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Abstract

In his note, Ryan Johnson drills down on the various ways that courts within the Second Circuit are approaching the viability of § 1983 lawsuits by incarcerated individuals against supervisors within correctional facilities. But how important is supervisory liability in the first place? Qualified immunity allows courts, as Mr. Johnson puts it, to "cop-out" from engaging in difficult constitutional inquiries and instead dispose of the case by invoking the magical words: "the law is unclear." Over the past thirty-five years, the Supreme Court has decided many qualified immunity cases, never seriously signaling a desire to reconsider its qualified immunity precedent. However, with the Supreme Court's current trend of overruling its prior decisions, we can hope that the Court's flawed qualified immunity jurisprudence is next on the chopping block.

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* Professor of Practice, Washington and Lee University School of Law. This comment is a response to Ryan E. Johnson, Note, *Supervisors Without Supervision:* Colon*,* McKenna*, and the Confusing State of Supervisory Liability in the Second Circuit*, 77 WASH. & LEE L. REV. 457 (2020), which received the 2019 Washington and Lee Law Council Law Review Award.

I. Introduction

Ryan Johnson's Note, *Supervisors Without Supervision:* Colon*,* McKenna*, and the Confusing State of Supervisory Liability in the Second Circuit*, is extremely important and topical for a host of reasons. He drills down on two components of an intra-circuit split, noting the various ways that courts within the Second Circuit are approaching the viability of lawsuits by incarcerated individuals against supervisors within correctional facilities. Mr. Johnson focuses, first, on the continued viability of the factors that the Second Circuit uses to determine when a supervisor may be liable for actions largely taken by subordinates after the Supreme Court decision in *Ashcroft v. Iqbal*.[1] The *Iqbal* Court suggested that supervisory liability is severely limited: "[A]bsent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct,"[2] which calls into question whether the Second Circuit factor test is still good law. Second, Mr. Johnson considers a more specific intra-circuit split that developed prior to *Iqbal*, which focuses on when, if ever, a supervisor's denial of an administrative grievance provides sufficient personal involvement to allow for supervisory liability. This inquiry into the nuances of Second Circuit law addressing suits by incarcerated individuals against supervisor in correctional facilities may seem like a narrow focus. But, in fact, Mr. Johnson's note topic addresses far-reaching concerns.

II. Supervisory Liability as a Force for Change

The plight of incarcerated individuals within correctional facilities is worth scrutinizing. The limited access defendants have to the courts, after they have been tried or pleaded guilty, have

1. 556 U.S. 662, 677 (2009); *see* Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995) (listing five factors courts should consider to determine when a supervisor is personally involved in a constitutional violation sufficient to allow for liability, including: (1) direct participation in the alleged violation; (2) knowledge of the violation but failure to remedy it; (3) creation of a policy or custom that allowed the violation to occur; (4) gross negligence in supervising subordinates who committed the violation; and (5) deliberate indifference to the rights of incarcerated individuals).

2. *Iqbal*, 556 U.S at 677.

been sentenced, and are serving out their sentences, is often overlooked. Justice Kennedy, recognizing the marginalized status of incarcerated individuals, recently explained: "Too often, discussion in the legal academy and among practitioners and policymakers concentrates simply on the adjudication of guilt or innocence. Too easily ignored is the question of what comes next. Prisoners are shut away—out of sight, out of mind."[3]

But how important is supervisory liability in the first place? For all of Justice Kennedy's concern for those "ignored" and "shut away" in prisons,[4] he is also the Justice who penned *Iqbal*, suggesting that liability should be limited only to those who act impermissibly and not those who oversee the wrongdoers.[5] Notwithstanding Justice Kennedy's dismissal of supervisory liability claims, these suits are important, particularly for those in correctional facilities. Individuals who are incarcerated are particularly vulnerable to those in positions of power.[6] There is no recourse, no ability for an incarcerated individual to distance him or herself from those inside the correctional facility. Therefore, providing incarcerated individuals the means by which to hold supervisors responsible for constitutional and federal law violations perpetrated by subordinates allows for an important level of accountability for those who occupy a role of authority within the correctional facility.[7] The threat of suit and liability incentivizes behavior.[8] Supervisors who face possible sanctions

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3. Davis. v. Ayala, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring).

4. *Id.*

5. *Iqbal*, 556 U.S. at 677 ("Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.").

