"LOCATION, LOCATION, LOCATION": RECENT DEVELOPMENTS IN THE QUALIFIED IMMUNITY DEFENSE

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> Inside the house, Dalton had raped [Cherie]. After shooting her in the chest with a 12-gauge shotgun, he shot himself. [Cherie] staggered to the door and unsuccessfully attempted to open it. She screamed for help, but none of the deputies responded. [Cherie] eventually staggered out a side door holding her entrails in her hands.[1]

The facts of the above case are deeply disturbing. Dalton Shipp had abused Cherie Shipp, his wife, for some time before she tried to escape the abusive marriage by moving into her sister's nearby home.[2] Her attempt at freedom was short lived, for Dalton soon tracked her down, began making threatening phone calls to her and driving by the home.[3] Dalton's harassment prompted Cherie to report his "drive-bys" to Deputy Sheriff Steve Cropper, who "informed [Cherie] that he would do nothing about Dalton."[4]

In another attempt to escape Dalton, Cherie relocated, but Dalton again found his wife, and this time assaulted her by "beating her with a telephone that he ripped from the wall, and [hitting] her with his fist."[5] When he finished his assault on Cherie, Dalton warned her that "if she reported the incident to law enforcement, she would 'find herself in the hospital.'"[6] Nonetheless, Cherie reported Dalton's assault to the authorities and Deputy Cropper came and took a report.

Instead of arresting Dalton, Cropper permitted him to turn himself in. Dalton was charged with battery and criminal damage to property incident to Cherie's assault[7] and was bailed out of jail

* Judge, United States Court of Appeals for the Eleventh Circuit. I am indebted to Rachel F. Bradley and John K. Neal, my law clerks. Without their collective contribution this Article would not have been possible.

1. Shipp v. McMahon, 234 F.3d 907, 910 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2193 (2001).
2. *Id.* at 909.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

shortly thereafter. As a condition of his release, the court forbade him from contacting Cherie.[8] In addition, Cherie obtained a temporary restraining order ("TRO") against him.[9] Nevertheless, Dalton violated the court order and the TRO by making threatening phone calls to Cherie. Although Cherie reported Dalton's violations, Dalton was neither arrested nor otherwise reprimanded.[10]

Dalton then kidnapped Cherie.[11] Cherie's mother immediately called the police department where Dalton's mother, Mrs. Betty Shipp, was the on-duty dispatcher who received the call.[12] Mrs. Shipp reported the situation to Deputy Cropper. Cherie's mother also informed the city police department and Cherie's father, Mr. Jerry Gates.[13] Mr. Gates located Deputy Cropper, who had decided not to take any action, and after Mr. Gates condemned Cropper's unwillingness to act, he informed Cropper that he was heading to Dalton's leased house.[14] Deputy Cropper "pursued Mr. Gates" to Dalton's house.[15] Shortly after Deputy Cropper, Mr. Gates, Cherie's mother, and several deputies arrived at the house, they heard two shots.[16] Mr. Gates repeatedly tried to enter the house to help Cherie, but the deputies steadfastly prohibited anyone from entering.[17] It was at this point that the morbid events quoted at the outset of this Article transpired.

Cherie recovered from her injuries and sued Deputy Cropper and others for violations of her equal protection and due process rights under the Fourteenth Amendment to the United States Constitution.[18]

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8. *Id.*
9. *Id.*
10. *Id.* at 909–10.
11. *Id.* at 910.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. Cherie sued under 42 U.S.C. § 1983 (Supp. IV 1999), which reads 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 . . . .

42 U.S.C. § 1983. She additionally sued for claims based on Louisiana state tort law. *Shipp*, 234 F.3d at 911.

Should Cherie be able to recover monetary damages from Deputy Cropper and the others? Should it make a difference whether she is in Louisiana or Pennsylvania?

I
INTRODUCTION

Wading through the doctrine of qualified immunity is one of the most morally and conceptually challenging tasks federal appellate court judges routinely face. When government actors engage in conduct that harms others, appeals courts must gauge whether the law allows the harmed party to recover damages from the individual government actor. Judges in qualified immunity matters frequently face a series of unappealing moral choices, ranging from subjecting a public servant to personal liability for conduct undertaken in good faith, to eliminating a potential remedy for a plaintiff who has been subjected to embarrassing and degrading conduct. As Justice Powell once noted, "[t]he resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative."[19]

Properly applying the law of qualified immunity is also a philosophical challenge. Government actors are generally entitled to qualified immunity for their actions, unless those actions violate the "clearly established" constitutional or statutory rights of a third party. Determining exactly when a right is "clearly established" for qualified immunity purposes is philosophically complex. Not surprisingly, the difficulty in developing a consistent, useful definition of "clearly established" has been the subject of some academic comment.[20]

In addition, there is remarkably little consensus among the United States circuit courts concerning how to interpret the term "clearly established." Some circuits have found the law governing a

19. Harlow v. Fitzgerald, 457 U.S. 800, 813–14 (1982).

20. *See, e.g.*, Roger C. Hartley, *The* Alden Trilogy: *Praise and Protest*, 23 HARV. J.L. & PUB. POL'Y 323 (2000); Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123 (1999); Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597 (1989); Heather Meeker, *"Clearly Established" Law in Qualified Immunity Analysis for Civil Rights Actions in the Tenth Circuit*, 35 WASHBURN L.J. 79 (1995); Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935 (1989); James Flynn Mozingo, Note, *The Confounding Prong of the* Harlow v. Fitzgerald *Qualified Immunity Test: When is a Constitutional Right Clearly Established?*, 17 AM. J. TRIAL ADVOC. 797 (1994); Recent Case, Jenkins v. Talladega City Board of Education, *115 F.3d 821 (11th Cir.) (en banc), cert. denied, 118 S. Ct. 412 (1997)*, 111 HARV. L. REV. 1341 (1998).

particular right to be "clearly established" when articulated at a broad, fairly abstract level.[21] Others, most notably my own Eleventh Circuit, have been reluctant to find that the law is "clearly established" for qualified immunity purposes unless the right which the government actor allegedly violated has been clearly identified and protected in an earlier, factually similar context.[22] The level of specificity at which a right is defined is outcome-determinative, and subtle differences in framing a constitutional right can lead to blatant differences in the ultimate result.

In this Article I would like to take a look at this issue—the lack of consensus on the appropriate definition of "clearly established"—through the lens of recent circuit level case law. A close analysis of recent cases from the various circuits illustrates conspicuous differences in how circuits are defining and applying the term "clearly established." Absent Supreme Court precedent offering more direct guidance on the meaning of the nebulous "clearly established" standard, we will likely continue to see substantial disparities among the lower courts working to develop the substantive law of qualified immunity.

To understand the current shape of qualified immunity law, we need to examine briefly some of the recent Supreme Court decisions that have shaped the doctrine. Following this historic overview, the Article will compare the analytic approaches currently in use by the various circuits to evaluate qualified immunity cases and will assess the effect these differences in approach have on the out-

21. *See, e.g.,* Amaechi v. West, 237 F.3d 356, 362 (4th Cir. 2001) (finding the right in question to be clearly established); Gruenke v. Seip, 225 F.3d 290, 301 (3d Cir. 2000) (same); Feist v. Simonson, 222 F.3d 455, 465 (8th Cir. 2000) (same), *overruled en banc on other grounds by* Helseth v. Burch, 258 F.3d 867 (8th Cir. 2001); Miller v. Kennebec County, 219 F.3d 8, 11 (1st Cir. 2000) (same). Each of these cases will be discussed *infra* in greater detail.

