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The End of Comparative Qualified Immunity

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Essay

The End of Comparative Qualified Immunity

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I. Introduction

Critics have called qualified immunity an "unqualified disgrace,"[1] an "abomination,"[2] and "a scourge that closes courthouse doors to people whose constitutional rights have been violated."[3] One particularly troubling aspect of qualified immunity is what I will call comparative qualified immunity: the ability of a government official to avoid liability by claiming that his behavior was not that much worse than conduct by a prior official that was deemed constitutional. In November 2020, the Supreme Court seemingly created a narrow exception to comparative qualified immunity in cases involving "particularly egregious facts."[4] In February 2021, however, the Supreme Court

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1. C.J. Ciaramella, *Qualified Immunity Is an Unqualified Disgrace*, REASON, (July 2019), https://reason.com/2019/06/17/qualified-immunity-is-an-unqualified-disgrace/ [https://perma.cc/35HY-8ZFG]

2. Charles Coddington, *Police should serve and protect without qualified immunity*, THE VOICE (June 30, 2020), https://thevoice.us/police-should-serve-and-protect-without-qualified-immunity/ [https://perma.cc/2S2T-JFG5].

3. Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 360 (2020).

4. Taylor v. Riojas, 141 S.Ct. 52, 54 (2020).

signaled that this was no mere narrow exception; instead, it was likely the end of comparative qualified immunity.

II. Qualified Immunity Generally

The qualified immunity doctrine insulates governmental agents from liability for unconstitutional acts as long "as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[5] The primary purpose of the doctrine "is to protect them 'from undue interference with their duties and from potentially disabling threats of liability.'"[6]

An example of qualified immunity can be found in the recent opinion of the Sixth Circuit in *J.H. v. Williamson County, Tennessee*.[7] In *J.H.*, juvenile detention center officials placed a fourteen-year-old with Pediatric Autoimmune Neuropsychiatric Disorder Associated with Streptococcal Infections (PANDAS) in solitary confinement for several weeks in 2013.[8] The Sixth Circuit concluded that this confinement violated the juvenile's Fourteenth Amendment right to substantive due process.[9] But the court held that the officials were entitled to qualified immunity because this constitutional right was not clearly established in 2013; instead "[m]any of the cases recognizing what a punishing experience placement in solitary confinement can be—especially for juveniles and those with mental health issues—have been issued after 2013."[10]

Notably, though, to defeat a claim of qualified immunity, a plaintiff does not need to cite "a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."[11] While such cases are rare,[12] *Burley v. Miller* provides an illustration of a plaintiff meeting this "definitional sweet spot" despite arguably "novel factual circumstances."[13] In *Burley*, inmate Edward Burley, who suffered from respiratory ailments, alleged that he was forced to stand in freezing rain for 10 to 12 minutes without winter attire and then ordered to sit in his saturated clothes

5. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

6. Elder v. Holloway, 510 U.S. 510, 514 (1994) (quoting *Harlow*, 457 U.S. at 806).

7. 951 F.3d 709 (6th Cir. 2020).

8. *Id.* at 713–14.

9. *Id.* at 720.

10. *Id.*

11. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

12. District of Columbia v. Wesby, 138 S.Ct. 577, 590 (2018) ("Of course, there can be the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances.").

13. 241 F.Supp.3d 828, 836–37 (E.D. Mich. 2017).

for two hours.[14] Even though there was no prior case directly on point, the Sixth Circuit found that qualified immunity was inapplicable because Burley had "shown that the right to be free from exposure to severe weather and temperatures was clearly established at the time of the incident alleged in the complaint."[15]

III. The End of Comparative Qualified Immunity

A. Comparative Qualified Immunity

While the *absence* of analogous prior precedent is not necessarily fatal to plaintiffs seeking to pierce qualified immunity, government officials often have found refuge in the *presence* of similar but less egregious behavior that courts deemed constitutional. This is a process this paper dubs comparative qualified immunity, in which courts use this similarity to find ambiguities that destroy claims that government officials violated clearly established rights.

