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### Iqbal, al-Kidd and Pleading Past Qualified Immunity: What the Cases Mean and How They Demonstrate a Need to Eliminate the Immunity Doctrines from Constitutional Tort Law

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***IQBAL, AL-KIDD AND PLEADING PAST QUALIFIED  
IMMUNITY: WHAT THE CASES MEAN AND HOW THEY  
DEMONSTRATE A NEED TO ELIMINATE THE IMMUNITY  
DOCTRINES FROM CONSTITUTIONAL TORT LAW***

John M. Greabe\*

ABSTRACT

The Supreme Court's decisions in *Ashcroft v. Iqbal* and *Ashcroft v. al-Kidd* contain issue-framing statements indicating that a constitutional tort plaintiff is required to plead facts sufficient to establish the inapplicability of the qualified immunity defense. Yet, framing the issue in this way ignores the Court's earlier decisions in *Gomez v. Toledo* and *Crawford-El v. Britton* and is at odds with the established law of pleading; a plaintiff is not required to anticipate an affirmative defense and negate its applicability in the complaint. These cases thus raise a number of questions—Does the Court really mean what its issue-framing statements suggest? If so, should we construe the obligation to state facts negating the applicability of qualified immunity as being limited to the context of qualified immunity? Or is the Court's intent a more general shift in the law governing the pleading and proof of affirmative defenses?

In this Article, I consider these questions and conclude that, while the Court's issue-framing statements were likely not accidental, they should not be seen to have implications outside of qualified immunity cases. It is apparent that the Court sees itself on the horns of a dilemma in such cases. On the one hand, the Court wants to see cases doomed to fail on qualified immunity grounds resolved on the pleadings so that public officials will not be put to the burdens of pretrial discovery and thereby be overly deterred in the performance of official duties. On the other hand, the Court does not want courts to impose heightened pleading requirements by judicial fiat. But therein lies the rub. For, if qualified immunity is to remain an affirmative defense, the only way to accomplish the pleadings-based dismissals that the Court desires is to require plaintiffs to plead facts establishing the inapplicability of qualified immunity. And this is heightened pleading.

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\* Professor of Law, University of New Hampshire School of Law. I extend special thanks to the following persons who read this paper and provided very helpful feedback: Seth Aframe, Jordan Budd, Nico Cornell, Kit Kinports, Nancy Leong, Hon. Landya McCafferty, John Orcutt, Dana Remus, Mitch Simon, Hon. Norman Stahl, and Michael Wells. I also thank Samantha Grover, Ian Mullet, Saurabh Vishnubhakat, and Jonathan Voegele for excellent research assistance. Finally, I thank the editors of the *William & Mary Bill of Rights Journal* for their assistance and hard work.

There is a way out of this conundrum. If the Court were to recognize that the individual-capacity claims to which the qualified immunity defense applies are in fact sub-constitutional, it easily could, consistent with precedent, reallocate to plaintiffs pressing such claims the burden of pleading facts sufficient to establish that the defendant violated clearly established constitutional rights. A doctrinal reform of this sort—which would render conceptually unnecessary the qualified and absolute immunity doctrines—would reinforce rule-of-law values and bring much needed clarity to constitutional tort law. Moreover, such a reform could be accomplished in a manner that is sensitive to the problem of “law freezing” which has occupied so much recent scholarly attention. Finally, the regime that would emerge in the wake of such a reform might well prove, in the long run, to be more rights-protective than that which presently governs individual-capacity claims.

### INTRODUCTION

For decades, the Supreme Court’s considered view has been that a plaintiff suing a state official under 42 U.S.C. § 1983,<sup>1</sup> or a federal official under the parallel doctrine recognized in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,<sup>2</sup> must plead only two elements in order to state a viable claim: (1) the defendant deprived plaintiff of a federally protected right, and (2) the defendant acted under color of law.<sup>3</sup> Accordingly, the Court has held that, in cases where the complaint’s allegations implicate the qualified immunity doctrine,<sup>4</sup> the plaintiff is *not* required to plead in the complaint facts showing the doctrine’s inapplicability.<sup>5</sup> To the extent that

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<sup>1</sup> In relevant part, § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2006).

<sup>2</sup> 403 U.S. 388 (1971). The *Bivens* doctrine allows plaintiffs to vindicate certain constitutionally protected rights through a private, federal common-law cause of action for damages against federal officials in their individual capacities. *See id.* at 397. The *Bivens* doctrine parallels the statutory damages regime authorized against those exercising state power by § 1983, although it is not nearly so broad. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009).

<sup>3</sup> *See, e.g., Wilkinson v. Dotson*, 544 U.S. 74, 78 (2005); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999); *West v. Atkins*, 487 U.S. 42, 48–49 (1988); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

<sup>4</sup> The qualified immunity doctrine immunizes public officials from damages liability and the burdens of trial preparation when their conduct did not violate clearly established rights of which a reasonable person would have known. *See, e.g., Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>5</sup> *Gomez*, 446 U.S. at 639–40; *see also Crawford-El v. Britton*, 523 U.S. 574, 595 (1998).

qualified immunity is an affirmative defense—and the Court on many occasions has stated that it is<sup>6</sup>—this rule is consistent with ordinary federal civil practice. Under the Federal Rules of Civil Procedure, a complaint does not need to anticipate and negate the applicability of a defendant’s affirmative defenses. Rather, in order to state a viable claim and to withstand a Rule 12(b)(6) motion, a plaintiff must only avoid establishing on the face of the complaint the applicability of some such defense.<sup>7</sup>

Yet, even as the Court has formally aligned with ordinary pleading principles, the pleading rules applicable to claims implicating qualified immunity, over the years it has issued a number of dicta that are fundamentally at odds with its stated position. For example, in *Mitchell v. Forsyth*,<sup>8</sup> the Court indicated that the plaintiff’s allegations must “state a claim of violation of clearly established law . . . .”<sup>9</sup> Similarly, in *Johnson v. Fankell*,<sup>10</sup> the Court stated that the complaint must “allege a violation of clearly established law,” even as it inharmoniously labeled qualified immunity a “defense.”<sup>11</sup> Moreover, the Court has gone to great lengths to emphasize that qualified immunity confers an entitlement to be free from suit, as well as liability, and to have “insubstantial claims . . . resolved prior to discovery.”<sup>12</sup> Unfortunately, the Court has left unexplained exactly *how* such pre-discovery resolutions are to be effectuated if qualified immunity really is an affirmative defense, given that a complaint is not subject to dismissal under Rule 12(b)(6) for failing to negate an affirmative defense and that a plaintiff typically is entitled to discovery after pleading a viable claim.

The Court’s recent decisions in *Ashcroft v. Iqbal*<sup>13</sup> and *Ashcroft v. al-Kidd*<sup>14</sup> have brought matters to a head. In both cases, the Court stated, without elaboration, that the question to be decided was whether the plaintiff had alleged facts sufficient to establish the inapplicability of the qualified immunity doctrine. Yet, as set forth below, framing the issue in this way ignores the Court’s earlier decisions in *Gomez v. Toledo*<sup>15</sup> and *Crawford-El v. Britton*,<sup>16</sup> and is at odds with established procedural principles.<sup>17</sup>

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<sup>6</sup> See, e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 69 (2001) (describing qualified immunity as an “affirmative defense”); *Siegert v. Gilley*, 500 U.S. 226, 231 (1991) (“Qualified immunity is a defense that must be pleaded by a defendant official.”).

<sup>7</sup> FED. R. CIV. P. 12(b)(6); see 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1357, at 708–10 (3d ed. 2004).

<sup>8</sup> 472 U.S. 511 (1985).

<sup>9</sup> *Id.* at 526. The assertion was a dictum because *Mitchell* involved a motion for summary judgment. See *id.* at 515.

<sup>10</sup> 520 U.S. 911 (1997).

<sup>11</sup> See *id.* at 915. This statement was a dictum because *Johnson* also involved a motion for summary judgment. See *id.* at 913.

<sup>12</sup> See, e.g., *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1945–46 (2009); *Johnson*, 520 U.S. at 915 n.2; *Mitchell*, 472 U.S. at 526.

<sup>13</sup> 129 S. Ct. 1937 (2009).

<sup>14</sup> 131 S. Ct. 2074 (2011).

<sup>15</sup> 446 U.S. 635 (1980).

<sup>16</sup> 523 U.S. 574 (1998).

<sup>17</sup> See *infra* Part I.

So, what is going on? What should I tell my Civil Procedure students when I teach them the law of pleading? Were the *Iqbal* and *al-Kidd* majorities merely mistaken when they stated that the plaintiff needed to plead in the complaint facts sufficient to establish that the named defendants were not entitled to qualified immunity?<sup>18</sup> If not, is the retreat from *Gomez* and *Crawford-El* suggested by these recent cases limited to civil rights damages claims asserted against individual defendants who, in their capacities as individuals, are entitled to assert a qualified immunity affirmative defense? (To simplify, I shall call this sort of damages claim an “individual-capacity claim.”) Or might the statements portend a general overhaul of the law governing the pleading and proof of *all* affirmative defenses?

In Part I of this Article, I elaborate on the problem and address these questions. I conclude that, while it is unclear whether the Court favors a heightened pleading standard applicable to the complaint, the mandatory use of a Rule 7(a)(7) reply or a Rule 12(e) more definite statement,<sup>19</sup> the Court almost certainly intends to require as a prerequisite to discovery the pleading of facts establishing the inapplicability of qualified immunity. But just as surely, the problematic issue-framing statements in *Iqbal* and *al-Kidd* should be limited to context, and regarded as applicable *only* to complaints containing claims subject to a qualified immunity defense. In other words, courts, lawyers, and commentators should *not* read *Iqbal* and *al-Kidd* as a step towards requiring plaintiffs generally to anticipate and plead past affirmative defenses in order to avoid Rule 12(b)(6) dismissals.

The issue-framing statements in these cases should be viewed as a probable consequence of a Court that sees itself on the horns of a dilemma in actions involving individual-capacity damages claims. On the one hand, the Court does not want to appear unduly activist, and so it has been reluctant to impose explicitly upon persons stating such claims a heightened pleading requirement that is not specified in Rule 9(b)—especially because the Court has repeatedly emphasized that the imposition of heightened pleading requirements should be accomplished by the process of amending the Rules and not by judicial fiat.<sup>20</sup> But on the other hand, the Court has been so concerned that public officials not be overly deterred<sup>21</sup> in the performance

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<sup>18</sup> See David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 136–37 (2010) (arguing that *Iqbal* should not be “over-read[ ]” to hold that civil rights plaintiffs must plead facts sufficient to overcome qualified immunity).

<sup>19</sup> See *infra* notes 45, 87–95 and accompanying text.

<sup>20</sup> See, e.g., *Hill v. McDonough*, 547 U.S. 573, 582 (2006) (declining to impose a requirement that suits challenging a method of execution must identify a specific alternative); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (declining to impose a heightened pleading requirement in employment discrimination lawsuits); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (declining to impose a heightened pleading requirement in civil rights claims seeking to impose liability on a municipality).

<sup>21</sup> By “overly deterred,” I mean deterred from engaging in conduct that, while perfectly constitutional, has not been held constitutional by a court. As Professor Sheldon Nahmod puts

of their public duties by the burden of defending damages claims that it has repeatedly encouraged lower court judges to dismiss such claims prior to discovery when they believe that the suit is doomed to fail on qualified immunity grounds. There is, however, a problem with this agenda—one that the Court has failed to acknowledge, let alone resolve. For, unless a heightened pleading requirement *is* imposed on civil rights plaintiffs seeking damages from individuals entitled to assert a qualified immunity defense, the pleadings-based dismissals that the Court is pushing are usually not possible.<sup>22</sup>

In Part II, I turn from the problem to a suggested solution. I propose a doctrinal reform designed not only to resolve the tension between the issue-framing statements in *Iqbal* and *al-Kidd* and ordinary federal pleading principles, but also to restore some stability and coherence to constitutional tort doctrine, which is an area of the law that has been appropriately criticized as a conceptual disaster area.<sup>23</sup> While reserving normative judgment about the Court's determination to see individual-capacity claims disposed of prior to discovery in cases where the plaintiff cannot state facts establishing the inapplicability of an anticipated qualified immunity defense, I argue that the Court does not need to choose between the consistent enforcement of basic pleading rules and the pre-discovery dismissals it desires. If the Court were to take stock of the true nature of an individual-capacity claim, it instead could simply reallocate the pleading burdens—whether the claims are brought against federal actors under the *Bivens* doctrine or state actors under § 1983<sup>24</sup>—and do away with the conceptually unnecessary qualified immunity doctrine that has bedeviled lawyers and judges for the past half a century.<sup>25</sup>

I argue from the premise that the problem discussed in Part I is best solved by abandoning a major underlying (although unexamined) assumption running through

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it: “Where there is optimal deterrence, only unconstitutional conduct is deterred; where there is over-deterrence, constitutional conduct is deterred as well.” Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability After Iqbal*, 14 LEWIS & CLARK L. REV. 279, 282 n.11 (2010).

<sup>22</sup> Indeed, even if a heightened-pleading standard is imposed on individual-capacity claims, pleadings-based dismissals are frequently impossible—at least under ordinary procedural principles. See Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 233–61 (2006) (explaining why the pleadings-based dismissals for which the Court advocates are not possible under the Federal Rules when a defendant's entitlement to qualified immunity turns on the resolution of a factual dispute).

<sup>23</sup> *Id.* at 230 n.4 (providing representative citations criticizing the Court's qualified immunity jurisprudence).

<sup>24</sup> See *supra* notes 1–2 and accompanying text.

