COMMENTS

Supervisory Liability after *Iqbal*: Decoupling *Bivens* from Section 1983

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> *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.*
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> —*Ashcroft v Iqbal*[1]

INTRODUCTION

At Big State University (BSU), a pattern of sexual harassment develops between a professor and his female students. Jane, a student adversely affected by the pattern of harassment, sues not only the professor but also the chancellor of BSU—an official of the state—alleging that he failed to remedy the situation despite being made aware of it through a series of incident reports. Jane's claims arise solely under the Equal Protection Clause of the Constitution, and she requests damages under 42 USC § 1983. What facts must Jane prove to recover damages for the sexual harassment?

In her case against the professor, the answer is clear. Jane must prove that the professor discriminated and that he acted with a discriminatory intent; that is what the Constitution requires.[2] But what of her case against the chancellor? Besides proving a causal connection between the chancellor's inaction and her ultimate injury, must Jane also prove that the chancellor's inaction was motivated by discriminatory intent? If not, what lesser mens rea, if any, must Jane prove? Finally, suppose that the same pattern of harassment occurs at West Point instead of BSU. What facts must Jane prove in a suit against the superintendent of West Point—an official of the federal government—

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1 129 S Ct 1937, 1949 (2009).

2 See *Washington v Davis*, 426 US 229, 239, 242 (1976) (requiring that claims of discrimination under the Equal Protection Clause be supported by a finding of discriminatory purpose).

to recover under *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*?[3]

On these questions involving the constitutional tort liability of government "supervisors," scholars fall into two camps. Some support separate rules of "supervisory liability"[4] that govern suits against high-level officials for injuries directly caused by their subordinates.[5] Under this approach, supervisory liability operates parallel to direct causal liability but employs different liability rules.[6] Others deny the existence of a separate doctrine of supervisory liability and would hold government supervisors liable only when they directly cause the underlying constitutional injury (through, for example, a direct order to a subordinate).[7] Proponents of the latter approach would apply the same liability rules to supervisors and to their subordinates—no more and no less.

Each side relies on Supreme Court precedent to buttress its position. Advocates of supervisory liability refer to a series of § 1983 cases against municipalities that employ separate liability rules. Opponents of supervisory liability rely on statements by the Court that deny the existence of separate rules. Significantly, both sides of the debate have always assumed that the same approach to supervisory liability operates in both § 1983 and *Bivens* actions.[8]

This academic controversy blossomed into a real-world conflict after *Ashcroft v Iqbal*, in which the Supreme Court directly addressed supervisory liability for the first time in three decades and called the doctrine into question.[9] The circuit courts—which had employed supervisory liability in both § 1983 and *Bivens* actions prior to *Iqbal*—have arrived at differing interpretations of the doctrine in the months since the decision. The Seventh and Tenth Circuits have followed *Iqbal*'s

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3 403 US 388 (1971).

4 I use the term "supervisory liability" as a term of art to refer to a separate doctrine of liability applied specifically to causally attenuated supervisors.

5 See Kit Kinports, *The Buck Does Not Stop Here: Supervisory Liability in Section 1983 Cases*, 1997 U Ill L Rev 147, 192.

6 Id at 188–89 (observing that supervisors can be "responsible in some causative sense" for their subordinates' constitutional violations).

7 See, for example, Sheldon H. Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 Iowa L Rev 1, 32 (1982) (arguing that § 1983's purpose and legislative history do not support liability against a supervisor who does not act unconstitutionally, but "causes" a subordinate to so act). Supervisors are considered directly liable when they (1) promulgate faulty policy pursuant to which one of their subordinates infringes on the constitutional rights of another while (2) personally possessing the mens rea set forth by the Constitution.

8 See, for example, Sheldon Nahmod, *Constitutional Torts, Over-deterrence and Supervisory Liability after* Iqbal, 14 Lewis & Clark L Rev 279, 283 (2010) (finding inconsistency in the Court's rejection of the causation approach in *Ashcroft v Iqbal*, a *Bivens* case, and its adoption of this approach in *City of Canton v Harris*, 489 US 378 (1989), a § 1983 case).

9 See 129 S Ct at 1949.

express language by abandoning supervisory liability entirely under both § 1983 and *Bivens*.[10] The Ninth Circuit has continued to employ supervisory liability under both § 1983 and *Bivens*, apparently construing *Iqbal*'s discussion as dicta.[11] And the First Circuit appears to have split the baby, continuing to apply supervisory liability under § 1983 while expressing doubt about the doctrine's continued applicability under *Bivens*.[12]

This Comment argues for the "decoupling" approach. Support for this interpretation comes not from the explicit text of *Iqbal*, but from prior Supreme Court decisions and, ultimately, from an understanding of supervisory liability rooted in common tort law. In other words, the decoupling approach was the correct one prior to *Iqbal* and remains so in its wake. This Comment proposes, however, that *Iqbal* be used proactively by the circuit courts to change their case precedents, which once allowed supervisory liability under *Bivens*. Under this Comment's interpretation, *Iqbal* will be the impetus for needed change.

Part I begins by defining supervisory liability in the abstract and discussing the likely benefits of separate liability rules for supervisors. Part II introduces the relevant case law in the circuit courts both pre- and post-*Iqbal*, and discusses the specific language in the *Iqbal* opinion that has led to conflicting interpretations in the circuit courts in recent months.

Part III employs a three-step proof of the source and substance of supervisory liability to argue that the best interpretation of *Iqbal* requires adoption of the decoupling approach. The first—and most important—move is to recast supervisory liability as a *duty of care* that is separate and distinct from the underlying constitutional tort. This view of supervisory liability is significantly different from the common view—that supervisory liability merely represents attenuated *causation* of the constitutional tort—because it means that the presence (or absence) of a legal source for the "supervisory duty" will determine whether a regime of supervisory liability exists. The second step is to show that § 1983 provides for such a duty, using as evidence its explicit text and Supreme Court cases that interpret this language. The final step is to suggest that there is no positive source of a supervisory duty in the *Bivens* realm, by showing that the Supreme Court has refused to create one through its federal common law powers and arguing that it will almost certainly not create one in the future.

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10 See *T.E. v Grindle*, 599 F3d 583, 588 (7th Cir 2010); *Dodds v Richardson*, 2010 WL 3064002, *12 (10th Cir).

11 See *Al-Kidd v Ashcroft*, 580 F3d 949, 965 (9th Cir 2009); *Couch v Cate*, 2010 WL 1936277, *2 (9th Cir). But see *Simmons v Navajo County*, 609 F3d 1011, 1020–21 (9th Cir 2010).

12 See *Sanchez v Pereira-Castillo*, 590 F3d 31, 49 (1st Cir 2009).

Therefore, despite the common belief that *Bivens* and § 1983 are federal and state analogs, this Comment argues that, in the context of supervisory liability, their rules are very different. In other words, Jane's decision to attend BSU over West Point could determine the outcome of her equal protection suit.

I. BACKGROUND: A PRIMER ON SUPERVISORY LIABILITY

This Part provides an overview of general concepts. Part I.A introduces *Bivens* and § 1983. Part I.B presents an overview of constitutional torts—a necessary prerequisite for any discussion of supervisory liability—and discusses how they are usually defined in terms of an act and a mens rea. Finally, Part I.C explains precisely what is encompassed within the term "supervisory liability." It explains what supervisory liability looks like in the abstract, and discusses some of the benefits it might provide, but does not attempt to prove its existence under *Bivens* or § 1983.

A. Introducing § 1983 and *Bivens*

Both § 1983 and *Bivens* create routes to recovery for constitutional injuries. *Bivens* is federal common law that operates solely on federal actors,[13] while § 1983 is a federal statute that operates on state actors.[14] Neither doctrine is itself generally considered "a source of substantive rights."[15] Rather, both are commonly understood to represent "a method for vindicating federal rights elsewhere conferred" in the Constitution.[16] Historically, *Bivens* and § 1983 were treated as if they were one and the same doctrine, in part for convenience, but largely because of a belief that "it would be incongruous . . . to develop different standards . . . for state officials sued under § 1983 and federal officers sued on similar grounds under [*Bivens*]."[17] The Supreme Court has repeatedly reinforced the idea that *Bivens* and § 1983 are coextensive, treating them identically insofar as qualified

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13 See *Butz v Economou*, 438 US 478, 504 (1978).
14 See *Monroe v Pape*, 365 US 167, 180 (1961).
15 *Baker v McCollan*, 443 US 137, 145 n 3 (1979).
16 Id.
17 *Butz*, 438 US at 499 (quotation marks and citation omitted).

immunity[18] and damages calculations[19] are concerned, and developing the law of constitutional torts together through both types of actions.[20]

But the Supreme Court has "never expressly held that the contours of *Bivens* and § 1983 are identical."[21] One important difference between § 1983 and *Bivens* is that § 1983 provides a remedy for every type of constitutional tort.[22] Under *Bivens*, on the other hand, a particular analysis must be performed before a remedy for a constitutional tort is created. First, a court must explore "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages."[23] Thus, when an alternate remedy is deemed adequate, courts will refuse to consider new *Bivens* claims. Second, even in the absence of such an alternative, a court must "make the kind of remedial determination that is appropriate for a common-law tribunal"[24] by determining that "no special factors counseling hesitation in the absence of affirmative action by Congress" exist.[25] The strenuousness of this analysis means that *Bivens* remedies tend to be awarded infrequently[26] compared to their counterparts under § 1983.[27]

B. The Elements of Direct Liability for Constitutional Torts

A necessary element of supervisory liability is that a subordinate actor must be directly liable for a constitutional tort.[28] Therefore, to understand what a separate doctrine of supervisory liability entails,

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18 See *Harlow v Fitzgerald*, 457 US 800, 809 (1982).

19 See *Carey v Piphus*, 435 US 247, 259 (1978) (invoking *Bivens*, in a case arising under § 1983, for the proposition that "courts of law are capable of making the types of judgment . . . necessary to accord meaningful compensation for invasion of constitutional rights"), quoting *Bivens*, 403 US at 409.

20 See, for example, *Pearson v Callahan*, 129 S Ct 808, 822 (2009) (observing that most of the same constitutional issues arise in *Bivens* cases and § 1983 actions).

21 *Correctional Services Corp v Malesko*, 534 US 61, 82 (2001) (Stevens dissenting).

22 See Erwin Chemerinsky, *Federal Jurisdiction* 570 (Aspen 5th ed 2007).

23 *Wilkie v Robbins*, 551 US 537, 550 (2007).

24 Id, quoting *Bush v Lucas*, 462 US 367, 378 (1983).

25 *Bivens*, 403 US at 396.

26 The Supreme Court has created *Bivens* remedies only three times: in *Bivens* itself, 403 US at 397 (search and seizure), in *Davis v Passman*, 442 US 228, 248–49 (1979) (equal protection), and in *Carlson v Green*, 446 US 14, 23 (1980) (cruel and unusual punishment). As of 1985, out of twelve thousand *Bivens* suits filed, only thirty had resulted in judgments for the plaintiff. Perry M. Rosen, *The* Bivens *Constitutional Tort: An Unfulfilled Promise*, 67 NC L Rev 337, 343 (1989). When favorable settlements are considered, however, the success rate for *Bivens* claims may be as high as 16 percent. See Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 Stan L Rev 809, 837 (2010).

