violations by imposing liability on supervisors, who have the power and resources to implement reforms.[20] It provides for punitive damages.[21] On a rhetorical level, supervisory liability demonstrates the systemic nature of constitutional violations, whereas claims against individual officers can be more easily dismissed as aberrations.[22] On a procedural level, a clearly-delineated supervisory liability doctrine helps to prevent officials from becoming overly cautious and helps to provide clear boundaries for potential plaintiffs.[23] Finally, on an individual level, supervisory liability can carry tremendous personal vindication, as exemplified by Javaid Iqbal himself.[24]

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15 ch. 22, 17 Stat. 13 (codified as amended as 42 U.S.C. §§ 1983, 1985, 1986 (1996)).

16 Owens v. Okure, 488 U.S. 235, 249–50 n.11 (1989) (discussing the origins of the Ku Klux Klan Act of 1871).

17 *See, e.g.*, Minneci v. Pollard, 565 U.S. 118, 120 (2012) (holding that *Bivens* liability does not extend to employees of private prisons); Wilkie v. Robbins, 551 U.S. 537, 541 (2007) (holding that *Bivens* liability does not extend to takings executed by the Bureau of Land Management); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 63 (2001) (holding that *Bivens* liability does not extend to contractors with a federal agency); Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 473 (1994) (holding that *Bivens* liability does not extend to actions against federal agencies); Schweiker v. Chilicky, 487 U.S. 412, 414 (1988) (holding that there is no *Bivens* remedy available to an erroneous denial of Social Security disability benefits); United States v. Stanley, 483 U.S. 669, 683–84 (1987) (holding that there is no *Bivens* remedy available for injuries incidental to military service); Bush v. Lucas, 462 U.S. 367, 368 (1983) (holding that a *Bivens* action would be inappropriate where regulatory remedies already exist); Chappell v. Wallace, 462 U.S. 296, 304 (1983) (holding that a *Bivens* action is not available for members of the military against their officers).

18 Evans, *supra* note 12, at 1405.

19 AVERY ET AL., *supra* note 7, § 4:3.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 *See* Shirin Sinnar, *The Lost Story of* Iqbal, 105 GEO. L.J. 379, 408 (2017) (discussing positive impacts the case had on Javaid Iqbal's personal life).

I. PRE-*IQBAL* JURISPRUDENCE

Before *Iqbal*, to successfully make out a claim for supervisory liability under either § 1983 or *Bivens*, a plaintiff had to show: (1) there was a failure to supervise or train,[25] (2) that failure to supervise or train was the proximate cause of a plaintiff's constitutional injury, and (3) that failure was committed with the necessary culpability.[26] In addition, most courts applied a sum-of-the-parts "personal involvement" consideration.[27]

The first element, the act itself, required that the plaintiff establish each defendant's failure to supervise or train a subordinate.[28] This analysis was conducted on an individual basis, requiring each defendant to have "participated, encouraged, authorized or acquiesced in" active unconstitutional behavior.[29] A supervisory role was not established by a formalistic organization title indicating a supervisor-subordinate relationship, but rather by the defendant's contextual, supervisory role.[30]

The second element required that a plaintiff establish that the supervisor's failure of supervision or of training was the proximate cause of her constitutional injury.[31] A plaintiff had to satisfy the standard tort law questions of foreseeability and remoteness, as well as the supervisory liability-specific question of an "affirmative causal link."[32] The foreseeability prong was satisfied if the plaintiff could show that the defendant knew or reasonably should have known that her actions would cause her subordinate to deprive the plaintiff of her constitutional rights.[33] While imprecise, remoteness in part referred to the significance of a lapse in time.[34] The final requirement of an affirmative link "contemplate[d] proof that the supervisor's conduct led

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25 Failures to supervise or train included specific theories, such as a supervisor directing a subordinate to take an act that violated a plaintiff's rights, or such as a supervisor knowing of a subordinate's act and acquiescing in it. *See, e.g.*, MODEL CIVIL JURY INSTRUCTIONS: FOR THE DIST. COURTS OF THE THIRD CIRCUIT § 4.6.1 (COMM. ON MODEL CIVIL JURY INSTRUCTIONS WITHIN THE THIRD CIRCUIT 2007).

26 Estate of Davis v. City of N. Richland Hills, 406 F.3d 375, 381 (5th Cir. 2005).

27 *See* Mesa v. Prejean, 543 F.3d 264, 274 (5th Cir. 2008).

28 *See* Trujillo v. Williams, 465 F.3d 1210, 1227–28 (10th Cir. 2006) (denying a § 1983 claim against certain defendants because their direct personal liability was not established).

29 Shehee v. Luttrell, 199 F.3d 295, 300 (6th Cir. 1999).

30 *See* Evans, *supra* note 12, at 1411 ("'Supervisory liability' is contextual, not formalistic; the title of 'supervisor' does not create supervisory liability.").

31 Cox v. Sugg, 484 F.3d 1062, 1066 (8th Cir. 2007).

32 *See* Hegarty v. Somerset Cty., 53 F.3d 1367, 1380 (1st Cir. 1995); Shaw v. Stroud, 13 F.3d 791, 807 (4th Cir. 1994) (Hall, J., dissenting).

33 *See* Arnold v. Int'l Bus. Machs. Corp. 637 F.2d 1350, 1355 (9th Cir. 1981); *see, e.g.*, Doe v. Wright, 82 F.3d 265, 269 (8th Cir. 1996) (declining to hold a supervisor liable for the primary defendant's offenses at his subsequent workplace).