<sup>25</sup> I have previously proposed a reinterpretation of 42 U.S.C. § 1983 that would have the effect of rendering the qualified immunity defense—for which there is no textual basis—conceptually unnecessary. See John M. Greabe, *A Better Path for Constitutional Tort Law*, 25 CONST. COMMENT. 189, 200–01 (2008). This Article expands upon my earlier argument in light of the Court's intervening *Iqbal* and *al-Kidd* decisions and develops the point that the qualified immunity doctrine is no more necessary in *Bivens* actions than it is in claims pressed under § 1983.

the Court's constitutional tort precedents. The assumption is that individual-capacity claims merely provide remedies for direct violations of the Constitution by government actors. I contend that individual-capacity claims do *not* merely provide remedies against constitutional violators; indeed, they cannot *directly* enforce the Constitution at all. Although individual-capacity claims contain an imbedded constitutional issue and certainly constitute an important part of the regulatory order designed to keep those wielding governmental power within constitutional boundaries, they are in truth "mere" tort claims authorized by statute and federal common law against jural entities—individual human beings in their capacities as such—who are intrinsically *incapable* of violating any provision of the Constitution other than the Thirteenth Amendment. These types of claims are *not* required by the Constitution: they differ fundamentally from direct constitutional enforcement mechanisms; they are frequently asserted in lawsuits to which the government is not formally a party and in which no government lawyer has filed an appearance; and, for better or worse, they are only *sometimes* available to persons who have suffered violations of constitutional rights.

Ascribing significance to the fact that individual-capacity claims only "indirectly" enforce the Constitution—even as they incentivize persons exercising government power to respect constitutional limits—might initially strike some readers as a formalism reminiscent of a happily bygone jurisprudential era.<sup>26</sup> It is not. If the Court were to recognize individual-capacity claims as the statutory or common-law tort claims against private parties that they really are, it would free itself from the constraining assumption that the rights and duties put into issue by the *prima facie* case pleaded in individual-capacity claims necessarily are the same as, or coextensive with, true constitutional rights and duties. So freed, the Court could then simply reformulate the *Bivens* doctrine and reinterpret § 1983 to require plaintiffs pressing individual-capacity claims to plead facts establishing a violation of clearly established law *as a necessary element of such claims*. A doctrinal reform of this sort would cohere with extant Court precedent and would have several additional positive effects.

First, such a reform would permit the Court to do away with the confusing, and often lawless, qualified immunity doctrine, while leaving undisturbed the liability boundaries that presently exist under constitutional tort law.<sup>27</sup> Second, it would reinforce rule-of-law values by legitimizing under basic pleading law Rule 12(b)(6) dismissals of individual-capacity claims that fail to contain a factual narrative giving rise to a plausible inference that the defendant has violated clearly established law. Third,

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<sup>26</sup> Recall the distinction between "direct" and "indirect" effects on interstate commerce that the pre-1937 Court frequently drew in explaining the scope of Congress's Commerce Clause power. *See, e.g.,* *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *United States v. E.C. Knight*, 156 U.S. 1 (1895).

<sup>27</sup> I do not intend this statement to endorse the propriety of current liability boundaries in civil rights damages actions. In fact, I am sympathetic to arguments that the Court's qualified immunity jurisprudence has placed too heavy a thumb on the scale in favor of avoiding over-deterrence, especially in the context of the Fourth Amendment. But whether and where liability boundary lines should be redrawn are beyond the scope of this Article.

the reform could be implemented in a manner that addresses legitimate concerns about “law freezing”—i.e., courts dismissing claims under the qualified immunity doctrine without saying what the Constitution requires and thus failing to establish the law going forward—that has led many commentators (including me) to argue that “unnecessary” rulings on constitutional meaning should sometimes be handed down in cases which properly terminate on qualified immunity grounds.<sup>28</sup> Fourth, the reform might, in the long run, be protective of individual constitutional rights; if implemented with care, it could lead to courts making law-settling constitutional rulings with the assistance of government counsel and in contexts where there are fewer reasons to suppose that courts might be inclined to construe constitutional rights too narrowly because of phenomena unrelated to the merits of the imbedded constitutional question.

Finally, in Part III, I demonstrate that the proposed doctrinal reform also should encompass a parallel elimination of the absolute immunity “defense”<sup>29</sup> that protects public officials exercising legislative, judicial, and prosecutorial functions, as well as grand jurors and witnesses.<sup>30</sup> Instead, pleaders of individual-capacity claims should be required simply to state facts tending to establish that the defendant is a person who is not protected by absolute immunity, and thus is capable of being held personally liable for participating in a constitutional tort. Eliminating individual immunity defenses from *all* civil rights tort claims would yield a liability regime that is more symmetrical, coherent, understandable, faithful to rule-of-law values, and (potentially) rights-protective than the one that exists under current law. Further, it would do so at little to no expense to competing jurisprudential and public policy values.

## I. THE PROBLEM: WHAT TO MAKE OF THE ISSUE-FRAMING STATEMENTS IN *IQBAL* AND *AL-KIDD*?

### A. A Summary of *Iqbal*

*Iqbal* arose from individual-capacity *Bivens* claims<sup>31</sup> that plaintiff Javaid Iqbal—a citizen of Pakistan and a Muslim—pleaded against former United States Attorney John

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<sup>28</sup> My own argument that courts frequently should issue such rulings is set forth in John M. Greabe, *Mirabile Dictum!: The Case for “Unnecessary” Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403 (1999).

<sup>29</sup> I enclose the word “defense” in quotation marks because it is mistaken—even under present doctrine—to treat absolute immunity as an affirmative defense, as courts and commentators sometimes do. See *infra* Part III.

<sup>30</sup> The Court’s extension of absolute immunity to persons performing such functions occurred in the following series of cases: *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983) (shielding private witnesses, judges, and prosecutors), *Imbler v. Pachtman*, 424 U.S. 409, 417–20, 423 n.20 (1976) (shielding prosecutors acting in a prosecutorial capacity and grand jurors), *Pierson v. Ray*, 386 U.S. 547, 554–55 (1967) (shielding judges acting in a judicial capacity), and *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (shielding legislators acting in a legislative capacity).

<sup>31</sup> See *supra* notes 1–2.



Ashcroft and Federal Bureau of Investigation Director Robert Mueller.<sup>32</sup> Iqbal, who was arrested on criminal charges and then detained by federal officials following the September 11, 2001, terrorist attacks, alleged that Ashcroft and Mueller had adopted an unconstitutional policy that subjected him to harsh treatment and conditions of incarceration on account of his race, religion, or national origin.<sup>33</sup> In support of this claim, Iqbal asserted that his federal jailers, who were subordinates of Ashcroft and Mueller,

‘kicked him in the stomach, punched him in the face, and dragged him across’ his cell without justification; subjected him to serial strip and body-cavity searches when he posed no safety risk to himself or others; and refused to let him . . . pray because there would be ‘[n]o prayers for terrorists.’<sup>34</sup>

Ashcroft and Mueller moved to dismiss the complaint under Rule 12(b)(6) on grounds of qualified immunity, arguing that dismissal was appropriate because the complaint did not allege facts showing that they had violated any clearly established constitutional right.<sup>35</sup> An affirmative defense of qualified immunity—which, again, shields public officials from damages liability unless the allegedly unconstitutional action violated “clearly established law” of which a reasonable person would have known<sup>36</sup>—was available to Ashcroft and Mueller because they were being sued for

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<sup>32</sup> The claims against Ashcroft and Mueller—the only claims that the Supreme Court considered—were part of a much broader lawsuit that Iqbal filed against a large number of government actors. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1942–44 (2009).

<sup>33</sup> *Id.* at 1942.

<sup>34</sup> *Id.* at 1944 (citations omitted).

<sup>35</sup> *Id.* The opinion does not say specifically that Ashcroft and Mueller used a Rule 12(b)(6) motion to raise their qualified immunity defenses, but an examination of the record reveals that the motion “to dismiss” that the opinion references was in fact brought pursuant to that Rule and not, for example, pursuant to Rule 12(c). *See* Motion and Notice of Partial Motion to Dismiss the Third Amended Complaint on Behalf of the United States and Motion to Dismiss the Third Amended Complaint on Behalf of Defendants John Ashcroft, Robert Mueller, James W. Ziglar, Dennis Hasty, and Michael Zenk in Their Individual Capacities at 3, *Turkmen v. Ashcroft*, 2006 WL 1662663 (E.D.N.Y. 2004) (No. 02-CV-2307), 2004 WL 3756452 (citing rule 12(b)(1) and 12(b)(6)). For a discussion of how Rule 12(c)—which authorizes motions for judgment on the pleadings—might be used to resolve qualified immunity issues on the pleadings, see Teressa E. Ravenell, *Hammering in Screws: Why the Court Should Look Beyond Summary Judgment When Resolving § 1983 Qualified Immunity Disputes*, 52 VILL. L. REV. 135, 165–67 (2007).

<sup>36</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The phrase “clearly established law” is a term of art. In assessing whether the defendant should have known that the challenged conduct violated “clearly established law,” courts must frame the question not at a high level of generality (e.g., if the case alleges a violation of due process, is the right to “due process” clearly established?), but rather in light of the specific facts that the defendant encountered

damages as individuals.<sup>37</sup> But the argument pressed in the Rule 12(b)(6) motion was built from the faulty premise that Iqbal was under an obligation to anticipate and negate these defenses in his complaint.

Certainly, a complaint may be subject to dismissal under Rule 12(b)(6) on the basis of a doctrine that ordinarily would be pleaded in an answer as a Rule 8(c) affirmative defense; that much is uncontroversial.<sup>38</sup> But it is black letter that the use of a Rule 12(b)(6) motion to seek dismissal on the basis of an affirmative defense is appropriate only “when [the complaint’s] allegations indicate the existence of [the] defense . . . .”<sup>39</sup> For this to occur, “the applicability of the defense has to be clearly indicated and must appear *on the face of the pleading to be used as the basis for the motion*.”<sup>40</sup> Thus, in order to state a claim on which relief may be granted, a complainant must avoid conclusively establishing that a Rule 8(c) affirmative defense applies, but does not need to make allegations establishing the defense’s inapplicability. Indeed, this is the very reason why the Court unanimously held in *Gomez*, and then reaffirmed in *Crawford-El*,<sup>41</sup> that a federal civil rights plaintiff does not need to plead in the complaint facts establishing the inapplicability of qualified immunity.<sup>42</sup>

To be sure, *Iqbal* (which does not mention *Gomez* or *Crawford-El*) is not the first time a court has suggested that plaintiffs pleading civil rights damages claims against individual defendants must anticipate an assertion of qualified immunity. The idea appears to trace back to *Mitchell v. Forsyth*,<sup>43</sup> in which the Supreme Court stated in

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(e.g., do the actual facts alleged, if proven, establish a violation of clearly established due process law?). As the Court has put it:

[T]he right the official is alleged to have violated must have been ‘clearly established’ in a more particularized, and hence more relevant, sense [than simply asking whether the right to due process is clearly established]: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

*Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

<sup>37</sup> See *Iqbal*, 129 S. Ct. 1937. Most civil rights damages claims target individuals because (1) the federal government enjoys sovereign immunity from *Bivens* claims, see *FDIC v. Meyer*, 510 U.S. 471, 485 (1994); (2) state governments are not “persons” subject to suits for damages under 42 U.S.C. § 1983, see *Will v. Michigan Department of State Police*, 491 U.S. 58, 64 (1989); and (3) it is very difficult to establish damages liability under § 1983 against municipalities, see *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978) (finding municipalities not liable under § 1983 under theory of *respondeat superior*; a municipal “policy or custom” must be shown to have caused the plaintiff harm). See generally Greabe, *supra* note 25, at 193 n.23 (summarizing the relevant law on civil rights damages claims).

<sup>38</sup> See, e.g., *Behrens v. Pelletier*, 516 U.S. 299, 306–07 (1996).

<sup>39</sup> 5B WRIGHT & MILLER, *supra* note 7, § 1357, at 708.

<sup>40</sup> *Id.* at 708–10 (emphasis added).

<sup>41</sup> See *Crawford-El v. Britton*, 523 U.S. 574 (1998); *Gomez v. Toledo*, 446 U.S. 635 (1980).

<sup>42</sup> See *Crawford-El*, 523 U.S. at 595; *Gomez*, 446 U.S. at 640; see also *Siebert v. Gilley*, 500 U.S. 226, 231 (1991) (citing *Gomez* in support of the proposition that “[q]ualified immunity is a defense that must be pleaded by a defendant official”).

<sup>43</sup> 472 U.S. 511 (1985).

an unelaborated dictum: “Unless the plaintiff’s allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.”<sup>44</sup> Moreover, notwithstanding *Gomez* and *Crawford-El*, the Eleventh Circuit insisted prior to *Iqbal* that this “heightened pleading requirement” applied to complaints containing claims for damages against defendants entitled to assert the qualified immunity defense.<sup>45</sup> But it is a different matter entirely for the Court to have indicated on multiple occasions in *Iqbal*—an opinion it surely knew would become *the* case on federal pleading requirements—that a Rule 12(b)(6) dismissal is appropriate if a complaint fails to establish the inapplicability of an affirmative defense.<sup>46</sup>

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<sup>44</sup> *Id.* at 526; see also *Johnson v. Fankell*, 520 U.S. 911, 915 (1997) (characterizing qualified immunity as a “defense” but then incongruously suggesting that a complaint must “allege a violation of clearly established law”). Professor Kit Kinports has noted the incompatibility between the *Mitchell* dictum and the Court’s holding in *Gomez*. See Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 652–53 n.223 (1989).

<sup>45</sup> See, e.g., *Swann v. S. Health Partners, Inc.*, 388 F.3d 834, 837 (11th Cir. 2004); see also Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 80 (1997) (noting the incompatibility between “ordinary notice pleading requirements” and requiring plaintiffs to “anticipate and plead around the affirmative defense of immunity”); Greabe, *supra* note 25, at 204 n.82 (noting that the Eleventh Circuit, unlike other circuits, had explicitly applied a heightened pleading standard to complaints containing claims subject to the qualified immunity defense); Ravenell, *supra* note 35, at 164–65 (noting the incompatibility between such a heightened pleading requirement and *Gomez*).

The Eleventh Circuit is not the only federal appeals court to have held, prior to *Iqbal*, that a plaintiff must plead facts sufficient to negate qualified immunity in order to obtain discovery. The Fifth Circuit imposed a similar requirement, but ordered district courts to use a Rule 7(a)(7) reply—and not a heightened pleading standard applicable to the complaint—to secure the requisite factual narrative. See *infra* notes 94–95 and accompanying text. Moreover, in the immediate aftermath of *Harlow*, several other circuits “tightened the application of Rule 8 to § 1983 cases.” *Arnold v. Bd. of Educ.*, 880 F.2d 305, 309 (11th Cir. 1989); see also *id.* at 309 n.2 (listing representative cases). But this latter group of courts retreated from requiring heightened pleading after the Supreme Court subsequently issued a number of rulings admonishing the lower federal courts to strictly follow the mandates of Rules 8 and 9(b). See *supra* note 20 and *infra* notes 99–100 and accompanying text.

