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THE OBVIOUS VIOLATION EXCEPTION TO QUALIFIED IMMUNITY: AN EMPIRICAL STUDY

Bailey D. Barnes*

Abstract: Qualified immunity shields government officials from civil suits for discretionary actions, as long as the violated right is not clearly established. A right is deemed established when every reasonable official would understand it based on precedent, placing it beyond debate, such that only the plainly incompetent may be held liable. Consequently, even when an act infringes on one's civil rights, a court may deny relief owing to a lack of factually comparable precedent. However, in 2020, the Supreme Court indicated its distrust for overreliance on precedent in certain contexts. In *Taylor v. Riojas*, the Court held that prison officials violated an incarcerated individual's clearly established rights, regardless of case law, where the allegations presented "extreme circumstances" and "egregious facts." Thus, *Taylor* articulated an exception to the usual requirement for overcoming qualified immunity—showing a factually comparable precedent—in cases that raise extreme circumstances and egregious facts.

This Article offers the first empirical study encompassing all published lower court opinions referencing *Taylor* within the three years following its release. This inquiry includes a quantitative analysis of the cases applying *Taylor* to grant or deny immunity, as well as a qualitative examination of the factual situations where the exception is most likely to succeed. Accordingly, this study suggests that the obvious violation exception is viable, albeit underused. Inferior courts are applying it in situations beyond the Eighth Amendment, and it is subject to a workable test. Therefore, Courts and litigants should employ it more frequently. Finally, the exception is consistent with *Taylor* and furthers the purpose of the Ku Klux Klan Act of 1871, 42 U.S.C. § 1983, by preventing blatant civil rights abusers from evading consequences.

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INTRODUCTION

Qualified immunity has fallen short of the promise made by the Ku Klux Klan Act of 1871, 42 U.S.C. § 1983.[1] When Congress created a private cause of action against government officials who violated civil rights, it said nothing of a defense.[2] Instead, it declared that any person acting under color of state law who deprives another of a constitutional or statutory right "*shall* be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."[3] Yet, officials today get one free deprivation because if no court has previously held the conduct at issue to violate the Constitution or a statute, officers are not subject to liability.[4] After initially identifying qualified immunity as a good faith defense, the United States Supreme Court has expanded the scope of qualified immunity and frustrated its purpose.[5] Rather than

1. *See generally* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018) [hereinafter Schwartz, *Case Against Qualified Immunity*] (describing the failings of qualified immunity).

2. *Cf.* The Ku Klux Klan Act of 1871 § 1, 42 U.S.C. § 1983 (2018) (making no mention of qualified immunity or a good faith defense).

3. 42 U.S.C. § 1983 (emphasis added).

4. *See, e.g.*, Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 62–66 (2016) (noting the near-universal requirement that a prior judicial opinion clearly establish the right at issue); Seth W. Stoughton, Kyle McLean, Justin Nix & Geoffrey Alpert, *Policing Suspicion: Qualified Immunity and "Clearly Established" Standards of Proof*, 112 J. CRIM. L. & CRIMINOLOGY 37, 61–62 (2022) (acknowledging the Supreme Court's requirement of on-point precedent to clearly establish the law in the vast majority of qualified immunity cases).

5. *See, e.g.*, Bailey D. Barnes, *A Reasonable Person Standard for Qualified Immunity*, 55 CREIGHTON L. REV. 33, 39–44 (2021) (detailing the Court's qualified immunity jurisprudence); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 53 (2018); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 38–39 (1989) ("Although *Pierson* showed fidelity to common law principles, the Court soon abandoned the common law . . . [i]n short order, the Court rejected the limits of the common law and . . . substituted its own policy judgments for the commands of both § 1983 and the Constitution."). *See generally* JOANNA SCHWARTZ, SHIELDED:

honoring Congress's admonition that offenders "*shall* be liable," lower courts routinely dismiss cases presenting prima facie deprivations of civil rights.[6]

That is because qualified immunity shields state officials if they do not offend a clearly established right.[7] Courts tasked with making this determination turn almost exclusively to precedent.[8] If a court has previously identified a deprivation on facts akin to those at bar, the right is clearly established—otherwise, it is not.[9]

But a lack of similar precedent does not always shield officers from accountability.[10] The Court has twice admonished that on-point case law is unnecessary if every reasonable officer should have known that the egregious actions transgressed the law.[11] This is the obvious violation

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HOW THE POLICE BECAME UNTOUCHABLE (2023) (discussing the problematic real-world effects of qualified immunity).

6. *Compare* Joanna Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 10 (2017) [hereinafter Schwartz, *How Qualified Immunity Fails*] (finding that only 0.6% of Section 1983 actions are dismissed at the motion to dismiss stage and only 2.6% are rejected on summary judgment), *with* Joanna Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U. L. REV. 1101, 1105–06 (2020) [hereinafter Schwartz, *Qualified Immunity's Selection Effects*] (arguing that qualified immunity often screens out civil rights actions before they are filed because of the risks of summary dismissal and the cost of fighting motions to dismiss, motions for summary judgment, and appeals based on the defense).

7. *See, e.g.*, John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010) ("Qualified immunity is the doctrine that precludes damages unless a defendant has violated '*clearly established*' constitutional rights. More fully, damages are barred if 'a reasonable officer would have believed' his or her actions to be lawful 'in light of clearly established law.'"); *cf.* Tyler Finn, Note, *Qualified Immunity Formalism: "Clearly Established Law" and the Right to Record Police Activity*, 119 COLUM. L. REV. 445, 460 (2019) (discussing the difficulties plaintiffs face in proving that a law is clearly established.).

8. *See* Alexander A. Reinert, *Asymmetric Review of Qualified Immunity Appeals*, 20 J. EMPIRICAL LEGAL STUDS. 4, 11 (2023); Tayler Bingham, Note, *Giving Qualified Immunity Teeth: A Congressional Approach to Fixing Qualified Immunity*, 21 NEV. L.J. 835, 869 (2021).

9. *See* John P. Gross, *Qualified Immunity and the Use of Force: Making the Reckless into the Reasonable*, 8 ALA. C.R. & C.L. L. REV. 67, 75 (2017); Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NORTE DAME L. REV. 1853, 1872–74 (2018).

10. *See generally* McCoy v. Alamu, __ U.S. __, 141 S. Ct. 1364 (2021) (vacating and remanding a case for reconsideration in light of *Taylor v. Riojas*); Taylor v. Riojas, 592 U.S. __, 141 S. Ct. 52 (2020) (summarily vacating a decision of the Fifth Circuit based on qualified immunity despite a lack of on-point precedent for the alleged offending conduct); Hope v. Pelzer, 536 U.S. 730 (2002) (denying qualified immunity based on an obvious violation of the Eighth Amendment regardless of available precedent).

11. *Taylor*, 141 S. Ct. at 54 ("Confronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution."); *Hope*, 536 U.S. at 745 ("The obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment.").

exception to qualified immunity.[12] In November 2020, in *Taylor v. Riojas*,[13] the Court held that a prisoner subjected to despicable conditions by prison officials did not need a prior opinion to establish his right to be free from those conditions.[14] Lower courts, litigators, and scholars have since wrestled with the decision's implications,[15] which the Court issued on its "shadow docket," meaning without briefing or oral argument.[16]

The present Article is the first to survey every reported lower court decision citing *Taylor* in the three years following the judgment to discern its impact. The analysis reveals a few key findings. First, the exception is viable, and courts may apply it using workable standards. Second, lower courts are underutilizing it, and litigants should argue it more often. Third, there are certain factual patterns where the exception applies.

This Article is divided into seven parts. First, I review the literature and indicate the contribution made by this Article. Second, I survey the history of qualified immunity and Section 1983. Third, I summarize the Supreme Court cases articulating the exception. Fourth, using the data, I outline the study's quantitative and qualitative findings, including the number of cases involved, as well as their facts and holdings, and suggest that the exception is underused. Fifth, I note that the exception is viable, suggest that litigators and jurists use it more often, and identify a test for courts to evaluate the exception. Sixth, I take a small detour to consider the Court's recent denial of certiorari in *Hamlet v. Hoxie*,[17] a 2023 case invoking the exception. Finally, I highlight how the exception can mitigate the extremes of qualified immunity.

I. LITERATURE REVIEW

Since *Taylor*, the obvious violation exception and qualified immunity have prompted significant scholarly debate. Some viewed *Taylor* as constrained to its facts or proving qualified immunity's potency,

12. I refer to the obvious violation exception throughout as the "obvious violation exception," "the exception," or, simply, "the OVE."

13. 592 U.S. __, 141 S. Ct. 52 (2020).

14. *See id.* at 53–54.

15. *See infra* Part I.

16. *See* Benjamin H. Barton, *Why Are These Justices Using the Shadow Docket More than Past Justices?*, 23 NEV. L.J. 845, 849–50 (2023); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1–2 (2015); *see also* STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023) (discussing the Court's more recent usage of the shadow docket).

17. __ U.S. __, 144 S. Ct. 485 (2023).

considering it took such visceral facts to find an obvious violation.[18] These scholars saw little hope for lower courts to reliably use the exception. For instance, Andrew Hessick and Katherine Richardson contended that *Taylor*'s shocking facts prove its rarity.[19] They said, "denials [based on obviousness] are the exception, not the norm. Courts regularly apply qualified immunity . . . even when those violations are outrageous. If anything, cases like *Riojas* illustrate the breadth and power of qualified immunity."[20] Similarly, distinguished qualified immunity scholar Joanna Schwartz cautioned against assuming that *Taylor* will have a lasting impact.[21] Schwartz noted,

> beyond . . . two decisions involving the torturous treatment of state prisoners—the Court's decisions have paid only lip service to the notion that constitutional rights can be clearly established without a prior case on point and have repeatedly required that plaintiffs identify court decisions to overcome . . . qualified immunity . . . .[22]

Additionally, Nyla Knox commented that *Taylor* has reinforced the viability of qualified immunity.[23] Knox, like Hessick and Richardson, argued that the Court's recognition of an exception in the face of terrible facts proves that immunity is the norm in cases with bad—but not egregious—circumstances.[24] Similarly, Alexander Reinert advocated that obvious cases "are exceptions that prove the rule because they involve the rare case in which a constitutional violation is so obvious that one would

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18. In *Taylor*, correctional officers knowingly forced Taylor, an incarcerated person, to remain, naked, in two different cold, feces-covered cells without a bed or running water—and, in one, Taylor only had a hole in the floor in which to relieve himself. *See Taylor*, 141 S. Ct. at 53. When Taylor involuntarily relieved himself after more than 24 hours of attempting to control his bladder, sewage spilled across the floor where Taylor was forced to sleep. *Id.*

19. *See* F. Andrew Hessick & Katherine C. Richardson, *Qualified Immunity Laid Bare*, 56 WAKE FOREST L. REV. 501, 511–12 (2021).

20. *Id.* at 511–512.

21. *See* Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 614 (2021) [hereinafter Schwartz, *Qualified Immunity's Lie*]; *see also* Joanna C. Schwartz, *Civil Rights Without Representation*, 64 WM. & MARY L. REV. 641, 695–96 (2023) ("[*Taylor*] suggests that a prior factually analogous court decision is unnecessary in extreme cases with clear constitutional violations. It is too early to know *Taylor*'s impact on the lower courts, but many continue to . . . requir[e] a prior court decision with nearly identical facts to overcome [it].").

22. Schwartz, *Qualified Immunity's Lie*, *supra* note 21, at 614.

23. *See* Nyla Knox, Comment, *Qualified Immunity: Rectifying a Detrimental Doctrine*, 53 ARIZ. ST. L.J. 945, 966–67 (2021).

24. *Id.* at 967 ("By showing that qualified immunity has some limits, the Court illustrated its commitment to the doctrine. So, even in light of this decision, the Supreme Court still seems unwilling to commit to reexamining qualified immunity.").

not need a prior case to establish it with clarity."[25] Finally, Katherine Mims Crocker and Nathan Chapman noted that the Court's cases following *Taylor* indicate that it is not a sea change.[26] Chapman counseled, "one swallow, or even two, does not a spring make."[27]

Yet, others have taken a more neutral approach. Notably, Crocker, a to-be *Taylor* skeptic, initially thought that *Taylor* might indicate the Court's unease toward the excesses of qualified immunity.[28] In 2021, a year before she became skeptical, Crocker surmised, "For today, *Taylor* . . . mark[s] a reticent qualified immunity retreat, serving as [a] modest but important move[] toward holding government actors accountable for unconstitutional conduct."[29] Likewise, Benjamin Levine postulated that *Taylor* is a limited shift in qualified immunity jurisprudence.[30] He questioned how lower courts would interpret *Taylor* outside of the prison context.[31] Ultimately, Levine predicted that *Taylor* would only reinforce existing qualified immunity frameworks in lower courts.[32]

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25. Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CALIF. L. REV. 201, 212 (2023).

26. *See* Nathan S. Chapman, *Fair Notice, The Rule of Law, and Reforming Qualified Immunity*, 75 FLA. L. REV. 1, 55 n.294 (2023); Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L.J. 1701, 1723–24 (2022). Crocker has declared:

> If anyone thought *Taylor* signaled that the Court might be more circumspect about expanding the reach of qualified immunity than the Justices had been before, *Tanzin v. Tanvir*, decided just a month later implied otherwise. And both *Rivas-Villegas* and *City of Tawagah v. Boyd*, decided the following year, reinforce the Court's pre-*Taylor* approach to qualified immunity.

Id. at 1723.

27. Chapman, *supra* note 26, at 55 n.294.

28. Katherine Mims Crocker, *The Supreme Court's Reticent Qualified Immunity Retreat*, 71 DUKE L.J. ONLINE 1, 5, 13, 17 (2021).

29. *Id.* at 17. Crocker added, "For tomorrow, qualified immunity critics should keep endeavoring to make the political process expand on the Supreme Court's characteristically measured course correction . . . ." *Id.* Additionally, Crocker indicated that *Taylor* might also be the Supreme Court's response to contemporary criticism for qualified immunity by civil rights advocates and protestors in response to the murders committed by police against citizens that rose to national prominence in the summer of 2020. *Id.* at 13 ("In light of all this, one could surmise that *Taylor* . . . suppl[ies] a limited response to the recent revolt against qualified immunity.").

30. Benjamin S. Levine, Comment, *"Obvious Injustice" and Qualified Immunity: The Legacy of* Hope v. Pelzer, 68 UCLA L. REV. 842, 871 (2021) ("*Taylor* undoubtedly marks a shift in the Court's treatment of qualified immunity in that it is the first time in years that the Court has overturned a grant of qualified immunity, let alone on the grounds that the violation was obvious per *Hope*.").

31. *Id.* ("While the Court clearly answered the question of whether *Hope* remains good law, it provided little insight regarding when courts should apply it outside of the prisons conditions context . . . .").

32. *Id.* at 903. Meanwhile, the Harvard Law Review Association has predicted that *Taylor* will promote more balance in the Court's civil rights decisions. *See* Recent Case, *Qualified Immunity – Obviousness Standard* – Taylor v. Riojas, 135 HARV. L. REV. 421, 430 (2021) ("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.").

Jennifer Laurin remarked, though, that *Taylor*'s significance is unclear, and it is difficult to predict how lower courts will respond.[33] *Taylor*'s brevity may suggest that the Court is also unsure about what to do with the clearly established standard.[34] Thus, Laurin predicted, "it is possible that lower courts will receive [*Taylor*] as a one-off outlier rather than a harbinger of change."[35] Similarly, Jack Nelson noted, "It is clear the Court is not interested in drastic overhaul, but it possibly has become sympathetic to victims alleging particularly egregious violations."[36] Lastly, Zina Makar, referring to *Taylor*'s shadow docket status, suggested that while the decision disrupts the status quo, it is hard to enforce.[37] Specifically, Makar stated, "the Court could be signaling that the qualified immunity analysis is right-dependent; that is, it is only willing to apply the broader, pro-plaintiff principles from [*Taylor*] when the circumstances are so undeniably 'extreme' or solely in the prison context."[38]

Finally, though solidly in the minority, Patrick Jaicomo and Anya Bidwell heralded *Taylor* as a positive development.[39] They speculated, "[*Taylor* and its progeny] provide hope that the Court may be recalibrating qualified immunity to reflect the historical availability of damages for constitutional violations.[40] They also added, "the Court's 2020 term could be the beginning of the end for qualified immunity. Although there is no way to tell when the Court might take more concrete steps toward recalibrating qualified immunity . . . recent decisions cast doubt

33. *See* Jennifer E. Laurin, *Reading* Taylor*'s Tea Leaves: The Future of Qualified Immunity*, 17 DUKE J. CONST. L. & PUB. POL'Y 241, 246–47 (2022) ("As stark a departure as *Taylor*'s tone is from the qualified immunity decisions that preceded it, the case's significance is far from 'loud and clear.'").

34. *Id.* at 249.

35. *Id.* at 264–65.

36. Jack Nelson, Note, Hope *Emerges from the Shadows:* Riojas *and* McCoy *Offer New Tool for Exonerees*, 67 VILL. L. REV. TOLLE LEGE 1, 16 (2023).

37. *Cf.* Zina Makar, *Per Curiam Signals in the Supreme Court's Shadow Docket*, 98 WASH. L. REV. 427, 466–68 (2023) (classifying *Taylor* as a disruptive signal and noting the difficulty faced by lower courts in applying it to new facts).

38. *Id.* at 457.

39. Patrick Jaicomo & Anya Bidwell, *Recalibrating Qualified Immunity: How* Tanzin v. Tanvir, Taylor v. Riojas*, and* McCoy v. Alamu *Signal the Supreme Court's Discomfort with the Doctrine of Qualified Immunity*, 112 J. CRIM. L. & CRIMINOLOGY 105, 109, 140 (2022). Though slightly less so, Danielle C. Jefferis, nevertheless, optimistically commented, "[*Taylor*] may signal some judicial willingness to, at a minimum, narrow the near-complete defense that the qualified immunity doctrine has come to provide given courts' readiness to defer to government actors." Danielle C. Jefferis, *Carceral Deference: Courts and Their Pro-Prison Propensities*, 92 FORDHAM L. REV. 983, 1029 (2023).

40. Jaicomo & Bidwell, *supra* note 39, at 109.

on . . . the application and theory underlying the clearly established test."[41]

This Article intervenes in three ways. First, I disagree with much of the literature by arguing that the exception is viable. Second, I demonstrate that jurists are already applying it under certain circumstances. Finally, I suggest a test for courts to use when relying on it. While others have speculated on *Taylor*'s effect, this is the first study to offer an empirical perspective.

II. BRIEF HISTORY OF SECTION 1983 & QUALIFIED IMMUNITY

Before the Civil War, federal enforcement of civil rights was minimal.[42] After the American Revolution, the purpose of law was to spur economic growth, not to shelter citizens from state abuse.[43] The federal government often violated rights rather than protected them, especially for

41. *Id.* at 140.

