
**SECTION 1983 LITIGATION:
POST-PEARSON AND POST-IQBAL**

*Karen M. Blum**

I. PEARSON V. CALLAHAN

The Supreme Court's decision in *Pearson v. Callahan*¹ marked a significant change in the structure of the analysis to be performed in the adjudication of the qualified immunity defense in § 1983 litigation. Prior to *Pearson*, the Court required a mandatory two-step approach for the qualified immunity analysis.² Whenever qualified immunity was raised in response to an alleged constitutional violation, the lower courts were instructed that the disposition of the qualified immunity issue required the court to first address the merits question.³ Under *Saucier v. Katz*,⁴ the courts were required first to decide whether the complaint stated a violation of a constitutional right under current law *before* addressing the question of whether the law was clearly established at the time of the challenged conduct.⁵ This mandatory two-step approach was frequently criticized by several Supreme Court Justices⁶ and a number of lower court judges.⁷

* Professor of Law, Suffolk University Law School. This Article is based on a presentation originally delivered by Professor Blum at the Practising Law Institute's Twenty-Sixth Annual Conference on Section 1983 Civil Rights Litigation in New York, New York.

¹ 129 S. Ct. 808 (2009).

² *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

³ *Id.* at 207 ("Our instruction to the district courts and courts of appeals to concentrate at the outset on the definition of the constitutional right and to determine whether, on the facts alleged, a constitutional violation could be found is important."); *see also* *Bingue v. Prunchak*, 512 F.3d 1169, 1173 (9th Cir. 2008) ("We now turn to the merits of the appeal, whether Prunchak is entitled to qualified immunity on Bingue's federal claims. In making this determination, we apply the Supreme Court's two-part sequential test.").

⁴ 533 U.S. 194 (2001).

⁵ *Id.* at 201.

⁶ *See, e.g., id.* at 210 (Ginsburg, J., concurring) ("The two-part test today's decision imposes holds large potential to confuse."); *see also* *Morse v. Frederick*, 551 U.S. 393, 425

Some of this criticism was merited, and the imposition of the non-

(2007) (Breyer, J., concurring in the judgment in part and dissenting in part) (“This Court need not and should not decide this difficult First Amendment issue on the merits. Rather, I believe that it should simply hold that qualified immunity bars the student’s claim for monetary damages and say no more.”); *Wilkie v. Robbins*, 551 U.S. 537, 583 n.10 (2007) (Ginsburg, J., joined by Stevens, J., concurring in part and dissenting in part) (“As I have elsewhere indicated, in appropriate cases, I would allow courts to move directly to the second inquiry.”); *Scott v. Harris*, 550 U.S. 372, 387 (2007) (Breyer, J., concurring) (“[L]ower courts should be free to decide the two questions in whatever order makes sense in the context of a particular case.”); *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (per curiam) (Breyer, J., joined by Scalia, J., and Ginsburg, J., concurring) (expressing concern “that the current rule rigidly requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (e.g., qualified immunity) that will satisfactorily resolve the case before the court”); *Bunting v. Mellen*, 541 U.S. 1019, 1019 (2004) (Stevens, J., joined by Ginsburg, J., and Breyer, J., respecting the denial of certiorari) (noting problem posed by an “unwise judge-made rule under which courts must decide whether the plaintiff has alleged a constitutional violation before addressing the question whether the defendant state actor is entitled to qualified immunity”); *id.* at 1023 (Scalia, J., joined by Rehnquist, C.J., dissenting) (urging that “this general rule [of refusing to entertain a party’s appeal on an issue as to which she prevailed] should not apply where a favorable judgment on qualified-immunity grounds would deprive a party of an opportunity to appeal the unfavorable (and often more significant) constitutional determination”).

⁷ See, e.g., *Egolf v. Witmer*, 526 F.3d 104, 110 (3d Cir. 2008) (“[T]he underlying principle of law elaboration is not meaningfully advanced in situations, such as this, when the definition of constitutional rights depends on a federal court’s uncertain assumptions about state law.”); *Clement v. City of Glendale*, 518 F.3d 1090, 1093 n.4 (9th Cir. 2008) (“[T]he *Saucier* rule may lead to the publication of a lot of bad constitutional law that is, effectively, cert-proof.”); *Hydrick v. Hunter*, 500 F.3d 978, 985 (9th Cir. 2007), *vacated*, 129 S. Ct. 2431 (2009) (noting that “a motion to dismiss on qualified immunity grounds puts the court in the difficult position of deciding ‘far-reaching constitutional questions on a non-existent factual record’ ” (quoting *Kwai Fun Wong v. United States*, 373 F.3d 952, 957 (9th Cir. 2004))); *Hatfield-Bermudez v. Aldanondo-Rivera*, 496 F.3d 51, 60 n.6 (1st Cir. 2007) (“[O]ur resolution of the constitutional issue would be dependent on ruling on an unclear question of Puerto Rico law. This would hardly create clearly established law for future cases.”); *McClish v. Nugent*, 483 F.3d 1231, 1253 n.1 (11th Cir. 2007) (Anderson, J., concurring specially) (criticizing the mandatory constitutional-question-first approach and noting that “twenty-eight states and Puerto Rico have recently urged the Supreme Court in an amicus brief to reconsider its mandatory *Saucier* approach to qualified immunity” (citing Brief for the States of Illinois et al. as Amici Curiae in Support of Petitioner, *Scott v. Harris*, 550 U.S. 372 (2007) (No. 05-1631))); *Robinette v. Jones*, 476 F.3d 585, 592 n.8 (8th Cir. 2007) (“[T]he ‘law’s elaboration from case to case,’ would be ill served by a ruling here, where the parties have provided very few facts to define and limit any holding on the reasonableness of the execution of the arrest warrant.” (quoting *Saucier*, 533 U.S. at 201)) (citation omitted); *Estate of Buchanan v. Maine*, 469 F.3d 158, 168 (1st Cir. 2006) (“We do not think the law elaboration purpose will be well served here, where the Fourth Amendment inquiry involves a reasonableness question which is highly idiosyncratic and heavily dependent on the facts.”); *Lyons v. City of Xenia*, 417 F.3d 565, 583 (6th Cir. 2005) (Sutton, J., concurring) (“Much as the *Saucier* two-step inquiry is a reasoned departure from the general rule . . . so also the Court should permit lower courts to make reasoned departures from *Saucier*’s inquiry where principles of sound and efficient judicial administration recommend a variance.”).

discretionary two-step approach was unpopular, particularly in the Second Circuit.⁸ Given the criticism and resistance to this “rigid ‘order of battle,’ ”⁹ the Supreme Court, in *Pearson*, requested that the parties brief the issue of whether the *Saucier* mandatory two-step approach analysis should be overruled.¹⁰ The Court was expected to, and did, in fact, overrule the mandatory nature of the two-step rule.¹¹ It is important to understand that *Pearson* does not abolish the two-step approach, but rather makes it discretionary.¹² In appropriate cases, such as *Safford Unified School District No. 1 v. Redding*,¹³ where the Court sought to establish a standard, the Court may choose to address the merits question and decide whether the facts allege a violation of a constitutional right.¹⁴

The issue in *Pearson* was whether the “consent-once-removed” doctrine applied to confidential informants.¹⁵ This doctrine normally applies when: (1) an undercover police officer is admitted into a suspect’s house; (2) said undercover officer notifies other officers outside to come in; and (3) the other police officers enter the home.¹⁶ The concept is that the consent given to the undercover officer operates as consent as to the remaining officers, even though the defendants have no knowledge of the undercover officer’s true identity.¹⁷ Under this doctrine, the officers are not required to present a warrant.¹⁸

⁸ See, e.g., *Ehrlich v. Town of Glastonbury*, 348 F.3d 48, 58 (2d Cir. 2003) (“[I]t is difficult to see how adherence to the *Saucier* sequence would accomplish the Supreme Court’s central objective—to make the law clear for future actors.”); *Koch v. Town of Brattleboro*, 287 F.3d 162, 166 (2d Cir. 2002) (“Although we normally apply this two-step test, where we are convinced that the purported constitutional right violated is not ‘clearly established,’ we retain the discretion to refrain from determining whether, under the first step of the test, a constitutional right was violated at all.”).

⁹ *Brosseau*, 543 U.S. at 201-02 (Breyer, J., joined by Scalia, J. and Ginsburg, J., concurring) (“[W]hen [the] courts’ dockets are crowded, a rigid ‘order of battle’ makes little administrative sense and can sometimes lead to a constitutional decision that is effectively insulated from review.”).

¹⁰ *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009).

¹¹ *Id.* at 818.

¹² *Id.*

¹³ 129 S. Ct. 2633 (2009).

¹⁴ See *id.* at 2643 (citing *Pearson*, 129 S. Ct. at 822).

¹⁵ *Pearson*, 129 S. Ct. at 822-23.

¹⁶ *Id.* at 814 (citing *Callahan v. Millard County*, 494 F.3d 891, 896 (10th Cir. 2007), *rev’d*, 129 S. Ct. 808 (2009)).

¹⁷ *Id.*

¹⁸ *Id.*

In *Pearson*, a confidential informant entered a home as part of a “sting.”¹⁹ When the drugs were exchanged, or at some designated point, the confidential informant signaled the police, and the officers entered the home.²⁰ The issue was whether the “consent-once-removed” doctrine applied when the person inside the home was not a police officer or an undercover officer, but rather a confidential informant.²¹ The Tenth Circuit decided that the doctrine did not apply.²² Additionally, the court held that a constitutional violation occurred when the consent given was from a confidential informant, rather than a police officer.²³ Therefore, the Tenth Circuit did not grant qualified immunity, stating that it was clearly established that such an entry by the police under these circumstances would violate a constitutional right.²⁴

In an unanimous opinion authored by Justice Alito, the Court reexamined the mandatory constitutional-question-first procedure required by *Saucier* and concluded “that a mandatory, two-step rule for resolving all qualified immunity claims should not be retained.”²⁵ The Court acknowledged much of the criticism that had been leveled at the “rigid order of battle” by lower court judges and members of the Court.²⁶ The Court justified its overruling of precedent by highlighting the various criticisms that have been directed at *Saucier*’s two-step protocol: (1) deciding the constitutional question first often resulted in substantial expenditures of resources by both the parties and the courts on “questions that ha[d] no effect on the outcome of the case[;]”²⁷ (2) the development of constitutional doctrine was not furthered by decisions that were often “so fact-bound that the deci-

¹⁹ *Id.* at 813 (“In 2002, Brian Bartholomew, who became an informant for the task force after having been charged with the unlawful possession of methamphetamine, informed Officer Jeffrey Whatcott that respondent Afton Callahan had arranged to sell Bartholomew methamphetamine later that day.”).

