
*Qualified Immunity — Obviousness
Standard — Taylor v. Riojas*

Qualified immunity protects government officers from being sued for damages unless they have violated “clearly established” law.¹ Following the high-profile police killings of spring 2020,² more eyes have turned to holding officers accountable and the ways in which legal doctrines like qualified immunity prevent that from happening.³ Qualified immunity has come under fire from academics,⁴ judges,⁵ practitioners,⁶ legislators,⁷ and the public⁸ alike for unjustly precluding remedies for violations of people’s constitutional rights. Last Term, in *Taylor v. Riojas*,⁹ the Supreme Court held that correctional officers were not entitled to qualified immunity because the conditions of confinement alleged by the petitioner were so horrific that any reasonable officer should have known they were unconstitutional.¹⁰ In doing so, the Court — for the

¹ Anderson v. Creighton, 483 U.S. 635, 639 (1987).

² See Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/Y2T7-NMPC>]; Andrew R. Chow, *People Expected Police Behavior to Change After George Floyd’s Murder. The Numbers Tell a Different Story*, TIME (May 13, 2021), <https://time.com/6046645/police-killings-2021> [<https://perma.cc/E2CJ-WMPE>].

³ See The Argument, *Should It Be This Hard to Sue the Police and Win?*, N.Y. TIMES (June 16, 2021), <https://www.nytimes.com/2021/06/16/opinion/qualified-immunity-sue-police.html> [<https://perma.cc/ESR2-BT83>].

⁴ See, e.g., William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 51 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1800 (2018). *But see* Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. REV. 547, 551 (2020) (“Qualified immunity permits damages liability for violation of such settled rules, while discouraging plaintiffs’ lawyers from bringing a wide variety of novel damages claims of questionable merit, and it also minimizes the costs that would be incurred by innocent third parties if public officials faced unlimited liability.”).

⁵ See *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). See generally Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219 (2015).

⁶ See Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999, 2000 (2018); Matthew Segal, Opinion, *Beyond #BlackLivesMatter: Police Reform Must Be Bolstered by Legal Action*, THE GUARDIAN (July 27, 2016, 7:00 AM), <https://www.theguardian.com/commentisfree/2016/jul/27/beyond-black-lives-matter-police-reform-legal-action> [<https://perma.cc/3RSF-FK49>].

⁷ See Harper Neidig & Marty Johnson, *Police Reform Fight Hinges on Qualified Immunity*, THE HILL (May 25, 2021, 6:00 AM), <https://thehill.com/homenews/house/555172-police-reform-fight-hinges-on-qualified-immunity> [<https://perma.cc/7BLS-Y2VH>].

⁸ See *id.* (“[Fifty-nine] percent of likely voters responded that they either ‘somewhat’ or ‘strongly’ supported the end of qualified immunity.”).

⁹ 141 S. Ct. 52 (2020) (per curiam).

¹⁰ See *id.* at 53.

first time — overturned a grant of qualified immunity based on the obviousness of the constitutional violation.¹¹ The decision sends a message to lower courts that they cannot ignore the obviousness standard and potentially shows a Supreme Court more willing to police the excesses of the qualified immunity doctrine, even if it will not rethink the doctrine altogether.

Trent Taylor was incarcerated in a Texas prison.¹² He alleged that, in September 2013, correctional officers kept him in a pair of disturbingly unsanitary cells for six full days.¹³ The first cell was covered in “massive amounts’ of feces”: there was waste on the floor, walls, windows, and even “packed inside the water faucet.”¹⁴ Taylor did not eat or drink anything for almost four days for fear that his food or water would be contaminated.¹⁵ Officers then moved him to a second cell, which was extremely cold and lacked a bed and a toilet.¹⁶ A clogged drain in the floor provided the sole means of disposing of human waste.¹⁷ Taylor alleged officers refused to take him to the bathroom.¹⁸ Being concerned that if he urinated, the drain would overflow, he held his bladder for twenty-four hours before involuntarily urinating.¹⁹ The drain ultimately did overflow, covering the floor with feces.²⁰ Confined without clothing, Taylor was forced to “sleep naked in sewage.”²¹

Taylor brought a civil rights action against the correctional officers under 42 U.S.C. § 1983.²² He alleged they confined him in unconstitutional conditions and were deliberately indifferent to his health and safety in violation of his Eighth Amendment rights.²³ The district court found that although Taylor’s conditions of confinement “may have been quite uncomfortable,” they were not unconstitutional and therefore that the officers had qualified immunity.²⁴ It also rejected Taylor’s deliberate indifference claims, finding that Taylor had not alleged more than de

¹¹ See Baude, *supra* note 4, at 82–83; Reinhardt, *supra* note 5, at 1244–50; Recent Case, Zadeh v. Robinson, 902 F.3d 483 (5th Cir. 2018), 132 HARV. L. REV. 2042, 2046 (2019).

