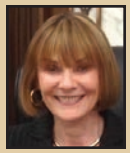
CLE PROGRAM
Colonial Hall
April 12, 2021

8:30 A.M.
REGISTRATION AND SPONSOR DISPLAY

8:45 A.M.
WELCOME

9:00 A.M.
FEMALE JURISTS IN AN EVOLVING PROESSION (1.5 CLE)

PANELIST **Judge Stephanie D. Thacker** — Fourth Circuit Court of Appeals



PANELIST **Judge Irene M. Keeley** — U.S. District Court for the Northern District of W.Va.

PANELIST **Justice Beth Walker** — Supreme Court of Appeals of W.Va.

PANELIST **Judge Jennifer P. Dent** — Eleventh Judicial Circuit

MODERATOR **Monica Nassif Haddad, Esq.** — President, West Virginia State Bar

10:25 A.M.
THE CHANGING POLITICS OF FREEDOM OF SPEECH

(1.0 CLE)

Fredrick Schauer — A distinguished professor of law at the University of Virginia, (and former professor at the WVU College of Law, William and Mary and Harvard), Professor Schauer has written extensively on constitutional interpretation, freedom of speech, evidence and legal reasoning.

11:15 A.M.
SPONSOR BREAK

11:40 A.M.
COLLEGE SPORTS: COMPLIANCE, CULTURE AND COVID

(1.0 CLE)

Roscoe C. Howard, Jr. — Roscoe Howard is the managing partner of the D.C. law office of Barnes & Thornburg and is a former U.S. Attorney for the District of Columbia. Roscoe practices in the areas of corporate compliance, white collar criminal matters and criminal and civil litigation.

12:30 P.M.
LUNCH AND SPONSOR BREAK

Greenbrier boxed lunch provided. During lunch, you are invited to earn an additional 1.0 CLE credit through a Power Act presentation by Magistrate Judges Michael Aloi and Cheryl Eifert of the United States District Courts for the Northern and Southern Districts of West Virginia — "Pro Bono Work to Empower and Represent."

1:30 P.M.
CIVIL RIGHTS AND QUALIFIED IMMUNITY

(1.5 CLE)

Mark Geragos — An international trial lawyer, Mark Geragos has obtained some of the largest verdicts/settlements against pharmaceutical and insurance giants. Geragos is the only lawyer besides Johnnie Cochran ever named "Lawyer of the Year" in both Criminal and Civil arenas.

3:05 P.M.
THE ART OF PERSUASION AT TRIAL

(1.0 CLE)

Al L. Emch — A retired Lt. Col., USAF/WVANG and former CEO of Jackson Kelly PLLC, Al Emch has been a trial and appellate lawyer for more than 40 years. He brings all of that experience to the table in speaking to groups about lawyer skills, leadership and lifelong learning.

4:00 P.M.
CLOSING

WV STATE BAR ANNUAL MEETING
April 11 and 12, 2021
The Greenbrier – White Sulphur Springs

AGENDA

Sunday, April 11, 2021

9:00 a.m. YOUNG LAWYER SECTION BOARD MEETING
Chesapeake Room

10:00 a.m. WV STATE BAR BOARD OF GOVERNORS MEETING
Colonial Hall

5:30 p.m. - 7:00 p.m. JUDICIAL AND ATTORNEY WELCOME RECEPTION
Chesapeake Room

7:00 p.m. - 9:30 p.m. ANNUAL MEETING BANQUET/DINNER
Colonial Hall

7:00 p.m. Banquet Registration and Cocktails
7:30 p.m. Dinner and Program

Monday, April 12, 2021

CONTINUING LEGAL EDUCATION PROGRAM
Colonial Hall

8:30 a.m. **Registration and Sponsor Displays**

8:45 a.m. **Welcome**

9:00 a.m. **Female Jurists in an Evolving Profession** (1.5 CLE)

Panelists:
Judge Stephanie D. Thacker – Fourth Circuit Court of Appeals
Judge Irene M. Keeley – U.S. District Court for the Northern District of WV
Justice Beth Walker – Supreme Court of Appeals of WV
Jennifer P. Dent – Eleventh Judicial Circuit

Moderator:
Monica Nassif Haddad, Esq. – 2020 -21 President, WV State Bar

10:25 a.m. **The Changing Politics of Freedom of Speech** (1.0 CLE)
Frederick Schauer
Professor of Law
University of Virginia School of Law

11:15 a.m. **SPONSOR BREAK**

11:40 a.m. **College Sports: Compliance, Culture and COVID** (1.0 CLE)
Roscoe C. Howard, Jr.
Managing Partner
Barnes & Thornburg, Washington, D.C.

12:30 p.m. **LUNCH** – Greenbrier boxed lunch provided
SPONSOR BREAK

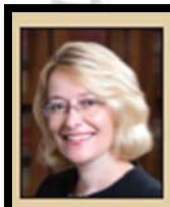
During lunch you are invited to earn an additional 1.0 CLE through a Power Act presentation by Magistrate Judges Michael Aloi and Cheryl Eifert of the United States District Courts for the Northern and Southern Districts of West Virginia – "Pro Bono Work to Empower and Represent"

1:30 p.m. **Civil Rights and Qualified Immunity** (1.5 CLE)
Mark Geragos
Geragos & Geragos
Los Angeles, California

3:05 p.m. **Beyond Ones and Zeroes: What it Means to Live in a World Full of** Hackers (1.0 CLE)
Jason Thomas,
Chief of Innovation and Special Programs
Thomson Reuters Special Services

4:00 p.m. **CLOSING**

Female Jurists in an Evolving Profession



PANELIST **Judge Stephanie D. Thacker** — Fourth Circuit Court of Appeals

PANELIST **Judge Irene M. Keeley** — U.S. District Court for the Northern District of W.Va.

PANELIST **Justice Beth Walker** — Supreme Court of Appeals of W.Va.

PANELIST **Judge Jennifer P. Dent** — Eleventh Judicial Circuit

MODERATOR **Monica Nassif Haddad, Esq.** — President, West Virginia State Bar

Biography for Stephanie D. Thacker

Judge Thacker graduated magna cum laude in 1987 from Marshall University with a degree in business administration. In 1990, she graduated Order of the Coif from the West Virginia University College of Law where she served as a member of the West Virginia Law Review, and the editor of the coal issue of the West Virginia Law Review.

Judge Thacker served as a federal prosecutor for 12 years, both at the United States Attorney's Office for the Southern District of West Virginia and at the Department of Justice in the Child Exploitation and Obscenity Section, where she served as principal deputy chief. During her time with the Department, Judge Thacker prosecuted and went to trial on cases in multiple jurisdictions, spearheaded several nationwide initiatives, and ultimately was awarded the Attorney General's Distinguished Service Award.

Following her tenure with the Department of Justice, Judge Thacker was a member of the law firm of Guthrie & Thomas in Charleston, West Virginia where she engaged in litigation practice concentrating on complex litigation, environmental and toxic tort, and criminal defense.

On April 16, 2012, Judge Thacker was confirmed by the Senate to the Fourth Circuit Court of Appeals.

United States District Judge Irene M. Keeley was born in Brooklyn, New York, and raised in the Maryland suburbs of Washington, D.C. She and her husband, Jack Keeley, live in Clarksburg, West Virginia, and have three daughters and four grandchildren. She received her undergraduate degree from the College of Notre Dame of Maryland in Baltimore, Maryland, and a Masters Degree from West Virginia University. Before attending law school, she was employed as a secondary education teacher in Harrison County, West Virginia. She received her Juris Doctorate from the West Virginia University College of Law in 1980, where she was an Associate Editor of the West Virginia Law Review and a member of the Moot Court Board.

From 1980-1992, she practiced law with the firm of Steptoe & Johnson, concentrating her practice in the areas of litigation and health care law. On August 12, 1992, she was appointed as Judge of the United States District Court for the Northern District of West Virginia by President George H. W. Bush (41). She served as Chief Judge of the Northern District from March 2001 to March 2008. She took senior status on August 12, 2017.

Judge Keeley is a member of the West Virginia State Bar and the West Virginia Bar Association. She is a Fellow of the American Bar Foundation and also a Fellow of the West Virginia Bar Foundation. She is a past chair of the ABA National Conference of Federal Trial Judges. From May 2005 until May 2007, she served as President of the Federal Judges Association, a national association

of over 1,000 federal circuit and district judges. She also served as Chair of the Committee on Criminal Law of the Judicial Conference of the United States from 2013 to 2016, and presently is a member of the Budget Committee of the Judicial Conference.

She is a former Chair of the former Board of Advisors of West Virginia University, board member and first vice-president of the West Virginia University Alumni Association Board of Directors, and member of the Visiting Committee of the West Virginia University College of Law. Currently, she serves as a member of the Blaney House Advisory Committee. In 2000, she was selected as the Outstanding Alumna of the Year by the West Virginia University Alumni Association. Also in 2000, she was selected by the West Virginia State Society of Washington, D.C., as its Daughter of the Year. In 2003, she was inducted into the Order of Vandalia of West Virginia University, and in 2005 received the Justicia Officium Award from the West Virginia University College of Law.

In May, 2019, Judge Keeley was awarded the Presidential Honorary Doctorate of Law by from West Virginia University.

Justice Beth Walker

Justice Beth Walker was elected to the Supreme Court of Appeals of West Virginia on May 10, 2016, becoming the first Justice elected in a non-partisan race. She took office on January 1, 2017 and served as Chief Justice during calendar year 2019.

Justice Walker is a 1987 graduate of Hillsdale College in Hillsdale, Michigan. She earned her law degree in 1990 from The Ohio State University. Immediately after graduation, she joined the law firm of Bowles Rice McDavid Graff & Love (now Bowles Rice) in Charleston. During her two decades at Bowles Rice, she concentrated her statewide practice on labor and employment law and mediation. Just prior to taking office, Justice Walker was Associate General Counsel for the West Virginia United Health System (also known as West Virginia University Medicine) for five years. In that role, she advised WVU Medicine's hospitals and other affiliates regarding labor and employment matters.

In 2012, Justice Walker was elected a Fellow of the College of Labor and Employment Lawyers. She is a 1999 graduate of Leadership West Virginia. A lifelong Girl Scout, Justice Walker is former chair of the board of directors of Girl Scouts of Black Diamond Council.

Justice Walker is active on social media and passionate about public engagement and civics education. She recently helped launch Lady Justice: Women of the Court, a podcast featuring four women Supreme Court justices (Justices Rhonda Wood of Arkansas, Bridget McCormack of Michigan, Eva Guzman of Texas and Justice Walker) discussing the judicial branch of government and their experiences on their state’s highest appellate court.

Judge Jennifer P. Dent
Eleventh Judicial Circuit (Greenbrier and Pocahontas Counties)

Judge Jennifer P. Dent was appointed to serve on the Eleventh Judicial Circuit (Greenbrier and Pocahontas Counties) on May 19, 2016 by then-Governor Earl Ray Tomblin. Previously thereto, she was elected on May 10, 2016, for a term that began on January 1, 2017.

In addition to her role as the Eleventh Judicial Circuit Judge, Judge Dent was appointed by the Supreme Court of Appeals of West Virginia in 2019 to serve as a Judge in the Business Court Division for a seven-year term. Judge Dent has also served by temporary assignment as a Justice on the Supreme Court of Appeals. Furthermore, she has been a member of the Juvenile Justice Commission since 2016 and she currently presides over the Southeastern Regional Drug Court in Pocahontas County.

Judge Dent is a native of Lewisburg, West Virginia, located in Greenbrier County. She attended the University of Alabama at Birmingham and received a bachelor's degree in business in 1983. She then obtained her Doctor of Jurisprudence from the Cumberland School of Law in 1986.

Following law school, she worked for the Central Bank of the South. She thereafter joined the U.S. Bankruptcy Court for the Northern District of Alabama, Eastern Division, serving as a law clerk from 1987 to 1989 and as the Deputy Clerk in Charge from 1989 to 1991. Following her clerkship, she practiced as an attorney at the Najjar, Denaburg Law Firm in Birmingham, Alabama.

Judge Dent returned to West Virginia in 1994, where she began working as an assistant prosecutor in Summers County (1994 to 2002) and an assistant prosecutor in Monroe County

(1998 to 2002). From 2002 until her appointment to the bench, she was an assistant prosecutor in Greenbrier County.

When she is not on the bench, she enjoys bicycling and serves as a member of the Mutual Improvement Club of Ronceverte and the Greenbrier Valley Bike Club, which sponsors Wheels of Hope to assist local cancer patients. Additionally, she is the 2005 recipient of the Champion for Children Award from the Child and Youth Advocacy Center. She and her husband, David Dent, have two sons.

Monica Nassif Haddad, Esq.

Monica Haddad earned her law degree from West Virginia University College of Law in 1991. Following 20 years in practice as a litigator in matters of insurance defense and more than 30 trials, she focuses her practice solely upon civil litigation mediation. Since 2011, Monica has mediated over 1,500 civil actions in West Virginia. Monica is active with the WV State Bar ADR Committee in providing its attorneys with mediation trainings. She is the former Chairperson of the ADR Committee and also served as its Training and Education Subcommittee Chair for 8 years organizing and implementing the annual Basic and Advanced Mediation Trainings. She participates regularly as a mediation coach, panelist and contributor at these trainings and also at those sponsored by the West Virginia Association for Justice, the Defense Trial Counsel of West Virginia, County Bar Associations throughout WV and the WV Department of Health and Human Services. Monica is a member of the National Academy of Distinguished Neutrals, the Association of Attorney-Mediators and the Mediation Council of Western Pennsylvania. She is a Super Lawyer in ADR (2020) and a WV Wonder Woman.

Monica also assists at the WVU College of Law where she serves as a Supervising Attorney/Lecturer in Law in the General Practice Clinic and as the Attorney Advisor for the WVU College of Law Magistrate Court Mediation Program. Monica is the President of the West Virginia State Bar and previously served as its President-Elect, Vice President and a member of its Board of Governors. She is a former President of the Monongalia County Bar Association.

Monica resides in Morgantown, West Virginia, where she has raised three daughters. She is active in her community where she serves on the Boards of the United Way of Monongalia and Preston Counties, Christian Help and the Rape and Domestic Violence Information Center.

The Changing Politics of Freedom of Speech

Frederick Schauer

Professor of Law

University of Virginia School of Law

FREDERICK SCHAUER is David and Mary Harrison Distinguished Professor of Law at the University of Virginia. From 1974 to 1978 he taught at the West Virginia University College of Law, and was subsequently Cutler Professor of Law at the College of William and Mary, Professor of Law at the University of Michigan, and, for nineteen years, Frank Stanton Professor of the First Amendment at Harvard University. A Fellow of the American Academy of Arts and Sciences and of the British Academy, a recipient of a Guggenheim Fellowship, and the holder of an honorary Doctor of Laws from Wirtschaftsuniversität Vienna, Schauer is the author of *The Law of Obscenity* (BNA, 1976), *Free Speech: A Philosophical Enquiry* (Cambridge, 1982), *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford, 1991), *Profiles, Probabilities, and Stereotypes* (Harvard, 2003), *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard, 2009), and *The Force of Law* (Harvard, 2015). The editor of Karl Llewellyn, *The Theory of Rules* (Chicago, 2011), and a founding editor of *Legal Theory*, he has chaired the Section on Constitutional Law of the Association of American Law Schools and the Committee on Philosophy and Law of the American Philosophical Association. In 2005 he wrote the Foreword to the *Harvard Law Review*'s Supreme Court issue, and has written widely on freedom of speech, constitutional interpretation, evidence, legal reasoning, and the philosophy of law.

THE SHIFTING POLITICS OF FREE SPEECH AND THE FIRST AMENDMENT

Outline for Presentation to the West Virginia State Bar, The Greenbrier, Lewisburg, WV, April 12, 2021[1]

FREDERICK SCHAUER
David and Mary Harrison Distinguished Professor of Law, University of Virginia
Frank Stanton Professor of the First Amendment, Emeritus, Harvard University

I. Free Speech: The Liberal Tradition

A. Obscenity and Pornography
   1. Historical background – Anthony Comstock; Banned in Boston; *Ulysses*
   2. The Supreme Court – *Roth v. United States*; *Memoirs v. Massachusetts*; *Paris Adult Theater v. Slaton*; *Miller v. California*
   3. Radio and Television Regulation

B. Communists, Socialists, and Their Fellow Travelers
   1. 1919 – Emergence of the Modern FirstAmendment
   2. Justices Oliver Wendell Holmes, Jr., and Louis Brandeis
   3. The McCarthy Era
   4. The 1960s – Black and Douglas, dissenting

C. The Civil Rights Era
   1. Picketing, Parades, and Demonstrations – *Edwards v. South Carolina*; *Cox v. Louisiana*
   2. Libel and Slander – *New York Times v. Sullivan*; *Garrison v. Louisiana*
   3. The Sit-In cases

D. The Vietnam Protests
   1. Overlap with Civil Rights – Cassius Clay, Julian Bond, and Dick Gregory
   2. "Symbolic" Speech – Flag Burning, Draft Card Burning, Etc.
   3. The *Pentagon Papers*

II. Signs of Change

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[1] And for a much earlier and now somewhat out-of-date treatment of these themes, see Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 University of Colorado Law Review 935-957 (1993).

A. Commercial Advertising
   1. *Virginia Pharmacy* and Its Aftermath
   2. Tobacco and Alcohol Advertising
   3. Antitrust, Securities Regulation, and Economic Libertarianism

B. The Feminist Anti-Pornography Movement
   1. Catharine MacKinnon, Andrea Dworkin, and the Minneapolis Ordinance
   2. *American Booksellers v. Hudnut*
   3. Sexual Harassment, Hostile Environments, and the Workplace

C. Racist and Other Forms of Hate Speech
   1. *R.A.V.* v. *St. Paul*
   2. Free Speech on Campus
   3. The View from Abroad

D. Campaigns and Elections
   1. *Buckley v. Valeo*
   2. *Citizens United v. Federal Election Commission*
   3. The Politics of Campaign Finance Reform

III. Contemporary Alignments

A. *Janus v. AFSCME* and the "Weaponization" of the First Amendment
B. Hate Speech Revisited – The Relevance of License Pates
C. Shifting Presumptions – *Brown v. Entertainment Merchants*; *United States v. Stevens*; *Reed v. Town of Gilbert*
D. Free Speech, the Internet, and Social Media
E. Free Speech in the Public Schools
F. The View from the Classroom – On So-Called Political Correctness
G. On the Relationship Between Freedom of Speech and Freedom of Religion

IV. Contemporary Controversies

A. Free Speech and the Assault on the Capitol
B. Charlottesville 2017
C. Emerging Issues of Tort Liability
D. The Expansion of Commercial Speech – Challenging the Food and Drug Administration, the Federal Trade Commission, and State and Federal Economic Regulation

V. In Search of Explanations

A. The "Hypocritical Liberal" Hypothesis
B. The Role of Racial and Gender Politics – Free Speech and Inequality
C. Economics, Property, and the Non-Metaphorical Marketplace
D. Protecting Your Allies – Justice Scalia on Anti-Abortion Protests

E. The Relevance of Libertarianism and the Changing Politics of American Conservatism
F. The Effect of Modern Technology

VI. The Larger Explanation I – The Increasing Irrelevance of "Second Order" Values

VII. The Larger Explanation II – Decline of the Rationalist Ideal

VIII. Conclusion: Will the Politics Change Again?

THE POLITICAL INCIDENCE OF THE FREE SPEECH PRINCIPLE

FREDERICK SCHAUER*

Principles matter. They do not always matter, and why and when they do matter is as much a function of numerous psychological, sociological, and political conditions as it is of the philosophical soundness of the principles themselves. Still, the principles providing the currency of legal, moral, and political argument are ones that their proponents think, sometimes with good reason, will make a difference. The need for a principle of equality comes precisely from the prevalence of inequality, just as the stricture to "Do Unto Others as You Would Have Them Do Unto You" derives its normative bite from the desirability to many people of doing unto others just those things they would *not* want done to them.[1]

So too with the principle of freedom of speech. It is only because restrictions on certain communications seem so pragmatically or consequentially desirable, and sometimes *are* so pragmatically or consequentially desirable, that a principle of free speech, operating as a side constraint on otherwise desirable controls, makes such a difference. If there were never any seemingly (to those with the power to restrict) good reasons to restrict commu-

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* Frank Stanton Professor of the First Amendment, John F. Kennedy School of Government, Harvard University. This is the written version of a paper presented at the Rothgerber Constitutional Law Conference at the University of Colorado School of Law. Earlier versions were presented at the University of Chicago Law School, the Woodrow Wilson School of Princeton University, the Joan Shorenstein Barone Center on the Press, Politics and Public Policy, and the Harvard Club of Indianapolis. I am grateful for the comments of Ed Baker and Richard Parker.

1. Consider why a specific rule of etiquette cautions me against putting my elbows on the table, but why no equally specific rule tells me not to chew tobacco during dinner (even though it would have been plausible to imagine just such a rule in different places or at different times). As constitutional provisions like the Third Amendment remind us, rules are reactions to perceptions about potential conduct, and so too with the use of middle-level principles in moral, legal, or political argument. And indeed, this point itself may be but the instantiation of a larger point that all assertions presuppose the empirical plausibility of their negations. *See* JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 141-46 (1969) ("no remark without remarkableness"). To observe that you are sober, for example, may suggest by the very remark a possibility of drunkenness greater than that suggested by saying nothing at all, just as to observe that you write your own articles might be taken as saying something about plagiarism, whether by you or by others.

nications, then there would be little need for a principle to prevent those restrictions.

But if the principle of free speech matters, *how* does it matter? One possible analogy is to the traditional picture of some of the rules of evidence. Under this picture, these rules of evidence are procedural rather than substantive, and therefore politically indiscriminate. And they are politically indiscriminate just because it is difficult to imagine, whether as a matter of purpose or a matter of effect, many of the rules of evidence (consider, for example, the best evidence rule) systematically favoring one ideology over another. And so follows one account of the principle of free speech, one that depicts that principle as essentially procedural and consequently politically indiscriminate.[2]

Another picture of the principle of free speech, however, would reject this neutral-sounding procedural account of the principle of free speech, and would instead understand the principle to be much more deeply ideological. Under this view, adoption of a free speech principle could be expected systematically over time to favor one ideology or political theory or outlook much more than it would favor others.[3] If this non-neutral account of the free speech principle is sound, however, then a further range of questions is presented, for if free speech has a political incidence, we musk ask just what that political incidence is. Is free speech the natural ally of, or one component of, or most comfortably resident in, political liberalism, in the modern American sense of that term, as has appeared to be the case for much of the twentieth century?[4] Or do recent events and contemporary political debate, aligning free speech arguments more with political conservatism (again in the modern American sense of that term) than has previously been the case, perhaps signal some aspect of the free speech principle that has only recently been recognized?

I.

My inquiry is prompted by a series of political developments dating roughly to the latter part of the 1970s.[5] I want to start by

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2. Which, of course, is not to say that it is indiscriminate in particular cases.

3. Nothing in this article turns on any difference between an ideology and a political theory, and I will use the terms interchangeably.

4. *See generally* David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 STAN. L. REV. 47 (1992).

5. Two possible doctrinal watersheds are First Nat'l Bank of Boston v. Bellotti, 435

describing, anecdotally, a number of these developments, and then, subject to all of the hazards of generalizing from anecdotal evidence, offer a possible empirical generalization, one which will provide the arena in which several competing explanations of that generalization can do battle.

Some of these anecdotes are Supreme Court cases, and one of the leading cases is *Austin v. Michigan Chamber of Commerce*,[6] in which Justice Marshall, joined by Justices Brennan, Stevens, Blackmun, Rehnquist, and White, upheld a restriction on corporate campaign expenditures over the First Amendment objections not only of the Michigan Chamber of Commerce, but also of Justices Scalia, Kennedy, and O'Connor. Justice Scalia's dissent, in particular, described the Michigan law and the majority opinion as "Orwellian,"[7] and in violation of the "absolute central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the 'fairness' of political debate."[8]

The themes and political alignments in *Austin* have been replicated in other cases dealing with the electoral process. They first surfaced with Senator James Buckley's First Amendment challenge to federal restrictions on campaign contributions and campaign expenditures,[9] and subsequently emerged in similar challenges in such cases as *California Medical Association v. Federal Election Commission*,[10] *Federal Election Commission v. National Conservative Political Action Committee*,[11] *Federal Election Commission v. National Right to Work Committee*,[12] and *Federal Election Commission v. Massachusetts Citizens For Life, Inc.*[13] A related case is of course *First National Bank of Boston v. Bellotti*,[14] in which the First National Bank of Boston successfully raised a First Amendment objection to Massachusetts's attempt to level the

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U.S. 765 (1978), and Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). The questions of whether this is so, and if so why, and if so whether causally or reflectively (in the sense of non-causally reflecting a phenomenon with another cause), will be addressed in the analysis to come.

6. 494 U.S. 652 (1990).

7. *Id.* at 679 (Scalia, J., dissenting).

8. *Id.* at 680.

9. Buckley v. Valeo, 424 U.S. 1 (1976). Senator Buckley is the brother of commentator and columnist William F. Buckley, Jr., a fact not irrelevant to the theme of this Article.

10. 453 U.S. 182 (1981).

11. 470 U.S. 480 (1985).

12. 459 U.S. 197 (1982).

13. 479 U.S. 238 (1986).

14. 435 U.S. 765 (1978).

political playing field by limiting corporate involvement in campaigns relating to political referenda. Thus in *First National Bank of Boston*, as in what appears to be a significant majority of the First Amendment cases on campaign spending and fund-raising, the First Amendment banner was carried by a person or institution of considerable wealth, challenging the constitutionality of a restriction seeking to minimize the advantages that that wealth would bring in the process of public political deliberation.

Parallel developments can also be seen in the area of commercial advertising. Although the early cases were attempts to limit the control of entrenched professional associations in law and pharmacy,[15] more recent claimants of First Amendment rights against the restrictive practices of government regulation have included the Central Hudson Gas and Electric Corporation,[16] Metromedia, Inc.,[17] owners of hotels,[18] organizers of "Tupperware parties" who wished to sell housewares to college students,[19] and various members of the securities industry.[20] And in the lower courts and the public arena, similar First Amendment arguments are commonly associated with the tobacco and alcohol industries' attempt to fend off encroaching restrictions or outright prohibitions on advertising their products.[21]

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15. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Bates v. State Bar of Ariz., 433 U.S. 350 (1977); In re Primus, 436 U.S. 412 (1978); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). *See also In re* R.M.J., 455 U.S. 191 (1982); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985). There is an intriguing difference between the lawyers' advertising cases and the pharmacists' advertising cases; in pharmacy, but not in law, the professional establishment seeking to restrict advertising was fighting against what it perceived as the vastly greater economic power of large pharmacy chains.

16. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

17. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

18. Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986).

19. Board of Trustees v. Fox, 492 U.S. 469 (1989).

20. *E.g.*, Lowe v. SEC, 472 U.S. 181 (1985). For a generally sympathetic account of the First Amendment claims of the securities industry, see Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223 (1990).

21. On alcohol advertising, *see, e.g.*, Queensgate Inv. Co. v. Liquor Control Comm'n, 433 N.E.2d 138 (Ohio), *appeal dismissed*, 459 U.S. 807 (1982); Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom.* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984). Various bills have been introduced in Congress on tobacco advertising—*e.g.*, H.R. 1493, 101st Cong., 1st Sess. (1989) (outright prohibition on tobacco advertising); H.R. 1250, 101st Cong., 1st Sess. (1989) (prohibition on tobacco advertising directed at children); H.R. 1544, 101st Cong., 1st Sess. (1989) (eliminating tax deductibility of expenses for tobacco advertising)—but none have been reported out of committee. *See also* the Canadian Tobacco Products Control Act, R.S.C., ch. 14 (4th Supp. 1988) (Can.), which took effect on January 1, 1989.

The debate over the fairness doctrine displays a similar political pattern. When the Federal Communications Commission, inspired by the deregulatory fervor sweeping Washington at the time, first proposed elimination of the Fairness Doctrine,[22] Congress, supported by organizations such as Common Cause, attempted to entrench the Fairness Doctrine in the United States Code. That attempt, however, produced a veto by President Ronald Reagan on June 19, the veto message relying exclusively on the First Amendment.[23] Similarly, President Reagan vetoed, again on First Amendment grounds, early attempts to restrict advertising directed at children,[24] and so too, initially, did his successor, President Bush. And indeed the efforts by the Cambridge, Massachusetts-based Action for Children's Television[25] to control by statute the content of television programming directed at children was a reaction to the FCC's reluctance to take such action under its own authority.[26]

Consider now a number of issues related to the question of hate speech. When administrators at Dartmouth College disciplined student reporters for the conservative newspaper *The Dartmouth Review* because of their face-to-face taunting of an African-American music professor named William Cole, nationally syndicated columnists such as William F. Buckley, Jr., and George Will, as well as numerous conservative political organizations, rallied to the defense of the disciplined students, arguing that the First Amendment and its penumbral principles were central to explaining why these students had been mistreated by their college administration.

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22. *See* Syracuse Peace Council, 2 F.C.C.R. 5043 (1987), *aff'd*, Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990); *In re* Inquiry into § 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligation of Broadcasting Licensees, 102 F.C.C.2d 145 (1985).

23. *See* Message to the Senate Returning Without Approval the Fairness in Broadcasting Bill, 1 PUB. PAPERS 690 (1987). The bill, S. 742, 100th Cong., 1st Sess. (1987), had been passed by a vote of 59 to 31 in the Senate, *see* 133 CONG. REC. 9114 (1987), and 302 to 102 in the House. Shortly after the presidential veto, the FCC administratively repealed the Fairness Doctrine, 52 Fed. Reg. 31,768 (1987), and Commission Chairman Dennis Patrick, a Reagan appointee, observed: "The First Amendment does not guarantee a fair press, only a free one."

24. In vetoing the Children's Television Act of 1988, H.R. 3966, 100th Cong., 2d Sess., on November 5, 1988, President Reagan said that the bill "cannot be reconciled with the freedom of expression secured by our Constitution." Memorandum of Disapproval on a Bill Concerning Children's Television, 11 PUB. PAPERS 1466 (1988-89).

25. The political inference to be drawn from the organization's home base is accurate.

26. *See* Action for Children's Television v. FCC, 756 F.2d 899, 900-01 (D.C. Cir. 1985); Washington Ass'n for Television and Children v. FCC, 712 F.2d 677, 679-80 (D.C. Cir. 1983).

And on the hate speech issue itself (as well as more general discussions on the topic of political correctness),[27] those commonly labeled as "conservative" have been among the most prominent articulators of the First Amendment objections to restrictions on racist and sexist speech, whether on campus or off. The Collegiate Speech Protection Act of 1991,[28] for example, introduced (but not pressed) in an attempt to limit the attempts by colleges and universities to restrict the supposed free speech rights of students, was the product of Rep. Henry Hyde, Republican from Illinois, and most prominently known for his successful attack on federal funding for abortions.[29] And consider in this connection the alignment of Justices in *R.A.V. v. City of St. Paul*,[30] in which Justices Blackmun and Stevens joined Justices White and O'Connor in arguing that Justice Scalia's majority opinion had swept too broadly and too aggressively in its attempt to protect First Amendment values against the evils of viewpoint discrimination.

Finally, consider the question of freedom of association and compelled speech. Although the issue of the unconstitutionality of compelled speech is historically associated with those pioneers of the modern First Amendment tradition, the Jehovah's Witnesses,[31] more recently the First Amendment claims against compelled speech have been raised by Right to Work and related anti-union organizations objecting to the expenditure of mandatory dues for political advocacy.[32]

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27. *See* Mark Tushnet, *Political Correctness, the Law, and the Academy*, 4 YALE J.L. & HUMAN. 127 (1992).

28. H.R. 1380, 102d Cong., 1st Sess. (1991), described and supported in Henry J. Hyde & George M. Fishman, *The Collegiate Speech Protection Act of 1991: A Response to the New Intolerance in the Academy*, 37 WAYNE L. REV. 1469 (1991).

29. *See* Harris v. McRae, 448 U.S. 297 (1980), upholding the "Hyde Amendment." Consistent with the theme of this Article, it is worth noting the political alignment in the current debates about various forms of picketing and obstruction at abortion clinics. Though most may believe that absolute physical obstruction does not implicate free speech principles, and most pro-choice liberals would still support the right of pro-life demonstrators to carry picket signs in the vicinity of abortion clinics, there are a range of activities that are more contested. Face-to-face but non-physical taunting of women entering abortion clinics, demonstrations at the residences of physicians who perform abortions (*see* Frisby v. Schultz, 487 U.S. 474 (1988)), and publication of the names of women who obtain abortions and the physicians who perform them, have seen a public discourse in which the pro-life demonstrators have been urging an expansive definition of free speech rights, while the pro-choice forces have been urging a much narrower definition.

30. 112 S. Ct. 2538 (1992).