22. *See, e.g.,* Denno v. Sch. Bd., 218 F.3d 1267, 1270 (11th Cir. 2000) ("the qualified immunity standard sets up a bright-line test that is a powerful constraint on causes of action under § 1983. . . . One way that a plaintiff can satisfy the qualified immunity standard is to point to case law which predates the official's alleged improper conduct, which case law involves materially similar facts and truly compels the conclusion that the plaintiff had a right under federal law."), *reh'g en banc denied*, 235 F.3d 1347 (11th Cir. 2000), *cert. denied*, 531 U.S. 958 (2000); Hall *ex rel.* Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821, 825–27 (11th Cir. 1997) (en banc) (finding that the right in question was not clearly established); Lassiter v. Ala. A & M Univ. Bd. of Trs., 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc) ("For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*.").

comes of those cases. We will conclude with an assessment of the state of qualified immunity doctrine in the circuit courts, and the practical ramifications of these inter-circuit differences.

II
BACKGROUND

The contemporary origins of the qualified immunity doctrine can be found in the seminal 1967 case *Pierson v. Ray*.[23] In 1961, police arrested a group of fifteen civil rights demonstrators in Jackson, Mississippi on a misdemeanor charge of "provoking a breach of the peace." The demonstration involved meeting with others in a public place and not moving on when asked to do so by the police.[24] Initially, the demonstrators were convicted and sentenced by a municipal police justice to four months in jail—the statutory maximum for that offense.[25] Each demonstrator appealed, and their appeals took the form of de novo trials before the county court.[26] After a directed verdict was granted to the demonstrator in the first such trial, the state dropped the charges against the others.[27] The demonstrators then brought a § 1983[28] action seeking damages from the officers who had perpetrated the arrest, as well as from the judge who had imposed the initial sentence.[29] While this action was on appeal before the Fifth Circuit,[30] the United States Supreme Court, in a separate case, declared unconstitutional, as applied to similar facts, the Mississippi Code provision used to charge the demonstrators.[31]

Thus, the Court faced two interesting problems in *Pierson*. At common law, judges enjoyed absolute immunity from suits for damages arising out of judicial decisions.[32] The common law also provided police officers with a broad, though not absolute, immunity

23. 386 U.S. 547 (1967).

24. *Id.* at 549. The statute violated was MISS. CODE § 2087.5 (1942) (current version at MISS. CODE ANN. § 97-35-3 (1999)). *Id.* Pierson v. Ray, 352 F.2d 213, 216 n.2 (5th Cir. 1965), *rev'd in part*, *Pierson*, 386 U.S. 547.

25. *Pierson*, 386 U.S. at 549.

26. *Pierson*, 352 F.2d at 216.

27. *Pierson*, 386 U.S. at 550.

28. 42 U.S.C. § 1983 (Supp. IV 1999).

29. *Pierson*, 386 U.S. at 550.

30. *Pierson*, 352 F.2d at 217.

31. Thomas v. Mississippi, 380 U.S. 524 (1965) (per curiam) (holding MISS. CODE § 2087.5 (1942) (current version at MISS. CODE ANN. § 97-35-3 (1999)) unconstitutional under similar circumstances).

32. The Supreme Court affirmed this long-standing principle in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347–48 (1871).

from tort actions for false arrest as long as an officer had made a good faith arrest of a suspect later found innocent.[33] The facts of *Pierson* seemed to fit the common law model; the judge was being sued for a decision he had made in his capacity as a judge, and the officers appeared to have made the arrest in good faith, relying on a law that had not been declared unconstitutional at the time. But the text of § 1983 does not mention the availability of common law defenses to its terms.[34] Could common law defenses be employed to defeat liability under a statute that, on its face, did not appear to contemplate their availability?

Chief Justice Warren, writing for the Court, held that § 1983 did not abolish common law immunity defenses for public officials. Thus, the Court reaffirmed the "solidly established" absolute immunity judges had enjoyed at common law for decisions within their judicial jurisdiction.[35] The Court's holding also granted immunity to the police officers, but on considerably narrower grounds. It found that the common law defense of "good faith" was still available to police officers in false arrest cases, as it had been at common law.[36]

Despite the facially narrow holding of *Pierson*, the rationale the Court used in arriving at the result hinted at the scope of immunity public officials would soon enjoy. When discussing the legitimacy of immunity for judges, the Court noted that a judge's "errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden . . . would contribute not to principled and fearless decision-making but to intimidation."[37] The Court also mentioned that "[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."[38] These explicit policy concerns about the personal liability of public officials would prove influential in future cases addressing the subject.[39]

Pierson thus established the foundation for the two critical doctrinal categories of public-official immunity: absolute and qualified.

33. *See* RESTATEMENT (SECOND) OF TORTS § 121 (1965).

34. *See* 42 U.S.C. § 1983 (Supp. IV 1999), *quoted in supra* note 18. R

35. Pierson v. Ray, 386 U.S. 547, 553–54 (1967).

36. *Id.* at 557.

37. *Id.* at 554.

38. *Id.* at 555.

39. For an excellent discussion of the *Pierson* case and its impact on qualified immunity law, see Hassel, *supra* note 20, at 126–27. R

Over the next twenty years, the Supreme Court and lower courts extended absolute immunity under § 1983 to prosecutors,[40] and used analogous reasoning to grant to the President[41] and other federal officials[42] absolute immunity from civil damages suits. These decisions reflected the policy assumptions initially made by the Court in *Pierson*: publicly important, discretionary decisions made by these types of officials would be unduly constrained if the fear of private liability loomed.[43]

Interestingly, the policy rationale the Court articulated in *Pierson* with respect to absolute immunity was used in the ensuing years to expand the law of qualified immunity. That is, courts began granting generally applicable immunity to all government officials on the basis of *Pierson*.[44] In time, the qualified immunity defense became a firmly established shield available to government employees to avoid civil liability.

Perhaps the most notable case in the post-*Pierson* period is the 1975 case *Wood v. Strickland*.[45] *Wood* extended a qualified immunity defense to public school officials, finding (*à la Pierson*) that school officials' ability to exercise their discretion uninhibited by fears of personal liability serves the public good.[46] The *Wood* case also established the theoretical framework by which future qualified immunity claims would be evaluated. *Wood* reaffirmed that, generally, public officials are immune from liability for discretionary acts performed in their official capacity—unless one of two exceptions applies. First, if the government actor knew or reasonably should

40. Imbler v. Pachtman, 424 U.S. 409, 427 (1976).

41. Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).

42. Butz v. Economou, 438 U.S. 478 (1978). This decision extended absolute immunity to federal agency officials who performed adjudicatory functions, made decisions on whether to initiate or continue agency proceedings, or, as agency attorneys, arranged for the presentation of evidence on the record in the course of agency adjudications. *Id.* at 514, 516–17. It also granted absolute immunity to federal executive officials exercising discretion in circumstances when they could demonstrate that absolute immunity was "essential for the conduct of the public business." *Id.* at 507.

43. *Nixon*, 457 U.S. at 740–53; *Butz*, 438 U.S. at 512–17; *Imbler*, 424 U.S. at 424–47.

44. *See* Scheuer v. Rhodes, 416 U.S. 232, 244–47 (1974) (recognizing that officers of the executive branch of government have qualified immunity), *overruled in part by* Harlow v. Fitzgerald, 457 U.S. 800 (1982); Wood v. Strickland, 420 U.S. 308, 317–22 (1975) (extending qualified immunity to school board members and school administrators), *overruled in part by* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

45. 420 U.S. 308.

46. *Id.* at 319–20.

have known that his action would violate another person's rights, the actor is denied a qualified immunity defense.[47] Second, a government actor who acts maliciously in an attempt to deny another's constitutional rights will also lose the defense.[48] Courts applying this doctrine therefore have to evaluate the government actor's conduct on both subjective and objective terms—weighing both whether the public official unreasonably violated the plaintiff's rights, and whether the official acted in bad faith.

