QUALIFIED IMMUNITY: HOW CLEAR IS CLEARLY ESTABLISHED?

I. BACKGROUND

Under 42 U.S.C. § 1983, any person who alleges that a public official deprived him or her of "any rights, privileges, or immunities secured by the Constitution and laws," may sue that public official for damages.[1] There are, however, exceptions to this protection. Public officials may be protected from liability in these suits under the doctrine of qualified immunity if their conduct "does not violate . . . clearly established . . . constitutional rights of which a reasonable person would have known."[2] Under this doctrine, public officials may be immune from liability, even if they violate a person's constitutional rights.[3]

That is what happened on June 12, 2018, when the Tenth Circuit issued an order reversing the United States District Court for the Northern District of Oklahoma's denial of summary judgment on the basis of qualified immunity for the Ottowa County Sheriff who was found to be responsible for the rape of a female prisoner at the county jail under the theory of supervisor liability.[4] Despite finding that the Sheriff had violated the prisoner's Fourteenth Amendment right because he knew that male detention officers frequently entered the female pod of the Jail, knew that there were blind spots in the video surveillance of the female pod, and knew that the blind spots were known to the male detention officers, the Tenth Circuit found that the contours of the constitutional right at issue were not clearly established, and thus the Sheriff escaped liability for his constitutional violation.[5]

II. QUALIFIED IMMUNITY

Qualified immunity "protects governmental officials from liability for civil damages insofar as their conduct does not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'"[6] Once a defendant asserts a qualified immunity defense, the burden shifts to the plaintiff to demonstrate two things on the facts alleged: 1) "that the defendant violated his [or her] constitutional rights," and 2) "that the right was clearly established at the time of the

1. 42 U.S.C. § 1983 (2018).
2. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
3. Alan Chen, *Qualified Immunity: Unpacking the Issues,* 2008 WL 2500675, at *2 (Apr. 17, 2008).
4. Perry v. Durborow, 892 F.3d 1116, 1118, 1122 (10th Cir. 2018).
5. *Id*. at 1118–19.
6. Weise v. Casper, 593 F.3d 1163, 1166 (10th Cir. 2010) (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)).

alleged unlawful activity."[7] For an official to have qualified immunity, he or she must satisfy this two-prong inquiry.[8]

At its inception, the doctrine of qualified immunity was placed in effect to limit public officials' exposure to civil rights claims. The Court argued that permitting unlimited exposure would

> (1) be unfair to public officials who must perform their duties at risk of litigation, and possibly liability, even when the applicable constitutional law is not particularly clear (unfairness); (2) inhibit or "overdeter" public officials in the performance of their jobs, since these officials may be reluctant to carry out important functions because they fear financial liability for their conduct (overdeterrence); and (3) impose substantial costs on public officials, their governmental unit, and society at large because of the burdens associated with defending constitutional tort claims (social costs).[9]

To mitigate these costs, the Court has held that public officials will only be held liable if the constitutional right is clearly established.[10]

III. *PERRY V. DURBOROW*

In *Perry v. Durborow*, the Tenth Circuit overturned the district court's order denying defendant Durborow's motion for summary judgment on the basis of qualified immunity.[11] In February 2013, a detention officer raped Taunya Perry while she was in custody at the Ottowa County Jail in Oklahoma.[12] Perry subsequently brought a § 1983 suit against the county's Sheriff, Terry Durborow. [13] Perry did not assert that Durborow personally raped her, but that because he was the supervisor of the detention officer who did, he was responsible for the alleged rape under the theory of supervisory liability.[14] Durborow moved for summary judgment under a theory of qualified immunity, which the district court denied.[15]

The district court, relying on four specific factual findings, held that Durborow was "deliberately indifferent to the health and safety of [the jail's] female inmates."[16] The court held that Durborow was not entitled to qualified immunity because "(1) Perry established a violation of her constitutional rights under the Eighth and Fourteenth Amendments, and (2)

