Bound By Oath | Season 2 | Episode 3: The Bubble

John: Lee Saunders broke the law.

Lee Saunders: I deserved the sentence that I got. All I can do is be a better person from now on out.

John: When the recession hit in 2007, his business folded; he broke up with his girlfriend, and he lost the house outside Tampa, Florida that they had shared. Around Thanksgiving, his father died unexpectedly of a stroke. All over the course of a few months. Lee was 32 years old.

Lee: When we broke up, I couldn't afford to pay for the house no more. I had to move back to Orlando. I was pretty much living with friends on their couches. I had fallen into a depression.

John: Lee started abusing pain pills that he had a legitimate prescription for. And when an acquaintance told him that his boss really needed painkillers but couldn’t go to the doctor because he didn’t have insurance, Lee agreed to sell a few pills.

Lee: The guy knew I needed money, so he gave me a sad story that his boss had hurt his back and needed pain pills and he couldn't go to a doctor. And it was to an undercover cop.

John: After several months in jail, Lee made bond and was released.

Lee: With no job, no place to stay. I was very desperate. Between that and the drug use, I made

some bad mistakes.

John: Within a week of getting out of jail, Lee decided the best thing to do to get money to fight his drug charges was to do a bunch of cocaine and then rob a bank.

Lee: I just told her, just put the money in the bag and she did. None of the other tellers knew what was going on.

John: He didn't have a weapon. He waited his turn in line. And other than wearing sunglasses, he didn't disguise himself at all.

Lee: I was recognized when they posted it on the news.

John: Lee never got to use any of the cash because the teller put an exploding dye pack in the bag. A week later, he robbed a jewelry store in Brevard County, Florida with a fake pistol. This time, he got caught right away.

Lee: I know I made terrible mistakes and ~~it's~~ I wish it's something that I could go back and change. I'm not proud of it.

John: Ultimately, Lee was sentenced to 10 years in Florida state prison. He served a little less than that because of good behavior. This episode will be about what happened to him while he was still a pretrial detainee prior to his conviction in the mental health unit of the Brevard County jail, where he spent over two months in 2008.

> **Lee's lawyer**: Morning, your honors and may it please the court. **Gov't lawyer**: The core of our argument in this appeal is that there was no constitutional violation. **Judge Martin**: The allegation is that There was vomit and excrement and urine and on and on, on the floors of the cell where he had to walk barefoot. I mean if I didn't have toilet paper and I had to eat with my hands, I would consider that a serious safety concern.

John: In 2012, Lee filed a lawsuit under Section 1983. As we talked about on the last episode, Section 1983 is a federal law passed by Congress specifically authorizing lawsuits for money damages, as well as other relief like injunctions, against state and local officials when they violate the Constitution. In his suit, Lee argued that the conditions in the psych unit of the Brevard County jail were cruel and unusual and in violation of the Eighth Amendment. But even though Congress passed Section 1983, and even though the Supreme Court says it prefers causes of action like 1983 that are authorized by Congress, the Court has invented an immunity doctrine that means the courthouse doors are often closed to plaintiffs like Lee whose claims you'd think just reading the text of Section 1983 should go forward. That doctrine is called qualified immunity. And it can be invoked across the board by all government employees -- federal, state, and local.

Joanna Schwartz: Qualified immunity is a doctrine that shields government officials when they are sued for damages even if they have violated the Constitution if they have not violated what the Supreme Court calls clearly established law.

John: That's UCLA Law Professor Joanna Schwartz.

Joanna Schwartz: It's a doctrine that the Court over the past several decades has described as one that is necessary to advance a number of different policy interests to protect government defendants from financial liability.

John: We're going to do two episodes on qualified immunity. On a later episode, we'll talk about where the doctrine comes from. On this episode, we're just going to describe the state of the law today. In practice, qualified immunity means that, usually, unless there is a prior case that specifically says that what was done to you is unconstitutional, a government official who wronged you can get off the hook.

Joanna Schwartz: The Court has said that there needs to be a prior case with very factually similar circumstances in which the prior Court had held that very similar conduct to be unconstitutional.

John: That might sound intuitive. Courts usually rely on precedent. But by very similar, she means *very* similar. Earlier this year, for instance, the U.S. Court of Appeals for the Fifth Circuit ruled that it was not clearly established that a corrections officer in Texas couldn't pepper spray an inmate for no reason without warning. *There are* prior cases that say officers can't use tasers on inmates for no reason or punch people for no reason or hit them with batons for no reason. But the court ruled that because there was no case about pepper spray specifically, the law wasn't clearly established, and therefore the officer was entitled to qualified immunity.

Joanna Schwartz: This is a challenging standard to meet in part because requiring a very

similar prior case is often challenging for plaintiffs to find. It's particularly challenging for plaintiffs to find because in 2009, the Supreme Court told lower courts that they did not need to rule on whether conduct was unconstitutional if they were going to grant qualified immunity. But at the same time, the Supreme Court has instructed plaintiffs that they need to find prior cases holding similar conduct unconstitutional.

John: The silver lining in the pepper spraying case is that the Fifth Circuit did choose to make a constitutional ruling. The next time an officer in the Fifth Circuit pepper sprays someone for no reason, it is now clearly established that that is unlawful and he or she won't be entitled to immunity. But clearly establishing something for first time is a completely optional act of judicial grace.

Joanna Schwartz: So the Court has told lower courts that it does not need to answer constitutional questions and told plaintiffs that they must find cases holding prior conduct unconstitutional. It's a vicious cycle that doesn't make a whole lot of intuitive sense and it increases the burdens dramatically for plaintiffs who are trying to defeat a qualified immunity motion.

John: For example: in 2018, the U.S. Court of Appeals for the Eighth Circuit ruled that there was no prior case telling an Arkansas state trooper that he could not intentionally ram a motorist, who was not fleeing or endangering the public in any way, off the road. He'd tried to pull a woman over for expired tags. But it was late at night on an empty stretch of road with no lights and a narrow shoulder; she had her minor daughter in the car; so she kept driving -- at 20 miles an hour below the speed limit -- until she reached a place she felt safe pulling over.

However, less than a minute after turning on his lights and sirens, the officer rammed her into a ditch where she hit a cement culvert. When she sued the officer, a federal district court said the case could proceed to trial. But on appeal, the Eighth Circuit said there was no case on point saying officers can't run people off the road in those circumstances. And there still is no case saying that -- because the court did not address whether that was excessive force.

Joanna Schwartz: When the Court doesn't rule and tells lower courts that they don't have to rule on the scope of these constitutional questions. It means that there's great uncertainty, which is detrimental to the plaintiffs in these cases. And it's also detrimental to law enforcement agencies who are in good faith trying to stay within the bounds of the law.