¹² See Taylor, 141 S. Ct. at 53.

¹³ See *id.*

¹⁴ *Id.* (quoting Taylor v. Stevens, 946 F.3d 211, 218 (5th Cir. 2019)).

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See Taylor, 946 F.3d at 218–19.

¹⁹ See *id.* at 219. Taylor was ultimately treated for a distended bladder and catheterized for holding his urine so long. See *id.* at 223.

²⁰ See Taylor, 141 S. Ct. at 53.

²¹ *Id.*

²² See Taylor v. Stevens, No. 14-CV-149, 2017 U.S. Dist. LEXIS 227537, at *2 (N.D. Tex. Jan. 5, 2017).

²³ See *id.* at *4–7. Taylor also claimed he was subject to excessive use of force when a correctional officer rammed him in the testicles with a steel bar. *Id.* at *7. The trial court denied the officer summary judgment on this claim, and the claim was set for trial. *Id.* at *42.

²⁴ *Id.* at *25.

minimis injuries.²⁵ The court therefore granted summary judgment to defendants on the unconstitutional conditions and deliberate indifference claims.²⁶ Taylor appealed.

The Fifth Circuit affirmed in part and reversed in part.²⁷ Writing for the panel, Judge Smith²⁸ held that the correctional officers were entitled to qualified immunity on Taylor’s Eighth Amendment conditions-of-confinement claim.²⁹ The Fifth Circuit also held that although the cell conditions alleged by Taylor violated the Eighth Amendment and that the defendants were deliberately indifferent to such violation,³⁰ the law was not “clearly established” at the time of the violation.³¹ “Though the law was clear that prisoners couldn’t be housed in cells teeming with human waste for months on end, [the Fifth Circuit] hadn’t previously held that a time period so short violated the Constitution.”³² In *Davis v. Scott*,³³ the court had held that an inmate being confined to a cell with blood and feces for three days did not violate the Constitution.³⁴ Since it was not clear that confinement in these conditions for such a short period of time violated the Constitution, the officers in Taylor’s case did not have “fair warning” that their specific acts were unconstitutional.³⁵

The Fifth Circuit did refuse qualified immunity to three officers for another claim: that the officers had violated Taylor’s Eighth Amendment rights by refusing to escort him to the bathroom for twenty-four hours.³⁶ Taylor had alleged facts sufficient to show a constitutional violation, and Fifth Circuit precedent clearly established that it was unconstitutional to deprive inmates of “a minimally sanitary way to relieve

²⁵ See *id.* at *28–32.

²⁶ See *id.* at *25, *29, *32.

²⁷ *Taylor v. Stevens*, 946 F.3d 211, 227 (5th Cir. 2019).

²⁸ Judge Smith was joined by Chief Judge Owen and Judge Jones.

²⁹ See *Taylor*, 946 F.3d at 222. The Fifth Circuit summarily dismissed Taylor’s claims for delay in medical treatment and unconstitutional policies on the basis of qualified immunity. *Id.* at 226–27. The court likewise held that Taylor had waived his claim of an Eighth Amendment violation for ignoring his complaints of chest pain. *Id.* at 226.

³⁰ To show a violation of the Eighth Amendment on a conditions-of-confinement claim, the plaintiff must show not only that the conditions “denied him ‘the minimal civilized measure of life’s necessities’ and exposed him ‘to a substantial risk of serious harm,’” but also that the officer was deliberately indifferent to that harm. *Id.* at 217 (quoting *Arenas v. Calhoun*, 922 F.3d 616, 620 (5th Cir. 2019)).

³¹ *Id.* at 222.

³² *Id.* (citation omitted). The Fifth Circuit also pointed to Supreme Court dicta, “which has instructed that a ‘filthy, overcrowded cell . . . might be tolerable for a few days and intolerably cruel for weeks or months.’” *Id.* (alteration in original) (quoting *Hutto v. Finney*, 437 U.S. 678, 686–87 (1978)).