42. *See, e.g.*, Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1323 (1952) ("Prior to [Reconstruction,] the Constitution protected fundamental personal rights only against infringement by the federal government. This protection, embodied primarily in the first ten amendments, was not designed to be a sword or a shield against infringement either by the states or by individuals."); G. Edward White, *The Origins of Civil Rights in America*, 64 CASE W. RES. L. REV. 755, 765–71, 813 (2014). Indeed, as legal historian Lawrence M. Friedman has noted, rule by local jurists was the primary mode of law enforcement as it related to economic matters during the American colonial period before the Revolutionary War. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 46 (4th ed. 2019). Friedman has stated:

> As in England, too, local—county and city—courts held much of the power to run the economy. This arrangement had a drawback—at least form the standpoint of the mother country. It meant that local gentry, and local magistrates, could make or break imperial policy. Local rule is efficient, from the standpoint of the center, only if local people can be trusted. American squires and American merchants did not meet this criterion, long before 1776. Enforcement of the laws which flowed out of London became, frankly, impossible.

Id. Likewise, historian William E. Nelson has added of local rule in the colonial period,

> Because the small size of some colonies rendered them intrinsically local, because local elites controlled the courts, or because juries determined the law, coercive power in Britain's . . . colonies was effective when it was local . . . [and] problematic when it was not. Colonial Americans had a strong preference for local self-government.

WILLIAM E. NELSON, E PLURIBUS UNUM: HOW THE COMMON LAW HELPED UNIFY AND LIBERATE COLONIAL AMERICA, 1607–1776 146–47 (2019). It is not surprising, consequently, that Americans disfavored national interference in local affairs after the Revolution.

43. FRIEDMAN, *supra* note 42, at 84–85 ("[I]n postcolonial law, a new set of attitudes developed gradually, and a new set of goals. Now the primary function of law was economic growth. More people, more land, more wealth. A moving, eager, restless, ambitious population."). Friedman added, "[A]fter the Revolution, the people who mattered came to see law, more and more, as a utilitarian tool: law protected the established order, to be sure, but it also furthered the interests of the middle-class *mass*; the point was to foster growth . . . ." *Id.* at 85.

enslaved persons.[44] For instance, the federal government ensured that "runaway" enslaved persons were returned to their enslavers.[45] In that sense, the United States (tragically) safeguarded slaveholders' rights from state interference.[46] Typically, though, the federal government was apathetic to individual rights.[47] It is no surprise, then, that before the Fourteenth Amendment, the Court, in *Barron v. Baltimore*,[48] declined to extend the Bill of Rights to state actions.[49]

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44. The Fugitive Slave Clause provides:

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

U.S. CONST. art. IV, § 2, cl. 3; *see* Prigg v. Pennsylvania, 41 U.S. 539, 540 (1842) (enslaved person at issue) ("The clause in the [C]onstitution of the United States, relating to fugitives from labor, manifestly contemplates the existence of a positive, unqualified right, on the part of the owner of the slave which no state law or regulation can in any way qualify, regulate, control or restrain."); *see also* Fugitive Slave Act of 1850, Ch. 60, 9 Stat. 462 (1850); Fugitive Slave Act of 1793, Ch. 7, 1 Stat. 302 (1793).

Furthermore, post-Revolution American federal, and to much the same degree state, law only conferred "individual rights" on a select few people. Historian Laura F. Edwards has recounted that numerous groups lacked formal legal rights, including, "wives, children, servant, and slaves, all of whom were legally subordinated to their household heads, as well as free [B]lack[] [people], unmarried free women, and poor whites, whose race, class, and gender marked them as subordinates." LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH 7 (2009).

45. *See* LOREN SCHWENINGER, APPEALING FOR LIBERTY: FREEDOM SUITS IN THE SOUTH 2 (2018) ("The crossing of a state line to capture fugitive slaves . . . was the federal government's responsibility, as determined by the US Constitution and the Fugitive Slave Law of 1793, which permitted slaveholders . . . to retrieve their human property . . . if they could show that the black people were fugitives.").

46. *See* FRIEDMAN, *supra* note 42, at 201–03.

47. *See* Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 AM. HIST. REV. 45, 67 (1987) ("[The Thirteenth and Fourteenth [A]mendments delegated to Congress the authority to render a radical change in the role of the national government in American life. Congress and the federal courts had not participated to any great extent before 1860 in guaranteeing the fundamental and personal rights of citizens.").

48. 32 U.S. 243 (1833).

49. *See id.* at 250–51 ("In compliance with a sentiment . . . generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in [C]ongress, and adopted by the states. These amendments contain no expression indicating an intention to the apply them to the state governments. This [C]ourt cannot so apply them."); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1198 (1992) ("In 1833, the Supreme Court confronted *for the first time* the argument that a state government had violated one of the provisions of the Bill of Rights.") (emphasis added); *see also* WILLIAM DAVENPORT MERCER, DIMINISHING THE BILL OF RIGHTS: *BARRON V. BALTIMORE* AND THE FOUNDATIONS OF AMERICAN LIBERTY 119 (2017). *Barron* concerned the application of the Fifth Amendment's Takings Clause, not a general consideration of the incorporation of the Bill of Rights against the states; however, jurists and policymakers read *Barron*, correctly given Chief Justice John Marshall's reasoning, to prevent incorporation generally. *Cf. id.* at 177 ("[During] the early republic, there was a continual debate over

Following the Union's victory, the people of the former Confederate states reacted poorly to Reconstruction.[50] Consequently, in December 1865, a small band of disgruntled and racist Confederate veterans formed the Ku Klux Klan in Pulaski, Tennessee.[51] Over the next few years, the Klan—which grew steadily in territory and membership—instigated a campaign of terror against the now-freed enslaved persons, interracial couples, Republicans, Union sympathizers, and others.[52] Disturbed by this lawlessness, President Ulysses S. Grant sought a federal legislative response.[53]

Congress obliged, and, in the process, learned of the state governments' apathy toward, or collusion with, lynch mobs and the Klan.[54] Representative Aaron F. Perry summarized the bleakness of the situation to his colleagues, "[s]heriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit jurors act as if they may be accomplices."[55] He added, "[i]n the

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the location of the boundaries where state power ended and federal power began. By removing the requirement that states observe the liberties recognized by the Bill of Rights, *Barron* helped cement the police power as a state function . . . .").

50. FRIEDMAN, *supra* note 42, at 482–83.

51. DAVID M. CHALMERS, HOODED AMERICANISM: THE FIRST CENTURY OF THE KU KLUX KLAN, 1865–1965 8–9 (1965) ("In December of 1865, in Pulaski, near the Alabama border of Tennessee, six young men decided to form a club. They were mainly college men and had been officers during the late War for Southern Independence."). *See also* Tyler Stovall, *White Freedom and the Lady of Liberty*, 123 AM. HIST. REV. 1, 11 (2018) ("Resistance to Reconstruction frequently turned violent, especially after a group of ex-Confederate soldiers founded the Ku Klux Klan in 1866, unleashing a wave of white terror against black and white Republicans throughout the South.").

52. CHALMERS, *supra* note 51, at 10 ("[A]s the Klansmen themselves boasted, they were a 'rough bunch of boys.' The method of the Klan was violence. It threatened, exiled, flogged, mutilated, shot, stabbed, and hanged."); ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 116 (2019) ("[The Klan's] campaign of assault, arson, and murder targeted a broad array of enemies, including local Republican officials and organizers, blacks who engaged in disputes with white employers, schoolteachers, interracial couples, and 'scalawags,' as Democrats called white southerners who allied themselves with the Republican party."); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 342 (updated. ed. 2014) ("Founded in 1866 as a Tennessee social club, the Ku Klux Klan now spread [in 1868] into nearly every Southern state, launching a 'reign of terror' against Republican leaders black and white."); FRIEDMAN, *supra* note 42, at 484; *see also* SARAH E. RICKS & EVELYN M. TENENBAUM, CURRENT ISSUES IN CONSTITUTIONAL LITIGATION 6 (3d ed. 2020) ("[W]hite resisters organized themselves into groups . . . to terrorize the newly freed slaves and freedman, often in nighttime raids on their houses, armed with guns, knives, whips, nooses, and fire, and often in disguise. The Klan targeted community and political leaders, their families, and their white Republican supporters.").

53. *See* Chandni Challa, *Yes, We Klan: Reviving the Ku Klux Klan Act to Punish Insurrectionists*, 67 ST. LOUIS U. L.J. 439, 446 (2023); Tiffany R. Wright, Ciarra N. Carr & Jade W.P. Gasek, *Truth and Reconciliation: The Ku Klux Klan Hearings of 1871 and the Genesis of Section 1983*, 126 DICK. L. REV. 685, 702 (2022).

54. *See* Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 484–86 (1982).

55. CONG. GLOBE, 42d Cong., 1st Sess. 78 (1871).

presence of these gangs . . . [state officials] skulk away as if government and justice were crimes and feared detection."[56] To cure this ailment, Congress passed the Ku Klux Klan Act of 1871.[57] Section 1, now codified as 42 U.S.C. § 1983, states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable* to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[58]

Still, despite this legislative enactment, judicial protection of civil rights laid dormant for a century.[59] But that changed in the 1960s when the Court, in *Monroe v. Pape*,[60] revived Section 1983.[61] The Court upended its precedent by holding that, now, aggrieved plaintiffs need not exhaust all available state claims before proceeding under Section 1983 and that actors "clothed with the authority of [the] state" who committed misdeeds were acting under color of state law, and therefore were proper subjects of Section 1983 actions.[62] Yet, it did not take the Court long to taper the scope of this action.[63] Six years later, the Court conceded that government agents could invoke a limited defense stemming from common law.[64] Qualified immunity, as held by the Court in *Pierson v.*

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56. *Id.*

57. Eisenberg, *supra* note 54.

58. 42 U.S.C. § 1983 (emphasis added).

59. *See* Jennifer A. Coleman, *42 U.S.C. Section 1988: A Congressionally-Mandated Approach to the Construction of Section 1983*, 19 IND. L. REV. 665, 669 (1986); Joanna C. Schwartz, *Municipal Immunity*, 109 VA. L. REV. 1181, 1191 (2023). Nevertheless, some formerly enslaved people did pursue civil remedies in state court with some success. *See* Melissa Milewski, *From Slave to Litigant: African Americans in Court in the Postwar South, 1865–1920*, 30 L. & HIST. REV. 723, 727 (2012).

60. 365 U.S. 167 (1961).

61. Coleman, *supra* note 59. For more on the background of *Monroe*, see Myriam E. Gilles, *Police, Race and Crime in 1950s Chicago:* Monroe v. Pape *as Legal Noir*, *in* CIVIL RIGHTS STORIES 41 (Myriam E. Gilles & Risa L. Goluboff eds., 2007).

62. *Monroe*, 365 U.S. at 183–84 ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.").

63. Pierson v. Ray, 386 U.S. 547, 557 (1967). *See generally* Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1005–06 (2002) (recognizing qualified immunity's role in circumscribing Section 1983's promise of damages); David D. Coyle, *Getting It Right: Whether to Overturn Qualified Immunity*, 17 DUKE J. CONST. L. & PUB. POL'Y 283, 292 (2022) (acknowledging the subjective good faith beginnings of qualified immunity); Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 601–07 (1989) (chronicling the early development of qualified immunity).

64. *Pierson*, 386 U.S. at 557.

Ray,[65] protected officials who acted in good faith, even where they injured the plaintiff.[66] But in the ensuing decades, the Court disfigured that version of qualified immunity beyond recognition.

The first blow to the version of qualified immunity that required officers to act in good faith to be protected landed when the Court proclaimed that government agents would be protected regardless of their subjective good faith.[67] Instead, "government officials performing discretionary functions, generally [would be] shielded from liability . . . insofar as their conduct [did] not violate *clearly established* statutory or constitutional rights of which a *reasonable person* would have known."[68] Thus, the Court shifted the inquiry from subjective to objective.[69]

Next, the Court concluded that qualified immunity protected all officials except the "plainly incompetent" or those "who knowingly violate the law."[70] Further, a right is clearly established when its "contours . . . [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right."[71] Case law must place the right's boundaries "beyond debate."[72] Courts conducting this inquiry should define the right with reference to the specific conduct being contested.[73]

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65. 386 U.S. 547 (1967).

66. *Id.* at 557.

67. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982). ("The subjective component refers to 'permissible intentions.'"). In the intervening years, the Court had also expanded civil rights liability to include federal officials and municipal governments. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

68. *Harlow*, 457 U.S. at 818 (emphasis added).

69. *Id.*

70. Malley v. Briggs, 475 U.S. 335, 341 (1986).

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

72. *See* Kisela v. Hughes, 584 U.S. 100, 104 (2018) (quoting White v. Pauly, 580 U.S. 73, 78–79 (2017)); Plumhoff v. Rickard, 572 U.S. 765, 779 (2014) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)).

73. *See* Mullenix v. Luna, 577 U.S. 7, 12 (2015) (quoting *al-Kidd*, 563 U.S. at 742). Additionally, in the decades since initially recognizing qualified immunity for Section 1983 cases, the Court has also made procedural changes that affect plaintiffs' abilities to succeed. For instance, in 2009, the Court declared that lower courts presented with qualified immunity no longer had to first ascertain if the defendant violated a constitutional right before considering if that right was clearly established. *See* Pearson v. Callahan, 555 U.S. 223, 236 (2008). This overturned precedent that stipulated that courts had to start with whether the defendant had deprived the plaintiff of a constitutional or statutory right. *See* Saucier v. Katz, 533 U.S. 194, 200 (2001). The practical impact of this shift is that lower courts may now eschew analyzing types of government conduct that are unlawful, and, in so doing, not clearly establish the law for future instances because courts rely heavily on prior decisions holding actions illegal to show that the law was established at the time. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 38 (2015); John C. Williams, Note, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295, 1316 (2012).

Armed with this guidance, lower courts have strictly demanded factually similar precedent.[74] For example, in *Sabbe v. Washington County Board of Commissioners*,[75] the Ninth Circuit granted immunity to officers who rammed an armored vehicle into a suspect's truck.[76] An observer relayed to 911 that Remi Sabbe, who was belligerent, drunk, and likely armed, was driving recklessly in a rural field owned by Sabbe.[77] Thirty officers responded.[78]

When they could not contact Sabbe, law enforcement engaged the pickup with an unmarked armored vehicle.[79] Seeing the vehicle approaching, Sabbe drove straight toward it, stopped just in time to prevent a severe crash, but still barely collided with it.[80] The officers then decided to apprehend Sabbe.[81] Employing the armored vehicle—which had never been used for such a maneuver and for which the driver was not trained—officers struck Sabbe's truck, spinning it around and crushing its bed.[82] But Sabbe drove off.[83] Shortly after, the officers heard a gunshot and assumed Sabbe had aimed at them, so they shot and killed him.[84] The district court granted the officers qualified immunity.[85]

The Ninth Circuit deduced that a jury could find that the second ram attempt was excessive force.[86] The armored car, which resembled a tank, risked substantial bodily harm amounting to deadly force.[87] Yet, because this was a case of first impression, the court declared that no analogous

74. *See* McKinney v. City of Middletown, 49 F.4th 730, 738–40 (2d Cir. 2022); Ramirez v. Escajeda, 44 F.4th 287, 292–93 (5th Cir. 2022); Evans v. Skolnik, 997 F.3d 1060, 1066–67 (9th Cir. 2021); Beck v. Hamblen Cnty., 969 F.3d 592, 599–600 (6th Cir. 2020); Corbitt v. Vickers, 929 F.3d 1304, 1311–12, 1315–16 (11th Cir. 2019); Apodaca v. Raemisch, 864 F.3d 1071, 1076–78 (10th Cir. 2017).

75. 84 F.4th 807 (9th Cir. 2023).

76. *Id.* at 825–26.

77. *Id.* at 812–13.

78. *Id.*

79. *Id.* at 813–14.

80. *Id.* at 814.

81. *Id.*

82. *Id.* at 815.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 825.

87. *Id.*

precedent had established the law and dismissed the action.[88] This is how qualified immunity cases operate.[89]

Therefore, over the years, Section 1983 has been diluted by the actions of the Supreme Court. No longer *shall* those who deprive others of constitutional or statutory rights be liable;[90] rather, they *may* be held responsible if the right's contours are established beyond debate by factually similar precedent, such that the offending official could be said to be plainly incompetent or to have knowingly transgressed the law.[91] Inferior tribunals have dutifully insisted on factually akin case law.[92] Still, the obvious violation exception suggests that, in egregious instances, qualified immunity may not stand between an injured citizen and a jury.

III. SUPREME COURT'S RECOGNITION OF THE OBVIOUS VIOLATION EXCEPTION

On three occasions, the United States Supreme Court has acknowledged that parallel precedent is not necessarily a prerequisite to clearly establish a right.[93] However, the Court has invoked the obvious violation exception sparingly. And it only started doing so in the twenty-

88. *Id.* at 826–27 ("We are unaware of any . . . decision quantifying or characterizing the degree of force involved in using an armored vehicle to execute a low-speed PIT maneuver, let alone any precedent that would have clearly established that the officers' use of the [vehicle] under these circumstances was unconstitutional.").

89. *See* Schulkers v. Kammer, 955 F.3d 520, 534–38 (6th Cir. 2020); Gray v. Cummings, 917 F.3d 1, 8–14 (1st Cir. 2019); Reese v. Cnty. of Sacramento, 888 F.3d 1030, 1037–40 (9th Cir. 2018); Henderson v. Glanz, 813 F.3d 938, 950–51, 952–53 (10th Cir. 2015).

90. *See* 42 U.S.C. § 1983 (emphasis added) (providing mandatory liability for constitutional and statutory deprivations).

91. *See* Kisela v. Hughes, 584 U.S. 100, 104 (2018) (quoting White v. Pauly, 580 U.S. 73, 78–79 (2017)); Plumhoff v. Rickard, 572 U.S. 765, 778–79 (2014) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)); Anderson v. Creighton, 483 U.S. 635, 640 (1987); Malley v. Briggs, 475 U.S. 335, 341 (1986); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

92. *See* McKinney v. City of Middletown, 49 F.4th 730, 738–40 (2d Cir. 2022); Ramirez v. Escajeda, 44 F.4th 287, 292–93 (5th Cir. 2022); Evans v. Skolnik, 997 F.3d 1060, 1066–67 (9th Cir. 2021); Beck v. Hamblen Cnty., 969 F.3d 592, 599–600 (6th Cir. 2020); Corbitt v. Vickers, 929 F.3d 1304, 1311–12, 1315–16 (11th Cir. 2019); Apodaca v. Raemisch, 864 F.3d 1071, 1076–78 (10th Cir. 2017).

93. *See generally* McCoy v. Alamu, __ U.S. __, 141 S. Ct. 1364 (2021) (reversing a case for reconsideration in light of *Taylor*); Taylor v. Riojas, 592 U.S. __, 141 S. Ct. 52 (2020) (summarily reversing a decision of the Fifth Circuit based on qualified immunity despite a lack of on-point precedent for the alleged offending conduct); Hope v. Pelzer, 536 U.S. 730 (2002) (denying qualified immunity based on an obvious violation of the Eighth Amendment regardless of available precedent).

first century.[94] Be that as it may, the Court has recently affirmed its support for the doctrine.[95]

A. Hope v. Pelzer[96]

Larry Hope sued Alabama Department of Corrections ("ADOC") officials for exposing him to cruel and unusual punishments.[97] Hope was on a work squad wherein he and other incarcerated individuals performed hard labor at different worksites.[98] On two occasions, jailers punished him for misconduct while on the job.[99]

In 1995, Alabama permitted the use of a hitching post for disruptive prisoners.[100] Those selected were handcuffed to a tall post and exposed to the elements.[101] According to ADOC policy, jailers were to offer bathroom breaks and drinks of water every fifteen minutes to hitched persons, and prison officials were to record the respondent's answers in an activity log.[102] If the prisoner stated their intent to comply and return to work, guards had to promptly unhitch them.[103]

The United States Department of Justice ("DOJ") audited ADOC's preservations of civil liberties in 1994.[104] It found that ADOC's hitching post policies were unconstitutional and that jailers routinely failed to follow regulations.[105] As such, DOJ recommended that ADOC discontinue it.[106] ADOC balked and retorted that the hitching post "preserve[d] prison security and discipline."[107]

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94. *Cf. McCoy*, 141 S. Ct. 1364 (decided in the twenty-first century); *Taylor*, 141 S. Ct. 52 (same); *Hope*, 536 U.S. 730 (same).

