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QUALIFIED IMMUNITY

THE MISSING VOICE *HERRING V. KEENAN*: THE NARROWING OF THE TENTH CIRCUIT'S QUALIFIED IMMUNITY ANALYSIS

INTRODUCTION

In *Herring v. Keenan*,[1] the Tenth Circuit granted a probation officer qualified immunity after the officer divulged a probationer's HIV positive status to both his employer and to his family.[2] The court held that although a probationer enjoys certain constitutional rights, including a constitutional right to privacy, a probationer's right to privacy regarding his HIV status was not a "clearly established" constitutional right at the time of the disclosure.[3]

Throughout the 1990's, the Tenth Circuit's definition of "clearly established" rights has been controversial. In *Eastwood v. Department of Corrections of the State of Oklahoma*,[4] the Tenth Circuit admitted that its "definitions of what constitutes a clearly established right have been hazy."[5] Specifically, in 1992, the Tenth Circuit drastically changed the nature of its qualified immunity requirements in *Medina v. City & County of Denver*.[6] With suspect justification, the *Medina* court drastically narrowed the definition of what constitutes a "clearly established" right by limiting the range of sources from which a "reasonable official" would be expected to be acquainted with for the purpose of knowing whether a certain right exists. According to *Medina*, for a right to be "clearly established" such that a "reasonable official" would be expected to know of its existence, there must be a United States "Supreme Court decision or Tenth Circuit decision on point, or the clearly established weight of authority from other courts."[7]

From this very narrow conception of what defines a "clearly established" right, the Tenth Circuit slowly broadened its scope to include the holdings in other circuits. In 1997, the Tenth Circuit stated in *Lawmaster v. Ward* [8] that a government official is not free from judgment simply

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1. 218 F.3d 1171 (10th Cir. 2000).
2. *See id.* at 1171-72.
3. *See id.* at 1173.
4. 846 F.2d 627 (10th Cir. 1988).
5. *Id.* at 630.
6. 960 F.2d 1493 (10th Cir. 1992).
7. *Id.* at 1498.
8. 125 F.3d 1341, 1350-51 (10th Cir. 1997) (holding that the Supreme Court need not have ruled the exact conduct at issue unlawful in order for a law to be "clearly established" and that rights

because the Supreme Court has not ruled on a particular form of conduct.[9]

Further, in *Anaya v. Crossroads Managed Care Systems, Inc.*,[10] the Tenth Circuit qualified its *Medina* holding by stating that the purpose of showing that a law is "clearly established" is to assure that an official understands that his conduct violates a right.[11] Thus, the *Anaya* court affirmed *Lawmaster's* broadening of the definition of "clearly established" by redefining and expanding the scope of what a reasonable government official would and should know.[12] The court in *Anaya* held that "the shield of qualified immunity is pierced if in light of pre-existing law, the unlawfulness of the conduct is apparent to the officer."[13]

In a considerable regression in *Herring*, the Tenth Circuit took a stricter stance on what constitutes a "clearly established" right than even *Medina*.[14] By granting the probation officer qualified immunity, the *Herring* court stepped away from *Lawmaster* and *Anaya's* broadening of the definition of what constitutes a "clearly established" right, and required strict analogies between the government officer's conduct and conduct previously deemed unlawful by the Supreme Court or by the Tenth Circuit.[15]

More importantly, the *Herring* court's narrow view did not account for pertinent Supreme Court precedent that clearly established that both prisoners' and probationers' constitutional rights cannot be violated

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cannot be defined too narrowly or else qualified immunity will wrongfully become an "insurmountable obstacle to plaintiffs seeking to vindicate their constitutional rights.").

9. *Id.* at 1350.

10. 195 F.3d 584 (10th Cir. 1999).

11. *Id.* at 594.

12. *Id.* at 594-95 (looking to other circuit precedent, Colorado Supreme Court precedent, and the laws of civil forfeiture to determine whether a right was "clearly established" at the time the official undertook the act in question).

13. *Id.* at 594 (quoting *Lawmaster*, 125 F. 3d at 1350).

14. By holding that a right is "clearly established" when the Supreme Court, Tenth Circuit, or the weight of authority from other courts have previously held the law to be as the plaintiff maintain, the *Herring* court ignored the *Anaya* court's specific emphasis on the "*weight of authority from other courts*" portion of the test and effectively focused only on the Supreme Court and the Tenth Circuit. *See Herring*, 218 F.3d at 1176. Furthermore, the *Herring* court decided to define the right of privacy in a probationer's HIV status very narrowly, thus requiring precise factual correspondence between the case at bar and a case previously ruled upon in the Supreme Court or the Tenth Circuit. *See id.* at 1179.

15. *Id.* at 1178 ("none of the cases discuss the question whether the right to privacy protects a probationer who may be HIV positive from a limited disclosure by his or her probation officer to persons whom the probation officer believed might be affected by their contact with the probationer. The cases, therefore, did not clearly establish such a right in 1993.").

without some justification relating to a legitimate penological or probationary objective.[16]

The first section of Part I of this survey discusses the Supreme Court's treatment of qualified immunity. The second section of Part I analyzes the Tenth Circuit's treatment of the "clearly established" prong of the qualified immunity determination. Part II reviews the Tenth Circuit's apparent backtrack in *Herring* and discusses how the Tenth Circuit's narrow treatment of qualified immunity overlooked Supreme Court and circuit precedent that recognizes the existence of a probationer's constitutional rights,[17] an individual's right to privacy in his or her personal information,[18] and more specifically, an individual's right to privacy concerning his or her medical information.[19] Part III examines the Supreme Court cases that clearly establish the balancing test a court must conduct to determine the constitutionality of a restriction on a probationer's constitutional rights. Part IV comments upon the Supreme Court and circuit cases that "clearly establish" that Keenan's disclosure of Herring's HIV status violated his constitutional right to privacy.[20] Finally, Part V explores the social ramifications of the Tenth Circuit's decision to grant qualified immunity in the highly sensitive right to privacy area. Further, Part V questions the implication of the Tenth Circuit's analysis regarding the creation of new rights in the Tenth Circuit.

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16. Turner v. Safley, 482 U.S. 78 (1987) (holding that a court must determine the "rational connection" between the infringement of a prisoner's constitutional rights and the existence of a legitimate penological goal); Griffin v. Wisconsin, 483 U.S. 868 (1987) (holding that the infringement of a probationer's rights is not "unlimited" and is justified only by a showing of the "special needs" of the probation system).

17. *Griffin*, 483 U.S. at 873-74 (holding that a probationer's retains constitutional rights, but that these rights are limited as compared to an average citizen and that they may be infringed if justified by the "special needs" of the probation system).

18. Whalen v. Roe, 429 U.S. 589, 598-99 (1977) (recognizing that an individual has a right to privacy concerning his or her interest in avoiding disclosure of personal matters and an individuals interest in independently making personal decisions).

19. United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3rd Cir. 1980) (interpreting *Whalen's* dual privacy rights to include an individual's right to privacy in medical records and medical information).

20. *Whalen*, 429 U.S. at 598-99 (recognizing that an individual has a right to privacy concerning his or her interest in avoiding disclosure of personal matters and an individuals interest in independently making personal decisions); *Eastwood*, 846 F.2d at 631 (holding that an individual has a right to privacy that protects him or her from forced disclosure of his or her sexual history); Lankford v. City of Hobart, 27 F.3d 477, 479 (10th Cir. 1994) (quoting *Eastwood*, 846 F.2d at 631 and reiterating that the right to privacy in one's medical information was established in 1990); Harris v. Thigpen, 941 F.2d 1495, 1513-14 (11th Cir. 1991) (recognizing the existence of a constitutional right to privacy and the "significant privacy interest" triggered by an individual's HIV information); *Westinghouse*, 638 F.2d at 577 (interpreting *Whalen's* dual privacy rights to include an individual's right to privacy in medical records and medical information).

I. QUALIFIED IMMUNITY

A. *Causes of Action Against Government Officials—§ 1983 and Bivens*

Qualified immunity arises in situations where a government official violates an individual's constitutional rights. In this situation, the qualified immunity doctrine was developed to strike a balance between an individual's interest in redress and society's interest in efficient government. Individuals injured at the hands of the government have available two avenues of redress. For violations by state or local government officials, the injured party may seek damages pursuant to 42 U.S.C. § 1983.[21] If a federal official violates an individual's rights directly under the Constitution, the injured party may seek redress under the Supreme Court's holding in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[22] In *Bivens*, the Court allowed an individual to state a cause of action directly under the Fourth Amendment.[23] The *Bivens* Court stated that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[24] As a result, *Bivens* stands for the right of an individual to sue a federal officer for a constitutional violation directly under that portion of the constitution that is alleged to be violated.[25]

B. *Qualified Immunity in the Supreme Court—The Harlow Objective Reasonableness Test*

Through §1983 and *Bivens*, an individual is entitled to state a cause of action for virtually any infringement at the hand of a local, state, or federal government actor.[26] Because of qualified immunity, however, the right to state a cause of action by no means guarantees vindication for the vioaltion. In *Harlow v. Fitzgerald*,[27] the Supreme Court defined the justi-

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21. Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (2000).