6. *See, e.g.*, United States v. Lambright, 320 F.3d 517, 518 (5th Cir. 2003) (noting the vulnerable nature of incarcerated individuals because they are locked in cells and dependent on correctional officers for their care).

7. *See* Owen v. City of Independence, 445 U.S. 622, 651 (1980) ("[Section] 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well.").

8. The Supreme Court has explained:

> The knowledge that a [defendant] will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights.

will be motivated to run a correctional facility with a greater degree of oversight and concern for the rights of incarcerated individuals. So, allowing suits against supervisors, particularly in the prison context, has important real-world consequences.

For this reason, the Second Circuit's inconsistent approach to supervisory liability—allowing suits to proceed in some contexts and not others—is, as Mr. Johnson discusses, concerning. However, much more troubling is a secondary result from *Iqbal* stemming from the confusion surrounding supervisory liability suits: courts' increased reliance on qualified immunity to dismiss these cases.

III. Qualified Immunity; Precedent Worth Pitching

In order for individuals to remedy serious constitutional violations while incarcerated, they must, for the most part, bring suits under the federal civil rights statute, 42 U.S.C. § 1983. Section 1983 does not bestow rights on individuals but allows private suits against government actors for violations of some constitutional rights.[9] Over time, the Supreme Court, in balancing the competing concerns that suits against government officials will chill conduct and prove costly on the one hand, with an individual's right to be compensated for violations of constitutional rights on the other, has limited the reach of § 1983 claims through qualified immunity. [10] Qualified immunity shields government officials from suits for money damages if the official did not violate "clearly established" constitutional law.[11] Accordingly, government actors

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Id. at 651–52. This rationale holds equally true for prison officials who are engaged in wrongful conduct as well as those overseeing them.

9. 42 U.S.C. § 1983 (2018). The statute imposes liability on "every person" who, "under color" of state law or custom, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." *Id.*

10. *See* Harlow v. Fitzgerald, 457 U.S. 800, 816, 819 (1982) (concluding that in order to balance "competing values" in § 1983 cases and ensure both "deterrence of unlawful conduct" and "compensation of victims," only violations of clearly established statutory or constitutional rights are compensable).

11. *See* Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011) ("Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct.")

are not responsible for *all* of their unconstitutional actions, rather only those that violate "settled law."[12] Courts are left with the task of determining when a constitutional right is "clearly established."

This presents two significant problems. First, some courts are loathed to conclude that a constitutional right is clearly established unless the plaintiff can present precedent that is directly on point. "Merely proving a constitutional deprivation doesn't cut it; plaintiffs must cite functionally identical precedent that places the legal question 'beyond debate' to 'every' reasonable officer."[13] Second, and more concerning, some courts refuse to engage in an analysis on the merits at all when there appears to be conflicting precedent.[14] Once a court concludes that an area of law is not settled—as is the case with supervisory liability following *Iqbal*—then government officials are immune without further inquiry.[15] Qualified immunity allows courts, as Mr. Johnson puts it, to "cop-out" from engaging in difficult constitutional inquiries and instead dispose of the case by invoking the magical words: "the law is unclear."[16]

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12. Hunter v. Bryant, 502 U.S. 224, 228 (1991) (per curiam).

13. Zadeh v. Robinson, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring, in part, and dissenting, in part). Judge Willett expressed his "broader unease with the real-world functioning of modern immunity practice." *Id.* In a scathing rebuke of the Supreme Court's qualified immunity jurisprudence he concluded that "[t]o some observers, qualified immunity smacks of unqualified impunity," because public officials are allowed to "duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the first to behave badly." *Id.*

14. *See* Gates v. Khokhar, 884 F.3d 1290, 1303 (11th Cir. 2018) ("That judges disagree about a constitutional issue is itself evidence that a right is insufficiently clearly established for purposes of denying qualified immunity.")

15. *See, e.g.*, Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 65 (2017) (noting that the Supreme Court's qualified immunity jurisprudence "allow[s] lower courts to grant qualified immunity without first assessing whether a defendant violated the constitutional or statutory rights of the plaintiff"); *see also* Funches v. Russo, No. 9:17-CV-1292(LEK/DJS), 2018 WL 6381058, *7 (N.D.N.Y. Dec. 6, 2018) (concluding that the "uncertainty inherent in the continued viability" of the Second Circuit's supervisory liability test following *Iqbal*, establishes that the defendants were entitled to qualified immunity); Mirabella v. O'Keenan, No. 15-CV-142S, 2016 WL 4678980, at *7 n.4 (W.D.N.Y. Sept. 7, 2016) (recognizing that once a court determines that the Second Circuit's supervisory liability jurisprudence is unsettled "[t]his argument would, in effect, allow qualified immunity to entirely negate supervisory liability under § 1983").

