FEDERAL COURTS — QUALIFIED IMMUNITY — SIXTH CIRCUIT DENIES QUALIFIED IMMUNITY TO POLICE OFFICER FOR ARREST FOR SPEECH AT PUBLIC MEETING. — *Leonard v. Robinson*, No. 05-1728, 2007 WL 283832 (6th Cir. Feb. 2, 2007).

Qualified immunity shields public officials performing discretionary functions from suit for civil rights violations as long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[1] However, the Supreme Court has given no clear guidance to the lower courts in determining what rights are at issue in a given case, producing uncertainty concerning defendants' potential immunity and plaintiffs' burden of proof.[2] The result is a "level of specificity" problem: in some jurisdictions, plaintiffs must point to a precedent establishing only an abstract legal principle, while in others they must find cases that are almost factually identical.[3] Recently, in *Leonard v. Robinson*,[4] the Sixth Circuit held that a police officer who arrested a town resident for cursing during a town meeting was not entitled to qualified immunity because the officer's actions violated the clearly established right to speak freely "at a democratic assembly where the speaker is not out of order."[5] Although *Leonard* appropriately denied qualified immunity in light of the important First Amendment rights at stake, it evinces the particular difficulties associated with applying the Supreme Court's "clearly established rights" test in cases involving the First Amendment.

On October 15, 2002, Thomas Leonard and his wife attended a meeting of the Township Board of Montrose, Michigan.[6] At the time, the Leonards were embroiled in a lawsuit with the township; Leonard alleged that the lawsuit created bad blood between his family and the Montrose Chief of Police and that this enmity led the latter to order

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[1] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[2] *See* Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 230–31 (2006) (calling qualified immunity doctrine "not only internally inconsistent, but also extraordinarily difficult and costly to administer"); Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000) (describing qualified immunity determinations as "one of the most morally and conceptually challenging tasks federal appellate court judges routinely face" and noting that "there is remarkably little consensus among the United States circuit courts concerning how to interpret the term 'clearly established'").

[3] *See* Wilson, *supra* note 2, at 447–48 (noting the disparity among circuits concerning the "level of specificity" at which the plaintiff must establish the right that has been violated).

[4] No. 05-1728, 2007 WL 283832 (6th Cir. Feb. 2, 2007).

[5] *Id.* at *6.

[6] *Id.*

police officer Stephen Robinson to attend the meeting that night.[7] During the portion of the meeting called "Citizen Time," Thomas addressed the Board, saying, among other things, "We're sick and tired of getting screwed" and "That's why you're in a God damn lawsuit."[8] After the Township Supervisor reprimanded Leonard for his language, Officer Robinson escorted Leonard from the room and placed him under arrest.[9] Leonard was charged under two state statutes with being a disorderly person and with obscenity.[10] He was released after being detained for an hour at the police station; the citation was voided and dismissed one month later.[11]

On June 6, 2003, Leonard filed a § 1983 action against Officer Robinson in his personal capacity, alleging three state-law torts and a violation of his Fourth Amendment right against unreasonable seizure under color of law.[12] Robinson removed the case to federal court and filed a motion for summary judgment, alleging that he was protected from suit by qualified immunity because he had had probable cause to arrest Leonard under four state statutes — the two under which Leonard was charged, as well as two others outlawing cursing and the disturbance of a lawful meeting.[13] Leonard raised a First Amendment retaliation claim in his response.[14]

The United States District Court for the Eastern District of Michigan granted Robinson's motion for summary judgment and dismissed Leonard's case.[15] The court noted that the obscenity statute under which Leonard was charged had been invalidated prior to his arrest,[16] but found that the other three statutes had given Robinson probable

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[7] *Id.* The lawsuit between the Leonards and Montrose concerned allegations that the township had cancelled contracts with Sarah Leonard's towing company when she refused to support a plan to expand the township police's jurisdiction. *Id.* That lawsuit was settled in January 2003. *See* Leonard v. Montrose, No. 02-71064 (E.D. Mich. Jan. 23, 2003).

[8] *Leonard*, 2007 WL 283832, at *2.