22. 403 U.S. 388 (1971).

23. *Id.* at 397 ("Having concluded that the petitioner's complaint states a cause of action under the Fourth Amendment, we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment.").

24. *Id.* at 396 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

25. *Id.* at 397.

26. *See supra* notes 21-25 and accompanying text.

27. 457 U.S. 800 (1982).

fications for qualified immunity as a defense against government official liability. According to *Harlow*, qualified immunity for government officials is necessary to strike the proper balance between the need to protect the rights of individual citizens and the "need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[28] According to *Harlow*, the unfettered ability to sue the government carries with it enormous social costs.[29] The Court believed that qualified immunity would be a viable mechanism to reduce the burden on society caused by insubstantial lawsuits.[30]

Prior to *Harlow*, the Court refused to grant qualified immunity where it could be shown that the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . . ."[31] In *Harlow*, the Court decided that the subjective portion of the *Wood* qualified immunity standard was "incompatible" with the stated goal of qualified immunity—to terminate insubstantial lawsuits prior to trial.[32] Whether a government official acted with malicious intent is typically a question of fact to be determined at trial after time-consuming discovery and depositions.[33] As a result, the Court chose to eliminate the subjective element from the qualified immunity standard and stated a new standard, "that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[34] The Court stated:

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge may appropriately determine, not only the currently applicable law, but whether the law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent le-

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28. *Id.* at 807.

29. *Id.* at 814 (discussing such social costs to include the "expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.").

30. *Id.*

31. Wood v. Strickland, 420 U.S. 308, 322 (1975). Prior to *Harlow*, there was a subjective element involved in determining whether an official knew that his conduct violated a "clearly established" right. *Id.*

32. *Harlow*, 457 U.S. at 815-16.

33. *Id.* at 816-17.

34. *Id.* at 818.

> gal developments, nor could be fairly be said to 'know' that the law forbade conduct not previously identified as unlawful.[35]

C. *Defining Harlow's Objective Reasonableness*—Anderson v. Creighton

In *Anderson v. Creighton*,[36] the Supreme Court shed light upon the question of what a reasonable official is to be expected to know. A government official's ability to invoke qualified immunity turns on whether that official's conduct was objectively reasonable "in light of the legal rules that were 'clearly established' at the time it was taken."[37] The Court stated that in order for the goals of qualified immunity to be met, the "clearly established" rule must be defined "in a . . . particularized, and hence more relevant, sense . . . ."[38] The Court stated that if the legal rule was defined generally, "[p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."[39] Most importantly, the *Anderson* Court seemed to address an issue that the *Harlow* Court left silent—how the circumstances under which the current state of the law are to be determined.[40] Instead of delineating a static list of courts upon whose decisions a reasonable government official should be knowledgeable, the *Anderson* Court held:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.[41]

By the *Anderson* court holding that the very act in question need not be deemed previously unlawful broadens the potential sources of legal rights that a reasonable official must be aware. The Court simply required that the right be "apparent" from "pre-existing law," without any further definition of the sources from which a law becomes "apparent."[42] The *Anderson* Court left only the negative assumption that even conduct not previously deemed unlawful can be "clearly established" if "pre-

35. *Id.*
36. 483 U.S. 635 (1987).
37. *Anderson*, 483 U.S. at 639.
38. *Id.* at 640.
39. *Id.* at 639.
40. *Id.* at 640.
41. *Id.* at 640.
42. *Id.*

existing law" makes it sufficiently "apparent" that the conduct is unlawful.[43]

D. *Qualified Immunity in the Tenth Circuit*

In order to show that a government official does not deserve qualified immunity, the plaintiff must prove that (1) a constitutional right exists and was in fact violated, and (2) that the defendant's conduct violated a right that was "clearly established such that a reasonable person in the defendant's position would have known the conduct violated the right."[44] Unlike *Anderson*, the Tenth Circuit in *Medina* and again in *Herring* severely limited the available sources of legal rights that a reasonable official is expected to know.[45] According to *Medina* and *Herring*, to prove that a right was clearly established at the time of the alleged violation, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains."[46]

Between *Medina* and *Herring*, the Tenth Circuit modified its approach to be more in line with *Anderson*.[47] In *Lawmaster*, the Tenth Circuit held, "[q]ualified immunity does not protect official conduct simply because the Supreme Court has never held the exact conduct at issue unlawful."[48] Rather, the shield of qualified immunity is pierced if in light of pre-existing law, the unlawfulness of the conduct is apparent to the officer."[49] Citing *Franz v. Lytle*,[50] the *Anaya* court held that, "[i]n light of this rationale underlying the qualified immunity doctrine, this court has held, for example, that police *did not* enjoy qualified immunity where *there was not a Supreme Court or Tenth Circuit case directly on point*,

43. *Id.*

44. Anaya v. Crossroads Managed Care Sys., Inc., 195 F.3d 584, 594 (10th Cir. 1999).

45. In *Medina*, the court held that in order for a right to be clearly established, "there must be a Supreme Court of Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." Medina v. City & County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992). Between 1992-2000, the Tenth Circuit broadened the scope of their inquiry to recognize the existence of rights in the absence of a Supreme Court or Tenth Circuit decision on point. *See* Lawmaster v. Ward, 125 F.3d 1341, 1350 (10th Cir. 1997). In *Herring*, the Tenth Circuit reverted back to *Medina* in their application of qualified immunity by not recognizing the existence of a right because neither the Supreme Court nor the Tenth Circuit had previously ruled on the specific matter that was the subject of the case. *See* Herring v. Keenan, 218 F.3d 1171, 1176 (10th Cir. 2000).

46. *Medina*, 960 F.2d at 1498; *see also Herring*, 195 F.3d at 1176 (holding that in order to show that a right is "clearly established," there must be a Supreme Court or Tenth Circuit case on point).

47. *See e.g., Lawmaster*, 125 F.3d at 1351 (holding that rights need to be defined with a degree of generality to facilitate a plaintiff's attempt to show that the right was "clearly established"); *Anaya*, 195 F.3d at 594-95 (expanding the range of sources of the "clearly established" inquiry beyond just the Supreme Court and Tenth Circuit).

48. *Lawmaster*, 125 F.3d at 1350.

49. *Id.*

50. 997 F.2d 784, 787-91 (10th Cir. 1993).

and where, in fact, there was some contrary authority . . . from other circuits."[51] (emphasis added)

Likewise, in *Franz*, the Tenth Circuit denied a police officer's claim of qualified immunity based on a search alleged to be in violation of the Fourth Amendment.[52] Despite the fact that no Supreme Court or Tenth Circuit cases existed on point, the court denied qualified immunity "based on the longstanding Fourth Amendment probable cause requirements and the officer's presumed familiarity therewith."[53]

When a government official seeks qualified immunity for an alleged violation of an individual's constitutional rights,[54] a court is typically charged with the duty to employ a balancing test to weigh a government official's need for freedom of action and an individual's constitutionally protected rights; this is especially true when dealing with the rights of prisoners and probationers.[55] The Tenth Circuit has previously ruled on the determination of a "clearly established" right when a constitutional balancing test is required.[56] On one hand, *Medina* stated that when a constitutional deprivation must be determined by a balancing test, a court is less likely to find the law clearly established.[57] Since *Medina*, however, the Tenth Circuit has uniformly held that qualified immunity can be pierced if the officer *should have known* that the conduct at issue and the purported governmental interest the official sought to further would not survive a constitutional balancing test.[58]

E. *Tenth Circuit decisions*

From 1992 through 2000, the Tenth Circuit has taken a circuitous route to define the requirements of qualified immunity.[59] From *Medina* to

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51. *Lawmaster*, 125 F.3d at 594.

52. *Franz*, 997 F.2d at 784.

53. *Id.* at 787-91.

54. As opposed to an individual's civil rights protected by 14 U.S.C. § 1983.

55. *See e.g.* Turner v. Safley, 482 U.S. 78, 87 (1987) (holding that a court must determine the "rational connection" between the infringement of a prisoner's constitutional rights and the existence of a legitimate penological goal); Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987) (holding that the infringement of a probationer's rights is not "unlimited" and is justified only by a showing of the "special needs" of the probation system).