Justice Powell, joined by several of his colleagues, issued a stinging dissent in *Wood*. Powell's concern centered on the objective component of the analysis. The majority in *Wood* stated that a public official could be held liable if he acted in "ignorance or disregard of settled, indisputable law"[49] or of "unquestioned constitutional rights."[50] Powell questioned how a lay official could be expected to know what an "unquestioned constitutional right" was, as the meaning of such a concept was hotly debated among legal scholars and practitioners. As Powell put it:

> The Court states the standard of required knowledge in two cryptic phrases: "settled, indisputable law" and "unquestioned constitutional rights." Presumably these are intended to mean the same thing, although the meaning of neither phrase is likely to be self-evident to constitutional law scholars—much less the average school board member.[51]

Powell's dissent is an early insight into the exact problem courts face today: how should courts delineate legal clarity, or, in today's parlance, "clearly established law."

The current contours of the qualified immunity doctrine can be traced to a 1982 case, *Harlow v. Fitzgerald*,[52] in which the Court modified the analysis established in *Wood*. In *Harlow*, the Court found that the subjective intent of a government actor was no longer relevant in qualified immunity determinations.[53] Testing the validity of a government official's subjective intent often requires extensive discovery, and assessing individual motives is a fact-intensive inquiry.[54] The subjective element of the earlier test thus made it difficult to resolve qualified immunity cases at the summary

47. *Id.* at 322.
48. *Id.*
49. *Id.* at 321.
50. *Id.* at 322.
51. *Id.* at 329 (Powell, J., dissenting).
52. 457 U.S. 800 (1982).
53. *Id.* at 816–18.
54. *Id.* at 816–17.

judgment stage,[55] and eliminating the test, the Court wrote, "should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment."[56]

Justice Powell wrote for the Court in *Harlow*, and his thinking on qualified immunity seems to have evolved considerably from his dissent in *Wood*. Powell drafted the new, purely objective test in language that still controls: "[G]overnment 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."[57]

While the choice of "clearly established . . . rights" as the relevant term is marginally clearer than "settled, indisputable law," or "unquestioned constitutional rights," the objections Powell raised in *Wood* are still applicable to the new formulation. When is the law clearly established such that denying qualified immunity is appropriate? How can an officer be expected to know when a right is clearly established, when the courts' development of constitutional law is in a continual state of evolution? *Harlow* made no effort to address these concerns.[58]

In the years since *Harlow*, the Court has made several halting efforts to refine its conception of "clearly established" for qualified immunity purposes. Two cases are particularly illustrative in this regard. In the first, *Anderson v. Creighton,*[59] the Court attempted to identify the level of specificity at which a right needed to be defined if it was to be considered "clearly established." The dispute in *Anderson* concerned the personal liability of an FBI agent who had undertaken a warrantless search of the plaintiff's house.[60] The Eighth Circuit had found that the plaintiff had a "clearly established" right under the Fourth Amendment to be free from such warrantless searches and denied the officer qualified immunity.[61]

Justice Scalia, writing for the Court, reversed the Eighth Circuit's decision, finding that the "clearly established" standard required the plaintiff's right needed to be defined with a greater

55. *Id.* at 816.

56. *Id.* at 818.

57. *Id.*

58. Erwin Chemerinsky's treatise notes these concerns with the *Harlow* opinion. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.6.3 (3d ed. 1999).

59. 483 U.S. 635 (1987).

60. *Id.* at 636–37.

61. *Id.* at 637–38.

degree of specificity.[62] While it is true that individuals generally have a right to be free from warrantless searches absent exigent circumstances and probable cause, Justice Scalia found that the circumstances "exigent" for Fourth Amendment purposes had not been defined with clarity.[63] Absent a case establishing that a search like the one conducted in *Anderson* was illegal, the officer was entitled to qualified immunity. For the law to be "clearly established" under *Anderson*:

> 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 that in the light of pre-existing law the unlawfulness must be apparent.[64]

Another case, *United States v. Lanier*,[65] emphasized that a factually similar prior case is not a prerequisite to denying a government official qualified immunity.[66] Analogizing the "fair and clear warning" standard in the context of vague criminal statutes to the civil sphere's "clearly established" standard, Justice Souter noted that "general statements of the law are not inherently incapable of giving fair and clear warning."[67] The Court then found by implication that a county judge who had sexually assaulted the plaintiffs would not be entitled to qualified immunity.[68]

So where does this leave us? At the present time, qualified immunity cases require circuit courts to apply a linguistically clear but conceptually complex doctrine. We know that qualified immunity can only be denied in cases where the government official violates a plaintiff's clearly established rights. We know that rights, to be clearly established, must be defined with some specificity in previous case law, to give the government official fair warning that his conduct may violate those rights.[69] But in some cases even the most

62. *Id.* at 639–40.
63. *Id.* at 640–41.
64. *Id.* at 640 (citation omitted).
65. 520 U.S. 259 (1997).
66. *Id.* at 270-72.
67. *Id.* at 271.
68. *Id.* at 272.
69. Additionally, courts may look to sources other than case law. For example, my circuit has stated, "We leave open the possibility that occasionally the words of a federal statute or federal constitutional provision will be specific enough to establish the law applicable to particular circumstances clearly and to overcome qualified immunity even in the absence of case law." Lassiter v. Ala. A & M Univ. Bd. of Trs., 28 F.3d 1146, 1150 n.4 (11th Cir. 1994) (en banc). This

generally defined rights can be clearly established so long as prior cases relating to those rights give some warning as to the type of conduct that would violate them.

III
DISCUSSION

Given the somewhat blurry definition of "clearly established law," the definition a court chooses—be it narrow, requiring plaintiffs to point to cases with extreme factual similarity, or broad, allowing plaintiffs to point to cases with only marginal factual similarity—determines the outcome of the court's inquiry, i.e., whether the government actor can be held civilly liable for his or her conduct. A look at recent case law from a variety of federal circuits demonstrates my point.

I have divided the cases into three sections. In the first, I use the panel decision and dissent in *Doe v. Broderick*[70] to illustrate how judges within the same circuit, when presented with the same set of facts and precedent to apply, can arrive at opposing conclusions as to whether the law has been clearly established. In the second section, I look to three cases, each from a different circuit, to examine how the circuits differ in their willingness to look to factually analogous cases in determining if the law has been clearly established in that circuit. In the third section, I compare three cases, again from various circuits, to illustrate that some courts take such analogous reasoning even further and will allow a case with analogous *principles* to clearly establish the law with respect to a certain constitutional right, while other courts refuse to do so.

A. Doe v. Broderick

The opinion in *Doe v. Broderick*[71] artfully illustrates the general concern I have with recent qualified immunity jurisprudence: that the way a court tailors its "clearly established" law inquiry singlehandedly determines the outcome of the qualified immunity issue. The facts of the case reveal that police detective Garrett G. Broderick was investigating a jewelry store grand larceny in Fairfax County, Virginia in August 1998.[72] The victim jewelry store was located near

article does not attempt to delve into the differences in inter-circuit application of these other sources, but rather focuses on the differences in applying clearly established case law.

70. 225 F.3d 440 (4th Cir. 2000).