[9] *Id.*

[10] *Id.*; *see* MICH. COMP. LAWS ANN. § 750.167 (West 2006) ("A person is a disorderly person if . . . [he] is engaged in indecent or obscene conduct in a public place . . . ."); *id.* § 750.337 (West 2006) ("Any person who shall use any indecent, immoral, obscene, vulgar or insulting language in the presence or hearing of any woman or child shall be guilty of a misdemeanor."), *invalidated by* People v. Boomer, 655 N.W.2d 255 (Mich. Ct. App. 2002).

[11] *Leonard*, 2007 WL 283832, at *2.

[12] *Id.*

[13] *Id.*; *see* MICH. COMP. LAWS ANN. § 750.103 (West 2006) ("Any person . . . who shall profanely curse or damn or swear by the name of God, Jesus Christ or the Holy Ghost, shall be guilty of a misdemeanor."); *id.* § 750.170 (West 2006) ("Any person who shall make or excite any disturbance or contention . . . at any election or other public meeting where citizens are peaceably and lawfully assembled, shall be guilty of a misdemeanor.").

[14] *Leonard*, 2007 WL 283832, at *2.

[15] *Id.* at *3; Leonard v. Robinson, No. 03-72199, 2005 WL 5352521, at *15 (E.D. Mich. May 4, 2005). The district court declined supplemental jurisdiction over the state-law tort claims. *Id.* at *15 n.17.

[16] *See* People v. Boomer, 655 N.W.2d 255, 257 (Mich. Ct. App. 2002) (invalidating § 750.337).

cause.[17] Turning to Leonard's First Amendment retaliation claim, the district court found no causal connection between Leonard's speech and his arrest.[18] Because the court found no evidence that he had arrested Leonard in bad faith, it declined to infer a retaliatory motive on Officer Robinson's part.[19]

The Sixth Circuit reversed and remanded.[20] Writing for the panel, Chief Judge Boggs[21] rejected Robinson's claim that he was "charged to enforce laws until and unless they are declared unconstitutional."[22] Emphasizing the "prominent position that free political speech has in our jurisprudence and our society,"[23] the panel held that although only one of the four statutes had been previously invalidated, a reasonable officer would have known that the other statutes were unconstitutionally vague, sharply limited with respect to speech, or inapposite.[24] Ultimately, the majority concluded that Robinson was not entitled to qualified immunity because "no reasonable officer would find that probable cause exists to arrest a recognized speaker at a chaired public assembly based solely on the content of his speech (albeit vigorous or blasphemous) . . . until the speaker is determined to be out of order by the [chair]."[25]

Turning to Leonard's First Amendment retaliation claim, the court found that the arrest was "particularly suited to chill" Leonard's speech.[26] Although it was a "close case," the court held that at trial a reasonable factfinder could conclude that Leonard was arrested in retaliation for exercising his free speech rights concerning the ongoing lawsuit and his feud with the Chief of Police.[27] The disputed facts

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17 *Leonard*, No. 2005 WL 5352521, at *4, *6.

18 *Id.* at *12.

19 *Id.* at *11–12.

20 *Leonard*, 2007 WL 283832, at *13.

21 Chief Judge Boggs was joined by Judge Keith.

22 *Leonard*, 2007 WL 283832, at *9.

23 *Id.* at *11.

24 The court found that § 750.167(f), the disorderly person statute, was too vague because it was "so free of limitation" and so closely tracked the language in the indecency statute previously struck down by the Michigan courts. *Id.* at *9; *see also* People v. Boomer, 655 N.W.2d 255, 257 (Mich. Ct. App. 2002) (invalidating § 750.103 for vagueness). Section 750.103, prohibiting some religion-themed cursing or swearing, was "if not facially invalid, radically limited by the First Amendment." *Leonard*, 2007 WL 283832, at *9. The court found that Leonard's speech did not constitute fighting words, that the state could not prohibit particular curse words, and that political speech mixed with expletives was constitutionally protected. *Id.* (citing Miller v. California, 413 U.S. 15 (1973); and Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)). While the majority found that precedent was unclear concerning the applicability of § 750.170, which prohibits creating a disturbance at a public meeting, to expressive activity, it held that there was "no conduct at issue for the statute to prohibit." *Id.* at *10.

25 *Leonard*, 2007 WL 283832, at *11.