For example, in *Kelsay v. Ernst*,[16] Melanie Kelsay brought an excessive force action against an officer who bear-hugged her and threw her to the ground, causing her to lose consciousness.[17] This body slam occurred after "Kelsay walked a few feet away from" the officer when he tried to arrest her for interfering with the arrest of her friend.[18] In finding the officer was entitled to qualified immunity, the Eighth Circuit cited to its prior opinion in *Ehlers v. City of Rapid City*,[19] in which it had found no constitutional violation when an officer body-slammed a man who, over the course of twenty seconds, twice ignored the officer's command to put his hands behind his back, "passing [the officer] closely as [the officer] gave the instruction a second time."[20] The court used this case to conclude that "even if there might be a constitutionally significant distinction between one command and two, no such rule was clearly established" when the officer slammed Kelsay to the ground.[21]

Similarly, in *Mlodzinski v. Lewis*,[22] family members brought an unreasonable seizure action against police officers who kept them in handcuffs for forty-five minutes while they arrested another family member for assault and

14. *Id.* at 838–39.
15. *Id.* at 839.
16. 933 F.3d 975, 978 (8th Cir. 2019).
17. *Id.*
18. *Id.*
19. *Id.* at 981; 846 F.3d 1002 (8th Cir. 2017)
20. *Ehlers*, 846 F.3d at 1011.
21. *Kelsay*, 933 F.3d at 981.
22. 648 F.3d 24 (1st Cir. 2011).

searched for the nightstick used in that assault.[23] The First Circuit granted the officers qualified immunity based upon their heavy reliance on the Supreme Court's opinion in *Muehler v. Mena*, in which it found a somewhat similar detention was constitutional.[24] Notably, the First Circuit reached this conclusion despite recognizing at least three key differences between the cases: (1) unlike in *Mlodzinski*, the detainees outnumbered the police officers in *Mena*; (2) the house in *Mena* was a gang house known to have guns in it; and (3) in *Mena*, the object of the search was a gun recently used in a drive-by shooting, a more dangerous weapon than the nightstick used in the assault in *Mlodzinski*.[25] According to the court, these differences were "not so substantial that no competent officer could have thought that the use of handcuffs during the search was permissible."[26]

Meanwhile, in *Youngbey v. March*,[27] the United States Court of Appeals of the District of Columbia Circuit dispensed with this type of detailed analysis.[28] In *Youngbey*, the plaintiffs claimed that police officers violated their Fourth Amendment rights by not knocking and announcing their presence before breaking a window and entering their home.[29] In response, the defendants cited three cases in which the court had found that no-knock raids were constitutional.[30] Instead of doing a detailed compare and contrast, the court granted qualified immunity, holding that "[a]ll that we need answer is whether the facts and reasoning of these cases are close enough to the particular circumstances of" the case at hand.[31]

B. Taylor v. Riojas *and the Beginning of the End of Comparative Qualified Immunity*

As in these three cases, the Fifth Circuit did a comparative qualified immunity analysis in its recent opinion in *Taylor v. Stevens*.[32] In *Taylor*, inmate Trent Taylor was forced to live for six days in two contaminated cells, including one that "was covered with 'massive amounts' of feces that emitted a 'strong fecal odor.'"[33] The Fifth Circuit found that there were triable issues of fact over whether the defendants had violated the Eighth Amendment by

23. *Id.* at 29, 31.
24. *Id.* at 34–35 (citing Muehler v. Mena, 544 U.S. 93, 98 (2005)).
25. *Id.* at 36.
26. *Id.* at 37.
27. 676 F.3d 1114 (D.C. Cir. 2012).
28. *Id.* at 1123–24.
29. *Id.* at 1118–19.
30. *Id.* at 1122–23.
31. *Id.* at 1123–24.
32. 946 F.3d 211 (5th Cir. 2019).
33. *Id.* at 218.

failing to provide humane conditions of confinement and ensure that Taylor received adequate food, clothing, shelter, and medical care.[34]