71. *Id.*

72. *Id.* at 443–44.

the Fairfax Methadone Treatment Center (the "Clinic"). Both buildings were near the parking garage where the jewelry store thief stole his getaway car.[73] These facts, combined with Broderick's "belief that drug addicts often engage in criminal activity to support their habits," led Broderick to hypothesize that a Clinic patient may have undertaken the crime.[74] Broderick asked the Clinic for records that would reveal who was at the clinic at the time of the crime. The Clinic refused to furnish such records.[75] Broderick then obtained a warrant to search the Clinic, and he and five other Fairfax County officers proceeded to do so, seizing the Clinic's log book, biographical files on seventy-nine patients, and methadone dosage information sheets for each patient.[76] One of the files seized was that of John Doe, a Clinic patient who was not at the Clinic at the time of the search.[77]

Believing the seizure of this confidential information was unconstitutional under the Fourth Amendment, Doe sued Broderick under § 1983.[78] Broderick moved for summary judgment on the basis of qualified immunity, and after the district court denied the motion,[79] Broderick interlocutorily appealed to the Fourth Circuit.[80] The court followed "a two-step analytical process," first determining whether Doe alleged a deprivation of a constitutional or statutory right, and then determining whether that constitutional or statutory right was "clearly established."[81] After conducting its first inquiry and determining that Doe had sufficiently alleged the deprivation of a constitutional right (the Fourth Amendment right to be free from unreasonable searches and seizures),[82] the court turned to the second inquiry: whether Broderick was "entitled to qualified immunity or whether, because he ran afoul of clearly established constitutional rights, he is to be held personally accountable for his unlawful conduct."[83]

The court framed the pertinent issue as follows: whether it was clearly established in August 1998 that "law enforcement officials were not free to barge into an area within a place of business where

73. *Id.* at 444.
74. *Id.*
75. *Id.*
76. *Id.* at 444–45.
77. *Id.* at 445.
78. *Id.*
79. *Id.*
80. *Id.* at 446.
81. *Id.*
82. *Id.* at 452.
83. *Id.* at 446.

the public was not invited and over the objection of the proprietors conduct a general search for evidence of a crime without the slightest hint of probable cause."[84] In so framing the issue, the court explicitly rejected Broderick's invitation to frame the issue more narrowly; Broderick had suggested that the court's query hinge on whether it was:

> clearly established in August 1998 that patients in drug treatment facilities had a legitimate expectation of privacy in their files stored at those facilities and, therefore, that it was not clearly established that an officer would violate their Fourth Amendment rights by entering a clinic and conducting a search of confidential patient files and records without a warrant or the slightest hint of probable cause.[85]

The court rejected Broderick's proffer because it believed Doe's expectation of privacy was irrelevant in light of "the admitted lack of probable cause in [Broderick's] warrant to search a private area within the clinic for closely held treatment information . . . ."[86] Using the more general query, the court simply pointed to general principles of search and seizure jurisprudence to illustrate that the law was clearly established.

Judge Karen Johnson Williams dissented on the theory that Doe's Fourth Amendment right was not clearly established at the time of Broderick's action. While she agreed with the majority that "Doe has properly asserted a violation of his Fourth Amendment rights,"[87] she disagreed with the majority's conclusion that Doe's right had been clearly established before the decision in the case-at-bar, which presented an issue of "first impression."[88] Judge Williams wrote:

> [T]he majority works under the premise that whether Doe's legitimate expectation of privacy in his records was clearly established is inconsequential. Because it was clear in August 1998 that police officers could not search "private areas" without a warrant supported by probable cause, the majority concludes that Detective Broderick cannot be afforded qualified immunity. The majority's approach thus frames the issue in such a way that it completely ignores whether the answer to "the threshold question" was clear. After skipping past this essential step in Fourth Amendment analysis, the majority goes

84. *Id.* at 453.
85. *Id.* at 452.
86. *Id.*
87. *Id.* at 458 (Williams, J., dissenting).
88. *Id.*

> on to assume that the area was private and then addresses the very general question of whether Broderick needed probable cause to search an area in which someone might have a legitimate expectation of privacy. The majority's error in declining to consider whether Doe's legitimate expectation of privacy was clearly established is underscored by this level of extreme generality at which the majority is forced to couch its inquiry.[89]

The distinct approaches taken by the majority and dissent in *Broderick* teach us much about the current state of qualified immunity law. First, it is notable that excellent judges looking at the same facts, and relying on identical Supreme Court and Fourth Circuit precedent, reached opposite conclusions as to whether the right in question was "clearly established" at the time of Broderick's act. Judge Williams accurately noted that the root of this problem is the differing levels of specificity in framing the right that the plaintiff alleges has been violated. The upshot of this problem is that government actors cannot really know whether a planned course of action will be deemed reasonable in light of "clearly established" law. Indeed, the two camps of jurists[90]—those who read the law as requiring courts to deny qualified immunity somewhat liberally and those who read the Supreme Court precedent as requiring a greater disposition towards granting qualified immunity—are essentially bickering about the extent of notice government actors must receive before they will be held accountable for their actions in a civil proceeding. Boiled down to its essence, the debate over the appropriate level of specificity at which rights are to be defined, as outlined in *Broderick*, reflects a deeper debate over the appropriate standard of accountability to which public servants should be held.

The majority opinion in *Broderick* exemplifies the philosophy of the first camp of qualified immunity jurists, those who will deny qualified immunity based on a lesser amount of prior case law than others would require. The opinion references general principles of Fourth Amendment law, and suggests that in this case, police officers can appropriately apply these general, firmly established prin-

89. *Id.* (citations omitted).

90. I am broadly dividing judges into "camps" of jurists, but this is obviously not meant to pigeonhole any particular judge into either camp in any given situation. Surely, all judges will be inclined to deny qualified immunity in some instances and grant it in others, depending on the right at issue, the facts at hand, and the precedent available to be applied; I do not mean to imply that judges are philosophically wed solely to one camp, but rather I use this distinction to make my point more clearly.

ciples to the factual situation at hand. The theory employed by the majority in *Broderick* thus requires police officers to know the general contours of the law, and to be able to apply intelligently that law, at least in situations where its appropriate application appears to be clear.

In contrast, the theory underlying the dissent maintains a different view of whether officers can reasonably be expected to apply general legal principles to complex factual scenarios. This approach is animated by the notion that the application of abstract legal standards to a particular fact pattern is often a complex matter of law, and one cannot demand that public officials employ such reasoning in the context of their official duties. Indeed, requiring public officials to divine whether an abstractly defined right is violated by a particular set of facts requires the public official to reason like a lawyer, which is a superb recipe for indecision and error. Our public officials often do not have the luxury of contemplating whether their actions will violate another's rights; their jobs frequently require reflexive decision-making and do not allow for mulling over whether a proposed course of action is reasonable in light of current law. Therefore, in situations like *Broderick*, some judges believe these actors should not be held personally liable for their actions, unless a court has earlier ruled that a particular action violates a plaintiff's rights in a factually similar context.

We see this debate being played out both within and among the circuits. Just as judges within the Fourth Circuit utilize varying degrees of specificity in framing the exact legal principle needed to be clearly established, the next few cases demonstrate that the various circuits around the country also define "clearly established" inconsistently. Specifically, in some circuits, cases with analogous facts can clearly establish a right and are seen to put future government actors on notice in analogous factual situations, while in other circuits, analogies are looked to only sparingly, if at all, in seeking to determine whether prior law clearly established a given constitutional right. A look at several recent cases will dramatically illustrate this inconsistency.

B. Feist v. Simonson, Amaechi v. West, *and* Hope v. Pelzer

In *Feist v. Simonson*,[91] Minneapolis police officer Bradley Jon Simonson was on a driving patrol[92] when he observed a black Ford Galaxy that matched the description of a recently stolen vehicle.[93] Officer Simonson followed the Ford. The driver, Darren Shannon, voluntarily pulled over.[94] Simonson exited his patrol car with his service pistol drawn and ordered the occupants of the Ford to put their hands in the air.[95] Neither Shannon nor his passenger complied, and after Officer Simonson repeated the order twice, Shannon yelled an expletive and "quickly took off."[96] Simonson immediately informed the police dispatcher of Shannon's flight and proceeded to give chase.[97]

After leading Officer Simonson on an extended high-speed chase that included running two red lights and driving the wrong way down two one-way streets, Shannon elected to enter Interstate 94, where he drove west in the eastbound lanes.[98] Simonson, who was joined at this point by several other police cars, followed Shannon on a lengthy, high speed chase, all the while going against traffic on I-94.[99] The chase ended when Shannon plowed into the vehicle driven by Brian Feist, killing Feist and injuring both Shannon and his passenger.[100]

Feist's mother brought a § 1983 action against Officer Simonson personally, alleging that Simonson had violated Feist's substantive due process rights by engaging in the high-speed chase.[101] Simonson sought summary judgment on the basis of qualified immunity.[102] The district court denied Simonson's motion for sum-

91. 222 F.3d 455 (8th Cir. 2000), *overruled en banc on other grounds by* Helseth v. Burch, 258 F.3d 867 (8th Cir. 2001).