26 *Id.*

27 *Id.* at *12.

concerning whether Leonard disturbed the meeting and whether Officer Robinson lied about his reason for attending the meeting were issues for the factfinder.[28] Because Leonard had established a prima facie case of First Amendment retaliation, the court reversed and remanded.[29]

Judge Sutton, concurring in part and dissenting in part, would have allowed Robinson to retain immunity for his good-faith enforcement of the three statutes that had not previously been declared unconstitutional. He argued that the three laws' unconstitutionality was not "clearly established": not only did the statutes deserve a "presumption of constitutionality,"[30] but at least one statute, § 750.170, had also been enforced within the past decade[31] and had survived two previous constitutional challenges.[32] Moreover, Judge Sutton argued that the Supreme Court had never denied qualified immunity except when a statute had been previously overruled[33] and that the majority's decision placed police officers in the untenable position of having to decide which laws to enforce.[34] Robinson's conduct was ultimately reasonable, Judge Sutton argued, because "undisputed facts" established probable cause for a violation of the "disturbing a public meeting" statute.[35] Because there was probable cause for the arrest, Judge Sutton opined that Leonard's First Amendment claim should fail as a matter of law.[36]

Leonard illustrates the myriad difficulties of applying the Supreme Court's "clearly established law" test for qualified immunity,[37] particu-

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[28] *Id.* The court noted that Leonard's testimony concerning his opinion that Robinson was ordered to arrest him at the meeting was "equivocal." *Id.*

[29] *Id.* at *13.

[30] *Id.* (Sutton, J., concurring in part and dissenting in part). Judge Sutton argued that the statutes were due this presumption because they were "enacted by a state legislature sworn to uphold the United States Constitution" and had "been on the books since 1931." *Id.*

[31] *Id.* at *14 (citing People v. Walker, No. 198893, 1998 WL 1989516 (Mich. Ct. App. Oct. 27, 1998)).

[32] *Id.* at *13 (citing People v. Mash, 206 N.W.2d 767 (Mich. Ct. App. 1973); and People v. Weinberg, 149 N.W.2d 248 (Mich. Ct. App. 1967)).

[33] *Id.* at *15; *see also id.* at *17 ("It is one thing to credit police officers with knowledge of all statutory and constitutional rulings potentially bearing on all statutes they enforce; but this necessary requirement needlessly loses any connection with reality when we hold police officers to the standard of anticipating a court's later invalidation of a statute . . . .").

[34] *See id.* at *17 (stating that the majority's position "risks placing [Robinson] in the push-me-pull-me predicament of having to decide which duly enacted laws to enforce and which ones not to enforce on pain of losing either way").

[35] *Id.* at *14. Judge Sutton reasoned that a video clearly showed Leonard yelling at the chair and that Robinson did not need to heed the meeting's parliamentary rules before restoring order. *Id.*

[36] *Id.* at *17.

[37] The Supreme Court has established a two-part test to determine which officials are eligible for qualified immunity. First, the court must determine whether the defendant's alleged conduct amounts to a constitutional violation. If the defendant did violate the plaintiff's rights, the court

larly in the First Amendment context. The panel in *Leonard* was confronted with a problem that has plagued the lower courts for years — namely, how to decide which, if any, of the plaintiff's "rights" are at play in a given case. Faced with scant guidance from the Supreme Court, the majority wisely chose to frame the case as concerning the plaintiff's broad right to speak freely at a public meeting. This framing of the case allowed the court to achieve a result that was appropriately protective of the plaintiff's free speech rights while remaining in line with the motivations behind the "clearly established law" test.

Qualified immunity protects a public official from suit concerning his official duties unless the official had notice that his conduct would violate another's rights.[38] However, the Supreme Court has failed to provide lower courts with sufficient guidance in determining what rights are "clearly established" enough to put an official on notice. While the awarding of qualified immunity "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified,"[39] the Supreme Court has refused to set a single level at which courts should frame the rights at issue.[40] Instead, the Court has tied the level-of-generality determination to notice, holding that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right" and that the "unlawfulness must be apparent."[41]

Lower courts are thus left to their own devices in framing the qualified immunity inquiry — and the framing itself often determines whether immunity is granted. If the plaintiff must merely find precedent that establishes a broad legal principle (such as the right to free speech), even if factually dissimilar, the court will most likely deny qualified immunity.[42] On the other hand, if the plaintiff must find a factually similar case that establishes a specific "right" similar to the one at issue in his case (such as the right to curse at a public meeting), the court is far more likely to award the defendant qualified immu-

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must then determine as a matter of law whether they were "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

38 *See* Saucier v. Katz, 533 U.S. 194, 206 (2001) (noting that the "clearly established law" test is designed to "ensure that before they are subjected to suit, officers are on notice their conduct is unlawful").