56. *See* Patrick v. Miller, 953 F.2d 1240, 1249 (10th Cir. 1992) (claiming that qualified immunity will be abrogated if it was sufficiently clear that Defendants should have known the [governmental] interest would not survive a balancing inquiry.); *see also* Prager v. LaFaver, 180 F.3d 1185, 1191-92 (10th Cir. 1999) (discussing that the balance in favor of plaintiff should have been anticipated by officials and thus their qualified immunity was abrogated); *see also Medina*, 960 F.2d at 1498 (stating that "[c]onduct may be so egregious that a reasonable person would know it to be unconstitutional even though it is judged by a balancing test.").

57. *See Medina*, 960 F.2d at 1498.

58. *See infra* note 56.

59. The Tenth Circuit has gone full circle in defining the scope of sources applicable to the determination of a "clearly established" right. *See* discussion *infra* pp. 13-29.

Herring, consistency has eluded the Tenth Circuit in its attempt to "clearly establish" what constitutes a "clearly established" right. Before analyzing Medina, however, it is first important to discuss *Stewart v. Donges*,[60] the unsuspecting root of the Tenth Circuit's chaotic qualified immunity jurisprudence.

1. *Stewart v. Donges*

In *Stewart*, the plaintiff brought suit under 42 U.S.C. § 1983 against a police officer for allegedly violating his rights under the Fourth and Fourteenth Amendments during the defendant's arrest of the plaintiff for larceny.[61] The plaintiff, Stewart, accused the officer of making "material misrepresentations and omissions" on the affidavit that supported a warrant for the plaintiff's arrest.[62] In response, the defendant officer claimed that he was entitled to qualified immunity from suit because it was not "clearly established" at the time of the alleged conduct that making such omissions would violate that plaintiff's rights under the Fourth and Fourteenth Amendments.[63]

The *Stewart* court noted that the Supreme Court had previously found that a police officer violates an individual's Fourth Amendment rights when, in submitting an affidavit, knowingly makes a false statement or makes a false statement in "reckless disregard of the truth."[64] The *Stewart* court stated, however, that the Supreme Court failed to mention whether this right extended to showings that a police officer deliberately or recklessly omitted material information.[65] Despite the Supreme Court's silence on the issue, the *Stewart* court looked to the rulings of the other circuits in coming to the determination that the right did extend to omissions, thereby holding that the right was "clearly established" at the time of the conduct at bar.[66] In a side note, the court made the following statement:

> Our conclusion that the law was 'clearly established' does not necessarily imply that it was frivolous for defendant to argue otherwise in his interlocutory appeal. As long as there was no controlling Supreme Court or Tenth Circuit precedent at the time and it required an extension of the holding in *Franks* to establish a duty of the defendant not to withhold material information from the search warrant affidavit, we cannot necessarily say that an appeal arguing that the law was

60. 915 F.2d 572 (10th Cir. 1990).
61. *Id.* at 573.
62. *Id.*
63. *Id.* at 573, 581.
64. *Id.* at 582 (referring to Franks v. Delaware, 438 U.S. 154 (1978)).
65. *Id.*
66. *Id.* at 582-83.

> therefore not clearly established was 'frivolous," a 'sham,' or 'wholly without merit.'[67]

In this statement, the *Stewart* court is simply noting situations where it might be deemed "frivolous" for a defendant to claim that a law is not "clearly established." If there is "*controlling Supreme Court or Tenth Circuit precedent at the time*"[68] (emphasis added), then it might be "frivolous" for a defendant to attempt to claim that the law is not "clearly established." As discussed below, the court in *Medina v. City and County of Denver*,[69] extended this limited statement beyond its intended boundaries by turning it into the determinative test of "clearly established" rights.[70]

2. *Medina v. City and County of Denver*

In *Medina*, the Tenth Circuit announced a rule that drastically altered the way the court handled qualified immunity cases.[71] In *Medina*, the plaintiff was hit while riding his bicycle by a stolen Cadillac engaged in a high-speed chase with the Denver Police Department.[72] The district court found that the plaintiff failed to state a claim under 42 U.S.C. § 1983[73] because he could not produce enough evidence to show that the Denver police "maintained a policy or course of conduct authorizing or condoning reckless, high speed chases that was deliberately indifferent to the rights of innocent bystanders."[74] The Tenth Circuit rejected the district court's dismissal of the claim on these grounds and instead found that the officers were entitled to qualified immunity.[75] In its review, the Tenth Circuit court stated that the police officers were entitled to qualified immunity because it was not "clearly established" at the time of the accident that reckless behavior could trigger § 1983 liability, nor was it apparent that police officers could be liable for injuries caused indirectly.[76]

The *Medina* court held that in order for a right to be clearly established, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts

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67. *Id.* at 583 n.14.

68. *Id.*

69. 960 F.2d 1493 (10th Cir. 1992).

70. *See id.* at 1498 (stating that "[o]rdinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.").

71. *See Medina*, 960 F.2d at 1498 (turning a single criterion from *Stewart v. Donges* for determining whether a right is "clearly established" into the single determinative test).

72. *Id.* at 1494.

73. *See infra* note 21.

74. *Medina*, 960 F.2d at 1494.

75. *Id.*

76. *Id.*

must have found the law to be as the plaintiff maintains."[77] In stating this new proposition, the *Medina* court cited *Stewart v. Donges*,[78] to justify stepping into new qualified immunity territory. The court, however, failed to explain how it made the leap from the holding in *Stewart* to its unprecedented holding in *Medina*.[79] Commentators believe that the *Medina* court overstepped its bounds by turning *Stewart's* statement intended to show when a defendant's claim is "frivolous"[80] into the affirmative "clearly established" requirement.[81] One commentator wrote:

> Citing *Stewart* for the proposition that a United States Supreme Court or Tenth Circuit opinion is necessary, rather than sufficient, for clear establishment is a classic example of fallacious converse logic in *Medina*. *Stewart* states that such authority is a sufficient condition to clearly establish a duty—not that it is a necessary condition. [citation omitted] Moreover, *Stewart* discussed not what constituted clearly established law, but what constituted a frivolous argument regarding clearly established law.[82]

Literally speaking, the *Medina* court placed a very strict limitation on the qualified immunity analysis; a limitation which effectively stood for the proposition that a law is not clearly established unless there is Supreme Court or Tenth Circuit case, or the weight of authority of other circuits on point. The *Medina* court merely paid lip service to the prior standard, that the "alleged unlawfulness must be apparent in light of pre-existing law . . . [the] contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[83] *Medina* redefined the "reasonable official" aspect of the analysis by drastically narrowing the scope of what a "reasonable official" is expected to know.[84] In a sweeping manner, *Medina* held that that if there is no Supreme Court of Tenth Circuit case on point, a "reasonable official" is not expected to possess knowledge of the contours of the right.[85] There are many scenarios where a government official knows that certain con-

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77. *Id.* at 1498.

78. 915 F.2d at 582-83 (stating that "[o]ur conclusion that the law was 'clearly established' does not necessarily imply that it was frivolous for the defendant to argue otherwise in his interlocutory appeal. As long as there was not controlling Supreme Court or Tenth Circuit precedent at the time and it required an extension of the holding in *Franks* to establish a duty on behalf of the defendant . . . we cannot necessarily say that an appeal arguing that the law was therefore not clearly established was 'frivolous.'").

79. In relying on *Stewart* to support its holding, the *Medina* court takes *Stewart* totally out of context and transforms a single factor in determining whether a law is "clearly established" into the definitive test for the Tenth Circuit. *Medina*, 960 F.2d at 1498.

80. *Stewart*, 915 F.2d at 583; *see also* discussion *infra* Part I.E.1.

81. Heather Meeker, *Article: "Clearly Established" Law in Qualified Immunity Analysis for Civil Rights Actions in the Tenth Circuit*, 35 WASHBURN L.J. 79 (1995).

82. *Id.* at 113; *see also Stewart*, 915 F.2d at 583 (citation omitted).

83. *Medina*, 960 F.2d at 1497.

84. *Id.* at 1498.

85. *Id.*

duct would violate another's constitutional rights where that particular conduct has not been the subject of a Supreme Court or Tenth Circuit case. In the face of the new *Medina* standard, however, these scenarios are kept out of the court's view.