27 See Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L Rev 482, 528 (1982) (reporting the results of a study revealing that § 1983 plaintiffs achieved favorable results in roughly 30 percent of cases).

28 See Part I.C.

one must first understand the mechanics of direct liability. This section introduces a simple logical structure through which direct liability can be understood.

Direct liability exists only where some government actor has committed a constitutional tort[29] and a victim has suffered a constitutional injury.[30] To recover damages for a constitutional tort, a plaintiff must prove that the defendant *acted* as the proximate cause of a constitutional injury. Usually, the plaintiff must also prove that the defendant possessed a culpable *mens rea* when acting. The particular mens rea that is required differs depending on the constitutional tort that is alleged; for some, no mens rea need be proven. But, importantly, in all cases involving a constitutional tort that includes a mens rea requirement, no constitutional injury will have occurred if the required mens rea is missing.[31] Injuries that are inflicted without the required mens rea may still be remediable under state or federal law, but they will not fall within the realm of constitutional torts.

To simplify the analysis of direct liability it is helpful to focus on a limited universe of constitutional rights. The majority of § 1983 and *Bivens* suits allege violations of the Fourth Amendment's protection against unreasonable searches and seizures or the Eighth Amendment's protection against cruel and unusual punishments.[32] *Iqbal* involved the right to equal protection derived from the Fifth and Fourteenth Amendments,[33] which is also a common subject of suit. Collectively, these three rights—the Fourth Amendment, Eighth Amendment, and equal protection—run the spectrum of mens rea requirements imposed by the Constitution on direct actors. Additionally, these are the only three constitutional rights for which the Supreme Court has granted a remedy against federal actors under *Bivens*.[34] For ease of understanding and analysis, this Comment will focus solely on these three categories of constitutional rights.

The Fourth Amendment creates an objectively measured right against "unreasonable" government conduct (generally speaking) that

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29 I use the term "constitutional tort" as a term of art to refer to behavior that infringes upon an individual's constitutional rights and results in an injury remediable under *Bivens* or § 1983.

30 I use the term "constitutional injury" as a term of art to refer to the injury suffered by the victim of a constitutional tort.

31 A useful analogy is provided by criminal law, where at common law an act was murder if it (1) caused death, and (2) was committed with the required mens rea of "malice aforethought." See Joshua Dressler, *Understanding Criminal Law* 543 (LexisNexis 4th ed 2006). Absent malice aforethought, a death-causing act was not murder. Constitutional torts follow a similar logic.

32 See Reinert, 62 Stan L Rev at 841 n 154 (cited in note 26) (showing that out of 128 *Bivens* cases filed in 5 districts during the study period, 101 alleged violations of the Fourth or Eighth Amendments).

33 See *Iqbal*, 129 S Ct at 1944.

34 See note 26 and accompanying text.

entails *no mens rea requirement*.[35] The Eighth Amendment protects against "cruel and unusual punishments," requiring a mens rea of subjective deliberate indifference[36] akin to recklessness under the Model Penal Code.[37] Finally, the Equal Protection Clause is violated only when a government actor has discriminated with "an invidious discriminatory purpose."[38]

	Act	*Mens Rea*
Fourth Amendment	Unreasonable Search and Seizure	None
Eighth Amendment	Cruel and Unusual Punishment	Subjective Deliberate Indifference
Equal Protection (Due Process)	Disparate Impact	Purpose to Discriminate

Except for the Fourth Amendment, the act and mens rea requirements are inextricably intertwined such that a constitutional tort exists only when both are present. This means that determining the existence of a constitutional tort differs significantly depending on the right allegedly violated. For instance, if a Fourth Amendment violation is alleged, the court does not need to examine the mindset of the actor and can focus its entire attention on the allegedly unconstitutional act.[39] Conversely, if an equal protection violation is alleged, the court must examine both the allegedly discriminatory act and the intent of the actor,[40] which presents a much stiffer burden. In sum, an essential

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35 See, for example, *Graham v Connor*, 490 US 386, 397 (1989) ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.").

36 See *Farmer v Brennan*, 511 US 825, 837–38 (1994).

37 See id at 839 (describing the Model Penal Code's definition of recklessness as action in conscious disregard of a substantial risk of serious harm), quoting MPC § 2.02(2)(c) (ALI 1962).

38 *Washington v Davis*, 426 US 229, 242 (1976). The Supreme Court has "not embraced the proposition that a law or other official act, without regard to whether it reflects a [ ] discriminatory purpose, is unconstitutional solely because it has a [ ] disproportionate impact." Id at 239. See also, for example, *Personnel Administrator of Massachusetts v Feeney*, 442 US 256, 259, 281 (1979) (affirming a "veterans' preference statute" that "overwhelmingly" advantaged males because there was no purpose to discriminate). Notably, proof of disparate impact may support an inference of discriminatory purpose and is particularly likely to do so when the impacted group qualifies for strict or intermediate scrutiny rather than rational basis review.

39 See, for example, *Goodman v Harris County*, 571 F3d 388, 397 (5th Cir 2009) (listing the elements of an illegal seizure under the Fourth Amendment as "(1) an injury that (2) resulted directly and only from the use of force that was excessive to the need and that (3) the force used was *objectively* unreasonable") (emphasis added).

40 See, for example, *Smith v City of Chicago*, 457 F3d 643, 650–51 (7th Cir 2006) (denoting the elements of an equal protection violation subject to rational basis review as "(1) the defendant intentionally treated [the plaintiff] differently from others similarly situated, (2) the defendant

prerequisite to the adjudication of constitutional torts is identification of the constitutional right that has allegedly been violated.

C. Supervisory Liability in the Abstract

When an individual is directly liable for a constitutional tort, he will have caused an injury while possessing the mens rea required by the particular constitutional provision. (Call this individual the "immediate actor.") Under the separate doctrine of supervisory liability, an official is liable when he has "caused"[41] a constitutional tort that was committed by a subordinate while the subordinate was under his authority.[42] (This individual—the supervisor—can also be called the "causally attenuated actor.") Supervisory liability, although distinct from direct liability, is thus not automatic: there is no respondeat superior in constitutional torts.[43]

1. The expected effects of a separate regime of supervisory liability.

The utility provided by a separate regime of supervisory liability comes from its analytic separation from direct liability. A typical supervisory liability test is composed of "causal link" and "culpability" elements in a way similar to direct liability's act and mens rea requirements.[44] But unlike direct liability, in which the act and mens rea are contingent upon the constitutional right at stake, a supervisory liability rule operates the same way in every case. The substance of its elements does not depend on the constitutional tort allegedly committed by the subordinate actor.[45] Thus, when the test for supervisory liability

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intentionally treated [the plaintiff] differently *because of* his membership in the class to which he belonged, and (3) the difference in treatment was not rationally related to a legitimate state interest") (emphasis added).

41 "Cause" in supervisory liability is not like typical causation, because constitutional torts—generally composed of an act element and a mens rea element—are committed by volitional actors. The substance of the "causation" requirement is more fully explored in Part III.A.

42 Importantly, where there is no control between the supervisory official and the immediate actor—as when the injury is committed by private actors—no supervisory liability exists. See, for example, *DeShaney v Winnebago County Department of Social Services*, 489 US 189, 201–02 (1989) (holding that local officials were not liable for injuries to a child after he was returned to his abusive father's custody).

43 See *Iqbal*, 129 S Ct at 1948 ("[R]espondent correctly concedes that Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*.").

44 For an example of a supervisory liability test used by the Fourth Circuit, see text accompanying note 67.

45 As an example, prior to *Iqbal* the lower federal courts more or less agreed that *objective deliberate indifference* was the level of culpability required for supervisory liability under § 1983, regardless of the constitutional tort committed by the immediate actor. Compare *Back v Hastings*

is fulfilled, the supervisor will be held liable for the constitutional tort inflicted by his subordinate, even if the supervisor fails to possess the mens rea required for direct liability.

This distinction has two important effects. First, supervisory liability alters the deterrent effect on supervisors—in most cases by increasing it[46]—and has a corresponding effect on plaintiff recovery. Some argue that a "no supervisory liability" regime is best because the constitutional mens rea[47] standards constructed by the Supreme Court are designed to provide the optimal level of deterrence.[48] But it is also possible that at least some constitutional mens rea standards were constructed with low-level actors in mind, and that applying these standards to supervisors would result in underdeterrence.[49]

Second, by bringing all supervisor behavior under a single rule, supervisory liability may reduce the cost of litigating constitutional tort claims by simplifying litigation and judicial responsibilities. Multiple constitutional violations can be alleged in § 1983 and *Bivens* cases, and the Supreme Court has ruled that courts cannot rely on the "dominant character" of the most salient constitutional right allegedly violated to determine the outcome of such cases. Instead, courts must

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on Hudson Union Free School District, 365 F3d 107, 127 (2d Cir 2004) (equal protection) with *Richardson v Goord*, 347 F3d 431, 434–35 (2d Cir 2003) (Eighth Amendment). See also Part II.A.

46 Supervisory liability rules—which typically impose a static mens rea of *objective deliberate indifference* across all supervisors, regardless of the specifics of the claim—effectively lower the required mens rea in Eighth Amendment and equal protection cases, but increase it in Fourth Amendment cases. Thus, supervisory liability undoubtedly increases the deterrence of supervisor behavior that might lead to Eighth Amendment and equal protection violations. With regard to Fourth Amendment violations, the effect of supervisory liability is ambiguous. On the one hand, supervisory liability plainly increases the applicable mens rea because the test for Fourth Amendment violations does not incorporate a mens rea. See note 35 and accompanying text. Thus, supervisory liability might decrease the deterrence of supervisors in Fourth Amendment cases by making the prima facie suit more difficult. Alternatively, the addition of a mens rea requirement could result in a more workable rule that indirectly increases the liability—and thus the deterrence—of causally attenuated officials sued under the Fourth Amendment. Professor Sheldon Nahmod has argued that courts would not hold supervisors to a rule of objective unreasonableness without compensating elsewhere. In his opinion, the proximate cause analysis might be strengthened to compensate. See Nahmod, 14 Lewis & Clark L Rev at 297 (cited in note 7) (suggesting that the Court might adopt a "plainly obvious consequence" standard for evaluating proximate cause under a rule of objective unreasonableness).

47 I use the term "constitutional mens rea" to refer to the mens rea required to prove the direct constitutional tort. As discussed in Part I.B, the constitutional mens rea varies depending on the constitutional injury alleged.

48 See, for example, Nahmod, 14 Lewis & Clark L Rev at 303 (cited in note 7) (arguing that separate supervisory liability rules would overdeter in most situations).

