Supervisory Liability and Ashcroft v. Iqbal

Introduction

For many decades, it was a given that, under certain circumstances, supervisory defendants in § 1983[1] or *Bivens*[2] actions could be held liable when their subordinates violated the Constitution. The various theories under which supervisors could be held accountable ultimately were given the generic term "supervisory liability."[3] When the Supreme Court announced its decision in *Ashcroft v. Iqbal*,[4] many predicted a seismic shift in how claims of supervisory liability would be adjudicated—after all, the majority opinion termed supervisory liability a "misnomer," and the principal dissent claimed that the decision foreshadowed the end of such liability.[5] As a result, some commentators believed the decision would send "shockwaves" through the lower courts.[6] In this brief Essay, I will show that these predictions have not come to pass and offer some explanations as to why.

First, in Part I, I will review the history of supervisory liability leading up to the Court's *Iqbal* decision. This discussion will review two primary concerns that courts negotiated as they elaborated a standard of liability for supervisory defendants. The first is well-documented: the need to establish that the supervisor was personally involved in any alleged constitutional violation. The second is underappreciated: the connection between limited supervisory liability and a constitutional framework that emphasizes negative restraints over affirmative governmental obligations. In short, courts were concerned that by imposing liability on supervisors for failing to take action, they might transform the Constitution into a source of affirmative rights.

Part II of the Essay turns to the *Iqbal* decision and its understanding of supervisory liability. As both a procedural matter and a substantive matter, the *Iqbal* Court's treatment of supervisory liability was something of a surprise. Procedurally, neither party had raised or even briefed the question—the Court reached out to address it sua sponte. And substantively, the concerns expressed by the Court about supervisory liability were disconnected from the historical focus on personal involvement and ensuring that the Constitution is read as a limited instrument of negative liberty. Instead, on my reading, the Court's treatment of supervisory liability was closely aligned with its pleading analysis, not with any grand theory of supervisory liability.

Part III of the Essay considers the implication of *Iqbal*'s decision for lower court assessments of supervisory liability claims.[7] As a descriptive matter, I show in Part III that *Iqbal* has had little impact on how courts of appeals have constructed supervisory liability standards.[8] Contrary to the dissenters' dire predictions, supervisory liability is still alive and well in the lower courts—misnomers notwithstanding. Nor has the Supreme Court, despite ample

opportunity, intervened to reinforce the message from *Iqbal*. To the contrary, the Court has considered, and upheld, traditional supervisory liability claims on at least two occasions after *Iqbal*.[9]

As I explain in Part III, this is not to minimize *Iqbal*'s impact on the trajectory of supervisory liability claims. That impact has been felt not through an adjustment of the standards for liability for supervisors, but instead through *Iqbal*'s more demanding pleading standard more generally. This becomes more obvious when one returns to the supervisory liability cases that predated *Iqbal* with a focus on pleading. Comparing these decisions to post-*Iqbal* supervisory liability decisions illustrates in greater detail the contrast between plausibility pleading and notice pleading.

In sum, *Iqbal* has changed little about the substance of supervisory liability claims. But its pleading analysis appears to have affected the viability of these claims nonetheless. I doubt this observation will come as a surprise to the participants in this symposium. But recognizing the role of pleading doctrine, rather than substantive law, in adjudicating constitutional claims against supervisors should clarify an ongoing debate among practitioners about the viability of longstanding supervisory liability theories.

1. Supervisory Liability Before *Iqbal*

The term "supervisory liability" is now used to encompass many different ways of establishing constitutional liability against defendants with superintendent responsibilities. But the terminology took some time to take hold. The first time the Supreme Court used the term was in *Iqbal* and as Figure 1 shows, use of the term in federal appellate decisions was sparse before 1990.[10]

The initial hesitancy to embrace theories of supervisory liability can be traced in part to the Supreme Court's 1976 decision in *Rizzo v. Goode*.[11] In *Rizzo*, the plaintiffs brought a class action seeking injunctive relief against the Mayor of Philadelphia, the Police Commissioner, and other city officials, alleging that they had permitted a longstanding pattern of police misconduct through their failure to act in the face of discrete instances of unconstitutional conduct. The district court, after finding that only a small percentage of Philadelphia police officers engaged in unconstitutional conduct, ordered the defendants to draft a program for addressing civilian complaints about police officers.[12] The Court reversed the district court's judgment on multiple grounds.[13]

First, the Court doubted the causal connection between the pattern of misconduct and the acts and omissions of the individual defendants. Per the Court, *Rizzo* did not involve a situation in which police misconduct was directly linked to policies set forth by high-level officials.[14] Instead, the plaintiff's theory was that the supervisory officials had a constitutional duty to eradicate police misconduct, and that statistical evidence provided evidence that the defendants had been in dereliction of their duty.[15] Plaintiffs rested this

theory on *Brown v. Board of Education* and its progeny,[16] but the Court found the analogy inapt because the remedial power of district courts to fashion broad equitable relief in the context of desegregation flowed from a prior finding of unconstitutional conduct by the government.[17] In the desegregation cases, government officials had "by their own conduct" engaged in violations of the Constitution; in *Rizzo*, none of the defendants subject to the district court's orders had violated the Constitution.[18]

Second, the Court addressed a more fundamental problem with the plaintiffs' theory, going beyond the causation and personal involvement problems identified above. Because the plaintiffs sought equitable relief, the Court noted there was a greater risk of intrusion into delicate federal-state relations. The Court therefore concluded that interests of federalism called for a limited use of equity to intrude on the internal workings of a local police department.[19]

Of these two aspects of *Rizzo*, it was the first that exerted a significant influence on the contours of supervisory liability claims. *Rizzo*'s emphasis that § 1983 claims only reach defendants who by their "own conduct" cause a constitutional violation was tailor fit to limit how far § 1983 could reach beyond line officers. As a general matter, except for supervisory defendants who participate directly in constitutional violations, questions of personal involvement and causation will always loom largest the further removed one is from direct infliction of constitutional injury.[20] And where a claim is based on a defendant's failure to act, *Rizzo*'s logic imposed even more barriers. This led to lower court decisions often characterizing *Rizzo* as a case about "supervisory liability," even though the Supreme Court itself never used the term.[21] In addition to *Rizzo*'s impact on the development of supervisory liability theories, it is important to note that *Monell v. Department of Social Services* also intervened in 1978 to establish that respondeat superior liability is not a valid theory for § 1983.[22]

But even before *Rizzo* and *Monell*, lower federal courts recognized that the principal challenge in cases involving supervisors, whether under § 1983 or *Bivens*, was the need to show personal involvement, whether it be decisional, directive, or directly participative.[23] Courts also emphasized, along the line of *Rizzo*, the need to establish a causal connection between the supervisor's action or inaction and the alleged unconstitutional conduct.[24] *Rizzo* raised the question for lower courts of whether inaction by supervisors was actionable under § 1983 (or *Bivens*),[25] but courts interpreted *Rizzo*, at the very least, to permit claims to proceed in which a supervisor knows of specific patterns of abuse by subordinates but fails to take any remedial steps.[26]

Beyond the question of personal involvement and causation, however, courts also recognized tension between imposing liability for omissions and construing the Federal Constitution as a document guaranteeing negative liberty, not one imposing affirmative obligations on government or its employees. This aspect of supervisory liability can be seen in the first appellate decision I could locate that used the term as a theory of liability: the

Seventh Circuit's decision in *Beard v. Mitchell*.[27] *Beard* involved a claim that an FBI agent had failed to adequately supervise an informant, who subsequently accompanied a Chicago police officer when the officer murdered a Chicago man. In *Beard*, the sister of the man killed by the Chicago police officer brought a *Bivens* action against the FBI agent who was responsible for keeping tabs on the FBI informant.[28] Central to the plaintiff's theory was that the FBI agent himself violated the Constitution by failing to supervise the informant's activities. On appeal from a jury verdict for the defendant, the Seventh Circuit affirmed that one potential theory of liability was that the brother's death was caused by the FBI agent's deliberate indifference in the training, supervision, and use of the informant.[29] The court nonetheless expressed concern about permitting suits such as the plaintiff's to proceed without holding that the agent "had a fixed duty to prevent the crime."[30] At most the court believed that it was permissible to find law enforcement had a general duty to the public, as opposed to a specific duty to protect the plaintiff's brother.[31] The court also expressed the heavy presumption against basing liability on the failure to prevent a harm.[32]

The First Circuit's decision in *Dimarzo v. Cahill*,[33] took a similar approach, but in the prison context. In *Dimarzo*, the Massachusetts Commissioner of Correction argued that he should be excused from a prison conditions case because he had a statutory, but not constitutional, mandate to engage in inspection and regulation.[34] Relying on *Rizzo*, the Commissioner argued that he could not be held liable for the constitutional violations of others.[35] The First Circuit acknowledged that this would be a valid argument, but held that his failure to act was directly linked to a constitutional violation.[36]

Taken together, *Monell*, *Rizzo*, and lower court opinions interpreting them provided a hazy outline of the extent to which liability could attach to supervisory action or omission. First, per *Monell*, the common law doctrine of respondeat superior would have no place in constitutional litigation. This, coupled with *Rizzo*, ensured that supervisors could only be held accountable for their own conduct.[37] Similarly, because of the need to establish causation, liability would only obtain when the supervisor herself directly violated a plaintiff's constitutional rights or when the supervisor's own conduct was a cause of a subordinate's violation of federal law. In service of the focus on personal involvement and causation, pre-*Iqbal* courts often contrasted the demerits of holding supervisors responsible for subordinates who acted negligently or "contrary to instructions," against holding supervisors accountable for causing the violations through their own conduct.[38] The Supreme Court's decision in *Rizzo* was central to this distinction.[39] Finally, when the theory of liability rested on an omission, courts were more hesitant to find liability for fear of creating affirmative constitutional obligations.

