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Supervisors Without Supervision: *Colon*, *McKenna*, and the Confusing State of Supervisory Liability in the Second Circuit*

Ryan E. Johnson**

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I. Introduction

A male prison guard repeatedly rapes a female prisoner for close to a year.[1] A prison supervisor learns of the ongoing abuse after the prisoner files a grievance and he launches an investigation into the assault.[2] Multiple prisoners and guards verify that the abuse occurred.[3] Nevertheless, the supervisor permits the accused guard to continue working during the investigation.[4] As an offhand gesture, the supervisor transfers the victim out of the cellblock where her attacker works.[5] However, to the victim's dismay, the supervisor reassigns her to her attacker's cellblock mere weeks later.[6] With the supervisor placing the prisoner back within her attacker's reach, the guard continues to assault the prisoner.[7] Should the supervisor be liable for the rape

1. *See* Plaintiff's Complaint at 5, Qasem v. Toro, 737 F. Supp. 2d 147 (S.D.N.Y. 2010) (No. 09-CV-8361), ECF No. 1 (explaining that the attacker worked in Building 93, which is where the victim lived).

2. *See id.* at 7 (mentioning that prisoners reported the assault to the prison's inspector general).

3. *See id.* ("[S]ome inmates and/or some corrections staff who suspected or were aware of impermissible sexual activity between [the attacker] and [the victim] reported it.").

4. *See id.* at 11 (alleging that the supervisor was aware of the ongoing investigation into the attacker's misconduct).

5. *See id.* at 7 (explaining that the purpose of the transfer was to separate the victim from her attacker).

6. *See id.* at 11 (complaining that the supervisor "caused or permitted [the victim] to be repeatedly transferred into the housing area where [the attacker] worked, allowing [the attacker] access to [the victim] to continue his abuse").

7. *See id.* at 8 (alleging that the supervisor was "deliberately indifferent to

that occurred once he transferred the victim back to her attacker's cellblock?

Fortunately, 42 U.S.C. § 1983 provides this victim a civil cause of action to recover damages against any government official who violates her constitutional rights.[8] The statute imposes (1) direct liability on those who personally commit a constitutional tort and (2) supervisory liability on those managing officials who direct or permit their subordinates to commit an unconstitutional act.[9] In theory, the victim above would be able to recover against both the guard for raping her and the supervisor for enabling the guard to continue raping her.[10] In practice, however, various legislative and judicial hurdles prevent prisoners from recovering against their abusers.[11]

This Note analyzes two intra-Second Circuit splits that make it nearly impossible for prisoners to recover against supervisors under § 1983.[12] First, district courts in the Second Circuit are divided as to whether the five categories of personal involvement defined in *Colon v. Coughlin*[13] survive the Supreme Court's decision in *Ashcroft v. Iqbal*.[14] Personal involvement by the

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the unreasonable risk of further sexual assault of [the victim] by [the attacker] and caused and/or permitted [the attacker] to have renewed access to [the victim] on multiple occasions").

8. *See* 42 U.S.C. § 1983 (2018) (providing a remedy to victims of constitutional violations committed by any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State").

9. *See* William N. Evans, *Supervisory Liability in the Fallout of* Iqbal, 65 SYRACUSE L. REV. 103, 110–11 (2014) (distinguishing between the situation in which an individual personally causes an injury and the situation in which an individual causes an injury through the acts of another).

10. *See id.* at 111–13 ("For a plaintiff to prevail on a constitutional tort claim using a theory of direct liability, she must show that she suffered a constitutional injury at the hands of the defendant.").

11. *See* Prison Litigation Reform Act, 42 U.S.C. § 1997e (2018) (requiring a prisoner to exhaust their administrative remedies before filing suit in federal court); William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 63 (2018) (commenting that the doctrine of qualified immunity "is a judicially invented immunity" and makes it more difficult for plaintiffs to prevail on a § 1983 claim).

12. *See infra* Parts III, IV (discussing the splits over (1) whether the test for personal involvement defined in *Colon* survives *Iqbal*; and (2) whether a supervisor is personally involved when they deny a prisoner's grievance).

13. 58 F.3d 865 (2d Cir. 1995).

14. 556 U.S. 662 (2009). *See infra* Part III.C (explaining that some courts

supervisory defendant is a necessary element to impose supervisory liability.[15] Some district courts hold that only the first and third *Colon* factors survive *Iqbal*,[16] while others hold that all five factors still apply.[17]

Second, district courts in the Second Circuit are divided as to whether a supervisor is personally involved in a constitutional tort when he or she rejects a prisoner's grievance complaining of the misconduct.[18] Some district courts always find personal involvement when a supervisor denies a grievance without considering any other factors.[19] Other district courts only find personal involvement when a supervisor investigates the alleged misconduct or answers the grievance with a detailed response.[20]

The Second Circuit must resolve both intra-circuit splits to give full effect to § 1983 because the disagreement allows district courts to dismiss claims on qualified immunity grounds.[21] Government officials are immune from suit and "entitled to qualified immunity" if their actions "did not violate clearly established law."[22] District courts point to both of the intra-circuit splits as evidence that the law surrounding supervisory liability is not clearly established and therefore grant supervisory defendants qualified immunity.[23]

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hold that *Iqbal* abrogates the *Colon* factors, while other courts limit *Iqbal*'s holding to similar facts).

15. *See* Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994) ("It is well settled in this Circuit that 'personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.'" (quoting Moffitt v. Town of Brookfield, 950 F.2d 880, 885 (2d Cir. 1991))).

16. *See infra* Part III.C.1 (describing the restrictive courts).

17. *See infra* Part III.C.2 (describing the hybrid courts).

18. *See infra* Part IV.A (explaining that some district courts always find personal involvement when a supervisor rejects a grievance, while other courts look for some further action by the defendant).

19. *See infra* Part IV.A.1 (discussing the simplistic approach).

20. *See infra* Parts IV.A.2–4 (discussing the investigation approach, detailed response approach, and ongoing violation approach).

21. *See infra* Parts II.C, IV.B (explaining that supervisory defendants are entitled to qualified immunity when they do not violate clearly established law and both intra-circuit splits indicate that the law is not clearly established).

22. Pearson v. Callahan, 555 U.S. 223, 243 (2009).

23. *See* Hayes v. Santiago, No. 3:18-cv-01758, 2018 WL 5456494, at *3 (D. Conn. Oct. 29, 2018) (explaining that the "Second Circuit law is not clearly established" regarding whether a supervisor is personally involved when they

The confusion surrounding supervisory liability in the Second Circuit perfectly encapsulates how legislatures and courts have quietly dismantled § 1983 as a viable cause of action for prisoners in recent years.[24] Congress passed § 1983 with bold aspirations to punish oppressive government actors who abuse their power by infringing on individuals' constitutional rights.[25] Given how vulnerable prisoners are by virtue of their incarceration, § 1983 serves as one of the only practical tools they have to put them on equal footing with their government custodians.[26] As the law currently stands in the Second Circuit, this tool is broken.

II. 42 U.S.C. § 1983

Section 1983 allows "private parties to enforce their federal constitutional rights . . . against defendants who acted under color of state law."[27] The statute states in relevant part:

> 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

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deny a grievance); Ojo v. United States, No. 15-cv-6089, 2018 WL 3863441, at *10 (E.D.N.Y. Aug. 14, 2018) ("Ultimately, however, I need not resolve the question of whether *Iqbal* abrogated *Colon* . . . . because[] regardless of whether *Colon*'s second category of supervisory liability survived *Iqbal* in such cases, the defendants are entitled to qualified immunity based on the very uncertainty of the governing law.").

24. *See* Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 913–14 (2015) ("There is a growing consensus among practitioners, scholars, and judges that Section 1983 is no longer serving its original and intended function as a vehicle for remedying violations of constitutional rights, that it is broken in many ways, and that it is sorely in need of repairs.").

25. *See infra* Part II.A (explaining how Congress passed the statute in 1871 to provide a civil remedy against government officials in the former Confederate states who deprived African Americans of their newfound civil liberties).

26. *See* Lynn Adelman, *The Erosion of Civil Rights and What to Do About It*, 2018 WIS. L. REV. 1, 3 (2018) (demonstrating that "Section 1983 is a critically important statute").

27. MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION 1 (Kris Markarian ed., 3d ed. 2014).

> liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[28]

Section 1983 does not create any new individual substantive rights, but simply provides a remedy when a government official, acting in his or her official capacity, violates an existing substantive right.[29]

There are two essential elements of a § 1983 claim: (1) the plaintiff must allege a deprivation of a constitutional or statutory right;[30] and (2) the person depriving the plaintiff of such right must have acted under the color of state law.[31] A defendant acts under the color of state law when he or she "exercise[] power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'"[32] This places purely private action, absent relevant state authority, outside of the scope of the statute.[33] A police officer, for instance, acts under the color of state law when she performs her official job duties as authorized by state law.[34]

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28. 42 U.S.C. § 1983 (2018).

29. *See* City of Okla. City v. Tuttle, 471 U.S. 808, 816 (1985) (explaining that § 1983 "merely provides remedies for deprivations of rights established elsewhere"); Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 459 F.3d 676, 681 (6th Cir. 2006) (explaining that for plaintiffs, "§ 1983 serves as a vehicle to obtain damages for violations of both the Constitution and of federal statutes").

30. *See* SCHWARTZ, *supra* note 27, at 29–74 (explaining that plaintiffs often allege constitutional violations of substantive and procedural due process rights under the Fourteenth Amendment, the prohibition against cruel and unusual punishment under the Eight Amendment, and the prohibition against unreasonable force under the Fourth Amendment).

31. *See* West v. Atkins, 487 U.S. 42, 48 (1988) (outlining the requirements to bring a § 1983 claim); *see also* SCHWARTZ, *supra* note 27, at 12 (expounding on the two general elements and arguing that there are in fact four distinct elements to § 1983 claims: "(1) conduct by a 'person'; (2) who acted 'under color of state law'; (3) proximately causing; (4) a deprivation of a federally protected right").

32. *West*, 487 U.S. at 49 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

33. *See* Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50 (1999) (clarifying that "the under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful'" (quoting Blum v. Yaretsky, 457 U.S. 991, 1002 (1982))).

34. *See* SCHWARTZ, *supra* note 27, at 81 (providing examples of when a government official acts under the color of state law).

A. Historical Background of § 1983

Congress passed 42 U.S.C. § 1983, originally called the Civil Rights Act of 1871, to combat the Ku Klux Klan's reign of terror in the South.[35] By providing a civil right of action against government officials who violate an individual's constitutional rights, Congress hoped to punish state officials who systematically denied African Americans their civil liberties.[36] In fact, one of the chief goals of the legislation was to afford a federal remedy, complementary to state remedies, because "by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced . . . ."[37] Congress feared that the former Confederate states would not respect the new progressive racial policies in the wake of the Civil War.[38]

Although Congress passed the statute in 1871, victims of constitutional violations used § 1983 sparingly until the Supreme Court's decision in *Monroe v. Pape*[39] in 1961.[40] James Monroe brought a § 1983 suit against the City of Chicago and several police officers for breaking into his home without a warrant.[41] The

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35. *See* Wilson v. Garcia, 471 U.S. 261, 276 (1985) (discussing how the Ku Klux Klan deprived African Americans of their civil liberties and political rights during the eighteenth and nineteenth centuries); SCHWARTZ, *supra* note 27, at 1 (explaining that what is now § 1983 was originally passed as the Ku Klux Klan Act).

36. *See Wilson*, 471 U.S. at 276 (discussing how state and local authorities in the South encouraged individuals to prevent African Americans from exercising their right to vote).

37. 365 U.S. 167 (1961).

38. *See id.* at 183 (explaining that Congress passed § 1983 "because of the conditions that existed in the South at that time"); Brad Reid, *A Legal Overview of Section 1983 Civil Rights Litigation*, HUFFINGTON POST (Apr. 14, 2017, 11:12 AM), https://perma.cc/KF7X-K5UA (last updated Apr. 14, 2017) (last visited Nov. 20, 2019) (explaining that § 1983 "was part of post Civil War legal developments that include the Thirteenth, Fourteenth, and Fifteenth Amendments") (on file with the Washington and Lee Law Review).

39. 365 U.S. 167 (1961).

40. *See* SCHWARTZ, *supra* note 27, at 1 (explaining that § 1983 "did not emerge as a tool for checking abuses by state officials until 1961, when the Supreme Court decided *Monroe v. Pape*"); *Monroe v. Pape*, FED. JUD. CTR., https://perma.cc/NV8W-AT5L (last visited Nov. 20, 2019) ("Between 1871 and 1920, there were only 21 cases decided based on the statute, but in 1995 there were more than 57,000.") (on file with the Washington and Lee Law Review).

41. *See Monroe*, 365 U.S. at 169 (alleging that "13 Chicago police officers broke into petitioners' home in the early morning, routed them from bed, made

defendants filed a motion to dismiss the complaint, arguing that they did not act "under color of" state law in unlawfully searching the plaintiffs' home.[42]

One of the essential elements of § 1983 is that the defendant government official must act under the color of state law.[43] Prior to *Monroe*, courts held that a government official did not act under the color of state law if his or her actions also violated state law.[44] This rule permitted courts to dismiss § 1983 claims in virtually every case because unconstitutional acts (which § 1983 seeks to eliminate) are inherently illegal under state law.[45]

For example, imagine that a prison guard violates a prisoner's Eighth Amendment right to be free from cruel and unusual punishment by viciously beating the prisoner without justification or excuse.[46] Because the prison guard's actions are illegal under state law, pre-*Monroe* courts would find that the guard did not act under the color of state law, and the requirements to bring a § 1983 claim would not be met.[47] This contradiction meant that victims who suffered abuse at the hands of government officials could never recover under § 1983 because constitutional violations are inherently illegal.[48]

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them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers").

42. *See id.* at 172 ("It is argued that 'under color of' enumerated state authority excluded acts of an official or policeman who can show no authority under state law, state custom, or state usage to do what he did.").

43. *See Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 49–50 (explaining that "the under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful'" (citation omitted)).

44. *See* Monroe v. Pape, 272 F.2d 365, 366 (7th Cir. 1959), *rev'd*, 365 U.S. 167 (1961) (finding that the police officers did not act under the color of state law because they infringed on the plaintiff's due process rights in violation of state law).

45. *See Monroe*, 365 U.S. at 172–73 (demonstrating that the police violated state law and the Constitution by breaking and entering into the plaintiff's apartment).

46. *See* Hudson v. McMillian, 503 U.S. 1, 4 (1992) (holding that "the use of excessive physical force against a prisoner may constitute cruel and unusual punishment when the inmate does not suffer serious injury").