49 See Kinports, 1997 U Ill L Rev at 189 (cited in note 5) (characterizing a regime without supervisory liability as determining the fate of supervisory officials "based on little more than ipse dixit"). A plaintiff suing an immediate actor will have easier access to evidence of the defendant's conduct than will a plaintiff suing a supervisor. As a result, proving mens rea becomes much more difficult in suits against supervisors, as plaintiffs are forced to rely more heavily on circumstantial evidence.

separately analyze every constitutional right that is allegedly violated and individually determine whether each constitutional mens rea is present.[50] Through its use of a static culpability rule, supervisory liability allows courts and litigants to avoid incurring costs to resolve additional claims against supervisors.

2. Supervisors who are not subject to supervisory liability.

Having set forth a broad definition of and justification for supervisory liability, two classes of actors can be excluded from its purview. First, individuals who are directly liable for their own unconstitutional behavior should be eliminated from consideration. Supervisory liability is an alternative route to liability that is used when the supervisory official lacks the requisite constitutional mens rea. When, however, a supervisor has personally committed a constitutional tort, she is directly liable for violating a duty created by the Constitution, and supervisory liability need not apply.

Excluding this class of actors is tricky, though, because supervisory officials that are directly liable often act *through* their subordinates such that the supervisor's direct action involves a subordinate's act.[51] For example, a jail warden who orders a subordinate to savagely beat a prisoner will be directly liable for violating the prisoner's Eighth Amendment rights even though the immediate physical injury is inflicted by the subordinate.[52] The most effective way to distinguish this class of supervisors is to determine whether the supervisor possessed the constitutional mens rea. If she did, direct liability is a possibility.[53] But if she did not, direct liability is impossible, and supervisory liability should be considered.

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50 See *Soldal v Cook County*, 506 US 56, 70 (1992).

51 See, for example, *Moffitt v Town of Brookfield*, 950 F2d 880, 886 (2d Cir 1991) (distinguishing "direct participation" from a "fail[ure] to remedy the wrong").

52 In this case, the jail warden's order would fulfill the act element, and the jail warden would undoubtedly possess the mens rea of subjective deliberate indifference required by the Eighth Amendment.

53 Remember that for direct liability, the constitutional mens rea is necessary but not sufficient. The act requirement must still be fulfilled. If the supervisor possesses the mens rea (or potentially, if there is no mens rea requirement, see Part I.B), the relevant question for direct liability is whether the act taken by the subordinate can be attributed to the supervisor. For example, the jail warden discussed above will not be directly liable if he silently wishes for his subordinate to savagely beat the prisoner—and thus has the mens rea—but does not perform any action that influences this outcome. The rules about attributing an act where the constitutional mens rea is fulfilled (or not at issue, as with the Fourth Amendment) are derived from the law of agency. A common phrasing is that the harm-causing act must have taken place "*pursuant to*" the policy of the supervisory official. *Samuels v Selsky*, 166 Fed Appx 552, 556 (2d Cir 2006) (emphasis added). Although these mechanics are important to understand, this class of actors should be distinguished and set aside because of the different questions posed.

Second, supervisors who have no control over the behavior of the immediate actor must be excluded. "Supervisory liability" is contextual, not formalistic; the title of "supervisor" does not create supervisory liability. In other words, a relationship of control between supervisor and subordinate is a necessary predicate of supervisory liability.[54]

II. A BRIEF HISTORY OF SUPERVISORY LIABILITY IN THE COURTS

The Supreme Court's decision in *Ashcroft v Iqbal* has cast doubt upon the continued viability of the supervisory liability doctrine. The opinion seemingly denies the existence of supervisory liability under both § 1983 and *Bivens*, although the case itself involved only a *Bivens* claim. Prior to *Iqbal*, the lower federal courts' application of supervisory liability was relatively harmonious. Supervisory liability rules rarely differed from circuit to circuit. But since *Iqbal*'s pronouncement, a three-way circuit split has developed over the existence of supervisory liability in § 1983 and *Bivens* suits. This Part details the development of the conflict.

Prior to *Iqbal*, the Supreme Court had heard only one case involving supervisory liability.[55] In *Rizzo v Goode*,[56] the Court denied an injunction under § 1983 against supervisory officials because the plaintiff had failed to establish an "affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy . . . express or otherwise showing [the supervisory officials'] authorization or approval of [subordinate] misconduct."[57] The "affirmative link" language in *Rizzo* would form the foundation of the lower courts' liability rules in suits against causally attenuated actors.

A. The Liability of Causally Attenuated Actors prior to *Iqbal*

This subpart details the pre-*Iqbal* relationship between the Supreme Court's resolution of claims against causally attenuated actors and the circuit courts' supervisory liability doctrines. Supreme Court decisions on the liability of causally attenuated municipalities under § 1983 formed the foundation for the circuit courts' § 1983 supervisory liability rules. The circuit courts transferred their supervisory liability rules from § 1983 to *Bivens* as a matter of course. But their use of the

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54 See note 42 and accompanying text.

55 Notably, *Parratt v Taylor*, 451 US 527 (1987), dealt with claims against supervisory officials not directly associated with the alleged harm, but the Court did not frame its holding in these terms because the immediate wrongdoers were unknown.

56 423 US 362 (1976).

57 Id at 371. The Court went on to note that in the absence of such an affirmative link, liability would have to be premised on "a constitutional 'duty' . . . to 'eliminate' future [subordinate] misconduct" that was "shown by the statistical pattern." Id at 376.

same supervisory liability rules under *Bivens* seemingly conflicted with two Supreme Court cases in which the Court determined that no route to liability existed for causally attenuated employers of federal officials.

1. Supervisory liability under § 1983 in the circuit courts was consistent with the Supreme Court's municipal liability jurisprudence.

The Supreme Court's municipal liability cases were the primary influence behind the development of the lower courts' supervisory liability rules.[58] Municipal liability first arose in *Monell v Department of Social Services of the City of New York*,[59] where the Court held that the "execution of a government's policy or custom" can create municipal responsibility under § 1983.[60] Importantly, for a municipality to be responsible for a "policy or custom," the policy must be created by a *policymaker*—an individual or government body "whose edicts or acts may fairly be said to represent official policy."[61]

A municipality, acting through its policymaker, is held liable for the constitutional torts of its subordinates when (1) the policymaker's acts "amount[] to *deliberate indifference* to the rights of" the plaintiff, and (2) this action or nonaction "*actually cause[s]*" the subordinate's constitutionally tortious behavior.[62] The deliberate indifference test—a test of culpability—is satisfied when a "deliberate choice to follow a course of action is made from among various alternatives" in the face of an obvious risk of the *victim's* constitutional rights being violated.[63] The test "does not turn on any underlying culpability test that determines when [direct constitutional] wrongs have occurred."[64] On the other hand, the "cause" test is solely concerned with causation of the *subordinate's* unconstitutional act, not causation of the injury ultimately effectuated. The fact that the policy of the municipality "caused" the behavior of the subordinate is enough to show that the policy is linked to the ultimate injury.[65]

With no Supreme Court cases speaking directly on supervisory liability after *Rizzo*, the circuit courts used the Supreme Court's municipal liability rules as a template for supervisory liability under

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58 For further discussion, see Parts III.B.2 and III.B.3.

59 436 US 658 (1978).

60 Id at 694–95.

61 Id at 694.

62 *City of Canton v Harris*, 489 US 378, 388, 391 (1989) (emphasis added).

63 Id at 389 (limiting what counts as a "policy or custom" sufficient to trigger liability under § 1983). See also *City of Springfield v Kibbe*, 480 US 257, 268–69 (1987) (O'Connor dissenting) (referencing "deliberate indifference to the rights of persons").

64 *Harris*, 489 US at 389 n 8.

65 See Part III.A for further unraveling of this sort of "causation" rule.

§ 1983. The specific language differed from circuit to circuit, but the Fourth Circuit's test in *Shaw v Stroud*[66] was representative: a supervisor was liable for his subordinate's constitutional harm under § 1983 if

> (1) [ ] the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff; (2) [ ] the supervisor's response to that knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices; and (3) [ ] there was an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.[67]

To show a pervasive and unreasonable risk, the plaintiff had to prove "that the [unconstitutional] conduct [was] widespread, or at least [had] been used on several different occasions."[68] To be deliberately indifferent, the supervisor must have displayed "continued inaction in the face of documented widespread abuses."[69] These first two elements virtually replicate the deliberate indifference test from *City of Canton v Harris*.[70] The third element creates liability for "the natural consequences" of the supervisor's actions.[71] Importantly, just like in *Harris*, this element does not require proof of causation in its generally understood sense, but merely requires a showing of a "link" between the supervisory behavior and the ultimate injury.[72]

The First, Second, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits used virtually identical tests to determine the liability of supervisory officials under § 1983.[73] The Third, Ninth, and DC Circuits employed similar tests but used a slightly stricter requirement of actual knowledge rather than deliberate indifference.[74]

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66 13 F3d 791 (4th Cir 1994).

67 Id at 799 (quotation marks omitted).

68 Id.

69 Id (quotation marks omitted).

70 489 US 378 (1989).

71 *Shaw*, 13 F3d at 800. Note the similarity to *Rizzo*, which also required the presence of an "affirmative link." *Rizzo*, 423 US at 371.

72 *Shaw*, 13 F3d at 800–01.

73 See, for example, *Whitfield v Melendez-Rivera*, 431 F3d 1, 14 (1st Cir 2005); *Richardson v Goord*, 347 F3d 431, 435 (2d Cir 2003); *Evett v DETNTFF*, 330 F3d 681, 689 (5th Cir 2003); *McQueen v Beecher Community Schools*, 433 F3d 460, 470 (6th Cir 2006); *Andrews v Fowler*, 98 F3d 1069, 1078 (8th Cir 1995); *Snell v Tunnell*, 920 F2d 673, 700 (10th Cir 1990); *Cottone v Jenne*, 326 F3d 1352, 1360 (11th Cir 2003).

74 See, for example, *Rode v Dellarciprete*, 845 F2d 1195, 1207–08 (3d Cir 1988); *Preschooler II v Clark County School Board of Trustees*, 479 F3d 1175, 1182 (9th Cir 2007); *Barham v Ramsey*, 434 F3d 565, 578 (DC Cir 2006).

2. Supervisory liability under *Bivens* in the circuit courts was largely consistent with supervisory liability under § 1983, but inconsistent with two Supreme Court cases involving causally attenuated employers of federal actors.

The Supreme Court has twice refused to hold a causally attenuated employer liable under *Bivens* for the constitutional tort of its employee.[75] In *FDIC v Meyer*,[76] the Court refused to allow a *Bivens* action against the FDIC—the employer of the immediate actor—to proceed because the "logic of *Bivens*" did not support it.[77] Specifically, the Court explained that *Bivens* was designed to deter immediate actors, and that an action against the FDIC would leave "no reason for aggrieved parties to bring damages actions against [immediate actors]."[78]

Seven years later, in *Correctional Services Corp v Malesko*,[79] which involved a private employer of federal officials, the Court expanded on its reasoning in *Meyer*. It explained that its goal was to focus lawsuits on the "individual directly responsible for the alleged injury."[80] Additionally, the Court refused to create liability for the causally attenuated actor even if it could be proved that this liability would indirectly increase the deterrence of immediate actors through the marketplace,[81] stating that the decision to create such liability was "a question for Congress, not us, to decide."[82] Neither *Meyer* nor *Malesko*, however, strictly dealt with supervisory liability. Interpreted in the narrowest sense, *Meyer* involved the liability of a federal agency for the actions of its federal employees and *Malesko* dealt with the liability of a private employer for the actions of its federal employees.

