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The Qualified Immunity Paradox and the Sixth Circuit's *Moderwell* Opinion: A Harbinger of Better Things to Come?

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President's Podium

Summer has arrived and changes are abound! I am excited to share that the board of directors has resumed in-person monthly meetings starting in June, with the option to continue to attend via Zoom. Seeing our colleagues in-person has been a welcome change to what was previously an endless stream of virtual video conferences.

April was an exciting and eventful month for the Chapter. We hosted a program on Restarting Trials in the Northern District of Ohio, the purpose of which was to address the Court's modified trial procedures and provide attorneys with guidance on case and trial preparation during the ongoing pandemic. Due to the importance of this topic this program was provided at no charge and continues to be available On Demand through the Chapter website.

Our first Immigration Trial Practice Skills CLE in April was also a resounding success. We were fortunate to have Assistant Chief Immigration Judge James McCarthy to provide recommendations on how to prepare for trial before the Immigration Court Judge McCarthy provided attendees with substantive examples of best practices and a unique perspective of what judges are interested in hearing through client testimony and documents.

We ended the month with a virtual brown bag lunch featuring U.S. District Judge Michael J. Newman, of the Southern District of Ohio. The luncheon was a great opportunity to get to know Judge Newman on a more personal level and we would continue to encourage Chapter members to take advantage of these unique opportunities in meeting members of the federal judiciary, who have been very gracious in donating their time to the Chapter.

Despite the challenges of the pandemic, our mentoring committee adapted and initiated several virtual programs for law students this spring, including a discussion on Civil Practice Experience and Remote Practice During the Pandemic and Virtual Bar Exam Preparation & Summer Associate and Law Clerk Tips. While we are looking forward to resuming a more traditional mentoring program in the fall, these programs have been a welcome substitute and provide important opportunities for our newer colleagues in the bar to receive guidance and advice from more experience practitioners.

Thus far, June has gotten off to a great start with the How a Spreadsheet Could Change the Criminal-Justice System: Focusing on Data in State and Federal Sentencing CLE that was offered earlier in the month. The newer lawyers committee also put together an all-star lineup of panelists, including Justice Michael P. Donnelly, Supreme Court of Ohio, Judge Pierre H. Bergeron, Ohio First District Court of Appeals, Neil Steinkamp, consultant at Stout, and Paul Hofer, former analyst at the Sentencing Resource Counsel.

The Diversity Committee remains active and engaged. On September 10, 2021, we will be hosting Dr. Kate Masur, Associate Professor at Northwestern University and author of *Until Justice Be Done: America's First Civil Right Movement, From the Revolution to Reconstruction.* Dr. Masur will be in Cleveland for an important discussion about America's historical movement in the field of civil rights, which will be followed by a book signing. In anticipation of this event, the Diversity Committee's next book club read is *Until Justice Be Done*.

As we continue to transition back to pre-COVID normalcy, please mark your calendar with a few save the dates. October 1, 2021 will be our annual State of the Court Luncheon and Officer Swearing in Ceremony at the Hilton Downtown Cleveland, which will promise to be an exciting and eventful occasion where we hope to see many of you in attendance. Additionally, the 2021 FBA Annual Meeting & Convention will be September 23-25 in Miami, Florida, registration for which is available online. Finally, Sixth Circuit Judicial Conference will be held at the Hilton Downtown Cleveland Hotel on December 15-17; details are expected to be forthcoming in late August. Otherwise, I can likely speak for all my Officer colleagues that we are looking forward to seeing you all at a happy hour soon.

The Qualified Immunity Paradox and the Sixth Circuit's *Moderwell* Opinion: A Harbinger of Better Things to Come?

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On May 12, 2021, the Sixth Circuit issued *Moderwell v. Cuyahoga County*.[1] The opinion constitutes a rare instance where qualified immunity was *denied* both at the District Court level (Judge Boyko of the Northern District of Ohio) and by the Court of Appeals, which affirmed (opinion by Judge Clay, joined by Judges Cole and Griffin).

This § 1983 lawsuit tells the tragic story of Larry Johnson, a former inmate at the Cuyahoga County Correctional Center. On June 20, 2018, Johnson was arrested on charges of petty theft. Nine days later, despite repeated alerts of suicidal risk—one by Johnson himself—the correctional staff did nothing, and Johnson hanged himself.

His estate sued, claiming a § 1983 violation. To simplify, the lawsuit involved two classes of defendants: The Correctional Defendants, who included officers working at the jail at the time; and the Executive Defendants, who included the Cuyahoga County Executive, the County's Sherriff, and others.

The District Court allowed some of the charges to proceed against both classes. The Court of Appeals affirmed. Before addressing the qualified immunity issues at hand, however, it is important to note the horrific conditions that Johnson and other inmates had to face at the facility, including "overcrowding . . . so severe that residents, including two pregnant women, were observed sleeping on mattresses on the floor." Op., at 4 (citing DOJ Report on the Facility's Conditions).

In addition, although it is well known by now that America's largest mental healthcare system can be found in jail,[2] *this* jail was far from prepared for the task. The Court chided the facility for having an "inadequate medical program," which included "numerous members of the medical staff [who] lacked proper licenses, comprehensive mental health appraisals [that] were not conducted in a timely manner, and . . . no mental health nurse practitioner." Op., at 4 (citing same).