Despite these limitations, over time, lower federal courts articulated robust supervisory liability regimes. The Second Circuit was the most influential and active court in this area, and by 1986, the appellate court recognized several different routes by which a defendant could be personally involved in a constitutional violation sufficient to trigger *Bivens* or § 1983 liability: (1) direct participation; (2) failing to remedy a wrong after learning of the violation

through one's supervisory role; (3) creating a custom or policy that leads to constitutional violations or allowing that custom or policy to continue; or (4) "gross negligence" in managing subordinates.[40] Other circuits expressed the standard slightly differently, requiring an "affirmative link" between the actions or omissions of the supervisor and the unconstitutional conduct, such that "the supervisor's conduct led inexorably to the constitutional violation."[41] The Third Circuit, for example, offered a different variation, to similar effect:

The plaintiff must (1) identify the specific supervisory practice or procedure that the supervisor failed to employ, and show that (2) the existing custom and practice without the identified, absent custom or procedure created an unreasonable risk of the ultimate injury, (3) the supervisor was aware that this unreasonable risk existed, (4) the supervisor was indifferent to the risk[,] and (5) the underling's violation resulted from the supervisor's failure to employ that supervisory practice or procedure.[42]

These supervisory liability claims stretched to high levels prior to *Iqbal*. In the Second Circuit alone there were several cases affirming damages verdicts against wardens and state commissioners of corrections, based on their knowledge of unconstitutional conditions and failure to intervene.[43] As one court succinctly explained: "The outer limits of liability in any given case are determined ultimately by pinpointing the persons in the decisionmaking chain whose deliberate indifference permitted the constitutional abuses to continue unchecked."[44] Lower courts acknowledged the "heavy burden" confronting a plaintiff seeking to establish supervisory liability, but also viewed the determination as principally factual, not legal.[45]

Three observations are relevant at this point. First, the development of supervisory liability regimes was bespoke. Plaintiffs used different theories to establish the personal involvement and causation elements of constitutional claims,[46] some of which were accepted as viable. Over time, federal courts synthesized these theories into a body of "supervisory liability" law. The downside to this synthesis was that it could confuse an observer into concluding that supervisory liability stood alone as a means of creating substantive rules of conduct, when each brand of liability was simply a way to connect a supervisor to a given constitutional wrong.

Second, cases involving prisons and jails were (and still are) by far the cases in which supervisory liability claims were most often successfully litigated.[47] This is so for several reasons. As an institutional matter, prisons and jails are operated as paramilitary organizations—there are clear lines of authority, giving supervisors direct responsibility and control over the actions of their subordinates. Second, prisons and jails are, in their way, highly regulated—administrative directives and rules provide clear reporting and monitoring obligations, making it easier for putative plaintiffs to establish causal connections between line officers and their supervisors. Third, and most important, concerns about creating affirmative duties through broad supervisory liability standards are less salient in prisons. The Eighth Amendment is one of the few constitutional provisions that has been interpreted to

impose affirmative obligations on state actors: obligations to provide medical and mental health care, protect incarcerated people from harmful conditions, and to protect people from violence.[48] In this context, imposing liability for a supervisors' failure to act in the face of known risks of harm requires no extension of constitutional doctrine: establishing those facts would meet the "deliberate indifference" standard that governs most conditions of confinement litigation, whether the defendant is a line officer or supervisor.[49]

Finally, of all of the versions of supervisory liability that were accepted by lower courts, the Second Circuit's "gross negligence" standard was the least tenable, given the original concerns about the doctrine. The standard itself has an uncertain provenance—it appears to have been based on a Second Circuit decision permitting liability against a municipality, not a natural person.[50] The Supreme Court had established, however, that claims against municipalities could be based on something approximating gross negligence—in *City of Canton v. Harris*,[51] it permitted the imposition of liability against a municipality for "objective" deliberate indifference. Such claims can be based on constructive knowledge, much like gross negligence.[52] So while there may be fine distinctions between an objective deliberate indifference standard and a gross negligence standard, it is easier to see how they could be considered interchangeable by the Second Circuit.

But even if the Second Circuit's gross negligence standard was at the margins of permissible theories of supervisory liability, it appears never to have played a significant role in any adjudicated case. In my research, I could identify no case in which liability turned solely on the presence of gross negligence. In most cases, the gross negligence standard was referred to in the same breath as deliberate indifference.[53] Take as one example the Second Circuit case most directly associated with the "gross negligence" standard: *Wright v. McMann*.[54] In *Wright*, the plaintiff sued Daniel McMann, the warden of New York's Clinton Correctional Facility, alleging that he was subjected to unconstitutional conditions when he was confined in a solitary confinement cell.[55] After a bench trial, Wright was awarded $1500 in damages, and McMann appealed on the ground that there was no finding that he "personally imposed the deprivations that resulted in the unconstitutional treatment."[56] The appellate court affirmed, finding ample evidence that the superintendent knew of the conditions of the solitary confinement cell and was aware of the complaints that had been made about those conditions by the plaintiff.[57] The court also pointed to state law that required the warden to keep a record of punishments like solitary confinement, but that the prison had flouted that regulation in practice.[58] The court thus ultimately concluded that the warden "knew or should have known" of the conditions—a classic negligence standard.[59] But the nature of the evidence relied upon by the Second Circuit supported the conclusion that the warden was subjectively aware of the unconstitutional conditions and permitted them to continue. The court found, in language that would be unlikely to be found in more recent federal court decisions:

We think Wright should be properly compensated for the suffering he had to endure, and recovery should not be defeated by an attempt by the warden to shift responsibility to inferiors when there is every reason to believe that he was aware of segregation cell conditions and when responsibility for permitting such conditions to exist was ultimately, in any event, squarely his. We are not moved by the suggestion that if we uphold liability today competent persons tomorrow will refuse to become superintendents, as the title is presently designated. In the unlikely event that a prospective superintendent in fact turns down an offer for fear of personal liability, we think that the position is probably better filled by someone determined to supervise the facility so as to prevent the type of inmate treatment giving rise to this lawsuit.[60]

Thus, prior to the Supreme Court's decision in *Iqbal*, lower courts were in general agreement that establishing a supervisor's liability for constitutional violations could be satisfied in multiple ways. The supervisor could directly violate the Constitution, as if she were a line officer—participate in a beating herself, order a person into solitary confinement without providing adequate process, etc. The supervisor also could be held liable for instituting, or permitting, policies or customs that violated the constitutional rights of plaintiffs. And, finally, perhaps most difficult to establish, a supervisor could exhibit deliberate indifference to constitutional violations by subordinates.

If there was an analytical error in how lower courts used supervisory liability, it was in discussing supervisory liability itself as a free-standing substantive source of liability, rather than a means to establish the personal involvement and causation requirements imposed by § 1983 and *Bivens*. In so doing, some courts left an impression that liability could be imposed on defendants who themselves did not violate the Constitution, but who merely permitted conditions to exist in which others committed constitutional violations. In *Iqbal* itself, as I will discuss in the next Part, neither the litigants nor the lower courts had deployed this version of supervisory liability

1. *Iqbal*'s Treatment of Supervisory Liability

Whatever concerns might have been raised by broad lower court versions of supervisory liability, *Iqbal* was a surprising vehicle in which to address them. As a procedural matter, none of the parties had addressed the issue in their briefing. In the lower courts, the plaintiffs had asserted claims against defendants Ashcroft and Mueller directly for their alleged adoption of a discriminatory policy that subjected Arab, Muslim, and South Asian Bureau of Prisons people held at a federal detention center in Brooklyn, New York to discriminatory treatment.[61] The plaintiffs also had alleged that the defendants had knowingly acquiesced in the discriminatory treatment of the plaintiffs—in other words, that the defendants had been deliberately indifferent to that treatment.[62] In the lower courts, the defendants had argued that they were entitled to qualified immunity because of the uncertain state of the law and the world in the aftermath of September 11.[63] In the Supreme Court, the defendants argued that the plaintiffs' factual allegations were insufficient to establish liability for a number of

different reasons.[64] The plaintiffs never sought to use the Second Circuit's broad "gross negligence" standard to establish liability, and the defendants had never argued that plaintiffs' theories of supervisory liability were inappropriate.[65]

Despite the parties' agreement on the relevant supervisory liability standard, the Court sua sponte reached out to address the question of the relevant standard for supervisory liability. The relevant language from *Iqbal* is as follows:

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.[66]

The principal dissent criticized the Court for addressing an issue that had been ignored by the parties and conceded by the defendants. The dissent also suggested that the Court was doing away entirely with supervisory liability, at least with respect to *Bivens* claims, but as discussed below no court has yet to adopt such a broad reading of *Iqbal*.

Substantively, the Court's use of *Iqbal* to address supervisory liability was also surprising. Much of what the Court had to say about supervisory liability was well-accepted. It had been long-established in both *Bivens* and § 1983 litigation that respondeat superior was not a viable theory of relief. And, correlatively, that all constitutional defendants had to be found liable based on their own conduct. In *Iqbal*, the only causes of action before the Court were *Bivens* claims for discrimination alleged against former Attorney General Ashcroft and FBI Director Robert Mueller.[67] In that context, the Supreme Court held that a "knowledge and acquiescence" theory of supervisory liability, akin to deliberate indifference, was inappropriate because constitutional discrimination claims depend on proof of the defendant's own discriminatory purpose.[68] That is, a supervisor who has only knowingly acquiesced in a subordinate's conduct, but who lacked discriminatory intent, simply has not violated the prohibition on intentional discrimination.[69]

In reaching that conclusion, the Supreme Court expressed no intent to eviscerate supervisory liability in its entirety or to require supervisors' direct participation in the unconstitutional conduct of their subordinates. Indeed, the Court made clear that an official may be held liable for "violations arising from his or her superintendent responsibilities."[70] The Court therefore seemed to contemplate that supervisors would continue to be liable where their conduct violated the Constitution. Thus, to the extent that the Court termed supervisory liability a "misnomer," it was the species of supervisory liability that treated it as a freestanding basis for liability rather than a means to establish personal involvement and causation.