31. *E.g.*, Wooley v. Maynard, 430 U.S. 705 (1977); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

32. The leading case is Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), and

Although these examples all represent instances—judicial, administrative, legislative, or executive—in which individuals or groups commonly thought of as "conservative" took up the First Amendment cudgels against regulatory forces supported by individuals or groups commonly thought to be "liberal," I want to offer an empirical generalization about these events that is as modest as possible. First, I do not maintain that so-called "conservatives" have been alone in pressing First Amendment claims in recent years. Senator Buckley was joined in *Buckley v. Valeo* not only by the Mississippi Republican Party and the Conservative Party of the State of New York, but also by Eugene McCarthy; the Michigan Chamber of Commerce numbered Greenpeace and the Fund for a Feminist Majority among its allies in *Austin*; and a leading co-sponsor of Representative Hyde's bill was Representative Barney Frank, whose politics normally travel a different route from Hyde's. Second, I do not claim that there is anything untoward or suspicious about alliances of this variety. Politics is substantially about alliances, and I no more fault Representative Frank for joining Representative Hyde in a cause that he thinks worthy[33] than I fault Senator Kennedy for joining then Vice-President Quayle in creating and securing passage of the Job Training Partnership Act of 1988. Third, I do not make greater claims for the evidence provided by this collection of anecdotes than the reader's own experiences might confirm. That is, I have listed what seem to me to be a large number of anecdotes providing some loose support for the claim that there appears to be a shift in the use of free speech rhetoric and free speech litigation towards individuals and groups thought of as "conservative" in the current American political climate. Although I plan more careful empirical study of this hypothesis,[34] at the moment I list numerous anecdotes

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more recent cases include Keller v. State Bar of Cal., 496 U.S. 1 (1990), and Ellis v. Brotherhood of Ry., Airline & Steamship Clerks, 466 U.S. 435 (1984). Related claims have been made against generally left-of-center student government organizations seeking to use mandatory student fees for activities or advocacy to which some students object. *See, e.g.*, Carroll v. Blinken, 957 F.2d 991 (2d Cir.), *cert. denied*, 113 S. Ct. 300 (1992); Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986); and, most recently, Smith v. Regents of Univ. of Cal., 61 U.S.L.W. 2511 (Cal. Feb. 3, 1993).

33. One can of course criticize Frank for taking the wrong position, even if he thinks it is the correct one. I only claim that the fact of entering into the alliance is not an independent ground for criticism.

34. It should be possible to study either state and federal court filings over some period of time, or at least decisions in lower state and federal courts, to determine whether the mix of plaintiffs raising primarily free speech claims is politically different in year t + x than it was in year t.

only to suggest the plausibility of a hypothesis that might be wrong, but that readers may still believe likely enough to be true to justify thinking about a possible explanation. Relatedly, and finally, even if the hypothesis is correct and there has indeed been some shift in the incidence of free speech argumentation away from and to the right of political forces commonly thought of as liberal in the contemporary United States, this does not mean that there has been anything like a large scale displacement. Gregory Johnson was no conservative,[35] nor were the free speech claimants in *Rust v. Sullivan*,[36] and nor are many who press free speech claims today. So my claim is only that there seems to have been somewhat of a rightward shift in the political center of gravity of free speech argumentation, a claim entirely consistent with the existence of large numbers of free speech claimants lying to the political left of the political center of gravity as now constituted.[37]

II.

So although my empirical claim is neither overly robust nor established to a high degree of confidence, I think the claim plausible enough to assume for current purposes the soundness of the proposition that there has been in the last fifteen years some noticeable rightward movement in the political center of gravity of free speech argumentation in the United States. With this assumption in hand, I now want to explore some possible explanations for that phenomenon.

In order to do this, it is necessary to introduce some cumbersome—but I believe nevertheless useful—theoretical machinery. Let me start by distinguishing two kinds of legal (or political) principles (or rules). One I call *indifferent*, and here the model is something like the best evidence rule, or the rule changing the

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35. Texas v. Johnson, 491 U.S. 397 (1989).

36. 111 S. Ct. 1759 (1991).

37. I am of course being quite loose about my use of terms like "left," "right," "liberal," and "conservative." Still, we should not let either political debate (with liberals claiming to be the "real" conservatives, and conservatives claiming to be the "real" liberals, and "radical" the term of choice for everyone who vigorously disagrees with you), serious political theorizing, linguistic ambiguity, or often complex political alignments blind us to the way in which the array of people who actively supported Ronald Reagan and George Bush differed in broad profile from the array of people who actively supported Michael Dukakis and Bill Clinton. My claim, therefore, is that the mix of pro-free speech proponents are somewhat less dominated by Dukakis-Clinton supporters than was the case in the 1950s, 1960s, and 1970s.

mandatory size of pleadings in federal courts from 8.5 x 14 inches to 8.5 by 11 inches. Rules like these are commonly thought to have little political incidence towards the left or the right, or towards plaintiffs or defendants, or towards one moral or economic position rather than another.[38] In contrast to indifferent principles, however, there are principles I will call *tilted*, meaning that, perhaps like the takings clause of the Fifth Amendment, or like a rule including sexual orientation within the category of suspect classifications under the equal protection clause of the Fourteenth Amendment, these rules have some substantive political or ideological incidence (whether by design, by intrinsic theoretical affinity, or by effect—or by some combination of these) in one direction or another.[39]

This distinction between indifferent and tilted principles might be attacked by maintaining that I have marked a difference that does not exist in the world, and this attack might take two forms. First, it could be claimed that all principles are tilted in my sense. Indeed, one of the most important contributions of feminist and critical jurisprudence has been to demonstrate that rules, principles, methods, or structures previously thought to be indifferent are actually tilted.[40] Some of the most important modern civil procedure scholarship, for example, has sought to demonstrate the tilt in what many people had previously thought to be ideologically indifferent procedural rules.[41] Moreover, the claim of unacknowledged tilt can be made even in the face of disagreement about the direction of the tilt. Duncan Kennedy has claimed, for example, that crisp and mechanical rules, as devices of legal form, have a tilt towards the individualistic and away from the altruistic. He thus argues against those (perhaps including me) who would see crisp rules and looser standards as ideologically indifferent tools roughly equally available to all political positions, depending on the identity of those in control and of those who might be the

38. The clearest case is the pure coordination rule, such as that mandating driving on the right (or on the left).

39. Although the geometric metaphors get trickier, it is quite possible that some principles will be tilted on one axis but not on another. For now, it is sufficient that there be tilted and indifferent principles relative to some factor, such as, for example, political conservatism and political liberalism.

40. *See* Ann Scales, *Feminist Legal Method: Not So Scary*, 2 UCLA WOMEN'S L.J. 1, 10-13 (1992).

41. *See, e.g.*, Robert Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1985); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837 (1984).

subject of that control.[42] But even if it is a mistake to see ruleness as politically indifferent, Kennedy might still not be right. That is, it might be argued that crisp and mechanical rules lessen the litigation advantage of those with greater resources, and thus have a tilt towards the egalitarian. In that case, Kennedy would be right to have identified a tilt in legal structures previously thought indifferent, but wrong in his analysis of the direction of that tilt.

But although some may attack my distinction between indifferent and tilted principles on the grounds that all rules and principles are tilted, others may claim just the opposite, maintaining, along with the traditional picture of the best evidence rule and the rule governing the size of the paper on which pleadings are filed, that all rules and principles are tools, waiting, like hammers and wrenches, to be used indiscriminately in the service of whatever political ideologies can find and deploy them. This challenge to the distinction, therefore, does not claim that all principles are tilted, but rather that none are. Indeed, this characterization, admittedly somewhat of a caricature, resembles the claim that Professor Balkin makes about the free speech principle itself.[43] Although he precedes me in identifying a rightward "ideological drift" in First Amendment argumentation in recent years, he argues that this should be seen as supporting the Legal Realist claim about the indiscriminate availability of legal doctrines to competing sides in a wide range of legal controversies.[44] To Balkin,

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42. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

43. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 Duke L.J. 375. *See also* J.M. Balkin, *Ideological Drift and the Struggle Over Meaning in Legal and Political Theory*, 25 CONN. L. REV. (forthcoming 1993).

44. I use "indiscriminate" here not to mean "willy-nilly," but only in opposition to a claim about the existence of a quite deep and relatively fixed political structure. Thus, just as those of us who often try to emphasize the comparative stickiness and acontextuality of legal and non-legal forms and language deny neither the importance of context nor the possibility of change in the contingent structure of our concepts, so too do Balkin and others who emphasize the contingency of legal forms not claim that our concepts can flip on a moment's notice. Still, there is a marked difference in emphasis, and there are plainly differences about the deepness of existing structures and the consequent difficulty of dramatic change. It is just this difference that attracts my attention here. Thus, consider the following: "Words in context, like the context of a summons, are not malleable putty that can mean anything we desire. Rather, they are brittle, like a pane of glass presenting a single face to the world, but with tiny cracks of alternative, even opposing meanings, that can shatter and break up the dominant understanding." Charles M. Yablon, *Forms*, *in* DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 258 (Drucilla Cornell et al. eds., 1992). Yablon's language is appealing, and his metaphor suggestive, but just as not all substances

therefore, the current rightward tilt of the free speech principle is nothing more than short- or intermediate-term evidence of the fact that a different side has picked up a particular hammer, or that the latent possibility that any rule might better serve an opposing interest has acutalized.

Although I take the "they are all tilted" position to be largely correct, but somewhat overstated (many of the rules of evidence and civil procedure do still appear to me to be indifferent in my sense),[45] I view the Realist-sounding "none are tilted" response as verging on incoherence unless treated with great care. For if all principles are but politically indifferent instruments, then what is it that they are politically indifferent instruments of? Either middle-sized political principles like the principle of free speech are instrumental to more basic political positions, in which case the empirical question of skewed incidence must be taken more seriously than the Realist argument would admit,[46] or political positions themselves are indifferent, waiting to be selected depending upon changing circumstances. But unless this position is reduced to an implausible nihilism, there must be something that determines the choice of political positions. In other words, there must be some essentially primary positions or desires that political actors see as driving all of their other (and thus instrumental) political positions. Perhaps these primary positions are hedonistic, in the sense that people select the political positions that make things best for them as they see it. Or perhaps the primaries are economic, such that what we think of as foundational political positions are in fact merely individual or group-based economic forces and preferences. Or perhaps at the most foundational level what matters is not money but power, such that the bedrock primary values, to which political positions are instrumental, are aspects of power relations among people. Or perhaps the primaries are ideological

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are as fragile as glass, neither would some of us want to emphasize the way in which for many concepts and definitions the appropriate material metaphor might be a steel casting rather than a pane of glass. True, the steel could have been used to make a locomotive rather than a bridge, but once the bridge is made it is substantially more difficult to turn it into a locomotive than it would have been to make the locomotive in the first instance.

45. Moreover, the putative soundness of the "they are all tilted" position does not undercut my argument here about the free speech principle, although it would undercut the view that freedom of speech is, at its core, a non-political and non-ideological procedural device of governmental organization.

46. That middle-sized principles are instrumental to more basic principles does not entail that all middle-sized principles are tilted. It could be that some of those principles turned out, upon empirical or philosophical investigation, to be indifferent. And in the context of freedom of speech, that is precisely what I seek to explore here.

in some broad sense of that term, such that people have some general normative worldview and then seek the more particular positions and principles that they believe will support that worldview. But my point is not dependent on whether any of these reductionist accounts are correct. My rejection of the strong version of the Realist argument depends only on there being something deeper than whim that determines what people want, and what they want to happen. And once there is something, or, more plausibly, some things, that are deeper than whim, then we can sensibly ask whether a principle of free speech is likely to have more affinity with some deeper positions than others. This is the question whether the principle of free speech is tilted rather than indifferent, and, if so, in which direction is it tilted?

III.

My interest in the tilt of political principles, and in the tilt of the free speech principle in particular, is in this article more theoretical than empirical. I freely admit that with the tools of history or political science, one could investigate with serious empirical care, and over a wider set of instances or a longer run of history, the claim that I support only anecdotally.[47] And this might in turn illuminate a theoretical account of why free speech has been at various times and places more aligned with one political position than another.

But my concern here is more directly theoretical. I am interested in addressing whether the free speech principle, as a question of political philosophy, has a closer and more natural theoretical affinity with a range of views commonly labelled as "conservative" than is often supposed, and conversely whether the free speech principle is in more tension with a range of views commonly called "liberal" than is often supposed. I focus on these theoretical questions for two reasons. The first is simply explanatory, in that I seek to understand and to explain the political phenomenon I described in the previous section. But the value of explanation often lies in its capacity to predict, and thus the explanation I offer is one that might help us to predict the future political incidence of marginal increases or decreases in the breadth or strength of the principle of free speech. In this sense my explan-

47. A particularly good example of historical analysis used to determine which political forces are making which arguments, and then to see what that tells us about the arguments themselves, is in DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY (1989).

atory task has some normative bite, insofar as knowing the likely political incidence of a principle in the intermediate or long term might be relevant to an individual or group trying to determine whether to advocate that principle now. And to the extent that principles that are advantageous to some individuals or groups in the short term might be disadvantageous to them in the longer term, awareness of that effect might influence the size of the principles they advocate, or about their comparative willingness to rely, whether in court or without, on one principle rather than another.[48]

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I have been insisting for some time that speech is not a self-regarding act. People ordinarily speak or write not only as a matter of self-expression or self-indulgence, but also as a way of trying to influence the beliefs and therefore the behavior of others.[49] This is most obvious when a speaker's utterances are prescriptive. In the typical case, prescriptive utterances are uttered just so that the target of those utterances, otherwise disinclined to do something the speaker favors, will as a result of the utterance (or some prudential reason supporting the utterance) take some action that the speaker wants taken. And even when the utterances are more factual than normative, more descriptive than prescriptive, a common motivation for providing information is to influence the beliefs and consequently the actions of another.

The foregoing is crude and egregiously over-simplified, but nevertheless sufficient to support the proposition that many of the activities protected by a principle of free speech are activities that are intended by the actor to get someone else to behave in ways that are advantageous to the actor.[50] And there is nothing even

48. It is, for example, interesting to explore the judgments that have led the Southern Poverty Law Center to decide to dedicate significant financial and human resources to attacking the written and printed utterances of the Ku Klux Klan and pressing litigation, such as that brought against Tom Metzger and the White Aryan Resistance in Oregon, seeking money damages as a result of utterances that some would argue are protected under Brandenburg v. Ohio, 395 U.S. 444 (1969).

49. I do not deal with the possibility that getting others to believe as you do is a form of self-expression or self-realization, but the possibility should not be dismissed out of hand. People wear allegiances as well as clothes and hair styles, and it may be that the identity and size of the class of adherents is a part of their self-identification. For a related suggestion on the way in which our dealings with (and not only control over) others is partly self-constitutive, see Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959 (1992).

50. I do not mean this in a hedonistic sense, and the sentence in the text is entirely consistent with my wanting you to contribute more to OXFAM than you now do.

slightly pernicious suggested by this account. For my purposes here, we can assume that persuasion occurs only with the entirely voluntary cooperation of the recipient of the communication. In other words, the attitudinal or behavioral changes described in the previous paragraph can be assumed (although in other contexts I would want to challenge this assumption[51]) to occur only as a result of the voluntary cooperation between the speaker and the hearer. Nevertheless, the ordinary assumption of speaking is that this voluntary change of attitude or behavior on the part of the hearer would not occur without some prompting by the speaker (or would be less likely to occur without some prompting), and that is a large part of why people speak in the first instance.

"There is no such thing as a free speech."[52] It might once have been the case that talk was cheap, but not anymore. Whether it be the increasingly high costs of advertising, or the accelerating costs of gaining access to the media, or the costs stemming from increasingly sophisticated communications technology, or the costs of the more sophisticated techniques of persuasion, or the costs necessary to make one's voice heard over a logarithmically increasing number of voices, it is more than ever the case that the ability of a speaker to succeed in her goals of behavioral or attitudinal change are at least partly a function of how much money she has to spend.[53] When it costs $100,000, most of it presumably spent on advertising, signs, buttons, and other forms of communication, to run for the state senate in Arkansas,[54] and typically millions to run for congressional or statewide office, we can understand how little hyperbole there is in the claim that it is possible to "buy an election." I have no reason to challenge Nike's assumption that they are able to sell more basketball shoes with Michael Jordan's

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51. *See* Frederick Schauer, *The Phenomenology of Speech and Harm*, 103 ETHICS (forthcoming 1993).

52. Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 GEO. L.J. 257, 258 (1985). If Neisser's line is not the best I've ever seen in a law review (and it might be), it certainly is the best I've ever seen in the free speech literature.

53. For recent documentation and analyses of the proposition that the ability to communicate, and thus the ability successfully to compete in the marketplace of ideas, is more dependent on economic power than has been commonly assumed, see Balkin, *Some Realism*, *supra* note 43; Stephen Carter, *Technology, Democracy, and the Manipulation of Consent*, 93 YALE L.J. 581 (1984) (reviewing MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERMENT EXPRESSION IN AMERICA (1983)); Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505 (1982); Jonathan Weinberg, Broadcasting and Speech (unpublished manuscript) (on file with the author).

54. *The Modern Day King Makers*, ARK. BUS., Oct. 12, 1992, at 1.

assistance than without, and even less reason to suspect that Jordan is donating his services to Nike as an act of altruism. And so in numerous areas it is increasingly apparent that the ability to speak, and therefore to persuade the hearer to act as the speaker wishes, is not insignificantly a function of the resources available to the speaker.

Nor is this only a matter of money. Money is certainly one determinant of why one person's speech is more effective than another's, but it strikes me as excessively reductionist to assume that money is the only content-independent factor influencing the acceptance or non-acceptance of propositions offered in public deliberation. In some cases it may be persuasive abilities, whether written or oral, in others it may be access to the facts that would support an argument, and often it is that shifting mix of reputation, demeanor, style, race, gender, class, ethnicity, institutional affiliation, physical appearance, and so on that determines who gets heard and who does not, and consequently whose speech has the greatest potential for producing attitudinal and behavioral change and whose has the least.

IV.

One conclusion that can be drawn from the foregoing is that the marketplace of ideas is less metaphor than description, and that in the marketplace of ideas, like in most other markets, one can compete much more successfully if one has greater resources. It should come as no surprise that Philip Morris and the Tobacco Institute are confident of their ability to compete successfully against the American Cancer Society in a competition unregulated by the state. This confidence surely does not stem from Philip Morris's subscribing to the classic Enlightenment belief that people have an intrinsic ability to separate truth from falsity if only both are made available to them. Rather, it seems more likely that Philip Morris believes that resources have more explanatory power than truth in determining which propositions a population will accept and which it will reject.

So too in the context of elections. The arguments for a "level playing field" do not come from those occupying the high side of a tilted field, and thus we are not surprised that it is the National Conservative Political Action Committee or Senator Buckley who are at the forefront of opposing restrictions on campaign expenditures. Similarly, the political alignment with respect to issues like advertising directed at children and the fairness doctrine reflects

the fact that those who have the comparative advantages in resources, whether financial or otherwise, are likely to be least sympathetic to governmental intervention, while conversely those with the greatest disadvantage in resources are most likely to favor governmental attempts at resource equalization, whether in the marketplace of ideas or elsewhere. As recent attacks on the public-private distinction in the context of freedom of speech have reminded us,[55] the non-involvement of government[56] does not leave an open and unregulated marketplace, but rather a marketplace regulated by all of the economic, social, cultural, and psychological forces that operate even when the state does not. And as long as we can imagine that there are winners and losers in economic, social, cultural, and psychological wars, then it should come as no surprise that those who would expect to win in these wars would be quite comfortable with keeping government out, while those who would expect to lose in these wars might expect that intervention would do them more good than harm.

Although I have referred several times to the marketplace of ideas, nothing I say is based upon a narrow conception of the marketplace of ideas as a vehicle for locating the truth, nor on the marketplace of ideas as a foundation for a principle of free speech for any reason. And this is so because many of the same issues about the nature of a governmentally-unregulated communicative environment arise under different conceptions of what is valuable about freedom of speech. A focus on public deliberation or public discourse, for example, whether in the political arena or elsewhere,[57] must also confront the argument that the occasions for discourse or deliberation are likely to reflect existing distributions of power and resources, and thus give deliberative advantages

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55. *See, e.g.*, CATHARINE MACKINNON, ONLY WORDS (forthcoming 1993); CASS R. SUNSTEIN, FREE SPEECH NOW (forthcoming 1993); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291 (1989).

56. The more thorough attacks on the public-private distinction properly note that even so-called private activity takes place through numerous structures that are themselves products of government action, *see, e.g.*, SUNSTEIN, *supra* note 55; *see also* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984). Nevertheless, there remains a noteworthy difference between direct governmental involvement or regulation at some particular time, and its absence at that time.

57. *See, e.g.*, Calvin Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103 (1992); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601 (1990).

to those also advantaged in the non-deliberative aspects of their lives.[58] Moreover, even a focus on the disadvantages of governmental intervention rather than on the marketplace of ideas as a positive facilitator of truth-seeking has embedded within it a claim about the comparative disadvantage of governmental intervention, a claim necessarily incorporating a claim about the comparative advantage of the unregulated marketplace. Finally, nothing that I say depends on the view that what is good about a marketplace of ideas or about deliberation is that it produces or identifies truth. My claim is simply that insofar as a forum of communication is left unregulated, its output, whether a view about truth, or about soundness, or about wise as opposed to unwise policy, is likely to be at least partially determined by the dominance within the forum of those with greatest access to economic, social, political, psychological, and cultural resources.

One further conclusion that can be drawn from this is that there may be a closer affinity between free speech libertarianism and economic libertarianism or libertarianism *simpliciter*[59] than has traditionally been supposed. Once we recognize that governmental non-intervention does not leave a vacuum with no power, no resources, and no advantages, but rather some existing distribution of power, resources, and advantages, then we understand why a contemporary liberal concern with the less powerful and with equalization of opportunity have caused liberalism and libertarianism to diverge in the post-New Deal era. But once we recognize that disparate distribution of resources brings advantages in the communicative process not dissimilar to the advantages of some in the economic marketplace, the burden of persuasion shifts. In other words, it appears as if the easiest assumption would be the

58. The claim here is that deliberation, as a process of self-government, may give greater voice in governing to those who have more or better voices in the process of public discourse, and that those may in turn be individuals or institutions who have greater access to economic or cultural resources. At its extreme, this may be reduced to an argument against democracy itself (which is not *eo ipso* a refutation of the claim), but it may be that there is something levelling and equalizing about the process of *voting*, with its idealistic one person-one vote character, that can be either fostered or weakened by the procedures surrounding the casting of a vote. My claim here is only that I can understand why those with greater access to communicative resources would prefer an opportunity to persuade prior to the act of voting, and that those who might expect to be out-talked would have reason to minimize the opportunities for pre-voting influence. Of course at this point we can wonder where the preferences expressed in voting would come from in the latter case, and much of the same debate may be replayed at one remove.

59. *See* David F. McGowan & Ragesh K. Tangri, Comment, *A Libertarian Critique of University Restrictions of Offensive Free Speech*, 79 CALIF. L. REV. 825, 888 (1991).

assumption of classical liberalism, that there is no great discontinuity between a theory of governmental disempowerment with respect to economic markets and a theory of governmental disempowerment with respect to the marketplace of ideas. If that assumption is wrong, it must be so for reasons other than the implausible reasons that speech is powerless, or that advantages in resources do not make a difference in persuasive capacity. But what might these legitimate reasons be?

V.

One argument for communication being different from other forms of social and economic activity might be inherited from the Enlightenment. According to this argument, better ideas have some natural advantage in the deliberative process. So although dramatic cases of market failure might have to be remedied,[60] the so-remedied process would be one in which sounder ideas and better arguments would have a sufficient natural advantage such that the necessity of equalizing intervention in the world of ideas would be less than in the world of goods and services.[61] Thus, even if we assume that any governmental intervention is susceptible to abuse, and even if we assume that the possibility of abuse by government is more worrisome than abuse by private forces,[62] it might still be the case that the natural advantage of better ideas was such that risks we would have to run with respect to goods and services are not risks that would have to be run with respect to ideas and arguments.

The question, then, is whether the assumptions of the Enlightenment are sound, particularly the Enlightenment's assumptions about the natural advantages, even if not absolute advantages, of

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60. *See* the discussion of the market failure idea in C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989).

61. If, however, certain types of information have some natural disadvantage in the marketplace, then equalizing principles might be necessary just to compensate for the peculiar operation of the economics of information. *See* Ronald A. Cass, *Commercial Speech, Constitutionalism, Collective Choice*, 56 U. CIN. L. REV. 1317 (1988); Daniel A. Farber, Commentary, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554 (1991); Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1 (1986).

62. The analysis of the effect of distrust on the design of legal decisionmaking institutions is more complex than ordinarily understood. *See* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991). For a less sophisticated version of similar concerns, *see* Frederick Schauer, *The Calculus of Distrust*, 77 VA. L. REV. 653 (1991).

better ideas and true factual propositions. There is obviously not the space here to explore the possible answers to that question in detail, but it may be worth noting that there is an enormous amount of literature, and even entire disciplines and sub-disciplines, devoted to just that question. One way of understanding the Enlightenment is to see it as accepting the view that the truth or falsity (or soundness or unsoundness) of an idea has more explanatory power in determining which ideas will be accepted by a population and which rejected than do factors such as the rhetorical force with which the idea is propounded, the technological amplification and embellishment (is the medium the message?) the idea receives, and the psychological presuppositions about the speaker and the idea with which the hearer begins. And if it is true that the soundness of an idea does more work than resource allocation (whether of economic or of cultural and psychological resources) in explaining which ideas will be accepted and which rejected, then there might be good reason to believe that public deliberation needs less governmental intervention (and thus less need to run the risks of governmental intervention) than do the processes of choosing goods, services, and contracts of employment. But if, conversely, the assumptions of the Enlightenment are somewhere between fragile and false, and there is reason to believe that the soundness of an idea ranks low in the hierarchy of determinants for which ideas are likely to be accepted and which rejected, then one argument for distinguishing the marketplace of ideas from the marketplace *simpliciter* cannot be sustained.

But suppose, following *Carolene Products*,[63] that we see freedom of speech not as a search for good or sound or true ideas, but rather as a component of the political process? Does this make a difference, and lead us (even if along with Madison Avenue we reject the epistemic presuppositions of the Enlightenment) to believe that the distortions in the unregulated communicative process are less problematic than the distortions likely to accompany governmental regulation? If anything, it would seem to be just the opposite. While it may be that an equally participatory deliberative process is a useful ideal in thinking about the optimal design of political institutions, our inquiry here is different. We are concerned with the non-ideal, and with the expected political incidence of non-interference with the deliberative process as it now exists.

63. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (distinguishing the degree of scrutiny for economic regulation from that for, *inter alia*, "legislation which restricts [the] political processes.").

And if that is our concern, then it is difficult to see why imbalances of communicative ability would be any less in degree or consequence than imbalances in the economic segments of society. As a result, it would seem that imbalances with consequences for political deliberation would be even more of a concern than other communicative imbalances, and that may be why speech-restricting proposals for electoral reform have been so common. That individuals and groups with general sympathy for governmental non-involvement in the communicative process have been more sympathetic with governmental involvement when political reporting and political advertising are at issue[64] may say something about what people believe when they see the stakes at their highest. In other words, the high stakes of political communication, high in the sense that winning an election enables one to win a lot of other things as well, may much more than what we say about Robert Mapplethorpe's photographs reveal a deeper set of beliefs about communication, its effects, and its regulation.

There remains, however, the argument from capture. If we suspect that extant imbalances of power on the basis of wealth, class, race, gender, and so on are replicated both in the marketplace of ideas and in the fora of political deliberation, then is there any reason to believe that those who are advantaged under circumstances of governmental non-involvement will be less advantaged by governmental involvement? Cannot those who have power in the marketplace of ideas use that same power to steer governmental action in the directions that would be most favorable to them?

The argument from capture seems intuitively plausible, but still there is no reason to believe that it is any less plausible for markets of goods and services than for markets of communication. The argument for post-New Deal interventionism, therefore, is not an argument that a general strategy of approving intervention will produce more good interventions than bad. To the extent that the argument from capture is true, then it is probably the case that there will be, from the perspective of those seeking to reverse rather than entrench imbalances of power, more bad interventions than good. But even if this is true, the number of good interventions may still be sufficient to produce more good results than would have been the case with non-intervention.[65] At any rate,

64. Consider, for example, the American Civil Liberties Union's support for the fairness doctrine.

65. Consider the ambiguous history of private ownership of guns. There is a way in

there is no reason to believe that this argument distinguishes communicative from non-communicative processes. The argument from capture may be sound, but if so, it is as much of a caution within the economic sphere as without.

VI.

My point is therefore a simple one. There seems little reason to believe that the kinds of political forces that have led those with numerous social resources to espouse economic libertarianism would lead those same people to resist communicative libertarianism. On the contrary, the expectation of more victories than losses in the unregulated marketplace of goods and services is likely to be also, and for many of the same groups, the expectation of more victories than losses in the unregulated marketplace of ideas. Conversely, the expectation of more losses than wins under a regime of economic laissez faire, perhaps a hallmark of post-New Deal liberalism, ought also in many areas to be an expectation of more losses than wins in a laissez faire deliberative process. And thus although I do not want to venture grand or deep speculations about some supposed "true" liberalism or "true" conservatism, I do want to venture the less ambitious claim that the affinity between economic libertarians, most of whom vote Republican, and the principle of free speech may be less startling than it has recently seemed; and that the gap between economic non-libertarians, most of whom do not vote Republican, and the principle of free speech may turn out to be more philosophically compatible than popular discourse would have it.

In nothing I have said have I attempted to add even the slightest nuance to my description of the free speech principle, but my crudeness has been intentional. Although any law student can subdivide free speech doctrine with impressive complexity and subtlety, these subtleties drop out in much of public debate. They may not all drop out, and there might be reason to hope that with greater public sophistication fewer and fewer will drop out. Still, great public sophistication about reconciliations of seemingly conflicting free speech positions is a long way off. In other words,

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which private ownership might equalize imbalances of physical strength, but would we expect that giving everyone a gun would produce more or less equality? If all landlords and all tenants had guns, what, if anything, would this do to the relationship between landlords and tenants? I am not sure of the answer to this question, but I do think that trying to answer it may be more illuminating for free speech theory than has traditionally been supposed.

although it is quite possible to draw theoretically coherent lines that would distinguish corporate speech from individual speech,[66] or with Alexander Meiklejohn,[67] the American Civil Liberties Union,[68] and the Supreme Court of the United States[69] to draw lines distinguishing radio and television from non-broadcast speech, or to draw lines between many of the cases that my crude model has combined together, it is an empirical question whether the distinction will be grasped (in the sense of making it available for subsequent correct use) by a significant proportion of the public. And if there is good reason to believe that theoretically coherent subdivisions of the broad principle "freedom of speech" might not be as easily grasped either by the public or by the political world than they might be by the legal doctrinal world, then any political force or group that seeks to make a political argument *from* free speech must take into account that one of the things that it may be doing is, however marginally, persuading the populace that it should accept as a virtue a largely undifferentiated free speech principle.[70] Conversely, as numerous anti-censorship advocates are so often at pains to remind left-wing proponents of this restriction or that, any political force or group that seeks to argue against the free speech principle must take into account that it may, again however marginally or however slightly, be attempting to encourage the populace to accept an undifferentiated free speech principle in a somewhat weaker or narrower form.

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66. *See, e.g.*, C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976).

67. Meiklejohn believed that radio was not entitled to First Amendment protection because "it is not engaged in the task of enlarging and enriching communication. It is engaged in making money." ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 87 (1965).

68. In its support for the fairness doctrine.

69. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

70. Again there are simplifying assumptions at work here. At times, the actions of courts influence or even constitute the understanding of certain principles, *see* Gordon, *supra* note 56, but my inclination is to believe that this phenomenon is less frequent than the legal academy supposes. *See* GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANOE? (1991). Although I do not doubt that the public understanding of what is encompassed by "free speech" has been influenced (more likely by seeing what the Supreme Court has permitted than by learning about the decisions themselves) by Supreme Court decisions about, for example, obscenity, flag-desecration, and racist speech, I would guess that those calculating whether to advocate a theoretically justifiable subset of a free speech principle would be more inclined to overestimate than to underestimate the likelihood that that principle's subtlety will be widely grasped (of course, this inclination, if taken further, would suggest that it makes little difference one way or another what we advocate).

With the issue so framed, we can then ask a slightly different question. From the perspective of a group possessing (and likely to continue possessing) considerable social power, would a relatively undifferentiated but strong free speech principle likely benefit them more than hurt them in the long run? Part of what I have been suggesting here is that the answer to this question may very well be in the affirmative, providing some explanation for the political phenomenon I am discussing. Similarly, if, from the perspective of a group possessing (and likely to continue possessing) little social power, a laissez faire principle of free speech would likely harm them more than help them in the long term, then it should be no surprise that they would be reluctant to tie themselves too closely to that principle.

Implicit in this approach is a view I have defended elsewhere, that the principle of free speech can only be subdivided so far before it dissolves, not empirically but conceptually.[71] Implicit in *any* free speech argument, even one more subtle than the caricature with which I have been operating, is the view that a proponent of free speech, as free speech, urges protection of a category of communicative acts somewhat larger than that which the proponent believes, as a matter of idea theory, is worthy of protection. The question then is whether proponents who are politically or socially situated in some way or another would have good reason to hope for this broader protection. Part of what I have tried to argue is that, the experience prior to the middle of the 1970s notwithstanding, there may be reason to believe that those who are politically or socially disadvantaged would urge this broader protection with caution, and that those who are politically or socially advantaged would welcome this greater protection with some enthusiasm. Perhaps the principal question remaining, and one to which there may be no easy answer, is only why this took so long to occur?

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71. Frederick Schauer, *The Second Best First Amendment*, 31 WM. & MARY L. REV. 1 (1989).

College Sports: Compliance, Culture and COVID

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Roscoe Howard is the managing partner of the Washington, D.C., office. He focuses on white collar criminal matters, criminal and civil litigation, corporate compliance and ethics. Having tried more than 100 cases as a federal prosecutor, Roscoe delivers proven skill in handling investigations initiated by local, state, federal and international law enforcement agencies to include the DOJ, SEC, DEA and FBI.