47. *See supra* notes 43–45 and accompanying text (explaining that courts were able to dismiss most § 1983 claims because it was nearly impossible to satisfy the "color-of-state law" requirement).

48. *See Monroe*, 365 U.S. at 172 (explaining that a police officer "violate[s] the Constitution and laws of Illinois" by searching a home without a warrant).

The Supreme Court reversed this rule in *Monroe* and held that "actions taken by state government officials in carrying out their responsibilities, even if contrary to state law, were nevertheless actions taken 'under color of law.'"[49] This holding gave full effect to § 1983 and finally made it a viable cause of action.[50]

B. The Purpose of § 1983

The primary purpose of § 1983 "is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief."[51] Congress had three goals in mind when passing § 1983: (1) to supersede state laws promoting discriminatory and unconstitutional activity; (2) to "provide[] a remedy where state law was inadequate"; and (3) "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."[52]

In furtherance of this objective, the courts must liberally construe § 1983 to give effect to the statute's broad scope.[53] Congress did not limit enforcement of § 1983 to certain

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49. SCHWARTZ, *supra* note 27, at 2; *see Monroe*, 365 U.S. at 187 (explaining that the Supreme Court rejected the argument that the phrase "under color of" enumerated state authority excludes [from § 1983] acts of an official or policeman who can show no authority under state law, state custom, or state usage to do what he did"); DAVID W. LEE, HANDBOOK OF SECTION 1983 LITIGATION § 1.01 (2019) ("The Court held that public officials' actions meet the 'color of law' requirement when they act under the *authority* of state law, regardless of whether their act is *illegal* under state law.").

50. *See* Adelman, *supra* note 26, at 4 (explaining that the *Monroe* decision "revived the statute and turned it into an effective means of vindicating violations of constitutional rights").

51. Hardin v. Straub, 490 U.S. 536, 539 n.5 (1989) (quoting Burnett v. Grattan, 468 U.S. 42, 55 (1984)).

52. *See* Monroe v. Pape, 365 U.S. 167, 173–74 (1961) (describing the main objectives of § 1983); SCHWARTZ, *supra* note 27, at 1 (providing background information and legislative history of § 1983).

53. *See* Dennis v. Higgins, 498 U.S. 439, 443–46 (1991) (emphasizing that the legislative history of § 1983 supports a liberal construction of the statute); Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 105 (1989) (explaining that the Supreme Court has "repeatedly held that coverage of [§ 1983] must be broadly construed"); *Hardin*, 490 U.S. at 539 n.5 (reiterating that § 1983 must "be accorded 'a sweep as broad as its language'" (citation omitted)).

enumerated rights, but rather provided sweeping protection against violations of *any* constitutional or statutory right.[54]

Section 1983 serves an important role in enforcing the Constitution and courts consider two core principles when analyzing a prisoner's claim of constitutional violations.[55] The first principle is "that federal courts must take cognizance of the valid constitutional claims of prison inmates."[56] Although a prisoner's rights are restricted by the nature of his criminal confinement, "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime."[57] Members of the public sometimes argue that prisoners and criminals should lose their constitutional rights solely based on their offender status.[58] A popular cliché cautions "don't do the crime if you can't do the time."[59] However, "there is no iron curtain drawn between the Constitution and the prisons of this country."[60] The Supreme Court expressly rejects the argument that prisoners are completely devoid of constitutional protection.[61]

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54. *See* 42 U.S.C. § 1983 (2018) (stating broadly that the statute applies to "the deprivation of *any* rights, privileges, or immunities secured by the Constitution and laws" (emphasis added)).

55. *See* Peter R. Shults, Note, *Calling the Supreme Court: Prisoners' Constitutional Right to Telephone Use*, 92 B.U. L. Rev. 369, 373 (2012) (listing the two core principles of prisoner constitutional claims).

56. Turner v. Safley, 482 U.S. 78, 84 (1987).

57. Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974).

58. *See* JOHN A. FLITER, PRISONERS' RIGHTS: THE SUPREME COURT AND EVOLVING STANDARDS OF DECENCY xi (2001) (discussing how the general public is often "either indifferent or hostile to the concept of prisoners' rights"); *but see* James Welch, *Why Do Human Rights Apply to Convicted Criminals?*, GUARDIAN (Sept. 14, 2009, 8:33 AM), https://perma.cc/A8TY-B7AZ (last visited Nov. 20, 2019) (dispelling and countering the opinion that prisoners should lose their human rights) (on file with the Washington and Lee Law Review).

59. *See* FLITER, *supra* note 58, at xi (discussing how some of the author's students do not "understand why the Constitution should even protect prison inmates").

60. *Wolff*, 418 U.S. at 555–56.

61. *See id.* at 555 (rejecting an argument that prisoners are not afforded Due Process as "plainly untenable"); *Turner*, 482 U.S. at 84 ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."); Johnson v. Avery, 393 U.S. 483, 485–86 (1969) (holding that prisoners have a fundamental right to petition the government for redress and that the right of habeas corpus cannot be obstructed).

The second principle is that the actions of prison administrators are entitled to judicial deference because they require discretion to effectively run the prison.[62] Three considerations guide this second principle: (1) American prisons are extremely complex and their issues "are not readily susceptible of resolution by [judicial] decree"; (2) operating and managing a prison "is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources"; and (3) prison operations "are peculiarly within the province of the legislative and executive branches . . . . and separation of powers concerns counsel a policy of judicial restraint."[63] These two principles often conflict and courts must balance protecting prisoners' rights with enforcing the prison's security needs.[64]

C. Qualified Immunity: The Ultimate Defense

Even where a defendant violates a plaintiff's constitutional right, the defendant may still prevail by asserting a qualified immunity defense.[65] Qualified immunity immunizes a government official not only from liability, but from the lawsuit itself, "so long as the official did not violate *clearly established* federal law."[66] This

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62. *See Turner*, 482 U.S. at 84 (explaining that when the state penal system is involved in allegations of constitutional abuse, federal courts "accord deference to the appropriate prison authorities" in their decisions); Procunier v. Martinez, 416 U.S. 396, 404–05 (1974) (explaining why prison administrators' decisions are entitled to judicial deference); *see also* Brown v. Plata, 563 U.S. 493, 559 (2011) (Scalia, J., dissenting) (arguing in favor of judicial restraint when reviewing prison officials' actions and decisions).

63. *Turner*, 482 U.S. at 84–85.

64. *See* Shults, *supra* note 55, at 373 (explaining that "judges must decide how to balance protection of prisoners' constitutional rights with prison administrators' flexibility to achieve their goals"); *Procunier*, 416 U.S. at 406 (explaining that there is "tension between the traditional policy of judicial restraint regarding prisoner complaints and the need to protect constitutional rights").

65. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (granting a defendant qualified immunity when the law is not clearly established because "an official could not reasonably be expected to anticipate subsequent legal development, nor could he fairly to be said to 'know' that the law forbade conduct").

66. SCHWARTZ, *supra* note 27, at 143; *see* Plumhoff v. Rickard, 572 U.S. 765, 771–72 (2014) (clarifying that qualified immunity is "an immunity from suit rather than a mere defense to liability" (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009))); *see also* Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) (mentioning

means that government actors "are not liable for bad guesses in gray areas; they are liable for transgressing bright lines."[67] A defendant is only liable under § 1983 where he or she violates clearly established law.[68] On its face, qualified immunity is a reasonable, prudent doctrine that promotes judicial efficiency. However, as will be discussed later in this Note, courts are increasingly using qualified immunity as a crutch to avoid ruling on the two intra-circuit splits.[69]

D. The Prison Grievance System

Until the 1960s, courts systematically refused to hear prisoner complaints alleging constitutional violations under the "hands-off doctrine."[70] Under this theory, "federal courts refused to intervene on the ground that 'it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined.'"[71]

Fortunately, the civil rights era of the 1960s sparked concern over prison conditions, and courts responded[72] by reorganizing

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that qualified immunity protects government officials from needless litigation and allows them to focus on their official job duties).

67. Coollick v. Hughes, 699 F.3d 211, 221 (2d Cir. 2012) (citation omitted).

68. *See* City of San Francisco v. Sheehan, 136 S. Ct. 1765, 1774 (2015) (explaining that qualified immunity "'gives government officials breathing room to make reasonable but mistaken judgments' by 'protect[ing] all but the plainly incompetent or those who knowingly violate the law'" (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011))).

69. *See infra* Part III.D.2 (discussing how district courts in the Second Circuit dismiss § 1983 suits on qualified immunity grounds to avoid resolving the *Colon* split).

70. *See* Van Swearingen, Comment, *Imprisoning Rights: The Failure of Negotiated Governance in the Prison Inmate Grievance Process*, 96 CAL. L. REV. 1353, 1355 (2008) (explaining that "[d]uring the vast majority of the United States' history, courts strictly adhered to a 'hands-off' approach toward prison litigation"); Block v. Rutherford, 468 U.S. 576, 594 (1984) (describing how during this period, the "prevailing barbarism and squalor of many prisons were met with a judicial blind eye").

71. MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS 10–11 (4th ed., vol. 1 2009) (quoting Stroud v. Swope, 187 F.2d 850, 851–52 (9th Cir. 1951)).

72. *See* Holt v. Sarver, 442 F.2d 304, 309 (8th Cir. 1971) (affirming the district court's intervention into the administration of a prison by ordering it to

prisons into bureaucratic systems.[73] As part of the new bureaucracy, prisons implemented internal grievance procedures to avoid litigation.[74] For example, the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA)[75] required federal prisons to adopt grievance procedures.[76] Shortly thereafter, all fifty states implemented grievance procedures.[77] As a result of CRIPA and the concern for prisoners' rights, prison litigation in federal court increased dramatically throughout the 1980s and 1990s.[78]

However, this growth eventually stalled when Congress passed the Prison Litigation Reform Act of 1995 (PLRA)[79] "in response to what Congress considered to be an abuse of the judicial process by inmates."[80] The goal of the PLRA is to "make it more difficult for prisoners to take their [constitutional] complaints to federal court"[81] and it has largely been successful in doing so.[82]

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hire more guards and appropriate more funds to improve infrastructure).

73. *See* Swearingen, *supra* note 70, at 1357 (explaining how creating a "centralized system with a consistent set of internal procedures and regulations . . . would both dismantle the broken system and effectively secure prisoners' rights"); MUSHLIN, *supra* note 71, at 15–16 (explaining that the civil rights movement sparked the necessary change to end the "hands-off doctrine").

74. *See* Swearingen, *supra* note 70, at 1359 (describing the "causal relationship between the success of prisoners' rights litigation and universal adoption of inmate grievance procedures").

75. 42 U.S.C. § 1997 (2018).

76. *See* Swearingen, *supra* note 70, at 1361 (explaining how CRIPA "provided for grievance procedures in all federal prisons, [and] provided powerful motivation for states to adopt similar procedures").

77. *See id.* ("By 1983, each of the fifty states had adopted some form of grievance procedures in their adult penitentiary systems.").

78. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1559 (2003) (providing prisoner suit statistics and explaining that prisoner suits constituted nineteen percent of the federal civil docket and fifteen percent of all trials in 1995).

79. 42 U.S.C. § 1997e (2018).

80. MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS 566–67 (4th ed., vol. 3 2009).

81. Michael Irvine, *Chapter 17: Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law*, 31 COLUM. HUM. RTS. L. REV. 305, 305 (2000).

82. "The PLRA has had an impact on inmate litigation that is hard to exaggerate; . . . [by] 2001 filings by inmates were down forty-three percent since their peak in 1995, notwithstanding a simultaneous twenty-three percent increase in the number of people incarcerated nationwide." Schlanger, *supra* note 78, at 1559–60 (footnotes omitted). The PLRA "drastically altered the corrections

With respect to prisoner grievance submissions, the PLRA requires prisoners to exhaust all internal administrative remedies to resolve the grievance before filing a claim in federal court.[83] Before the PLRA, exhaustion was not a mandatory prerequisite to filing.[84] The PLRA is still in effect today and severely restricts prisoners' ability to seek redress for constitutional violations.[85]

III. Supervisory Liability in the Second Circuit and the Colon *Split*

Supervisory officials may be held responsible for constitutional violations under one of two doctrines: (1) direct liability; or (2) supervisory liability.[86] As its name suggests, direct liability occurs when the supervisor directly causes the constitutional violation, either by personally causing the injury or directing a subordinate (i.e. an agent) to cause the injury.[87] Supervisory liability, on the other hand, holds the supervisor responsible for a subordinate's constitutional violation when the supervisor did not directly cause the injury as required by direct liability.[88]

The test for supervisory liability varies by jurisdiction, but every test contains three elements: (1) a subordinate directly

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litigation environment, imposing filing fees on even indigent inmates, requiring them to exhaust administrative remedies prior to filing lawsuits, and limiting their damages and attorneys' fees." *Id.* at 1559.

83. *See* MUSHLIN, *supra* note 80, at 59 ("Under the PLRA, exhaustion is no longer discretionary; it is mandatory.").

84. *See id.* at 598 (explaining that the PLRA "made a dramatic 180-degree change" in imposing strict exhaustion requirements).

85. *See supra* notes 79–84 and accompanying text (describing how the PLRA reversed some of the advancements made by CRIPA and the civil rights movement).

86. *See* Evans, *supra* note 9, at 110–11 (distinguishing between the situation where an individual personally causes an injury and the situation where an individual causes an injury through the acts of another).

87. *See id.* at 111–13 ("For a plaintiff to prevail on a constitutional tort claim using a theory of direct liability, she must show that she suffered a constitutional injury at the hands of the defendant.").

88. *See id*. at 113–14 (describing supervisory liability as "causally attenuated liability" because the supervisor is usually one step removed from the underlying constitutional tort).

causes a constitutional violation;[89] (2) the supervisor possesses the requisite *mens rea* for culpability;[90] and (3) the supervisor's personal involvement[91] creates an affirmative link between the supervisor's conduct and the subordinate's unconstitutional act.[92]

There is considerable disagreement over what constitutes personal involvement in the third element.[93] Each circuit has adopted a different definition of personal involvement.[94] This definitional distinction serves as the launching point for the remainder of the Note, which focuses on supervisory liability in the Second Circuit.

*A. Pre-*Iqbal *Liability in the Second Circuit*

The Second Circuit established the test for personal involvement in *Colon v. Coughlin*.[95] Under this test, a supervisory

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89. *See id.* at 114 (describing how "the entire claim falls" against a supervisor unless the subordinate is directly liable for the unconstitutional act).

90. *See id.* at 117–18 (noting that some jurisdictions require that the supervisor display deliberate indifference to the subordinate's unconstitutional actions, whereas other jurisdictions require that supervisor have actual knowledge of such actions).