16. Ryan E. Johnson, Note, *Supervisors Without Supervision:* Colon,

Mr. Johnson is not alone in recognizing the problematic nature of qualified immunity. In the past couple of years, scrutiny of the doctrine has increased. Numerous scholars have questioned whether the doctrine of qualified immunity is, on the one hand, supported by law,[17] and on the other hand, effective[18]. There is a growing concern that the current qualified immunity jurisprudence runs counter to historical understandings of the doctrine.[19] Moreover, one scholar's review of qualified immunity dockets across the country demonstrated that the purposes of qualified immunity—to ensure that government actors are not deterred from performing official functions for fear of being sued and are not required to shoulder heavy financial burdens—were not accomplished in practice.[20]

More importantly, many judges and Justices have also recently noted the problems inherent in qualified immunity jurisprudence. Interestingly, Supreme Court Justices on either side of the political divide have questioned whether qualified immunity, as currently applied, should stand. Justice Thomas recently expressed reservations about the viability of the Court's qualified immunity doctrine in its current iteration: "The Court correctly applies our [qualified immunity] precedents, which no party has asked us to reconsider. I write separately, however, to note my growing concern with our qualified immunity jurisprudence."[21] Justice Thomas, an avowed textualist, took issue with the doctrine to the extent that courts are applying qualified immunity in ways that are

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McKenna*, and the Confusing State of Supervisory Liability in the Second Circuit*, 77 WASH. & LEE L. REV. 457, 507 (2020).

17. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 88 (2018) (asserting that qualified immunity "lacks legal justification, and the Court's justifications are unpersuasive").

18. *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1799 (2018) ("Research examining contemporary civil rights litigation against state and local law enforcement shows that qualified immunity also fails to achieve its intended policy aims.").

19. *See* Baude, *supra* note 17, at 88 (asserting that qualified immunity "lacks legal justification, and the Court's justifications are unpersuasive").

20. *See* Schwartz, *supra* note 15, at 11 ("Yet available evidence suggests that qualified immunity is not achieving its policy objectives; the doctrine is unnecessary to protect government officials from financial liability and ill suited to shield government officials from discovery and trial in most filed cases.").

21. Ziglar v. Abbasi, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring, in part and in the judgment).

inconsistent with the types of immunity available to government actors in 1871, when the Civil Rights Act, and § 1983 were enacted.[22]

Justice Sotomayor, too, in a dissent joined by Justice Ginsburg, has expressed concern with the way in which the Court applies the qualified immunity doctrine.[23] She observed that courts, and most notably the Supreme Court, apply qualified immunity to inure to the benefit of state actors, rarely finding immunity inappropriate, which provides "an absolute shield" for alleged wrongdoers.[24] Justices Thomas and Sotomayor have highlighted different problems with qualified immunity. However, the fact that these two justices, who stand on opposite ends of the political spectrum, agree on the problematic nature of qualified immunity, suggests that this may be an area of the law that a majority of the Justices are willing to revisit.

Over the past thirty-five years, the Supreme Court has decided many qualified immunity cases, never seriously signaling a desire to reconsider its qualified immunity precedent.[25] Some scholars have argued that the Court remains steadfast to its qualified immunity jurisprudence because it is worried that significant upheaval to policing practices and constitutional lawsuits would result from upending extant qualified immunity law.[26] However, the answer may be simpler than potential far-reaching fallout. The Supreme Court may continue to apply qualified immunity to government actors for the simple reason that it has done so for many, many years, rather than because it thinks that a change to the law would drastically change the behavior of police or litigants. The Court has held that "[o]verruling a case always requires

22. *Id.* at 1870–71.

23. *See* Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J. dissenting).

24. *Id.* at 1155.

25. *See* Baude, *supra* note 17, at 82 (noting that in more than thirty-five years, the Supreme Court has decided thirty qualified immunity cases on the merits without reconsidering the continued viability of the doctrine).

26. *See* Schwartz, *supra* note 18, at 1800 (concluding that the Supreme Court upholds the doctrine of qualified immunity because the "Justices fear eliminating or restricting qualified immunity would alter the nature and scope of policing or constitutional litigation in ways that would harm government officials and society more generally").