Roscoe represents corporate and individual clients at virtually every stage of the criminal defense process, handling parallel civil and administrative litigation, grand jury subpoenas, multi-jurisdictional matters, congressional inquiries, and cases from onset through settlement, trial and appeal. He knows, from his experience as a federal prosecutor, the serious consequences that can result from criminal and regulatory investigations, and works diligently to mitigate and resolve claims at every phase of development.

Roscoe vigorously defends clients in matters involving bet-the-company sanctions and where personal freedom is on the line. A veteran advocate and trusted adviser, Roscoe brings seasoned experience to companies facing multiple investigations, whether criminal, regulatory, congressional, internal, or by other parties or commissions. His guidance can direct productive decision-making and facilitate resolution. Roscoe can provide counsel on suspension or debarment actions following indictment or conviction and can guide clients through international investigations.

When businesses and executives need help, Roscoe is personally committed to helping clients obtain the desired result either before a charge is brought or at trial. Civil and polite, yet aggressive, formidable and effective, Roscoe knows how to negotiate with government agencies and advocate both in and out of the courtroom. His extensive experience at trial on both sides of the aisle when it comes to white collar crime is enhanced by his honed people skills. A direct communicator able to grasp the big picture, Roscoe remains dedicated to assessing his client's position accurately in order to mount the right defense.

Roscoe served as the U.S. Attorney for the District of Columbia from

2001-2004, by appointment of President George W. Bush. During his appointment, he served on the Attorney General's Advisory Committee. Roscoe was appointed as U.S. Attorney from a tenured, full professorship at the University of Kansas School of Law, where he taught from 1994 to 2001. He has twice served as associate independent counsel, and was an Assistant U.S. Attorney in the District of Columbia and in the Eastern District of Virginia in both Richmond and Alexandria.

As a federal prosecutor, Roscoe handled criminal cases involving narcotics trafficking, homicides, fraud and public corruption, as well as dozens of trials and numerous grand jury investigations. He has also argued appeals before the U.S. Court of Appeals for the Fourth Circuit and served as the Organized Crime Drug Enforcement Task Force coordinator while in Richmond and chief of the task force that prosecuted cases arising from a local prison.

As charismatic speaker and author, Roscoe frequently speaks nationally at white collar crime seminars and institutes and has written articles on criminal law and procedure.

Professional and Community Involvement

Board member, Washington Lawyers Committee

Former board member, U.S.-Canada Fulbright Foundation Board

Former board member, Roger Williams University School of Law

Former member, NCAA Division I Committee on Infractions

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Washington, D.C., Super Lawyers, 2007-2008, 2013-2020

Federal Contracting, Procurement and National Security

University and Professional Athletics

College Athletics:
The Light at the End of the Tunnel

Roscoe C. Howard, Jr.| Washington, DC Office Managing Partner

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"Coming out of the pandemic, there is no such thing as a 'new normal' for college athletics."

Dr. Gordon Gee
President, West Virginia University
Barnes & Thornburg Athletics-EY Webinar
October 29, 2020

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Overview: Professional and College Sports

Coming out of the COVID-19 Pandemic

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Professional Sports and the Pandemic

Losses through 2020-2021 season total app. **$14 billion** for the 4 major sports

- NFL: Est. $4.5 billion
- NBA: Est. $3.5 billion
- MLB: Est. $3.1 billion
- NHL: Est. $2.5 billion

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College Sports and the Pandemic

- Collective losses, assuming spring 2021 season completion without further complications: **$3.5 Billion**
- Significantly more vulnerable than professional sports
- Part of the overall financial crisis in higher education
- Losses are reflected across *all* of NCAA sports

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College Sports Before the Pandemic

The NCAA College Athletics Structure

- **Division I:**
  - 357 colleges and universities, 6,000 teams, 180,000 student athletes.
  - For schools playing Division I football, two conference subdivisions:
    FBS (formerly Division I-A). 10 Conferences: 5 “Autonomy” (Power 5), 5 “Non-Autonomy” (Group of 5)
    FCS (formerly Division I-AA). 14 Conferences
- **Division II**
  - 320 colleges and universities, 5,000 teams, 100,000 student athletes
  - 23 conferences
- **Division III**
  - 450 colleges and universities, 8,000 teams, 120,000 student athletes
  - 54 Conferences - 43 All Sport, 11 Single Sport (football, ice hockey, lacrosse volleyball), 5 mixed Div. I/III

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College Sports Financials Pre-Pandemic (2019)

Div. I FBS - Autonomy (*i.e.,* 65 Power 5 Conference schools)

- 25 schools reported positive Net Generated Revenue: Median + $6.7 MM
- 40 schools reported negative Net Generated Revenue: Median - $15.9 MM

2019 Net Generated Revenue, FBS Autonomy schools:
Median *Loss* of $6.9 Million/School

* Net Generated Revenue = "Generated Revenue" (revenue before subsidies) – Total Expenses

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College Sports Financials Pre-Pandemic (2019)

Div. I FBS - Non-Autonomy (*i.e.,* the "Group of 5")

- 64 schools
- *All* 64 lost money in 2019

2019 Net Generated Revenue, FBS Non-Autonomy schools:
Median *Loss* of $23 Million/School

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College Sports Financials, Pre-Pandemic (2019)

Div. I FCS Schools with Football Programs

- 125
- *All* 125 lost money in 2019

2019 Net Generated Revenue, Div. I FCS Football Schools:

Median *Loss* of $14 Million/School

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College Sports Financials, Pre-Pandemic (2019)

Division I FCS w/out Football Programs

- 97 schools
- *All* 97 lost money in 2019

2019 Div. I Net Generated Revenue, FCS Non-Football Schools:

Median *Loss* of $3.5 Million/School

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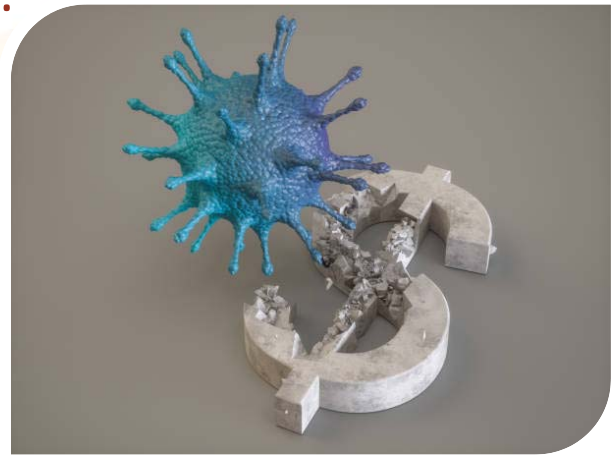
Then Came COVID-19…

A quick at look the effects of COVID-19 on NCAA sports, 2020-21



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College Sports After the Pandemic - NCAA

NCAA Audited Statement for 2019-2020 (through August, 2020)

- Revenue loss of $600+ million from NCAA Tournament cancellation
- Reduced distribution to all Divisions
  - Division I: 62.5% reduction (from $600 MM to $225 MM)
  - Division II: 68% reduction (from $43 MM to $13.9 MM)
  - Division III: 68% reduction (from $33 million to $10.7 million)
- A strict remediation plan forcing a 45% ($176 million) reduction in NCAA expenses via furloughs, pay cuts, project reductions, etc.

Total NCAA 2019-20 Losses: $56 Million

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College Sports After the Pandemic – Fall 2020

NCAA 2020-21 Season: Football/Other Fall Sports

FBS:

- 139 games cancelled/postponed across FBS Conferences
- Revenue (including national television) projected to be reduced by 50%
- Standard expenses reduced, but costs of player health/safety increased
- Anticipate $2 billion in losses

FCS:

- Jury still out. 12 Conferences will play abbreviated 4-8 game spring schedules
- Project $600 million in total losses

Total Projected 2020-21 Div. I FBS/FCS/Other Losses: $3 Billion

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College Sports After the Pandemic – Winter 2020

NCAA 2020-21 Season: Basketball/Other Winter Sports

NCAA

- Good news: NCAA will distribute $613 million from 2021 MBB/WBB Championships
- Significant loss in ticket revenue from regional and Final 4 tournaments
- Savings from single-venue "bubble" approach

Colleges and Universities

- 357 teams. Projected average team net loss, includes MBB, WBB: app. $1.2 million
- Includes NCAA Championship revenue

Total Projected 2020-21 Div. I Basketball Losses: $600 Million

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College Sports After the Pandemic

West Virginia University Mountaineers

2020-21 Budget (In Progress)

- Fourth highest revenue earner in Big 12 (after Texas, Oklahoma, Kansas)
- Big 12 distribution app. $37.7 million/school (tournaments, media)
- $93 million original 2020-21 budget forecast
- 2020-21 forecast was reduced as COVID issues reduced schedule and attendance, ultimately down to $60 million – an app. $32.5 million revenue shortfall
- Budget focused on $50-55 million fixed costs (scholarships, debt service, etc.)
- All other expenses were subject to cuts (furloughs, hiring freezes, travel, etc.)

Projected 2020-21 Loss: $5-6 Million

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College Sports After the Pandemic

Marshall University Thundering Herd

2020-21 Budget (In Progress)

- 11th in annual revenues, 13th in annual budget in 14-member Conference USA
- C-USA distribution app. $400 million (tournaments, media)
- 2020-21 budget was cut more than $5 million from 2019-20, from $30.6 million to $25 million (and 2019-20 sustained with $1.2 million loss)
- 8% -15% across-the-board pay, deferral of capital expenditures, etc.
- Football C-USA East Champions, Camellia Bowl; Men's Basketball 15-17 record, 10 games postponed or cancelled, limited attendance.

Projected 2020-21 Loss: $2.0-2.3 Million

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So – what does it look like at the end of the tunnel?

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College Sports 2021-2022 – What will it look like?

<u>Crisis Item: Student Athlete and Program Safety</u>

COVID management will continue through 2021-22, and cause ongoing expense.

- 2020 NCAA testing mandates require testing of every athlete, once per week, 72 hours or less prior to competition). Potential for higher standards at Conference level.
- For a min. Div. I 14 sport program, once/week rapid point-of-care COVID tests will average cost of $100/test, or *minimum* $1 million/year. (Note: Less expensive tests being developed)
- Depending on number of participants, incidents of infection: (1) Contact tracing, oversight, management – add'l of $50K-$200K/season; (2) Supervised quarantining of players – add'l $50K-$200K/season; (3) Increased cleaning of athletic facilities – add'l $100K-$500K/season.

<u>Bottom line</u>: Student athlete safety will continue to be a mandate, at great risk and expense, and no clear standard of care.

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College Sports 2021-2022 – Next Steps

Crisis Item: Venue and Event Management Safety

Best efforts to assure full stadiums, despite only partial vaccination and incomplete herd immunity, will involve significant expense and risk.

- Inconsistent regulations and enforcement will pose safety and public issues, and significant management consequences in the event of COVID spikes
- Full attendance not assumed. Attendance, TV ratings were in a six-year decline in 2019.
- COVID safety enforcement will be difficult:
  - Social distancing at seat is possible, but venues cannot address spacing in common areas (passageways, entrance and exits, concessions, etc.)
  - 60% of the fan base is the 20-40 year demographic, the most noncompliant age re mask mandate compliance, and responsible for 75% of the COVID

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College Sports 2021-2022 – Next Steps

Crisis Item: Venue and Event Management Safety (continued)

- Most college venues are aging and problematic as entertainment venues:
  - Critical improvements to improve fan experience are required (Internet access, concessions, seating, parking, hallways), but capital is scarce
  - Safety-based facility management (cleaning, staffing, materials, frequency, testing) represent significant cost increases and vulnerability
- Significant legal issues will loom throughout the season – event insurance, player/staff/fan/student health and safety, local and state regulation, etc.

Bottom line: Full venues are critical for recovery, but will require modernized management, significant expense, and pose risk beyond institutional control.

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College Sports 2021-2022 – Next Steps

Crisis Item: Financial Management in Crisis Mode

Higher education including athletics is addressing unprecedented financial losses over the past 18 months. Recovery for both are related and problematic.

- Public institutions are seeing across-the-board impact in 2021-22 budgets:
  - Reduced state funding ($23 million reduction for WVU)
  - Reduced enrollment ($5 million for WVU), and reduced housing fees
  - No tuition or fee increases
  - Reduced financial aid (2.75% for WVU)
- Tensions between academics and athletics will increase over resources:
  - Return of furloughed employees
  - Restoration of salary (including retroactive pay) for 2021 pay cuts
  - Capital project funding for campus versus athletic facilities

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College Sports 2021-2022 – Next Steps

Crisis Item: Financial Management in Crisis Mode (continued)

- Increasing pressure to terminate non-revenue-generating sports
  - 227 NCAA/NAIA programs cut to date, including 78 Division I programs; at least 45 colleges and universities are reporting as considering additional program cuts
  - Rowing, swimming, diving, tennis, track and field, volleyball most affected
  - Significant Title VI and Title IX implications are generating major lawsuits, as cuts include women's teams or team head count, and loss of sports (esp. track and field) will reduce current racial and ethnic diversity.

Bottom line: Financing COVID recovery will pit athletics against multiple other powerful state and campus needs and interests. Athletics will face increased criticism, and existential pressure to increase revenues and cut costs.

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College Sports 2021-2022 – Next Steps

Crisis Item: Name, Image and Likeness Rights

Accelerated by racial and social justice issues, multiple states and emerging federal legislation are now recognizing student athletes NIL rights.

- Basic NIL definition: an individual's right to control the commercial use of his/her identity
- 31 states have introduced NIL legislation to date, with Florida law effective July 1, 2021.
- NCAA proposal tabled after receiving DOJ letter warning of potential antitrust issues.
- Federal proposals have been introduced, but passage is currently unlikely.
- Lack of clarity or coordination creates significant Federal-state-NCAA conflicts, issues re enforcement, and "best-offer" competition within states and conferences.

Bottom line: A significant issue unresolved at the NCAA, state, or Federal level. As such, NIL rights may issue haphazardly, competitively, and without oversight.

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College Sports 2021-2022 – Next Steps

Crisis Item: *Alston v. NCAA*

The Supreme Court's decision in the NCAA's appeal of a 2020 Ninth Circuit ruling striking down some of its "amateurism" rules could alter the future of NCAA sports.

- The 2019 District Court decision ordered the NCAA to cease restrictions on benefits tied to education, but allowed the Association to continue prohibiting outright pay-for-play.
- The NCAA's appeal defended its authority as a governing body, and warned the ruling threatens college athletics by blurring the line between professional and amateur sport.
- Justices questioned the NCAA's definition of amateurism, but were also wary of further professionalizing the sector and undercutting its social value.

Bottom line: Supreme Court is likely to invalidate NCAA restrictions on education-related benefits, but "the jury is out" on allowing direct pay for play.

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College Sports 2021-2022 – Next Steps

Crisis Item: Gambling and College Sports

Murphy v. NCAA invalidated the Professional and Amateur Sports Profession Act. 25 states and D.C. have now legalized sports betting, including on college sports.

- NCAA rules prohibit participation sports wagering, including providing information to anyone in the wagering sector concerning college, amateur or professional athletics.
- The sector is struggling to address vulnerability to gambling pressure. The NCAA and schools seek an outright federal ban, and short of that a ban on gambling on in-state competition.
- Nevada-based estimates are that 50% of football, 65% of all basketball wagers are on college games, and project increases as more states allow gambling.

Bottom line: Schools are increasing scrutiny, training and compliance to prevent illegal activity, but student athletes remain vulnerable to corruption.

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Conclusion:
(or more accurately, a pause on the work in progress)

College athletics is on the cusp of the most significant set of changes in its history.

- Unanticipated financial losses within higher education, their college athletic programs and the various resources that support both – public funding, sponsors, donors, and fans
- The need to recommence the production of critically necessary, risk-filled, crowd-based games and events in the aftermath of a pandemic that has redefined safety protocols
- Increasing legal challenges to the NCAA administrative and structure
- Growing support of the movement to allow greater compensation to student athletes via various strategies, from increased benefits, to NIL rights, to pay for play
- Threats to the integrity of college athletics, as local and on-line wagering deliver billions of dollars into a sector vulnerable to the corruption of young student athletes

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Conclusion:
(or more accurately, a pause on the work in progress)

And finally:

Maintaining the crucial role college athletics plays as a critical part of higher education in increasing student population diversity, fighting historic segregation and discrimination, supporting and celebrating Title IX and women's rights, promoting social and racial justice as a critical forum for colleges and universities, and continuing to provide access to a college education for student athletes for whom college sports is a pathway.

These are political, cultural, social and financial issues – all *of which will be addressed, disputed, and ultimately resolved in courtrooms, boardrooms and classrooms – but only with the assistance of counsel.*

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And – oh, just in case we forgot…

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What to expect in the Biden Administration

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What to expect in the Biden Administration

- President Biden will be very aggressive naming Federal Judges
- Expect Biden to be vocal about Racial and Social Justice Issues
- Focus on equity regarding the Federal Government
- Look for the Biden Administration and A.G. Merrick Garland to step up enforcement against hate crimes targeted at minorities

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Civil Rights and Qualified Immunity

Mark Geragos

Geragos & Geragos

Los Angeles, California

Mark Geragos

As the Principal with the internationally known trial lawyer firm of Geragos & Geragos, Mark Geragos cemented his national reputation as a trial lawyer a dozen years ago with back-to-back State and Federal Court jury trial acquittals for renowned Whitewater figure Susan McDougal, later securing a presidential pardon for Ms. McDougal for a conviction sustained prior to his representation of her.

During the last decade, Geragos has won two consecutive dismissals of murder charges against clients by proving flawed eyewitness identification. One of those clients later won a $1.7 million settlement when the Geragos firm sued the City of Glendale for their false arrest of that client. In another twelve-week murder trial where the victim was the defendant's four-year-old daughter, Geragos was the lead lawyer where the jury did not convict his client. He was the attorney who successfully represented Chris Brown last year.

Geragos won dismissal of prostitution charges against James Bond movie director Lee Tamahori; dismissal of all felony charges - including kidnapping and torture - for Hung Bao Zhong, the recognized exiled leader of China's shadow government with an estimated 38 million followers worldwide; dismissal of murder charges for the third time for a USC co-ed charged with murder in the death of her fetus; and dismissal of a decades-old murder charge against Japanese national Kazuyoshi Miura, a case christened the "Japanese O.J. Case" by Japanese media.

Geragos was one of the lead lawyers in a pair of groundbreaking Federal Class Action Lawsuits against New York Life Insurance and AXA Corporation for insurance policies issued in the early 20th century during the genocide of over 1.5 million Armenians by the Ottoman Turk Regime, eventually settling these two cases for more than $37.5 million. He is currently suing the Government of Turkey for reparations arising out of the Armenian Genocide.

Geragos is the only lawyer besides Johnnie Cochran ever named "Lawyer of the Year" in both Criminal and Civil arenas. California Law Business Magazine named Geragos "One of the 100 Most Influential Attorneys in California" three years in a row, and Geragos has repeatedly been voted by his peers as one of Los Angeles' SuperLawyers. His $59 million jury verdict in a trade secrets case against pharmaceutical giant Pfizer Corporation was voted both "Top Ten Verdicts in 2008 in California" by the Daily Journal, as well as "Top Fifty Verdicts in the United States" by the National Law Journal.

Mark Geragos has represented some of the most prominent figures in the world. His client list has included former Congressman Gary Condit, former first brother Roger Clinton, Academy Award-nominated actress Winona Ryder, pop star Michael Jackson, Nicole Ritchie, singer Chris Brown, hip hop stars Nathaniel "Nate Dogg" Hale and Sean "Diddy" Combs (aka Puff Daddy), international arms dealer Sarkis Soghanalian, and the Sarkisyan family, whose seventeen-year-old daughter died when Cigna Corporation refused to authorize a liver transplant. For the last several years, Geragos has represented Barry Bonds' personal trainer, Greg Anderson, in his matter relating to the Federal Investigation into steroid use in Professional Sports.

Geragos has regularly appeared as both guest and legal commentator on the "Today Show," "Good Morning America," "Dateline NBC," "Larry King Live," "Greta Van Susteren's On the Record," "60 minutes," and "48 hours," and has lectured extensively and authored numerous articles and Law Review publications on the subject of Media and the Law.

Mark Geragos attended Haverford College in Pennsylvania as an undergraduate, and later earned his Juris Doctorate from Loyola Law School. He was born in Los Angeles.

###

Selected docket entries for case 18−1803

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Filed	Document Description	Page	Docket Text
07/03/2019			OPINION FILED − THE COURT: Duane Benton, Michael J. Melloy and Bobby E. Shepherd AUTHORING JUDGE:Duane Benton (PUBLISHED) [4804532] [18−1803] (YML)
	Opinion Filed	2	
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United States Court of Appeals
For the Eighth Circuit

No. 18-1803

Piper Partridge, Individually as mother and next of kin to Keagan Schweikle and as Special Administratrix of the Estate of Keagan Schweikle; Dominic Schweikle, Individually as father and next of kin to Keagan Schweikle

Plaintiffs - Appellants

v.

City of Benton, Arkansas; Kyle Ellison, Individually and as Employee of City of Benton, Arkansas; Kirk Lane, Individually and as Employee of City of Benton, Arkansas; John Does, 1-20, Individually and as Employees of City of Benton, Arkansas

Defendants - Appellees

Appeal from United States District Court
for the Eastern District of Arkansas - Little Rock

Submitted: March 7, 2019
Filed: July 3, 2019

Before BENTON, MELLOY, and SHEPHERD, Circuit Judges.

BENTON, Circuit Judge.

Benton police officer Kyle Ellison shot and killed 17-year-old Keagan Schweikle. His parents, Piper Partridge and Dominic Schweikle, sued Ellison, the

Chief of Police, and the City of Benton under 42 U.S.C. § 1983 and Arkansas law. The district court granted qualified immunity to the officers, and judgment on the pleadings. Partridge and Schweikle appeal. Having jurisdiction under 28 U.S.C. § 1291, this court reverses in part, affirms in part, and remands.

I.

On October 17, 2016, Keagan walked into the woods with a gun. His mother called 911. She said he ingested cough syrup and possibly marijuana, was depressed after being suspended from school earlier that morning, and threatened to shoot himself. She said he was not going to hurt anyone but himself. She repeated these facts to the first officer on the scene, explaining that Keagan was suicidal, walked into the woods with a gun, and (she believed) was going to try to hurt himself.

Ellison was dispatched to help with the search. Using a police dog, he found Keagan standing 45 feet away on a riverbank. Ellison told Keagan to show his hands. Keagan turned slightly to his right. Ellison saw a gun in Keagan's right hand, drew his gun, and ordered Keagan to drop the gun. Without speaking, Keagan instead raised the gun to his right temple. Ellison commanded Keagan to drop the gun "several times." Keagan remained silent. As Keagan began moving the gun away from his head, Ellison fired three shots. Two hit Keagan, killing him.

Partridge and Schweikle sued several officers in their individual capacities for excessive force and deprivation of the right to a familial relationship. They also made related *Monell* claims against the officers in their official capacities and the City, including failure to train and failure to adequately investigate police misconduct. They alleged assault and battery under state law. The district court granted the defendants judgment on the pleadings. It found Ellison's use of force was not constitutionally excessive, warranting qualified immunity on the individual-capacity claims. It dismissed the *Monell* claims for lack of an underlying constitutional

violation. It declined to exercise supplemental jurisdiction over the state-law claims. Partridge and Schweikle appeal, arguing they sufficiently pled excessive force.

II.

This court reviews de novo a judgment on the pleadings, accepting as true the facts in the complaint and drawing all reasonable inferences in favor of the nonmoving party. ***Levitt v. Merck & Co.***, 914 F.3d 1169, 1171 (8th Cir. 2019). Judgment on the pleadings "should be granted only if the moving party has clearly demonstrated that no material issue of fact remains and the moving party is entitled to judgment as a matter of law." ***Whatley v. Canadian Pac. Ry.***, 904 F.3d 614, 617–18 (8th Cir. 2018).

In a § 1983 action, qualified immunity shields government officials from liability "when their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" ***Morgan v. Robinson***, 920 F.3d 521, 523 (8th Cir. 2019) (en banc), *quoting* ***Pearson v. Callahan***, 555 U.S. 223, 231 (2009). To overcome qualified immunity at the pleadings stage, a plaintiff must "plead[] facts showing (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." ***Ashcroft v. al-Kidd***, 563 U.S. 731, 735 (2011), *quoting* ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982).

A.

This appeal turns on the claim that Ellison violated Keagan's Fourth Amendment right to be free from excessive force. The key is whether Ellison's actions "were objectively reasonable in light of the facts and circumstances confronting him." ***Rogers v. King***, 885 F.3d 1118, 1121 (8th Cir. 2018). Objective reasonableness is "judged from the perspective of a reasonable officer on the scene,"

in light of "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." ***Kisela v. Hughes***, 138 S. Ct. 1148, 1152 (2018) (per curiam), *quoting* ***Graham v. Connor***, 490 U.S. 386, 396 (1989). "It is reasonable for an officer to use deadly force if he has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or others." ***Rogers***, 885 F.3d at 1121. "But where a person 'poses no immediate threat to the officer and no threat to others,' deadly force is not justified." ***Ellison v. Lesher***, 796 F.3d 910, 916 (8th Cir. 2015), *quoting* ***Tennessee v. Garner***, 471 U.S. 1, 11 (1985).

Keagan was not suspected of a crime. He was not actively resisting arrest or attempting to flee. He was, however, armed, suicidal, and under the influence of cough syrup and possibly marijuana. Whether a reasonable officer could conclude he posed an immediate threat depends on the circumstances at the time of the shooting. Taking the facts in the complaint as true, "Keagan simply began to move the gun away from his head," "was shot as he began to move the gun away from his head, per Ellison's orders to 'drop the gun,'" and "never pointed the gun at the officers." On these facts, no reasonable officer could conclude that a compliant individual posed an immediate threat. *See* ***Henderson v. City of Woodbury***, 909 F.3d 933, 939–40 (8th Cir. 2018) (reversing grant of qualified immunity where testimony supported a finding that suspect was shot after surrendering to police); ***Division of Emp't Sec. v. Board of Police Comm'rs***, 864 F.3d 974, 979 (8th Cir. 2017) (holding burglary suspects' compliance with officers' commands meant they did not pose an immediate threat to the officers).

The district court concluded it would have "been nearly impossible for Ellison to tell whether Keagan was moving the gun away from his head to comply with Ellison's order or if he was repositioning the gun to aim it at the officers." *See* ***Hernandez v. Jarman***, 340 F.3d 617, 624 (8th Cir. 2003) ("The reasonableness of [an

officer's] use of deadly force is judged from the perspective of a reasonable officer on the scene, and not from the unknowable intentions of the victim." (internal citation omitted)). This conclusion does not accept the facts in the complaint as true and draw all reasonable inferences in favor of the nonmoving party.

Keagan had to move the gun to comply with Ellison's commands. The complaint does not tell the direction or speed Keagan moved the gun, how far he moved it before Ellison shot him, or the timing of the facts. The complaint does not give Ellison's views. *See* ***Dooley v. Tharp***, 856 F.3d 1177, 1183 (8th Cir. 2017) (collecting cases concluding, on summary judgment, officers' beliefs that suspects posed serious threats justifying deadly force were reasonable, even if mistaken, based on perceptions that suspects pointed a gun in their direction or took other menacing action); ***Rogers***, 885 F.3d at 1121–22 (granting qualified immunity where reasonable officer had probable cause to believe suicidal defendant posed threat of serious physical harm when "she raised the gun to [the officer's] shin level"); ***Thompson v. Hubbard***, 257 F.3d 896, 899 (8th Cir. 2001) (concluding, on summary judgment, officer's use of deadly force was objectively reasonable where the officer said a fleeing armed-robbery suspect "turned and looked at him while the two were in close proximity and moved as though reaching for a weapon"). Based on the complaint, Keagan may have slowly lowered the gun while pointing it in the opposite direction of Ellison. This would be "so obviously an attempt to comply with [Ellison's] commands to drop the [gun] that a reasonable officer would have known that opening fire would constitute excessive force." ***Partlow v. Stadler***, 774 F.3d 497, 503 (8th Cir. 2014). *See* ***Neal v. Ficcadenti***, 895 F.3d 576, 581 (8th Cir. 2018) (denying qualified immunity where, although suspect initially failed to follow commands, he was in full compliance at the time force was used); ***Bell v. Kansas City Police Dep't***, 635 F.3d 346, 347 (8th Cir. 2011) (denying qualified immunity where, under the plaintiff's version of the facts, a reasonable officer would have known he was complying with the officers' orders just before being tasered). Based on all reasonable inferences, this court cannot conclude Ellison's actions were objectively

reasonable. *See* ***Wilson v. City of Des Moines***, 293 F.3d 447, 452–53 (8th Cir. 2002) (factual issues about how suspect turned towards officers—whether he turned in a shooting stance—precluded qualified immunity on excessive-force claim).

The district court relied on several summary judgment cases, including *Garcyznski v. Bradshaw*, 573 F.3d 1158 (11th Cir. 2009). There, the Eleventh Circuit granted qualified immunity to officers that shot a suicidal individual (in a car) who refused to drop his weapon, after he "swung the gun from his head in the direction of the officers." ***Garcynzski***, 573 F.3d at 1168. That court noted—on summary judgment—that even if Garcyznski did not point his gun in the officers' direction, his refusal "to comply with the officers' repeated commands to drop his gun justified the use of deadly force under these particular circumstances." ***Id.*** at 1169. Based on the facts pleaded (and reasonable inferences) here, a reasonable officer would have known that Keagan was moving his gun in compliance with commands to drop the gun. Shooting him under such circumstances would constitute excessive force, even though he was armed. *See* ***Perez v. Suszczynski***, 809 F.3d 1213, 1220 (11th Cir. 2016) ("[T]he mere presence of a gun or other weapon is not enough to warrant the exercise of deadly force and shield an officer from suit. Where the weapon was, what type of weapon it was, and what was happening with the weapon are all inquiries crucial to the reasonableness determination."). *Cf.* ***Craighead v. Lee***, 399 F.3d 954, 961–62 (8th Cir. 2005) (denying qualified immunity where officer shot suspect holding a gun "continuously over [his] head, pointed upward," while struggling with another person).

Keagan's right to be free from excessive force under these circumstances was clearly established in October 2016. Taking the facts in the complaint as true and drawing all reasonable inferences in Keagan's favor, Ellison shot a non-resisting, non-fleeing minor as he moved his gun in compliance with commands to drop his gun. Under these circumstances, no reasonable officer could conclude Keagan posed an immediate threat of serious physical harm. The law was "sufficiently clear that

every reasonable official would understand that" shooting an individual in these circumstances is unlawful. ***District of Columbia v. Wesby***, 138 S. Ct. 577, 589 (2018) (internal quotation marks and citation omitted). *See* ***Henderson***, 909 F.3d at 940 (holding it was clearly established in 2012 that shooting a suspect who surrendered to police and did not pose a threat of serious harm constituted excessive force); ***Wealot v. Brooks***, 865 F.3d 1119, 1126–27 (8th Cir. 2017) (noting it was clearly established in 2013 that shooting a suspect attempting to surrender was not objectively reasonable); ***Craighead***, 399 F.3d at 962–63 (collecting cases that "put officers on notice . . . that they may not use deadly force under circumstances in which they should know that the suspect does not present an immediate threat of serious physical injury or harm").

Ellison contends that *Partlow* would "give a reasonable officer the impression that shooting Keagan was constitutional." This is wrong. The officers in *Partlow* saw a suicidal suspect "in the dark of night" forcefully push open an apartment-building door "with a shotgun in his hand," and only "seconds passed" until they opened fire. ***Partlow***, 774 F.3d at 502. Before shooting, the officers ordered the suspect to drop the gun, and "they observed [him] move the shotgun in such a way that the officers believed that [he] was aiming the barrel of the shotgun at them." ***Id.*** Based on the facts in the summary judgment record, this court concluded the officers had a reasonable belief, even if mistaken, that the suspect was aiming at them. ***Id.*** at 503. Here, however, the complaint does not allege that Keagan moved to aim his gun at Ellison. Nor is there an allegation that Ellison believed Keagan to be moving to aim at him. *Partlow* is consistent with the clearly established law that it is objectively unreasonable to shoot an individual who does not pose an immediate threat to the officers or others. *See* ***id.*** at 502–03 (ruling out possibility that suspect's movement was obvious attempt to comply with officers' commands).

Because this court reverses the judgment on the pleadings on the excessive force claim, the dismissal of the related *Monell* claims is reversed as well. *See*

Wealot, 865 F.3d at 1128 (noting the general rule that "for municipal liability to attach, individual liability first must be found on an underlying substantive claim").

In light of this court restoring federal claims, the dismissal of Partridge's and Schweikle's state-law claims is vacated.

B.