John: Some police departments recommend that motorists -- if they don't feel safe -- proceed to a well lit, populated area instead of pulling over. But some police will also apparently run you off the road if you do that. It seems like something courts should settle so everyone knows what the law is. And there are plenty of examples:

Joanna Schwartz: For example, there has been increasing use by citizens of video to capture images of police doing their work and the question of whether individuals have a First Amendment right to record the police is a subject that has percolated in lower courts over the past 10 or so years. Qualified immunity has made it more difficult to develop that law. Because if a lower court can grant qualified immunity without ruling on the constitutional question, then it makes it difficult to establish that constitutional right.

John: Sometimes these uncertainties arise in the context of novel technologies. But coming

back to the Arkansas case, traffic stops are not a new phenomenon, and yet the law is unsettled. And coming back to Lee Saunders' case in the Brevard County jail, bad conditions in jail are as old as jail. If you talk to Lee, he'll tell you that being in jail shouldn't be like being in a hotel, but conditions should be humane.

Lee: Being incarcerated you're not entitled to Holiday Inn conditions, but you're entitled to humane conditions. And the conditions that we were being forced to live in weren't humane at all.

John: Before we get to conditions in the mental health unit, we have to say how Lee got there. When he arrived at Brevard County jail to await trial, he was assigned to a two-man cell that already had two men in it.

Lee: There was no room to move around. They would have to stay on their bunks and I would have to stay on my mat cause there were no space to even stand up or walk around in the cell. I'm sleeping right next to, in front of the toilet.

John: After a few weeks of that, Lee says he was a physical and emotional wreck. He knew he was looking at serious prison time. And he couldn't get decent sleep on his thin mat directly on the concrete.

Lee: I didn't have nobody. I didn't want to ~~go in and~~ go on anymore. I didn't see any point in going on anymore. I had been up without sleep for so long. When they passed out the razors, I just decided to end it there.

John: Once a week, guards came around with razors for shaving and then collected them back 10 or 15 minutes later.

Lee: I took a razor and cut across across my wrist. Then I cut straight up twice in two different spots. And I just sat on the toilet and bled.

John: Later, the jail's lawyers would say the suicide attempt was just Lee being manipulative, faking serious distress. And look, I don't have a medical background so make of this what you will, but in my opinion that is utter garbage. I met Lee before the pandemic. He showed me his scars, and they are intense. They run from his wrist to the inside of his elbow. They are wide, and they look like he cut deep.

Lee: I started getting lightheaded, started blacking out. Then the next thing I know, I'm getting rushed to the hospital. When I got to the hospital, they gave me about 50 stitches in my arm.

John: Three hours later, he was back at the jail. But this time, Lee was taken to the mental health unit, a place that staff and inmates call the Bubble.

Lee: It's a round room with a small officer station in the middle of it and you can see inside all the cells.

John: The cells in the Bubble are basically small rooms with a toilet and a sink. 9 feet by 15 feet at most. And inmates were always coming and going, but at any given time there were usually

seven or eight people in one cell -- a cell that, according to Florida state jail standards, should not have held more than three or four people.

Lee: There's blankets on the floor at all times. 24 hours a day. Everybody's bedding is on the floor. Everybody was pretty much back to back. There was absolutely no room to move around. You had people sleeping in front around the toilets. You got seven or eight guys using the toilets back to back. So, and they're urinating on the floor, splashing on the floor.

John: The place was filthy. Everyone was barefoot and constantly exposed to urine, vomit, feces, blood, and semen.

Lee: They're stepping all over your blankets. Dirty feet, bloody feet, fungus on their feet, stepping in urine and feces.

John: The cell was swept and mopped twice a week, but Lee says his bedding was never washed once the whole time he was in the Bubble -- even when it was soiled with water from a flooded toilet.

Lee: The odor was so bad. It was between like a hot men's locker room after a football game and a septic tank.

John: And the staff knew it was filthy because on days when there were inspections, the guards would pass out plastic platforms for inmates to lie on that got them up a few inches off the concrete. After the inspection was over, the platforms would be removed.

Lee: They never had any kind of proper equipment in there to clean the cells. The cells don't have any kind of drains.

John: When the cells got mopped, all it did was push dirty water around because the guards didn't change the water in the buckets. And even if the water had been clean, just mopping wouldn't get anywhere close to actually cleaning the cell. There was mold on the ceilings that the jail didn't even attempt to clean.

Lee: You got inmates in there that are throwing feces all over the place, on the ceilings, on the walls. They would take the feces and they would cram it in the vents. They would cram it into the water spigot out of the sink that people drink out of. They'd cram it in there. And every crack and crevice all over the door where the door flaps are, where they put the food through.

John: Inmates only got to leave the cells for 20 minutes twice a week to shower. And when they got done they put their same dirty clothes back on and went back to their same dirty mats and blankets.

Lee: The two showers is visible to all the cells, no doors or nothing on it. You got inmates masturbating while they're watching guys shower. Any kind of female that goes in there, a nurse come around, they be sitting there wide open masturbating.

John: If you wanted to use the phone or write a letter, shower time was your only chance to do it, and you'd have to decide between that or going without a shower. Shower time was also the

only chance inmates had to brush their teeth. There was no soap or hand sanitizer or toilet paper in the cells, and inmates had to eat meals with their hands.

Lee: I mean, it's just so unsanitary. You don't get no hygiene, any kind of hygiene. Just being in those conditions, the fear of catching some kind of disease it aggravates your mental state. You're in constant fear of what am I going to catch in here?

John: Lee got some rashes in the Bubble, but he thinks he was spared the worst of the communicable diseases that were in there because he was on antibiotics after getting his stitches.

Lee: It was like everybody that was coming out of the Bubble had staph infection, lesions all over their body. They'd come out of there with scabies. Come out with lice, all kinds of weird bacterial infections.

John: Perhaps not surprisingly, cramming inmates into a small space led to arguments and fights. One one occasion, Lee was attacked, unprovoked while he was trying to sleep.

Lee: The night before I woke up to a commotion and this inmate was butt naked choking out another inmate on the floor.

John: The guards came in and removed the inmate who was attacked, and left the aggressor in the cell.

Lee: The next day I was under the blanket with the blanket pulled over my head. And the guy was butt naked for no reason -- started stomping me on the neck and head. It felt like a safe had dropped on my neck. Dude was like 220 pounds. Stomped on me with full body weight.

John: The attack left him with a broken nose.

Lee: Later on, when I got out of the Bubble, I saw him, he had finally got stabilized, I guess, and I asked him, I said, what was wrong with you? Why did you do that? And he didn't remember doing it or nothing. He was out of it.

John: And the guards were not remotely professional.

Lee: They were always on the computer. They're always watching YouTube videos, all kinds of videos porn videos.

John: The guards thought it was funny to rile up inmates in acute mental distress.

Lee: You got veterans, they'd be in there suffering from PTSD. Or the elderly inmates be suffering from dementia. You got other inmates they suffer from schizophrenia. They don't know what's going on. And the officers would be taunting them and harassing them and teasing them, getting them riled up. They get pleasure off of it, seeing the inmates freak out.