III. Post-*Iqbal* Case Law

The dissent was not the only source of predictions that *Iqbal* would have the effect of doing away entirely with supervisory liability.[71] But the reality is more nuanced. First, most circuits already had relatively narrow standards for supervisory liability, particularly outside of the prison context—for most lower courts, there was no real news to be found in *Iqbal*'s admonition that there is no respondeat superior liability in constitutional litigation and that supervisors are held liable for their own unconstitutional acts or omissions. Nor did any circuit read *Iqbal* as holding that all supervisors must act intentionally in order to be held liable—liability for reckless or even negligent conduct by supervisors, depending on the source of the constitutional right, continues to be actionable after *Iqbal*.

There are three ways in which *Iqbal* could be considered to have altered the trajectory of supervisory liability claims. First, *Iqbal* clarified that free-standing supervisory liability, independent of any unconstitutional conduct by a supervisor, is not a viable theory of relief. Although, as described above, some circuits had collapsed different avenues for establishing the personal involvement and causation of supervisors into a single concept of "supervisory liability," circuits also disclaimed any intention that by so doing they were creating a new species of constitutional liability. *Iqbal*'s clarification, then, may have a limited impact on the most broad-ranging theories of liability, such as the Second Circuit's "gross negligence" standard. But as discussed above, there is no evidence that standard ever did substantive work in particular cases.

Second, one circuit, described below, has misinterpreted *Iqbal* to suggest that the constitutional violation asserted against a supervisor must be the same as the constitutional violation asserted against a subordinate. But as many lower courts have recognized, there are ways in which supervisory governmental officials can violate the Constitution, often without engaging in exactly the same conduct as their subordinates (or acting with exactly the same culpable state of mind). For example, while subordinate correction officers who use force directly against inmates violate the Constitution when they behave intentionally,[72] the officials responsible for supervising such officers violate the Constitution if, without using any force themselves, they exhibit deliberate indifference to the risk that their subordinates will inflict force intentionally and unnecessarily upon detainees.[73] Although all the defendants in such a case are in violation of the Constitution, their constitutional violations are established with different evidence precisely because they occupy different levels of the correctional hierarchy.

Nothing about this liability regime is any way inconsistent with *Iqbal*'s reminder that supervisors are only "liable for [their] own misconduct."[74] The Tenth Circuit's decision in *Dodds v. Richardson*,[75] provides a useful example. The court conducted an extensive analysis of the impact of *Iqbal* on supervisory liability and concluded, in part, that the supervisor had to act with deliberate indifference because the challenge involved an alleged substantive due process violation.[76] Other circuits have reached similar conclusions. All

circuits to have addressed the question have held that deliberate indifference continues to suffice for supervisory liability, at least where the root constitutional claim does not require a showing of intent.[77]

Third, and most significant, there is good evidence that *Iqbal*'s pleading standard, applied in supervisory liability cases, has had an impact on analyses by lower courts. Allegations that would have sufficed to establish particular facts prior to *Iqbal* are now being treated as "conclusory" by some courts of appeals, making supervisory liability claims more vulnerable to dismissal at the pleading stage.

1. *Iqbal*'s Impact on Supervisory Liability Standards, Circuit by Circuit

In this Part, I will first address how each circuit has addressed supervisory liability standards after *Iqbal*, before turning to the more significant impact of pleading doctrine. I will then close with evidence that the Supreme Court has not shown an appetite to double down on its decision in *Iqbal* and in some cases seems to be motivated to retreat from the broadest potential interpretations of *Iqbal*.

1. First Circuit

In the First Circuit, there have long been two principal ways for a plaintiff to establish supervisory liability: by alleging that the supervisor 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."[78] Nothing about *Iqbal* has changed this analysis. The First Circuit recently reaffirmed this approach in a case seeking liability against supervisors of ICE agents who were deliberately indifferent to the risk that their subordinates were issuing and enforcing immigration detainers against U.S. citizens.[79] The defendants in *Morales v. Chadbourne* argued not that *Iqbal* displaced supervisory liability, but that the plaintiffs' allegations against the supervisors were conclusory. The First Circuit rejected this argument, because the complaint, contra *Iqbal*, made factual assertions, including the following: The supervisory defendants "knew or should have known that their subordinates, including Defendant Donaghy, regularly . . . issued immigration detainers against individuals such as Ms. Morales, without conducting sufficient investigation and without probable cause to believe that the subject of the immigration detainer was a non-citizen subject to removal and detention."[80]

That the supervisory defendants:

formulated, implemented, encouraged, or willfully ignored [ICE's] policies and customs [in Rhode Island] with deliberate indifference to the high risk of violating Ms. Morales's constitutional rights and failed to change[] these harmful policies and customs although they

had the power and the authority to change [them] by, for instance, training officers such as Defendant Donaghy to perform an adequate investigation into individuals' citizenship and immigration status before issuing detainers.[81]

The First Circuit found these allegations, unlike the conclusory ones in *Iqbal*, factually sufficient to establish the necessary link between supervisors' indifference and the underlying constitutional violations.[82] The First Circuit conducted a similar analysis when it considered a free speech discrimination claim brought against high-level Puerto Rican officials (including the Governor and First Lady) for whom there were sufficient allegations of knowledge of and participation in the decision to terminate employees based on their political beliefs.[83]

Of course, any complaint can be dismissed if a plaintiff makes insufficient allegations of participation in activities that directly or indirectly caused constitutional violations. But it should be clear that in these cases the problem is one of pleading, not of the unavailability of supervisory liability as a theory of liability.[84] In *Soto-Torres v. Fraticelli*, the plaintiff's claim was insufficient because it provided no factual allegations to support the conclusory assertion that the supervisor "participated in or directed" the relevant constitutional violations.[85]

1. Second Circuit

As discussed above, the Second Circuit had articulated a broad supervisory liability standard prior to *Iqbal*. Although the issue of supervisory liability has been raised many times after *Iqbal* in the Second Circuit, the court has been less than clear on how to resolve the problem. Some panels have recognized the difficult nature of the question.[86] Some have assumed that pre-*Iqbal* case law applies.[87] The court seemed to clarify matters in 2015, holding that "[t]he 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."[88] In other words, a supervisor can be found liable when her conduct violates the Constitution, itself an unexceptional proposition.

District courts within the Second Circuit have mostly continued to apply pre-*Iqbal* case law, although there is a fair amount of disagreement. Several district courts within the circuit have held that *Iqbal* affects supervisory liability only in intentional discrimination cases.[89] Others have assumed that the pre-*Iqbal* standards still apply or have applied them without comment.[90] Some Southern District of New York cases have concluded that only some of the pre-*Iqbal* supervisory liability standards apply now.[91] In the Western District of New York, courts have declined to overrule *Colon v. Coughlin* in the absence of contrary direction from the Second Circuit.[92]

1. Third Circuit

The Third Circuit has not read *Iqbal* to have displaced all supervisory liability, and has adhered to its pre-*Iqbal* case law. In one case, later reversed by the Supreme Court on other grounds, the Third Circuit held:

[W]e agree with those courts that have held that, under *Iqbal*, the level of intent necessary to establish supervisory liability will vary with the underlying constitutional tort alleged. In this case, the underlying tort is the denial of adequate medical care in violation of the Eighth Amendment's prohibition on cruel and unusual punishment, and the accompanying mental state is subjective deliberate indifference. *See Farmer v. Brennan*, 511 U.S. 825, 847 (1994). *Iqbal* held that state officials are liable only for their *own* unconstitutional actions. The essence of the type of claim we approved in *Sample* [*v. Diecks*, 885 F.2d 1099 (3d Cir. 1989)] is that a state official, by virtue of his or her *own* deliberate indifference to *known* deficiencies in a government policy or procedure, has allowed to develop an environment in which there is an unreasonable risk that a constitutional injury will occur, and that such an injury *does* occur. Liability in such a situation is, as *Iqbal* requires, imposed not vicariously but based on the supervisor's own misconduct, because to exhibit deliberate indifference to such a situation is a culpable mental state under the Eighth Amendment.[93]

More recently, the Third Circuit stated that, whatever the outward bounds of supervisory liability, at the very least it will obtain when the supervisor is "personally involved" in unconstitutional conduct, which can be established by showing direct participation, directing others to violate rights, or knowledge and acquiescence in the violations.[94]

1. Fourth Circuit

In *Shaw v. Stroud*,[95] announced many years before *Iqbal*, the court held that supervisors may be liable for the actions of their subordinates where the supervisor, by his own conduct, was deliberately indifferent to, or tacitly authorized or approved prior constitutional violations. Such liability is not based on respondeat superior, but rather upon "a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict on those committed to their care."[96]

The Fourth Circuit has not revisited *Shaw* in light of *Iqbal*, although in a recent case it emphasized that a supervisor's liability cannot be based merely on her knowledge that subordinates are engaged in unconstitutional conduct, and instead must be based on violation of the Constitution through the supervisor's individual actions.[97] Ultimately, however, the Fourth Circuit resolved that case through application of pleading doctrine, not via revising standards for supervisory liability.[98]

1. Fifth Circuit

Like the Fourth Circuit, the Fifth Circuit has yet to revisit its pre-*Iqbal* supervisory liability case law, but it has noted "the many cases in the years since *Iqbal* in which we have continued to apply our rigorous pre-*Iqbal* standards for supervisory liability."[99] That standard permits

supervisors to be held liable when the plaintiff shows "(1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference."[100] The Fifth Circuit continues to rely on this standard of deliberate indifference post-*Iqbal*.[101] Indeed, the relevant standard is deliberate indifference to the risk that a subordinate will violate the plaintiff's constitutional rights, thereby severing the required mens rea for the subordinate and that required for the supervisor.[102]

