Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

2015 Supplement to CURRENT ISSUES IN CONSTITUTIONAL LITIGATION: A CONTEXT AND PRACTICE CASEBOOK (Carolina Academic Press 2011)

by Sarah E. Ricks, Chapters 14 and 15 by Evelyn Tenenbaum

Forward to Second Edition by Rebecca E. Zietlow

Professor Ricks and Professor Tenenbaum's CURRENT ISSUES IN CONSTITUTIONAL LITIGATION is an excellent, innovative textbook. It is both a comprehensive treatment of the substantive material and an effective tool for teaching practical skills to law students. As law students increasingly demand practical skills courses, some professors fear that they will be required to sacrifice coverage of substantive law. This textbook shows that it is not necessary to make such a choice. The innovative means in which the material is presented motivates students to learn the substantive law in even greater scope and depth than a conventional lecture class. The material is presented through appellate decisions, jury instructions, and other sources that practicing lawyers use. This material is accessible to students, and it more closely resembles the practice of law than the conventional presentation of only Supreme Court cases. The book also presents contextual information, which enables students to understand the issues covered in a sophisticated fashion. Students become engaged in the subjects presented, and this also motivates them to learn more.

The strongest aspect of CURRENT ISSUES IN CONSTITUTIONAL LITIGATION is the inclusion of simulation exercises. The students enjoy the exercises and take on the responsibility of teaching the material to other students as they engage in the simulations. Thus the students take ownership of the learning process, and have a great time as well. Many of my students have told me that they wish that there were more classes like this one in law school. I agree.

Rebecca E. Zietlow
Charles W. Fornoff Professor of Law and Values
University of Toledo College of Law
January 2015

What's Past is Prologue:
Forward to Second Edition by Aderson Bellegarde François[1]

In the winter of 1907, Albert Martin Kales, an 1899 graduate of Harvard Law School and professor at Northwestern University Law School, published an article in the Harvard Law Review titled "The Next Step in the Evolution of the Casebook."[2] In it, Professor Kales argued that "the comparative merits of the casebook and the text-book methods of teaching law are no longer an issue in legal education," that casebooks "have driven the text-book out of existence as a means of education, " and that the time had come to ask "what is to be the next step in their evolution?"[3] In Professor Kales' view, for all of their virtues, casebooks had one fatal flaw: by focusing exclusively on important English and national cases they did not afford sufficient flexibility to the law

[1] A version of this essay was published in THE LAW TEACHER (Fall 2011) at 26.
[2] Albert Martin Kales, *The Next Step in the Evolution of the Casebook*, 2 Harv. L. Rev. 92 (1907).
[3] *Id*.

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

teacher who wished to instruct students on how the law of local jurisdictions fits into the national scheme.

In the spring of 2007, Professor Matthew Bodie published an article in the *Journal of Legal Education* titled "The Future of the Casebook: An Argument for an Open-Source Approach."[4] In it, Professor Bodie argued that "ever since Christopher Langdell devised the first compilation to teach his students using the case method, law professors have relied on casebooks to provide the substantive basis for their courses," that "the casebook is, quite simply, the written centerpiece of legal education," but that "despite its privileged position, the casebook as we know it is probably on its way to extinction."[5] In Professor Bodie's view, for all of their virtues, the fatal flaw of most casebooks is that, by relying on a fixed set of bound cases they do not afford law teachers sufficient flexibility to customize the materials in the book to fit their teaching styles, the demands of their courses, and the needs of their students.

At the time Professor Kales published his call for the next evolutionary step in the development of the casebook, the case method had been in widespread use for barely thirty-five years,[6] there were only sixty-one published casebooks in circulation,[7] and it would be at least another year before West Publishing company established a national casebook market with the launch of the American Casebook Series.[8] In the intervening century between Professor Kales' call for its evolution and Professor Bodie's warning of its extinction, the casebook has been in a near constant state of change. Indeed, a year after he first distributed the introductory bound collection of cases to his Harvard students, Langdell himself began to edit it, not only adding and expunging cases but also eventually including commentaries that had been absent in the very first iterations of the book.[9] It sometimes seems as though the casebook has been in a constant state of flux ever since.

Perhaps the reason law teachers seem to be endlessly tinkering with the format of the casebook is that, as a teaching tool, the casebook is not terribly well suited for the case method. Strictly understood, the case method rests on the idea that the goal of law teaching is not to impart legal knowledge but to introduce legal reasoning. As Professor Peggy Cooper Davis recently showed, while it has long been the accepted view that Langdell's case method is overly rigid and formalistic in its insistence that law is a science and that legal reasoning, when subjected to scientific methods, can lead to the right answers, there is, in fact, nothing in Langdell's published works, letters and other collected papers that supports the claim that he was concerned about imparting knowledge so that students arrived at the right answers.[10] Rather, the case method and its accompanying Socratic dialogue was first and foremost an attempt at "giving students the chance to learn in the way that psychologists increasingly say that both children and adults learn best: by working collaboratively and at the growing edge of their abilities – at times sharing and applying collaborators' knowledge and methods, at times gaining new knowledge and developing new methods."[11] The problem is that a relatively short

---

[4] Matthew Bodie, *The Future of the Casebook: An Argument for an Open-Source Approach*, 57 J. Legal Educ. 10 (2007).
[5] *Id*.
[6] Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 Vill. L. Rev. 517, 520-21 (1991).
[7] Douglas W. Lind, *An Economic Analysis of Early Casebook Publishing*, 96 Law Libr. J. 95, 103-04 (2004).
[8] *Id.* at 107.
[9] Steve Shepard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 Iowa L. Rev. 547, 600-01 (1997).
[10] Peggy Cooper Davis, *Desegregating Legal Education*, 26 Ga. St. L. Rev. 1271, 1281 (2010).
[11] *Id*. at 1289

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

time after the case method was widely adopted, casebook authors increasingly began to organize and format their volumes to achieve maximum coverage of particular legal subjects.[12]That transformation of the casebook into a tool for coverage was based on a failure to recognize that, in Langdell's view, "science or not, law poses hard questions that can't be, or at least haven't been, resolved with certainty." As such, "the notion that the courses offered should include everything a student need know, that he need consider or will consider that is not gone over in class, is a mistaken one."[13]

Of all the non-core upper-level law school courses, perhaps none is as prone to the mistaken notion that "courses should include everything students need to know," and none is as ill equipped to keep that dubious promise, than the typical civil rights course. I speak from personal experience, being both the supervising attorney for the Civil Rights Clinic at Howard University School of Law and a professor of several upper level civil rights and constitutional law seminars.

So, it is particularly heartening to now have a casebook from Professor Sarah Ricks and her collaborator Professor Evelyn Tenenbaum that offers a vision of civil rights litigation teaching, not as a survey of the body of constitutional provisions, judicial decisions, legislative enactments, and regulatory regimes that make up federal civil rights law, but as a meditation on whether and how Congress, the courts, and American society have kept or broken faith with the constitutional ideal of respect for human rights and equality. Using mostly– though not exclusively – prison and police litigation, focusing on selected legislation, cases, briefs, and social developments, and relying on a set of interlocking questions and problems for discussion, Professor Ricks demonstrates that, particularly when it comes to civil rights litigation, "law professors should worry less about details and ramifications, and should concentrate more on method, technique, vocabulary, approach, arts, and the other things that go to make up a lawyer who will be adequately qualified to dig into problems, – for the most part, problems the details of which we could not possibly teach him now no matter how hard we tried."[14]

Professor Ricks' decision to use civil rights law to teach the fundamental indeterminacy of legal reasoning and the intellectual versatility of legal practice is perhaps best demonstrated not just by the relatively small number of cases she has culled from the vast body of civil rights precedent, but by her decision to place federal district and circuit court rather than Supreme Court opinions at the center of her book. Indeed, it is no exaggeration to suggest that Supreme Court precedent is the least important feature of the book. This choice is made abundantly clear in the introductory chapter on §1983, more than two-thirds of which Ricks devotes to a discussion of the social milieu of the reconstruction Era, the rise of the Ku Klux Klan, and first-hand testimony of victims of Klan violence. Only after providing this background does Ricks make any mention of the Supreme Court's decision of *Monroe v. Pape*,[15] which is credited with reviving §1983 as a viable civil rights tool after it had fallen into disuse following the Supreme Court's evisceration of the Reconstruction civil rights statues of 1866, 1870, 1871 and 1875.

Where one would normally expect a recapitulation of Supreme Court precedent, Professor Ricks offers attorneys' interviews and briefs as a way of making evident the indispensible role advocates play in the development of civil rights law. The relegation of the Supreme Court as a distant overseer is, like so many decisions in this beautifully

[12] *See generally*, Shepard, *Casebooks, Commentaries*, 82 Iowa L. Rev. 547.
[13] Roscoe Pound, *Book Review*, 4 Ill. L. Rev.150 (1909).
[14] Erwin Griswold, *Some Thoughts About Legal Education Today*, in FRONTIERS IN LAW AND LEGAL EDUCATION 77 (1961)
[15] 365 U.S. 167 (1961).

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

written book, an attempt to take back the casebook to its true origins: as a tool to teach not knowledge but reasoning, not details but techniques, not doctrine but method.

Of course, Professor Ricks' casebook is not the first or the only one to supplement cases with historical materials, scholarly discussions, workbook problems, or even practice documents. Many, if not most, casebooks nowadays do the same thing in one fashion or another. However, in many casebooks, these supplemental materials are yet another means of increasing coverage of the substantive doctrinal law students need to know – the idea being that, to fully cover, say, federal employment discrimination law, it is necessary for students to know the historical circumstances of the passage of Title VII of Civil Rights Act of 1964. What makes Professor Ricks' casebook different in an important respect is that the historical and practice materials are not there to supplement coverage of doctrine but to provide a structure for students to address "the complex and contradictory interplay of a formalistic deference to authority and an indeterminacy that allows the law to respond to notions of justice and efficiency."[16]

My years of serving both as a civil rights clinician and a doctrinal professor of constitutional law have taught me that the most difficult issues students encounter are almost never about doctrine. Rather, far more challenging are questions such as: How do you choose between advancing a new theory of a claim, knowing you will likely face a skeptical, if not hostile, judicial audience, or rehearsing the more conventional argument that does nothing to advance the law? How do you rhetorically frame your case in a way that the court is predisposed to understand, accept and respect, while at the same time telling a story that rings true to a client who spent years trying to just get someone to listen? Why, if we are being honest, do so many pro bono civil rights litigants seem at first (or even second) blush a little mentally disturbed? Did the psychological pressure of spending years fighting a losing battle against social forces bent on destroying them eventually extract a psychic cost now made manifest through their unshakable conviction that their pro bono attorney is secretly conspiring against them? Or is the fact that they took on the fight in the first place itself evidence of a less than fully developed sense of self-preservation because most of us supposedly rational folks would not be so quick to tilt at the windmills of the system by, say, trying, as did James Meredith, to singlehandedly racially integrate the University of Mississippi? Or is it really us advocates, ever the products of the legal status quo even while challenging it, who are afflicted with a skewed perspective for being too quick to reduce every question of justice and fairness into a legal issue?

No Supreme Court case I am aware of holds the answer to these questions. But, without explicitly framing her book as a historical and cultural critique of American civil rights law, Professor Ricks has, in fact, offered a trenchant account of how civil rights law is a catalogue of public morality and a registry of social consciousness; how any civil rights doctrine, whether significant or minor, whether honored or abused, reveals something about the people who adopted it and the ideas they profess to hold dear; and how civil rights litigation is not merely (or indeed mainly) a contest over the technical requirements of judicial, legislative and administrative rules but a reflection of American society's ideas of justice, fairness, power, equality and democracy.

But above all this: Professor Ricks has managed to accomplish in this textbook, with prose at once clearheaded and lyrical, in a format at once straightforward and complex, and with materials at once conventional and unexpected, the difficult and seemingly contradictory task of pointing the way to the future of the casebook while at the same time proving herself a true intellectual heir to Langdell's original vision of the case method.

---

[16] Davis, *Desegregating Legal Education*, 26 Ga. St. L. Rev. at 1289.

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

Aderson Bellegarde François
Professor of Law and Supervising Attorney
Howard University School of Law Civil Rights Clinic
Washington, DC January 2015

Chapter 1, p. 35, Note 3

See Minneci v. Pollard, _ U.S. _, 132 S.Ct. 617, 626 (Jan. 10, 2012) (no *Bivens* action available for federal prisoners to sue private prison guards for violating their constitutional rights "where that conduct is of a kind that typically falls within the scope of traditional state tort law (such as the conduct involving improper medical care at issue here.)"). Inmate Richard Lee Pollard was represented by a team including the Georgetown University Institute for Public Representation and the University of Richmond School of Law.