John: On another occasion, Lee asked guards to see a nurse. So a guard took Lee out of the cell, but not for medical attention.

Lee: Then he put me in a cell with another inmate and this inmate had serious mental issues. He was urinating all over floor. He was carrying a blanket around like it was a baby, talking to himself. The inmate kept trying to walk up to me and hand me this blanket full of urine.

John: The guard thought that was pretty amusing.

Lee: He put me in there barefoot for about three hours while he sat there and joked about it and made fun of me.

John: On another occasion, the air conditioning broke, and Lee asked Corporal John Wright to do something.

Lee: It was a hot summer day. There was at least eight people in the cell. The AC wasn't working. Everybody was profusely sweating. Real foul odor. It was hard to breathe because without any air coming through the cell there's poor ventilation. I was complaining to the officers at first and they kept, they, they were making jokes about it, laughing, saying, stop complaining. It's hot out here too. Then when I saw a Corporal Wright.

John: Corporal Wright was the supervising officer in the Bubble.

Lee: I asked him to, if he can move us to other cells with the AC working. I asked him if he could open the flap on the door, put a fan in front of the door to get air blown in the cell. I even offered if he could put me in a strap chair. I just needed to be out of the cell. I couldn't breathe in there.

John: And Corporal Wright refused to help.

Lee: He went to the officers' station, him and the other officers sitting there laughing about it and making jokes. After a little while longer, I started hyperventilating and I had a nervous breakdown, blacked out. And started banging my head against the door, split my head open.

John: Lee had a panic attack and started hitting his head on the steel door. There were no video cameras in the Bubble, but another inmate testified that the guards watched and laughed for five minutes before intervening.

Lee: They took me down to medical the doctor stitched up my forehead at the jail. And after he stitched me up, they took me back and put me back in the Bubble again.

John: All told, Lee spent over two months in the Bubble in 2008. After he was convicted of armed robbery and transferred to state prison, Lee filed a lawsuit over the conditions the psych unit. Several years later, in 2013, when he had a hearing about that lawsuit, he was transferred back to Brevard County jail. And even though his mental condition was stable, he got sent straight back into the Bubble and nobody would tell him why.

Lee: I felt like they're putting me in the Bubble out of retaliation cause I'm here for the lawsuit that I filed.

John: Conditions had not improved. Another inmate had open wounds on his feet and was

walking all over everyone’s mats.

Lee: There was a guy in my cell, he had lesions all over him. He’s bleeding all over the cell and you're walking around in that barefoot exposed to that.

John: Of course, safely housing detainees who are having mental health crises is going to have its challenges. But according to Lee, other jails in Florida do manage to do that.

Lee: I was briefly in The Bubble in the Orange County jail. It's the same thing. It's a psych unit with plexiglass cells over there.

John: It wasn’t the Holiday Inn. But ...

Lee: You're off the floor, you're on a bunk. You're not barefoot. They don't put a bunch of you in a cell together, overcrowd you in there. Because all you're doing is aggravating each other's mental state more. That's how they should be running it. They should be separating you and keeping an eye on you, but ~~you're~~ in a kind of therapeutic environment and get you stable.

John: When Lee filed his lawsuit, at first he represented himself but eventually he was appointed counsel.

Coleman Watson: One of the difficult parts of this case when I first got it was trying to find witnesses who could corroborate.

John: That's Lee's lawyer, Coleman Watson.

Coleman Watson: We asked for the records of the Bubble. What we found was there really is, frankly no system where they can tell me who was in what room and what time when they came out, when they went in. That was all admitted at deposition.

John: Guards were supposed to make a note of each detainee's condition every 15 minutes, which would have been helpful, but those records -- if they ever existed -- were destroyed. Ultimately, they were only able to find two inmates they could talk to.

Coleman Watson: There were two inmates we could identify. They both did remember Mr. Saunders.

John: They both corroborated that Corporal Wright laughed while Lee hit his head against the cell door.

Coleman: They corroborated that the conditions that -- at least that they experienced too in their cells -- were very similar to Mr. Saunders.

John: Lee sued a bunch of different guards, but eventually all of them got dismissed from the suit except one: Corporal Wright. The jail's lawyers disputed some of Lee's allegations. Lee said, for instance, that inmate who attacked him in his sleep had attacked someone else one day before. The jail said the first attack happened three days before. They also said that Lee's suicide attempt, his repeated requests for medical attention, and hitting his head against the cell

door -- all of that was just Lee being manipulative, faking symptoms in order to get transferred to mental health facility outside of the jail. Also, the jail said that Lee didn't hit his head against the door for a full five minutes before guards intervened -- they say they got to him much sooner. And, the jail disputed how dirty the cells were.

> **Lawyer for Brevard County**: The plaintiff did say that he never saw the mop water changed, but I mean, as far as we're concerned, that doesn't mean it wasn't.
> **Judge Martin**: Well, we accept his allegations in this posture of the case. Right?
> **Lawyer**: Yes. That is true, your honor.

John: Before the case could go to trial and before Lee had a chance to present evidence on those disputed questions of fact, Corporal Wright invoked the defense of qualified immunity. And when an official does that it does not really matter if the official actually did what they're accused of doing. What matters is whether Lee can find a prior case in the Eleventh Circuit, which covers Florida, or in the US Supreme Court holding that conditions very similar to those in the Brevard County jail are unconstitutional. Otherwise, Corporal Wright is immune from suit. But before we get to the outcome of Lee's suit, we're going to take a break. When we get back, we'll talk about the Supreme Court's justifications for its qualified immunity doctrine and whether they hold water.

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Break 1

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John: And we're back. Earlier this year, in the spring of 2020, it really seemed like the Supreme Court was going to revisit qualified immunity and at least crack open the courthouse doors to more plaintiffs.

Robert McNamara: I think a lot of people thought that the time had really come for the court to start reconsidering its doctrine. You had an increasing wave of scholarship telling you that the the Court's purported foundations for the doctrine were just flat wrong.

John: That's my colleague, Robert McNamara.

Robert McNamara: There was just a wide sense that there was pressure coming from the left. There was pressure coming from the right. And there was sympathy for the anti-qualified immunity arguments coming from what people see as the left wing and the right wing of the Court.

John: And there was George Floyd, who was killed by police over memorial day weekend, putting police accountability, including qualified immunity, into the national spotlight. So there was this feeling that the Court was going to do something, especially given that the justices scheduled a whole bunch of different qualified immunity cases for the same 'conference' later in June, which is where the justices sit down and confer about what cases they are going to grant hearings to. But the Court didn't take any of them.

Robert McNamara: I really thought that by spring of 2020, there had been enough development in the lower courts. And there had been enough lower court judges just flatly saying either this

doctrine is wrong, which you usually don't see lower court judges say about Supreme Court opinions, or saying that they didn't know what they were doing. You had actual sitting Article III judges saying I don't know what it means for the law to be clearly established. And usually those please eventually get an answer from the Supreme Court.