1. Sixth Circuit

In the Sixth Circuit, the court has said both before and after *Iqbal* that a "mere failure to act" is insufficient to establish supervisory liability.[103] Instead, what is necessary is some "active unconstitutional behavior" on the part of the supervisor.[104] The court has noted, however, even post-*Iqbal* that "'active' behavior does not mean 'active' in the sense that the supervisor must have physically put his hands on the injured party or even physically been present at the time of the constitutional violation."[105] This means that a plaintiff must at the very least show that the defendant "implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers."[106]

In *Peatross v. City of Memphis*, the Sixth Circuit found that this standard was satisfied because the complaint sufficiently alleged knowledge and acquiescence by alleging that the supervisor failed to train and supervise officers to avoid using excessive force, failed to properly investigate claims of excessive force, and attempted to cover up unconstitutional conduct by "exonerating the officers in an effort to escape liability."[107] The complaint went beyond the minimum requirements, according to the court, by alleging that more than fifty-four officer shootings took place over the course of four years, with no improvements made to respond to these incidents.[108] And the complaint sufficiently established a causal connection between the supervisor and the officers because it alleged that the defendant:

[W]as involved at least in part in creating and enforcing all department policies; that he did not punish officer misconduct, including the use of excessive force; that he failed to take action in the face of the growing use of excessive force by officers and admonishment from the Mayor on the issue; and that he "rubber stamped" officer misconduct.[109]

1. Seventh Circuit

The Seventh Circuit, similar to other courts, has recognized that *Iqbal*'s requirement that the defendants act with intentionality was linked to the substantive constitutional right at issue in that case—the right to be free of intentional discrimination.[110] As the Seventh Circuit noted, however, "*Iqbal* simply did not speak to standards of liability for Eighth Amendment violations . . . and the Court certainly gave no indication of discontent with the settled law set forth in *Farmer* [*v. Brennan*, 511 U.S. 825 (1994)]."[111] And in *Haywood v. Hathaway*, the

court found that supervisory liability was established against a prison warden by showing that he was aware of unconstitutional conditions of confinement and took no action.[112] In dissent, Judge Easterbrook argued that the majority ignored *Iqbal*'s requirement that more than knowledge was necessary to allege a supervisory liability claim.[113]

1. Eighth Circuit

The Eighth Circuit has not squarely addressed how *Iqbal* interacts with supervisory liability, but in a two-judge concurrence, it was observed that, where the constitutional violation requires an intentional state of mind, supervisory liability for the same violation also requires intent.[114] This, however, is exactly what *Iqbal* holds. Nor have district courts addressed the question in any significant manner, other than to apply *Iqbal*'s pleading standards in the supervisory liability context.[115]

1. Ninth Circuit

The Ninth Circuit's decision in *Starr v. Baca*[116] is the leading case in the circuit. In *Starr*, the Ninth Circuit reviewed the circuit precedent—all of which had recognized the continued vitality of a supervisory liability theory based on deliberate indifference—and applied it to the Los Angeles County Sheriff.[117] The court summed up its conclusion as follows:

Starr does not allege purposeful discrimination by Sheriff Baca. Rather, he alleges unconstitutional conditions of confinement in violation of the Eighth Amendment's prohibition against cruel and unusual punishment, as incorporated through the Due Process Clause of the Fourteenth Amendment. A claim of unconstitutional conditions of confinement, unlike a claim of unconstitutional discrimination, may be based on a theory of deliberate indifference. A showing that a supervisor acted, or failed to act, in a manner that was deliberately indifferent to an inmate's Eighth Amendment rights is sufficient to demonstrate the involvement—and the liability—of that supervisor. Thus, when a supervisor is found liable based on deliberate indifference, the supervisor is being held liable for his or her own culpable action or inaction, not held vicariously liable for the culpable action or inaction of his or her subordinates. We see nothing in *Iqbal* indicating that the Supreme Court intended to overturn longstanding case law on deliberate indifference claims against supervisors in conditions of confinement cases. We also note that, to the extent that our sister circuits have confronted this question, they have agreed with our interpretation of *Iqbal*.[118]

1. Tenth Circuit

In the Tenth Circuit, *Iqbal* has been read to limit, but not eliminate, supervisory liability for government officials based on an employee's or subordinate's constitutional violations.[119] As the court said in *Dodds*:

Whatever else can be said about *Iqbal*, and certainly much can be said, we conclude the following basis of § 1983 liability survived it and ultimately resolves this case: § 1983 allows a plaintiff to impose liability upon a defendant-supervisor who creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of a policy the enforcement (by the defendant-supervisor or her subordinates) of which "subjects, or causes to be subjected" that plaintiff "to the deprivation of any rights . . . secured by the Constitution . . . ."[120]

In a more recent Tenth Circuit case, the court stated that, whatever state of mind is required of supervisors, it can be no less than the mens rea required to demonstrate that a subordinate committed the underlying constitutional violation.[121] This, however, is a misreading of *Iqbal* inasmuch as it suggests that the constitutional violation asserted against the supervisor must be identical to the constitutional violation asserted against the subordinate. Particularly in the prison context, it is easy to imagine circumstances in which the constitutional source of the claim against the subordinate is different from that asserted against the supervisor—a person in prison may need to establish that an individual officer used force intentionally for the very purpose of causing harm, but may need to establish that the supervisor was deliberately indifferent to the risk of assault by that officer. Each defendant could be held liable even though they are alleged to have engaged in different conduct with a different state of mind.[122]

1. Eleventh Circuit

In the Eleventh Circuit, a plaintiff may show that a supervisor is liable by (a) showing that she was directly involved in violating the plaintiff's constitutional rights or (b) by showing that the defendant knew subordinates would act unlawfully and failed to take action to stop them.[123] The latter requirement can be met "when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so" or when a supervisor's "custom or policy . . . result[s] in deliberate indifference to constitutional rights[] or when facts support an inference that the supervisor directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so."[124] The Eleventh Circuit does not appear to have revisited this pre-*Iqbal* standard, but perhaps that is because it is already relatively rigorous.

1. D.C. Circuit

In the D.C. Circuit, district courts have generally adhered to pre-*Iqbal* case law, in which a supervisor is liable when he knows about unconstitutional conduct and condones it or is willfully blind to it.[125] The D.C. Circuit also has applied *Iqbal* to intentional discrimination claims, holding that supervisory liability claims must be based on intentional conduct, not deliberate indifference.[126] Courts in the D.C. Circuit also have, post-*Iqbal*, accepted claims based on failure to train by supervisors where the "supervisor fails to provide more stringent training in the wake of a history of past transgressions by the agency or provides training 'so

clearly deficient that some deprivation of rights will *inevitably* result absent additional instruction.'"[127] In *Shaw v. District of Columbia*,[128] the court found this standard satisfied where plaintiff alleged that a supervisor failed to provide training regarding the treatment of female transgender detainees, because it alleged that the defendant engaged in no training or supervision while knowing that harm was "likely to occur" if the transgender plaintiff were treated as if she were male.

1. *Iqbal*'s Impact on Supervisory Liability Through Pleading Doctrine

In the prior Part, I showed that much of the substantive law of supervisory liability remains intact even after *Iqbal*. In this Part, I will show that *Iqbal*, through its altered pleading standard, has nonetheless had an impact on supervisory liability claims. To show how pleading supervisory liability claims has changed post-*Iqbal*, I will focus on some salient examples both pre- and post-*Iqbal*. This is an admittedly imprecise method, one that I hope could be supplemented through more precise empirical research. For the moment, however, these examples suffice to at least raise the question of how *Iqbal*'s pleading standard has altered the trajectory of supervisory liability cases without effectuating a substantive change in the law.

In the First Circuit, for example, there are several examples of cases in which lower courts permitted complaints to survive dismissal on the basis of allegations that would be considered "conclusory" under *Iqbal*. In one case against supervisory police officials, the allegations that sufficed against the supervisors would appear to amount to "mere" recitations of the elements of a claim.[129] Similar allegations were found sufficient in the prison context.[130] In another case, even though the plaintiff had not made "specific allegations" regarding the commissioner of corrections, the court denied a motion to dismiss because the plaintiff had "alleged a policy sweeping enough that it is reasonable to assume, for purposes of preliminary review, that the Commissioner of Corrections has at least tacitly approved the policy."[131] Indeed, pre-*Iqbal*, it appeared sufficient in some cases to simply allege that state regulations created a general duty to supervise.[132]

In pre-*Iqbal* decisions from the Fourth Circuit, courts were similarly open to general allegations made against supervisory defendants. In one case, a district court described a complaint as making allegations that the defendants were "specifically involved" in the constitutional deprivation because they knew of constitutional violations, could prevent them, and failed to take preventative action.[133] The decision cited to particular paragraphs of the complaint, which are hardly a model of detail. Indeed, they are structurally identical to the critical allegations deemed "conclusory" by the Supreme Court in *Iqbal*.[134] Other courts were similarly forgiving to plaintiffs who made general allegations of causation against supervisors, finding satisfactory bare allegations because of "the plaintiff's minimum pleading allegations."[135]

Particularly illustrative is one case that found allegations of supervisory involvement sufficient, contrasting the allegations in the complaint with a prior case that had dismissed supervisory claims.[136] The allegations deemed sufficient were minimal—namely that the defendants "knowingly, recklessly and/or with deliberate indifference failed to carry out their duty to properly instruct, train, supervise and control [their subordinates]."[137] In the earlier case, the supervisory claims did not survive because there were literally no allegations that the defendants "played any affirmative part in depriving the plaintiffs of any constitutional rights."[138] The plaintiff's theory was based solely on the fact that defendants did not prevent a constitutional violation, a proposition rejected as inconsistent with *Rizzo*'s negative constitutionalism.[139]