³³ 157 F.3d 1003 (5th Cir. 1998).

³⁴ See *id.* at 1004, 1006.

³⁵ See *Taylor*, 946 F.3d at 222 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

³⁶ See *id.* at 225.

themselves for a period of seventeen hours, leaving them no choice but to sleep in their own waste overnight.”³⁷ Taylor petitioned for certiorari regarding the grant of immunity on the cell conditions claim.³⁸

The Supreme Court vacated and remanded.³⁹ In a short per curiam opinion,⁴⁰ the Court held that “any reasonable officer should have realized that Taylor’s conditions of confinement offended the Constitution.”⁴¹ Following *Hope v. Pelzer*,⁴² the Court reasoned that general Eighth Amendment principles made it obvious that Taylor’s cell conditions violated the Constitution.⁴³ The Court distinguished *Davis* as too dissimilar to provide on-point precedent: there, the alleged violation was merely a dirty cell where the individual was provided with cleaning supplies.⁴⁴ The Court noted that even if it could not be sure that all the officers were deliberately indifferent, the record indicated that at least some were, with one remarking that he hoped Taylor would “f***ing freeze.”⁴⁵ The Court further noted that there was no evidence that the conditions of Taylor’s confinement were necessary or that they could not have been mitigated.⁴⁶

Justice Alito concurred in the judgment. He would not have granted certiorari in the first place because he believed that this was merely a case where the Court disagreed with the Fifth Circuit’s application of the correct legal standard.⁴⁷ But, given that the Court had granted certiorari, Justice Alito agreed with the outcome.⁴⁸ He agreed with the majority that a reasonable corrections officer would have known their conduct was unconstitutional and that case law stating “that holding a prisoner in a ‘filthy’ cell for ‘a few days’ ‘might be tolerable’”⁴⁹ was not to the contrary, since Taylor’s cells were not just unpleasant but were “the filthiest cells imaginable.”⁵⁰ Justice Thomas dissented without explanation.⁵¹

³⁷ *Id.* (footnote omitted) (citing *Palmer v. Johnson*, 193 F.3d 346, 352–53 (5th Cir. 1999)).

³⁸ See Petition for a Writ of Certiorari at 1–2, *Taylor*, 141 S. Ct. 52 (No. 19-1261).

³⁹ See *Taylor*, 141 S. Ct. at 54.

⁴⁰ Justice Barrett took no part in the decision.

⁴¹ *Taylor*, 141 S. Ct. at 54.

⁴² 536 U.S. 730 (2002).

⁴³ See *Taylor*, 141 S. Ct. at 54.

⁴⁴ See *id.* at 54 n.2.

⁴⁵ *Id.* at 54 (citing *Taylor v. Stevens*, 946 F.3d 211, 218 n.9 (5th Cir. 2019)).

⁴⁶ See *id.*

⁴⁷ See *id.* at 55 (Alito, J., concurring in the judgment). Additionally, the Supreme Court rarely grants review of nonfinal decisions, like the summary judgment claim here. *Id.* If the facts a petitioner alleges are not proven at trial, he may still lose to a qualified immunity defense. *Id.* at 55–56.

⁴⁸ See *id.* at 56.

⁴⁹ *Id.* (quoting *Hutto v. Finney*, 437 U.S. 678, 686–87 (1978)).

⁵⁰ *Id.*

⁵¹ See *id.* at 54 (Thomas, J., dissenting).

In *Taylor*, the Court, for the first time, applied the obviousness standard it established in *Hope* to overturn a grant of qualified immunity. This outcome frustrated some, who had hoped the Court would use *Taylor* as an opportunity to reexamine, and perhaps limit or abolish, the qualified immunity doctrine.⁵² Nonetheless, *Taylor* is an important, and rare, win for a plaintiff in a qualified immunity case. By reinvigorating the obviousness standard, *Taylor* marks a significant development in the Court's qualified immunity jurisprudence, and it suggests that in the future the Court might be willing to reconsider its historically overbroad grant of immunity to official actors.