95. *See McCoy*, 141 S. Ct. 1364; *Taylor*, 141 S. Ct. 52; *Hope*, 536 U.S. 730.

96. 536 U.S. 730 (2002).

97. *Id.* at 735.

98. *Id.* at 733–34.

99. *Id.*

100. *Id.* at 733.

101. *Id.* at 733–34. The Court described the hitching post as follows:

> [T]he hitching post is a horizontal bar made of sturdy, nonflexible material, placed between 45 and 57 inches from the ground. Inmates are handcuffed to the hitching post in a standing position and remain standing the entire time they are placed on the post. Most inmates are shackled to the hitching post with their two hands relatively close together and at face level.

Id. at 733–34 n.1 (internal quotation marks omitted) (quoting Austin v. Hopper, 15 F. Supp. 2d 1210, 1241–42 (M.D. Ala. 1998)).

102. *Id.* at 744.

103. *Id.*

104. *Id.*

105. *Id.* at 745.

106. *See id.*

107. *Id.*

On May 11, 1995, Hope quarreled with someone on his work squad.[108] ADOC officials handcuffed both men to a hitching post for two hours.[109] Because Hope was only slightly taller than the post, his arms were in an uncomfortable, painful position.[110] When he attempted to change posture to relieve the pain, the handcuffs cut into his wrists.[111] The guards, as instructed, offered him water and bathroom breaks every fifteen minutes and recorded his responses.[112] Fortunately, once ADOC employees learned that the other individual had initiated the disagreement, they freed Hope.[113]

He returned to the post less than a month later.[114] Hope had fallen asleep on the bus en route to a job site and, when awoken by guards, refused to comply with demands.[115] Instead, he confronted a guard.[116] Officers returned Hope for punishment.[117] Guards ordered him to remove his shirt before hitching him.[118] This time, Hope spent seven hours in the sun, causing blistering skin burns.[119] In the meantime, the officers offered Hope water only once or twice, and there were no bathroom breaks.[120] Jailers, worse still, taunted him by giving water to dogs and spilling a water cooler next to him.[121]

Hope sued those involved.[122] The district court granted qualified immunity to the defendants.[123] On appeal, the Eleventh Circuit affirmed the decision despite designating the hitching post cruel and unusual because no cases warned the guards that their conduct offended the Constitution.[124] The Supreme Court, however, reversed the decision.[125]

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108. *Id.* at 734.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 734–35.

119. *Id.* at 735.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*; *see* Hope v. Pelzer, No. CV 96-BU-2968-S, 2000 WL 35501948, at *1–2 (N.D. Ala. Mar. 24, 2000).

124. *Hope*, 536 U.S. at 735–36; *see* Hope v. Pelzer, 240 F.3d 975 (11th Cir. 2001).

125. *Hope*, 536 U.S. at 748.

The Court found that Hope's treatment obviously violated the Eighth Amendment.[126] Writing for the six-to-three majority, Justice John Paul Stevens noted:

> Any safety concerns had long since abated by the time [Hope] was handcuffed to the hitching post because Hope had already been subdued, handcuffed, placed in leg irons, and transported back to the prison. He was separated from his work squad and not given the opportunity to return to work. Despite the clear lack of an emergency situation, the respondents knowingly subjected him to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation.[127]

But that did not conclude the analysis.[128] The defendants argued, as the Eleventh Circuit had concluded, that the right was not clearly established because there was no similar precedent.[129] The Court disagreed.[130]

Justice Stevens replied that the Court's rulings do not preclude liability in "novel factual circumstances."[131] Instead, "earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, [but] they are not necessary to such a finding."[132] The "salient question," is "whether the state of the law [at the time] gave respondents fair warning that their alleged treatment of Hope was unconstitutional."[133]

With respect to that question, the Court readily found it did.[134] Justice Stevens observed that the officials' conduct was an obvious violation because it "unnecessary[ily] and wanton[ly] inflicted pain."[135] The Court emphasized:

> The obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated

126. *Id.* at 736–38.

127. *Id.* at 738.

128. *Id.* at 739.

129. *Id.*

130. *Id.*

131. *Id.* at 741.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 741–42 (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986) (internal quotation marks omitted)) (alteration in original).

> Hope's constitutional protection against cruel and unusual punishment. Hope was treated in a way antithetical to human dignity—he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous. This wanton treatment was not done of necessity, but as punishment for prior conduct.[136]

Accordingly, the Court denied immunity.[137] After it decided *Hope*, the Court neglected to apply it to deny qualified immunity for nearly two decades.[138]

B. Taylor v. Riojas

In 2020—the same year wherein mass protests sparked against police brutality in the United States by the murder of, among others, George Floyd—the Court heeded *Hope* to deny prison officials qualified immunity.[139] Trent Taylor was incarcerated in a Texas prison where jailers confined him, unclothed, in two cells in deplorable conditions for six days.[140] The first cell, his home for four days, had "massive amounts" of human feces on the floor, windows, walls, ceiling, and water faucet.[141] One officer involved remarked that Taylor would "have a long weekend."[142] Concerned his food and water were contaminated, Taylor refused to eat.[143] Consequently, prison officials moved him to a frigid cell for the two remaining days.[144] This time, a correctional officer told Taylor that "he hoped Taylor would 'f[uck]ing freeze.'"[145] Compounding matters, the second cell had only a "clogged drain in the floor to dispose of bodily wastes" and lacked a bed.[146] Despite controlling his bladder for more than twenty-four hours, Taylor eventually relieved himself involuntarily, causing the already built up sewage to spew across the

136. *Id.* at 745.

137. *Id.* at 746, 748.

138. *See* Taylor v. Riojas, 592 U.S. __, 141 S. Ct. 52 (2020).

139. *See id.* at 53–54; Barnes, *supra* note 5, at 33–34, 73–75. Justice Clarence Thomas was the lone dissenter while Justice Amy Coney Barrett took no part in the case's consideration. *Taylor*, 141 S. Ct. at 54. Justice Samuel Alito concurred in the judgment. *Id.*

140. *Taylor*, 141 S. Ct. at 53.

141. *Id.* (quoting Taylor v. Stevens, 946 F.3d 211, 218 (5th Cir. 2019) [hereinafter *Stevens*], *cert. granted, judgment vacated* sub nom. *Taylor*, 141 S. Ct. 52).

142. *Id.* at 54 (quoting *Stevens*, 946 F.3d at 218).

143. *Id.* at 53.

144. *Id.*

145. *Id.* at 54 (quoting *Stevens*, 946 F.3d at 218 n.9).

146. *Id.* at 53.

floor.[147] Naked, cold, and alone, Taylor slept on the sewage-covered floor.[148]

Thereafter, Taylor sued.[149] The district court held that Taylor's conditions did not violate the Eighth Amendment; as such, the court did not analyze whether the right was clearly established.[150] Although the Fifth Circuit concluded that Texas officials cruelly and unusually punished Taylor,[151] it found that the right was not clearly established by precedent.[152]

At the petition stage, the Supreme Court summarily reversed the decision.[153] Regardless of precedent, "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."[154] The defendants had not shown that confining Taylor under these conditions was "compelled by necessity or exigency" or that his experience of these conditions "could not have been mitigated, either in degree or duration."[155] Thus, the Court declined to conduct a precedential analysis to ascertain whether one of its own or the circuit courts' prior decisions clearly established the law.[156] Instead, the Court summarily concluded, that "[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."[157] Accordingly, the Court vacated the opinions below.[158]

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147. *Id.*

148. *Id.*

149. *Stevens*, 946 F.3d at 216.

150. Taylor v. Stevens, No. 5:14-CV-149-C, 2017 WL 11507190, at *8 (N.D. Tex. Jan. 5, 2017) ("[A]lthough the conditions of [Taylor's] confinement may have been quite uncomfortable during the days he was held in the two cells in question, the conditions did not violate the Eighth Amendment's prohibition against cruel and unusual punishment.").

151. *Stevens*, 946 F.3d at 220.

152. *Id.* at 222 ("Though the law was clear that prisoners couldn't be housed in cells teeming with human waste for months on end, we hadn't previously held that a time period so short violated the Constitution.") (citations omitted).

153. *Taylor*, 141 S. Ct at 53–54.

154. *Id.* at 54.

155. *Id.*

156. *Id.* at 53–54.

157. *Id.* at 54 (emphasis added). In his concurrence, Justice Alito disagreed with the Court's decision to address the question, but he nevertheless agreed that "[a] reasonable corrections officer would have known that this course of conduct was unconstitutional, and the cases on which respondents rely do not show otherwise." *Id.* at 55 (Alito, J., concurring).

158. *Id.* at 54. The case settled with undisclosed terms. *See* Joint Stipulation of Dismissal with Prejudice, Taylor v. Stevens, No. 14-cv-00149 (N.D. Tex. July 8, 2022), ECF No. 350.

C. McCoy v. Alamu

Three months later, the Court abrogated another Fifth Circuit decision granting qualified immunity.[159] A prisoner housed near Prince McCoy, Sr., Marquieth Jackson, threw water on Alamu, a correctional officer.[160] Alamu attempted to pepper spray Jackson but was foiled by sheets blocking the cell.[161] Then, according to Alamu, McCoy heaved toilet paper at Alamu.[162] The guard then sprayed McCoy, allegedly causing "burning skin and eyes, congested lungs, difficulty breathing, stomach pain, vision impairment, anxiety, nightmares, depression, and other emotional distress."[163] Alamu's supervisors determined the force was unnecessary and violated prison guidelines, and placed him on probation.[164]

As in *Taylor*, the Fifth Circuit found that McCoy had created a factual question regarding whether Alamu used excessive force.[165] Yet, the law was not clearly established by case law placing the question "beyond debate."[166] The appellate court rejected McCoy's argument that the law was clear that "prison officers can't act 'maliciously and sadistically to cause harm.'"[167] Yet, because the Court issued *Taylor* after the Fifth Circuit's decision in *McCoy*, without briefing, argument, or a written opinion, the Supreme Court vacated the Fifth Circuit's opinion for reconsideration in light of *Taylor*.[168]

IV. LOWER COURTS & THE EXCEPTION

Since *Taylor*, some lower courts have applied the obvious violation exception, while others have eschewed it. This Part surveys every reported decision in the thirty-six months following *Taylor*. This analysis suggests

159. McCoy v. Alamu, __U.S. __,141 S. Ct. 1364 (2021).

160. McCoy v. Alamu, 950 F.3d 226, 229 (5th Cir. 2020) [hereinafter *McCoy II*], *cert. granted, judgment vacated*, __ U.S. __,141 S. Ct. 1364.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 231.

166. *Id.* at 233.

167. *Id.* at 234 (quoting Hudson v. McMillian, 503 U.S. 1, 7 (1992)).

168. McCoy v. Alamu, __ U.S. __, 141 S. Ct. 1364 (2021). On remand, the Fifth Circuit remanded the case to the district court for further proceedings. *See* McCoy v. Alamu, 842 F. App'x 933 (5th Cir. 2021). The case proceeded to trial where the jury found in favor of the correctional officer, Alamu. *See* Final Judgment, McCoy v. Alamu, No. 17-CV-00235 (S.D. Tex. Oct. 21, 2022), ECF No. 126.

that, while limited, the obvious violation exception exists in practice and whether the lower courts accept (or reject) it depends on the type of case.

A. Methodology

In organizing any empirical study, some limiting decisions are necessarily needed. First, I focused exclusively on cases citing to *Taylor*, rather than *Hope* or *McCoy*, because it is the most recent judgment where the Court applied the exception to specific facts.[169] Thus, inferior courts heeding the obvious violation exception (OVE) with any depth after *Taylor* are presumably likely to cite it. That is not to say, of course, that citations to *Hope* are not relevant to the exception's efficacy. Yet, because *Taylor* reaffirmed and built upon *Hope*,[170] focusing on *Taylor* is more likely to render an accurate dataset. Second, I included only reported decisions because of their precedential value.[171] Although many unreported decisions are persuasive,[172] I chose reported decisions so that they are subject to less debate.[173]

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169. *See McCoy*, 141 S. Ct. 1364 (decided in 2021 without analysis beyond directing the Fifth Circuit to reconsider in light of *Taylor*); Taylor v. Riojas, 592 U.S. __, 141 S. Ct. 52 (2020); Hope v. Pelzer, 536 U.S. 730 (2002). Admittedly, some lower court judgments may rely on *Hope* for the exception without mentioning *Taylor*. To the extent this study ignores those opinions, the objective of this Article is to show the OVE's existence and contours since *Taylor*. This is, necessarily, a limitation of the instant analysis. Future research may need to contemplate how frequently courts refer only to *Hope* versus using both to articulate the exception. That inquiry is beyond the scope of this Article.

Nevertheless, there is little need for researchers to scrutinize how often courts cite McCoy alone. Since its release, only 13 published decisions have referenced it. Of those, only one did not also cite Taylor. See Frick v. Jergins, 657 S.W.3d 840, 850 (Tex. Ct. App. 2022). And one was only a denial of rehearing en banc where only a concurrence and a dissent referenced McCoy. See Ramirez v. Guadarrama, 2 F.4th 506, 514–15 (5th Cir. 2021) (Oldham, J., concurring); Id. at 523–24 (Willett, J., dissenting).

170. *Cf. Taylor*, 141 S. Ct. at 53–54 (citing *Hope*, 536 U.S. at 741) (acknowledging *Hope*'s first indication that precedent is not essential to finding a right clearly established).

171. *See generally* Lawrence J. Fox, *Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility?*, 32 HOFSTRA L. REV. 1215 (2004) (decrying unpublished opinions as an abdication of judicial responsibility because litigants are sometimes prevented from citing to them); Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177 (1999) (discussing the precedential value of unpublished opinions and advocating that they be given even less precedential status); Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235 (2004) (highlighting the precedential value of unreported decisions).

172. *See* George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477, 490–93 (1988).

173. The precedential value of published district court opinions is only persuasive. *See, e.g.*, Jewish War Veterans of the U.S.A., Inc. v. Mattis, 266 F. Supp. 3d 248, 253 (D.D.C. 2017) ("As a district court opinion, it is not binding on any court beyond its use in this case, and instead, is only valuable as persuasive authority."). However, to litigants in those districts, at least, the reported decisions of that district offer strong support for their position. *See* Chinn v. Jenkins, No. 3:02-CV-512, 2018 WL

Third, I selected thirty-six months because a date range is necessary to limit the inquiry's expanse, and three years is sufficient to capture a picture of how lower courts comprehend *Taylor*. Fourth, to harvest the data, I used Westlaw's "Citing References" function to filter for cases citing *Taylor*. Similarly, I relied on Westlaw to sort out unpublished opinions. Fifth, to ascertain the extent to which each case engaged with the exception, I read the opinion and subjectively determined how it relied on *Taylor*.[174] In so doing, I separated the decisions into six categories: (1) the OVE applied and used; (2) the OVE applied and denied; (3) the OVE applied and deferred; (4) cited for the OVE but not applied; (5) cited for a general proposition of law; (6) cited only in concurrence or dissent or for both. Finally, to supply the most accurate figures about lower court interpretations, I have removed Supreme Court decisions and duplicate opinions.[175]

B. Quantitative Findings

Lower courts issued eighty-two[176] published decisions citing *Taylor* from November 3, 2020, to November 3, 2023.[177] Of those, nineteen were

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488159, at *3 (S.D. Ohio Jan. 19, 2018) (citing United States v. Hirschhorn, 21 F.2d 758 (S.D.N.Y. 1927)) ("In the absence of supervening case authority from the Supreme Court or the Court of Appeals, a court should as a matter of comity to colleagues and even-handed justice to litigants, follow decisions of its own judges.").

174. Because my objective is to understand how inferior court judges use the OVE since *Taylor*, I did not remove opinions that were later vacated either at the court of appeals (for trial court judgments) or through en banc adjudications (for appellate panels). I do, however, note repeals in the citations to permit those who may view this as a limitation of this study to account for those rescissions in recreating this dataset.

175. For reference, three Supreme Court opinions cited to *Taylor* during the relevant period while two decisions from the Court of Appeals were amended or revised without changing the citation to *Taylor* and, therefore, were duplicate decisions. *See* Ramirez v. Guadarrama, __ U.S. __, 142 S. Ct. 2571, 2572 (2022) (Sotomayor, J., dissenting); Cope v. Cogdill, __ U.S. __, 142 S. Ct. 2573, 2575 (2022) (Sotomayor, J., dissenting); McCoy v. Alamu, __ U.S. __, 141 S. Ct. 1364 (2021); Truman v. Orem City, 998 F.3d 1164 (10th Cir. 2021), *vacated*, 1 F.4th 1227 (10th Cir. 2021); Villarreal v. City of Laredo, 17 F.4th 532 (5th Cir. 2021), *withdrawn and superseded by*, 44 F.4th 363 (5th Cir. 2022), then *superseded on reh'g en banc*, 94 F.4th 374 (5th Cir. 2024).

