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## **Municipal Liability and Liability of Supervisors: Litigation Significance of Recent Trends and Developments**

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## MUNICIPAL LIABILITY AND LIABILITY OF SUPERVISORS: LITIGATION SIGNIFICANCE OF RECENT TRENDS AND DEVELOPMENTS

*Karen Blum,\* Celeste Koeleveld,\*\* Joel B. Rudin\*\*\*  
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### I. INTRODUCTION

PROFESSOR BLUM: Claims of municipal and supervisory

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liability are common in § 1983<sup>1</sup> litigation. The purpose of this presentation is to examine two recent Supreme Court decisions, *Connick v. Thompson*<sup>2</sup> and *Ashcroft v. Iqbal*<sup>3</sup> with an eye to their impact on how lower federal courts will assess such claims in the wake of new constraints imposed by these cases. The focus of the discussion will be on developments in single-incident liability cases after *Connick* and supervisory liability claims after *Iqbal*.

## II. THE DEMISE OF SINGLE INCIDENT LIABILITY

### A. *City of Canton v. Harris*

In *City of Canton v. Harris*,<sup>4</sup> the Court determined what would make a government entity liable for an admitted violation of the Constitution by a non-policymaking employee.<sup>5</sup> In *City of Canton*, the respondent, Geraldine Harris, was arrested and brought to a police station.<sup>6</sup> Mrs. Harris displayed signs requiring medical attention.<sup>7</sup> On several occasions she slumped to the ground and fell, but instead of giving her medical support, the jail personnel “left [her] lying on the floor to prevent her from falling again.”<sup>8</sup> She was asked, but incoherently responded, as to whether she required medical attention.<sup>9</sup> Eventually, when she was released, her family provided her with medical support.<sup>10</sup>

By the time the case reached the Supreme Court, it was conceded that there was an underlying Fourteenth Amendment<sup>11</sup> constitutional violation.<sup>12</sup> Specifically, Mrs. Harris, as a pre-trial detainee, was deprived of necessary medical attention.<sup>13</sup> The question raised

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<sup>1</sup> 42 U.S.C. § 1983 (2006).

<sup>2</sup> 131 S. Ct. 1350 (2011).

<sup>3</sup> 556 U.S. 662 (2009).

<sup>4</sup> 489 U.S. 378 (1989).

<sup>5</sup> *Id.* at 380.

<sup>6</sup> *Id.* at 381.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *City of Canton*, 489 U.S. at 381.

<sup>10</sup> *Id.*

<sup>11</sup> U.S. CONST. amend. XIV, § 1.

<sup>12</sup> *City of Canton*, 489 U.S. at 388 n.8.

<sup>13</sup> *See id.* (“First, petitioner has conceded that, as the case comes to us, we must assume that respondent’s constitutional right to receive medical care was denied by city employees—whatever the nature of that right might be.” (citing Transcript of Oral Argument

was what must the respondent prove in order to hold the City of Canton liable for the underlying constitutional violation?<sup>14</sup> In *City of Canton*, the Court unanimously rejected the City's argument that municipal liability can be imposed only where the challenged policy is itself unconstitutional and concluded that "there are limited circumstances in which an allegation of a 'failure to train' can be the basis for liability under § 1983."<sup>15</sup> Noting substantial disagreement among the lower courts as to the level of culpability required in "failure to train" cases, the Court went on to hold that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."<sup>16</sup> The *City of Canton* "deliberate indifference" standard is based on a construction of the § 1983 causation language, and it is clear that the statutory standard has nothing to do with the level of culpability that may be required to make out the underlying constitutional wrong.<sup>17</sup> The Court in *City of Canton* decided that deliberate indifference is what is required to establish the municipal policy as the "moving force" behind or cause of the constitutional violation.<sup>18</sup> As the Court later explained, the "term was used in the [*City of*] *Canton* case for the . . . purpose of identifying the threshold for holding a city responsible for the constitutional torts committed by its inadequately trained agents."<sup>19</sup>

The Court indicated two ways the plaintiff may show the requisite objective deliberate indifference in order to establish municipal liability in a failure-to-train case. First, a plaintiff may establish deliberate indifference by demonstrating a failure to train officers in a specific area where there is an obvious need for training to avoid violations of citizens' constitutional rights.<sup>20</sup> The Court noted the following:

[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or

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at 8-9, *City of Canton*, 489 U.S. 378 (1989), available at [http://www.oyez.org/cases/1980-1989/1988/1988\\_86\\_1088#argument](http://www.oyez.org/cases/1980-1989/1988/1988_86_1088#argument))).

<sup>14</sup> *Id.* at 383.

<sup>15</sup> *Id.* at 387.

<sup>16</sup> *Id.* at 388.

<sup>17</sup> *City of Canton*, 489 U.S. at 388 n.8.

<sup>18</sup> *Id.* at 388 (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)) (internal quotation marks omitted).

<sup>19</sup> *Collins v. City of Harker Heights*, 503 U.S. 115, 124 (1992).

<sup>20</sup> *City of Canton*, 489 U.S. at 390.

different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.<sup>21</sup>

The example all of the Justices agreed would demonstrate “deliberate indifference,” is where city policymakers provide no training on the constitutional limits of the use of deadly force to armed police officers who are given authority to arrest fleeing felons.<sup>22</sup> Without training, officers will likely commit constitutional violations and a pattern is not needed to establish the deliberate indifference of the city in failing to train where the outcome of no training is so predictable and obvious. Second, as Justice O’Connor suggested in her partial concurrence, a plaintiff may rely on a pattern of unconstitutional conduct that is so pervasive as to imply actual or constructive knowledge on the part of policymakers, whose deliberate indifference, evidenced by a failure to correct once the need for training became obvious, would be attributable to the municipality.<sup>23</sup> Both of these methods, the obviousness method and the constructive notice method, are discussed in *Sornberger v. City of Knoxville*.<sup>24</sup>

### B. *Board of County Commissioners v. Brown*

In *Board of County Commissioners v. Brown*,<sup>25</sup> the Supreme Court revisited the issue of municipal liability under § 1983 in the context of a single bad hiring decision made by a county sheriff who was stipulated to be the final policymaker for the county in matters of law enforcement.<sup>26</sup> Specifically, the sheriff hired his nephew’s son, Burns, for the position of reserve deputy.<sup>27</sup> In addition to having no training,<sup>28</sup> Burns had a criminal record consisting of various traffic

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 390 n.10.

<sup>23</sup> *Id.* at 396 (O’Connor, J., concurring in part and dissenting in part).

<sup>24</sup> 434 F.3d 1006, 1029-30 (7th Cir. 2006).

<sup>25</sup> 520 U.S. 397 (1997).

<sup>26</sup> *Id.* at 402.

<sup>27</sup> *Id.* at 401.