²⁰ *Pearson*, 129 S. Ct. at 813.

²¹ *Id.* at 814.

²² *Id.* (“[T]he majority disagreed with decisions that broaden this doctrine to grant informants the same capabilities as undercover officers.” (quoting *Callahan*, 494 F.3d at 896) (internal quotation marks omitted)).

²³ *Id.* (citing *Callahan*, 494 F.3d at 898-99).

²⁴ *Callahan*, 494 F.3d at 898-99.

²⁵ *Pearson*, 129 S. Ct. at 817.

²⁶ *Id.*; see cases cited *supra* notes 8-9.

²⁷ *Pearson*, 129 S. Ct. at 818.

sion provide[d] little guidance for future cases[;]”²⁸ (3) it made little sense to force lower courts to decide a constitutional question that was pending in a higher court or before an en banc panel;²⁹ (4) it likewise did little to further the development of constitutional precedent to force a decision that depended “on an uncertain interpretation of state law[;]”³⁰ (5) requiring a constitutional decision at the pleading stage based on bare or sketchy allegations of fact, or one at the summary judgment stage resting on “woefully inadequate” briefs, “create[d] a risk of bad decisionmaking[;]”³¹ (6) the mandated two-step analysis often shielded constitutional decisions from appellate review when the defendant lost on the “merits” question but prevailed on the clearly-established-law prong of the analysis. Such unreviewed decisions “may have a serious prospective effect” on conduct;³² and finally (7) the approach required unnecessary determinations of constitutional law and “depart[ed] from the general rule of constitutional avoidance.”³³

While abandoning the mandatory nature of the two-step analysis, the Court continued to recognize that the approach can be beneficial in promoting “the development of constitutional precedent,” and “is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.”³⁴ In the end, the Court has left it to the lower court judges to decide, as a matter of discretion, what “order of decisionmaking will best facilitate the fair and efficient disposition of each case.”³⁵ The Court addressed the expressed “misgivings” about its decision.³⁶ First, it is important to understand that the *Saucier* approach was not prohibited; it was simply no longer mandated.³⁷ Second, constitutional law will continue to develop in other contexts, such as criminal cases, cases involving claims against government entities, and cases

²⁸ *Id.* at 819.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 820.

³² *Pearson*, 129 S. Ct. at 820.

³³ *Id.* at 821.

³⁴ *Id.* at 818, 819.

³⁵ *Id.* at 821.

³⁶ *Id.* at 821-22.

³⁷ *Pearson*, 129 S. Ct. at 821.

involving claims for injunctive relief.³⁸ Third, the Court did not predict a flood of suits against local governments by plaintiffs pursuing novel claims.³⁹ Nor did the Court anticipate “a new cottage industry of litigation” over the proper standards to use in “deciding whether to reach the merits in a given case.”⁴⁰

Without addressing or overruling the constitutional holding of the Court of Appeals, the Court reversed the Tenth Circuit on the grounds that the law on the “consent-once-removed” doctrine was not clearly established at the time of the challenged conduct such that a reasonable officer would have understood the conduct here to be unlawful. As the Court explained:

When the entry at issue here occurred in 2002, the “consent-once-removed” doctrine had gained acceptance in the lower courts. This doctrine had been considered by three Federal Courts of Appeals and two State Supreme Courts starting in the early 1980’s. It had been accepted by every one of those courts. Moreover, the Seventh Circuit had approved the doctrine’s application to cases involving consensual entries by private citizens acting as confidential informants. The Sixth Circuit reached the same conclusion after the events that gave rise to respondent’s suit, and prior to the Tenth Circuit’s decision in the present case, no court of appeals had issued a contrary decision.

The officers here were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on “consent-once-removed” entries. The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law. Police officers are entitled to rely on existing lower court cases without facing personal liability for their actions. . . . [H]ere, where the divergence of views on the consent-once-removed doctrine was created by the

³⁸ *Id.* at 821-22.

³⁹ *Id.* at 822.

⁴⁰ *Id.* at 822.

decision of the Court of Appeals in this case, it is improper to subject petitioners to money damages for their conduct.⁴¹

II. POST-PEARSON LANDSCAPE

The post-*Pearson* landscape is varied, and it is valuable to look at what courts are doing with the decision.⁴² The cases can be sorted into four categories: (1) cases where the courts find the violation of a clearly established right, and thus, deny qualified immunity; (2) cases where the courts find no constitutional violation and grant qualified immunity; (3) cases where the courts invoke their newly found discretion under *Pearson* to avoid reaching the “merits” prong of qualified immunity, and grant qualified immunity based on the “clearly established law” prong; and (4) cases where the courts find a constitutional violation but grant qualified immunity because the law was not clearly established at the time.

A. Violation of a Clearly Established Right: Qualified Immunity Denied

Obviously, there are still a significant number of cases where the courts will find that official conduct violated a clearly established constitutional right. *Nelson v. Correctional Medical Services*⁴³ was an en banc decision authored by the Honorable Diana Murphy, the only woman ever appointed to the Eighth Circuit.⁴⁴ It is notable and surprising that it took an en banc court to decide whether it was a constitutional violation to put a pregnant prisoner in leg shackles

⁴¹ *Id.* at 822-23 (citations omitted).

⁴² Compare *Jones v. Byrnes*, 585 F.3d 971, 980 (6th Cir. 2009) (Martin, J., concurring) (“I . . . applaud the Court’s decision to address the constitutional question in this case even though not required under *Pearson*.”), with *Bash v. Patrick*, 608 F. Supp. 2d 1285, 1294 (M.D. Ala. 2009) (“In order to avoid the risk of ‘bad decisionmaking’ or an opinion of ‘dubious value’ the Court will not follow the *Saucier* procedure in this case.” (quoting *Pearson*, 129 S. Ct. at 819-20)).

⁴³ 583 F.3d 522 (8th Cir. 2009).

⁴⁴ See, e.g., Michael W. Unger, *U.S. Circuit Court Judge Diana E. Murphy*, 44 FED. LAW. 18, 18-19 (Dec. 1997) (“Twenty years before her elevation to the Court of Appeals in 1994, Diana Murphy received her law degree with high honors from the University of Minnesota. . . . From 1980 to 1994, U.S. District Judge Murphy served with distinction as one of the finest trial judges in Minnesota.”).

while she was in the midst of labor, but the majority of the en banc court did find such conduct violated a clearly established constitutional right.⁴⁵ Along similar lines, the First Circuit Court of Appeals recently held “that forcing a prisoner to undergo an invasive abdominal surgery for the purpose of determining whether or not he is hiding a cell phone in his rectum is a violation of a clearly established constitutional right.”⁴⁶ Most courts will continue to address the merits question where the conduct so clearly violates constitutional rights.⁴⁷

B. No Constitutional Right Alleged: Qualified Immunity Granted

Courts continue to dispose of cases by reaching the first prong of the analysis and deciding that the plaintiff has not asserted the violation of a constitutional right at all.⁴⁸ For example, in *Kelsey v. County of Schoharie*,⁴⁹ the Second Circuit held that there was no Fourth Amendment violation with regard to the change-out procedure

⁴⁵ *Nelson*, 583 F.3d at 538, 540-41.

⁴⁶ *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 53 (1st Cir. 2009).

⁴⁷ *See, e.g.*, *Howard v. Kansas City Police Dept.*, 570 F.3d 984, 988, 990-91 (8th Cir. 2009) (electing to proceed under traditional framework and concluding the officers violated clearly established law when they acted unreasonably in responding to dangers posed by hot asphalt); *Grawey v. Drury*, 567 F.3d 302, 309, 311 (6th Cir. 2009) (applying traditional analysis and finding that an officer’s discharge of enough pepper spray in a subdued detainee’s face to cause him to lose consciousness violated clearly established law); *Bergeron v. Cabral*, 560 F.3d 1, 7, 12, 13 (1st Cir. 2009), *abrogated by*, *Pearson v. Callahan*, 129 S. Ct. 808 (2009) (addressing merits question where parties had briefed and argued the case pre-*Pearson*; holding that Sheriff violated clearly established law when she decommissioned deputy sheriffs based on their political affiliation); *Amnesty Int’l, USA v. Battle*, 559 F.3d 1170, 1181-85 (11th Cir. 2009) (finding two-step analysis appropriate where defendants violated Amnesty’s clearly established right to assemble, protest, and be heard while doing so); *Dominguez v. Corr. Med. Servs.*, 555 F.3d 543, 549, 552 (6th Cir. 2009) (finding both prongs of analysis satisfied where prisoner’s right to medical care was clearly established).

⁴⁸ *See, e.g.*, *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 382, 385 (5th Cir. 2009) (finding officer’s fatal shooting of suspect reasonable where officer could have reasonably believed suspect was reaching for a weapon); *McCullough v. Antolini*, 559 F.3d 1201, 1205-08 (11th Cir. 2009) (finding no violation of Fourth Amendment where sheriff’s deputies used deadly force on suspect who refused to pull over, engaged in a high-speed chase, refused to show his hands when stopped, and drove the truck toward the deputy); *Case v. Eslinger*, 555 F.3d 1317, 1326-27 (11th Cir. 2009) (finding two-part inquiry was the “better approach” where the Sheriff and City were named defendants and their liability turned on whether the constitutional violation had been committed by the officer; finding no violation where officer had probable cause for arrest and seizure of property).