On the rare occasions when the question arose, the circuit courts generally employed the same supervisory liability tests in *Bivens* cases as they did in § 1983 cases. For instance, in the Second Circuit, a supervisor could be held liable for a subordinate's constitutional violation under *Bivens* if he

> (1) directly participated in the constitutional violation; (2) failed to remedy the violation after learning of it through a report or appeal; (3) created a custom or policy fostering the violation or

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75 These cases are more fully discussed in Part III.C.2.

76 510 US 471 (1994).

77 Id at 484–85. Importantly, it is unclear whether the complaint against the FDIC in this case alleged supervisory or direct liability.

78 Id at 485.

79 534 US 61 (2001).

80 Id at 71 (predicting that where a corporate defendant is available for suit, "claimants will focus their collection efforts on it").

81 Id.

82 Id at 72.

> allowed the custom or policy to continue after learning of it; (4) was grossly negligent in supervising subordinates who caused the violation; or (5) failed to act on information indicating that unconstitutional acts were occurring.[83]

This is a broad test involving a number of slightly different ways to prove liability. Although it looks significantly different from the Fourth Circuit scheme outlined in *Shaw*, this test covers the same ground. The First, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and DC Circuits also employed supervisory liability tests under *Bivens* that were largely in line with their respective tests under § 1983.[84]

B. What *Iqbal* Said about Supervisory Liability

Despite minimal guidance from the Supreme Court, the lower federal courts had achieved relative unanimity on supervisory liability prior to *Iqbal*. But in the summer of 2009, *Iqbal* thrust supervisory liability into a state of flux. An analysis of the opinion itself shows why it has confused the lower federal courts.

1. The complaint.

Javaid Iqbal, a Muslim who was arrested in the wake of 9/11, sued former attorney general John Ashcroft and FBI director Robert Mueller under *Bivens*, alleging that Ashcroft and Mueller "'each knew of, condoned, and willfully and maliciously agreed to subject' [Iqbal] to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.'"[85] Iqbal sought relief for alleged "invidious discrimination in contravention of the First and Fifth Amendments."[86] Ultimately, his case was dismissed because the complaint failed to "meet the standard necessary to comply with Rule 8" of the Federal Rules of Civil Procedure.[87] But the Court also issued a supervisory liability holding that has puzzled the lower federal courts.

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83 *Thomas v Ashcroft*, 470 F3d 491, 497 (2d Cir 2006).

84 See, for example, *Ruiz Rivera v Riley*, 209 F3d 24, 28–29 (1st Cir 2000); *Murrell v Chandler*, 277 Fed Appx 341, 343 (5th Cir 2008); *Shehee v Luttrell*, 199 F3d 295, 300 (6th Cir 1999); *Hammer v Ashcroft*, 512 F3d 961, 970 (7th Cir 2008), revd en banc, 570 F3d 798 (7th Cir 2009); *Harris v Roderick*, 126 F3d 1189, 1204 (9th Cir 1997); *Kite v Kelley*, 546 F2d 334, 337–38 (10th Cir 1976); *Gonzalez v Reno*, 325 F3d 1228, 1234–35 (11th Cir 2003); *Haynesworth v Miller*, 820 F2d 1245, 1262 (DC Cir 1987), revd on other grounds, *Hartman v Moore*, 547 US 250 (2006).

85 *Iqbal*, 129 S Ct at 1944.

86 Id at 1948.

87 Id at 1952.

2. The Court's supervisory liability holding is unclear.

In the supervisory liability section of the opinion, Justice Anthony Kennedy equated supervisory liability with respondeat superior and seemed to reject the entire doctrine. He famously asserted that "[i]n 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."[88] Instead of pleading supervisory liability, "a plaintiff must plead that each Government-official defendant, through the official's own actions, has violated the Constitution."[89] He concluded that because Ashcroft and Mueller were not alleged to have possessed the mens rea required for direct liability, they could not be held liable for the constitutional torts committed by their subordinates.[90]

Importantly, Justice Kennedy did not fully explain his apparent rejection of other forms of derivative liability besides respondeat superior, and may not have considered the possibility of a separate doctrine of supervisory liability springing from a source other than the Constitution. He restated Iqbal's argument that the defendant supervisors "can be liable for 'knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees'"[91] as actually saying that "a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution."[92] But *that was not Iqbal's argument*; rather, the complaint was worded to invoke the traditional conception of a separate doctrine of supervisory liability. Justice David Souter accurately framed the import of Justice Kennedy's language in his dissent, concluding that "the majority is . . . eliminating *Bivens* supervisory liability entirely. The nature of a supervisory liability theory is that the supervisor may be liable, under certain conditions, for the wrongdoing of his subordinates, and it is this very principle that the majority rejects."[93] Note, however, that in this assessment of the majority opinion, Justice Souter omitted mention of *Iqbal*'s purported effect on supervisory liability in § 1983 actions.

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88 Id at 1949.

89 *Iqbal*, 129 S Ct at 1948.

90 Id at 1949 (asserting that a discriminatory purpose is necessary to establish a supervisor's liability under *Bivens*).

91 Id.

92 Id.

93 *Iqbal*, 129 S Ct at 1957 (Souter dissenting).

3. The Court's supervisory liability holding is not dicta.

The procedural holding of *Iqbal* does not detract from the strength of the supervisory liability holding. The procedural portion of the opinion proceeds in two steps: first, it rejects those parts of the complaint deemed to be conclusory,[94] and second, it dismisses the remainder of the allegations because they fail "to 'nudge' the plaintiff's claim of purposeful discrimination 'across the line from conceivable to plausible.'"[95]

In rejecting the allegations that were deemed conclusory in the first step, the Court noted that Iqbal's complaint alleged facts that "amount to nothing more than a formulaic recitation of the elements of a constitutional discrimination claim, namely, that [Ashcroft and Mueller] adopted a policy *because of*, not merely *in spite of*, its adverse effects upon an identifiable group."[96] The Court admitted that Iqbal's complaint alleged facts that, if true, demonstrated "serious official misconduct" by subordinate officers, but concluded that the complaint failed to plausibly suggest "purposeful, invidious discrimination" by Ashcroft or Mueller.[97]

Had Iqbal's supervisory liability claim remained viable (as it would have, for instance, had the supervisory liability holding been omitted), Iqbal would not have needed to allege that Ashcroft and Mueller intentionally discriminated against him. Allegations of a causal link and deliberate indifference would probably have been enough,[98] and the facts in Iqbal's complaint were sufficient to plausibly make this sort of claim.[99] Therefore, even though Justice Souter apparently believed otherwise,[100] it was a necessary part of the Supreme Court's holding that supervisory liability was dismissed prior to the procedural discussion.

C. Post-*Iqbal* Use of Supervisory Liability in the Circuit Courts

It is unclear where supervisory liability stands after *Iqbal*. Most circuits have yet to adopt a unified approach to supervisory liability, with three circuits expressly acknowledging a desire to decide cases on

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94 Id at 1950–51 (majority).

95 Id, quoting *Bell Atlantic Corp v Twombly*, 550 US 544, 570 (2007).

96 *Iqbal*, 129 S Ct at 1951 (emphasis added) (quotation marks and citation omitted).

97 Id at 1951–52.

98 See note 67 and accompanying text.

99 See Edward A. Hartnett, *Taming* Twombly*, Even after* Iqbal, 158 U Pa L Rev 473, 497 (2010) (observing that the *Iqbal* majority never suggests that it would be implausible to impute to the attorney general knowledge of his subordinates' actions).

100 See *Iqbal*, 129 S Ct at 1958 (Souter dissenting) (denigrating the majority's "foray into supervisory liability" as "ha[ving] no bearing on its resolution of the case").

other grounds whenever possible.[101] A three-way circuit split has developed, however.

One approach, which the Ninth Circuit has used, is to assume that *Iqbal*'s rejection of supervisory liability is dicta under both § 1983 and *Bivens*.[102] (For reasons stated earlier, this view is incorrect.[103]) In a similar fashion, several district courts have limited *Iqbal* to its facts.[104] The courts that adopt these views proceed to apply supervisory liability under their pre-*Iqbal* precedents in both § 1983 and *Bivens* actions.

Another approach, which the Seventh and Tenth Circuits have adopted, is to take Justice Kennedy at his word and abandon supervisory liability entirely under § 1983 and *Bivens*.[105] The courts that adopt this view believe that the logic used in *Iqbal* applies equally to § 1983 even though *Iqbal* involved only a *Bivens* claim.

Despite their differences, these first two approaches have one thing in common: they assume that there is a single doctrine of supervisory liability that is equally applicable—or not applicable at all—in both § 1983 and *Bivens*, and they develop their view of *Iqbal* around this premise. By referring to § 1983 and *Bivens* together in its supervisory liability holding, *Iqbal* undoubtedly suggests this kind of interpretation. But there is an intriguing alternative interpretation of *Iqbal* that the First Circuit has hinted at: supervisory liability, although nonexistent under *Bivens* for reasons alluded to in *Iqbal*, remains available

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101 See, for example, *Bayer v Monroe County Children and Youth Services*, 577 F3d 186, 191 n 5 (3d Cir 2009); *Parrish v Ball*, 594 F3d 993, 1001 n 1 (8th Cir 2010); *Arar v Ashcroft*, 585 F3d 559, 563–64 (2d Cir 2009), cert denied 130 S Ct 3409 (2010).

102 See, for example, *Al-Kidd v Ashcroft*, 580 F3d 949, 965 (9th Cir 2009) (asserting in a *Bivens* case that "[s]upervisors can be held liable for the actions of their subordinates . . . for . . . knowingly refusing to terminate a series of acts by others, which they knew . . . would cause others to inflict constitutional injury"); *Couch v Cate*, 2010 WL 1936277, *2 (9th Cir) (reaffirming that under § 1983 a "supervisor is liable for the acts of his subordinates 'if the supervisor . . . knew of the violations of subordinates and failed to act to prevent them'"). But see *Simmons v Navajo County*, 609 F3d 1011, 1020–21 (9th Cir 2010) (asserting in a § 1983 case that a plaintiff must prove that supervisory officials "themselves acted or failed to act unconstitutionally, not merely that a subordinate did").

103 See notes 94–100 and accompanying text.

104 See, for example, *Womack v Smith*, 2009 WL 5214966, *5–6 (MD Pa) (distinguishing *Iqbal* because it involved claims of discrimination, which require a "discriminatory purpose").

