What Criminal Defense Lawyers Should Know About Civil Damages Recoveries For Clients Whose Constitutional Rights have been Violated by the Police

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Dane County Criminal Defense Lawyers' Association
Bellini's
401 E. Washington Avenue
Madison, Wisconsin 53703

Jeff Scott Olson

THE JEFF SCOTT OLSON LAW FIRM, S.C.

131 W. Wilson St., Suite 1200
Madison, WI 53703
Phone: (608) 283-6001
E-mail: jsolson@scofflaw.com

"It isn't really power that corrupts. It's immunity."

- John W. Campbell, Jr.

I. QUALIFIED IMMUNITY: INTRODUCTION

The modern defense of qualified immunity was born two decades ago with *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). Qualified immunity is the principle "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. It is the streamlined modern descendent of the "good faith immunity" previously enjoyed by government officials, which had both subjective and objective components. *Wood v. Strickland,* 420 U.S. 308 (1975). In *Harlow,* the Supreme Court removed the subjective element of this defense in order to make the doctrine a better tool to "permit '[i]nsubstantial lawsuits [to] be quickly terminated." *Id.* at 814, *quoting Butz v. Economou,* 438 U.S. 478, 507-508 (1978). The Court wanted a defense which would be dispositive, in appropriate cases, on summary judgment. It recognized that the subjective prong of good faith immunity was incompatible with this end because, where state of mind is at issue, "there is often no clear end to the relevant evidence." *Id.* at 817.

The Seventh Circuit has described the purpose of the qualified immunity doctrine as two-fold:

> [I]t allows officials to carry out their duties confidently, without fear of incurring unexpected liability, and it allows courts to dispose of insubstantial claims prior to trial, sparing officials from unnecessary litigation. (Citations omitted).

Pounds v. Griepenstroh, 970 F.2d 338, 340 (7th Cir. 1992).[1]

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[1] It is worth noting here that neither of these purposes is served in the unusual case where it was clear that a defendant's act violated a Constitutional right of the plaintiff, but there remains some ambiguity as to which right was violated. This scenario has obtained historically, as one example, in connection with the cases of persons subjected to physical abuse while in government custody. At some point the Fourth Amendment right against unreasonable seizure gives way to the Fourteenth Amendment rights of a pretrial detainee, which in turn are replaced by the Eighth Amendment rights of convicted prisoners. *Viero v. Bufano,* 901 F. Supp. 1387, 1392 (N.D.Ill. 1995). There may be in a given case some uncertainty about which right applies, but as long as there is no uncertainty that physical abuse of the person in custody violates some constitutional right, immunity should be denied, as granting it serves neither of its dual purposes. See, *Id.*(denying qualified immunity in jail suicide case despite uncertainty as to which constitutional right applicable). *See also, Allen v. Guerrero,* 2004 WI App ____, ¶ 2, ____ Wis. 2d ____, _____,____N.W.2d ____ (September 16, 2004)("We conclude that a 42 U.S.C. § 1983 defendant is not entitled to qualified

Qualified immunity turns on what the Supreme Court called the "objective reasonableness," *Harlow,* 457 U.S. at 818, of a government employee's conduct. As the Seventh Circuit explained in *Pounds, id.*, at 340, "The standard is objective, based on what a reasonable official would or should have known and thought in the same circumstances, given the state of the law at that time." In the specific context of a police officer's application for a warrant, the Supreme Court made it clear that the availability of qualified immunity turns not on whether the officer in question knew that his affidavit failed to establish probable cause, but on "whether a reasonably well trained officer . . . would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Malley v. Briggs,* 475 U.S. 335, 345 (1986). This in turn depends strictly on the state of the law: "[W]here the law at the time of the act was not sufficiently developed to put the official on notice that his or her act would violate the plaintiffs statutory or constitutional rights, the official is immune from liability." *Pounds v. Griepenstroh,* 970 F.2d 338, 340 (7th Cir. 1992). The 1986 opinion of the Supreme Court in *Malley v. Briggs* foreshadowed the question which was to bedevil the courts in the wake of *Harlow:* How clearly established must a constitutional or statutory right be in order to deprive a government official who violates it of qualified immunity from suit for damages?

The Supreme Court attempted to address this question in *Anderson v. Creighton,* 483 U.S. 635 (1987). There, the Court made it clear that a constitutional or statutory right must be clearly established in a sufficiently "particularized" sense to make it possible for public officials to anticipate when their conduct might give rise to liability for damages. *Id.* at 639. The Court said:

> the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to *say* that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say in light of pre-existing law the unlawfulness must be apparent.

Id. at 640.

The doctrine of qualified immunity can have two serious pernicious effects upon the principle of judicial redress for state violations of federal rights which is embodied in § 1983. First, some courts have refused to hold public officials to legal rules in the absence of reported cases applying those rules to nearly identical fact situations. The

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immunity when, even if there was some uncertainty in the law regarding precisely which constitutional provision was violated, the law nonetheless clearly established that the defendants' alleged conduct violated the U.S. Constitution.")

most extreme example of this sort of decision is *Rich v. City of Mayfield Heights,* 955 F.2d 1092 (6th Cir. 1992), in which the plaintiff sued jailers who had found him hanging by the neck from his socks in his jail cell and, instead of taking immediate action to get him down, called the fire department rescue squad. Observing that "no case has been brought to this Court's attention which recognizes a constitutional duty on the part of jail officials to immediately cut down a prisoner found hanging in his or her cell," *id.* at 1097, the Court reversed the decision of the district court and granted the defendant jailers qualified immunity from damages.

The second frightening trend one observed, until just recently, was a focus on the law of the past so intense that the law of the present was ignored and the growth of the law was stunted. In *Courson v. McMillian,* 939 F.2d 1479 (11th Cir. 1991), the plaintiff had been abandoned at the side of a highway by police officers who arrested her two male companions and impounded the vehicle in which she had been a passenger. Because "no Supreme Court or Eleventh Circuit precedent existed in May, 1985, concerning a law enforcement officer's abandoning a passenger in a vehicle which was impounded and the other occupants arrested," *id.* at 1497, the Court of Appeals granted the defendant officer qualified immunity from damages. The Court never decided, one way or the other, whether such abandonment actually violated the plaintiff's constitutional rights under the law as understood at the time of its decision, though it did characterize the officer's conduct as "disappointing" and "bad judgment." *Id.* at 1498.

The difficulty with such decisions is that they do not provide a clear legal rule to guide the next police officer faced with a similar challenge. Thus, such a decision guarantees the next officer qualified immunity whatever action he or she takes. Because such decisions focus exclusively upon the clearly established law of some past time and eschew any effort to synthesize principles from controlling cases to create new rules for unprecedented situations, they represent an end to the incremental growth of decisional law as American jurisprudence has come to know it.

Fortunately, a close look at recent controlling authorities teaches that neither of these trends is currently in the ascendancy. As basic principles of the doctrine of qualified immunity as enunciated by the Supreme Court take hold, they both should be abandoned. Meanwhile, the courts have been addressing many other procedural and substantive aspects of the qualified immunity defense, as the following discussion shows.

II. QUALIFIED IMMUNITY: SCOPE OF THE DEFENSE

Qualified immunity is a defense to federal causes of action, based on the United States Constitution or federal statutes only. It does not protect state or local government employees from claims based upon state law. *Andreu v. Sapp,* 919 F.2d 637, 640 (11th Cir. 1990). Neither municipalities, *Owen v. City of Independence,* 445 U.S. 662 (1980), nor private parties, *Wyatt v. Cole,* 112 S. Ct. 1827 (1992), are entitled to invoke qualified immunity. *Richardson v. McKnight* 117 S.Ct. 2100 (1997) held that a correctional officer working for a private contractor engaged by Tennessee to manage its prisons was not entitled to claim qualified immunity; see also *Malinowski v. DeLuca*, No. 98-1667, slip op. at 2 (7th Cir. April 30, 1999) (holding that privately employed building inspectors were not entitled to claim qualified immunity under *Richardson*).