The defendants, however, claimed that they were entitled to qualified immunity due to the Fifth Circuit's somewhat similar opinion in *Davis v. Scott*.[35] In *Davis*, prison guards placed inmate Robert Davis in a feces-stained cell for three days and gave him the chance to clean it.[36] The Fifth Circuit found that the misconduct in *Davis* was less egregious than the behavior in *Taylor* because "Taylor spent twice as much time locked in his squalid cells as did the *Davis* prisoner . . . [a]nd unlike the *Davis* prisoner, . . .Taylor wasn't given the chance to clean his cells."[37] Nonetheless, because *Davis* was precedent that confining an inmate to a squalid cell for a certain number of days does not violate the Eighth Amendment, the Fifth Circuit concluded that *Davis* "doom[ed] Taylor's claim" because it created an ambiguity that triggered qualified immunity.[38]

On November 2, 2020, however, the United States Supreme Court issued a per curiam opinion—*Taylor v. Riojas*—vacating the Fifth Circuit's opinion and remanding the case.[39] According to the Court, the finding of qualified immunity was improper because "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time."[40] Specifically, there was "no evidence that the conditions of Taylor's confinement were compelled by necessity or exigency" nor "any reason to suspect that the conditions of Taylor's confinement could not have been mitigated."[41] Therefore, "[c]onfronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution."[42] In reaching this conclusion, the Court rejected the Fifth Circuit's reliance on *Davis*, concluding that it was "too dissimilar, in terms of both conditions and duration of confinement, to create any doubt about the obviousness of Taylor's right."[43]

It would be easy to interpret *Taylor v. Riojas* as creating a narrow exception to the doctrine of comparative qualified immunity: an exception that only applies in cases with "extreme circumstances" or "particularly egregious

34. *Id.* at 220–22.
35. *Id.* at 220–21; 157 F.3d 1003 (5th Cir. 1998).
36. *Davis*, 157 F.3d at 1004.
37. *Taylor*, 946 F.3d at 221 (internal citations omitted).
38. *Id.* at 222.
39. 141 S.Ct. 52, 54 (2020).
40. *Id.* at 53.
41. *Id.* at 54.
42. *Id.*
43. *Id.* at 54 n.2.

facts." In other words, in a garden variety case, a government official can use the shield of qualified immunity by citing cases in which similar but less egregious conduct was deemed constitutional. But in cases with "extreme circumstances" or "particularly egregious facts," any such attempt to analogize must fail and comparative qualified immunity is inapplicable.

Indeed, this is the exact analysis employed by the United States District Court for the Western District of Texas in *Vaughn v. Acosta*.[44] In *Vaughn*, Christopher Vaughn brought an excessive force action against a correctional officer, claiming that the officer threw a bucket of water on him while he was in a wheelchair.[45] In finding that the officer was entitled to qualified immunity, the court concluded that "Vaughn's factual allegations do not present 'extreme circumstances' or 'particularly egregious facts.'"[46] Therefore, the court was able to analogize Vaughn's case to *Jackson v. Culbertson*, in which the Fifth Circuit found that a correctional officer did not violate an inmate's constitutional rights by spraying him in the face with a fire extinguisher, a *de minimis* use of physical force.[47]

C. McCoy v. Alamu *and the End of Comparative Qualified Immunity*

This narrow construction of *Taylor*, however, is belied by a second case that relied on *Jackson* and recently reached the Supreme Court. In *McCoy v. Alamu*,[48] Prince McCoy alleged that a correctional officer sprayed him in the face with pepper spray after a neighboring inmate twice doused the officer with water.[49] The Fifth Circuit found that "McCoy's injuries were minor, because, in the Use of Force video, McCoy never complained about his eyes, and he was 'walking and talking with no detectible breathing issues.'"[50] That said, the court concluded that there were "genuine disputes as to whether there was *any* need for force, whether the force used was proportionate, and whether [the officer] reasonably perceived *any* threat from McCoy."[51]

But while the court found that the officer's spraying of McCoy crossed the constitutional line if it was unprovoked, it held that "it was not beyond debate that it did, so the law wasn't clearly established."[52] To support this conclusion, the Fifth Circuit noted that:

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44. No. EP-20-CV-00246-KC-ATB, 2021 WL 232135 (W.D. Tex. Jan. 22, 2021).
45. *Id.* at *1.
46. *Id.* at *7.
47. *Id.* at *6 (citing Jackson v. Culbertson, 984 F.2d 699, 700 (5th Cir. 1993)).
48. 950 F.3d 226 (5th Cir. 2020).
49. *Id.* at 229.
50. *Id.* at 230.
51. *Id.* at 231.
52. *Id.* at 233 (emphasis omitted).