39 Anderson v. Creighton, 483 U.S. 635, 639 (1987).

40 *See* United States v. Lanier, 520 U.S. 259, 271 (1997) (noting that no "single warning standard points to a single level of specificity sufficient in every instance").

41 *Anderson*, 483 U.S. at 640.

42 *See* Wilson, *supra* note 2, at 475 ("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 . . . .").

nity.[43] Substantial uncertainty and unpredictability have become the norm in qualified immunity cases because of the inherent manipulability of the test.[44]

The disparity between the majority's and the dissent's approach in *Leonard* clearly illustrates how the framing of the rights at issue in the case can be determinative. The majority points to rather abstract First Amendment principles that clearly establish a broad right to speak in an orderly fashion at a democratic assembly.[45] This framing correspondingly lowered Leonard's required showing — the court established his rights by reference to cases that were factually dissimilar from his. In contrast, the dissent frames the case in a way that is particularly unfavorable to Leonard. To prevail under the dissent's test, Leonard would have to cite factually similar cases that demonstrated that his behavior was clearly outside the scope of the criminal statutes.

Both of these approaches can be seen as consonant with the Supreme Court's notice-based "clearly established law" test. Even though three of the four statutes cited by Officer Robinson had not been judicially invalidated, the majority believed that overarching and long-recognized First Amendment principles would put a reasonable officer on notice that the statutes could not justify Leonard's arrest.[46] However, under the dissent's view, the necessary notice cannot derive from acting in accordance with a statute that has never been declared "bad law," lest "we hold police officers to the standard of anticipating a court's later invalidation of a statute."[47]

The dissent's position, however, fails to take into account the unique problems that arise in the First Amendment context. One such concern arises because two of the statutes at issue, the disorderly person and disturbing a public meeting statutes, facially applied to conduct, not speech.[48] The dissent's approach would almost certainly

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[43] *See id.* ("[C]ourts that find the law . . . 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.").

[44] *See id.* at 455 ("[J]udges 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."); *see also id.* at 460–72 (comparing vastly different lower court approaches to identifying "clearly established" law).

[45] *See Leonard*, 2007 WL 283832, at *11 ("In light of . . . the prominent position that free political speech has . . . in our society, it cannot be seriously contended that any reasonable police officer . . . would believe that mild profanity while peacefully advocating a political position could constitute a criminal act.").

[46] *See id.*

[47] *Id.* at *17 (Sutton, J., concurring in part and dissenting in part).

[48] *See* MICH. COMP. LAWS ANN. §§ 750.167, 750.170 (West 2006). The dissent also highlighted that § 750.170 had previously survived constitutional scrutiny. *See* cases cited *supra* note 32. However, in both cases the statutes were found not to be vague as applied to *conduct*, not speech.

lead to absolute immunity for police officers who arrest citizens for speech acts under statutes not specifically aimed at speech. To overcome immunity, these potential plaintiffs would have to find the rare cases in which the statutes were successfully challenged as applied to speech. Given that the vast majority of criminal statutes facially apply to conduct, it is unlikely that such cases would exist for most statutes on the books. Indeed, the dearth of cases involving criminal prosecution under the statutes in *Leonard* might well have resulted from other police officers determining that they were inapplicable to speech.[49] While the dissent noted repeatedly that the laws were enacted by the state legislature pursuant to its constitutional oath,[50] it is not at all clear that the Michigan legislature contemplated the unique concerns involved in curtailing speech as opposed to conduct.[51] The dissent's position would undercut free speech protections without clear legislative guidance concerning such regulation.[52]

A related problem with the dissent's approach arises in connection with First Amendment "chilling effects."[53] The Supreme Court has previously expressed concern that criminal prosecution under vague statutes may "cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images,"[54] and has shown particular concern with protecting political speech.[55] Granting a wide swath of qualified immunity to police officers in cases like *Leonard* would undermine the Supreme Court's goal of preventing such chilling effects. The embarrassment of simply being arrested for speech might very well cause people like Leonard to refrain from speaking at a political meeting, even if criminal charges will never be filed.