Following the complaint, both defendant classes moved for judgment on the pleadings under Fed. R. Civ. P. 12(c). The District Court allowed some claims to proceed, concluding that plaintiff has "sufficiently alleged a § 1983 claim of excessive force as against the Correction[s] Defendants," and "sufficiently alleged a § 1983 claim of deliberate indifference to serious medical needs" and "set forth a plausible Supervisory Liability Claim" against the Executive Defendants." Op. at 5. The District Court also refused to dismiss the case based on qualified immunity, recognizing that the Sixth Circuit "has cautioned against dismissing a case on qualified immunity grounds based only on the pleadings." Op., at 6. In this short note, I would like to address this qualified immunity issue.

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[1] https://www.opn.ca6.uscourts.gov/opinions.pdf/21a0104p-06.pdf.

[2] *See, e.g.,* Matt Ford, *America's Largest Mental Hospital is a Jail*, The Atlantic, June 8, 2015, available at https://www.theatlantic.com/politics/archive/2015/06/americas-largest-mental-hospital-is-a-jail/395012/

The Qualified Immunity "Clearly-Established" Paradox

Typically, when a Plaintiff claims a § 1983 violation, the defendants-officials would respond by asking to dismiss the suit based on qualified immunity. To overcome such a defense, a plaintiff must show "(1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct." Op. at 7.

When is a right "clearly established"? According to the Sixth Circuit, to be clearly established, "a legal principle must have a sufficiently clear foundation in *then-existing precedent*. There does not need to be a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." Moreover, "[t]he 'clearly established' standard also requires that the legal principle clearly prohibit the officer's conduct in the *particular circumstances* before him. The Supreme Court has repeatedly stressed that courts must not 'define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.'" Op. at 7 (emphasis added).

In other words, to win over a qualified immunity defense, the plaintiff must show that *someone else*, facing similar "*particular* circumstances," has already prevailed over a qualified immunity claim, thus establishing an "*existing precedent*." But that, of course, leads to a paradox of infinite regression: How could a plaintiff prevail for the *first time*, if each time—in order to prevail—they must show that someone else has already won? Assume, for example, that a police officer continuously places his knee on the neck of a restraint suspect, who is also handcuffed, for eight minutes and 46 seconds, causing the suspect's death; assume, in addition, that this set of "particular circumstances" has never occurred before. How, then, could a § 1983 plaintiff prevail over a qualified immunity defense if there is no "existing precedent" on hand to support him?

Or take another example. On June 7, 1995, Larry Hope, a prisoner at an Alabama state prison, was punished severely: "Four guards subdued Hope, handcuffed him, placed him in leg irons and . . . [tied him to a] hitching post. The guards made him take off his shirt, and he remained shirtless all day while the sun burned his skin. He remained attached to the post for approximately seven hours, [during which] he was given water only once or twice and was given no bathroom breaks."[3] The Eleventh Circuit, expectedly, found this treatment to amount to "cruel and unusual punishment" under the Eighth Amendment; and yet, because that conclusion was not supported by "earlier cases with materially similar facts," it held that defendants were entitled to qualified immunity.

Solving The "Clearly Established" Paradox

In *Hope* (properly named), the Supreme Court reversed the Court of Appeals and resolved the paradox. The Court held that "Respondents violated clearly established law. . . . *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. Hope was treated in a way antithetical to human dignity."[4]

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[3] *Hope v. Peltzer*, 536 U.S. 730, 734-35 (2002).

[4] Id. at 744-45 (emphasis added).

The Court, in other words, recognized that there are certain situations that are *so obvious*, that despite the lack of a clear "previous precedent" a reasonable officer should know that such behavior is constitutionally proscribed. More recently, in *Taylor v. Riojas*,[5] the Supreme Court repeated this principle. In *Taylor*, an inmate was subject— again—to truly inhumane conditions of incarceration, the likes of which one would be surprised to know still exist in this country. Again the Fifth Circuit—despite finding that such behavior clearly violated the Eighth Amendment—granted qualified immunity, explaining that there was no "clearly established" law and that the guards had no "fair warning" about their conduct. Again the Supreme Court reversed, citing *Hope*, explaining that "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."[6]

Legal commentators took notice. Professor Joanna Schwartz argued that "the Court's decision in *Taylor* sends the signal to lower courts that they can deny qualified immunity without a prior case on point—a very different message than the Court has sent in its recent qualified immunity decisions."[7] Similarly, Professor Lawrence Rosenthal wrote that, based on *Taylor*, "the Court has stressed that on egregious facts, qualified immunity should be denied regardless whether there are factually similar precedents."[8]

Back to *Moderwell*

In *Moderwell*, the Sixth Circuit affirmed the District Court's decision to deny qualified immunity, based in large part on the *early stage of the proceedings* in which the motion was filed (prior to discovery). Still, the court took great pains to emphasize the lessons of *Hope* and *Taylor*. It also approvingly cited the academic articles quoted above. And it concluded by saying that the rule, as it stands today, holds that "when no reasonable correctional officer could have concluded that the challenged action was constitutional, the Supreme Court has held that there does not need to be a case directly on point." Op. at 7.

In that, the Sixth Circuit has both resolved the "clearly established" paradox and provided much hope for better days to come.

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[5] 141 S. Ct. 52 (2020) (per curiam).
[6] *Id.* at 53.
[7] Joanna A. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L.J. 305, 351 (2020).
[8] Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. REV. 547, 593 n.193 (2020).