92. Feist v. Simonson, 36 F. Supp. 2d 1136, 1139 (D. Minn. 1999), *aff'd*, *Feist*, 222 F.3d 455, *overruled en banc on other grounds by Helseth*, 258 F.3d 867.

93. *Feist*, 222 F.3d at 459.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 459–60.

99. *Id.*

100. *Id.* at 460.

101. *Feist*, 36 F. Supp. 2d at 1139, 1143–44 (D. Minn. 1999), *aff'd*, *Feist*, 222 F.3d 455, *overruled en banc on other grounds by* Helseth v. Burch, 258 F.3d 867 (8th Cir. 2001).

102. *Feist*, 222 F.3d at 458.

mary judgment, and the Eighth Circuit considered the issue on interlocutory appeal.[103]

The Eighth Circuit began by referring to a general rule governing police pursuits, enunciated in *County of Sacramento v. Lewis*.[104] The rule states that injuries sustained in the course of a police chase rise to the level of a due process violation only if the police officer's conduct is "'so egregious, so outrageous' that it serves to 'shock the contemporary conscience.'"[105] The court then went through the details of Officer Simonson's car chase,[106] took special cognizance of some of the more outlandish aspects of the incident (such as the fact that Officer Simonson pursued Shannon the wrong way through a tunnel and was about to enter an even more dangerous tunnel),[107] and concluded that the chase Simonson engaged in was sufficiently egregious to constitute a violation of Feist's Fourteenth Amendment rights.[108]

Moving to the inquiry as to whether it was "clearly established" that Officer Simonson's conduct was a violation of Feist's due process rights, the court noted that it "employs a flexible standard in determining whether a right is clearly established, requiring some factual correspondence with precedent and demanding that government officials respect general, well established principles of law."[109] Next, the court cited a number of cases from the Eighth and other circuits, in which personal liability had been considered for officers who engaged in high-speed chases resulting in injuries.[110] In summarizing the legal principles that could be gleaned from the cited cases, the court noted that "more frequently than not officers escaped liability in these cases."[111] However, the fact that "the potential for liability nonetheless existed" meant that "the law was clearly established at the time of its alleged violation."[112]

What exactly did the court do here? The court looked to the precedent it had developed on high-speed automobile chases and failed to identify a case that was factually on all fours with the Si-

103. *Id.*

104. 523 U.S. 833 (1998).

105. *Id.* at 848 n.8, *quoted in Feist*, 222 F.3d at 458–59.

106. *Feist*, 222 F.3d at 459–60.

107. *Id.* at 463–64.

108. *Id.* at 464.

109. *Id.*

110. *Id.* at 464–65. The chase at issue occurred in 1996. *Id.* at 459. Thus *Lewis*, a 1998 case, could not have put Simonson on notice that his conduct was illegal in the matter.

111. *Id.* at 465.

112. *Id.*

monson case, or in which the government actor was actually held liable. However, the court found that a factually similar case proscribing conduct much like Officer Simonson's was not necessary; suggestions from dicta in factually analogous cases sufficed. So long as Simonson knew that the potential for liability existed (from dicta in factually analogous, though not factually identical, cases), he was on notice that dangerous, high-speed chases could lead to a violation of a third party's rights.

This is a notably broad way to frame the inquiry. The Eighth Circuit expected Officer Simonson to look at prior cases that had merely discussed the *possibility* of substantive due process violations resulting from police pursuits and determine that his conduct was illegal under the general principles enunciated in those cases. The relevant question could have been framed much more narrowly, i.e., "Are Fourteenth Amendment due process rights violated by police pursuit of a suspected car thief who flees a lawful arrest, when the chase proceeds at high speeds, lasts over five minutes, and involves traveling the wrong way down an interstate?" No prior case law addressed this question with any specificity. If the court had framed the question in the latter form, it is hard to conclude that Officer Simonson would be denied qualified immunity for his actions.

Similarly, in *Amaechi v. West*,[113] the Fourth Circuit needed to extrapolate from marginally analogous cases to find that the right in question was clearly established. In *Amaechi*, one of the plaintiff's, Lisa Amaechi's, neighbors complained to the Dumfries, Virginia police department about loud music coming from Amaechi's townhouse.[114] The police department responded to the noise ordinance complaint by dispatching Officer Stephen Hargrave to the residence. Hargrave told Amaechi to turn down the music and promised not to arrest her unless he received another complaint.[115] Amaechi complied with Hargrave's instruction to turn down the music but complained to the county police department about Hargrave's unnecessary impoliteness in handling the matter.[116] Hargrave learned of Amaechi's registered complaint on the afternoon that she submitted it.[117]

Despite having received no further complaints about Amaechi, two days later Hargrave secured an arrest warrant charging

113. 237 F.3d 356 (4th Cir. 2001).
114. *Id.* at 359.
115. *Id.*
116. *Id.*
117. *Id.*

Amaechi with violating Dumfries's misdemeanor noise ordinance.[118] That evening, several Dumfries police department representatives went to arrest Amaechi for the violation, including trainee Matthew West and officer Bernard Pfluger.[119] When Pfluger and West arrived, Amaechi was nude in her bathroom, preparing for bed. She covered herself with a house dress when she heard Pfluger and West knocking.[120] When she and her husband opened the door, Pfluger advised Amaechi she was under arrest.[121] Amaechi:

> fully cooperated during the arrest, but when told that she was to be handcuffed, Amaechi pointed out to the officers that she was completely naked under the dress and requested permission to get dressed because she would no longer be able to hold her dress closed once handcuffed. This request was denied . . . .[122]

Therefore, when Amaechi was handcuffed, her naked pelvic region was exposed.[123] West then walked Amaechi, still in her semi-clad state, past several officers to his police car.[124] Amaechi tried to get into the back seat of the car, but West stopped her and explained that he needed to search her before she entered the car.[125] Amaechi protested, reminding West that she was not wearing underwear, but West nonetheless proceeded with the search. "West then stood in front of Amaechi, squeezed her hips, and inside her opened dress, 'swiped' one ungloved hand, palm up, across her bare vagina, at which time the tip of his finger slightly penetrated Amaechi's genitals."[126] In response to this intrusion, "Amaechi jumped back, still in handcuffs, and exclaimed, 'I told you I don't have on any underwear.' West did not respond and proceeded to put his hand 'up into [her] butt cheeks,' kneading them."[127] At this point, West allowed Amaechi to enter the car.[128] It is important to note that West searched Amaechi in front of the Amaechis' townhouse, "where the other police officers, Amaechi's husband,

118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* (citation omitted).
128. *Id.* at 359–60.

her five children, and all of her neighbors had the opportunity to observe."[129]

Amaechi sued West and others for violations of her Fourth Amendment right to be free from West's unreasonable, sexually invasive search.[130] West tried to obtain a favorable summary judgment ruling by raising the defense of qualified immunity, but the district court rejected his motion.[131] West then appealed to the Fourth Circuit, which framed the issue before it as follows:

> [W]e must analyze whether clearly established Fourth Amendment jurisprudence protected Amaechi's right to be free from the public exposure, touching, and penetration of her genitalia and kneading of her buttocks during a search incident to arrest for a misdemeanor noise violation, and where no security risk or threat of the concealment or destruction of evidence was present.[132]

Thus, the court's framing of the issue seemed to suggest that Amaechi's burden would be insurmountable (i.e., she would have to point to a case where the same bizarre facts had led to a finding of a Fourth Amendment violation). But the court went on:

> Contrary to West's argument, the exact conduct at issue need not have been held unlawful for the law governing an officer's actions to be clearly established. Such precise precedent is not what the particularity principle mandates. Rather, the particularity principle mandates that courts refer to concrete applications of abstract concepts to determine whether the right is clearly established.[133]

In looking for precedent that clearly established Amaechi's right, the court looked to Supreme Court precedent, including dicta, and several Fourth Circuit cases. The *Amaechi* court first noted the Supreme Court's dicta in *Illinois v. Lafayette*,[134] a case upholding the search of an arrestee's shoulder bag at a police station. The dicta in that case stated that "the interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street."[135] Next, the *Amaechi* court turned to several Fourth Circuit

129. *Id.* at 360.