91. *See* Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009) (clarifying that a supervisor is not personally involved under a theory of vicarious liability or *respondeat superior*).

92. *See* Evans, *supra* note 9, at 114–18 (summarizing and condensing the elements of supervisory liability as found across the various circuits).

93. *See* Rosalie Berger Levinson, *Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post-*Iqbal/Connick *World*, 47 HARV. C.R.-C.L. L. REV. 273, 278–81 (2012) (discussing how it is more difficult to hold supervisors liable for constitutional violations when they are one step removed from the wrongful act).

94. *See* Whitfield v. Melendez-Rivera, 431 F.3d 1, 14 (1st Cir. 2005) ("[A] supervisor may only be held liable where (1) the behavior of [his] subordinates results in a constitutional violation and (2) the [supervisor's] action or inaction was *affirmatively link*[*ed*] to the behavior . . . ." (quotation and citation omitted)); Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988) ("Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence."); Evett v. DETNTFF, 330 F.3d 681, 689 (5th Cir. 2003) ("[A] plaintiff must show either the supervisor personally was involved in the constitutional violation or that there is a sufficient causal connection between the supervisor's conduct and the constitutional violation." (quotation and citation omitted)).

95. 58 F.3d 865 (2d Cir. 1995).

defendant is only personally involved in a constitutional violation if:

> (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.[96]

Colon "permitted courts to find that supervisory officials were 'personally involved' in any constitutional deprivation, regardless of the elements of the underlying constitutional provision at issue, if plaintiffs could prove any one of th[e]se five factors."[97] District courts in the Second Circuit unquestioningly applied *Colon*'s straightforward test when analyzing personal involvement.[98] However, the Supreme Court's 2009 opinion in *Ashcroft v. Iqbal* disrupted the supervisory liability doctrine.[99]

B. The Iqbal *Decision*

Following the attacks on September 11, 2001, the FBI arrested Javaid Iqbal for crimes relating to his immigration documents.[100] Iqbal pleaded guilty, spent time in jail, and returned to his native

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96. *Id.* at 873 (quoting Williams v. Smith, 781 F.2d 319, 323–24 (2d Cir. 1986)).

97. Marom v. City of New York, No. 15-cv-2017, 2016 WL 916424, at *14 (S.D.N.Y. Mar. 7, 2016).

98. *See, e.g.*, Harnett v. Barr, 538 F. Supp. 2d 511, 523–24 (N.D.N.Y. 2009) (before *Iqbal*) (listing all five *Colon* factors as the starting point for the personal involvement discussion before dismissing several supervisory defendants from the suit because they did not satisfy any of the *Colon* factors).

99. *See* Montanez v. City of Syracuse, No. 6:16-cv-00550, 2019 WL 315058, at *16–17 (N.D.N.Y. Jan. 23, 2019) (noting that *Iqbal* may have changed the test for personal involvement and questioning whether *Colon* still governs).

100. *See* Elmaghraby v. Ashcroft, No. 04 CV 01809, 2005 WL 2375202, at *1 n.1 (E.D.N.Y. Sept. 27, 2005) (explaining that the United States charged Iqbal with "conspiracy to defraud the United States and fraud with identification" in violation of 18 U.S.C. §§ 371 and 1028).

country of Pakistan.[101] Upon his return to Pakistan, Iqbal filed a *Bivens*[102] action against numerous federal officials, including former FBI Director Robert Mueller and Attorney General John Ashcroft.[103] Iqbal alleged that Mueller and Ashcroft violated his First and Fifth Amendment rights by implementing penal policies in the wake of September 11th that unconstitutionally targeted Arab Muslim men.[104] Ashcroft and Mueller filed a motion to dismiss Iqbal's complaint and the Supreme Court granted *certiorari* to clarify pleading standards under the Federal Rules of Civil Procedure.[105]

Although *Iqbal* shook the legal world in its discussion concerning pleading standards,[106] the opinion also contains an oft-overlooked holding about supervisory liability.[107] Before addressing the pleading issue, the Supreme Court briefly addressed whether Ashcroft and Mueller could be liable as

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101. *See* Brief of Respondents in Opposition to Petitioners' Petition for a Writ of Certiorari at 3, Ashcroft v. Iqbal, 556 U.S. 662 (2009) (No. 07-1015), ECF No. 9 (explaining that the United States deported Iqbal to Pakistan following his imprisonment).

102. A *Bivens* suit is "an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Iqbal*, 556 U.S. at 676 (citation omitted). A *Bivens* action is the "federal analog to suits brought against state officials under . . . 42 U.S.C § 1983." *Id.* at 675–76 (citation omitted).

103. *See id.* at 668 (noting that Iqbal named over fifty defendants in his § 1983 lawsuit ranging from low-level prison guards to high-ranking government officials).

104. *See* First Amended Complaint ¶ 96, Elmaghraby v. Ashcroft, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005) (No. 04-cv-01809), ECF No. 35 (alleging that Ashcroft and Mueller "each knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to [harsh] conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest").

105. *See Iqbal*, 556 U.S. at 669–70 (explaining that the Eastern District of New York denied the motion to dismiss and the Second Circuit affirmed this ruling on appeal).

106. *See* Raymond H. Brescia, *The* Iqbal *Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 239–40 (2012) (noting that dismissal rates increased "from sixty-six percent to seventy-five percent" after *Iqbal*); Evans, *supra* note 9, at 105 (explaining that "it was like a nuclear weapon had gone off" when the court decided *Iqbal*).

107. *See Iqbal*, 556 U.S. at 676–77 (explaining that in a § 1983 or *Bivens* action alleging discrimination in violation of the First and Fifth Amendments, a supervisor is only liable for the discriminatory acts of a subordinate if the supervisor also acted with a discriminatory purpose).

supervisors for the discriminatory actions of their subordinates.[108] The court rejected the plaintiff's argument that "a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution."[109] Rather, "[i]n a § 1983 suit or a *Bivens* action . . . the term 'supervisory liability' is a misnomer . . . . [and] [e]ach Government official . . . is only liable for his or her own misconduct."[110] Furthermore, just as "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."[111]

In light of this powerful language, circuit courts did not know whether the concept of supervisory liability survived *Iqbal*.[112] In fact, Justice Souter in his dissent lamented that the "majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely."[113] *Iqbal*'s supervisory liability holding threw the circuits into complete disarray.

*C. Post-*Iqbal *Liability in the Second Circuit*

A deep circuit split emerged as the courts struggled to discern *Iqbal*'s impact on supervisory liability.[114] The Fourth Circuit, Fifth Circuit, Sixth Circuit, and Eleventh Circuit (the "Avoidant Family") did not believe that *Iqbal* effected supervisory liability, so

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108. *See id.* at 675 (addressing the question of substantive law posed by Iqbal's complaint).

109. *Id.* at 677.

110. *Id.*

111. *Id.*

112. On one end of the spectrum, the Fourth, Fifth, Sixth, and Eleventh Circuits ignored *Iqbal* and continued to apply their pre-*Iqbal* supervisory liability tests in full. *See* Evans, *supra* note 9, at 131 (describing these circuits as the "Avoidant Family"). The Seventh Circuit landed on the opposite end of the spectrum by completely abandoning its pre-*Iqbal* supervisory liability test. *See* Vance v. Rumsfeld, 701 F.3d 193, 203 (7th Cir. 2012) (en banc) ("The supervisor can be liable only if he wants the unconstitutional or illegal conduct to occur." (citing Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009))).

113. Ashcroft v. Iqbal, 556 U.S. 662, 693 (2009) (Souter, J., dissenting).

114. *See* Evans, *supra* note 9, at 130 (discussing how the lower courts struggled to reconcile *Iqbal* with existing supervisory liability doctrine).

they continued to apply their pre-*Iqbal* tests.[115] On the other end of the spectrum, the Seventh Circuit (the "Demolition Family") completely "abandoned its pre-*Iqbal* supervisory liability tests."[116] Still, the D.C. Circuit and Eighth Circuit adopted a hybrid approach between these extremes by retaining the supervisory liability doctrine while limiting *Iqbal*'s holding to similar facts.[117]

Whereas most of the circuits took a firm stance on supervisory liability's status after *Iqbal*, the Second Circuit has yet to address the issue directly.[118] Despite several opportunities to resolve the question, the Second Circuit has declined to clarify how *Iqbal* impacts supervisory liability, if at all.[119] Without any guidance from the Second Circuit, the district courts unsurprisingly split over their interpretations of supervisory liability after *Iqbal*.[120] The various tests adopted by the district courts resemble the tests adopted by the other circuits.[121]

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115. *See id.* at 131–39 (describing these circuits as the "Avoidant Family" because they "have made no changes to the content of or rationale behind their respective tests").

116. *See id.* at 146–51 (explaining how the Seventh Circuit strictly interpreted *Iqbal* and completely disallowed supervisory liability, unless the supervisor was directly involved in the unconstitutional act).

117. *See id.* at 171–78 (explaining that these circuits "apply [*Iqbal*'s] supervisory liability holding only when the underlying constitutional tort imposes a mens rea of purpose or intent").

118. *See id.* at 159–64 (noting that the Second Circuit's post-*Iqbal* decisions merely acknowledge "the supervisory liability question without resolving it").

119. *See* Jamison v. Fischer, 617 Fed. App'x 25, 28 n.1 (2d Cir. 2015) (explaining that the Second Circuit has not determined whether *Iqbal* altered personal involvement analysis); Raspardo v. Carlone, 770 F.3d 97, 117 (2d Cir. 2014) (explaining that the Second Circuit has "not yet determined the contours of the supervisory liability test . . . after *Iqbal*").

120. *See infra* Part III.C (discussing how some district courts hold that *Iqbal* supersedes *Colon*, others limit *Iqbal* to its facts, and still others avoid the issue completely).

121. In other words, the district courts in the Second Circuit independently applied the same tests that the circuit courts applied. *See supra* notes 114–117 and accompanying text (listing the various tests adopted by the circuit courts).

1. The Restrictive Courts

Bellamy v. Mount Vernon Hospital,[122] decided just one month after the Supreme Court's *Iqbal* opinion, was the first district court case in the Second Circuit to thoroughly analyze *Iqbal*'s effect on *Colon*.[123] Prisoner Jerome Bellamy brought a § 1983 claim against Dr. Lester Wright, a medical supervisor,[124] alleging that Wright failed to prevent further injury to the plaintiff after learning of his grievances.[125] Bellamy wrote to Wright on several occasions, complaining of inadequate medical treatment.[126] Wright never personally responded to Bellamy's letters or had any other contact with him.[127]

However, other medical staff did respond to all of Bellamy's letters.[128] Under *Colon*'s second factor, Wright's failure to remedy Bellamy's injury would likely be enough to render him personally liable as a supervisor.[129] However, the district court held that Wright was not personally involved because *Iqbal* invalidated the second *Colon* factor.[130] Lending support to this reasoning, the

122. No. 07 Civ. 1801, 2009 WL 1835939 (S.D.N.Y. June 26, 2009).

123. *See id.* at *4–6 (discussing the issue without referencing any Second Circuit or district court precedent).

124. *See id.* at *1 (explaining that Wright's supervisory responsibilities as Chief Medical Officer included "the development and operation of a system to provide necessary medical care for inmates in the custody of the DOCS").

125. *See id.* at *2 (discussing Bellamy's epididymectomy, which subsequently caused him to have testosterone and cortisol deficiencies).

126. *See id.* at *1 (explaining that Bellamy "claimed, *first*, that a female officer entered his cell and retrieved his HIV medication, *second*, that an officer eavesdropped on a medical consultation with his doctor, and, *third,* that he went" several days without HIV, Cortisol, and testosterone treatment).

127. *See id.* (mentioning that "Wright's office routinely receives hundreds of letters each year, addressed to him personally from inmates throughout the DOCS system and from individuals writing on behalf of inmates").

128. *See id.* at *2 (explaining that Wright's staff screened Bellamy's letters and forwarded them to the Regional Health Services Administrator or Regional Medical Director).

129. *See* Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995) ("The personal involvement of a supervisory defendant may be shown by evidence that . . . the defendant, after being informed of the [constitutional] violation through a report or appeal, failed to remedy the wrong . . . .").

130. *See Bellamy*, 2009 WL 1835939, at *6 (explaining that the second *Colon* factor "impose[s] the exact types of supervisory liability that *Iqbal* eliminated—situations where the supervisor knew of and acquiesced to a constitutional violation committed by a subordinate").

Second Circuit affirmed the district court's decision in an unpublished opinion on appeal.[131]

Other courts in the Second Circuit followed *Bellamy*'s lead in ruling that *Iqbal* abrogated all but the first and third *Colon* factors.[132] For example, in *Butler v. Suffolk County*,[133] the district court did not find supervisory liability where the supervisors neither directly contributed to the constitutional violation, nor created a policy that allowed for unconstitutional practices to occur.[134] Weighing in on the intra-circuit split, the court aligned itself with the *Bellamy* court in ruling that "only two of the *Colon*-factors—direct participation and the creation of a policy or custom—survive *Iqbal*."[135]

2. The Hybrid Courts

Contrary to *Bellamy* and *Butler*, other courts in the Second Circuit continue to apply all of the *Colon* factors and limit *Iqbal*'s supervisory liability holding to similar facts.[136] In *Williams v.*

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131. *See* Bellamy v. Mount Vernon Hosp., 387 Fed. App'x 55, 57 (2d Cir. 2010) (affirming the district court's "judgment for substantially the same reasons").

132. *See* Betances v. Fischer, 144 F. Supp. 3d 441, 449 (S.D.N.Y. 2015) (explaining that a supervisor is only personally involved if she "participates directly in the alleged constitutional violation, creates a policy or custom under which unconstitutional practices occur, or allows such practices to continue"); Williams v. King, 56 F. Supp. 3d 308, 320 (S.D.N.Y. 2014) (declining to consider the second, fourth, or fifth *Colon* factors in analyzing the personal involvement of the supervisory defendants).

133. 289 F.R.D. 80 (E.D.N.Y. 2013).

134. *See id.* at 94–95 (dismissing the prisoner's § 1983 claim against the supervisory defendants for lack of personal involvement).

135. *Id.* at 94 n.8.