105 See, for example, *T.E. v Grindle*, 599 F3d 583, 588 (7th Cir 2010) (asserting in a § 1983 case that "after *Iqbal* a plaintiff must [ ] show that the supervisor possessed the requisite" constitutional mens rea); *Dodds v Richardson*, 2010 WL 3064002, *12 (10th Cir) (quotation marks omitted):

> [A]fter *Iqbal*, Plaintiff can no longer succeed on a § 1983 claim against Defendant by showing that as a supervisor he behaved knowingly or with deliberate indifference that a constitutional violation would occur at the hands of his subordinates, unless that is the same state of mind required for the constitutional deprivation he alleges.

under § 1983.[106] This "decoupling" approach is not precluded by *Iqbal*, which only involved claims under *Bivens* and cannot govern supervisory liability under § 1983. And, in fact, it is the only interpretation of *Iqbal* that is consistent with prior Supreme Court decisions.

III. The Proper Interpretation of *Iqbal*, or Why *Bivens* Must Be Decoupled from § 1983 in the Supervisory Liability Context

This Comment argues that there is only one viable interpretation of *Iqbal*: supervisory liability exists for state actors under § 1983 but not for federal actors under *Bivens*. Support for this interpretation comes not from *Iqbal*'s reasoning, but through an analysis of the substance and source of supervisory liability, supported by closely related Supreme Court decisions involving causally attenuated actors. An investigation of the *substance* of supervisory liability reveals that supervisory liability's pivotal test—the supervisor must "cause" the subordinate's constitutional tort—actually reflects a duty placed on the supervisor that is distinct from the constitutional duty that is violated by the subordinate. In turn, this separate supervisory duty must come from some legal *source*. An exploration of the framework of § 1983 and *Bivens* reveals that there is a source of a separate supervisory duty in § 1983, but that no such source has been held to exist for *Bivens* actions. Without a source for the supervisory duty, no supervisory liability can properly be imposed in *Bivens* actions.

A. The Substance of "Causation" in Supervisory Liability: Explaining the Supervisory Duty

Unlike direct liability, which holds an actor accountable for personally violating someone's constitutional rights,[107] supervisory liability holds the supervisor responsible for the constitutional tort of a subordinate. A typical supervisory liability regime holds causally attenuated actors responsible for the immediate actor's constitutional tort[108] if the supervisor "caused" the subordinate's tort.[109] This section uses common tort law to define the contours of "causation" in supervisory liability.

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106 See *Sanchez v Pereira-Castillo*, 590 F3d 31, 49 (1st Cir 2009) (affirming the circuit's pre-*Iqbal* supervisory liability rules in a § 1983 case, but limiting its holding to "the context of Section 1983").

107 See Part I.B.

108 Recall from note 29 that "constitutional tort" refers to the unconstitutional act that results in a compensable injury. It generally includes both mens rea and act elements.

109 See Part I.C. See also note 67 and accompanying text.

1. "Causation" in supervisory liability must account for both the injury-causing act and the mens rea of the immediate actor.

Because most constitutional torts comprise an act *and* a mens rea,[110] "causation" in supervisory liability must somehow account for both. In other words, the test employed must be able to distinguish between those supervisors who are responsible for their subordinates' constitutional torts—the injury-causing acts *and* the mens rea (if there is one)—and those supervisors who are not. But under traditional conceptions of causation it is incoherent to think of an actor as *causing* the mens rea of another person.[111] Culpable actions are considered freely chosen unless the actor's choice is nonvolitional because of diminished mental capacity, imminent harm, or other limitations.[112] To understand supervisory liability, we must conceive of it differently.

Thus, it is incorrect to view supervisory liability as solely a question of causation of the underlying constitutional tort, because when an immediate actor possesses a culpable state of mind—as an immediate actor committing a constitutional tort usually does[113]—that mens rea is his own, and nobody else can cause it. More accurately, the "causation" rule used in supervisory liability actually determines when a subordinate's liability for his constitutional tort can be *imputed* to the supervisor through a separate *duty*. This means that when a supervisor is held liable under supervisory liability, it is for *his own behavior*, not the subordinate's constitutional tort. The subordinate's constitutional tort is merely a condition of his eventual liability, not the ultimate source of it.

The test of "causation" in supervisory liability incorporates two elements. First, the "causal link" element requires that the supervisor's action be affirmatively linked to the subordinate's behavior.[114] Second, the "culpability" element requires that the supervisor tacitly authorized, or was deliberately indifferent to, the possibility of injury.[115] This scheme of derivative liability shares many characteristics with the scheme used in intentional torts. There, "intent" is a necessary element

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110 See Part I.B.

111 See Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 Cal L Rev 323, 398–404 (1985) (discussing legal tensions arising from the traditional view that volitional acts are not caused).

112 See id at 392–98. In situations where the immediate act is nonvolitional, liability is typically imposed under the doctrine of proximate cause when the immediate actor's behavior was a foreseeable risk of the act taken by the causally attenuated actor. See W. Page Keeton, et al, *Prosser and Keeton on the Law of Torts* § 42 at 276–79 (West 5th ed 1984); Dressler, *Understanding Criminal Law* at 204–05 (cited in note 31).

113 See Part I.B.

114 See note 71 and accompanying text.

115 See note 69 and accompanying text.

of liability,[116] fulfilling a role similar to the constitutional mens rea in constitutional torts. Thus, a closer look at the liability rules for causally attenuated actors in the realm of intentional torts helps explain the substance of the corresponding rules used in supervisory liability.

2. In a closely analogous situation, a separate duty of care governs when causally attenuated actors are liable for the injuries caused by the intentional torts of others.

Tort law typically deals with problems associated with causally attenuated actors under the banner of "intervening causation."[117] Under this doctrine, a human actor's voluntary act prevents those involved earlier in the chain of events from being held liable. For example, a railroad's gross negligence in allowing gasoline to escape containment and explode will result in liability for the railroad if the explosion was occasioned through the negligence of a cigarette smoker.[118] But if the smoker intentionally threw his cigarette into the gasoline, intending to cause the conflagration, the railroad will be excused.[119] Thus, when an immediate actor has committed an intentional tort, the general rule is that the causally attenuated actor's liability is cut off.

But a causally attenuated actor can be liable in tort for the intentional act of the immediate actor if he breaches a *duty of care* to protect the victim from the harm that materializes.[120] Although the Restatement (Second) of Torts and many cases frame this inquiry as just another element of causation,[121] in actuality "the liability is entirely

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116 See Keeton, et al, *Prosser and Keeton on Torts* § 8 at 34 (cited in note 112) (describing intent as the purpose to bring about certain consequences coupled with a substantial certainty that the consequences will occur).

117 Consider an example: "A knocks B down and leaves B lying unconscious in the street, where B may be run over by negligently driven automobiles, and C, a personal enemy of B, discovers B there and intentionally runs B down." Id at 317. What mindset must A have possessed when he knocked B down for his liability to extend to the harm caused by C's intentional act? Note that this question is separate and distinct from the question of what mindset C must possess to be liable.

118 See *Watson v Kentucky & Indiana Bridge & Railroad Co*, 126 SW 146, 150 (Ky App 1910) (observing that "it was most probable that some one would strike a match to light a cigar or for other purposes in the midst of the gas," the probable consequences of which were "too plain to admit of doubt").

119 See id at 151 (noting that the railroad could not have foreseen that someone would maliciously ignite the gas).

120 See Restatement (Second) of Torts § 449, comment a (1965) (explaining that the likelihood of subsequent harm through third-party misconduct is not alone sufficient to render an actor's conduct negligent); Restatement (Second) of Torts § 302B ("An act . . . may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm . . . through the [mis]conduct of . . . a third person.").

121 See Restatement (Second) of Torts § 448 (referring to the actor's creation of an opportunity for future misconduct).

omission-based."[122] Thus, where the causally attenuated actor is subject to liability, it is not for the intentional tort. Rather, it is for breach of the independent duty of care to "act as a reasonable person would to avoid any type of foreseeable physical harm to others."[123] Importantly, when the causally attenuated actor and the victim have no relationship—as is typically the case in a supervisory liability suit—this duty exists only when there is a preexisting relationship between the causally attenuated actor and the immediate actor.[124]

The use of a separate duty is necessary to hold the causally attenuated actor liable because of the logic of intentional torts. Since intent requires volition, a causally attenuated actor cannot cause the intentional tort of an immediate actor. Therefore, without a separate duty of care, no causally attenuated actor could be held liable for the resulting injury no matter how blameworthy his acts were. The behavior of the causally attenuated actor is seen, in some sense, to have "caused" the intentional tort, thus creating responsibility for the ultimate injury. As with supervisory liability, however, this is not causation in its generally understood sense.[125]

In tort—as in supervisory liability—the test of the causally attenuated actor's liability can be divided into "causal link" and "culpability" elements.[126] These two elements are often combined under the

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122 Michael S. Moore, *The Metaphysics of Causal Intervention*, 88 Cal L Rev 827, 851 (2000) ("[T]here is and should be liability in those . . . cases where defendant's negligence consists precisely in her failure to anticipate some foreseeably intervening, harm-causing, voluntary human action or abnormal natural event."). Moore explains that "[t]he defendant who fails to remove the keys [from a borrowed car, allowing it to be stolen,] is liable for *failing to prevent* the loss of the car, not for *causing* its loss." Id (first emphasis added).

123 Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 Vand L Rev 941, 995–96 (2001).

124 See, for example, *Tarasoff v Regents of the University of California*, 551 P2d 334, 342–43 (Cal 1976). See also Restatement (Second) of Torts § 315 ("There is no duty . . . to prevent [a third person] from causing physical harm to another unless . . . a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct.").

125 This distinction is not particularly important in the realm of intentional torts because duties of care can easily be created by common law judges. Thus, some scholars have incorrectly argued that this is a separate type of causation. See, for example, Kadish, 73 Cal L Rev at 403–04 (cited in note 111) (noting tort law's "well-established precedent for modifying proximate cause principles to impose liability on a defendant for harm caused by another where the defendant negligently provided him with the opportunity to do the harm"); Ralph S. Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U Pa L Rev 586, 588 (1933) (asserting that the rules of causation are administered differently in cases of intentional, reckless, and negligent wrongdoing). Within supervisory liability, this distinction between causation of the volitional act and violation of a separate duty not to "cause" the volitional act takes on a tremendous amount of importance, see Parts III.B and III.C, but in intentional torts it is but a blip on the radar because either way there is equivalent liability.

126 David Seidelson helpfully divides the analysis in this way. See David E. Seidelson, *Some Reflections on Proximate Cause*, 19 Duquesne L Rev 1, 23–29 (1982) (arguing that courts should

banner of "proximate cause" by courts, but they require distinct analyses. First, the "causal link" question asks whether the ultimate injury is "directly traceable" to the causally attenuated actor's act.[127] For instance, a person who negligently leaves his keys in his car allowing it to be stolen may be liable for an injury to a pedestrian that occurs during the thief's getaway.[128] But he will not be liable for an injury to a pedestrian five days later,[129] because in that case the accident is too far removed from the causally attenuated actor's behavior. In both cases the behavior of the causally attenuated actor is a cause-in-fact of the injury but only in the first is the injury "directly traceable" to it.