⁴⁹ 567 F.3d 54 (2d Cir. 2009).

in a jail.⁵⁰ In this case, all inmates and anyone else who was processed had to go through a change-out procedure where street clothes were exchanged for prison clothes.⁵¹ The majority of the panel accepted, as fact, that individuals were afforded privacy and were not subjected to exposing their private parts.⁵² The assumption was that there was some sort of barrier where they could protect themselves from full view.⁵³ Justice (then Judge) Sotomayor dissented, stating that whether such privacy was available was an issue of fact.⁵⁴ Plaintiffs alleged that they did not have such protection and, as such, the court should have accepted their allegation as true for purposes of this ruling.⁵⁵ Justice Sotomayor stated that if the allegation of no privacy was taken as true, the change-out procedure was, in fact, an unconstitutional strip search where there was no reasonable suspicion of contraband hidden on one's person.⁵⁶

C. Qualified Immunity Granted by Jumping to Second Prong

Many courts are invoking *Pearson* to dispose of cases on the second prong of the immunity analysis without deciding the question of whether there was a constitutional right under the facts alleged by the plaintiff.⁵⁷ Three cases illustrate how, in certain contexts, the ri-

⁵⁰ *Id.* at 65.

⁵¹ *Id.* at 56.

⁵² *Id.* at 65.

⁵³ *Id.*

⁵⁴ *Kelsey*, 567 F.3d at 65-66 (Sotomayor, J., dissenting).

⁵⁵ *Id.* at 66-67.

⁵⁶ *Id.* at 71. The Ninth Circuit Court of Appeals has recently joined the Eleventh Circuit in holding that:

[T]he rights of arrestees placed in custodial housing with the general jail population “are not violated by a policy or practice of strip searching each one of them as part of the booking process, provided that the searches are no more intrusive on privacy interests than those upheld in the *Bell* case,” and the searches are “not conducted in an abusive manner.”

Bull v. City & County of San Francisco, Nos. 06-15566, 05-17080, 2010 WL 431790, at *13 (9th Cir. Feb. 9, 2010) (en banc) (quoting *Powell v. Barrett*, 541 F.3d 1298, 1314 (11th Cir. 2008)).

⁵⁷ *See, e.g., Estrada v. Rhode Island*, No. 09-1149, 2010 WL 376978, at *3-5 (1st Cir. Feb. 4, 2010) (choosing to answer the question of qualified immunity first and concluding that it was not clearly established that officer's line of questioning into plaintiffs' immigration status prolonged the stop such that independent reasonable suspicion was necessary); *Weise v.*

Casper, No. 09-1085, 2010 WL 293798, at *6 (10th Cir. Jan. 27, 2010) (“Because it is plain that the constitutional right claimed was not clearly established at the time of the alleged violation, Defendants are entitled to qualified immunity. Therefore, we need not reach the question of whether Defendants violated Plaintiffs’ constitutional rights.”); *Waeschle v. Dragovic*, 576 F.3d 539, 550 (6th Cir. 2009) (amended opinion) (disposing of case on the ground that plaintiff’s “alleged constitutionally protected property right to her mother’s brain [was] . . . not clearly established because the underlying state-created property interest [was] not ‘sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right’ ” (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987))), *reh’g denied*, 576 F.3d 539 (6th Cir. 2009); *Matrisciano v. Randle*, 569 F.3d 723, 735, 736 (7th Cir. 2009) (finding the law not clearly established such that officials would have understood that transferring Assistant Deputy Director in the Department of Corrections for testifying on behalf of “infamous prisoner” before the Prisoner Review Board violated First Amendment rights); *Tibbetts v. Kulongoski*, 567 F.3d 529, 535-40 (9th Cir. 2009) (noting that parameters of plaintiff’s right to a name-clearing hearing were not clearly established); *Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 579 (5th Cir. 2009) (finding the officer’s action in terminating the threat posed by presumptively intoxicated suspect fleeing down narrow, curvy highway at excessive rates of speed did not violate clearly established law, even though no bystanders were threatened at the time officer “bumped” suspect’s car, resulting in the suspect’s death); *Rasul v. Myers*, 563 F.3d 527, 530 (D.C. Cir. 2009) (exercising judicial restraint after *Pearson*, deciding only the narrower clearly-established-law question, and holding that “[a]t the time of their detention, neither the Supreme Court nor this court had ever held that aliens captured on foreign soil and detained beyond sovereign U.S. territory had any constitutional rights—under the Fifth Amendment, the Eighth Amendment, or otherwise”); *Lewis v. City of W. Palm Beach*, 561 F.3d 1288, 1290-92 (11th Cir. 2009) (finding that the law was not clearly established such that the officers’ use of a hogtie or hobble on noncompliant suspect, resulting in his death, was unlawful); *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1022-24 (9th Cir. 2009) (using *Saucier* approach on claim of unlawful pat-down, which was found to violate clearly-established Fourth Amendment right; using *Pearson* approach on unlawful arrest claim and granting qualified immunity on the grounds that a reasonable officer would not have known his conduct was unlawful under the circumstances); *Chaklos v. Stevens*, 560 F.3d 705, 711, 716 (7th Cir. 2009) (holding that case law did not give fair warning to defendants that their conduct was unconstitutional where “quirky facts” complicated the constitutional inquiry in a First Amendment employee retaliation case); *Rodis v. City & County of San Francisco*, 558 F.3d 964, 968-70 (9th Cir. 2009) (on remand for reconsideration in light of *Pearson*) (declining to address the “merits” question and holding that the officers were entitled to qualified immunity for their conduct in arresting suspect for possession of a counterfeit bill when it was not clearly established that specific intent beyond tender of a counterfeit note was required for probable cause); *Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1276-78 (10th Cir. 2009) (exercising its “newfound discretion” and holding that law enforcement officers would not have known that it was unconstitutional “to enforce a general ordinance prohibiting unlicensed outdoor business activity on public property against an artist wishing to sell his wares in a park”); *see also Morgan v. Hubert*, No. 08-30388, 2009 WL 1884605, at *4 (5th Cir. July 1, 2009) (finding, in the context of an Eighth Amendment claim, that the order of analysis was less important “because the obligation of prison officials to protect prisoners from violence at the hand of other inmates [was] clear”); *Fennell v. Gilstrap*, 559 F.3d 1212, 1216 n.6 (11th Cir. 2009) (observing that *Pearson* “has no application in a Fourteenth Amendment excessive-force claim because the qualified immunity analysis involve[d] only the first prong”); *Phillips v. Hust*, 588 F.3d 652, 657-58 (9th Cir. 2009) (on remand from Supreme Court).

[T]his is a case “in which the constitutional question is so fact-bound

gid two-step approach is not appropriate, and why courts might choose to avoid the merits question in the resolution of the qualified immunity defense.

In *Rasul v. Myers*,⁵⁸ resolving the first prong of the analysis would have required the court to decide whether detainees at Guantanamo Bay—prisoners captured on foreign soil and brought over to the naval base—had constitutional rights.⁵⁹ In other words, the issue was whether Eighth and Fourteenth Amendment rights extended to these particular detainees. The court, apparently unwilling to decide this difficult question in the context of ruling on qualified immunity, chose to dispose of the case on an easier basis by declaring that whatever constitutional rights might exist for Guantanamo detainees were certainly not clearly established at the time.⁶⁰

Another good example is *Waeschle v. Dragovic*,⁶¹ which was decided by the Sixth Circuit Court of Appeals. The court stated that, in this case, it did not make sense to address the merits question first.⁶² Addressing the merits question would result in the federal court deciding a difficult question of state law, which would be non-binding because the state could determine it otherwise.⁶³ In

that the decision [would] provide [] little guidance for future cases.” Thus, gladly exercising our newfound authority, we do not decide whether Hust’s actions violated Phillips’s constitutional rights. Rather, we proceed directly to ask whether Hust is entitled to qualified immunity.

....

In light of the Supreme Court’s flexible rules for pro se filings, which do not require and perhaps do not even permit comb-binding, we have no difficulty concluding that Hust is entitled to qualified immunity.

Id. (citation omitted).

⁵⁸ 563 F.3d 527 (D.C. Cir. 2009).

⁵⁹ *Id.* at 529.

⁶⁰ *Id.* at 530.

⁶¹ 576 F.3d 539 (6th Cir. 2009).

⁶² *Id.* at 544.

⁶³ *Id.* at 550 (“[W]hether to recognize such a right is a task that the Michigan legislature and courts are better equipped to handle than this court, which is why we are exercising our discretion under *Pearson* to not further explore the first prong of the qualified-immunity test”); see also *Whitlock v. Brown*, No. 08-2800, 2010 WL 624307, at *1, *6 (7th Cir. Feb. 24, 2010) (“Under [*Pearson*], we are permitted to skip directly to the second question, and we do so here . . . [where] it is not clear under Indiana law that the information Brown allegedly withheld was material to the probable-cause determination for a charge of criminal conversion.”) (citation omitted). But see *Baribeau v. City of Minneapolis*, No. 08-3165, 2010 WL 624300, at *4, *9-11 (8th Cir. Feb. 24, 2010) (addressing the first prong and

Waeschle, the plaintiff's mother died in a nursing home and she suspected some foul play.⁶⁴ An autopsy of the plaintiff's mother was ordered for forensic purposes.⁶⁵ After the autopsy, her mother's body was released to the plaintiff for burial.⁶⁶ However, the plaintiff was not informed that the brain was not in the body when it was returned for burial.⁶⁷ The issues were: (i) whether, under Michigan State law, the plaintiff had a property right in her mother's brain, and (ii) whether she had been deprived of that right without due process.⁶⁸ The court declined to address these issues and, instead, decided that the law—whatever it was—was not clearly established at the time.⁶⁹ Ultimately, the court certified that question to the Michigan Supreme Court.⁷⁰

In the last case, *Lewis v. City of West Palm Beach*,⁷¹ the Eleventh Circuit addressed the second question first, and determined that regardless of whether there was a constitutional violation, it was not clearly established at the time.⁷² The court held that the use of a hobble, tightened to form a hog tie, by officers on an uncooperative and agitated individual was not clearly established as unlawful.⁷³ *Lewis* exemplifies the approach taken in many Fourth Amendment excessive force cases, which tend to be very fact-specific and not particularly useful vehicles for performing a “rights-declaring” function. Because establishing a constitutional right may not be helpful in subsequent cases, the courts appropriately address the “clearly established” question first.⁷⁴

interpreting two Minnesota statutes, involving disorderly conduct and weapons of mass destruction, in such a way as to find that defendants violated plaintiffs' clearly established Fourth Amendment rights).