Post-*Iqbal*, courts in the First and Fourth Circuits have been less forgiving in assessing allegations of supervisory liability. Allegations that a supervisor "knew of" violations and "failed to act to prevent them" have been deemed insufficient not because they seek to establish liability based on an insufficient legal theory, but because they lack detailed facts.[140] General allegations of knowledge are insufficient without facts showing "what [defendant] is alleged to have known when" and without allegations stating "how he is alleged to have known it."[141] Allegations of knowledge by defendants made collectively are insufficient because they fail to establish each individual's responsibility for constitutional violations.[142]

One can find similar examples when one contrasts pre-*Iqbal* cases in other circuits as well. In the Second Circuit, lower courts routinely permitted claims to proceed against high level officials based on "conclusory" allegations of knowledge and a duty to correct conditions or the actions of lower-level officials.[143] Third Circuit cases follow a similar pattern. In one case, the district court denied a motion to dismiss where the plaintiffs alleged that the defendants acted "intentionally, deliberately and maliciously,"[144] allegations that would be deemed "conclusory" under *Iqbal*.[145] Although the district court could have imagined "a more specific set of allegations" it simply observed that "such detail is not required under federal notice pleading."[146] Other cases in the Third Circuit accepted allegations along similar lines as sufficient at the pleading stage.[147]

After *Iqbal*, however, it is much less likely that these allegations would be considered sufficient to establish the personal involvement of a supervisor in a constitutional violation. This is in large part because general allegations of knowledge, intent, or deliberate indifference do not appear viable after *Iqbal*, without additional supporting factual allegations.[148] Before *Iqbal*, however, these same allegations on their own would have been sufficient to establish a particular defendant's culpable state of mind.

In other words, while *Iqbal* has had an effect on supervisory liability, it is not in the way predicted by the dissent or other commentators. It is common parlance among proceduralists to note the inextricability of substance and procedure. And keen observers of procedure

know that significant substantive changes can be achieved through procedural reform.[149] Whether the Supreme Court intended to do so or not, this appears to be the most accurate account of *Iqbal*'s impact on supervisory liability claims.

Conclusion

The Supreme Court's decision in *Iqbal* was predicted by many to strike a death blow to supervisory liability claims. Reality is more complex. As a descriptive matter, I have endeavored to show that *Iqbal* has had little impact on how courts of appeals have constructed substantive supervisory liability standards. In most lower courts, claims based on supervisory action or inaction remain viable, even when far removed from the misconduct of individual officers.

If one wanted confirmation of this account, the Supreme Court's post-*Iqbal* decisions provide it, as they do not support the dissent's prediction that supervisory liability is effectively dead. In *Ortiz v. Jordan*,[150] the Court permitted a classic supervisory liability claim to go forward without so much as citing *Iqbal*. In *Ortiz*, the Court held that the deliberate indifference standard for supervisory liability was "clearly established law" for qualified immunity purposes, one of the rare cases over the past two decades in which the Court has issued a pro-plaintiff qualified immunity decision.[151] Moreover, the Court denied certiorari after the Ninth Circuit decided *Starr*,[152] which affirmed a supervisory liability claim brought against the Los Angeles County Sheriff.[153] Given the Court's proclivity for reversing the Ninth Circuit, particularly in plaintiff-friendly civil rights cases, one might have been surprised by the denial of certiorari in *Starr*.

Even when a case strikingly similar to *Iqbal* returned to the Court in 2017, issues of supervisory liability were not at the forefront.[154] Indeed, in that case, the Court found that allegations were sufficient to state a supervisory claim against a prison warden alleged to have been indifferent to prison abuse by corrections officers.[155] The plaintiffs made several allegations connecting the warden to discrete instances of abuse by corrections officers: the warden allegedly prevented detainees from using normal grievance procedures; the warden intentionally avoided the unit where the abuse occurred so that he would not see it; that he was made aware of abuse via "inmate complaints, staff complaints, hunger strikes, and suicide attempts;" that the Warden ignored records that would confirm the abuse; and that he did not take any action to counter the abuse.[156]

At the same time, I have tried to show that *Iqbal*'s procedural reverberations have affected the construction and viability of supervisory liability claims. By altering the pleading standard in federal court, with particular salience for civil rights claims, *Iqbal* has effectively made supervisory liability actions harder to maintain. The nuance of procedure, once again, shapes the hard edges of substantive law.

[1] Claims brought against state actors for violations of federal law are authorized by 42 U.S.C. § 1983 (2018).

[2] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). In *Bivens*, the Supreme Court held that federal law creates a right to sue federal officials for Fourth Amendment violations. *Id.* at 397. *Bivens* has been expanded to cover certain Fifth and Eighth Amendment violations, but since 1980 the doctrine has been under sustained assault. For a discussion of the trajectory of the *Bivens* doctrine, see Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing* Bivens *After* Minneci, 90 Wash. U. L. Rev. 1473, 1474 (2013). *See also* James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, Stan. L. Rev. (forthcoming 2020).

[3] As I show in Part I, *infra*, use of this term was not widespread until the 1990s, although the seeds of supervisory liability doctrine had been planted in the early 1970s.

[4] Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[5] *Id.* at 692–93; *see also* Patrick Boynton, *Supervisory Liability in the Circuit Courts After* Iqbal, 21 U. Pa. J. Const. L. 639, 645 (2018) (collecting contemporaneous academic commentaries on *Iqbal*'s impact on supervisory liability); Peter Margulies, *Noncitizens' Remedies Lost?: Accountability for Overreaching in Immigration Enforcement*, 6 FIU L. Rev. 319, 333–34 n.86 (2011) (noting that author had initially read *Iqbal* as eliminating liability for supervisors entirely, but reconsidered that view in light of lower court decisions interpreting *Iqbal*); Rosalie Berger Levinson, *Who Will Supervise the Supervisors? Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post*-Iqbal/Connick *World*, 47 Harv. C.R.-C.L. L. Rev. 273, 276–77 (2012); Peter Laumann, Ashcroft v. Iqbal *and Binding International Law: Command Responsibility in the Context of War Crimes and Human Rights Abuses*, 16 U. Pa. J.L. & Soc. Change 181, 182 (2013) (describing *Iqbal* as "apparently abolishing" supervisory liability).

[6] Rory K. Schneider, *Illiberal Construction of Pro Se Pleadings*, 159 U. Pa. L. Rev. 585, 607 (2011).

[7] For additional exploration of this issue, see Karen M. Blum, *Supervisory Liability After* Iqbal*: Misunderstood but Not Misnamed*, 43 Urb. Law. 541, 544–48 (2011); Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 Wm. & Mary Bill Rts. J. 913, 920–21 (2015); Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability After* Iqbal, 14 Lewis & Clark L. Rev. 279, 283 (2010).

[8] Other commentators, looking at the jurisprudence of specific circuit courts, have come to a similar conclusion: namely that *Iqbal* has not had a significant impact on the standard for supervisory liability claims. Boynton, *supra* note 5, at 645–46; William N. Evans,

Supervisory Liability in the Fallout of Iqbal, 65 Syracuse L. Rev. 103, 130–77 (2014) (reviewing circuit court decisions and concluding that only one circuit, the Seventh, has significantly revised supervisory liability standards after *Iqbal*).

[9] *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1864 (2017); Ortiz v. Jordan, 562 U.S. 180 (2011). I discuss *Ziglar* and *Ortiz* in greater detail in the Conclusion, *infra*.

[10] The data used for Figure 1 were generated by searching Westlaw for any appellate opinion that used the term "supervisory liability" in its text. This is an admittedly blunt instrument for measuring the extent to which appellate courts considered constitutional claims against supervisors. As I discuss below, well before the term came to encompass wide ranges of claims, courts recognized different bases for establishing liability against high-level officials. *See infra* notes 22–39 and accompanying text.

[11] Rizzo v. Goode, 423 U.S. 362 (1976).

[12] *Id.* at 366–67.

[13] The Court was doubtful that Article III standing was satisfied by the named plaintiffs in the case, but addressed merits issues in large part because the district court had certified a class in the case. *Id.* at 372–73.

[14] *Id.* at 375.

[15] *Id.* at 376.

[16] *Id.* at 376–78. Most significantly, plaintiffs relied on *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), for the proposition that a district court had broad equitable power to remedy constitutional violations, going beyond the cause of the violation itself. *Id.*

[17] *Rizzo*, 423 U.S. at 377–78.

[18] *Id.* at 377.

[19] *Id.* at 378–79.

[20] Guadalupe-Báez v. Pesquera, 819 F.3d 509, 515 (1st Cir. 2016) (describing causation in supervisory liability as a "difficult standard to meet"); Dodds v. Richardson, 614 F.3d 1185, 1209 (10th Cir. 2010) (Tymkovich, J., concurring) ("As to supervisory liability, the added level of removal between the violation and the supervisor makes questions of causation even more difficult."); Bowlin v. Yuba Cty. Sheriff, No. 2:16-cv-2934 KJN P, 2017 WL 1105931, at *4 (E.D. Cal. Mar. 24, 2017) (describing difficulty of establishing personal involvement of supervisors).

[21] *See, e.g.*, Sherrill v. Knight, 569 F.2d 124, 131 n.24 (D.C. Cir. 1977) (referring to *Rizzo* as a "supervisory liability" case).

[22] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 693–94 (1978).

[23] Jackson v. Wise, 385 F. Supp. 1159, 1162–63 (D. Utah 1974).

[24] Fernandez v. Chardon, 681 F.2d 42, 55–59 (1st Cir. 1982), *aff'd sub nom.* Chardon v. Fumero Soto, 462 U.S. 650 (1983).

[25] Wilkinson v. Ellis, 484 F. Supp. 1072, 1086–87 (E.D. Pa. 1980).