Partridge and Schweikle claim Ellison's unjustified shooting violated their Fourteenth Amendment due process rights to a familial relationship. True, the "practical effect" of a police officer killing a minor child is "to deny the [parents] the fundamental right to raise [their] son." ***Mattis v. Schnarr***, 502 F.2d 588, 595 (8th Cir. 1974). The *Schnarr* case does not address a claim for damages under § 1983 in these circumstances.[1]

Pleading a plausible familial-relationship claim under § 1983 requires an allegation that the state action was intentionally directed at the familial relationship. *See* ***Harpole v. Arkansas Dep't of Human Servs.***, 820 F.2d 923, 927–28 (8th Cir. 1987) ("Protecting familial relationships does not necessarily entail compensating relatives who suffer a loss as a result of wrongful state conduct, especially when the loss is an indirect result of that conduct."), *favorably citing* ***Ortiz v. Burgos***, 807 F.2d 6, 8–9 (1st Cir. 1986) (noting Supreme Court substantive-due-process cases protect the right to make certain private family decisions, such as whether to bear children, and deal with governmental attempts to directly affect the parent-child relationship,

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[1]At issue in *Schnarr* was the plaintiff's standing to bring a constitutional challenge for a declaratory judgment against Missouri statutes authorizing deadly force for some arrests. *See* ***Schnarr***, 502 F.2d at 593–95. The Supreme Court in *Ashcroft v. Mattis*, 431 U.S. 171, 172–73 (1977), abrogated *Schnarr*'s standing holding, based on a lack of "present right" at stake. *See* ***Frost v. Sioux City***, 920 F.3d 1158, 1162 (8th Cir. 2019) (recognizing the abrogation).

such as terminating parental rights, but "[t]he Court has never held that governmental action that affects the parental relationship only incidentally . . . is susceptible to challenge for a violation of due process"). *See also* ***Reasonover v. St. Louis Cty.***, 447 F.3d 569, 585 (8th Cir. 2006) (rejecting familial-association claim where plaintiff "present[ed] no evidence that defendants had an intent to interfere with the relationship between [plaintiff] and her daughter"); ***Singleton v. Cecil***, 176 F.3d 419, 423 (8th Cir. 1999) (en banc), *aff'g in pertinent part* 133 F.3d 631, 635 (8th Cir. 1998) ("A defendant can be held liable for violating a right of intimate association only if the plaintiff shows an intent to interfere with the relationship."), *quoting* ***Morfin v. Albuquerque Pub. Sch.***, 906 F.2d 1434, 1440 (10th Cir. 1990).

Here, Partridge and Schweikle did not allege in their complaint, or argue on appeal, that Ellison's shooting was directed at their relationship with Keagan. This forecloses their claims. *Accord* ***Gorman v. Rensselaer Cty.***, 910 F.3d 40, 47–48 (2d Cir. 2018) ("Based on the Supreme Court's directive that only deliberate conduct implicates due process, we join the consensus view of the circuit courts: a claim under the Due Process Clause for infringement of the right to familial associations requires the allegation that state action was specifically intended to interfere with the family relationship."), *citing* ***Daniels v. Williams***, 474 U.S. 327, 331 (1986) ("Historically, th[e] guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property."); ***Russ v. Watts***, 414 F.3d 783, 789–90 (7th Cir. 2005) (en banc) (collecting cases) ("Under any standard, finding a constitutional violation based on official actions that were not directed at the parent-child relationship would stretch the concept of due process far beyond the guiding principles set forth by the Supreme Court."). *But see* ***Smith v. City of Fontana***, 818 F.2d 1411, 1420 n.12 (9th Cir. 1987) (refusing to adopt requirement that plaintiff allege state official intentionally targeted the familial relationship to state a due process violation under § 1983), *overruled on other grounds by* ***Hodgers-Durgin v. de la Vina***, 199 F.3d 1037, 1041 n.1 (9th Cir. 1999) (en banc).

The judgment on the pleadings on the familial-relationship claims is affirmed. *See* ***Tony Alamo Christian Ministries v. Selig***, 664 F.3d 1245, 1248 (8th Cir. 2012) ("We may affirm based on any grounds supported by the record."). Because Partridge and Schweikle failed to allege a Fourteenth Amendment violation, their related *Monell* claims were properly dismissed. *See* ***Rogers***, 885 F.3d at 1122 ("A suit against a public official in his official capacity is actually a suit against the entity for which the official is an agent."); ***Moore v. City of Desloge***, 647 F.3d 841, 849 (8th Cir. 2011) ("This circuit has consistently recognized a general rule that, in order for municipal liability to attach, individual liability first must be found on an underlying substantive claim.").

* * * * * * *

The judgment is reversed in part, affirmed in part, and remanded for proceedings consistent with this opinion.

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

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July 03, 2019

Mr. Mark John Geragos
GERAGOS & GERAGOS
644 S. Figueroa Street
Los Angeles, CA 90017

RE: 18-1803 Piper Partridge, et al v. City of Benton, Arkansas, et al

Dear Counsel:

The court has issued an opinion in this case. Judgment has been entered in accordance with the opinion. The opinion will be released to the public at 10:00 a.m. today. Please hold the opinion in confidence until that time.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 14 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. No grace period for mailing is allowed, and the date of the postmark is irrelevant for pro-se-filed petitions. Any petition for rehearing or petition for rehearing en banc which is not received within the 14 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans
Clerk of Court

YML

Enclosure(s)

cc: Ms. Jenna Allison Adams
Mr. David West Gammill
Mr. Richard Eugene Holiman
Ms. Margaret Sova McCabe
Mr. Jim McCormack

District Court/Agency Case Number(s): 4:17-cv-00460-BSM

United States Court of Appeals
For The Eighth Circuit
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July 03, 2019

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RE: 18-1803 Piper Partridge, et al v. City of Benton, Arkansas, et al

Dear Sirs:

A published opinion was filed today in the above case.

Counsel who presented argument on behalf of the appellant was Mark John Geragos, of Los Angeles, CA. The following attorney(s) appeared on the appellant brief; David West Gammill, of Manhattan Beach, CA., Richard E. Holiman. of Little Rock, AR.

Counsel who presented argument on behalf of the appellee was Jenna Allison Adams, of North Little Rock, AR. The following attorney(s) appeared on the appellee brief; Michael Mosley, of North Little Rock, AR., Jenna Allison Adams, of North Little Rock, AR.

The judge who heard the case in the district court was Honorable Brian S. Miller. The judgment of the district court was entered on March 9, 2018.

If you have any questions concerning this case, please call this office.

Michael E. Gans
Clerk of Court

YML

Enclosure(s)

cc: MO Lawyers Weekly

District Court/Agency Case Number(s): 4:17-cv-00460-BSM

NOT FOR PUBLICATION

FILED

MAR 13 2020

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LANEY SWEET, an individual, on behalf of E.S., N.S., and the estate of Daniel Shaver; et al., Plaintiffs-Appellees, v. CHARLES J. LANGLEY, Defendant-Appellant.	No. 18-16118 D.C. Nos. 2:17-cv-00152-GMS 2:17-cv-00715-GMS MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
G. Murray Snow, Chief District Judge, Presiding

Argued and Submitted March 2, 2020
Phoenix, Arizona

Before: CLIFTON, OWENS, and BENNETT, Circuit Judges.

Charles Langley appeals from the district court's denial of his motion to dismiss on qualified immunity grounds two 42 U.S.C. § 1983 actions based on Langley's involvement in the fatal shooting of Daniel Shaver. We have jurisdiction under 28 U.S.C. § 1291. *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009).

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

We review de novo a district court's decision denying a motion to dismiss, accepting as true all well-pleaded allegations of material fact and construing them in the light most favorable to the non-moving party. *Padilla v. Yoo*, 678 F.3d 748, 757 (9th Cir. 2012). As the parties are familiar with the allegations, we do not recount them here. We affirm.

"Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (internal quotation marks and citations omitted). The clearly established right "must be defined with specificity" so that officials can be said to have reasonable notice of the violation. *Id.* When determining whether a defendant's actions violate clearly established law, courts may look not only to Supreme Court precedent, but also to Ninth Circuit precedent, unpublished decisions, and the law of other circuits. *Prison Legal News v. Lehman*, 397 F.3d 692, 701–02 (9th Cir. 2005).

1. Philip Brailsford violated clearly established law when he shot Shaver. "A police officer may not seize an unarmed, nondangerous suspect by shooting him dead." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). Under the integral participant rule, the plaintiffs need not demonstrate "that each officer's actions themselves rise to the level of a constitutional violation." *Boyd v. Benton*

Cty., 374 F.3d 773, 780 (9th Cir. 2004). Any "fundamental involvement in the conduct that allegedly caused the violation" is sufficient to make an officer an integral participant under clearly established law. *Blankenhorn v. City of Orange*, 485 F.3d 463, 481 n.12 (9th Cir. 2007). Ninth Circuit precedent in effect at the time of Shaver's death clearly establishes that Langley was an integral participant in the shooting.

In *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997), this court denied a motion to dismiss based on qualified immunity by federal officials who "developed the plan that resulted in [plaintiff's] shooting and encouraged [the shooter] to fire at him." *Id.* at 1204. The defendants could be held liable for setting "special rules of engagement" that "directly impinged on the clearly established constitutional rights of those against whom they were aimed . . . ." *Id.* at 1205. Here, the plaintiffs allege that Langley developed the plan that led to three police officers pointing rifles at the unarmed Shaver. Langley also told Shaver that there was a "very severe possibility" that he would be shot and killed if he made a mistake or if he moved. Because it is alleged that Langley effectively authorized his subordinates to use excessive force against Shaver, he was an integral participant in Brailsford's ultimate decision to shoot Shaver. *Id.*

2. Langley also argues that Shaver's parents, Grady and Norma Shaver, failed to allege that Langley's conduct "shocks the conscience." *Wilkinson v.*

Torres, 610 F.3d 546, 554 (9th Cir. 2010). He claims that, because he and his fellow officers made a "snap judgment" when shooting Shaver, "his conduct may be found to shock the conscience only if he act[ed] with a purpose to harm unrelated to legitimate law enforcement objectives." *Hayes v. Cty. of San Diego*, 736 F.3d 1223, 1230 (9th Cir. 2013). The Shavers argue that the standard for reviewing whether Langley's conduct shocks the conscience is "deliberate indifference," because "actual deliberation [was] practical." *Id.* The Shavers' complaint plausibly alleges that Langley acted with either the purpose to harm or deliberate indifference when he threatened to shoot Shaver for "mak[ing] a mistake" and ordered his subordinates to point guns at an obviously unarmed and compliant person. The district court properly denied qualified immunity in light of these allegations.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

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- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No.

IN THE

Supreme Court of the United States

PRINCE MCCOY, SR.,

Petitioner,

v.

TAJUDEEN ALAMU,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent is a prison guard who attacked an asthmatic prisoner in the face with a can of mace "for no reason at all." The Fifth Circuit held that Respondent's unprovoked assault violated the Eighth Amendment but also that he was entitled to qualified immunity. This Court has held, and reiterated via summary reversal, that it violates the Eighth Amendment to use force against prisoners maliciously and sadistically for the purpose of causing harm.

1. Is a prison official entitled to qualified immunity if he gratuitously assaults a prisoner but not every *Hudson* factor favors the plaintiff, as the Fifth Circuit held here, or can the plaintiff nonetheless defeat qualified immunity, as the Fourth, Sixth, Ninth, and Eleventh Circuits have held?

The Fifth Circuit held that the unconstitutionality of Respondent's unprovoked assault was not clearly established despite circuit precedent holding that unprovoked attacks with a fist or taser violate the Eighth Amendment.

2. Is a prison official who assaults a prisoner without justification entitled to qualified immunity if past precedent involved different mechanisms of force, as the Fifth Circuit implicitly held here, or can precedent concerning unprovoked assaults by one weapon clearly establish the unconstitutionality of unprovoked assaults by other weapons, as the Fourth and Ninth Circuits have held?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were Petitioner Prince McCoy and Respondent Tajudeen Alamu.

RELATED PROCEEDINGS

There are no related proceedings.

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INTRODUCTION

In 2010, this Court unanimously summarily reversed a grant of qualified immunity to a guard who assaulted a prisoner without justification. *Wilkins v. Gaddy*, 559 U.S. 34 (2010) (per curiam). While this Court's precedent required that a defendant use excessive force "maliciously and sadistically to cause harm" to state an Eighth Amendment excessive force claim, *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992), it had rejected any requirement that the injury resulting from such force be significant because "[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated." *Id.* at 9. Accordingly, this Court in *Wilkins* summarily reversed a lower court opinion requiring that an Eighth Amendment claim plead a significant injury, which this Court did not consider a "defensible" holding because it ignored this Court's "aim[] to shift the core judicial inquiry from the extent of the injury to the nature of the force—specifically, whether it was nontrivial and was applied ... maliciously and sadistically to cause harm." 559 U.S. at 39 (quoting *Hudson*, 503 U.S. at 7).

Prince McCoy similarly was assaulted for no legitimate reason when a guard maced him in the face because the guard was angry at a different prisoner. Like that of the plaintiff in *Wilkins*, McCoy's case was dismissed, this time on qualified immunity grounds. The Fifth Circuit held that this Court's repeated holdings that a prison guard may not use force without justification were not specific enough to clearly establish that *this* use of force without justification was unconstitutional. In doing so, the

court invented a barrier to relief as indefensible as that in *Wilkins*.

The decision below created two circuit splits, which the Court should grant certiorari to resolve. This case is an ideal vehicle for considering the questions presented—the record is crisp, the arguments are preserved, and the decisions below are reasoned.

If, however, the Court does not grant plenary review, it should summarily reverse for two reasons. First, the majority holding squarely conflicts with the Court's holding in *Wilkins*. Second, the decision below disregards the Court's long-standing rule that the lack of identical precedent does not immunize government officials who engage in obviously unlawful conduct.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 950 F.3d 226 and is reproduced at Pet. App. 1a-16a. The order of the district court granting summary judgment is not officially reported but may be found at 2018 WL 4006001 and is reproduced at Pet. App. 17a-34a. The unpublished letter of the Court of Appeals stating that the time for an extension or petition for rehearing has expired is reproduced at Pet. App. 35a-37a.

JURISDICTION

The Fifth Circuit entered its judgment on February 11, 2020. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

42 U.S.C. § 1983 provides in relevant part:

> 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….

STATEMENT OF THE CASE[1]

1. At the time of the events giving rise to this suit, Petitioner Prince McCoy was an asthmatic prisoner in the Darrington Unit of the Texas Department of Criminal Justice. Pet. App. 18a; Pet. App. 21a. Respondent Tajudeen Alamu was a correctional officer at Darrington. *Id.*

On December 28, 2016, McCoy was incarcerated in an administrative segregation unit, which uses solitary confinement for non-punitive reasons. Pet. App. 2a. As Alamu approached the cell of Marquieth Jackson, a prisoner in a cell neighboring McCoy's, Jackson threw water on Alamu. *Id.* Later in the day, Alamu returned to the unit and again Jackson threw water on him. *Id.* Angered, Alamu grabbed his chemical spray and threatened to spray Jackson while the other inmates on the unit protested. *Id.* Jackson blocked the front of his segregation cell with sheets so Alamu could not spray him. *Id.* Two minutes passed. *Id.* Alamu walked toward McCoy, who was locked in his segregation cell, and asked him for his name and identification number. *Id.* When McCoy approached the front of the cell to respond to him, Alamu sprayed McCoy directly in the face with mace for no reason. *Id.* A video taken after the use of force showed McCoy pacing around his cell stating that he could not breathe. Pet. App. 3a. McCoy alleged in the prison's internal investigation that as a result of the

[1] These facts are drawn primarily from the decision below and the district court's summary judgment order. Because this case was resolved at summary judgment, the facts and inferences are viewed in the light most favorable to McCoy. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014).

assault he had "burning skin and eyes, congested lungs, difficulty breathing, stomach pain, vision impairment, anxiety, nightmares, depression, and other emotional distress." *Id.* The investigation concluded that Alamu had unnecessarily used force and Darrington placed him on three months' probation. *Id.*

2. McCoy filed a *pro se* complaint in the Southern District of Texas on July 25, 2017, alleging an Eighth Amendment violation for excessive force. Pet. App. 17a. He attached medical request forms he had submitted to the prison for months after the incident requesting medical attention for consequences from the attack and statements from two other prisoners who corroborated his story, including one from Jackson confirming that Jackson was the instigator of the incident. Pet. App. 18a; Pet. App. 22a.

The Southern District of Texas held that McCoy had not raised a genuine question of material fact on whether Alamu's use of force was excessive and granted Alamu summary judgment. Pet. App. 32a. It credited Alamu's statement that he had reacted "involuntarily" after he "reasonably perceived" a threat from McCoy after having water thrown on him by Jackson. Pet. App. 28a. It held that Alamu had "tempered the use of force" by spraying McCoy with mace only once instead of multiple times. Pet. App. 29a. The court considered McCoy's injuries to be minor. Pet. App. 30a. The court therefore held that McCoy had not raised a genuine question of material fact as to whether Alamu's force was used maliciously or sadistically to inflict pain rather than in a good faith attempt to maintain discipline. Pet. App. 32a.

3. Still proceeding *pro se*, McCoy appealed to the Fifth Circuit. Pet. App. 3a. The court held that the district court erred in resolving factual disputes in Alamu's favor on summary judgment instead of doing so for McCoy, as was required. Pet. App. 5a. Reconsidering the evidence and drawing the appropriate inferences, the court found that McCoy's version of events stated a constitutional violation, as there was no need for force, the force used was disproportionate to the perceived threat, and Alamu did not perceive any threat whatsoever from McCoy, because he had done nothing and was locked in a cell. Pet. App. 6a-7a.

The court nonetheless affirmed on qualified immunity grounds. Pet. App. 10a-11a. The court held that the principle that prison officials cannot act "maliciously and sadistically to cause harm" defines the right too vaguely to clearly establish the unconstitutionality of macing a prisoner once in the face for no reason. Pet. App. 10a-11a. The court did not describe any analogous cases but declared that no case was sufficiently on-point to clearly establish the unconstitutionality of Alamu's conduct. Finally, it noted that even if general standards can defeat qualified immunity when the violation is "obvious," this was not such an "obvious" case because two of the factors this Court articulated in *Hudson* to evaluate alleged Eighth Amendment violations favored Alamu. Pet. App. 11a.

4. Judge Costa dissented in part. Pet. App. 13a. He pointed to Fifth Circuit precedent clearly establishing that an unprovoked attack with a fist or a taser violated the Eighth Amendment, which could

be distinguished only because Alamu used a different weapon. *Id.* He also identified precedent, ignored by the majority, establishing that defendants in excessive force cases cannot escape liability simply by using a novel instrument of violence. *Id.* Finally, he noted that in addition to the specific precedent that provided adequate notice of the unconstitutionality of Alamu's conduct, this was the rare "obvious" case where the general principle that defendants could not use force maliciously and sadistically to cause harm put Alamu on notice that spraying McCoy with mace for no reason was excessive force. Pet. App. 15a.

5. On February 24, 2020, still *pro se*, McCoy filed a letter seeking an extension to file a petition for rehearing en banc until he could obtain a lawyer. Pet. App. 35a. The court informed him on March 6, 2020 that the time had expired to file either the petition for rehearing en banc or an extension to file a petition for rehearing en banc. Pet. App. 37a.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts With Circuit Court Decisions That Have Found That Clearly Established Constitutional Violations Can Be Deduced Even When Not Every *Hudson* Factor Is Met Or The Instrument Of Force Is Different.

McCoy alleges that he was sprayed directly in the face with mace for no legitimate reason in quantities sufficient to ruin his shoes and his radio and despite the fact that he suffered from asthma. The panel majority and dissent below each articulated one

conceivable way of distinguishing these facts from *Wilkins*. According to the panel majority, this case is distinguishable because not every *Hudson* factor favors McCoy. Pet. App. 11. According to the dissent, the primary difference is that the instrument of force was different from past cases from this Court and the Fifth Circuit. Pet. App. 13a. Neither of these distinctions is sufficient to entitle Alamu to qualified immunity, and granting qualified immunity based on either would constitute a break from this Court's precedent and a split from multiple circuit courts that have held the opposite in analogous circumstances.

A. The use of significant force without justification is clearly established as unconstitutional, even if not every *Hudson* factor favors the plaintiff.

In *Hudson v. McMillian*, this Court considered "whether the use of excessive physical force against a prisoner may constitute cruel and unusual punishment when the inmate does not suffer serious injury." 503 U.S. 1, 4. Hudson was punched and kicked without provocation by officers, but it resulted in only minor injuries that did not require medical attention. *Id.* at 5. This Court held that "[w]hen prison officials maliciously and sadistically use force to cause harm," the Eighth Amendment is always violated, "whether or not significant injury is evident." *Id.* at 9. This Court listed five factors that "may" aid courts in determining whether force was used in good faith or maliciously and sadistically: "the extent of injury suffered," "the need for application of force, the relationship between that need and the

amount of force used, the threat reasonably perceived by the responsible officials, and any efforts made to temper the severity of a forceful response." *Id.* at 7 (internal quotation marks omitted).

The Fifth Circuit here held that *Hudson*'s first factor, the extent of the injury suffered, favored Alamu because he sprayed McCoy directly in the face with mace only once, and the court determined the resulting injuries minor. Pet. App. 4a; Pet. App. 11a. It held that *Hudson*'s fifth factor, whether any efforts were made to temper the severity of response, also favored Alamu because his decision to not spray McCoy with mace additional times demonstrated an effort to "temper the severity of a forceful response." *Id.* The other factors obviously supported a constitutional violation—the need for application of force was none; the relationship between the nonexistent need for force and a spray of mace to the face was gratuitous and cruel; and the threat perceived by Defendant was nonexistent. The court found decisive, however, that the mixed direction of the *Hudson* factors meant that the right could not be clearly established. Pet. App. 11a. The court held that even if a broad principle can supply adequate notice to a defendant, this could not be such a case because two of the five factors this Court articulated in *Hudson* supported Respondent.[2]

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[2] The panel majority's conclusion that any of the *Hudson* factors favored Alamu was also in error. Viewed in the light most favorable to McCoy, "burning skin and eyes, congested lungs, difficulty breathing, stomach pain, vision impairment, and various forms of emotional distress" do not constitute a minor injury. Pet. App. 6a. n.3. And Alamu's decision to spray McCoy

The panel majority's conclusion splits from every other circuit to consider the question of whether all *Hudson* factors must favor the plaintiff for a right to be clearly established. In *Thompson v. Commonwealth of Virginia*, for instance, a prisoner brought an Eighth Amendment excessive force claim against guards who intentionally drove in such a manner as to throw him around the back of a van during a prison transport. 878 F.3d 89 (4th Cir. 2017). The court evaluated the *Hudson* factors, noting that the medical attention the guards gave the plaintiff could arguably qualify as "efforts to temper the use of force." *Id.* at 100. But "[e]ven assuming this factor weighs in the government's favor," the court held, "it alone cannot preclude the conclusion that Mr. Thompson has alleged a constitutional violation. To hold otherwise would allow prison officials to escape liability in excessive force cases simply by rendering medical assistance after the fact." *Id.* Though this *Hudson* factor supported the defendants, the court found this violation clearly established, writing that "[a]lthough *McMillian* and *Wilkins* did not reach the qualified immunity question, their holdings provide officers with fair notice that malicious, unprovoked, unjustified force inflicted on inmates who are compliant and restrained, … violates the Eighth Amendment." *Id.* at 102-03; *see also Iko v. Shreve*, 535 F.3d 225, 239-40 (4th Cir. 2008) (determining that the

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with mace for no reason, even if followed by a choice not to deploy further amounts of mace, cannot be characterized as an effort "made to temper the severity of a forceful response." Every unconstitutional assault at some point comes to an end; characterizing any decision to stop assaulting a prisoner as a tempering of severity renders this element of the *Hudson* test meaningless.

first *Hudson* factor supported defendants but still denying them qualified immunity).

The Sixth Circuit came to a similar conclusion in *Cordell v. McKinney*, where a prisoner alleged that after an argument and a brief physical dispute, an officer rammed the prisoner's head into a wall. 759 F.3d 573, 577-78 (6th Cir. 2014). The Sixth Circuit found "no genuine dispute as to whether [defendant] had a reasonable basis for using *some* force against" the plaintiff, in line with *Hudson*'s second factor. *Id.* at 582. While the court found this factor favored the defendant, it nonetheless denied qualified immunity, concluding that "any reasonable official would know that ramming a handcuffed and controlled prisoner headfirst into a concrete wall is an unreasonable method of regaining control of a prisoner in a hallway occupied only by other jail officials." *Id.* at 588; *see also Roberson v. Torres*, 770 F.3d 398, 407 (6th Cir. 2014) (concluding that spraying an inmate with pepper spray without provocation violates clearly established law without even analyzing the *Hudson* factors).

In a materially similar case, *Furnace v. Sullivan*, a prisoner alleged that he was pepper sprayed in the face after a disagreement with a guard over a meal tray. 705 F.3d 1021, 1025 (9th Cir. 2013). Just as the court did here, the Ninth Circuit found that *Hudson* factors one and five favored the defendants, as the injuries were merely "moderate" and the defendants "made an effort to temper the severity of their forceful response by allowing [plaintiff] to decontaminate, and giving him medical treatment." *Id.* at 1029-30. *Furnace* nonetheless denied qualified immunity to

the officers because "a significant amount of force was employed without significant provocation from [plaintiff] or warning from the officers." *Id.* at 1030.

The Eleventh Circuit likewise considered the issue in *Skrtich v. Thornton*, where an intransigent prisoner was removed from his cell through a forced cell extraction. 280 F.3d 1295, 1301-02 (11th Cir. 2002). The plaintiff conceded that some amount of force was lawful, *Hudson*'s second factor, but nonetheless alleged an Eighth Amendment violation for the additional assaults he received after being incapacitated. *Id.* The Eleventh Circuit agreed, holding that the continued beating of the prisoner after he had ceased resisting violated the Eighth Amendment and that defendants were not entitled to qualified immunity because it was "clearly established that government officials may not use gratuitous force against a prisoner." *Id.* at 1303.

Alamu's unprovoked assault of McCoy was clearly malicious, sadistic, and contrary to established law. The Fifth Circuit split from several of its sister circuits by suggesting that all of the *Hudson* factors must favor the plaintiff to overcome qualified immunity.

B. Qualified immunity does not require courts to establish the unconstitutionality of unprovoked and significant force weapon by weapon.

Had McCoy been punched in the face for no reason, or tased for no reason, rather than maced in

the face for no reason, on-point circuit precedent would have clearly established the constitutional violation. As Judge Costa explained in dissent, an alternative explanation for the panel majority's break from this Court's precedent is that Alamu's unprovoked assault simply involved the wrong weapon. Pet. App. 13a-14a. But there is no requirement that a constitutional violation be weapon-specific, and defining Eighth Amendment violations weapon by weapon and granting qualified immunity to defendants using novel weaponry would also break from the other circuits that have considered the question.[3]

The Fourth Circuit squarely rejected that proposition in *Thompson*. 878 F.3d at 102. The Fourth

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[3] The panel majority suggested that pepper spraying an asthmatic directly in the face with enough spray to break his radio and ruin his shoes might constitute *de minimis* force, but this would be the most aberrant of any of the potential bases for its decision. The Eighth Amendment's mens rea standard is already very difficult to meet, and its *de minimis* exception is meant to exclude trivial uses of force such as a simple push, even when done sadistically, from constitutional regulation. *Wilkins*, 559 U.S. at 38. There is no support for a holding that the level of force alleged here is *de minimis*, and such a suggestion clashes with decisions from numerous other circuits. *See, e.g.*, *Roberson v. Torres*, 770 F.3d 398, 407 (6th Cir. 2014) (concluding that spraying an inmate with pepper spray without provocation violates clearly established law); *Furnace*, 705 F.3d at 1028-30 (same); *Iko*, 535 F.3d at 239 (holding that the excessive use of pepper spray violated a clearly established Eighth Amendment right, noting that the defendants' medical examiner stated that it "may have contributed to [plaintiff's] asphyxia and death"); *Lawrence v. Bowersox*, 297 F.3d 727, 733 (8th Cir. 2002) (holding that ordering another guard to unnecessarily pepper spray an inmate was a clearly established constitutional violation).

Circuit relied on this Court's Eighth Amendment cases involving punches and kicks to hold clearly established the unconstitutionality of a "rough ride," where a prisoner was intentionally thrown around the back of a van. *Id.* "[I]t makes no difference to the constitutional analysis," the court wrote," whether the plaintiff:

> was slammed against the side of the van by the officer's hands or by the momentum maliciously created by the officer's driving. The intentionally erratic driving was simply a different means of effectuating the same constitutional violation. To draw a line between these acts would encourage bad actors to invent creative and novel means of using unjustified force on prisoners. … Although few circuits have addressed specifically an officer's use of a vehicle to injure an inmate, there is a clear consensus among the circuits, including the Fourth, that infliction of pain and suffering without penological justification violates the Eighth Amendment in an array of contexts. Simply put, there are many ways of physically and maliciously assaulting a helpless prisoner, and all of them violate the Eighth Amendment.

Id. at 102-03 (internal citation omitted).

The Fourth Circuit is not alone. In *Rodriguez v. County of Los Angeles*, prison officials argued that they were entitled to qualified immunity for the unprovoked use of tasers because the

unconstitutionality of such attacks was not clearly established. 891 F.3d 776, 796 (9th Cir. 2018). The Ninth Circuit rejected this distinction:

> An officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury. This statement applies with particular strength in the context of the Eighth Amendment [because a] plaintiff cannot prove an Eighth Amendment violation without showing that force was employed maliciously and sadistically for the purpose of causing harm.

Id. (citation and internal quotation marks omitted).

Several circuits courts have reached the same conclusion in the analogous context of excessive force by police officers. *See, e.g.*, *Terebesi v. Torreso*, 764 F.3d 217, 237 n.20 (2d Cir. 2014) (rejecting the "commonplace" trend "for defendants in excessive force cases to support their claims to qualified immunity by pointing to the absence of prior case law concerning the precise weapon, method, or technology employed by the police"); *Nelson v. City of Davis*, 685 F.3d 867, 884 (9th Cir. 2012) ("[a]n officer is not entitled to qualified immunity on the ground[] that the law is not clearly established every time a novel method is used to inflict injury") (internal quotation marks omitted); *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 528 (7th Cir. 2012) ("Every time the police employ a new weapon, officers do not get a free pass to use it in any manner until a case from the Supreme Court or from this circuit involving that particular

weapon is decided."). If anything, precedent on Eighth Amendment excessive force claims should require less specificity around the instrument of force used because its mens rea standard of "malicious or sadistic" is both far more difficult to meet than the Fourth Amendment test and provides greater notice to defendants.

The Fifth Circuit has again broken from its sister circuits by ignoring controlling precedent involving mechanisms of force other than the precise one used by Alamu in his unprovoked attack.

II. In the Alternative, This Court Should Summarily Reverse Because Respondent's Conduct Was Obviously Unconstitutional.

If the Court chooses not to grant plenary review, it should summarily reverse the court of appeals for two reasons. First, as detailed above, the majority holding is plainly contrary to *Wilkins*.

Second, the decision below sharply deviates from the Court's qualified immunity doctrine. For decades, the Court has warned government officials that the absence of analogous precedent does not guarantee immunity for egregious constitutional violations. *See*, *e.g.*, *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Hope v. Pelzer*, 536 U.S. 730, 741, 745-46 (2002); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377-78 (2009); *D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018); *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018); *City of Escondido v. Emmons*, 139 S. Ct. 500, 504 (2019). As these cases establish, for conduct sufficiently beyond

the pale, the notice necessary to defeat a claim of qualified immunity is inseparable from the violation itself. In such a "rare obvious" case, in other words, "the unlawfulness of the officer's conduct is sufficiently clear" to defeat qualified immunity "even though existing precedent does not address similar circumstances." *City of Escondido,* 139 S. Ct. at 504 (quoting *Wesby*, 138 S. Ct. at 581).

This longstanding rule "plays an important role in qualified immunity doctrine" by "ensur[ing] vindication of the most egregious constitutional violations." Pet. App. 16a. After all, "cases involving the most blatantly unconstitutional conduct will not often end up in the courts of appeals" or before this Court because they are less likely to arise. *Id.* Courts faced with an "obvious case[]," unlikely as they are to manufacture precedent, would ensure "perverse results" should they demand "on-point precedent" to defeat immunity. *Id.*

This is one such case. For "no reason at all," Alamu attacked McCoy with pepper spray, Pet. App. 2a., a "dangerous weapon" that is not only "capable of inflicting death or serious bodily injury" but is also "banned for use in war," Pet. App. 14a. (internal quotation marks omitted). No "reasonable" government official—indeed, no reasonable person—would require access to a case book to know that the law forbids unprovoked violence that might "gratuitously blind an inmate." Pet. App. 15a-16a.

Blatantly disregarding both the inescapable conclusion that Alamu's conduct is obviously unlawful and this Court's numerous cases instructing lower

courts that obviously unlawful conduct provides adequate notice, the panel majority held that Alamu was entitled to qualified immunity merely because identical precedent purportedly could not be identified. That error calls for summary reversal.

The Court has not hesitated to summarily reverse when lower court decisions squarely conflict with precedent, including in almost identical circumstances. *See Wilkins*, 559 U.S. at 38; *see also, e.g.*, *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (summarily reversing a lower court for advancing a proposition when "this Court ha[d] previously considered—and rejected—almost that exact formulation of the qualified immunity question"). As Judge Costa aptly noted, "with so many voices critiquing current law [on the qualified immunity doctrine], the last thing [courts] should be doing is recognizing an immunity defense when existing law rejects it." Pet. App. 16a.

Because the panel majority's decision cannot be reconciled with this Court's precedent, summary reversal is warranted.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari. Alternatively, it should summarily reverse the decision below.

Respectfully submitted,

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July 10, 2020

Per Curiam

SUPREME COURT OF THE UNITED STATES

TRENT MICHAEL TAYLOR *v.* ROBERT RIOJAS, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19–1261. Decided November 2, 2020

PER CURIAM.