34 *Shaw*, 13 F.3d at 807 (Hall, J., dissenting).

inexorably to the constitutional violation."[35] A plaintiff had to "show that 'an affirmative link exists between the [constitutional] deprivation and either the supervisor's personal participation, his exercise of control or direction, or his failure to supervise.'"[36] The validity of an affirmative link "rapidly deteriorates with passage of time."[37]

The third element, culpability, required that a plaintiff establish the defendant's requisite *culpability*. Some of the most common culpability requirements for supervisory liability included: (1) reckless disregard,[38] (2) subjective deliberate indifference,[39] (3) knowing, willful, or reckless action,[40] and (4) gross negligence.[41] In the context of a § 1983 claim, deliberate indifference, "generally requires a showing 'of more than a single instance of the lack of training or supervision causing a violation of constitutional rights.'"[42] Simple negligence is not enough to impose § 1983 or *Bivens* liability on a supervisor.[43] Before *Iqbal*, the circuit courts approached the level of scienter required to establish supervisory liability in two main ways. Several circuits varied the scienter required for supervisory liability depending on the constitutional right at issue.[44] Other courts required a single scienter for supervisory liability, regardless of the constitutional right at issue.[45] Claims based on a failure to train theory required a showing of deliberate indifference, regardless of the underlying constitutional right.[46]

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35 Hegarty v. Somerset Cty., 53 F.3d 1367, 1380 (1st Cir. 1995).

36 Worrell v. Henry, 219 F.3d 1197, 1214 (10th Cir. 2000) (quoting Meade v. Grubbs, 841 F.2d 1512, 1527 (10th Cir. 1988)). In this paragraph, failure to train and failure to supervise refer to the act element of general § 1983/*Bivens* causes of action. They do not refer to theories with their own elements.

37 *Shaw*, 13 F.3d at 807.

38 *See, e.g.*, Hall v. Lombardi, 996 F.2d 954, 961 (8th Cir. 1993).

39 *See, e.g.*, Atteberry v. Nocona Gen. Hosp., 430 F.3d 245, 254, 256 (5th Cir. 2005).

40 *See, e.g.*, Rascon v. Hardiman, 803 F.2d 269, 274 (7th Cir. 1986).

41 *See, e.g.*, Meriwether v. Coughlin, 879 F.2d 1037, 1048 (2d Cir. 1989).

42 Burge v. St. Tammany Parish, 336 F.3d 363, 370 (5th Cir. 2003) (quoting Thompson v. Upshur Cty., 245 F.3d 447, 459 (5th Cir. 2001)).

43 *See* Doe v. City of Roseville, 296 F.3d 431, 441 (6th Cir. 2002) (declining to impose section 1983 liability for mere negligence in supervision); Abate v. S. Pac. Transp. Co. 993 F.2d 107, 110 (5th Cir. 1993) (holding that mere negligence is not enough to give rise to a *Bivens* claim). *But see* Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 582 (1st Cir. 1994) (noting that "gross negligence" can "signify" deliberate indifference).

44 *See, e.g.*, Boyd v. Knox, 47 F.3d 966, 968 n.1 (8th Cir. 1995) (requiring proof that the supervisor also acted with the subjective deliberate indifference required to state an Eighth or Fourteenth Amendment claim against his subordinate).

45 *See* Locke v. Haessig, 788 F.3d 662, 669 (7th Cir. 2015) ("Before *Iqbal*, most circuits required that a supervisor act (or fail to act) with the state of mind of deliberate indifference to be liable, no matter the underlying constitutional violation.").

46 Estate of Davis v. City of N. Richland Hills, 406 F.3d 375, 381 (5th Cir. 2005).

Finally, most circuits applied a "personal involvement" requirement. While no court explicitly outlined how this consideration interacts with the three canon factors, it seemed to act as a sum-of-the-parts analysis. Courts alternately cited the act itself,[47] the causation factor,[48] and the culpability factor[49] as governing the personal involvement analysis. At the end of the day, "the thrust of courts' concern is that the defendant's own actions be sufficiently connected to the violation of plaintiff's rights that personal liability is shown."[50] Personal involvement was by no means a hard-and-fast rule. While it certainly required more than a supervisor's mere presence at the scene where a subordinate allegedly violated a plaintiff's constitutional right,[51] courts found sufficient personal involvement even in "failure to intervene" causes of action.[52]

II. THE *ASHCROFT V. IQBAL* DECISION

Javaid Iqbal, a Pakistani citizen and Muslim, was arrested following the September 11, 2001 terrorist attacks.[53] Iqbal alleged that, in the course of his detention, he was deprived of various constitutional protections.[54] Among other officials, Iqbal brought *Bivens* claims against John Ashcroft, then the U.S. Attorney General, and Robert Mueller, then the Director of the Federal Bureau of Investigation, alleging that they adopted a policy that violated his First and Fifth Amendment rights, subjecting him to unconstitutional, invidious discrimination on account of his race, religion, or national origin.[55]

Most discussion of *Iqbal* analyzes the Court's landmark holding on pleading standards, not supervisory liability. Indeed, neither side actually

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47 *See* Melear v. Spears, 862 F.2d 1177, 1183–84 (5th Cir. 1989) (summarizing the court's ability to consider all the circumstances of an event to determine whether an individual was a bystander or a participant in the action); *see also* Blankenhorn v. City of Orange, 485 F.3d 463, 481 n.12 (9th Cir. 2007) ("An officer's liability under section 1983 is predicated on his 'integral participation' in the alleged violation." (quoting Chuman v. Wright, 76 F.3d 292, 294–95 (9th Cir. 1995))).

48 *See* Wesby v. District of Columbia, 765 F.3d 13, 29–30 (D.C. Cir. 2014) (noting that each officer must have violated the constitution through individual actions in order to be held culpable), *rev'd on other grounds*, 138 S. Ct. 577 (2018).

49 *See* Brown v. City of Huntsville, 608 F.3d 724, 737 (11th Cir. 2010) ("Here, the facts do not show personal participation by [Norris] in Sonia's arrest. . . . Norris was busy arresting Brown and testified that he was not aware Hudson was arresting Sonia.").

50 AVERY ET AL., *supra* note 7, § 4:2.

51 Mesa v. Prejean, 543 F.3d 264, 274 (5th Cir. 2008).

52 *See, e.g.*, Webb v. Hiykel, 713 F.2d 405, 407–08 (8th Cir. 1983) (approving a failure to intervene theory of liability for a supervisory officer who was present when his subordinate beat the plaintiff and made no attempt to stop the attack).