3. *Lawmaster v. Ward*

The Tenth Circuit's decision in *Lawmaster v. Ward*[86] is a prime example of the court's disapproval of the narrow qualified immunity requirements set forth in *Medina*. While many of the post-*Medina* qualified immunity decisions mention *Medina's* main holding, they seem to treat it not as the end-all-be-all requirement, but as one of the many factors of consideration.[87]

In *Lawmaster*, the plaintiff sued several agents from the United States Bureau of Alcohol, Tobacco and Firearms for their conduct during a search of his home.[88] After a confidential informant advised the agents that the plaintiff owned an illegal automatic machine gun, the agents submitted an affidavit and received a warrant to search the plaintiff's home.[89] The plaintiff alleged that the agents ransacked his home, and conducted their search in an unreasonable manner in violation of his Fourth and Fifth Amendment rights.[90] Specifically, the plaintiff claimed that he came home to find one of his pistols "submerged in the dog's water bowl" and cigarette ashes "mixed in with the bedding which had been stripped from the bed and left in a pile on the floor."[91] The District Court granted the agents qualified immunity from suit and consequently granted them summary judgment.[92] The *Lawmaster* court reversed the district court's decision to grant qualified immunity on the Fourth Amendment claim of unreasonable conduct during the search of the plaintiff's home.[93] The court first discussed the rationale behind qualified immunity:

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86. 125 F.3d 1341

87. The post-*Medina* decisions seem to lend credence to the claim that *Medina* misconstrued the holding in *Stewart v. Donges* by turning a single factor of consideration into the circuit's determinative test. *Lawmaster* emphasizes that a law may be "clearly established" even if neither the Supreme Court nor the Tenth Circuit had previously ruled on the particular action. *See Lawmaster*, 125 F.3d at 1350. Further, in *Anaya*, the Tenth Circuit analyzes several sources besides Supreme Court and Tenth Circuit cases in their determination of whether a right is "clearly established." *See* Anaya v. Crossroads Managed Care Sys., Inc., 195 F.3d 584, 594-95 (10th Cir. 1999).

88. *Lawmaster*, 125 F.3d at 1344.

89. *Id.*

90. *Id.* at 1345-46.

91. *Id.* at 1346.

92. *Id.*

93. *Id.* at 1351.

> Qualified immunity serves the public by striking a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions. Qualified immunity mitigates costs that society as a whole otherwise bear such as the expenses of litigation, the diversion of official energy from important public issues, and the deterrence of talented citizens from accepting public office.[94]

In defining a "clearly established" right, the *Lawmaster* court stated a new and broader way to look at the "clearly established" requirement.[95] The new guideline did not necessarily broaden *Medina's* "Supreme Court and Tenth Circuit" limitation,[96] but it did expand upon the range of Supreme Court, Tenth Circuit and other circuit cases the Tenth Circuit was willing to consider in its determination of whether the right was "clearly established."[97] The court stated:

> However, where the reasonableness inquiry necessarily turns on the cases' particular facts such that the reasonableness determination must be made on an ad hoc basis, we must allow some degree of generality in the contours of the constitutional right at issue. We would be placing an impracticable burden on the plaintiff if we required them to cite to a factually identical case before determining they showed the law was 'clearly established' and cleared the qualified immunity hurdle . . . [w]hile qualified immunity was meant to protect officials performing discretionary duties, it should not present an insurmountable obstacle to plaintiffs seeking to vindicate their constitutional rights.[98]

In line with this rationale, the *Lawmaster* court did not grant the agents qualified immunity even though there were no decisions expressly prohibiting the conduct at issue.[99] The court ruled that the general principles of the Fourth Amendment; the preservation of the sanctity of the home and that while conducting searches, officers may only engage in conduct that reasonably furthers the purpose of the search, were in fact clearly established.[100] Unlike *Medina*, *Lawmaster* stood for the principal that "[q]ualified immunity does not protect official conduct simply because the Supreme Court has never held the exact conduct at issue un-

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94. *Id.* at 1347.

95. *Id.* at 1351 (discussing that in order for a plaintiff to have any chance to overcome the officer's qualified immunity defense, the right in question must be defined with "some degree of generality," so that the plaintiff does not face an "insurmountable burden" proving the right to be "clearly established").

96. *Medina*, 960 F.2d at 1498.

97. *Lawmaster*, 125 F.3d at 1351.

98. *Id.* at 1351.

99. *Id.*

100. *Id.* Generally, the Fourth Amendment grants individuals the right to be "free from unreasonable searches and seizures." *Id.* at 1347.

lawful."[101] Rather, the court retreated from *Medina's* narrow survey of Supreme Court and Tenth Circuit cases in favor of a broader test of what constitutes "clearly established."[102] The court stated, "the test here is whether the law is sufficiently well-defined such that a 'reasonable official would understand that what he is doing violates that right.'"[103]

4. *Anaya v. Crossroads Managed Care Systems, Inc.*[104]

In 1999, the Tenth Circuit in *Anaya* reiterated the holding of *Medina*, but did so with new emphasis on the second prong of *Medina's* analysis.[105] The court held: "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, *or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.*"[106] The *Anaya* court's analysis of the qualified immunity issue at bar clearly demonstrated its rationale behind adding italics to the *Medina* test.[107] As opposed to *Medina*, the *Anaya* court sought to re-formulate the definition of the "clearly established" right requirement to encompass rights beyond the limits of the Supreme Court and the Tenth Circuit.[108] First, the *Anaya* court mentioned that the Tenth Circuit had, on prior occasion, ruled that a right was "clearly established" where the Supreme Court and the Tenth Circuit had never before ruled on the issue.[109] Second, the court surveyed the decisions of six circuit courts that had ruled on the issue.[110] Third, the court noted that the Colorado Supreme Court had specifically ruled on the issue at hand.[111] Finally, the court thought it was also instructive to look to the law of civil forfeitures in determining whether the right was "clearly established" at the time of the conduct at issue.[112] In coming to

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101. *Id.* at 1350.

102. *Id.* at 1351.

103. *Id.* at 1351.

104. 195 F.3d 584 (10th Cir. 1999).

105. *Id.* at 594 (quoting *Medina*, 960 F.2d at 1498).

106. *Id.* (citing the exact holding of *Medina*, but adding italics to the entire second half of the "clearly established" law requirement).

107. After specifically adding emphasis to the second half of the *Medina* test, the *Anaya* court found that the right to be free from civil seizures without probable cause "to believe that a person was a danger to himself or others" was "clearly established" by the combination of other circuit precedent, Colorado Supreme Court precedent, and the law of civil forfeitures. *Id.* at 594-95. Looking at the *Anaya* court's analysis, it is clear that they intended to broaden the range of sources from which a court may find a right to be "clearly established."

108. *Id.* at 594-95.

109. *Id.* at 594 (discussing the Tenth Circuit's ruling in *Franz v. Lytle* that Supreme Court or Tenth Circuit precedent are not absolute preconditions to a finding that a right is "clearly established).

110. *Id.*

111. *Id.* at 595.

112. *Id.*

the decision that the right at issue was "clearly established," the *Anaya* court held:

> *In light of the clear authority* that existed prior to 1995, and *in light of the laws of seizure the police officers should be expected to know*, we hold it was clearly established in 1995 that civil seizures without probable cause to believe a person was a danger to himself or others violated the Fourth Amendment. The defendants in their individual capacities are not protected by qualified immunity.[113]

The court's analysis clearly displays their intention to broaden the scope of what a "reasonable official" must know in order to properly claim the protection of qualified immunity.[114] In contrast, under a *Medina* analysis, if a particular right was not specifically delineated by a Supreme Court or Tenth Circuit case, whether or not a reasonable official knew or should have known that his conduct violated a particular right was immaterial.[115] Despite *Medina's* assertion that "the clearly established weight of authority from other courts"[116] can be determinative of a law's "clearly established" status, commentators disagree with the reality of this contention.[117] The clear intent of the *Anaya* court was to redefine and broaden the scope of the Tenth Circuit's "clearly established" inquiry.[118] By italicizing the second portion of the *Medina* requirement,[119] and by reasserting a broader sense of the "reasonable official" test,[120] the *Anaya* court followed *Lawmaster* and continued to broaden what constitutes a "reasonable official" in the Tenth Circuit's qualified immunity jurisprudence.