Chapter 2, p. 93, following For further discussion, Note 5.

6. In May 2012, pursuant to the Prison Rape Elimination Act, the Justice Department released final administrative regulations to prevent, detect, and respond to sexual abuse in prison. The Justice Department described the regulations as the first federal effort to set standards to protect inmates in adult prisons and jails, lockups, community confinement facilities, and juvenile facilities at the federal, state, and local levels. While the final rule is binding on the Federal Bureau of Prisons, states that do not comply with the standards are subject to a reduction in federal funds they would otherwise receive for prisons. Below are excerpts from the Justice Department's summary of the new requirements.

Prevent: To prevent sexual abuse, the standards require, among other things, that facilities:
…

- Screen inmates for risk of being sexually abused or sexually abusive, and use screening information to inform housing, bed, work, education and program assignments;
- Develop and document a staffing plan that provides for adequate levels of staffing and, where applicable, video monitoring;
- Train employees on their responsibilities in preventing, recognizing and responding to sexual abuse;
- Perform background checks on prospective employees and not hire abusers;
- Prevent juveniles from being housed with adult inmates or having unsupervised contact with adult inmates in common spaces;
- Ban cross-gender pat-down searches of female inmates in prisons and jails and of both male and female residents of juvenile facilities;
- Incorporate unique vulnerabilities of lesbian, gay, bisexual, transgender, intersex and gender nonconforming inmates into training and screening protocols;
- Enable inmates to shower, perform bodily functions and change clothing without improper viewing by staff of the opposite gender;
- Restrict the use of solitary confinement as a means of protecting vulnerable inmates; and
- Enter into or renew contracts only with outside entities that agree to comply with the standards.

Detect: To detect sexual abuse, the standards require, among other things, that facilities:

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

- Make inmates aware of facility policies and inform them of how to report sexual abuse;
- Provide multiple channels for inmates to report sexual abuse, including by contacting an outside entity, and allow inmates to report abuse anonymously upon request;
- Provide a method for staff and other third parties to report abuse on behalf of an inmate;
- Develop policies to prevent and detect any retaliation against those who report sexual abuse or cooperate with investigations; and
- Ensure effective communication about facility policies and how to report sexual abuse with inmates with disabilities and inmates who are limited English proficient;

Respond: To respond to sexual abuse, the standards require, among other things, that facilities:

- Provide timely and appropriate medical and mental health care to victims of sexual abuse;
- Where available, provide access to victim advocates from rape crisis centers for emotional support services related to sexual abuse;
- Establish an evidence protocol to preserve evidence following an incident and offer victims no-cost access to forensic medical examinations;
- Investigate all allegations of sexual abuse promptly and thoroughly, and deem allegations substantiated if supported by a preponderance of the evidence;
- Discipline staff and inmate assailants appropriately, with termination as the presumptive disciplinary sanction for staff who commit sexual abuse;
- Allow inmates a full and fair opportunity to file grievances regarding sexual abuse so as to preserve their ability to seek judicial redress after exhausting administrative remedies; and
- Maintain records of incidents of abuse and use those records to inform future prevention planning.

See Dept. of Justice, *Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape* (May 17, 2012), available at http://www.justice.gov/opa/pr/2012/May/12-ag-635.html. The rule is available at: www.ojp.usdoj.gov/programs/pdfs/prea_final_rule.pdf

Chapter 2, p. 113, before Law Practice Simulation 1

In Memory of Jack Lee Young (1981-2013), advocate for prisoners

Jack had been a staff attorney for the Plattsburgh office of Prisoners' Legal Services of New York for only one year when he died at age 32.

But already "Jack had become a true and effective prisoner advocate," wrote Michael Cassidy, Managing Attorney for the office. Mr. Cassidy wrote: "Jack brought real help and compassion to countless individuals, many of whom were more desperate, more broken, and more alone than most people who do not do this work can ever truly appreciate. Individuals who were cast out by society, thrown and locked away, out of sight and out of mind, and so easily reviled and de-humanized by both the society that had condemned them and many of those charged with their custody." Jack successfully helped ensure that prisoners "in need of medical care and mental health care received the services they required and that the law demanded," Cassidy wrote. "He helped secure the release of prisoners who had been wrongfully placed in the unbelievably harsh and inhumane conditions of solitary confinement." Jack's rewards, Cassidy wrote, were "the victories he obtained, all the more sweet and satisfying due to their unfortunate rarity," "the many heart-felt appreciations he regularly received from clients for all that he did for them," and the knowledge that he had "helped give voice to those often deprived of any voice."

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

Jack graduated from Rutgers School of Law-Camden in 2009, took the Civil Rights Litigation class based on this book in 2008, and was a research assistant for the first edition of this book.

When Jack died, he was preparing to file a 42 U.S.C. § 1983 due process claim on behalf of a prisoner placed in solitary confinement for six months and was investigating several officer uses of force that may have violated the Eighth Amendment. Jack was particularly interested in the rights of transgender prisoners and took the lead in Prisoner Legal Services' role in an amicus brief to the First Circuit concerning discrimination against a transgender prisoner, a case pending as of December 2014.

Jack's excitement to be embarking on a career of advocacy for prisoners is suggested by an email he sent to Professor Ricks just a year before he died:

> So happy to let you know that I just accepted a position with Prisoners' Legal Services of New York in Plattsburgh. The job at PLS is doing exactly what I want. This work has literally been a dream of mine since I was in your constitutional litigation course in law school. Thank you so much for sharing your passion with that class, it's literally been life-changing for me.
>
> Now I just have to figure out how to actually be a lawyer and how to live on very little money (with lots of vacation days!). Wish me luck!
>
> Best, Jack

Chapter 3, p. 193, substitute for Exercise 4-B

Exercise 4-B

The below Model Jury Instructions were published in 2014. The instructions reflect that, sixteen years after the Supreme Court decided *Lewis*, courts and litigants were still wrestling with the consequences of *Lewis* on state-of-mind requirement of the state-created danger doctrine. Does that surprise you?

Consider that jury instructions are intended to be plain language explanations of the law that will be readily grasped by a group of lay people. Do you think a jury will readily grasp the meaning of the second element of the state-created danger doctrine, the state of mind requirement? Do you think a jury will readily grasp how to apply that legal standard to the facts proved at trial? How would you explain these instructions to your client?

Are the below Model Jury Instructions on the second element of the state-created danger doctrine, the state-of-mind requirement, consistent with your understanding of the spectrum of fault in *Lewis*? Do the Model Jury Instructions adequately account for the existence of competing interests in determining the level of fault necessary? If you were an attorney assigned to review Third Circuit model jury instructions for consistency with Supreme Court doctrine, would you recommend that the second element of the state-created danger instruction be amended? If so, why?

Model Civil Jury Instructions for Third Circuit

4.14 Section 1983 – State-created Danger (2014) (Second Element)

. . .

Second: [Defendant] acted with [conscious disregard of a great risk of serious harm] [deliberate indifference].[17]

[17] Select the appropriate level of culpability. See Comment for a discussion of this element.

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

. . .

[[For cases in which the requisite level of culpability is subjective deliberate indifference:][18] The second of these four elements requires [plaintiff] to show that [defendant] acted with deliberate indifference. To show that [defendant] was deliberately indifferent, [plaintiff] must show that [defendant] knew that there was a strong likelihood of harm to [plaintiff], and that [defendant] disregarded that risk by failing to take reasonable measures to address it. [Plaintiff] must show that [defendant] actually knew of the risk. If [plaintiff] proves that the risk of harm was obvious, you are entitled to infer from the obviousness of the risk that [defendant] knew of the risk. [However, [defendant] claims that even if there was an obvious risk, [he/she] was unaware of that risk. If you find that [defendant] was unaware of the risk, [footnote omitted] then you must find that [he/she] was not deliberately indifferent.]]

[For cases in which the requisite level of culpability is objective deliberate indifference, see Comment for discussion of the second element.]

[[For cases in which the requisite level of culpability is gross negligence or arbitrariness that shocks the conscience:][19] The second of these four elements requires [plaintiff] to show that [defendant] acted with conscious disregard of a great risk of serious harm. It is not enough to show that [defendant] was careless or reckless. On the other hand, [plaintiff] need not show that [defendant] acted with the purpose of causing harm. Rather, [plaintiff] must show that [defendant] knew there was a great risk of serious harm, and that [defendant] consciously disregarded that risk.]

. . .

Comment

. . .

The second element. . . . In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the Supreme Court held that a "shocks-the-conscience test" governs substantive due process claims arising from high-speed chases, and that in the context of a high-speed chase that test requires "a purpose to cause harm." *Id.* at 854. The Court of Appeals has since made clear that state-created danger claims require "a degree of culpability that shocks the conscience." *Bright v. Westmoreland County*, 443 F.3d 276, 281 (3d Cir. 2006).[20] *See also Morrow v. Balaski,* 719 F.3d

[18] This option can be used if the court concludes that the requisite level of culpability is subjective deliberate indifference. If the court concludes that the appropriate standard is objective deliberate indifference, a different formulation would be necessary. The Court of Appeals has not yet determined definitively which standard is appropriate in state-created danger cases. See Comment.

[19] This option is designed for use in cases where the requisite level of culpability is gross negligence or arbitrariness that shocks the conscience. *See* Comment (discussing the explanation of this standard provided in *Ziccardi v. City of Philadelphia*, 288 F.3d 57 (3d Cir. 2002)).

[20] *See also Marasco*, 318 F.3d at 507 (noting that *Miller v. City of Philadelphia*, 174 F.3d 368, 374-75 (3d Cir.1999) "suggested that the 'shocks the conscience' standard [applies] to all substantive due process cases"); *Schieber v. City of Philadelphia*, 320 F.3d 409, 419 (3d Cir. 2003) (opinion of Stapleton, J.) ("[N]egligence is not enough to shock the conscience under any circumstances. . . . [M]ore culpability is required to shock the conscience to the extent that state actors are required to act promptly and under pressure. Moreover, the same is true to the extent the responsibilities of the state actors require a judgment between competing, legitimate interests."); *id.* at 423 (reversing denial of summary judgment to police officers sued by parents who alleged their daughter was murdered after officers responded to 911 call but failed to enter daughter's apartment, "[b]ecause the record would not support a finding of more than negligence on the part of" the officers); *see also id.* at 423 (Nygaard, J., concurring) (stating that he did

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

160 (3d Cir. 2013) (en banc) (stating the second element as "a state actor acted with a degree of culpability that shocks the conscience").

However, "the precise degree of wrongfulness required to reach the conscience-shocking level depends on the circumstances of a particular case." *Marasco*, 318 F.3d at 508. "The level of culpability required to shock the conscience increases as the time state actors have to deliberate decreases." *Sanford v. Stiles*, 456 F.3d 298, 309 (3d Cir. 2006); *see also, e.g.*, *Walter v. Pike County, Pa.*, 544 F.3d 182, 192-93 (3d Cir. 2008). "For example, in the custodial situation of a prison, where forethought about an inmate's welfare is possible, deliberate indifference to a prisoner's medical needs may be sufficiently shocking, while '[a] much higher fault standard is proper when a government official is acting instantaneously and making pressured decisions without the ability to fully consider the risks.'" *Marasco*, 318 F.3d at 508 (quoting *Miller*, 174 F.3d at 375). Between the deliberate indifference standard (appropriate to controlled environments where deliberation is practicable)[21] and the purpose to cause harm standard (applied to high-speed chases) is an intermediate standard – "arbitrariness" – that governs in instances that present neither the urgency of a high-speed chase nor a full opportunity for deliberate response. [footnote omitted] *See Miller*, 174 F.3d at 375-77 & n.7 (where "a social worker act[ed] to separate parent and child," requiring "evidence of acts . . . that rose to a level of arbitrariness that shocks the conscience"); *see id.* at 375-76 (stating the applicable standard as "exceed[ing] both negligence and deliberate indifference, and reach[ing] a level of gross negligence or arbitrariness that indeed 'shocks the conscience'").[22]

In other words, "except in those cases involving either true split-second decisions or, on the other end of the spectrum, those in which officials have the luxury of relaxed deliberation, an official's conduct may create state-created danger liability if it exhibits a level of gross negligence or arbitrariness that shocks the conscience." *Marasco*, 318 F.3d at 509.[23] In *Ziccardi v. City of*

"not disagree with [Judge Stapleton's] analysis as far as it goes" but that the crux of the case was the plaintiff's failure to show an affirmative act on the part of the police).