[26] *Id.* at 1086 ("Plaintiffs in this case have not yet had an opportunity to prove, or even to take discovery on, their claims. We read the complaint to allege specific knowledge on O'Neill's part of a pervasive pattern of illegal police behavior generally and in this case, and to allege that O'Neill had ultimate supervisory responsibility for the police who actually committed the alleged beatings, threats, and other coercive acts. If in fact O'Neill actually knew of the pervasive pattern of abuse alleged to have resulted in plaintiff's injuries yet failed to take any steps to remedy or prevent this situation, his endorsement of these practices could be inferred under the principles set forth in *Rizzo*.").

[27] Beard v. Mitchell, 604 F.2d 485 (7th Cir. 1979).

[28] *Id.* at 489.

[29] *Id.* at 498.

[30] *Id.* at 499.

[31] *Id.* at 499 n.21.

[32] *Id.* at 500.

[33] Dimarzo v. Cahill, 575 F.2d 15 (1st Cir. 1978).

[34] *Id.* at 16–17.

[35] *Id.* at 17 ("Defendant Hall argues, relying on *Rizzo v. Goode*, 423 U.S. 362, 371 (1976), that there is an insufficient causal link between the constitutional violations and any action or inaction on his part. He argues that his mandate is only to promulgate standards and inspect the facility and that his failure to do so does not have constitutional implications.").

[36] *Id.* at 18 n.3 ("Failure to act where there is a duty to act can give rise to an actionable claim under section 1983.").

[37] Some courts focused on these principles when summarizing the boundaries of supervisory lability: (1) the need to show that an agent of the supervisor committed the wrong; and (2) the need to show personal involvement. Davis v. Casey, 493 F. Supp. 117, 119–20 (D. Mass. 1980) (collecting cases); McCann v. Coughlin, 698 F.2d 112, 125 (2d Cir. 1983) (focusing on need for personal involvement); Duchesne v. Sugarman, 566 F.2d 817, 830–31 (2d Cir. 1977).

[38] *Duchesne*, 566 F.2d at 831.

[39] *Id.* at 831–32.

[40] Williams v. Smith, 781 F.2d 319, 323–24 (2d Cir. 1986).

[41] Maldonado v. Fontanes, 568 F.3d 263, 275 (1st Cir. 2009) (internal quotation marks omitted).

[42] Brown v. Muhlenberg Twp., 269 F.3d 205, 216 (3d Cir. 2001). The Tenth Circuit agrees with the Third Circuit that there must be personal direction or "actual knowledge and acquiescence." Woodward v. City of Worland, 977 F.2d 1392, 1400 (10th Cir. 1992) (citing Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3d Cir. 1990)).

[43] United States *ex rel.* Larkins v. Oswald, 510 F.2d 583, 589–90 (2d Cir. 1975) (affirming judgment against Commissioner of Corrections and Warden for their knowledge of a prisoner's unlawful confinement in solitary and their failure to release him); McCann v. Coughlin, 698 F.2d 112, 125 (2d Cir. 1983) (affirming judgment against Commissioner and Warden based on their actual or constructive knowledge of unconstitutional conduct and their failure to take action, constituting "gross negligence" or "deliberate indifference").

[44] Slakan v. Porter, 737 F.2d 368, 373 (4th Cir. 1984).

[45] *Id.*

[46] Whether seeking relief under § 1983 or *Bivens*, every plaintiff must establish at the very least the personal involvement of a defendant in a series of events that caused a constitutional wrong. With all of these barriers to imposing supervisory liability, it is worth asking why one would pursue such claims. They can multiply legal and factual theories; complicate discovery, proof, and motion practice; and delay the resolution of seemingly simple disputes. On the other hand, they will usually ensure a solvent defendant, in the event one is concerned about line officers not being indemnified. Moreover, they may also increase access to relevant discovery and may increase the scope of relevant trial evidence. Some juries also may be more willing to find high level defendants liable, especially where there is evidence that unlawful conduct was the result of systematic policy decisions. In addition,

having supervisors as defendants reduces the potential that a “following orders” defense will have legs. In short, it is a case-by-case determination, but in most cases it will be more beneficial than costly to have supervisory defendants in the case.

[47]Sostre v. McGinnis, 442 F.2d 178, 205 (2d Cir. 1971) (en banc) (prison warden liable for ordering that inmate be placed in solitary confinement); Wright v. McMann, 460 F.2d 126, 135 (2d Cir. 1972) (warden responsible for condition of disciplinary units at prison); Johnson v. Glick, 481 F.2d 1028, 1033–34 (2d Cir. 1973) (prison guard liable for beating inmate); *Larkins*, 510 F.2d at 589; Duchesne v. Sugarman, 566 F.2d 817, 830–31 (2d Cir. 1977); Turpin v. Mailet, 619 F.2d 196, 201 (2d Cir. 1980).

[48] Farmer v. Brennan, 511 U.S. 825, 842–43 (1994) (concluding that prison officials can be held liable for failing to protect a prisoner from assault by other detainees); Estelle v. Gamble, 429 U.S. 97, 104–05 (1976) (concluding that deliberate indifference to a prisoner’s medical needs can violate the Eighth Amendment).

[49] For example, while subordinate correction officers who use force directly against inmates violate the Constitution when they behave intentionally, see Hudson v. McMillian, 503 U.S. 1, 7 (1992), the officials responsible for supervising such officers violate the Constitution if, without using any force themselves, they exhibit deliberate indifference to the risk that their subordinates will inflict force intentionally and unnecessarily upon detainees. Blyden v. Mancusi, 186 F.3d 252, 264 (2d Cir. 1999); White v. Holmes, 21 F.3d 277, 280 (8th Cir. 1994).

[50] *See* McCann v. Coughlin, 698 F.2d 112, 125 (2d Cir. 1983) (citing Owens v. Haas*,* 601 F.2d 1242, 1246 (2d Cir. 1979), for the proposition that “gross negligence” was an adequate basis for relief under § 1983).

[51] City of Canton v. Harris, 489 U.S. 378, 385 (1989).

[52] *See, e.g.*, Jauch v. Choctaw Cty., 874 F.3d 425, 435 (5th Cir. 2017) (acknowledging that constructive knowledge suffices in *Monell* claims), *cert. denied*, 139 S. Ct. 638 (2018); United States *ex rel.* Folliard v. Comstor Corp., 308 F. Supp. 3d 56, 88 (D.D.C. 2018) (collecting cases describing the relationship between constructive knowledge and gross negligence).

[53] *See, e.g.*, *McCann*, 698 F.2d at 125.

[54] Wright v. McMann, 460 F.2d 126, 134–35 (2d Cir. 1972).

[55] *Id.* at 128.

[56] *Id.* at 134.

[57] *Id.* at 134–35.

[58] *Id.* at 135.

[59] *Id.*

[60] *Id.*

[61] *See* Elmaghraby v. Ashcroft, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at *28–29 (E.D.N.Y. Sept. 27, 2005), *aff'd in part*, *rev'd in part and remanded sub nom.* Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007), *rev'd and remanded sub nom.* Ashcroft v. Iqbal, 556 U.S. 662 (2009) (district court decision denying Ashcroft and Mueller's motion to dismiss religious and racial discrimination claims).

[62] *Iqbal*, 490 F.3d at 175 ("[T]he allegation that Ashcroft and Mueller condoned and agreed to the discrimination that the Plaintiff alleges satisfies the plausibility standard . . . .").

[63] *Id.* at 159–60 ("Several Defendants contend that even if the Plaintiff's complaint would survive a motion to dismiss in the face of a qualified immunity defense under normal circumstances, the post–9/11 context requires a different outcome.").

[64] *See* Brief for Petitioners at 15–42, *Iqbal*, 556 U.S. 662 (No. 07-1015), 2008 WL 4063957.

[65] Defendants instead argued that the plaintiffs should not be permitted to survive dismissal based on a theory of "constructive notice," but acknowledged that plaintiffs could proceed on a theory of deliberate indifference. *Id.* at 42.

[66] *Iqbal*, 556 U.S. at 677.

[67] *Id.* at 666, 75–77.

[68] *Id.* at 676–77.

[69] *Id.* at 677.

[70] *Id.*

[71] *See* sources cited *supra* note 5.

[72] *See* Hudson v. McMillian, 503 U.S. 1, 7 (1992).

[73] Blyden v. Mancusi, 186 F.3d 252, 262, 264–65 (2d Cir. 1999); White v. Holmes, 21 F.3d 277, 280 (8th Cir. 1994).

[74] *Ashcroft*, 556 U.S. at 676–77.

[75] Dodds v. Richardson, 614 F.3d 1185 (10th Cir. 2010).

[76] *Id.* at 1205.