53 Ashcroft v. Iqbal, 556 U.S. 662, 666 (2009).

54 *Id.*

55 *Id.*

briefed whether supervisory liability can attach under *Bivens*[56] and, moreover, the government conceded that supervisory liability could attach to the defendants, were the complaint not, it argued, deficient.[57] Nonetheless, the Court effected a seismic shift in supervisory liability jurisprudence in a single paragraph:

> [R]espondent believes a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. We reject this argument. Respondent's conception of "supervisory liability" is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents. In a § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term "supervisory liability" is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of a clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.[58]

In the weeks after *Iqbal* was issued, many commentators jumped to the most extreme interpretation: the Court had rejected supervisory liability wholesale. Blog posts were published with titles like: "*Did the Supreme Court Wipe Out Supervisory Liability in Section 1983 Cases? It Sure Looks That Way*."[59] In the years since, the academy has coalesced around a handful of more nuanced interpretations:

1. The narrowest interpretation is that the Court's discussion of supervisory liability is dicta.[60] The Court ruled against Javaid Iqbal on separate grounds (that his complaint did not allege a plausible claim), rendering a separate holding on supervisory liability unnecessary.[61]
2. Another similarly narrow interpretation is that any holding on supervisory liability is limited to the facts of *Iqbal*.[62] *Iqbal* was brought against senior officials in the wake of the September 11 terrorist attacks, and required a showing of discriminatory purpose.[63] The

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56 *See generally* Brief for Respondent Javaid Iqbal, *Iqbal*, 556 U.S. 662 (No. 07-1015), 2008 WL 4734962; Brief for the Petitioners, *Iqbal*, 556 U.S. 662 (No. 07-1015), 2008 WL 4063957.

57 Brief for the Petitioners, *supra* note 56, at 50–52.

58 *Iqbal*, 556 U.S. at 676.

59 Bergstein & Ullrich, LLP, *Did the Supreme Court Wipe Out Supervisory Liability in Section 1983 Cases? It Sure Looks That Way*, WAIT A SECOND! (May 26, 2009, 7:41 AM), https://secondcircuitcivilrights.blogspot.com/2009/05/did-supreme-court-wipe-out-supervisory.html.

60 Evans, *supra* note 12, at 1418.

61 *Iqbal*, 556 U.S. at 680.

62 Evans, *supra* note 12, at 1418.

63 AVERY ET AL., *supra* note 7, § 4:4.

case received substantial public coverage and opinion.[64] The facts framing the case were, in other words, particularly strong, and lent themselves to a broad ruling. To this interpretation, *Iqbal* only affects culpability in the rare case in which the constitutional right at issue requires a showing of discriminatory purpose.[65]

3. A third interpretation is that the Court heightened its requirement that a supervisor be shown to have personal involvement in the offense.[66] Advocates of this approach point to the Court's admonishment that, "[b]ecause 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."[67]
4. Finally, according to the most far-reaching interpretation, the *Iqbal* court treated supervisory liability disjunctively, maintaining it under § 1983 but rendering it a dead letter under *Bivens*.[68] This interpretation followed Justice Souter who, in his dissenting opinion, argued that, "[l]est there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely."[69] In his view, the majority created a false dichotomy between "*respondeat superior* liability . . . or no supervisory liability at all."[70] This interpretation is consistent with the Court's general disfavoring of *Bivens* actions.

In practice, each of these scholarly interpretations has been over- or under-inclusive of the circuit courts' applications. As the Third Circuit observed, "[m]ost courts have gravitated to the center," neither interpreting *Iqbal* as dicta and maintaining supervisory liability unchanged, nor abolishing § 1983 and *Bivens* supervisory liability entirely.[71] Rather, the courts have tightened the requirements to successfully state a supervisory liability claim, shortening the permitted attenuation, and raising the bar for culpability.

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64 *See, e.g.*, Linda Greenhouse, *Court to Hear Challenge From Muslims Held After 9/11*, N.Y. TIMES, June 17, 2008, at A18; Adam Liptak, *Justices Hear a Case Weighted by 9/11*, N.Y. TIMES, Dec. 11, 2008, at A28; Lyle Denniston, *Court to Rule on Right to Sue Cabinet Officers*, SCOTUSBLOG (June 16, 2008, 10:16 AM), http://www.scotusblog.com/2008/06/court-to-rule-on-right-to-sue-cabinet-officers/.

65 AVERY ET AL., *supra* note 7, § 4:4.

66 *See* Desiree L. Grace, Comment, *Supervisory Liability Post-*Iqbal*: A "Misnomer" Indeed*, 42 SETON HALL L. REV. 317, 319 (2012) ("*Iqbal* . . . did not alter the requirement that government officials must be personally involved; it simply reiterated this requirement by stating that officials are only liable 'for their own misconduct.'" (footnote omitted)).

67 Aschcroft v. Iqbal, 556 U.S. 662, 676 (2009).

68 Evans, *supra* note 12, at 1418–19.

69 *Iqbal*, 556 U.S. at 693 (Souter, J., dissenting).

70 *Id.*

71 Barkes v. First Corr. Med., Inc., 766 F.3d 307, 318 (3d Cir. 2014), *rev'd sub nom.* Taylor v. Barkes, 135 S. Ct. 2042, 2045 (2015) (per curiam).

The Supreme Court has yet to directly revisit *Iqbal*, but it did discuss supervisory liability in 2017 in *Ziglar v. Abbasi*.[72] In *Abbasi*, the Court considered another matter arising in the wake of the September 11 terrorist attacks.[73] Among other claims, the respondents, six men of Arab or South Asian descent, brought a *Bivens* action against three senior officials in the Department of Justice and two prison wardens, challenging the duration and conditions of their detention under the Fourth and Fifth Amendments.[74] The Court held that there existed "special factors counselling hesitation,"[75] a prudential limitation that may defeat a *Bivens* claim.[76] Even before *Abbasi*, some courts had held that national security concerns were an established, valid reason for hesitation.[77] In *Abbasi*, the respondents asked for a *Bivens* remedy in a national security context against high-level supervisors and policymakers.[78] At the end of the day, however, the Court in *Abbasi* made no intimation that *Bivens* doctrine had changed after *Iqbal*.[79]

In the absence of further Supreme Court guidance, some of the most interesting discussions of supervisory liability jurisprudence have occurred in the First, Second, Third, Sixth, and Ninth Circuits. Each element of traditional supervisory liability jurisprudence is discussed below in descending order of the clarity of *Iqbal*'s impact. It is important to note that this subset is not necessarily representative of how things are handled in all circuits. Some of the most telling signs of *Iqbal*'s impact (or lack thereof) have come in the form of consistency and changes to circuit model jury instructions, and these are noted as they arise.