Petitioner Trent Taylor is an inmate in the custody of the Texas Department of Criminal Justice. Taylor alleges that, for six full days in September 2013, correctional officers confined him in a pair of shockingly unsanitary cells.[1] The first cell was covered, nearly floor to ceiling, in "'massive amounts' of feces": all over the floor, the ceiling, the window, the walls, and even "'packed inside the water faucet.'" *Taylor* v. *Stevens*, 946 F. 3d 211, 218 (CA5 2019). Fearing that his food and water would be contaminated, Taylor did not eat or drink for nearly four days. Correctional officers then moved Taylor to a second, frigidly cold cell, which was equipped with only a clogged drain in the floor to dispose of bodily wastes. Taylor held his bladder for over 24 hours, but he eventually (and involuntarily) relieved himself, causing the drain to overflow and raw sewage to spill across the floor. Because the cell lacked a bunk, and because Taylor was confined without clothing, he was left to sleep naked in sewage.

The Court of Appeals for the Fifth Circuit properly held that such conditions of confinement violate the Eighth Amendment's prohibition on cruel and unusual punishment. But, based on its assessment that "[t]he law wasn't clearly established" that "prisoners couldn't be housed in

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[1] The Fifth Circuit accepted Taylor's "verified pleadings [as] competent evidence at summary judgment." *Taylor* v. *Stevens*, 946 F. 3d 211, 221 (2019). As is appropriate at the summary-judgment stage, facts that are subject to genuine dispute are viewed in the light most favorable to Taylor's claim.

cells teeming with human waste" "for only six days," the court concluded that the prison officials responsible for Taylor's confinement did not have "'fair warning' that their specific acts were unconstitutional." 946 F. 3d, at 222 (quoting *Hope* v. *Pelzer*, 536 U. S. 730, 741 (2002)).

The Fifth Circuit erred in granting the officers qualified immunity on this basis. "Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau* v. *Haugen*, 543 U. S. 194, 198 (2004) (*per curiam*). But 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. See *Hope*, 536 U. S., at 741 (explaining that "'a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question'" (quoting *United States* v. *Lanier*, 520 U. S. 259, 271 (1997))); 536 U. S., at 745 (holding that "[t]he obvious cruelty inherent" in putting inmates in certain wantonly "degrading and dangerous" situations provides officers "with some notice that their alleged conduct violate[s]" the Eighth Amendment). The Fifth Circuit identified no evidence that the conditions of Taylor's confinement were compelled by necessity or exigency. Nor does the summary-judgment record reveal any reason to suspect that the conditions of Taylor's confinement could not have been mitigated, either in degree or duration. And although an officer-by-officer analysis will be necessary on remand, the record suggests that at least some officers involved in Taylor's ordeal were deliberately indifferent to the conditions of his cells. See, *e.g.,* 946 F. 3d, at 218 (one officer, upon placing Taylor in the first feces-covered cell, remarked to another that Taylor was "'going to have a long weekend'"); *ibid.*, and n. 9 (another officer, upon placing Taylor in the second cell, told

Taylor he hoped Taylor would "'f***ing freeze'").

Confronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution.[2] We therefore grant Taylor's petition for a writ of certiorari, vacate the judgment of the Court of Appeals for the Fifth Circuit, and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BARRETT took no part in the consideration or decision of this case.

JUSTICE THOMAS dissents.

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[2] In holding otherwise, the Fifth Circuit noted "ambiguity in the caselaw" regarding whether "a time period so short [as six days] violated the Constitution." 946 F. 3d, at 222. But the case that troubled the Fifth Circuit is too dissimilar, in terms of both conditions and duration of confinement, to create any doubt about the obviousness of Taylor's right. See *Davis* v. *Scott*, 157 F. 3d 1003, 1004 (CA5 1998) (no Eighth Amendment violation where inmate was detained for three days in dirty cell and provided cleaning supplies).

SUPREME COURT OF THE UNITED STATES

TRENT MICHAEL TAYLOR *v.* ROBERT RIOJAS, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19–1261. Decided November 2, 2020

JUSTICE ALITO, concurring in the judgment.

Because the Court has granted the petition for a writ of certiorari, I will address the question that the Court has chosen to decide. But I find it hard to understand why the Court has seen fit to grant review and address that question.

I

To see why this petition is ill-suited for review, it is important to review the procedural posture of this case. Petitioner, an inmate in a Texas prison, sued multiple prison officers and asserted a variety of claims, including both the Eighth Amendment claim that the Court addresses (placing and keeping him in filthy cells) and a related Eighth Amendment claim (refusing to take him to a toilet). The District Court granted summary judgment for the defendants on all but one of petitioner's claims under Federal Rule of Civil Procedure 54(b), which permitted petitioner to appeal the dismissed claims. On appeal, the Fifth Circuit affirmed as to all the claims at issue except the toilet-access claim. On the claim concerning the conditions of petitioner's cells, the court held that the facts alleged in petitioner's verified complaint were sufficient to demonstrate an Eighth Amendment violation, but it found that the officers were entitled to qualified immunity based primarily on a statement in *Hutto* v. *Finney*, 437 U. S. 678 (1978), and the Fifth Circuit's decision in *Davis* v. *Scott*, 157 F. 3d 1003 (1998).

The Court now reverses the affirmance of summary judgment on the cell-conditions claim. Viewing the evidence in the summary judgment record in the light most favorable to petitioner, the Court holds that a reasonable corrections officer would have known that it was unconstitutional to confine petitioner under the conditions alleged. That question, which turns entirely on an interpretation of the record in one particular case, is a quintessential example of the kind that we almost never review. As stated in our Rules, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law," this Court's Rule 10. That is precisely the situation here. The Court does not dispute that the Fifth Circuit applied all the correct legal standards, but the Court simply disagrees with the Fifth Circuit's application of those tests to the facts in a particular record. Every year, the courts of appeals decide hundreds if not thousands of cases in which it is debatable whether the evidence in a summary judgment record is just enough or not quite enough to carry the case to trial. If we began to review these decisions we would be swamped, and as a rule we do not do so.

Instead, we have well-known criteria for granting review, and they are not met here. The question that the Court decides is not one that has divided the lower courts, see this Court's Rule 10, and today's decision adds virtually nothing to the law going forward. The Court of Appeals held that the conditions alleged by petitioner, if proved, would violate the Eighth Amendment, and this put correctional officers in the Fifth Circuit on notice that such conditions are intolerable. Thus, even without our intervention, qualified immunity would not be available in any similar future case.

We have sometimes granted review and summarily reversed in cases where it appeared that the lower court had conspicuously disregarded governing Supreme Court precedent, but that is not the situation here. On the contrary,

as I explain below, it appears that the Court of Appeals erred largely because it read too much into one of our decisions.

It is not even clear that today's decision is necessary to protect petitioner's interests. We are generally hesitant to grant review of non-final decisions, and there are grounds for such wariness here. If we had denied review at this time, petitioner may not have lost the opportunity to contest the grant of summary judgment on the issue of respondents' entitlement to qualified immunity on his cell-conditions claim. His case would have been remanded for trial on the claims that remained after the Fifth Circuit's decision (one of which sought relief that appears to overlap with the relief sought on the cell-conditions claim), and if he was dissatisfied with the final judgment, he may have been able to seek review by this Court of the cell-conditions qualified immunity issue at that time. *Major League Baseball Players Assn.* v. *Garvey*, 532 U. S. 504, 508, n. 1 (2001) (*per curiam*). And of course, there is always the possibility that he would have been satisfied with whatever relief he obtained on the claims that went to trial.

Today's decision does not even conclusively resolve the issue of qualified immunity on the cell-conditions claim because respondents are free to renew that defense at trial, and if the facts petitioner alleges are not ultimately established, the defense could succeed. Indeed, if petitioner cannot prove the facts he alleges, he may not be able to show that his constitutional rights were violated.

In light of all this, it is not apparent why the Court has chosen to grant review in this case.

II

While I would not grant review on the question the Court addresses, I agree that summary judgment should not have been awarded on the issue of qualified immunity. We must

view the summary judgment record in the light most favorable to petitioner, and when petitioner's verified complaint is read in this way, a reasonable fact-finder could infer not just that the conditions in the cells in question were horrific but that respondents chose to place and keep him in those particular cells, made no effort to have the cells cleaned, and did not explore the possibility of assignment to cells with better conditions. 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.

Although this Court stated in *Hutto* that holding a prisoner in a "filthy" cell for "a few days" "might be tolerable," 437 U. S., at 686–687, that equivocal and unspecific dictum does not justify what petitioner alleges. There are degrees of filth, ranging from conditions that are simply unpleasant to conditions that pose a grave health risk, and the concept of "a few days" is also imprecise. In addition, the statement does not address potentially important factors, such as the necessity of placing and keeping a prisoner in a particular cell and the possibility of cleaning the cell before he is housed there or during the course of that placement. A reasonable officer could not think that this statement or the Court of Appeals' decision in *Davis* meant that it is constitutional to place a prisoner in the filthiest cells imaginable for up to six days despite the availability of other preferable cells or despite the ability to arrange for cleaning of the cells in question.

For these reasons, I concur in the judgment.

No.

IN THE

Supreme Court of the United States

TRENT MICHAEL TAYLOR,

Petitioner,

v.

ROBERT RIOJAS, Sergeant of Corrections Officer, Individually and in Their Official Capacity; RICARDO CORTEZ, Sergeant of Corrections Officer, Individually and in Their Official Capacity; STEPHEN HUNTER, Correctional Officer, Individually and in Their Official Capacity; LARRY DAVIDSON, Correctional Officer, Individually and in Their Official Capacity; SHANE SWANEY, Sergeant of Corrections Officer, Individually and in Their Official Capacity; JOE MARTINEZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents are prison officials who deliberately left Petitioner Trent Taylor naked for six days in two filthy cells; the first cell was covered from floor to ceiling in feces from previous residents, and in the second Petitioner had to sleep in a pool of sewage overflowing from a clogged drain. Petitioner brought suit under 42 U.S.C. § 1983 challenging Respondents' conduct as violating the Eighth Amendment. The Fifth Circuit concluded that the substantial risk of harm Respondents imposed on Petitioner was "especially obvious" and therefore unconstitutional. But the court nonetheless granted qualified immunity to Respondents on the theory that, although prior circuit precedent recognized the unconstitutionality of forcing prisoners to live in human waste, those cases involved longer periods of confinement and therefore did not clearly establish a constitutional violation under these precise circumstances. The questions presented are:

1. When the unconstitutionality of government officials' conduct is obvious, does that suffice to render the violation clearly established, as the Sixth, Ninth, and Eleventh Circuits have recognized in analogous cases, or must there also be binding precedent directly on point, as the Fifth Circuit held below?

2. Are government officials entitled to qualified immunity so long as there is no prior precedent recognizing the unconstitutionality of an identical fact pattern, as the Fifth and Eighth Circuits have held, or can prior precedent clearly establish a constitutional violation despite some factual variation, as the Third,

Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits have held?

3. Should the judge-made doctrine of qualified immunity, which is not justified by reference to the text of 42 U.S.C. § 1983 or its common law backdrop and which has been demonstrated not to serve its policy goals, be narrowed or abolished?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were Petitioner Trent Taylor; Respondents Robert Riojas, Ricardo Cortez, Stephen Hunter, Larry Davidson, Shane Swaney, and Joe Martinez; and Defendants-Appellees Robert Stevens, Franco Ortiz, Creastor Henderson, and Stephanie Orr, who are not part of this appeal.

RELATED PROCEEDINGS

Taylor v. McDonald, No. 18-11572 (5th Cir.) (briefing complete)

Taylor v. Olmstead, No. 17-10342 (5th Cir.) (judgment entered June 28, 2018)

Taylor v. Stevens, No. 17-10253 (5th Cir.) (judgment entered Dec. 20, 2019)

Taylor v. Stevens, No. 16-11355 (5th Cir.) (judgment entered Dec. 21, 2017)

Taylor v. Williams, No. 16-10498 (5th Cir.) (judgment entered Nov. 3, 2017)

Taylor v. Stevens, No. 14-CV-0149 (N.D. Tex.) (partial final judgment entered Jan. 5, 2017)

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INTRODUCTION

Petitioner Trent Taylor entered a Texas psychiatric prison unit to receive mental health treatment following a suicide attempt. Instead of providing that treatment, prison officials (Respondents here) stripped Taylor of his clothing, including his underwear, and left him naked for nearly a week in filthy cells, forcing him to live and sleep in the urine and feces of the cells' prior occupants. Taylor brought this suit under 42 U.S.C. § 1983 challenging Respondents' conduct as violating the Eighth Amendment.

In its decision below, the Fifth Circuit concluded that Taylor met his summary judgment burden of establishing that Respondents violated the Eighth Amendment, explaining that the substantial health risk they imposed on Taylor was "especially obvious" under these circumstances. The court nonetheless held that Respondents were entitled to qualified immunity because circuit precedent recognizing the unconstitutionality of forcing prisoners to live in human waste involved a longer period of confinement and therefore did not clearly establish a constitutional violation under these precise circumstances.

This Court should review the decision below for three reasons.

First, having determined that the substantial risk posed to Taylor by Respondents' conduct was "especially obvious," the Fifth Circuit strayed from this Court's precedent—and split from decisions of the Sixth, Ninth, and Eleventh Circuits addressing analogous fact patterns—in failing to recognize that the

obviousness of that risk rendered Respondents' conduct a clearly established constitutional violation, regardless of the existence of prior case law addressing similar facts.

Second, the decision below further entrenches a deep and acknowledged circuit split over how factually similar a prior case must be to clearly establish a constitutional violation for qualified immunity purposes. The Fifth and Eighth Circuits stand at one end of the divide, requiring precedent with nearly identical facts to establish a constitutional violation. In contrast, the Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits hold that a constitutional violation may be clearly established by prior precedent that does not precisely mirror the facts at hand. Absent further guidance from this Court, the lower courts will continue to struggle to apply the "clearly established" prong of the qualified immunity inquiry.

Third, this case presents an opportunity for the Court to abolish or significantly curtail qualified immunity. A growing chorus of critics—including members of this Court, numerous other federal judges, and legal scholars across the ideological spectrum—has demonstrated that qualified immunity is grounded in neither the text of § 1983 nor the common law of official liability that existed when that statute was enacted. What began as an attempt by this Court to apply a narrow good-faith defense to a false arrest claim—because bad faith is an element of that claim at common law—has since been transformed by judicial policy preference into a near-total liability shield across *all* § 1983 claims. And without justification—

the near-universal indemnification of government officials means that qualified immunity is unnecessary to serve its primary purpose of protecting officials from the risk of financial liability when exercising their discretion in the line of duty. Qualified immunity also stagnates the development of constitutional law by encouraging courts to perpetually avoid determining the constitutionality of challenged practices by instead simply finding that any violation is not clearly established. This Court should revisit qualified immunity in light of the myriad weighty arguments favoring its abolition.

This case is an ideal vehicle to consider these important issues. Because the Fifth Circuit found that Respondents' conduct violated Taylor's Eighth Amendment rights, the sole and dispositive question is whether Respondents are entitled to qualified immunity. There are no procedural barriers to this Court's review. And the Fifth Circuit's extraordinary conclusion—that Respondents did not have "fair warning" that it would violate the Eighth Amendment to force an incarcerated psychiatric patient to live and sleep in other people's excrement for six days—illustrates that modern qualified immunity jurisprudence is fundamentally flawed and in need of reconsideration by this Court.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 946 F.3d 211 and is reproduced at Pet. App. 1a-28a. The order of the district court granting partial summary judgment is not officially reported but may be found at 2017 WL 11507190 and is reproduced at Pet.

App. 29a-65a. The unpublished order of the Court of Appeals denying the petition for panel rehearing and rehearing en banc is reproduced at Pet. App. 70a-72a.

JURISDICTION

The Fifth Circuit entered its judgment on December 20, 2019. Pet. App. 1a. A timely petition for panel rehearing and rehearing en banc was denied on January 29, 2020. Pet. App. 72a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

42 U.S.C. § 1983 provides in relevant part:

> 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….

STATEMENT OF THE CASE[1]

Respondents Force Taylor To Live And Sleep In Other Inmates' Excrement For Nearly A Week

At the time of the events giving rise to this suit, Petitioner Trent Taylor was incarcerated in the John T. Montford Unit of the Texas Department of Criminal Justice (Montford). Pet. App. 3a. Respondents Robert Riojas, Ricardo Cortez, Stephen Hunter, Larry Davidson, Shane Swaney, and Joe Martinez were officials at Montford during that period. *Id.*

Taylor was transferred to Montford, a psychiatric prison unit, for mental health treatment following a suicide attempt. Electronic Record on Appeal (R.O.A.) 49. Instead of providing that treatment, Respondents stripped Taylor of his clothing, including his underwear, and placed him in a cell where almost every surface—including the floor, ceiling, windows, and walls—was covered in "massive amounts" of human feces belonging to previous occupants. Pet. App. 7a-8a; R.O.A. 50. The smell was overpowering and could be discerned from the hallway. Pet. App. 8a; R.O.A. 50. Taylor was unable to eat because he feared that any food in the cell would become contaminated. Pet. App. 8a. Feces "packed inside the water faucet" prevented him from drinking water for days. *Id.* Respondents were aware the cell was coated in

[1] These facts are drawn primarily from the decision below and the district court's summary judgment order. Because this case was resolved at summary judgment, the facts and inferences are viewed in the light most favorable to Taylor. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (per curiam).

excrement: One Respondent asked several others whether Taylor's cell was the one covered in feces; another answered, "Yes, he's going to have a long weekend," and the officials laughed. *Id.*; R.O.A. 50. Taylor asked numerous prison staff members to clean the cell, but they refused. Pet. App. 8a n.8. When Taylor complained of the conditions, Respondent Swaney responded, "Dude, this is Montford, there is s*** in all these cells from years of psych patients." Pet. App. 8a (brackets omitted).

Four days later, Respondents removed Taylor from the first cell; they then transferred him, still naked, to a different "seclusion cell." Pet. App. 8a, 12a. Montford inmates referred to this cell as "the cold room" because of its frigid temperature; Swaney told Taylor he hoped Taylor would "f***ing freeze" there. Pet. App. 8a n.9. This cell had no toilet, water fountain, or furniture. Pet. App. 8a. It contained only a drain on the floor, which was clogged, leaving a standing pool of raw sewage in the cell. Pet. App. 8a. Because the cell lacked a bunk, Taylor had to sleep on the floor, naked and soaked in sewage, with only a suicide blanket for warmth. Pet. App. 8a-9a, 33a.

Taylor spent three days in the seclusion cell, during which Respondents repeatedly told him that if he needed to urinate, he would not be escorted to the restroom but should urinate into the backed-up drain. Pet. App. 8a. Taylor refused, not wanting to add to the pool of sewage in which he had to sleep naked. Pet. App. 8a-9a. Instead, Taylor avoided urinating for 24 hours until he involuntarily urinated on himself; he attempted to use the clogged drain as instructed, but Taylor's urine "mix[ed] with the raw sewage and r[a]n

all over [his] feet." Pet. App. 9a, 19a (alterations in original). As a result of holding his urine in a bacteria-laden environment for an extended period, Taylor developed a distended bladder requiring catheterization. *Id.*

Taylor Files Suit Challenging The Constitutionality Of Respondents' Conduct, And The District Court Holds That Respondents Are Entitled to Qualified Immunity

Proceeding pro se, Taylor filed suit against Respondents under 42 U.S.C. § 1983, alleging, among other things, that Respondents violated the Eighth Amendment by confining him in such squalid conditions and that certain Respondents had shown deliberate indifference to his serious medical needs by refusing to allow him to use a bathroom for 24 hours, also in violation of the Eighth Amendment. Pet. App. 9a, 30a-34a. The district court denied Respondents' motion to dismiss these claims as insufficiently pleaded, Pet. App. 30a-31a; R.O.A. 513, but later granted summary judgment to Respondents on qualified immunity grounds, Pet. App. 5a, 31a-32a.

Addressing Taylor's cell conditions claim, the court acknowledged that Respondents "provided little in the way of specific summary judgment evidence to support their assertion that the cells were not, in fact, covered with feces." Pet. App. 47a. The court nonetheless concluded the cell conditions did not "violate the Eighth Amendment's prohibition against cruel and unusual punishment" because Taylor was "exposed to the alleged conditions for only a matter of days," Respondents "did attempt to clean the [second cell] by

using a towel to wipe the sewage from the floor," and Taylor did not allege any lasting injury from the exposure. Pet. App. 49a-50a. Accordingly, the district court held that Taylor "failed to rebut [Respondents'] assertion of qualified immunity on his conditions-of-confinement claim." Pet. App. 50a-51a.

The district court also granted summary judgment to Respondents on Taylor's claim that they were deliberately indifferent to his serious medical needs when they denied him bathroom access for 24 hours. Pet. App. 51a-53a. Though the court acknowledged that Respondents did not "directly deny [Taylor's] allegations that they refused him the opportunity to use the restroom … or that they advised him to 'pee in the drain like everyone else,'" the court concluded that Taylor had not adequately established his claim or "demonstrated that it was not physically possible for him to relieve himself in the drain as instructed and thus prevent his discomfort and eventual bladder distension." Pet. App. 52a-53a.[2]

The Fifth Circuit Concludes That Respondents' Conduct Violated The Eighth Amendment, But Nonetheless Holds That Respondents Are

[2] Because the district court denied summary judgment with respect to a claim not at issue here—an excessive force claim against a different correctional officer arising from a separate event—the court entered a partial final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure on Taylor's cell conditions and medical needs claims. The excessive force claim proceeded to trial, where a jury found that the officer "maliciously and sadistically" used excessive force against Taylor but awarded no damages.

Entitled To Qualified Immunity On Taylor's Cell Conditions Claim

On appeal, the Fifth Circuit reversed the grant of summary judgment as to Taylor's deliberate indifference claim against certain Respondents for denying him bathroom access. Pet. App. 18a-24a. The court explained that a reasonable jury could find that Respondents knowingly put Taylor at risk of substantial harm when they refused to take him to the bathroom for 24 hours and instead insisted that he urinate in a drain in his cell that was already overflowing with sewage. Pet. App. 23a & n.21. The court of appeals further held that Respondents were not entitled to qualified immunity because circuit precedent clearly established a constitutional violation under almost identical circumstances. Pet. App. 21a-22a.[3]

The Fifth Circuit affirmed the grant of summary judgment, however, with respect to Taylor's cell conditions claim. Pet. App. 7a, 28a. As with the bathroom claim, the court held that Taylor had established a genuine factual dispute as to whether Respondents violated the Eighth Amendment by confining Taylor in "squalid cells" for nearly a week. Pet. App. 12a-15a. The court explained that the "risk posed by Taylor's exposure to bodily waste was … especially obvious here, as [Respondents] forced Taylor to sleep naked on a urine-soaked floor," and "failed to remedy the

[3] Taylor's live claim of deliberate indifference to serious medical needs involves only Respondents Riojas and Martinez and Defendant-Appellee Franco Ortiz. Respondents Swaney, Cortez, Hunter, and Davidson are not parties to that claim.

paltry conditions." Pet. App. 15a-16a (internal quotation mark omitted).

The Fifth Circuit nonetheless found Respondents entitled to qualified immunity on Taylor's cell conditions claim, holding that the constitutional violation was not "clearly established at the time." Pet. App. 16a-17a. The court observed that while "the law was clear that prisoners couldn't be housed in cells teeming with human waste for months on end," it had not previously held that confinement in human waste for six days violated the Constitution. Pet. App. 17a. Accordingly, the court concluded, Respondents lacked "'fair warning' that their specific acts were unconstitutional." Pet. App. 17a.

Taylor timely filed a petition for rehearing en banc with respect to his cell conditions claim. The Fifth Circuit denied the petition on January 29, 2020. Pet. App. 70a-72a. This petition followed.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With This Court's Precedent That "Obvious" Constitutional Violations Are Clearly Established Even Absent Factually Similar Precedent And Splits From Decisions Of Other Circuits Denying Qualified Immunity In Analogous Circumstances.

Having recognized that the substantial risk of serious harm to Taylor from the squalid cell conditions imposed by Respondents was "especially obvious here," the Fifth Circuit should have followed this

Court's guidance that the unconstitutionality of truly egregious conduct may be clearly established without any case law directly on point. The Fifth Circuit's holding that Respondents are entitled to qualified immunity despite the obviousness of the constitutional violation conflicts not only with this Court's precedent, but also with decisions of the Sixth, Ninth, and Eleventh Circuits involving analogous fact patterns.

A. The Fifth Circuit's holding that Respondents are entitled to qualified immunity despite the obvious unconstitutionality of their conduct conflicts with this Court's precedent.

The animating concern underlying modern qualified immunity jurisprudence is that officers must be "on notice their conduct is unlawful" before being subjected to suit for damages. *Saucier v. Katz*, 533 U.S. 194, 206 (2001). That is, officers must have "fair warning that their conduct violated the Constitution." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Often, this fair warning is provided by prior cases establishing the unlawfulness of the conduct. But an official's conduct may also be so "obvious[ly]" illegal that no "body of relevant case law" is necessary. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (citing *Hope*, 536 U.S. at 738); *see also Hope*, 536 U.S. at 753 (Thomas, J., dissenting) ("Certain actions so obviously run afoul of the law that an assertion of qualified immunity may be overcome even though court decisions have yet to address 'materially similar' conduct."); *United States v. Lanier*, 520 U.S. 259, 270-71 (1997) (particularly egregious conduct may be clearly unconstitutional even if "the very action in question

has [not] previously been held unlawful"). Recent decisions of this Court have reaffirmed that obviously illegal conduct can defeat qualified immunity. *See City of Escondido v. Emmons*, 139 S. Ct. 500, 504 (2019) (per curiam); *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018); *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam).

The obviousness principle follows directly from the fair warning requirement: For conduct that is "obviously" illegal, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741. The principle is also essential to ensure that the most egregiously violative conduct gives rise to liability. Obviously unconstitutional conduct is by its nature less likely to lead to the development of precedent to serve as clearly established law: Because it is obviously unconstitutional, officials are—or should be—less likely to do it. *See Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377-78 (2009) ("[O]utrageous conduct obviously will be unconstitutional, this being the reason … that the easiest cases don't even arise." (internal quotation marks and brackets omitted)).

If there is any circumstance that involves obviously illegal conduct, it is deliberately forcing a person to live and sleep naked in squalid cells contaminated by massive amounts of feces and urine left by previous occupants, without access to food or

drinking water.[4] Indeed, the Fifth Circuit acknowledged that the risk of serious bodily harm to Taylor from the cell conditions Respondents imposed on him was "especially obvious here." Pet. App. 15a-16a. The court's holding that Respondents are nonetheless entitled to qualified immunity is inconsistent with this Court's direction that claims describing obviously unconstitutional behavior overcome qualified immunity even absent case law directly on point.

This Court first articulated the principle that obviously illegal conduct defeats qualified immunity in a case involving circumstances similar to Taylor's. In *Hope v. Pelzer*, Hope, an incarcerated plaintiff,

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[4] In affirming the grant of qualified immunity, the Fifth Circuit cited *Davis v. Scott*, 157 F.3d 1003 (5th Cir. 1998), in which the court found no constitutional violation when a prisoner was kept in a filthy cell for three days. *Davis*, however, involved a very different fact pattern and casts no doubt on the obviousness of the constitutional violation here. In *Davis*, the officers had given the plaintiff supplies to clean the cell, "mitigating any intolerable conditions." *Id.* at 1006. In addition, the officers had put the plaintiff in the "crisis management" cell because he was throwing substances at them, *id.* at 1004; he was not placed into squalid conditions simply because he was a psychiatric patient. Moreover, *Davis* preceded this Court's decision in *Hope*, in which this Court declared analogous but less egregious mistreatment to be so obviously unconstitutional that no prior precedent was required to establish the violation. And *Davis* cuts against the great weight of precedent holding that it is impermissible to expose prisoners to their own waste and the waste of others. *See, e.g.*, *Brooks v. Warden*, 800 F.3d 1295, 1303-04 (11th Cir. 2015); *DeSpain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001); *Gates v. Cook*, 376 F.3d 323, 334 (5th Cir. 2004); *Young v. Quinlan*, 960 F.2d 351, 365 (3d Cir. 1992); *LaReau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972).

brought an Eighth Amendment claim after prison officials handcuffed him to a "hitching post" as punishment for "a wrestling match with a guard." 536 U.S. at 734. Hope was left shirtless in the sun and cuffed to the post for seven hours, given water only once or twice, and provided no bathroom breaks. *Id.* at 734-35. A guard taunted Hope by giving water to some nearby dogs instead of to him. *Id.* at 735.

This Court readily concluded that these conditions were actionable under the Eighth Amendment. *Id.* at 738. It further held that the unconstitutionality of the prison officials' actions was clearly established. *Id.* at 744. After noting that circuit precedent established the unconstitutionality of the defendants' actions, the Court found a second, independent basis for denying qualified immunity:

> 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—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.

Id. at 745.

Hope is squarely on point. Taylor's treatment is evocative of Hope's: the degradation, humiliation, and risk of bodily harm; the lack of drinking water; the

denial of bathroom breaks creating "a risk of particular discomfort and humiliation," *id.* at 738; extreme temperature conditions; nudity; and the taunting of guards. But in its particulars, Taylor's treatment was far worse: Taylor was abused in this manner for 20 times as long as Hope was, and while Hope was subjected to the hitching post as punishment for fighting a guard, Taylor was forced to sleep naked in sewage, unable to eat or drink for days, merely because he required psychiatric treatment for suicidality during his incarceration. *See* R.O.A. 49. Though not amenable to quantification, it is difficult to imagine many more degrading and humiliating affronts to the dignity of an incarcerated person than what Taylor experienced. If *Hope* stands for anything, it must mean that the "especially obvious" risk of harm to Taylor, Pet. App. 15a-16a, clearly established a constitutional violation.

B. The Fifth Circuit's holding that Respondents are entitled to qualified immunity despite the obvious unconstitutionality of their conduct conflicts with decisions of the Sixth, Ninth, and Eleventh Circuits denying qualified immunity on analogous facts.

The Fifth Circuit's holding also directly conflicts with decisions of the Sixth, Ninth and Eleventh Circuits denying qualified immunity under similar circumstances because the constitutional violation was so obvious as to be clearly established even absent a "body of relevant case law." *Brosseau*, 543 U.S. at 199.

In *Brooks v. Warden*, the Eleventh Circuit considered § 1983 claims asserted by a prisoner who had been confined to a hospital bed for two days in a jumpsuit filled with his own waste. 800 F.3d at 1298. Finding the Eighth Amendment violation clearly established, the Eleventh Circuit explained that no factually analogous precedent was necessary because it was a "rare case of obvious clarity." *Id.* at 1307 (internal quotation marks and brackets omitted). The court observed that "[f]orcing a prisoner to soil himself over a two-day period … create[d] an obvious health risk and [wa]s an affront to human dignity," while "[l]aughing at and ridiculing an inmate who [wa]s forced to sit in his own feces for an extended period of time [wa]s not merely unreasonable, but an act of 'obvious cruelty.'" *Id.*

Similarly, the Sixth Circuit has held that a prison official was on "fair warning" that it violated the Eighth Amendment to "le[ave] [a plaintiff] to lay in his own urine and feces for several hours," citing *Hope*'s admonition that certain misconduct is "obvious[ly]" unconstitutional. *Berkshire v. Beauvais*, 928 F.3d 520, 537-38 (6th Cir. 2019); *cf. Barker v. Goodrich*, 649 F.3d 428, 435, 437 (6th Cir. 2011) (noting that the "obvious cruelty" inherent in restraining an inmate in an uncomfortable position, denying access to water, and denying "even the basic dignity of relieving himself" warned defendants "that they were violating the prohibition against cruel and unusual punishment").

Evaluating analogous—though less sustained and egregious—circumstances, the Ninth Circuit reached the same conclusion. In *Weathers v.*

Loumakis, an incarcerated plaintiff alleged that he had twice been made to spend hours cleaning sewage overflow from a malfunctioning toilet with only latex gloves as protection. 742 F. App'x 332, 333 (9th Cir. 2018) (unpublished). Citing *Hope*, the Ninth Circuit held that while it had "never squarely confronted a case with facts precisely like these," "[h]aving to spend hours wading through water filled with human waste" was clearly unconstitutional. *Id.* at 333-34.

The Fifth Circuit disregarded this Court's clear direction in *Hope* and broke with its sister circuits in requiring precedent establishing that the cell conditions here violated the Eighth Amendment despite the obvious unconstitutionality of forcing Taylor to live and sleep naked in human waste. This Court should grant review (or, alternatively, summarily reverse) to restore uniformity among the lower courts on this important aspect of qualified immunity doctrine.

II. The Decision Below Further Entrenches A Deep And Acknowledged Circuit Split On The Degree Of Factual Similarity To Prior Precedent Required For A Constitutional Right To Be Clearly Established.

The decision below also entrenches a second conflict among the circuits that demands this Court's attention. "[C]ourts of appeals are divided—intractably—over precisely what degree of factual similarity must exist" to find a clearly established constitutional violation. *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part). The Fifth Circuit stands at

one end of the spectrum in applying a remarkably myopic approach to qualified immunity, which permits government officials to avoid accountability for patently unconstitutional behavior so long as there is no published precedent recognizing that the exact conduct under identical circumstances violates the Constitution.