136. *See* Montanez v. City of Syracuse, No. 6:16-cv-00550, 2019 WL 315058, at *18 (N.D.N.Y. Jan. 23, 2019) ("In this case because Plaintiff's claims do not require a showing of discriminatory intent and are based on the unreasonable conduct standard of the Fourteenth Amendment, the Court will apply [all of] the *Colon* factors."); Carpenter v. Apple, No. 9:15-CV-1269, 2017 WL 3887908, at *9 (N.D.N.Y. Sept. 5, 2017) ("The majority of district courts, however, have held that all five *Colon* factors survive where the constitutional violate at issue does not require a showing of discriminatory intent."); Lebron v. Mrzyglod, No. 14-CV-10290, 2017 WL 365493, at *5 (S.D.N.Y. Jan. 24, 2017) ("*Iqbal*'s limitation on supervisory liability applies only to claims for discrimination under the First or Fifth Amendments.").

Adams,[137] a prisoner brought a § 1983 suit against prison supervisors who allegedly learned their subordinates were providing inadequate medical care, but failed to fix the situation.[138] In analyzing the supervisors' personal involvement, the district court noted that courts are split as to whether *Colon* survives *Iqbal*.[139]

The district court adopted the hybrid approach, explaining "that the *Colon* analysis still applies where the constitutional claim asserted does not require a showing of discriminatory intent."[140] In this case the plaintiff alleged medical indifference, which does not require a showing of discriminatory intent, so the district court applied all five *Colon* factors.[141] The court reasoned that *Iqbal* only discussed supervisory liability in the context of claims involving discriminatory intent, so its impact on supervisory liability should be limited to those circumstances.[142]

3. The Avoidant Courts

Most recently, district courts in the Second Circuit have avoided weighing in on the *Iqbal* debate altogether.[143] These avoidant courts simply note that there is an intra-circuit split on

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137. No. 9:18-CV-1041, 2019 WL 350215 (N.D.N.Y. Jan. 29, 2019).

138. *See id.* at *2 (alleging that the prison officials were deliberately indifferent to the plaintiff's "chronic neck and lower back spinal conditions that required use of backbrace [sic]").

139. *See id.* at *7 ("In this Circuit, '*Iqbal* has engendered conflict . . . about the continued vitality of the supervisory liability test set forth in *Colon*' . . . ." (citation omitted)).

140. *Id.*

141. *See id.* (holding that *Colon* survives *Iqbal* so long as the underlying constitutional claim does not involve discriminatory intent).

142. *See id.* (noting that "[t]he factors necessary to establish a [§ 1983] violation will vary with the constitutional provision at issue" (quoting Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009))).

143. *See* Coleman v. Cuomo, No. 9:18-CV-0390, 2019 WL 257933, at *4 n.1 (N.D.N.Y. Jan. 18, 2019) (discussing how the Second Circuit has yet to resolve the *Colon* split and that "[f]or purposes of this Decision and Order, the Court assumes that all five categories under *Colon* remain valid"); Amaya v. Ballyshear LLC, 295 F. Supp. 3d 204, 225 (E.D.N.Y. 2018) (explaining that "[t]he court will assume, for purposes of this motion, that *Colon* remains good law" after noting the intra-circuit split).

the issue of supervisory liability and will continue to apply *Colon* until told otherwise.[144]

For example, in *Franks v. Russo*[145] a prisoner brought a § 1983 claim against prison officials relating to inadequate medical treatment and abuse.[146] The supervisory defendants argued that they were not personally involved in the alleged misconduct.[147] In analyzing the defendants' personal involvement, the district court acknowledged the intra-circuit confusion; however, without any further analysis, the district court simply "assume[d] that all five categories under *Colon* remain valid."[148] The split is so well-defined at this point that the district courts have given up trying to resolve the issue themselves.[149] The Second Circuit must step in and resolve the issue.

144. *See Lebron*, 2017 WL 365493, at *4 (explaining that "[s]ome courts have simply concluded that, in the absence of Second Circuit precedent suggesting otherwise, they will continue to apply the *Colon* test").

145. No. 9:18-CV-1282, 2018 WL 6674293 (N.D.N.Y. Dec. 19, 2018).

146. *See id.* at *2–3 (alleging that the plaintiff did not receive appropriate medical accommodations after he suffered a mental breakdown and that the prison staff denied him treatment as punishment for filing grievances).

147. *See id.* at *5 (stating that the plaintiff's complaint simply named the supervisors as defendants without alleging supporting facts to find personal involvement).

148. *Id.* at *3 n.4; *see also* Pritchard v. Cty. of Erie, No. 04-CV-534, 2018 WL 1036165, at *3 n.6 (W.D.N.Y. Feb. 23, 2018) ("[T]he Court assumes that *Colon* remains an accurate statement of the law in the Second Circuit."); Muhammad v. Cohen, No. 13-cv-1422, 2015 WL 1973330, at *7 n.12 (S.D.N.Y. May 1, 2015) ("Since *Iqbal*, courts in this district have disagreed over whether the *Colon* categories continue to apply, and the Second Circuit has yet to provide guidance . . . . The Court's analysis here assumes that the *Colon* categories continue to apply.").

149. *See* Aponte v. Fischer, No. 14-CV-3989, 2018 WL 1136614, at *8 n.5 (S.D.N.Y. Feb. 28, 2018) (explaining that the district court will continue to apply all five *Colon* factors until the Supreme Court or Second Circuit hold otherwise); El-Hanafi v. United States, No. 1:13-cv-2072, 2015 WL 72804, at *13 (S.D.N.Y. Jan. 6, 2015) (noting that the court will continue to apply *Colon* in full "absent any contrary directive from the Second Circuit" (quoting Vazquez-Mentado v. Buitron, 995 F. Supp. 2d 93, 96–97 (N.D.N.Y. 2014))).

D. What Does This All Mean?

The split regarding *Colon*'s viability boils down to competing interpretations of *Iqbal*'s scope.[150] According to courts that continue to apply *Colon* in full, *Iqbal* only limits supervisory liability to factually similar situations where the underlying constitutional violation involves discriminatory intent by the subordinate.[151] Therefore, when the underlying claim does not require a showing of discriminatory intent, the personal involvement test set forth in *Colon* still applies.[152] Courts rejecting this analysis, as in *Bellamy*, reason that *Iqbal* restricts supervisory liability even in situations where the underlying constitutional violation does not involve discriminatory intent.[153] In other words, *Iqbal* is not limited to the facts of the case.

1. Observations

Despite the confusion and uncertainty surrounding supervisory liability due to the Second Circuit's reluctance to address the issue, some indications of clarity are slowly emerging.[154] First, and most notably, the majority of district courts

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150. *See* Evans, *supra* note 9, at 105 ("The Supreme Court has not explained what it meant in *Iqbal* in the years since it was decided, and few scholars have touched on this area of law.").

151. *See* Thomas v. Calero, 824 F. Supp. 2d 488, 506 (S.D.N.Y. 2011) ("[W]here the claim does not require a showing of discriminatory intent, the personal-involvement analysis set forth in *Colon* should still apply . . . ."); Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability after* Iqbal, 14 LEWIS & CLARK L. REV. 279, 295 (2010) (explaining that *Iqbal* requires supervisors to have "the same state of mind as that for the underlying constitutional violation").

152. *See* Sash v. United States, 674 F. Supp. 2d 531, 544 (S.D.N.Y. 2009) ("It was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.'" (quoting Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009))).

153. *See* Bellamy v. Mount Vernon Hosp., No. 07 Civ 1801, 2009 WL 1835939, at *6 (S.D.N.Y. June 26, 2009) (establishing the blanket rule that the second, fourth, and fifth *Colon* factors "impose the exact types of supervisory liability that *Iqbal* eliminated—situations where the supervisor knew of and acquiesced to a constitutional violation committed by a subordinate").

154. *See* Grullon v. City of New Haven, 720 F.3d 133, 139 (2d Cir. 2013)

in the Second Circuit adopt the hybrid approach and continue to apply *Colon* when the underlying constitutional claim does not involve discriminatory intent.[155] *Bellamy* and its progeny are in the clear minority in holding that *Iqbal* limits *Colon*'s scope.[156] In fact, many of the cases discrediting *Colon*, including *Bellamy*, were decided by Judge Shira Scheindlin[157] who has since retired.[158] Given these developments, the Second Circuit may not believe it is necessary to definitively rule on the issue.[159]

(mentioning that *Iqbal* may have affected the *Colon* test, but avoiding the issue by explaining that regardless of *Iqbal*, the supervisor in that case was not personally involved under any of the *Colon* factors).

155. *See* Montanez v. City of Syracuse, No. 6:16-cv-00550, 2019 WL 315058, at *17 (N.D.N.Y. Jan. 23, 2019) (explaining that "neither the Second Circuit nor the Supreme Court has endorsed" the restrictive courts' approach (quoting Cano v. City of New York, 44 F. Supp. 3d 324, 336 (E.D.N.Y. 2014))); Amaya v. Ballyshear LLC, 295 F. Supp. 3d 204, 225 (E.D.N.Y. 2018) (discussing whether *Iqbal* supersedes *Colon*); Vazquez-Mentado v. Buitron, 995 F. Supp. 2d 93, 96–97 (N.D.N.Y. 2014) ("The majority of district courts, however, have held that, absent any contrary directive from the Second Circuit, all five *Colon* factors survive where . . . the constitutional violation at issue does not require a showing of discriminatory intent.").

156. *See* Doe v. New York, 97 F. Supp. 3d 5, 12 (E.D.N.Y. 2015) (mentioning that the majority of courts have continued to apply all five *Colon* factors and that "neither the Second Circuit nor the Supreme Court" has supported the interpretation that only the first and third factors survive *Iqbal* (quoting Cano v. City of New York, 44 F. Supp. 3d 324, 336 (E.D.N.Y. 2014))).

157. *See* Betances v. Fischer, 144 F. Supp. 3d 441, 449 n.48 (S.D.N.Y. 2015) (Scheindlin, J.) (finding that *Iqbal* abrogates the second, fourth, and fifth *Colon* factors); Williams v. King, 56 F. Supp. 3d 308, 320 n.60 (S.D.N.Y. 2014) (Scheindlin, J.) (same); Bentley v. Dennison, 852 F. Supp. 2d 379, 396 n.102 (S.D.N.Y. 2012) (Scheindlin, J.) (same); Newton v. City of New York, 640 F. Supp. 3d 426, 448 n.155 (S.D.N.Y. 2009) (Scheindlin, J.) (same); Spear v. Hugles, No. 08 Civ. 4026, 2009 WL 2176725, at *2 (S.D.N.Y. July 20, 2009) (Scheindlin, J.) (same); Bellamy v. Mount Vernon Hosp., No. 07 Civ 1801, 2009 WL 1835939, at *6 (S.D.N.Y. June 26, 2009) (Scheindlin, J.) (same).

158. *See* Benjamin Weiser, *Shira Scheindlin, Judge Behind Stop-and-Frisk Ruling, Will Step Down*, N.Y. TIMES (Mar. 23, 2016), https://perma.cc/5Z39-4VQY (last visited Nov. 20, 2019) (announcing Judge Scheindlin's resignation from the bench of the U.S. District Court for the Southern District of New York effective April 2016) (on file with the Washington and Lee Law Review). Nevertheless, Judge Scheindlin is not alone as other judges have also sided with her. *See, e.g.*, Butler v. Suffolk County, 289 F.R.D. 80, 94 n.8 (E.D.N.Y. 2013) (Seybert, J.) (finding that *Iqbal* abrogates the second, fourth, and fifth *Colon* factors); Bryant v. County of Monroe, No. 09-CV-6415, 2010 WL 4877799, at *3 (W.D.N.Y. Nov. 22, 2010) (Siragusa, J.) (same).

159. Circuit courts often decide cases when an intra-circuit split emerges. The Second Circuit may not believe that there is enough of a division to justify issuing

Second, a recent unpublished summary order[160] issued by the Second Circuit in *Delee v. Hannigan*[161] also suggests that all five *Colon* factors may survive *Iqbal*.[162] Prisoner Maurice Delee brought a § 1983 suit against several supervisory prison officials alleging mistreatment during his incarceration.[163] The district court granted the supervisory defendants' motion to dismiss for lack of personal involvement and the Second Circuit reviewed for error.[164]

In affirming the motion to dismiss, the Second Circuit listed all five *Colon* factors in its definition of personal involvement.[165] On its surface, this indicates that *Iqbal* does not abrogate *Colon*, but the court's reasoning does not support such an expansive reading of *Colon*'s presence in the opinion.[166] The Second Circuit listed the five *Colon* factors and then explained that the "amended complaint makes no allegation as to the involvement of [the supervisory defendants], other than the titles of their employment."[167] As such, "[t]here is therefore no well-plead

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a decision on the issue. *See* Tillman J. Breckenridge, *Petitioning for Further Review After Losing a Federal Appeal*, VA. LAW. (Oct. 2015), https://perma.cc/AD58-BJV2 (last visited Nov. 20, 2019) (mentioning that the "strongest petition for rehearing *en banc* exposes a conflict between holdings within the circuit [because] . . . . an intra-circuit split allows the petitioner to appeal to the judges' base sense of judicial efficiency and fairness of the process") (on file with the Washington and Lee Law Review).

160. *See* 2d Cir. R. 32.1.1 (establishing guidelines for the disposition of cases by summary order and explaining that unpublished summary orders do not carry precedential authority to bind the district courts in the Second Circuit).

161. 729 Fed. App'x 25 (2d Cir. 2018).

162. *See id.* at 27 (reviewing the district court's decision to dismiss the plaintiff's § 1983 suit alleging that prison guards and officials used excessive force and retaliated against him).

163. *See id.* at 27–28 (claiming that several corrections officers "beat, kicked, and sexually assaulted [the plaintiff] as retribution for seeking [a] refund" of a disputed commissary charge).

164. *See id.* at 31 ("The amended complaint makes no allegation as to the involvement of [the supervisory] defendants . . . other than the titles of their employment.").

165. *See id.* (describing the test for establishing the personal involvement of a supervisor in a § 1983 suit).

166. *See id.* (affirming the district court's decision because the plaintiff did not allege any facts that would establish the supervisors' personal involvement under any of the *Colon* factors, even if the court accepted the alleged facts as true).

167. *Id.*

allegation against any" of the supervisory defendants.[168] The court did not substantively discuss *Colon*'s viability, but rather dismissed Delee's complaint on pleading grounds.[169]

In other words, even if *Colon* survived in full, the outcome of *Delee* would not change because the complaint did not allege sufficient personal involvement under any of the five factors.[170] If the complaint failed to satisfy the definition of personal involvement under the hybrid interpretation of *Iqbal*,[171] it would also fail to satisfy the definition of personal involvement under the restrictive interpretation of *Iqbal*.[172] Nevertheless, the fact that the Second Circuit approvingly cited all five factors bodes well for *Colon*'s continued viability.