III. THIRD CIRCUIT ON CULPABILITY

For five years after *Iqbal* was handed down, the Third Circuit repeatedly declined to "wade into the muddied waters of post-*Iqbal* 'supervisory liability,'"[80] acknowledging only that, if *Iqbal* did change the circuit's

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72 137 S. Ct. 1843, 1860 (2017).

73 *Id.* at 1851.

74 *Id.* at 1853–54.

75 *Id.* at 1857–58; Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

76 *Abbasi*, 137 S. Ct. at 1857–58; Carlson v. Green, 446 U.S. 14, 18 (1980).

77 *See* Arar v. Ashcroft, 585 F.3d 559, 573–74 (2d Cir. 2009) (noting that the definition of special factors is limited).

78 *Abbasi*, 137 S. Ct. at 1852–53.

79 *See id*. at 1857 ("The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful resources to retain it in that sphere.").

80 Bistrian v. Levi, 696 F.3d 352, 366 n.5 (3d Cir. 2012); *see also* Lawal v. McDonald, 546 F. App'x 107, 110 n.5 (3d Cir. 2014) (declining to analyze *Iqbal*'s effect on supervisory liability); Argueta v. U.S. Immigration & Customs Enf't, 643 F.3d 60, 70 (3d Cir. 2011) (same).

supervisory liability doctrine, it did so by narrowing its scope.[81] In the interim, the district courts either resolved supervisory liability claims on other grounds[82] or applied the Third Circuit's existing supervisory liability analysis.[83] In 2014, the appeals court explicitly decided to consider *Iqbal*'s impact in *Barkes v. First Correctional Medical, Inc*.[84] and, in so doing, exemplified *Iqbal*'s most significant and most concrete contribution to supervisory liability doctrine.

In *Barkes*, the court outlined two general ways in which liability may attach to a supervisor-defendant: first, deliberately indifferent maintenance of a policy, practice, or custom that caused a constitutional violation, or second, if the supervisor "participated in violating the plaintiff's rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in the subordinate's unconstitutional conduct."[85] The "failure to supervise" claim at issue in *Barkes* fell into the first of those categories and, as such, was historically governed in the Third Circuit by the *Sample v. Diecks*[86] subjective deliberate indifference test for Eighth Amendment supervisory liability claims.[87]

The *Barkes* court upheld the *Sample* test, reasoning that *Iqbal* now "expressly tied the level of intent . . . to the underlying constitutional tort."[88] In light of this, the Third Circuit held that, for Eighth Amendment claims, the level of culpability for supervisory liability must now vary according to the underlying constitutional tort.[89] It would appear, moreover, that it must vary in lock step; whatever *mens rea* is required to hold a subordinate liable is the same as the scienter required to hold her supervisor liable. In the case before the *Barkes* court concerning an Eighth Amendment violation,

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81 *See* Santiago v. Warminster Twp., 629 F.3d 121, 130–31 n.8 (3d Cir. 2010) ("Numerous courts, including this one, have expressed uncertainty as to the viability and scope of supervisory liability after *Iqbal*. . . . Because we hold that Santiago's pleadings fail even under our existing supervisory liability test, we need not decide whether *Iqbal* requires us to narrow the scope of that test.").

82 *See, e.g.*, Gaymon v. Esposito, No. 11–4170 (JLL), 2012 WL 1068750, at *10 (D.N.J. Mar. 29, 2012) (dismissing the claim because it failed to allege a sufficient factual basis).

83 *See, e.g.*, Campbell v. Gibb, No. 10–6584 (JBS), 2012 WL 603204, at *10 n.6 (D.N.J. Feb. 21, 2012) ("[A]lthough the Third Circuit has acknowledged *Iqbal*'s potential impact on § 1983 supervisory liability claims, it has declined to hold that a plaintiff may no longer establish liability under § 1983 based on a supervisor's knowledge of and acquiescence in a violation."); Major Tours, Inc. v. Colorel, 799 F. Supp. 2d 396, 398–99 (D.N.J. 2011) ("[C]laims based on a showing that a supervisor knew of an acquiesced to the discriminatory conduct of a subordinate are not foreclosed by *Iqbal*.").

84 766 F.3d 307 (3d Cir. 2014), *rev'd sub nom.* Taylor v. Barkes, 135 S. Ct. 2042, 2045 (2015) (per curiam) (reversing on the basis of qualified immunity).

85 *Id.* at 316.

86 885 F.2d 1099 (3d Cir. 1989) (focusing on whether an individual "was aware that [an] unreasonable risk existed" and whether that individual "was indifferent to that risk").

87 *Barkes*, 766 F.3d at 317; *see also* Washington v. Davis, 426 U.S. 229, 242 (1976).

88 *Barkes*, 766 F.3d at 318.

89 *Id.* at 320 ("[L]eav[ing] for another day the question whether and under what circumstances a claim for supervisory liability derived from a violation of a different constitutional provision remains valid.").

therefore, the *Sample* test appropriately required a showing of deliberate indifference for both subordinate and supervisor.[90] Aligning supervisor scienter and subordinate *mens rea* is an approach most circuits have taken following *Iqbal*.[91] The change implied in the Third Circuit's approach is summarized in the tables below (focusing on the constitutional rights for which the Supreme Court has granted remedies under *Bivens*):

	Act	**Minimum Culpability, Pre-*Iqbal***	
		Subordinate	**Supervisor**
4A	Unreasonable search and seizure	Objective unreasonableness[92]	Varied by circuit, taking into account the constitutional violation and theory of liability[93]
8A	Cruel and unusual punishment	Subjective deliberate indifference[94]	
14A	Disparate treatment	Purpose to discriminate[95]	

	Act	**Minimum Culpability, Post-*Iqbal***	
		Subordinate	**Supervisor**
4A	Unreasonable search and seizure	Objective unreasonableness	Subjective deliberate indifference[96]
8A	Cruel and unusual punishment	Subjective deliberate indifference	Subjective deliberate indifference[97]
14A	Disparate treatment	Purpose to discriminate	Purpose to discriminate[98]

90 *Id.* at 319–20.