A. Inapplicable to Claims for Equitable Relief

Harlow v. Fitzgerald, 457 U.S. 800, 819 n. 34 (1982), expressly reserved ruling on the applicability of the defense of qualified immunity to claims for equitable relief. Since then courts have uniformly held that qualified immunity shields governmental defendants only from liability for damages and does not bar an action for declaratory or prospective injunctive relief. *Supreme Video v. Schauz*, 15 F.3d 1345 (7th Cir. 1994); *Fry v. Melaragno,* 939 F.2d 832 (8th Cir. 1991); *American Fire, Theft and Collision Managers, Inc. v. Gillespie,* 932 F.2d 816, 818 (9th Cir. 1991); *Cagle v. Gilley,* 957 F.2d 1347 (6th Cir. 1992).

B. Subjective Good Faith or Malice Irrelevant

As noted above, the revolution of *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), was to take the element of subjective good faith out of what had previously been called "good faith immunity." The courts have continued to hold that subjective good faith does not aid a defendant asserting qualified immunity, *Courson v. McMillian,* 939 F.2d 1479, 1487 (11th Cir. 1991), and that evidence of malice does not help to defeat a claim of qualified immunity, *Carlier v. Lussier,* 955 F.2d 841, 846 (2d Cir. 1992); *Winn v. Lynn,* 941 F.2d 236, 239-240 (3d Cir. 1991). The Ninth Circuit was simply wrong in suggesting that the issue of qualified immunity in the context of a police seizure of private property could turn on whether the officer "did not reasonably believe in good faith that his actions were constitutional." *Mills Graves,* 930 F.2d 729, 731 (9th Cir. 1991).

It is worth noting that the oft-quoted phrase from *Malley v. Briggs*, 475 U.S. 335, 341 (1986) to the effect that qualified immunity protects "all but the plainly incompetent or

those who knowingly violate the law," is a little misleading in its apparent reference to the subjective mental state of the defendant. It harmonizes with all of the law that says qualified immunity is an objective test only when taken in conjunction with the rock-solid rule, expressed below, that a defendant who invokes the defense of qualified immunity accepts the perhaps-fictional presumption that he or she knew the law governing his or her actions.

These cases do not remove state-of-mind issues from other aspects of cases in which qualified immunity is asserted as a defense, because intent is an element of some constitutional violations. *Elliott v. Thomas,* 937 F.2d 338, 344 (7th Cir. 1991).

C. Reasonable Public Official Presumed to Know Case Law

One important legal fiction originated by *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), necessary to the Court's scheme of keeping state-of-mind evidence out of qualified immunity determinations, is that "a reasonably competent public official should know the law governing his conduct." *Id.* at 819. *See also Mellon v. City of Oklahoma City,* 879 F.2d 706, 731 (10th Cir. 1989) ("in sum, officials are presumed to know and abide by clearly established law. When their actions are otherwise, their claim of qualified immunity will fail."). As the doctrine moved into the 90's, no courts questioned this fiction, and those that touched upon it continue to honor it. *Winn v. Lynn,* 941 F.2d 236, 241 (3d Cir. 1991) ("officials should be aware of the law governing their actions.") Recently the Seventh Circuit has put this in slightly different terms, in *U.S. v. Koerth*, 312 F.3d 862, 869 (7th Cir. 2002):

> We evaluate an officer's good-faith reliance with an analysis similar to that used in cases involving the affirmative defense of qualified immunity. See *Olson v. Tyler*, 825 F.2d 1116, 1120 (7th Cir. 1987) (citing *Malley v. Briggs*, 475 U.S. 335 (1986)). "Police officers in effecting searches are charged with a knowledge of well-established legal principles as well as an ability to apply the facts of a particular situation to these principles." [United States v.] Brown, 832 F.2d [991] at 995 (7th Cir. 1987).

There is a good reason for this presumption that government employees know the clearly established law governing their actions. The doctrine of qualified immunity denies the opportunity to recover compensation to a defined subset of those persons who are found to have been injured by violations of their federally-protected rights. Immunity arises in the cases of those victims where the unlawfulness of the act in

question was not clearly established at the time, and denies a remedy to this class of persons. It seems like a poor result to deny compensation to persons whose rights really have been violated and who really have been injured, yet this is precisely what the qualified immunity doctrine does. But it also seems like a bad thing to make public employees, who could not have known that what they were doing would later be determined to have broken the law, pay damages. There is constant border warfare over the boundaries of the qualified immunity doctrine.

To the police officer or the assistant principal, the doctrine of qualified immunity must seem like a shield with a big invisible hole in it. It is a shield because it immunizes a public employee from liability for damages in a Section 1983 action where he or she must choose a course of action in a gray area of the law. Where, depending on what an unpredictable court decides, a given course of action might truly be lawful or unlawful, the doctrine gives the first actor to face the choice the benefit of the doubt, though it does require the court to decide the lawfulness of the chosen act so as to eliminate the defense for future defendants who go down the same road. The big invisible hole comes from the aspect of the qualified immunity doctrine that holds that public employees are presumed to know the law. If it is clearly established by relevant court decisions, at the time of an action, that the action is unlawful, the immunity vanishes, whether the public employee in question *really* knows about the relevant decisions or not, because he or she is presumed to know the law. By invoking the defense, he or she accepts this presumption.

The hole in the qualified immunity shield was necessary to solve a greater problem, that of the unwieldiness and unfairness of the defense of ignorance of the law. The predecessor doctrine, good faith immunity, allowed the fact of immunity to turn upon the subjective state of mind of the defendant. At its high-water mark, in *Wood v. Strickland,* 420 U.S. 308 (1975), it mandated immunity if a defendant was subjectively ignorant as to whether or not he or she was violating the law when injuring the plaintiff. Such a defense created an incentive to remain ignorant of recent developments in the law. It also created trials without visible boundaries, for where a subjective state of mind is at issue, "there is often no clear end to the relevant evidence." *Harlow v. Fitzgerald,* 457 U.S. 800, 817 (1982).

The Supreme Court, in other words, thought it a better balance between the right to compensation of an injured citizen and the interest of society in immunizing public servants caught in circumstances where they have to guess about the lawfulness of their actions to erect a somewhat Spartan shield than a shield that could be expanded to defeat as many lawful claims as necessary through willful or feigned ignorance of the law.

So, the doctrine does not protect all public actors who in good faith make a sincere effort to conform their conduct to the law, because even a government employee

acting in good faith will sometimes simply not know that the unlawfulness of a course of action has recently become clearly established, but on balance it may be better to immunize fewer defendants than to allow a manipulable form of immunity to defeat more legitimate claims, especially where the presumption that government agents know the law vastly shortens and simplifies litigation of the immunity question.