[21] In *Phillips*, Michalski was suspended and then fired from his job as a 911 dispatcher. After his suspension, two of his former dispatcher colleagues gave him information that would help him to locate Phillips (Michalski's ex-girlfriend's new boyfriend). After being fired, Michalski told his former colleagues that he had nothing to live for and that his ex-girlfriend and Phillips would "pay for putting him in his present situation." The dispatchers failed to contact Phillips, the ex-girlfriend, or the police departments of the areas in which those two people were located. Michalski then shot and killed his ex-girlfriend, her sister, and Phillips. *Phillips*, 515 F.3d at 228-29. The court of appeals held that the deliberate indifference standard applied to the dispatchers because they "had no information which would have placed them in a 'hyperpressurized environment.'" *Id*. at 241.

[22] Subsequently, however, in *Nicini v. Morra*, 212 F.3d 798 (3d Cir. 2000) (en banc), the Court of Appeals held that a family services worker's alleged failure to investigate in connection with a foster care placement "should be judged under the deliberate indifference standard," *id.* at 811.

Neither *Nicini* nor *Miller* was a state-created danger case (*Nicini* proceeded on a "special relationship" theory, while the plaintiff in *Miller* alleged that a social worker pursued a child abuse investigation without probable cause). But both *Nicini* and *Miller* involved substantive due process claims and the Court of Appeals applied the *Lewis* framework in both cases. For further discussion of the "special relationship" theory, see *infra* Instruction 4.16.

[23] For example, the Court of Appeals has held that emergency medical technicians "who responded to an emergency in an apartment where a middle-aged man was experiencing a seizure" would be held to have violated substantive due process only if they "consciously disregard[ed] a substantial risk that [the man] would be seriously harmed by their actions." *Rivas v. City of Passaic*, 365 F.3d 181, 184,

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

Philadelphia, 288 F.3d 57, 66 (3d Cir. 2002), the Court of Appeals provided some detail on the nature of this standard.[24] Specifically, the Court of Appeals held that the plaintiff must prove "that the defendant[paramedics] consciously disregarded, not just a substantial risk, but a great risk that serious harm would result if, knowing Smith was seriously injured, they moved Smith without support for his back and neck." *Ziccardi*, 288 F.3d at 66; *see also Sanford*, 456 F.3d at 310 (holding that "the relevant question is whether the officer consciously disregarded a great risk of harm"). [footnote omitted]

In *Kaucher v. County of Bucks*, 455 F.3d 418 (3d Cir. 2006), the Court of Appeals noted uncertainty whether the deliberate-indifference test that applies under the *Lewis* substantive due process framework is an objective or a subjective test, see id. at 428 n.5. [footnote omitted] The Court observed that the Eighth Amendment deliberate-indifference test is subjective, *see id.* at 427, but that the deliberate-indifference test for municipal liability is objective, *see id.* at 428 n.5. The *Kaucher* Court "recognize[d] strong arguments weighing in favor of both standards," but declined to decide the question because the plaintiff's claim failed under either standard. *Id.*[footnote omitted].

Chapter 5, p. 257, after Exercise 5-A and before Exercise 5-B

Developing a Factual Record

One of the skills lawyers must develop is the ability to determine what kind of facts will help prove a claim or a defense. The lawyer must then plan how to investigate the facts and locate evidence to satisfy the relevant legal standard. This book has several exercises designed to help you develop fact investigation skills. For Exercise 5-A, you synthesized legal standards from multiple sources. For exercise 5-B, you will plan questions to ask a client to elicit factual information to satisfy that legal standard – facts to prove that an off-duty police officer acted "under color of law."

Developing Questions for a Client Interview

Lawyers decide the steps needed to accomplish the client's goals, while the client makes the ultimate decisions (whether to litigate or to settle, for example). To best represent the client, the lawyer wants to learn both what the client wants (money, public vindication) and why (I want money because I have to pay the rent; I want public vindication because I was wronged).

---

196 (3d Cir. 2004); *see id.* at 196 (stating that this test would be met if the EMTs had falsely told police officers that the man was violent and had failed to tell the police officers that the man was suffering a seizure); *cf. Brown v. Commonwealth of Pennsylvania*, 318 F.3d 473, 481 (3d Cir. 2003) (holding that "EMTs who attempted to arrive at the scene of the incident as rapidly as they could" did not behave in a way that shocks the conscience).

[24] *See id.* at 66 n.6 (observing that the phrase 'gross negligence or arbitrariness that shocks the conscience' "is not well suited for th[e] purpose" of conveying the nature of the standard). Though *Ziccardi* is technically not a "state-created danger" case because the plaintiff alleged that the *Ziccardi* defendants injured the plaintiff themselves, rather than creating the danger of injury, *Ziccardi* applied the teachings of *Lewis* and is thus instructive here. *See Ziccardi*, 288 F.3d at 64; *see also Estate of Smith v. Marasco*, 430 F.3d 140, 154 n.10 (3d Cir. 2005) ("We think that the definition adopted in *Ziccardi* is useful in assessing [state-created danger] claims.").

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

For the lawyer to fully understand the client's problem, goals, and reasons for those goals, one step is to interview the client.[25] The attorney's purposes in interviewing the client also include learning what the client knows about the facts, reducing the client's anxiety, forming the attorney client relationship, and explaining the attorney's procedures to the client. The lawyer's objectives at the interview are listening, exploring, and strategizing, rather than "solving the problem."

The client's goals in a client interview are to tell his or her story (in a confidential setting) and to be heard; to get advice, assistance, perspective; to understand the process; and to develop a good working relationship.

During the interview, lawyers let the client do most of the talking, try to build rapport, and try to be conscious of when and how often they interrupt a client. Lawyers use active listening techniques such as reframing what the client is explaining ("so as I understand it you feel, want, need") both to move the conversation along and to make sure the lawyer is learning all relevant information from the client. Like a funnel, a client interview typically begins with open-ended questions ("tell me what happened," "what would you like to see happen"), then moves to narrower questions to elicit detail. As the client speaks, the lawyer might take notes about specific topics to revisit and explore in greater detail, rather than derailing the conversation by narrowing the topic too quickly.

Once the client has told the story fully, the lawyer typically will ask questions about each specific topic that needs revisiting. For each particular topic to revisit, the lawyer again starts with broad questions, then narrows the focus. The lawyer determines the source of the client's knowledge and typically exhausts the client's memory on a topic before moving to the next topic.

Exercise 5-B concerns the narrowly focused phase of the client interview. For Exercise 5-B, you will focus on drafting questions to elicit details related only to one specific topic, whether the off-duty police officer acted under color of law.

Chapter 5, Guide to Law Practice Simulation 3, p. 260

Note that Valentin is *not* a defendant; the defendants are the officers who did not intervene to stop Valentin.

Chapter 6, after Exercise 6-A, p. 285

Preparing to negotiate to resolve a dispute

The Exercise below is a negotiation of an excessive force claim involving police use of a taser. The purpose of a negotiation is to get the other party to agree on terms as favorable as possible to your client. Everything about how and what you communicate should reflect that purpose.

Negotiating an end to litigation can be an opportunity to creatively deal with obstacles and craft a tailored solution. It can be collegial and cooperative. Negotiation can also be anxiety-producing if the lawyer is worried he or she will not have good enough information to avoid being misled, is mistrustful of negotiators on other side, is concerned about a disparity in power between the two sides, or is concerned about posturing by negotiators on the other side – yelling, abusive language, pounding the table, walking out.

[25] This brief introduction to client interviewing is based on Richard Neumann and Stefan Krieger, ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS (Aspen, 4th Ed. 2011).

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

A party's interests are the needs, desires, concerns, and fears that underlie the position of each side. Before the negotiation, try to identify both your own client's interests and the interests of the opposing party. Try to decide which interests take priority for each side. Examples of possible interests:

- resolving litigation promptly
- maintaining a beneficial long-term relationship
- maintaining reputation
- receiving money - how much and when
- psychological/emotional need for apology or admission of wrongdoing

Rights are independent legal rules or social standards that demonstrate the legitimacy or fairness of a party's position. The legal rules provide the context for a negotiation to resolve a dispute and help to predict what would happen if the litigation is not settled.

Most negotiations involve both an adversarial approach and a problem-solving approach. The adversarial approach focuses on the power and rights of the parties. Each party takes the position that s/he is entitled to something and the parties make concessions based on their perceptions of the strengths of their cases until an agreement is reached - or not reached.

The problem-solving approach focuses on the underlying interests of the parties and on how each can be better off by agreement, aiming for a win/win. A problem-solving approach requires each side to recognize its own interests and the interests of the other side. This approach can avoid parties getting locked into positions because they have invested energy in justifying those positions to opponents.

Before the negotiation, develop a Best Alternative To a Negotiated Agreement, BATNA, to measure the negotiation result. If the negotiation does not result in terms that are better than the BATNA, the negotiation will be abandoned and the litigation will proceed. Negotiators try to anticipate the other side's alternatives to settling, which is one way of measuring the strength or weakness of your own client's negotiating position. Good planning for the negotiator therefore involves imagining the other party's BATNA as well as your own.[26]

Exercise

In this exercise, you will strategize for a negotiation to settle a 4th Amendment excessive force claim against police that Ms. Brooks just filed. You represent either Ms. Brooks or the two police officers.

Police tasered Ms. Brooks under the following circumstances. Consider why police used force on Ms. Brooks, the seriousness of the crime, whether Ms. Brooks was an immediate threat to the safety of the police or other people, whether she was actively resisting arrest, and whether she was trying to escape from police.

Ms. Brooks was driving her son to school. Two police officers stopped her for driving 32 miles per hour when the speed limit was 20. Brooks disagreed. From her seat in the car, she asked the Officer to let her accept the ticket without signing it. Officer Jones became angry and asked "*Can't you read?*" Brooks answered, *"Are you implying that I can't read because I'm black?*"

Officer Jones told Brooks that if she did not sign the speeding ticket she would be arrested. Brooks asked him "*For what?*" After Brooks refused to sign the ticket, the two police officers told Brooks she was under arrest. Police ordered Brooks out of the car.

---

[26] This brief introduction to negotiation is based on Stefan H. Krieger and Richard Neumann, ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS (Aspen 2007).

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

Ms. Brooks refused to get out of the car. She explained to the police that she was seven months pregnant. She had already given the police officers her driver's license and asked the officers to allow her to take the ticket and leave. Officer Jones reached into the car, removed her keys, and dropped the keys on the floor of the car.

The two police officers tried to pull Brooks out of the car. She resisted by holding the steering wheel. The officers recognized that trying to pull Brooks from the car might risk injury to her or themselves. Instead, the officers decided to use a taser. The officers knew from training and experience that the taser causes pain but not injury and would not injure a pregnant woman. Officer Jones took out his taser. He warned Brooks that if she did not obey their order to get out of the car she would be tasered. She continued to resist arrest. Officer Jones applied the taser to her neck. Brooks shouted and honked the car horn. The 2 police were able to pull her from the car and handcuff her. Brooks admits she suffered no lasting physical injury from the taser, but does have a scar on her neck.

How do rules from *Graham, Bryan,* and the model jury instructions apply to your client's facts? In addition to that 4th Amendment excessive force authority, you may want to rely on *Bryan*'s summary of *Draper*, which held that police use of the taser did not violate the 4th Amendment. In planning your strategy for the negotiation, consider all of the following:

1. What are your client's interests?
2. What are the other party's interests?
3. What steps can your client take to change the power relationship? What steps can the other party take?
4. What is your client's Best Alternative to a Negotiated Agreement? Can you predict the other party's Best Alternative to a Negotiated Agreement?
5. What possible solutions can you suggest?
6. What information will you disclose? What will you try to conceal?
7. What negotiating style(s) will you use?

Chapter 6, before Practice Pointer, p. 314

For further discussion
A seizure may be permissible even though the police officer makes a reasonable factual mistake about the justification for the seizure. But what if the officer makes a reasonable *legal* mistake?

> In this case, an officer stopped a vehicle because one of its two brake lights was out, but a court later determined that a single working brake light was all the law required. The question presented is whether such a mistake of law can nonetheless give rise to the reasonable suspicion necessary to uphold the seizure under the Fourth Amendment. We hold that it can. Because the officer's mistake about the brake-light law was reasonable, the stop in this case was lawful under the Fourth Amendment.

Heien v. North Carolina, 574 U. S. __, 135 S.Ct. 530, 534 (2014). In Chapter 11, this book returns to the significance of mistakes of fact and law in the context of qualified immunity from Section 1983 liability.

Chapter 7, *For further discussion*, p. 320

1. The *Lopez* facts do not present a typical physical beating scenario but a use of force – e.g., chaining a man's arm midair to a wall for prolonged periods – that is akin to torture, in part because it caused sleep deprivation. Because of the American public debate about

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

the use of "stress positions" in the conflicts in Iraq and Afghanistan, you may be aware of ways force can be used to coerce and injure, even if it does not leave marks.