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[49] *See* Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. REV. 1467, 1518 (1996) ("[A] positivistic approach to qualified immunity protects those officers fortunate enough to have made a mistake so egregious that it is also unusual.").

[50] *Leonard*, 2007 WL 283832, at *13, *17 (Sutton, J., concurring in part and dissenting in part).

[51] *See* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1138 (2005) ("By enacting [a generally applicable] law, the legislature has decided to ban a broad range of conduct, the overwhelming majority of which doesn't consist of speech, because the conduct may cause certain harms. But this doesn't mean that the legislators even considered whether speech . . . should be outlawed as well. Courts ought not to defer to a legislative judgment that wasn't made.").

[52] *See* Grayned v. City of Rockford, 408 U.S. 104, 109 n.5 (1972) ("Where First Amendment interests are affected, a precise statute 'evincing a legislative judgment that certain specific conduct be . . . proscribed' assures us that the legislature has focused on the First Amendment interests and determined that other governmental policies compel regulation." (citation omitted) (quoting Edwards v. South Carolina, 372 U.S. 229, 236 (1963))).

[53] *See, e.g.*, Virginia v. Hicks, 539 U.S. 113, 119 (2003) (noting the chilling effects on speech of overbroad criminal laws); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 51 (1988) (holding that a rule imposing liability on publishers for false factual assertions would chill speech concerning public figures).

[54] Reno v. ACLU, 521 U.S. 844, 872 (1997).

[55] *See, e.g.*, Mills v. Alabama, 384 U.S. 214 (1966).

These chilling effects are particularly troublesome in *Leonard* for two closely related reasons. First, arrests like that in *Leonard* could amount to a prior restraint on speech, which is "heavily disfavored" under Supreme Court case law.[56] Second, those effects could also be viewpoint discriminatory. *Leonard* arguably presents both problems — on one view, a governmental officer sent an underling to silence a political opponent before he could make a potentially damaging speech. Allowing qualified immunity to protect such actions, as it almost certainly would under the dissent's analysis, would be completely out of step with broader First Amendment doctrine.

The majority's approach alleviates each of these concerns. Under the majority's rule, the police cannot protect themselves through post-hoc rationalizations for arrests, which lessens prior restraint and viewpoint discrimination concerns. This position also limits the wide-ranging immunity that the police would enjoy until every potentially applicable criminal conduct statute were declared unconstitutional as applied to speech. Moreover, the majority was more attuned to the Supreme Court's concerns with notice to the official than was the dissent. The Supreme Court's concept of "notice" to the police in the qualified immunity context is largely notice in name only, as it is premised on the legal fiction that all officers have perfect knowledge of legal precedent concerning all statutes and constitutional provisions that they enforce.[57] While this fiction might approximate the truth in, for instance, the Fourth Amendment search and seizure context, it is safe to say that the police are much more likely to be unfamiliar with the contours of First Amendment doctrine. The majority's focus on broader free speech principles focuses on what an officer is actually likely to know, and it thus more adequately provides notice to government officials.

Despite the fact that both the majority's and the dissent's approaches are doctrinally adequate, the majority's method was clearly preferable in *Leonard* because of the unique concerns implicated by the First Amendment. While the dissent's manner of framing the case might function well in the context of other constitutional rights, it raises the specter of prior restraint and viewpoint discrimination in cases like *Leonard*. In contrast, the majority's position wisely safeguards the central concerns of the First Amendment while remaining consonant with the Supreme Court's qualified immunity caselaw.

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[56] Morse v. Republican Party of Va., 517 U.S. 186, 244 (1996) (Scalia, J., dissenting).

[57] *See Leonard*, 2007 WL 283832, at *14 (Sutton, J., concurring in part and dissenting in part) ("Even had Robinson been equipped with this uncommonly extensive knowledge of Michigan and federal law, indeed even had Robinson carried a laptop equipped with Westlaw and Lexis/Nexis to the meeting, I am hard-pressed to understand how he would have known that it was 'clearly established' that he could not enforce this law in this setting.").