130. *See id.* at 358 & n.1.

131. *Id.* at 358.

132. *Id.* at 362.

133. *Id.* (citation omitted).

134. 462 U.S. 640 (1983).

135. *Id.* at 645, *quoted in Amaechi*, 237 F.3d at 364. The Court was making the point that some searches that might be unreasonable if conducted on the street would be permissible at a police station. *Id.* at 645–47.

cases which had previously noted that the private nature of a search may allow disputed searches to constitute reasonable ones. For example, the court had approvingly observed in one case that, "[t]he search did not occur on the street subject to public viewing but took place in the privacy of the police van."[136] Citing another Fourth Circuit case, the *Amaechi* court stated that the "intrusive, highly degrading nature of a strip search demands a reason for conducting such a search that counterbalances the invasion of personal rights that such a search involves."[137] By virtue of the above-cited authority, according to the *Amaechi* court:

> Firmly rooted Supreme Court and Fourth Circuit precedent involving strip searches and body cavity searches should have made it apparent to West, as a reasonable officer, that his search of Amaechi was unlawful under the Fourth Amendment. It is not a new rule of law that searches involving the public exposure, touching, and penetration of an arrestee's genitalia are subject to limitations under the Fourth Amendment. Relevant precedent compels the conclusion that West's search transgressed these clear limitations.[138]

Thus, while no precedent made it exactly clear that public invasive body searches are unconstitutional under the Fourth Amendment, the *Amaechi* court reasoned that the analogous cases were close enough to provide West with clear notice that his search of Amaechi was unlawful.

The implication of the *Amaechi* decision is that in the Fourth Circuit, government actors must extrapolate from earlier, factually similar cases, when deciding whether their actions are reasonable in light of clearly established law. The actors in that circuit will not be able to stave off § 1983 claims by pointing to the dearth of factually similar cases delineating the right in question. Rather, reasoning by analogy will suffice.

While the Eighth and Fourth Circuits have held that analogous cases sufficiently demarcate "clearly established" law, as demonstrated above in *Feist* and *Amaechi*, the Eleventh Circuit has specifically declined to do so, most recently in *Hope v. Pelzer*.[139] The Eleventh Circuit instead requires a "bright-line rule," whereby ear-

136. United States v. Dorlouis, 107 F.3d 248, 256 (4th Cir. 1997), *quoted in Amaechi*, 237 F.3d at 364.

137. *Amaechi*, 237 F.3d at 364 (citing Logan v. Shealy, 660 F.2d 1007, 1013 (4th Cir. 1981)).

138. *Id.*

139. 240 F.3d 975 (11th Cir. 2001).

lier cases must have applied the applicable rule in materially similar factual circumstances.[140]

In *Hope*, several prison guards handcuffed inmate Larry Hope to a hitching post (once for two hours and another time for seven hours) after Hope engaged in altercations with a prison inmate and a prison guard.[141] While tied to the hitching post for the seven-hour stretch, the guards gave Hope water only once or twice, gave him no bathroom breaks, and deprived him of his shirt.[142] Hope eventually sued the guards, claiming that they had violated his Eighth Amendment rights against "cruel and unusual punishment."[143] The guards defended themselves on the grounds of qualified immunity, and the district court dismissed the suit on that basis.[144] When considering whether prison guards were on notice that handcuffing an inmate to a hitching post was unlawful as violative of the inmate's Eighth and Fourteenth Amendment rights, the Eleventh Circuit stated, "Hope argues that several of our cases . . . established a bright-line rule against use of the hitching post. While we recognize that the inappropriateness of the hitching post could be inferred from these opinions, a bright-line rule for qualified immunity purposes 'is not to be found in abstractions . . . .'"[145] Accordingly, the Eleventh Circuit granted qualified immunity to the guards.[146]

Thus, while some courts will liberally infer rules of law from analogous situations, thereby clearly establishing the relevant right in a circuit, other courts require nearly identical parity of facts before a right will be considered "clearly established."

The next several cases demonstrate that some courts are willing to take this liberal construction even further. These courts are open to utilizing general principles enunciated in earlier cases to clearly establish the law in similar cases. Other circuits, in contrast, cling to a requirement of strict factual similarity and eschew looking to earlier-enunciated principles absent the requisite factual similarity.

140. *Id.* at 981.

141. *Id.* at 977.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 981 (quoting Lassiter v. Ala. A&M Univ. Bd. of Trs., 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc)).

146. *Id.*

C. Gruenke v. Seip, Miller v. Kennebec County, *and* Lauro v. Charles

The Third Circuit utilized an extremely broad definition of "clearly established" to reach its result in *Gruenke v. Seip*.[147] The case involved Michael Seip, coach of the Emmaus High School girls' swim team. Leah Gruenke, a junior, was a member of Seip's varsity squad.[148] During January 1997, Seip began to suspect that Gruenke was pregnant because she was often nauseated, made frequent trips to the bathroom, and complained her energy level was low, and because her body was undergoing rapid changes.[149] When Seip and an assistant coach asked Gruenke if she could be pregnant, Gruenke emphatically denied any such possibility.[150] In fact, she later claimed never to have engaged in sexual intercourse.[151]

Around the same time, some of Gruenke's teammates and their mothers also began to suspect that Gruenke might be pregnant.[152] One mother bought a pregnancy test for Gruenke and gave it to Seip, for which he reimbursed her.[153] Seip kept the test, and according to Gruenke, incited several of Gruenke's teammates to cajole her into submitting to it.[154] Whatever the exact circumstances, the facts of the case reveal that several of her teammates were ultimately present when Gruenke took a pregnancy test, which came back positive.[155] Three subsequent tests came back negative, but Gruenke was discovered to be six months pregnant approximately one week later.[156]

As a result of the allegedly forced nature of the pregnancy test, and the circumstances leading up to it, Gruenke sued Seip. She claimed, inter alia, that by forcing her to take the pregnancy test, Seip had violated her Fourth Amendment right to be free of unreasonable searches.[157] Seip raised qualified immunity as his defense, and the district court ruled in his favor, holding that qualified immunity protected him because he had not violated a "clearly established" constitutional right.[158] The Third Circuit reversed.