> This was an isolated, single use of pepper spray. McCoy doesn't challenge the evidence that [the officer] initiated the Incident Command System immediately after the spray, nor that medical personnel promptly attended to him and provided copious amounts of water. Nor does he provide evidence to contest the Use of Force Report's finding that [the officer] used less than the full can of spray.[53]

The court thus found that the officer was entitled to qualified immunity, analogizing McCoy's case to *Jackson v. Culbertson*, in which, as noted, the Fifth Circuit found no constitutional violation when a correctional officer sprayed an inmate with a fire extinguisher.[54] According to the court, "[s]imilarly here, on these facts, it wasn't beyond debate that [the officer's] single use of spray stepped over the *de minimis* line."[55]

McCoy subsequently filed a petition for writ of certiorari with the United States Supreme Court, which issued a deceptively simple summary disposition of the case on February 22, 2021. That summary disposition stated that "[t]he petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Taylor v. Riojas*, 592 U. S. ___ (2020) (per curiam)."[56]

There are likely only two interpretations of the Court's summary disposition. The first is that the Court remanded so that the Fifth Circuit could consider whether McCoy's case involved "extreme circumstances" or "particularly egregious facts" like those in *Taylor*.[57] But this seems implausible. The Court found extreme circumstances in *Taylor* in large part due to the duration of the misconduct—six days—and the failure to mitigate.[58] Conversely, the officer sprayed McCoy once, causing minor injuries, and immediately initiated the Incident Command System, allowing medical personnel to attend to him.[59] While this spraying, if unprovoked, was unconstitutional, it would be difficult to characterize it as "particularly egregious" without making a similar finding about most other unconstitutional behavior by government officers who seek qualified immunity.

This leads to the second interpretation, which is that the Supreme Court remanded so that the Fifth Circuit could reconsider the case without doing a

53. *Id.*
54. *Id.* at 233–34.
55. *Id.*
56. McCoy v. Alamu, No. 20-31, 2021 WL 666347 (Feb. 22, 2021).
57. Taylor v. Riojas, 141 S.Ct. 52, 53–54 (2020).
58. *Id.*
59. *McCoy*, 950 F.3d at 233.

comparative qualified immunity analysis. Under this interpretation, the Court's opinion in *Taylor v. Riojas* is broader than first believed and prohibits comparative qualified immunity analysis in any case, not just cases involving "particularly egregious facts." Read this way, the Supreme Court remanded in *McCoy* so that the Fifth Circuit could remove its reliance on *Jackson* and instead determine whether any reasonable officer should have realized that pepper spraying McCoy violated his constitutional rights.

If this interpretation is correct, unless there is a case directly on point in either direction, every qualified immunity case should stand or fall on its own merits, based on whether any reasonable officer should have realized that his behavior contravened the Constitution. An officer who body slams a suspect after one ignored command would not get qualified immunity just because another officer was given such immunity for a body slam after two ignored commands. Officers who handcuffed family members while searching for a nightstick would not get qualified immunity simply because other officers were immunized for handcuffing occupants of a gang house while searching for a gun. And officers would not get qualified immunity for no-knock raids merely because other officers were immunized for different types of no-knock entries. The lifeline of similar, less egregious conduct being deemed constitutional would be gone. Instead, an officer would have to explain why a reasonable officer in his shoes would not have realized that his specific behavior was unconstitutional.

IV. Conclusion

For years, government officials who violated plaintiffs' constitutional rights immunized themselves from liability by citing to cases in which similar, less egregious conduct was deemed constitutional. But this comparative qualified immunity analysis might have met its end in the Supreme Court's summary disposition in *McCoy v. Alamu*. If true, the Supreme Court has significantly shrunk the qualified immunity defense and expanded the constellation of cases in which citizens can vindicate violations of their constitutional rights.