5. *Prager v. LaFaver*[121]

In 1999, the Tenth Circuit supported a somewhat different "clearly established" standard for rights found under a constitutional balancing test.[122] For example, if a plaintiff makes a claim that a government official violated his First Amendment right of free speech, a court will en-

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113. *Id.* at 595 (emphasis added).
114. *Id.* at 594-95.
115. *Medina*, 960 F.2d at 1498.
116. *Id.*
117. *See e.g.* Meeker, *supra* note 24, at 116 (stating "[f]inally, there is the law of other circuits. The pivotal question is what type and what amount of extra-circuit authority, under the rubric of *Medina*, comprise clearly established law. The answer to this question is at best complex and at worst nonexistent. The Tenth Circuit has been quite inconsistent in its treatment of extra-judicial authority to clearly establish rights.").
118. *Anaya*, 195 F.3d 594-95.
119. *Id.* at 594.
120. *Id.* at 594-95.
121. 180 F.3d 1185 (10th Cir. 1999).
122. *Id.* at 1191-92.

gage in a *Pickering*[123] balancing test to determine whether his right was abridged.[124] Likewise, if a prisoner alleges that a government official deprived him of his constitutional rights while incarcerated, the court will engage in "rational connection" balancing test to determine whether the deprivation was justified by a legitimate and neutral penological objective.[125] Because rights that find their definition in constitutional balancing inquiries are, by their nature, more difficult to clearly foresee, *Prager* recognized a need to allow more leeway to government officials in this setting.[126] The court stated, "[n]evertheless, 'to the extent that courts in analogous (but not necessarily factually identical) cases have struck the necessary balance, government officials will be deemed 'on notice.'"[127] The Tenth Circuit produced similar holdings in several other cases throughout the 1990's.[128]

II. *HERRING V. KEENAN*: BACK TO MEDINA AND BEYOND

In September 2000, the Tenth Circuit's decision in *Herring v. Keenan*[129] ignored the recent trend of *Lawmaster* and *Anaya* and reinvigorated the narrowness of *Medina*.[130] The decision arguably went a step beyond *Medina* in its narrow approach to the "clearly established" right inquiry and turned its back on the qualified immunity doctrine created by the circuit since *Medina*.[131]

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123. Pickering v. Bd. of Educ. of Township High School Dist. 205, 391 U.S. 563, 569 (1968) (creating a balancing test for the determination of a public employee's First Amendment rights).

124. In *Pickering*, in determining whether the state had violated the teacher's First Amendment right to free speech, the Court balanced the interests of the state as an employer promoting the efficiency of "the public services that it performs through its employees" and the interests of the teacher as a citizen commenting upon matters of public concern. *See id.* at 568.

125. Turner v. Safley, 482 U.S. 78, 87 (1987) (holding that a court must determine the "reasonable relation" between the infringement of a prisoner's constitutional rights and the existence of a legitimate penological goal).

126. *Prager*, 180 F.3d at 1191 (stating the qualified immunity test, where there is a balancing test involved, requires that a government official know where courts have "struck the necessary balance" in cases that are factually analogous, but not requiring strict factual adherence).

127. *Id.* at 1191-92.

128. *Medina*, 960 F.2d at 1498 (holding that "[c]onduct may be so egregious that a reasonable person would know it to be unconstitutional even though it is judged by a balancing test."); *see also See* Patrick v. Miller, 953 F.2d 1240, 1246, 1249 (10th Cir. 1992) (holding that qualified immunity will be abrogated if it was "sufficiently clear that Defendants should have known the [governmental] interest would not survive a balancing inquiry.").

129. 218 F.3d 1171 (10th Cir. 2000).

130. By defining the right in question with utter particularity, *Herring* ignored *Lawmaster's* notion that rights need to be defined with a degree of generality. *Id.* at 1179. Furthermore, by focusing only upon Supreme Court and Tenth Circuit cases, *Herring* disregarded *Anaya's* analysis that included sources outside the Supreme Court and the Tenth Circuit. *See id.* at 1176.

131. *See infra* note 119.

A. *Facts*

In September of 1993, Mr. Herring began serving probation under the supervision of probation officer Ms. Keenan following his conviction for driving while intoxicated on federal property.[132] In December, in accordance with the terms of his probation, Herring met with Keenan. During the meeting, Herring voluntarily told Keenan that he had been tested for HIV and that he suspected that he would test positive.[133] It is undisputed that Herring had not received the results of the test prior to this meeting nor did he at any time after the meeting inform Keenan of the final results of the test.[134] Additionally, Herring did not authorize Keenan to disclose this information.[135]

Without knowledge of the results of the test and without any authorization to disclose any such information, Keenan immediately informed Herring's employer, the manager of the 50's Café at the Lowry Air Force Base Recreation Center, that Herring was *in fact* HIV positive.[136] (emphasis added) Further, Keenan advised the manager to fire Herring from his position as a waiter.[137] Directly thereafter, Keenan telephoned Herring's sister and informed her that her brother *in fact* tested positive for HIV.[138] On January 10, 1994, Keenan informed the acting director of the 50's Café that Herring was HIV positive.[139] She further told the acting director that Herring should be fired "because she believed that Colorado law prohibited a person who has tested as HIV positive from working in a food preparation position."[140] Herring's complaint, amongst other allegations, charged that Keenan's unauthorized disclosure of his HIV status was in direct violation of her own internal probation department guidelines.[141] The Guide to Judiciary Policies and Procedures provides:

> Officers should not disclose HIV infection or illness information to the offender's family members, parents, or sexual/drug partners without the offender's informed, written consent. If the offender will not consent to disclosure and State law permits non-consensual disclosure to public health officials, the officer should notify such officials ... Officers should seek written, informed consent of the offender before

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132. *Id.* at 1173.
133. *See Herring*, 218 F.3d at 1173.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Herring*, 218 F.3d at 1173.
140. *Id.*
141. *Id* ("The complaint also alleges that: Defendants' conduct was in blatant violation of Volume X, Sec. 16 D and F of the Guide to Judiciary Policies and Procedures which provides that probation officers 'should not disclose HIV infection or illness information to the offender's family members, parents, or sexual/drug partners without the offender's informed, written consent' and that 'notification of other third parties is the responsibility of the exposed person.'").

> making further disclosure when information concerning a individual's HIV antibody test ... is disclosed to the officer by a third party or by the offender.[142]

B. *Disposition*

Herring brought suit in the district court alleging that Keenan violated his federal constitutional right to privacy and his statutory right to non-disclosure of a record pursuant to the Privacy Act, 5 U.S.C. § 552(b),[143] by divulging to his employer and sister his alleged HIV positive status.[144] Herring died seven months after filing the initial complaint.[145] Herring's sister took the role of her brother's personal representative and subsequently filed a second amended complaint alleging that Keenan's disclosures "violated Herring's constitutional right to privacy, constitutes cruel and unusual punishment in violation of the Eighth Amendment, and deprived Herring of his liberty without due process of law in violation of the Fifth Amendment."[146] Keenan filed a motion to dismiss the second amended complaint alleging that she was entitled to qualified immunity.[147] The District Court submitted Keenan's motion to a magistrate judge for an opinion whether Keenan's conduct had violated "clearly established" law.[148] The magistrate judge recommended that Keenan's motion to dismiss be granted.[149] The magistrate judge based his decision on the opinion that the "contours of the right of privacy" of a probationer's HIV status were not "sufficiently clear" because "[n]o decision of the United States Supreme Court or the United States Court of Appeals for the Tenth Circuit ha[d] specifically considered the parameters of the constitutional right to privacy in the context of the limited governmental disclosure of one's HIV status."[150] Despite the magistrate judge's recommendation, the District Court rejected Keenan's motion to dismiss.[151] The District Court ruled that Keenan's actions were clearly not supported by a compelling governmental interest due to the fact that her actions directly violated the written guidelines for probation

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142. UNITED STATES JUDICIAL CONFERENCE COMMITTEE ON CRIMINAL LAW AND PROBATION ADMINISTRATION, GUIDE TO JUDICIARY POLICIES AND PROCEDURES, vol. X, ch. IV, § 16, D, F (requiring that probation officers receive written consent prior to any disclosure of a probationer's HIV status).

143. Section 552(b)(6) disallows the disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," Privacy Act, 5 U.S.C. § 552(b)(6) (2000).

144. *Herring*, 218 F.3d at 1173.

145. *Id.*

146. *Id.* at 1173-74.

147. *Id.* at 1174.

148. *Id.*

149. *Id.*

150. *Herring*, 218 F.3d at 1174.