<sup>28</sup> *Brown* did not go to the Supreme Court on the issue of failure to train, but, on remand, the Fifth Circuit reinstated the jury verdict for the plaintiff on the failure to train claim. *Id.* at 402. The Fifth Circuit held that because Deputy Burns did not receive any training where there was an obvious need to train, a single incident could result in county liability. *Brown v. Bryan Cnty.*, 219 F.3d 450, 465 (5th Cir. 2000).

violations and misdemeanors.<sup>29</sup> However, because none of the crimes were felonies under Oklahoma law, he could not be barred from this position.<sup>30</sup>

Respondent was injured when she was forcibly extracted from a vehicle driven by her husband.<sup>31</sup> Mr. Brown was avoiding a police checkpoint and was eventually stopped by a squad car in which Reserve Deputy Burns was riding.<sup>32</sup> Burns removed Mrs. Brown from the vehicle with such force that he caused severe injury to her knees.<sup>33</sup>

Respondent sued both Burns and the county under § 1983.<sup>34</sup> The United States Court of Appeals for the Fifth Circuit affirmed the district court's entry of judgment on the jury's verdict against Burns for excessive force, false arrest, and false imprisonment.<sup>35</sup> The majority of the panel also affirmed the judgment against the county based on Sheriff Moore's decision to hire Burns without adequately investigating his background.<sup>36</sup> The Fifth Circuit concluded that Moore's inadequate screening and hiring of Burns demonstrated "deliberate indifference to the public's welfare."<sup>37</sup>

The Supreme Court, in a 5-to-4 opinion written by Justice O'Connor, reversed the court of appeals, distinguishing Brown's case, involving a claim that a single lawful hiring decision ultimately resulted in a constitutional violation, from a case "[w]here a plaintiff claims that a particular municipal action *itself* violates federal law, or directs an employee to do so."<sup>38</sup> As the Court noted, its prior cases, recognizing municipal liability based on a single act or decision attributed to the government entity, involved decisions of local legislative bodies or policymakers that directly effected or ordered someone to effect a constitutional deprivation.<sup>39</sup> In such cases, there are no real

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<sup>29</sup> *Brown*, 520 U.S. at 401.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 400-01.

<sup>32</sup> *Id.* at 400.

<sup>33</sup> *Id.* at 400-01.

<sup>34</sup> *Brown*, 520 U.S. at 401.

<sup>35</sup> *Id.* at 402.

<sup>36</sup> *Id.*

<sup>37</sup> *Brown v. Bryan Cnty.*, 67 F.3d 1174, 1184 (5th Cir. 1995), *vacated*, 520 U.S. 397 (1997).

<sup>38</sup> *Brown*, 520 U.S. at 402-04.

<sup>39</sup> *Id.* at 403-04. The Court explained:

To the extent that we have recognized a cause of action under § 1983 based on a single decision attributable to a municipality, we have done so only where the evidence that the municipality had acted and that the

problems with respect to the issues of fault or causation.

Because the respondent did not allege a pattern of “bad hires” in *Brown*, the argument for county liability was based on Sheriff Moore’s alleged deliberate indifference in failing to investigate Burns’s background. The theory was that “Burns’[s] use of excessive force was the plainly obvious consequence of Sheriff Moore’s failure to screen Burns’[s] record.”<sup>40</sup> The majority, however, rejected respondent’s effort to analogize her inadequate screening case to a failure-to-train case.<sup>41</sup> Justice O’Connor noted:

In attempting to import the reasoning of [*City of*] *Canton* into the hiring context, respondent ignores the fact that predicting the consequence of a single hiring decision, even one based on an inadequate assessment of a record, is far more difficult than predicting what might flow from the failure to train a single law enforcement officer as to a specific skill necessary to the discharge of his duties. As our decision in [*City of*]

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plaintiff had suffered a deprivation of federal rights also proved fault and causation. For example, *Owen v. Independence* and *Newport v. Fact Concerts, Inc.* involved formal decisions of municipal legislative bodies. In *Owen*, the city council allegedly censured and discharged an employee without a hearing. In *Fact Concerts*, the city council canceled a license permitting a concert following a dispute over the performance’s content. Neither decision reflected implementation of a generally applicable rule. But we did not question that each decision, duly promulgated by city lawmakers, could trigger municipal liability if the decision itself were found to be unconstitutional. Because fault and causation were obvious in each case, proof that the municipality’s decision was unconstitutional would suffice to establish that the municipality itself was liable for the plaintiff’s constitutional injury. Similarly, *Pembaur v. Cincinnati* concerned a decision by a county prosecutor, acting as the county’s final decisionmaker to direct county deputies to forcibly enter petitioner’s place of business to serve *capiases* upon third parties. Relying on *Owen* and *Newport*, we concluded that a final decisionmaker’s adoption of a course of action “tailored to a particular situation and not intended to control decisions in later situations” may, in some circumstances, give rise to municipal liability under § 1983. In *Pembaur*, it was not disputed that the prosecutor had specifically directed the action resulting in the deprivation of petitioner’s rights. The conclusion that the decision was that of a final municipal decision-maker and was therefore properly attributable to the municipality established municipal liability. No questions of fault or causation arose.

*Id.* at 405-06 (citations omitted).

<sup>40</sup> *Id.* at 408-09.

<sup>41</sup> *Id.* at 409.

*Canton* makes clear, “deliberate indifference” is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. Unlike the risk from a particular glaring omission in a training regimen, the risk from a single instance of inadequate screening of an applicant’s background is not “obvious” in the abstract; rather, it depends upon the background of the applicant. A lack of scrutiny may increase the likelihood that an unfit officer will be hired, and that the unfit officer will, when placed in a particular position to affect the rights of citizens, act improperly. But that is only a generalized showing of risk. The fact that inadequate scrutiny of an applicant’s background would make a violation of rights more *likely* cannot alone give rise to an inference that a policymaker’s failure to scrutinize the record of a particular applicant produced a specific constitutional violation.<sup>42</sup>

The majority opinion concluded the following:

Only where adequate scrutiny of an applicant’s background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party’s federally protected right can the official’s failure to adequately scrutinize the applicant’s background constitute “deliberate indifference.”<sup>43</sup>

Thus, the majority insisted on evidence from which a jury could find that had Sheriff Moore adequately screened Deputy Burns’s background he “should have concluded that Burns’[s] use of excessive force would be a plainly obvious consequence of the hiring decision.”<sup>44</sup> In the view of the majority, scrutiny of Burns’s record did not produce sufficient evidence from which a jury could have found that Sheriff Moore’s hiring decision reflected deliberate indifference to “an obvious risk” that Burns would use excessive force.<sup>45</sup>

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<sup>42</sup> *Brown*, 520 U.S. at 410-11.

<sup>43</sup> *Id.* at 411.

<sup>44</sup> *Id.* at 412-13.

<sup>45</sup> *Id.* at 415.