⁶⁴ *Waeschle*, 576 F.3d at 542.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 541-42.

⁶⁹ *Waeschle*, 576 F.3d at 544.

⁷⁰ *Id.* at 551.

⁷¹ 561 F.3d 1288 (11th Cir. 2009).

⁷² *Id.* at 1291.

⁷³ *Id.* at 1292.

⁷⁴ *See, e.g., Estate of Buchanan v. Maine*, 469 F.3d 158, 168 (1st Cir. 2006) (“We do not think the law elaboration purpose will be well served here, where the Fourth Amendment inquiry involves a reasonableness question which is highly idiosyncratic and heavily dependent on the facts.”). *See generally* Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 709 (2009).

Given the significant number of cases in which courts are now opting to dispose of qualified immunity on the second prong, plaintiffs' attorneys might be anxious about losing the mandated two-step approach of *Saucier*, which was viewed as performing a rights-establishing function.⁷⁵ Some empirical data suggests that, in fact, when the courts addressed the issue of whether there was a constitutional right first, they most often found that there was no right.⁷⁶ Therefore, *Pearson* may not hurt plaintiffs and, in fact, might even help them.

In the three aforementioned cases, for example, it is not clear that if the courts addressed the constitutional question first, they would have found a right. However, in some cases, plaintiffs may want to have the law clearly established, and that argument should be made to the court. If the case presents issues that are likely to recur in subsequent cases, it makes sense to set a standard that will be applicable in other cases. The more factually particular a case is, the more successfully a defendant can argue that the merits question should not be addressed first, because it is of little use in future cases. Alternatively, a plaintiff who argues that the issue is more general, and not particularly tied to the facts, could push for the constitutional question to be addressed first. This, of course, is provided that there are enough facts pleaded in the complaint to withstand the standard set by *Ashcroft v. Iqbal*.⁷⁷

D. Constitutional Right Asserted but Not Clearly Established

There have been some post-*Pearson* cases where courts have found a constitutional right but applied qualified immunity because the right was not clearly established at the time. The Supreme Court

⁷⁵ *Pearson v. Callahan*, 129 S. Ct. 808, 815-16 (2009).

⁷⁶ Leong, *supra* note 74, at 693.

In 76% of the cases where an appellate court ultimately granted qualified immunity for the defendants, the court also held that the asserted constitutional right did not exist, while in only 17% of cases did the court acknowledge the existence of the right. At a basic level, therefore, our results similarly demonstrate that courts are more likely to deny than to acknowledge constitutional rights.

Id.

⁷⁷ *See* 129 S. Ct. 1937 (2009).

has adhered to the *Saucier* approach, in a post-*Pearson* case, where plaintiffs asserted claims against individual defendants, along with a *Monell v. Department of Social Services*⁷⁸ claim against a government entity. In *Redding*,⁷⁹ the Court held that the school officials' strip search of a thirteen-year-old middle school girl, suspected of bringing prescription-strength Ibuprofen to school, was a violation of the student's Fourth Amendment rights.⁸⁰ Applying the rationale of *New Jersey v. T.L.O.*,⁸¹ the majority concluded that the scope of the search was totally unwarranted in light of the age and sex of the student and the minimal threat presented by the specific "drugs" being sought.⁸² While eight Justices found the search unlawful,⁸³ only Justices Stevens and Ginsburg would have denied qualified immunity to the school official who ordered the search.⁸⁴ As Justice Stevens put it, this was "in essence, a case in which clearly established law meets clearly outrageous conduct."⁸⁵ The Court remanded the case for consideration of the *Monell* claim against Safford, Arizona.⁸⁶

In *Stoot v. City of Everett*,⁸⁷ a Ninth Circuit case, the issue was whether a police officer could rely solely on the uncorroborated and inconsistent statements of a very young victim of alleged sexual abuse in order to establish probable cause to seize or arrest the suspect.⁸⁸ The court held that relying solely on the statements of the very young victim was a constitutional violation.⁸⁹ But, the court

⁷⁸ *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). In *Monell*, the Court declared the rule that "a municipality cannot be held liable under § 1983 on a *respondeat superior* theory," but can be held liable where constitutional violations result from official policy or custom. *Id.* at 691 (emphasis in original).

⁷⁹ 129 S. Ct. 2633 (2009).

⁸⁰ *Id.* at 2637-38.

⁸¹ 469 U.S. 325, 342 (1985) (reasoning that "a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction").

⁸² *Redding*, 129 S. Ct. at 2643.

⁸³ *See id.* at 2646-58 (Thomas, J., concurring in the judgment in part and dissenting in part) (explaining that only Justice Thomas would have upheld the constitutionality of the search).

⁸⁴ *Id.* at 2644 (Stevens, J., joined by Ginsburg, J., concurring in part and dissenting in part).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ 582 F.3d 910 (9th Cir. 2009).

⁸⁸ *Id.* at 919.

⁸⁹ *Id.* at 921.

went on to hold that the law was not so clearly established at the time that a reasonable police officer would have understood his action to constitute a violation; therefore, qualified immunity applied to the arrest.⁹⁰ In *Greene v. Camreta*,⁹¹ the Ninth Circuit again opted to clarify the law in order to “provide guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment.”⁹² The court held that the in-school seizure of a child suspected of being abused by her parents was unconstitutional where there was no warrant, no court order, no exigent circumstances, and no consent.⁹³ While recognizing that such conduct was unlawful, the court granted qualified immunity to the officials involved because Ninth Circuit precedent “did not clearly establish that the in-school seizure of a student suspected of being the victim of child sexual abuse can be subject to traditional Fourth Amendment protections.”⁹⁴

Cordova v. Aragon,⁹⁵ a Tenth Circuit case, is interesting because it was a high-speed pursuit case⁹⁶ that implicated issues from *Scott v. Harris*,⁹⁷ the Supreme Court’s decision concerning the use of deadly force to terminate a pursuit.⁹⁸ Judge McConnell wrote the opinion and has since left the bench to become the Director of the Stanford Constitutional Law Center at Stanford Law School.⁹⁹ He was a conservative jurist, and the facts, in my opinion, described a much more outrageous high-speed pursuit than in *Scott*. The defendant was traveling the wrong direction and struck various objects.¹⁰⁰ A police officer finally managed to get in front of him on the wrong side of the road, shot at him as he passed by, and killed him.¹⁰¹ Judge McConnell articulated the merits issue as whether this constituted an unreasonable use of force and unreasonable seizure.¹⁰² The opinion

⁹⁰ *Id.* at 922.

⁹¹ 588 F.3d 1011 (9th Cir. 2009).

⁹² *Id.* at 1022.

⁹³ *Id.* at 1030.

⁹⁴ *Id.* at 1033.

⁹⁵ 569 F.3d 1183 (10th Cir. 2009).

⁹⁶ *Id.* at 1185.

⁹⁷ 550 U.S. 372 (2007).

⁹⁸ *Id.* at 374.

⁹⁹ John Schwartz, *California: Judge to Step Down*, N.Y. TIMES, May 6, 2009, at A21.

¹⁰⁰ *Cordova*, 569 F.3d at 1186.

¹⁰¹ *Id.* at 1187.

¹⁰² *See id.* at 1188.

stated that the threat to the officers was a disputed fact, but that the district court “assumed the officers to be in no immediate danger.”¹⁰³ Any danger to third parties was “less ‘imminent’ than that posed by the driver in *Scott*.”¹⁰⁴ There was no other traffic on the road, so there was only a remote possibility that he might kill somebody else.¹⁰⁵ Weighing the remote possibility of danger to third persons versus the virtual certainty of shooting and killing him with a gun, the court decided that there was a Fourth Amendment violation on these assumed facts.¹⁰⁶ The court, then, granted qualified immunity because the law was not so clear that a reasonable officer would or should have understood this to be a violation.¹⁰⁷ It was unusual that the court decided the merits question first because this was a particularly fact-specific case.¹⁰⁸ However, the court was concerned about the prospect of *Scott* being understood as a blanket approval of any use of deadly force—shooting as well as ramming—to terminate a pursuit, even when the danger posed to innocent third persons was not imminent.¹⁰⁹ *Cordova* at least puts officers on notice that “there is a spectrum of ‘deadly force,’ and that just because a situation justifies ramming does not mean it will justify shooting a suspect in the head.”¹¹⁰

III. HEIGHTENED PLEADING

A. *Iqbal & Twombly*—A History

With regard to heightened pleading, leading up to *Bell Atlantic Corp. v. Twombly*,¹¹¹ a series of Supreme Court cases, including *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,¹¹² *Swierkiewicz v. Sorema N. A.*,¹¹³ and others, unanimous-

¹⁰³ *Id.* at 1190.

¹⁰⁴ *Id.* at 1189.

¹⁰⁵ *Cordova*, 569 F.3d at 1190.

¹⁰⁶ *See id.* at 1189.

¹⁰⁷ *Id.* at 1193.

¹⁰⁸ *Id.* at 1186-87.

¹⁰⁹ *Id.* at 1188-89.

¹¹⁰ *Cordova*, 569 F.3d at 1189.

¹¹¹ 550 U.S. 544 (2007).