151. *Id.*

officers.[152] Moreover, relying on two prior Tenth Circuit opinions, the District Court held that "the contours of the constitutional right to privacy as it relates to dissemination of one's actual or potential HIV status were clearly established in late 1993."[153] The Tenth Circuit agreed with the District Court that there is a constitutional right to privacy that protects an individual from the nonconsensual disclosure of information pertaining to a person's health.[154] The court, however, reversed the District Court's denial of Keenan's qualified immunity claim.[155] The court claimed that the right to privacy of a probationer regarding information concerning his or her medical condition was not "clearly established" at the time of Keenan's disclosure in 1993.[156]

The court started its inquiry by recognizing that the Supreme Court has repeatedly held that there exists a constitutional right to privacy regarding the non-disclosure of personal information.[157] The court also cited *Eastwood*, the decision relied upon by the District Court in its determination that the probationer's right to privacy in his HIV status was "clearly established," for the more limited proposition that a constitutional right to privacy in the non-disclosure of personal information exists.[158] After determining that a constitutional right to privacy exists,[159] the court then turned its attention to the "clearly established" requirement of the qualified immunity claim.[160]

The court proceeded to state that the "plaintiff need not demonstrate that the specific conduct in this case had been previously held unlawful, so long as the unlawfulness was 'apparent.'"[161] This statement, however,

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152. *Id.*

153. *Id.* The District Court held that the Tenth Circuit had, prior to 1993, established that an individual's constitutional right to privacy is "implicated when an individual is forced to disclose information regarding personal sexual matters." Eastwood v. Dep't of Corrections of the State of Oklahoma, 846 F.2d 627, 631 (10th Cir. 1988). The District court further found that that Tenth Circuit had recognized that employee medical records, which may contain intimate facts are entitled to privacy protection. Lankford v. City of Hobart, 27 F.3d 477, 479 (10th Cir. 1994).

154. *Herring*, 218 F.3d at 1175.

155. *Id.* at 1180-81.

156. *Id.*

157. *Id.* at 1175 (citing the Supreme Court's decision in *Whalen v. Roe*, 429 U.S. 589 (1977), as establishing two rights of privacy. First, an individual's interest in avoiding disclosure of personal matters, and second, the interest in being independent when making certain kinds of personal decisions).

158. *Id.* (limiting the holding in Eastwood to a general right to privacy in the non-disclosure of personal information).

159. *Id.* (stating that "[t]his circuit, however, has repeatedly interpreted the Supreme Court's decision in *Whalen v. Roe* as creating a right to privacy in the non-disclosure of personal information.").

160. *Id.* at 1175-76.

161. *Id.* at 1176.

was not in accordance with the standard the court applied.[162] In the very next sentence, the *Herring* court cited the holding in *Anaya*, without any reference to the special emphasis the *Anaya* court placed on the "proposition is supported by the weight of authority from other courts"[163] segment of the test.[164] In effect, the *Herring* court disregarded the intention of the *Anaya* holding and reverted back to *Medina*. Furthermore, the *Herring* court ignored its own statement in which they purported that factual adherence to a Supreme Court or Tenth Circuit decision was not a necessary precondition to qualified immunity.[165] While stating that "some but not precise factual correspondence" is required for a right to be clearly established, the court went on to require strict factual adherence. The court stated:

> Thus, while *Eastwood*, *Lankford*, and *Mangels* indicate that under some circumstances, a release of information regarding a person by a government officer may violate a constitutionally protected right to privacy, *none of the cases discuss the question whether the right to privacy protects a probationer who may be HIV positive from a limited disclosure by his or her probation officer to persons whom the probation officer believed might be affected by their contact with the probationer.* The cases, therefore, did not clearly establish such a right in 1993.[166]

In *Anderson v. Creighton*,[167] the Supreme Court required that the right being questioned be defined with some degree of particularity so that its' contours are clear enough that a "reasonable official would understand that what he is doing violates that right."[168] In *Lawmaster v. Ward*,[169] however, the Tenth Circuit limited necessary the degree of particularity.[170] The court in *Lawmaster* held:

> However, where the reasonableness inquiry necessarily turns on the cases' particular facts such that the reasonableness determination must be made on an ad hoc basis, we must allow some degree of generality in the contours of the constitutional right at issue. We would be placing an impracticable burden on plaintiffs if we required them to cite to a factually identical case before determining they showed the law was 'clearly established' and cleared the qualified immunity

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162. *See infra*, note 157. The *Anaya* court mentioned that the specific conduct at issue need not be previously deemed unlawful but proceeded to search amongst the Supreme Court and the Tenth Circuit for cases factually identical to the case at bar.

163. *Anaya*, 195 F.3d at 594.

164. *Herring*, 218 F.3d at 1176 (placing the second half of the qualified immunity in italics to emphasize that the inquiry needs to extend beyond just the Supreme Court and the Tenth Circuit).

165. *Id.* at 1176.

166. *Id.* at 1178-9 (emphasis added).

167. 483 U.S. 635 (1987).

168. *Id.* at 639.

169. 125 F.3d 1341 (10th Cir. 1997).

170. *Id.* at 1351.

> hurdle . . . While qualified immunity was meant to protect officials performing discretionary duties, it should not present an insurmountable obstacle to plaintiffs seeking to vindicate their constitutional rights.[171]

If a plaintiff were required to show that the exact factual scenario had previously been held unlawful to defeat the defendant's qualified immunity defense, *Harlow's* balance[172] would be summarily defeated. For example, *Anderson* required a plaintiff to state the right with more particularity than "the defendant violated my 14th Amendment Due Process rights,"[173] while *Harlow* and *Lawmaster* emphasize a plaintiff's need to vindicate constitutional violations and a plaintiff's inability to do so if rights are defined too narrowly.[174] In *Herring*, the Tenth Circuit required precise factual correspondence between the right alleged to be violated and a right that had previously been judicially vindicated.[175] In the process, *Herring* violated its own precedent in *Lawmaster*[176] and severely disregarded *Harlow's* balancing strictures.[177] In essence, the court held that because the Supreme Court and the Tenth Circuit have not specifically ruled on this precise factual scenario, the right was not clearly established.[178] Even though the Supreme Court, the Tenth Circuit, and the weight of authority from other courts clearly indicated that a government official's public release of personal information regarding a person may violate a constitutionally protected right to privacy, the court failed to classify the right as "clearly established" because the cases did not include the specific factual combination of probationer, probation officer, and HIV positive status.[179]

III. *TURNER V. SAFLEY*[180] AND *GRIFFIN V. WISCONSIN*:[181] THE RIGHT CLEARLY ESTABLISHED

The United States Supreme Court, in *Turner v. Safley* established the rule that the charged government official must show that the infringement of a prisoner's constitutional right is "reasonably related" to a

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171. *Id.*

172. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1981) (holding that the rationale behind the qualified immunity doctrine is striking a balance between a citizen's interest in vindicating violations of his or her constitutional rights and the government's interest in effective and efficient governance).

173. *Anderson*, 483 U.S. at 639.

174. *Harlow*, 457 U.S. at 814; *see also Lawmaster*, 125 F.3d at 1351.

175. *Herring*, 218 F.3d at 1178-79.

176. Lawmaster v. Ward, 125 F.3d 1341, 1350-51 (10th Cir. 1997).

177. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

178. *See infra*, note 157.

179. *Id.*

180. 482 U.S. 78 (1987).

181. 483 U.S. 868 (1987).

legitimate governmental objective.[182] In *Turner*, the Supreme Court identified several factors applied in the balancing test to determine the relatedness of the infringement and the government's objective.[183] The factors in the penal system are:

> (a) whether there is a 'valid, rational connection' between the regulation and a legitimate government interest put forward to justify it; (b) whether there are alternative means to exercising the asserted constitutional rights that remain open to the inmates; (c) whether and the extent to which accommodation of the asserted right will have an impact on prison staff, inmates and the allocation of prison resources generally; and (d) whether the regulation represents an 'exaggerated response' to prison concerns.[184]

Before turning to the Supreme Court's treatment of the probation system in *Griffin v. Wisconsin*,[185] it is important to note the ramifications of its determination of a prisoner's constitutional rights in *Turner*. In *Griffin*, the Supreme Court stated that "probation is simply one point (or, more accurately, one set of points) on a continuum of possible punishments ranging from solitary confinement . . . to mandatory community service."[186] While *Griffin* does not explicitly delineate a balancing test for the deprivation of a probationer's constitutional rights akin to the test set forth in *Turner*,[187] it is only logical to assume that a probationer's constitutional rights are *less restricted* than a prisoner's. If *Turner* holds that a prisoner's constitutional rights cannot be infringed without a showing that the infringement is "reasonably related" to a legitimate penological goal,[188] it is safe to assume that an infringement of a probationer's constitutional rights must *at least* be justified by a showing that the infringement "reasonably related" to a legitimate probationary goal. On *Griffin's* continuum,[189] probation is one step removed from prison, thus it is logically necessary that a probationer's constitutional rights are less restricted than a prisoner's. Supporting this rationale, in her dissenting opinion in *Herring*, Judge Seymour took it as "clearly established" that *Griffin* stands for the proposition that "probationers retain a right to

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182. *Turner*, 482 U.S. at 78-9 (requiring that an infringement of a prisoner's constitutional rights be "reasonably related to legitimate penological interests.").