### C. The *Connick* Decision

The recent opinion of the Supreme Court in *Connick* will undoubtedly make it more difficult for plaintiffs to assert failure-to-train claims based on single-incident violations and a theory of obviousness in the need for training.<sup>46</sup> In a 5-to-4 decision, with the majority opinion written by Justice Thomas, the Court held that Harry Connick, the Orleans Parish District Attorney in Louisiana, could not be sued for damages in his official capacity<sup>47</sup> for failure to train his prosecutors as to *Brady* obligations.<sup>48</sup>

In *Connick*, John Thompson had been convicted of attempted armed robbery and was subsequently convicted of an unrelated murder; he chose not to testify at his murder trial because of the possibility of impeachment from the robbery conviction.<sup>49</sup> “Thompson spent eighteen years in prison, including fourteen years on death row,” and was one month away from execution when a private investigator working on his case “discovered . . . undisclosed evidence from his armed robbery trial.”<sup>50</sup> As it turned out, a prosecutor on the robbery trial had withheld blood-test evidence, which exonerated Thompson of the armed robbery and thus infected the murder conviction as well.<sup>51</sup>

The robbery conviction was vacated and the murder case was retried with a jury verdict of not guilty.<sup>52</sup> As a result, Thompson brought a wrongful conviction suit against the district attorney’s office, claiming that by failing to disclose the crime lab report, the district attorney’s office violated *Brady v. Maryland*.<sup>53</sup> Two questions were presented in *Connick*. First, was this a single incident case?<sup>54</sup> Second, if so, was there sufficient evidence to prove the requisite de-

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<sup>46</sup> See *Connick*, 131 S. Ct. at 1356 (holding that one *Brady* violation alone was insufficient for a failure-to-train claim).

<sup>47</sup> See *Van de Kamp v. Goldstein*, 555 U.S. 335, 338-39 (2009) (granting absolute immunity to prosecutors and supervising attorneys in failure-to-train claims and thereby eliminating any possibility of a suit against Connick in his individual capacity for failure-to-train in performing his administrative functions as head of the office).

<sup>48</sup> *Connick*, 131 S. Ct. at 1356; see also *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (placing an obligation on a prosecutor to disclose all exculpatory evidence to an accused “irrespective of the good faith or bad faith of the prosecution”).

<sup>49</sup> *Connick*, 131 S. Ct. at 1355.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1356.

<sup>52</sup> *Id.* at 1356-57.

<sup>53</sup> 373 U.S. 83 (1963); *Connick*, 131 S. Ct. at 1357.

<sup>54</sup> *Connick*, 131 S. Ct. at 1360-61.

liberate indifference standard on the part of the district attorney's office?<sup>55</sup> Over a twenty-year period "no fewer than five [different] prosecutors" had known about and failed to turn over the exculpatory blood-test evidence.<sup>56</sup> Indeed, there were ten exhibits disclosed at the retrial that had not been disclosed at the initial murder trial.<sup>57</sup> The majority viewed this egregious conduct over a twenty-year period as a "single incident" and, overturning a fourteen-million-dollar verdict in Thompson's favor, stated that "[f]ailure to train prosecutors in their *Brady* obligations does not fall within the narrow range of *Canton*'s hypothesized single-incident liability."<sup>58</sup> The Court distinguished prosecutors from police officers in terms of legal education and training needs, concluding that "[a] licensed attorney making legal judgments, in his capacity as a prosecutor, about *Brady* material simply does not present the same 'highly predictable' constitutional danger as *Canton*'s untrained officer."<sup>59</sup> According to the majority, "The reason why the *Canton* hypothetical is inapplicable is that attorneys, unlike police officers, are equipped with the tools to find, interpret, and apply legal principles."<sup>60</sup> The majority underscored that "[a] pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train"<sup>61</sup> and observed that none of the four convictions that had been overturned due to *Brady* violations in the ten-year period prior to Thompson's robbery trial had "involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind," and thus, none could have put Connick on notice as to the need for specific training to avoid the constitutional violation in Thompson's case.<sup>62</sup>

Justice Ginsburg wrote a strong dissent, which she read from the bench.<sup>63</sup> The dissenters saw the *Brady* violations in Thompson's case as "not singular" and "not aberrational," but rather "just what one would expect given the attitude toward *Brady* pervasive in the District Attorney's Office."<sup>64</sup> Justice Ginsburg concluded that if

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<sup>55</sup> *Id.* at 1361.

<sup>56</sup> *Id.* at 1384 (Ginsburg, J., dissenting).

<sup>57</sup> *Id.* at 1376.

<sup>58</sup> *Id.* at 1361 (majority opinion).

<sup>59</sup> *Connick*, 131 S. Ct. at 1361-63.

<sup>60</sup> *Id.* at 1364.

<sup>61</sup> *Id.* at 1360 (quoting *Brown*, 520 U.S. at 409).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1370 (Ginsburg, J., dissenting).

<sup>64</sup> *Connick*, 131 S. Ct. at 1384.

prosecutors were not trained about *Brady*, it is foreseeable that conduct like this would occur, and by not training its prosecutors, the district attorney's office was deliberately indifferent to "a legal requirement fundamental to a fair trial."<sup>65</sup>

#### D. Cases Post-*Connick*

After deciding *Connick*, the Court granted certiorari in *Conn v. City of Reno*<sup>66</sup> and vacated and remanded in light of *Connick*.<sup>67</sup> Following a suicide in jail, the Ninth Circuit found that failing to adopt and implement policies on suicide prevention established deliberate indifference.<sup>68</sup> On remand, the district court's grant of summary judgment for the city was reinstated by the Ninth Circuit.<sup>69</sup> Other post-*Connick* cases also signal a tougher hurdle for plaintiffs in establishing liability based on the *Canton* single-incident theory.

##### 1. *Craig v. Floyd County*

In *Craig v. Floyd County*,<sup>70</sup> there appeared to be some disagreement as to whether the injury to plaintiff was the result of a single incident. Craig was tasered and fell to the ground in a pool of his own blood.<sup>71</sup> He was detained for nine days in jail and received sixteen health evaluations from nine different employees of the Georgia Correctional System before he got a CT scan, which indicated he required neurological surgery.<sup>72</sup> The majority stated that this was a single incident and one that was insufficient to establish deliberate indifference.<sup>73</sup> The concurring opinion questioned whether it was a single incident when there was multiple employees involved including nine different employees and sixteen evaluations.<sup>74</sup>

Litigants may find that the facts of a case often present a question about whether the case will be viewed as a single-incident

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<sup>65</sup> *Id.*

<sup>66</sup> 591 F.3d 1081 (9th Cir. 2010).

<sup>67</sup> *City of Reno v. Conn*, 131 S. Ct. 1812 (2011).

<sup>68</sup> *Conn*, 591 F.3d at 1105.

<sup>69</sup> *Conn v. City of Reno*, 658 F.3d 897 (9th Cir. 2011).

<sup>70</sup> 643 F.3d 1306 (11th Cir. 2011).

<sup>71</sup> *Id.* at 1308.

<sup>72</sup> *Id.* at 1309.

<sup>73</sup> *Id.* at 1311.

<sup>74</sup> *Id.* at 1312-13 (Cox, J., concurring).

situation or not. Unless plaintiffs have a case where the need for training is plainly obvious, it would behoove plaintiffs to look for a pattern of incidents, in addition to their own, that would have put policymakers on notice of a problem. Defendants, of course, should raise the “single-incident flag” whenever they can and argue that there was no obvious need to train absent a pattern of constitutional violations.