91 *See, e.g.*, OSU Student All. v. Ray, 699 F.3d 1053, 1071 (9th Cir. 2012) (finding that " *Iqbal* makes crystal clear that constitutional tort claims against supervisory defendants turn on the requirements of the particular claim—and, more specifically, on the state of mind required by the particular claim."); L.L. Nelson Enters., Inc. v. St. Louis, 673 F.3d 799, 810 (8th Cir. 2012) (finding that when "the alleged constitutional violation requires proof of an impermissible motive, the amended complaint must allege" that the supervisor also acted with "impermissible purpose"); T.E. v. Grindle, 599 F.3d 583, 588 (7th Cir. 2010) (requiring proof of discriminatory intent for an Equal Protection claim against a supervisor).

92 Maryland v. Macon, 472 U.S. 463, 470–71 (1985).

93 *See supra* Part I.

94 Farmer v. Brennan, 511 U.S. 825, 843 (1994).

95 Washington v. Davis, 426 U.S. 229, 242 (1976).

96 *See* Dinote v. Danberg, 601 F. App'x 127, 131 (3d Cir. 2015) (discussing the sufficiency of the plaintiff's pleading to establish a supervisory official's knowledge and acquiescence to an alleged Fourth Amendment violation).

97 Barkes v. First Correctional Med., Inc., 766 F.3d 307, 322–23 (3d Cir. 2014), *rev'd sub nom.* Taylor v. Barkes, 135 S. Ct. 2042, 2045 (2015) (per curiam) (reversing on the basis of qualified immunity).

98 Ashcroft v. Iqbal, 556 U.S. 662, 676–77 (2009); *accord* Wiseman v. Hernandez, No. 08cv1272-

The *Barkes* court did caution that applying the same level of culpability to both subordinate and supervisory liability does not mean "ignoring the different ways" each can evince the same culpability.[99] As an illustration, the court cites the example Judge Hamilton used in his *Vance v. Rumsfeld* dissent:

> [S]uppose . . . that a local police chief or even the FBI director issued a policy that authorized the use of deadly force against any fleeing subject. The policy itself would be unconstitutional under *Tennessee v. Garner*. The chief or director who authorized that unconstitutional use of force could certainly be held personally responsible under section 1983 or *Bivens* to a person shot by an officer following the policy.[100]

The Third Circuit has had several occasions to apply its updated doctrine, largely in Eighth Amendment contexts. In *Wright v. Warden, Forest SCI*, the Third Circuit considered an Eighth Amendment claim in which an inmate plaintiff alleged hazardous prison conditions after he cut himself on a door.[101] The court required a minimum scienter of deliberate indifference to hold the supervising safety manager liable, derived from the *mens rea* required for the underlying, Eighth Amendment offense.[102] In *Palakovic v. Wetzel*, a deceased inmate's family alleged that various prison officials and prison mental healthcare providers had exhibited deliberate indifference to the deceased's mental illness and the conditions that he underwent in prison, violating his Eighth Amendment rights. [103] Additionally, they alleged that the defendants failed to adequately train their subordinates.[104] The court required a minimum showing of deliberate indifference, derived from the *mens rea* required for the underlying Eighth Amendment offense.[105] In *Wharton v. Danberg*, the Third Circuit considered Eighth Amendment and Fourteenth Amendment Due Process Clause claims, in which the plaintiffs alleged that the prison system failed to release prisoners in a timely manner.[106] The court applied *Barkes* and required a showing of deliberate indifference to hold the defendant senior prison officers liable under either claim.[107]

LAB (NLS), 2009 WL 5943242 at n.8 (S.D. Cal. Nov. 24, 2009) (noting that Iqbal did not change the pleading requirements for disprate impact claims), *adopted* 2010 WL730716 (S.D. Cal. Mar. 1, 2010).

99 *Barkes*, 766 F.3d at 320.

100 Vance v. Rumsfeld, 701 F.3d 193, 223 (7th Cir. 2012) (Hamilton, J., dissenting) (internal citations omitted).

101 582 F. App'x 136, 136 (3d Cir. 2014) (per curiam).

102 *Id.* at 137 n.2.

103 Palakovic v. Wetzel, 854 F.3d 209, 217–18 (3d Cir. 2017).

104 *Id.* at 218.

105 *Id.* at 225 n.17.

106 854 F.3d 234, 237 (3d Cir. 2017).

107 *Id.* at 241–42 n.10.

The Third Circuit's discussion in *Barkes* has yet to materially affect the circuit's model jury instructions.[108] As noted in the comment following section 4.6.1 of the Model Civil Jury Instructions, the Committee on Model Civil Jury Instructions Within the Third Circuit remains confident that supervisory liability based on a supervisor's direction survived, but that claims based on knowledge-and-acquiescence or deliberate indifference may be "more broadly affected by *Iqbal*."[109] The Seventh Circuit Committee on Pattern Civil Jury Instructions similarly has not modified its model jury instructions in response to *Iqbal*.[110] That said, its pre-*Iqbal* instructions were less susceptible, as they did not specify a particular scienter.[111] By contrast, the Fifth Circuit Committee on Pattern Civil Jury Instructions reevaluated its model jury instructions in the wake of *Iqbal*. The circuit's pre-*Iqbal* model jury instructions required that a jury find the supervisor "had a legal duty to act to prevent the misdeeds of [his subordinate] and [the supervisor]'s failure to act amounted to gross negligence or deliberate indifference of plaintiff's rights."[112] After *Iqbal*, the Committee changed this to require that a plaintiff prove the supervisor "[acted/failed to act] with deliberate indifference" and emphasized that "[d]eliberate indifference requires a showing of more than negligence or even gross negligence."[113]

Aligning the *mens rea* and supervisory scienter inquiries beyond the Eighth Amendment may result in an interesting doctrinal issue: its extension to supervisory liability claims for which the underlying offense's standard is objective unreasonableness. Fourth Amendment claims, for example, turn on an objective unreasonableness standard for which *mens rea* does not enter the equation. The circuit courts have been understandably hesitant to extend the *Barkes* court's holding to Fourth Amendment cases, and to therefore measure supervisory defendants against an objective

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108 *Compare* MODEL CIVIL JURY INSTRUCTIONS: FOR THE DIST. COURTS OF THE THIRD CIRCUIT § 4.6.1 (COMM. ON MODEL CIVIL JURY INSTRUCTIONS WITHIN THE THIRD CIRCUIT 2007), *with* MODEL CIVIL JURY INSTRUCTIONS: FOR THE DIST. COURTS OF THE THIRD CIRCUIT § 4.6.1 (COMM. ON MODEL CIVIL JURY INSTRUCTIONS WITHIN THE THIRD CIRCUIT 2017).