John: Each of the cases the Court looked at in June was more outrageous than the next. In one case, police officers in Georgia pursued an unarmed suspect into a yard where a bunch of children were playing. An officer ordered everyone to the ground at gunpoint, and the suspect and the children complied. But according to the allegations, which the court accepted as true at that stage of the case, the officer fired his gun at a nonthreatening family dog and missed badly. He hit a 10-year-old boy who was lying at his feet. The dog was on the other side of the yard.

Robert McNamara: The appellate court looked at that and said, Wow, these are egregious facts. But these facts are egregious in a way that means there's no precedent on point. We've never decided a case about whether you can shoot a child while aiming at a non-threatening dog. And in the absence of guiding federal precedent, we have to award qualified immunity.

John: In the Eleventh Circuit, there is no precedent saying police can’t accidentally shoot innocent bystanders in a situation where there is no reason to be shooting in the first place. And there still is no precedent saying that. In another case, police officers in Fresno, California were accused of stealing more than $200,000 dollars of cash and collector coins from a business.

Robert McNamara: The allegation was that police officers executing a warrant, instead of properly booking the evidence had simply stolen a bunch of money for themselves for their own

use. And the business owner sued and said: it violates the Fourth Amendment to steal my stuff. And the Ninth Circuit said, well, notwithstanding the fact that, you know, every civilization in recorded history has recognized that theft is wrong, there's no federal precedent saying that you can't steal things.

John: And like the Georgia case, the court declined to make a constitutional ruling that would clearly establish for next time that theft by government officials constitutes an unreasonable seizure.

Robert McNamara: Which means that the next group of officers that is accused, rightly or wrongly, of stealing stuff will be able to avail themselves of the same qualified immunity defense. Look, this isn't clearly established. It just can't be good for public trust in the system. And it certainly isn't good for development of coherent constitutional doctrines that we just leave these questions undecided.

John: It's obviously not good for people whose rights have been violated, and by the way the police executed that search warrant in 2013, and the business owners still haven't been charged with anything. But it's also not necessarily good for the government officials who are the defendants in these suits.

Robert McNamara: One thing that really struck me about the Fresno case, in particular is how unfair it was to the officers themselves who were accused of stealing all this money. Because the officers' point -- and they made it in every brief -- is: We didn't steal anything. We are falsely accused. We are innocent. And it just struck me how horrible it must be to be embedded in a

legal system where you say, we didn't steal anything, but the actual legal answer, and the answer you're getting from the courts is: whoa, whoa whoa, it's okay if you did. And I always just think about what that would mean in my own life. If I were accused of stealing something from my neighbor and I was going to go to trial for theft. And then at the last minute, the prosecutor dropped the charges and publicly announced he wasn't dropping the charges because he thought I was innocent. He was just dropping the charges because I seemed like the kind of guy who should get away with stealing stuff. My neighbors aren't going to trust me anymore because now I'm the guy who's allowed to steal.

John: One of the cases the Supreme Court declined to hear last June was an Institute for Justice case. Our client, Shaniz West, is a single mother living in Idaho.

Robert McNamara: And Shaniz came home one day to find her house surrounded by five local police officers. There was someone stationed at every exit.

John: The police were looking for her ex-boyfriend, who was suspected of committing a violent crime. Shaniz didn’t think he was in the house, and he wasn’t supposed to be in the house. But she wasn’t sure.

Robert McNamara: So she handed over keys and gave the officers her consent to get inside and apprehend him. And then she left. It was the last day to register her kid for school, so she had to get to the school to register her kid.

John: After Shaniz left, the officers’ plans changed.

Robert McNamara: They called the local SWAT team, and instead of going into the house they set up shop outside the house and proceeded to bombard the house with tear gas grenades fired from modified shotguns. At no point did they use the keys. At no point did they try the keys. They didn't need the keys by the time they went in because the door had shattered.

John: Over the course of several hours, they shot out every window. They left gaping holes in walls and floors. And it turned out the ex-boyfriend wasn't there.

Robert McNamara: Everything she owned, including the crib she had purchased for the baby she was expecting in the next couple of months was covered in this noxious, sticky yellow film from the tear gas that made everything essentially a total loss. And Shaniz ended up homeless for two months.

John: The government offered her a few hundred bucks and a hotel voucher good for three weeks.

Robert McNamara: And the government's position was we didn't do anything wrong. If you invite us in -- if you let us come into your home, that necessarily gives us the authority to destroy your home.

John: And the Ninth Circuit said, well, there's no prior case that says that's wrong.

Robert McNamara: And that's the basis on which they won. The Ninth Circuit made clear that in

Shaniz's case it wasn't saying that a competent police officer could have understood Shaniz's his consent to get inside her house as consent to bombard it with tear gas grenades. But there wasn't a case on point.

John: And there still isn't a case on point.

Robert McNamara: Lurking in the background of all of this qualified immunity stuff is a case called *Hope v. Pelzer*. And *Hope* says that sometimes you don't need a case exactly on point to defeat qualified immunity. Sometimes the official misconduct is so egregious that it should just be obvious to the government official that he's not allowed to do this.

John: In 2002, the Supreme Court denied qualified immunity to prison guards in Alabama who, among other things, shackled a prisoner to a hitching post, forcing him to stand shirtless in the sun in the summer for seven hours. A guard taunted him, by giving water to a dog right in front of him, and then spilling it on the ground in front of him. The Supreme Court said that was so obviously unconstitutional that no case on point was necessary because any guard would already be on notice without having to be told that they shouldn't do that. And so you'd think that, applying that logic, any number of the cases we've mentioned would be equally obviously unconstitutional.

Robert McNamara: But the problem with *Hope* is that after the Supreme Court articulated that standard, it proceeded to basically ignore it. It didn't set forth any criteria you could use to decide whether something was sufficiently egregious. And didn't find that anything else was sufficiently egregious for decades afterwards. To the contrary, it would frequently take up cases

and summarily reverse them. Where a lower court had said: Oh, this is obvious misconduct, this must fall within *Hope,* the Court would take them up and with very little analysis, just say, No, you need a case on point, this one isn't obvious. And people have raised arguments over the years saying things like: Oh, this government official had been specifically trained not to do the thing he did. There's a whole policy manual that forbids him from doing this. So of course, it would have been obvious to him that this was wrong. And the courts have said, No, no, that doesn't matter. That's not the kind of obviousness we mean, you still need a case on point.

John: For example, this fall the Ninth Circuit granted qualified immunity to a Los Angeles County social worker who allegedly groped a woman who was in the process of adopting a child. There was a prior case saying that corrections officers can't grope prisoners. And there was a prior case saying government employees can't grope other government employees. But there was no case saying that government employees can't grope regular people. There is now. The court did clearly establish that for next time. But somehow the fact that groping is both illegal and against Los Angeles County policy wasn't an obvious enough violation that the court was willing to rely on *Hope v. Pelzer*. Because when lower courts have relied on *Hope*, the Supreme Court reverses.