## 2. *Cash v. County of Erie*

In *Cash v. County of Erie*,<sup>75</sup> the plaintiff was sexually assaulted by a guard while she was in custody at the Erie County Holding Center.<sup>76</sup> While the state of New York categorically condemned any sexual activity between prisoners and guards, supervisors were aware of some history of “consensual” sexual favors being performed by prisoners for guards.<sup>77</sup> The court explicitly stated that this was not a failure-to-train case.<sup>78</sup> The court reasoned that based on the law, every police officer or jail guard knows that any form of sexual conduct with prisoners, unwanted and wanted alike, is unacceptable.<sup>79</sup> This kind of case is one in which there is absolutely no discretion for an individual to act in a manner contrary to that dictated by law.<sup>80</sup> The deliberate indifference stems not from a failure to train, but from the defendant’s own failure to establish a policy that would protect against the likelihood of sexual contact between guards and prisoners.<sup>81</sup>

The issue in *Cash* was whether the entity had a policy consistent with the law to protect their female inmates from sexual contact with guards.<sup>82</sup> According to the majority of the panel, a reasonable jury could have found that once the defendants learned that guards were violating an absolute proscription in any respect, the County of Erie’s actions to prevent future violations were deficient.<sup>83</sup> In sum, the court concluded that a jury could find that “mere reiteration of the

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<sup>75</sup> 654 F.3d 324 (2d Cir. 2011).

<sup>76</sup> *Id.* at 328.

<sup>77</sup> *Id.* at 329-30.

<sup>78</sup> *Id.* at 336.

<sup>79</sup> *Id.* at 336-37.

<sup>80</sup> *Cash*, 654 F.3d at 336.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 339.

<sup>83</sup> *Id.*

proscriptive policy unaccompanied by any proactive steps to minimize the opportunity for exploitation, as for example by prohibiting unmonitored one-on-one interactions between guards and prisoners, demonstrated deliberate indifference to defendants' affirmative duty to protect prisoners from sexual exploitation."<sup>84</sup>

Chief Judge Jacobs issued a vehement dissent, arguing that the decision was inconsistent with *Connick* because it was a single-incident liability case with one sexual assault.<sup>85</sup> He argued that the previous encounters were not sexual assaults and therefore could not have put the institution on notice.<sup>86</sup> As with *Craig*, the decision reflects disagreement about whether specific facts give rise to a single-incident theory of liability, or whether a pattern has been alleged sufficiently to put the entity on notice of a problem.<sup>87</sup>

### III. INTERPRETATIONS OF SINGLE INCIDENT LIABILITY

PROFESSOR SCHWARTZ: Cases such as *Cash* involving municipal liability can be complicated, but can often be categorized as failure to train or failure to supervise cases, or perhaps even both.<sup>88</sup> The question regarding *Cash* is whether the plaintiff is trying to establish municipal liability based on the municipality's inaction of failing to implement a policy. There are additional cases that discussed municipal liability such as the leading precedent case in the Second Circuit, *Walker v. City of New York*.<sup>89</sup> Officers are not traditionally trained on moral aspects of the job, such as not lying.<sup>90</sup> However, in *Walker*, the court said that if officers engage in a pattern of lying, that they may need training on not lying.<sup>91</sup>

MR. RUDIN: *Walker* also established the theory that the City of New York could be held liable for a pattern of misconduct by

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<sup>84</sup> *Id.*

<sup>85</sup> *Cash*, 654 F.3d at 346 (Jacob, C.J., dissenting).

<sup>86</sup> *See id.* at 345 (enumerating a parade of horrors that will likely result from holding municipalities liable in such situations and arguing that the court would essentially be telling police forces and prisons how to do their business, and how to spend their money and what policies they should or should not have in place).

<sup>87</sup> *See Craig*, 643 F.3d at 1312-13 (Cox, J., concurring) ("I am not satisfied that this case involves a 'single incident.' I do not have to count 'incidents,' however, to conclude that *Craig* has failed to offer proof that can support a finding that there was a custom, policy or practice of deliberate indifference to serious medical needs.").

<sup>88</sup> *See generally Cash*, 654 F.3d 324.

<sup>89</sup> 974 F.2d 293 (2d Cir. 1992).

<sup>90</sup> *Id.* at 295, 299-301.

<sup>91</sup> *Id.* at 301.

prosecutors.<sup>92</sup> While *Connick* rejects that liability may be based upon a failure to train prosecutors in their *Brady* obligations absent a history of prior similar misconduct showing a need to train, it was still the first Supreme Court case to accept the holding in *Walker* that a municipality can be held liable for an unlawful policy under *Brady* even though prosecutors individually would have absolute immunity.<sup>93</sup> With no Justice disagreeing that there could be such liability, *Connick* essentially lays out a roadmap to establish liability in failure to train cases.<sup>94</sup>

The problem in *Connick* is that the jury rejected the alternative theory of liability of an unlawful *Brady* disclosure policy, as opposed to the theory that the jury found and the Supreme Court reviewed, which was a failure-to-train prosecutors in their *Brady* obligations.<sup>95</sup> The jury was presented with evidence that the District Attorney had an unlawful policy of withholding *Brady* material, which caused the violations in the Thompson prosecution, but the jury was not persuaded.<sup>96</sup> This meant that the failure-to-train claim was the only issue that went up to the Supreme Court on a record that had little, if any, evidence of prior violations, similar in kind to those in Thompson's case, to provide notice of a need for better training.<sup>97</sup> Although Justice Ginsberg's dissent argued that there was considerable evidence, ignored by the majority, establishing the indifference of the District Attorney to *Brady* compliance, this evidence related more to the rejected unlawful *policy* claim than to the specific theory before the Court of whether the District Attorney was indifferent to *training* as the best way to avoid *Brady* violations.<sup>98</sup>

The case law between the decisions in *Canton* and *Connick* overwhelmingly required, except in a few very narrow circumstances, a pattern of prior similar misconduct, as opposed to just a single incident, to establish a training claim under *Monell v. Department of Social Services*.<sup>99</sup> If *Connick* had been decided the other way, it would have been a departure from the general rule, and would have been a

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<sup>92</sup> *Id.* at 300.

<sup>93</sup> *Connick*, 131 S. Ct. at 1365-66.

<sup>94</sup> *Id.* at 1365.

<sup>95</sup> *Id.* at 1377 (Ginsburg, J., dissenting).

<sup>96</sup> *Id.* at 1376-77.

<sup>97</sup> *Id.* at 1361, 1364 (majority opinion).

<sup>98</sup> Compare *Connick*, 131 S. Ct. at 1364, with *id.* at 1370 (Ginsburg, J., dissenting).