109 MODEL CIVIL JURY INSTRUCTIONS: FOR THE DIST. COURTS OF THE THIRD CIRCUIT § 4.6.1 (COMM. ON MODEL CIVIL JURY INSTRUCTIONS WITHIN THE THIRD CIRCUIT 2018) (citing Bayer v. Monroe Cty. Children and Youth Servs., 577 F.3d 186, 190 n.5 (3d Cir. 2009) (questioning in dictum the sufficiency of evidence showing knowledge and acquiescence)).

110 *Compare* FED. CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 7.23 (COMM. ON PATTERN CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 2017), *with* FED. CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 7.17 (COMM. ON PATTERN CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 2008).

111 FED. CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 7.17 (COMM. ON PATTERN CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 2008).

112 PATTERN JURY INSTRUCTIONS (CIVIL CASES) § 10.3 (COMM. ON PATTERN CIVIL JURY INSTRUCTIONS DIST. JUDGES ASS'N FIFTH CIRCUIT 2009).

113 PATTERN JURY INSTRUCTIONS (CIVIL CASES) § 10.4 (COMM. ON PATTERN CIVIL JURY INSTRUCTIONS DIST. JUDGES ASS'N FIFTH CIRCUIT 2016).

unreasonableness standard.[114] Such an extension could result in supervisory liability even in instances where one could not say that a supervisor knew of and acquiesced in, directed, participated in, or adopted or failed to adopt with deliberate indifference a policy or practice and, by so doing, caused her subordinate's unreasonable use of force. Even within the same opinion, courts have wavered on the issue. In *Reedy v. Evanson*, for example, the Third Circuit established that the plaintiff had to show the police supervisor's knowledge and acquiescence in his subordinates' allegedly unreasonable search and seizure.[115] Later in the same paragraph, however, the court required that the plaintiff show the police supervisor did not merely acquiesce, but "directed [his subordinate] to take or not to take any particular action."[116] Chicago-Kent College of Law Professor Sheldon Nahmod has argued that the Supreme Court "may not have foreseen and almost certainly did not intend" that its holding would result in the adoption of a negligence test for supervisors' liability for their subordinates' Fourth Amendment violations, giving pause to the idea that courts will extend the aligned *mens rea* and supervisory scienter approach to Fourth Amendment claims.[117]

As a policy matter, aligning the *mens rea* and supervisory scienter analyses has three major implications. First, aligning the inquiries can be seen as reducing the costs of litigation and adjudication.[118] A plaintiff can allege multiple constitutional violations under § 1983 and *Bivens*, and the Supreme Court has ruled that the trial court may not streamline its analysis by assigning liability based on the "dominant character" of the most salient constitutional violation alleged.[119] Rather, the courts must separately analyze each constitutional right—and the relevant *mens rea* and supervisory scienter for violating each.[120] By aligning the *mens rea* and supervisory scienter inquiries, the argument goes, courts must make fewer separate analyses.

However, aligning the analyses can result in incongruous outcomes. The *mens rea* required to hold a subordinate liable is a complex inquiry that varies not only according to the underlying constitutional violation, but also

114 *See, e.g.*, Wernecke v. Garcia, 591 F.3d 386, 401 (5th Cir. 2009) (holding that the plaintiff parents, who brought a section1983 action claiming that the Texas Department of Protective Services had violated their Fourth Amendment rights by removing their children from their home, had to establish that the supervisor acted with subjective deliberate indifference—not just objective unreasonableness); Horton v. City of Harrisburg, No. 1:06-CV-2338, 2009 WL 2225386, at *5 (M.D. Pa. July 23, 2009) (requiring a showing of deliberate indifference for supervisory liability to attach on a Fourth Amendment excessive force claim).

115 Reedy v. Evanson, 615 F.3d 197, 231 (3d Cir. 2010).

116 *Id.*

117 Nahmod, *supra* note 14, at 297.

118 Evans, *supra* note 12, at 1409–10.

119 Soldal v. Cook Cty., 506 U.S. 56, 70 (1992).

120 *Id.*

according to the circuit, the type of claimant, and the attendant circumstances.[121] Professor Rosalie Levinson has argued that tying supervisory scienter to this complex set of factors will result in incongruous results.[122] Professor Levinson has argued, therefore, for a uniform scienter for supervisory liability. A supervisor's failure to train, supervise, or correct her subordinate's wrongdoing amounts to the same supervisory failure, she argues, regardless of the subordinate's specific constitutional violation.[123] Moreover, in cases in which the underlying violation does not require intent, a supervisor's knowledge and acquiescence, or even mere deliberate indifference, nonetheless "caused" an individual to be subjected to a deprivation of her constitutional rights, meeting the language of § 1983.[124]

Additionally, aligning the *mens rea* and supervisory scienter inquiries necessarily moves the bar for supervisory liability to attach.[125] In the Third Circuit, it raises the bar for Fourteenth Amendment claims and (potentially) lowers it for Fourth Amendment claims, thereby reducing or increasing supervisory liability's deterrent effect on supervisory actors.

IV. NINTH CIRCUIT ON THE MUNICIPAL LIABILITY PARALLEL

Before *Iqbal*, supervisory and municipal liability were considered parallel doctrines. To successfully state a failure to train claim under either one, a plaintiff had to show the defendant acted with deliberate indifference to the "known or obvious consequences" of her actions (i.e. the infringement of the rights of the people with whom the subordinate might come into contact).[126] Regardless of the underlying claim, the standard for the supervisor or municipality was deliberate indifference.[127] The Supreme Court first imposed the standard in the municipal liability context in *City of Canton v. Harris*.[128] Such a strenuous standard was important because a failure to train is not facially unlawful, making a claim based on a failure to train particularly

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121 *See, e.g.*, Cty. of Sacramento v. Lewis, 523 U.S. 833, 854 (1998) (ratcheting up the deliberate indifference standard that is typically required by due process claims to a "purpose to cause harm" standard in cases in which there was no time to deliberate).