176. For ease of reading, I use numerals above ten throughout Part IV.B.

177. In reverse chronological order, the circuit cases are: Ablordeppey v. Walsh, 85 F.4th 27, 35 (1st Cir. 2023); Prude v. Meli, 76 F.4th 648, 660 (7th Cir. 2023); King v. Riley, 76 F.4th 259, 268 (4th Cir. 2023); Crown Caste Fiber, LLC v. City of Pasadena, 76 F.4th 425, 432 (5th Cir. 2023); Garrett v. Clarke, 74 F.4th 579, 589 (4th Cir. 2023); Rosales v. Bradshaw, 72 F.4th 1145, 1157 (10th Cir. 2023); Benning v. Comm'r, Ga. Dep't of Corrs., 71 F.4th 1324, 1334 (11th Cir. 2023); La. St. *ex rel.* La. Dep't of Wildlife & Fisheries v. Nat'l Oceanic & Atmospheric Admin., 70 F.4th 872, 878 (5th Cir. 2023); Jackson v. City of Cleveland, 64 F.4th 736, 750 (6th Cir. 2023); Mack v. Yost, 63 F.4th 211, 235 (3d Cir. 2023); Ducksworth v. Landrum, 62 F.4th 209, 218 (5th Cir. 2023) (Oldham, J., concurring in part and dissenting in part); Gonzalez v. Trevino, 60 F.4th 906, 913 (5th Cir. 2023)

(Ho, J., dissenting); Guillot *ex rel.* T.A.G. v. Russell, 59 F.4th 743, 749–50 (5th Cir. 2023); Pfaller v. Amonette, 55 F.4th 436, 453 (4th Cir. 2022); Baxter v. Roberts, 54 F.4th 1241, 1268 (11th Cir. 2022); Henderson v. Harris Cnty., 51 F.4th 125, 135 (5th Cir. 2022); Laviage v. Fite, 47 F.4th 402, 408 (5th Cir. 2022); Harris v. Clay Cnty., 47 F.4th 271, 279 (5th Cir. 2022); Richmond v. Badia, 47 F.4th 1172, 1190 (11th Cir. 2022); *Villarreal*, 44 F.4th at 370, *superseded on reh'g en banc*, 94 F.4th 374 (5th Cir. 2024); Zakora v. Chrisman, 44 F.4th 452, 465 (6th Cir. 2022); Stockton v. Milwaukee Cnty., 44 F.4th 605, 621 (7th Cir. 2022); Tyson v. Sabine, 42 F.4th 508, 519 (5th Cir. 2022); Colson v. City of Alcoa, 37 F.4th 1182, 1189 (6th Cir. 2022); Thorpe v. Clarke, 37 F.4th 926, 934 (4th Cir. 2022); Burnett v. Griffith, 33 F.4th 907, 914–15 (6th Cir. 2022); Fuentes v. Classica Cruise Operator Ltd., 32 F.4th 1311, 1315 (11th Cir. 2022); Palma v. Johns, 27 F.4th 419, 458 (6th Cir. 2022) (Readler, J., dissenting); Sturdivant v. Fine, 22 F.4th 930, 938 (10th Cir. 2022); Crane v. Utah Dep't of Corrs., 15 F.4th 1296, 1310 (10th Cir. 2021); French v. Merrill, 15 F.4th 116, 126 (1st Cir. 2021); Spikes v. McVea, 12 F.4th 833, 833 (5th Cir. 2021); Williams v. Maurer, 9 F.4th 416, 437 (6th Cir. 2021); Ashaheed v. Currington, 7 F.4th 1236, 1247 (10th Cir. 2021); Cope v. Cogdill, 3 F.4th 198, 206, 209 (5th Cir. 2021); Thomas v. Blackard, 2 F.4th 716, 720–21 (7th Cir. 2021); Ramirez v. Guadarrama, 2 F.4th 506, 514 (5th Cir. 2021) (Oldham, J., concurring); *id.* at 522–24 (Willett, J., dissenting); *Truman*, 1 F.4th at 1240; Taylor v. Ways, 999 F.3d 478, 492 (7th Cir. 2021); Moderwell v. Cuyahoga Cnty., 997 F.3d 653, 660, 662 (6th Cir. 2021); Huff v. Reeves, 996 F.3d 1082, 1088 (10th Cir. 2021); Aguirre v. City of San Antonio, 995 F.3d 395, 424 (5th Cir. 2021) (Jolly, J., concurring in the judgment); Lopez v. Sheriff of Cook Cnty., 993 F.3d 981, 991–92 (7th Cir. 2021); Roque v. Harvel, 993 F.3d 325, 335 (5th Cir. 2021); Frasier v. Evans, 992 F.3d 1003, 1021–22 (10th Cir. 2021); O'Doan v. Sanford, 991 F.3d 1027, 1044 (9th Cir. 2021); HIRA Educ. Servs. N. Am. v. Augustine, 991 F.3d 180, 191 n.7 (3d Cir. 2021); Lachance v. Town of Charlton, 990 F.3d 14, 20 (1st Cir. 2021); Rico v. Ducart, 980 F.3d 1292, 1307 (9th Cir. 2020) (Silver, J., concurring in part and dissenting in part); Irish v. Fowler, 979 F.3d 65, 76 (1st Cir. 2020).

Meanwhile, the only reported state decision citing *Taylor* is *Miller v. Doe*, 279 A.3d 286, 301–02 (Conn. App. Ct. 2022).

Finally, the district court cases in reverse chronological order are: Green v. Padilla, 697 F. Supp. 3d 1115, 1201–02 (D.N.M. 2023); Spectrum WT v. Wendler, 693 F. Supp. 3d 689, 701 n.11 (N.D. Tex. 2023); MacDonald v. Or. Health & Sci. Univ., 689 F. Supp. 3d 906, 922 (D. Or. 2023); Brown v. Cumberland Cnty., 687 F. Supp. 3d 150, 161–62 (D. Me. 2023) [hereinafter *Brown II*]; Jedliska *ex rel.* D.J. v. Snow, 683 F. Supp. 3d 864, 870 (S.D. Ill. 2023); Caldwell v. Univ. of N.M. Bd. of Regents, 679 F. Supp. 3d 1087, 1141–49 (D.N.M. 2023); Johnson v. City of Biddeford, 665 F. Supp. 3d 82, 119 (D. Me. 2023); McCrae v. City of Salem, 660 F. Supp. 3d 993, 1001 (D. Or. 2023); D.P. v. Sch. Bd. of Palm Beach Cnty., 658 F. Supp. 3d 1187 *passim* (S.D. Fla. 2023); Walton v. Tunica Cnty., 648 F. Supp. 3d 780, 789 (N.D. Miss. 2023); Williams v. Olsen, 638 F. Supp. 3d 204, 221 (N.D.N.Y. 2022), *rev'd on other grounds*, No. 22-3008, 2023 WL 7497231 (2d Cir. Nov. 13, 2023); Mendoza v. Edge, 615 F. Supp. 3d 163, 171 (E.D.N.Y. 2022); Boerste v. Ellis Towing, LLC, 607 F. Supp. 3d 721, 743 n.12 (W.D. Ky. 2022); Salter v. Olsen, 605 F. Supp. 3d 987, 1000 (E.D. Mich. 2022); Skinner v. Gautreaux, 593 F. Supp. 3d 383, 394 (M.D. La. 2022); Hanington v. Multnomah Cnty., 593 F. Supp. 3d 1022, 1041–42 (D. Or. 2022); Brooks v. Taylor Cnty., 592 F. Supp. 3d 550, 554 (N.D. Tex. 2022); E.R. v. Jasso, 573 F. Supp. 3d 1117, 1141 (W.D. Tex. 2021); Matzell v. McKoy, 566 F. Supp. 3d 154, 160 (N.D.N.Y. 2021), *rev'd in part sub nom.*, Matzell v. Annucci, 64 F.4th 425 (2d Cir. 2023); Lindell v. Pollard, 558 F. Supp. 3d 734, 751 (E.D. Wis. 2021); Brown v. Cumberland Cnty., 557 F. Supp. 3d 169, 182 (D. Me. 2021) [hereinafter *Brown I*]; Parsons v. Velasquez, 551 F. Supp. 3d 1085, 1147–56 (D.N.M. 2021); Ortiz v. New Mexico, 550 F. Supp. 3d 1020, 1055 (D.N.M. 2021); Guy v. Lorenzen, 547 F. Supp. 3d 927, 944 (S.D. Cal. 2021); T.S. v. Twentieth Century Fox Television, 548 F. Supp. 3d 749, 777 (N.D. Ill. 2021), *rev'd sub nom.*, T.S. v. Cnty. of Cook, 67 F.4th 884 (7th Cir. 2023); Christmann v. Link, 532 F. Supp. 3d 263, 274 n.9 (E.D. Pa. 2021); Bhattacharya v. Murray, 515 F. Supp. 3d 436, 459 (W.D. Va. 2021); Keenan v. Ahern, 524 F. Supp. 3d 472, 481 (E.D. Va. 2021); Rios v. City of Chicago, 523 F. Supp. 3d 1020, 1030 (N.D. Ill. 2021); Maldonado v. Baker Cnty. Sheriff's Off., 513 F. Supp. 3d 1339, 1348 (M.D. Fla. 2021); Fudge v. Martinez, 504 F. Supp. 3d 1215, 1223 (D.N.M. 2020).

for general propositions of law about qualified immunity or Eighth Amendment law or appeared in concurrences or dissents.[178] Similarly, twenty-two referred to *Taylor* to articulate the obvious violation exception but declined to apply it.[179] In one case, a court acknowledged the OVE's applicability but deferred enforcing it pending further trial court proceedings.[180] Finally, of the forty cases applying the exception, twenty-two granted immunity,[181] while eighteen used it to deny immunity.[182]

Another important consideration is looking at which courts engaged with *Taylor*'s OVE. Of the United States Courts of Appeal, the following nine circuits have acknowledged the exception: First, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh.[183] Thus, among the non-specialty courts, only the Second, Eighth, and District of Columbia

178. For the references to general qualified immunity law or Eighth Amendment standards, see *Brown II*, 687 F. Supp. 3d at 161–62; *King*, 76 F.4th at 268; *Crown Castle Fiber*, 76 F.4th at 432; *La. State ex rel. La. Dep't of Wildlife & Fisheries*, 70 F.4th at 878; *Russell*, 59 F.4th at 749; *Pfaller*, 55 F.4th at 453; *Mendoza*, 615 F. Supp. 3d at 171; *Fuentes*, 32 F.4th at 1315; *Spikes*, 12 F.4th at 833; *Lindell*, 558 F. Supp. 3d at 751; *Bhattacharya*, 515 F. Supp. 3d at 459; *Lachance*, 990 F.3d at 20; *Maldonado*, 513 F. Supp. 3d at 1348. For the citations in dissents, concurrences, or both, see *Ducksworth*, 62 F.4th at 218 (Oldham, J., concurring in part and dissenting in part); *Gonzalez*, 60 F.4th at 913 (Ho, J., dissenting); *Palma*, 27 F.4th at 458 (Readler, J., dissenting); *Guadarrama*, 2 F.4th at 514 (Oldham, J., concurring); *Id.* at 522–24 (Willett, J., dissenting); *Augirre*, 995 F.3d at 424 (Jolly, J., concurring in the judgment); *Rico*, 980 F.3d at 1307 (Silver, J., concurring in part and dissenting in part).

179. *See Jedliska*, 683 F. Supp. 3d at 170; *Caldwell*, 679 F. Supp. 3d at 1141–49; *Jackson*, 64 F.4th at 750; *Zakora*, 44 F.4th at 465; *Colson*, 37 F.4th at 1189; *Salter*, 605 F. Supp. 3d at 1000; *Skinner*, 593 F. Supp. 3d at 394; *Brooks*, 592 F. Supp. 3d at 554; *Sturdivant*, 22 F.4th at 938; *Crane*, 15 F.4th at 1310; *Matzell*, 566 F. Supp. 3d at 160; *French*, 15 F.4th at 126; *Brown I*, 557 F. Supp. 3d at 182; *Parsons*, 551 F. Supp. 3d at 1147–56; *Maurer*, 9 F.4th at 437; *Ashaheed*, 7 F.4th at 1247; *Huff*, 996 F.3d at 1088; *Christmann*, 532 F. Supp. 3d at 274 n.9; *Roque*, 993 F.3d at 335; *Keenan*, 524 F. Supp. 3d at 481; *Rios*, 523 F. Supp. 3d at 1030; *Fowler*, 979 F.3d at 76.

180. *See Moderwell*, 997 F.3d at 662–63.

181. *See Ablordeppey*, 85 F.4th at 35; *Spectrum WT*, 693 F. Supp. 3d at 701 n.11, 708; *MacDonald*, 689 F. Supp. 3d at 922; *Garrett*, 74 F.4th at 589; *Benning*, 71 F.4th at 1334; *Johnson*, 665 F. Supp. 3d at 121; *McCrae*, 660 F. Supp. 3d at 1001, 1013; *D.P.*, 658 F. Supp. 3d at 1232–33; *Baxter*, 54 F.4th at 1268; *Henderson*, 51 F.4th at 135; *Laviage*, 47 F.4th at 408; *Miller*, 279 A.3d at 301–03; *Boerste*, 607 F. Supp. 3d at 743 n.12; *Burnett*, 33 F.4th at 914–15; *Hanington*, 593 F. Supp. 3d at 1041–42; *Cope*, 3 F.4th at 206, 209; *Thomas*, 2 F.4th at 720–21; *T.S.*, 548 F. Supp. 3d at 777; *Lopez*, 993 F.3d at 984–85, 991–92; *Frasier*, 992 F.3d at 1021–22; *O'Doan*, 991 F.3d at 1044; *Augustine*, 991 F.3d at 191 n.7.

182. *See Prude*, 76 F.4th at 659–60; *Rosales*, 72 F.4th at 1148–49, 1159; *Mack*, 63 F.4th at 237; *Walton*, 648 F. Supp. 3d at 789; *Olsen*, 638 F. Supp. 3d at 222; *Harris*, 47 F.4th at 279; *Richmond*, 47 F.4th at 1186; *Villarreal*, 44 F.4th at 378; *Stockton*, 44 F.4th at 620–21; *Tyson*, 42 F.4th at 519; *Thorpe*, 37 F.4th at 940–41; *Green*, 697 F. Supp. 3d at 1201–02; *E.R.*, 573 F. Supp. 3d at 1143; *Ortiz*, 550 F. Supp. 3d at 1175; *Guy*, 547 F. Supp. 3d at 943–44; *Truman*, 1 F.4th at 1240; *Ways*, 999 F.3d at 492; *Fudge*, 504 F. Supp. 3d at 1223.

183. *See supra* cases cited in note 177.

Circuits have not mentioned the OVE.[184] The Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits have relied on the OVE to deny immunity.[185] Meanwhile, the First, Sixth, and Ninth circuits have applied it but still granted qualified immunity.[186] Additionally, the Appellate Court of Connecticut, the lone state court to extensively discuss the question, has engaged the OVE but, nonetheless, granted immunity.[187]

Sixteen federal district courts have recognized the OVE's existence.[188] These are: Eastern Michigan, Eastern Pennsylvania, Eastern Virginia, Maine, Middle Louisiana, New Mexico, Northern Illinois, Northern Mississippi, Northern New York, Northern Texas, Oregon, Southern California, Southern Florida, Southern Illinois, Western Kentucky, and Western Texas.[189] Of these, five—New Mexico, Northern Mississippi, Northern New York, Southern California, and Western Texas—have used the exception to deny immunity.[190] Meanwhile, Maine, Oregon, Northern Illinois, Northern Texas, Southern Florida, and Western Kentucky have applied the obvious violation exception but granted immunity.[191] The others merely acknowledged it without application.[192]

In sum, while most federal appellate circuits have recognized the applicability of the exception,[193] only half have relied on it to deny qualified immunity.[194] Furthermore, of the ninety-four federal district courts, sixteen—or roughly seventeen percent—have acknowledged it.[195] In eighteen out of eighty-one instances (approximately twenty-two percent), courts have withheld immunity because of it.[196] Therefore, the OVE is viable but not thriving.

C. Qualitative Results

To conceptualize the abovementioned findings, I briefly summarize the facts of, and reasoning applied in some of the cases that relied on the

184. *Cf. supra* cases cited in note 177.
185. *See supra* cases cited in note 182.
186. *See supra* cases cited in note 181.
187. Miller v. Doe, 279 A.3d 286, 301–03 (Conn. App. Ct. 2022).
188. *See supra* cases cited in note 177.
189. *See supra* cases cited in note 177.
190. *See supra* cases cited in note 182.
191. *See supra* cases cited in note 181.
192. *See supra* cases cited in note 177.
193. *See supra* text and cases cited in note 177.
194. *See supra* cases cited in note 179.
195. *See supra* cases cited in note 177.
196. *See supra* cases cited in note 182.

obvious violation exception.[197] Doing so distills the situations and rights most susceptible to *Taylor*'s OVE. This data challenges the literature that is skeptical of *Taylor*. The analysis is divided into two sections. First, I highlight an illustrative subset of the cases that have used the exception to deny immunity to state actors. Second, I survey a sample of the cases that have considered the exception but still granted immunity. This information indicates that the OVE extends beyond Eighth Amendment cases with visceral facts, but courts may disregard it in exigent circumstances.

1. Cases Using the Exception to Deny Immunity

In the eighteen published cases relying on *Taylor* to reject qualified immunity, courts have applied the OVE to seven distinct constitutional or statutory rights.[198] Of those, four focused on excessive force,[199] four on unreasonable search or seizure,[200] four on due process,[201] four on cruel and unusual punishment,[202] one on freedom of the press and speech,[203] one on equal protection,[204] and one on the Religious Freedom Restoration Act (RFRA).[205] One opinion denied immunity based on two rights, so I have counted it twice here only as it relates to the number of rights involved.[206]

Thus, while the Supreme Court's use of the obvious violation exception has concentrated solely on the Eighth Amendment, lower courts have enforced it more broadly.[207] Furthermore, the exception does not only

197. Cases appear chronologically in the order decided within each category.

198. *See infra* text and sources accompany notes 199–80.

199. *See* Walton v. Tunica Cnty., 648 F. Supp. 3d 780, 780 (N.D. Miss. 2023); Williams v. Olsen, 638 F. Supp. 3d 204, 222 (N.D.N.Y. 2022); Richmond v. Badia, 47 F.4th 1172, 1185–86 (11th Cir. 2022); Stockton v. Milwaukee Cnty., 44 F.4th 605, 620–21 (7th Cir. 2022).

200. *See* Rosales v. Bradshaw, 72 F.4th 1145, 1148–49, 1159–60 (10th Cir. 2023); Harris v. Clay Cnty., 47 F.4th 271, 279 (5th Cir. 2022); Villarreal v. City of Laredo, 44 F.4th 363, 375, 378 *superseded on reh'g en banc*, 52 F.4th 265, *aff'd*, 94 F.4th 374 (5th Cir. 2024); E.R. v. Jasso, 573 F.Supp.3d 1117, 1142–43 (W.D. Tex. 2021).

201. *See* Prude v. Meli, 76 F.4th 648, 659–60; Tyson v. Sabine, 42 F.4th 508, 519 (5th Cir. 2022); Guy v. Lorenzen, 547 F. Supp. 3d 927, 944 (S.D. Cal. 2021); Truman v. Orem City, 1 F.4th 1227, 1239–1240 (10th Cir. 2021).

202. *See* Green v. Padilla, 697 F. Supp. 3d 1115, 1201–02 (D.N.M. 2023); Thorpe v. Clarke, 37 F.4th 926, 940–41 (4th Cir. 2022); Ortiz v. New Mexico, 550 F. Supp. 3d 1020, 1175 (D.N.M. 2021); Fudge v. Martinez, 504 F. Supp. 3d 1215, 1217–18, 1223 (D.N.M. 2021).

203. *See Villarreal*, 44 F.4th 363.

204. *See* Taylor v. Ways, 999 F.3d 478, 492 (7th Cir. 2021).

205. *See* Mack v. Yost, 63 F.4th 211, 237 (3d Cir. 2023).

206. *See Villarreal*, 44 F.4th at 378.

207. *See* McCoy v. Alamu, __ U.S. __, 141 S. Ct. 1364 (2021) (Eighth Amendment action alleging excessive force for an unwarranted attack by a correctional officer); Taylor v. Riojas, 592 U.S. __,

pertain to situations involving visceral, gruesome facts, but it also affects cases with somewhat dispassionate or procedural factual patterns, such as retaliation against the First Amendment and employment discrimination.[208] To illuminate the facts warranting the obvious violation exception according to the courts, I summarize one case for every right to which lower courts have extended the exception.