2. Recommendations

Even though recent trends suggest that *Colon* remains good law, it is imperative that the Second Circuit issue a definitive ruling on *Iqbal*'s scope because courts are avoiding the question entirely by granting defendants qualified immunity.[173] Government officials are immune from suit and "entitled to qualified immunity" if their actions "did not violate clearly established law."[174] The law is clearly established when, "at the

168. *Id.*

169. *See id.* (noting that a plaintiff's mere reference to a supervisor's job title in a complaint, without more, is not enough to properly allege personal involvement under any of the *Colon* factors).

170. *See id.* (dismissing the three supervisory defendants from the lawsuit because there was "no well-pleaded allegation against any of [the supervisory defendants]").

171. *See supra* Part III.C.2 (discussing how the hybrid interpretation continues to apply all of the *Colon* factors, unless the underlying constitutional violation imposes a *mens rea* of discriminatory purpose).

172. *See supra* Part III.C.1 (discussing how the restrictive interpretation invalidates all but the first and third *Colon* factors regardless of the elements of the underlying unconstitutional act).

173. *See* Ojo v. United States, No. 15-cv-6089, 2018 WL 3863441, at *10 (E.D.N.Y. Aug. 14, 2018) ("Ultimately, however, I need not resolve the question of whether *Iqbal* abrogated *Colon* . . . . because, regardless of whether *Colon*'s second category of supervisory liability survived *Iqbal* in such cases, the defendants are entitled to qualified immunity based on the very uncertainty of the governing law.").

174. Pearson v. Callahan, 555 U.S. 223, 243 (2009).

time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood what he is doing violates that right.'"[175] Given the uncertainty surrounding supervisory liability following *Iqbal*, some district courts have found that the law is not clearly established and dismiss the claims on qualified immunity grounds.[176]

For example, in *Funches v. Russo*[177] prisoner Funches brought a § 1983 claim against supervisor McKoy.[178] Funches alleged that McKoy retaliated against him for filing prison grievances in violation of his First Amendment rights.[179] McKoy raised qualified immunity as a defense, arguing that he did not violate any clearly established law.[180] The Northern District of New York agreed with McKoy, explaining that "the uncertainty inherent in the continued viability of the *Colon* test implies that 'regardless of whether *Colon*'s second category of supervisory liability survived *Iqbal* . . . , [the defendant is] entitled to qualified immunity based on the very uncertainty of the governing law.'"[181] Until the Second Circuit clarifies the contours of *Iqbal* and *Colon*, district courts can grant qualified immunity to defendants because the law is not clearly established.[182]

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175. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

176. *See* Funches v. Russo, No. 9:17-CV-1292, 2018 WL 6381058, at *7 (N.D.N.Y. Dec. 6, 2018) (granting the supervisory defendant qualified immunity because it is not clearly established that the second *Colon* factor survives *Iqbal*); *Ojo*, 2018 WL 3863441, at *10 (same).

177. No. 9:17-CV-1292, 2018 WL 6381058 (N.D.N.Y. Dec. 6, 2018).

178. *See id.* at *6 (arguing that defendant McKoy was obligated to approve the plaintiff's correspondence request).

179. *See* Magistrate Judge's Report-Recommendation and Order at 3, Funches v. Russo, 2018 WL 6381058 (N.D.N.Y. Dec. 6, 2018) (No. 9:17-CV-1292), ECF No. 39 (alleging that defendant McKoy prevented Funches from communicating with family members after Funches filed several complaints against prison staff).

180. *See* Defendants' Objection to Magistrate Judge's Report at 10, Funches v. Russo, 2018 WL 6381058 (N.D.N.Y. Dec. 6, 2018) (No. 9:17-CV-1292), ECF No. 40 (claiming that "no clearly established law holds that [McKoy] was required to approve Plaintiff's correspondence request").

181. *Funches*, 2018 WL 6381058, at *7 (quoting Ojo v. United States, No. 15-CV-6089, 2018 WL 3863441, at *10 (E.D.N.Y. Aug. 14, 2018)).

182. *See id.* at *6–7 (explaining that it is unclear whether all five *Colon* factors survive *Iqbal*).

The Second Circuit should explicitly hold that *Iqbal* only limits *Colon* where the underlying constitutional violation involves discriminatory intent.[183] *Iqbal*'s restriction on supervisory liability should be limited to similar facts because the opinion only discussed supervisory liability in the context of constitutional violations involving discriminatory conduct.[184] A careful reading of the Supreme Court's language supports this conclusion.[185]

The Supreme Court began its discussion of supervisory liability by explaining that "[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*."[186] Rather, § 1983 only imposes liability when the government official's own actions cause a constitutional violation.[187] The restrictive courts interpret this language to unequivocally conclude that only the first and third *Colon* factors survive *Iqbal*.[188] However, this is a simplified reading of the opinion and fails to consider the context of the case.[189]

In *Iqbal*, the plaintiff sought to impose liability on government supervisors for the discriminatory conduct of their subordinates.[190] The Supreme Court stated that "[t]he factors necessary to

183. *See* Ziemba v. Jajoie, No. 3:11-cv-00845, 2016 WL 5395265, at *7 (D. Conn. Sept. 26, 2016) (noting that "*Iqbal* dealt specifically with allegations of intentional discrimination, and the [Supreme] Court noted explicitly that the factors necessary to establish liability 'will vary with the constitutional provision at issue'" (quoting Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009))).

184. *See* Carpenter v. Apple, No. 9:15-CV-1269, 2017 WL 3887908, at *10 (N.D.N.Y. Sept. 5, 2017) (following the majority of district courts in the Second Circuit in holding that all five *Colon* factors survive when the alleged constitutional violation does not involve discriminatory conduct).

185. *See* Drew v. City of New York, No. 16 Civ. 0594, 2016 WL 4533660, at *12 (S.D.N.Y. Aug. 29, 2016) (explaining that the restrictive courts, such as *Bellamy*, "may overstate *Iqbal*'s impact on supervisory liability").

186. Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009).

187. *See id.* (explaining that "vicarious liability is inapplicable to *Bivens* and § 1983 suits").

188. *See* Bellamy v. Mount Vernon Hosp., No. 07 Civ 1801, 2009 WL 1835939, at *6 (S.D.N.Y. June 26, 2009) (concluding that *Iqbal* abrogates *Colon* in every situation, regardless of the underlying constitutional violation alleged).

189. *See* Sash v. United States, 674 F. Supp. 2d 531, 544 (S.D.N.Y. 2009) (explaining that the restrictive courts' interpretation "may overstate *Iqbal*'s impact on supervisory liability").

190. *See Iqbal*, 556 U.S. at 666–67 (naming the Attorney General and FBI Director as defendants in the lawsuit because lower-level government officials allegedly profiled the plaintiff because of his race, religion, and national origin).

establish a *Bivens* [and § 1983] violation will vary with the constitutional provision at issue."[191] In other words, the elements of a § 1983 claim mirror the elements of the underlying constitutional violation.[192] When discrimination is an element of the alleged constitutional violation, the plaintiff must prove that the defendant acted with discriminatory purpose to prevail on a § 1983 claim.[193] In such cases, the defendant-official, whether a supervisor or subordinate, is only liable if they acted with discriminatory purpose.[194]

The plaintiff in *Iqbal* argued that supervisors should be liable for the discriminatory conduct of their subordinates as long as the supervisor knew of, or acquiesced to, such discrimination.[195] The Supreme Court rejected this argument, explaining that "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."[196] A supervisor is only liable for the discriminatory actions of their subordinates if the supervisor also possesses discriminatory purpose in acting or failing to act.[197]

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191. *Id.* at 676.

192. *See* Turkmen v. Hasty, 789 F.3d 218, 250 (2d Cir. 2015), *rev'd on other grounds by* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017) (explaining that liability is appropriate when a defendant acts with deliberate indifference and the "underlying constitutional violation requires no more than deliberate indifference").

193. *See Iqbal*, 556 U.S. at 676 ("Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose.").

194. *See, e.g.*, Carpenter v. Apple, No. 9:15-CV-1269, 2017 WL 3887908, at *9 (N.D.N.Y. Sept. 5, 2017) ("The majority of district courts, however, have held that all five *Colon* factors survive where the constitutional violation at issue does not require a showing of discriminatory intent.").

195. *See Iqbal*, 556 U.S. at 677 (advocating for an expansive application of supervisory liability in which supervisors would be vicariously liable for the unconstitutional acts of their subordinates).

196. *Id.* (emphasis added).

197. *See* Marom v. City of New York, No. 15-cv-2017, 2016 WL 916424, at *15 (S.D.N.Y. Mar. 7, 2016) (explaining that *Iqbal* "only requires that a supervisor's action—whether direct or through 'his or her superintendent responsibilities'—must *itself* violate the terms of the constitutional provision at issue" (citation omitted)).

The Supreme Court only analyzed supervisory liability in the context of constitutional violations involving discrimination.[198] The Court did not say anything about non-discriminatory constitutional violations.[199] Rather, the "Supreme Court limited its holding to those claims alleging 'invidious discrimination in contravention of the First and Fifth Amendments.'"[200] Therefore, "[t]he most natural reading . . . is that *Iqbal*'s limitation on supervisory liability applies only to claims for discrimination under the First or Fifth Amendments."[201] *Iqbal*'s holding does not affect supervisory liability analysis of any other unconstitutional act that does not involve discriminatory purpose.[202]

Properly read, *Iqbal* simply clarifies that a defendant, whether a subordinate or supervisor, must individually satisfy the elements of the underlying constitutional violation.[203] Prior to *Iqbal*, the *Colon* test "permitted courts to find that the supervisory officials were 'personally involved' in any constitutional deprivation, regardless of the elements of the underlying constitutional provision at issue, if the plaintiffs could prove any one of those five

198. *See* Lebron v. Mrzyglod, No. 14-CV-10290, 2017 WL 365493, at *5 (S.D.N.Y. Jan. 24, 2017) ("The Supreme Court, however, said nothing about liability for defendants who failed to adequately supervise their subordinates, nor did the Court say anything about what is required to establish personal involvement under *Bivens* or § 1983, the question addressed by *Colon*.").

199. *See id.* ("The issue addressed by the Court, instead, was whether discriminatory intent by a subordinate could be imputed to a supervisor—the Supreme Court concluded that it could not . . . .").

200. *Id.* (quoting Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009)).

201. *Id.*

202. *See id.*

> [T]he Supreme Court did not hold that a supervisor could not be held liable for . . . failing to correct a constitutional violation presented through a direct appeal, discharging her supervisory duties with gross negligence, or acting with deliberate indifference in failing to act on information that unconstitutional conduct was occurring.

See also Sash v. United States, 674 F. Supp. 2d 531, 544 (S.D.N.Y. 2009) ("It was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.").

203. *See* Turkmen v. Hasty, 789 F.3d 218, 250 (2d Cir. 2015), *rev'd on other grounds by* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017) ("The proper inquiry is not the name we bestow on a particular theory or standard, but rather whether that standard—be it deliberate indifference, punitive intent, or discriminatory intent—reflects the elements of the underlying constitutional tort.").

factors."[204] *Iqbal* only implicates personal involvement and abrogates *Colon* for discriminatory-based claims.[205] However, absent an allegation of discriminatory intent, *Colon* survives in full.[206]

IV. Personal Involvement in the Second Circuit and the McKenna *Question*

In addition to the *Colon* split, the Second Circuit laid the groundwork for another intra-circuit split[207] in *McKenna v. Wright*[208] when it questioned "whether an adjudicator's rejection of an administrative grievance would make him liable for the conduct complained of."[209] In this case, Edward McKenna, a prisoner, brought a § 1983 claim against various doctors and non-medical

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204. *Marom*, 2016 WL 916424, at *14; *see also Turkmen*, 718 F.3d at 250 ("Prior to *Iqbal*, this Court recognized claims against a supervisory defendant so long as the defendant was personally involved with the alleged constitutional violation.").

205. *See* Zenon v. Downey, No. 9:18-CV-0458, 2018 WL 6702851, at *7 (N.D.N.Y. Dec. 20, 2018) ("'*Iqbal* does not preclude . . . claims [against government officers] premised on deliberate indifference,' as opposed to a purposefully illegal policy or practice, 'when the underlying constitutional violation requires no more than deliberate indifference.'" (quoting Turkmen v. Hasty, 718 F.3d 218, 250 (2d Cir. 2015))).

206. *See* Evans, *supra* note 9, at 171 (explaining that the hybrid courts "apply [*Iqbal*'s] supervisory liability holding only when the underlying constitutional tort imposes a mens rea of purpose or intent. Where the underlying tort requires something less than intent[,] . . . [these courts] follow[] [their] pre-*Iqbal* precedent" under *Colon*); *see also* Montanez v. City of Syracuse, No. 6:16-cv-00550, 2019 WL 315058, at *18 (N.D.N.Y. Jan. 23, 2019) ("The Court agrees with the reasoning of the cases holding that the *Colon* analysis may still apply where the claim does not require a showing of discriminatory intent, 'insofar as it is "consistent with the particular constitutional provision alleged to have been violated."'" (citation omitted)).

207. *See* Thomas v. Calero, 824 F. Supp. 2d 488, 507 (S.D.N.Y. 2011) ("Recent cases dealing with the issue of personal liability arising from the defendant's involvement in the prison grievance process have struggled with the *dicta* left by the Circuit in *McKenna*."); Burton v. Lynch, 664 F. Supp. 2d 349, 360 (S.D.N.Y. 2009) (explaining that after *McKenna*, "courts in this Circuit are divided regarding whether review and denial of a grievance constitutes personal involvement in the underlying alleged unconstitutional act").

208. 386 F.3d 432 (2d Cir. 2004).

209. *Id.* at 437.

supervisors for inadequate medical treatment.[210] McKenna argued that one of the supervisory defendants, T.J. Miller,[211] was personally involved in denying McKenna medical treatment by rejecting his grievance.[212] This argument falls within the scope of the second and fifth *Colon* factors.[213] However, the Second Circuit ignored this argument and instead found Miller's personal involvement under the third *Colon* factor,[214] explaining that McKenna was injured under Miller's medical treatment system and policy.[215] In avoiding the grievance issue, the Second Circuit left unanswered the question: is a supervisor personally involved in a constitutional violation if they reject a prisoner's grievance? (hereinafter "the *McKenna* question").

A. The Different Tests to Answer the McKenna *Question*

The district courts in the Second Circuit split in answering the *McKenna* question and have adopted different tests to do so.[216]

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210. *See id.* at 434–35 (alleging that the prison's medical officials' delay in treating the plaintiff for Hepatitis C caused further medical complications including cirrhosis of the liver, jaundice, ascites, and hemorrhaging).

211. *See id.* at 435 (describing Miller's position as the Deputy Superintendent of the prison).