¹¹² 507 U.S. 163 (1993).

ly rejected any notion of heightened pleading.¹¹⁴ Likewise, in *Crawford-El v. Britton*,¹¹⁵ the Supreme Court rejected the D.C. Circuit's requirement that there be some form of heightened pleading—a higher burden of proof at the pleading stage—where motive was involved in the underlying constitutional violation.¹¹⁶ Justice Stevens, writing for the Court, noted that procedural devices already existed to perform a screening and clarifying function.¹¹⁷ The Court noted two procedural devices available to trial judges that could be used prior to any discovery.¹¹⁸ “First, the [district] court may order a reply . . . under Federal Rule of Civil Procedure 7(a), or grant the defendant’s motion for a more definite statement under Rule 12(e).”¹¹⁹ With these rules, the Court held that there was no need to impose a heightened pleading requirement.¹²⁰

In an unexpected departure from this consistent line of cases affirming the notice pleading standard under Rule 8(a), the Supreme Court, in *Twombly*,¹²¹ an anti-trust case, retired the “no set of facts” standard from *Conley v. Gibson*.¹²² Although the Court stressed that

¹¹³ 534 U.S. 506 (2002).

¹¹⁴ See, e.g., *Jones v. Bock*, 549 U.S. 199, 224 (2007) (“We once again reiterate . . . as we did unanimously in *Leatherman*, *Swierkiewicz*, and *Hill*—that adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts.”); *Hill v. McDonough*, 547 U.S. 573, 582 (2006) (“Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through federal courts’ case-by-case determinations.”); *Leatherman*, 507 U.S. at 168 (holding that a heightened pleading standard that exceeds the pleading standard in the Federal Rules of Civil Procedure should not be applied with respect to claims alleging municipal liability in § 1983 cases); *Swierkiewicz*, 534 U.S. at 515 (rejecting a “heightened pleading standard for employment discrimination suits”); see also *Crawford-El v. Britton*, 523 U.S. 574, 594 (1998) (rejecting a “clear and convincing burden of proof” standard).

¹¹⁵ 523 U.S. 574.

¹¹⁶ *Id.* at 594-95. *Crawford-El* was a First Amendment retaliation case brought by a prisoner. *Id.* at 580-81.

¹¹⁷ *Id.* at 599-600 (suggesting a myriad of procedural tools available to the trial judge, which tools can serve as alternatives to the requirement of heightened pleadings). The Court also stressed the role of “the discovery process [in] facilitat[ing] prompt and efficient resolution of the lawsuit.” *Id.* at 599. Finally, Rule 11 “authorizes sanctions for the filing of papers that are frivolous, lacking in factual support, or ‘presented for any improper purpose, such as to harass.’” *Crawford-El*, 523 U.S. at 600.

¹¹⁸ *Id.* at 598.

¹¹⁹ *Id.*; see also FED. R. CIV. P. 7(a); FED. R. CIV. P. 12(e).

¹²⁰ *Crawford-El*, 523 U.S. at 600-01.

¹²¹ 550 U.S. 544 (2007).

¹²² 355 U.S. 41 (1957).

it was not requiring “heightened fact pleading of specifics,”¹²³ the Court also made clear that “labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do,”¹²⁴ and that a plaintiff would have to plead “enough facts to state a claim to relief that is plausible on its face.”¹²⁵ Within two weeks of issuing *Twombly*, however, the Court in *Erickson v. Pardus*,¹²⁶ in a per curiam decision, chastised the Tenth Circuit for its “departure from the liberal pleading standards set forth by Rule 8(a)(2)” in a pro se case brought by a prisoner complaining about his removal from a hepatitis C treatment program.¹²⁷ The Court held it was error for the court of appeals to conclude that allegations concerning the harm caused by the termination of the treatment were too conclusory for pleading purposes.¹²⁸

Despite *Erickson* and frequent disclaimers, as in *Jones v. Bock*,¹²⁹ about the imposition of a heightened pleading requirement,¹³⁰ it is difficult to characterize the Court’s latest decision on pleading as anything other than a case that will require plaintiffs to plead specific facts in some detail in order to avoid a motion to dismiss and open the gates to discovery. Call it what you will, plaintiffs are advised to support allegations in the complaint with as many specific facts as possible.

*Ashcroft v. Iqbal*¹³¹ involved a Muslim Pakistani, who was arrested on immigration charges, detained, convicted, and deported in the wake of 9/11.¹³² Iqbal claimed that he was designated a “person of high interest” and subjected to harsh detention conditions based on his race, religion, or national origin in violation of the First and Fifth Amendments to the Constitution.¹³³ Review in the Supreme Court was limited to the sufficiency of the allegations with respect to the claims asserted against former Attorney General John Ashcroft, and

¹²³ *Twombly*, 550 U.S. at 570.

¹²⁴ *Id.* at 555.

¹²⁵ *Id.* at 570.

¹²⁶ 551 U.S. 89 (2007).

¹²⁷ *Id.* at 94.

¹²⁸ *Id.*

¹²⁹ 549 U.S. 199, 224 (2007).

¹³⁰ See cases cited *supra* note 114.

¹³¹ 129 S. Ct. 1937 (2009).

¹³² *Id.* at 1939.

¹³³ *Id.* at 1943.

the Director of the FBI, Robert Mueller. In holding that Iqbal's pleadings were insufficient to withstand a motion to dismiss, Justice Kennedy wrote for a five-to-four majority of the Court.¹³⁴ He explained that "two working principles" underlie the decision in *Twombly*: "First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."¹³⁵ Thus, Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."¹³⁶ Second, "only a complaint that states a plausible claim for relief survives a motion to dismiss."¹³⁷ Determining plausibility will be a "context-specific task" requiring application of judicial experience and common sense.¹³⁸

The bottom line in *Iqbal* is that pleadings that contain legal conclusions, as viewed by the Court, will be deemed insufficient unless those conclusions are supported by specific factual allegations.¹³⁹ Applying this heightened standard to Iqbal's pleadings against Ashcroft and Mueller, the Court found the complaint lacking sufficient facts to make plausible the claim that these officials had *purposefully* subjected Iqbal to harsh treatment *because of* his race, religion, or national origin.¹⁴⁰ *Iqbal* was a *Bivens*¹⁴¹ action, challenging conduct of very high-level government officials, in the wake of a devastating attack upon this country, and a case asserting constitutional claims requiring proof of impermissible motive.¹⁴² Plaintiffs may try to cabin

¹³⁴ *Id.* at 1950-51. Justice Kennedy was joined by Chief Justice Roberts and Justices Alito, Scalia, and Thomas. *Id.* at 1941. Justice Souter filed a dissent in which Justices Ginsburg, Stevens, and Breyer joined. *Iqbal*, 129 S. Ct. at 1954 (Souter, J., dissenting). Justice Breyer also filed a dissenting opinion. *Id.* at 1962 (Breyer, J., dissenting).

¹³⁵ *Id.* at 1949 (majority opinion).

¹³⁶ *Id.* at 1950.

¹³⁷ *Id.*

¹³⁸ *Iqbal*, 129 S. Ct. at 1950.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1950-51. In some sense, *Iqbal* seems to accomplish what *Crawford-El* ruled against, by requiring heightened pleadings where the underlying constitutional violation is one involving motive. *Id.* at 1952. *Iqbal* will no doubt lead to a different outcome in some cases, but pro se plaintiffs should continue to benefit from *Erickson*. See, e.g., *Burks v. Raemisch*, 555 F.3d 592, 594 (7th Cir. 2009) ("Plaintiffs need not lard their complaints with facts; the federal system uses notice pleading rather than fact pleading. Knowledge and intent, in particular, need not be covered in detail[.]" (citing *Erickson v. Pardus*, 551 U.S. 89, 93 (2007))).

¹⁴¹ *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

¹⁴² *Iqbal*, 129 S. Ct. at 1942.

Iqbal by underscoring the very “context-specific” facts that gave rise to its holding.¹⁴³

A number of judges have commented that *Iqbal* and *Twombly* are being over-read.¹⁴⁴ A transcript from an oral hearing before Judge Milton Shadur, a well-respected judge from the Northern Dis-

¹⁴³ A good case for plaintiffs to examine is *Chao v. Ballista*, where plaintiff’s claims against supervisory officials survived a motion to dismiss. 630 F. Supp. 2d 170, 177-79 (D. Mass. 2009). The plaintiff, a prison inmate, had been sexually abused repeatedly over an extended period of time by a prison guard. *Id.* With respect to the claims against the supervisors, including the Commissioner of the Massachusetts Department of Correction, the court concluded “[the] factual allegations [of the complaint] raise the plausible inference that, given their supervisory duties and security responsibilities, the Defendants failed to adequately train, supervise, or investigate [the guard’s] year-long sexual encounters with [Plaintiff].” *Id.* at 178. The court noted that “the state of mind required to make out a supervisory claim under the Eighth Amendment—i.e., deliberate indifference—requires less than the discriminatory purpose or intent that *Iqbal* was required to allege in his suit against Ashcroft and Mueller.” *Id.* at 178 n.2; *see also* *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1034 (N.D. Cal. 2009).

In light of [the] allegations [in the complaint], the Court finds Padilla has alleged sufficient facts to satisfy the requirement that Yoo set in motion a series of events that resulted in the deprivation of Padilla’s constitutional rights. . . . Here, in contrast [to *Iqbal*], Padilla alleges with specificity that Yoo was involved in the decision to detain him and created a legal construct designed to justify the use of interrogation methods that Padilla alleges were unlawful.