Robert McNamara: You do periodically over the years see a lower court invoking *Hope v. Pelzer*. And there are a couple things to note about these lower court decisions. One is that with surprising frequency, they were reversed by the Supreme Court. The Supreme Court developed the habit of taking cases. And usually the Supreme Court only takes cases where there's a clear split of authority among the lower courts. And it takes cases after full merits briefing, and it decides them with oral argument. And what you saw in these cases that were trying to follow

Hope v. Pelzer is the Supreme Court would take them up and summarily reverse them. They wouldn't require merits briefing. They wouldn't require oral argument. They just take them up and say, Nope, this isn't obvious. That started to send a signal to lower courts that that must mean we're not supposed to apply *Hope*. That must mean we're only supposed to be looking for a case on point.

John: And not only that but for the last couple decades the Supreme Court only reversed lower courts that denied qualified immunity and let cases proceed to trial. By contrast, it never reversed lower courts that shielded officials from suit. Until last month. In November of 2020, the Supreme Court broke an 18-year streak of only summarily reversing rulings that went against the government. We're going to come back to that case and what it might mean a little later.

Robert McNamara: So what we're left with is that qualified immunity is essentially a doctrine of randomness. Most of the time, if a government official violates the Constitution in a novel way that hasn't been addressed by the case law, the government official is going to get off the hook for that constitutional violation. But they won't always get off the hook if their behavior is egregious enough. But it's hard to tell how egregious their behavior has to be or what will count as clearly established law because the courts have to do this kind of fine grained analysis about whether or the official hit someone with a baton versus pepper sprayed them in the face versus kicked them versus punched them.

John: The problem with qualified immunity is not that immunity is always extended to government officials. Courts do deny qualified immunity on regular basis. For instance, earlier this year the Second Circuit denied qualified immunity to Connecticut officials who allegedly

knew that radon gas, which is a carcinogen, was leaking into a prison. And when inmates sued, the government's lawyers argued: well there is no precedent about radon. There is precedent about exposing inmates cigarette smoke, but that's a different carcinogen. The Second Circuit said no, a carcinogen is a carcinogen. And it denied qualified immunity.

Robert McNamara: So the problem is not that plaintiffs always lose or even that they lose cases I think they should win. The problem is that the outcomes in these cases are fundamentally arbitrary. It's impossible to know at the outset of a lawsuit, what criteria are going to be used to decide whether a law is clearly established or whether behavior is sufficiently egregious that it's obviously unconstitutional, and in the absence of clear guidance from the Supreme Court, a lot of that just comes down to the judges you happen to draw. And a rule that comes down to whether you get a judge who's a little looser or a little stricter about what clearly established means just isn't a rule of law that's predictable. And when you have a rule of law that isn't predictable, it's impossible for that rule of law to provide the right incentives to people to encourage them to behave properly.

John: So that's the doctrine as it stands today. It is a doctrine that the Supreme Court has invented. Congress has never passed a law saying that officials should be shielded by qualified immunity. Which leads to the question, what does the Supreme Court think it's achieving by closing the courthouse doors on most of the plaintiffs we've talked about.

Joanna Schwartz: The doctrine is justified by the Court in its own words by the policy goals that it intends to achieve.

John: Here's Joanna Schwartz from UCLA again.

Joanna Schwartz: And there is now compelling evidence that qualified immunity does not achieve the policy goals it intends and does not achieve the balance that the Supreme Court says that qualified immunity is supposed to achieve. The Court has written that, if there is evidence undermining the policy justifications for qualified immunity, that is a reason to reconsider the doctrine. And the evidence is there.

John: The Supreme Court has said that maybe people won't want government jobs or that they'll be afraid to to do their jobs if they can be held personally financially liable and face bankruptcy every time they make a mistake.

Joanna Schwartz: So I researched the extent to which officers -- and I focused on law enforcement officers as they are one of the most common defendants in section 1983 cases and they are also very often the defendants in cases that the Supreme Court accepts in the cases in which it has developed it's qualified immunity defense. I looked at the frequency with which law enforcement officers are required to contribute to settlements and judgments in police misconduct cases.

John: Looking at a massive dataset of settlements and judgments in 81 law enforcement agencies across the country, including 44 of the largest agencies, Prof. Schwartz found: officers do not pay out of their own pockets.

Joanna Schwartz: I found that law enforcement officers paid 0.02% of the dollars that went to

plaintiffs in these cases. 99.98% of the dollars in these cases were paid by the governments that employed these officers, not the officers themselves.

John: That includes cases where officers were fired or even criminally prosecuted for their misconduct. And it includes cases where the officers were assessed punitive damages. That is, damages on top of regular damages that are meant to punish officials for especially egregious misconduct.

Joanna Schwartz: So the notion that government officials are financially at risk from these suits is simply not supported by the record. And although my focus was on law enforcement officers, there is every assumption that other government employees are similarly indemnified.

John: For decades, the Supreme Court has assumed that officials pay these judgments out of pocket, and it's not true. And though that's absolutely been brought to the Court's attention, the Court has never addressed the issue. But that's not the Court's only justification for qualified immunity.

Joanna Schwartz: Increasingly the Court is focused on the desire to protect government defendants from costs and burdens of discovery and trial. That is what the Court has called the driving force behind qualified immunity.

John: The Court also says that it wants to protect officers from the burdens of litigation like sitting for depositions, responding to discovery requests, showing up at court, and defending themselves at trial.

Joanna Schwartz: To explore the extent to which that justification is warranted, I looked at federal court filings in section 1983 cases against law enforcement officers in five federal districts around the country over a two year period. And I looked at almost 1200 dockets in those five districts. And I found some regional variation, but ultimately what I concluded was that qualified immunity was very rarely the formal reason that cases were dismissed.

John: Instead those cases were dismissed after a significant amount of litigation had already occurred.

Joanna Schwartz: What I found was very few cases -- 0.6% of the cases in my dataset -- were dismissed before discovery on qualified immunity grounds and an additional 2.6% were dismissed on qualified immunity at summary judgment. So qualified immunity, which is intended to shield government officials from discovery and trial was very infrequently doing that in filed cases.

Robert McNamara: This is a huge deal. What Professor Schwartz's research establishes is that the foundational premise of qualified immunity -- the idea that it results in less litigation -- is false, or at least very possibly false, or at the very least, shouldn't be assumed to be obviously true the way Supreme Court doctrine assumes it is.

John: One piece of qualified immunity doctrine that we haven’t mentioned yet is the availability of what’s called interlocutory review. In a usual case, you file your lawsuit, and you litigate until you get to a final judgment, and then you can appeal that. That's not how qualified immunity

works.