See, e. g., *Bier v. City of Lewiston*, ____ F. 3d ____ , ____(9th Cir. 2004):

> Probable cause cannot be established by an erroneous understanding of the law. While an officer may have reasonable suspicion or probable cause even where his reasonable understanding of the facts turns out to be mistaken, see, e.g., *United States v. King*, 244 F.3d 736, 739 (9th Cir. 2001), we have repeatedly held that a mistake about the law cannot justify a stop, let alone an arrest, under the Fourth Amendment. See *Alford v. Haner*, 333 F.3d 972, 976 (9th Cir. 2003) (holding that officers had no probable cause where they arrested suspect for conduct that did not constitute a crime); *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000) (holding that officer had no reasonable suspicion for traffic stop where driver "simply was not" violating any law); accord *United States v. Mariscal*, 285 F.3d 1127, 1130 (9th Cir. 2002); King, 244 F.3d at 739; *United States v. Twilley*, 222 F.3d 1092, 1096 (9th Cir. 2000); cf. *United States v. Wallace*, 213 F.3d 1216, 1220-21 (9th Cir. 2000) (suggesting that no probable cause would exist in "cases in which the defendant's conduct does not in any way, shape or form constitute a crime"). As we explained in *Mariscal*: "If an officer simply does not know the law, and makes a stop based on objective facts that cannot constitute a violation, his suspicions cannot be reasonable. The chimera created by his imaginings cannot be used against the [suspect]." 285 F.3d at 1130.

III. QUALIFIED IMMUNITY: HOW CLEARLY ESTABLISHED?

A. The Source of Prior Authority: Is Binding Precedent Required?

The courts have arrayed themselves across the spectrum on the issue of what sort of authority is required to clearly establish the law governing an official's actions. One pole was established in the last decade in *Melton v. City of Oklahoma City,* 879 F.2d 706, 729 n.36 (10th Cir. 1989):

> We also emphasize that our decision *does not* mean that only binding

> precedent will clearly establish a right. We assume that counsel for government entities remain abreast of the decisional law and periodically update responsible government officials so that their actions will be informed by, and will comport with, the law. [Emphasis in original].

The other pole was established in *Jermosen v. Smith,* 945 F.2d 547, 551 (2d Cir. 1991), in which the Court afforded qualified immunity to prison officials who imposed a disciplinary penalty of one week "keeplock" on an inmate without affording him certain elements of due process. Although a prior decision, *Powell v. Ward,* 487 F. Supp. 917, 925-26 n.8 (S.D.N.Y. 1980), *modified,* 643 F.2d 924 (2d Cir. 1981), *cert. denied,* 454 U.S. 832 (1981), had found, in *dicta,* these aspects of due process to be applicable to such penalties, the Second Circuit held that the law was not clearly established in large part because "this decision was rendered in the Southern District of New York [so] it could not, by itself, clearly establish a principle of law in the Western District of New York where Attica is situated." *Jermosen,* 945 F.2d at 551 (2d Cir. 1991).

A number of other decisions touched upon this issue. The closest thing to a codification of principles in the area has been attempted by the Sixth Circuit in *Daugherty v. Campbell,* 935 F. 2d 780, 784 (6th Cir. 1991), which held that courts attempting to assay clearly established law should look first to the decisions of the Supreme Court, then to the decisions of their own circuit court of appeals, then to decisions of other courts within the circuit, and finally to decisions from other circuits. The Sixth Circuit took a dim view of case law from other circuits, holding that for it to clearly establish a legal principle it must both "point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting." *Id., quoting Ohio Civil Service Employees Association v. Seiter,* 858 F.2d 1171, 1177 (6th Cir. 1988). *Accord Marsh v. Am,* 937 F.zd 1056, 1068 (6th Cir. 1991).

Other courts were somewhat more realistic about the way real-world lawyers advise their government clients. In *Maraziti v. First Interstate Bank of California,* 953 F.2d 520, 525 (9th Cir. 1992), the Court recognized that "in the absence of binding precedent, a court should look at all available decisional law including decisions of state courts, other circuits, and district courts to determine whether the right was clearly established." (quoting *Ward v. County v. San Diego,* 791 F.2d 1329, 1332 (9th Cir. 1986), *cert. denied,* 483 U.S. 1020 (1987)). *In Salmon v. Schwarz,* 948 F.2d 1131, 1139 (10th Cir. 1991), and *Stewart v. Donges,* 915 F.2d 572, 582 (10th Cir. 1990), the Tenth Circuit considered arrests pursuant to warrants issued before it had directly decided whether material omissions in a warrant affidavit ran afoul of *Franks v. Delaware,* 438 U.S. 154 (1978), and found the affirmative answer to this question to have been clearly established by the decisions of other circuits.

In this century, the Seventh Circuit has said, "The law is `clearly established' if `various courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand.'" *Campbell v. Peters*, 256 F.3d 695, 700 (7th Cir. 2001) (quoting Saucier, 121 S.Ct. at 2156).

The Wisconsin Supreme Court elaborated on the sources of "clearly established" law in *Arneson v. Jezwinski*, 225 Wis. 2d 371, 388-90, 592 N.W.2d 606 (1999):

> While of greatest value, a Supreme Court decision on "all fours" is not necessary to overcome a qualified immunity defense. In light of the Supreme Court's decision in *Harlow* which left unanswered the source of federal law, the Seventh Circuit has observed that "reliance on Supreme Court decisions alone might be inappropriate (unless they are the only cases ruling on the question), because they are infrequent in comparison to the decisions of the district and appellate courts, and this infrequency could have the practical effect of converting qualified immunity into absolute immunity." *Benson v. Allphin*, 786 F.2d 268, 275 (7th Cir.1986). Furthermore, the United States Supreme Court has acknowledged when it was itself determining the source of clearly established law, that "for purposes of determining whether a constitutional right was clearly established, the Court may look to the law of the relevant circuit at the time of the conduct in question." *Siegert v. Gilley*, 500 U.S. 226, 243, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991)(citing *Davis v. Scherer*, 468 U.S. 183, 191-92, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984)).
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> At a minimum, defendants should be held aware of the controlling authority of this state, as well as the highly persuasive authority found within the Seventh Circuit. However, the absence of controlling authority on point should not be dispositive that the law is not clearly established. *See Donovan v. City of Milwaukee*, 17 F.3d 944, 952 (7th Cir.1994) (citing *Cleveland-Perdue v. Brutsche*, 881 F.2d 427, 431 (7th Cir.1989)). Instead, where there is no controlling authority on point, the parties must point to "such a clear trend in the caselaw that [they] can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time." Id. (quoting *Cleveland-Perdue*, 881 F.2d at 431). To so show, "rulings in other circuits are instructive on what the law is as to constitutionally protected rights." *Spreen v. Brey*, 961 F.2d 109, 112 (7th Cir.1992). But see *Kolman v. Sheahan*, 31 F.3d 429, 434, (7th Cir.1994)(the court intimated that if the Seventh Circuit did not have an analogous case, the defendant would be qualifiedly immune for his or her actions).
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> In considering the weight to accord district court decisions, we recognize that by themselves, they cannot "clearly establish a constitutional

right," *Anderson*, 72 F.3d at 525 (emphasis in the original)(citing *Jermosen v. Smith*, 945 F.2d 547, 551 (2nd Cir.1991)), for they "have no weight as precedents, no authority." *Anderson*, 72 F.3d at 525. However,

> [t]hey are evidence of the state of the law. Taken together with other evidence, they might show that the law had been clearly established. But by themselves they cannot clearly establish the law because, while they bind the parties by virtue of the doctrine of res judicata, they are not authoritative as precedent and therefore do not establish the duties of nonparties.

Anderson, 72 F.3d at 525.

¶ 44 In summary, we believe that on the question governed by federal law, and with a view to the guidelines described above, this court should, as does the Seventh Circuit, "look to whatever decisional law is available to ascertain whether the law has been clearly established." *McGrath v. Gillis*, 44 F.3d 567, 570 (7th Cir.1995)(citing *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir.1988)(en banc)). A " 'sufficient consensus based on all relevant case law, indicating that the officials' conduct was unlawful' is required." Id. (quoting *Henderson v. DeRobertis*, 940 F.2d 1055, 1058-59 (7th Cir.1991)(quoting *Landstrom v. Illinois Dept. of Children & Family Serv.*, 892 F.2d 670, 676 (7th Cir.1990))).