Id. For other post-*Iqbal* decisions, *see, e.g.*, *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969-72 (9th Cir. 2009) (concluding that “factual content contained within the complaint does not allow us to reasonably infer that [Secret Service] Agents ordered the relocation of Plaintiffs’ demonstration because of its anti-Bush message, and it therefore fails to satisfy *Twombly* and *Iqbal*”); *Maldonado v. Fontanes*, 568 F.3d 263, 273 (1st Cir. 2009) (“[A]nalyzing the pleadings under *Iqbal*, we hold that the allegations of the complaint do not allege a sufficient connection between the Mayor and the alleged conscience-shocking behavior—the killing of the seized pets—to state the elements of a substantive due process violation.”); *Kyle v. Holina*, No. 09-cv-90-slc, 2009 WL 1867671, at *1 (W.D. Wis. June 29, 2009) (revisiting conclusion in light of *Iqbal*, which the court found “implicitly overturned decades of circuit precedent in which the court of appeals had allowed discrimination claims to be pleaded in a conclusory fashion. . . . Under the Supreme Court’s new standard, an allegation of discrimination needs to be more specific.”); *see also* *Boring v. Google Inc.*, No. 09-2350, 2010 WL 318281, at *2 (3d Cir. Jan. 28, 2010); *Kirby v. Dallas County Adult Prob. Dep’t*, Nos. 08-2265, 08-2292, 2009 WL 5064789, at *5 (10th Cir. Dec. 28, 2009); *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009); *Mitchell v. Fed. Bureau of Prisons*, 587 F.3d 415, 420 (D.C. Cir. 2009); *al-Kidd v. Ashcroft*, 580 F.3d 949, 977 (9th Cir. 2009), *reh’g denied*, 2010 WL 961855 (9th Cir. Mar. 18, 2010) (en banc); *Cohen v. Gerson Lehrman Group, Inc.*, No. 09 Civ. 4352 (PKC), 2010 WL 92484, at *2 (S.D.N.Y. Jan. 7, 2010).

¹⁴⁴ *See* *Limestone Dev. Corp. v. Vill. of Lemont*, 520 F.3d 797, 803 (7th Cir. 2008). Judge Posner of the Seventh Circuit Court of Appeals warned that “*Bell Atlantic* must not be over-read.” *Id.*

trict of Illinois, provides a wonderful illustration.¹⁴⁵ In the hearing, the city moved to dismiss, citing *Twombly* and *Iqbal*.¹⁴⁶ This was the colloquy that followed:

When I got this motion, my guess was that Ms. Neeley, who was the one who drafted it, didn't make what I suppose is in some respects an ill-conceived career switch that I did well over 60 years ago[,] when I went from majoring in physics and mathematics to the law. But[,] you know[,] you don't have to be a nuclear physicist to recognize that [*Twombly*] and [*Iqbal*] don't operate as a kind of universal "get out of jail free" card. That seems to be the approach—and I mean no offense, Ms. Neeley, because you are not alone—of too many defense counsel, just as though those decisions had somehow blotted out what had been two unanimous Supreme Court decisions, the first written by that noted liberal, Chief Justice Rehnquist, in that *Leatherman* against Tarrant County, and then the latter one, written by the even better known flaming liberal, you know, Justice Thomas, in *Swierkiewicz* against *Sorema*.

As you might guess this whole business of what effect to give to *Twombly* and *Iqbal* has been a topic of discussion among judges here. And I won't pretend to be able to report everyone's view, but I will tell you the general sense is what I have just conveyed.¹⁴⁷

Here is an example of a post-*Twombly*, pre-*Iqbal* case from the Second Circuit that likely would not survive *Iqbal*:

Boykin is correct that she did not need to allege discriminatory animus for her disparate treatment claim to be sufficiently pleaded. There is no heightened pleading requirement for civil rights complaints alleg-

¹⁴⁵ Transcript of Oral Argument at 2-3, *Madison v. City of Chicago*, No. 09 C 3629 (N.D. Ill. Aug. 11, 2009) (on file with Author and *Touro Law Review*).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

ing racial animus Here, it is sufficient that [the] complaint states that she “is African American female,” describes KeyBank’s actions with respect to her loan application and alleges that she “was treated differently from similarly situated loan applicants . . . because of her race, sex, and the location of the property in a predominantly African-American neighborhood.”¹⁴⁸

Perhaps this states a plausible claim, but perhaps another judge with different judicial experience and different common sense would read it another way. In stating that there is no heightened pleading requirement with civil rights complaints alleging racial animus, plaintiffs should be careful. After *Iqbal*, there is unquestionably a requirement to plead with more particularity with regard to these types of claims. The claim must be more than conceivable—it must be plausible. This determination is bound to be very subjective, and will be determined quite differently by different judges in the federal courts. Especially in cases where motive is an essential element of the underlying constitutional claim, plaintiffs who request discovery to show that an allegation has factual support will find themselves in a quandary: if an allegation is considered conclusory, there is no discovery; however, the only way to get the facts to support the allegation is through discovery.¹⁴⁹

B. Post-*Iqbal* Decisions: Impact on Pleading Standards

Iqbal is clearly having an impact on pleading requirements imposed by the courts. Both the Third Circuit and the Fourth Circuit have suggested that *Swierkiewicz* has been repudiated by *Twombly* and *Iqbal*.¹⁵⁰ In *Cooney v. Rossiter*,¹⁵¹ the Seventh Circuit stated that

¹⁴⁸ *Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir. 2008) (internal citations omitted).

¹⁴⁹ *See, e.g., Ibrahim v. Dep’t of Homeland Sec.*, No. C 06-00545 WHA, 2009 WL 2246194, at *10 (N.D. Cal. July 27, 2009) (“A good argument can be made that the *Iqbal* standard is too demanding. Victims of discrimination and profiling will often not have specific facts to plead without the benefit of discovery.”).

¹⁵⁰ *See Francis v. Giacomelli*, 588 F.3d 186, 192 n.1 (4th Cir. 2009) (“The standard that the plaintiffs quoted from *Swierkiewicz* . . . was explicitly overruled in *Twombly*.”); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) (“We have to conclude . . . that be-

“the height of the pleading requirement is relative to the circumstances.”¹⁵² In comparing the two cases—*Twombly* and *Iqbal*—the circumstances in *Twombly* consist of a complicated antitrust case that would necessitate extensive, expensive, and prolonged discovery.¹⁵³ As a result, the Court would raise the standard.¹⁵⁴ Similarly, in *Iqbal*, where the circumstances involve high-level officials and qualified immunity, the Court is going to make it tougher to get out of the gate and into discovery.¹⁵⁵ In *Cooney*, the Seventh Circuit noted that although this case involved neither complexity nor immunity, “paranoid pro se litigation” may be occurring, and so the heightened pleading standard applied.¹⁵⁶

al-Kidd v. Ashcroft,¹⁵⁷ a Ninth Circuit case, is a good case for plaintiffs to review. In fact, most of the good cases for plaintiffs are now in the Ninth Circuit waiting to be overruled.¹⁵⁸ In *al-Kidd*, there were several different claims.¹⁵⁹ First, *al-Kidd* alleged that Ashcroft was responsible for a policy followed by the Federal Bureau of Investigation and Department of Justice, whereby these agencies “sought material witness orders without sufficient evidence” and improperly and intentionally used those orders to put people into custody.¹⁶⁰ In other words, it was alleged that these witness orders were not issued to secure the testimony of material witnesses, but rather, the agencies used them as a means of investigating and holding witnesses as sus-

cause *Conley* has been specifically repudiated by both *Twombly* and *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*.”)

¹⁵¹ 583 F.3d 967 (7th Cir. 2009).

¹⁵² *Id.* at 971.

¹⁵³ *Id.*

¹⁵⁴ See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (holding that the plaintiff need not allege specific facts, but nonetheless, the plaintiff failed to state enough facts to make his claim plausible).

¹⁵⁵ See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009).

¹⁵⁶ *Cooney*, 583 F.3d at 971.

¹⁵⁷ 580 F.3d 949 (9th Cir. 2009).

¹⁵⁸ Brian T. Fitzpatrick, *Disorder in the Court*, L.A. TIMES, July 11, 2007, at 15 (stating that “[t]he 9th Circuit is overturned [by the Supreme Court] more than any other appeals court”). A district court from the Northern District of Illinois has recently relied on both *al-Kidd* and *Padilla* in denying a motion to dismiss in a case brought by two American citizens who claim to have been tortured while held in a prison in Iraq. *Vance v. Rumsfeld*, No. 06 C 6964, 2010 WL 850173 (N.D. Ill. Mar. 5, 2010). After reviewing the allegations of the complaint, the court concluded “that plaintiffs have alleged sufficient facts to survive Rumsfeld’s motion to dismiss on account of a lack of personal involvement.” *Id.* at *7.

¹⁵⁹ *al-Kidd*, 580 F.3d at 957.

¹⁶⁰ *Id.*

pects, even though there was not sufficient evidence.¹⁶¹ The court stated that the allegations, with respect to the violation of the material witness statute, must pass the *Iqbal* hurdle.¹⁶² al-Kidd did allege facts with respect to what Ashcroft did, which would make him personally involved in this decision to use the material witness statute in this way; therefore, as for the material witness claim, the plaintiff satisfied the *Iqbal* hurdle.¹⁶³

The second claim was substantially similar to that asserted in *Iqbal* and involved the conditions of confinement.¹⁶⁴ Here, the court decided that al-Kidd did not meet the *Iqbal* standard.¹⁶⁵ Just as in *Iqbal*, al-Kidd was not able to show that Ashcroft had any particular knowledge or purpose with respect to the conditions under which he was confined.¹⁶⁶ Here, the allegations were deemed conclusory,¹⁶⁷ therefore, the plaintiff's conditions claim could not succeed under *Iqbal*.¹⁶⁸

In *Ibrahim v. Department of Homeland Security*,¹⁶⁹ a district court judge for the Northern District of the California stated that "[a] good argument can be made that the *Iqbal* standard is too demanding. Victims of discrimination and profiling will often not have specific facts to plead without the benefit of discovery."¹⁷⁰ However, "[d]istrict judges . . . must follow the law as laid down by the Supreme Court."¹⁷¹ Although the court noted that the plaintiff failed to allege the requisite facts for motive needed to state a Fourteenth Amendment claim, the allegations of a Fourth Amendment violation were sufficient, and the case proceeded on that claim, which requires a showing of objective unreasonableness.¹⁷² Discovery was permitted on the Fourth Amendment claim, and the court suggested that the plaintiff may be able to add a Fourteenth Amendment claim if suffi-

¹⁶¹ *Id.*

¹⁶² *Id.* at 974.