[77] *See* Sanchez v. Pereira-Castillo, 590 F.3d 31, 49 (1st Cir. 2009) (holding that supervisors may be liable either as direct participants or by exhibiting deliberate indifference that contributes to a civil rights violation); Wright v. Leis, 335 F. App'x 552, 555 (6th Cir. 2009) (accepting failure to train as a viable theory for claim against a supervisor where jail detainee alleged he was subjected to excessive force by a line officer); *Dodds*, 614 F.3d 1185; Langford v. Norris, 614 F.3d 445, 459–60 (8th Cir. 2010) (holding that supervisors who ignored complaints of deficient medical care could be liable for deliberate indifference under the Eighth Amendment); Starr v. Baca, 652 F.3d 1202 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 2101 (2012); Doe v. Sch. Bd. Of Broward Cty., 604 F.3d 1248, 1266–67 (11th Cir. 2010) (permitting the imposition of supervisory liability based on a failure to correct widespread abuse, or the creation of a custom or policy that "results in deliberate indifference to constitutional rights"); *see also* Keating v. City of Miami, 598 F.3d 753, 764–65 (11th Cir. 2010) (holding that supervisors violate the Constitution when they know of unconstitutional conduct or that subordinates will act unconstitutionally, possess the power to order their subordinates to cease, but fail to do so); Graham v. Williams, No. 0:15-772-TMC-PJG, 2016 WL 674629, at *5 (D.S.C. Jan. 25, 2016) (applying pre-*Iqbal* Fourth Circuit precedent to supervisory liability claim), *report and recommendation adopted*, 2016 WL 631925 (D.S.C. Feb. 17, 2016); Hendrix v. Stephens, No. 6:15cv1015, 2016 WL 1000402, at *2 (E.D. Tex. Feb. 23, 2016) (applying pre-*Iqbal* circuit law to supervisory liability claim), *report and recommendation adopted*, 2016 WL 951768 (E.D. Tex. Mar. 14, 2016); Johnson v. City of Hammond, No. 2:14 CV 281, 2016 WL 1244016, at *3 (N.D. Ind. Mar. 29, 2016) (finding supervisory claim sufficient where it alleged that defendant "authorized and/or turned a blind eye" to subordinate's unconstitutional conduct (citing Arnett v. Webster, 658 F.3d 742, 757 (7th Cir. 2011))).

[78] *See* Camilo-Robles v. Zapata, 175 F.3d 41, 44 (1st Cir. 1999) (cited with approval in *Sanchez,* 590 F.3d at 49).

[79] Morales v. Chadbourne, 793 F.3d 208, 221–22 (1st Cir. 2015).

[80] *Id.* at 221 (alteration in original) (internal quotation marks omitted).

[81] *Id.* (alteration in original) (internal quotation marks omitted).

[82] *Id.* at 222 ("[I]t is plausible that *Chadbourne* and *Riccio* either formulated and implemented a policy of issuing detainers against naturalized U.S. citizens without probable cause or were deliberately indifferent to the fact that their subordinates were issuing detainers against naturalized U.S. citizens without probable cause.").

[83] Ocasio-Hernández v. Fortuño-Burset, 640 F.3d 1, 16–17 (1st Cir. 2011).

[84] *See, e.g.*, Soto-Torres v. Fraticelli, 654 F.3d 153, 159 (1st Cir. 2011).

[85] *Id.* ("*Iqbal* makes clear that this is plainly insufficient to support a theory of supervisory liability and fails as a matter of law.").

[86] *See* Raspardo v. Carlone, 770 F.3d 97, 117 (2d Cir. 2014) ("We have not yet determined the contours of the supervisory liability test, including the gross negligence prong, after *Iqbal*."); Grullon v. City of New Haven, 720 F.3d 133, 139 (2d Cir. 2013) (recognizing but refusing to resolve the issue); Reynolds v. Barrett, 685 F.3d 193, 205–06 (2d Cir. 2012) (same).

[87] *See* Vincent v. Yelich, 718 F.3d 157, 173 (2d Cir. 2013) (assuming that *Colon* factors still apply); Platt v. Inc. Vill. of Southampton, 391 F. App'x. 62, 65 (2d Cir. 2010) (adhering to pre-*Iqbal* case law on supervisory liability, and citing Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994) ("[S]upervisory liability may be imposed where an official demonstrates gross negligence or deliberate indifference to . . . constitutional rights . . . by failing to act on information indicating that unconstitutional practices *are taking place*." (alteration in original)).

[88] Turkmen v. Hasty, 789 F.3d 218, 250 (2d Cir. 2015), *rev'd in part, vacated in part sub nom.* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017).

[89] *See* McCarroll v. Fed. Bureau of Prisons, No. 9:08-CV-1343 (DNH/GHL), 2010 WL 4609379, at *4 (N.D.N.Y. Sept. 30, 2010) (*Iqbal* affects only supervisory liability claims based on intentional discrimination); Qasem v. Toro, 737 F. Supp. 2d 147, 152 (S.D.N.Y. 2010) (the Second Circuit's pre-*Iqbal* standards survive "as long as they are consistent with the requirements applicable to the particular constitutional provision alleged to have been violated"); Mason v. Hann, No. 01 Civ. 523(DAB)(MHD), 2010 WL 3025669, at *5 n.4 (S.D.N.Y. July 26, 2010) (pre-*Iqbal* standards apply in Fourth and Eighth Amendment cases, but not in discrimination claims); D'Olimpio v. Crisafi, 718 F. Supp. 2d 340, 346–47 (S.D.N.Y. 2010); Sash v. United States, 674 F. Supp. 2d 531, 543–44 (S.D.N.Y. 2009) (pre-*Iqbal* standard "may" still apply except in intentional discrimination cases).

[90] *See* Frederick v. Sheahan, No. 6:10-CV-6527 (MAT), 2014 WL 3748587, at *8–9 (W.D.N.Y. July 29, 2014) (relying on "gross negligence" prong of *Colon* test); Cagle v. Gravlin, No. 9:09-CV-0648 (FJS/GHL), 2010 WL 2088267, at *7 n.7 (N.D.N.Y. Apr. 29, 2010) (recognizing that *Iqbal* casts doubt on the Second Circuit's standard, but assuming that it still applies); Tafari v. McCarthy, 714 F. Supp. 2d 317, 343 n.11 (N.D.N.Y. 2010) (same); Robinson v. Fed. Bureau of Prisons, No. 08-CV-902(NGG)(LB), 2010 WL 1752587, at *5 (E.D.N.Y. Mar. 24, 2010) (applying Second Circuit's standard without referring to *Iqbal*); Hardy v. Diaz, No. 9:08-CV-1352 (GLS/ATB), 2010 WL 1633379, at *7–8 (N.D.N.Y. Mar. 30, 2010) (applying Second Circuit's pre-*Iqbal* law); Rahman v. Fischer, No. 08 Civ. 4368(DLC), 2010 WL 1063835, at *4 (S.D.N.Y. Mar. 22, 2010) (collecting cases); Morris v. Rabsatt, No. 9:10-CV-0041 (LEK/GHL), 2010 WL 1444880, at *2 (N.D.N.Y. Feb. 2, 2010) (dismissing, but applying the pre-*Iqbal* standard).

[91] *See* Hill v. Laird, No. 06-CV-0126(JS)(ARL), 2016 WL 3248332, at *6 (E.D.N.Y. June 13, 2016) ("In the absence of additional guidance from the Supreme Court or Second Circuit, this Court continues to conclude that only the first and third *Colon* factors continue to be viable post-*Iqbal*."); Doe v. New York, 97 F. Supp. 3d 5, 12 (E.D.N.Y. 2015) ("This Court remains skeptical that all five of the *Colon* factors survive under *Iqbal*. However, unless or until the Second Circuit or Supreme Court rule otherwise . . . at least the first and third *Colon* avenue[s] for supervisory liability survive in their entirety."); Spear v. Hugles, No. 08 Civ. 4026(SAS), 2009 WL 2176725, at *2 (S.D.N.Y. July 20, 2009) (assuming that only two of the five Second Circuit supervisory liability standards survive *Iqbal*); Bellamy v. Mount Vernon Hosp., No. 07 Civ. 1801(SAS), 2009 WL 1835939, at *4 (S.D.N.Y. June 26, 2009) (same).

[92] Davis v. Fischer, No. 09-CV-6084 CJS, 2012 WL 177400, at *5 n.8 (W.D.N.Y. Jan. 20, 2012); Rivera v. Wright, No. 08-CV-00157-JJM, 2012 WL 13659, at *3 n.6 (W.D.N.Y. Jan. 4, 2012) ("[T]end[ing] to agree with those courts that have" limited *Iqbal*'s supervisory holding to intent-based claims); Davidson v. Desai, 817 F. Supp. 2d 166, 196 (W.D.N.Y. 2011) (applying *Colon* factors without commentary).

[93] Barkes v. First Corr. Med., Inc., 766 F.3d 307, 319–20 (3d Cir. 2014), *judgment rev'd sub nom. on other grounds*, Taylor v. Barkes, 575 U.S. 822 (2015).

[94] Williams v. Papi, 714 F. App'x 128, 133–34 (3d Cir. 2017).

[95] Shaw v. Stroud, 13 F.3d 791 (4th Cir. 1994).

[96] *Id.* at 798 (quoting Slakan v. Porter, 737 F.2d 368, 372–73 (4th Cir. 1984)).

[97] Evans v. Chalmers, 703 F.3d 636, 660–61 (4th Cir. 2012).

[98] *Id.* at 661–62; *see also* Williams v. W. Va. Reg'l Jail Auth., No. 3:17-cv-03714, 2018 WL 4291828, at *4–5 (S.D.W. Va. Aug. 14, 2018), *report and recommendation adopted*, No. 3:17-cv-03714, 2018 WL 4291928 (S.D.W. Va. Sept. 6, 2018) (dismissing complaint against supervisor because plaintiff did not sufficiently allege that defendant knew of a substantial risk of harm to plaintiff).

[99] Pena v. Givens, 637 F. App'x 775, 785 n.6 (5th Cir. 2015).

[100] Smith v. Brenoettsy, 158 F.3d 908, 911–12 (5th Cir. 1998).

[101] Pierce v. Hearne Indep. Sch. Dist., 600 F. App'x 194, 199 (5th Cir. 2015).

[102] Whitley v. Hanna, 726 F.3d 631, 639–41 (5th Cir. 2013).

[103] Peatross v. City of Memphis, 818 F.3d 233, 241–42 (6th Cir. 2016).

[104] Bass v. Robinson, 167 F.3d 1041, 1048 (6th Cir. 1999).

[105] *Peatross*, 818 F.3d at 242.

[106] *Id.*

[107] *Id.* at 243.

[108] *Id.*

[109] *Id.* at 244.

[110] Haywood v. Hathaway, 842 F.3d 1026, 1032 (7th Cir. 2016).