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7. Riggins v. Goodman, 572 F.3d 1101, 1107 (10th Cir. 2009).
8. *Harlow,* 457 U.S. at 818.
9. Chen, at *3 (citing *Harlow*, 457 U.S. at 814).
10. *Id.* (citing *Harlow*, 457 U.S. at 818).
11. *Perry*, 892 F.3d at 1118.
12. *Id.*
13. *Id.*
14. *Id.* at 1118, 1121.
15. *Id.* at 1118.
16. *Id.* at 1119.

the right of a female inmate to be protected from sexual assault is a clearly established right."[17]

Durborow appealed the district court's decision, arguing that "even assuming Perry demonstrated a constitutional violation, he is nevertheless entitled to qualified immunity because, as of February 25, 2013, no 'clearly established law . . . would . . . have put a reasonable official in [his] position on notice that his supervisory conduct' violated Perry's constitutional rights."[18] The Tenth Circuit assumed that Perry "successfully demonstrated Durborow violated her Fourteenth Amendment rights under [the applicable] framework" and moved to the analysis of whether the law was clearly established at the time of the violation.[19]

The Court held that "the district court erred in concluding that the law was clearly established without first "identify[ing] in its order 'a case where an officer acting under similar circumstances as [Durborow] was held to have violated' the Eighth or the Fourteenth Amendments."[20] The court argued that "in the absence of a finding that Durborow was aware of any previous incidents of sexual assault at the Jail, none of the cases that Perry identifies on appeal place[] the constitutional question in this case beyond debate."[21]

IV. HOW CLEAR IS CLEARLY ESTABLISHED?

In its analysis finding that the law was not clearly established in this case, the Tenth Circuit stated that "[f]or the law to be clearly established, [t]he contours of the constitutional right at issue must be sufficiently clear that a reasonable official would understand what he is doing violates that right."[22] These contours, the court argues, are only sufficiently clear if a plaintiff "(1) identif[ies] an on-point Supreme Court or Tenth Circuit decision," or (2) shows "the clearly established weight of authority from other courts [has] found the law to be as the plaintiff maintains."[23]

On appeal, Perry cited to eight cases that she argues "would have put a reasonable official in Durborow's position on notice that his conduct in this case violated the Constitution."[24] The court however, argued that these cases did not place the constitutional question at hand, whether the constitutional right Durborow violated was clearly established, beyond debate.[25] After arguing that five of the cases were inapplicable for various reasons,

17. *Id.* (internal quotations omitted).
18. *Id.* at 1121 (citing Cox v. Glanz, 800 F.3d 1231, 1242 (10th Cir. 2015)).
19. *Id.* at 1122.
20. *Id.* at 1127 (citing White v. Pauly, 137 S. Ct. 548, 552 (2017)).
21. *Id.* at 1127 (citing *White*, 137 S. Ct. at 551 (internal quotations omitted)).
22. *Id.* at 1122–23 (citing Wilson v. Montano, 715 F.3d 847, 852 (10th Cir. 2013) (internal quotations omitted)).
23. *Id.* at 1123 (citing Quinn v. Young, 780 F.3d 998, 1005 (10th Cir. 2015)).
24. *Id.* at 1124.
25. *Id.*

the court analyzed the last three.[26] The court stated that "[i]n each of these [three] cases, we found the evidence sufficient to demonstrate that the defendants failed to protect the plaintiffs from a known risk of assault. And we also found that the defendants' conduct violated the plaintiffs' Eighth or Fourteenth Amendment rights under a theory of supervisory liability."[27]

The court nonetheless found that these cases did not show a clearly established law because "in each of these cases, the defendant-supervisors weren't just aware of the risk that such assaults might occur. Instead, in each of these cases, the defendants were aware that those known risks had, in fact, *already previously materialized.*"[28] Because the district court could not find sufficient evidence to support Perry's assertion that Durborow had known of any previous assaults at the jail, these cases, the Tenth Circuit held, were not sufficient to "place[] the . . . constitutional question" in this case "beyond debate."[29]