¹⁶³ *Id.* at 975.

¹⁶⁴ *al-Kidd*, 580 F.3d at 978.

¹⁶⁵ *Id.* at 978-79.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 979.

¹⁶⁸ *Id.*

¹⁶⁹ No. C 06-00545 WHA, 2009 WL 2246194, at *10 (N.D. Cal. July 27, 2009).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

cient facts were uncovered during the discovery process.¹⁷³ A plaintiff may also strategize by filing the case in state court, alleging only state law claims. She can conduct discovery, and if further facts are discovered, then she can amend the complaint to add the federal claim to the state court complaint. At that point, defendants might request removal, or the plaintiff might voluntarily dismiss and file in federal court.¹⁷⁴

Discrepancies in pleading standards are also implicated in cases concerning *Monell* claims.¹⁷⁵ Some courts are taking the position that *Twombly* and *Iqbal* overrule *Leatherman*,¹⁷⁶ and that more than mere conclusory allegations must be alleged to state a claim for municipal liability under § 1983.¹⁷⁷ Other courts maintain that *Leatherman* is still good law, and there is no heightened pleading stan-

¹⁷³ *Ibrahim*, 2009 WL 2246194, at *10.

¹⁷⁴ *See, e.g., id.* at 4.

¹⁷⁵ *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). In *Monell*, the Court declared the rule that “a municipality cannot be held liable under § 1983 on a respondeat superior theory,” but can be held liable where constitutional violations result from official policy or custom. *Id.* at 691.

¹⁷⁶ *See supra* note 114.

¹⁷⁷ *See, e.g., Howard v. City Of Girard*, No. 08-3586, 2009 WL 2998216, at *3 (6th Cir. Sept. 21, 2009) (“Despite the fact that Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim’ at the complaint stage, we hold that plaintiff’s amended complaint falls short of the *Twombly* threshold.”); *Birgs v. City of Memphis*, No. 09-2468, 2010 WL 625401, at *4 (W.D. Tenn. Feb. 18, 2010) (“Although intensive fact pleading is not required, a plaintiff has the burden to plead more than conclusory statements.”); *Hutchison v. Metro. Gov’t of Nashville & Davidson County*, No. 3:09-0397, 2010 WL 565156, at *4 (M.D. Tenn. Feb. 5, 2010) (“In the context of Section 1983 municipal liability, district courts in the Sixth Circuit have interpreted *Iqbal*’s standards strictly.”); *Cuevas v. City of New York*, No. 07 Civ. 4169(LAP), 2009 WL 4773033, at *3 (S.D.N.Y. Dec. 7, 2009) (“Plaintiff’s boilerplate allegations against the City of New York satisfy neither the elements enumerated above, nor the pleading requirements set forth in *Iqbal*.”); *Young v. City of Visalia*, No. 1:09-CV-115 AWI GSA, 2009 WL 2567847, at *6 (E.D. Cal. Aug. 18, 2009) (“In light of *Iqbal*, it would seem that the prior Ninth Circuit pleading standard for *Monell* claims (i.e. ‘bare allegations’) is no longer viable.”); *Eckert v. City of Chicago*, No. 08 C 7397, 2009 WL 1409707, at *6 (N.D. Ill. May 20, 2009) (“We agree with Defendants that under the post-*Bell Atlantic* pleading standard, a plaintiff must provide more than boilerplate allegations to survive a motion to dismiss.”); *see also* *Buster v. City of Cleveland*, No. 1:09 CV 1953, 2010 WL 330261, at *9 (N.D. Ohio Jan. 21, 2010) (“[A] pleading must more than unadorned, ‘the defendant unlawfully harmed me’ accusations.”); *Smith v. Corr. Corp. of Am.*, No. 09-0594 (JDB), 2009 WL 4849600, at *4 (D.D.C. Dec. 16, 2009) (suggesting that mere conclusory allegations or verbatim recitation of the elements is not sufficient in a *Monell* pleading); *Swift v. McKeesport Hous. Auth.*, No. 08-275, 2009 WL 3856304, at *9 (W.D. Pa. Nov. 17, 2009) (“Plaintiff’s allegations concerning the establishment of a policy are mere conclusions. Absent specific factual allegations to support the conclusions, plaintiff’s conclusions are not entitled to the assumption of truth.”).

dard for municipal liability claims.¹⁷⁸

III. *IQBAL*'S IMPACT ON SUPERVISORY LIABILITY CLAIMS

The issue of supervisory liability had not been briefed or argued by the parties in *Iqbal*,¹⁷⁹ but Justice Kennedy made some troubling statements about the standard for establishing supervisory liability in § 1983 and *Bivens* actions.¹⁸⁰ In this case, where the underlying constitutional claim alleged discriminatory treatment of detainees based on race, religion, or national origin,¹⁸¹ 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.”¹⁸² Justice Kennedy proclaimed 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.”¹⁸³ Thus, where plaintiffs allege a claim

¹⁷⁸ See, e.g., *Riley v. County of Cook*, 2010 WL 376064, at *4 (N.D. Ill. Jan. 27, 2010) (“[T]he Supreme Court has expressly rejected a heightened pleading standard for § 1983 claims against a municipality. Courts in this district have affirmed this principle post-*Twombly*.” (citing *Leatherman*, 507 U.S. at 165-66)) (citation omitted); *Gilbert ex rel. James v. Ross*, No. 09-cv-2339, 2010 WL 145789, at *2 (N.D. Ill. Jan. 11, 2010) (“Plaintiff is not required to meet a heightened pleading standard for a § 1983 official-capacity claim.”); *Dwyer v. City of Corinth*, No. 4:09-CV-198, 2009 WL 3856989, at *9 (E.D. Tex. Nov. 19, 2009) (“ ‘Boilerplate’ allegations of inadequate municipal policies or customs are generally sufficient.”); *Abdulkhalik v. City of San Diego*, No. 08CV1515-MMA (NLS), 2009 WL 4282004, at *10 (S.D. Cal. Nov. 25, 2009) (finding that bare allegations of the officers’ conduct is sufficient); *Carnes v. Salvino*, No. CV-08-1846-PHX-GMS, 2009 WL 2568643, at *5 (D. Ariz. Aug. 18, 2009) (“[A] claim of municipal liability under § 1983 is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than bare allegations. . . .”).

¹⁷⁹ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1957 (2007) (Souter, J., dissenting). 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.” *Id.* The issue presented on appeal was whether the allegations of the complaint were sufficient to state such a claim. *Id.* Because of the concession, the Court “received no briefing or argument on the proper scope of supervisory liability” *Id.*

¹⁸⁰ In *Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, the Court recognized, for the first time, an implied private action for damages against federal officers alleged to have violated a citizen’s constitutional rights. 403 U.S. 388, 397 (1972).

¹⁸¹ *Iqbal*, 129 S. Ct. at 1942.

¹⁸² *Id.* at 1949.

¹⁸³ *Id.*

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*.¹⁸⁴

In the wake of *Iqbal*, four 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.¹⁸⁵ Another court has noted that "[a] question has arisen as to whether the traditional supervisory-liability test has been eviscerated by the recent Supreme Court decision"¹⁸⁶ While the Court used broad language, several factors may limit the ultimate reach of this ruling. First, the case challenged government conduct in the immediate wake of 9/11, a time of intense crisis and concern about national security. Second, *Iqbal* was a *Bivens* action, involving claims against very high-level officials of the federal government, whom the Court has historically afforded the highest level of protection from suit. The Court emphasized that implied *Bivens* actions are disfavored and that it is disinclined to extend their reach.¹⁸⁷ While the Court did reference § 1983, there was no

¹⁸⁴ *Id.*

¹⁸⁵ See *Arocho v. Nafziger*, No. 09-1095, 2010 WL 681679, at *3 n.4, *11 (10th Cir. Mar. 1, 2010)

[G]iven a recent Supreme Court pronouncement, the basic concept of § 1983 or *Bivens* supervisory liability itself may no longer be tenable. . . . After [*Iqbal*], circuits that had held supervisors liable when they knew of and acquiesced in the unconstitutional conduct of subordinates have expressed some doubt over the continuing validity of even that limited form of liability.

Id. at *3 n.4 (citations omitted); *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 County Children & Youth Servs.*, 577 F.3d 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."); *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.") (citation omitted).

¹⁸⁶ *Jackson v. Goord*, 664 F. Supp. 2d 307, 324 n.7 (S.D.N.Y. 2009) (citing Martin A. Schwartz, *Supreme Court Sets Standards for Civil Rights Complaints*, N.Y.L.J., Aug. 3, 2009, at 3, 7).

¹⁸⁷ *Iqbal*, 129 S. Ct. at 1948 ("Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'").

discussion or analysis of the fact that the explicit language of the § 1983 remedial statute provides liability for those who cause constitutional violations, not merely for those who commit them. The causation language in § 1983—“every person who . . . subjects, or causes to be subjected”—is significant in the statute.¹⁸⁸ Third, *Iqbal* was a case about intentional discrimination, where the underlying claim required a showing of discriminatory purpose to make out a violation. Discriminatory purpose is not required to make out claims of unreasonableness under the Fourth Amendment or subjective deliberate indifference under the Eighth or Fourteenth Amendments.¹⁸⁹ Even prior to *Iqbal*, in cases involving supervisory liability for claims of deliberate indifference to medical or safety needs of prisoners or detainees, some courts required plaintiffs to prove that the supervisors, as well as their subordinates, acted with the subjective deliberate indifference required to state an Eighth or Fourteenth Amendment claim.¹⁹⁰ After *Iqbal*, if the specific constitutional violation requires a

¹⁸⁸ 42 U.S.C.A. § 1983 (West 2010).