B. Is There a Role for Expert Opinion Evidence?

The question arises as to whether there is any role for expert opinion in the determination of the qualified immunity question. The answer would appear to be that there is, at least in cases where the defendant is arguing that a reasonable person could have determined that the course of action he or she chose was acceptable under a broadly-worded legal standard. In *West v. Schwebke*, 333 F.3d 745, 749 (7th Cir. 2003) the Seventh Circuit held:

> What sets this case apart from others in which the defendants received immunity, such as *Allison v. Snyder,* No. 03-1570 (7th Cir. June 19, 2003), is that respected experts have opined, on plaintiffs' behalf, that the defendants' choices exceed the scope of honest professional disagreement.

> Plaintiffs must show something worse than a mistake about a matter open to bona fide disagreement or genuine uncertainty. But if a trier of fact concludes that the Resource Center's use of seclusion was designed to inflict extra punishment for the plaintiffs' sex crimes, rather than to treat their condition or protect others from new violence, then the plaintiffs are entitled to damages.

Perhaps the most useful recent discussion of the role of expert opinion, properly phrased, in defeating the assertion of qualified immunity has come in *Doe v. Gustavus*, 294 F.Supp.2d 1003, 1009, (E.D.Wis. 2003) where the court denied qualified immunity to nursing defendants based in part on the testimony of a nursing defendant, saying:

> The recurring theme of the allegations against the defendant nurses is that they dropped the ball so egregiously that the only reasonable explanation is that they knowingly disregarded the risks to the plaintiff. That is, their treatment errors were so beyond the pale that a jury could conclude that they were not errors at all, but intentional or reckless actions. This argument relies largely on the opinion of the plaintiff's expert witness, a professor of nursing at Marquette University in Milwaukee. One example from her report should suffice:
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> > All the symptoms presented by the plaintiff indicated the need for her immediate transport. These include patient feeling rectal pressure, vaginal discharge with some blood, pulse increasing, pain increasing, vomiting . . . Any nurse eligible for licensure in the State of Wisconsin would have known to send this patient to the hospital based on these signs and symptoms that labor was progressing and the patient needed monitoring and professional care only available in a hospital setting.
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> (Tobin Report at 8; italics added.)
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> While the nurse defendants argue that there is no evidence to suggest that they were deliberately indifferent, what they really mean is that there is no direct evidence of their subjective mental state. That is, no one heard any of the nurses say, "let's all delay treating Jane Doe so that she suffers." The lack of direct evidence is not surprising, however, as most claims involving a mental state must be proved without a clear view into the mind of the accused. Instead, such claims commonly rely on a jury's ability to make inferences based on the circumstances involved. Here, the expert's testimony, if credited, will invite the jury to make the first of a series of logical inferences required for the plaintiff to win her

> case. Specifically, the expert will testify that any nurse would have known that the plaintiff was in labor. The jury could then connect the dots and find that, because the defendants are nurses, they must have known that the plaintiff was in labor. A jury could proceed to find that some, or all, of their actions constituted deliberate indifference. Thus, while the defendants are correct that the expert nursing witness cannot testify to the ultimate legal issue of deliberate indifference, she can certainly present testimony from which a jury could reasonably conclude that the performance of the nursing staff was so far below acceptable standards that the behavior of any given nurse was deliberate. Accordingly, construing the evidence in the light most favorable to the plaintiff, I conclude that a reasonable jury could find in the plaintiff's favor. I therefore will deny the motion for summary judgment as to the nursing defendants.

C. The Content of Prior Authority: How Analogous?

In a very real sense the great majority of qualified immunity decisional law in this (and the last) decade is an exegesis on the following language from *Anderson v. Creighton,* 483 U.S. 635, 640 (1987):

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say in light of pre-existing law the unlawfulness must be apparent.

The courts have recognized that measuring a defendant's conduct against a rule of law expressed in overly general terms will, as a practical matter, render the defense of qualified immunity unavailable, while requiring too specific a statement of clearly established law to defeat the defense "would render the defense available to all public officials except in those rare cases in which a precedential case existed which was 'on all fours' factually with the case at bar." *Melton v. City of Oklahoma City,* 879 F.2d 706, 729 n.37 (10th Cir. 1989), *quoting Dart lands v. Metropolitan Dade County,* 681 F. Supp. 1539, 1546 (S.D. Fla. 1988).

The Courts have been realistic in recent years about realizing that the unlawfulness of a given act can be apparent even though there is no authority directly paralleling the facts at issue. In *Hildebrandt v. Illinois D.N.R.*, ___ F. 3d ___, Case No. 01-3064 (7th Cir., October 30 2003) the Seventh Circuit said:

we note that the district court erred in requiring the plaintiff to come forward with a case precisely on point in order to show that the right was clearly established. We previously have explained that

> [a] right is clearly established when its contours are sufficiently clear so that a reasonable official would realize that what he is doing violates that right. This does not mean that there has to be a case on point holding that the officials' exact conduct is illegal before we will find the officials liable; however, in the light of preexisting law the unlawfulness must be apparent.

Gossmeyer v. McDonald, 128 F.3d 481, 495 (7th Cir. 1997) (internal quotation marks and citations omitted).

Consequently, the fact that Dr. Hildebrandt cannot point to a case holding "that giving a lower raise that was within the set guidelines" resulted in a constitutional violation, Trial Tr. at 684, is not dispositive of the qualified immunity issue. See, e.g., *Nabozny v. Podlesny*, 92 F.3d 446, 455-56 (7th Cir. 1996) (holding that defendants were not entitled to qualified immunity on a claim of gender discrimination even though there were no cases directly on point because the Supreme Court in 1971 had established that the Equal Protection Clause "prevent[ed] arbitrary gender-based discrimination" and by 1982 the Supreme Court had held that the Equal Protection Clause "requir[ed] equal treatment regardless of gender"); *Markham v. White,* 172 F.3d 486, 491 (7th Cir. 1999) ("The fact that arbitrary gender-based discrimination, including discrimination in an educational setting, violates the equal protection clause has been plain in this circuit for almost a decade and a half.").

The Seventh Circuit said in *Finsel v. Cruppenink*, 326 F.3d 903, 906 (7th Cir. 2003) that:

> Recently the Court has cautioned that, for a right to be clearly established, it is not necessary that there be earlier cases with materially similar facts. Rather, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 122 S.Ct. 2508, 2516 (2002).
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> The Court employed this principle in its holding:
>
> We have found no case specifically outlawing Cruppenink's conduct. But as the Court recently said in *Hope*, even in novel situations, in an

> appropriate case, officials can be on notice that their conduct violates established law. This is such a case. Given the facts as we must interpret them, Cruppenink should have known that he could not break down the door and forcibly enter Finsel's motel room.

Id., at 907.

There is some tension between cases that require a plaintiff to identify a closely analogous case in which an asserted right was established in order to defeat qualified immunity and cases that make it plain that in some circumstances a violation can be crystal clear in a case of first impression. An example of the "closely analogous case" strain is *Sonnleitner v. York*, 304 F.3d 704, 716 (7th Cir. 2002), in which the court said: "Although Sonnleitner need not offer up a federal decision which precisely mirrors the facts of this case, at a minimum he must point to a closely analogous case decided prior to the challenged conduct. See *Lawhe v. Simpson,* 16 F.3d 1475, 1483 (7th Cir. 1994)."