Qualified immunity protects government officers from damages suits unless their conduct violates “clearly established . . . constitutional rights of which a reasonable person would have known.”⁵³ It is intended to “balance[] 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.”⁵⁴ In order to overcome the qualified immunity defense, a plaintiff must show both that the officer's conduct violated the plaintiff's constitutional rights *and* that these rights were clearly established at the time of the alleged violation.⁵⁵ A right is clearly established if there is precedent — usually in the form of case law⁵⁶ — articulating that right and thereby putting the officer on notice that his or her conduct is unlawful.⁵⁷ The Court has typically required that this precedent define the right at a particularized level, so that the officer can “reasonably . . . anticipate when their conduct may give rise to liability for damages.”⁵⁸ So, for instance, it is not sufficient that the Fourth Amendment protects from unreasonable searches and seizures; there must be precedent showing that the specific circumstances of a particular search were unconstitutional.⁵⁹ That being said, officers “can

⁵² See Jay Schweikert, *The Supreme Court Won't Save Us from Qualified Immunity*, CATO INST. (Mar. 3, 2021, 4:58 PM), <https://www.cato.org/blog/supreme-court-wont-save-us-qualified-immunity> [<https://perma.cc/2WNL-HGYU>].

⁵³ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

⁵⁴ *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

⁵⁵ See *id.* at 232.

⁵⁶ Circuits are divided as to what kinds of authority count in the “clearly established law” analysis. Some circuits will only consider their own case law, while others will consider extracircuit case law. See John C. Jeffries, Jr., *What's Wrong with Qualified Immunity*, 62 FLA. L. REV. 851, 858–59 (2010); Amelia A. Friedman, Note, *Qualified Immunity in the Fifth Circuit: Identifying the “Obvious” Hole in Clearly Established Law*, 90 TEX. L. REV. 1283, 1289–90 (2012). Equally, it is unclear the extent to which authority other than case law, such as policy documents, should be considered. See Friedman, *supra*, at 1290–91.

⁵⁷ See *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)).

⁵⁸ *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)).

⁵⁹ See *id.*

still be on notice that their conduct violates established law even in novel factual circumstances.”⁶⁰ In *Hope*, the Court stated that officers just needed “fair warning” and that a violation could be so obvious that general constitutional principles already expressed in precedent could suffice to give the officers warning that their conduct was unconstitutional.⁶¹

Despite the Court’s recognition of an obviousness standard in *Hope*, the Court seemed to back away from it in subsequent cases. The Court occasionally reaffirmed the existence of the obviousness standard.⁶² Yet, increasingly, the Court ignored *Hope* or actively proposed more stringent standards.⁶³ In *Mullenix v. Luna*,⁶⁴ the Court stated that a right must be established “beyond debate,”⁶⁵ which seems much more stringent than *Hope*’s fair warning standard.⁶⁶ This “beyond debate” standard was first established in *Ashcroft v. al-Kidd*,⁶⁷ in which the Supreme Court chastised lower courts for defining law at too high a level of generality.⁶⁸ The Court did not even acknowledge *Hope*’s existence, despite the fact that the lower court in *al-Kidd* had primarily relied on *Hope* in its decision, which the Supreme Court overturned.⁶⁹ *Al-Kidd* therefore provoked speculation as to the continued vitality of *Hope*, as some saw it as a “doctrinal shift[]” away from *Hope*’s fair warning principle and toward requiring that the constitutional violation be established “beyond debate.”⁷⁰

The Supreme Court’s confused guidance has led lower courts to adopt differing standards.⁷¹ Different panels of the same circuit have even come to different conclusions on the same set of facts.⁷² In *Baxter*

⁶⁰ *Hope*, 536 U.S. at 741.

⁶¹ *Id.*

⁶² See *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam).

⁶³ See Karen Blum et al., *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 *TOURO L. REV.* 633, 657 (2013).

⁶⁴ 577 U.S. 7 (2015) (per curiam).

⁶⁵ *Id.* at 12 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

⁶⁶ See Blum et al., *supra* note 63, at 654 (“[S]ince [*Hope*], the ‘fair warning’ formula has been virtually ignored by the Supreme Court.”).

⁶⁷ 563 U.S. 731.

⁶⁸ *Id.* at 742.

⁶⁹ See *Morgan v. Swanson*, 659 F.3d 359, 373 (5th Cir. 2011) (citing *al-Kidd v. Ashcroft*, 580 F.3d 949, 970 (9th Cir. 2009), *rev’d*, 563 U.S. 731 (2011)).