212. *See id.* at 436–37 (claiming that the defendants denied "adequate medical care in violation of the Eighth Amendment" and "acted with deliberate indifference to a serious medical need").

213. *See* Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995) (finding personal involvement where a supervisory defendant "after being informed of the violation through a report or appeal, fail[s] to remedy the wrong" or "exhibit[s] deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring").

214. *See McKenna*, 386 F.3d at 437–38 ("Miller was properly retained in the lawsuit at this stage, not simply because he rejected the grievance, but because he is alleged, as Deputy Superintendent for Administration at [the prison], to have been responsible for the prison's medical program."); *Colon*, 58 F.3d at 873 (explaining that a supervisor is personally involved in a constitutional violation if they "created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom").

215. *See McKenna*, 386 F.3d at 438 ("When allegations of improperly denied medical treatment come to the attention of a supervisor of a medical program, his adjudicating role concerning a grievance cannot insulate him from responsibility for allowing the continuation of allegedly unlawful policies within his supervisory responsibility.").

216. *See infra* Part IV.A (discussing how some district courts find personal involvement when a supervisor rejects a grievance alone, whereas other courts

1. The Simplistic Approach

A small minority of courts have found sufficient personal involvement when a supervisor simply rejects a prisoner's grievance without any other involvement. For example, in *Atkinson v. Selsky*[217] the supervisory defendants argued that they were entitled to qualified immunity because it was not clearly established that denying a grievance request constituted personal involvement.[218] The district court rejected this argument and ruled that a "prison official's denial of a grievance or grievance appeal is sufficient personal involvement to render that official liable under Section 1983."[219] The opinion did not mention or consider any other factors that would change this outcome.[220] According to *Selsky*, a supervisory defendant would be *per se* personally involved in a constitutional violation whenever they deny a grievance or grievance appeal.[221]

Similarly, in *Benitez v. Locastro*,[222] prisoner Henry Benitez brought a § 1983 suit challenging the conditions of his confinement.[223] Benitez filed several grievances complaining of the

require a higher degree of involvement).

217. No. 03 Civ. 7759, 2004 WL 2319186 (S.D.N.Y. Oct. 15, 2004). It is important to note that *Selsky* (October 15, 2004) was decided three days before the *McKenna* decision (October 18, 2004). Nevertheless, *Selsky* still answered the *McKenna* question verbatim despite the timing. *Compare id.* at *1 (addressing "whether a prison official's denial of a grievance or grievance appeal is sufficient personal involvement to render the official liable under Section 1983"), *with McKenna*, 386 F.3d at 437 (questioning "whether an adjudicator's rejection of an administrative grievance would make him liable for the conduct complained of"). Therefore, *Selsky* is still a useful tool in understanding how district courts in the Second Circuit approach the *McKenna* question.

218. *See Selsky*, 2004 WL 2319186, at *1 (petitioning the district court to reconsider a magistrate judge's recommendation to deny the supervisory defendants' motion for summary judgment on qualified immunity grounds); *see also infra* Part IV.B (explaining how government officials are immune from suit, unless their actions violate clearly established law).

219. *Selsky*, 2004 WL 2319186, at *1.

220. *See id.* ("[A] considerable preponderance of cases in this district hold that a prison official's denial of a grievance or grievance appeal is sufficient personal involvement to render that official liable under Section 1983.").

221. *See id.* (explaining that the law clearly establishes a supervisor's personal involvement in denying a prisoner's grievance).

222. No. 9:04-CV-423, 2008 WL 4767439 (N.D.N.Y. Oct. 29, 2008).

223. *See id.* at *5–10 (alleging that the defendants violated the plaintiff's constitutional rights by throwing urine and dirty mop water on him, making

prison conditions.[224] According to Benitez, supervisory defendants Burge and Eagen reviewed his grievances, but failed to take any remedial action.[225] In their motion for a judgment on the pleadings, Burge and Eagen argued that they were not personally involved in the underlying violation.[226] The district court disagreed, holding that the defendants were personally involved because they "received, reviewed, and failed to remedy a Grievance."[227] In other words, a supervisory defendant is personally involved in the underlying violation whenever they learn of the violation through a grievance and fail to act on it.[228]

This creates *per se* liability when these conditions are met, similar to *Selsky*, but this ruling is more expansive. In *Selsky*, the supervisory defendant at least responded in some manner to the prisoner's grievance by personally denying it.[229] Here, the defendants simply ignored the grievance altogether.[230] This suggests that inaction is tantamount to an affirmative denial of a grievance and is enough to establish personal involvement.

The *Selsky* and *Benitez* courts took a simplistic approach to the *McKenna* question. Without undertaking a fact-specific inquiry into the supervisor's actions, the courts ruled that a supervisor is personally involved in the underlying constitutional violation by

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death threats, and denying him meals).

224. *See* Amended Complaint ¶ 15, Benitez v. Locastro, 2008 WL 4767439 (N.D.N.Y. Oct. 29, 2008) (No. 9:04-CV-423), ECF No. 5 (alleging that Benitez's prison cell lacked "adequate air flow [which] was causing him to experience bronchospasm and great difficulty breathing").

225. *See id.* ¶¶ 16–17 (alleging that Burge and Eagen "willfully refused to remedy the problem complained of [in the grievance], even though [they] knew that failure to remedy the problem would continue to pose a substantial risk of serious harm to Benitez's health or wellbeing").

226. *See* Memorandum of Law in Support of Defendants' Motion for Judgment on the Pleadings at 13, Benitez v. Locastro, 2008 WL 4767439 (N.D.N.Y. Oct. 29, 2008) (No. 9:04-CV-423), ECF No. 94 (contending that Benitez only named Burge and Eagen as defendants because of their positions as supervisors in the prison, which is insufficient to establish personal involvement).

227. *Benitez*, 2008 WL 4767439, at *13.

228. *See id.* (explaining that a plaintiff sufficiently alleges a supervisor's personal involvement if the supervisor receives and reviews a grievance but does not take any steps to remedy the unconstitutional conduct complained of).

229. *See supra* notes 219–221 and accompanying text (detailing the supervisors' level of involvement in the grievance process).

230. *See supra* notes 225–227 and accompanying text (detailing the supervisors' level of involvement in the grievance process).

the mere act of denying the prisoner's grievance.[231] It does not matter whether the supervisor responded to the grievance or investigated the prisoner's complaint.[232] As long as the supervisor denies the grievance, or affirms the denial on appeal, these courts will find sufficient personal involvement regardless of any other factors.[233] However, this is the minority approach and most courts in the Second Circuit apply one of three other tests to answer the *McKenna* question—all three look beyond the simple act of denial and search for further action by the supervisor before finding sufficient personal involvement.[234]

2. The Investigation Approach

Unlike the simplistic approach, the investigation approach makes a distinction "between simply affirming the denial of a grievance and reviewing and responding to a prisoner's complaint by undertaking some kind of investigation."[235]

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231. *See supra* notes 219–220, 227 and accompanying text (failing to require a higher degree of involvement by the supervisor before imposing supervisory liability).

232. *Cf.* Gallagher v. Shelton, 587 F.3d 1063, 1069 (10th Cir. 2009) ("[A] denial of a grievance, by itself without any connection to the violation of constitutional rights alleged by the plaintiff, does not establish personal participation under § 1983."); O'Brien v. Mich. Dep't of Corr., 592 Fed. App'x 338, 341 (6th Cir. 2014) ("A defendant's involvement in the denial of an administrative grievance is insufficient to show personal involvement in the alleged unconstitutional conduct as required to state a claim under § 1983.").

233. *See* Atkinson v. Selsky, No. 03 Civ. 7759, 2004 WL 2319186, at *1 (S.D.N.Y. Oct. 15, 2004) (explaining that a "prison official's denial of a grievance or grievance appeal is sufficient personal involvement to render that official liable under Section 1983").

234. *See infra* Parts IV.A.2–3 (requiring a higher degree of involvement by the supervisor beyond merely rejecting a grievance, such as investigating the grievance or providing a detailed response to the prisoner).

235. Thomas v. Calero, 824 F. Supp. 2d 488, 507 (S.D.N.Y. 2011) (quotation and citation omitted); *see also* Ciaprazi v. Fischer, No. 13-CV-4967, 2015 WL 1315466, at *9 (S.D.N.Y. Feb. 24, 2015) ("Courts have, however, found the requisite level of personal involvement when a defendant actually reviewed and responded to a plaintiff's complaint or undertook an investigation."); Alvarado v. Westchester County, 22 F. Supp. 3d 208, 215 (S.D.N.Y. 2014) ("[A] defendant's mere 'receipt of a letter or grievance, without personally investigating or acting [thereon], is insufficient to establish personal involvement.'" (citation omitted)).

In *Pugh v. Goord*,[236] prisoners Thomas Pugh, Jr. and Clay Chatin alleged constitutional violations arising from the prison's failure to provide Shi'a religious services separate from Sunni services.[237] Both Pugh and Chatin filed several grievances complaining of discrimination against Shi'ites.[238] In response to the grievances, Deputy Superintendent for Program Services Ada Perez "conducted an investigation into the claims in plaintiffs' grievances and made recommendations."[239] Distinguishing Perez's actions from the mere affirmance of a grievance denial, the district court held that conducting an investigation was sufficient to render Perez personally involved in the underlying constitutional violation.[240]

Similarly, in *Ciaprazi v. Fischer*,[241] prisoner Roberto Ciaprazi filed grievances with the former prison commissioner, Brian Fischer, complaining of the conditions of his confinement.[242] However, defendants Martuscello and Bellnier investigated and responded to Ciaprazi's grievances on Fischer's behalf.[243] Specifically, Martuscello looked into the windows, air conditioning, and ventilation systems in Ciaprazi's cell block and determined that his complaints were unwarranted.[244] Bellnier also "conferred

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236. 571 F. Supp. 2d 477 (S.D.N.Y. 2008).

237. *See id.* at 483–84 (explaining that the plaintiffs "brought this action . . . to be free from the establishment of the Sunni Muslim religion").

238. *See id.* at 499 (complaining that Sunni-led religious services do not carry any religious significance and "as practicing Shi'ites, they are required to participate in [religious] service[s] led by a Shi'ite").

239. *Id.* at 515.

240. *See id.* at 515–16 (denying Perez's motion to dismiss for lack of personal involvement because she failed to remedy an unconstitutional act after being made aware of its occurrence).

241. No. 13-cv-4967, 2015 WL 1315466 (S.D.N.Y. Feb. 24, 2015).

242. *See* Amended Complaint ¶¶ 37–58, 201–20, Ciaprazi v. Fischer, 2015 WL 1315466 (S.D.N.Y. Feb. 24, 2015) (No. 13-cv-4967), ECF No. 5 (alleging that the temperature of the plaintiff's cell was unbearably high and that the prison lights prevented him from sleeping).

243. *See id.* ¶¶ 58, 218 (explaining that Fischer did not respond to Ciaprazi's grievances himself).

244. *See* Plaintiff's Memorandum of Law in Opposition to the Defendants' Partial Motion to Dismiss at 12–13, Exhibit 2, Ciaprazi v. Fischer, 2015 WL 1315466 (S.D.N.Y. Feb. 24, 2015) (No. 13-cv-4967), ECF No. 102 (explaining that Ciaprazi's complaints "have been carefully reviewed" and denying his requests).

with third parties to assure himself that Ciaprazi's concerns were resolved."[245]

The district court accordingly denied Martuscello and Bellnier's motion to dismiss for lack of personal involvement because they undertook an investigation into Ciaprazi's grievances.[246] The supervisory defendants did more than merely deny the plaintiff's grievance—they dedicated time, energy, and resources to reviewing the complaints.[247] When the defendants demonstrate such a high degree of commitment to an alleged constitutional violation, they will be deemed personally involved for supervisory liability purposes under the investigation approach.[248]

Despite its appealing rationale, the investigation approach may have unintended consequences by disincentivizing supervisors to investigate prisoner grievances.[249] There is a strong "possibility that officials will be over-deterred, or chilled, in performing their duties because they fear the consequences if they make a constitutional error."[250] If the supervisor does not investigate the grievance, courts following the investigation approach will not be held personally involved in the constitutional violation.[251] Therefore, supervisors will not investigate grievances

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245. *Ciaprazi*, 2015 WL 1315466, at *9.

246. *See id.* (finding the supervisory defendants personally involved in the underlying alleged constitutional violations because their actions went beyond merely denying a grievance).

247. *See supra* notes 244–245 and accompanying text (detailing how the supervisors personally investigated the plaintiff's grievances to determine their merit).

248. *See* Thomas v. Calero, 824 F. Supp. 2d 488, 507 (S.D.N.Y. 2011) (explaining that the investigation approach makes a distinction "between simply affirming the denial of a grievance and reviewing and responding to a prisoner's complaint by undertaking some kind of investigation" (quotation and citation omitted)).

249. *See* Joshua J. Fougere, *Paying for Prisoner Suits: How the Source of Damages Impacts State Correctional Agencies' Behavior*, 43 COLUM. J.L. & SOC. PROBS. 283, 296 (2010) ("The classic concern with creating government liability is that it will over-deter conduct and chill officers.").

250. Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of* Monroe v. Pape, 78 UMKC L. REV. 889, 910 (2010).

251. *See* Alvarado v. Westchester County, 22 F. Supp. 3d 208, 215 (S.D.N.Y. 2014) ("[A] defendant's mere 'receipt of a letter or grievance, without personally investigating or acting [thereon], is insufficient to establish personal involvement.'" (citation omitted)).

and may simply issue blanket rejections to minimize their risk of becoming personally involved in the constitutional tort.[252]

3. The Detailed Response Approach

The detailed response approach makes a distinction "between a *pro forma* denial of a grievance and a 'detailed and specific' response to a grievance's allegations."[253] In *Long v. Annucci*,[254] Vincent Long filed prison grievances complaining of the conditions in the Alcohol and Substance Abuse Treatment program (ASAT) dorm.[255] Prison Superintendent N. Doldo responded to the grievances and validated Long's complaints, yet failed to resolve the situation.[256] The district court explained that Doldo was personally involved in the underlying constitutional violation because he "provide[d] a detailed and specific response to [Long's] grievance rather than a pro forma denial."[257] The court focused on the nature of the supervisor's response, rather than the mere fact of the denial itself, to find personal involvement.[258]

The district court in *Johnson v. Fischer*[259] similarly adopted the detailed response approach. Prisoner Kevin Johnson brought a § 1983 suit alleging that he was exposed to toxic levels of second hand smoke, bird feces, and mold while incarcerated.[260] Johnson

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252. *See supra* notes 249–251 and accompanying text (discussing why the investigation approach disincentivizes supervisors to investigate prisoner grievances).