147. 225 F.3d 290 (3d Cir. 2000).
148. *Gruenke*, 225 F.3d at 295.
149. *Id.* at 295–96.
150. *Id.* at 296.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 296–97.
156. *Id.* at 297.
157. *Id.*
158. *Id.*

The Third Circuit first defined its standard in qualified immunity cases: "In sum, an official will not be liable for allegedly unlawful conduct so long as his actions are objectively reasonable under current federal law."[159] The court then endeavored to determine whether it was clearly established that a student had the right to be free from a school official's administration of a pregnancy test.[160] The court discussed *Vernonia School District 47J v. Acton*,[161] where the Supreme Court found that random urinalysis drug testing of student athletes could be intrusive due to the nature of the sample collection and the personal information derived from the testing. The invasion of privacy was not significant, however, when the samples were collected in private, were tested only for drugs, and disclosure of the information revealed therefrom was limited.[162] Notably, however, the Court ultimately ruled that subjecting the student-athlete to such tests was *not* a Fourth Amendment violation.[163] After considering *Vernonia*, the *Gruenke* court leapt to the following pronouncement:

> We believe that the standard set forth in *Vernonia* clearly establishes that a school official's alleged administration to a student athlete of the pregnancy tests would constitute an unreasonable search under the Fourth Amendment. Although student athletes have a very limited expectation of privacy, a school cannot compel a student to take a pregnancy test absent a legitimate health concern about a possible pregnancy and the exercise of some discretion.[164]

Clearly, the *Gruenke* court required only a minimal showing of factual similarity, accomplished by using a broad reading of clearly established law; for example, the court did not discuss other cases in which pregnancy testing was involved, or in which athletic coaches had in some way intruded on the personal lives of their team members. Instead, the court extrapolated from an analogous principle enunciated in dicta in *Vernonia*—which the *Gruenke* court described as finding urinalysis testing of student-athletes unconstitutional absent a compelling state interest[165]—to mean that the law in the circuit was "clearly established" with respect to a student-athlete's right to be free from undergoing a forced pregnancy test in

159. *Id.* at 299.
160. *Id.*
161. 515 U.S. 646 (1995), *discussed in Gruenke*, 225 F.3d at 301.
162. *Id.* at 658, 660, *discussed in Gruenke*, 225 F.3d at 301.
163. *Id.* at 665.
164. *Gruenke*, 225 F.3d at 301.
165. *Id.* (citing *Vernonia Sch. Dist. 47J*, 515 U.S. at 660).

circumstances such as those in *Gruenke*. The Supreme Court did not hold in *Vernonia* that the drug testing was illegal, or reach any conclusions regarding pregnancy tests. Yet, despite the fact that no Third Circuit or Supreme Court case had dealt with school officials and pregnancy testing, the Third Circuit allowed Gruenke's suit to proceed against Seip.

Likewise, in *Miller v. Kennebec County*,[166] the First Circuit employed a broad definition of clearly established law. Officer Brent Davis stopped the car in which Carmen Miller and her six-year-old passenger were traveling because the inspection sticker on the car had expired.[167] Davis then ran a routine warrant check on Miller, which revealed that Miller had an outstanding warrant for failure to appear in court and pay a $235 fine.[168] The outstanding warrant required Miller to be taken before a judge immediately, so Davis arrested Miller, and en route to the jail dropped off the child passenger with Miller's husband.[169] While Davis was dropping off the child, Miller's husband told Davis that the fine had been paid and offered to retrieve the canceled check as proof. But Davis would not wait and left with Miller.[170] Davis did not, however, take Miller before a judge, as per the instructions of the warrant.[171] Instead, he delivered Miller to the Knox County jail, where she remained for two days without being taken before a judge.[172] At the County jail, Miller was several times required to "submit to a strip search and, while naked, to squat and cough."[173] Miller's husband was only allowed to bail her out of jail two days later.

Miller thereafter sued Davis individually under § 1983. Davis claimed qualified immunity protection. The district court granted him summary judgment on that basis[174] and Miller appealed the decision.

The First Circuit's task was thus to consider whether Davis was entitled to qualified immunity. The court divided its query into two distinct parts. First, did the government actor—here, Davis—violate the plaintiff's constitutional rights? And second, if so, was that constitutional right "clearly established" at the time the government

166. 219 F.3d 8 (1st Cir. 2000).
167. *Id.* at 10.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*

actor engaged in the conduct at issue? First, then, considering whether Davis had violated Miller's constitutional rights, the court held, "While there is no case law directly relating to arrest warrants, it is self-evident that a seizure conducted pursuant to an arrest warrant must conform to the terms of that warrant."[175] Turning to whether the law was clearly established that Davis's conduct was improper, the court held:

> [W]e see no ambiguity in this warrant nor can we find as a matter of law that Davis acted reasonably in executing it. The explicit direction that "this warrant [is] to be executed by bringing defendant immediately before a sitting judge" told the arresting officer precisely the scope of the warrant and of his authority under it. Moreover, taking into account the fact that it was not a felony warrant but a bail warrant for nonpayment of a fine . . . a reasonably competent officer would not execute it by depositing an arrestee in jail for a long weekend stay. That the restriction on this warrant may have been novel to Davis and the dispatcher does not alter our conclusion.[176]

The court thus denied Davis qualified immunity, but in so doing discussed precious little precedent that would serve to reveal that Miller's rights were clearly established. Rather, the court cited a broad proposition—the requirement that "an arrest warrant must conform to the terms of that warrant." By broadly painting its query and utilizing analogous principles, the First Circuit had no need to search for cases with factual similarity to the one before it to provide "clearly established" law.

To contrast the broadly defined "clearly established" law in *Gruenke* and *Miller*, consider the Second Circuit's definition of "clearly established" law in *Lauro v. Charles*.[177] Lauro involved the New York City police department's and the media's practice of staging so-called "perp walks," wherein the police paraded newly arrested suspects in front of the press.[178] Through this mutually beneficial arrangement, the police department was able to tout its crime-fighting efforts, while the press received a wonderfully dramatic snapshot to illustrate a story about an arrest.[179] Sometimes perp walks occurred "quasi-naturally"—for example, when the police merely alerted the press that the suspect would be en route from the police station to another location, and allowed the press

175. *Id.* at 11.
176. *Id.*
177. 219 F.3d 202 (2d Cir. 2000).
178. *Id.* at 203.
179. *Id.*

to capture the suspect on film at that time.[180] Other times, however, perp walks were literally staged—"the police [took] the suspect outside the station house, at the request of the press, for no reason other than to allow him to be photographed."[181] The New York City Police Department took John Lauro on the latter type of perp walk after he was arrested for allegedly burglarizing an Upper East Side apartment building.[182] A Fox 5 news crew filmed Lauro's perp walk, and the station subsequently broadcast the event.[183] Lauro sued the City of New York, the Police Department, and the individual police officer who led Lauro on his perp walk—Detective Michael Charles—under § 1983 for allegedly violating his Fourth Amendment rights.[184] Detective Charles raised qualified immunity as a defense to the suit. The district court denied Charles qualified immunity,[185] and Charles appealed to the Second Circuit.[186]

In analyzing Lauro's claim and Charles's alleged entitlement to qualified immunity, the Second Circuit first determined that Charles's "conduct in subjecting Lauro to the staged perp walk violated the Fourth Amendment,"[187] because "Charles engaged in conduct that was unrelated to the object of the arrest, that had no legitimate law enforcement justification, and that invaded Lauro's privacy to no purpose."[188]

The court then sought to determine whether Charles's conduct violated a "clearly established" right. It looked initially to Supreme Court precedent, namely *Wilson v. Layne*,[189] which was factually analogous to Lauro's case. In *Wilson*, the Supreme Court had found a Fourth Amendment violation when the police brought the media into a private home to film the execution of a warrant.[190] Nonetheless, the Supreme Court granted the police officers qualified immunity in that case because theretofore it had not been clearly established that such conduct would constitute a Fourth

180. *Id.* at 204.

181. *Id.*

182. *Id.* at 204–05.

183. *Id.* at 205.

184. *Id.* Lauro also sued for alleged violations of other rights, including his Sixth and Eighth Amendment rights, and for alleged violations of the Fourteenth Amendment Due Process Clause. *Id.*

185. *Id.*

186. *Id.* at 206.

187. *Id.* at 214.

188. *Id.* at 213.

189. 526 U.S. 603 (1999), *cited in Lauro*, 219 F.3d at 214–15.

190. *Id.* at 614.