This case is emblematic of the Fifth Circuit's approach. The federal circuits—including the Fifth Circuit—uniformly agree that dangerously unsanitary prison conditions may violate the Eighth Amendment.[5] Among the conditions that raise constitutional concerns, there is broad consensus that "[e]xposure to human waste, like few other conditions of confinement, evokes … [the] standards of dignity embodied in the Eighth Amendment." *DeSpain*, 264 F.3d at 974; *see, e.g.*, *Gates*, 376 F.3d at 334 ("No one in civilized society should be forced to live under conditions that force exposure to another person's bodily wastes."); *Young*, 960 F.2d at 365 ("It would be an abomination of the Constitution to force a prisoner to live in his own excrement for four days in a stench that not even

[5] *See LaReau*, 473 F.2d at 978; *Hite v. Leeke*, 564 F.2d 670, 672 (4th Cir. 1977); *Hawkins v. Hall*, 644 F.2d 914, 918 (1st Cir. 1981); *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985); *Parrish v. Johnson*, 800 F.2d 600, 609 (6th Cir. 1986); *Inmates of Occoquan v. Barry*, 844 F.2d 828, 836 (D.C. Cir. 1988); *Howard v. Adkison*, 887 F.2d 134, 137 (8th Cir. 1989); *McCord v. Maggio*, 927 F.2d 844, 847 (5th Cir. 1991); *Young*, 960 F.2d at 365; *DeSpain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001); *Budd v. Motley*, 711 F.3d 840, 843 (7th Cir. 2013); *Brooks*, 800 F.3d at 1303-04.

a fellow prisoner could stand.").[6] Despite this consensus—including Fifth Circuit precedent that confinement in a sewage-flooded cell violates the Eighth Amendment, *see McCord*, 927 F.2d at 847-48—the Fifth Circuit in this case found no violation of clearly established law because Respondents forced Taylor to live and sleep in cells covered in feces and urine for "only six days" and the court had not previously held that confinement in human waste for that precise time period violated the Eighth Amendment. Pet. App. 17a.

The Fifth Circuit regularly demands this level of "specificity and granularity" in examining whether a constitutional violation is clearly established. *Morrow v. Meachum*, 917 F.3d 870, 874-75 (5th Cir. 2019). In an opinion issued just weeks after *Taylor*, the Fifth Circuit concluded that a prison guard employed excessive force in violation of the Fourth Amendment when he pepper sprayed an inmate "for no reason at all." *McCoy v. Alamu*, 950 F.3d 226, 231-32 (5th Cir. 2020). The court expressly rejected the guard's argument that a single spray was too insignificant to violate the Constitution, noting that this Court had "rejected that line of reasoning." *Id.* at 232 ("Injury and force ... are only imperfectly correlated, and it is the latter that ultimately counts." (alteration in original) (quoting *Wilkins v. Gaddy*, 559 U.S. 34, 38 (2010))). And while Fifth Circuit precedent recognized that the Constitution prohibits officers from punching or tasing

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[6] *See also, e.g.*, *LaReau*, 473 F.2d at 978; *Johnson v. Pelker*, 891 F.2d 136, 139-40 (7th Cir. 1989); *Fruit v. Norris*, 905 F.2d 1147, 1151 (8th Cir. 1990); *McCord*, 927 F.2d at 847-48; *Brooks*, 800 F.3d at 1303-04.

someone for no reason, *see id.* at 234-35 (Costa, J., dissenting in part), the court concluded that the guard was entitled to qualified immunity because no case law specifically held that "an isolated, single use of pepper spray" qualified as excessive force, *id.* at 233.

The Eighth Circuit has employed a similarly narrow approach. In *Kelsay v. Ernst*, for instance, a woman suspected of a misdemeanor suffered serious injuries after police "placed [her] in a bear hug, threw her to the ground, and placed her in handcuffs." 933 F.3d 975, 978-79 (8th Cir. 2019), *cert. petition pending*, No. 19-682. In finding the officers shielded by qualified immunity, the court acknowledged circuit precedent establishing that "where a nonviolent misdemeanant poses no threat to officers and is not actively resisting arrest or attempting to flee, an officer may not employ force just because the suspect is interfering with police or behaving disrespectfully." *Id.* at 980 (collecting cases). The court nonetheless found that the law was not clearly established because "[n]one of [these] authorities 'squarely govern[ed] the *specific* facts at issue.'" *Id.* (emphasis added) (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018)). In particular, "[i]t was not clearly established … that a deputy was forbidden to use a takedown maneuver to arrest a suspect who ignored the deputy's instruction to 'get back here' and continued to walk away from the officer." *Id.* Like the Fifth Circuit, the Eighth Circuit in *Kelsay* demanded a granular level of factual similarity that is nearly impossible to satisfy and permits even clearly unconstitutional conduct to go unsanctioned.

On the other side of the spectrum, the Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits hold that a case involving precisely the same facts is not required for law to be clearly established. *See, e.g.*, *Davis v. Clifford*, 825 F.3d 1131, 1136 (10th Cir. 2016) ("[T]he qualified immunity analysis involves more than a scavenger hunt for prior cases with precisely the same facts.").

The Tenth Circuit, in a case nearly identical to this one, held that to find clearly established law, "[t]here need not be precedent declaring the exact conduct at issue to be unlawful." *DeSpain*, 264 F.3d at 979. Thus, where an inmate was held in a prison unit flooded with water, feces, and urine, the court found a clearly established constitutional violation based on cases condemning "unsanitary, offensive conditions" such as exposure to human waste. *Id*. Unlike the Fifth Circuit here, the court did not split hairs over the precise number of days the inmate was locked in sewage. Rather, the court asked whether "the contours of the right [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id*. at 979 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The court found those contours clear given "the great weight of cases … condemning on constitutional grounds an inmate's exposure to human waste." *Id.*; *see also id*. ("Causing a man to live, eat, and perhaps sleep in close confines with his own human waste is too debasing and degrading to be permitted." (quoting *McBride v. Deer*, 240 F.3d 1287, 1292 (10th Cir. 2001)).

Similarly, in *Brooks*, where guards forced a prisoner to sit in his own waste for two days, the Eleventh

Circuit did not require precedent that "involved the precise circumstances at issue" to find a clear constitutional violation. 800 F.3d at 1306. As discussed, *supra* at 16, the Eleventh Circuit found the violation in *Brooks* so obvious as to be clearly established independent of the case law. *Id.* at 1307. But the court separately held that the guards could not invoke qualified immunity because precedent established that Eighth Amendment violations "can arise from 'conditions lacking basic sanitation.'" *Id.* (quoting *Chandler v. Baird*, 926 F.2d 1057, 1066 (11th Cir. 1991)). The court emphasized that qualified immunity is overcome if existing precedent would lead "a reasonable official [to] understand that what he is doing violates" the law and that this inquiry does not require "[e]xact factual identity with a previously decided case." *Id.* at 1306.

The Third, Fourth, Seventh, and Ninth Circuits agree. *See Kane v. Barger*, 902 F.3d 185, 195 (3d Cir. 2018) ("[W]e do not require a case directly mirroring the facts at hand, so long as there are sufficiently analogous cases that should have placed a reasonable official on notice that his actions were unlawful." (internal quotation marks and brackets omitted)); *Thompson v. Virginia*, 878 F.3d 89, 98 (4th Cir. 2017) ("In the absence of directly on-point, binding authority, courts may also consider whether the right was clearly established based on general constitutional principles or a consensus of persuasive authority." (internal quotation marks omitted)); *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 528 (7th Cir. 2012) ("Every time the police employ a new weapon, officers do not get a free pass to use it in any manner until a case from the Supreme Court or from this circuit involving

that particular weapon is decided."); *Ioane v. Hodges*, 939 F.3d 945, 956 (9th Cir. 2018) (holding that the court "need not identify a prior identical action to conclude that the right is clearly established").

The divergent approaches of the courts of appeals demonstrate that "[i]n day-to-day practice, the 'clearly established' standard is neither clear nor established among our Nation's lower courts." *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part, dissenting in part); *see also* John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 Fla. L. Rev. 851, 869 (2010) (discussing "the divergent approaches of the Circuits" in determining whether prior precedent clearly establishes a constitutional violation for qualified immunity purposes).

The practical cost of this confusion—particularly in circuits applying an overly stringent qualified immunity analysis—is that it largely nullifies § 1983. Congress enacted § 1983 "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). Congress's purpose is thwarted if state actors can avoid accountability so long as there is no precedent that addresses the precise conduct at issue. This Court's review is warranted to reject the Fifth Circuit's narrow qualified immunity analysis and to restore clarity and uniformity in federal courts' application of the doctrine.

III. This Court Should Grant Review To Abolish Or Substantially Curtail Qualified Immunity.

There is another, more fundamental reason the Court should grant this petition: It presents an ideal vehicle for reexamining modern qualified immunity jurisprudence, which derives neither from the text of § 1983 nor the common law of official immunity and should be abolished or significantly curtailed.

A. Qualified immunity doctrine is inconsistent with § 1983's text and common law backdrop.

Qualified immunity doctrine has evolved dramatically since it was first invoked to bar a § 1983 suit. Modern qualified immunity doctrine bears little resemblance to the common law of official liability when § 1983 was enacted.

When this Court first identified a good-faith defense to a § 1983 false arrest suit, it did so based on the narrow rationale that "the defense of good faith and probable cause" applied to the analogous "common-law action for false arrest and imprisonment." *Pierson v. Ray*, 386 U.S. 547, 556-57 (1967). But the Court soon began applying a qualified immunity defense to all § 1983 suits, without investigating whether any corresponding common law claim included such a defense. The Court revised its approach repeatedly, expanding the doctrine to protect an ever broadening array of official misconduct, until it reached its current formulation of the "objective test": that "government officials performing discretionary

functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established … rights." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). While the Court once required courts to determine whether a constitutional right had been violated before considering whether the right had been clearly established at the time of the violation, *see Saucier*, 533 U.S. at 201, it later reversed course and permitted courts to conduct the qualified immunity inquiry in either order, *see Pearson v. Callahan*, 555 U.S. 223, 234-42 (2009).

None of these doctrinal maneuvers derives from the statutory text. Nothing in the language of § 1983, as originally enacted or as currently codified, requires that a constitutional violation be "clearly established" to support a damages claim. The language of § 1983 "is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted." *Owen v. City of Independence*, 445 U.S. 622, 635 (1980); *see Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (§ 1983 "admits of no immunities").

Instead, the interpretation of § 1983 to include a broad qualified immunity defense is predicated on the notion that the statute incorporates the common law of 1871, when it was enacted. *See Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). At least in principle, this Court has attempted "to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). The Court has described its approach as seeking to determine whether any common law immunities were "so well established in 1871, when § 1983 was enacted, that 'we presume that Congress

would have specifically so provided had it wished to abolish' them." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Pierson*, 386 U.S. at 554-55); *see also Filarsky v. Delia*, 566 U.S. 377, 383 (2012).

Yet modern qualified immunity doctrine departs markedly from the common law. *See, e.g.*, James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1922-24 (2010). As a growing body of legal scholarship has revealed, "lawsuits against officials for constitutional violations did not generally permit a good-faith defense during the early years of the Republic." William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 55-58 (2018). Rather, early American courts adapted the principle of personal official liability from the English tradition and "applied it with unprecedented vigor." David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 14 (1972). Early public officers "bore personal liability for … affirmative acts, willfully done," including both "any positive wrong which was not actually authorized by the state" and even purportedly authorized wrongs. *Id.* at 16-17. The early American rule was thus "extremely harsh to the public official." *Id.* at 18.[7] In short, "good-faith reliance did not create a defense to liability—what mattered was legality." Baude, *supra*, at 56.

[7] This stringent rule of official accountability was mitigated by the possibility that an official held liable for misconduct could petition the legislature for indemnification. *See* Pfander & Hunt,

Strict official accountability for civil rights claims persisted through Reconstruction and after the enactment of § 1983. *See, e.g.*, Joseph Story, *Commentaries on the Constitution of the United States* § 1676 (4th ed. 1873) ("If the oppression be in the exercise of unconstitutional powers, then the functionaries who wield them, are amenable for their injurious acts to the judicial tribunals of the country, at the suit of the oppressed."). For instance, in 1851, this Court upheld a monetary award against a U.S. colonel for seizing property in Mexico during the Mexican-American War, despite the defendant's presumed "honest judgment" that the seizure was justified by wartime emergency. *See Mitchell v. Harmony*, 54 U.S. 115, 133-35, 137 (1851). Shortly after § 1983's enactment, this Court again affirmed that official liability for wrongful acts "committed from a mistaken notion of power" "cannot be diminished by reason of good motives upon the part of the wrongdoer," because "the law tolerates no such abuse of power, nor excuses such act." *Beckwith v. Bean*, 98 U.S. 266, 276-77 (1878). And in an early case interpreting § 1983, this Court rejected a good-faith defense to a constitutional claim brought under that statute as foreclosed by the statutory text. *See Myers v. Anderson*, 238 U.S. 368, 378-79 (1915). It was not until 1967—nearly a century after § 1983 was enacted—that this Court began to read a qualified immunity defense into the statute; it was many more

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supra, at 1924. But neither the official's subjective good faith nor any objective requirement that the law be "clearly established" categorically shielded the official from liability in the first instance. *See, e.g.*, Baude, *supra*, at 55-58.

years before the present-day, "objective" qualified immunity doctrine took shape.

What's more, there was no "freestanding common-law defense" available in suits against government officials. Baude, *supra*, at 58-59. Instead, where good faith *was* implicated, it was because the particular tort that was the subject of the lawsuit included bad faith or malice as an element. *Id.* at 59-60. In that case, a finding of good faith or the absence thereof fell on "the merits side of the ledger" and determined whether the plaintiff could make out a claim at all. *Id.* But "good faith" was not a generic defense to official liability. And the subjective good-faith defense available for certain common law actions against government officials bears no relationship to the modern objective qualified immunity inquiry. *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1802 (2018).[8] To the extent this Court has attempted to capture the background common law principles regarding official liability and immunity when § 1983 was enacted in 1871, its qualified immunity jurisprudence has not succeeded in that endeavor.

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[8] Indeed, a good-faith inquiry is already built into Eighth Amendment claims such as Taylor's, which require an analysis of the objective risk of harm from the defendants' conduct and the subjective deliberate indifference exhibited by the defendants. The Fifth Circuit expressly resolved the subjective deliberate indifference analysis in Taylor's favor, Pet. App. 15a-16a, exemplifying the divergence between the objective "clearly established" inquiry and the kind of good-faith defense that might be available to certain claims at the common law.

It is not just academics who have recognized that qualified immunity is a modern invention untethered from any common law immunities. Past and current members of this Court have acknowledged that modern qualified immunity doctrine has "diverged to a substantial degree from the historical standards." *Wyatt*, 504 U.S. at 170-72 (Kennedy, J., concurring); *see also, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) (critiquing the doctrine as lacking grounding in the text and history of § 1983, an example of the Court "substitut[ing] [its] own policy preferences for the mandates of Congress"); *cf. Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting) (describing modern qualified immunity doctrine as an "absolute shield for law enforcement officers").[9]

[9] These concerns are echoed across the judiciary. *See, e.g.*, *Horvath v. City of Leander*, 946 F.3d 787, 795 (5th Cir. 2020), as revised (Jan. 13, 2020) (Ho, J., concurring in the judgment in part and dissenting in part); *McCoy*, 950 F.3d at 237 (5th Cir. 2020) (Costa, J., dissenting in part); *Kelsay*, 933 F.3d at 987 (Grasz, J., dissenting); *Zadeh,* 928 F.3d at 479 (Willett, J., concurring in part, dissenting in part); *Rodriguez v. Swartz*, 899 F.3d 719, 732 n.40 (9th Cir. 2018); *Thompson v. Cope*, 900 F.3d 414, 421 n.1 (7th Cir. 2018); *Irish v. Fowler*, No. 15-CV-0503 (JAW), 2020 WL 535961, at *51 n.157 (D. Me. Feb. 3, 2020); *Ventura v. Rutledge*, 398 F. Supp. 3d 682, 697 n.6 (E.D. Cal. 2019); *Russell v. Wayne Cty. Sch. Dist.*, No. 17-CV-154 (CWR) (JCG), 2019 WL 3877741, at *2 (S.D. Miss. Aug. 16, 2019); *Manzanares v. Roosevelt Cty. Adult Det. Ctr.*, 331 F. Supp. 3d 1260, 1293 n.10 (D.N.M. 2018); *Thompson v. Clark*, No. 14-CV-7349 (JBW), 2018 WL 3128975, at *9-10 (E.D.N.Y. June 26, 2018).

B. Qualified immunity does not further the policy goals it was designed to achieve.

Despite its lack of statutory or common law roots, qualified immunity is primarily justified by the purported need to protect officials from financial liability and to avoid chilling the exercise of their duties. *See, e.g.*, *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). The theory is that, "[w]hen officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct." *Forrester v. White*, 484 U.S. 219, 223 (1988). In the § 1983 context, this Court has guarded assiduously against "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Harlow*, 457 U.S. at 814 (alteration in original) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)); *see also, e.g.*, *Pierson*, 386 U.S. at 555 ("A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.").

By contrast, in cases where these considerations were not implicated, the Court has declined to extend qualified immunity to protect defendants from damages claims. *See Richardson v. McKnight*, 521 U.S. 399, 411 (1997) (comprehensive insurance coverage for private prison guards "reduces the employment-discouraging fear of unwarranted liability"); *Owen*,

445 U.S. at 654 (noting that the "injustice … of subjecting to liability an officer who is required … to exercise discretion" is "simply not implicated when the damages award comes not from the official's pocket, but from the public treasury").

Yet the nearly universal practice of government indemnification of public officials means that government actors are virtually never on the hook financially for actions performed in the course of duty. As Professor Joanna Schwartz found in a recent empirical study tracking litigation payments and indemnifications over a five-year period, in 44 of the country's largest jurisdictions, "officers financially contributed to settlements and judgments in just .41% of … civil rights damages actions resolved in plaintiffs' favor, and their contributions amount to just .02%" of the damages paid out in these cases. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890, 912-13, 936-37 (2014).[10] In 37 smaller jurisdictions tracked in the study, officers "never contributed to settlements or judgments in lawsuits brought against them." *Id.* Officers "did not contribute to settlements and judgments even when indemnification was prohibited by statute or policy" and even when the liable officers "were disciplined, terminated, or prosecuted for their misconduct." *Id.* at 937. Officer indemnification included legal representation as well, as officers

[10] This expansive indemnification extended to punitive damages awards: Only one officer in the study was required to pay anything in punitive damages, for a total of $300. *Id.* at 917-18.

were "almost always provided with defense counsel free of charge" when they were sued. *Id.* at 915.

Thus, for any individual officer, the likelihood of having to contribute to a damages settlement or judgment in the course of a career is "exceedingly remote": In most jurisdictions studied, "officers are more likely to be struck by lightning than they are to contribute to a settlement or judgment in a police misconduct suit." *Id.* at 914. The same is true of prison officials: "[F]or individual officers, litigation is mostly a minor inconvenience because … officers do not have to pay for either their defense or any resulting settlement or judgment. Instead, in nearly all inmate litigation, it is the correctional agency that pays both litigation costs and any judgments or settlements, even though individual officers are the nominal defendants." Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1675-76 (2003). That is, publicly employed prison officials are in precisely the same financial situation as the private prison guards who were denied qualified immunity in *Richardson* because they were covered by insurance. 521 U.S. at 411. The principal concern animating the development of a robust qualified immunity defense is empirically invalid.

C. Qualified immunity leaves significant violations of important constitutional rights without remedy.

Modern qualified immunity doctrine stunts the development of constitutional law, preventing individuals from vindicating their constitutional rights. In theory, each case alleging a constitutional violation should help clarify the contours of constitutional

rights and limitations. Even under a qualified immunity regime, where the first plaintiff to raise a valid constitutional claim might be unable to recover unless the violation was "obvious," so long as the court reached the merits of the claim, subsequent plaintiffs could take advantage of the rule established in that suit. *See, e.g.*, John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 Sup. Ct. Rev. 115, 120 (2009) ("When the lack of a clearly established right precludes recovery in one case, adjudication of the merits puts the next case on a different footing.").

Yet since this Court in *Pearson* permitted courts to conduct the two-pronged qualified immunity analysis in any order, courts have frequently granted qualified immunity because of a lack of factually analogous precedent without first determining whether the challenged behavior is unconstitutional. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Calif. L. Rev. 1, 33-51 (2015). Now, "[t]he law is never made clear enough to hold individual officials liable for constitutional violations … as Congress authorized in 42 U.S.C. § 1983." *Kelsay*, 933 F.3d at 987 (Grasz, J., dissenting). And the cycle of qualified immunity can perpetuate endlessly, resulting in "[i]mportant constitutional questions go[ing] unanswered precisely because no one's answered them before." *Zadeh*, 928 F.3d at 479-80 (Willett, J., concurring in part, dissenting in part); *see also* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 65-66 (2017) ("[I]f courts regularly find that the law is not clearly established without first ruling on the scope of the underlying constitutional right, the constitutional right at issue

will never become clearly established."). Absent an overhaul of qualified immunity, constitutional law will continue to stagnate, and plaintiffs alleging serious constitutional harm will continue to lack a remedy.

IV. This Case Is The Ideal Vehicle To Resolve The Questions Presented.

Several aspects of this case make it an ideal vehicle for addressing these critical questions about the scope and propriety of qualified immunity.

First, the facts are straightforward and essentially uncontested. Taylor was forced to reside for nearly a week in egregiously unsanitary conditions, first in a cell that was coated top to bottom with other prisoners' feces where he could neither eat nor drink water and then in a "cold room" where he was made to sleep in a puddle of raw sewage. He repeatedly brought his horrific cell conditions to the attention of Respondents, who refused to help him and at times mocked or laughed at him. As the district court pointed out in its summary judgment order, Respondents barely disputed Taylor's account, "provid[ing] little in the way of specific summary judgment evidence to support their assertion that the cells were not, in fact, covered with feces." Pet. App. 47a. The clear record and streamlined facts make this a clean vehicle to decide the questions presented as a matter of law.

Second, no ancillary issues would obstruct this Court's consideration of the questions presented. The appeal presents no procedural barriers inhibiting the

Court's review of the merits. The Fifth Circuit unanimously held that the horrific conditions Taylor experienced violated his constitutional rights. The only issue for this Court to resolve is whether qualified immunity bars Taylor's claim. The issue is squarely presented and was the sole basis for the decision below.

Third, this case does not feature split-second decisionmaking, and the officials here were not faced with an urgent decision that they resolved without deliberation. Instead, they intentionally placed Taylor in two separate squalid cells covered in human waste and left him there for nearly a week, despite his repeated pleas to be relocated. Their choice to subject Taylor to these conditions could have been reversed at any time. Moreover, there was no possible penological justification for Respondents' behavior; Respondents did not choose incorrectly between two plausible approaches but instead subjected Taylor to these filthy conditions in "obvious" disregard for his bodily safety. Pet. App. 15a-16a. Official immunity should be at its nadir in the face of a deliberate and long-lasting constitutional violation.

Finally, this case effectively demonstrates several ways in which modern qualified immunity doctrine is untenable. The Fifth Circuit's granular parsing of the number of days Taylor spent naked in a cell covered in others' feces and urine demonstrates the difficulty that courts face in determining the appropriate level of generality at which to define the right at issue. Its refusal to find an "obvious" constitutional violation renders *Hope* a nullity. Even the holding that Respondents' mistreatment of Taylor *was* unconstitutional gives minimal prospective guidance to courts in

evaluating analogous but slightly differentiated circumstances against a qualified immunity defense: What if an inmate is left in a cell like Taylor's for only five days? What if an inmate is placed in a seclusion cell as punishment for misbehavior rather than during treatment for suicidality? What if the next time there is a chair in the second cell? These minor tweaks to the fact pattern could be rightfully recognized as irrelevant to the core constitutional violation or incorrectly found to immunize future illegal conduct, depending on the specificity with which the constitutional right established by Taylor's case is defined. This case thus enables the Court to consider the validity of its qualified immunity jurisprudence in a context in which the flaws of that doctrine are apparent and were dispositive to the outcome below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 24, 2020

SLATE
THE LEGEND'S ALREADY BEING PRINTED

JURISPRUDENCE

A Trump-Nominated Judge's Courageous Campaign for Police Accountability

BY MARK JOSEPH STERN

APRIL 02, 2021 • 3:28 PM

Judge Don Willett. Texas Public Policy Foundation

Progressives have many reasons to be skeptical of Don Willett, a former justice of the Texas Supreme Court whom Donald Trump placed on the 5th U.S. Circuit Court of Appeals in 2018. Willett has suggested that the Voting Rights Act's ban on the dilution of racial minorities' votes is unconstitutional. He refused to reconsider an anti-abortion decision by his colleagues that flouted Supreme Court precedent. And he declined to revisit a ridiculous,

overtly political ruling that threatened to eradicate Obamacare.

Willett is, in other words, a very conservative jurist. But unlike so many Trump nominees, he does not seem to be a rank partisan in robes. Willett has embarked upon an impressive and even courageous crusade for police accountability, challenging Supreme Court precedents that shield both state and federal law enforcement from liability when they brutalize civilians. Traditionally, it's left-leaning judges who try to bend the law toward justice for victims of police violence. Willett, however, has become arguably the most vocal advocate of reform in this area of law among lower court judges. And there are already subtle signs that the Supreme Court is listening.

The chief target of Willett's ire is the doctrine of qualified immunity, which limits the scope of federal civil rights law. The actual statute, Section 1983, that grants civilians the ability to sue state and local law enforcement in federal court for violating their constitutional rights, says nothing about qualified immunity. But the Supreme Court has grafted this doctrine onto the statute and used it to immunize most officers from civil suits. Under qualified immunity, a victim of police misconduct must prove two things before their case can proceed to trial: first, that the officer violated a constitutional right, and second, that this right was "clearly established" at the time of the offense. If the victim flunks either test, the officers get qualified immunity, the case is thrown out, and the victim never even gets their day in court.

It is this second test, the requirement that the right at issue be "clearly established," that wreaks the most havoc. Federal appeals courts demand that the right be "clearly established" by their own precedents, freeing police to violate their own department rules if those rules haven't been explicitly affirmed by the court. Yet courts don't even have to decide whether a constitutional right exists in qualified immunity cases; they can simply

say that the alleged right is not "clearly established," denying future plaintiffs a precedent they could use to overcome qualified immunity.

Worse, courts frequently grant qualified immunity because of some minor discrepancy between the precedent establishing a constitutional right and the case at hand. For instance, in *Taylor v. Riojas* the 5th Circuit extended qualified immunity to the prison guards who locked Trent Taylor in a cell covered in human feces for six days—even though the court had previously held that locking people in feces-covered cells is unconstitutional. In the prior case, the court reasoned, the victim was locked up for months; in this one, he was locked up for six days. Because of this distinction, the court held, Taylor's right not to be locked in an excrement-coated cell for six days was not "clearly established."

Willett has consistently criticized both the doctrine of qualified immunity and its perverse consequences. In one opinion, he wrote "to register my disquiet over the kudzu-like creep of the modern immunity regime." As he summarized it: "No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads defendants win, tails plaintiffs lose." No wonder that "to some observers, qualified immunity smacks of unqualified impunity." Willett concluded by adding his "voice to a growing, cross-ideological chorus of jurists and scholars urging recalibration" of the doctrine.

One month later, Willett reiterated his concerns about "the entrenched, judge-invented qualified immunity regime." By "insulating incaution" from consequence, he wrote, "the doctrine formalizes a rights–remedies gap through which untold constitutional violations slip unchecked." Victims are left "violated but not vindicated." But, he added, "as a middle-management circuit judge, I take direction from the Supreme Court." And "a majority of the Supreme Court," Willett wrote, "disagrees" with his critique.

Do they, really? On Nov. 2, the Supreme Court issued a surprise 7–1 decision in *Taylor v. Riojas* reversing the 5th Circuit's grant of qualified immunity to the prison guards. (Justice Clarence Thomas dissented, and Justice Amy Coney Barrett did not participate.) In its unsigned decision, issued without oral arguments, the court reprimanded the 5th Circuit for ignoring "the obviousness of Taylor's right." Because of "the particularly egregious facts of this case," the court held, "any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution." Then, in February, the Supreme Court ordered the 5th Circuit to reevaluate its decision in another qualified immunity case, *McCoy v. Alamu*, in light of *Taylor v. Riojas.*

As University of South Carolina School of Law professor Colin Miller has noted, these decisions indicate a major shift in the Supreme Court's qualified immunity jurisprudence. The justices appear to be moving away from a "comparative" standard, which requires a precedent directly on point, toward a "no reasonable officer" standard, which would deny qualified immunity to an officer whose behavior was obviously unreasonable. This development would address Willett's concerns: Victims of police misconduct would no longer need to identify a virtually identical precedent clearly establishing their rights; they could, instead, demonstrate that any reasonable officer would've known that the conduct in question was unconstitutional.

Willett seems to have picked up on this trend. Shortly after the Supreme Court's decision in *Riojas*, he denied qualified immunity to two police officers who killed a man who posed no clear threat by pinning him to the ground, shocking him with a stun gun, and beating him with a baton. More recently, on Thursday, Willett denied qualified immunity to an officer who repeatedly shot an unarmed, mentally ill man as he stumbled away from the police, killing him. As Willett summed it up: "By 2017, it was clearly established—and possibly even obvious—that an officer violates the Fourth Amendment if he shoots an unarmed, incapacitated suspect who is moving away from everyone present at the scene."

To his credit, Willett's distress over law enforcement's lack of accountability extends beyond qualified immunity. In March, he wrote an impressive opinion criticizing a huge loophole in federal law: While Section 1983 allows lawsuits against *state* officers, there is no statute that lets victims sue *federal* officers, like FBI and Border Patrol agents, for damages. In a 1971 case called *Bivens*, the Supreme Court tried to remedy this problem by authorizing civil suits for excessive force against federal agents. Since 1980, though, an increasingly conservative SCOTUS has slashed away at *Bivens*, rendering it close to a dead letter.

Bemoaning this trend, Willett highlighted the tragic practical consequences of *Bivens*' demise: "Private citizens who are brutalized—even killed—by rogue federal officers can find little solace in *Bivens*," he wrote. In 2021, "redress for a federal officer's unconstitutional acts is either extremely limited or wholly nonexistent, allowing federal officials to operate in something resembling a Constitution-free zone." That means that "if you wear a federal badge, you can inflict excessive force on someone with little fear of liability." Willett questioned the Supreme Court's abandonment of *Bivens,* citing recent scholarship providing an originalist justification for the decision. And he implored either Congress or SCOTUS to fix the "rights-without-remedies regime" that they helped to create.

Because Willett was nominated by a lawless con artist, it may be tempting to write off his criminal justice opinions as a disingenuous bid for bipartisan praise. But the consistency and passion with which he has attacked unjust precedents suggests that, at least on police accountability, Willett is the real deal. And given that he might have the Supreme Court's ear, he's well-positioned to bend the law in a more just direction. In today's conservative judiciary, progressives need all the allies they can find.

The Art of Persuasion at Trial

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THE ART OF PERSUASION AT TRIAL

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Presentation at the Annual Meeting of the West Virginia State Bar at The Greenbrier

12 April 2021

JACKSONKELLY PLLC

THE ART OF PERSUASION AT TRIAL

DESERVE SUCCESS

I want to first lift up the three primary words in the title: art, persuasion, and trial.

The first word is "art." In the context of the whole title phrase, the word implies the addition of something creative, something evocative, something beyond mere technical skill, something indeed that suggests the application of talents and gifts as well as skills to the trial itself. This is all true. But let me emphasize that the "art" involved here is mostly hard work. No matter what you bring to the table, effecting and implementing your own "art" of persuasion at trial is intensely difficult. It will tax you. It will make your brain tired. An artful cross-examination may take ten minutes to execute and twenty hours to prepare. But it is worth it.

"Persuasion" is the absolute core of what we do. It may be the guts of every lawyer and the life blood of every litigator, but it is the pure heart and soul of a trial lawyer. Persuasion is what we do every day in letters, discussions, e-mails, presentations, arguments, briefs, and on way too few occasions now-a-days, at trial. In fact, a great proportion of the communication that we human beings engage in all of the time involves our efforts to persuade other human beings of one thing or another. Lawyers are just supposedly better at it than ordinary mortals.

Last but not least, "trial" – the place where only the truth, the whole truth, and nothing but the truth is told, and where justice always prevails. Well, maybe not exactly. But, handled properly by competent lawyers before a competent judge, trial is indeed a place where the jury will be able to divine enough truth to lead them to a fair and reasoned decision, and that is justice in our system. Most important to my subject, trial is the place – really the only place in litigation – where everything comes together. It is the place where all of the elements of persuasion, all of

the skills, all of the techniques, and all of the artistry that you can muster are brought to bear upon six or twelve of your fellow human beings in an effort to persuade them – all of them – that they should lean in your direction, accept your position, decide in favor of your client.

Notice that in the previous sentence I did not use the phrase "get a defense verdict" or the word "win." That is because, after more than 40 years of trial work as a defense lawyer, my definition of "win" has morphed a bit. For only one example: If the last demand that you received prior to the jury rendering its verdict was $30 million, your last offer was $9 million, and the verdict was $500,000, is that a "win?" One of the things you learn in doing this work for a long time, and one of the reasons you become a devotee of the "art or persuasion," is that most well-tried cases – meaning well-tried by plaintiff, defendant, and the judge – can sustain a verdict either way, or at least one leaning in either direction, especially where the optional result is an award of money damages.