Robert McNamara: In qualified immunity, as soon as you file a complaint in court the government official you're suing gets to file a motion to dismiss that says this complaint should just be dismissed on its face, because on the face of it I would be entitled to qualified immunity.

John: And if the district court says no, the government official gets an automatic right of appeal.

Robert McNamara: Right then and there up to an appellate court to say, No, no, the complaint should have been thrown away on its face.

John: And if the appeals court agrees with the district court that qualified immunity does not apply -- then the case goes back to the district court.

Robert McNamara: And you get to what we call summary judgment where one side or both sides can say we don't need to go to trial, because there aren't any disputed facts here. We agree on what the facts are. And on the agreed facts, I should win, or I should win, or he should lose. And if a court denies that and says no, no, I'm not going to grant summary judgment. I think you guys disagree about enough facts that this should go to trial. Again, the government official in qualified immunity and only in qualified immunity gets to appeal that.

John: And if the appeals court agrees with the plaintiff, the case finally can go to trial.

Robert McNamara: And at the end of the trial, if the plaintiff prevails, then again, the

government official gets to appeal a third time. And so we're now at three appeals and three separate decisions, when in ordinary litigation, we would streamline the whole thing. The case would get to final judgment within a year. And that would go up on one final appeal. Instead, qualified immunity cases can go round after round on these preliminary questions that stretch things out over years, sometimes, as we see in a lot of these cases, never even getting to resolving the underlying factual disputes that in theory, the courts are there to resolve in the first place.

John: It is very likely that if qualified immunity were repealed or substantially pared back, we would get those answers on pressing constitutional questions, and we'd get them without increasing the overall amount of litigation. And there's no reason to think removing qualified immunity would expose officials to more baseless litigation.

Robert McNamara: So one other justification we hear for qualified immunity is the desire to protect government officials from frivolous or unnecessary lawsuits. And I think that's a reasonable concern. But I think it's too narrow. We want to protect everyone from frivolous baseless lawsuits. Right? It's it's not only government officials who shouldn't be defendants in bad lawsuits. No one should have to be a defendant in a bad lawsuit. And so we have rules that are designed to kick bad lawsuits out of federal court. When someone files a complaint, you can file a motion to dismiss that says that complaint doesn't actually state a valid legal claim. And I just want to fight about that right now, before I have to spend any time fighting about the lawsuit. There are tools to prevent you from going to trial, if someone alleges something in their complaint that they can't prove. Once you figure out they can't prove that you can file what's called a motion for summary judgment to get the case thrown out before trial. And so there are

all of these tools and mechanisms that are designed to weed out bad cases and help prevent people from having to defend against bad cases. And it's just never been clear to me why those rules have to be different for government officials and why those rules have to be more protective of people who allegedly violated the Constitution than they are of people who allegedly violated a contract.

John: And so what that means is that often cases that are being dismissed because of qualified immunity are the very cases that have survived all the other procedural hurdles used to weed out frivolous cases. Which means that qualified immunity is closing the door on claims that are not frivolous.

John: Another justification for qualified immunity is that officials deserve fair warning about what conduct is unlawful. And that sounds intuitive. But qualified immunity doesn't actually serve that purpose. That assumes that government officials know about the all relevant court decisions that are out there and that they rely on those decisions to guide their behavior.

Joanna Schwartz: There is no reason to think that local law enforcement officers are reading these opinions and comparing the facts to the facts before them when deciding whether to take action. But the Court, the Court's decisions, and the Court's qualified immunity analysis seems to expect that they are.

John: Professor Schwartz looked at policy guides, training manuals, and educational materials at hundreds of law enforcement agencies in California, and found that officers are not being trained on developments in the law.

Robert McNamara: So it ends up making qualified immunity inquiries into sort of a farce, right? Where you can have a case, where the question really comes down to the officer is liable if this particular appellate decision was decided one month before he engaged in this conduct. And he is not liable if this decision came down one month after he engaged in the conduct. And that's true, even though we all understand that he would not have read it or been aware of it in any way. And I think that adds to the arbitrariness of qualified immunity where liability is no longer determined by what was in an officer's mind or by what a reasonable person would have done in these circumstances. Liability is determined by the existence of a document that no one involved in the transaction could have read, would have read, or would have been aware of.

John: But even if we assume that the only guide to correct behavior is published federal caselaw you'd think it would be enough for those cases to set out general, easy-to-follow rules, like "you're not allowed to exceed the scope of the property owner's consent to search." But the courts say that *doesn't* provide fair warning to the officers who tear-gassed Shaniz's house because there aren't any cases applying that rule to tear gas grenades. A related concern about qualified immunity is that often officers are in a position where they have to make split-second decisions in challenging, rapidly evolving situations and it's not fair to penalize them for doing the wrong thing with the benefit of hindsight.

Robert McNamara: Another justification you frequently hear for qualified immunity is that we don't want to penalize officers who have to make these difficult split second decisions in the field. We want to give them a certain amount of leeway to make a wrong call because we don't want to deter them from doing their jobs, which are difficult jobs out there in difficult

circumstances. And I think that objection fails for a couple of reasons. One, it's double counting. The Fourth Amendment only forbids unreasonable searches, unreasonable seizures. And one thing that certainly goes into whether your decision was reasonable is how much time you had to make it. Which brings me to my second problem with that objection, which is qualified immunity actually has nothing to do with split second decisions. Qualified immunity applies in exactly the same way to the officer who has to make a split second decision in the field, as it does to the IRS auditor who has weeks and months to plan an unconstitutional scheme to retaliate against you for your First Amendment speech. The qualified immunity test is just whether the right that was being violated is clearly established, it has nothing to do with whether the decision was split second. No one sincerely thinks that an officer making a decision about how much force to use is thinking in the moment about the clearly established law of the jurisdiction where he happens to be. He's thinking about whether his behavior is reasonable. He's thinking about the threats he perceives. And so we should be looking to those things instead of looking to whether there's clearly established law in the form of a case that the officer has never read and was certainly not thinking about at the time he decided to act.

John: So there’s no reason to think qualified immunity cuts down on frivolous litigation. Nor are government employees aware of the caselaw that supposedly puts them on notice as to what conduct is unlawful. They aren’t spared the burden of litigation. And if a jury rules against them and finds they acted unconstitutionally, they don’t pay that judgment out of their own pocket.

Joanna Schwartz: I think that if the Supreme Court took the available evidence undermining its policy justifications for qualified immunity seriously, it would abolish or greatly limit the defense. I think that the Court or some justices on the Court might be wary of doing so for fear of what a

world without qualified immunity might look like.

John: But there is really nothing to worry about. A world without qualified immunity is a world where more people with strong claims get their day in court.

Joanna Schwartz: The focus of these cases and of these trials will be on what I think should be the critical issue in these cases, which is whether the Constitution has been violated, not whether there is a prior case on point.