'special justification.'"[27] Traditionally, special justification has not consisted of five members of the Supreme Court disagreeing with a prior decision.[28]

But this Supreme Court, in particular, has been willing to forgo adherence with stare decisis. In determining whether to overrule prior precedent, a majority of the Court has recently concluded that the quality of a prior decision's reasoning can support overruling it, suggesting that a disagreement with a decision may be enough to qualify as a "special justification."[29] And the Court has so acted. In the past two years, a five-member majority of the Supreme Court has overruled numerous of its prior decisions. In *Janus v. AFSCME*,[30] the Court overruled long standing precedent regarding union fees; Justice Alito "recognize[d] the importance of following precedent unless there are strong reasons for not doing so."[31] However, he ultimately concluded that there were "very strong reasons in this case."[32] More recently, in *Franchise Tax Board of California v. Hyatt*,[33] a five-member majority of the Court overruled established precedent dealing with suits by private individuals against states, concluding: "Stare decisis does not compel continued adherence to this erroneous precedent."[34] More recently still, in *Ramos v. Louisiana*, argued during the Court's October 2019 term, Justice Gorsuch voiced a willingness to overrule prior cases: "I can't help but wonder, well, should we forever ensconce an incorrect view of the [law] for perpetuity, for all states and all people. . . ?"[35] In an opinion authored by Justice

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27. Kimble v. Marvel Entertainment, LLC, 135 S. Ct. 2401, 2409–10 (2015).

28. *See id.* (noting that "an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent"); *see also* Franchise Tax Board of California v. Hyatt, 139 S. Ct. 1485, 1505 (2019) (Breyer, J., dissenting) (same).

29. *See* Janus v. AFSCME, 138 S. Ct. 2448, 2478 (2018) (noting that the first of five factors to consider before overruling prior precedent, is the quality of reasoning in the prior decision).

30. 138 S. Ct. 2448 (2018).

31. *Id.* at 2460.

32. *Id.*

33. 139 S. Ct. 1485 (2019).

34. *Id.* at 1492.

35. Oral Argument at 51:00, Ramos v. Louisiana, 590 U.S. ___ (2020), https://www.oyez.org/cases/2019/18-5924. Justice Gorsuch, in *Ramos*, focused on a perceived incorrect interpretation of the Constitution. While the Court has

Gorsuch, the Court subsequently overruled the prior decisions under consideration in *Ramos*.[36]

While this willingness to throw out prior precedent with the bathwater has caused some Justices concern, they have been in the minority. Justice Kagan, in the *Janus* dissent, admonished: "Rarely if ever has the Court overruled a decision—let alone one of this import—with so little regard for the usual principles of stare decisis."[37] In the *Franchise Tax Board* dissent, Justice Breyer prophesied that: "Today's decision can only cause one to wonder which cases the Court will overrule next."[38] We can only hope that if the Court continues with its current trend of overruling its prior decisions, it is the Court's flawed qualified immunity jurisprudence, rather than some other legal doctrine, that is next on the chopping block.

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noted that it has a heightened responsibility to reconsider its prior jurisprudence that erroneously interprets the Constitution, as such decisions cannot be altered or amended by Congress, the Court nonetheless has recognized its power to overturn any of its prior precedent. *See also* South Dakota v. Wayfair, 138 S. Ct. 2080, 2101 (2018) (Roberts, J., dissenting) (noting that the bar for overturning precedent based on statutory interpretation is "even higher in fields in which Congress exercises primary authority and can, if it wishes, override this Court's decisions with contrary legislation.") (internal quotation marks omitted). Moreover, when the Court's prior decision is "based on a judge-made rule," as is the "clearly-established" requirement under § 1983, "and is not grounded in anything that Congress has enacted," the Court is more likely to correct its "own error." *Kimble*, 135 S. Ct. at 2418 (Alito, J. dissenting).

36. *See* Ramos v. Louisiana, No. 18-5924, slip op. at 26 (U.S. Apr. 20, 2020) ("Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right.").

37. *Janus*, 138 S. Ct. at 2501 (Kagan, J. dissenting). Justice Kagan also wrote a scathing dissent in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), a case in which the majority overruled established precedent regarding the Fifth Amendment's Takings Clause, noting that the decision, "transgresses all usual principles of stare decisis." *Knick*, 139 S. Ct. at 2181 (Kagan, J., dissenting).

38. Franchise Tax Board of California v. Hyatt, 139 S. Ct. 1485, 1506 (2019) (Breyer, J. dissenting).