<sup>46</sup> See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1944 (2009) (“Petitioners moved to dismiss the complaint for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct.”); *id.* at 1946 (“[W]hether a particular complaint sufficiently alleges a clearly established violation of law cannot be decided in isolation from the facts pleaded.”); *id.* at 1947 (“[W]e begin by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity.”); *id.* at 1948–49 (“It follows that, to state a claim based on a violation of a clearly established right, [Iqbal] must plead sufficient factual matter to show that [Ashcroft and Mueller] adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.”); *id.* at 1949 (“In the context of determining whether there is a

In any event, after observing that the district court denied the defendants' motion to dismiss (and that the Second Circuit upheld the district court's denial on interlocutory appeal),<sup>47</sup> the Court endorsed the premise that *Iqbal* was required to plead in his complaint facts sufficient to show that Ashcroft and Mueller were not entitled to qualified immunity. The Court stated: "This case . . . turns on a narrow[ ] question: Did [*Iqbal*], as the plaintiff in the District Court, plead factual matter that, if taken as true, states a claim that [Ashcroft and Mueller] deprived him of his clearly established constitutional rights."<sup>48</sup> This was no isolated indication that *Iqbal* was under an obligation to plead facts sufficient to defeat anticipated assertions of the qualified immunity affirmative defense. In fact, it was the first of *six separate occasions* that the Court stated either that the case required it to decide whether *Iqbal*'s complaint sufficiently alleged that Ashcroft and Mueller had violated "clearly established" constitutional rights or, more generally, whether the complaint adequately established that defendants were not entitled to qualified immunity.<sup>49</sup> Ironically, *Iqbal* went on to hold *not* that the complaint failed to allege facts adequate to defeat qualified immunity, but rather that the complaint failed to state a viable underlying claim that Ashcroft and Mueller had deprived *Iqbal* of his constitutional rights *at all*.<sup>50</sup>

Given that the holding of *Iqbal* does not rely on a failure to establish the inapplicability of the qualified immunity defense, why did the Court, on six separate occasions, frame the issue in terms that flout the basic law of pleading and ignore the Court's prior decisions in *Gomez* and *Crawford-El*?<sup>51</sup> Though it is hazardous to ascribe a unitary intent to any action of the Court—obviously, Justices act for different reasons and often envision different outcomes—it seems fair to suggest that at least a partial answer lies in the fact that the majority needed to respond to *Iqbal*'s argument that the Court lacked appellate jurisdiction over his case.<sup>52</sup>

Recall that the case came before the Court on the Second Circuit's judgment affirming the district court's *denial* of Ashcroft and Mueller's motion to dismiss under

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violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.").

<sup>47</sup> *Id.* at 1944.

<sup>48</sup> *Id.* at 1942–43.

<sup>49</sup> See *supra* note 46 and accompanying text.

<sup>50</sup> See *Iqbal*, 129 S. Ct. at 1950–52. Of course, in an individual-capacity action premised on an alleged constitutional violation, the question whether a complaint adequately states a violation of the Constitution is anterior to and imbedded within the qualified immunity question. See, e.g., *Pearson v. Callahan*, 129 S. Ct. 808, 815–16 (2009). Thus, a ruling that the complaint states no viable constitutional claim obviates any need for a court to reach the qualified immunity issue and to decide whether the law was clearly established at the relevant point in time. See, e.g., *id.* at 816.

<sup>51</sup> See *supra* notes 38–42 and accompanying text (discussing the traditional pleading process for civil rights claims under *Gomez* and *Crawford-El*).

<sup>52</sup> See *Iqbal*, 129 S. Ct. at 1945.

Rule 12(b)(6).<sup>53</sup> Of course, the Court ordinarily lacks appellate jurisdiction to review a denial of a motion to dismiss.<sup>54</sup> The Court has held, however, that a denial of a pretrial motion for judgment grounded on an assertion of qualified immunity may be immediately appealed under the “collateral-order doctrine”<sup>55</sup> so long as the appellant is challenging the lower court’s application of law to fact and not the factual inferences drawn from the record.<sup>56</sup> This rule, like the pleading issue under examination, is rooted in the Court’s opinion in *Mitchell*,<sup>57</sup> which stated that qualified immunity is not only an immunity from liability, but also an “entitlement not to stand trial or face the other burdens of litigation . . . .”<sup>58</sup> The Court stated that this entitlement—which I shall discuss in greater detail below<sup>59</sup>—would be lost if law-based denials of motions for judgment on qualified immunity grounds were not subject to an immediate appeal.<sup>60</sup>

Thus, in *Iqbal*, the Court first justified its entitlement to review the lower court’s denial of the defendants’ motion to dismiss because the motion was premised on an assertion of qualified immunity.<sup>61</sup> The Court then stated that, with appellate jurisdiction established, it was entitled to reach the anterior, imbedded question of whether *Iqbal*’s complaint stated viable claims that defendants Ashcroft and Mueller had caused a constitutional violation in the first instance.<sup>62</sup> Whatever one may think of this line of analysis, it appears that the principal reason the *Iqbal* majority repeatedly framed the issue for decision in terms of the adequacy of the complaint to meet the anticipated qualified immunity defense was to rebut the argument that it was acting *ultra vires* in reviewing the merits of the denial of the defendants’ Rule 12(b)(6) motion to dismiss.

### *B. A Summary of al-Kidd*

The Court’s decision in *al-Kidd* also arose from a *Bivens* action against former Attorney General Ashcroft. Plaintiff Abdullah al-Kidd alleged that Ashcroft had authorized subordinates to use the federal material witness statute, 18 U.S.C. § 3144,<sup>63</sup>

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<sup>53</sup> See *supra* text accompanying note 47 (noting the Second Circuit’s affirmance of the denial of the motion to dismiss).

<sup>54</sup> See 28 U.S.C. § 1291 (2003).

<sup>55</sup> See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546–47 (1949).

<sup>56</sup> See, e.g., *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996).

<sup>57</sup> See *supra* notes 43–44 and accompanying text (discussing dictum in *Mitchell*).

<sup>58</sup> *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

<sup>59</sup> See *infra* Part I.C.

<sup>60</sup> *Mitchell*, 472 U.S. at 527–28.

<sup>61</sup> See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1945–46 (2009).

<sup>62</sup> See *id.* at 1946–47 (citing *Hartman v. Moore*, 547 U.S. 250, 257 (2006), and *Wilkie v. Robbins*, 551 U.S. 537, 548–49 (2007), two other cases in which the Court asserted an entitlement to reach back and discuss the viability of the pleaded claim on an appeal of a law-based denial of a motion for judgment based on the qualified immunity doctrine).

<sup>63</sup> The statute authorizes judges to “order the arrest of [a] person” whose testimony “is material in a criminal proceeding . . . if it is shown that it may become impracticable to secure the presence of the person by subpoena.” 18 U.S.C. § 3144 (2006).

to detain him, even though they had no intention of calling him as a witness.<sup>64</sup> The complaint alleged that this pretextual use of the statute violated al-Kidd's Fourth Amendment right to be free from an unreasonable seizure.<sup>65</sup> Ashcroft moved to dismiss on grounds of qualified immunity, but the district court denied his motion and the Ninth Circuit affirmed.<sup>66</sup> The Supreme Court reversed.<sup>67</sup>

In doing so, the Court held that al-Kidd's claim should be dismissed for failure to "plead[] facts showing . . . that [the right in question] was 'clearly established' at the time of the challenged conduct."<sup>68</sup> Although this was an alternate holding—the Court also held that the complaint failed to allege the violation of a constitutional right at all<sup>69</sup>—it *was* a holding; the Court was clear in stating that it was reversing *both* the Ninth Circuit's constitutional ruling (that al-Kidd had stated a claim for violation of a constitutional right) *and* the Ninth Circuit's qualified immunity ruling (that al-Kidd had stated a claim for violation of a clearly established constitutional right).<sup>70</sup> Moreover, the appeal in question was from a Ninth Circuit judgment affirming the denial by the district court of Ashcroft's Rule 12(b)(6) motion to dismiss.<sup>71</sup> Thus, there is a clear conflict between *al-Kidd* and the rule established in *Gomez* and reiterated in *Crawford-El*: that ordinary pleading rules govern a claim implicating qualified immunity, and that a complaint setting forth such a claim need not establish the inapplicability of qualified immunity in order to forestall a Rule 12(b)(6) dismissal.<sup>72</sup> But the Court failed to acknowledge this conflict; indeed, it once again neither mentioned *Gomez* and *Crawford-El* nor recognized that the manner in which it had framed the issue was a departure from the norm.

### *C. Does the Court Really Mean What the Issue Framing Statements in Iqbal and al-Kidd Suggest?*

Although the matter is not free from doubt, there is strong reason to believe that the Court's issue-framing statements in *Iqbal* and *al-Kidd* should be taken seriously and that, notwithstanding usual pleading principles, a plaintiff asserting an individual-capacity claim must now anticipate the defendant's qualified immunity defense and state *in the complaint* facts showing that the defendant violated clearly established law. Otherwise, the plaintiff will be denied discovery and face a Rule 12(b)(6) dismissal.<sup>73</sup>

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<sup>64</sup> Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2078 (2011).

<sup>65</sup> *Id.* at 2080.

<sup>66</sup> *Id.* at 2079.

<sup>67</sup> *Id.* at 2085.

<sup>68</sup> *Id.* at 2080 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); *see also id.* at 2083–86.

<sup>69</sup> *Id.* at 2083–84.

<sup>70</sup> *Id.*

<sup>71</sup> *Al-Kidd v. Ashcroft*, 580 F.3d 949, 955 n.7 (9th Cir. 2009), *rev'd*, 131 S. Ct. 2074 (2011).

<sup>72</sup> *See supra* notes 38–42 and accompanying text.

<sup>73</sup> *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

But more to the point, these cases almost certainly should be read to require that judgment be entered on the pleadings and prior to discovery, unless a plaintiff pressing an individual-capacity claim is able *at some point* to plead facts sufficient to overcome a qualified immunity defense. A brief examination of how the Court has dealt with the qualified immunity doctrine from a procedural perspective—and a focus on several little-used pleading devices—is necessary to clarify this point.

Since *Mitchell*, the Court has continually emphasized that the “entitlement not to stand trial or face the other burdens of litigation”<sup>74</sup> conferred by the qualified immunity doctrine<sup>75</sup> entails more than the right to bring an immediate appeal of a law-based motion for judgment on qualified immunity grounds.<sup>76</sup> *Mitchell* itself stated that the entitlement also encompasses a right to dismissal before discovery.<sup>77</sup> Moreover, the Court has since described its “desire to ensure that insubstantial claims against government officials . . . be resolved prior to discovery” as “*the driving force*” behind its creation of the qualified immunity doctrine.<sup>78</sup> Pronouncements to this effect are numerous and have been consistent in recent years.<sup>79</sup> But the Court has sent decidedly mixed messages about *how* the entitlement to dismissal prior to discovery should be enforced within our federal procedural system, given that qualified immunity, at least nominally, remains an “affirmative defense.”<sup>80</sup>

On the one hand, the Court’s 1998 decision in *Crawford-El* indicates that usual pleading principles apply,<sup>81</sup> but it also suggests that courts should use certain discretionary mechanisms available to them under the Federal Rules to force plaintiffs to plead facts sufficient to establish the inapplicability of qualified immunity prior to permitting discovery.<sup>82</sup> As stated above, the Court in *Crawford-El* reiterated *Gomez*’s holding that qualified immunity is an affirmative defense, which a plaintiff need not

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<sup>74</sup> *Mitchell*, 472 U.S. at 526.

<sup>75</sup> See *supra* note 4 and accompanying text.

<sup>76</sup> See *supra* notes 55–60 and accompanying text (discussing the collateral order doctrine in the qualified immunity context).

<sup>77</sup> See *Mitchell*, 472 U.S. at 526 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982)).

<sup>78</sup> *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987) (internal quotation marks omitted)) (emphasis added). The Court has candidly admitted that qualified immunity is a judicial creation that does not derive from any positive law text. See Greabe, *supra* note 25, at 203–04.

<sup>79</sup> See, e.g., *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) (“[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.”).

<sup>80</sup> See, e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 69 (2001) (describing qualified immunity as an “affirmative defense”).

<sup>81</sup> *Crawford-El v. Britton*, 523 U.S. 574, 589 (1998) (noting that Supreme Court precedent “provides no support for making any change in the nature of the plaintiff’s burden of proving a constitutional violation”).