2. Compare the treatment of Mr. Lopez with the treatment of some detainees held by the Central Intelligence Agency (CIA), as described in a 2014 Senate report. According to the report, multiple detainees at CIA detention sites were "forced to stand with their arms shackled above their heads for extended periods of time. . . . In one example, a U.S. military legal advisor observed the technique known as 'hanging,' involving handcuffing one or both wrists to an overhead horizontal bar. The legal advisor noted that one detainee was apparently left hanging 22 hours each day for two consecutive days to 'break' his resistance. . . . According to CIA cables, Abu Zubaydah was handcuffed 'high on the bars.'"[27] "Draft [CIA Office of Medical Services] guidelines on interrogations, noted that detainees could be shackled with their arms above their heads for 'roughly two hours without great concern,' and that the arms could be elevated for between two and four hours if the detainee was monitored for 'excessive distress.'"[28] In her forward to the Report, Senator Dianne Feinstein wrote:

> While the Office of Legal Counsel found otherwise between 2002 and 2007, it is my personal conclusion that, under any common meaning of the term, CIA detainees were tortured. I also believe that the conditions of confinement and the use of authorized and unauthorized interrogation and conditioning techniques were cruel, inhuman, and degrading.[29]

Chapter 8, p. 389, before Note 3

In 2011, the international court issued its opinion in favor of Jessica Lenahan. The remedy included the Recommendation "[t]o adopt multifaceted legislation at the federal and state levels, or to reform existing legislation, making mandatory the enforcement of protection orders and other precautionary measures to protect women from imminent acts of violence, and to create effective implementation mechanisms. These measures should be accompanied by adequate resources destined to foster their implementation; regulations to ensure their enforcement; training programs for the law enforcement and justice system officials who will participate in their execution; and the design of model protocols and directives that can be followed by police departments throughout the country." The full text of the opinion is on the companion website for this book, *available at* http://www.constitutionallitigation.rutgers.edu; select "Links," and scroll down. The opinion is also available at www.oas.org/en/iachr/decisions/2011/USPU12626EN.doc. Her lawyers included law school clinics at Columbia University and University of Miami law schools.

Chapter 9, p. 412, add to paragraph 6

In *Rehberg v. Paulk*, _ U.S. _, 132 S.Ct. 1497 (2012), the Yale Law School Supreme Court Clinic was on the litigation team for petitioner Charles Rehberg. Rehberg was a certified public

---

[27] Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program (Declassified Revisions Dec. 3, 2014), Section IX, Appendix 2: CIA Detainees from 2002 – 2008, at 497-98.

[28] *Id.* at 498.

[28] *Id.* at 4.

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

accountant who criticized management of a hospital. Allegedly as a favor to the hospital's leadership, Rehberg was criminally investigated by James Paulk, the district attorney's chief investigator and the "complaining witness" who testified before the grand jury.

In *Rehberg*, the Supreme Court held that a complaining witness in a grand jury proceeding is entitled to absolute immunity because a witness's fear of liability could impair the truth-seeking process and the threat of perjury provides sufficient deterrent to false testimony. *Id.* at 1505. The Court reasoned:

> The factors that justify absolute immunity for trial witnesses apply with equal force to grand jury witnesses. In both contexts, a witness' fear of retaliatory litigation may deprive the tribunal of critical evidence. And in neither context is the deterrent of potential civil liability needed to prevent perjurious testimony. In *Briscoe*, the Court concluded that the possibility of civil liability was not needed to deter false testimony at trial because other sanctions—chiefly prosecution for perjury—provided a sufficient deterrent. *Id.*, at 342. Since perjury before a grand jury, like perjury at trial, is a serious criminal offense . . . there is no reason to think that this deterrent is any less effective in preventing false grand jury testimony.

Id.

> [W]e conclude that grand jury witnesses should enjoy the same immunity as witnesses at trial. This means that a grand jury witness has absolute immunity from any § 1983 claim based on the witness' testimony. In addition, as the Court of Appeals held, this rule may not be circumvented by claiming that a grand jury witness conspired to present false testimony or by using evidence of the witness' testimony to support any other § 1983 claim concerning the initiation or maintenance of a prosecution. Were it otherwise, 'a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves." *Buckley v. Fitzsimmons*, 509 U.S. 259, 283 (1993) (KENNEDY, J., concurring in part and dissenting in part) . . . .

Id. at 1506.

Chapter 9, p. 435, before Simulation 7

Orally Briefing a Non-Lawyer Client

In preparing to orally brief the client, try to anticipate what information a client may need to make an informed decision about the next steps in the litigation. Anticipate the questions a client might ask. Try to anticipate questions a client might not think to ask and prepare to address those also. In outlining what the lawyer plans to say, consider how much detail the client likely will need to make an informed decision.

While the client will want the lawyer's prediction for how a court is likely to apply law to the client's facts, the client also will need to consider the practical context for the decision. Consider available alternative steps and the legal and practical consequences of each alternative.

Before orally briefing a client, consider whether the client is likely to understand legal terms. If not, consider how the lawyer can explain legal concepts without using vocabulary more likely to confuse than clarify the client's understanding of the options. Consider whether the lawyer will call the client by the client's title, name, or nickname.

Try to communicate in a professional, yet conversational, tone that conveys seriousness of purpose and confidence in the thoroughness of your work. "Avoid complex sentences and unusual vocabulary words. . . . By choosing commonly used words and simple sentence phrasing

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

(subject before action verb, for example)" your oral briefing will be more easily understood by the client.[30]

Chapter 10, p. 441, add to Note 2

The Supreme Court held in *Fox v. Vice*, __ U.S. __, 131 S.Ct. 2205, 2215-16 (2011) that, under Section 1988, a defendant can obtain "only the portion of his fees that he would not have paid but for the frivolous claim," which includes (1) fees for defending a non-frivolous claim that was only performed because of the potential damage liability on a frivolous claim; (2) fees incurred because the frivolous claim drove up litigation expenses by enabling removal to federal court; and (3) fees incurred because the frivolous claim reasonably caused defendant to hire specialized and more expensive counsel). Counsel for the defendants included the University of Virginia School of Law Supreme Court Clinic.

Chapter 10, p. 453, add to Note 1

Under Section 1988, a demonstrator who successfully obtained an injunction against police officials' standing threat to prohibit him from carrying anti-abortion signs was a "prevailing party" normally entitled to attorney's fees. *Lefemine v. Wideman*, __ U.S. __, 133 S.Ct. 9, 11 (Nov. 5, 2012) (*per curiam*). The district court's injunction "worked the requisite material alteration in the parties' relationship" because "[b]efore the ruling, the police intended to stop [the demonstrator] from protesting with his signs; after the ruling, the police could not prevent him from demonstrating in that manner." *Id*.

Chapter 10, p. 467, Section D2

Compare Skinner v. Switzer, __ U.S. __, 131 S.Ct. 1289, 1298 (2011) (Section 1983 action seeking post-conviction access to DNA evidence was not barred by *Heck* because it did not necessarily imply the conviction was invalid).

Chapter 11, pp. 481-82, after Note 1 block quote from *Anderson*.

See Reichle v. Howards, __ U.S. __, 132 S.Ct. 2088, 2094 (2012)("[T]he right allegedly violated must be established, ' "not as a broad general proposition,"' *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam), but in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official") (further citation omitted).

Chapter 11, p. 482, add to Note 1

---

[30] Christine Coughlin, Joan Malmud Rocklin, and Sandy Patrick, A Lawyer Writes: A Practical Guide to Legal Analysis (2d Ed. 2013) 287; *see also* Sarah Morath, *From Awkward Law Student to Articulate Attorney: Teaching the Oral Research Report*, Vol. 27, No. 2 THE SECOND DRAFT: THE OFFICIAL MAGAZINE OF THE LEGAL WRITING INSTITUTE (Fall 2013/Winter 2014).

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

See Reichle v. Howards, _ U.S. _, 132 S. Ct. 2088, 2094 (2012)("[T]he right allegedly violated must be established, '"not as a broad general proposition,"' *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (*per curiam*), but in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official") (further citation omitted); *Ashcroft v. Al-Kidd*, _ U.S. _, 131 S. Ct. 2074, 2084 (2011) ("We have repeatedly told courts—and the Ninth Circuit in particular . . . not to define clearly established law at a high level of generality. . . The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established"). *Brosseau* is excerpted later in this Chapter.

Chapter 11, p. 483, add to Note 3

Qualified immunity also promotes fairness to defendants by permitting mistakes of law. *See Ashcroft v. Al-Kidd*, __ U.S. __, 131 S. Ct. 2074, 2085 (2011) ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions."). Recall from Chapter 6 that neither a police officer's reasonable mistake of fact nor reasonable mistake of law will violate the 4th Amendment.

Chapter 11, p. 484, after Note 6

In *Filarsky v. Delia*, the Supreme Court held that an individual hired to do government work is permitted to invoke qualified immunity even though "he works for the government on something other than a permanent or full-time basis." __ U. S. __, 132 S.Ct. 1657, 1660 (2012). Justice Roberts wrote for the unanimous Court:

> Affording immunity not only to public employees but also to others acting on behalf of the government similarly serves to " 'ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service.' " *Richardson* [*v. McKnight*, 521 U.S. 399, 408 (1997) (further citation omitted)]. The government's need to attract talented individuals is not limited to full-time public employees. Indeed, it is often when there is a particular need for specialized knowledge or expertise that the government must look outside its permanent work force to secure the services of private individuals. This case is a good example: Filarsky had 29 years of specialized experience as an attorney in labor, employment, and personnel matters, with particular expertise in conducting internal affairs investigations.

132 S.Ct. at 1665-66

> *Richardson v. McKnight*, 521 U.S. 399 (1997) [is] not to the contrary.
> . . .
> In *Richardson*, we considered whether guards employed by a privately run prison facility could seek the protection of qualified immunity. Although the Court had previously determined that public-employee prison guards were entitled to qualified immunity, *see Procunier v. Navarette*, 434 U.S. 555 (1978), it determined that prison guards employed by a private company and working in a privately run prison facility did not enjoy the same protection. We explained that the various incentives characteristic of the private market in that case ensured that the guards would not perform their public duties with unwarranted timidity or be deterred from entering that line of work. 521 U.S., at 410–411.

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

> *Richardson* was a self-consciously "narrow[ ]" decision. *Id*., at 413 ("[W]e have answered the immunity question narrowly, in the context in which it arose"). The Court made clear that its holding was not meant to foreclose all claims of immunity by private individuals. *Ibid*. Instead, the Court emphasized that the particular circumstances of that case—"a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms"—combined sufficiently to mitigate the concerns underlying recognition of governmental immunity under § 1983. *Ibid*. Nothing of the sort is involved here, or in the typical case of an individual hired by the government to assist in carrying out its work.

Id. at 1667.

Justice Sotomayor concurred, emphasizing that "it does not follow that *every* private individual who works for the government in some capacity necessarily may claim qualified immunity when sued under 42 U.S.C. § 1983." *Filarsky*, 132 S.Ct. at 1669 (Sotomayor, J., concurring). She reasoned that, in *Richardson v. McKnight*, 521 U.S. 399 (1997),

> we left open . . . the question whether immunity would be appropriate for 'a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision.' *Id*., at 413. . . [T]here is no doubt that Filarsky worked alongside the employees in investigating [the firefighter suspected of abusing sick leave]. In such circumstances, I agree that Filarsky should be allowed to claim qualified immunity from a § 1983 suit.
>
> This does not mean that a private individual may assert qualified immunity only when working in close coordination with government employees. For example, *Richardson*'s suggestion that immunity is also appropriate for individuals 'serving as an adjunct to government in an essential governmental activity,' 521 U.S., at 413, would seem to encompass modern-day special prosecutors and comparable individuals hired for their independence.

Filarsky, 132 S.Ct. at 1670 (Sotomayor, J., concurring).

The Supreme Court clarified the pleading standard that applies in the qualified immunity context in *Wood v. Moss*, _ U.S. _, 134 S.Ct. 2056, 2066-67 (2014):

> The doctrine of qualified immunity protects government officials from liability for civil damages "unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al–Kidd*, 563 U.S. ——, ——, 131 S.Ct. 2074, 2080 (2011). And under the governing pleading standard, the "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S., at 678 (internal quotation marks omitted). Requiring the alleged violation of law to be "clearly established" "balances ... the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808 (2009). The "dispositive inquiry," we have said, "is whether it would [have been] clear to a reasonable officer" in the agents' position

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

> "that [their] conduct was unlawful in the situation [they] confronted." *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151 (2001).

In 2014, the Supreme Court denied a petition for certiorari requesting clarification of the appealability of a trial court's postponement of decision on a qualified immunity defense (as opposed to granting or denying qualified immunity). The petition posed this question:

> Whether the Ninth Circuit erred when it held - in conflict with the First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits, but in accord with the Seventh Circuit - that a district court's order striking or refusing to consider a qualified immunity motion is not subject to interlocutory appeal, even when it subjects a public official to unlimited discovery for the duration of a lawsuit.