183. *Turner*, 482 U.S. at 89-91.

184. *Id.*

185. 483 U.S. 868 (1987).

186. *Id.* at 874.

187. *Id.* ("We have recently held that prison regulations allegedly infringing constitutional rights are themselves constitutional as long as they are 'reasonably related to legitimate penological interests.' We have no occasion in this case to decide whether, as a general matter, that test applies to probation regulations as well.").

188. *Turner*, 482 U.S. at 89-91.

189. *Griffin*, 483 U.S. at 874.

privacy under the Constitution which is violated where the State impinges upon that right without a legitimate, governmental purpose."[190]

Herring, nevertheless, failed to make a single mention of *Turner's* "reasonable relation" requirement.[191] Moreover, *Herring* failed to analyze the logical and necessary connection between *Turner* and *Griffin*—if prisoners are protected by "X" (requiring that an infringement be "reasonably related" to a legitimate penological goal[192]) then probationers are logically protected by "X+1" because probation is a less restrictive step in the criminal justice process. While *Griffin* refrained from delineating a standard of review for infringements in the probation system,[193] it did hold that restrictions must bear a relationship to the "special needs" of the probation system.[194] It is only natural to assume that the Supreme Court would determine the level of review in the probation system to at least require a reasonable relation, if not more. Instead, *Herring* cited *Griffin* as standing solely for the proposition that a probationer's right to privacy is limited,[195] and that Herring's expectation of privacy was justifiably infringed by the probation officer.[196] The court stated:

> In view of the fact that it was clearly established in *Griffin* that a probationer's right to privacy is limited, without further guidance from the Supreme Court or this circuit, a reasonable probation officer in late 1993 could not be presumed to know whether a limited disclosure of a probationer's HIV status to his sister and restaurant employer would violate a probationer's constitutional rights.[197]

As noted by Chief Judge Seymour in her dissenting opinion, the *Herring* majority completely misconstrued the *Griffin* holding.[198] There is no support for the *Herring* majority's claim that *Griffin* stands for the bare holding that probationers have limited constitutional rights to privacy and that the Supreme Court gave no further guidance.[199] Chief Judge Seymour stated:

> The majority here simply relies upon the court's approval of the regulation in *Griffin* to conclude that Mr. Herring's privacy right was not clearly established in this case. In so doing, the majority extrapolates from the Court's naked holding without ever acknowledging the underlying analysis and reasoning, and fails entirely to apply that analysis and reasoning to the facts of this case. The majority thus ig-

190. Herring v. Keenan, 218 F.3d 1171, 1182 (10th Cir. 2000).
191. *Turner*, 482 U.S. at 78-9.
192. *Id.*
193. *Griffin*, 483 U.S. at 874.
194. *Id.* at 873-74.
195. *Herring*, 218 F.3d at 1176.
196. *Id.*
197. *Id.*
198. *Id.* at 1182.
199. *Id.* at 1176.

> nores the clear holding in *Griffin* that a probationer has a constitutional right to privacy, which is limited insofar as the limitation is justified by the 'special needs' of the probation system.[200]

Moreover, the Tenth Circuit previously established a standard for determining whether a right is "clearly established" when a constitutional balancing test is required.[201] In three prior opinions, the Tenth Circuit established that when a balancing test is at issue, if it is "sufficiently clear" that the defendant should be aware that the governmental interest would not survive a balancing inquiry, then the defendant is deemed to be on notice.[202] In *Medina*, the Tenth Circuit held that "[c]onduct may be so egregious that a reasonable person would know it to be unconstitutional even though it is judged by a balancing test."[203] Keenan's conduct was unsupported and inimical to any recognizable governmental interest. In fact, it ran contrary to U.S. probation system policy, Colorado state criminal law, and was undertaken prior to her even securing knowledge that Herring in fact was HIV positive.[204] Peculiarly, the *Herring* court failed to analyze Keenan's conduct in light of an officer's reasonable expectation of whether his or her conduct would survive a balancing test. It seems rather clear that Keenan reasonably should have been aware of her own internal probation system guidelines and would have known that a direct violation of its stated guidelines would tip the balance out of her favor.

The *Herring* decision ignored Tenth Circuit precedent by requiring that there be strict factual analogy between the case at bar and a case previously decided by either the Supreme Court or the Tenth Circuit.[205] Further, the narrowness of the court's inquiry caused it to turn a blind eye to the balancing tests established by both *Turner* and *Griffin*.[206] As

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200. *Id.*; *see also* Turner v. Safley, 482 U.S. 78, 89 (1987) (holding that prison guidelines infringing prisoner's constitutional rights are lawful only when reasonably related to legitimate penological interests); Doe v. Attorney Gen., 941 F.2d 780, 796 (9th Cir. 1991) (stating that the law was clearly established in 1988 that the government may disclose private information only upon a showing that the disclosure of such information advances a legitimate governmental objective).

201. *See* discussion *infra* Part I.E.4.

202. Patrick v. Miller, 953 F.2d 1240, 1246, 1249 (10th Cir. 1992) (holding that qualified immunity will be abrogated if it was "sufficiently clear that Defendants should have known the [governmental] interest would not survive a balancing inquiry."); *see also* Prager v. LaFaver, 180 F.3d 1185, 1191-92 (10th Cir. 1999) (stating that a balance in favor of plaintiff should have been anticipated by officials and thus their qualified immunity was abrogated); *see also Medina*, 960 F.2d at 1498 ("Conduct may be so egregious that a reasonable person would know it to be unconstitutional even though it is judged by a balancing test.").

203. *Medina*, 960 F.2d at 1498.

204. *Herring*, 281 F.3d at 1182.

205. *Id.* at 1178-79.

206. *Turner* establishes that a prisoner's rights cannot be infringed absent a "reasonable relation" to a legitimate penological goal. *See Turner*, 482 U.S. at 89. *Griffin* does not speak to a level of judicial scrutiny for the probation system, but does state that infringements must bear a relationship to the "special needs" of the probation system. *Griffin*, 483 U.S. at 873-74,

noted by Chief Judge Seymour, *Griffin* clearly held that the "legitimacy of the governmental interest" is the key ingredient to the "legitimate government purpose" balancing test.[207] The majority swept *Turner* and *Griffin* under the rug and refused to recognize that Keenan's conduct was actually contrary to a legitimate governmental interest. To highlight this fact, the probation system maintained an internal policy of non-disclosure of a probationer's HIV status.[208] If the court had applied the proper qualified immunity requirements and recognized that *Turner* and *Griffin* both require a variation of a balancing test, it would be impossible for Keenan to attain qualified immunity. Conduct that not only failed to state a legitimate governmental purpose but also explicitly violated the policy of the governmental entity should fail a balancing inquiry per se. Moreover, had *Keenan* followed its own precedent set in *Anaya*,[209] its "clearly established" analysis would have included such sources as other circuit authority, the probation system's internal guidelines (which Herring was required to abide by), the Colorado state criminal statute which she violated. If Keenan had been properly aware of the law "clearly established" in 1993, she would have known that her conduct would fail even the most deferential balancing test and constitute a violation of Herring's constitutional right to privacy.

IV. THE CLEARLY ESTABLISHED RIGHT TO PRIVACY PROTECTING FROM DISCLOSURE OF PERSONAL INFORMATION FROM SUPREME COURT AND CIRCUIT CASES

In *Whalen v. Roe*,[210] the Supreme Court dealt with a challenge to a New York law seeking to create a database of names and addresses of individuals on prescription drugs.[211] The plaintiffs in the action claimed that the compilation of personal medical information and the possibility of its release to the public undermined their constitutional right to privacy.[212] The *Whalen* court stated that the Constitution supported a privacy interest grounded in the Fourteenth Amendment's concept of personal liberty.[213] From this foundation, the court outlined two distinct privacy interests; an individual's interest in avoiding disclosure of personal matters, and an individual's interest in independently making personal

207. *Herring*, 218 F.3d at 1182.

208. *Id.* The internal policy statement mandates that "[o]fficers should not disclose HIV infection or illness information without the offender's informed written consent." *See id.* at 1182.