Despite recognizing factual similarities between the cases to which Perry cited and her own experience in the jail, the court held that Durborow's unawareness of any previous assaults was a critical distinction, so much so that the law could not be found to be clearly established.[30] The court specifically pointed to *Tafoya v. Salazar*, where "the defendants in both cases were sheriffs who knew of blind spots in their jails' video surveillance systems and also knew that male officers were violating policies designed to restrict their contact with female inmates."[31] The court held that despite the fact that the previous courts had found that the other defendants' supervisory conduct had violated the plaintiffs' Eighth or Fourteenth Amendment rights, and despite the similarities between the facts of the cases, the cases still "wouldn't have put a reasonable official in [Durborow's] position on notice that his supervisory conduct in this case—which amounted to knowingly allowing the jail's male detention officers to enter the female pod in violation of policy and without adequate supervision and monitoring—violated the Constitution."[32]

The court stated that it "do[es] not mean to suggest that [a] prior case must have identical facts before it will put reasonable officials on notice

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26. *Id.* at 1125.

27. *Id.* (citing to Ortiz v. Jordan, 562 U.S. 180 (2011); Farmer v. Brennan, 511 U.S. 825 (1994); Bryson v. City of Oklahoma City, 627 F.3d 784 (10th Cir. 2010); Dodds v. Richardson, 614 F.3d 1185 (10th Cir. 2010); Tafoya v. Salazar, 516 F.3d 912 (10th Cir. 2008); Gonzales v. Martinez, 403 F.3d 1179 (10th Cir. 2005); Smith v. Cochran, 339 F.3d 1205 (10th Cir. 2003); Lopez v. LeMaster, 172 F.3d 756 (10th Cir. 1999)).

28. *Id.* at 1125–26 (emphasis in original).

29. *Id.* at 1118, 1126 (citing White v. Pauly, 137 S. Ct. 548, 551 (2017) (internal quotations omitted)).

30. *Id.* at 1126–27.

31. *Id.*

32. *Id.* at 1127 (citing *Cox*, 800 F.3d at 1247).

that their specific conduct is unconstitutional,"[33] but in effect, that is exactly what this order requires.

While "existing precedent must have placed the statutory or constitutional question beyond debate,"[34] that requirement does not require identical factual scenarios.[35] The Tenth Circuit does not require that it "engage in 'a scavenger hunt for prior cases with precisely the same fact' but examine 'whether the law put officials on fair notice that the described conduct was unconstitutional.'"[36] Officials can certainly still be on notice that their conduct violates a law, even in light of new factual circumstances.[37]

Requiring this level of particularity in clearly-established-law analysis provides government officials with a way to avoid accountability and presents yet another hurdle for prisoners to be granted relief when they are the victims of constitutional violations. By requiring this level of particularity, and by reading constitutional rights so narrowly, constitutional law can rarely be clearly established.[38] This allows for public officials to "exploit even the slightest ambiguities in the case law to avoid liability."[39]

* *Olivia Kohrs*

33. *Id.* at 1126 (citing Patel v. Hall, 849 F.3d 970, 980 (10th Cir. 2017); Casey v. City of Fed. Heights, 509 F.3d 1278, 1284 (10th Cir. 2007) ("We cannot find qualified immunity wherever we have a new fact pattern.")).

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

35. Currier v. Doran, 242 F.3d 905, 923 (10th Cir. 2001).

36. *Tenorio v. Pitzer*, 802 F.3d 1160, 1163-64 (10th Cir. 2015) (quoting Clark v. Wilson, 625 F.3d 686, 690 (10th Cir. 2010).

37. *Hope v. Pelzer*, 536 U.S. 730, 740-41 (2002).

38. Chen, *supra* note 2, at *19.

39. Michael C. Dorf, *Supreme Court Jail Suicide Case Illustrates the Breadth of Qualified Immunity*, VERDICT (June 3, 2015), https://verdict.justia.com/2015/06/03/supreme-court-jail-suicide-case-illustrates-the-breadth-of-qualified-immunity.

* Associate Editor for the *Denver Law Review* and 2019 J.D. Candidate at the University of Denver Sturm College of Law.