First, the Seventh Circuit broadened the scope of the OVE to include employment discrimination under the Equal Protection clause in *Taylor v. Ways*.[209] An apartment resident accused a Cook County Sheriff's employee, Percy Taylor, who resided at the apartment complex, of shooting a BB gun at a vehicle in which the resident was working.[210] A detective searched Taylor's residence and found no evidence incriminating him.[211] While searching the apartment, and in the subsequent disciplinary process, this investigator used racial slurs to refer to Taylor, said he planned to get Taylor, and pressured Taylor to quit his job.[212] Despite the lack of evidence, the Sheriff's Department discharged Taylor,[213] who sued, claiming his termination was racially motivated.[214] Relying on *Taylor v. Riojas*, the Seventh Circuit declared that "the facts . . . qualify this case as that rare, obvious [violation]."[215] The court arrived at this conclusion based on the long line of cases prohibiting discrimination in public employment both in the Seventh Circuit and across the federal judiciary, such that no reasonable official could have believed that firing someone on the basis of race did not transgress the Constitution.[216] No precedent with similar facts was needed to warn the Sheriff's Department that its conduct deprived Taylor of equal protection of the law.[217]

Second, in a cruel and unusual punishment case, the Fourth Circuit found that factually identical precedent was not a prerequisite for

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141 S. Ct. 52 (2020) (Eighth Amendment challenge based on unsanitary conditions); Hope v. Pelzer, 536 U.S. 730 (2002) (Eighth Amendment claim based on cruel conditions of punishment without a legitimate penological interest); *see also supra* text and sources accompanying notes 200–06.

208. *See Villarreal*, 44 F.4th at 368; *Ways*, 999 F.3d at 481–85.

209. *Ways*, 999 F.3d at 482.

210. *Id.*

211. *Id.* at 482–83.

212. *Id.* at 483–85.

213. *Id.* at 485.

214. *Id.*

215. *Id.* at 492.

216. *Id.* ("Based on the wealth of case law on the unlawfulness of race discrimination in the employment context, Ernst had 'fair and clear' warning in 2011 and 2013 that he was violating the Constitution." (quoting Thompson v. Cope, 900 F.3d 414, 422 (7th Cir. 2018))).

217. *Ways*, 999 F.3d at 492.

overcoming qualified immunity.[218] In *Thorpe v. Clarke*,[219] Virginia supermax prisoners given lengthy periods of solitary confinement with little prospect of returning to the general prison population challenged their conditions.[220] The class averred that their confinement was inhumane and forced them to endure serious physical and mental injuries.[221] The defendant guards claimed that the class could not locate a case highlighting that prolonged solitary confinement without a set end was unconstitutional.[222] The panel rejected this argument, though, because, especially in Eighth Amendment situations, less particularity is required of precedent where the facts may show an obvious violation.[223] Consequently, the court acknowledged that depriving prisoners of interaction with the outside world indefinitely, to the point of inflicting extreme physical and mental damages, clearly violated the Eighth Amendment.[224] Additionally, because the guards knew that the prisoners were suffering because of their indefinite solitary confinement, they could not be shielded from suit.[225]

Third, applying *Taylor* to an issue concerning which fundamental rights are protected by substantive due process, the Fifth Circuit considered the OVE in *Tyson v. Sabine*.[226] Melissa Tyson's husband

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218. Thorpe v. Clarke, 37 F.4th 926, 940–41 (4th Cir. 2022). Three other cases based on cruel and unusual punishment used the OVE to deny immunity. *See, e.g.*, Green v. Padilla, 697 F. Supp. 3d 1115, 1201–02 (D.N.M. 2023) (denying immunity on the same basis as Ortiz v. New Mexico, *infra*); Ortiz v. New Mexico, 550 F. Supp. 3d 1020, 1175 (D.N.M. 2021) (permitting an action to proceed against a prison guard that engaged in an allegedly consensual relationship with an inmate because, under New Mexico law, that conduct constituted per se sexual assault, and it is obvious that a jailer may not sexually assault someone in their custody); Fudge v. Martinez, 504 F. Supp. 3d 1215, 1217–18, 1223 (D.N.M. 2020) (rejecting immunity to prison guards that housed a prisoner in an unsanitary cell and prevented the inmate from accessing legal library and mail services).

219. 37 F.4th 926 (4th Cir. 2022).

220. *Id.* at 931–33.

221. *Id.*

222. *Id*. at 939.

223. *Id.* at 940 ("And while the Court has regularly insisted on highly particularized law in the Fourth Amendment context, it has not done the same with Eighth Amendment claims.").

224. *Id.* at 940–41.

225. *Id.*

226. 42 F.4th 508, 521 (5th Cir. 2022). For the other due process cases, see *Prude v. Meli*, 76 F.4th 648 *passim* (7th Cir. 2023) (denying immunity to a supervising correctional officer who colluded with a supposedly impartial hearing adjudicator to prevent an inmate from preventing evidence in his defense when presented on charges for threatening a guard and for forcing the hearing officer to levy a punishment decided by the supervisor regardless of the proof submitted at the hearing); *Guy v. Lorenzen*, 547 F. Supp. 3d 927, 936, 943–44 (S.D. Cal. 2021) (rejecting immunity for an officer who restrained a non-resisting suspect in the middle of a busy roadway at night when another officer crashed into them and significantly injured the suspect); *Truman v. Orem City*, 1 F.4th 1227, 1233–34, 1240 (10th Cir. 2021) (declining to shield a prosecutor who knowingly and fraudulently procured a misleading cause of death opinion to secure a conviction).

called for a welfare check on her.[227] A deputy, who also called himself a preacher, arrived the next day.[228] The officer asked if Tyson videoed the property or had neighbors nearby; he also threatened that he could cite her on account of the drug paraphernalia he claimed he had seen in the house.[229] The officer then made sexual comments about Tyson before demanding that she show him her breasts and vagina, including exposing her clitoris.[230] Tyson—isolated, vulnerable, and scared—did so.[231] While she was naked, the deputy masturbated and ejaculated.[232]

As a result, Tyson suffered emotional trauma.[233] She sought psychiatric care, gained weight, installed cameras around her house, purchased a gun, stopped leaving her home, and ceased being intimate with her husband.[234] Tyson reported the incident, and a grand jury indicted the officer.[235] Tyson, additionally, sued under Section 1983.[236] The district court dismissed the action for want of an underlying constitutional violation.[237]

The Fifth Circuit reversed by relying on the fundamental right to bodily integrity,[238] which prevents harms to a person by a state agent's "egregious" and "outrageous" conduct that "shock[s] . . . the conscience."[239] Precedent showed that sexual assault by a state actor deprived an individual of the right.[240] Yet, no case contemplated whether a state actor who never actually touched a person, but who engaged in sexual misconduct, infringed the Fourteenth Amendment.[241] Still, the Fifth Circuit regarded the violation as obvious.[242] It said:

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227. *Tyson*, 42 F.4th at 512.

228. *Id.* at 512–13.

229. *Id.* at 513–14.

230. *Id.*

231. *Id.* ("He pressed her to answer invasive questions about her sex life, such as whether she and her husband would consider a threesome and whether her husband would allow someone to watch them having sex. And he asked for nude pictures of her husband.").

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 523.

239. *Id.* at 517 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998)).

240. *Id.* at 520.

241. *Cf. id.* (omitting any reference to such a case).

242. *Id.* ("It is obvious that the right to bodily integrity forbids a law enforcement officer from sexually abusing a person by coercing them to perform nonconsensual physical sex acts for his enjoyment. As noted, we have long held that physical sexual abuse by a government official violates the Fourteenth Amendment.").

> We have little trouble finding that the constitutional offense was obvious because the physical sexual abuse alleged here is a "particularly egregious" and "extreme circumstance[]" of assault by a state official. The record reflects that Deputy Boyd took advantage of his office to become acquainted with Tyson. He used the pretense of legitimate policy activity—a welfare check, in fact—to gain entrance to Tyson's property. Upon arrival, he immediately ensured that Tyson was isolated and that his conduct would not be observed by neighbors or security cameras. Instead of proceeding to the welfare check, he then sexually harassed Tyson for nearly two hours. Ultimately, he committed physical sexual abuse by instructing her to perform nonconsensual physical sex acts for his sexual gratification. He told her to strip her privates, to manually manipulate her genitals, and to remain exposed while he masturbated to ejaculation. That Deputy Boyd's alleged physical sexual abuse violated Tyson's constitutional right to bodily integrity would have been obvious to any reasonable officer.[243]

The Fifth Circuit added that requiring on-point case law in this situation would be unwise because the conduct is so egregious that it (fortunately) does not occur with enough frequency to appear in the Federal Reporter.[244]

Fourth, in a case invoking the First Amendment freedoms of speech and the press, the Fifth Circuit vacated a district court's dismissal of a Section 1983 complaint.[245] The police arrested a citizen journalist, Priscilla Villarreal, who shared information that she had confirmed through a police department source on her Facebook page.[246] Doing so, according to law enforcement, violated a thirty-year-old statute that Texas had never before enforced.[247] Villarreal was eventually released on a federal writ of habeas corpus.[248] But when she sued, the district court dismissed the case.[249]

The Fifth Circuit reversed the decision because it is commonly known that the government may not jail journalists for publishing information the

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243. *Id.* at 520 (citation omitted).

244. *Id.* at 521 ("By their nature, cases addressing the most flagrant forms of unconstitutional conduct seldom rise to the court of appeals. When they do, the obviousness exception 'plays an important role in . . . ensur[ing] vindication of the most egregious constitutional violations.'" (quoting McCoy v. Alamu, 950 F.3d 226, 236 (5th Cir. 2020)) (citation omitted)).

245. Villarreal v. City of Laredo, 44 F.4th 363, 378 (5th Cir. 2022).

246. *Id.* at 368–69.

247. *Id.* at 368.

248. *Id.* at 369.

249. *Id.*

government dislikes.[250] It is commonly known that journalists receive information from state sources.[251] Based on this historical understanding, it was obvious—with or without precedent—that officers could not arrest a journalist for sharing stories confirmed by government sources.[252] The defendants' argument that Villarreal was violating a statute was unpersuasive because the statute was unconstitutional to any reasonable observer.[253] Accordingly, the arrest deprived Villarreal of her First Amendment rights.[254]

Fifth, the Eleventh Circuit, analyzing the right to be free from excessive force, found that a student resource officer ("SRO") violated clearly established law when he threw a middle schooler to the ground and restrained him.[255] The SRO was called to the entrance of the school when a student shoved his mother because she asked him to remove his hoodie, which he refused to do.[256] After arriving at the scene, the officer mocked and berated the child for minutes.[257] When the minor "did not look directly at" the SRO, the officer "grabbed the [child's] . . . face," who reflexively swiped away.[258] The officer then threw the student to the ground and restrained him for three minutes.[259] He then told the child to "remember him" as he pushed him as the minor walked away.[260] The officer was

250. *Id.* at 369–75.

251. *Id.* at 376.

252. *Id.* at 371–75. The court added, "If th[is] is not an obvious violation of the Constitution, it's hard to imagine what would be. And as the Supreme Court has repeatedly held, public officials are not entitled to qualified immunity for obvious violations of the Constitution." *Id.* at 367.

253. *Id.* at 372–73.

254. *Id.* at 373. A sharply divided Fifth Circuit, sitting en banc, reversed the panel's decision in early 2024. *See* Villarreal v. City of Laredo, 94 F.4th 374 (5th Cir. 2024) (en banc).

255. Richmond v. Badia, 47 F.4th 1172, 1186 (11th Cir. 2022). For the other cases addressing the OVE for excessive force, see *Walton v. Tunica Cnty.*, 648 F. Supp. 3d 780, 784, 789 (N.D. Miss. 2023) (denying immunity to a police canine handler who consciously failed to immediately tell the dog to stop when the canine attacked a suspect who tripped and fell with a deputy—through no fault of her own—and the suspect endured substantial suffering because of the dog's attack); *Williams v. Olsen*, 638 F. Supp. 3d 204, 222 (N.D.N.Y. 2022) (rejecting immunity to an officer who shot an unarmed, surrounded, fleeing suspect in the back); *Stockton v. Milwaukee Cnty.*, 44 F.4th 605, 612–13, 619–21 (7th Cir. 2022) (refusing to dismiss an action against a correctional officer who propped an inmate suffering a medical emergency against his legs and then, for no penological or other reason, moved his legs so that the prisoner fell and hit his head on the ground).

256. *Richmond*, 47 F.4th at 1178.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

terminated and pleaded guilty to criminal battery.[261] When the child's parent sued, though, "the district court . . . granted qualified immunity."[262]

The Eleventh Circuit reversed the decision, acknowledging that no reasonable officer would view the SRO's actions as acceptable.[263] The officer witnessed no criminal conduct, could not have reasonably viewed the child as a safety threat, and used the force necessary for a resisting adult on a non-resisting minor.[264] Meanwhile, no exigency existed to warrant this conduct.[265] Thus, even without precedent, the SRO should have known his actions violated the Fourth Amendment.[266]

Sixth, scrutinizing the right to be uninhibited by unreasonable seizures, the Fifth Circuit denied immunity to jailers who knowingly detained an individual for "six years after he should have been released."[267] The defendant, Harris, was charged with numerous violent crimes, but a psychiatric evaluation declared him incompetent to stand trial; thus, the criminal court stayed the case and ordered him to be detained during the civil commitment proceedings.[268] However, a procedural quirk resulted in the dismissal of his commitment case on the same day.[269] Accordingly, Harris should have been released.[270] Instead, five days later, two jailers knowingly falsely affirmed that Harris was not in their custody.[271] More than six years later, the mistake came to light and another competency evaluation concluded with the same result and the jail finally released

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261. *Id.*

262. *Id.* at 1178–79.

263. *Id.* at 1185–86.

264. *Id.* at 1183-85 ("[T]he potential crime at issue was . . . misdemeanor battery, and Richmond neither posed a threat nor was attempting to flee . . . . We have repeatedly held that less force is appropriate when the crime at issue is a misdemeanor, and the suspect does not pose a threat or attempt to flee." (citing Reese v. Herbert, 527 F.3d 1253, 1274 (11th Cir. 2008) (citation omitted)).

265. *Id.* at 1183 ("We underscore that [the SRO's] decision to start the physical confrontation was unrelated to any law enforcement need to restrain or arrest Richmond.").

266. *Id.* at 1185.

267. Harris v. Clay Cnty., 47 F.4th 271, 279 (5th Cir. 2022). For the other cases involving the right to be free from unreasonable searches or seizures, see *Rosales v. Bradshaw*, 72 F.4th 1145, 1148–49, 1158–59 (10th Cir. 2023) (denying immunity to an off-duty officer who chased a vehicle that cut him off in traffic to his home and then pointing a gun at the driver and threatened to shoot him, resulting in a criminal conviction for the officer); *Villarreal v. City of Laredo*, 44 F.4th 363 *passim* (5th Cir. 2022) (rejecting immunity for officers who jailed a journalist under an obviously unconstitutional statute for publishing information received from a government source); *E.R. v. Jasso*, 573 F. Supp. 3d 1117 *passim* (W.D. Tex. 2021) (declining immunity for officers who used a key received from the frisk of a minor to enter a residence without a warrant or any warrant exception).

268. *Harris*, 47 F.4th at 273–74.

269. *Id.* at 274. Specifically, without knowing what the criminal court was doing, the Chancery Court dismissed the commitment case on the exact same day for lack of jurisdiction. *Id.* at 273–74.

270. *Id.* at 273.

271. *Id.* at 274

Harris.[272] Harris's mother sued on his behalf.[273] The district court denied qualified immunity based on an obvious Fourteenth Amendment violation.[274] The Fifth Circuit agreed because every jailer should know that an inmate must be released or civilly committed if they cannot stand trial.[275] Furthermore, this conduct was egregious because the guards signed a false declaration to mislead the court, indicating their knowledge that the continued detention was unlawful.[276] Consequently, similar precedent was unnecessary.[277]

Finally, in *Mack v. Yost*,[278] the Third Circuit withheld immunity from prison guards in a RFRA case.[279] There, a Muslim inmate, Charles Mack, worked in the commissary and prayed during shift breaks.[280] While he prayed, two openly anti-Muslim correctional officers harassed and distracted him.[281] Fearful his faith would affect his position, Mack stopped praying.[282] Still, prison officials terminated his commissary role.[283] Mack sued, claiming religious retaliation.[284] The district court granted the defendants qualified immunity because Mack could not point to specific instances clearly establishing that this violated RFRA.[285]

The Third Circuit found that a longstanding tradition in the United States, as well as general First Amendment and RFRA principles, have broadly established that interfering with an incarcerated person's religion, without any penological interest, is unlawful.[286] No direct precedent was required because every reasonable corrections official should be aware of

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272. *Id.*

273. *Id.*

274. *Id.* at 275.

275. *Id.* at 279 ("The commit-or-release rule is fifty years old. The rule has no wiggle room; its line is as bright as they come: An incompetent defendant who has no reasonable expectation of restored competency must be civilly committed or released.").

276. *Id.* at 278.

277. *Id.*

278. 63 F.4th 211 (3d Cir. 2023).

279. *Id.* at 237. For a critique of the Third Circuit's finding that qualified immunity applies to RFRA actions, see Nicole B. Godfrey, *The Religious Freedom Restoration Act, Federal Prison Officials, and the Doctrinal Dinosaur of Qualified Immunity*, 98 N.Y.U. L. REV. 1045, 1095–96 (2023).

280. *Mack*, 63 F.4th at 217–18.

281. *Id.* at 218–19.

282. *Id.* at 219.

283. *Id.*

284. *Id.* at 219–21.

285. *Id.* at 221.

286. *Id.* at 233–34 ("We are convinced that it should be clear to any reasonable correctional officer that, in the absence of some legitimate penological interest, he may not seek to prevent an inmate from praying in accordance with his faith.").

the law and tradition.[287] Nevertheless, the guards argued that their conduct paled in comparison to that of *Hope* and *Taylor*.[288] The court agreed that this case did not present "viscerally abhorrent" facts similar to those opinions,[289] but the panel rejected that such circumstances were a prerequisite to using the OVE.[290] Instead, "[t]he question is whether 'broad rules and general principles' make the existence of the right 'so manifest that it is clearly established.'"[291] Here, those rules and principles did establish the right.[292]

2. Cases Applying but Declining the Exception

Meanwhile, twenty-two of the forty decisions applying the OVE nevertheless granted qualified immunity.[293] Of these, eleven gave the exception more than a fleeting consideration.[294] Here, I review most of those opinions to demonstrate the importance of exigency—emergent circumstances requiring immediate action—and how courts that avoid the exception often conduct a comparative analysis of the facts in their cases to those in *Hope* and *Taylor*.[295]

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287. *Id.* at 234–37 ("The long-standing history and force of these general principles lead us to conclude that, during the time at issue, it was clearly established that a correctional officer was forbidden to pressure an inmate to forego engaging in prayer, absent justification by a compelling government interest.").

288. *Id.* at 235 ("The Defendants also assert that there is a 'wide gap' between their actions and those in the cases that have been found to be 'obvious' violations of law.").

289. *Id.* at 236.

290. *Id.*

291. *Id.* (quoting Schneyder v. Smith, 653 F.3d 313, 330 (3d Cir. 2011)).

292. *Id.* The court added, "And the fact that there have been 'few violations' of religious liberty involving the 'rare' targeting of an individual based on his religious practices indicates that the illegality of such conduct is generally obvious enough to be understood even without judicial guidance." *Id.* (citations omitted).

293. *See supra* text accompanying note 180.