Petition for Certiorari in Schultz v. Wescom, 2014 WL 3540581 (July 16, 2014), *cert. denied*, U.S. _, 2014 WL 3556551 (Dec. 15, 2014).

Chapter 11, p. 505 in Note 2

In *Reichle v. Howards*, __ U.S. __, 132 S.Ct. 2088, 2093 (2012), a post-*Pearson* decision, the Supreme Court declined to decide the constitutional question, and held that Secret Service agents were entitled to qualified immunity because the constitutional right allegedly violated by their arrest of plaintiff was not "clearly established" at the time of the arrest. In holding that the constitutional right had not been "clearly established" at the time of the arrest, the Court considered (1) its own precedent; (2) controlling precedent from the relevant circuit; and (3) one precedential decision from a different circuit that predated the arrest. In addition, to support its reasoning that the constitutional right remained unclear after the date of plaintiff's arrest in *Reichle*, the Supreme Court relied on (4) one precedential and one non-precedential decision from different circuits that *post*-dated the arrest. *Id.* at 2093-96.

Yet the issue still is not fully resolved. In 2014, the Supreme Court held a government defendant entitled to qualified immunity because no "clearly established" constitutional right existed where there was "a discrepancy" in the relevant circuit's precedent, "no decision of this Court was sufficiently clear to cast doubt on the controlling [c]ircuit['s] precedent," and the controlling circuit's precedent conflicted with precedent from other circuits. *Lane v. Franks*, U.S. _, 134 S. Ct. 2369 (2014); *compare Carroll v. Carman*, 135 S. Ct. 348, 350, 574 U. S. ____ (2014) (*per curiam*) ("assuming for the sake of argument that a controlling circuit precedent could constitute clearly established federal law"); *Reichle*, 132 S. Ct. at 2094 (no clearly established right "[a]ssuming arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law").

Chapter 11, p. 506, after Note 4

5. Recall Justice Breyer's concern in his concurrence in *Brosseau* that *Saucier*'s "rigid" sequence "can sometimes lead to a constitutional decision that is effectively insulated from review." Since the time *Brosseau* was decided, not only has *Pearson* allowed courts to reach the "clearly established" inquiry before deciding the constitutional question - one solution to Justice Breyer's concern - but the Supreme Court has created an alternate path to review the constitutional question. In *Camreta v. Greene*, __ U.S. __, 131 S.Ct. 2020 (2011), the Court held that it "may review a lower court's constitutional ruling at the behest of a government official granted immunity." *Id*. at 2026. Article III's case-or-controversy requirement may be met when officials who prevailed on qualified immunity grounds before the appellate court seek to challenge a ruling that their conduct violated the Constitution:

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

> That is . . . because the judgment may have prospective effect on the parties. The court in such a case says: 'Although this official is immune from damages today, what he did violates the Constitution and he or anyone else who does that thing again will be personally liable.' If the official regularly engages in that conduct as part of his job (as [the child protective service worker here] does), he suffers injury caused by the adverse constitutional ruling. So long as it continues in effect, he must either change the way he performs his duties or risk a meritorious damages action. . . . Only by overturning the ruling on appeal can the official gain clearance to engage in the conduct in the future. He thus can demonstrate, as we demand, injury, causation, and redressability. And conversely, if the person who initially brought the suit may again be subject to the challenged conduct, she has a stake in preserving the court's holding.

Id. at 2029. The Court held that the adverse constitutional rulings challenged by government officials who prevailed on qualified immunity grounds before the circuit court "are rulings that have a significant future effect on the conduct of public officials—both the prevailing parties and their co-workers—and the policies of the government units to which they belong." *Id.* at 2030. The Court explained that constitutional rulings adverse to the government imbedded in opinions holding the government actors qualifiedly immune are intended to shape future conduct by better defining constitutional rights:

> [T]hey are rulings self-consciously designed to produce [effect conduct of public officials], by establishing controlling law and preventing invocations of immunity in later cases. And still more: they are rulings designed this way with this Court's permission, to promote clarity—and observance—of constitutional rules.
>
> . . .
>
> Consider a plausible but unsettled constitutional claim asserted against a government official in a suit for money damages. The court does not resolve the claim because the official has immunity. He thus persists in the challenged practice; he knows that he can avoid liability in any future damages action, because the law has still not been clearly established. Another plaintiff brings suit, and another court both awards immunity and bypasses the claim. And again, and again, and again. So the moment of decision does not arrive. Courts fail to clarify uncertain questions, fail to address novel claims, fail to give guidance to officials about how to comply with legal requirements. . . Qualified immunity thus may frustrate 'the development of constitutional precedent' and the promotion of law-abiding behavior. *Pearson v. Callahan*, 555 U.S. 223, 237 (2009).

Id. at 2031-32. The Court limited its holding in two ways. It clarified that there was no change in how it would decide whether to grant certiorari. *Id*. at 2033. Further, the Court did not decide whether a Court of Appeals – as opposed to the Supreme Court - could hear an appeal from a government official who prevailed on immunity grounds. Because district court decisions are not binding "[m]any Courts of Appeals . . . decline to consider district court precedent when determining if constitutional rights are clearly established for purposes of qualified immunity. *See*, *e.g*., *Kalka v. Hawk*, 215 F.3d 90, 100 (C.A.D.C. 2000) (Tatel, J., concurring in part and concurring in judgment) (collecting cases). Otherwise said, district court decisions—unlike those from the courts of appeals—do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity." *Id*. at 2033

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

Questions to guide reading of *Plumhoff*

1. Why do you think that the Sixth Circuit decided *Plumhoff* in a non-precedential opinion?
2. *Plumhoff* was decided after *Pearson*. Yet the Court reached the constitutional question before deciding whether the constitutional right was clearly established. Why?
3. Why was there no Fourth Amendment violation in *Plumhoff*?
4. Litigants often argue in the alternative. That means the litigant makes two arguments that are inconsistent with one another and the second argument assumes the failure of the first argument. Should the Supreme Court decide qualified immunity cases in the alternative, as it did in *Plumhoff*? Why?

Plumhoff v. Rickard

__ U.S. __, 134 S. Ct. 2012 (2014)

Justice ALITO delivered the opinion of the Court.

The courts below denied qualified immunity for police officers who shot the driver of a fleeing vehicle to put an end to a dangerous car chase. We reverse and hold that the officers did not violate the Fourth Amendment. In the alternative, we conclude that the officers were entitled to qualified immunity because they violated no clearly established law.

. . .

III. A

Petitioners contend that . . . they did not violate [decedent Donald] Rickard's Fourth Amendment rights and that, in any event, their conduct did not violate any Fourth Amendment rule that was clearly established at the time of the events in question. When confronted with such arguments, we held in *Saucier v. Katz*, 533 U.S. 194, 200, (2001), that "the first inquiry must be whether a constitutional right would have been violated on the facts alleged." Only after deciding that question, we concluded, may an appellate court turn to the question whether the right at issue was clearly established at the relevant time. *Ibid*.

We subsequently altered this rigid framework in *Pearson*, declaring that "*Saucier*'s procedure should not be regarded as an inflexible requirement." 555 U.S., at 227. At the same time, however, we noted that the *Saucier* procedure "is often beneficial" because it "promotes 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." 555 U.S., at 236. . . .

Heeding our guidance in *Pearson*, we begin in this case with the question whether the officers' conduct violated the Fourth Amendment. This approach, we believe, will be "beneficial" in "develop[ing] constitutional precedent" in an area that courts typically consider in cases in which the defendant asserts a qualified immunity defense. *See Pearson*, *supra*, at 236.

B

A claim that law-enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's "reasonableness" standard. *See Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985). . . [In *Scott*, w]e held that a "police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." [550 U.S. 372,] 386 [2007].

. . .

We see no basis for reaching a different conclusion here. As we have explained [in this opinion], the chase in this case exceeded 100 miles per hour and lasted over five minutes. During that chase, Rickard passed more than two dozen other vehicles, several of which were forced to alter course. Rickard's outrageously reckless driving posed a grave public safety risk. And while it is true that Rickard's car eventually collided with a police car and came temporarily to a near standstill, that did not end the chase. Less than three seconds later, Rickard resumed maneuvering his car. Just before the shots were fired, when the front bumper of his car was flush with that of one of the police cruisers, Rickard was obviously pushing down on the accelerator because the car's wheels were spinning, and then Rickard threw the car into reverse "in an attempt to escape." Thus, the record conclusively disproves respondent's claim that the chase in the present case was already over when petitioners began shooting. Under the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road. Rickard's conduct even after the shots were fired—as noted, he managed to drive away despite the efforts of the police to block his path—underscores the point.

In light of the circumstances we have discussed, it is beyond serious dispute that Rickard's flight posed a grave public safety risk, and here, as in *Scott*, the police acted reasonably in using deadly force to end that risk.

2

We now consider respondent's contention that, even if the use of deadly force was permissible, petitioners acted unreasonably in firing a total of 15 shots. We reject that argument. It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended. . . . Here, during the 10–second span when all the shots were fired, Rickard never abandoned his attempt to flee. Indeed, even after all the shots had been fired, he managed to drive away and to continue driving until he crashed. This would be a different case if petitioners had initiated a second round of shots after an initial round had clearly incapacitated Rickard and had ended any threat of continued flight, or if Rickard had clearly given himself up. But that is not what happened.

In arguing that too many shots were fired, respondent relies in part on the presence of [passenger] Kelly Allen in the front seat of the car, but we do not think that this factor changes the calculus. Our cases make it clear that "Fourth Amendment rights are personal rights which ... may not be vicariously asserted." [citations omitted]. Thus, the question before us is whether petitioners violated Rickard's Fourth Amendment rights, not Allen's. . . . But Allen's presence in the car cannot enhance Rickard's Fourth Amendment rights. After all, it was Rickard who put Allen in danger by fleeing and refusing to end the chase, and it would be perverse if his disregard for Allen's safety worked to his benefit.

C

We have held that petitioners' conduct did not violate the Fourth Amendment, but even if that were not the case, petitioners would still be entitled to summary judgment based on qualified immunity.

An official sued under § 1983 is entitled to qualified immunity unless it is shown that the official violated a statutory or constitutional right that was " 'clearly established' " at the time of the challenged conduct. *Ashcroft v. al–Kidd*, 563 U.S. ——, ——, 131 S.Ct. 2074, 2080 (2011). And a defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

have understood that he was violating it. *Id*., at 2083–2084. In other words, "existing precedent must have placed the statutory or constitutional question" confronted by the official "beyond debate." *Ibid*. In addition, "[w]e have repeatedly told courts ... not to define clearly established law at a high level of generality," id., at 2074, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced. We think our decision in *Brosseau v. Haugen*, 543 U.S. 194 (2004) (*per curiam*) squarely demonstrates that no clearly established law precluded petitioners' conduct at the time in question. In *Brosseau*, we held that a police officer did not violate clearly established law when she fired at a fleeing vehicle to prevent possible harm to "other officers on foot who [she] believed were in the immediate area, ... occupied vehicles in [the driver's] path[,] and ... any other citizens who might be in the area." Id., at 197 [further citation omitted]. After surveying lower court decisions regarding the reasonableness of lethal force as a response to vehicular flight, we observed that this is an area "in which the result depends very much on the facts of each case" and that the cases "by no means 'clearly establish[ed]' that [the officer's] conduct violated the Fourth Amendment." 543 U.S., at 201. In reaching that conclusion, we held that *Garner* and *Graham*, which are "cast at a high level of generality," did not clearly establish that the officer's decision was unreasonable. 543 U.S., at 199.

Brosseau makes plain that as of February 21, 1999—the date of the events at issue in that case—it was not clearly established that it was unconstitutional to shoot a fleeing driver to protect those whom his flight might endanger. We did not consider later decided cases because they "could not have given fair notice to [the officer]." Id., at 200, n. 4. To defeat immunity here, then, respondent must show at a minimum either (1) that the officers' conduct in this case was materially different from the conduct in *Brosseau* or (2) that between February 21, 1999, and July 18, 2004, there emerged either " 'controlling authority' " or a "robust 'consensus of cases of persuasive authority,' " *al-Kidd*, *supra*, at 2084 (quoting *Wilson v. Layne*, 526 U.S. 603, 617); some internal quotation marks omitted), that would alter our analysis of the qualified immunity question. Respondent has made neither showing.