122 *See generally* Rosalie B. Levinson, *Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post-*Iqbal*/*Connick *World*, 47 HARV. C.R.–C.L. L. REV. 273 (2012).

123 *Id.* at 296.

124 *Id.* at 297.

125 In the Third Circuit, for example, lowering the pre-*Iqbal* scienter for Eighth Amendment claims and raising the pre-*Iqbal* scienter for Fourteenth Amendment claims. *See supra* Part III.

126 Bd. of Comm'rs v. Brown, 520 U.S. 397, 410 (1997).

127 City of Canton v. Harris, 489 U.S. 378, 387 n.8 (1989); Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 452–54 & nn. 7–8 (5th Cir. 1994) (en banc); *see also* Walker v. Norris, 917 F.2d 1449, 1455–56 n.10 (6th Cir. 1990) (noting that the Supreme Court has established this standard).

128 489 U.S. at 387 n.8.

tenuous.[129] The courts then imported the standard into the supervisory liability context.[130]

Now, by suggesting that the standard for supervisory liability is not always deliberate indifference, that it depends on the underlying claim, *Iqbal* has upset the symmetry between supervisory and municipal liability.[131] Professor Nahmod argues that the *Iqbal* approach is the more convincing one. "[T]here is no persuasive justification," he asserts, "for applying the [*Iqbal*] approach to all individuals, including supervisors, while at the same time applying the [universal deliberate indifference] approach to local governments," against which failure to train claims are often brought.[132] If this were not muddled enough, some courts have held that failure to train claims, already tenuous, were a casualty of *Iqbal* and did not survive in any form.[133] Other courts have held that failure to train claims continue to be viable.[134] The Ninth Circuit, for one, maintains the failure to train theory as an option in its supervisory liability model jury instructions[135] and the court affirmed the ongoing viability of failure to train claims in *Henry A. v. Willden*.[136] The judicial winds are likely at Professor Nahmod's back but, until this tension is resolved, there will be a dissonance in the traditional parallel between municipal and supervisory liability.

V. FIRST AND SIXTH CIRCUITS ON CAUSATION

Given that causation is already a "regrettably imprecise concept," it should come as little surprise that the courts have struggled to apply *Iqbal*'s also-imprecise discussion of supervisory liability to the causation requirement.[137]

On the traditional questions of foreseeability and remoteness, the Sixth Circuit has generally tried to tighten its inquiry, but has yet to emerge with a

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

130 *See Taylor Indep. Sch. Dist.*, 15 F.3d at 452–54 & nn. 7–8 (adopting the deliberate indifference standard of municipal liability for supervisory liability).

131 *See* Nahmod, *supra* note 14, at 305–08 (explaining that the Supreme Court has not resolved the issue).

132 *Id.* at 308 (emphasis omitted).

133 *See, e.g.*, Newton v. City of New York, 640 F. Supp. 2d 426, 448 (S.D.N.Y. 2009) (discussing supervisory liability).

134 *See, e.g.*, Diaz-Bernal v. Myers, 758 F. Supp. 2d 106, 132 (D. Conn. 2010) (discussing supervisory liability).

135 MANUAL OF MODEL CIVIL JURY INSTRUCTIONS: FOR THE DIST. COURTS OF THE NINTH CIRCUIT § 9.4 (NINTH CIRCUIT JURY INSTRUCTIONS COMM. 2017).

136 678 F.3d 991, 999 n.5 (9th Cir. 2012) (noting that the complaint does not make a specific factual allegation that the county failed to provide basic training for caseworkers).; *see also* Reed v. Lieurance, 863 F.3d 1196, 1207–08 (9th Cir. 2017) (reversing dismissal of failure to train claim since the district court did not provide notice).

137 Shaw v. Stroud, 13 F.3d 791, 807 (4th Cir. 1994).

new test. In *Burley v. Gagacki*, the Sixth Circuit considered a claim for supervisory liability under § 1983, in which the plaintiffs alleged that law enforcement officers subjected them to excessive force, violating their Fourth Amendment rights.[138] In finding against the plaintiffs, the court emphasized that, "it is a plaintiff's burden to specifically link the officer's involvement to the constitutional infirmity."[139] Considering whether defendants personally violated the plaintiffs' rights in a different § 1983 context, the Sixth Circuit clarified that "the term 'participated' should be construed within the context of tort causation principles."[140] In *Peatross v. City of Memphis*, the court considered a Fourth Amendment claim brought by the administrator of an arrestee's estate, alleging that the officers' shooting of the arrestee constituted an unreasonable seizure. [141] Addressing remoteness, the court noted that, "Supervisors are often one step or more removed from the actual conduct of their subordinates; therefore, § 1983 requires more than an attenuated connection between the injury and the supervisor's alleged wrongful conduct."[142] The court went on to essentially merge the causation inquiry with the personal involvement inquiry, noting that, "We have interpreted [personal involvement] to mean that 'at a minimum,' the plaintiff must show . . . there is a causal connection between the defendant's wrongful conduct and the violation alleged."[143] This merger of the causation and personal involvement requirements echoes the Second Circuit's merger of the culpability and personal involvement requirements.[144]

On the supervisory liability-specific question of an affirmative link, the First Circuit has taken a similar approach: tightening its inquiry, but without an identifiable new test. Shortly after *Iqbal* was handed down, the court clarified in *Sanchez v. Pereira–Castillo* that the plaintiff can establish an affirmative link by showing that the defendant was "a primary violator or direct participant in the rights-violating incident," or that "a responsible official supervises, trains, or hires a subordinate with deliberate indifference toward the possibility that deficient performance of the task eventually may contribute to a civil rights deprivation."[145] In *Morales v. Chadbourne*, the First Circuit applied this updated *Sanchez v. Pereira-Castillo* standard.[146] The court

138 834 F.3d 606, 611 (6th Cir. 2016).