294. As such, eleven cases only gave the OVE summary acknowledgment. *See* Spectrum WT v. Wendler, 693 F. Supp. 3d 689, 701 n.11 (N.D. Tex. 2023); MacDonald v. Or. Health & Sci. Univ., 689 F. Supp. 3d 906, 922 (D. Or. 2023); Garrett v. Clarke, 74 F.4th 579, 589 (4th Cir. 2023); Benning v. Comm'r, Ga. Dep't of Corrs., 71 F.4th 1324, 1334 (11th Cir. 2023); McCrae v. City of Salem, 660 F. Supp. 3d 993, 1001, 1013 (D. Or. 2023); Baxter v. Roberts, 54 F.4th 1241, 1268 (11th Cir. 2022); Laviage v. Fite, 47 F.4th 402, 408 (5th Cir. 2022); Boerste v. Ellis Towing, LLC, 607 F. Supp. 3d 721, 743 n.12 (W.D. Ky. 2022); Cope v. Cogdill, 3 F.4th 198, 206, 209–10 (5th Cir. 2021); T.S. v. Twentieth Century Fox Television, 548 F. Supp. 3d 749, 764–72, 777 (N.D. Ill. 2021); HIRA Educ. Servs. N. Am. v. Augustine, 991 F.3d 180, 191 n.7 (3d Cir. 2021). These opinions analyzed the exception in no more than a couple conclusory sentences at best, and, as such, do not warrant significant scrutiny here.

295. Beyond exigency or comparing the facts of a case to *Taylor* or *Hope*'s, some courts also have simply noted the rarity of the exception in declining to employ it. *See, e.g.*, Hanington v. Multnomah Cnty., 593 F. Supp. 3d 1022, 1029–31, 1040–42 (D. Or. 2022) (immunizing a prison nurse who failed

First, despite considering the OVE, the Ninth Circuit granted qualified immunity for a false arrest in *O'Doan v. Sanford*.[296] A 911 caller related that her partner, James O'Doan, was having an epileptic grand mal seizure, was postictal (in an altered state of mind), and had fled their home, naked, in a violent disposition.[297] In the meantime, and without the benefit of this information from dispatch, officers responded to a distress call from the Reno Fire Department, which had independently seen O'Doan and suggested that he might be experiencing some type of seizure or be on drugs.[298] The police encountered O'Doan and commanded him to stop walking down the street, but he did not comply.[299] Instead, he turned toward them with clenched fists.[300] The officers engaged and restrained O'Doan before charging him with resisting arrest and indecent exposure.[301] O'Doan sued, claiming his seizure prevented him from forming the mens rea for those offenses, and, as such, the officers lacked probable cause to arrest him.[302]

The Ninth Circuit rejected O'Doan's contention that the officers obviously violated his rights.[303] According to the court, law enforcement faced an emergency situation on a public street with a violent, naked, and non-compliant individual.[304] The court disregarded O'Doan's suggestion that police must accept a 911 caller's statement about the provenance of a suspect's behavior; hence, the officers did not have to assume that O'Doan's erratic conduct was involuntary.[305] The panel, thus, rejected O'Doan's OVE argument because it was not comparable to *Taylor*, saying, "[s]uffice to say, this case bears no reasonable comparison to *Taylor*."[306] As a result, the Ninth Circuit immunized the officers.[307]

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to consider a prisoner's criminal history in assessing whether he should be placed on suicide watch despite the inmate attesting to no history of suicidal ideation); Frasier v. Evans, 992 F.3d 1003 *passim* (10th Cir. 2022) (safeguarding officers who seized and searched the tablet of a bystander who had recorded a police interaction involving significant force).

296. O'Doan v. Sanford, 991 F.3d 1027, 1044–45 (9th Cir. 2021).

297. *Id.* at 1032–33.

298. *Id.*

299. *Id.* at 1033.

300. *Id.*

301. *Id.* at 1033, 1035.

302. *Id.* at 1038.

303. *Id.* at 1044.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.* at 1044–45.

Second, the Seventh Circuit refused to invoke the exception's protections in a case with unique circumstances.[308] An off-duty correctional officer heard gunshots near a bar around 4:00 a.m.[309] Armed, he ran to the scene, where he saw Fernando Lopez shooting in the air and chasing fleeing individuals.[310] When Lopez saw the officer, he tried to open his vehicle door to escape, but the officer shot him.[311] Injured, Lopez hid behind his vehicle.[312] Then, one of Lopez's passengers picked up Lopez's gun and fired at the officer.[313] The guard restrained Lopez and used him as a shield during a standoff.[314] The officer alternated between pointing the gun at Lopez and aiming at the other suspect.[315] Fortunately, the other suspect ran away after a few minutes and no one died.[316] Lopez sued for excessive force.[317] The Seventh Circuit rejected the OVE based on exigency.[318] The court noted that "[t]he situation was too fast-moving, too unpredictable, and too volatile" for the violation to be deemed obvious.[319] Instead, reasonable jurists could find the officer's actions justified under the circumstances.[320]

Third, the Seventh Circuit safeguarded officers in a case seemingly akin to *Taylor*.[321] In *Thomas v. Blackard*,[322] prison officials housed a person in a cell with a bed and walls covered in human feces and urine, and without hot running water for two months.[323] When he complained about the mattress, guards ordered him a new one, but it took two weeks to arrive.[324] In the meantime, the officers gave him sheets to cover the

308. Lopez v. Sheriff of Cook Cnty., 993 F.3d 981, 984–86, 991–92 (7th Cir. 2021).

309. *Id.* at 984–85.

310. *Id.*

311. *Id.* at 985.

312. *Id.*

313. *Id.*

314. *Id.* ("For about three and a half minutes, Mario Orta (Lopez's friend) and Officer Raines engaged in a protracted standoff with guns pointed at one another. At several points in the standoff, Orta circled Raines, getting as close as a couple of feet away from him.").

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* at 991–92.

319. *Id.*

320. *Id.*

321. Thomas v. Blackard, 2 F.4th 716, 720–21 (7th Cir. 2021).

322. 2 F.4th 716 (7th Cir. 2021).

323. *Id.* at 719. The prison administration did permit the inmate to take three hot showers per week due to the lack of running hot water in his cell. *Id.*

324. *Id.* 718–19.

soiled mattress to avoid contact with the excrement.[325] Likewise, when the prisoner protested the walls, guards gave him a cleaning solvent that he refused to use because he had no warm water, though he failed to provide evidence showing that he ever informed the jailers about this.[326] The Seventh Circuit declined to employ the OVE because, unlike in *Taylor*, the guards were not indifferent to, or supportive of, the inhumane conditions.[327] Rather, they tried to mitigate the inhumanity by offering him supplies to avoid direct contact with the soiled mattress and clean the cell.[328] Therefore, the jailers' response was much different and forbade the exception.[329]

Fourth, focusing on exigent circumstances, the Sixth Circuit protected an officer despite considering the obvious violation exception.[330] In *Burnett v. Griffith*,[331] when Dillon Burnett failed to appear at a work program that was part of a criminal sentence, he was presented before a court where his erratic behavior prompted the judge to hold him in contempt.[332] After he was detained, an officer prepared to transport him to suicide watch per a mental health professional's guidance.[333] But Burnett attempted to pull away.[334] The officer retained control, but the prisoner tried again.[335] In response, the officer threw him to the ground and Burnett temporarily lost consciousness and suffered a head laceration, post-traumatic stress, and migraines.[336] The Sixth Circuit determined that this was not obviously excessive force because it deemed the facts were not particularly egregious and, unlike in *Taylor*, Burnett created the exigency requiring the use of force by resisting.[337]

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325. *Id.* at 719.

326. *Id.* at 721.

327. *Id.* at 719. For other cases employing a comparative analysis of the egregiousness of the facts, see *D.P. v. Sch. Bd. of Palm Beach Cnty.*, 658 F. Supp. 3d 1187, 1231–33 (S.D. Fla. 2023) (granting immunity to SROs who handcuffed special needs students who had been aggressive or violent at school during transportation to a facility for involuntary psychiatric evaluations because the SROs' conduct was not particularly egregious); *Johnson v. City of Biddeford*, 665 F. Supp. 3d 82 *passim* (D. Me. 2023) (immunizing an officer who failed to take threats of violence serious while on a call resulting in the death of those who sought his help; though the court found the officer's actions incompetent, it was not convinced that the facts were as egregious as those in *Hope* or *Taylor*).

328. *Thomas*, 2 F.4th at 720–21.

329. *Id.*

330. Burnett v. Griffith, 33 F.4th 907, 915 (6th Cir. 2022).

331. 33 F.4th 907 (6th Cir. 2022).

332. *Id.* at 909.

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* at 909–10.

337. *Id.* at 914–15.

Fifth, the Connecticut Court of Appeals similarly rejected an argument centered on the exception.[338] An officer transported an inmate in a small vehicle that required the handcuffed prisoner to lie down across the back bench without a seat belt.[339] When the official got in an accident and wrecked the car because of his careless driving, the inmate slammed into the metal divider separating the officer from the detainee, lost consciousness, and endured injuries.[340] The court conducted a comparative analysis between these facts and those in *Hope* and *Taylor* to determine that the officer did not obviously violate the United States Constitution because his actions were dissimilar from those of the guards in those cases.[341]

Sixth, in *Henderson v. Harris County*,[342] the Fifth Circuit rejected the exception where an officer tased a fleeing suspect who turned toward the officer and, according to police, reached for his waistband.[343] Since the first tasing attempt failed, the officer tased the suspect again, causing him to fall and hit his head.[344] During the ensuing struggle, the officer tased him a third time.[345] The court refrained from categorizing this as an obvious constitutional violation because of the exigency involved.[346] The officer witnessed a fleeing suspect reach for a location on the body where individuals are known to conceal weapons.[347] It was, therefore, not a clear violation of the Constitution to use the force necessary to apprehend the individual in such instances.[348]

Lastly, the First Circuit granted immunity to supervisors of a state-funded nursing home in response to allegations made by a certified nursing assistant ("CNA") alleging a lack of safety measures at the beginning of the COVID-19 pandemic.[349] The CNA argued that by requiring employees to come to work without sufficient personal protective equipment and by threatening to fire those who did not show

338. Miller v. Doe, 279 A.3d 286, 290–91, 301–02 (Conn. App. Ct. 2022).

339. *Id.* at 290.

340. *Id.* at 290–91.

341. *Id.* at 301–03.

342. 51 F.4th 125 (5th Cir. 2022).

343. *Id.* at 128–29, 135.

344. *Id.* at 129.

345. *Id.*

346. *Id.* at 135 ("Even accepting Henderson's version of the facts, this case is not obvious. [The officer] made the split-second decision to deploy his taser after Henderson had led him on a long chase by car and by foot and was still unrestrained.").

347. *Id.*

348. *Id.* ("This is a far cry from the handful of instances where we have recognized an 'obvious case.' If anything, the obviousness of this case points in the other direction . . . .").

349. Ablordeppey v. Walsh, 85 F.4th 27, 35 (1st Cir. 2023).

up, the facility exposed the CNA to the virus.[350] Notably, the CNA never contracted the virus.[351] The First Circuit spurned the CNA's contention that the facility supervisors committed an obvious constitutional violation for three reasons.[352] First, the exigency posed by the pandemic necessitated the defendants' conduct.[353] Second, the CNA, unlike the prisoners in *Taylor* and *Hope*, was a voluntary employee.[354] Finally, since the defendants were reacting to an evolving situation, their judgments were entitled to deference.[355]

Taken together, the cases that dismiss the OVE shed light on how courts understand the exception. In situations where the defendants confronted exigencies, courts afforded them grace.[356] This, of course, aligns with the Court's stated purpose for qualified immunity—to protect government officials faced with split-second decisions.[357] When exigency is absent, courts employ a comparative analysis, and if the facts seem less severe than *Hope* or *Taylor*'s, jurists are less likely to find the deprivation obvious.[358]

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350. *Id.* at 30–32 ("[O]ver a loudspeaker, [a supervisor] thanked staff who 'showed up to work every day' and threatened that those who called in sick 'would be penalized and that there would be disciplinary action.'").

351. *Id.* at 32 ("The complaint is bereft of any allegation that Appellant contracted COVID-19 . . . .").

352. *Id.* at 35.

353. *Id.*

354. *Id.*

355. *Id.*

356. *See id.*; Henderson v. Harris Cnty., 51 F.4th 125, 135 (5th Cir. 2022); Burnett v. Griffith, 33 F.4th 907, 914–15 (6th Cir. 2022); Lopez v. Sheriff of Cook Cnty., 993 F.3d 981, 991–92 (7th Cir. 2021); O'Doan v. Sanford, 991 F.3d 1027, 1044 (9th Cir. 2021).

357. *See* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982); Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 586 (1998); Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1409 (2019); Knox, *supra* note 23, at 950.

358. *See* Johnson v. City of Biddeford, 665 F. Supp. 3d 82, 119 (D. Me. 2023) ("This case is different in kind [from *Taylor*]."); D.P. v. Sch. Bd. of Palm Beach Cnty., 658 F. Supp. 3d 1187, 1232 (S.D. Fla. 2023) ("The facts of this case are not as clear-cut as those in *Gray* or the other 'obvious clarity' cases."); Miller v. Doe, 279 A.3d 286, 301–02 (Conn. App. Ct. 2022) ("The facts alleged here . . . are far less egregious than those alleged in *Hope* and *Taylor*, where inmates were treated in ways that were 'antithetical to human dignity.'"); Hanington v. Multnomah Cnty., 593 F. Supp. 3d 1022, 1041 (D. Or. 2022) ("Such malice [as was in *Hope* and *Taylor*] is not present here."); Thomas v. Blackard, 2 F.4th 716, 721 (7th Cir. 2021) ("Unlike in *Taylor*, Thomas failed to point to evidence that prison officials responded with deliberate indifference to the abysmal cell conditions. To the contrary, the record shows that officials reacted reasonably . . . .") (citations omitted); Frasier v. Evans, 992 F.3d 1003, 1021–22 (10th Cir. 2021) ("Even a cursory consideration of these facts—in light of cases like *Taylor* and *Hope*—makes clear that this is not such a rare case.").

V. FUTURE OF THE OBVIOUS VIOLATION EXCEPTION

Despite robust scholarly pessimism about the OVE's viability,[359] this Article implies that the exception can be effective, albeit in limited circumstances. In eighteen published decisions, lower courts relied on it to deny qualified immunity despite no precedent establishing the law.[360] Furthermore, inferior courts have expanded it to include at least six constitutional and statutory rights beyond the Eighth Amendment.[361]

Based on the number of citations alone, *Taylor*'s exception is sparingly invoked.[362] But do eighty-one published decisions really demonstrate *Taylor*'s continued viability? I think so. Obvious violations, one should hope, are relatively rare. Of course, there are likely dozens of cases, if not more, where the exception should have prevented qualified immunity, but lower courts rejected it either because the plaintiff did not raise it or the judge was unsure about how to apply it. Yet, for the eighteen litigants identified here, the OVE certainly played a critical role in affording them some redress. And courts still have an opportunity to expand its application to encompass more rights and fact patterns. This Part contemplates the need for lawyers and plaintiffs to summon the OVE more often and devises a standard for such cases.

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359. *See* Chapman, *supra* note 26, at 55 n.294; Crocker, *Qualified Immunity, Sovereign Immunity, and Systematic Reform*, *supra* note 26, at 1723; Hessick & Richardson, *supra* note 19, at 511–12; Knox, *supra* note 23, at 966–67; Reinert, *Qualified Immunity's Flawed Foundation*, *supra* note 25, at 212; Schwartz, *Qualified Immunity's Boldest Lie*, *supra* note 21, at 614.

360. *See* Green v. Padilla, 697 F. Supp. 3d 1115, 1201–02 (D.N.M. 2023); Prude v. Meli, 76 F.4th 648, 660 (7th Cir. 2023); Rosales v. Bradshaw, 72 F.4th 1145, 1157 (10th Cir. 2023); Mack v. Yost, 63 F.4th 211, 235 (3d Cir. 2023); Walton v. Tunica Cnty., 648 F. Supp. 3d 780, 789 (N.D. Miss. 2023); Williams v. Olsen, 638 F. Supp. 3d 204, 221 (N.D.N.Y. 2022); Harris v. Clay Cnty., 47 F.4th 271, 279 (5th Cir. 2022); Richmond v. Badia, 47 F.4th 1172, 1190 (11th Cir. 2022); Villarreal v. City of Laredo, 44 F.4th 363, 370 (5th Cir. 2022); Stockton v. Milwaukee Cnty., 44 F.4th 605, 621 (7th Cir. 2022); Tyson v. Sabine, 42 F.4th 508, 519 (5th Cir. 2022); Thorpe v. Clarke, 37 F.4th 926, 934 (4th Cir. 2022); E.R. v. Jasso, 573 F. Supp. 3d 1117, 1141 (W.D. Tex. 2021); Ortiz v. New Mexico, 550 F. Supp. 3d 1020, 1054 (D.N.M. 2021); Guy v. Lorenzen, 547 F. Supp. 3d 927, 944 (S.D. Cal. 2021); Truman v. Orem City, 1 F.4th 1227, 1240 (10th Cir. 2021); Taylor v. Ways, 999 F.3d 478, 492 (7th Cir. 2021); Fudge v. Martinez, 504 F. Supp. 3d 1215, 1223 (D.N.M. 2020).

361. *See Prude*, 76 F.4th at 659–60 (due process); *Rosales*, 72 F.4th at 1148–49, 1159 (unreasonable search or seizure); *Mack*, 63 F.4th at 237 (RFRA); *Walton*, 648 F. Supp. 3d at 784 (excessive force); *Olsen*, 638 F. Supp. 3d at 222 (excessive force); *Harris*, 47 F.4th at 279 (unreasonable search or seizure); *Richmond*, 47 F.4th at 1186 (excessive force); *Villarreal*, 44 F.4th at 378 (unreasonable search or seizure and freedom of speech and press); *Stockton*, 44 F.4th at 620–21 (excessive force); *Tyson*, 42 F.4th at 519 (due process); *Thorpe*, 37 F.4th at 940–41 (cruel and unusual punishment); *E.R.*, 573 F. Supp. 3d at 1143 (unreasonable search or seizure); *Ortiz*, 550 F. Supp. 3d at 1175 (cruel and unusual punishment); *Guy*, 547 F. Supp. 3d at 944 (due process); *Truman*, 1 F.4th at 1240 (due process); *Ways*, 999 F.3d at 492 (equal protection); *Fudge*, 504 F. Supp. 3d at 1217–18 (cruel and unusual punishment).

362. *See infra* Part V.A.

A. Advocates and Jurists Should Apply the OVE More Frequently

Only eighty-two lower court decisions (excluding duplicates) cited *Taylor* in the three years after the Court rendered it.[363] In comparison, inferior tribunals referenced *Harlow v. Fitzgerald*,[364] which built the foundation of the modern clearly established law test, 567 times in published decisions in the same amount of time.[365] Similarly, lower courts referred to *Anderson v. Creighton*,[366] a case expanding qualified immunity's scope, 540 times.[367] Finally, lower courts addressed *Plumhoff v. Rickard*,[368] a decision protecting officers who fired fifteen shots into a fleeing vehicle, 180 times.[369] Thus, the lack of citations to *Taylor* is stark.