John: But in June 2020, the Court declined to reconsider the doctrine. Which means this is the doctrine we're stuck with for a while. We're going to take a break and then return to Brevard County, Florida for the outcome of Lee Saunders' suit against Corporal Wright.

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Break 2

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John: In 2016, a federal district court in Orlando denied qualified immunity to Corporal Wright and said Lee's suit over conditions in the Bubble at Brevard County jail could go to trial. But then the government appealed to the U.S. Court of Appeals for the Eleventh Circuit.

Lee: A lot of these officials and these jail staff, they act with such indifference because they

know they're protected under these immunities. They feel like they're pretty untouchable. If they had to suffer consequences for their negligence or their incompetence, they wouldn't be acting the way they were.

John: Before Lee's claim that inmates in The Bubble were forced to live on top of each other, exposed to disease and to filth could go to a jury, the Eleventh Circuit wanted one thing.

> **Judge Marcus**: I'm looking for you to point me to some clearly established law that would have put these ~~two~~ officers on notice.

> **Judge Newsom**: The only thing we really have appellate jurisdiction to determine is whether or not the rights were clearly established, correct?

> **Judge Martin**: Whether there was a clearly established constitutional violation

> **Judge Marcus**: You've got to point to some clearly established law.

John: The Eleventh Circuit, by a vote of two judges to one, granted qualified immunity to Corporal Wright. Here's the language from the majority opinion:

> **Eleventh Circuit majority opinion**: When viewed in the light most favorable to Saunders, the record presents evidence of undoubtedly unpleasant conditions. Even so, we conclude that none of Saunders' claims can overcome the defendants' qualified-immunity defenses. While we take no particular pleasure in foreclosing

Saunders' suit, we have no other choice.

John: The Court said, even if we accept as true that Corporal Wright stood by and watched and laughed for five minutes while Lee slammed his head against the cell door, that's not what matters. What matters is whether conditions in the cell -- the high temperatures and inadequate ventilation -- that were the immediate cause of Lee's panic attack were a violation of a clearly established constitutional right.

> **Eleventh Circuit**: Although Saunders testified that he found the ventilation unsatisfactory, he provides only one specific example of what he alleges to have been unconstitutionally inadequate cooling: … For a period of up to two days, the "AC vent . . . was blowing no air" and had "stopped working." While surely unpleasant, this episode does not describe clearly unconstitutional conditions.

John: So a claim about a suicidal pre-trial detainee self-harming in full view of guards, well, you can boil that to temporary ventilation failure, which -- not so serious. The court did the same thing with Lee's claim about the lack of access to toilet paper and soap.

> **Eleventh Circuit**: Saunders fails to cite any precedent to demonstrate that a prison procedure that temporarily inhibits suicidal inmates' access to toiletries so plainly violates an inmate's clearly established Eighth Amendment rights that qualified immunity does not apply.

John: Again, that downplays the allegation. The allegation was that often when an inmate would

ask for toilet paper or soap, the guards would set it down on the other side of the glass where the inmate could see it, and they wouldn't hand it over for up to 45 minutes. The Court said oh well a 45-minute wait is just a temporary delay. Never mind that that's cruel and that inmates just stopped asking for basic necessities and in practice were eating with dirty hands every day.

> **Eleventh Circuit**: The officers explain that this temporary deprivation was a feature, not a bug; the Jail intentionally restricted the Bubble's inmates' access to these items due to concerns over their physical safety and potential for self-harm.

John: The jail argued that it denied inmates access to soap and toilet paper for their own good. If you're wondering how exactly an inmate could self harm with toilet paper, well, the court didn't ask the the jail to explain.

Lee: I don't know what you're going do unless you're going to eat a bunch of it -- big wads of it to try to choke yourself. But if you could do that, you could eat big wads of styrofoam off the trays, choke yourself more than toilet paper.

John: About the overcrowding, Lee argued that Florida jail standards say that the cells in the Bubble, based on their size, shouldn't have more than three or four people in them, and that Corporal Wright would have known that and that therefore he was on notice that eight people was too many. And the Eleventh Circuit said, no. Policy manuals and internal guidelines don't cut it. We want a case on point.

> **Judge Marcus**: Is there anything in *Ham*, our case, *Hail*, our case, *Rhodes*, the

> Supreme Court case, clearly establishing that seven or eight would violate the Constitution?

John: There is not. There is a Supreme Court case that says having twice as many inmates in a cell as it's designed for is not unconstitutional. But there's no case that says when precisely overcrowding starts to be unconstitutional. And there still isn't because the Eleventh Circuit declined to consider clearly establishing that or anything else about this case for next time. As for the allegation that the cells were covered in filth, again the court downplayed Lee's claim. Lee alleged that he never saw the mop water changed as orderlies went from cell to cell.

> **Eleventh Circuit**: Testimony alleging that officers would use the same mop bucket for the Bubble's 18 cells—cannot without more detail … create "an objectively unreasonable risk of serious damage to his future health." More importantly for the purposes of this analysis, however, Saunders fails to show that our caselaw has clearly established the unconstitutionality of such a practice.

John: There's no case that says if you're mopping up cell 1, cell 2, cell 3, that you need to change the water at some point before you get to cell 18. But Lee's claim was about more than dirty mop water. It was that cleaning overall was inadequate. The walls and ceilings were never cleaned, and they were covered in feces and mold. An inmate with bloody feet walked on Lee's blanket, and the jail didn't get Lee a clean blanket. After going through all of the allegations individually and finding there's no precedent specifically about each them, the court said well, the Supreme Court does say that if each individual allegation isn't on its own a violation, the combination of a lot of different things could still violate the Constitution if they have a quote

"mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise." Lee argued that the single, identifiable human need that was lacking was basic sanitation. But the majority said no. There was a dissent in the case.

> **Eleventh Circuit dissenting opinion**: The majority opinion downplays the conditions Mr. Saunders faced, describing them as "troubling" and "unpleasant." These adjectives do not accurately describe the gratuitous cruelty Mr. Saunders endured at the Brevard County Jail. … Our Constitution does not turn a blind eye to these types of conditions, and neither should we.

John: The dissenting judge said hey wait a minute -- we do have precedent about a lack of sanitation in jails. In one case, called *Novak*, an inmate was forced to quote "sit in his own feces for an extended period of time." And in another, *Baird*, inmates were never allowed toilet paper and soap. But the majority said those cases were not sufficiently on point. Because sitting in your own waste is worse than conditions in the Bubble. And because the inmates in the Bubble were allowed toilet paper and soap -- with some delay after they asked for it.

> **Eleventh Circuit dissent**: It's true that neither *Baird* nor *Novak* involved the precise circumstances at issue here. … But "[e]xact factual identity with a previously decided case is not required."