<sup>82</sup> *Id.* at 597–98 (stating that “the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense”).

anticipate and plead around in the complaint.<sup>83</sup> But, the *Crawford-El* Court also provided a blueprint for how trial courts might vigorously enforce the doctrine's entitlement to avoid suit within current federal procedural confines. In rejecting a lower court's adoption of a heightened burden of proof for individual-capacity claims alleging that the defendant acted with an unconstitutional motive, *Crawford-El* emphasized the "many options"<sup>84</sup> available to a trial judge to protect defendants facing such claims who are entitled to assert a qualified immunity defense against "unnecessary and burdensome discovery."<sup>85</sup> Prior to permitting any discovery, the trial judge has two options: first, under Rule 7(a), the judge may order a plaintiff to reply to a defendant's answer;<sup>86</sup> and second, under Rule 12(e), the judge may grant a defendant's motion for a more definite statement.<sup>87</sup> Either way, the court may *and should* demand prior to discovery that the plaintiff plead "specific, nonconclusory factual allegations"<sup>88</sup> that, if credited, establish an entitlement to relief.<sup>89</sup>

True, the above discussion is intended to explain how a trial judge could filter and quickly enter judgment on insubstantial claims alleging that a defendant entitled to assert qualified immunity had acted with an unconstitutional motive. However, the same mechanisms are available to trial judges anxious to heed the Court's admonition to resolve *any* qualified immunity issue "at the earliest possible stage in litigation."<sup>90</sup> Just as Rules 7(a)(7) and 12(e) could be used to require a plaintiff to supplement her allegations of unconstitutional motive, they also could be used to require a plaintiff

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<sup>83</sup> See *supra* notes 41–42 and accompanying text (noting the holding of *Crawford-El*); see also *Siebert v. Gilley*, 500 U.S. 226, 231 (1990) (citing *Gomez* in support of the statement that "[q]ualified immunity is a defense that must be pleaded by a defendant official"). *Gomez* was decided prior to *Harlow*, which transformed the qualified immunity doctrine from one that required a defendant to establish both objective reasonableness and subjective good faith into one that contemplates a wholly objective inquiry. See *Harlow v. Fitzgerald*, 457 U.S. 800, 814–18 (1982). Thus, *Crawford-El*'s (and *Siebert*'s) post-*Harlow* reaffirmations of *Gomez* are significant: they stand as an obstacle to simply regarding *Gomez*—which justified its holding by pointing out that the facts establishing subjective good faith are "peculiarly within the knowledge and control of the defendant," *Gomez v. Toledo*, 446 U.S. 635, 640–41 (1980)—as having been superseded by *Harlow*. For an explanation why the policy justifications for *Gomez* no longer apply post-*Harlow*, see Greabe, *supra* note 25, at 207 n.92. See also *infra* Part II.B.1.

<sup>84</sup> 523 U.S. at 599.

<sup>85</sup> *Id.* at 598.

<sup>86</sup> FED. R. CIV. P. 7(a).

<sup>87</sup> *Crawford-El*, 523 U.S. at 598; FED. R. CIV. P. 12(e).

<sup>88</sup> 523 U.S. at 598 (quoting *Siebert*, 500 U.S. at 236 (Kennedy, J., concurring in the judgment) (internal quotation marks omitted)).

<sup>89</sup> *Id.* Although *Crawford-El* does not say so, the plaintiff's failure to do so would render appropriate a Rule 12(c) motion for judgment on the pleadings. See *infra* note 93 and accompanying text (describing dismissal of pleadings under Rule 12(c)).

<sup>90</sup> *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) (internal quotation marks omitted)).



to supply extra “specific, nonconclusory factual allegations”<sup>91</sup> that, if credited, would permit a court to infer that the defendant has violated the plaintiff’s clearly established rights.<sup>92</sup> If the plaintiff fails to discharge this requirement, the defendant would be entitled to have judgment entered in his or her favor—not under Rule 12(b)(6), but under Rule 12(c) as a judgment on the pleadings.<sup>93</sup> Indeed, the Fifth Circuit has done precisely this. Within the Fifth Circuit, trial courts entertaining claims to which a qualified immunity affirmative defense is pleaded in an answer are effectively under order to require the plaintiff to file a Rule 7(a)(7) reply of “sufficient precision and factual specificity to raise a genuine issue as to the illegality of defendant’s conduct at the time of the alleged acts.”<sup>94</sup> If the plaintiff’s reply fails to satisfy this standard, the court “need not allow any discovery.”<sup>95</sup>

On the other hand, in contrast to *Crawford-El*’s now 13-year-old indication that courts should employ Rule 7(a)(7) or Rule 12(e) to force plaintiffs to plead facts sufficient to establish the non-applicability of qualified immunity, there is a great deal of evidence that the Court simply has decided to require plaintiffs bringing individual capacity claims to plead *in their complaints* facts establishing a violation of clearly established law.<sup>96</sup> Not only does *Iqbal* so indicate on six separate occasions,<sup>97</sup> but its author, Justice Kennedy, is also separately on record as favoring the application of such a heightened pleading standard to complaints stating claims to which a qualified immunity defense applies.<sup>98</sup>

Moreover, the Court has left undisturbed two circuit splits over whether the usual rules governing federal civil trial practice apply in cases raising qualified immunity issues. As previously mentioned,<sup>99</sup> the first is a split between the Eleventh Circuit (which imposed a heightened pleading standard requiring that a plaintiff anticipate a defendant’s qualified immunity defense in the complaint) and other circuits (which declined explicitly to impose such a requirement in the face of the Supreme Court’s

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<sup>91</sup> *Crawford-El*, 523 U.S. at 598 (quoting *Siebert*, 500 U.S. at 236 (Kennedy, J., concurring in the judgment) (internal quotation marks omitted)).

<sup>92</sup> Professor Teressa Ravenell has previously made this same point. *See* Ravenell, *supra* note 35, at 164–65.

<sup>93</sup> *See id.* at 165–67.

<sup>94</sup> *Schultea v. Wood*, 47 F.3d 1427, 1434 (5th Cir. 1995) (en banc); *see also* 5B WRIGHT & MILLER, *supra* note 7, § 1186 (discussing the “*Schultea* reply” and listing illustrative cases requiring such a reply); 2 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 7.02[7][b] (3d ed. 2011) (similar).

<sup>95</sup> *Schultea*, 47 F.3d at 1434.

<sup>96</sup> *See* *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1942–43 (2009).

<sup>97</sup> *See supra* notes 48–49 and accompanying text.

<sup>98</sup> *See* *Siebert v. Gilley*, 500 U.S. 226, 235–36 (1990) (Kennedy, J., concurring in the judgment) (acknowledging that the imposition of such a standard “is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b),” but arguing that it is necessary to vindicate a core purpose of the official immunity doctrines, which is “avoidance of disruptive discovery”).

<sup>99</sup> *See supra* note 45 and accompanying text.

repeated indications that courts should not rewrite Rules 8 and 9(b)).<sup>100</sup> The second involves a disagreement among the circuits as to whether, in cases where disputes of mixed fact and law preclude resolution of qualified immunity assertions on the pleadings,<sup>101</sup> a jury should be entitled to apply law to fact and, ultimately, to decide the defendant's entitlement to qualified immunity.<sup>102</sup> If the Supreme Court were committed to enforcing the usual procedural rules in cases raising qualified immunity issues, would it countenance so much contrary appellate authority? Similarly, if the Court were committed to reining in lower court adventurism in this area, would it have explicitly exempted individual-capacity actions from its strong statement in *Leatherman* that courts should not impose heightened pleading requirements by fiat?<sup>103</sup>

In any event, the preceding paragraphs merely describe an unsettled state of affairs as to *how* federal trial courts should go about imposing a heightened pleading standard to claims subject to a qualified immunity defense; they do not detail a split over *whether* they should do so. Even if the proper way to proceed is the three-step process suggested in *Crawford-El*, and mandated by the Fifth Circuit in *Schultea*,<sup>104</sup> a regime that effectively requires either a Rule 7(a)(7) reply or a Rule 12(e) more definite statement involves just as much "heightened pleading" vis-à-vis that which is ordinarily required as does a regime in which a plaintiff is obliged to plead *in the complaint* facts tending to establish that an affirmative defense does not apply. After all, replies ordered pursuant to Rule 7(a)(7), and "more definite statements" ordered pursuant to Rule 12(e),

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<sup>100</sup> See *supra* note 20 and accompanying text.; see also *Randall v. Scott*, 610 F.3d 701, 705–07 (11th Cir. 2010) (acknowledging the circuit split and providing exemplary cases from other circuits). Oddly, in *Randall*, the Eleventh Circuit read *Iqbal* to require that it *disavow* its heightened pleading standard because *Iqbal* did not specifically say that it was applying a heightened pleading standard. See *id.* at 709. The *Randall* court appears not to have considered the fact that a heightened pleading standard is implicit in the way that *Iqbal* framed the issue for decision.

<sup>101</sup> See *Chen*, *supra* note 22, at 269–70.

<sup>102</sup> The Third Circuit recently summarized the confused state of the law on this question: The First, Fourth, Seventh, and Eleventh Circuits have all indicated that qualified immunity is a question of law reserved for the court. The Fifth, Sixth, Ninth, and Tenth Circuits have permitted the question to go to juries. Precedent from the Second and Eighth Circuits can be viewed as being on both sides of the issue, with the evolution being toward reserving the question for the court.

*Curley v. Klem*, 499 F.3d 199, 208–09 (3d Cir. 2007) (internal citations omitted). As *Curley* recognized, the Third Circuit has been on both sides of the issue. See *id.* at 209–11. In *Curley*, the Third Circuit cast its lot with the First, Fourth, Seventh, and Eleventh Circuits and clarified that the question is for the court. See *id.* at 211.

<sup>103</sup> *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166–67 (1993) (stating that "[w]e . . . have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials" before admonishing lower courts not to apply a heightened pleading standard to civil rights damages claims pressed against municipalities).

<sup>104</sup> See *supra* notes 81–95 and accompanying text.

are “pleadings.”<sup>105</sup> Moreover, pleadings of this sort are extremely rare in the run-of-the-mill federal civil case.<sup>106</sup> Thus, while it is not entirely clear whether the majorities in *Iqbal* and *al-Kidd* intended to entirely abrogate *Gomez* and *Crawford-El* and require plaintiffs to anticipate assertions of a qualified immunity defense in their complaints, it does seem clear that they meant what their issue-framing statements suggested if the matter is put at a slightly higher level of generality: a plaintiff pressing a claim to which a defendant is entitled to qualified immunity must *eventually* plead facts tending to establish a violation of clearly established law before the claim will be permitted to proceed to discovery.<sup>107</sup> If the Court has been clear on one thing since *Mitchell*, it is that qualified immunity confers an entitlement to avoid discovery if the plaintiff cannot so plead.

Assuming that the issue-framing statements in *Iqbal* and *al-Kidd* were not mistakes and that the Court truly intended to impose on plaintiffs asserting individual-capacity claims an obligation to plead facts sufficient to overcome an anticipated qualified immunity defense, one may reasonably wonder whether the obligation should be regarded as limited to the context of constitutional tort claims implicating qualified immunity. After all, the Court has been unwilling to admit that it has fashioned a heightened pleading standard applicable *only* to individual-capacity actions.<sup>108</sup> The absence of such an admission, when coupled with the Court’s strong warnings that courts should not rewrite Rules 8 and 9(b),<sup>109</sup> raises the following question: might the Court now view the negation of applicable affirmative defenses to be part of the “showing” of entitlement to relief that Rule 8(a)(2) contemplates in *all* federal claims? I turn next to this question.

#### *D. Should the Issue Framing Statements in Iqbal and al-Kidd Be Understood to Mean That All Federal Plaintiffs Must Plead Around Anticipated Affirmative Defenses?*

There is a relatively widespread belief that *Iqbal*, in particular, is the means by which a defendant-friendly Supreme Court has decided to reinvent Rule 8(a)(2) to require fact pleading and to serve as a robust merits filter.<sup>110</sup> Those who construe *Iqbal*

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<sup>105</sup> See FED. R. CIV. P. 7(a)(7) (describing a “reply to an answer” as a “pleading”); 5C WRIGHT & MILLER, *supra* note 7, § 1377, at 371 (“[C]ourts now assume that the pleader’s more definite statement is considered as an amended pleading.”).

<sup>106</sup> See FED. R. CIV. P. 7(a)(7) (stating that a reply to an answer need not be filed unless “the court orders one”); see also 5C WRIGHT & MILLER, *supra* note 7, § 1376, at 336 (“[T]here should be a bias against the use of the Rule 12(e) motion as a precursor to a Rule 12(b)(6) motion or as a method for seeking out a threshold defense. This practice is not authorized by the language of the rule and experience has shown that a willingness to grant Rule 12(e) motions often leads to delay, harassment, and proliferation of the pleading stage . . .”).

<sup>107</sup> See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1942–43 (2009).

<sup>108</sup> See, e.g., *Leatherman*, 507 U.S. at 166–67.

<sup>109</sup> See *supra* note 20 and accompanying text.

<sup>110</sup> See, e.g., Nahmod, *supra* note 21, at 282 (describing *Iqbal* as a component part of the Court’s recent, pro-defendant jurisprudence); Martin A. Schwartz, *Supreme Court § 1983*

this way may be tempted to press its (and *al-Kidd*'s) issue-framing statements to the limits of their logic and view the cases as a step towards requiring *all* federal plaintiffs to plead facts sufficient to establish the inapplicability of any affirmative defense that has been recognized as sufficient to defeat their claims. Logic permits such an argument to be reverse engineered from *Iqbal* and *al-Kidd* because, as noted above, the Court has not stated that cases raising qualified immunity issues are exceptional.<sup>111</sup> If qualified immunity cases are not exceptional, one might wonder, why shouldn't other federal plaintiffs be put to the same pleading burden as those pressing individual-capacity claims?

*Iqbal* and *al-Kidd* should not be read in this way. The most obvious basis for concluding that these cases' issue-framing statements should be confined to the qualified immunity context is that the reasons typically provided for requiring that certain legal theories be treated as affirmative defenses under Rule 8(c)—the policy of requiring a party making disfavored allegations to bear the burden of raising and proving those allegations; the avoidance of unfair surprise at trial; and the fairness of imposing the burden of pleading and proof on the party with control of the relevant information<sup>112</sup>—continue to apply to other affirmative defenses, but have little application in the realm of qualified immunity. In view of the importance the Court has recently assigned to avoiding the over-deterrence of those exercising public functions,<sup>113</sup> as well as the related emphasis the Court has placed on raising and resolving qualified immunity questions prior to trial,<sup>114</sup> it would be specious to describe qualified immunity as either a “disfavored” legal theory or one likely to surprise a plaintiff pressing an individual-capacity claim. Moreover, as I shall explain below,<sup>115</sup> although the doctrine once required a defendant to show both the objective reasonableness of the challenged conduct *and* that it was undertaken in subjective good faith, *Harlow* did away with the subjective requirement and transformed the analysis into one that is wholly objective.<sup>116</sup> Thus, *Harlow* rendered immaterial the evidence of good faith which *Gomez* had previously identified as being “peculiarly within the knowledge and control of the defendant,”<sup>117</sup> and concomitantly undermined the only fairness-based reason the Court has ever supplied for treating qualified immunity as an affirmative defense.<sup>118</sup>

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*Decisions—October 2008 Term*, 45 TULSA L. REV. 231, 232–34 (2009) (describing *Iqbal* as pro-defendant and highlighting the Court's negative attitude towards *Bivens* claims); A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 187 (2010) (arguing that *Iqbal* is part of a design on the part of the Court to become a “pro-defendant gatekeeper”).