[111] *Id.*

[112] *Id.* at 1032–33.

[113] *Id.* at 1033–34 (Easterbrook, J., dissenting).

[114] Ellis v. Houston, 742 F.3d 307, 327–28 (8th Cir. 2014) (Loken, J., concurring in judgment, joined by Colloton, J.).

[115] *E.g.*, Chavero-Linares v. Smith, No. 12-CV-42-LRR, 2013 WL 11309511, at *5–6 (N.D. Iowa Feb. 27, 2013).

[116] Starr v. Baca, 652 F.3d 1202 (9th Cir. 2011), *cert. denied*, 566 U.S. 982 (2012).

[117] *Id.* at 1205–07.

[118] *Id.* at 1206–07 (internal citation omitted).

[119] *See* Dodds v. Richardson, 614 F.3d 1185, 1199 (10th Cir. 2010).

[120] *Id.* at 1199 (alteration in original).

[121] Cox v. Glanz, 800 F.3d 1231, 1248–49 (10th Cir. 2015); *see also* Estate of Booker v. Gomez, 745 F.3d 405, 435 (10th Cir. 2014).

[122] Most significantly, in cases in which plaintiffs attempt to establish that prison supervisors can be held accountable for excessive force by subordinates, the constitutional standard for line officers—intentionality —is more stringent than the deliberate indifference standard applied by most courts against supervisors. *See*, *e.g.*, *Starr*, 652 F.3d at 1205–07 (finding viable supervisory liability claim based on deliberate indifference to excessive force used by prison officers); *Shuford v. Conway*, 666 F. App'x 811, 818–19 (11th Cir. 2016) (per curiam) (applying deliberate indifference theory for supervisory liability in excessive force context; finding questions of fact about whether a supervisor was deliberately indifferent to the risk of officer-on-detainee excessive force).

[123] Hammonds v. Jones, No. 2:15-cv-6-WKW, 2018 WL 1528803, at *9–10 (M.D. Ala. Mar. 5, 2018), *report and recommendation adopted*, No. 2:15-CV-06-WKW, 2018 WL 1527828 (M.D. Ala. Mar. 28, 2018).

[124] Cottone v. Jenne, 326 F.3d 1352, 1360 (11th Cir. 2003) (alteration in original) (internal quotation marks omitted).

[125] Int'l Action Ctr. v. United States, 365 F.3d 20, 28 (D.C. Cir. 2004) (cited in Smith v. District of Columbia, 149 F. Supp. 3d 128, 133–34 (D.D.C. 2015)).

[126] Johnson v. Gov't of D.C., 734 F.3d 1194, 1204–05 (D.C. Cir. 2013).

[127] Elkins v. District of Columbia, 690 F.3d 554, 566 (D.C. Cir. 2012).

[128] Shaw v. District of Columbia, 944 F. Supp. 2d 43, 61–64 (D.D.C. 2013).

[129] Hernandez-Lopez v. Pereira, 380 F. Supp. 2d 30, 34–35 (D.P.R. 2005) (finding allegations sufficient where plaintiff pleaded that defendants acted "with deliberate indifference [and] failed to properly sanction or discipline police officers for the violation of the constitutional rights of citizens, thereby causing police, including defendant Sergeant and Officers, to engage in the unlawful conduct described" and were "grossly negligent in the training, supervision and discipline of police sergeants and officers, so that they were deliberately indifferent to and demonstrated a reckless disregard toward the potential violation of constitutional rights which were likely to occur, as indeed occurred through the conduct of Defendant[s] . . . in the present case") (alteration in original) (internal quotation marks omitted); *see also* Luce v. Hayden, 598 F. Supp. 1101, 1104–05 (D. Me. 1984) (reading pro se plaintiff's complaint "generously" to allege a valid cause of action against a supervisory defendant—plaintiff alleged defendant "knew of" subordinate's misconduct and "allowed" it to occur).

[130] Muniz Souffront v. Alvarado, 115 F. Supp. 2d 237, 243–44 (D.P.R. 2000) (denying motion to dismiss against the Administrator of Correctional Services where plaintiff alleged that he "formulated policies and failed to execute other policies which resulted in the inadequate provision of medical attention" to the plaintiff; denying motion to dismiss another supervisory defendant where plaintiff alleged that she "knew or should have known" that a subordinate was "improperly trained").

[131] Barrett v. Coplan, 292 F. Supp. 2d 281, 286–87 (D.N.H. 2003).

[132] *See* Arruda v. Berman, 522 F. Supp. 766, 769 (D. Mass. 1981) (finding allegations sufficient where supervisory officials "knew of or should have known" of policy of unconstitutional strip searches, because of regulatory responsibilities of supervisors created by state law).

[133] Blair v. Cty. of Davidson, No. 1:05CV00011, 2006 WL 1367420, at *11 (M.D.N.C. May 10, 2006).

[134] As just one example, a series of allegations in the complaint list all of the defendants together and allege that they collectively "did each conspire and make common cause, one with the others, for the purpose of depriving, both directly and indirectly, Plaintiff C. Blair of the equal protection of the laws of the United States and the State of North Carolina." Complaint ¶ 173, *Blair*, 2006 WL 1367420 (No. 1:05CV00011), 2005 WL 176529.

[135] Simmons v. Johnson, No. 7:05 CV 00053, 2005 WL 2671537, at *4 (W.D. Va. Oct. 20, 2005) (noting that existence of deliberate indifference is "largely a factual issue"); *see also* Bell v. Bd. of Educ. of Cty. of Fayette, 290 F. Supp. 2d 701, 712 (S.D.W. Va. 2003) (finding general allegations of deliberate indifference to school sexual assault sufficient because the Rule 8 standard "is not high or demanding").

[136] Smith v. Rector & Visitors of Univ. of Va., 78 F. Supp. 2d 533, 542 (W.D. Va. 1999) (distinguishing Cobb v. Rector & Visitors of Univ. of Va., 69 F. Supp. 2d 815, 834 (W.D. Va. 1999)).

[137] *Id.*

[138] *Cobb*, 69 F. Supp. 2d at 834 n.21.

[139] *Id.*

[140] Soto-Torres v. Fraticelli, 654 F.3d 153, 159–60 (1st Cir. 2011); *see also* Peñalbert-Rosa v. Fortuño-Burset, 631 F.3d 592, 595 (1st Cir. 2011).

[141] *Soto-Torres*, 654 F.3d at 160.

[142] Evans v. Chalmers, 703 F.3d 636, 661 (4th Cir. 2012) (Wilkinson, J., concurring) ("The plaintiffs here, however, have roped in a number of Durham city officials without pleading any allegedly improper *individual* actions.").

[143] Diaz v. Ward, 437 F. Supp. 678, 688–89 (S.D.N.Y. 1977) (denying motion to dismiss claims where plaintiffs alleged that supervisors knew of allegedly unconstitutional actions of subordinates, and acted with "deliberate indifference and an intentional disregard of plaintiffs' rights") (internal quotation marks omitted).

[144] Kedra v. City of Philadelphia, 454 F. Supp. 652, 675 (E.D. Pa. 1978).

[145]Ashcroft v. Iqbal, 556 U.S. 662, 686 (2009) (interpreting Rule 9(b) to find bare allegations of a defendant's state of mind to be "conclusory").

[146] *Kedra*, 454 F. Supp. at 676.

[147] United States *ex rel.* Walker v. Fayette Cty., 599 F.2d 573, 574 (3d Cir. 1979) (finding allegations against jail supervisors sufficient where plaintiff alleged that he informed prison employees of his narcotics habit but he was provided with no medical treatment); Norton v. McKeon, 444 F. Supp. 384, 388 (E.D. Pa. 1977), *aff'd sub nom*. McKeon, Appeal of, 601 F.2d 575 (3d Cir. 1979), *and aff'd*, 601 F.2d 575 (3d Cir. 1979) (denying motion to dismiss complaint against police supervisors where plaintiff alleged that defendants "'repeatedly and knowingly failed to enforce' state laws and police department regulations 'pertaining to the use of force and excessive force by Philadelphia Police Officers, thereby creating within the Philadelphia Police Department an atmosphere of lawlessness in which police officers employ excessive and illegal force and violence'"); Santiago v. City of Philadelphia, 435 F. Supp. 136, 144 (E.D. Pa. 1977), *abrogated on other grounds by* Chowdhury v. Reading Hosp. & Med. Ctr., 677 F.2d 317 (3d Cir. 1982) (finding complaint sufficient where plaintiff alleged that their mistreatment was a "direct consequence of policies and practices which have been authorized or acquiesced in by these defendants"); Fialkowski v. Shapp, 405 F. Supp. 946, 950–51 (E.D. Pa. 1975) (finding allegations of "general knowledge combined with direct supervisory control" adequate to allege personal involvement of supervisors).

[148] *Iqbal*, 556 U.S. at 686.

[149] Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 Brook. L. Rev. 827 (1993) (arguing that procedural changes that reduce access to courts obscure substantive motivations); Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 Duke L.J. 929, 958–59 (1996) (discussing substantive motivations behind the Civil Justice Reform Act of 1990); Patrick E. Longan, *Congress, the Courts, and the Long Range Plan*, 46 Am. U. L. Rev. 625, 652 (1997) (discussing substantive goals accomplished by the Prison Litigation Reform Act's procedural changes).

[150] Ortiz v. Jordan, 562 U.S. 180 (2011).

[151] *Id.* at 189–92.

[152] Starr v. Baca, 652 F.3d 1202 (9th Cir. 2011), *cert. denied*, 2012 WL 1468577 (2012).

[153] *Id.* at 1207.

[154]Ziglar v. Abbasi, 137 S. Ct. 1843, 1864 (2017). Again, in the interest of full disclosure, I was one of the lawyers representing the plaintiffs in *Ziglar*.

[155] *Id.*

[156] *Id.*