To begin, certain facts here are more favorable to the officers. In *Brosseau*, an officer on foot fired at a driver who had just begun to flee and who had not yet driven his car in a dangerous manner. In contrast, the officers here shot at Rickard to put an end to what had already been a lengthy, high-speed pursuit that indisputably posed a danger both to the officers involved and to any civilians who happened to be nearby. . . . Attempting to distinguish *Brosseau*, respondent focuses on the fact that the officer there fired only 1 shot, whereas here three officers collectively fired 15 shots. But it was certainly not clearly established at the time of the shooting in this case that the number of shots fired, under the circumstances present here, rendered the use of force excessive.

Since respondent cannot meaningfully distinguish *Brosseau*, her only option is to show that its analysis was out of date by 2004. Yet respondent has not pointed us to any case—let alone a controlling case or a robust consensus of cases—decided between 1999 and 2004 that could be said to have clearly established the unconstitutionality of using lethal force to end a high-speed car chase.

. . .

For further discussion

1. *Plumhoff* concerned the claim of the driver of the car, who was killed. *Plumhoff* did not concern a claim by the passenger in the car, who also was killed. Footnote 4 of *Plumhoff* identifies "some disagreement" about a potential passenger claim:

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

> There seems to be some disagreement among lower courts as to whether a passenger in Allen's situation can recover under a Fourth Amendment theory. *Compare Vaughan v. Cox*, 343 F.3d 1323 (C.A.11 2003) (suggesting yes), and *Fisher v. Memphis*, 234 F.3d 312 (C.A.6 2000) (same), with *Milstead v. Kibler*, 243 F.3d 157 (C.A.4 2001) (suggesting no), and *Landol–Rivera v. Cruz Cosme*, 906 F.2d 791 (C.A.1 1990) (same). We express no view on this question. We also note that in *County of Sacramento v. Lewis*, 523 U.S. 833, 836 (1998), the Court held that a passenger killed as a result of a police chase could recover under a substantive due process theory only if the officer had 'a purpose to cause harm unrelated to the legitimate object of arrest.'

Plumhoff, 134 S. Ct. at 2022, n. 4. Review the excerpt from *Lewis* in Chapter 6, Section F, discussing the distinction between claims under the Fourth and Fourteenth Amendments. Given your reading of the *Lewis* excerpt, why do you think the Supreme Court in *Plumhoff* "express[ed] no view" on the issue of whether the passenger could assert a Fourth Amendment claim?

2. In *Tolan v. Cotton*, _ U.S. _, 134 S.Ct. 1861 (2014) (*per curiam*), the Supreme Court took the unusual step of granting certiorari to correct a circuit court's application of a well-settled legal rule, the summary judgment standard. The Supreme Court vacated the judgment "so that the court can determine whether, when [the injured party's] evidence is properly credited and factual inferences are reasonably drawn in his favor, [the police officer's] actions violated clearly established law." *Id*. at 1868.

> During the early morning hours of New Year's Eve, 2008, police sergeant Jeffrey Cotton fired three bullets at Robert Tolan; one of those bullets hit its target and punctured Tolan's right lung. At the time of the shooting, Tolan was unarmed on his parents' front porch about 15 to 20 feet away from Cotton.
> . . .
> [U]nder either prong [of the qualified immunity analysis], courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment. See *Brosseau v. Haugen*, 543 U.S. 194, 195, n. 2 (2004) (*per curiam*); *Saucier*, *supra*, at 201; *Hope*, *supra*, at 733, n. 1. . . .Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard. In cases alleging unreasonable searches or seizures, we have instructed that courts should define the 'clearly established' right at issue on the basis of the 'specific context of the case.' *Saucier*, *supra*, at 201; *see also Anderson v. Creighton*, 483 U.S. 635, 640–641 (1987). Accordingly, courts must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions. *See Brosseau*, *supra*, at 195, 198 (inquiring as to whether conduct violated clearly established law ' "in light of the specific context of the case" ' and construing "facts . . . in a light most favorable to" the nonmovant). . . . In holding that Cotton's actions did not violate clearly established law, the Fifth Circuit failed to . . . credit evidence that contradicted some of its key factual conclusions[,] improperly "weigh[ed] the evidence" and resolved disputed issues in favor of the moving party, *Anderson*, 477 U.S., at 249.
> First, the court relied on its view that at the time of the shooting, the Tolans' front porch was 'dimly-lit.' . . . Second, the Fifth Circuit stated that Tolan's mother 'refus[ed] orders to remain quiet and calm,' thereby 'compound[ing]' Cotton's belief that Tolan 'presented an immediate threat to the safety of the officers.' . . . . But here, too, the court did not credit directly

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

> contradictory evidence. . . .Third, the Court concluded that Tolan was 'shouting,'. . . and 'verbally threatening' the officer, . . . in the moments before the shooting. . . . [T]he parties agree, that while Cotton was grabbing the arm of his mother, Tolan told Cotton, '[G]et your fucking hands off my mom.' . . . But Tolan testified that he 'was not screaming.' . . . . A jury could well have concluded that a reasonable officer would have heard Tolan's words not as a threat, but as a son's plea not to continue any assault of his mother. Fourth, the Fifth Circuit inferred that at the time of the shooting, Tolan was 'moving to intervene in Sergeant Cotton's' interaction with his mother. . . .
>
> The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. . . .[T]he court should have acknowledged and credited Tolan's evidence with regard to the lighting, his mother's demeanor, whether he shouted words that were an overt threat, and his positioning during the shooting. . . .

Tolan, 134 S.Ct. at1863-68. Consider *Tolan* in preparing for Simulation 9.

Chapter 11, p. 525

The cite for *Espinosa* includes *cert. denied*, _ U.S. _, 132 S.Ct. 1089 (2012).

Chapter 11, p. 531

Add *Tolan* and *Plumhoff* to the purpose of Simulation 8, to read:

Purpose

- **Better understand qualified immunity for government employees by comparing variations in how qualified immunity is applied, including *Harlow, Lewis, Hope, Brosseau, Tolan, Plumhoff, Butera, Carr*, and *Espinosa***

Chapter 11, p. 533

Before the settlement conference, review the guidance on negotiation in this Supplement.

Add *Tolan* and *Plumhoff* to the purpose of Simulation 8 and Simulation 9, to read:

Purpose

- **Better understand qualified immunity for government employees by comparing variations in how qualified immunity is applied, including *Harlow, Lewis, Hope, Brosseau, Tolan, Plumhoff, Butera, Carr*, and *Espinosa***

Chapter 12, p. 539, substitute for Note 6:

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

6. The *Monell* requirement that plaintiffs establish a municipal policy or custom applies whether plaintiff seeks monetary, declaratory, or injunctive relief. *Los Angeles County, Cal. v. Humphries*, _ U.S. _, 131 S. Ct. 447 (2010). In 2010, the Supreme Court granted certiorari to decide whether "claims for declaratory relief against a local public entity [are] subject to the requirement of *Monell* that the plaintiff demonstrate that the constitutional violation was the result of a policy, custom or practice attributable to the local public entity as determined by the First, Second, Fourth and Eleventh Circuits, or are such claims exempt from *Monell's* requirement as determined by the Ninth Circuit?" *Humphries v. County of Los Angeles*, 2010 WL 596529 (Feb. 22, 2010). The Supreme Court resolved the circuit split by rejecting the Ninth Circuit's position.

Chapter 12, p. 549, following Note 6

Questions to guide reading of *Connick*

1. Plaintiff did not argue that he had proved a pattern of constitutional violations. Even so, the majority stated that plaintiff's evidence was insufficient to have put Connick on notice that the office's *Brady* training was inadequate. Why was the evidence insufficient to show a pattern?
2. Is *Connick* limited to lawyer-employees? Does the reasoning of *Connick* apply to government employees who do *not* undergo years of professional training before accepting a government job, such as correctional officers or child protection caseworkers?
3. After *Connick*, is a government policymaker entitled to rely on the professional training of government employees (such as social workers) as sufficient to prevent constitutional violations? Unless the policymaker has a reason not to rely on that professional training, such as a pattern of violations?
4. Contrast how the majority and dissent describe the preparedness of recent law graduates to decide what *Brady* evidence to produce. Which description do you think is more accurate?

Connick v. Thompson

563 U.S. __ , 131 S.Ct. 1350 (2011)

Justice THOMAS delivered the opinion of the Court.

The Orleans Parish District Attorney's Office now concedes that, in prosecuting respondent John Thompson for attempted armed robbery, prosecutors failed to disclose evidence that should have been turned over to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963). Thompson was convicted. Because of that conviction Thompson elected not to testify in his own defense in his later trial for murder, and he was again convicted. Thompson spent 18 years in prison, including 14 years on death row. One month before Thompson's scheduled execution, his investigator discovered the undisclosed evidence from his armed robbery trial. The reviewing court determined that the evidence was exculpatory, and both of Thompson's convictions were vacated.

After his release from prison, Thompson sued petitioner Harry Connick, in his official capacity as the Orleans Parish District Attorney, for damages under. . .42 U.S.C. § 1983. Thompson alleged that Connick had failed to train his prosecutors adequately about their duty to produce

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

exculpatory evidence and that the lack of training had caused the nondisclosure in Thompson's robbery case. The jury awarded Thompson $14 million. . . . We granted certiorari to decide whether a district attorney's office may be held liable under § 1983 for failure to train based on a single *Brady* violation. We hold that it cannot.
. . .

The *Brady* violation conceded in this case occurred when one or more of the four prosecutors involved with Thompson's armed robbery prosecution failed to disclose the crime lab report to Thompson's counsel. Under Thompson's failure-to-train theory, he bore the burden of proving both (1) that Connick, the policymaker for the district attorney's office, was deliberately indifferent to the need to train the prosecutors about their *Brady* disclosure obligation with respect to evidence of this type and (2) that the lack of training actually caused the *Brady* violation in this case. Connick argues that he was entitled to judgment as a matter of law because Thompson did not prove that he was on actual or constructive notice of, and therefore deliberately indifferent to, a need for more or different *Brady* training. We agree.
. . .

In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983. A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 822–823 (1985) (plurality opinion) ("[A] 'policy' of 'inadequate training' " is "far more nebulous, and a good deal further removed from the constitutional violation, than was the policy in *Monell*"). To satisfy the statute, a municipality's failure to train its employees in a relevant respect must amount to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *Canton*, 489 U.S., at 388. Only then "can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." *Id*., at 389.

" '[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bryan Cty*., 520 U.S., at 410. Thus, when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program. *Id*., at 407. The city's "policy of inaction" in light of notice that its program will cause constitutional violations "is the functional equivalent of a decision by the city itself to violate the Constitution." *Canton*, 489 U.S., at 395 (O'Connor, J., concurring in part and dissenting in part). A less stringent standard of fault for a failure-to-train claim "would result in de facto *respondeat superior* liability on municipalities . . . ." *Id.*, at 392. . .

A pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train. *Bryan Cty*., 520 U.S., at 409. Policymakers' "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger municipal liability." *Id*., at 407. Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.

Although Thompson does not contend that he proved a pattern of similar *Brady* violations . . . he points out that, during the ten years preceding his armed robbery trial, Louisiana courts had overturned four convictions because of *Brady* violations by prosecutors in Connick's office.

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

Those four reversals could not have put Connick on notice that the office's *Brady* training was inadequate with respect to the sort of *Brady* violation at issue here. None of those cases involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind. Because those incidents are not similar to the violation at issue here, they could not have put Connick on notice that specific training was necessary to avoid this constitutional violation.
. . .

Instead of relying on a pattern of similar *Brady* violations, Thompson relies on the "single-incident" liability that this Court hypothesized in *Canton*. He contends that the *Brady* violation in his case was the "obvious" consequence of failing to provide specific *Brady* training, and that this showing of "obviousness" can substitute for the pattern of violations ordinarily necessary to establish municipal culpability.

In *Canton*, the Court left open the possibility that, "in a narrow range of circumstances," a pattern of similar violations might not be necessary to show deliberate indifference. *Bryan Cty*., supra, at 409. The Court posed the hypothetical example of a city that arms its police force with firearms and deploys the armed officers into the public to capture fleeing felons without training the officers in the constitutional limitation on the use of deadly force. *Canton*, supra, at 390, n. 10. Given the known frequency with which police attempt to arrest fleeing felons and the "predictability that an officer lacking specific tools to handle that situation will violate citizens' rights," the Court theorized that a city's decision not to train the officers about constitutional limits on the use of deadly force could reflect the city's deliberate indifference to the "highly predictable consequence," namely, violations of constitutional rights. *Bryan Cty*., supra, at 409. The Court sought not to foreclose the possibility, however rare, that the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations.