¹⁸⁹ See, e.g., *Estate of Allen ex rel. Wrightsman v. CCA of Tenn., LLC*, No. 1:08-cv-0774-SEB-TAB, 2009 WL 2091002, at *3 (S.D. Ind. July 14, 2009) (finding plaintiffs were not to rely “solely on a theory of supervisory liability” where they alleged that Sheriff “did nothing despite knowing that [deceased] and others [in jail] were not receiving necessary medical attention”); *Chao v. Ballista*, 630 F. Supp. 2d 170, 178 n.2 (D. Mass. 2009) (noting that “the state of mind required to make out a supervisory claim under the Eighth Amendment—i.e., deliberate indifference—requires less than the discriminatory purpose or intent that *Iqbal* was required to allege in his suit against Ashcroft and Mueller”). But see *Jacobs v. Strickland*, No. 2:08-cv-680, 2009 WL 1911781, at *3 (S.D. Ohio June 30, 2009) (noting that in a complaint alleging violations of RLUIPA and First Amendment based on failure to meet religious dietary requirements, the court held complaint against supervisors must be dismissed even if allegations that “the supervisor ha[d] actual knowledge of the constitutional violation as long as the supervisor did not actually participate in or encourage the wrongful behavior”); *Bellamy v. Mount Vernon Hosp.*, No. 07 Civ. 1801(SAS), 2009 WL 1835939, at *4, *6 (S.D.N.Y. June 26, 2009) (stating that on claim of deliberate indifference to medical needs, the court concluded that “*Iqbal v. Ashcroft* abrogate[d] several of the categories of supervisory liability enumerated in *Colon v. Coughlin* [58 F.3d 865, 873 (2d Cir. 1995)]” and that “a supervisor [was] only held liable if that supervisor participate[d] directly in the alleged constitutional violation or if that supervisor create[d] a policy or custom under which unconstitutional practices occurred”); *Levy v. Holinka*, No. 09-cv-279-slc, 2009 WL 1649660, at *3 (W.D. Wis. June 11, 2009) (alleging a claim under RFRA; mere knowledge and acquiescence not enough). Excessive force claims under the Eighth Amendment require a showing of “malicious and sadistic” use of force, and some substantive due process claims will require a showing of “purpose to harm” in order to “shock the conscience.” See *County of Sacramento v. Lewis*, 523 U.S. 833, 836 (1998); *Hudson v. McMillian*, 503 U.S. 1, 6 (1992).

¹⁹⁰ See, e.g., *Boyd v. Knox*, 47 F.3d 966, 968 n.1 (8th Cir. 1995) (citing *Farmer v. Brennan*, 511 U.S. 825 (1994)) (rejecting plaintiff’s argument—that a supervisor’s corrective in-

showing of discriminatory purpose, plaintiffs will be required to allege and prove that the supervisor had the discriminatory purpose, and will not be permitted to assert liability based on mere knowledge and acquiescence.

Of course, this requirement that the supervisor be held to the same constitutional standard as the subordinate can work in plaintiffs' favor in some cases. For example, with a Fourth Amendment violation where the standard is objective reasonableness, according to *Iqbal*, a plaintiff should be able to assert a claim of supervisory liability by alleging that a supervisor's failure to train on the use of a taser was objectively unreasonable under the circumstances.¹⁹¹ Such a determination coincides with the standard for a Fourth Amendment violation.¹⁹² Failure to train, itself, may satisfy the level of culpability if it is objectively unreasonable¹⁹³ and causes the plaintiff to be subjected to a Fourth Amendment violation.¹⁹⁴ Prior to *Iqbal*, the majority of courts have applied the *City of Canton*¹⁹⁵ standard of objective deliberate indifference to supervisory liability for the "failure to train" cases.¹⁹⁶ Neither subjective nor objective deliberate indiffe-

action could be found to constitute deliberate indifference toward the underlying constitutional violation if the supervisor knew or should have known of the violation—and applying the subjective standard of deliberate indifference, requiring proof of supervisors' actual knowledge of the violations to find them liable.); *see also* *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 254 (5th Cir. 2005) (noting that deliberate indifference in context of supervisory liability required showing of subjective knowledge of serious risk of harm to patients); *Palmer v. Marion County*, 327 F.3d 588, 594 (7th Cir. 2003) (requiring plaintiff to establish that sheriff actually knew that plaintiff was assigned to particular cell block and that sheriff inferred from that assignment that there was substantial risk of serious harm to plaintiff).

¹⁹¹ *See Iqbal*, 129 S. Ct. at 1948 (explaining that a supervisor, in order to establish supervisor liability, must have violated a constitutional right; however, the factors necessary to establish a violation will vary depending on which Amendment of the Constitution has been violated).

¹⁹² *See, e.g., Pearson v. Callahan*, 129 S. Ct. 808, 822 (2009) (noting that the applicable standard in a search and seizure case is whether the action was objectively reasonable); *Los Angeles County v. Rettele*, 550 U.S. 609, 614 (2007) ("The test of reasonableness under the *Fourth Amendment* is an objective one.").

¹⁹³ *See Pearson*, 129 S. Ct. at 822 (noting that inquiry on the constitutionality of an act falls on whether or not the act was objectively reasonable).

¹⁹⁴ *Iqbal*, 129 S. Ct. at 1948 (stating that if the violation sufficiently meets the criteria necessary to establish a constitutional violation under the appropriate amendment, then it can be used to prove supervisory liability).

¹⁹⁵ *City of Canton v. Harris*, 489 U.S. 378 (1989).

¹⁹⁶ *See, e.g., McDowell v. Brown*, 392 F.3d 1283, 1291 (11th Cir. 2004) (indicating that a municipality's action must have been "taken with . . . deliberate indifference to its . . . consequences") (internal quotations omitted); *Tokar v. Armontrout*, 97 F.3d 1078, 1083 (8th Cir. 1996) (indicating that a cause of action against a supervisor for failure to supervise his

rence is required for Fourth Amendment violations,¹⁹⁷ so plaintiffs should make the argument that objectively unreasonable failures to train, supervise, or discipline that result in subordinate officers committing Fourth Amendment violations should suffice for holding supervisors liable as well.¹⁹⁸

IV. CONCLUSION

Finally, it is worth noting that *Iqbal* says nothing about liability of governmental entities under *Monell*, where the Court has clearly recognized that entities may be held liable under § 1983 for policies or customs that are objectively deliberately indifferent to the likelihood that employees will violate citizens' constitutional rights.¹⁹⁹ It appears that *Iqbal* and *City of Canton* may be on a collision course. The Court in *City of Canton*, decided that the city can be held liable, not because it has a policy that is unconstitutional, but because it was deliberately indifferent in an objective way.²⁰⁰ To clarify, the city did not commit a constitutional violation, but rather was deliberately indifferent in that it knew, or should have known that its failure to train, supervise, discipline, etc., would cause the underlying constitutional violation.²⁰¹ The Court adopted a causation approach to § 1983, and

subordinates can only be made when the supervisor exhibited deliberate indifference).

¹⁹⁷ See *Pearson*, 129 S. Ct. at 822 (noting that a Fourth Amendment violation determination is based on whether the act was objectively reasonable).

¹⁹⁸ See, e.g., *Argueta v. U.S. Immigration & Customs Enforcement*, No. 08-1652 (PGS), 2010 WL 398839, at *5, *7 (D.N.J. Jan. 27, 2010).

Plaintiffs here do not allege invidious discrimination, but rather violations of their Fourth Amendment rights. Thus, Plaintiffs' pleadings must be analyzed under the appropriate Fourth Amendment standards. . . . It is important to note that the Supreme Court in *Iqbal* distinguished its case from the type of case presently before this Court. . . . "Purposeful discriminatory intent" because of "race, religion, or national origin" is not an element of a Fourth Amendment claim.

Id.; see also *Sash v. United States*, No. 08 Civ. 8332(AJP), 2009 WL 4824669, at *11 (S.D.N.Y. Dec. 15, 2009) ("Where the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standards of the Fourth and Eighth Amendments, the personal involvement analysis set forth in *Colon v. Coughlin* may still apply.").

¹⁹⁹ See *Canton*, 489 U.S. at 389-90.

²⁰⁰ *Id.* at 388.

²⁰¹ *Id.* at 389 ("Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983.").

stated that an entity can be liable for causing a constitutional violation.²⁰² There is no requirement under *City of Canton* that the governmental entity or any policymaker must be shown to have the particular state of mind required by the underlying constitutional offense.

Iqbal, on the other hand, insists that the supervisor not merely *cause* a constitutional violation, but must himself or herself demonstrate the level of culpability needed to make out the underlying constitutional wrong.²⁰³ It is difficult to reconcile *Iqbal* with *City of Canton* unless one accepts that the Court is drawing a distinction between the types of “persons” who may be sued under § 1983 and establishing different standards for entity and individual liability.²⁰⁴ Pre-*Iqbal*, courts would routinely borrow concepts from municipal liability and apply them to supervisory liability.²⁰⁵ After *Iqbal*, both litigants and courts need to assess the elements of the particular constitutional violation asserted and decide what acts or omissions will suffice to implicate the supervisor in the constitutional wrongdoing. It is too early to assess what impact *Iqbal* will have on § 1983 supervisory claims, or whether *Iqbal* and *City of Canton* can co-exist, but litigants are advised to keep a close watch on case law developing in the circuits.

²⁰² See *id.* (noting that a municipality can be held liable for unconstitutional violations when the municipality’s policies are the cause or “moving force” of the violation).

²⁰³ Compare *Iqbal*, 129 S. Ct. at 1949 (rejecting the argument that supervisors can be liable for subordinates’ policy violations; if the government official or supervisor is not subject to vicarious liability, he or she is only liable for his or her own conduct), with *Canton*, 489 U.S. at 386-88 (explaining that the city failed to adequately train the municipal employees, particularly police officers, when it was the city’s obligation to do so and therefore it caused the constitutional violation).

²⁰⁴ Compare *Canton*, 489 U.S. at 380 (indicating that the city, which is an entity, could be subject to municipal liability), with *Iqbal*, 129 S. Ct. at 1942 (indicating that this case of supervisory liability was the result of a lawsuit against the Attorney General and FBI director personally, not an entity).

²⁰⁵ Martin A. Schwartz, *Fundamentals of § 1983 Litigation*, 806 P.L.I. 87, 122, 124 (2009).