253. *Calero*, 824 F. Supp. 2d at 507 (citation omitted); *see also* Brooks v. Chappius, 450 F. Supp. 2d 220, 226 (W.D.N.Y. 2006) (explaining that "personal involvement will not be found unless 'the supervisor's response is detailed and specific'" (citation omitted)).

254. No. 9:17-cv-0916, 2018 WL 4473404 (N.D.N.Y. July 26, 2018).

255. *See id.* at *2 (alleging that the plaintiff's placement in the ASAT dorm exacerbated the pinched nerves in his back, hip, and foot because he could not stretch as instructed by his doctor).

256. *See id.* at *5 (explaining that Doldo "acknowledged Plaintiff was medically excused from all [ASAT] programs at the time, and yet Plaintiff remained in the ASAT dorm").

257. *Id.*

258. *See id.* (denying Doldo's motion to dismiss Long's claims for lack of personal involvement).

259. No. 9:12-CV-0210, 2015 WL 670429 (N.D.N.Y. Feb. 17, 2015).

260. *See* Plaintiff's Amended Complaint at 2–4, Johnson v. Fischer, 2015 WL 670429 (N.D.N.Y. Feb. 17, 2015) (No. 9:12-CV-0210), ECF No. 38 (alleging that

filed several grievances complaining of these prison conditions with supervisory defendant Harold Graham.[261] Responding to the grievances, Graham directed Johnson to "address concerns regarding staff smoking to a supervisor and inmates smoking to area staff, at that time, to allow for remedial action to be taken."[262]

Graham did not investigate Johnson's allegations, but simply suggested a means for the plaintiff to resolve his complaint.[263] According to the district court, this response was enough to render Graham personally involved in the underlying violation.[264] Even though the response was short, it was more than a perfunctory, mechanical rejection.[265] Any response that goes beyond "Grievance Rejected" or the like is enough to determine that the supervisor is personally involved in the violation. In other words, if the supervisor provides an explanation for the rejection, they are personally involved.

Similar to the investigation approach, the detailed response approach may disincentivize supervisors to respond to prisoner grievances.[266] There is a strong "possibility that officials will be over-deterred, or chilled, in performing their duties because they fear the consequences if they make a constitutional error."[267] This encourages supervisors to intentionally overlook prisoner complaints and rubberstamp rejections without responding to

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there is a "network of smokers that stick together [and] there is nothing being done to stop indoor smoking").

261. *See id.* at 3–4 (explaining that Johnson attempted to clean the feces and mold and stop prison guards from smoking indoors).

262. Plaintiff's Response in Opposition to the Defendants' Motion for Summary Judgment at 32, Johnson v. Fischer, 2015 WL 670429 (N.D.N.Y. Feb. 17, 2015) (No. 9:12-CV-0210), ECF No. 89.

263. *See id.* (rejecting the plaintiff's argument that he "should not be required to police the staff and or Inmates [sic]").

264. *See Johnson*, 2015 WL 670429, at *8 ("Defendant Graham issued responses to Plaintiff's grievances that, although not lengthy, were more than simply pro forma denials.").

265. *See* Thomas v. Calero, 824 F. Supp. 2d 488, 507 (S.D.N.Y. 2011) (explaining that the detailed response approach makes a distinction "between a *pro forma* denial of a grievance and a 'detailed and specific' response to a grievance's allegations" (citation omitted)).

266. *See supra* notes 249–252 and accompanying text (arguing that the investigation approach will have a chilling effect on supervisor involvement in the grievance process).

267. Chen, *supra* note 250, at 910.

minimize their risk of becoming personally involved in a constitutional violation.[268]

4. The Ongoing Violation Approach

The ongoing violation approach looks to whether the "alleged constitutional violation complained of in a grievance [is] 'ongoing' . . . such that the 'supervisory official who reviews the grievance can remedy [it] directly.'"[269]

In *Allah v. Annucci*,[270] prisoner Shakim Abd Allah filed a § 1983 action against several prison officials for (1) preventing his attendance at two religious events; and (2) failing to provide adequate religious accommodations.[271] Allah filed several prison grievances complaining that Sunni Muslims were given preferential treatment over Shi'ite Muslims.[272] Allah named Superintendent Thomas Griffin as a defendant and Griffin filed a motion to dismiss, arguing that he could not be liable as a supervisor because he was not personally involved in denying Allah religious accommodations.[273] In response, Allah argued that Griffin was personally involved because he responded to, and signed, Allah's grievances, yet failed to remedy them.[274] After briefly discussing the merits of the investigation approach and

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268. *See* Brooks v. Chappius, 450 F. Supp. 2d 220, 226 (W.D.N.Y. 2006) (explaining that "personal involvement will not be found unless 'the supervisor's response is detailed and specific'" (citation omitted)).

269. *Calero*, 824 F. Supp. 2d at 507 (citation omitted); *see* Burton v. Lynch, 664 F. Supp. 2d 349, 360 (S.D.N.Y. 2009) ("[T]his Court finds most persuasive the many courts in this Circuit which have held that an alleged constitutional violation complained of in an grievance must be 'ongoing' in order to find personal involvement . . . .").

270. No. 16-CV-1841, 2018 WL 4571679 (S.D.N.Y. Sept. 24, 2018).

271. *See id.* at *1–2 (arguing that the prison placed the religious needs of Sunni Muslims over those of Shi'ite Muslims).

272. *See id.* at *2 (advocating for the plaintiff's "'right to practice his faith as a Shi'ite Muslim, and . . . object[ing] to the unequal treatment of Shi'ite Muslims' compared to other faith groups" (citation omitted)).

273. *See id.* at *7 (contending that Griffin's conduct did not fall within any of the *Colon* factors for personal involvement).

274. *See id.* at *2 (discussing Griffin's response to Allah's grievance, which explained that Allah was excluded from the religious services "because he did not request participation").

detailed response approach, the district court ultimately adopted the ongoing violation approach.[275]

The ongoing violation approach contains two elements: (1) the alleged constitutional violation must be ongoing at the time the grievance is filed; and (2) the supervisor who reviews the grievance must be in a position to remedy the ongoing violation directly.[276] The court determined that the prison's deficient Shi'a program constituted an ongoing constitutional violation because the basis for Allah's complaints existed at the time Allah filed his grievances.[277] The court reasoned that Griffin was in a position to remedy the ongoing violations because he held a position of authority within the prison as the Superintendent.[278] Therefore, the court determined that Griffin was personally involved in failing to provide adequate religious services.[279]

In contrast, the court did not find Griffin personally involved in denying Allah access to the two religious events.[280] Whereas Allah suffered ongoing harm as a result of the inadequate religious system, Allah's harm from being denied attendance at the events ended when those events ended.[281] Therefore, there was no ongoing constitutional violation to remedy when Allah filed his

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275. *See id.* at *8 (choosing the ongoing violation approach because it is consistent with Supreme Court precedent and satisfies § 1983's causation requirements).

276. *See id.* at *7–8 ("The Court agrees with those cases holding that 'an alleged constitutional violation complained of in a grievance must be ongoing in order to find personal involvement, such that the supervisory official who reviews the grievance can remedy it directly.'" (citations omitted)).

277. *See id.* at *8 ("[T]he chaplain is a Sunni Muslim, the sermons during Jumah service focus on Sunni Muslim [t]eachings, . . . the majority of classes offered in DOCCS facilities are for Sunni Muslims, and the money raised through fund[ ]raisers is used to purchase Sunni Muslim texts and other educational material.").

278. *See id.* ("[B]ased on Plaintiff's allegations, it is plausible that Griffin, as the supervisory official who reviewed the grievance, could have remedied [the violations] directly.").

279. *See id.* at *9 (denying Griffin's motion to dismiss for lack of personal involvement because the unconstitutional act was ongoing and he was in a position to remedy the violation).

280. *See id.* (granting Griffin's motion to dismiss in part because his actions did not satisfy the ongoing violation approach adopted by the district court).

281. *See id.* (explaining that Allah's "harm had ceased when he filed his grievance").

grievances.[282] Griffin could not go back in time to permit Allah attendance at the services.[283] Therefore, Griffin was not personally involved because the circumstances surrounding the violations did not satisfy both elements of the ongoing violation test.[284]

B. Qualified Immunity

It is imperative that the Second Circuit adopt a test to answer the *McKenna* question because courts are avoiding the question entirely by granting defendants qualified immunity.[285] The doctrine of qualified immunity completely immunizes government officials from liability when they are named as defendants in § 1983 suits.[286]

Government officials are only liable when their conduct violates clearly established law, otherwise they are protected by qualified immunity.[287] When the government official is a supervisory defendant, they are entitled to qualified immunity "unless the actions of the supervisor *and* the subordinate both violate clearly established law."[288] The purpose of qualified

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282. *See id.* ("[T]here was no ongoing situation that Griffin could have remedied at the time he responded to [Allah's] grievance.").

283. *See id.* at *8 ("A superintendent cannot 'remedy' a violation of constitutional rights which has already ceased by ordering some change in prison conditions." (citation omitted)).

284. *See id.* at *9 (granting Griffin's motion to dismiss on this claim alone).

285. *See* Whipper v. Erfe, No. 3:18-cv-00347, 2018 WL 5618106, at *6 (D. Conn. Oct. 30, 2018) (dismissing the supervisory defendants from the § 1983 suit and granting qualified immunity "because the law is not clearly established"); Corbett v. Annucci, No. 16-cv-4492, 2018 WL 919832, at *8 (S.D.N.Y. Feb. 13, 2018) (granting a supervisory defendant qualified immunity, reasoning that the intra-circuit split prevented the law from being clearly established).

286. *See* Pearson v. Callahan, 555 U.S. 223, 231 (2009) (granting qualified immunity to government officials who do not violate clearly established law, "regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact'" (citation omitted)).

287. *See* City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 (2015) (explaining that qualified immunity "'gives government officials breathing room to make reasonable but mistaken judgments' by 'protect[ing] all but the plainly incompetent or those who knowingly violate the law'" (citation omitted)).

288. Grice v. McVeigh, 873 F.3d 162, 169 (2d Cir. 2017).

immunity is to allow the government to perform its necessary functions without frivolous interference.[289]

Again, qualified immunity does not insulate a government official from liability if they violate "clearly established law."[290] The law is clearly established when it is sufficiently clear "that every 'reasonable official would [have understood] that what he is doing violates that [law]'" and "existing precedent . . . ha[s] placed the statutory or constitutional question beyond debate."[291] This is an extremely high standard that grants immunity to government officials if there is any controversy surrounding the legality of their conduct.[292]

If there is a legitimate debate over whether an action would violate a prisoner's constitutional right, then reasonable government officials may likewise have competing interpretations of the law.[293] Some may act in a manner that comports with one interpretation of the law, while others may consider such action illegal.[294] This conflict would all but assure application of qualified immunity.

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289. *See Pearson*, 555 U.S. at 231 ("Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."); Filarsky v. Delia, 566 U.S. 377, 389–90 (2012) (explaining that qualified immunity "help[s] to avoid 'unwarranted timidity' in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits" (citation omitted)).

290. *See* Reichle v. Howards, 566 U.S. 658, 664 (2012) (listing the requirements for a defendant to be entitled to qualified immunity); *supra* notes 287–289 and accompanying text (same).

291. *Reichle*, 566 U.S. at 664 (citation omitted); Doninger v. Niehoff, 642 F.3d 334, 345 (2d Cir. 2011) ("In determining if a right is clearly established, this Court looks to whether (1) it was defined with reasonable clarity, (2) the Supreme Court or the Second Circuit has confirmed the existence of the right, and (3) a reasonable defendant would have understood that his conduct was unlawful.").

292. *See Reichle*, 566 U.S. at 664 (explaining that in order to impose liability, the law must be clear enough that a reasonable government official would know that certain actions would be impermissible).

293. *See* Anderson v. Creighton, 483 U.S. 635, 646 (1987) (explaining that qualified immunity exists so that "officials can know that they will not be held personally liable as long as their actions are reasonable in light of current American law").

294. *See id.* ("The general rule of qualified immunity is intended to provide government officials with the ability 'reasonably [to] anticipate when their

Given the confusion in the Second Circuit surrounding *Iqbal*,[295] *Colon*,[296] and *McKenna*[297] the law is anything but settled.[298] As the law currently stands, it is unclear what a supervisor must do to be personally involved in a constitutional violation, and therefore violate the law, when denying a prison grievance.[299] As a result, some district courts in the Second Circuit avoid the personal involvement issue altogether and grant supervisors qualified immunity because the supervisors are not violating clearly established law.[300]

For example, in *Hayes v. Santiago*,[301] prisoner Ticey Hayes argued that District Administrator Edward Maldonado violated his constitutional rights by denying his grievance appeal.[302] The district court acknowledged the *McKenna* question[303] and the split regarding which test to apply when answering it.[304] However, the court neither adopted, nor applied, any of the three tests to analyze whether Maldonado was personally involved by denying Hayes's

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conduct may give rise to liability for damage.'" (citation omitted)).

295. *See supra* Part III.B (discussing how *Iqbal* changed how circuit courts analyze supervisory liability).

296. *See supra* Part III.C (discussing how *Iqbal* caused district courts in the Second Circuit to split over whether *Colon* survived the *Iqbal* decision).

297. *See supra* Part IV.A (discussing how district courts in the Second Circuit split in answering the *McKenna* question).

298. *See supra* notes 295–297 and accompanying text (referencing the chaotic status of supervisory liability in the Second Circuit).

299. *See supra* Part IV.A (explaining the intra-circuit split over the *McKenna* question).

300. *See* Whipper v. Erfe, No. 3:18-cv-00347, 2018 WL 5618106, at *6 (D. Conn. Oct. 30, 2018) (dismissing the supervisory defendants from the § 1983 suit and granting qualified immunity "because the law is not clearly established"); Corbett v. Annucci, No. 16-cv-4492, 2018 WL 919832, at *8 (S.D.N.Y. Feb. 13, 2018) (granting a supervisory defendant qualified immunity, reasoning that the intra-circuit split prevented the law from being clearly established).

301. No. 3:18-cv-01758, 2018 WL 5456494 (D. Conn. Oct. 29, 2018).

302. *See id.* at *3 (describing Hayes's First, Fifth, and Fourteenth Amendment claims against Maldonado in the § 1983 suit).

303. *See* McKenna v. Wright, 386 F.3d 432, 437 (2d Cir. 2004) ("[I]t is questionable whether an adjudicator's rejection of an administrative grievance would make him liable for the conduct complained of . . . .").