Failure to train prosecutors in their *Brady* obligations does not fall within the narrow range of *Canton*'s hypothesized single-incident liability. The obvious need for specific legal training that was present in the *Canton* scenario is absent here. Armed police must sometimes make split-second decisions with life-or-death consequences. There is no reason to assume that police academy applicants are familiar with the constitutional constraints on the use of deadly force. And, in the absence of training, there is no way for novice officers to obtain the legal knowledge they require. Under those circumstances there is an obvious need for some form of training.

In stark contrast . . . [a]ttorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment. Before they may enter the profession and receive a law license, all attorneys must graduate from law school or pass a substantive examination; attorneys in the vast majority of jurisdictions must do both. . . .These threshold requirements are designed to ensure that all new attorneys have learned how to find, understand, and apply legal rules. . . .

Nor does professional training end at graduation. Most jurisdictions require attorneys to satisfy continuing-education requirements. . . . Attorneys who practice with other attorneys, such as in district attorney's offices, also train on the job as they learn from more experienced attorneys. . . .

In addition, attorneys in all jurisdictions must satisfy character and fitness standards to receive a law license and are personally subject to an ethical regime designed to reinforce the profession's standards. . . Among prosecutors' unique ethical obligations is the duty to produce *Brady* evidence to the defense. . . . An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment.

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

. . .
In light of this regime of legal training and professional responsibility, recurring constitutional violations are not the "obvious consequence" of failing to provide prosecutors with formal in-house training about how to obey the law. *Bryan Cty*., 520 U.S., at 409. Prosecutors are not only equipped but are also ethically bound to know what *Brady* entails and to perform legal research when they are uncertain. A district attorney is entitled to rely on prosecutors' professional training and ethical obligations in the absence of specific reason, such as a pattern of violations, to believe that those tools are insufficient to prevent future constitutional violations in "the usual and recurring situations with which [the prosecutors] must deal." *Canton*, 489 U.S., at 391. 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.

A second significant difference between this case and the example in *Canton* is the nuance of the allegedly necessary training. The *Canton* hypothetical assumes that the armed police officers have no knowledge at all of the constitutional limits on the use of deadly force. But it is undisputed here that the prosecutors in Connick's office were familiar with the general *Brady* rule. Thompson's complaint therefore cannot rely on the utter lack of an ability to cope with constitutional situations that underlies the *Canton* hypothetical, but rather must assert that prosecutors were not trained about particular *Brady* evidence or the specific scenario related to the violation in his case. That sort of nuance simply cannot support an inference of deliberate indifference here. As the Court said in *Canton*, "[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident." 489 U.S., at 392 (citing *Tuttle*, 471 U.S., at 823 (plurality opinion)).

Thompson suggests that the absence of any formal training sessions about *Brady* is equivalent to the complete absence of legal training that the Court imagined in *Canton*. But failure-to-train liability is concerned with the substance of the training, not the particular instructional format. The statute does not provide plaintiffs or courts carte blanche to micromanage local governments throughout the United States.

We do not assume that prosecutors will always make correct *Brady* decisions or that guidance regarding specific *Brady* questions would not assist prosecutors. But showing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability. "[P]rov[ing] that an injury or accident could have been avoided if an [employee] had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct" will not suffice. *Canton*, supra, at 391. The possibility of single-incident liability that the Court left open in *Canton* is not this case.

The dissent rejects our holding that *Canton*'s hypothesized single-incident liability does not, as a legal matter, encompass failure to train prosecutors in their *Brady* obligation. It would instead apply the *Canton* hypothetical to this case, and thus devotes almost all of its opinion to explaining why the evidence supports liability under that theory. But . . . [t]he 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.
. . .

The District Court and the Court of Appeals panel erroneously believed that Thompson had proved deliberate indifference by showing the "obviousness" of a need for additional training. They based this conclusion on Connick's awareness that (1) prosecutors would confront *Brady*

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

issues while at the district attorney's office; (2) inexperienced prosecutors were expected to understand *Brady*'s requirements; (3) *Brady* has gray areas that make for difficult choices; and (4) erroneous decisions regarding Brady evidence would result in constitutional violations. . . This is insufficient.

It does not follow that, because *Brady* has gray areas and some *Brady* decisions are difficult, prosecutors will so obviously make wrong decisions that failing to train them amounts to "a decision by the city itself to violate the Constitution." *Canton*, 489 U.S., at 395 (O'Connor, J., concurring in part and dissenting in part). To prove deliberate indifference, Thompson needed to show that Connick was on notice that, absent additional specified training, it was "highly predictable" that the prosecutors in his office would be confounded by those gray areas and make incorrect *Brady* decisions as a result. In fact, Thompson had to show that it was so predictable that failing to train the prosecutors amounted to conscious disregard for defendants' *Brady* rights. *See Bryan Cty*., 520 U.S., at 409; *Canton*, supra, at 389. He did not do so.
. . .

We conclude that this case does not fall within the narrow range of "single-incident" liability hypothesized in Canton as a possible exception to the pattern of violations necessary to prove deliberate indifference in § 1983 actions alleging failure to train. The District Court should have granted Connick judgment as a matter of law on the failure-to-train claim because Thompson did not prove a pattern of similar violations that would "establish that the 'policy of inaction' [was] the functional equivalent of a decision by the city itself to violate the Constitution." *Canton*, supra, at 395 (opinion of O'Connor, J.).

Justice GINSBURG, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.
. . .
Connick should have comprehended that Orleans Parish prosecutors lacked essential guidance on *Brady* and its application. In fact, Connick has effectively conceded that *Brady* training in his Office was inadequate. . . .

In 1985, Connick acknowledged, many of his prosecutors "were coming fresh out of law school," and the Office's "[h]uge turnover" allowed attorneys with little experience to advance quickly to supervisory positions. . . .[I]t was possible for "inexperienced lawyers, just a few weeks out of law school with no training," to bear responsibility for "decisions on ... whether material was *Brady* material and had to be produced." [citation omitted].

Thompson's expert characterized Connick's supervision regarding *Brady* as "the blind leading the blind." . . . For example, in 1985 trial attorneys "sometimes ... went to Mr. Connick" with *Brady* questions, "and he would tell them" how to proceed. But Connick acknowledged that he had "stopped reading law books . . . and looking at opinions" when he was first elected District Attorney in 1974. . . .

Prosecutors confirmed that training in the District Attorney's Office, overall, was deficient. Soon after Connick retired, a survey of assistant district attorneys in the Office revealed that more than half felt that they had not received the training they needed to do their jobs.

Thompson, it bears emphasis, is not complaining about the absence of formal training sessions. . . His complaint does not demand that *Brady* compliance be enforced in any particular way. He asks only that *Brady* obligations be communicated accurately and genuinely enforced. Because that

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

did not happen in the District Attorney's Office, it was inevitable that prosecutors would misapprehend *Brady*.

. . .

For further discussion

1. Note that *Connick* reaffirmed that, under § 1983, a local government's deliberate indifference to constitutional rights is measured objectively: "when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program." Contrast the meaning of "deliberate indifference" in the Eighth Amendment context. *See Farmer v. Brennan*, Chapter 2 at p. 79 (rejecting an objective measure of deliberate indifference and holding a prison official liable only where the official was "aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed], and he [drew] the inference").

2. Recall from Chapter 9 that, in the context of deciding whether individual social workers were entitled to absolute immunity, the Third Circuit reasoned that mechanisms other than the threat of § 1983 liability would protect the public against constitutional violations by child protective service workers. Those protections include the government employer's incentive to ensure that its employees did not violate constitutional rights because the local government itself is not immune from suit. *See Ernst v. Child and Youth Services of Chester County*, Chapter 9. Is there tension between the reasoning in *Ernst* and the holding of *Connick*?

3. Did *Connick* foreclose the possibility of a plaintiff demonstrating deliberate indifference to the need for training even in the absence of prior, similar violations by showing an "obvious" need for training? No, that path is narrow but remains open, says a district court in California.

> *Connick* explained that the 'single-incident' theory represents the Supreme Court's refusal to 'foreclose upon the possibility' that the failure to train is so patently obvious that a single constitutional violation suffices to give rise to municipal liability under § 1983. *Id.* In this case, the Court finds that, based on the allegations in the complaint, it is plausible that the failure to train was so obviously deficient that it could lead to liability resulting from the single constitutional deprivation at issue here. In other words, the court can reasonably infer that, based on the particular circumstances as alleged, the [corrections] facility's employees so obviously lacked training in providing proper medical care that it resulted in Decedent's death and, consequently, Plaintiff's loss of her son's companionship. Specifically, as alleged, Decedent visibly lost forty pounds; directly requested, and was refused, medical care; and previously had medical complications while detained at the Facility. These allegations are compounded by Plaintiff's assertion that Decedent's physician sent a letter explaining that, because of Decedent's severe medical condition, he should not be detained at the Facility, but rather should be placed in the care of his mother. Thus, at this stage of the litigation, absent more fully-developed facts, the Court declines to dismiss

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

> Plaintiff's § 1983 claims on the basis that Plaintiff has only alleged a single incident of failure to provide medical care.

Schwartz v. Lassen Cnty. ex rel. Lassen Cnty. Jail (Det. Facility), 838 F. Supp. 2d 1045, 1058 (E.D. Cal. 2012). The consequences of *Connick* will become clearer as federal courts, local governments, and litigants apply the Supreme Court's ruling to new factual situations.

Chapter 12, p. 530, footnote 1

> *Estate of Gilliam* v. City of Prattville, 667 F.Supp. 2d 1276, 1292, 1293 (M.D. Ala. 2009), rev'd. in part, 639 F.3d 1041 (11th Cir.), *cert. denied*, __ U.S. __, 132 S.Ct. 817 (2011).

Chapter 12, p. 530, footnote 5

> *Conn v. City of Reno*, 591 F.3d 1081, 1103 (9th Cir.), *vacated by* 591 U.S. 1081 (2010), *on remand* 658 F.3d 897 (9th Cir. 2011).

Chapter 12, p. 563

In August 2014, the model jury instruction was amended to add:

> *See Los Angeles County, Cal. v. Humphries*, 131 S. Ct. 447, 178 L. Ed. 2d 460 (2010) (requirement that, in order for civil rights plaintiffs to successfully sue a municipal entity under § 1983, they must show their injury was caused by municipal policy or custom is equally applicable, irrespective of whether the remedy sought is money damages or prospective relief).[6]

Chapter 12, p. 579, substitute for Section F.

F. The Murky Landscape of Post-*Iqbal* Supervisory Liability: Is it Statutory or Constitutional? Is Intent Required?

The current status of § 1983 supervisory liability is uncertain. Below is a brief overview of the doctrine before and after the Supreme Court's surprising decision in *Iqbal*. A close-up of the varying ways one circuit, the Seventh, has applied the supervisory liability doctrine gives a snapshot of the doctrinal uncertainty in the wake of *Iqbal*.

1. Pre-*Iqbal* Supervisory Liability

It is well settled that there is no *respondeat superior* liability under § 1983. *See* Chapter 1. But for many years, federal appellate courts have recognized supervisory liability as a kind of individual liability under § 1983. While formulated differently by the circuits, supervisory liability permits the supervisor of an employee who violated a person's rights to be liable for the

[6] Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 3B FED. JURY PRAC. & INSTR. § 165.26 (6th ed.) (updated Aug. 2014).

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

supervisor's own conduct, such as when the supervisor played a role in the violation or knew of the violation and condoned or acquiesced in the conduct. For example, the Fourth Circuit required a plaintiff to prove all of the following to prevail on a § 1983 supervisory liability claim:

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

Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994), *cert. denied*, 513 U.S. 813 (1994). Similarly, in the context of alleged sexual abuse of a minor public school child by a school employee, the Fifth Circuit held a supervisory school official could be liable under § 1983 when:

> (1) the defendant learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student; and
> (2) the defendant demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and
> (3) such failure caused a constitutional injury to the student.

Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 454 (5th Cir. 1994) (*en banc*), *cert. denied*, 513 U.S. 815 (1994).

2. *Iqbal* on Supervisory Liability

In a surprising 2009 decision discussed in Chapter 10, the Supreme Court called into question the continuing existence of supervisory liability. In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), a Pakistani Muslim filed suit against federal officials based on his arrest and detention following the September 11, 2001, attacks. The Supreme Court's decision could be read to eliminate supervisory liability in the federal analog to a § 1983 case, a *Bivens* action, for reasons equally applicable to § 1983 claims.[8]

The Court rejected plaintiff's claim that '"knowledge and acquiescence [by supervisors] in their subordinates' use of discriminatory criteria to make classification decisions among detainees'" was sufficient to find that the supervisors had committed a constitutional violation and concluded that "the term 'supervisory liability' is a misnomer" in a section 1983 suit or a *Bivens* suit. *Iqbal*, 556 U.S. at 677

In dissent, Justice Souter, joined by three other Justices, canvassed the circuits' various supervisory liability tests, argued that the Court failed to recognize the distinction between *respondeat superior* and supervisory liability, and argued further that the Court should not have reached the issue of supervisory liability because it had neither been briefed nor argued:

> [T]here is quite a spectrum of possible tests for supervisory liability: it could be imposed where a supervisor has actual knowledge of a subordinate's constitutional violation and

[8] The federal analog to 42 U.S.C. § 1983 action was created in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971), where the Supreme Court held that an implied cause of action exists against officials acting under color of federal law who violate an individual's constitutional rights.