⁷⁰ Reinhardt, *supra* note 5, at 1248; Recent Case, *supra* note 11, at 2046 (“*Al-Kidd* and similar Supreme Court cases have weakened the validity of *Hope*’s fair warning principle, which the Supreme Court has declined to apply since.” (footnote omitted)).

⁷¹ See SCOTT MICHELMAN, *CIVIL RIGHTS ENFORCEMENT* 231 (2020); Alan K. Chen, *The Intractability of Qualified Immunity*, 93 *NOTRE DAME L. REV.* 1937, 1948–51 (2018).

⁷² See MICHELMAN, *supra* note 71, at 231.

v. Harris,⁷³ police officers released a police dog, without warning, onto a man who had been sitting motionless with his hands in the air.⁷⁴ A Sixth Circuit panel affirmed the district court's denial of qualified immunity, relying on a prior case that declared it unconstitutional for an officer to release an inadequately trained police dog without warning onto two suspects who were not fleeing.⁷⁵ After discovery, the police officers again argued qualified immunity and the district court again denied it.⁷⁶ But a different panel of the Sixth Circuit reversed, finding that there was no case establishing that a person raising their hands alone was sufficient to put the officers on notice that it would be unconstitutional to release the dog.⁷⁷

Circuit courts have adopted differing standards specifically as relates to unconstitutional conditions, like those Taylor alleged.⁷⁸ In *DeSpain v. Uphoff*,⁷⁹ for example — in which a prisoner's cell was flooded with urine for around thirty-six hours⁸⁰ — the Tenth Circuit held that the officers did not have qualified immunity because, although no cases were factually on point, there was a “great weight of cases . . . condemning on constitutional grounds an inmate's exposure to human waste” generally, so the officers were on notice that their actions were unconstitutional.⁸¹ Likewise, in *Brooks v. Warden*,⁸² the Eleventh Circuit held that it was not only obviously unconstitutional to force a prisoner to sit in his own waste for two days⁸³ but also clearly established that Eighth Amendment violations “can arise from ‘conditions lacking basic sanitation.’”⁸⁴ The Fifth Circuit has precedents that similarly condemn requiring prisoners to live in unsanitary conditions as unconstitutional⁸⁵ but, unlike other circuits, chose to hold that these cases were not sufficiently similar to put the officers in *Taylor* on notice that their conduct was unconstitutional.

⁷³ No. 15-CV-00019, 2015 WL 6873667 (M.D. Tenn. Nov. 9, 2015), *aff'd*, No. 15-6412, 2016 WL 11517046 (6th Cir. Aug. 30, 2016).

⁷⁴ *See id.* at *2.

⁷⁵ *See Baxter*, 2016 WL 11517046, at *2 (citing *Campbell v. City of Springboro*, 700 F.3d 779, 789 (6th Cir. 2012)).

⁷⁶ *See Baxter v. Bracey*, 751 F. App'x 869, 870–71 (6th Cir. 2018).

⁷⁷ *See id.* at 872.

⁷⁸ *See* Petition for a Writ of Certiorari, *supra* note 38, at 21–23 (discussing cases).

⁷⁹ 264 F.3d 965 (10th Cir. 2001).

⁸⁰ *See id.* at 972. If anything, the conditions in *DeSpain* were less egregious than in *Taylor*. The plaintiff in *DeSpain* had a bed to sit on to get out of the contaminated water, and he was confined in these unsanitary conditions for thirty-six hours rather than six days. *Id.* at 972–73.

⁸¹ *Id.* at 979.

⁸² 800 F.3d 1295 (11th Cir. 2015).

⁸³ *See id.* at 1307.

⁸⁴ *Id.* at 1306 (quoting *Chandler v. Baird*, 926 F.2d 1057, 1066 (11th Cir. 1991)).

⁸⁵ *See, e.g., McCord v. Maggio*, 927 F.2d 844, 847 (5th Cir. 1991).