<sup>99</sup> 436 U.S. 658, 694-95 (1978) (concluding that a city is not liable under § 1983 unless a municipal "policy or custom" is the "moving force [behind] the constitutional violation").

shock, although a shock welcomed by plaintiffs. It is important to remember that, unlike in *Cash*, the Court in *Connick* did not address other theories of establishing liability besides training, and revealed no hostility to them.<sup>100</sup> After *Connick*, a municipality may still be held liable for *Brady* violations based upon proof of an unlawful policy to violate the law, a history of condoning such violations, or even ratification by a policymaker of the specific violation in the case, which would be evidence that the violation reflected and was caused by the existence of an unlawful policy.<sup>101</sup> These are all additional theories of *Monell* liability that are unaffected by the *Connick* decision.<sup>102</sup>

PROFESSOR BLUM: Custom was not raised in the above cases, such as *Canton*, *Brown*, and *Connick*, because in order to show custom, there must be a pattern.<sup>103</sup>

PROFESSOR SCHWARTZ: Furthermore, the difficulty with *Connick* is that it is impossible for a plaintiff to prove what the court required.<sup>104</sup> The *Brady* rule in itself is a very intricate and difficult concept to master and may require time to understand. Although *Brady* is taught in schools, it is taught in elective courses, which many prosecutors may not take. Therefore, it cannot be effectively stated that training on *Brady* is unnecessary for prosecutors and all lawyers alike. Case law seems to be stacked very heavily against the plaintiff.

PROFESSOR BLUM: In *Van de Kamp v. Goldstein*,<sup>105</sup> the

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<sup>100</sup> See *Connick*, 131 S. Ct. at 1356 (holding “a district attorney’s office may not be held liable under § 1983 for failure to train based on a single *Brady* violation”); *Cash*, 654 F.3d at 337 (“Accordingly, even if Gallivan had no knowledge of prior sexual *assaults*, it was hardly speculative for a jury to conclude that, at least by 1999, he knew or should have known that guards at ECHC and other local correctional facilities were engaging in proscribed sexual contact with prisoners . . .”).

<sup>101</sup> *Cash*, 654 F.3d at 337.

<sup>102</sup> See *Connick*, 131 S. Ct. at 1366 (concluding that a policymaker’s failure to train attorneys under his supervision did “not fall within the narrow range of ‘single-incident’ liability . . . necessary to prove deliberate indifference in § 1983 actions alleging failure to train”); *Monell*, 436 U.S. at 694-95.

<sup>103</sup> See *Monell*, 436 U.S. at 694 (noting that a government could not be sued for an injury caused by one of its employees unless the injury was caused pursuant to the execution of a governmental custom and “may fairly be said to represent official policy”).

<sup>104</sup> See *Connick*, 131 S. Ct. at 1360 (requiring that defendant show that there was an obvious need to train in order to address *Brady* based on a pattern of prosecutorial misconduct).

<sup>105</sup> 555 U.S. 335 (2009). Goldstein had been convicted of murder but, after serving twenty-four years of his sentence, his conviction was set aside when it came to light that the prosecution had withheld potential impeachment information regarding the critical witness against him. *Id.* at 339.

Court makes it very clear that a plaintiff cannot go after the head or supervising prosecutor in a district attorney's office in his or her individual capacity for a failure-to-train claim as was done in *Walker*, because the prosecutor will have absolute immunity.<sup>106</sup>

MS. KOELEVELD: In addition, the Court in *Connick* elucidates that a pattern is required to prove municipal liability.<sup>107</sup> The majority points to there being four *Brady* reversals in ten years and even those did not establish a pattern sufficient to put *Connick* on notice of misconduct because each incident was distinct.<sup>108</sup> The Court stated that the issue is notice.<sup>109</sup> What would be sufficient notice to a municipality that they need to train, discipline, or supervise enough to hold them liable? Likely, this issue of notice will potentially turn on whether there is a significant pattern of similar violations signifying the need to train, discipline, or supervise.<sup>110</sup> Finally, the Court in *Connick* suggested that even if a number of *Brady* violations are identified, it would still be difficult to establish municipal liability for failing to train prosecutors because *Brady* violations are so nuanced and the specific training required is therefore not obvious.<sup>111</sup> Of course, it is important for prosecutors to understand, as a general matter, that evidence favorable to the defense must be turned over, and there was no dispute in *Connick* that the prosecutors had that understanding.<sup>112</sup> But beyond that general understanding, there are innumerable variations in different factual scenarios. Just as district attorney's offices cannot be expected to train on every such scenario, a municipality should not be held liable because it failed to anticipate one particular scenario or another. Merely pointing to additional training that could have been done to avoid a particular constitutional violation is not enough to establish municipal liability. It has to be reasonable to expect that training to have occurred.

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<sup>106</sup> *Id.* The Court unanimously held that a district attorney and chief deputy district attorney had absolute immunity as to claims "that the prosecution failed to disclose impeachment material due to: (1) a failure properly to train prosecutors, (2) a failure properly to supervise prosecutors, or (3) a failure to establish an information system containing potential impeachment material about informants." *Id.* (citation omitted).

<sup>107</sup> *Connick*, 131 S. Ct. at 1360.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *See id.* ("A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train.").

<sup>111</sup> *Id.* at 1363.

<sup>112</sup> *Connick*, 131 S. Ct. at 1355.



MR. RUDIN: In New York, and in many jurisdictions elsewhere, there have been training programs established for assistant district attorneys in individual county district attorney's offices concerning *Brady* compliance.<sup>113</sup> Some of the *Brady* violation cases that have been litigated under *Monell*, before now, involved prosecutions that occurred in the 1980s and early 1990s before such training programs went into effect.<sup>114</sup> In the future, cases such as *Connick*, where there was *no* training, are unlikely to be brought successfully. However, the question in future cases may be whether the district attorney, regardless of training, can be shown to have been deliberately indifferent to, to have condoned, or to have defended illegal conduct, thereby revealing an unlawful policy to permit such violations.

#### IV. SUPERVISORY LIABILITY – *ASHCROFT V. IQBAL* AND ITS PROGENY

PROFESSOR BLUM: In a case that was about pleading requirements,<sup>115</sup> and a case in which the issue of supervisory liability had not been briefed or argued by the parties,<sup>116</sup> Justice Kennedy, writing for a five-member majority of the Court in *Iqbal*, changed the conversation surrounding, and arguably the standard governing, claims of supervisory liability in both *Bivens* actions<sup>117</sup> and § 1983

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<sup>113</sup> *Id.* at 1363.

<sup>114</sup> *See, e.g., Canton*, 489 U.S. at 382 (“Canton shift commanders were not provided with any special training . . . to make a determination as to when to summon medical care for an injured detainee.”).

<sup>115</sup> There are many scholarly articles addressing the impact of *Iqbal* on pleading. *See, e.g.,* Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010); Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849 (2010). For a thoughtful criticism of the decision and its ramifications for litigants and judges alike, see *McCauley v. City of Chi.*, 671 F.3d 611, 620, 622-25, 627-29 (7th Cir. 2011) (Hamilton, J., dissenting in part).

<sup>116</sup> As Justice Souter noted in his dissent, Ashcroft and Mueller had conceded “that a supervisor’s knowledge of a subordinate’s unconstitutional conduct and deliberate indifference to that conduct [were] grounds for *Bivens* liability.” *Iqbal*, 556 U.S. at 691 (Souter, J., dissenting). The issue presented on appeal was whether the allegations of the complaint were sufficient to state such a claim. *Id.* at 690. “[B]ecause of the concession, [the Court has] received no briefing or argument on the proper scope of supervisory liability . . .” *Id.* at 692.