The United States Supreme Court has recently reiterated that the question of whether a right was clearly established need not be determined through rigid analysis of materially identical case law. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). In examining an Eighth Amendment violation, the Supreme Court explained:

> For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. That is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Id. (internal quotations and citations omitted). The Court also reminded litigants that while "earlier cases involving fundamentally similar facts can provide strong support for the conclusion that the law is clearly established," "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* at 742.

In *Ienco v. City of Chicago*, 286 F.3d 994 (7th Cir. 2002) the Seventh Circuit denied qualified immunity where the fact that certain acts amounted to a constitutional violation had been clear at time of the defendants' acts, even where the textual basis for finding a violation had changed (from unconstitutional malicious prosecution to denial of a fair trial in violation of due process clause) between the time of the violation and the time of the decision. See also, *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001).

A very sensible formulation of the law on this issue can be found in *Siebert v. Severino*, 256 F.3d 648, 654-655 (7th Cir. 2001), where the court denied qualified immunity for the warrantless seizure of horses from a barn despite the absence of a closely analogous Seventh Circuit case and held:

> A violation may be clearly established if the violation is so obvious that a reasonable state actor would know that what they are doing violates the Constitution, or if a closely analogous case establishes that the conduct is unconstitutional. *Brokaw v. Mercer County*, 235 F.3d 1000, 1022 (7th Cir. 2000).
>
> This case seems to fit within the "obvious" scenario — a reasonable state actor would know that he cannot enter a fenced-in, closed structure located within 60 feet of a person's house without a warrant or some exception to the warrant requirement. But even if not reasonably obvious to Severino, a closely analogous case indicates that his conduct was unconstitutional: his search took place in 1996, and less than three years earlier the Fourth Circuit held that citizens enjoy an expectation of privacy in their barn. See Wright, 991 F.2d at 1186. Therefore, Severino is not protected by qualified immunity. [footnote omitted]

This alternative formulation for how law might be clearly established – *either* set down in a closely analogous case *or* screamingly obvious -- was also expressed in *Smith v. City Of Chicago*, 242 F.3d 737, 742 (7th Cir. 2001):

> Qualified immunity is dissolved, however, if a plaintiff points to a clearly analogous case establishing a right to be free from the specific conduct at issue or when the conduct is so egregious that no reasonable person could have believed that it would not violate clearly established rights. See *Saffell v. Crews*, 183 F.3d 655, 658 (7th Cir. 1999).

The reason for not always requiring closely analogous case law to deny qualified immunity was well expressed in *Burgess v. Lowery*, 201 F.3d 942, 945 (7th Cir. 2000), where qualified immunity was denied for strip searches of prison *visitors*:

> Equally, however, the absence of a decision by the Supreme Court or this court cannot be conclusive on the issue whether a right is clearly established in this circuit. There might be no decision in either court simply because the existence of the right was so clear, as a matter of the wording of a constitutional or statutory provision or decisions in other circuits or in the state courts, that no one thought it worthwhile to litigate the issue. E.g., Anderson v. Romero, 72 F.3d 518, 526-27 (7th Cir. 1995); Buonocore v. Harris, 65 F.3d 347, 356-57 (4th Cir. 1995); cf. Key v. Grayson, 179 F.3d 996, 999-1000 (6th Cir. 1999). To rule that until the Supreme Court has spoken, no right of litigants in this circuit can be deemed established before we have decided the issue would discourage anyone from being the first to bring a damages suit in this court; he would be certain to be

unable to obtain any damages.

D. Decisions in Particular Subject Areas

1. First Amendment

A district court's dismissal of damage claims on the grounds of qualified immunity was affirmed in *Penthouse International, Ltd. v. Meese,* 939 F.2d 1011 (D.C. Cir. 1991). At issue was whether a First Amendment right to be free from blacklisting by the Attorney General's Commission on Pornography was clearly established when the Meese Commission allegedly induced the Seven-Eleven stores to take *Playboy* and *Penthouse* off their shelves. The Court held that such a right was not clearly established, rejecting the authority of *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963), because in that case the defendant commission had threatened actual prosecution, and rejecting the authority of *Hobson v. Wilson,* 737 F.2d 1 (D.C. Cir. 1984), *cert. denied,* 470 U.S. 1084 (1985), where the FBI's extensive scheme to disrupt political activities of certain disfavored groups had been found unlawful without any threat of actual prosecution, because in that case the agents acted surreptitiously and in disguise.

In *Elliott v. Thomas,* 937 F.2d 338 (7th Cir. 1991), the Court afforded qualified immunity to university administrators who transferred a professor, in part because her protected speech created a disturbance undermining the productivity of other workers, and, arguably, in part in retaliation for the content of her protected speech, because it held that the state of the law on such "mixed motive transfers," *id.* at 346, was ambiguous at the time of the defendant's actions. The Court rejected assertions of qualified immunity where there were indications that the plaintiffs' protected speech was the only motivation for the defendants' retaliation against them in *Sanchez v. City of Santa Anna,* 936 F.2d 1027, 1040 (9th Cir. 1990).

Retaliation against a public employee for speaking out on a matter of public interest only violates the employee's First Amendment rights, of course, if the employee's rights are not outweighed by the employer's interest in efficiently and effectively carrying on its business. *Connick v. Myers,* 461 U.S. 138 (1983). Though some courts have indicated that "if the existence of a right or the degree of protection it warrants in a particular context is subject to a balancing test, the right can rarely be considered 'clearly established,' at least in the absence of closely corresponding factual and legal precedent," *Frazier v. Bailey,* 957 F.2d 920, 931 (1st Cir. 1992), *quoting Myers v. Morris,* 810 F.2d 1437, 1462-63 (8th Cir. 1987), *cert. denied,* 484 U.S. 828 (1987) (granting

qualified immunity to social workers who allegedly interfered with family relationships). The Court denied qualified immunity to defendants who retaliated against a public employee for testifying truthfully on matters of public concern before a legislative body in *Piesco v. City of New York Department of Personnel,* 933 F.2d 1149 (2d Cir. 1991).

Qualified immunity was denied in First Amendment retaliation case in *Myers v. Hasara*, 226 F.3d 821, 829 (7th Cir. 2000)("It was, therefore, clear in June 1996 that government employees had a First Amendment right to speak on matters of public concern that must be weighed against the employer's right to punish insubordination. Hasara and Danner cannot claim not to have known that disciplining Myers under these circumstances would not implicate her right to free speech.")

2. Police Misconduct

a. Excessive Force

In *Austin v. Hamilton,* 945 F.2d 1155 (10th Cir. 1991), the plaintiffs had been caught with a small amount of marijuana in their vehicle by federal agents at a port of entry into the United States from Mexico. They were subjected to 12 hours of unnecessary physical violence and inhumane treatment, after which they were released without charge. The Tenth Circuit denied qualified immunity to the defendants with respect to the initial arrest, because it held that it was clearly established at the time of their actions that the Fourth Amendment proscribed excessive force in arrests, but granted qualified immunity in connection with the conduct of the defendants during the plaintiffs' lengthy detention, because of legal ambiguity concerning the source of the plaintiffs' rights to humane treatment after arrest. Conspicuous by its absence in the Court's opinion is any discussion of whether the defendants' actions violated even the most conservative extant description of the plaintiffs' rights.