<sup>111</sup> See *supra* note 103 and accompanying text.

<sup>112</sup> See 5 WRIGHT & MILLER, *supra* note 7, § 1271.

<sup>113</sup> See, e.g., Nahmod, *supra* note 21, at 287–88.

<sup>114</sup> See *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); see also *supra* Part I.B.

<sup>115</sup> See *infra* Part II.B.1.

<sup>116</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 815–19 (1982).

<sup>117</sup> *Gomez v. Toledo*, 446 U.S. 635, 641 (1980).

<sup>118</sup> See *infra* Part II.B.1.

A recent decision pointedly emphasizing rule-of-law values and the importance of distinguishing between affirmative defenses and elements of the claim also strongly suggests that the Court is not poised to do away with the traditional law of pleading burdens outside of the qualified immunity context. In *Jones v. Bock*,<sup>119</sup> Chief Justice Roberts concluded on behalf of a unanimous Court that the failure of an inmate to exhaust prison grievance procedures before filing a civil rights lawsuit, as required by the federal Prison Litigation Reform Act,<sup>120</sup> is an affirmative defense to be pleaded and proved by the defendant.<sup>121</sup> Having so interpreted the statute, *Jones* went on to hold that “inmates are not required to specially plead or demonstrate exhaustion in their complaints.”<sup>122</sup>

Notably, this clear and unanimous opinion was rendered in a context where, it is fair to say, the Court is not particularly enthused about encouraging the type of lawsuit in question.<sup>123</sup> Furthermore—and this seems crucial—the Court explicitly reaffirmed the principle that Rule 12(b)(6) dismissals premised on affirmative defenses are appropriate *only* when the allegations of the complaint establish the defense’s applicability.<sup>124</sup> The Court also strongly reemphasized that “courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns.”<sup>125</sup> And, at the same time, the Court endorsed the continued vitality of three of its recent and unanimous holdings that generally prohibit courts from tinkering with the notice-pleading regime authorized by the Federal Rules.<sup>126</sup>

In sum, the issue-framing statements in *Iqbal* and *al-Kidd* were almost certainly not a first step towards a revolution in the pleading of affirmative defenses.<sup>127</sup> Tellingly, the federal defense bar has not understood the statements in this way. Outside of the qualified immunity context, my research has not uncovered a single reported instance in which a federal court has addressed an *Iqbal*- or *al-Kidd*-based argument for dismissal under Rule 12(b)(6) for failure to plead facts tending to establish the inapplicability of an affirmative defense. For all of these reasons, *Iqbal*’s and *al-Kidd*’s issue-framing statements should be construed to mean only that plaintiffs in individual-capacity

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<sup>119</sup> 549 U.S. 199 (2007).

<sup>120</sup> 42 U.S.C. § 1997e(a) (2006).

<sup>121</sup> See *Jones*, 549 U.S. at 216.

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

<sup>123</sup> See *id.* at 203 (stating that “[p]risoner litigation continues ‘to account for an outsized share of filings’ in federal district courts”) (quoting *Woodford v. Ngo*, 548 U.S. 81, 94 n.4 (2006)); see also *id.* (“Most of these cases have no merit; many are frivolous.”).

<sup>124</sup> See *id.* at 214–15 (citing 5B WRIGHT & MILLER, *supra* note 7, § 1357).

<sup>125</sup> *Id.* at 212.

<sup>126</sup> See *id.* at 213–14 (expressing renewed support for *Hill v. McDonough*, *Swierkiewicz v. Sorema N.A.*, and *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*). See cases cited *supra* note 20.

<sup>127</sup> Recall that the issue-framing statements in *Iqbal* were necessary to establish the Court’s appellate jurisdiction; indeed, the Court may well have included them only for this more modest purpose. See *supra* Part I.A.; see also *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1946 (2009).

actions must anticipate a defendant's qualified immunity defense and plead facts sufficient to establish its inapplicability.

### *E. Where Matters Now Stand*

Of course, even if the issue-framing statements in *Iqbal* and *al-Kidd* should not be understood to have implications for affirmative defenses other than qualified immunity, a couple of substantial questions remain. The smaller, form-over-substance question is whether courts should take these cases at face value and require plaintiffs to plead *in their complaints* facts establishing the inapplicability of qualified immunity, or whether courts should follow the lead of *Crawford-El* and *Schultea* and use Rule 7(a)(7) or Rule 12(e) to bring matters to a head prior to allowing discovery.<sup>128</sup> On this question, I have nothing further to say other than that, if the Court is going to simply impose a heightened pleading standard on individual-capacity claims, it might as well be efficient about it and require that the plaintiff put the necessary facts in the complaint.<sup>129</sup>

The larger question is how the Court's application of a heightened-pleading requirement to individual-capacity actions can be reconciled with the principle that courts ought not depart from usual federal practice or rewrite the Federal Rules for public policy reasons.<sup>130</sup> Justice Kennedy's opinion concurring in the judgment in *Siebert v. Gilley*,<sup>131</sup> which calls for the imposition of a heightened-pleading requirement to claims subject to the qualified immunity defense, suggests that the answer may be found in the substance-procedure distinction: where there is a conflict between a federal rule and a substantive legal entitlement such as the entitlement to avoid disruptive discovery that inheres in qualified immunity, "[t]he substantive defense of immunity controls."<sup>132</sup> Yet, as Judge Higginbotham explained for the en banc Fifth Circuit in *Schultea*, the argument that "the substantive right of qualified immunity supplants the Federal Rules's scheme of pleading by short and plain statement," although "powerful," is also "problematic."<sup>133</sup> For "[a]ll federal rules of court enjoy presumptive validity. Indeed, to date the Supreme Court 'has never squarely held a provision of the civil rules to be invalid on its face or as applied.'"<sup>134</sup>

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<sup>128</sup> See *supra* notes 81–95 and accompanying text.

<sup>129</sup> If the Court contemplates such a regime, it ought to emphasize that courts should freely grant leave to amend defective complaints to plaintiffs to supply facts tending to show a violation of clearly established law. See FED. R. CIV. P. 15(a)(2).

<sup>130</sup> See *Jones v. Bock*, 549 U.S. 199, 212–13 (2007); *Hill v. McDonough*, 547 U.S. 573, 582 (2006); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002); *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

<sup>131</sup> 500 U.S. 226, 235 (1991) (Kennedy, J., concurring in the judgment).

<sup>132</sup> *Id.*

<sup>133</sup> *Schultea v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995) (en banc).

<sup>134</sup> *Id.* (quoting *Exxon Corp. v. Burglin*, 42 F.3d 948, 951 (5th Cir. 1995) (citations omitted)).

In Part II of this Article, I seek to demonstrate how the Court can achieve its purposes without either ignoring traditional pleading principles or resorting to the dramatic and dubious step of declaring the federal notice pleading rules unconstitutional as applied to individual-capacity claims. As I shall explain, a straightforward and entirely legitimate reallocation of pleading burdens would do the trick if the Supreme Court were to make use of the insight that individual-capacity actions are not truly “constitutional.” I turn now to that argument.

## II. A PROPOSED SOLUTION: “DE-CONSTITUTIONALIZING” INDIVIDUAL-CAPACITY CLAIMS AND REALLOCATING TO THE PLAINTIFF THE BURDEN OF PLEADING A VIOLATION OF “CLEARLY ESTABLISHED LAW” AS AN ELEMENT OF ANY INDIVIDUAL-CAPACITY CLAIM

### *A. Scope of the Argument*

At the outset, I wish to be clear about the scope of my argument. In this Article, I do not defend on historical, instrumental, or any other grounds the pleading regime that the Supreme Court has imposed on those asserting individual-capacity claims. Nor do I defend the correctness of the Court’s previous readings of the text of § 1983, or the more general doctrinal regime that the Court has constructed to govern constitutional tort law. Rather, I proceed from the premise that these readings and regimes will be with us for the foreseeable future and seek to harmonize my proposal with the precedent that the Court is apparently intent on following.<sup>135</sup> My goal is to explain how the Court could achieve its apparent purposes without either doing violence to the Federal Rules or declaring them unconstitutional insofar as they are applied in lawsuits raising qualified immunity issues. The Court would do a great service if it were to undertake a reform that eliminated the doctrinal incoherence that presently pervades this important area of federal litigation.

### *B. The Argument*

The point of departure for this Article was the incongruity between the Court’s indications in *Gomez* and elsewhere that qualified immunity is an affirmative defense,

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<sup>135</sup> See *L.A. Cnty. v. Humphries*, 131 S. Ct. 447, 449 (2010) (relying on prior statutory readings to unanimously hold that a plaintiff may not successfully sue a municipality for prospective relief under § 1983 without showing an unlawful custom or policy); cf. *Crawford-El*, 523 U.S. at 611–12 (Scalia, J., dissenting) (suggesting that the Court’s interpretations of § 1983 have been so at odds with the statute’s text, history, and purposes that the present Court should take a “legislative” rather than interpretive approach to the statute unless it is willing to scrap all of its precedents). Of course, if a majority of the Court were to follow Justice Scalia’s lead and acknowledge that its § 1983 jurisprudence is in fact legislative and not interpretive, the Court could simply adopt the proposed reform without concern for harmonizing its prior cases parsing the statute’s text. But *Humphries* suggests that a majority of the Court is not prepared to do this.

and the several suggestions in *Iqbal* and *al-Kidd* that a failure to plead facts negating qualified immunity justifies a pre-discovery Rule 12(b)(6) dismissal.<sup>136</sup> In Part I, I posited that the Court meant what it said in *Iqbal* and *al-Kidd*, but only with respect to individual-capacity actions subject to qualified immunity.<sup>137</sup> If I am correct, the Court must find a way to reconcile its de facto imposition of a heightened pleading requirement on individual-capacity claims with its repeated holdings that courts should not rewrite the Federal Rules for policy reasons.

As noted above, one way to do so was suggested by Justice Kennedy in his opinion concurring in the judgment in *Siegert*: the Court could hold the Federal Rules unconstitutional as applied to individual-capacity claims.<sup>138</sup> Yet, as the en banc Fifth Circuit pointed out in *Schultea*, this would be a problematic and unprecedented holding.<sup>139</sup> For this reason, the Fifth Circuit directed district courts to enforce a three-part pleading scheme, whereby a plaintiff who failed to establish the inapplicability of qualified immunity in the complaint would be required to file a Rule 7(a)(7) reply making the required showing.<sup>140</sup> Yet, the “*Schultea* reply” really does not avoid the problem. A Rule 7(a)(7) reply is a pleading; therefore, under *Schultea*, a plaintiff pressing an individual-capacity claim still must satisfy a heightened pleading requirement that is not imposed by the Federal Rules.<sup>141</sup> The plaintiff simply gets two chances to make the grade.

Before mandating the *Schultea* reply, the Fifth Circuit considered a more straightforward solution to the problem: reallocating the pleading burdens in individual-capacity claims and requiring the plaintiff to plead *as an element of the claim* facts tending to establish the inapplicability of qualified immunity.<sup>142</sup> But, the court rejected this possibility on grounds of vertical stare decisis; *Siegert* (decided only four years earlier) had reaffirmed *Gomez*, so *Gomez* was binding on the federal courts of appeals.<sup>143</sup> Obviously, however, the Supreme Court itself would not be precluded from abrogating *Gomez* and holding that a plaintiff pressing an individual-capacity claim under *Bivens* or § 1983 must plead facts tending to establish a violation of clearly established law as an element of the claim.

A doctrinal reform of this sort—which would render the qualified immunity defense conceptually unnecessary—is attractive because of the functional and rule-of-law values it would serve. If nothing else, requiring an individual-capacity plaintiff

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<sup>136</sup> See *supra* notes 1–17 and accompanying text.

<sup>137</sup> See *supra* Part I.C–D.

<sup>138</sup> See *Siegert v. Gilley*, 500 U.S. 163, 235–36 (1993) (Kennedy, J., concurring in the judgment); see also *supra* notes 131–32 and accompanying text.

<sup>139</sup> See *Schultea v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995) (en banc).

<sup>140</sup> See *id.* at 1433–34.

<sup>141</sup> See *supra* notes 104–07 and accompanying text.

<sup>142</sup> See *Schultea*, 47 F.3d at 1433 (mentioning the possibility of treating the negation of qualified immunity as an element of the claim).

<sup>143</sup> See *id.* (“Nor will it do to insist that avoiding qualified immunity is an element of a claim. As *Siegert* made plain, *Gomez* is alive and well.”).



to plead facts tending to show a violation of clearly established law would truncate and simplify the pleading of individual capacity claims (at least vis-à-vis the three-step process suggested in *Crawford-El* and required in *Schultea*),<sup>144</sup> and would resolve the inconsistency between the Court's de facto imposition of a heightened pleading requirement on those pressing claims subject to qualified immunity and its many admonitions that courts refrain from rewriting the rules of federal pleading. Both accomplishments would be of great practical significance to the judges and lawyers who must regularly deal with the commonly litigated qualified immunity doctrine. Why, then, shouldn't the Court adopt the proposed reform? Why would it hesitate?

A survey of the Court's qualified immunity opinions and the voluminous academic literature on the subject suggests three potential sources of objection. First, the proposal obviously conflicts with *Gomez* (as reaffirmed post-*Harlow* in *Siegert* and *Crawford-El*), which held that qualified immunity is an affirmative defense that need not be anticipated in the complaint.<sup>145</sup> Second, the proposal is in tension with the way *Bivens* and § 1983 presently are conceptualized and interpreted—i.e., as purely remedial vehicles that merely channel substantive rights created elsewhere, usually in the Constitution.<sup>146</sup> Finally, the proposal will raise justifiable concern that “de-constitutionalizing” individual-capacity actions ultimately would be self-defeating because it would impede the very “clear establishment” of constitutional law that is a prerequisite to individual-capacity liability under *Bivens* and § 1983.<sup>147</sup> I turn now to each potential objection.