Taylor is important because it is the first time the Court has relied on the obviousness of a constitutional violation to overturn qualified immunity, regardless of case law on point. In *Hope*, the Court recognized obviousness as a possible basis to deny qualified immunity, but it still based its holding on clearly established precedent.⁸⁶ *Hope* was a prisoner in Alabama.⁸⁷ As a sanction for disorderly conduct, prison officers tied him, shirtless, to a hitching post for seven hours in the middle of the summer, only giving him water once or twice and never untying him to allow him to go to the bathroom.⁸⁸ The Eleventh Circuit found that the officers' conduct violated *Hope's* Eighth Amendment rights but that, since there was no prior case with "materially similar" facts, the officers were entitled to qualified immunity.⁸⁹ The Supreme Court rejected this "materially similar" standard. Citing *United States v. Lanier*,⁹⁰ the Court stated that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."⁹¹ The Court elaborated:

Arguably, the violation was so obvious that our own Eighth Amendment cases gave respondents fair warning that their conduct violated the Constitution. *Regardless*, in light of binding Eleventh Circuit precedent [and other precedent], . . . we readily conclude that the respondents' conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known."⁹²

The Court then discussed two cases that were binding in the Eleventh Circuit and that put the officers on notice that their conduct was unconstitutional: one that held that handcuffing inmates to cells or fences for long periods of time was unconstitutional⁹³ and the other reasoning that physical abuse of a prisoner when he is no longer resisting authority,

⁸⁶ See *Vinyard v. Wilson*, 311 F.3d 1340, 1354 n.27 (11th Cir. 2002) ("*Hope* appears to be a preexisting case law decision where the facts in *Hope* were not fairly distinguishable from those in *Gates v. Collier*], 501 F.3d 1291 (5th Cir. 1974)."); John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 256–57 (2013) ("[E]ven under a demanding standard of factual similarity, the conduct in *Hope* stood condemned."). *But see* Joanna Schwartz, *The Supreme Court Is Giving Lower Courts a Subtle Hint to Rein in Police Misconduct*, THE ATLANTIC (Mar. 4, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/the-supreme-courts-message-on-police-misconduct-is-changing/618193> [<https://perma.cc/L9EK-87DB>] (stating that the Court in *Hope* had ruled based on obviousness).

⁸⁷ See *Hope v. Pelzer*, 536 U.S. 730, 733 (2002).

⁸⁸ See *id.* at 734–35.

⁸⁹ *Id.* at 733.

⁹⁰ 520 U.S. 259 (1997).

⁹¹ *Hope*, 536 U.S. at 741. *Lanier* was not a qualified immunity case but was a criminal case in which the Sixth Circuit analogized to qualified immunity to decide what constituted fair notice in a criminal context. See *Lanier*, 520 U.S. at 263.

⁹² *Hope*, 536 U.S. at 741–42 (emphasis added) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). In fact, this language in *Hope* led the Fifth Circuit once to opine that *Hope's* obviousness discussion was just dicta. *Morgan v. Swanson*, 659 F.3d 359, 373 (5th Cir. 2011).

⁹³ See *Hope*, 536 U.S. at 742 (citing *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974)).

such as denying him water, would be unconstitutional.⁹⁴ The Court stated that this violation of clearly established law was “buttressed” by a Department of Justice (DOJ) report specifically advising the Alabama Department of Corrections that its practices were unconstitutional.⁹⁵ The Court concluded that “the Eleventh Circuit precedent . . . , as well as the DOJ report condemning the practice, put a reasonable officer on notice that [their conduct] was unlawful.”⁹⁶ The Court in *Hope* therefore recognized that it would be possible for conduct to be so egregious as to *obviously* violate the Constitution, as was “[a]rguably”⁹⁷ the case on *Hope*’s facts, but ended up simply following on-point precedent.⁹⁸

In *Taylor*, by contrast, the Court did not rely on any prior precedent. The only unconstitutional conditions case the Court cited was *Davis*, and it did so to emphasize the *dissimilarity* between *Davis* and *Taylor*.⁹⁹ The Court chastised the Fifth Circuit for finding that *Davis* cast doubt on whether it was unconstitutional for officers to hold Taylor in the cells for “only” six days.¹⁰⁰ Lower courts have, following *Hope*, decided cases based on obviousness,¹⁰¹ and *Hope* is generally understood to have established obviousness as a possible basis to deny qualified immunity.¹⁰² But, while the Court has reiterated the existence of the obviousness standard,¹⁰³ it had never — until *Taylor* — actually used it to decide a case.¹⁰⁴

Though it is true that *Taylor* was based on “particularly egregious facts,”¹⁰⁵ *Taylor* shows a Supreme Court more willing to give some teeth to the obviousness doctrine. It is too early to tell whether *Taylor* was an

⁹⁴ See *id.* at 743 (citing *Ort v. White*, 813 F.2d 318 (11th Cir. 1987)).