A better approach was taken by the same court in *Frohmader v. Wayne,* 953 F.2d 1024 (10th Cir, 1992), a case in which the plaintiff alleged excessive force in connection with his post-arrest restraint in a holding cell. The Court first applied contemporary Fourth Amendment law to the plaintiff's claims, based on its decision in *Austin v. Hamilton,* 945 F.2d 1155, 1160 (10th Cir. 1991), that claims of post-arrest excessive force by arrestees detained without warrants are governed by the Fourth Amendment until such arrestees are brought before a judicial officer for a determination of probable cause

to arrest. Based on the application of a Fourth Amendment standard, the Court of Appeals reversed the district court's determination that the defendant's treatment of the plaintiff was objectively reasonable. Then, the Court considered the qualified immunity defense under a substantive due process standard, applicable to post-arrest police conduct before *Austin.* Though there may have been some ambiguity as to which standard properly applied pre-*Austin*, the Tenth Circuit noted that the Due Process standard was more onerous for plaintiffs than the Fourth Amendment reasonableness standard and proceeded to inquire whether even under the stricter standard the plaintiff could defeat the defendant's assertion of qualified immunity. Summary judgment for the defendant was reversed.

A number of courts have observed that the defense of qualified immunity is of extremely limited utility in excessive force cases because "the substantive inquiry that decides whether the force exerted by police was so excessive that it violated the Fourth Amendment is the same inquiry that decides whether the qualified immunity defense is available to the government actor," *Quezada v. County of Bernalillo,* 944 F.2d 710, 718 (10th Cir. 1991), that is, whether the degree of force employed was "objectively unreasonable." *Jd., citing Dixon v. Richer,* 922 F.2d 1456, 1463 (10th Cir. 1991) ("In excessive force claims asserted under the Fourth Amendment, the qualified immunity question is usually answered in the Fourth Amendment inquiry . . . because, in the excessive force context, the Fourth Amendment inquiry asks directly whether the police officer reasonably could have believed that the force was necessary under the circumstances." [footnotes omitted]). The same principle was recognized in *Jackson v. Hoyt-man,* 933 F.2d 401 (6th Cir. 1991).

However, in *Saucier v. Katz*, 533 U.S. 194 (2001), the Court recognized that a police officer might act with excessive force yet lack precise guidance from the case law as to whether the nature and amount of force employed in the extant circumstances would be constitutionally excessive and thus still be entitled to qualified immunity. The impact of this decision in the Seventh Circuit was explained in Marshall v. Teske, 284 F.3d 765, 772 (7th Cir. 2002) the court said:

> At the time that Marshall's civil rights suit went to trial, the law in our circuit was that a jury's determination that an officer's conduct was objectively unreasonable under the Fourth Amendment determined for qualified immunity purposes whether a reasonable officer could have believed that his conduct was lawful. See *McNair v. Coffey,* 234 F.3d 352, 355 (7th Cir. 2000). The Supreme Court, however, vacated our holding in McNair and remanded for further consideration in light of its holding in *Saucier v. Katz*, 121 S.Ct. 2151 (2001). See Coffey v. McNair, 121 S.Ct. 2545, 2545 (2001).
>
> *Saucier* held that even in cases in which the question of qualified

> immunity is factually intertwined with the question of whether officers violated the Fourth Amendment (in that case, by using excessive force), judges must still make an immunity determination separate from the jury's finding on whether the officers violated the plaintiff's constitutional rights. See *Saucier*, 121 S.Ct. at 2154. (footnote omitted).

In *Courson v. McMillian,* 939 F.2d 1479 (11th Cir. 1991), the Court looked at the length of *Terry* detentions which previous decisions had found reasonable and unreasonable in determining that the 30-minute detention in that case was not clearly unreasonable, and looked at prior cases granting liberal approval to police officers pointing their guns in granting qualified immunity on the plaintiff's excessive force claim. As noted above, the Court also granted qualified immunity on the plaintiff's claim that she was abandoned by the roadside, because of the absence of clear authority that this violated her rights.

In *Slattery v. Rizzo,* 939 F.2d 213 (4th Cir. 1991), the court held that a criminal suspect at the wheel of a van who ignored repeated instructions to raise his hands, and instead grasped a beer bottle, did not have a clearly established right not to be shot in the face.

In *Weimer v. Schroeder,* 952 F.2d 336 (10th Cir. 1991), the Court held that the plaintiff's decedent did not have a clearly established right at the time of the subject incident or at the time of the decision to be prevented from ingesting a lethal dose of cocaine from his own suitcase in the back seat of a squad car.

Generally, the courts are solicitous when police officers claim to have been acting in self-defense, and this has sometimes led to confusing the question of qualified immunity with the question of liability on the merits. In both *Rhodes v. McDannel,* 945 F.2d 117 (6th Cir. 1991), and *Fraire v. City of Arlington,* 957 F.2d 1268 (5th Cir. 1992), the gist of the Court's holding was that the defendant officer's actions were undertaken in objectively reasonable self-defense. These determinations disposed of the Fourth Amendment claims on their merits, so there was no need to discuss the issue of qualified immunity, but both of these opinions purport to turn on qualified immunity. It bears repeating that there is no need to reach the issue of qualified immunity unless the plaintiff can make a case that his or her rights, as established by the law current at the time of the litigation, were violated. Only then does it become necessary to consider whether, in light of the perhaps less clearly established law at the time of the alleged violation, the defendant's actions were objectively reasonable in the light of the law that existed then.

In *Payne v. Pauley,* 337 F.3d 767, 778 (7th Cir. 2003) the Seventh Circuit denied qualified immunity for excessively tight handcuffs.

b. Non-Custodial Interactions with Civilians

In *Andrews v. Wilkins,* 934 F.2d 1267 (D.C. Cir. 1991), the Court held that it had not been clearly established at the time of the incident and was not, in fact, the law at the time of the decision, that officers violated the rights of a drowning criminal suspect by ordering a boater whose aid they had requested not to dive into the water to save the suspect.

In *Alexander v. DeAngelo,* 329 F.3d 912 (7th Cir. 2003) the Seventh Circuit held that coercing a suspect through fraudulent threats to act as an agent provocateur and have sex with another suspect is a substantive deprivation of liberty but was immunized as the right was not clearly established in the particular context.

Police offering unwelcome guests in a home the option to leave or be arrested was determined to be probably not a seizure in *White v. City Of Markham,* 310 F.3d 989 (7th Cir. 2002) but if a seizure, reasonable; qualified immunity was used as a backup basis for dismissal.

c. Applying for Search Warrants

Several cases discussed qualified immunity in the context of police officers applying for warrants. *Salmon v. Schwarz,* 948 F.2d 1131 (10th Cir. 1991). In *Brunig v. Pixler,* 949 F.2d 352 (10th Cir. 1991), the Court denied qualified immunity to officers who arguably intentionally omitted exculpatory facts from an affidavit in support of an order for nontestimonial identification. Relying largely on a First Circuit case, *Krohn v. United Stales,* 742 F.2d 24, 31 (1st Cir. 1984), the Tenth Circuit held that it was clearly established in 1986 that knowing or reckless omissions of information which would have vitiated probable cause would run afoul of the Constitution. In *Cartier v. Lussier,* 955 F.2d 841 (2d Cir. 1992), the Court granted qualified immunity to a state trooper who arguably misrepresented the facts in an affidavit supporting an arrest warrant on the ground that it would have been objectively reasonable for a similarly situated trooper to believe that a corrected and true affidavit still supplied probable cause.

d. Conducting Searches and Seizures (Including Arrests)

In *Molina v. Cooper,* 325 F.3d 963 (7th Cir. 2003) the Seventh Circuit found no Fourth Amendment violation for a 5-13 second wait after a knock-and-announce at a dangerous drug dealer's residence or for use of flash-bang grenade and gratuitously observed that qualified immunity would also preclude liability.