Almost no case is ever "open and shut." That is not to say that you will not be confident of what the outcome should be, only that you must not blind yourself to the reality that there usually are indeed at least two sides to every story. The best that we can do as trial lawyers is to pursue the goal set by John Adams in one of his letters to Abigail when he was engaged in the work of the Continental Congress: **"We can't guarantee success, but we can deserve it."**[1] You will find as you struggle through the profession of trial lawyer that the case that cannot possibly be won, can be, and the case that cannot possibly be lost, can be too. The vicissitudes of rulings,

[1] *Landon Lecture Series* given by David McCullough on 1 February 2002 at Kansas State University, "The Founders: The Greatest Generation." Although often attributed to John Adams, Mr. McCullough explained that he read the same sentence in a couple of letters that George Washington had written. Thinking perhaps the line was not original to either, he did a little research and found that it actually came from the play "Cato" by Joseph Addison, which was probably the most popular play of that time. McCullough further explained that the actual line in the play is, he thought, even better than the one used by Adams. The line in the play is "We can't guarantee success, we can do something better, we can deserve it."

witnesses, juror proclivities, group dynamics, and all of the other subtle and not so subtle factors that can influence the outcome of trials are what make them so exciting and so demanding. But there is no such thing as a sure thing; all we can do is apply our skills and talents and intelligence as artfully as possible in our effort to persuade the decision maker to come toward us. We can make sure that our clients – we – deserve to win.

Individuality

A great deal has been written by accomplished practitioners about litigation and trial skills.[2] You hear from talented trial lawyers in articles and seminars all the time; lawyers who have demonstrated over their careers that they are effective purveyors of their art. All of you have been to and will go to many more seminars that break the "trial" process down into its various segments and "teach" you techniques and methods, dos and don'ts, providing pointers that are designed to assist you in becoming adept at the various elements of trial preparation and trial: e and other document/digital discovery, motions practice, voir dire, jury selection, opening statements, direct examination, cross-examination, witness preparation, handling documents and exhibits, closing statements, verdict forms, special interrogatories, jury instructions, and more. Each one is a seminar in and of itself, an activity demanding its own set of special knowledge and skills, but my topic subsumes them all. My topic incorporates everything you learn about all

[2] There are an extraordinary number of wonderful books and articles and webpages and blogs by great trial lawyers about how to perfect our art. Among the best are the writings of James McElhaney for the American Bar Association, and those of the great Irving Younger. There are also many books that reproduce memorable summations and oral arguments, including many going back to the early days of our United States Supreme Court and down through great trials of the twentieth century. Some of this good reading includes:

Miller, Henry G., Esq. *On Trial: Lessons from a lifetime in the courtroom*. New York: ALM Publishing, 2001. Print.

McElhaney, James W. *Litigation.* Chicago: American Bar Association, 1995. Print.

McElhaney, James W. *The Litigation Manual First Supplement*. Chicago: American Bar Association, 2007. Print.

Younger, Irving. *No. 1 The Art of Cross-Examination.* Chicago: American Bar Association, 1976. Print.

There are many more numbers in this series and scores of articles, books, lectures, and recordings of Younger. He is wonderful.

of the various aspects and pieces of a trial and addresses how you interlock all of those pieces into a conceptual whole that makes you deserve success. That is the art part.

It is imperative to understand, however, that the artistry of which we speak is unique to each individual. Just as the expression of creativity through painting or the composing of music, while sustaining many similarities, nevertheless produces an infinite number of variations from one person to the next, so too with the art of trial lawyers. My style will not be your style. My expression of the art will not be your expression of it. Each of us must apply ourselves in our own way which, inevitably for those who are truly great at this work, will be at bottom unique. There are few highly successful rote imitators in this line of work. All trial lawyers draw ideas and techniques from many, which they refine and combine to their own use. The good trial lawyers stop there; the great ones use the pieces to build something new.

The artistry of trial work is a bit like Justice Stewart's famous comment about obscenity:[3] it's hard to describe, but you recognize it when you see it. Thus, one normally discusses ideas, elements, technical know-how, activities, and examples that can equip you to be an artist without really being able to tell you much about what your paintings are going to look like. The fact is that the artistic approaches that are possible in effectuating the art of persuasion at trial are as infinite and idiosyncratic as the lawyers who attempt to perfect that art and the fact situations that they face in the individual cases that they must try.

Mastery of all the fundamental litigation/trial skills is foundational – you must first be a really good craftsman. To elevate yourself from a craftsman to an artist requires a lot of hard work, including recognition and refreshment of your own innate talents. It is critical in this

[3] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description ['hardcore pornography'], and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it*, and the motion picture involved in this case is not that." *Jacobellis v. Ohio* 378 U.S. 184, 197(Stewart, J., *concurring*, emphasis added.)

respect to understand the distinction between presentation and persuasion. Any marginally competent lawyer can "present" witnesses and other evidence; to be a trial lawyer is to do so in a way that will persuade the jury to move toward your position. The difference is huge. That is not to say that a lawyer who does a workmanlike job at presenting the case cannot be an effective and successful lawyer; she can. I am only saying that great trial lawyers elevate the process through art. Any conversation, argument, or presentation can persuade, but the lawyers who blend everything together by adding those brushstrokes that creatively transform the presentation and elevate it to an art form are those who are most successful as trial lawyers.

Know your audience

The playwright George Bernard Shaw once said that "[t]he single biggest problem in communication is the illusion that it has taken place."[4] Lawyers live and die by the spoken and written word. A trial lawyer's whole *raison d'etre* is to communicate ideas, thoughts, concepts, facts, and eventually persuasive arguments to others. How many times in life and work, however, do we think that we have communicated when actually we have not because there is no "meeting of the minds" in the sense that each of us has the same understanding of what the communication was about. Ships passing in the night. This is nowhere more important than it is when a trial lawyer is trying to persuade a jury. As a youngster growing up in rural West Virginia, I learned, truly learned, at an early age that communication is easy, but comprehension is difficult. "Clean the barn" carried a lot more meaning to my dad than it did to me – at least it did the first time he told me. The trial lawyer must not only communicate the evidence and the information to the jury, but she must also find a way to make sure that the audience, usually the

[4] As quoted and footnoted in Bennett, Mark W. "Eight traits of great trial lawyers." *Voir Dire.* Summer 2014: 9-19. Print.

jury, “gets it.” The jury must comprehend the meaning in the way that the trial lawyer believes is accurate, which is to say the way the trial lawyer wants the jury to comprehend the information.

It is always best in trial to allow the jury to reach the conclusion themselves. While the trial lawyer will no doubt express to the jury, certainly in closing argument, what it is the jury should conclude, it is so much better if by that time you are merely stating the obvious because the jury has already gone there on its own. How many times have you or your colleagues who are trial lawyers noted that the jury was seen to be unconsciously nodding their heads during testimony or during closing argument, indicating not so much agreement as that they are getting it?

A great deal of the modern literature about trial work suggests that we have to conform our delivery to our audience. This is usually spoken in the context of the jury and in the context of the stereotypical differences that are represented by comparing the characteristics of the greatest generation from WWII vintage, the baby boomers, and the serial “younger” and “youngest” generations who have followed. The modern emphasis consistently is on tech-savviness, short attention spans, and other such statistical stereotypical insights that are supposed to help us hone our “presentation” so that the members of the jury will receive and process the information. I go a distance down that road, but not nearly all the way. The questions I always ask myself or those who are speaking this view are indeed the usual ones: Who exactly is going to be on your jury? Can you describe them for me? How old are they? What are their backgrounds? What are their educational levels? What do their homes and yards look like? Etc, Etc., Etc. Of course, the underlying, unasked, and essentially unanswerable question is the most

important: Are they stereotypical sheep, wide-eyed independent thinkers, loose cannons, or inscrutable individuals?

These are the questions you always ask once you are looking at a jury venire and trying to make some kind of informed "judgment" (read: "guess") about how each particular person might react to the evidence that you know is going to be presented to them in your case so that you can pick just the right ones during jury selection. I suggest that you can use all of the demographic and other information it is possible to accumulate, organize, and study about those persons in the jurisdiction involved who will be eligible to be on your next jury, but the fact is that until they are selected and "in the box," you really have very little idea of what that jury – that very particular mix of people – is going to look like. Even then, your information is pretty generic and sketchy at best. In the end, you must live with the concept of "what you see is what you get." Your jury could be dominated by retired baby boomers. It could be dominated by 20 year old unemployed people without a high school education. It could include a loose cannon or two. Probably a mix of strong and weak personalities. If any conclusion can be drawn from 40+ years of doing mock trials and focus groups, studying potential jurors, then seeing jurors put in the box, and then hearing what those jurors decide, it is that these aspects are themselves very, very hard to evaluate – especially in the unique group dynamic situation imposed by being a jury – and are seldom predictive of the result anyway. You will have some insight once the jurors are selected, or will think you do, but surprises – good and bad – still abound. Do not misread this comment: I am a **strong** believer in the jury system and in the ability of jurors to do the right (which often means simply the fair) thing at the end of a trial if they have been presented with all of the necessary information in a competent way, and especially if they have been "persuaded" that they should move in the proper direction. I just resist any reliance on being able to predict

that in advance based on juror stereotypes. I don't like stereotyping; it inevitably degrades and erodes the effectiveness of your communication.

So, in general, my advice is that you not try to build the presentation part of your trial work on some stereotypical prediction as to what will be the stereotypical characteristics of your jury – how great will be their ability to comprehend, how smart they are, how attentive they will be, etc. It is much better for you to simply decide upon the best ways for you to communicate and persuade about the particular ideas, concepts, facts, and theories that are present in your particular case. Focus on those things that always remain the same: the basic principles that underlie the art of persuasion, and use all of the techniques, tools, talents, and tricks (meaning artistic tricks) available to you to inform and persuade the jury. The principles themselves do not change, although the means used to employ them certainly will.

I think the two biggest pot-holes in the "juries are stereotypical" road today are 1) it underestimates the jury, and 2) it overemphasizes technology. In my experience, juries will surprise you because they will recognize the importance of what they are doing. They will surprise you because, if dealt with properly, they will "get it." They will surprise you because so many times, whether you objectively "won" or "lost," you will come away thinking that they did their job pretty well.

I think it underestimates the jury to suggest that their attention span collectively will be so short that they will not be able to concentrate on or comprehend a thought that cannot be persuasively submitted in the length of a Twitter feed. I think it underestimates the jury to conclude that they will not be able to understand complex principles and concepts, resulting in an unpersuasive level of dumbing down (if you think the jury is stupid, they will know it, and they won't like it). Rather, it is normally the lawyers' inability to translate those principles and

concepts into an understandable layman's form that is the culprit. Doing that, to many lawyers today, means only one thing: technology. Technology is a fantastic tool in many ways. But it is only a tool. Jurors cannot stare a computer in the eye; they cannot through PowerPoint experience the nuance, emphasis, other subtle and persuasive elements that voice and person add. You must use them all. I think juries will surprise you in much the same way as small children do, because they will understand and know and do much more than you might normally think them capable of – even without a TV screen between them and you.

Trial is of course unique in the world of communication and persuasion. Normally, whether we are engaged in argument or trial or marketing or advertising or elections or even casual conversation, we try very hard to work on "persuading the persuadable" – using our presentations and our arguments on people who we believe are open to be persuaded to the point of view that we are advocating. I know you want to be a great trial lawyer. Thus, I am certain it will be easier for me to "persuade" you that certain concepts and techniques might be useful. But it is rare for you to obtain a jury that you <u>know</u> is persuadable in that sense. We certainly try, but jury selection remains, in this respect, an imperfect science at best, a disaster at worst.

Thus, what we as trial lawyers must do is elevate our game to the highest level possible, meaning we make it so good that we believe we can "persuade the <u>un</u>persuadable." Again, "we cannot guarantee success, but we can deserve it."

MODES OF PERSUASION

There is nothing really new today as far as the modes of persuasion are concerned. [5] Human beings have been trying to persuade one another of things literally since the dawn of

[5] Talking about the art of persuasion almost has to begin with Aristotle and Pascal, but the writings on the topic thereafter are literally legion, including the publication by two of our WV colleagues in "*For the Defense*." Shaefer,

time. In fact, most would probably agree that, as a general matter, enlightened human beings were better at this in older times than they are today. I wager that few of us have ever read Lincoln's Cooper Union speech[6], but literally thousands did after he gave it. Today it would be reduced to 20 seconds on the news and maybe some "Facebook" comments. There are many advantages that one can point to in the age of Twitter, Facebook, sound bites, YouTube videos, and everything else that the technological revolution has brought to us, but among them are not the encouragement of higher levels of concentration ability, longer attention spans, or a heightened interest in understanding a thing deeply – all these being shortcomings that the trial lawyer must in the preparation stage avoid entirely.

The three primary modes of persuasion have not been better described than they were by Aristotle in *The Art of Rhetoric*. Find it and read it. Really. They are *ethos*, *pathos*, and *logos*.

Ethos

The first of the three is *ethos*. I like this one because, well, it's all about me or, as budding trial lawyers, it's all about you. *Ethos* is the appeal of the person trying to do the

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Natalie, C. and Callie E. Waers. "Make the Most out of your Face Time with a Jury: Speak Psychology." DRI's For the Defense, Oct. 2014. See also:

Aristotle. *The Art of Rhetoric.* Penguin Classics, 1992. Print.

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Scalia, Antoni, and Bryan A. Garner *Making Your Case The Art of Persuading Judges* St. Paul: Thompson/West, 2008. Print.

[6] Lincoln's Cooper Union Address delivered on 27 February 1860 at Henry Ward Beecher's church in Brooklyn, New York. "An eyewitness that evening said, 'when Lincoln rose to speak, I was greatly disappointed. He was tall, too, - oh, how tall! And so angular and awkward that I had, for an instant, a feeling of pity for so ungainly a man.' However, once Lincoln warmed up, his face lighted up as with an inward fire; the whole man was transfigured. I forgot his clothes, his personal appearance, and his individual peculiarities. Presently, forgetting myself, I was on my feet like the rest, yelling like a wild Indian, cheering this wonderful man.'" *Abraham Lincoln's Cooper Union Address*. N.p., n.d. 11 Nov. 2014. Web. The lengthy and scholarly speech was reprinted in newspapers and widely circulated – and read – as campaign literature. Unlikely today.

persuading, in this instance the trial lawyer. It is about how credible that person is to his audience, the jury. *Ethos* is all about convincing the jury, or maybe informing the jury is a better way to put it, that you are the most qualified, most trustworthy person present in the courtroom to talk about and present information, true information, to them about the case.

Pathos

Pathos is an appeal to the audience's emotions (the words pathetic and empathy are both derived from *pathos*). This is probably the method most reliably used (and sometimes overplayed) by plaintiffs' attorneys. But emotion is more than sympathy. It can merely mean the evocation of memory through the use of metaphor, similes, comparisons, or references that we believe will resonate with the jury. It can mean injecting a bit of passion in your delivery or your examination – not overdone, but passion. Humor, of course, can have a place, but it is perhaps the most subtle and dangerous *pathos* technique to try. It takes a very deft touch and much careful thought. Don't try it in your first trial.

Logos

Last on Aristotle's list is *logos* which, as the name implies even for those unschooled in Latin, is the appeal to logic. This is probably the most comfortable of the three modes, especially for lawyers. Just the facts, ma'am. It is, in fact, probably the most important mode in the trial setting. No other mode of persuasion can be expected to work effectively if it is not supported by *logos*. You cannot allow your case to be overwhelmed by *logos*, however. Too many statistics, too many charts, too much information, can overload even the most intelligent and attentive jury. It can reach the law of diminishing returns, and that usually acts to the

disadvantage of the persuader. "Simplify, simplify, simplify"[7] finds its antithesis in the overplay of *logos*.

CRAFTSMAN TO ARTIST

So, how do you create and employ *ethos, pathos,* and *logos* to move yourself from craftsman to artist?

First, by establishing credibility, authority, and likeability.

Credibility will almost always start with the relationship you have with the judge. If you have been before the judge on multiple occasions, hopefully the judge will have come to believe that you are an ethical, honest, honorable lawyer who he can trust to act appropriately and present argument and evidence in a confident, correct, and honest way. If you have been able to establish that credibility with the judge over past experience, it will come through when you are in trial before that judge in front of a jury.

Beyond that, your presentation to the jury must demonstrate those characteristics. Each trial will begin that process anew; the jury does not know you yet and so, over the course of the days or maybe even weeks that trial continues, they will have innumerable opportunities to gain insight into your credibility, and you must never for a moment forget that that is one of the things that the jury is doing and that it will matter at the end of the trial.

You must also demonstrate to the jury that you are knowledgeable about <u>your</u> case; in fact, you must make the jury believe that you are the most knowledgeable person in the courtroom about the case. If you are credible and knowledgeable, the jury will likely also find you trustworthy, which means they will believe and, more important, follow you.

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[7] Thoreau, Henry David. *Walden.* Boston: Ticknor and Fields. First published in 1854. Print.

Finally, you want to be likeable. That's a tough one for some of us. It is especially tough when you can't really have a personal relationship with those who matter, meaning the jury, but must somehow project your likeability through your general demeanor and conduct in the courtroom, your interaction with those with whom you must deal – the judge, the bailiff, the client, the clerk, the court reporter, opposing counsel, other attorneys and staff who are working with you, etc. – which means that you must constantly be, as your mother no doubt told you at some point, "on your best behavior" at all times. It also means being respectful, professional, and civil. Most human beings, if you get to know them, are capable of being liked. Exuding likeability through a five or ten day trial, however, can be difficult for some when they are under the constant, intense pressures that inevitably come with every trial.

The old adage about "preparation, preparation, preparation" is certainly true. The elements of credibility, authority, trustworthiness, and likeability all are supported if not engendered by the work that you put into the preparation of your case. Confidence – not overconfidence or egotism or arrogance or condescension – but calm, straightforward confidence in what you are doing will come out if you are thoroughly prepared and ready for battle.

Gird yourself

So, how do you get ready for battle? First, you prepare yourself. Put on your armor or, in this context, "dress for success." I'm sure you all have gotten directly or read a lot of advice about how to do this for interviews, in the workplace, and for going to court or to trial. I have heard it all – everything from wearing the same "outfit" every day of trial, never wearing a suit, not having on any jewelry, having a new haircut, shaving your moustache, no pants (for women), to the opposite of each. My view is that jurors expect to see a professional. They expect to see

someone who is confident and successful – and looks it. They don't expect to see someone who is about to go out to – or worse, has just returned from – the gym. My advice is to dress in a way that makes you feel professional, comfortable, and confident. To me, that means dressing your best. You need to show the judge and the jury that you have the utmost respect for them and for the proceeding that you are in. Best suit, nicely pressed, shoes shined for the man; "appropriate" suit or dress, sensible heels, for the woman; not too much makeup or hair products for either. There clearly is a place in the world of trial work for the absentminded professor, the loveable goofball, etc., and the potential for a negative first impression can always be overcome as a jury gets to know the real you, but why take a chance on the things that you can easily correct? Why have hair that looks like it was trimmed by an unsharpened lawnmower blade when a set of $20.00 clippers can make you reasonably presentable every day? Take care of the easy things first.

Be yourself – but armed and ready. Don't copy others – learn from them. You need to do everything possible to master your craft, *i.e.* the craft involved in presenting your evidence and arguments. All of the things in all of the seminars and all of the books and articles and all of the presentations that you go to from law school through your career that are directed toward helping you hone your skills are important. You need to have down pat the fundamentals of how to handle a document and get it introduced into evidence (something that normally is not going to be very hard, but occasionally shows up as an insurmountable hurdle to some), how to do a direct examination, a cross, an opening, a closing, a jury voir dire, etc. Once you know how to play the instrument, you can begin to create your own tunes.

Practice

You should practice. Don't let yourself fall into routines as you perform the everyday parts of a litigation practice. You have to take a deposition of a fact witness? Go beyond your checklist of things you want to find out. Your skills in persuasion don't come into play only at trial; figure out ways to persuade the witness to move in your direction, tell you what you need to know, admit what you want admitted. Think ahead, and lay the groundwork for your trial examination in the deposition. Going to a meeting with the client? Practice making and using visual aids, and please know that "visual aids" does not mean only a PowerPoint presentation. Some people can actually walk up to a dry erase board (especially if they have practiced on paper or on an actual such board) and diagram something while they talk. You might be amazed at how "persuasive" that can be as compared to the usual, boring, 40 slide PowerPoint that you use for a read along. Make a freehand diagram or drawing, an excel spreadsheet, a chronology, a map – and use it. You have an argument to make? Before a judge who you think will not listen, will not have read the briefs, and probably won't ever read the briefs? Nevertheless, don't just stand up and regurgitate all or part of what you wrote in the paper that you filed, think through your argument and figure out a way to make your point in a more interesting and more engaging way. Practice.

Most important, I think, for a trial lawyer, is to present all the time. Talk every chance you get. Take advantage of any and every opportunity you have to speak, to inform, to persuade, whether it be in informal meetings, before various groups or boards, at seminars, or whatever. Bear in mind that such opportunities are always presumed to involve preparation (meaning you know and fully understand the subject and what it is you want to say about it) and often even practice. In my mind, there is no such thing as an extemporaneous speech; it is either something

you specifically practiced over and over again to make it economical, crisp, interesting, evocative, etc., or it is something that you have thought about so much that you can speak on the subject intelligibly and interestingly anytime you are poked into doing it. And, as much as you possibly can, **throw away your notes**.

Play to your strengths

Especially in the world of *ethos*, you must play to your own particular strengths. The things we talk about as being attributes of a great trial lawyer are essentially aspirational. Most of us cannot combine in sufficient degree all of the talents, skills, and characteristics that make up a great trial lawyer because we do not innately possess them and cannot develop them because they are too much of a reach beyond our basic individual nature. We must, therefore, recognize our own shortcomings, try as hard as we can to improve those shortcomings, and, crucially, we must develop our strengths as close as possible to their full potential. Some of us are excellent writers, good public speakers, logical thinkers, creative, hardworking, charming, humorous, and so much else – but few of us are all of these things combined. Thus you need to recognize your strong points and your weak ones, play to the former and minimize the impact of the latter. Another way of saying this is that you must be yourself, but always try to make that self better. The serenity prayer is still a pretty good creed to live by: "God grant me the serenity to accept the things I cannot change, the courage to change the things I can, and the wisdom to know the difference." No truer words could be spoken about the development of a great trial lawyer. For those few who possess in significant measure many if not all of the natural talents and attributes necessary, you need only fertilize them with hard work and dedication in order to harvest a great trial lawyer.

Master your case and your evidence

It goes without saying, which means that I am going to say it again, that most of the dedicated hard work that gets you ready to be persuasive at trial goes on during all the pretrial and discovery effort that you put into your case. Much is written nowadays of the demise of trial, and therefore of trial lawyers. It is true. I have read that the distinction between a litigator and a trial lawyer is this: litigators make simple things complicated and trial lawyers make complicated things simple. I believe this also to be true, and I am convinced that a great trial lawyer probably must, to be both in today's environment because the first thing the trial lawyer needs to do in a case is to master it in the most excruciating detail possible. You must indeed be able to take the simple and break it down into every conceivable subpart so that you have it arrayed before you in as much complicated detail as possible. I always say that in the pretrial stages the lawyer gathers a hundred percent of the information, thoughts, concepts, facts, diagrams, documents, etc., so that for trial she can distill it all down to the three or four percent that matter, and that is what she uses. The only way to get to that three or four percent, however, is to master the full one hundred percent.

Now to the place where I think the magic happens, and that is where the artistic trial lawyers emerge. That is the point at which all of the other work has been done and comes the task of the trial lawyer to take the complex bunch of detailed information arrayed before him by his litigator persona and simplify it for presentation to the jury in a way that will persuade them to come in his direction. How does one make that happen?

Think

As a trial lawyer you must sit back and take stock of all of the stuff that you have put together in the course of preparing for the trial and figure out a way to boil it down, simplify it, represent it, and present it to a jury in a way that will persuade them. Make them "get it." To do this you must reach back, grasp, and embrace an ancient concept: you must think. Think about your case and the evidence that will come in, both that of the opposition as well as what you will present. Think. The trial lawyer must be able to gather, collate, organize, and somehow comprehend all of the information that one has available in this modern age when one investigates and discovers a case. Technology certainly helps, but at the end of the day, we are not yet (thank goodness) to the point where technology will, at the press of a button, present your case in a persuasive way. That is still a product of the human mind, in this instance the human mind of a trial lawyer whose whole being is directed toward the end result of bringing concepts to a jury in a way that persuades them to come toward his position. To do that, you must think about your case.

To my mind is often called the scene that occurs frequently in movies and television shows, usually those that involve mysteries or crime solving, where the hero takes the "file," whether paper or electronic, and studies it for day after day. We have scenes of him or her lying in bed with a computer and papers strewn all about, sitting on the floor with file folders and pictures lying around the room, standing with others in the conference room or office with the wall covered with photographs and locations and times and strings and lines connecting all of them and crossing over each other – all these scenes depicting the same process of studying the information that is in front of them and trying to figure out how to put together the unsolved puzzle that they present. It is the same way with your preparation to present at trial. One has to

concentrate and focus on all of the evidence that has been adduced and figure out what it means. Once you figure out what it means and turn it over in your mind time and time again, looking at it from every different angle, you begin to figure out the ways that it can best be presented to the jury so as to persuade them to your point. There are some key elements of this process, in my view.

Two sides of the coin

First, it is absolutely critical that you be able to understand and even argue both sides of every issue. It is only by understanding the important points that will legitimately be made by the other side that you can come to properly frame the points you want to make. Empathy is an important aspect in this process, for if you do not understand the emotional place from which the plaintiff comes or where a witness resides, you cannot adequately and effectively deal with that aspect of your case.[8]

I also often say that "every snake has a head on both ends." By this I mean that any good idea can be turned. A competent lawyer will figure out some way (if any exists) to diminish, refute, or destroy any point or argument that a good lawyer on the other side can figure out how to make. You must always think about those counters, anticipate them, and plan how to deal with them if your snake turns.

[8] For example, before I began work on the civil litigation arising out of the Upper Big Branch Mine Disaster, I read the book They Died in the Darkness, a history of mine explosions in the United States, in order to better understand the emotions that rightfully were engendered by this terrible tragedy. Dillon, Lacy A. *They Died in the Darkness.* Printed by author, Ravencliff, West Virginia 1976. Print.

Focus: See the big picture

When I was in the military, we always joked about the fact that only the upper echelons of command had access to the "big picture."[9] This seems always to have been true in war. Only the battlefield commander is expected to comprehend everything about the battlefield, to be able to dispense orders, move troops, allocate, position, and expend resources in a way that is informed by an understanding of the entire picture, not just that tiny portion where your particular, tiny role is involved. So it is with the trial lawyer who, after having mastered all of the details of his or her case, must be able to step back as far as necessary in order to see the big picture, the whole battlefield, and make sense of it. This is not something that you wait to do until the final period of preparation; it is an aspect that you must find time for throughout the entire run-up of the case toward trial. An important part of what the trial lawyer applies to any case is his or her ability to focus and concentrate on the case with the ever present purpose of creating a simplified presentation to persuade the jury.

For me, a part of my effort in this direction in most cases involves my creation of a focal point or a mantra. Many of my cases over the years have involved pieces of equipment, particular job sites or locations, or other core physical elements. Thus, I often have used models as a focal point – machines and aircraft, or sometimes a tool or a piece of personal equipment like a glove or ice cleat. Or it might be a chronology, a diagram, a map, a schematic, or a photograph. Whatever it is, what I use it for is to focus my concentration. Many have been the times when someone has entered my office to see me "playing" with a model or perhaps just staring out the window; in these moments, I was engaged in the most important activity that any trial lawyer can undertake: thinking. Concentrating. Trying to "get it" myself in a way that

[9] What we said, precisely, was that our aircraft – though big – were not big enough to carry more than a tiny piece of the "big picture."

would permit me to examine a witness, prepare an exhibit, or make an argument that would "click" in a way that would persuade the jury to move in my direction.

Seeing the big picture means the trial lawyer is never dealing with all of the small pieces that make up a case in isolation, she is always dealing with that piece in context of the overall case, the overall theme or themes that she intends to pursue, and the relationship that that small piece of the puzzle may have to the overall picture that she intends to paint for the jury. All of the evidence has to come together in some way. This is not to say that every single piece is related to another, but it is to say that the trial lawyer has to have a good enough grasp of the details and of how they fit into the big picture to be able to see that Witness A and Witness F can be used to elicit a thought or conclusion through Witness X. So the trial planning involves thinking through how one presents the first two pieces of testimony and then draws everything to fruition in the last piece. Sometimes you are able to do this when you are planning for trial, and other times you do it "on the fly" during trial. Either way, it represents the art of persuasion at trial, and it comes about because the lawyer has mastered all of the details and then stepped back and contemplated at great length the big picture.

Be in command

You must be in command of the courtroom. I do not mean overbearing, I do not mean obnoxious, I do not mean bullying, I do not mean egotistical; I mean that you must demonstrate in everything that you say and in every movement you make that you are confident and in control of yourself and your evidence. You must look, feel, and project mastery of what you do, never being surprised (unless it is an affectation that you have decided to use, and practiced), never losing your temper, never being flummoxed, never sweating, never showing fear, never

acting, speaking, or moving in anything other than a deliberate, controlled way. That takes discipline and practice. And probably a few mistakes.

Projecting this presence is not an accident. It takes preparation and planning for each trial. You need to be very familiar with the layout of the courtroom and everything that you intend to use in that courtroom. For each witness, each examination, each presentation, you must have thought through the logistics as well as the questions; you must be so practiced in all of your movements that they will appear to occur without thought, effortlessly. Where will your exhibits lay? When will you pick them up? Where will you stand when you examine the witness? Where will you put the big exhibit so it can be seen by witness, jury, and judge? How will you handle actual demonstrative aids, like the models that I have been talking about previously? Is technology in play? Does it work? Have you practiced – not just its function but how it fits into your flow of questioning? What is your backup? You must never have to look for something, appear confused, disorganized, or unplanned. You must always be in command. The exception would be only if the well-planned and well-practiced confusion or disarray is actually an application of the artistry of the trial lawyer because it is specifically designed and implemented to persuade the jury. "Confusion" of the lawyer in asking some questions, producing "confusion" on the part of the expert answering the questions, demonstrating "confusion" of the science he is supposedly testifying about. Much more effective than simply exploring that science and then arguing to the jury that it is "confused." Sometimes if the witness obviously heads down the road of irrationality, the cross examiner should lead the witness as far down that road as he is willing to go, perhaps all the way to ridiculousity. The jury will get it. If artfully done.

Keep 'em interested

You must develop ways to keep the jury interested, even when what you are presenting to them is uninteresting. The story is told by Henry Kissinger of the time when he was at a cocktail party and was approached by a tall, very beautiful, very poised blonde woman who asked "are you Henry Kissinger?" When he replied that he was, she looked deep into his eyes and said "I'm told that you are fascinating. So, . . . fascinate me."[10] This is one way to frame the task of the trial lawyer. Expectations are and should be high. You must make the mundane interesting, if not fascinating. You must make the droll, ordinary, chronological recitation of facts somehow entertaining. You must find ways to keep the jury engaged, more in your evidence than that of the opposition, but always directed toward having them "get it" where they need to. The jury must come to expect a deft touch, a focus on what is meaningful, and efficiency from you in your presentation of the evidence. When you get up to present evidence, the jury should come to expect that you will be to the point, and that you will know when to quit. And, while you do need to simplify the evidence for the jury, know that by this I mean helping the jury "get it" in as economical a way as possible. I do not mean dumbing it down. While you never want to do things that might make the jury think you think you know more than they do, you do want them to believe that you are extremely knowledgeable about your case yet respect the fact that they are able to understand it themselves without having you explain it to them in a condescending way. This, again, is artistry. You present the case in a way that brings the jury on their own to the conclusion that you want them to reach.

[10] No citation – I heard Mr. Kissinger tell the story when he spoke in Charleston years ago.

HAVE FUN

And always remember, as Emerson said: “Nothing great was ever achieved without enthusiasm.” Show the jury that you want to be there and that you love what you do, which is persuade. Artfully.

THE ART OF PERSUASION AT TRIAL

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Article to accompany a Presentation at the Bridge the Gap Program of The West Virginia State Bar Young Lawyers Section held at The Greenbrier

12 April 2021

JACKSONKELLY PLLC

THE ART OF PERSUASION AT TRIAL

DESERVE SUCCESS

I want to first lift up the three primary words in the title: art, persuasion, and trial.

The first word is "art." In the context of the whole title phrase, the word implies the addition of something creative, something evocative, something beyond mere technical skill, something indeed that suggests the application of talents and gifts as well as skills to the trial itself. This is all true. But let me emphasize that the "art" involved here is mostly hard work. No matter what you bring to the table, effecting and implementing your own "art" of persuasion at trial is intensely difficult. It will tax you. It will make your brain tired. An artful cross-examination may take ten minutes to execute and twenty hours to prepare. But it is worth it.

"Persuasion" is the absolute core of what we do. It may be the guts of every lawyer and the life blood of every litigator, but it is the pure heart and soul of a trial lawyer. Persuasion is what we do every day in letters, discussions, e-mails, presentations, arguments, briefs, and on way too few occasions now-a-days, at trial. In fact, a great proportion of the communication that we human beings engage in all of the time involves our efforts to persuade other human beings of one thing or another. Lawyers are just supposedly better at it than ordinary mortals.