Second, if the causally attenuated actor's behavior is closely related to the ultimate injury, the "culpability" question asks whether his "responsibility extends to [the] intervention[]" of the immediate actor.[130] In this step, a court compares the culpability of the causally attenuated actor to the seriousness of the ultimate injury and determines whether a duty exists.[131] For example, suppose a man leaves a hunting knife lying in plain view in his unlocked automobile. If a maniac steals the knife and murders people with it, the car owner would not be liable for these injuries.[132] Here, the ultimate injury is directly traceable to the causally attenuated actor's behavior, but the causally attenuated actor is not sufficiently culpable for there to be liability. To avoid deviating from the proximate cause paradigm, some courts might say that the causally attenuated actor's behavior in this case is *not negligent*. But this would "avoid the real issue."[133] The true issue is not whether the causally attenuated actor behaved reasonably or was negligent, but "the scope of the legal obligation to protect the plaintiff against [the] intervening cause."[134]

3. The substance of the duty used in supervisory liability is virtually identical to that employed in the realm of intentional torts.

Supervisory liability hinges on the same two questions—"causal link" and "culpability"—that are relevant in the intentional tort context.

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consider whether the intervening act enlarged the orbit or type of foreseeable risk and assess the relative degree of each actor's culpability).

127 Keeton, et al, *Prosser and Keeton on Torts* § 42 at 272–73 (cited in note 112).

128 See, for example, *Enders v Apcoa, Inc*, 127 Cal Rptr 751, 756 (Cal App 1976).

129 See, for example, *Dersookian v Helmick*, 261 A2d 472, 475 (Md 1970).

130 Keeton, et al, *Prosser and Keeton on Torts* § 44 at 313 (cited in note 112).

131 See *Palsgraf v Long Island Railroad Co*, 162 NE 99, 100 (1928) ("The risk reasonably to be perceived defines the duty to be obeyed.").

132 This example was taken from Stapleton, 54 Vand L Rev at 999 (cited in note 123).

133 Keeton, et al, *Prosser and Keeton on Torts* § 44 at 313 (cited in note 112).

134 Id.

Broadly speaking, to establish a violation of the supervisory duty a judge must determine that (1) the subordinate's behavior is directly traceable to the supervisor's action or failure to act, and (2) the supervisory official is sufficiently culpable to be held liable for the constitutional tort committed by his subordinate.[135] It should not be surprising that the same concerns underlie both analyses, because supervisory liability and intentional torts both involve the liability of causally attenuated actors.

As in intentional torts, the rule in supervisory liability should be viewed as a test for the violation of a separate duty of care. A separate duty is required to hold causally attenuated supervisors liable because the immediate actor's culpable action—the constitutional tort—cannot be caused by the supervisor in the traditional sense.[136] And the supervisory duty—like the corresponding duty in tort—is distinct from the duty imposed on direct actors.[137]

One significant difference between the two, however, is that supervisory liability employs a static test for culpability—deliberate indifference, which is the virtual equivalent of recklessness in tort[138]—whereas in tort the test of culpability varies.[139] The explanation for this difference is expediency: with so many cases against supervisors to adjudicate, a static culpability rule is preferable.[140]

Emphatically, no duty will exist in the absence of law that creates it. Justice Kennedy's opinion in *Iqbal* concluded that there is no source of a supervisory duty anywhere in the Constitution,[141] but he failed to consider the possibility of a nonconstitutional source. The next two sections pick up the baton and search for a source of the supervisory duty in § 1983 and *Bivens*.

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135 For evidence of a similar test, see note 67.

136 Concededly, since violations of the Fourth Amendment do not require proof of a mens rea, see Part I.B, a simpler test of supervisory liability might be possible in this context. See note 53. But prior to *Iqbal*, most jurisdictions employed a static rule of supervisory liability in all constitutional torts, including those under the Fourth Amendment. See, for example, *Walters v Stafford*, 317 Fed Appx 479, 486 (6th Cir 2009). Although applying the same rule across the board may reduce litigation costs, see note 50 and accompanying text, this Comment takes no position on whether the same supervisory liability rules should apply when the constitutional harm occurs under the Fourth Amendment.

137 See Part I.B.

138 "Reckless disregard," sometimes called "wanton or willful misconduct," is defined as acting or failing to act while "knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent." Restatement (Second) of Torts § 500.

139 See note 134 and accompanying text.

140 See notes 44–50 and accompanying text.

141 See Part II.B.

B. The Source of the Supervisory Duty in § 1983

Section 1983 codifies part of the Civil Rights Act of 1871,[142] which was enacted to provide a civil remedy for the constitutional harms committed by state officials during Reconstruction. It is a common refrain that § 1983, like *Bivens*, "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred."[143] But this principle, however correct it may be, says nothing about whether § 1983 might be the source of a separate supervisory duty. The sections that follow collectively show that § 1983 does incorporate a separate duty for supervisory officials, and thus that it is wrong to dismiss supervisory liability under § 1983.

1. Section 1983 seems to create a supervisory duty through its "causes to be subjected" language.

Section 1983 explicitly holds liable a party who "subjects, or causes [another person] to be subjected" to the deprivation of a constitutional right.[144] Unless the latter part of the phrase is mere surplusage, this language would seem to create liability beyond the immediate actor. The existence of supervisory liability for state actors under § 1983 hinges on the import of these words.

Analyses of the legislative history surrounding the enactment of the Civil Rights Act of 1871 are suggestive but not conclusive of a duty. There was virtually no debate about the text of the provisions ultimately enacted.[145] At most, the record provides tentative support for the argument that high-level state executives were intended to be made liable through the legislation,[146] but it does not indicate what specific rule governs the liability of causally attenuated actors under § 1983.

Some scholars assert that the "causes to be subjected" language is, in fact, surplusage. For instance, Professor Sheldon Nahmod argues that this language was included "solely as a formal matter to include both personal, hands-on causation and causation through intervening

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142 Civil Rights Act of 1871, 17 Stat 13.

143 *Baker v McCollan*, 443 US 137, 145 n 3 (1979).

144 42 USC § 1983 ("Every person who . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable.").

145 See Cong Globe, 42d Cong, 1st Sess 522 (Apr 7, 1871).

146 See Cong Globe, 42d Cong, 1st Sess 374–76 (Mar 31, 1871) ("The Federal Government cannot serve a writ of mandamus upon State Executives or upon State courts to compel them to . . . protect the rights, privileges, and immunities of citizens . . . [so] the Federal Government must resort to its own agencies to carry its own authority into execution."); id at 378 ("Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; . . . all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection.").

actors."[147] Dismissing the argument that these words create a supervisory duty, he further asserts that "this statutory language on its face addresses only causation and says nothing about any supervisory liability state of mind requirement."[148] If Professor Nahmod is correct, and § 1983 does not contain a supervisory duty, supervisors would only be subject to direct liability. That is, a supervisor would only be liable for an injury caused by a subordinate if (1) the subordinate acted as an agent of the supervisor, and (2) the supervisor personally possessed the constitutional mens rea.[149] Although this reading of "causes to be subjected" may be plausible, it would eliminate liability in cases where a subordinate actor acts on his own and does not act as an agent of the causally attenuated actor. (For example, a supervisor's failure to properly train his subordinate would never result in liability under such a regime.) More importantly, this reading of § 1983 is inconsistent with how the statute has been applied in cases against causally attenuated municipalities.[150]

As discussed above,[151] this Comment argues that the need to extend liability beyond the immediate actor *necessitates* a separate duty of care. The post-enactment treatment of § 1983 is the best evidence that the "causes to be subjected" language in § 1983 creates such a separate duty. Although supervisory liability has a meager history in the Supreme Court, the Court has provided extensive analyses of the "subjects, or causes to be subjected" language in cases against municipalities under § 1983. These cases involve causally attenuated actors and employ a duty rule, and thus are readily comparable to supervisory liability.

2. A separate duty is imposed in § 1983 cases against causally attenuated municipalities.

The liability of municipalities under § 1983 comes from the same "subjects, or causes to be subjected" language as the liability of individual actors. An analysis of the duty rule used in municipal liability shows that it requires proof of the same two elements as supervisory liability: (1) a causal link, and (2) culpability.[152] The history of the development of municipal liability shows that the Supreme Court derived these two elements from the "causes to be subjected" language in § 1983.

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147 Nahmod, 14 Lewis & Clark L Rev at 299 n 104 (cited in note 8).

148 Id at 301–02.

149 See notes 51–53 and accompanying text.

150 Professor Nahmod admits as much. See Nahmod, 14 Lewis & Clark L Rev at 305–08 (cited in note 8) (asserting that the Supreme Court's § 1983 municipal liability jurisprudence is "wrong").

151 See Part III.A.

152 See note 135 and accompanying text.

Municipalities were first held liable for their direct constitutional violations in *Monell*,[153] but it was not until *City of Oklahoma City v Tuttle*[154] that the Court addressed an attenuated liability claim against a municipality. In that case, the Court emphasized that liability against the municipality would require the showing of "an *affirmative link* between the training inadequacies alleged, and the particular constitutional violation at issue."[155] This would "establish both the requisite *fault* on the part of the municipality, and the *causal connection* between the 'policy' and the constitutional deprivation."[156]

In her dissent in *City of Springfield v Kibbe,*[157] Justice Sandra Day O'Connor articulated a standard for municipal liability that would later be adopted by the Court. In her view, "the 'inadequacy' of [subordinate] training may serve as the basis for § 1983 liability only where the failure to train amounts to a reckless disregard for or *deliberate indifference* to the rights of persons."[158] She emphasized that this "'causation' requirement of § 1983 is a matter of statutory interpretation rather than of common tort law," believing "such a showing [ ] necessary . . . to make out a claim that the city 'subjected, or caused [the defendant] to be subjected' to a deprivation of his constitutional rights under § 1983."[159] To show that this principle was anchored not only in the text of § 1983 but also in the common law, Justice O'Connor referenced "traditional tort principles [that]. . . show[] that the law has been willing to trace more distant causation when there is a cognitive component to the defendant's fault than when the defendant's conduct results from simple or heightened negligence."[160]

In *Harris*, the specific duty to which municipalities are held was finally articulated. The Court adopted Justice O'Connor's view that "that the inadequacy of [subordinate] training may serve as the basis for § 1983 liability only where the failure to train amounts to *deliberate indifference* to the rights of" the plaintiff.[161] The Court emphasized that "[t]he 'deliberate indifference' standard we adopt for § 1983 'failure to train' claims does not turn upon the degree of fault (if any) that

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153 436 US at 694–95.

154 471 US 808 (1985).

155 Id at 824 n 8 (emphasis added).

156 Id at 824 (emphasis added).

157 480 US 257 (1987).

158 Id at 268–69 (O'Connor dissenting) (emphasis added).

159 Id at 269–70.

160 Id at 269. See also Part III.A.2.

161 *Harris*, 489 US at 388 (emphasis added) (reasoning that this approach is most consistent with previous cases that required the policy to be a moving force behind the constitutional violation).

a plaintiff must show to make out an underlying claim of a constitutional violation."[162] Thus, a separate duty of care was articulated.