139 *Id.* at 615 (citing Binay v. Bettendorf, 601 F.3d 640, 650 (6th Cir. 2010) (requiring that a plaintiff show the defendant's actions sufficiently connect to the alleged violation)).

140 France v. Lucas, 836 F.3d 612, 625 (6th Cir. 2016).

141 818 F.3d 233, 237–39 (6th Cir. 2016).

142 *Id.* at 241.

143 *Id.* at 242 (quoting Shehee v. Luttrell, 199 F.3d 295, 300 (6th Cir. 1999)).

144 *See infra* Part VI.

145 590 F.3d 31, 49 (1st Cir. 2009) (internal quotation marks omitted) (quoting Camilo-Robles v. Zapata, 175 F.3d 41, 44 (1st Cir. 1999)).

146 793 F.3d 208, 221 (1st Cir. 2015).

considered a claim in which the plaintiff, a naturalized United States citizen, alleged that her twenty-four-hour detention by U.S. Immigration and Customs Enforcement ("ICE") officers violated her Fourth and Fifth Amendment rights.[147] The court found that the plaintiff adequately pleaded the existence of an affirmative link by demonstrating that the supervisory ICE officials were "primary violators" of her constitutional rights.[148]

VI. SECOND CIRCUIT ON PERSONAL INVOLVEMENT

Having given rise to *Iqbal* itself, it should come as little surprise that the Second Circuit has engaged in some of the most interesting reckoning with *Iqbal*'s meaning. Before *Iqbal*, the Second Circuit recognized five "*Colon* factors" through which personal involvement could be established:

> (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.[149]

In the wake of *Iqbal*, the Second Circuit has largely merged its personal involvement requirement with its scienter requirement—and, like the Third Circuit, tied supervisory scienter to subordinate *mens rea*. In *Turkmen v. Hasty*, a putative class of men detained in the wake of September 11 terrorist attacks brought a *Bivens* claim against various senior officials, alleging *inter alia* that their First, Fourth, Fifth, and Fourteenth Amendment rights had been violated.[150] The court enumerated the five ways to show personal involvement before noting that, "The proper inquiry is not the name we bestow on a particular theory or standard, but rather whether that standard—be it deliberate indifference, punitive intent, or discriminatory intent—reflects the elements of the underlying constitutional tort."[151]

In *Grullon v. City of New Haven*, a pretrial detainee plaintiff brought a § 1983 action against a prison warden, challenging jail conditions.[152] The Second Circuit reasoned that, while *Iqbal* may have heightened the personal

147 *Id*. at 221–22.

148 *Id.*

149 Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995).

150 Turkmen v. Hasty, 789 F.3d 218, 225 (2d Cir. 2015), *rev'd on other grounds sub nom.* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017).

151 *Id.* at 250.

152 720 F.3d 133, 136 (2d Cir. 2013).

involvement requirement, the plaintiff did not "adequately plead the Warden's personal involvement even under *Colon*."[153] In *Warren v. Pataki*, two convicted sex offenders brought suit against various New York state officials responsible for a policy designed to screen "sexually violent predators" for involuntary civil commitment, alleging violations of their Fourth and Fourteenth Amendment rights.[154] The trial court provided an instruction to the jury outlining the personal involvement necessary for a § 1983 claim, to no objection from either party, with language tracking the third *Colon* factor for indirect supervisory liability.[155] The Second Circuit held on appeal that the omission of the other four *Colon* factors did not evince "plain error affecting substantial rights that go[] to the very essence of the case," reasoning that there was no evidence in the record that, even if the other four factors had been included in the jury instructions, the plaintiffs could have demonstrated any of them.[156]

CONCLUSION

Standing here today, eight years after *Iqbal* was handed down, the promised earthquake seems to have dissipated. Every court to cite *Iqbal* has noted its treatment of supervisory liability as vaguely ominous. To a large extent, though, that is the long and short of it. In a representative approach shortly after *Iqbal* was handed down, the Eighth Circuit cautioned that,

> The Supreme Court's recent pronouncement in *Iqbal* may further restrict the incidents in which the "failure to supervise" will result in liability. However, we do not address the extent to which *Iqbal* so limits our supervisory liability precedent because, even under our prior precedent, [the defendant] is entitled to qualified immunity.[157]

Iqbal first percolated into opinions as a kind of exclamation point on the established rule that neither § 1983 nor *Bivens* supports vicarious supervisory liability. Almost every circuit has since made the next clearest doctrinal change that *Iqbal* urged: pegging supervisory scienter to subordinate *mens rea*. It would make sense to next resolve whether this approach also applies to supervisory liability for Fourth Amendment unreasonable search and seizure claims. The interrupted parallel between supervisory and municipal liability begs to be resolved next. Thereafter, however, the courts run into uncharted

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153 *Id.* at 139.

154 823 F.3d 125, 130–35 (2d Cir. 2016).

155 *Id.* at 136–37 ("If a given defendant played a material role, directly or indirectly, in creating or implementing, even in good faith, the aforementioned aspects of the sexually-violent predator initiative that were constitutionally defective, and that foreseeably would be applied to someone in a given plaintiff['s] position, that would be sufficient to establish that that defendant proximately caused the violation of that plaintiff['s] constitutional right to procedural due process.").

156 *Id.* at 138–39.

157 Parrish v. Ball, 594 F.3d 993, 1001 n.1 (8th Cir. 2010) (internal citations omitted) (citing Ashcroft v. Iqbal, 556 U.S. 662, 677–78 (2009); Maldonado v. Fortanes, 568 F.3d 263, 274 n.7 (1st Cir. 2009)).

territory. On questions of causation and personal involvement, the circuits have yet to find clear tests to further narrow the boundaries of supervisory liability. For as long as this uncertainty lingers, the poorly-delineated boundaries around supervisory liability will force officials to be overly cautious and leave potential plaintiffs unsure of their rights. While it may have come as a surprise that the Supreme Court tackled supervisory liability in *Iqbal*—an opinion ultimately resolved on other grounds—the Court has created an ambiguity that almost guarantees a return to the subject before long.