Last but not least, "trial" – the place where only the truth, the whole truth, and nothing but the truth is told, and where justice always prevails. Well, maybe not exactly. But, handled properly by competent lawyers before a competent judge, trial is indeed a place where the jury will be able to divine enough truth to lead them to a fair and reasoned decision, and that is justice in our system. Most important to my subject, trial is the place – really the only place in litigation – where everything comes together. It is the place where all of the elements of persuasion, all of

the skills, all of the techniques, and all of the artistry that you can muster are brought to bear upon six or twelve of your fellow human beings in an effort to persuade them – all of them – that they should lean in your direction, accept your position, decide in favor of your client.

Notice that in the previous sentence I did not use the phrase "get a defense verdict" or the word "win." That is because, after more than 40 years of trial work as a defense lawyer, my definition of "win" has morphed a bit. For only one example: If the last demand that you received prior to the jury rendering its verdict was $30 million, your last offer was $9 million, and the verdict was $500,000, is that a "win?" One of the things you learn in doing this work for a long time, and one of the reasons you become a devotee of the "art or persuasion," is that most well-tried cases – meaning well-tried by plaintiff, defendant, and the judge – can sustain a verdict either way, or at least one leaning in either direction, especially where the optional result is an award of money damages.

Almost no case is ever "open and shut." That is not to say that you will not be confident of what the outcome should be, only that you must not blind yourself to the reality that there usually are indeed at least two sides to every story. The best that we can do as trial lawyers is to pursue the goal set by John Adams in one of his letters to Abigail when he was engaged in the work of the Continental Congress: **"We can't guarantee success, but we can deserve it."**[1] You will find as you struggle through the profession of trial lawyer that the case that cannot possibly be won, can be, and the case that cannot possibly be lost, can be too. The vicissitudes of rulings,

[1] *Landon Lecture Series* given by David McCullough on 1 February 2002 at Kansas State University, "The Founders: The Greatest Generation." Although often attributed to John Adams, Mr. McCullough explained that he read the same sentence in a couple of letters that George Washington had written. Thinking perhaps the line was not original to either, he did a little research and found that it actually came from the play "Cato" by Joseph Addison, which was probably the most popular play of that time. McCullough further explained that the actual line in the play is, he thought, even better than the one used by Adams. The line in the play is "We can't guarantee success, we can do something better, we can deserve it."

witnesses, juror proclivities, group dynamics, and all of the other subtle and not so subtle factors that can influence the outcome of trials are what make them so exciting and so demanding. But there is no such thing as a sure thing; all we can do is apply our skills and talents and intelligence as artfully as possible in our effort to persuade the decision maker to come toward us. We can make sure that our clients – we – deserve to win.

Individuality

A great deal has been written by accomplished practitioners about litigation and trial skills.[2] You hear from talented trial lawyers in articles and seminars all the time; lawyers who have demonstrated over their careers that they are effective purveyors of their art. All of you have been to and will go to many more seminars that break the "trial" process down into its various segments and "teach" you techniques and methods, dos and don'ts, providing pointers that are designed to assist you in becoming adept at the various elements of trial preparation and trial: e and other document/digital discovery, motions practice, voir dire, jury selection, opening statements, direct examination, cross-examination, witness preparation, handling documents and exhibits, closing statements, verdict forms, special interrogatories, jury instructions, and more. Each one is a seminar in and of itself, an activity demanding its own set of special knowledge and skills, but my topic subsumes them all. My topic incorporates everything you learn about all

[2] There are an extraordinary number of wonderful books and articles and webpages and blogs by great trial lawyers about how to perfect our art. Among the best are the writings of James McElhaney for the American Bar Association, and those of the great Irving Younger. There are also many books that reproduce memorable summations and oral arguments, including many going back to the early days of our United States Supreme Court and down through great trials of the twentieth century. Some of this good reading includes:

Miller, Henry G., Esq. *On Trial: Lessons from a lifetime in the courtroom*. New York: ALM Publishing, 2001. Print.

McElhaney, James W. *Litigation*. Chicago: American Bar Association, 1995. Print.

McElhaney, James W. *The Litigation Manual First Supplement*. Chicago: American Bar Association, 2007. Print.

Younger, Irving. *No. 1 The Art of Cross-Examination.* Chicago: American Bar Association, 1976. Print.

There are many more numbers in this series and scores of articles, books, lectures, and recordings of Younger. He is wonderful.

of the various aspects and pieces of a trial and addresses how you interlock all of those pieces into a conceptual whole that makes you deserve success. That is the art part.

It is imperative to understand, however, that the artistry of which we speak is unique to each individual. Just as the expression of creativity through painting or the composing of music, while sustaining many similarities, nevertheless produces an infinite number of variations from one person to the next, so too with the art of trial lawyers. My style will not be your style. My expression of the art will not be your expression of it. Each of us must apply ourselves in our own way which, inevitably for those who are truly great at this work, will be at bottom unique. There are few highly successful rote imitators in this line of work. All trial lawyers draw ideas and techniques from many, which they refine and combine to their own use. The good trial lawyers stop there; the great ones use the pieces to build something new.

The artistry of trial work is a bit like Justice Stewart's famous comment about obscenity:[3] it's hard to describe, but you recognize it when you see it. Thus, one normally discusses ideas, elements, technical know-how, activities, and examples that can equip you to be an artist without really being able to tell you much about what your paintings are going to look like. The fact is that the artistic approaches that are possible in effectuating the art of persuasion at trial are as infinite and idiosyncratic as the lawyers who attempt to perfect that art and the fact situations that they face in the individual cases that they must try.

Mastery of all the fundamental litigation/trial skills is foundational – you must first be a really good craftsman. To elevate yourself from a craftsman to an artist requires a lot of hard work, including recognition and refreshment of your own innate talents. It is critical in this

[3] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description ['hardcore pornography'], and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it*, and the motion picture involved in this case is not that." *Jacobellis v. Ohio* 378 U.S. 184, 197(Stewart, J., *concurring*, emphasis added.)

respect to understand the distinction between presentation and persuasion. Any marginally competent lawyer can "present" witnesses and other evidence; to be a trial lawyer is to do so in a way that will persuade the jury to move toward your position. The difference is huge. That is not to say that a lawyer who does a workmanlike job at presenting the case cannot be an effective and successful lawyer; she can. I am only saying that great trial lawyers elevate the process through art. Any conversation, argument, or presentation can persuade, but the lawyers who blend everything together by adding those brushstrokes that creatively transform the presentation and elevate it to an art form are those who are most successful as trial lawyers.

Know your audience

The playwright George Bernard Shaw once said that "[t]he single biggest problem in communication is the illusion that it has taken place."[4] Lawyers live and die by the spoken and written word. A trial lawyer's whole *raison d'etre* is to communicate ideas, thoughts, concepts, facts, and eventually persuasive arguments to others. How many times in life and work, however, do we think that we have communicated when actually we have not because there is no "meeting of the minds" in the sense that each of us has the same understanding of what the communication was about. Ships passing in the night. This is nowhere more important than it is when a trial lawyer is trying to persuade a jury. As a youngster growing up in rural West Virginia, I learned, truly learned, at an early age that communication is easy, but comprehension is difficult. "Clean the barn" carried a lot more meaning to my dad than it did to me – at least it did the first time he told me. The trial lawyer must not only communicate the evidence and the information to the jury, but she must also find a way to make sure that the audience, usually the

[4] As quoted and footnoted in Bennett, Mark W. "Eight traits of great trial lawyers." *Voir Dire.* Summer 2014: 9-19. Print.

jury, "gets it." The jury must comprehend the meaning in the way that the trial lawyer believes is accurate, which is to say the way the trial lawyer wants the jury to comprehend the information.

It is always best in trial to allow the jury to reach the conclusion themselves. While the trial lawyer will no doubt express to the jury, certainly in closing argument, what it is the jury should conclude, it is so much better if by that time you are merely stating the obvious because the jury has already gone there on its own. How many times have you or your colleagues who are trial lawyers noted that the jury was seen to be unconsciously nodding their heads during testimony or during closing argument, indicating not so much agreement as that they are getting it?

A great deal of the modern literature about trial work suggests that we have to conform our delivery to our audience. This is usually spoken in the context of the jury and in the context of the stereotypical differences that are represented by comparing the characteristics of the greatest generation from WWII vintage, the baby boomers, and the serial "younger" and "youngest" generations who have followed. The modern emphasis consistently is on tech-savviness, short attention spans, and other such statistical stereotypical insights that are supposed to help us hone our "presentation" so that the members of the jury will receive and process the information. I go a distance down that road, but not nearly all the way. The questions I always ask myself or those who are speaking this view are indeed the usual ones: Who exactly is going to be on your jury? Can you describe them for me? How old are they? What are their backgrounds? What are their educational levels? What do their homes and yards look like? Etc, Etc., Etc. Of course, the underlying, unasked, and essentially unanswerable question is the most

important: Are they stereotypical sheep, wide-eyed independent thinkers, loose cannons, or inscrutable individuals?

These are the questions you always ask once you are looking at a jury venire and trying to make some kind of informed "judgment" (read: "guess") about how each particular person might react to the evidence that you know is going to be presented to them in your case so that you can pick just the right ones during jury selection. I suggest that you can use all of the demographic and other information it is possible to accumulate, organize, and study about those persons in the jurisdiction involved who will be eligible to be on your next jury, but the fact is that until they are selected and "in the box," you really have very little idea of what that jury – that very particular mix of people – is going to look like. Even then, your information is pretty generic and sketchy at best. In the end, you must live with the concept of "what you see is what you get." Your jury could be dominated by retired baby boomers. It could be dominated by 20 year old unemployed people without a high school education. It could include a loose cannon or two. Probably a mix of strong and weak personalities. If any conclusion can be drawn from 40+ years of doing mock trials and focus groups, studying potential jurors, then seeing jurors put in the box, and then hearing what those jurors decide, it is that these aspects are themselves very, very hard to evaluate – especially in the unique group dynamic situation imposed by being a jury – and are seldom predictive of the result anyway. You will have some insight once the jurors are selected, or will think you do, but surprises – good and bad – still abound. Do not misread this comment: I am a **strong** believer in the jury system and in the ability of jurors to do the right (which often means simply the fair) thing at the end of a trial if they have been presented with all of the necessary information in a competent way, and especially if they have been "persuaded" that they should move in the proper direction. I just resist any reliance on being able to predict

that in advance based on juror stereotypes. I don't like stereotyping; it inevitably degrades and erodes the effectiveness of your communication.

So, in general, my advice is that you not try to build the presentation part of your trial work on some stereotypical prediction as to what will be the stereotypical characteristics of your jury – how great will be their ability to comprehend, how smart they are, how attentive they will be, etc. It is much better for you to simply decide upon the best ways for you to communicate and persuade about the particular ideas, concepts, facts, and theories that are present in your particular case. Focus on those things that always remain the same: the basic principles that underlie the art of persuasion, and use all of the techniques, tools, talents, and tricks (meaning artistic tricks) available to you to inform and persuade the jury. The principles themselves do not change, although the means used to employ them certainly will.

I think the two biggest pot-holes in the "juries are stereotypical" road today are 1) it underestimates the jury, and 2) it overemphasizes technology. In my experience, juries will surprise you because they will recognize the importance of what they are doing. They will surprise you because, if dealt with properly, they will "get it." They will surprise you because so many times, whether you objectively "won" or "lost," you will come away thinking that they did their job pretty well.

I think it underestimates the jury to suggest that their attention span collectively will be so short that they will not be able to concentrate on or comprehend a thought that cannot be persuasively submitted in the length of a Twitter feed. I think it underestimates the jury to conclude that they will not be able to understand complex principles and concepts, resulting in an unpersuasive level of dumbing down (if you think the jury is stupid, they will know it, and they won't like it). Rather, it is normally the lawyers' inability to translate those principles and

concepts into an understandable layman's form that is the culprit. Doing that, to many lawyers today, means only one thing: technology. Technology is a fantastic tool in many ways. But it is only a tool. Jurors cannot stare a computer in the eye; they cannot through PowerPoint experience the nuance, emphasis, other subtle and persuasive elements that voice and person add. You must use them all. I think juries will surprise you in much the same way as small children do, because they will understand and know and do much more than you might normally think them capable of – even without a TV screen between them and you.

Trial is of course unique in the world of communication and persuasion. Normally, whether we are engaged in argument or trial or marketing or advertising or elections or even casual conversation, we try very hard to work on "persuading the persuadable" – using our presentations and our arguments on people who we believe are open to be persuaded to the point of view that we are advocating. I know you want to be a great trial lawyer. Thus, I am certain it will be easier for me to "persuade" you that certain concepts and techniques might be useful. But it is rare for you to obtain a jury that you know is persuadable in that sense. We certainly try, but jury selection remains, in this respect, an imperfect science at best, a disaster at worst.

Thus, what we as trial lawyers must do is elevate our game to the highest level possible, meaning we make it so good that we believe we can "persuade the unpersuadable." Again, "we cannot guarantee success, but we can deserve it."

MODES OF PERSUASION

There is nothing really new today as far as the modes of persuasion are concerned. [5] Human beings have been trying to persuade one another of things literally since the dawn of

[5] Talking about the art of persuasion almost has to begin with Aristotle and Pascal, but the writings on the topic thereafter are literally legion, including the publication by two of our WV colleagues in "*For the Defense.*" Shaefer,

time. In fact, most would probably agree that, as a general matter, enlightened human beings were better at this in older times than they are today. I wager that few of us have ever read Lincoln's Cooper Union speech[6], but literally thousands did after he gave it. Today it would be reduced to 20 seconds on the news and maybe some "Facebook" comments. There are many advantages that one can point to in the age of Twitter, Facebook, sound bites, YouTube videos, and everything else that the technological revolution has brought to us, but among them are not the encouragement of higher levels of concentration ability, longer attention spans, or a heightened interest in understanding a thing deeply – all these being shortcomings that the trial lawyer must in the preparation stage avoid entirely.

The three primary modes of persuasion have not been better described than they were by Aristotle in *The Art of Rhetoric*. Find it and read it. Really. They are *ethos*, *pathos*, and *logos*.

Ethos

The first of the three is *ethos*. I like this one because, well, it's all about me or, as budding trial lawyers, it's all about you. *Ethos* is the appeal of the person trying to do the

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Natalie, C. and Callie E. Waers. "Make the Most out of your Face Time with a Jury: Speak Psychology." DRI's For the Defense, Oct. 2014. See also:

Aristotle. *The Art of Rhetoric.* Penguin Classics, 1992. Print.

Pascal, Blaise. *The Art of Persuasion*. The Harvard Classics. Vol. 48, first published 1909-14.

Nazar, Jason. "The 21 Principles of Persuasion." *Forbes*. Forbes Magazine, 2014. 11 Nov. 2014. Web.

"Persuasion." *Wikipedia*. Wikimedia Foundation, 11 Nov. 2014. Web.

McKay, Brett and Kate. "Classical Rhetoric 101: The Three Means of Persuasion." *The Art of Manliness*. 11 Nov. 2014. Web.

Scalia, Antoni, and Bryan A. Garner *Making Your Case The Art of Persuading Judges* St. Paul: Thompson/West, 2008. Print.

[6] Lincoln's Cooper Union Address delivered on 27 February 1860 at Henry Ward Beecher's church in Brooklyn, New York. "An eyewitness that evening said, 'when Lincoln rose to speak, I was greatly disappointed. He was tall, too, - oh, how tall! And so angular and awkward that I had, for an instant, a feeling of pity for so ungainly a man.' However, once Lincoln warmed up, his face lighted up as with an inward fire; the whole man was transfigured. I forgot his clothes, his personal appearance, and his individual peculiarities. Presently, forgetting myself, I was on my feet like the rest, yelling like a wild Indian, cheering this wonderful man.'" *Abraham Lincoln's Cooper Union Address*. N.p., n.d. 11 Nov. 2014. Web. The lengthy and scholarly speech was reprinted in newspapers and widely circulated – and read – as campaign literature. Unlikely today.

persuading, in this instance the trial lawyer. It is about how credible that person is to his audience, the jury. *Ethos* is all about convincing the jury, or maybe informing the jury is a better way to put it, that you are the most qualified, most trustworthy person present in the courtroom to talk about and present information, true information, to them about the case.

Pathos

Pathos is an appeal to the audience's emotions (the words pathetic and empathy are both derived from *pathos*). This is probably the method most reliably used (and sometimes overplayed) by plaintiffs' attorneys. But emotion is more than sympathy. It can merely mean the evocation of memory through the use of metaphor, similes, comparisons, or references that we believe will resonate with the jury. It can mean injecting a bit of passion in your delivery or your examination – not overdone, but passion. Humor, of course, can have a place, but it is perhaps the most subtle and dangerous *pathos* technique to try. It takes a very deft touch and much careful thought. Don't try it in your first trial.

Logos

Last on Aristotle's list is *logos* which, as the name implies even for those unschooled in Latin, is the appeal to logic. This is probably the most comfortable of the three modes, especially for lawyers. Just the facts, ma'am. It is, in fact, probably the most important mode in the trial setting. No other mode of persuasion can be expected to work effectively if it is not supported by *logos*. You cannot allow your case to be overwhelmed by *logos*, however. Too many statistics, too many charts, too much information, can overload even the most intelligent and attentive jury. It can reach the law of diminishing returns, and that usually acts to the

disadvantage of the persuader. "Simplify, simplify, simplify"[7] finds its antithesis in the overplay of *logos*.

CRAFTSMAN TO ARTIST

So, how do you create and employ *ethos, pathos,* and *logos* to move yourself from craftsman to artist?

First, by establishing credibility, authority, and likeability.

Credibility will almost always start with the relationship you have with the judge. If you have been before the judge on multiple occasions, hopefully the judge will have come to believe that you are an ethical, honest, honorable lawyer who he can trust to act appropriately and present argument and evidence in a confident, correct, and honest way. If you have been able to establish that credibility with the judge over past experience, it will come through when you are in trial before that judge in front of a jury.

Beyond that, your presentation to the jury must demonstrate those characteristics. Each trial will begin that process anew; the jury does not know you yet and so, over the course of the days or maybe even weeks that trial continues, they will have innumerable opportunities to gain insight into your credibility, and you must never for a moment forget that that is one of the things that the jury is doing and that it will matter at the end of the trial.

You must also demonstrate to the jury that you are knowledgeable about <u>your</u> case; in fact, you must make the jury believe that you are the most knowledgeable person in the courtroom about the case. If you are credible and knowledgeable, the jury will likely also find you trustworthy, which means they will believe and, more important, follow you.

[7] Thoreau, Henry David. *Walden.* Boston: Ticknor and Fields. First published in 1854. Print.

Finally, you want to be likeable. That's a tough one for some of us. It is especially tough when you can't really have a personal relationship with those who matter, meaning the jury, but must somehow project your likeability through your general demeanor and conduct in the courtroom, your interaction with those with whom you must deal – the judge, the bailiff, the client, the clerk, the court reporter, opposing counsel, other attorneys and staff who are working with you, etc. – which means that you must constantly be, as your mother no doubt told you at some point, "on your best behavior" at all times. It also means being respectful, professional, and civil. Most human beings, if you get to know them, are capable of being liked. Exuding likeability through a five or ten day trial, however, can be difficult for some when they are under the constant, intense pressures that inevitably come with every trial.

The old adage about "preparation, preparation, preparation" is certainly true. The elements of credibility, authority, trustworthiness, and likeability all are supported if not engendered by the work that you put into the preparation of your case. Confidence – not overconfidence or egotism or arrogance or condescension – but calm, straightforward confidence in what you are doing will come out if you are thoroughly prepared and ready for battle.

Gird yourself

So, how do you get ready for battle? First, you prepare yourself. Put on your armor or, in this context, "dress for success." I'm sure you all have gotten directly or read a lot of advice about how to do this for interviews, in the workplace, and for going to court or to trial. I have heard it all – everything from wearing the same "outfit" every day of trial, never wearing a suit, not having on any jewelry, having a new haircut, shaving your moustache, no pants (for women), to the opposite of each. My view is that jurors expect to see a professional. They expect to see

someone who is confident and successful – and looks it. They don't expect to see someone who is about to go out to – or worse, has just returned from – the gym. My advice is to dress in a way that makes you feel professional, comfortable, and confident. To me, that means dressing your best. You need to show the judge and the jury that you have the utmost respect for them and for the proceeding that you are in. Best suit, nicely pressed, shoes shined for the man; "appropriate" suit or dress, sensible heels, for the woman; not too much makeup or hair products for either. There clearly is a place in the world of trial work for the absentminded professor, the loveable goofball, etc., and the potential for a negative first impression can always be overcome as a jury gets to know the real you, but why take a chance on the things that you can easily correct? Why have hair that looks like it was trimmed by an unsharpened lawnmower blade when a set of $20.00 clippers can make you reasonably presentable every day? Take care of the easy things first.

Be yourself – but armed and ready. Don't copy others – learn from them. You need to do everything possible to master your craft, *i.e.* the craft involved in presenting your evidence and arguments. All of the things in all of the seminars and all of the books and articles and all of the presentations that you go to from law school through your career that are directed toward helping you hone your skills are important. You need to have down pat the fundamentals of how to handle a document and get it introduced into evidence (something that normally is not going to be very hard, but occasionally shows up as an insurmountable hurdle to some), how to do a direct examination, a cross, an opening, a closing, a jury voir dire, etc. Once you know how to play the instrument, you can begin to create your own tunes.

Practice

You should practice. Don't let yourself fall into routines as you perform the everyday parts of a litigation practice. You have to take a deposition of a fact witness? Go beyond your checklist of things you want to find out. Your skills in persuasion don't come into play only at trial; figure out ways to persuade the witness to move in your direction, tell you what you need to know, admit what you want admitted. Think ahead, and lay the groundwork for your trial examination in the deposition. Going to a meeting with the client? Practice making and using visual aids, and please know that "visual aids" does not mean only a PowerPoint presentation. Some people can actually walk up to a dry erase board (especially if they have practiced on paper or on an actual such board) and diagram something while they talk. You might be amazed at how "persuasive" that can be as compared to the usual, boring, 40 slide PowerPoint that you use for a read along. Make a freehand diagram or drawing, an excel spreadsheet, a chronology, a map – and use it. You have an argument to make? Before a judge who you think will not listen, will not have read the briefs, and probably won't ever read the briefs? Nevertheless, don't just stand up and regurgitate all or part of what you wrote in the paper that you filed, think through your argument and figure out a way to make your point in a more interesting and more engaging way. Practice.

Most important, I think, for a trial lawyer, is to present all the time. Talk every chance you get. Take advantage of any and every opportunity you have to speak, to inform, to persuade, whether it be in informal meetings, before various groups or boards, at seminars, or whatever. Bear in mind that such opportunities are always presumed to involve preparation (meaning you know and fully understand the subject and what it is you want to say about it) and often even practice. In my mind, there is no such thing as an extemporaneous speech; it is either something

you specifically practiced over and over again to make it economical, crisp, interesting, evocative, etc., or it is something that you have thought about so much that you can speak on the subject intelligibly and interestingly anytime you are poked into doing it. And, as much as you possibly can, **throw away your notes**.

Play to your strengths

Especially in the world of *ethos*, you must play to your own particular strengths. The things we talk about as being attributes of a great trial lawyer are essentially aspirational. Most of us cannot combine in sufficient degree all of the talents, skills, and characteristics that make up a great trial lawyer because we do not innately possess them and cannot develop them because they are too much of a reach beyond our basic individual nature. We must, therefore, recognize our own shortcomings, try as hard as we can to improve those shortcomings, and, crucially, we must develop our strengths as close as possible to their full potential. Some of us are excellent writers, good public speakers, logical thinkers, creative, hardworking, charming, humorous, and so much else – but few of us are all of these things combined. Thus you need to recognize your strong points and your weak ones, play to the former and minimize the impact of the latter. Another way of saying this is that you must be yourself, but always try to make that self better. The serenity prayer is still a pretty good creed to live by: "God grant me the serenity to accept the things I cannot change, the courage to change the things I can, and the wisdom to know the difference." No truer words could be spoken about the development of a great trial lawyer. For those few who possess in significant measure many if not all of the natural talents and attributes necessary, you need only fertilize them with hard work and dedication in order to harvest a great trial lawyer.

Master your case and your evidence

It goes without saying, which means that I am going to say it again, that most of the dedicated hard work that gets you ready to be persuasive at trial goes on during all the pretrial and discovery effort that you put into your case. Much is written nowadays of the demise of trial, and therefore of trial lawyers. It is true. I have read that the distinction between a litigator and a trial lawyer is this: litigators make simple things complicated and trial lawyers make complicated things simple. I believe this also to be true, and I am convinced that a great trial lawyer probably must, to be both in today's environment because the first thing the trial lawyer needs to do in a case is to master it in the most excruciating detail possible. You must indeed be able to take the simple and break it down into every conceivable subpart so that you have it arrayed before you in as much complicated detail as possible. I always say that in the pretrial stages the lawyer gathers a hundred percent of the information, thoughts, concepts, facts, diagrams, documents, etc., so that for trial she can distill it all down to the three or four percent that matter, and that is what she uses. The only way to get to that three or four percent, however, is to master the full one hundred percent.

Now to the place where I think the magic happens, and that is where the artistic trial lawyers emerge. That is the point at which all of the other work has been done and comes the task of the trial lawyer to take the complex bunch of detailed information arrayed before him by his litigator persona and simplify it for presentation to the jury in a way that will persuade them to come in his direction. How does one make that happen?

Think

As a trial lawyer you must sit back and take stock of all of the stuff that you have put together in the course of preparing for the trial and figure out a way to boil it down, simplify it, represent it, and present it to a jury in a way that will persuade them. Make them "get it." To do this you must reach back, grasp, and embrace an ancient concept: you must think. Think about your case and the evidence that will come in, both that of the opposition as well as what you will present. Think. The trial lawyer must be able to gather, collate, organize, and somehow comprehend all of the information that one has available in this modern age when one investigates and discovers a case. Technology certainly helps, but at the end of the day, we are not yet (thank goodness) to the point where technology will, at the press of a button, present your case in a persuasive way. That is still a product of the human mind, in this instance the human mind of a trial lawyer whose whole being is directed toward the end result of bringing concepts to a jury in a way that persuades them to come toward his position. To do that, you must think about your case.

To my mind is often called the scene that occurs frequently in movies and television shows, usually those that involve mysteries or crime solving, where the hero takes the "file," whether paper or electronic, and studies it for day after day. We have scenes of him or her lying in bed with a computer and papers strewn all about, sitting on the floor with file folders and pictures lying around the room, standing with others in the conference room or office with the wall covered with photographs and locations and times and strings and lines connecting all of them and crossing over each other – all these scenes depicting the same process of studying the information that is in front of them and trying to figure out how to put together the unsolved puzzle that they present. It is the same way with your preparation to present at trial. One has to

concentrate and focus on all of the evidence that has been adduced and figure out what it means. Once you figure out what it means and turn it over in your mind time and time again, looking at it from every different angle, you begin to figure out the ways that it can best be presented to the jury so as to persuade them to your point. There are some key elements of this process, in my view.

Two sides of the coin

First, it is absolutely critical that you be able to understand and even argue both sides of every issue. It is only by understanding the important points that will legitimately be made by the other side that you can come to properly frame the points you want to make. Empathy is an important aspect in this process, for if you do not understand the emotional place from which the plaintiff comes or where a witness resides, you cannot adequately and effectively deal with that aspect of your case.[8]

I also often say that "every snake has a head on both ends." By this I mean that any good idea can be turned. A competent lawyer will figure out some way (if any exists) to diminish, refute, or destroy any point or argument that a good lawyer on the other side can figure out how to make. You must always think about those counters, anticipate them, and plan how to deal with them if your snake turns.

[8] For example, before I began work on the civil litigation arising out of the Upper Big Branch Mine Disaster, I read the book They Died in the Darkness, a history of mine explosions in the United States, in order to better understand the emotions that rightfully were engendered by this terrible tragedy. Dillon, Lacy A. *They Died in the Darkness.* Printed by author, Ravencliff, West Virginia 1976. Print.

Focus: See the big picture

When I was in the military, we always joked about the fact that only the upper echelons of command had access to the "big picture."[9] This seems always to have been true in war. Only the battlefield commander is expected to comprehend everything about the battlefield, to be able to dispense orders, move troops, allocate, position, and expend resources in a way that is informed by an understanding of the entire picture, not just that tiny portion where your particular, tiny role is involved. So it is with the trial lawyer who, after having mastered all of the details of his or her case, must be able to step back as far as necessary in order to see the big picture, the whole battlefield, and make sense of it. This is not something that you wait to do until the final period of preparation; it is an aspect that you must find time for throughout the entire run-up of the case toward trial. An important part of what the trial lawyer applies to any case is his or her ability to focus and concentrate on the case with the ever present purpose of creating a simplified presentation to persuade the jury.

For me, a part of my effort in this direction in most cases involves my creation of a focal point or a mantra. Many of my cases over the years have involved pieces of equipment, particular job sites or locations, or other core physical elements. Thus, I often have used models as a focal point – machines and aircraft, or sometimes a tool or a piece of personal equipment like a glove or ice cleat. Or it might be a chronology, a diagram, a map, a schematic, or a photograph. Whatever it is, what I use it for is to focus my concentration. Many have been the times when someone has entered my office to see me "playing" with a model or perhaps just staring out the window; in these moments, I was engaged in the most important activity that any trial lawyer can undertake: thinking. Concentrating. Trying to "get it" myself in a way that

[9] What we said, precisely, was that our aircraft – though big – were not big enough to carry more than a tiny piece of the "big picture."

would permit me to examine a witness, prepare an exhibit, or make an argument that would "click" in a way that would persuade the jury to move in my direction.

Seeing the big picture means the trial lawyer is never dealing with all of the small pieces that make up a case in isolation, she is always dealing with that piece in context of the overall case, the overall theme or themes that she intends to pursue, and the relationship that that small piece of the puzzle may have to the overall picture that she intends to paint for the jury. All of the evidence has to come together in some way. This is not to say that every single piece is related to another, but it is to say that the trial lawyer has to have a good enough grasp of the details and of how they fit into the big picture to be able to see that Witness A and Witness F can be used to elicit a thought or conclusion through Witness X. So the trial planning involves thinking through how one presents the first two pieces of testimony and then draws everything to fruition in the last piece. Sometimes you are able to do this when you are planning for trial, and other times you do it "on the fly" during trial. Either way, it represents the art of persuasion at trial, and it comes about because the lawyer has mastered all of the details and then stepped back and contemplated at great length the big picture.

Be in command

You must be in command of the courtroom. I do not mean overbearing, I do not mean obnoxious, I do not mean bullying, I do not mean egotistical; I mean that you must demonstrate in everything that you say and in every movement you make that you are confident and in control of yourself and your evidence. You must look, feel, and project mastery of what you do, never being surprised (unless it is an affectation that you have decided to use, and practiced), never losing your temper, never being flummoxed, never sweating, never showing fear, never

acting, speaking, or moving in anything other than a deliberate, controlled way. That takes discipline and practice. And probably a few mistakes.

Projecting this presence is not an accident. It takes preparation and planning for each trial. You need to be very familiar with the layout of the courtroom and everything that you intend to use in that courtroom. For each witness, each examination, each presentation, you must have thought through the logistics as well as the questions; you must be so practiced in all of your movements that they will appear to occur without thought, effortlessly. Where will your exhibits lay? When will you pick them up? Where will you stand when you examine the witness? Where will you put the big exhibit so it can be seen by witness, jury, and judge? How will you handle actual demonstrative aids, like the models that I have been talking about previously? Is technology in play? Does it work? Have you practiced – not just its function but how it fits into your flow of questioning? What is your backup? You must never have to look for something, appear confused, disorganized, or unplanned. You must always be in command. The exception would be only if the well-planned and well-practiced confusion or disarray is actually an application of the artistry of the trial lawyer because it is specifically designed and implemented to persuade the jury. "Confusion" of the lawyer in asking some questions, producing "confusion" on the part of the expert answering the questions, demonstrating "confusion" of the science he is supposedly testifying about. Much more effective than simply exploring that science and then arguing to the jury that it is "confused." Sometimes if the witness obviously heads down the road of irrationality, the cross examiner should lead the witness as far down that road as he is willing to go, perhaps all the way to ridiculousity. The jury will get it. If artfully done.

Keep 'em interested

You must develop ways to keep the jury interested, even when what you are presenting to them is uninteresting. The story is told by Henry Kissinger of the time when he was at a cocktail party and was approached by a tall, very beautiful, very poised blonde woman who asked "are you Henry Kissinger?" When he replied that he was, she looked deep into his eyes and said "I'm told that you are fascinating. So, . . . fascinate me."[10] This is one way to frame the task of the trial lawyer. Expectations are and should be high. You must make the mundane interesting, if not fascinating. You must make the droll, ordinary, chronological recitation of facts somehow entertaining. You must find ways to keep the jury engaged, more in your evidence than that of the opposition, but always directed toward having them "get it" where they need to. The jury must come to expect a deft touch, a focus on what is meaningful, and efficiency from you in your presentation of the evidence. When you get up to present evidence, the jury should come to expect that you will be to the point, and that you will know when to quit. And, while you do need to simplify the evidence for the jury, know that by this I mean helping the jury "get it" in as economical a way as possible. I do not mean dumbing it down. While you never want to do things that might make the jury think you think you know more than they do, you do want them to believe that you are extremely knowledgeable about your case yet respect the fact that they are able to understand it themselves without having you explain it to them in a condescending way. This, again, is artistry. You present the case in a way that brings the jury on their own to the conclusion that you want them to reach.

[10] No citation – I heard Mr. Kissinger tell the story when he spoke in Charleston years ago.

HAVE FUN

And always remember, as Emerson said: "Nothing great was ever achieved without enthusiasm." Show the jury that you want to be there and that you love what you do, which is persuade. Artfully.