⁹⁵ *Id.* at 744.

⁹⁶ *Id.* at 745–46.

⁹⁷ *Id.* at 741.

⁹⁸ See *id.* at 741–42.

⁹⁹ See *Taylor*, 141 S. Ct. at 54 n.2.

¹⁰⁰ See *id.*

¹⁰¹ See, e.g., *Barker v. Goodrich*, 649 F.3d 428, 437 (6th Cir. 2011); *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 534 (8th Cir. 2009).

¹⁰² See, e.g., *Schwartz*, *supra* note 4, at 1835.

¹⁰³ See, e.g., *City of Escondido v. Emmons*, 139 S. Ct. 500, 504 (2019) (per curiam); *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009); *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam).

¹⁰⁴ In the thirty Supreme Court cases dealing with qualified immunity between 1982 and 2020, plaintiffs have prevailed only twice. Erwin Chemerinsky, *Chemerinsky: SCOTUS Hands Down a Rare Civil Rights Victory on Qualified Immunity*, ABA J. (Feb. 1, 2021, 9:11 AM), <https://www.abajournal.com/columns/article/chemerinsky-scotus-hands-down-a-rare-civil-rights-victory-on-qualified-immunity> [<https://perma.cc/7DLM-YYQB>]. The first time was *Hope*. See *id.* The second was *Groh v. Ramirez*, 540 U.S. 551 (2004), in which the Court relied on case law clearly establishing that a warrantless search of a home without an exigency is unconstitutional. See *id.* at 564–65. Thus, in no case did a plaintiff prevail based on obviousness.

¹⁰⁵ *Taylor*, 141 S. Ct. at 54.

outlier or whether it signals a new approach to qualified immunity.¹⁰⁶ But at least one data point suggests optimism. Fewer than four months after *Taylor*, in *McCoy v. Alamu*,¹⁰⁷ the Court reversed a grant of summary judgment on the grounds of qualified immunity for further proceedings consistent with *Taylor*.¹⁰⁸ This outcome suggests that the Court might be serious about applying the standard going forward.

Admittedly, the obviousness standard far from solves all the issues with qualified immunity. It allows plaintiffs to defeat qualified immunity only in the most egregious cases, leaving the majority of plaintiffs unprotected. And the obviousness standard lacks guidelines and relies entirely on judges' subjective perceptions of how bad a constitutional violation is.¹⁰⁹ This type of "you know it when you see it"¹¹⁰ test will surely lead to a broad variation in when lower courts decide that conduct is so egregious as to be obviously unconstitutional.

Nonetheless, *Taylor* is an important development in the law. The Court historically has exhibited a "troubling asymmetry" in its qualified immunity jurisprudence: it has frequently reversed denials of qualified immunity but rarely reversed grants of qualified immunity.¹¹¹ This asymmetry is well illustrated by the Court's repeated reversal — with varying levels of impatience — of cases it considers to have defined clearly established law at too high a level of generality.¹¹² Perhaps *Taylor* shows a Court that has finally decided to take a more balanced approach, policing lower courts both for being too quick to grant qualified immunity as well as too quick to deny it.

¹⁰⁶ See Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L.J. 305, 351 (2020); Chemerinsky, *supra* note 104.

¹⁰⁷ 141 S. Ct. 1364 (2021) (mem.).

¹⁰⁸ See *id.*

¹⁰⁹ See Allen H. Denson, Commentary, *Neither Clear nor Established: The Problem with Objective Legal Reasonableness*, 59 ALA. L. REV. 747, 761–62 (2008).

¹¹⁰ Cf. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

¹¹¹ See *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) ("[T]his Court routinely displays an unflinching willingness 'to summarily reverse courts for wrongly denying officers the protection of qualified immunity' but 'rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases.'" (alteration in original) (quoting *Salazar-Limon v. Houston*, 137 S. Ct. 1277, 1282–83 (2017) (Sotomayor, J., dissenting from denial of certiorari))); see also Reinhardt, *supra* note 5, at 1244–50.

¹¹² See *White v. Pauly*, 137 S. Ct. 548, 551–52 (2017); see also *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011); Schwartz, *supra* note 86 ("The Court has repeatedly chided lower courts for denying qualified-immunity motions . . .").