### 1. *Gomez* and Stare Decisis

Recall that, in *Gomez*, the Supreme Court held that there is “no basis for imposing on the plaintiff [in an individual-capacity action] an obligation to anticipate [a qualified immunity] defense . . . in his complaint . . . .”<sup>148</sup> Clearly, *Gomez* would no longer be good law if the Court were to require individual-capacity plaintiffs to state facts tending to show a violation of clearly established law. In fact, because this is precisely what the Court indicated that plaintiffs must do in *Iqbal* and *al-Kidd*, *Gomez* is no longer good law if the Court meant what is suggested by their issue-framing statements: the pleading of facts tending to show a violation of clearly established law is necessary if an individual-capacity plaintiff is to successfully oppose a Rule 12(b)(6) motion to dismiss premised on qualified immunity.<sup>149</sup>

In any event, considerations of horizontal stare decisis do not militate in favor of having the Court continue to follow *Gomez*. In *Gomez*, the Court provided two reasons

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<sup>144</sup> See *Crawford-El v. Britton*, 523 U.S. 574, 598–99 (1998); *Schultea*, 47 F.3d at 1433–34.

<sup>145</sup> See *supra* note 83 (explaining why the Court's post-*Harlow* reaffirmations of *Gomez* in *Siegert* and *Crawford-El* are significant).

<sup>146</sup> See *infra* Part III.B.2.

<sup>147</sup> See *infra* Part III.B.3.

<sup>148</sup> *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

<sup>149</sup> See *supra* Parts I.A–C.

for treating qualified immunity as an affirmative defense to be pleaded by the defendant.<sup>150</sup> The first was that the text of § 1983 did not support holding that the inapplicability of the doctrine is an element of the plaintiff's claim.<sup>151</sup> I will rebut this argument in the next subsection of this paper.<sup>152</sup> The second was fairness; at the time *Gomez* was decided, qualified immunity required both an objective showing (i.e., that there existed objectively reasonable grounds for the defendant to conclude that the challenged action was lawful "at the time and in light of all the circumstances")<sup>153</sup> and a subjective showing (i.e., that the defendant in "good faith" acted "sincerely and with a belief that he is doing right").<sup>154</sup> It was the *subjective* component of qualified immunity that, according to the Court, supported allocating the burden of pleading to the defendant:

There may be no way for a plaintiff to know in advance whether the official has such a belief or, indeed, whether he will even claim that he does. The existence of a subjective belief will frequently turn on factors which a plaintiff cannot reasonably be expected to know. For example, the official's belief may be based on state or local law, advice of counsel, administrative practice, or some other factor of which the official alone is aware. To impose the pleading burden on the plaintiff would ignore this elementary fact and be contrary to the established practice in analogous areas of the law.<sup>155</sup>

Two years after the Court decided *Gomez*, it issued *Harlow*.<sup>156</sup> *Harlow* transformed qualified immunity from a doctrine containing both objective and subjective components to a doctrine requiring a wholly objective inquiry into whether the defendant's conduct was reasonable in light of clearly established law.<sup>157</sup> This transformation undermined the policy reason identified in *Gomez* for treating qualified immunity as an

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<sup>150</sup> *Gomez* involved an individual-capacity action brought pursuant to § 1983 against the Superintendent of Police of the Commonwealth of Puerto Rico. See 446 U.S. at 636. As the Court noted, Puerto Rico is treated as a state for purposes of § 1983. See *id.* at 640 n.7.

<sup>151</sup> See *id.* at 640 ("By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.").

<sup>152</sup> See *infra* Part III.B.2.

<sup>153</sup> 446 U.S. at 641 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 247–48 (1974)).

<sup>154</sup> *Id.* (quoting *Wood v. Strickland*, 420 U.S. 308, 321 (1975)) (internal quotation marks omitted).

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

<sup>156</sup> *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

<sup>157</sup> See 457 U.S. at 814–18; see also *supra* note 116 and accompanying text. *Harlow* justified its doctrinal reformation by emphasizing a need for deciding the defendant's entitlement to qualified immunity as early as possible in the litigation in order to avoid the costs of having so many claims involving immunity issues proceed to trial. See 457 U.S. at 814–16. The Court also expressed a desire to shield officials entitled to immunity from the burdens of costly discovery. See *id.* at 817–18.

affirmative defense.<sup>158</sup> And with the disappearance of the principal premise of *Gomez*'s holding has gone any basis for continuing to follow *Gomez*.<sup>159</sup> Put in the terms of the Court's now well-known framework for considering whether *stare decisis* calls for continuing to follow a questionable precedent, the *Gomez* ruling constitutes a "remnant of abandoned doctrine";<sup>160</sup> a ruling that lacks "workability" in view of the Court's intervening decision to promote the resolution of immunity issues on the pleadings;<sup>161</sup> and a ruling that should not be seen to have engendered significant reliance interests in view of the Court's contradictory statements in *Mitchell*, *Iqbal*, and *al-Kidd*.<sup>162</sup> For all of these reasons, the Court should not hesitate to confirm that *Mitchell*, *Iqbal*, and *al-Kidd*, rather than *Gomez*, supply the proper framework for pleading individual-capacity claims, and clarify that *Harlow* has effectively abrogated *Gomez*.

## 2. Conceptual and Interpretive Barriers

A more formidable obstacle to the proposed reform is presented by the way the Court has conceptualized and interpreted the individual-capacity claim authorized by *Bivens* and § 1983. Repeatedly, the Court has indicated that *Bivens* and § 1983 do not create substantive rights; rather, they merely borrow substantive rights created elsewhere and authorize remedies against defendants who have "violated" these rights.<sup>163</sup> Moreover, in the context of an individual-capacity claim, the Court has stated that, by § 1983's plain terms,

two—and only two—allegations are required in order to state a cause of action under [the] statute. First, the plaintiff must allege

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<sup>158</sup> See *supra* notes 117–18 and accompanying text; see also Greabe, *supra* note 25, at 207 n.92.

<sup>159</sup> By this statement, I do not intend to deny the possibility that there exist persuasive policy reasons other than those the Court thus far has identified for maintaining qualified immunity as an affirmative defense. Again, my argument proceeds from the assumption that the Court is committed to the extant doctrinal regime and the balance that it strikes. See *supra* text accompanying note 135.

<sup>160</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 855 (1992).

<sup>161</sup> *Id.* at 854.

<sup>162</sup> See *id.* at 854–55.

<sup>163</sup> For statements to this effect in the *Bivens* context, see *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (describing *Bivens* as a "freestanding" mechanism for obtaining a "damages remedy for a claimed constitutional violation"); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66–70 (2001) (emphasizing the limited remedial purpose of the *Bivens* doctrine). For statements to this effect in the § 1983 context, see *Gonzaga Univ. v. Doe*, 536 U.S. 273, 279 (2002) (indicating that § 1983 merely creates remedies for federal rights created elsewhere); *Albright v. Oliver*, 510 U.S. 266, 271 (1994), *reh'g denied*, 510 U.S. 1215 (1994); *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985) (Rehnquist, J., plurality opinion), *reh'g denied*, 473 U.S. 925 (1979); *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979); *Chapman v. Hous. Welfare Rights Org.*, 441 U.S. 600, 617 (1979) ("[O]ne cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything[.]").

that some person deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of . . . law<sup>164</sup>

Thus, the rights that *Bivens* and § 1983 are thought to put into controversy in an individual-capacity claim as a prima facie matter—i.e., before the scaling-back qualified immunity doctrine enters the picture as a defense under current law—are treated as identical to, or at the very least coextensive with, the constitutional rights that usually serve as their referents. Obviously, then, individual-capacity claims under *Bivens* and § 1983 would have to be reconceived and “de-constitutionalized” if the Court were to hold that an allegation that the defendant violated *clearly established* law is the central element of an individual-capacity claim.

Such a conceptual and doctrinal reform is long overdue. The Court’s many indications that *Bivens* and § 1983 are non-substantive, solely remedial mechanisms for directly enforcing constitutional rights defy the reality of the individual-capacity action. In such an action, the plaintiff seeks to recover damages from an individual, human defendant—a jural entity that is *entirely distinct* from the government whose power the defendant is alleged to have unlawfully exercised.<sup>165</sup> Yet, outside of extremely unusual situations involving the Thirteenth Amendment, an individual, human defendant is not intrinsically *capable* of violating the Constitution in her own name.<sup>166</sup> Only

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<sup>164</sup> *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (citations omitted).

<sup>165</sup> See Greabe, *supra* note 25, at 193–95. It is precisely the fact that the plaintiff is suing an individual—and *not* the government—that permits the Court to avoid the difficult immunity issues that are raised by suits for damages against public entities. See *supra* note 37 and accompanying text.

<sup>166</sup> The so-called “state action” cases do not hold that a private person in his or her capacity as a private person can sometimes violate the Constitution; they hold only that “conduct that might initially be thought to fall beyond the Constitution’s regulatory compass because it was undertaken by persons who are not government employees is *nonetheless treated as state action attributable to the government.*” Greabe, *supra* note 25, at 194 n.26 (citing ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 474–518 (2d ed. 2005); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 18-1, at 1688–91 (2d ed. 1988)). Similarly, the cases holding that the Constitution reaches even the unauthorized conduct of individuals exercising government power, *see, e.g.*, *Home Telephone & Telegraph Company v. City of Los Angeles*, 227 U.S. 278, 286–87 (1913) (recognizing that the Fourteenth Amendment applies to unauthorized conduct by persons who are repositories of state power and not merely to acts that the state formally has ratified by judicial judgment), and the cases insulating government agencies from liability for the unauthorized conduct of their agents, *see, e.g.*, *L.A. Cnty. v. Humphries*, 131 S. Ct. 447, 451–52 (2010) (noting that municipalities are subject to liability for prospective relief only when their agents have violated the Constitution pursuant to municipal custom or policy); *Monell v. Department of Social Services*, 436 U.S. 658, 690–95 (1978) (noting that municipalities are subject to monetary liability only when their agents have violated the Constitution pursuant to municipal custom or policy), do not suggest that there is an absence of government *action* whenever the plaintiff is harmed by the unauthorized conduct of a government agent. See *Home Tel. & Tel. Co.*, 227 U.S. at 286–87 (describing the

*the government*, whose power the individual concomitantly exercises when acting under color of law, has the inherent capacity to violate the Constitution.<sup>167</sup> Thus, an individual-capacity claim under *Bivens* or § 1983 is necessarily substantive; it is *not* a mechanism for directly enforcing the Constitution. A natural person held liable under *Bivens* or § 1983 for what the Supreme Court sometimes loosely terms a “constitutional violation”<sup>168</sup> has not personally “violated” the Constitution. Individual-capacity liability depends upon the fact that the defendant has breached either the federal common law duty recognized in *Bivens* or the federal statutory duty created by § 1983—duties whose substantive reach are defined by reference to the Constitution, but which themselves exist only because they are created and imposed against individuals by federal common law and a federal statute.<sup>169</sup> Put another way, there would be no legal vehicle for bringing a constitutional tort claim against a person *in an individual capacity* without *Bivens* or § 1983. The Constitution is also not a tort statute that authorizes lawsuits against individuals.<sup>170</sup>

The language of § 1983 also should not stand as an obstacle to making an allegation that the defendant violated clearly established law an element of an individual-capacity claim.<sup>171</sup> *Gomez* was insufficiently attentive to the statutory text when it suggested that an individual-capacity claim under § 1983 requires only that the plaintiff allege that the defendant “has deprived him of a federal right.”<sup>172</sup> *Gomez* overlooked the fact that the language of the statute contemplates liability for *two* categories of “person”: one who directly “subjects” the plaintiff to a constitutional deprivation, and

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unauthorized conduct of a government employee as an “exercise by a state of power”). Rather, these cases merely involve instances where the misuse of government *power* does not give rise to government *liability*.

<sup>167</sup> See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 18-1, at 1688 (2d ed. 1988) (“Nearly all of the Constitution’s self-executing, and therefore judicially enforceable, guarantees of individual rights shield individuals only from government action.”); *id.* at 1688 n.1 (recognizing that only “[t]he thirteenth amendment’s prohibitions of slavery encompass both governmental and private action”) (citing *The Civil Rights Cases*, 109 U.S. 3, 20 (1883)); see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991); *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 191 (1988); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978); *The Civil Rights Cases*, 109 U.S. at 13–14.

<sup>168</sup> See, e.g., *Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006) (“*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.”) (quoting *Carlson v. Green*, 446 U.S. 14, 18 (1980) (internal quotation marks omitted)); *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997) (“Section 1983 is a codification of § 1 of the Civil Rights Act of 1871. The text of the statute purports to create a damages remedy against every state official for the violation of any person’s federal constitutional or statutory rights.”) (footnotes omitted).

<sup>169</sup> See *supra* notes 1–2.

<sup>170</sup> See Greabe, *supra* note 25, at 195.

<sup>171</sup> I focus here only on § 1983 because there is no textual barrier to the Court reallocating the pleading burdens under *Bivens*, which is widely recognized to be a creature of federal common law. See *supra* note 2 and accompanying text.

<sup>172</sup> *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

another who indirectly “causes” the plaintiff “to be subjected . . . to” such a deprivation.<sup>173</sup> Because the statutory term “person” encompasses both government entities and non-government entities,<sup>174</sup> and typically only government entities can themselves violate the Constitution, it makes sense to read § 1983’s “subjects” clause to apply *only* to government defendants who directly inflict constitutional harm, and to regard the natural persons who are intrinsically incapable of violating the Constitution, but who nonetheless face individual-capacity liability under the statute, to fall under its “causes to be subjected . . . to” clause.<sup>175</sup> Thus, what *Gomez* should have said is that, in an individual-capacity damages action, the plaintiff must allege that the defendant *caused* him to suffer a deprivation of a federal right while acting under color of state law.<sup>176</sup> The question would then become: what must a plaintiff plead and prove in an individual-capacity claim in order to establish unlawful *causation*?