Also, *Harlow* and *Anderson* were decided in the 1980s.[370] The number of civil rights claims filed has steadily risen since the 1960s, and litigants have initiated significantly more cases since the mid-1990s.[371] Consequently, lower courts have more chances to cite *Taylor* today than they would have had in the 1980s.[372] Yet, inferior courts cited *Taylor* only fourteen percent as much as *Harlow* (fifteen percent for *Anderson*; forty-five percent for *Plumhoff*).[373]

However, critics may protest that the Court decided those cases on its merits calendar, not its shadow docket like *Taylor*.[374] But the data undermines such an argument. Lower courts have referenced recent qualified immunity dispositions at the petition stage more frequently, with only one exception, in the same number of days as *Taylor*. First, the sole

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363. Taylor v. Riojas, 592 U.S. __, 141 S. Ct. 52 (2020). As I did in Part IV, *supra*, I utilized Westlaw's filters to sort out the number of published decisions rendered by lower courts—federal and state—for the three years following the relevant date of adjudication for each Supreme Court opinion. For ease of reference, I will cite to each opinion referenced in the text. Nevertheless, interested parties may replicate the data using Westlaw's filters for each case mentioned here.

364. 457 U.S. 800 (1982).

365. *Id.*

366. 483 U.S. 635 (1987).

367. *Id.*

368. 572 U.S. 765 (2014).

369. *Id.* at 768–70.

370. Specifically, the Court decided *Harlow* in 1982 and *Anderson* in 1987. *See Anderson*, 483 U.S. at 635; *Harlow*, 457 U.S. at 800.

371. U.S. CTS., CIVIL RIGHTS CASES FILED FROM 1963 – 2013 (2014), https://www.uscourts.gov/sites/default/files/civil-rights-cases-2013.pdf [https://perma.cc/D9ES-WVEV].

372. *Cf. id.* (civil rights plaintiffs filed fewer cases in the 1980s than today).

373. Taylor v. Riojas, 592 U.S. __, 141 S. Ct. 52 (2020); *Plumhoff*, 572 U.S. at 765; *Anderson*, 483 U.S. at 635; *Harlow*, 457 U.S. at 800.

374. *Cf.* Makar, *supra* note 37, at 455 (noting that per curiam dispositions on the shadow docket do not provide as much guidance to lower courts as opinions from the merits docket).

outlier: eighty-two lower court opinions—two fewer than *Taylor v. Riojas* without considering duplicates—cited *Taylor v. Barkes*,[375] which concluded that no precedent established that inmates had a right to adequate suicide prevention protocols.[376] Second, 312 judgments mentioned *Mullenix v. Luna*,[377] which held that it was not clearly established that an untrained officer could not shoot at a moving vehicle while perched on a bridge.[378] Third, 329 opinions referenced *White v. Pauly*,[379] a shadow docket disposition granting immunity for a lack of precedent where an officer shot and killed a man in his house while the man was pointing a weapon at the officer in the dark despite law enforcement failing to identify themselves as police.[380] Finally, 281 decisions cited *Kisela v. Hughes*,[381] which shielded an officer who shot a suspect armed with a kitchen knife who was potentially threatening another individual but not police.[382] Accordingly, *Taylor*'s shadow docket status does not explain why lower courts have neglected it.

Courts are either unnecessarily hesitant or unwilling to rely upon *Taylor*. Or, perhaps, lawyers are simply failing to advocate using the OVE. The same reticence, however, is not as pronounced when relying on opinions granting immunity.[383] Nevertheless, the exception being

375. 575 U.S. 822 (2015).

376. *Id.* at 826. Demonstrating its reliance on precedent, the Court noted:

> No decision of this Court establishes a right to the proper implementation of adequate suicide prevention protocols. No decision of this Court even discusses suicide screening or prevention protocols. And "to the extent that a 'robust consensus of cases of persuasive authority'" in the Courts of Appeals "could itself clearly establish the federal right respondent alleges," the weight of that authority at the time of Barkes's death suggested that such a right did *not* exist.

Id. (citations omitted).

377. 577 U.S. 7 (2015).

378. *Id.* at 13–15.

379. 580 U.S. 73 (2017).

380. *Id.* at 75–76, 79–80. Again, noting its hyper-reliance on precedent, the Court stated, "The panel majority misunderstood the 'clearly established law' analysis: It failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment.". *Id.* at 79.

381. 584 U.S. 100 (2018).

382. *Id.* at 105–06.

383. It is worth noting that the Court has issued multiple opinions reversing inferior courts for denying qualified immunity since *Taylor*. *See* City of Tahlequah v. Bond, 595 U.S. 9, 12–14 (2021); Rivas-Villegas v. Cortesluna, 595 U.S. 1, 6–8 (2021). Likewise, the Court has denied certiorari in cases in which the lower court granted qualified immunity. *See* N.S. *ex rel.* Stokes v. Kan. City Bd. of Police Comm'rs, __ U.S. __, 143 S. Ct. 2422 (2023); Lombardo v. City of St. Louis, __ U.S. __, 143 S. Ct. 2419 (2023); Cope v. Cogdill, __ U.S. __, 142 S. Ct. 2573 (2022); Ramirez v. Guadarrama, __ U.S. __, 142 S. Ct. 2571 (2022); James v. Bartelt, __ U.S. __, 142 S. Ct. 4 (2021); Hoggard v. Rhodes, __ U.S. __, 141 S. Ct. 2421 (2021). Yet, none of those cases abrogates the principles discussing in *Taylor*, or for that matter, *Hope* or *McCoy*.

underused is harmful for litigants in egregious cases and those who will file similar cases after them.

It is neither naïve nor idealistic to suggest that fewer Section 1983 cases should be affected by qualified immunity.[384] As the Court has opined, "In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees."[385] Like in torts for private wrongs, no one can bring back a loved one unjustly killed or perfectly restore a limb recklessly marred, so the only remedy for those losses often is monetary judgments.[386]

Furthermore, barring qualified immunity in the most abhorrent cases deters loathsome government misbehavior.[387] By the same token, granting safe harbor in those instances allows the worst abusers one uninhibited bite of the apple. For instance, if the Supreme Court had affirmed the Fifth Circuit in *Taylor*, future correctional officers would have been prohibited from forcing prisoners to live in those conditions.[388] But Taylor's tormentors would have gotten away with their actions merely because they were the first sued for that *specific* conduct.[389] It is unjust to afford the most horrific violators a free pass so long as they are creative in their abuse.[390]

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384. Because Schwartz has shown that not many cases are dismissed because of qualified immunity, the same principle applies to cases not brought by plaintiffs because of fears that a lack of precedent will doom their action. *See* Schwartz, *How Qualified Immunity Fails*, *supra* note 6, at 10; Schwartz, *Qualified Immunity's Selection Effects*, *supra* note 6, at 1105–06.

385. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (citing Butz v. Economou, 438 U.S. 478, 506 (1978)); *see also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment) ("For people in Bivens' shoes, it is damages or nothing.").

386. Of course, that is not to say that injunctive relief is never an appropriate remedy; it is only to suggest that monetary damages are typically the redress sought as an injunction also will not compensate for damages. *See generally* Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300 (2023) (analyzing the Court's recent weariness regarding injunctive relief for constitutional violations).

387. *See* Thomas L. Horvath, Note, *Constitutional Law – Punitive Damages Authorized in Section 1983 Action When "Reckless Disregard" Shown*, 67 MARQ. L. REV. 757, 757 n.3 (1984) (quoting Adickes v. Kress & Co., 398 U.S. 144, 234 (1970) (Brennan, J., concurring in part and dissenting in part)).

388. *Cf.* Taylor v. Stevens, 946 F.3d 211, 220–22 (5th Cir. 2019) (finding that Taylor's cell conditions violated the Eighth Amendment and, therefore, establishing the law for future cases that such conditions offended the Constitution).

389. *See, e.g.*, Taylor v. Barkes, 575 U.S. 822, 826 (2015) (acknowledging the need for a factually indistinguishable case holding the same or similar conduct at issue to violate the Constitution before imposing liability in a subsequent case based on clearly established law).

390. *See, e.g.*, Schwartz, *The Case Against Qualified Immunity*, *supra* note 1, at 1818 (discussing the impunity with which qualified immunity's strict clearly established law test permits officers to act and how that doctrine harms the Constitution).

Finally, harnessing qualified immunity is consistent with the text and history of Section 1983.[391] It is not the aim of this Article to challenge the defense's foundations.[392] Suffice it to say, though, that it appears incongruous with the goal of preventing government officials' apathy toward civil rights deprivations to say that those officials may only be liable if the right is clear to *every* reasonable official.[393] Those sheriffs, judges, witnesses, and jurors whom Representative Perry decried as not hearing and seeing and instead abetting the human rights abuses in the post-war South assuredly would not have viewed many constitutional rights as clearly established.[394] And they unquestionably would be counted among the "reasonable officials" whose knowledge of the law the Court has demanded.[395]

Similarly, one does not find the phrase "clearly established" anywhere in Section 1983.[396] Nor does one discern the word "may."[397] Instead, the text shows an unambiguous proclamation that any state actor who

391. *See* 42 U.S.C. § 1983; Eisenberg, *supra* note 54, at 484–86.

392. Others, to be sure, have adeptly done so. *See* Alan K. Chen, *Qualified Immunity Limiting Access to Justice and Impeding Development of the Law*, 41 HUM. RTS. 8, 9–10 (2015); Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935, 939 (1989); Schwartz, *The Case Against Qualified Immunity*, *supra* note 1. Likewise, it is not only scholars who have challenged qualified immunity's existence, some jurists have lent their voices to that chorus as well. *See* Zadeh v. Robinson, 902 F.3d 483, 498–500 (5th Cir. 2018) (Willett, J., concurring) (Fifth Circuit Judge Don R. Willett challenged qualified immunity as a "yes harm, no foul" doctrine that needs revision); Jamison v. McClendon, 476 F. Supp. 3d 386, 391, 423 (S.D. Miss. 2020) (United States District Judge Carlton W. Reeves called on the Supreme Court to eliminate qualified immunity to restore Section 1983's promise of redress for constitutional wrongs). Two Supreme Court justices, Clarence Thomas and Sonia Sotomayor, have lent their voices, for separate reasons, to propose a reconsideration of qualified immunity. *See* Baxter v. Bracey, __ U.S. __, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from the denial of certiorari) ("Although I express no definitive view on this question, the defense of good-faith official conduct appears to have been limited to authorized actions within the officer's jurisdiction. An officer who acts unconstitutionally might therefore fall within the exception to a common-law good-faith defense.") (citations omitted); Kisela v. Hughes, 584 U.S. 100, 121 (2018) (Sotomayor, J., dissenting from the denial of certiorari) ("The majority . . . decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.").

393. *Cf.* Eisenberg, *supra* note 54, at 484–86 (noting the intention of the Reconstruction Congress in passing Section 1983 to prevent apathy toward civil rights abuses by state and local governments).

394. CONG. GLOBE, 42d Cong., 1st Sess. 78 (1871).

395. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) ("A government official's conduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right.") (internal quotation marks omitted) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

396. 42 U.S.C. § 1983.

397. *Id.*

deprives another of a constitutional or statutory right *shall* be liable.[398] These observations counsel an approach to qualified immunity, if it is to endure, that is tethered more closely to the law's purpose and language. Employing the OVE to deter egregious misconduct and compensate victims seems as good a place to start as any.

B. Viable Standards to Govern the Exception's Application

Despite concerns that it is an amorphous inquiry, the obvious violation exception is not without cognizable standards to manage the analysis.[399] Jurists have articulated at least two tests that already operate as guideposts.[400] The Eleventh Circuit has employed the "obvious clarity" test,[401] stating that for an official to be denied qualified immunity for an obvious violation, the "officer's conduct must be of a nature that every reasonable officer would have known the conduct was unlawful."[402] In other words, the standard creates two poles for government conduct: on one end, officials are protected if not every reasonable officer would have known the action violated the law, while on the other end, they are not shielded if every reasonable officer would have known that the action violated the law.[403]

In application, the Eleventh Circuit was tasked with deciding a case where an officer strip searched two Black men for drugs even though they were not under arrest for drug-related crimes.[404] The obvious clarity test was employed to decide the application of the exception.[405] The denial of immunity was not triggered by the search itself but by the manner in which it was conducted.[406] The officer took one of the men into a closet, where he was instructed to remove his shirt and shoes.[407] Subsequently, he was

398. *Id.*

399. *See* Ducksworth v. Landrum, 62 F.4th 209, 218 (5th Cir. 2023) (Oldham, J., concurring in part and dissenting in part); Richmond v. Badia, 47 F.4th 1172, 1184 (11th Cir. 2022).

400. *Ducksworth*, 62 F.4th at 218 (Oldham, J., concurring in part and dissenting in part); *Richmond*, 47 F.4th at 1184.

401. *Richmond*, 47 F.4th at 1184. *See also* Kate Seabright, Comment, *Arriving at Clearly Established: The Taser Problem and Reforming Qualified Immunity Analysis in the Ninth Circuit*, 89 WASH. L. REV. 491, 511–14 (2014) (praising the Eleventh Circuit's obvious clarity approach and suggesting that the Ninth Circuit adopt it).

402. *Richmond*, 47 F.4th at 1185 (citing Gray *ex rel.* Alexander v. Bostic, 458 F.3d 1295, 1307 (11th Cir. 2006)).

403. *Id.*

404. *See* Evans v. Stephens, 407 F.3d 1272, 1275–77, 1283 (11th Cir. 2005).

405. *See id.* at 1283.

406. *Id.*

407. *Id.* at 1276.

ordered to shed the remainder of his clothing, including his underwear.[408] When the suspect objected, the officer placed him in a chokehold and beat him with a baton before shoving him back against the wall where, in the other suspect's presence, the officer removed the suspect's underwear.[409] The officer then inserted the baton into the suspect's anus and also used it to lift his testicles.[410] The officer repeated the process with the other suspect, including inserting the baton into his anus and using it to lift his testicles, without cleaning the baton[411] The first suspect was still in the room.[412] Throughout the encounter, the officer directed racist and derogatory language at the suspects.[413]

The court held that this obviously violated the Fourth Amendment, and no factually indistinguishable precedent was necessary.[414] The panel analyzed:

> [T]he text of the Fourth Amendment prohibits "unreasonable" searches. Seldom does a general standard such as "to act reasonably" put officers on notice that certain conduct will violate federal law given the precise circumstances before them: Fourth Amendment law is intensely fact specific. But we conclude the supposed facts of this case take the manner of the searches well beyond the "hazy border" that sometimes separates lawful conduct from unlawful conduct. The violation was obvious.
>
> Every objectively reasonable officer would have known that, when conducting a strip search, it is unreasonable to do so in the manner demonstrated by the sum of the facts alleged by Plaintiffs. The totality of the facts alleged here made this violation—on the day of the search—clear from the terms of the Constitution itself: No objectively reasonable policeman could have believed that the degrading and forceful manner of this strip search (especially in the light of the complete lack of circumstances that might have called for immediate action to conduct a search without the time for cool and calm thought about how to proceed) was "reasonable" in the constitutional sense.[415]

408. *Id.*
409. *Id.* at 1276–77.
410. *Id.* at 1277.
411. *Id.*
412. *Id.*
413. *Id.* at 1275–76.
414. *Id.* at 1283.
415. *Id.* (citations omitted).

Additionally, Judge Andrew S. Oldham of the Fifth Circuit distilled a test for obvious violations.[416] According to the test, the OVE applies when two conditions are met: "(1) particularly egregious facts and (2) . . . the official's actions were [not] compelled by necessity or exigency."[417] In *Ducksworth v. Landrum*,[418] a car wash manager reported a conflict with a customer—Ducksworth.[419] When four officers arrived, the manager said the confrontation was over and the customer was free to stay.[420] The officers, unsatisfied, told Ducksworth to leave.[421]

As he had already paid for the service, Ducksworth rebuffed their commands so he could finish vacuuming his truck, prompting an officer to attempt to tase him unsuccessfully.[422] He then turned away to get into his truck when officers grabbed and tased him multiple times.[423] All of this unfolded in front of his minor children.[424] The officers arrested Ducksworth for disorderly conduct and resisting arrest; a municipal court later dismissed those charges, and Ducksworth sued.[425]

Judge Oldham considered whether the OVE was applicable to Ducksworth's contention of false arrest.[426] At first glance, the facts were particularly egregious because every reasonable officer knows that probable cause is a necessity for arresting someone,[427] and its lack was evident.[428] Ducksworth was a paying customer on private property who

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416. *See* Ducksworth v. Landrum, 62 F.4th 209, 218 (5th Cir. 2023) (Oldham, J., concurring in part and dissenting in part) (quoting McMurry v. Brunner, No. 21-50888, 2022 WL 17493708, at *7 (5th Cir. Dec. 7, 2022) (Oldham, J., concurring in the judgment)).

417. *Id.* The Sixth Circuit has utilized a similar test without explicitly articulating it. *See* Burnett v. Griffith, 33 F.4th 907, 914–15 (6th Cir. 2022). Assessing a litigant's argument that the OVE should apply in their case, the Sixth Circuit stated:

> [Defendant's] actions were not so egregious as to obviate the requirement of identifying precedent that places "the statutory or constitutional question beyond debate" such that [Defendant] was placed on fair warning that his conduct was unconstitutional. And in further contrast to *Taylor* and *McCoy*, the video evidence in this case establishes that [Defendant's] use of force was motivated by an exigency created by [Defendant's] actions.

Id. (citations omitted). In other words, without directly saying so, the Sixth Circuit considered whether (1) the facts were particularly egregious; and (2) whether an exigency justified the conduct. *See id.*; *Ducksworth*, 62 F.4th at 218 (Oldham, J., concurring in part and dissenting in part).

418. 62 F.4th 209 (5th Cir. 2023).

419. *Id.* at 214.

420. *Id.*

421. *Id.*

422. *Id.* at 214–15.

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.* at 218–19.

427. *Id.*

428. *Id.* at 218.

was not threatening anyone, including the officers; moreover, the person with whom he had quarreled did not want to press charges or force him to leave either.[429] In addition, the officers could not point to any exigency.[430] Ducksworth was never violent and he did not escalate the interaction with the officers.[431] Judge Oldham viewed any exigency, if one existed, as created by the police, which cannot provide a basis for law enforcement action.[432] Consequently, the egregious facts combined with the lack of exigency prompted the use of the exception.[433]

The standards set forth by Judge Oldham and the Eleventh Circuit can be merged into one cohesive test. First, Judge Oldham's "particularly egregious facts" can be modified by the standard of "every reasonable officer" principle of obvious clarity.[434] The question thus becomes whether the case presents particularly egregious facts such that every reasonable officer would know that the conduct violated the plaintiff's constitutional or statutory rights.[435] If so, the second step involves the court inquiring if any exigency justified the egregious conduct.[436] To determine this, courts can rely on criminal law's definition of exigency.[437]

The Supreme Court has categorized an exigency as circumstances "mak[ing] the needs of [governmental action] so compelling that [such conduct] is objectively reasonable."[438] Meanwhile, the Ninth Circuit has said an exigency exists where "circumstances . . . would cause a reasonable person to believe that [action] was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of [a] suspect, or some other consequence improperly

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.* ("[P]olice-created exigencies receive no deference under the Fourth Amendment.") (citing Kentucky v. King, 563 U.S. 452, 462 (2011)).