In *Sparing v. Village Of Olympia Fields*, 266 F.3d 684 (7th Cir. 2001) a violation was found but qualified immunity was granted where the defendant officer opened a screen door without consent to effect a warrantless arrest.

The Ninth Circuit denied qualified immunity to defendants who participated in the warrantless seizure of an arrestee's blood for the purpose of HIV testing in *Barlow v. Ground,* 943 F.2d 1132 (9th Cir. 1991), *distinguishing Scltmerber v. California,* 384 U.S. 757 (1966), which authorized a warrantless seizure of blood for alcohol testing, on the ground that alcohol in the blood is "evanescent," *id.* at 1138, and there thus might not be time to obtain a warrant. The Ninth Circuit relied on a Fifth Circuit criminal case which distinguished *Schmerber* for the same reason, *Graves v. Beto,* 424 F.2d 524, *.525* (5th Cir. 1970).

e. Arrests Allegedly Without Probable Cause

In *Thompson v. Wagner*, 319 F.3d 931 (7th Cir. 2003) qualified immunity was denied for the arrest of suspected wearer of a stolen diamond ring. The court said:

> So, what this all boils down to is that the officers here are entitled to qualified immunity, and Thompson's § 1983 action against them must be dismissed without a trial if a reasonable officer could have believed that, in light of the facts and circumstances within the officers' knowledge and clearly established law, Mrs. Thompson had committed or was committing an offense. See *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). A reasonable but mistaken belief that probable cause exists is sufficient for entitlement to qualified immunity. Id. at 227. In cases involving the issue of whether probable cause existed to support an arrest, "the case should not be permitted to go to trial if there is any reasonable basis to conclude that probable cause existed." McDonnell v. Cournia, 990 F.2d 963, 968 (7th Cir. 1993) (quoting Cross v. City of Des Moines, 965 F.2d 629, 632 (8th Cir. 1992)). So we see that in getting around the defense of qualified immunity in a probable cause to arrest situation, plaintiffs have a very difficult hurdle to pass. Difficult, but not impossible.

In *Payne v. Pauley,* 337 F.3d 767, 778 (7th Cir. 2003) the Seventh Circuit denied qualified immunity for an arrest, for obstructing, of a woman who did not argue, swear, incite, obstruct or resist.

Under the impression we've abolished debtors prisons? Think again. Probable cause to arrest for theft of services exists where homeowner has not paid home repair bills, so the question of clearly established law was not reached in *Neiman v. Keane,* 232 F.3d 577 (7th Cir. 2000).

Perry v. Sheahan, 222 F.3d 309 (7th Cir. 2000) found no qualified immunity for warrantless seizure of firearms from residence.

Jacobs v. City of Chicago, 215 F.3d 758, 766 (7th Cir. 2000) denied qualified immunity for entry of an apartment not specified in the warrant and detention of the occupants.

3. Rights of Pretrial Detainees, Prisoners and Visitors

The Second Circuit took a pragmatic approach to the question of how tightly prior law must fit the facts of the case at bar in *Kaminsky v. Rosenblum,* 929 F.2d 922 (2d Cir. 1991). Based on "established law that deliberate indifference to the essential medical needs of prisoners" violates the Eighth Amendment, and several cases presenting analogous but far from identical facts, the Second Circuit determined that the law had been sufficiently clearly established at the time the defendants allegedly delayed the plaintiff's medical care to warrant denial of qualified immunity on summary judgment.

In A/Jars/i v. Am, 937 P.2d 1056 (6th Cir. 1991), the *Court of* Appeals reversed a jury award of damages against a prison guard and in favor of an inmate who was attacked and severely beaten by her cellmate. The Court held that, while a cause of action for failure to protect an inmate from attack by another inmate, under a deliberate indifference standard of liability, had been clearly established at the time of the *attack,* the right of an inmate to be segregated due to the threats of her cellmate had not, and afforded qualified immunity to the guard. While the *A/Jars/i* court claimed to place "little or no value on the opinions of other circuits in determining whether a right is clearly established," *id.* at 1069, the Sixth Circuit found the right of a prison visitor to be free from body cavity searches absent a reasonable suspicion of wrongdoing to have been clearly established based on prison visitor cases from other circuits in *Daugherty v. Campbell,* 935 F.2d 780, 785-787 (6th Cir. 1991). In *Burgess v. Lowery*, 201 F.3d 942, 945

(7th Cir. 2000) qualified immunity was denied for requiring prison visitors to submit to strip searches without any reasonable suspicion that they were carrying contraband.

In *Vaughan v. Ricketts, 950* F.2d 1464 (9th Cir. 1991), the Court of Appeals affirmed a jury's decision that prison personnel who conducted body cavity searches of inmates were entitled to qualified immunity from damage awards although they had violated the plaintiffs' Fourth and Eighth Amendment rights. Although the Court held that it had been clearly established at the time in question that rectal searches in prison could only be conducted with reasonable cause and in a reasonable manner, the Court also found that competent prison officials could have believed they had cause and that the manner of the searches was reasonable, as the jury had found. As to visitors, though, the modern result is different.

In *Crawford-El v. Britton,* 951 F.2d 1314 (D.C. Cir. 1991), the Court held that it had been clear by 1989 that an officer who interfered with the transmission of an inmate's legal papers for the purpose of thwarting the inmate's litigation violated his constitutional right of access to the courts.

In *Jermosen v. Smith,* 945 F.2d 547 (2d Cir. 1991), the Court held that it had not been clearly established in 1982 that the full panoply of due process procedural protections mandated by *Wolff v. McDonnell,* 418 U.S. 539 (1974), in prison disciplinary cases, applied to a punishment as minor as seven days' keeplock. In *Plelka v. Nix,* 943 F.2d 916 (8th Cir. 1991), the Court denied qualified immunity to Iowa prison officials who placed an inmate in punitive segregation, then transferred him to a Texas prison where he was released in the general population, then returned him to Iowa and put him back in punitive segregation without a new hearing.

As noted above and discussed in more detail below, perhaps the most striking qualified immunity case of the last decade was *Rich v. City of Mayfield Heights,* 955 F.2d 1092 (6th Cir. 1992), in which the Sixth Circuit held that an inmate caught in the act of attempting suicide by hanging did not have a clearly established right to be cut down without delay by the first prison personnel to find him.

There would appear to have been considerable progress on the prison suicide front over the last decade. In *Sanville v. Mccaughtry,* 266 F.3d 724 (7th Cir. 2001), qualified immunity was denied to guards for failing to observe a suicidal prisoner at Waupun for five hours. In the same case, no actual violations were found as to medical personnel and wardens.

In *Egebergh v. Nicholson*, 272 F.3d 925 (7th Cir. 2001), qualified Immunity was denied for failing to give a pretrial detainee an insulin shot at the proper time, resulting in his death.

4. Due Process

Qualified immunity in the context of due process claims requires courts to parse historic clearly established law both on the nature of deprivations which entitle persons to due process and on the type of process due under different circumstances. In *Texas Faculty Association v. University of Texas at Dallas,* 946 F.2d 379 (5th Cir. 1991), terminated faculty members claimed due process rights to be heard in connection with both the University's decision to eliminate the academic programs in which they taught and the University's decision to subsequently terminate their employment rather than transferring them elsewhere. The Fifth Circuit reversed the district court's grant of summary judgment to the defendants on the second claim and remanded for trial, at least in so far as equitable relief was sought, but affirmed the district court's holding that the defendants were entitled to qualified immunity, as the question of whether the faculty members were entitled to be heard in connection with both decisions was one of first impression.