<sup>117</sup> *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389, 392, 397 (1971) (holding that an action could be brought against federal law enforcement officials for a Fourth Amendment violation; in the absence of a statutory

cases.<sup>118</sup>

In *Iqbal*, where the underlying constitutional claim alleged discriminatory treatment of detainees based on race, religion, or national origin,<sup>119</sup> the Court rejected the argument that high-level supervisory officials (Ashcroft and Mueller) could be held individually liable in a *Bivens* action based on “mere knowledge of [a] subordinate’s discriminatory purpose.”<sup>120</sup> Justice Kennedy held 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. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.”<sup>121</sup> Thus, where plaintiffs allege a claim that requires the showing of discriminatory purpose, plaintiffs must allege and prove that a supervisor himself had the impermissible purpose, not just knowledge of a subordinate’s discriminatory purpose, in order to impose liability under § 1983 or *Bivens*.<sup>122</sup>

Justice Souter, the author of *Bell Atlantic Corp. v. Twombly*,<sup>123</sup> dissented in *Iqbal*, writing that the Court is not only limiting the scope of supervisory liability, but also completely eliminating it in the context of *Bivens*.<sup>124</sup> So, the question is whether there is such a thing as supervisory liability after *Iqbal*, and, if so, how does a plaintiff go about proving it?

The Second Circuit has not spoken to this issue yet,<sup>125</sup> but the

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remedy against federal officials, the Court implied a remedy based directly on the Constitution).

<sup>118</sup> See *Iqbal*, 556 U.S. at 692 (Souter, J., dissenting) (“According to the majority, because *Iqbal* concededly cannot recover on a theory of *respondeat superior*, it follows that he cannot recover under any theory of supervisory liability.”). The only other case in which the Court has addressed the issue of supervisory liability is *Rizzo v. Goode*, 423 U.S. 362 (1976), where the Court recognized that the misconduct of the subordinate must be “affirmative[ly] link[ed]” to the action or inaction of the supervisor. *Id.* at 371.

<sup>119</sup> Former Attorney General, John Ashcroft, and Director of the Federal Bureau of Investigation, Robert Mueller, were among high-ranking officials named by *Iqbal* in a *Bivens* action complaining of harsh treatment and conditions during his confinement in the wake of the terrorist attacks on September 11, 2001. *Iqbal*, 556 U.S. at 666. He claimed that certain detainees were selected to be of high interest and treated harshly because of their race, religion, or national origin. *Id.* at 666, 668-69.

<sup>120</sup> *Id.* at 677.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> 550 U.S. 544 (2007).

<sup>124</sup> *Iqbal*, 556 U.S. at 687-88 (Souter, J., dissenting).

<sup>125</sup> See *Reynolds v. Barrett*, 685 F.3d 193, 205 n.14 (2d Cir. 2012) (“*Iqbal* has, of course, engendered conflict within our Circuit about the continuing vitality of the supervisory

debate circulating in the Second Circuit is about whether and to what extent the *Colon v. Coughlin*<sup>126</sup> factors are still viable.<sup>127</sup> *Colon* sets out five ways that supervisory liability may be shown,<sup>128</sup> but some district courts believe that after *Iqbal*, three of those categories may no longer apply.<sup>129</sup> Therefore, the two ways that may remain are where the supervisor directly participates in the constitutional violation or where the supervisor implements a policy or custom that violates the Constitution.<sup>130</sup> Some courts have suggested that the other methods of establishing supervisory liability based on knowledge and acquiescence in underlying constitutional wrongs committed by subordinates, recklessness, gross negligence, and other similar standards, are all in question now.<sup>131</sup>

In the wake of *Iqbal*, there have been few appellate cases with extensive discussions of the supervisory liability issue. The First, Third, and Eighth Circuits have suggested that the Supreme Court's decision may call into question prior circuit law on the standard for holding a public official liable for damages under § 1983 on a theory of supervisory liability.<sup>132</sup> The Third Circuit has decided cases on the

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liability test set forth in *Colon v. Coughlin*. . . . But the fate of *Colon* is not properly before us. . . ." (citation omitted)).

<sup>126</sup> 58 F.3d 865 (2d Cir. 1995).

<sup>127</sup> See *id.* at 873 (setting forth the five ways in which "personal involvement of a supervisory defendant may be shown by evidence").

<sup>128</sup> *Id.*

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

*Id.* (citing *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994)).

<sup>129</sup> See, e.g., *Diaz-Bernal v. Myers*, 758 F. Supp. 2d 106, 129-30 (D. Conn. 2010); *Sash v. United States*, 674 F. Supp. 2d 531, 542 (S.D.N.Y. 2010).

<sup>130</sup> *Sash*, 674 F. Supp. 2d at 542.

<sup>131</sup> See, e.g., *Rivera v. Metro. Transit Auth.*, 750 F. Supp. 2d 456, 462-63 (S.D.N.Y. 2010) (questioning what remains after *Iqbal*); *Bellamy v. Mount Vernon Hosp.*, No. 07 Civ. 1801(SAS), 2009 WL 1835939, at \*4, \*6 (S.D.N.Y. June 26, 2009) (discussing the categories of supervisory liability that remain after *Iqbal*), *aff'd*, 387 Fed. App'x 55 (2d Cir. 2010).

<sup>132</sup> See *Parrish v. Ball*, 594 F.3d 993, 1001 n.1 (8th Cir. 2010) ("The Supreme Court's recent pronouncement in *Iqbal* may further restrict the incidents in which the 'failure to supervise' will result in liability."); *Bayer v. Monroe Cnty. Children & Youth Servs.*, 577 F.3d

pleadings aspect rather than going into the standards for supervisory liability.<sup>133</sup> The Eleventh Circuit continues to rely on pre-*Iqbal* precedent that allows for supervisory liability where a supervisor personally participates in the constitutional violation or where there is a causal connection between the unconstitutional conduct and the supervisor's action or inaction.<sup>134</sup> Many lower courts are parroting the language of *Iqbal* that supervisory liability is a "misnomer," but are continuing to apply pre-*Iqbal* law until their circuits decide the is-

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186, 191 n.5 (3d Cir. 2009) ("In light of the Supreme Court's recent decision in *Ashcroft v. Iqbal*, it is uncertain whether proof of such personal knowledge, with nothing more, would provide a sufficient basis for holding Bahl liable with respect to plaintiffs' Fourteenth Amendment claims under § 1983." (citation omitted)); *Maldonado v. Fontanes*, 568 F.3d 263, 275 n.7 (1st Cir. 2009) ("Some recent language from the Supreme Court may call into question our prior circuit law on the standard for holding a public official liable for damages under § 1983 on a theory of supervisory liability."); *see also* *Lewis v. Tripp*, 604 F.3d 1221, 1227 n.3 (10th Cir. 2010) (refusing to "stake out a position" in the debate about *Iqbal*'s impact on supervisory liability standard where claim failed even under pre-*Iqbal* standard); *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 48-49 (1st Cir. 2009) (holding no plausible supervisory liability claim stated against administrative correctional officials where plaintiff merely parroted standard for supervisory liability).