433. *Id.* at 218–19.

434. *Id.* at 218; Richmond v. Badia, 47 F.4th 1172, 1185 (11th Cir. 2022).

435. *Ducksworth*, 62 F.4th at 218 (Oldham, J., concurring in part and dissenting in part); *Richmond*, 47 F.4th at 1185.

436. *Ducksworth*, 62 F.4th at 218 (Oldham, J., concurring in part and dissenting in part).

437. Courts most often analyze exigent circumstances in the context of exceptions to the Fourth Amendment's warrant requirement. *See, e.g.*, Caniglia v. Strom, 593 U.S. __, 141 S. Ct. 1596, 1603 (2021) (Kavanaugh, J., concurring) ("The Court's Fourth Amendment case law already recognizes the exigent circumstances doctrine, which allows an officer to enter a home without a warrant if the 'exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.'") (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).

438. Lange v. California, 594 U.S. __, 141 S. Ct. 2011, 2017 (2021) (quoting Kentucky v. King, 563 U.S. 452, 460 (2011)).

frustrating legitimate law enforcement efforts."[439] Finally, *Black's Law Dictionary* defines exigency as "a situation requiring immediate action."[440]

The proposed test is workable in practice. Tribunals already assess whether every reasonable official would believe the law to be clearly established, so they are, likewise, capable of weighing whether those same officials would understand the law to clearly prohibit certain actions.[441] And jurists routinely examine exigent circumstances in other contexts, such as if an evolving situation allows law enforcement to enter a residence without a warrant.[442]

Reliance on exigency also aligns with the purpose of qualified immunity, i.e., to prevent officers from being deterred from acting in the face of emergencies.[443] Indeed, in nearly half of the published cases that granted qualified immunity despite considering the obvious violation exception, the justification for doing so was exigency.[444] Whether that was a fleeing suspect who appeared to have a weapon,[445] an armed standoff,[446] an unruly inmate trying to flee an officer's grasp,[447] an erratic, naked man with clenched fists walking toward officers,[448] or the COVID-19 pandemic,[449] courts have declined to find obvious violations for debatable decisions made in evolving circumstances. Thus, step two of the test will prevent cases from "run[ning] against the innocent as well as the guilty," an outcome against which the Supreme Court has cautioned.[450] Further,

439. United States v. Brooks, 367 F.3d 1128, 1135 (9th Cir. 2004) (quoting United States v. McConney, 728 F.2d 1195, 1199 (9th Cir. 1984) (en banc), *overruled on other grounds by* Estate of Merchant v. Comm'r, 947 F.2d 1390, 1392–93 (9th Cir. 1991)).

440. *Exigency*, BLACK'S LAW DICTIONARY (11th ed. 2019).

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

442. *See Caniglia*, 593 U.S. __, 141 S. Ct. at 1603 (quoting *Stuart*, 547 U.S. at 403).

443. *See* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

444. *See* Ablordeppey v. Walsh, 85 F.4th 27, 35 (1st Cir. 2023); Henderson v. Harris Cnty., 51 F.4th 125, 135 (5th Cir. 2022); Burnett v. Griffith, 33 F.4th 907, 914–15 (6th Cir. 2022); Lopez v. Sheriff of Cook Cnty., 993 F.3d 981, 991–92 (7th Cir. 2021); O'Doan v. Sanford, 991 F.3d 1027, 1044 (9th Cir. 2021).

445. *Henderson*, 51 F.4th at 135.

446. *Lopez*, 993 F.3d at 991–92.

447. *Burnett*, 33 F.4th at 909–10.

448. *O'Doan*, 991 F.3d at 1033.

449. *Ablordeppey*, 85 F.4th at 35.

450. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

focusing on exigency is consistent with *Hope* and *Taylor*, where the Court has indicated that the lack of an exigency supported denying immunity.[451]

At the heart of Judge Oldham and the Eleventh Circuit's tests is reasonableness. Some, therefore, may challenge that "reasonableness" is not a sufficient, objective guideline for ascertaining whether government agents should be made to stand trial or pay recompense. This criticism, however, misunderstands the daily task of judges. Whether it is calculating reasonable time under a contract, considering how a reasonable person should have acted, asking if an expectation of privacy is reasonable, or deciding if a corporate board used reasonable business judgment, to name only a few, judges spill a great deal of ink on reasonableness.[452]

Therefore, the obvious violation exception is governable by definable standards that jurists have already ably articulated.[453] A constitutional or statutory deprivation for which there is no factually indistinguishable precedent nevertheless violates clearly established law in cases where: (1) the facts are particularly egregious, such that every reasonable officer would understand that the conduct violated the plaintiff's rights; and (2) no exigency justified the offending action. The proposed test will not result in judges peering at a crystal ball to decipher which cases call for the OVE; rather, it will allow courts to prevent officials from getting away with blatant abuses while tailoring liability to serve the purpose of qualified immunity.

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451. Taylor v. Riojas, 592 U.S. __, 141 S. Ct. 52, 54 (2020) ("The Fifth Circuit identified no evidence that the conditions of Taylor's confinement were compelled by necessity or exigency."); Hope v. Pelzer, 536 U.S. 730, 745 (2002) ("This wanton treatment was not done of necessity, but as punishment for prior conduct.").

452. *See, e.g.*, Alan Calnan, *The Nature of Reasonableness*, 105 CORNELL L. REV. ONLINE 81, 81 (2020) ("Reasonable legal minds agree that *reasonableness* is one of the foundational concepts of American law, infiltrating everything from administrative, corporate, and constitutional law to crimes, torts, and contracts."); Brandon L. Garrett, *Constitutional Reasonableness*, 102 MINN. L. REV. 61, 61 (2017) ("The concept of reasonableness pervades constitutional doctrine. The concept has long served to structure common-law doctrines, from negligence to criminal law, but its rise in constitutional law is more recent.").

Frédéric Sourgens has offered a comprehensive listing of reasonableness tests in the law. Frédéric G. Sourgens, *Reason and Reasonableness: The Necessary Diversity of the Common Law*, 67 ME. L. REV. 73, 74–75 (2014). He has noted, "For instance, reasonableness governs liability in negligence cases, determines what performance a contract requires, sets the scope of permissible police intrusion in people's private affairs, defines the limit of criminal liability, and administers the diversity of the student body at state universities." *Id.* Sourgens has added, "It informs corporate law, banking law, commercial law, bankruptcy law, and civil procedure." *Id.* at 75.

453. *See* Ducksworth v. Landrum, 62 F.4th 209, 218 (5th Cir. 2023) (Oldham, J., concurring in part and dissenting in part); Richmond v. Badia, 47 F.4th 1172, 1185 (11th Cir. 2022). Again, the Sixth Circuit has also already applied the basic formula proposed by Judge Oldham. *See* Burnett v. Griffith, 33 F.4th 907, 914–15 (6th Cir. 2022).

VI. A NOTE ON *HAMLET V. HOXIE*: LIMITED DOCTRINAL IMPACT

At its final conference of 2023, the Supreme Court denied a petition for a writ of certiorari in a case that could have implicated the obvious violation exception.[454] Notably, it did so without any recorded dissent.[455] This is a careful reminder that the exception is exceedingly rare, and the Court will hesitate before calling upon it. Some observers may even conclude that the Court's denial undermines *Taylor*. However, a closer examination reveals that mitigating factors and questions surrounding the plaintiff's credibility undermined a finding of an obvious violation.

Lynn Hamlet, an elderly man incarcerated in Florida, sued an officer for subjecting him to cruel and unusual punishment.[456] On April 25, 2018, jailers escorted Hamlet—who had open wounds on his feet from his diabetes—to a handicap shower to bathe himself.[457] Once inside, Hamlet noticed urine on the floor and a small potato chip bag containing human feces.[458] He yelled for the guards to let him out, but Officer Brandon Hoxie accused Hamlet of defecating in the shower himself before opening the door and pushing Hamlet back into the stall.[459]

For the next forty minutes, Hamlet sat in a chair with his feet intermittently contacting the excrement.[460] He eventually maneuvered to an elevation to evade the waste, but not before it had infiltrated his wounds.[461] At a deposition, though, Hamlet testified that he could have propped his feet on his chair to avoid the water.[462] When Hoxie released Hamlet, the inmate alleged that Hoxie had taken the clean clothes from his cell and left him with only the water in his toilet to flush his wounds.[463]

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454. *See* Hamlet v. Hoxie, __ U.S. __, 144 S. Ct. 485 (2023).

455. *Id.*

456. *See* Hamlet v. Martin Corr. Inst., No. 21-11937, 2022 WL 16827438, at *1 (11th Cir. Nov. 9, 2022) [hereinafter *Hamlet II*]; Hamlet v. Hoxie, No. 18-CV-14167, 2021 WL 2384516, at *1–2 (S.D. Fla. Apr. 27, 2021) [hereinafter *Hamlet I*].

457. *Hamlet I*, 2021 WL 2384516, at *1.

458. *Id.* Unfortunately, news reports recount that Florida correctional officers fairly routinely make incarcerated individuals shower in stalls with human waste. *See* Nicole Einbinder, *Florida Prisons Lock People in Dirty Showers for Hours, Report Finds*, TAMPA BAY TIMES (Nov. 8, 2023) https://www.tampabay.com/news/florida/2023/11/08/florida-department-of-corrections-prisons-showers/ [https://perma.cc/B8TW-VCGG].

459. *Hamlet I*, 2021 WL 2384516, at *1.

460. *Id.*

461. *Id.*

462. Hamlet v. Martin Corr. Inst., No. 21-11937, 2022 WL 16827438, at *4 (11th Cir. Nov. 9, 2022).

463. *Hamlet I*, 2021 WL 2384516, at *1–2.

Consequently, he could not adequately disinfect himself, but he never asked for cleaning supplies.[464]

Though he gave conflicting timelines, Hamlet fell ill sometime after the incident with what he claimed was a bacterial infection stemming from the soiled shower.[465] His medical records, however, indicated that he was suffering from hypoglycemia and refusal to take his Hepatitis C medications.[466] Nevertheless, the prison sent him to the hospital, where he underwent emergency surgery to fix a deteriorated heart valve.[467] Although he contended that his cardiac ailment resulted from the shower, the healthcare records that he was able to produce on summary judgment did not corroborate that claim.[468] For two months, Hamlet remained in the hospital, unable to care for himself.[469] He then sued Hoxie for depriving him of the right to be free from cruel and unusual punishment by compelling him to stay in the unclean shower for half an hour and withholding resources to irrigate his wounds.[470]

The district court granted Hoxie qualified immunity because Hamlet could not prove an Eighth Amendment violation.[471] To prove his case, Hamlet had to demonstrate that the condition was serious enough to offend the Constitution and that Hoxie acted with sufficient mental culpability toward the condition.[472] The district court found that Hamlet could prove neither because being exposed to minute human waste for forty minutes is not serious enough to infringe the Eighth Amendment.[473] Likewise, Hamlet could have avoided the excrement and wash off any that got on him while in the shower.[474] His allegations about the urine were too vague and conclusory to warrant credit.[475] Further, Hamlet had never told Hoxie about feces having entered his wounds, such that the guard

464. *Id.* at *2.

465. *Id.*

466. *Id.*

467. *Id.*

468. *Id.* It is worth mentioning that, proceeding without the assistance of counsel, it may have been difficult for Hamlet to procure the medical records if they, in fact, did exist to support this allegation.

469. *Id.*

470. *Id.*

471. *Id.* at *5–6.

472. *Id.* at *5.

473. *Id.* at *5–6.

474. *Id.* at *5.

475. *Id.*

could have consciously disregarded the condition.[476] So, the district judge granted summary judgment to Hoxie.[477]

Exercising its discretion to first consider the clearly-established-law prong of qualified immunity, the Eleventh Circuit affirmed because no case law warned that Hoxie's actions were unlawful.[478] The only opinion Hamlet cited was worse in kind and degree because it involved a person being exposed to excrement for days, not minutes, and showed that the officers involved consciously disregarded the exposure.[479] The circuit conceded that if Hamlet's exposure had lasted for days, the case might have been different.[480] The Supreme Court denied Hamlet's request for review without comment from any justice.[481]

Before heralding *Hamlet v. Hoxie*[482] as spelling the Court's break from *Taylor*, it is important to recognize that it is not even apparent that the exception should have altered the result. Reasonable jurists could differ on the first prong of the test (proposed in Part V.B above) in Hamlet's case.[483] As the Eleventh Circuit recognized, Hamlet could have avoided the fouled water by resting his feet on the chair.[484] He also could have requested cleaning supplies or to see a medical professional.[485] But he did not.[486] Instead, he left his feet in the sewage and, beyond initially asking to be let out of the shower, did not seek help.[487] Furthermore, his exposure was in the presence of running water in a shower, i.e., in a position affording him the option to clean his foot.[488] These mitigating conditions were not present in *Taylor*.[489] Thus, reasonable minds could differ about whether Hoxie's conduct was particularly egregious, such that every reasonable official would have known it was cruel and unusual.

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476. *Id.* at *6.

477. *Id.*

478. Hamlet v. Martin Corr. Ins., No. 21-11937, 2022 WL 16827438, at *3–5 (11th Cir. Nov. 9, 2022).

479. *Id.* at *3–4 (citing Brooks v. Warden, 800 F.3d 1295, 1298, 1300, 1304–05 (11th Cir. 2015)).

480. *Id.* at *4.

481. *See* Hamlet v. Hoxie, __ U.S. __, 144 S. Ct. 485 (2023).

482. *Id.*

483. *See* Ducksworth v. Landrum, 62 F.4th 209, 218 (5th Cir. 2023) (Oldham, J., concurring in part and dissenting in part); Richmond v. Badia, 47 F.4th 1172, 1185 (11th Cir. 2022).

484. *Hamlet II*, 2022 WL 16827438, at *4.

485. *See id.*

486. *Id.*

487. *Id.* at *2, *4.

488. *Id.* at *4.

489. *See* Taylor v. Riojas, 592 U.S. __, 141 S. Ct. 52, 53 (2020).

Finally, one should not overvalue the Court's rejection of a writ of certiorari.[490] In the twenty-first century, the Court has consistently granted only around one percent of the thousands of petitions it receives annually.[491] For instance, in 2000, litigants sought relief from the Court in 7,500 petitions but it granted only 100, and in 2018, the Court adjudicated only 90 of the 6,400 controversies requesting the Court's attention.[492] For the same reason that its decision to adjudicate a case is significant for its rarity, its denial is not noteworthy given its frequency.[493] *Taylor* and *McCoy* are important because they are outside the norm; meanwhile, the rejection of *Hamlet* is less important because dismissal is the expected action.[494] Therefore, although critiques of *Taylor*'s effect based on its shadow docket status are unfounded,[495] *Hamlet*'s meaning is attenuated as it accompanied thousands denied by the Court.[496]

In sum, the quiet rejection, by the Justices, of a case with facts that, at first blush, implicate *Taylor*, calls for reflection. Unlike *Taylor* or *Hope*, though, credibility issues and mitigating circumstances forestalled *Hamlet* from becoming the Court's next foray into the obvious violation exception. The rejection admittedly may blur the Court's guidance after *Taylor*, but only minimally. As noted, rejections at the petition stage are, by far, the norm. Accordingly, *Hamlet* does not diminish the conclusions presented here.

CONCLUSION

Qualified immunity, as currently executed, is inconsistent with the aspirations of Section 1983.[497] Owing to lower courts' strict requirement

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490. *See* Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827, 850 (2021). That is not to say that individual justices, or a group of them, cannot signal their individual beliefs about a specific issue by writing separately concerning the denial of a petition. *See* Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 866 (2013).

491. *See* Barry P. McDonald, *SCOTUS's Shadiest Shadow Docket*, 56 WAKE FOREST L. REV. 1021, 1040 (2021). In 1970, 1980, and 1990, the Court accepted only three percent of the petitions for writ of certiorari filed to it. *Id.*

492. *Cf. id.* (acknowledging the rarity of grants of petitions for writ of certiorari).

493. *See id.*

494. *Cf. id.*

495. *See supra* text accompanying notes 354–59.

496. *See* McDonald, *supra* note 491, at 1040.

497. *Cf.* 42 U.S.C. § 1983 (noting lack of mention of qualified immunity or any of its elements); Eisenberg, *supra* note 54, at 484–86 (discussing the history and intent of Section 1983, which demonstrates that it was intended to enforce the Constitution's protections without mention to immunity).

of on-point precedent, civil rights abusers are afforded one free deprivation.[498] But the Court has provided an avenue for inferior courts to avoid this outcome in abhorrent situations.[499] Where a deprivation is egregious, courts need not shield the offender regardless of factually indistinguishable case law.[500] Fortunately, some lower courts have followed that admonition—but not nearly enough.

Therefore, this Article has proposed that the OVE (1) exists; (2) is used by courts in situations beyond Eighth Amendment prisoner suits; (3) is not constrained to viscerally disturbing fact patterns; (4) is consistent with the text and goals of Section 1983; and (5) is governable by standards for judicial scrutiny. By no means is the obvious violation exception thriving; in fact, the doctrine is underused. It, nevertheless, can help remedy the worst wrongs without swallowing qualified immunity in the process. Thus, advocates should advance the OVE in their cases, and, when presented with it, jurists should evaluate the exception and enforce it where the facts satisfy the proposed two-part test.

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498. *See, e.g.*, Schwartz, *Case Against Qualified Immunity*, *supra* note 1, at 1818 (noting how qualified immunity's strict clearly established law test allows officers to act without consequences). Justice Sotomayor has articulated a strong rebuke of this aspect of qualified immunity, saying:

> These dual mistakes—resolving factual disputes or drawing inferences in favor of the police, then using those inferences to distinguish otherwise governing precedent—have become the calling card of many courts' qualified immunity jurisprudence. . . . The result is that a purportedly "qualified" immunity becomes an absolute shield for unjustified killings, serious bodily harm, and other grave constitutional violations. Officers are told "that they can shoot first and think later," because a court will find some detail to excuse their conduct after the fact. . . . The public is told "that palpably unreasonable conduct will go unpunished." . . . And surviving family members like Stokes' daughter are told that their losses are not worthy of remedy. I would summarily reverse the court below to break this trend. It is time to restore some reason to a doctrine that is becoming increasingly unreasonable. If this Court is unwilling to do so, then it should reexamine its judge-made doctrine of qualified immunity writ large.

N.S. *ex rel.* Stokes v. Kan. City Bd. of Police Comm'rs, __ U.S. __, 143 S. Ct. 2422, 2424 (2023) (Sotomayor, J., dissenting from the denial of certiorari) (citations omitted).

499. *See generally* McCoy v. Alamu, __ U.S. __, 141 S. Ct. 1364 (2021) (reversing a case for reconsideration in light of *Taylor*); Taylor v. Riojas, 592 U.S. __, 141 S. Ct. 52 (2020) (summarily reversing a decision of the Fifth Circuit based on qualified immunity despite a lack of on-point precedent for the alleged offending conduct); Hope v. Pelzer, 536 U.S. 730 (2002) (denying qualified immunity based on an obvious violation of the Eighth Amendment regardless of available precedent).

500. *McCoy*, 141 S. Ct. at 1364; *Taylor*, 141 S. Ct. at 53–54; *Hope*, 536 U.S. at 744–46.