John: The dissent said Lee's allegations are egregious enough that *Hope v. Pelzer* should apply. But by a vote of two to one, Corporal Wright got qualified immunity. Lee appealed to the Supreme Court, but in 2019, the Court declined to hear the case. That wasn't the end of Lee's

case. Because Lee did sue one other defendant for whom qualified immunity is not available as a defense. So we'll come back to that on a later episode. But for this episode, we still have one piece of unfinished business. Which is that this fall, for the first time since it handed down the decision in 2002, the Supreme Court breathed a little life back into *Hope v. Pelzer*. That case, *Taylor v. Riojas*, is remarkably like Lee Saunders' case.

Elizabeth Cruikshank: Mr. Taylor was transferred to a psychiatric unit in the Texas prisons theoretically to receive treatment.

John: That is Elizabeth Cruikshank, who was one of Trent Taylor's lawyers.

Elizabeth Cruikshank: He was stripped of all his clothing, and put in a cell that was covered floor to ceiling in the feces of prior residents, including packed into the faucet so he couldn't drink the water. He protested those conditions to the guards who laughed at him and told him he was going to have a long weekend. And then after three days in that cell, Mr. Taylor was transferred to a different cell, which was referred to colloquially throughout the unit as the cold room. He was still naked and was given only a suicide blanket to keep warm. That cell had no furniture at all and had a clogged drain in the floor that was already overflowing with human waste onto the floor where Mr. Taylor had to sleep.

John: And the Fifth Circuit did not downplay those facts.

Tiffany Wright: The Fifth Circuit didn't downplay the severity of the circumstances. They found a constitutional violation.

John: That is Tiffany Wright, who is also Mr. Taylor's lawyer.

Tiffany Wright: What the Fifth Circuit did rather than downplay the severity of what Mr. Taylor went through, was to look for too much factual specificity in terms of what was required to equal a constitutional violation.

Elizabeth Cruikshank: Both the district court and the court of appeals and in Mr. Taylor's case, acknowledged that the defendants basically didn't contest what Mr. Taylor said happened to him.

John: And the Fifth Circuit ruled that going forward, conditions like what Mr. Taylor endured are unconstitutional. But it ruled that his claim couldn't go forward because there were no prior cases precisely on point. But in November 2020 the Supreme Court, in a 2-page opinion, summarily reversed.

Elizabeth Cruikshank: There have only been a handful of instances in history in which the Supreme Court has denied qualified immunity. So just on that ground, it's a significant move. I think reaffirming the *Hope* principle is really important. In the *Hope* case itself, the Court said, look, truly egregious conduct by its nature is unlikely to come up all that often, you're going to have a hard time pointing to a perfectly factually analogous case, because ideally most people aren't doing this kind of thing. But we don't want the most egregious misconduct to escape liability.

John: That said, unsanitary conditions in prison is not that uncommon at all.

Elizabeth Cruikshank: I've been sort of shocked to realize this. There are actually so many cases in which people are incarcerated are kept in shockingly unsanitary conditions.

Tiffany Wright: Until very recently, I had not realized how pervasive this sort of treatment of incarcerated people is. Many, many of the prison condition cases that we see the facts are just really, really egregious. And it's really, really obvious that what happened was not right, and was a violation of the Constitution. And so my hope is that courts will take what the Supreme Court did here and stop this exercise of looking for exact factual specificity.

John: So what might *Taylor* mean going forward? Lower courts now have more leeway not to demand hyper-specific prior cases. Maybe Lee Saunders would have won his case today. But then again, maybe not. In Taylor, the plaintiff was naked and the cell was freezing cold. Lee was only barefoot, and except for a couple days the temperature was fine. Lee had access to a working toilet, and Taylor didn't. Three weeks after *Taylor* came down, the Ninth Circuit in another prison conditions case gave *Taylor* a read and then granted qualified immunity anyway. There, an inmate alleged that prison guards in California make a ton of unnecessary noise at night and that he never gets more than 45 minutes of continuous sleep. The guards are under a court order to observe inmates every 45 minutes to prevent suicides, and the allegation is that the guards are engaging malicious compliance with that order, waking up the inmates on purpose while they are doing their rounds. The Ninth Circuit said, well there's precedent that depriving inmates of sleep by keeping their cells constantly illuminated is unconstitutional and there's precedent that exposing them to constant noise from other inmates is unconstitutional.

But sleep deprivation because of guards who are complying with a court order, that's different. So qualified immunity applies. So *Taylor* is historic. The Supreme Court almost never denies qualified immunity. But the Supreme Court still has a lot of work to do.

Robert McNamara: So the one good thing you can say about qualified immunity is that it's a target rich environment. The Supreme Court is going to keep getting petitions in cases that have just really outrageous facts, but where lower courts feel like they've been constrained and aren't able to provide a remedy. So when the court eventually feels ready to address the doctrine, it's not going to have any shortage of opportunities. Last spring, when the court rejected all of those qualified immunity petitions on its docket, there was a lot of debate over qualified immunity. There were bills pending in Congress considering reforming qualified immunity. So one can imagine the court wanted to see how the legislative fight played out before it weighed in. But in the absence of legislation, the ball remains in the Court's court.

John: That is the state of qualified immunity doctrine today. We are going to come back to qualified immunity and look at where it comes from in a later episode. But before we wrap up this episode, I want to add an addendum to the last episode about Frank Robbins' in Wyoming.

Robert McNamara: In *Wilkie v. Robbins*, the Court goes out of its way to say that a big concern it has with recognizing a *Bivens* cause of action is that it's worried about the floodgates of litigation that that cause of action would open. And for my money, that is the most frustrating argument the Court could possibly have made.

John: If Frank Robbins had won at the Supreme Court and if the court had recognized a *Bivens*

cause of action, the next stage in his lawsuit would been overcoming qualified immunity. As we said, qualified immunity comes up most often in Section 1983 cases against state and local officials. But it applies to all officials. Including federal officials in *Bivens* cases.

Robert McNamara: So when it comes to constitutional actions for damages against federal officials, the Supreme Court is double counting its policy justifications. Assume that there is a lawsuit against a federal official for violating the Constitution, the plaintiff in that lawsuit already has to overcome qualified immunity. And the purpose of qualified immunity is to make sure the floodgates of litigation aren't opened to bad claims, it makes no sense to then also argue that you can't recognize a cause of action in the first place, because the cause of action will open the floodgates. But at a certain point, this turns into just The Princess and the Pea, where we have layer after layer of protections against enforcing the Constitution. And that troubles me. The Constitution is meant to be a bulwark of liberty, it's meant to constrain government power. And these doctrines treat it not like a bulwark, but like a hothouse flower that has to be protected from exposure at all costs. And that just seems to me the opposite of what we have a constitution for. And it seems like a very dangerous attitude to take towards the foundational law of our entire system of government.

John: And that concludes this episode. We'll be back in the new year with a history of qualified immunity. But before we turn to that, we're going to dig into a related history: the origins of Section 1983, which Congress passed in 1871 to destroy the Ku Klux Klan.

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