<sup>133</sup> *See, e.g.,* *Argueta v. U.S. Immigration & Customs Enforcement*, 643 F.3d 60, 70 (3d Cir. 2011) ("To date, we have refrained from answering the question of whether *Iqbal* eliminated—or at least narrowed the scope of—supervisory liability . . ."); *Santiago v. Warminster Twp.*, 629 F.3d 121, 128-34, 130 n.8, 134 n.10 (3d Cir. 2010) ("Because we hold that Santiago's pleadings fail even under our existing supervisory liability test, we need not decide whether *Iqbal* requires us to narrow the scope of that test.").

<sup>134</sup> *See, e.g.,* *Am. Fed'n of Labor & Cong. of Indus. Orgs. v. City of Miami*, 637 F.3d 1178, 1190 (11th Cir. 2011) ("A supervisor can be held liable for the actions of his subordinates under § 1983 if he personally participates in the act that causes the constitutional violation or where there is a causal connection between his actions and the constitutional violation that his subordinates commit."); *Doe v. Sch. Bd. of Broward Cnty.*, 604 F.3d 1248, 1266 (11th Cir. 2010) ("It is well established in this circuit that supervisory officials are not liable . . . for the unconstitutional acts of their subordinates' unless the 'supervisor personally participates in the alleged constitutional violation' or 'there is a causal connection between actions of the supervising official and the alleged constitutional deprivation.' " (quoting *Hartley v. Parnell*, 193 F.3d 1263, 1269 (11th Cir. 1999))); *Keating v. City of Miami*, 598 F.3d 753, 763-65 (11th Cir. 2010) (finding that the protestors satisfied § 1983's pleading requirements for a supervisory liability claim "by alleging a causal connection" between those of authority in the Miami Police Department and the acts of the "subordinate officers" who followed their direction); *Harper v. Lawrence Cnty.*, 592 F.3d 1227, 1236 (11th Cir. 2010) ("Supervisory liability lies where the defendant personally participates in the unconstitutional conduct or there is a causal connection between such conduct and the defendant's actions."); *Bryant v. Jones*, 575 F.3d 1281, 1299-1300 (11th Cir. 2009) ("[S]upervisory liability occurs either when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation.").

sue.<sup>135</sup>

Circuits that have addressed the issue of supervisory liability have stated that deliberate indifference is still a standard that applies for supervisory liability where the underlying constitutional standard is deliberate indifference.<sup>136</sup> Therefore, for example, if there is a Fourteenth Amendment medical-needs claim in a prison context, where the constitutional standard itself is one of subjective deliberate indifference, actual knowledge and a failure to do anything, then if that requisite state of mind is demonstrated on the part of the supervisor, there would be supervisory liability in most circuits.

In *Sandra T.E. v. Grindle*,<sup>137</sup> the Seventh Circuit addressed supervisory liability in the context of an interlocutory appeal by a school principal who was denied qualified immunity with respect to both equal protection and substantive due process claims arising from the sexual abuse of female students by a music teacher.<sup>138</sup> The court noted that after *Iqbal*, the plaintiff would have to make out a showing of intentional discrimination on the equal protection claim to hold the supervisor liable.<sup>139</sup> Thus, while the court's "precedent would have previously allowed a plaintiff to recover from a supervisor based on that supervisor's 'deliberate indifference' toward a subordinate's purposeful discrimination, after *Iqbal* a plaintiff must also show that the supervisor possessed the requisite discriminatory intent."<sup>140</sup> The court went on to find that there was sufficient evidence from which a jury could find that the principal knew about the teacher's abuse and acted deliberately to cover it up.<sup>141</sup> Based on this evidence, "a jury could reasonably infer—though it would not be required to infer—

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<sup>135</sup> See, e.g., *Steen v. City of Pensacola*, 809 F. Supp. 2d 1342, 1346-48 (N.D. Fla. 2011) (acknowledging that courts have "arrived at differing interpretations following the decision in *Iqbal*").

<sup>136</sup> See, e.g., *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (holding that plaintiff adequately asserted a deliberate indifference claim), *cert. denied*, 132 S. Ct. 2101 (2012); *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010) (concluding that under § 1983, a plaintiff is allowed "to impose liability upon a defendant-supervisor who creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of a policy the enforcement" which denies plaintiff of a basic constitutional right); *Sandra T.E. v. Grindle*, 599 F.3d 583, 591 (7th Cir. 2010) ("When a state actor's deliberate indifference deprives someone of his or her protected liberty interest in bodily integrity, that actor violates the Constitution, regardless of whether the actor is a supervisor or subordinate, and the actor may be held liable for the resulting harm.").

<sup>137</sup> 599 F.3d 583 (7th Cir. 2010).

<sup>138</sup> *Id.* at 585.

<sup>139</sup> *Id.* at 588.

<sup>140</sup> *Id.* (citation omitted).

<sup>141</sup> *Id.* at 588-89.

that [the principal] also had a purpose of discriminating against the girls based on their gender.”<sup>142</sup> Turning to the substantive due process claim, the court found that the plaintiffs’ allegations were not based on a theory of supervisory liability for a failure to act, but rather were directed at the principal’s own misconduct in depriving them of “their constitutional right to bodily integrity.”<sup>143</sup> The plaintiffs alleged that the principal “actively conceal[ed] reports of abuse and creat[ed] an atmosphere that allowed abuse to flourish.”<sup>144</sup> The court concluded that “[w]hen a state actor’s deliberate indifference deprives someone of his or her protected liberty interest in bodily integrity, that actor violates the Constitution, regardless of whether the actor is a supervisor or subordinate, and the actor may be held liable for the resulting harm.”<sup>145</sup>

The most extensive treatment of supervisory liability post-*Iqbal* appears in the Tenth Circuit opinion of *Dodds v. Richardson*.<sup>146</sup> The plaintiff in *Dodds* sued a county sheriff whom he claimed violated his constitutional right by being deliberately indifferent to a policy that disallowed bail set in an arrest warrant to be posted after hours or until the arrestee had been arraigned by a judge, which resulted in plaintiff’s unjustified weekend detention after bail had been set.<sup>147</sup> The defendant, relying on *Iqbal*, argued that he could not be held liable unless “he personally participated in such a violation with a sufficiently culpable state of mind.”<sup>148</sup> Noting that “[d]efendant’s argument implicates important questions about the continuing vitality of supervisory liability under § 1983 after the Supreme Court’s recent decision in *Ashcroft v. Iqbal*,”<sup>149</sup> the court relied on the “causes to be subjected” language of § 1983 to conclude that personal involvement does not require direct participation in the constitutional violation.<sup>150</sup> The court explained:

Whatever else can be said about *Iqbal*, and certain-

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<sup>142</sup> *Sandra T.E.*, 599 F.3d at 589.

<sup>143</sup> *Id.* at 590.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 591.

<sup>146</sup> 614 F.3d 1185 (10th Cir. 2010); *see also* Porro v. Barnes, 624 F.3d 1322, 1328 (10th Cir. 2010) (“Simply put, there’s no special rule of liability for supervisors. The test for them is the same as the test for everyone else.”).

<sup>147</sup> *Dodds*, 614 F.3d at 1189.

<sup>148</sup> *Id.* at 1194.

<sup>149</sup> *Id.* (citation omitted).