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

> acquiesces [citing 3d and 10th Circuit]; or where supervisors "'know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see,'" [quoting D.C. Circuit] (quoting *Jones v. Chicago*, 856 F.2d 985, 992 (7th Cir. 1988) (Posner, J.)); or where the supervisor has no actual knowledge of the violation but was reckless in his supervision of the subordinate [citing 8th Circuit]; or where the supervisor was grossly negligent [citing 1st Circuit].

Iqbal, 556 U.S. at 693-94 (Souter, J., dissenting). Justice Souter predicted that *Iqbal* eliminated supervisory liability: "Lest there be any mistake . . . the majority . . . is eliminating *Bivens* supervisory liability entirely. The nature of a supervisory liability theory is that the supervisor may be liable, under certain conditions, for the wrongdoing of his subordinates, and it is this very principle that the majority rejects." *Iqbal*, 556 U.S. at 693 (Souter, J., dissenting).

At least one commentator considered Justice Souter's dissent alarmist and counseled courts to read *Iqbal* to have narrowed but not eliminated supervisory liability. Professor Stein argued *Iqbal* denied the existence of supervisory liability "only in regard to claims of intentional discrimination; insofar as [the federal supervisory officials] were only charged with intentional discrimination, that intentionality must be their own, not that of their subordinates. That intentionality presumably could be established either through their own discriminatory policy, or through knowledge of and indifference to their subordinate's discriminatory conduct." Allan R. Stein, *Confining Iqbal*, 45 Tulsa L. Rev. 277, 290 & n.87 (2010).

3. Doctrinal Uncertainty: The Seventh Circuit's Applications of Supervisory Liability

The uncertain status of supervisory liability since *Iqbal* is illustrated by the Seventh Circuit's various approaches. Existing Seventh Circuit precedent analyzes claims against supervisors (1) as a question of causation under § 1983 by asking if the supervisor knew about the conduct and turned a blind eye (*Backes*); (2) as a constitutional question where the standard varies with the requirements of the constitutional claim (*T.E.*; *Arnett; Paine*); (3) as a constitutional question but reserving the question of whether a supervisor must intend to violate the constitution even if the constitutional standard does not require intent (*Arnett*); (4) as a constitutional question and holding a supervisor must intend to violate the constitution even if the constitutional standard does not require intent but holding subjective deliberate indifference is a form of intent (*Vance*).

a. Is supervisory liability a statutory claim about § 1983 causation?

The Seventh Circuit in one precedent appeared to treat supervisory liability as unchanged by *Iqbal*, that is, as a question of statutory construction of the § 1983 causation language requiring that the underlying constitutional violation be *caused by* the supervisor. *Backes v. Village of Peoria Heights, Ill.*, 662 F.3d 866 (7th Cir. 2011). Without even citing *Iqbal*, the Seventh Circuit reasoned:

> [A] defendant need not 'participate[ ] directly in the deprivation' for liability to follow under § 1983. [citing 7th Circuit precedent]. Indeed, a supervisor may still be personally liable for the acts of his subordinates if he 'approves of the conduct and the basis for it.' [citing 7th Circuit precedent] '[S]upervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see. They must in other words act either knowingly or with deliberate, reckless indifference.' *Id*. [quoting 7th Circuit precedent].

Backes, 662 F.3d at 869-70.

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

b. Is supervisory liability a constitutional question where the standard varies depending on the constitutional claim?

By contrast, citing *Iqbal,* the Seventh Circuit has analyzed claims against supervisors as independent constitutional claims. The Seventh Circuit held that a public school principal could be liable for concealing reports of sexual abuse by a teacher and "creating an atmosphere that allowed abuse to flourish" because such conduct was "not mere failure of supervisory officials to act" but a claim that a defendant's "own misconduct" and "deliberate indifference" deprived students of their liberty interests in violation of substantive due process, "regardless whether a supervisor or a subordinate." *T.E. v. Grindle*, 599 F.3d 583, 590-91 (7th Cir. 2010); *see Arnett v. Webster*, 658 F.3d 742, 758 (7th Cir. 2011) (similarly, suggesting that a supervisor's failure to act can be culpable where plaintiff can show the supervisor knew of a substantial risk of serious harm to plaintiff, the same 8th Amendment standard that applies to non-supervisors).

Consistently with analyzing claims against supervisors as constitutional claims (rather than statutory claims based on the causation language of Section 1983), the Seventh Circuit, again citing *Iqbal*, has plainly stated that a police supervisor "can only be liable for what he did; there is no doctrine of supervisory liability for the errors of subordinates such as [police]." *Paine v. Cason*, 678 F.3d 500, 512 (7th Cir. 2012) (supervisor could be liable for denying a clearly established constitutional right to medical care based on supervisor's own observation of a mentally disturbed arrestee and own treatment of call from arrestee's father as a prank).

c. Is intent to harm required for all claims, not just for invidious discrimination claims?

But even if the claim against the supervisor is constitutional and not based on the causation language of the §1983 statute, it is not clear what standard governs. The Seventh Circuit explicitly has recognized that, after *Iqbal*, if plaintiff's constitutional claim requires not intent to harm but the lesser standard of deliberate indifference, it is not clear whether a supervisor nevertheless must *intend* to violate the constitution. While *Iqbal* "was a discrimination case involving discriminatory purpose," *Arnett*, 658 F.3d at 757, the Supreme Court "stated that 'purpose rather than knowledge is required to impose *Bivens* liability,'" *id*. (citing *Iqbal*, 556 U.S. at 677, and therefore the reasoning of *Iqbal* "has raised questions about whether a stricter standard of personal liability for supervisors applies in deliberate indifference suits." *Arnett*, 658 F.3d at 757. The Seventh Circuit concluded that "[t]he *landscape of such claims after Iqbal remains murky* . . . ." *Id*. (emphasis added).

d. If intent to harm is required, is it satisfied by subjective deliberate indifference?

The Seventh Circuit addressed the implications of *Iqbal* on a claim against a supervisor for a constitutional violation that does not itself require intent. *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (*en banc*), *cert. denied*, _ U.S. _, 133 S.Ct. 2796 (June 10, 2013). Unlike *Iqbal*, the constitutional right was not invidious discrimination but a constitutional claim governed by a standard less than intent. Yet the Seventh Circuit held that the supervisor's intent was required: "[k]nowledge of a subordinate's misconduct is not enough for liability. The supervisor can be liable only if he *wants* the unconstitutional or illegal conduct to occur." *Vance*, 701 F.3d at 203 (emphasis added). The Seventh Circuit held that "[t]he supervisor must want the forbidden outcome to occur" but that subjective deliberate indifference "is a form of intent" and therefore inaction could be culpable if "the public official knew of risks with sufficient specificity to allow an inference that inaction is designed to produce or allow harm." *Id* at 204.

Vance does not fully answer the question of what standard governs a constitutional claim against supervisors. Plaintiffs in *Vance* were security contractors in Iraq who were detained by the military and subjected to violence, sleep deprivation, and other "harsh interrogation methods" authorized by Defense Secretary Donald Rumsfield for enemy combatants, but not authorized for civilian contractors. *Vance*, 701 F.3d at 196; *id.* at 203. Plaintiffs sued very high level officials of a very large bureaucracy, the U.S. military. Perhaps *Vance* will be limited to *Bivens* claims, or to

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

high-ranking officials in huge agencies with a long chain of subordinates between them and the actors who inflicted harm. But dicta suggests that *Vance* also applies to lower ranking officials subject to Section 1983 liability. *Id*. at 205 ("Every police chief knows that some officers shoot unnecessarily . . . [b]ut heads of organizations have never been held liable on the theory that they did not do enough to combat subordinates' misconduct, and the Supreme Court made it clear in *Iqbal* that such theories of liability are unavailing"). The Supreme Court could have clarified the standard but denied certiorari in June 2013.

e. Continuing uncertainty

The various approaches taken by just one circuit, the Seventh, highlight the continuing uncertainty about *Iqbal*'s effect on supervisory liability. *Iqbal*'s holding on supervisory liability "has bedeviled the Courts of Appeals to have considered it, producing varied interpretations of its effect on supervisory liability." *Barkes v. First Corr. Med., Inc.*, 766 F.3d 307, 318 (3d Cir. 2014). According to the Third Circuit, "[m]ost courts have . . . recognize[ed] that because the state of mind necessary to establish a § 1983 or *Bivens* claim varies with the constitutional provision at issue, so too does the state of mind necessary to trigger liability in a supervisory capacity." *Id.*

Until the doctrinal significance of *Iqbal* has been resolved, courts confronted with claims of 42 U.S.C. § 1983 supervisory liability may opt to apply the circuit's pre-existing doctrine as an alternate ground for the decision. *See*, *e.g.*, *Maldonado v. Fontanes*, 568 F.3d 263, 275 n.7 (1st Cir. 2009) (while *Iqbal* "may call into question our prior circuit law" on the § 1983 standard for supervisory liability, "[w]e need not resolve this issue" because "plaintiffs have not pled facts sufficient to make out a plausible entitlement to relief under our previous formulation of the standards for supervisory liability"). What are some practical consequences for litigation strategy if courts decide supervisory claims under both pre-and post-*Iqbal* standards?

While *Iqbal* did not address local government liability, Professor Karen Blum predicts that "*Iqbal* and *City of Canton* may be on a collision course." Karen Blum, *Section 1983 Litigation: Post-Pearson and Post-Iqbal*, 26 Touro L.Rev. 433, 462 (2010).

> [In *City of Canton*,] 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. The Court adopted a causation approach to § 1983, and stated that an entity can be liable for causing a constitutional violation. 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. 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.

Id. at 462-63.

Copyright © 2015. Sarah E. Ricks and Evelyn Tenenbaum. All rights reserved.

Chapter 13, p. 611, before Simulation 10

For further discussion

Other commentators advocating for a parental liberty interest in grown children have taken different paths to that result. One Note argued:

> [T]here is a constitutionally protected parental interest in the companionship of an adult child. Under the approach advanced in this Note, the parental liberty interest alters in scope during the two phases of a child's life. During a child's minor years, the parental liberty interest contains the full constellation of rights. The parent of such a minor child has a constitutionally protected interest in the companionship, care, custody, and management of his or her children. The scope of the parental liberty interest, however, fundamentally changes as the child matures in adulthood. Many liberties in the constellation would conflict with the adult child's own constitutional liberty and autonomy. Under the second tier, therefore, the parental liberty interest would extend only to the companionship and care of the adult child, provided that a companionship relationship had been developed before the occurrence of any state action that may have limited it.
>
> Though this Note arguably advances the expansion of substantive due process, and for that reason could be viewed as activist, it can also be viewed as conservative in that it furthers the profound value that American society has placed on the intimacy of family life. The two-tiered approach to the parental liberty interest continues in the tradition of Supreme Court precedent on the family and logically flows from the special rights and obligations imposed on individuals by virtue of the relationship of a parent and her adult child. This Note also goes further and attempts to honor the normative values of the family that the Court previously has previously been unwilling to acknowledge explicitly. Once one views the family unit not just in utilitarian terms of economic support or guardian, but as a source for emotional support and nurture, it makes perfect sense to afford constitutional protection to the companionship interest of a parent and her adult child.

Isaac J.K. Adams, *Growing Pains: The Scope of Substantive Due Process Rights of Parents of Adult Children*, 57 Vand. L. Rev. 1883, 1932-33 (2004) (footnotes omitted). Another Note argued:

> By finding that there is a constitutionally protected right for a parent to associate with an adult child based on the importance of family relationships, the Ninth Circuit complies with the Supreme Court's constant reminders of the value of the family. To abide by § 1983, this right should only be actionable in situations where the governmental action is deliberately aimed at disrupting the parent-adult child relationship, as agreed on by most of the courts of appeal. Lastly, the original approach of the Seventh Circuit, holding that the right should be protected only when certain factors are met, is most practical and best avoids unnecessary litigation. This mixed approach is consistent with the large precedent expanding due process familial rights, and takes the accepted right to a parent's companionship with a minor child and logically extends it to an adult child.

Meir Weinberg, *The Fourteenth Amendment Due Process Right of Companionship Between A Parent and His or Her Adult Child: Examination of A Circuit Split*, 43 New Eng. L. Rev. 271, 299 (2009).