304. *See Hayes*, 2018 WL 5456494, at *3 (recognizing that some district courts apply the detailed response approach, while others apply the ongoing violation approach).

grievance appeal.[305] Rather, the court completely avoided the issue by simply granting Maldonado qualified immunity.[306] The court reasoned that Maldonado could not be held liable, regardless of any further involvement on his part, because the law is not settled in the Second Circuit.[307]

In a similar case, prisoner King Knowledge Born Allah brought a § 1983 suit against several prison supervisors for denying his grievance submissions on appeal.[308] As in *Hayes*, the district court acknowledged the *McKenna* question and explained that "district court decisions appear divided about whether and when a supervisory official's denial of a grievance may constitute sufficient [personal] involvement for a supervisory official to be liable for a violation of an inmate's constitutional rights."[309] Relying on this division, the court granted the supervisors qualified immunity "because at best the law is not clearly established that a supervisory official violates the Constitution by erroneously denying a grievance appeal."[310] Again, the court dodged the underlying substantive legal question by granting qualified immunity to the supervisory defendant.[311]

C. Recommendations

In order to prevent courts from granting qualified immunity as a way to avoid the *McKenna* question, the Second Circuit should explicitly adopt the ongoing violation approach. First, the ongoing violation approach is consistent with Supreme Court

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305. *See id.* (avoiding the personal involvement issue by simply granting the supervisory defendant qualified immunity without weighing in on the intra-circuit split).

306. *See id.* (explaining that the "Second Circuit law is not clearly established" regarding whether a supervisor is personally involved when they deny a grievance).

307. *See id.* (dismissing Hayes's claims against the supervisory defendant for rejecting his grievance because he could not establish personal involvement).

308. *See* Allah v. Semple, No. 3:18-cv-00887, 2018 WL 3733970, at *2–3 (D. Conn. Aug. 6, 2018) (explaining that the plaintiff was charged with a disciplinary violation for being an active member of a prison gang, the Latin Kings).

309. *Id.* at *7.

310. *See id.* (avoiding the personal involvement issue).

311. *See id.* (dismissing the claims against the supervisory defendants because the plaintiff could not establish their personal involvement).

jurisprudence.[312] It is well-established that *respondeat superior* is not a basis for liability in a § 1983 claim.[313] "Requiring an ongoing constitutional violation which is 'capable of mitigation at the time the supervisory official was apprised thereof' . . . ensures that a [supervisor] is not held liable for every constitutional tort committed by a subordinate solely by virtue of his role . . . in the inmate grievance process."[314] Therefore the ongoing violation approach complies with the Supreme Court's prohibition of *respondeat superior* liability.[315]

Second, the ongoing violation approach is consistent with § 1983's causation requirements.[316] In order to impose liability on a supervisor, a "plaintiff must also establish that the supervisor's actions were the proximate cause of the plaintiff's constitutional deprivation."[317] If a constitutional violation is not ongoing at the time the supervisor reviews a grievance, and there is therefore nothing to remedy, the supervisor cannot be said to have caused the harm of which the plaintiff complains.[318]

Third, the second *Colon* factor finds personal involvement when a supervisor, "after being informed of the violation through

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312. *See* Burton v. Lynch, 664 F. Supp. 2d 349, 361 (S.D.N.Y. 2009) (explaining that the ongoing violation approach conforms to the Supreme Court's prohibition against *respondeat superior* liability).

313. *See* Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009) ("Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.").

314. Allah v. Annucci, No. 16-CV-1841, 2018 WL 4571679, at *8 (S.D.N.Y. Sept. 24, 2018) (citation omitted).

315. *See* Richardson v. Goord, 347 F.3d 431, 435 (2d Cir. 2003) ("[M]ere 'linkage in the prison chain of command' is insufficient to implicate a state commissioner of corrections or a prison superintendent in a § 1983 claim." (citation omitted)); *supra* notes 312–314 and accompanying text (rejecting the notion that a supervisor could be liable for the unconstitutional acts of a subordinate simply based on her position or employment title).

316. *See* 42 U.S.C. § 1983 (2018) ("Every person who, under color of [state law] . . . subjects, or causes to be subjected, any citizen of the United States . . . the deprivation of any rights, privileges, or immunities secured by the Constitution, shall be liable to the party injured . . . .").

317. Raspardo v. Carlone, 770 F.3d 97, 116 (2d Cir. 2014).

318. *See Annucci*, 2018 WL 4571679, at *8 (explaining that a supervisor who receives "post hoc notice" of an injury is not the proximate cause of the injury "because the violation is not 'ongoing and the defendant has [no] opportunity to stop the violation after being informed of it'" (citation omitted)).

a report or appeal, *failed to remedy the wrong*."[319] The supervisor must be in a position to remedy a constitutional violation because one cannot fail to remedy a wrong unless they have the power to do so in the first place.[320]

For example, a supervisor in charge of dining services in the prison may not be in a position to remedy a prisoner's complaint about the quality of the prison cells.[321] If a prisoner sued the dining service official for failing to remedy a wrong after learning of it, it would not make sense to find the supervisor liable because they were not in a position to remedy the wrong in the first place. The ongoing violation approach is therefore consistent with *Colon*'s language and Second Circuit precedent.[322]

Finally, the ongoing violation approach solves the problems presented by the investigation approach and the detailed response approach, which inadvertently incentivize supervisors to rubberstamp grievance denials.[323] Under the ongoing violation approach, a supervisor's personal involvement turns on two objective factors: (1) whether the unconstitutional act was ongoing at the time the supervisor rejected a grievance; and (2) whether the supervisor was in a position to remedy the ongoing tort.[324] The personal involvement analysis does not change whether or not a

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319. Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995) (emphasis added).

320. *See* Ackridge v. Aramark Corr. Food Servs., No. 16-CV-6301, 2018 WL 1626175, at *16 (S.D.N.Y. Mar. 30, 2018) (finding the supervisor personally involved in rejecting a grievance because he "could have remedied it directly"); Young v. Choinski, 15 F. Supp. 3d 172, 192 (D. Conn. 2014) ("[I]f the supervisory official is confronted with an 'ongoing' constitutional violation and reviews a grievance or appeal regarding that violation, that official is 'personally involved' if he or she can remedy the violation directly.").

321. A supervisor in this situation likely cannot do anything beyond referring the complaint to the appropriate supervisor.

322. *See Colon*, 58 F.3d at 873 (imposing liability on supervisors who, "after being informed of the violation through a report or appeal, *failed to remedy the wrong*" (emphasis added)).

323. *See supra* notes 249–252, 266–268 and accompanying text (explaining why the investigation approach and detailed response approach may have a chilling effect on supervisors becoming personally involved in the grievance process).

324. *See* Thomas v. Calero, 824 F. Supp. 2d 488, 507 (S.D.N.Y. 2011) (explaining that the ongoing violation approach looks to whether the "alleged constitutional violation complained of in a grievance [was] 'ongoing' . . . such that the 'supervisory official who reviews the grievance can remedy [it] directly'" (citation omitted)).

supervisor takes a personal interest in the grievance by ordering an investigation or answering the prisoner's complaint.[325] The prison system and the courts should do everything in their power to encourage supervisors to thoroughly investigate the unconstitutional acts of their subordinates, and the ongoing violation approach gives supervisors the freedom to do so without risking increased § 1983 liability.[326]

Regardless of what test the Second Circuit ultimately adopts, it must first settle the *Iqbal*-*Colon* split before it can even address the *McKenna* question. A plaintiff in a § 1983 suit must establish that a defendant is personally involved in the unconstitutional act by demonstrating that their conduct fell within one of the *Colon* factors.[327] When a supervisor denies a prisoner's grievance without any other involvement, their actions could only possibly fall under the second or fifth *Colon* factors:

> The personal involvement of a supervisory defendant may be shown by evidence that: (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.[328]

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325. *See* Allah v. Annucci, No. 16-CV-1841, 2018 WL 4571679, at *9 (S.D.N.Y. Sept. 24, 2018) (granting the supervisory defendant's motion to dismiss for lack of personal involvement because the alleged unconstitutional harm had stopped by the time the supervisor reviewed the grievance).

326. *See supra* notes 323–325 and accompanying text (arguing that the ongoing violation approach does not have a chilling effect on supervisors becoming invested in a prisoner's grievance by investigating the alleged misconduct).

327. *See* Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994) ("It is well settled in this Circuit that 'personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.'" (citation omitted)).

328. *Colon*, 58 F.3d at 873; *see also* Funches v. Russo, No. 9:17-CV-1292, 2018 WL 6381058, at *7 (N.D.N.Y. Dec. 6, 2018) (explaining that the second *Colon* factor applies where a supervisory defendant denies or rejects a plaintiff's grievance).

If only the first and third *Colon* factors survive *Iqbal*, then the supervisor would not be sufficiently personally involved in the unconstitutional act by rejecting the prisoner's grievance submission.[329] Without personal involvement, the supervisor would not be liable.[330] However, if all five *Colon* factors survive *Iqbal*,[331] then the official *may* be personally involved in the unconstitutional act by rejecting the prisoner's grievance submission.[332] Simply put, if *Iqbal* supersedes *Colon*, then the *McKenna* question becomes moot.[333]

The Second Circuit must resolve both of these intra-circuit splits because they are necessarily intertwined as the resolution of one directly affects the outcome of the other.[334] Unless, and until, the Second Circuit holds that *Iqbal* invalidates all but the first and third *Colon* factors, the *McKenna* question remains unanswered.

V. Conclusion

The status of supervisory liability in the Second Circuit is chaotic considering the compounding effect of the *Colon* split and the unresolved *McKenna* question.[335] This confusion permits

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329. *See supra* Part III.C.1 (discussing how the restrictive courts hold that *Iqbal* eliminates the second and fifth *Colon* factors as a basis for personal involvement).

330. *See Wright*, 21 F.3d at 501 ("It is well settled in this Circuit that 'personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.'" (citation omitted)).

331. *See supra* Part III.C.2 (discussing how the hybrid courts continue to apply the second and fifth *Colon* factors as long as the elements of the underlying constitutional tort permit their application).

332. I emphasize the word "may" because it is unclear whether the supervisor would in fact be liable in light of the *McKenna* split. *See supra* Part IV.A (discussing how some district courts find personal involvement when a supervisor rejects a grievance alone, whereas other courts require a higher degree of involvement).

333. *See supra* notes 327–332 and accompanying text (demonstrating why the *McKenna* question cannot be definitively answered until the Second Circuit resolves the *Iqbal* issue).

334. *See supra* notes 327–333 (explaining that the Second Circuit cannot answer the *McKenna* question before resolving the *Colon* split).

335. *See supra* Parts III–IV (discussing the two intra-circuit splits and laying the groundwork for courts to grant supervisory defendants qualified immunity to avoid the splits).

courts to grant supervisors qualified immunity—a trend that adds further complication to an area of law already fraught with uncertainty.[336]

Qualified immunity offers district courts a cop-out.[337] Rather than analyzing the personal involvement question and weighing the merits of the various personal involvement tests, district courts can avoid the issue altogether by declaring the law too unsettled to warrant supervisory liability.[338] This uncertainty will continue unless the Second Circuit clarifies *Iqbal*'s effect on *Colon* and issues a definitive answer to the question it posed in *McKenna*.[339] Until this happens, it will be difficult, if not impossible, for prisoners to recover against supervisors regardless of how involved they are in the grievance process.

Unfortunately, this trend is not surprising given that § 1983 no longer provides the protection that it once did.[340] In fact, "[t]here is a growing consensus among practitioners, scholars, and judges that Section 1983 is no longer serving its original and intended function as a vehicle for remedying violations of constitutional rights, that it is broken in many ways, and that it is sorely in need of repairs."[341] Since *Monroe v. Pape* first made § 1983 a viable cause of action, the courts have "substantially diminished the availability of § 1983 damages actions."[342] The absolute hectic

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336. *See* John C. Jeffries, Jr., *What's Wrong With Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010) ("In fact, determining whether an officer violated 'clearly established' law has proved to be a mare's nest of complexity and confusion.").

337. *See id.* at 869 (explaining that "the law of qualified immunity is out of balance" and "[t]he Supreme Court needs to intervene . . . to get constitutional tort law back on track").

338. *See supra* Parts III.D.2, IV.B (discussing how district courts avoid answering the intra-circuit splits by relying on qualified immunity).

339. *See supra* Parts III.D.2, IV.C (encouraging the Second Circuit to definitively rule on these splits to prevent courts from simply granting qualified immunity to supervisors without weighing the merits of the case).

340. *See* Adelman, *supra* note 26, at 4 (explaining that the Supreme Court "has been hostile to [§ 1983], continuously narrowing it and imposing restrictions on civil rights plaintiffs").

341. Blum, *supra* note 24, at 913–14; *see also* Adelman, *supra* note 26, at 9 (explaining that federal courts of appeals dismiss about seventy-two percent of § 1983 claims on qualified immunity grounds).

342. *See* Chen, *supra* note 250, at 890, 910 ("In the nearly fifty years that have passed since Monroe, the Supreme Court has issued a series of decisions that have gradually diminished § 1983 in ways that make damages recovery both costly and

status of supervisory liability in the Second Circuit contributes to this diminution and demonstrates how § 1983 is practically ineffectual in the courts.[343]

While a comprehensive critique of § 1983 is beyond the scope of this Note, it is clear that § 1983 cannot "function in [its] current, weakened state."[344] The Second Circuit, however, can take a step towards strengthening the statute's viability by resolving the two intra-circuit splits.[345] First, the court must definitively rule on *Iqbal*'s impact on the *Colon* factors. The court should adopt the hybrid approach and hold that the *Colon* factors survive as long as the underlying constitutional tort does not require a showing of discriminatory intent.

Second, the court must definitively answer the *McKenna* question. The Second Circuit should adopt the ongoing violation approach and hold that a supervisor is personally involved by rejecting a grievance where the unconstitutional act is ongoing and they are in a position to remedy the misconduct. Resolving the splits in this manner will prevent courts from excessively granting qualified immunity and will provide prisoners a functional means to enforce their constitutional rights.

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difficult."); Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (explaining that qualified immunity is not simply a defense raised at trial, but a complete immunity from suit and the court must resolve the issue before trial to protect the official from the burdens of discovery and litigation).

343. *See* Adelman, *supra* note 26, at 9 (lamenting that "[t]he clear message sent by the Supreme Court is that district courts should think twice before allowing suits against government officials for violation a person's constitutional rights to proceed").

344. Chen, *supra* note 250, at 928.

345. *See id.* at 928–29 ("If the Court, Congress, and the academic community fail to recognize the valuable role that § 1983 damages claims play . . . then for many litigants, like their video game counterparts, it is 'game over.'").