The Court most recently addressed the liability of a causally attenuated municipality in *Board of County Commissioners of Bryan County v Brown*.[163] In that case, the Court framed the separate duty as a question of "culpability and causation,"[164] and it acknowledged that this route to liability "present[s] much more difficult problems of proof" than does direct liability.[165] The Court reaffirmed the efficacy of the test articulated in *Harris*—that the municipal action be "taken with 'deliberate indifference' as to its known or obvious consequences"—in cases against causally attenuated municipalities.[166]

Through these decisions, the Court articulated a four-step analysis to determine the liability of causally attenuated municipalities. First, the municipal policy must be created by an appropriate "policymaker."[167] Second, a municipal official must have committed a constitutional tort.[168] Third, the municipality must have acted with deliberate indifference such that "its policies are the 'moving force behind the constitutional violation.'"[169] Fourth, "the identified deficiency in a city's training program must be closely related to the ultimate injury."[170] This setup is similar to that in intentional torts.[171] The third prong is akin to the "culpability" element, while the fourth prong corresponds to the "causal link" element.

As the case law involving municipalities shows, this duty rule is drawn straight from the text of § 1983. The next subpart explains why the duty that is used in the municipal liability cases also applies to supervisors under § 1983.

3. There is no doctrinal reason to distinguish the duty used in municipal liability from that used in supervisory liability.

To determine whether a different duty should apply to supervisors than to municipalities, it is helpful to examine the two elements

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162 Id at 389 n 8. See also *Collins v City of Harker Heights*, 503 US 115, 122 (1992) (emphasizing "the separate character of the inquiry into the question of municipal responsibility and the question whether a constitutional violation occurred").

163 520 US 397 (1997).

164 Id at 415.

165 Id at 406.

166 Id at 407.

167 See *Tuttle*, 471 US at 823–24. See also note 61 and accompanying text.

168 See *City of Los Angeles v Heller*, 475 US 796, 799 (1986).

169 *Harris*, 489 US at 389, quoting *Monell*, 436 US at 694.

170 *Harris*, 489 US at 391.

171 See Part III.A.2.

behind the creation of a separate duty: "causal link"[172] and "culpability."[173] If one of these elements were to vary systematically between supervisors and municipalities, this would be strong evidence supporting the use of different duty rules.

The causal attenuation of supervisors and municipalities is virtually identical. To illustrate, consider the possible arrangement of the parties in cases where a municipality and a supervisor both face liability as causally attenuated actors. Three possible relationships present themselves. Sometimes the supervisory official will be a lower-level actor who is not a municipal "policymaker"; in these cases the supervisor is causally closer to his subordinate's constitutional tort than is the municipality.[174] Other times, the supervisor will be a high-level actor who is further removed from the constitutional tort than is the municipality, and who may exercise control over multiple municipalities.[175] And, still other times, the supervisor will be a *Monell* policymaker[176] such that his act is considered the municipality's act.[177] Without empirical evidence showing otherwise, it seems fair to assume that municipalities and supervisors generally inhabit roughly the same area of the causal chain.

Furthermore, there is no reason to think that supervisors are systematically more or less culpable than municipalities. Ultimately, supervisor behavior is the basis for all municipal liability,[178] and there is no evidence that the culpability of supervisors varies along the causal spectrum. Thus, the animating factors behind a separate duty—causal link and culpability—seem to support using the same duty to govern supervisor and municipality behavior.[179]

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172 See note 127 and accompanying text.

173 See note 130 and accompanying text.

174 See, for example, *Shaw*, 13 F3d at 798–99 (involving a suit against a police sergeant with direct supervisory authority over the offending police officer).

175 See, for example, *Taylor v List*, 880 F2d 1040, 1043 (9th Cir 1989) (involving a suit against, among others, the attorney general for the state of Nevada in his supervisory capacity).

176 See note 61 and accompanying text.

177 See, for example, *Bennett v City of Eastpointe*, 410 F3d 810, 818–19 (6th Cir 2005) (involving a suit against the city police chief in his personal capacity and the city itself based on policy memos filed by the same police chief).

178 See notes 62–65 and accompanying text.

179 The availability of suit against a municipality in some cases should not affect one's perspective of supervisory liability under § 1983. Although many municipalities provide legal representation for and indemnify judgments against employees sued under § 1983, see Nicole G. Tell, Note, *Representing Police Officers and Municipalities: A Conflict of Interest for a Municipal Attorney in a § 1983 Police Misconduct Suit*, 65 Fordham L Rev 2825, 2834–37 (1997) (comparing statutes requiring municipalities to indemnify and provide representation for their police officers), federal law does not require the municipality to do this, and not all do. See Martin A. Schwartz, *Should Juries Be Informed That Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?*, 86 Iowa L Rev 1209, 1216–19 (2001) (discussing common requirements for indemnification, as well as the policy considerations that lead states and municipalities to provide this protection). One important effect of supervisory liability is to subject

Prior to *Iqbal*, the lower courts agreed and liberally used language from the Supreme Court's municipality cases when constructing their supervisory liability rules.[180] For instance, in *Sample v Diecks*,[181] the Third Circuit determined that "the standard of individual liability for supervisory public officials" should be "no less stringent than the standard of liability for the public entities that they serve."[182] Other circuits followed suit with similar holdings, most of which remained in force at the time *Iqbal* was decided.[183] The logic connecting supervisory liability and municipal liability under § 1983 likely remains intact after *Iqbal*, in which the Supreme Court appeared to purposely avoid affecting its municipal liability rules.[184]

Two factors distinguish municipal from supervisory liability under § 1983. First, supervisors can escape liability through qualified immunity, but municipalities have no such defense.[185] Second, supervisors are subject to occasional punitive damage awards, while municipalities are immune from these judgments.[186] The denial of qualified immunity to municipalities is necessitated by the negative effects that would ensue were a government thus relieved of liability[187] and by the difficulty of performing a qualified immunity analysis on a nonliving entity.[188] In a

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supervisors to additional punitive judgments, which may not be covered by government indemnification. See id at 1237–42 (discussing conflicting authority on the issue of whether juries should be informed that a defendant is or is not indemnified against punitive damages).

180 See also Part II.A.

181 885 F2d 1099 (3d Cir 1989).

182 Id at 1118.

183 See, for example, *Doe v Taylor Independent School District*, 15 F3d 443, 453, 454 n 8 (5th Cir 1994) (finding "no principled reason why an individual to whom the municipality has delegated responsibility to directly supervise the employee should not be held liable under the same standard"); *Greason v Kemp*, 891 F2d 829, 837 (11th Cir 1990) (analyzing a supervisory liability claim with reference to municipal liability because "a supervisor's orders and directions are tantamount to official policy in the eyes of a subordinate").

184 The supervisory liability holding in *Iqbal* was carefully phrased to exclude municipalities: "a plaintiff must plead that each *Government-official defendant*, through the *official*'s own individual actions, has violated the Constitution." *Iqbal*, 129 S Ct at 1948 (emphasis added).

185 Compare *Harlow v Fitzgerald*, 457 US 800, 818 (1982) (holding that government officials are shielded from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known") with *Owen v City of Independence*, 445 US 622, 650 (1980) (finding no basis in the Civil Rights Act's legislative history for extending qualified immunity to municipalities for good faith constitutional violations).

186 Compare *Smith v Wade*, 461 US 30, 51 (1983) (holding that punitive damages—available in almost all jurisdictions when the Civil Rights Act was passed—are available under § 1983) with *City of Newport v Fact Concerts, Inc*, 453 US 247, 271 (1981) (holding that municipalities are not subject to punitive damages for their officials' bad-faith conduct, due in part to the strain that large awards would place on municipal treasuries and public services).

187 See *Owen*, 445 US at 651 (noting that municipal immunity, in combination with qualified immunity for government officials, would leave remediless "many victims of municipal misfeasance").

188 See id at 649 (explaining that the rationale behind immunity for "discretionary" functions does not apply to municipalities: "a municipality has no 'discretion' to violate the Federal Constitution").

similar vein, the imposition of punitive damages against municipalities was rejected because it would not effectively deter a municipality, with its changing cast of "policymakers,"[189] and because the extra damages would inevitably come out of the pockets of taxpayers.[190] Neither distinction has any relationship to the two factors—causal link and culpability—with which a duty is concerned. Thus, neither distinction justifies imposing different duties on supervisors and municipalities.

Since the separate supervisory duty—like the municipal duty—has its source in the text of § 1983, an interpretation of *Iqbal* that eliminates supervisory liability under § 1983 is erroneous. Although some of the language used in *Iqbal* appears critical of supervisory liability in § 1983 actions,[191] the case did not involve any claims against state actors. Therefore, this language is dicta. Accordingly, until Congress removes the source of the separate duty in the text of § 1983, causally attenuated state officials should be subject to supervisory liability.

C. The (Lack of a) Source of a Supervisory Duty under *Bivens*

Although *Iqbal*'s denigration of supervisory liability may have proceeded with too sweeping a stroke by implicating § 1983, it was not without merit as to *Bivens* actions. This subpart searches in vain for the corresponding source of a separate duty in the *Bivens* doctrine.

Two potential sources of a duty can be eliminated at the outset. First, unlike the situation for state actors under § 1983, there is no congressional statute from which the supervisory duty can be derived for federal actors. Congress has not created a § 1983 equivalent to govern the behavior of federal actors.

Second, a duty cannot be adopted from state law. Under the Rules of Decision Act,[192] three factors must be fulfilled before state substantive law can be adopted by the federal courts. First, the Constitution must not require an alternate rule. Second, congressional intent must support the application of state principles. And third, state law must be applicable in the case generally.[193] Even if the first two elements

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189 See *Fact Concerts*, 453 US at 269.

190 See id at 263 (observing that "such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised").

191 See note 88 and accompanying text.

192 28 USC § 1652.

193 See 28 USC § 1652. Although the Rules of Decision Act is not limited to diversity cases, see Note, Clearfield*: Clouded Field of Federal Common Law*, 53 Colum L Rev 991, 996 (1953) (citing as examples cases arising under the Miller Act and § 301 of the Taft-Hartley Act), in federal question cases it is not clear that the Rules of Decision Act "establish[es] a *mandatory* rule that [the Court must] apply state law in federal interstices." *DelCostello v International Brotherhood of Teamsters*, 462 US 151, 160 n 13 (1983). If the rule is actually of discretionary

were fulfilled, state law would fail the third: it cannot realistically be deemed to "apply" to a case involving constitutional torts. If supervisory liability were to exist for federal actors it would need to be applied uniformly, which is inconsistent with the application of state law.[194] Moreover, the Supreme Court has explicitly concluded that state law is not the source of liability in suits against federal officials for constitutional harms.[195]

Because there is no statutory source—federal or state—of a supervisory duty for federal actors, the only remaining possibility is that the Constitution impliedly provides for a supervisory duty. Concededly, the Supreme Court might have the power to "interpret" the Constitution as providing for a supervisory duty, just as it can determine that a right implies a remedy[196] in a regular *Bivens* case. Such a decision would be a step beyond the average decision to create a *Bivens* remedy, but this Comment assumes that the Court could exercise this power if it wished. But even if the Court could uncover a supervisory duty through its interpretive power, every indication—especially after *Iqbal*—suggests that it will not.