If one accepts this reading of § 1983, extant Court precedent easily permits reallocating to the plaintiff, the burden of pleading that the defendant violated clearly established law. The Court has rejected arguments for reading strict liability into § 1983’s “causes to be subjected to” language and instead imposed on plaintiffs seeking to show statutorily proscribed “causation” a required showing of fault.<sup>177</sup> In *Monell* and its plurality opinion in *Tuttle*, the Court held, and then reiterated, that a municipality’s simple act of delegating power to an agent who, in an official capacity, directly subjects another to a constitutional deprivation is insufficient to ground municipal liability under § 1983’s “causation” clause.<sup>178</sup> Instead, the plaintiff needs to establish *blameworthy*

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<sup>173</sup> See 42 U.S.C. § 1983 (2006).

<sup>174</sup> See *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 n.10 (1989) (noting that state officials sued in their “official” capacities for injunctive relief are “persons” subject to suit under § 1983); *supra* note 37 and accompanying text (noting that individuals are “persons” frequently targeted for suit under § 1983).

<sup>175</sup> Notably, the Court previously has assumed § 1983’s “causes to be subjected . . . to” clause applies to individual-capacity damages claims asserted against individuals *qua* individuals. See *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). For a summary of the truly crazy set of doctrines governing who and what can be sued under § 1983, and the capacity in which they can be sued, see Greabe, *supra* note 25, at 202–03. For an argument that synthesizes and reconciles the language of § 1983 with the liability boundaries and remedy limitations that the Court has read into § 1983, see *id.* at 209–12.

<sup>176</sup> To complicate matters further, it is not only natural persons who fall within § 1983’s “causes to be subjected . . . to” language. According to the Court, a municipality is also a “person” who can be liable under § 1983’s “causes to be subjected . . . to” clause (even though the state of which it is a subdivision cannot) if it promulgates an unconstitutional custom or policy and then confers power on one of its agents who, in an official capacity, directly “subjects” the plaintiff to a constitutional deprivation pursuant to that custom or policy. See *Oklahoma City v. Tuttle*, 471 U.S. 808, 816–18 (1985) (Rehnquist, J., plurality opinion); see also *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690–91 (1978).

<sup>177</sup> See *infra* note 179 and accompanying text.

<sup>178</sup> See *Monell*, 436 U.S. at 691 (rejecting municipal respondeat superior liability); *Tuttle*, 471 U.S. at 816–18 (Rehnquist, J., plurality opinion).

conduct on the city's part—the adoption of an unconstitutional custom or policy pursuant to which a municipal agent subjects the plaintiff to a constitutional deprivation—in order to establish statutory “causation.”<sup>179</sup> Unauthorized conduct by a municipal agent will not yield municipal liability.<sup>180</sup>

Extending this line of reasoning to individual-capacity claims would have the effect of merging what is presently the qualified immunity doctrine into the statutory term “causes.” The precise purpose of the qualified immunity doctrine is to insulate from liability those who have not acted in a blameworthy manner in light of clearly established law.<sup>181</sup> The doctrine protects those who have acted without fault—i.e., in an objectively reasonable manner—in exercising government power.<sup>182</sup> The Court could greatly simplify the law governing individual-capacity claims—and reconcile with ordinary pleading principles the pleading standard that it appears to have adopted in *Iqbal* and *al-Kidd*—if it did away with the qualified immunity doctrine and held that § 1983 “causation” requires a plaintiff suing a defendant in his or her individual capacity to plead and prove that the defendant acted in an objectively unreasonable manner by participating in a violation of clearly established constitutional law.<sup>183</sup>

A reform of this sort would do more than serve the functional and rule-of-law values previously mentioned; it also would take far better account of the reality underlying the litigation of individual-capacity claims than does the present assumption

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<sup>179</sup> See *Monell*, 436 U.S. at 694–95; *Tuttle*, 471 U.S. at 816–18 (Rehnquist, J., plurality opinion). For an interesting recent argument that this construction of the statutory term “causes” is sub-optimal in the context of nominally “private” conduct regulable under § 1983 pursuant to the state-action doctrine, see Richard Frankel, *Regulating Privatized Government through § 1983*, 76 U. CHI. L. REV. 1449, 1457 (2009). Be that as it may, one presently cannot be said to have “caused” another to suffer a deprivation of rights that is remediable under § 1983 without having acted in a blameworthy manner.

<sup>180</sup> See *supra* note 178 and accompanying text.

<sup>181</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (noting that qualified immunity shields those who act in an objectively reasonable manner from liability).

<sup>182</sup> See Greabe, *supra* note 25, at 211 (arguing that the objectively unreasonable conduct that must be demonstrated in order to overcome an assertion of qualified immunity under present law serves as an excellent proxy for the showing of fault necessary to establishing § 1983 “causation”).

<sup>183</sup> The proposed reform need not call into doubt the rule that presently permits an immediate appeal of a law-based denial of a dismissal motion predicated on qualified immunity. See *supra* notes 55–60 and accompanying text. The entitlement not to face suit presently serves as both the justification for the entitlement to an immediate appeal, see *supra* notes 55–60 and accompanying text, and as the driving force behind the Court's creation of the affirmative defense itself, see *supra* notes 75–79 and accompanying text, would not disappear; it simply would become part of the reason for reading individual-capacity liability under *Bivens* and § 1983 to extend only to violations of “clearly established” law as a *prima facie* matter. Because the entitlement would still be lost in the event of an erroneous denial of a pretrial motion attacking the plaintiff's case theory as a legal matter, such a denial would still constitute a collateral order subject to immediate appeal under *Mitchell* and its progeny.

that such claims are fully “constitutional.” In litigation in which a party seeks to enforce rights derived directly from the Constitution—e.g., cases in which the target of a government enforcement action defends on constitutional grounds, habeas corpus claims, takings claims, constitutional claims for injunctive relief against government agencies or agents acting in their official capacities—the government is a formal party and is typically represented by a government attorney. Thus, while constitutional rulings are usually a measure of last resort even in prototypical constitutional litigation,<sup>184</sup> courts typically issue such rulings only after receiving briefing and argument from a lawyer who represents the government entity whose conduct is challenged, owes the court the advocacy duties that accompany representation of a sovereign entity, and is paid a salary with public funds.<sup>185</sup>

Individual-capacity claims are fundamentally different: the government is not a formal party to such claims; they are not a necessary component of our constitutional order;<sup>186</sup> and insurance defense attorneys, who are not bound by the advocacy duties incumbent on a government attorney, frequently defend them.<sup>187</sup> Therefore, if one accepts

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<sup>184</sup> See, e.g., *Three Affiliated Tribes v. Wold Eng’g*, 467 U.S. 138, 157 (1984) (noting that courts ought not decide constitutional questions “in advance of the necessity of deciding them”); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (providing a famous exegesis of how and why federal courts should exercise the passive virtues and avoid unnecessary constitutional rulings), *reh’g denied*, 297 U.S. 728.

<sup>185</sup> See *Berger v. United States*, 295 U.S. 78, 88 (1935) (observing that a government attorney is a “servant of the law” and “the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all”).

<sup>186</sup> See, e.g., Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of Monroe v. Pape*, 78 UMKCL. REV. 889, 891, 908 (2010) (acknowledging that the Constitution, at least as originally conceived, is not necessarily a source of affirmative remedial power, and that individual-capacity claims are not constitutionally mandated); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 88 (1999) (suggesting that “the only constitutionally mandatory, as distinct from normatively desirable, remedial scheme is the right of a target of government prosecution or enforcement to defend against that action on the ground that it violates the superior law of the Constitution”).

<sup>187</sup> State agencies and municipalities commonly take out private insurance policies that obligate the insurer to defend and indemnify state and municipal employees against individual-capacity claims. See Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 158 n.75 (2010); Greabe, *supra* note 25, at 193–94 n.23; Jeffries, *supra* note 186, at 92–93; see also John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49–50 (1998). The federal government, by contrast, typically provides a government attorney to defend an individual-capacity claim brought under *Bivens* against a federal employee. See 28 C.F.R. § 50.15(a) (2010). But, the federal employee sued in an individual capacity is informed of his or her right to hire private counsel and that any government attorney provided “will not assert any legal position or defense . . . which is deemed not to be in the interest of the United States.” *Id.* at § 50.15(a)(8). Moreover, if a government attorney representing a federal employee against an individual-capacity claim under *Bivens* concludes that the represented party is entitled to have an argument presented on his or



the premise that a court ought to hear the views of the affected government entity before passing on the constitutionality of that entity's conduct, cases involving individual-capacity claims and no claim against a public entity frequently provide a less favorable context for the establishment or elaboration of constitutional meaning than do the prototypically "constitutional" cases of the sort listed in the preceding paragraph.

Finally, the proposed reform would protect individual-capacity defendants and their indemnifiers<sup>188</sup> from the possibility of being held responsible for the pleading blunders of their frequently private lawyers. As matters presently stand, qualified immunity is an affirmative defense that may be considered waived if it is not pleaded as such in the answer.<sup>189</sup> By contrast, failure to plead and establish an element of the claim—and therefore, to state a claim upon which relief can be granted—is a defense that need not be raised in a Rule 12(b)(6) motion or answer; it can be raised for the first time, as late as, at trial.<sup>190</sup> Given the Court's emphasis on the need to avoid overly deterring those performing public functions,<sup>191</sup> it seems more appropriate and consistent with recent legal developments to treat the entitlement to avoid trial, and the burdens of trial, which the Court says are the essence of qualified immunity,<sup>192</sup> as an entitlement that is not easily lost by a lawyer's misstep at the pleading stage.

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her behalf that is contrary to the interests of the United States, representation can, at that point, be farmed out to a private attorney whose fees and expenses will be paid by the government. *See id.* at §§ 50.15(a)(11)(ii–iii), 50.16(a).

To provide a rough sense of the frequency with which courts must rule on individual-capacity claims without the benefit of assistance from a government attorney, consider that, from 2005 to 2009, a government attorney filed an appearance in only 125 out of 213 § 1983 cases litigated in the United States Court of Appeals for the First Circuit (the Circuit within which I teach and practice), and in only 133 out of 370 § 1983 cases litigated in the United States District Court for the District of New Hampshire (the District within which I teach and practice). The cases in which no government attorney filed an appearance typically were either pro se prisoner complaints weeded out without process being served pursuant to the Prison Litigation Reform Act, see *supra* notes 119–22 and accompanying text, or were individual-capacity claims defended by private attorneys.

<sup>188</sup> Again, government employers commonly indemnify their employees against individual-capacity liability, often through insurance. *See supra* note 187 and accompanying text. Of course, even where there is insurance, the costs of indemnification are still ultimately borne by the public fisc, which funds the premiums paid to insure against individual-capacity claims.

<sup>189</sup> *See* FED. R. CIV. P. 8(c)(1) (“In responding to a pleading, a party *must* affirmatively state any avoidance or affirmative defense . . . .”) (emphasis added); *see also, e.g.,* *McCardle v. Haddad*, 131 F.3d 43, 50–52 (2d Cir. 1997) (affirming trial court's conclusion that the defendant had waived his qualified immunity defense by failing to raise it properly); *Maul v. Constan*, 928 F.2d 784, 785–87 (7th Cir. 1991) (similar); *Moore v. Morgan*, 922 F.2d 1553, 1557–58 (11th Cir. 1991) (similar).

<sup>190</sup> *See* FED. R. CIV. P. 12(h)(2) (“Failure to state a claim upon which relief can be granted . . . may be raised: (A) in any pleading allowed or ordered under Rule 7(a); (B) by a motion under Rule 12(c); or (C) at trial.”).

<sup>191</sup> *See supra* note 21 and accompanying text.

<sup>192</sup> *See supra* notes 74–79 and accompanying text.

### 3. The Problem of “Law Freezing”

Thus far, I have discussed two backward-looking obstacles—*stare decisis* (in particular, *Gomez*) and, more generally, the way individual-capacity actions under *Bivens* and § 1983 are conceptualized—that the Court would face were it to require plaintiffs to plead and prove that the defendant violated clearly established law as an element of an individual-capacity claim. The third and final obstacle I shall discuss is forward-looking: a reform that so re-conceives the nature of individual-capacity actions might well increase the frequency with which courts will bypass the imbedded constitutional question and decide only whether the right on which the plaintiff relies is “clearly established.”<sup>193</sup> An increased use of this constitutional avoidance technique would raise renewed concerns among some about unwelcome “law freezing”—i.e., that courts will fail to establish what the Constitution requires under the circumstances pleaded and thus invite repeated constitutional violations without accountability.<sup>194</sup>

I say “renewed” concerns because, in *Saucier v. Katz*, the Supreme Court sought to address the law freezing problem by requiring that courts *always* first address the constitutional issue that is imbedded within any individual-capacity claim subject to a qualified immunity defense.<sup>195</sup> Yet, many balked at the mandatory nature of this rule<sup>196</sup> and eight years later, in *Pearson v. Callahan*, the Court backed off its mandate and made discretionary the decision whether to address the imbedded constitutional claim.<sup>197</sup> Critics of the proposed doctrinal reform might well point to this 2009 retrenchment and argue that, if the Court were to “de-constitutionalize” individual-capacity

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<sup>193</sup> For a summary of what it means for a right to be “clearly established,” see *supra* note 36 and accompanying text.

<sup>194</sup> Many commentators (including myself) have discussed the law freezing problem in the context of *Bivens* and § 1983. See, e.g., Beermann, *supra* note 187, Greabe, *supra* note 25, Greabe *supra* note 28; Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C.L. REV. 847 (2005); Paul Hughes, *Not a Failed Experiment: Wilson-Saucier Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401 (2009); John C. Jeffries, *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115 (2010); Jeffries, *supra* note 186; Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of Saucier v. Katz*, 16 GEO. MASON L. REV. 53 (2008); Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913 (2007); Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667 (2009); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249 (2006); Michael L. Wells, *The “Order-of-Battle” in Constitutional Litigation*, 60 SMU L. REV. 1539 (2007).

<sup>195</sup> 533 U.S. 194, 201 (2001).

<sup>196</sup> The principal critic on the Court was Justice Breyer. See *Morse v. Frederick*, 551 U.S. 393, 431–33 (2007) (Breyer, J., concurring in part and dissenting in part); *Scott v. Harris*, 550 U.S. 372, 387–89 (2007) (Breyer, J., concurring); *Brosseau v. Haugen*, 543 U.S. 194, 201–02 (2004) (Breyer, J., concurring). For other prominent criticisms of *Saucier*, see Healy, *supra* note 194; Karlan, *supra* note 194; Leong, *supra* note 194; Leval, *supra* note 194.