<sup>150</sup> *Id.* at 1199 (quoting 42 U.S.C. § 1983 (2006)).

ly much can be said, we conclude the following basis of § 1983 liability survived it and ultimately resolves this case: § 1983 allows a plaintiff to impose liability upon a defendant-supervisor who creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of a policy the enforcement (by the defendant-supervisor or her subordinates) of which “subjects, or causes to be subjected” that plaintiff “to the deprivation of any rights . . . secured by the Constitution . . . .” A plaintiff may therefore succeed in a § 1983 suit against a defendant-supervisor by demonstrating: (1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation.<sup>151</sup>

The court found sufficient evidence to support the first two requirements, active maintenance of the policy and causation of the constitutional injury,<sup>152</sup> and then proceeded to address the question of whether the defendant acted with the requisite state of mind required to violate plaintiff’s substantive due process right to post preset bail and not be subjected to over detention.<sup>153</sup> The court concluded that, after *Iqbal*, a showing of deliberate indifference or knowledge and acquiescence would no longer suffice to establish supervisory liability “unless that is the same state of mind required for the constitutional” violation alleged.<sup>154</sup> Because neither party challenged the district court’s determination that deliberate indifference was the applicable standard, the Court of Appeals assumed (but did not decide) that “deliberate indifference constitutes the requisite state of mind.”<sup>155</sup> Significantly, the “deliberate indifference” required in *Dodds* is of the subjective or constitutional type, not the *Canton* statutory or objective type.<sup>156</sup> In concluding that plaintiff had presented enough facts to support the conclusion that the defendant had acted with deliberate

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<sup>151</sup> *Id.* (alterations in original).

<sup>152</sup> *Dodds*, 614 F.3d at 1204.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* (emphasis added).

<sup>155</sup> *Id.* at 1205.

<sup>156</sup> *Id.*

indifference, the court relied on two cases that involved Fourteenth Amendment due process violations where plaintiffs were required to show that a defendant supervisor had actual subjective knowledge of the risk of constitutional injury and disregarded the risk.<sup>157</sup>

In *Starr v. Baca*,<sup>158</sup> the plaintiff was a former county jail inmate who alleged that he had been beaten by a deputy sheriff while other deputies looked on.<sup>159</sup> The complaint also alleged that there had been numerous incidents in which inmates in county jails had been killed or injured because of such conduct on the part of the Sheriff's deputies, and that, despite having been given notice of such wrongful conduct by his subordinates, the Sheriff did nothing to protect inmates under his care.<sup>160</sup> In evaluating the claim of supervisory liability against Sheriff Baca, the court stated:

We see nothing in *Iqbal* indicating that the Supreme Court intended to overturn longstanding case law on deliberate indifference claims against supervisors in conditions of confinement cases. We also note that, to the extent that our sister circuits have confronted this question, they have agreed with our interpretation of *Iqbal*. . . .

We therefore conclude that a plaintiff may state a claim against a supervisor for deliberate indifference based upon the supervisor's knowledge of and acquiescence in unconstitutional conduct by his or her subordinates.<sup>161</sup>

In *Hydrick v. Hunter*,<sup>162</sup> on remand from the Supreme Court in light of *Iqbal*,<sup>163</sup> the Ninth Circuit panel distinguished the allegations in the complaint in *Hydrick* from the more factually specific allegations in *Baca*, and found the complaint filed by civilly committed persons in a state hospital insufficient under *Iqbal* to state Fourth and First Amendment claims against the supervisory officials of the hos-

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<sup>157</sup> *Dodds*, 614 F.3d at 1205-06 (citing *Campbell v. Johnson*, 586 F.3d 835, 840 (11th Cir. 2009)); *Serna v. Colo. Dep't of Corrs.*, 455 F.3d 1146, 1154-55 (10th Cir. 2006).

<sup>158</sup> 652 F.3d 1202 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2101 (2012).

<sup>159</sup> *Id.* at 1204.

<sup>160</sup> *Id.* at 1216.

<sup>161</sup> *Id.* at 1207 (citation omitted).

<sup>162</sup> 669 F.3d 937 (9th Cir. 2012).

<sup>163</sup> *Hunter v. Hydrick*, 500 F.3d 978 (9th Cir. 2007), *vacated*, 129 S. Ct. 2431 (2009).



pital in their individual capacities.<sup>164</sup>

*Baca* was denied rehearing en banc.<sup>165</sup> Dissenting from the denial of rehearing en banc, Judge O’Scannlain characterized the majority’s application of *Iqbal* as “*Iqbal Lite*,” and concluded the following:

The court’s ruling today conflicts with *Iqbal* in its statement of the pleading standard, in its application of the pleading standard, and in its far-reaching conclusions regarding supervisory liability. By failing to rehear this case en banc, we fail to correct these errors and once again must wait for the Supreme Court to do so for us.<sup>166</sup>

The Supreme Court evidently was not eager to jump back into the issue of supervisory liability and denied the petition for certiorari.<sup>167</sup>

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<sup>164</sup> *Hydrick*, 669 F.3d at 939.

<sup>165</sup> *See Starr v. City of L.A.*, 659 F.3d 850, 851 (9th Cir. 2011) (“A judge of the court called for a vote on the petition for rehearing en banc. A vote was taken, and a majority of the active judges of the court failed to vote for en banc rehearing.”).

<sup>166</sup> *Id.* at 852, 855 (O’Scannlain, J., dissenting).

<sup>167</sup> *Starr*, 659 F.3d 850, *cert. denied*, 132 S. Ct. 2101 (2012). A more recent decision by the Ninth Circuit, published after this program and as this article was going to print, may give the Supreme Court another opportunity to clarify the law on supervisory liability. In *OSU Student Alliance v. Ray*, 699 F.3d 1053 (9th Cir. 2012), the court provides a lengthy discussion of supervisory liability in a case brought by a student organization against state university officials, alleging First Amendment violations resulting from a policy with respect to the placement of student newspaper bins. The court notes that “[p]ut simply, constitutional tort liability after *Iqbal* depends primarily on the requisite mental state for the violation alleged,” and that “while a specific intent requirement inheres in claims for invidious discrimination, the same requirement does not inhere in claims for free speech violations.” *Id.* at 1071, 1075. Judge Ikuta, in dissent, observes:

In place of personal misconduct and causation, the majority substitutes mere knowledge of a lower-ranking employee’s misconduct. But this is the very standard *Iqbal* rejected, because it makes officials responsible for lower-ranking employees’ misdeeds merely by virtue of the officials’ positions in the organization. By adopting this standard, the majority returns us to pre-*Iqbal* jurisprudence and revives vicarious liability, at least for First Amendment claims.

*Id.* at 1081 (Ikuta, J., dissenting in part).

**V. CONCLUSION**

*Connick* and *Iqbal* leave many questions unanswered with respect to claims asserting entity and individual liability under § 1983. Litigants should pay close attention to the law in their circuits and keep a watchful eye for the next case to reach the Supreme Court. Undoubtedly, the Supreme Court will have to revisit the issue of supervisory liability to clarify the scope of such liability and what standard applies after *Iqbal*. But, as they say, be careful what you wish for.