1. The Supreme Court is extremely reluctant to expand the *Bivens* doctrine.

Bivens was immediately controversial when it was decided in 1971.[197] With *Bivens*, the Supreme Court created a right to sue federal

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application in federal question cases, this only weakens the argument for adopting state tort principles in *Bivens* actions.

194 Consider Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U Pa L Rev 797, 805 (1957):

> The question of judicial incorporation [of state law] can only arise in an area which is sufficiently close to a national operation to establish competence in the federal courts to choose the governing law, and yet not so close as clearly to require the application of a single nationwide rule of substance.

See also *United States v Kimbell Foods, Inc*, 440 US 715, 726–27 (1979) ("When Government activities aris[e] from and bea[r] heavily upon a federal . . . program, the Constitution and Acts of Congress 'require' otherwise than that state law govern of its own force.") (ellipses and alterations in original) (quotation marks omitted).

195 See *Meyer*, 510 US at 478 (asserting that "[b]y definition, federal law, *not state law*, provides the source of liability for a claim alleging the deprivation of a federal constitutional right") (emphasis added).

196 See *Marbury v Madison*, 5 US (1 Cranch) 137, 163 (1803) ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy.").

197 Scholarly interpretations of the *Bivens* remedy tend to fall somewhere between two poles. On one side is the argument that in *Bivens*, the Supreme Court was exercising its common law power to fashion an adequate remedy for every constitutional harm, a power that, under this view, cannot be taken away by Congress. See Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S Cal L Rev 289, 299–303 (1995) (inferring a power to craft appropriate relief from 28 USC § 1331's general grant of federal question jurisdiction). On the other side is the position that *Bivens* represents an unconstitutional intrusion on Congress's lawmaking

officers for damages for their Fourth Amendment violations.[198] Three justices—Chief Justice Warren Burger and Justices Hugo Black and Harry Blackmun—dissented on the grounds that judicial creation of a remedy violated separation of powers.[199] But it was Justice John Harlan's concurring opinion that formed the foundation for the development of the *Bivens* doctrine by evaluating a "range of policy considerations" including "deterren[ce]," just compensation, and the "incremental expenditure of judicial resources."[200] This would develop into the two-step "alternate remedy" and "special factors" analysis that effectively prohibits the creation of any new *Bivens* remedy today.[201]

Once its initial enthusiasm waned, the Court repeatedly indicated its intent to limit the *Bivens* doctrine. No new *Bivens* remedies have been created since *Carlson v Green*[202] was decided in 1980.[203] In the three decades since, the Court has explicitly refused to create new *Bivens* remedies on seven separate occasions,[204] and has undoubtedly avoided hearing many other cases in which it had the same opportunity.

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power. See *Bivens*, 403 US at 428 (Black dissenting); *Carlson v Green*, 446 US 14, 38 (1980) (Rehnquist dissenting) ("In my view the authority of federal courts to fashion remedies based on the 'common law' of damages for constitutional violations . . . does not exist where not conferred by Congress."). Under this view, absent a showing of congressional intent, the creation of any *Bivens* remedy violates separation of powers. The truth probably lies somewhere in the middle, with the federal judiciary possessing limited power to construct remedies for constitutional harms in the interstices of congressional intent. See Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U Chi L Rev 1, 46–48 (1985) (proposing a four-part test for determining the legitimacy of federal common law); Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 Harv L Rev 1, 2–3 (1975) (maintaining that "a surprising amount of what passes as authoritative constitutional 'interpretation' is best understood as . . . a constitutional common law subject to amendment, modification, or even reversal by Congress").

198 See *Bivens*, 403 US at 397.

199 See id at 411–12 (Burger dissenting) ("Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not."); id at 427–28 (Black dissenting) ("[This is] an exercise of power that the Constitution does not give us."); id at 430 (Blackmun dissenting) (noting that, if additional remedies are truly inadequate, "it is the Congress and not this Court that should act").

200 Id at 407–11 (Harlan concurring in the judgment) (answering what he saw as the main question—"whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted").

201 See note 24–27 and accompanying text.

202 446 US 14 (1980).

203 See note 26.

204 See *Chappell v Wallace*, 462 US 296, 305 (1983) (declining to create a *Bivens* remedy for enlisted men against their superiors); *Bush v Lucas*, 462 US 367, 390 (1983) (refusing to create a *Bivens* remedy for an alleged First Amendment violation); *United States v Stanley*, 483 US 669, 683–84 (1987) (holding that there is no *Bivens* remedy available for any injuries arising out of military service); *Schweiker v Chilicky*, 487 US 412, 428–29 (1988) (refusing to create a remedy for an allegedly unconstitutional denial of due process in the "denial of a statutory right"); *Meyer*, 510 US at 485–86 (1994) (refusing to create a *Bivens* remedy against a federal agency); *Malesko*, 534 US at 71–75 (2001) (rejecting the creation of a *Bivens* remedy against a private operator of prisons); *Wilkie v Robbins*, 551 US 537, 561 (2007) (finding no *Bivens* remedy for retaliation allegedly unconstitutional under the Due Process Clause).

Additionally, lower courts have actively sought to undermine the *Bivens* actions that do exist.[205] For instance, the DC Circuit has applied its rules of procedure in creative ways to effectuate the Supreme Court's apparent desire to dismiss *Bivens* cases in the early stages of litigation.[206] Furthermore, the dramatic expansion in the scope of the qualified immunity doctrine can be traced to the Court's distaste for *Bivens* actions.[207] With courts and commentators alike considering the *Bivens* doctrine a dead letter,[208] it seems unlikely that the Supreme Court will ever allow it to expand, let alone through the "discovery" of a supervisory duty in the Constitution.

2. On three occasions—*Meyer*, *Malesko*, and now *Iqbal*—the Court has refused to hold a causally attenuated actor liable under *Bivens*.

In two cases prior to *Iqbal*—*Meyer* and *Malesko*—the Supreme Court dismissed a *Bivens* action against a causally attenuated employer of an immediate actor in large part because of the employer's causal attenuation.[209] Three policies motivated these decisions. First, and most importantly, was the policy against expanding the *Bivens* doctrine.[210] Second was the goal to focus liability on the immediate actor to create maximum deterrence for the direct constitutional tort.[211] Third was the concern that a significant expansion of liability to new

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205 Consider note 26 and accompanying text.

206 See, for example, *Simpkins v District of Columbia Government*, 108 F3d 366, 370 (DC Cir 1997) (dismissing a *Bivens* case with prejudice even though common practice would have allowed the plaintiff to refile because of the "duty of the lower federal courts to stop insubstantial *Bivens* actions in their tracks and get rid of them"); *Cameron v Thornburgh*, 983 F2d 253, 258 & n 5 (DC Cir 1993) (dismissing *Bivens* actions even though venue was improper because dismissal furthered the Supreme Court's purpose to "weed out insubstantial *Bivens* actions").

207 See Reinert, 62 Stan L Rev at 824–26 (cited in note 26).

208 See, for example, *Vaughan & Potter 1983, Ltd v United States*, 1992 WL 235868, *3 (D Colo) ("[B]ringing a *Bivens* action is a Herculean task with little prospect of success."); Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs without Remedies after* Wilkie v. Robbins, 2007 Cato S Ct Rev 23, 26 ("[T]he best that can be said of the *Bivens* doctrine is that it is on life support with little prospect of recovery.").

209 See notes 75–82 and accompanying text.

210 See *Meyer*, 510 US at 484–85 (determining that the "logic of *Bivens*" counseled against expanding the doctrine); *Malesko*, 534 US at 74 ("The caution toward extending *Bivens* remedies into any new context, a caution consistently and repeatedly recognized for three decades, forecloses such an extension here.").

211 See *Meyer*, 510 US at 485 ("If we were to imply a damages action directly against federal agencies . . . there would be no reason for aggrieved parties to bring damages actions against individual officers."); *Malesko*, 534 US at 71 ("[I]f a corporate defendant is available for suit, claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury.").

parties would violate separation of powers.[212] Notably absent from the discussion in either case was any concern that the plaintiff might not be made whole unless he could sue the causally attenuated actor. Thus, the Court's predominant focus was on the systemic consequences of expanding *Bivens* liability. These concerns are not compatible with the creation of a supervisory duty.

In *Iqbal*, the Court appears to have closed the door to the supervisory liability of federal officials for good. After noting its "reluctan[ce] to extend *Bivens* liability to any new context or new category of defendants,"[213] the Court clearly and emphatically denied the existence of a separate supervisory duty in the Constitution. It emphasized that *Bivens* liability requires that "each Government-official defendant, through the official's own individual actions, has violated the Constitution" because "each Government official . . . is only liable for his or her own [constitutional] misconduct."[214] The Court went on to declare that under *Bivens*, "the term 'supervisory liability' is a misnomer."[215] With a flourish, the Court rejected the idea of a separate supervisory duty.

Without a supervisory duty, a separate doctrine of supervisory liability cannot exist.[216] The Supreme Court has not—and apparently will not—find that a separate duty of care governs the behavior of causally attenuated federal actors. It is thus incorrect to hold federal supervisors responsible for anything other than their direct liability.

CONCLUSION

This Comment's conclusion—that supervisory liability exists under § 1983 but not under *Bivens*—must follow once one accepts the premise that supervisory liability is derived from a separate duty of care. Through careful analysis and reference to analogous principles in tort, this Comment has shown that premise to be valid.

The *Iqbal* opinion does not expressly support this dichotomous result; it instead appears to deny the existence of supervisory liability entirely. Thankfully, avoidance of *Iqbal* is not needed for the lower federal courts to achieve the correct result: *Iqbal*'s rejection of supervisory liability for federal actors falls in line with the Court's policy

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212 See *Meyer*, 510 US at 486 ("We leave it to Congress to weigh the implications of such a significant expansion of Government liability."); *Malesko*, 534 US at 72 ("Whether it makes sense to impose asymmetrical liability costs on private prison facilities alone is a question for Congress, not us, to decide.").

213 *Iqbal*, 129 S Ct at 1948 (quotation marks omitted).

214 Id at 1948–49.

215 Id at 1949.

216 See Part III.A.

against creating new *Bivens* actions, and its language relating to § 1983 is mere dicta. Moreover, evading *Iqbal* would be imprudent: as only the second case heard by the Supreme Court involving supervisory liability, *Iqbal* could be a forceful precedent.

Instead, the lower federal courts would be wise to use *Iqbal* to achieve the necessary changes in supervisory liability. They should view *Iqbal* as overturning the incorrect circuit precedents that previously allowed supervisory liability under *Bivens*. But *Iqbal*'s § 1983 dicta should be distinguished, because Congress expressly incorporated a supervisory duty in § 1983. Thus, *Iqbal* should be interpreted as decoupling *Bivens* from § 1983 in the context of supervisory liability.