In *Aacen v. San Juan County Sheriff's Department,* 944 F.2d 691 (10th Cir. 1991), the Court determined that New Mexico's procedure for notifying judgment debtors of their right to claim exemptions before seizure of their property violated the debtors' rights under the Fourteenth Amendment, but afforded qualified immunity to the defendants because plaintiff's counsel could point to no sufficiently analogous case law. Due process claims also foundered on the rocks of qualified immunity in *McBride v. Taylor,* 924 F.2d 386 (1st Cir. 1991), though the rights asserted by the plaintiffs had been enshrined in a temporary injunction in a nationwide class action and the defendant Farmers Home Administration officials had already been held in contempt for violating the injunction in their treatment of the plaintiffs.

Male supervisors fired for sexual harassment brought due process claims in *Schleck v. Ramsey County,* 939 F.2d 638 (8th Cir. 1991), and the court reversed a district court's denial of summary judgment based on qualified immunity, holding that it had not been clearly established at the time of the defendant's actions that the process the supervisors received was insufficient. *Id.* at 641. The male supervisors had been afforded both skeletal pre-termination hearings and the opportunity for much more elaborate post-termination hearings.

In *Finlcelstein v. Bergna,* 924 F.2d 1449 (9th Cir. 1991), the Court of Appeals considered the claims of a deputy district attorney whose temporary suspension was announced by his superiors at a press conference at which he was identified as the source of a "leak" concerning a rival's alleged misconduct. This decision is an excellent example of a court's determination of clearly established law from prior cases arising

under analogous but not identical facts. The Ninth Circuit determined that the deputy's right to due process in conjunction with a temporary suspension of his employment was clearly established by cases guaranteeing due process in connection with the temporary suspension of a student, *Goss v. Lopez,* 419 U.S. 565 (1975), and the temporary suspension of VA educational benefits, *Devine v. Cleland,* 616 F.2d 1080 (9th Cir. 1980). The student suspension case, *Goss,* was also used to support the Court's determination that it was clearly established that a temporary suspension of employment could implicate a liberty interest as well as a property interest. The Court also cited analogous cases, none involving temporary suspensions, in determining that it was clearly established that some pre-suspension process was an indispensable part of the plaintiff's due process right.

5. Statutes

The doctrine of qualified immunity is most often invoked as a defense to constitutional tort claims, but it is also available when § 1983 is used to enforce rights arising under federal statutes or regulations. In *Jackson v. Rapps,* 947 F.2d 332 (8th Cir. 1991), the directors of the Missouri Division of Child Support and Enforcement claimed qualified immunity from damage claims grounded in their disobedience of federal regulations which establish a formula to calculate the amount owed by non-custodial parents of AFDC recipients. The court found the defendants' obligations to be clearly established, not by case law, but by the unambiguous language of the federal regulations themselves, and denied the defendants the qualified immunity they sought.

In *Andreu o. Sapp,* 919 F.2d 637 (11th Cir. 1990), the Court also denied qualified immunity based on the plain meaning of a state statute which gave a sheriff's deputy a due process property interest in his job. *Id.* at 643 ("while qualified immunity protects a defendant from liability when the legal concepts that make up the plaintiff's claim are not clear, the defense cannot be manipulated by arguing that the common sense meaning of a familiar term is unclear merely because a court has yet to construe the term."). In that case, the Court noted that a paucity of judicial decisions on a particular question may indicate, not lack of clarity in the law, but rather that the question is so clear that rational parties to litigation have not wasted resources disputing it. *Id.* at 643 n.6.

IV. QUALIFIED IMMUNITY: CONCLUSION

The remaining unfortunate, but happily declining, trend in decisional law, typified by *Rich v. City of Mayfield Heights,* 955 F.2d 1092 (6th Cir. 1992), the jail suicide case, is a tendency for courts to insist on finding case law where liability has been premised on nearly identical facts in order to deny qualified immunity. ("No case has been brought to this court's attention which recognizes a constitutional duty on the part of jail officials to immediately cut down a prisoner found hanging in his or her cell.") This disposition violates the Supreme Court's decision, in *Anderson v. Creighton,* 483 U.S. 635, 640 (1987), to reject the proposition "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." The correct test is not whether there has been a previous case on the same facts, but whether the unlawfulness of the official's conduct was "apparent," *Id.,* under then-existing law. Obviously, whether the unlawfulness of a course of action was apparent depends not only on how close prior cases were on their facts, but on the content of the legal principles which were held dispositive in those cases. A public official who claims that the unlawfulness of his or her conduct was not apparent should be able to point to something about the content of those principles which admits of the possibility that they might not apply in the case at bar.

Put differently, where *similar* official conduct has been held unlawful, a defendant claiming qualified immunity should be able to articulate some reason why a court might not have applied the principles set down in that case law to the circumstances he or she faced. For example, in *Finklestein v. Bergna,* 924 F.2d 1449 (9th Cir. 1991), the Court denied qualified immunity to defendants who failed to afford a public prosecutor a hearing in advance of the temporary suspension of his employment. Qualified immunity was denied upon principles enunciated in cases involving the temporary suspension of a student's enrollment and the temporary suspension of VA educational benefits. The result in that case might have been different if the defendants had been able to point to a basis in the case authority which would have warranted a reasonable belief that these principles might not control in the employment context. In *Barlow v. Ground,* 943 F.2d 1132 (9th Cir. 1991), the defendants tried to show that reasonable officers might have believed that a court would not apply general principles of law barring warrantless seizures absent probable cause and exigent circumstances to a warrantless seizure of blood for HIV testing. They pointed to case authority which they asserted might have warranted this reasonable belief, in *Schmerber v. California,* 384 U.S. 757 (1966), which authorized the warrantless seizure of blood for alcohol testing. Although this effort failed (because alcohol in the blood is rapidly metabolized and this creates an exigent circumstance not present with the permanently testable HIV antibody), it at least bespoke an awareness on the part of the defendants that one claiming qualified immunity in the face of general rules apparently prohibiting his or

her actions cannot simply rest on his or her ability to point to differences of fact from previously reported cases, but must be able to argue, from case authority, why those factual differences might be material, that is, why they might have produced a different result. This case authority relied on might be those decisions that establish the rules, without clearly delineating their boundaries, or subsequent decisions creating exceptions to the rules on which the plaintiff relies, or authority in related areas which suggests that a particular exception might be viable.

Courts and litigants want to know how to determine whether the unlawfulness of a particular act should have been apparent to a reasonable state actor. The answer is that if the act apparently violates general rules laid down by statutes or prior case law, qualified immunity should be denied unless a defendant can point, not merely to factual differences from prior cases, but to some principle warranting a reasonable belief that those general rules of law might not apply to the instant facts. This is a workable test in most cases which solves the problem left unsolved in *Anderson v. Creighton,* 483 U.S. 635 (1987).

V. Right to Fair Trial

Jones v. City Of Chicago, 856 F.2d 985 (7th Cir. 1988) affirming $801,000 verdict. *Newsome v. McCabe,* 256 F.3d 747, 753 (7th Cir. 2001):

> the normal immunity inquiry: was it clearly established in 1979 and 1980 that police could not withhold from prosecutors exculpatory information about fingerprints and the conduct of a lineup? See *Wilson,* 526 U.S. at 614-18; *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *Saucier v. Katz,* No. 99-1977 (U.S. June 18, 2001). The answer is yes: The Brady principle was announced in 1963, and we applied it in Jones to affirm a hefty award of damages against officers who withheld exculpatory information in 1981.

Craig v. Chicago Police Officers, Case No. 05 C 0172. (N.D.Ill. 2005)(damages may be assessed even where defendant acquitted.)