<sup>197</sup> 555 U.S. 223, 236–43 (2009).

actions, courts will be unlikely to *ever* take the extra steps necessary to address the imbedded constitutional question and to settle the law.

I am in full agreement with the argument that courts should be sensitive to law freezing concerns when ruling on individual-capacity claims.<sup>198</sup> It would surely be regrettable if sequential, individual-capacity lawsuits challenging the constitutionality of similar or identical conduct were repeatedly dismissed without reaching the imbedded constitutional question simply because prior courts with the capacity to “clearly establish” the law had failed to do so. Yet, just as surely, the conditions for elaborating the content and scope of constitutional rights presented by the typical individual-capacity action—to which, again, the government is often neither a formal party nor represented by government counsel—are sub-optimal vis-à-vis other contexts in which constitutional law is made.<sup>199</sup> The question thus becomes: is there a way to avoid choosing between undesirable alternatives? I believe that there is.

Certainly, every court entertaining an individual-capacity action that is doomed to fail because the illegality of the challenged conduct has not been clearly established should seriously consider the potential value of addressing the imbedded constitutional question before dismissing the case. That said, federal and state trial judges usually can, and should, dismiss these claims without discussing whether a constitutional violation has taken place. Trial courts are busy places and, as a general rule, only decisions by the Supreme Court, federal appeals courts, or a state’s highest court are capable of “clearly establishing” the law.<sup>200</sup> Systemic considerations therefore will typically militate in favor of constitutional avoidance, and processing the case as efficiently and inexpensively as possible, at the trial level.<sup>201</sup>

By contrast, appellate courts capable of clearly establishing the law frequently—indeed, presumptively—should address the merits of the imbedded constitutional question because of the law freezing problem.<sup>202</sup> In such circumstances, the appellate court

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<sup>198</sup> See Greabe, *supra* note 25, at 199; Greabe, *supra* note 28, *passim*; see also Beermann, *supra* note 187; Jeffries, *supra* note 186; Jeffries, *supra* note 194; Kamin, *supra* note 194.

<sup>199</sup> See *supra* notes 184–87 and accompanying text.

<sup>200</sup> See Beermann, *supra* note 187 (collecting authority establishing this proposition).

<sup>201</sup> Of course, there will often be circumstances in which, given the perceived importance of the imbedded constitutional issue, a trial judge may wish to make his or her views on the matter known to the appellate courts, policy makers, and supervisors at coordinate public agencies. In such circumstances, a judge might well consider inviting the agency whose conduct has been put into question to intervene and to brief the merits of the imbedded question. *Cf.* FED. R. CIV. P. 5.1 (requiring that a federal district judge entertaining a lawsuit to which the government is not a party, but which challenges the constitutionality of a federal or state statute, notify the appropriate attorney general and provide at least 60 days for possible intervention).

<sup>202</sup> In a recent article, Professor Jack Beermann argues for a presumption in favor of reaching the imbedded constitutional issue unless unusual circumstances yield a conclusion that the ruling is unlikely to have precedential value to future courts and other public actors. See Beermann, *supra* note 187, at 175–79. This argument—which I think makes a great deal of sense for courts capable of establishing the law—is consistent with my own pre-*Saucier* and

should not address the constitutionality of the challenged conduct without first inviting the government to intervene and brief the constitutionality of the conduct that the appeal puts into question.<sup>203</sup> So long as the affected government unit accepts the invitation—and there is little reason to suppose that it would not, since a conclusion that the pleaded claim states a constitutional violation could expose it, at least indirectly, to future damages liability<sup>204</sup>—such a process would rectify the structural deficiencies that presently make individual-capacity lawsuits defended by private attorneys less-than-ideal contexts for the establishment and elaboration of constitutional rights.<sup>205</sup> With the benefit of government assistance and briefing, the appellate court could then proceed to issue a ruling that both notifies public actors of constitutional boundaries and establishes the law for purposes of future individual-capacity litigation.

### *C. Some Thoughts on the Protection of Individual Constitutional Rights*

I conclude this Section with a tentative suggestion that adoption of the proposed reform—with the understanding that appellate courts would presumptively address the imbedded constitutional question after soliciting government intervention and briefing—might do more than serve functional and rule-of-law values while minimizing the likelihood of unwelcome law freezing. The emergent regime may well also provide an adjudicatory environment more conducive to an undistorted elaboration of individual constitutional rights.

There is, in the academic literature, a lively debate about whether courts construing the scope of individual constitutional rights in the context of individual-capacity lawsuits have, because of various external and internal pressures, tended to define rights too narrowly.<sup>206</sup> I do not intend to take sides in this debate, which raises complex

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pre-Pearson views on the matter. See Greabe, *supra* note 28, at 426–37 (arguing for a presumption that courts address the imbedded constitutional question unless case-specific reasons counsel against doing so).

<sup>203</sup> Cf. FED. R. APP. P. 44 (requiring a federal appeals court entertaining an appeal to which the government is not a party, but which challenges the constitutionality of a federal or state statute, to send notice of the challenge to the appropriate attorney general). Government intervention in such cases is authorized by 28 U.S.C. § 2403. The similar government interests implicated by cases where the constitutionality of government *conduct* is challenged but to which the government is not a party would doubtless authorize government intervention. See 7C WRIGHT & MILLER, *supra* note 7, § 1908.2 (recognizing that the stare decisis effect of a judgment on a person or entity is frequently sufficient to authorize intervention as of right under Federal Rule of Civil Procedure 24(a)). For an elaboration of this argument, see Greabe, *supra* note 25, at 199–200.

<sup>204</sup> See *supra* note 187 and accompanying text (observing that government employers often indemnify their employees or pay for insurance that performs the same function).

<sup>205</sup> See *supra* notes 184–87 and accompanying text.

<sup>206</sup> Compare Nahmod, *supra* note 21, at 288–89 (providing a number of examples in support of a conclusion that “[i]t has been clear for some time now that the possibility of damages liability under § 1983 and *Bivens*, and its feared impact on the independence of public official

questions that are beyond the scope of this Article. If in fact the atmospheric unique to the individual-capacity action sometimes bring undue rights-narrowing pressures to bear on a court deciding the imbedded constitutional issue, it is worth considering whether the proposed regime would be an improvement. A reform emphasizing that an individual-capacity action is merely a statutory, or common-law, tort action against an individual that is entirely distinct from, and cumulative of, any remedy that might be available against the directly breaching government agency—and that ensures formal government participation and briefing in any individual-capacity case where constitutional meaning is elaborated—might well ameliorate the rights-narrowing pressures that some commentators have identified. Judges operating within the proposed regime would have even less reason to confuse the question of right with the question of remedy, and they would receive the same assistance from the government that is typical of other contexts in which constitutional law is made. The net result may be far from perfect, but it may well provide conditions more favorable to undistorted constitutional lawmaking than do present circumstances.

### III. A PARALLEL TREATMENT FOR ABSOLUTE IMMUNITY CASES

If the Court were to undertake the doctrinal reform proposed in Part II and thereby render the qualified immunity defense conceptually unnecessary, it should, for purposes of doctrinal symmetry and coherence, undertake a similar initiative with respect to absolute immunity. Such a “reform” could be easily accomplished as, even under current law, statements characterizing absolute immunity as a “defense,”<sup>207</sup>

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decision-making, have affected the scope of certain constitutional provisions”); Chen, *supra* note 186, at 913–14; Leong, *supra* note 194, at 702–06 (suggesting that cognitive dissonance may lead judges to conclude that there has been no constitutional violation in circumstances where they are obliged by the qualified immunity doctrine to withhold a remedy), with Jeffries, *supra* note 194, at 121–26 (expressing skepticism with these lines of argument, given that the qualified immunity analysis is quite separate from the merits of the imbedded constitutional issue and that judges deal with separate issues like this all the time), and Jennifer E. Laurin, *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1004–05 (2010) (arguing that courts have been less generous to civil rights plaintiffs in defining constitutional rights than they have when elaborating similar rights in a criminal context on behalf of criminal defendants). There is also an interesting empirical debate about whether *Saucier* had the effect of causing courts to define rights more narrowly in the context of individual-capacity actions than they might have done in other litigation contexts. Compare Hughes, *supra* note 194 (providing empirical evidence to reject this claim), with Leong, *supra* note 194 (providing empirical evidence to support the claim).

<sup>207</sup> See, e.g., *Kalina v. Fletcher*, 522 U.S. 118, 124–25 (1997) (describing absolute immunity as a “defense”); *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 431–32 n.2 (1993); *Shmueli v. City of New York*, 424 F.3d 231, 236 (2d Cir. 2005) (treating absolute immunity as an affirmative defense that must be pleaded by the defendant); *Desi’s Pizza, Inc. v. City of Wilkes-Barre*, 321 F.3d 411, 428 (3d Cir. 2003) (“Absolute immunity is an affirmative defense that should be asserted in an answer.”).

and suggesting that it is subject to forfeiture under Rule 12(h)(1) if not pleaded under Rule 8(c) or made the subject of a Rule 12(b)(6) motion,<sup>208</sup> misperceive the doctrine's nature and origins. Therefore, with respect to absolute immunity, all that is needed is doctrinal clarification.

The cases in which absolute immunity was recognized for legislators acting in a legislative capacity, judges acting in a judicial capacity, prosecutors acting in a prosecutorial capacity, grand jurors, and witnesses<sup>209</sup> do not hold or indicate that absolute immunity is a non-textual affirmative defense that must be read into § 1983.<sup>210</sup> Rather, they suggest that individuals who are protected from individual-capacity liability by the absolute immunity doctrine are simply not “person[s]” on whom the statute imposes liability.<sup>211</sup> In these cases, the Court has described the question whether an individual is entitled to absolute immunity under § 1983 as a “question of statutory construction”<sup>212</sup> to be resolved not by giving the phrase “[e]very person”<sup>213</sup> a “literal” reading, but rather by construing it to take account of the fact that Congress did not intend to impose § 1983 liability on individuals who were not amenable to suit at common law.<sup>214</sup> As I have argued before, the Court's absolute immunity jurisprudence is better read as being grounded on a narrow interpretation of the statutory phrase “[e]very person”; it should *not* be understood to read into § 1983 (or, by extension, *Bivens*) a non-textual, affirmative absolute immunity defense of common-law origins.<sup>215</sup>

#### CONCLUSION

The Supreme Court's issue-framing statements in *Iqbal* and *al-Kidd* have not only cast into doubt whether the commonly litigated qualified immunity doctrine remains an affirmative defense that the defendant must plead and prove; they also could be read

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<sup>208</sup> See, e.g., *Cozzo v. Tangipahoa Parish Council-President Gov't*, 279 F.3d 273, 283 (5th Cir. 2002); *Chestnut v. City of Lowell*, 305 F.3d 18, 22 (1st Cir. 2002) (en banc) (Torruella, J., concurring); see also *Tully v. Barada*, 599 F.3d 591, 594 (7th Cir.) (describing absolute immunity as an “affirmative defense” and treating it as waived because it was not raised in the district court), *cert. denied*, 131 S. Ct. 299 (2010).

<sup>209</sup> See *supra* note 30 and accompanying text.

<sup>210</sup> See *Wyatt v. Cole*, 504 U.S. 158, 163–64 (1992) (acknowledging that “[s]ection 1983 creates a species of tort liability that on its face admits of no immunities”) (internal quotation marks omitted).

<sup>211</sup> Once again, I focus on § 1983 because *Bivens* is merely a federal common-law doctrine designed to mirror § 1983 liability in certain situations.

<sup>212</sup> *Briscoe v. LaHue*, 460 U.S. 325, 326 (1983).

<sup>213</sup> 42 U.S.C. § 1983 (2006).

<sup>214</sup> See *Briscoe*, 460 U.S. at 330; see also *id.* at 347–48 (Marshall, J., dissenting) (analyzing the defendant's entitlement to absolute immunity by asking whether such a defendant should be regarded as a “person” within the reach of the statute); *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (acknowledging that the Court has not read the statutory phrase “[e]very person” to apply “as stringently as it reads”).

<sup>215</sup> See Greabe, *supra* note 25, at 207–08.

to suggest that plaintiffs must anticipate and negate *all* potentially applicable affirmative defenses in order to meet the pleading requirements of Rule 8(a)(2).<sup>216</sup> While I do not believe that the Court is headed in this direction, even a hint to the contrary is unsettling and destabilizing, particularly given the many questions that presently exist about the scope of *Iqbal*.

Concerned about the effects that the *Saucier* rule<sup>217</sup> was having on the administration of constitutional tort liability in the lower courts under *Bivens* and § 1983, the Court did not hesitate to order the parties to a § 1983 claim to brief and argue whether the rule should be retained, and then to use the case to clarify the law and overturn *Saucier*.<sup>218</sup> For similar reasons, the Court should consider asking the parties to a *Bivens* or § 1983 individual-capacity action to brief and argue whether the individual immunity doctrines should be treated as affirmative defenses to be pleaded and proved by defendants. The Court should then use the occasion to clarify that the answer to this question is no: plaintiffs pressing individual-capacity claims under *Bivens* and § 1983 must plead facts sufficient to establish both that the individual being sued is a “person” to whom *Bivens* or § 1983 liability can attach, and that the individual has “cause[d]” the plaintiff to be subjected to a deprivation of clearly established constitutional rights. The Court should also clarify that its issue-framing statements in *Iqbal* and *al-Kidd* should not be taken to suggest any abrogation of the rule that, under Rule 8(a)(2), plaintiffs need not anticipate and establish the inapplicability of affirmative defenses that the defendant might be in a position to assert in view of the complaint’s allegations.

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<sup>216</sup> See *supra* Part I.D.

<sup>217</sup> See *supra* notes 195–97 and accompanying text.

<sup>218</sup> See *id.*; see also *Pearson v. Callahan*, 552 U.S. 1279 (2008) (granting writ of certiorari and directing sua sponte that the parties brief and argue whether to overturn *Saucier*).