Amendment violation.[191] The Second Circuit noted that the *Wilson* opinion was not so restrictive as to require that the exact same action had earlier been found unconstitutional, explaining that "[s]uch a constricted view of the scope of official liability would deprive officers of the incentive to evaluate their actions carefully to determine if they are consistent with constitutional principles."[192]

The court then found that the case most factually analogous to Lauro's situation was the Second Circuit case *Ayeni v. Mottola*,[193] in which the court had denied qualified immunity to a Secret Service agent being sued for a Fourth Amendment violation for his admission of a television news crew into a home to film a search.[194] But, the court found, even the facts of *Ayeni* were insufficiently similar to those of *Lauro* for the unconstitutionality of Charles's actions to have been "apparent" to him as required by *Anderson*.[195] In addition to *Ayeni*'s having involved a *search* rather than a *seizure* as in *Lauro*, the *Ayeni* search had intruded upon a private home, where Fourth Amendment privacy protection is at its apogee, whereas Lauro's seizure violated his privacy while he was in police custody, where privacy protections are less stringent.[196] Therefore, the Second Circuit determined:

> In light of *Wilson*'s admonition that the particular right must be defined with specificity, we are not prepared to say that a reasonable police officer should clearly have been able to discern that the search in *Ayeni* and the seizure in this case infringe what are merely different aspects of the same previously defined constitutional right.[197]

Accordingly, the court granted Detective Charles qualified immunity from Lauro's suit.[198]

IV
CONCLUSION

What lessons can we draw from this survey of recent circuit-level case law on the doctrine of qualified immunity? We can certainly see significant differences in how the circuits (and judges

191. *Id.* at 615–17.
192. *Lauro*, 219 F.3d at 215.
193. 35 F.3d 680 (2d Cir. 1994), *cited in Lauro*, 219 F.3d at 216.
194. *Id.* at 686.
195. *Lauro*, 219 F.3d at 214 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).
196. *Id.* at 216 (citing *Ayeni*, 35 F.3d at 685).
197. *Id.*
198. *Id.*

within the circuits) approach the nebulous issue of when the law is "clearly established" for the purposes of qualified immunity doctrine. In my own circuit, the law governing whether a particular action by a public official violates another's constitutional rights is rarely "clearly established," unless we have earlier found that precise action illegal in a case with virtually identical facts. Several other circuits have recently demonstrated a willingness to find that dicta in cases with factually related subject matter can put a government actor on notice that certain conduct is illegal. Still others take an even broader approach to the question and hold that general principles of law enunciated in earlier cases, even when the subject matter of those cases is factually distinct from the case at hand, can "clearly establish" the law governing whether particular actions by government actors violate the constitutional or statutory rights of others.

The debate over the appropriate level of specificity with which to define "clearly established" reflects the tension between competing values inherent in any application of the law of qualified immunity. On the one hand, as was recognized both at common law and by the Supreme Court in *Pierson*, government actors need a sphere of protection from personal liability if they are to do their jobs diligently. However, there are times when public servants abuse their official discretion and violate the rights of others, and justice demands that the injured party have a remedy against the public official. Circuits that demand tight factual similarity between a prior case and the case at hand for the law to be clearly established, represent those where the prevailing consensus seeks strongly to support the former value, protection of public officials from personal liability for actions carried out in the course of their official duties. In circuits where general principles of law, or dicta from factually similar cases can clearly establish the law, the more persuasive policy concern has tended to be that of providing plaintiffs with an adequate remedy against government actors who violate their rights. The absence of Supreme Court precedent outlining clear guidelines for how courts should define "clearly established" has allowed the debate over these values to flourish, both among and within the circuits.

The cases we have seen should leave little doubt about the import of a court's definition of the term "clearly established." The doctrinal approach that a court takes in determining whether or not the law is "clearly established" in a particular area is outcome-determinative in most qualified immunity cases. Perhaps nowhere is this point better illustrated than in the case we discussed at the

beginning of this article, *Shipp v. McMahon*.[199] As we noted earlier, the facts of the *Shipp* case are troubling. In an egregious dereliction of his duty as a law enforcement officer, Deputy Steve Cropper ignored Cherie Shipp's repeated pleas to arrest her violent and abusive husband, Dalton.[200] Deputy Cropper's refusal to intervene, after learning that Dalton had kidnapped Cherie, led directly to Cherie's injuries.[201] The Fifth Circuit used the case to examine how other circuits and the Supreme Court had treated equal protection claims alleging that police protection services are afforded unequally to victims of domestic assault.[202]

The court adopted the framework for evaluating such cases that was employed by the Tenth Circuit in *Watson v. City of Kansas City*.[203] Had the test enunciated in *Watson* been employed in this case, it is likely that the conduct of Deputy Cropper and his cohorts would have constituted a violation of Cherie's Fourteenth Amendment rights. However, the court never reached this question, because it found that the *Watson* test was not "clearly established" in Fifth Circuit law prior to Deputy Cropper's actions. While it located a case from its own circuit addressing the issue of equal protection claims in the context of police protection policies/practices,[204] the Fifth Circuit could not find a case directly addressing whether differential treatment of domestic violence victims could constitute an equal protection violation.[205] In the absence of such a case, the court reasoned that Deputy Cropper was not on notice that his conduct could violate Cherie's right to equal protection.[206] Finally, the court noted that, in the past, it had "narrowly adjudicated issues of qualified immunity, largely to the benefit of government officials."[207]

Contrast this result with the resolution of the *Gruenke* case. In *Gruenke*, the Third Circuit looked to the broadest principles of

199. 234 F.3d 907 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2193 (2001).

200. *Id.* at 909–10.

201. *See id.* at 910.

202. *See id.* at 912–14.

203. 857 F.2d 690, 694 (10th Cir. 1988), *cited in Shipp*, 234 F.3d at 913. The test requires that the victim show: "(1) the existence of a policy, practice, or custom of law enforcement to provide less protection to victims of domestic assault than to victims of other assaults; (2) that discrimination against women was a motivating factor; and (3) that the plaintiff was injured by the policy, custom, or practice." *Shipp*, 234 F.3d at 914.

204. McKee v. City of Rockwall, 877 F.2d 409 (5th Cir. 1989), *cited in Shipp*, 234 F.3d at 912.

205. *Shipp*, 234 F.3d at 912, 915.

206. *Id.* at 915.

207. *Id.*

Fourth Amendment law in determining that it was clearly established that a pregnancy test forced upon a high school athlete represented a violation of the student's constitutional rights. The *Gruenke* court did not cite any cases addressing the issue directly—rather, it found that Supreme Court dicta, stating that drug tests of high school athletes may in some cases be unconstitutional, put Seip on notice that his efforts to persuade Gruenke to take a pregnancy test were illegal. In contrast, in *Shipp*, despite the existence of a wealth of Supreme Court and some circuit precedent on the principles underlying equal protection claims in the police protection context, the Fifth Circuit found that the absence of a case factually on point doomed Cherie's efforts to recover from Deputy Cropper. The discrepancy in how these two circuits determine whether the law is "clearly established" leads to two interesting questions. First, would Deputy Cropper have been subject to personal liability for his callous disregard of Cherie's welfare had he been a Sheriff's deputy in Pennsylvania rather than Louisiana, even assuming that the Third Circuit had no precedent mirroring the facts of *Shipp*? Second, would Seip have been granted qualified immunity if he had taken the same action in a Texas high school, once again assuming that the Fifth Circuit (like the Third) had no case law factually on all fours with *Gruenke*? The fact that the answer to both questions is likely yes reveals a good deal about the current state of qualified immunity doctrine in the circuit courts.

My goal in writing this Article is to make clear that the way in which courts frame the question, "was the law clearly established," virtually guarantees the outcome of the qualified immunity inquiry. Courts that permit the general principles enunciated in cases factually distinct from the case at hand to "clearly establish" the law in a particular area will be much more likely to deny qualified immunity to government actors in a variety of contexts. Conversely, those courts that find the law governing a particular area to be clearly established only in the event that a factually identical case can be found, will find that government actors enjoy qualified immunity in nearly every context. I do not mean to condemn either side—both approaches protect certain fundamentally important values—but I welcome the day when Supreme Court guidance will clarify exactly how circuit courts should address this vexing issue.