209. In *Anaya*, the Tenth Circuit broadened its definition of the scope of the sources from which "clearly established" law may arise. For example, the *Anaya* court looked to other circuit cases, cases decided by the Colorado Supreme Court, and the civil forfeitures laws in determining the applicable "authority" in determining whether a right in actually "clearly established." Anaya v. Crossroads Managed Care Sys. Inc., 195 F.3d 584, 594-95 (10th Cir. 1999).

210. 429 U.S. 589 (1977).

211. *Id.* at 591.

212. *Id.* at 599-600

213. *Id.* at 600.

decisions.[214] The Tenth Circuit has repeatedly interpreted the Supreme Court's decision in *Whalen* as effectively "creating a right to privacy in the non-disclosure of personal information."[215] The following cases show that both the Tenth Circuit and several other circuits have interpreted *Whalen's* two privacy interests to include an individual's right to privacy in the non-disclosure of one's sexual and medical information.[216]

A. Eastwood v. Department of Corrections of the State of Oklahoma[217]—*Whalen Interpreted in the Tenth Circuit*

In *Eastwood*, the plaintiff, a former employee of the Oklahoma Department of Corrections brought a § 1983 suit against a departmental investigator for violating her constitutional right to privacy.[218] After being sexually assaulted by a fellow employee, the Department of Corrections assigned an investigator to question her version of the incident.[219] The plaintiff alleges that this investigator, Mr. Lovelace, harassed her with explicit questions regarding her sexual history which he subsequently shared with others at the Department of Corrections.[220] As a result, the plaintiff alleges that the Department of Corrections became an "offensive work environment" where she was continually harassed with further sexually explicit questions and "offensive and insulting drawings within the DOC facility."[221]

In response to the defendant's claim of qualified immunity, the *Eastwood* court first stated that in determining whether a law is "clearly established," they do not require there to be "strict factual correspondence between the cases establishing the law and the case at hand."[222] Even further, the court held that it is "incumbent upon government officials 'to relate established law to analogous factual settings.'"[223]

Regarding the constitutional right to privacy question, the *Eastwood* court noted that the Supreme Court had established two distinct privacy

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214. *Id.* at 599-600.

215. *Herring*, 218 F.3d at 1175; *see also* Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986) (recognizing a constitutional privacy interest that is especially significant where the information is "intimate or otherwise personal in nature"); Eastwood v. Dep't of Corrections of Okla., 846 F.2d 627, 630-31 (10th Cir. 1988) (holding that an individual has a right to privacy that protects him or her from forced disclosure of his or her sexual history); Lankford v. City of Hobart, 27 F.3d 477 (10th Cir. 1994) (holding that the right to privacy in one's medical information was established in 1990).

216. *See* discussion *infra* Part IV.A-D.

217. 846 F.2d 627 (10th Cir. 1988).

218. *Id.* at 628-29.

219. *Id.* at 629.

220. *Id.*

221. *Id.*

222. *Id.* at 630.

223. *Id.*

interests in *Whalen v. Roe*.[224] The *Eastwood* court interpreted *Whalen* to encompass the privacy interest implicated in this case.[225] The court held: "[t]his constitutionally protected right is implicated when an individual is forced to disclose information regarding personal sexual matters."[226]

B. Lankford v. City of Hobart[227]—*Right to Privacy of Medical Records in the Tenth Circuit*

In *Lankford*, the plaintiff alleged that after rebuking her employer's sexual advances, he "used his authority as chief of police to obtain [her] private medical records without her consent from a local hospital in an attempt to discredit her and to prove his statements that she was a lesbian."[228] In holding that the defendant was not entitled to qualified immunity because the privacy violations of this sort were "clearly established in 1990,"[229] the court stated, "there is 'no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection.'"[230]

C. Harris v. Thigpen:[231] *Eleventh Circuit Applies the Turner Factors*

In *Harris v. Thigpen*, the Eleventh Circuit discussed a prisoner's specific right regarding the non-disclosure of his or her HIV positive status.[232] In *Harris*, the appellant challenged the Alabama Department of Corrections' policies of mandatory HIV testing and segregation of prisoners testing HIV positive as a violation of those prisoners' constitutional right to privacy.[233] First, the court explained that as a general principle, "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison."[234] The court cited

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224. 429 U.S. 589, 599 (1977); *see also* discussion *infra* Part IV.

225. *Eastwood*, 846 F.2d at 631.

226. *Id.*

227. 27 F.3d 477 (10th Cir. 1994).

228. *Id.* at 478.

229. *Id.*

230. *Id.*; *see also* Woods v. White, 689 F. Supp. 874, 876 (W.D. Wis. 1988) (holding that "[c]asual, unjustified dissemination of confidential medical information to non-medical staff and other prisoners can scarcely be said to belong to the sphere of defendants' discretionary functions. Therefore, the defense of qualified immunity is not available to defendants); U.S. v. Westinghouse, 638 F.2d 570, 577 (3d Cir. 1980) (interpreting *Whalen's* dual privacy rights to include an individual's right to privacy in medical records and medical information).; Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986) (recognizing a constitutional privacy interest that is especially significant where the information is "intimate or otherwise personal in nature").

231. 941 F.2d 1495 (11th Cir. 1991).

232. *Id.* at 1498.

233. *Id.* at 1512.

234. *Id.*; *see also* Bell v. Wolfish, 441 U.S. 520, 545 (1979) (holding that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison").

Turner v. Safley[235] when it stated, "[p]rison walls do not separate inmates from their constitutional rights."[236] Thus, prior to their determination of whether the prisoner's constitutional rights to privacy regarding the non-disclosure of his HIV positive status was violated, the Eleventh Circuit affirmatively proclaimed that prisoners[237] maintain constitutional protection despite their position within the penological system.[238]

The *Harris* court went on to state the limitations upon the constitutional rights of prisoners.[239] "It is also axiomatic, however, that 'lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the consideration underlying our penal system."[240] The court added that prisoners retain the constitutional rights that do not run contrary to the "legitimate penological objectives of the corrective system."[241]

Upon this foundation, the *Harris* court used the "rational connection" factors set forth in *Turner*[242] and found that the Alabama Department of Corrections' policies did not violate the prisoners' constitutional right to privacy in light of the countervailing interests of the penological system.[243] The court recognized the legitimacy of the penological system's interest in reducing HIV transmission and violence.[244]

More importantly, however, the *Harris* court recognized and followed two "clearly established" trends that the Tenth Circuit ignored in *Herring*. First, *Harris* acknowledged a prisoner's residual constitutional rights, and followed *Turner* by balancing those residual rights with the

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235. 482 U.S. 78 (1987).

236. *Harris*, 941 F.2d at 1512; *see also* Turner v. Safley, 482 U.S. 78, 84 (1987).

237. The Supreme Court in *Griffin v. Wisconsin* also held that probationers maintain constitutional protections despite their involvement with the probation system. *See infra* pp. 16-17; *see also* Herring v. Keenan, 218 F.3d 1171, 1182 (10th Cir. 2000) (discussing in dissent, Judge Seymore claimed, "*Griffin*, therefore, clearly established six years prior to the incidents here that probationers retain a right to privacy under the Constitution which is violated where the State impinges upon that right without a legitimate, governmental purpose.").

238. *Harris*, 941 F.2d at 1515-16; *see also* Procunier v. Martinez, 416 U.S. 396 (1974) (holding that "[t]he constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights."); Thornbaugh v. Abbott, 490 U.S. 401 (1989) (reiterating *Turner's* holding that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution."); Sheley v. Dugger, 833 F.2d 1420, 1423 (11th Cir. 1987) (holding that "[a] prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country.").

239. *Id.* at 1512-13

240. *Id.*

241. *Id.*

242. *See infra* p. 15.

243. *Harris*, 941 F.2d at 1521.

244. *Id.* at 1517.

legitimate objectives of the penological system.[245] To the contrary, *Herring* misconstrued the holding in *Griffin* and failed to recognize the need to justify an infringement of a probationer's constitutional rights by the "special needs" of the probation system.[246] Second, the *Harris* court was careful to point out the existence of a constitutional right to privacy and the "significant privacy interest" triggered by the disclosure of a prisoner's HIV status.[247] As previously discussed, because the probation system is situated on a less restrictive point on the criminal justice continuum than the penological system, it naturally follows that probationer's maintain a greater constitutional rights than prisoners.[248]

D. United States v. Westinghouse:[249] *The Right to Privacy in Medical Information*

In *United States v. Westinghouse*, the Third Circuit interpreted the dual privacy rights created by the Supreme Court in *Whalen*; an individual's interest in avoiding disclosure of personal matters, and an individual's interest in independently making personal decisions,[250] to encompass an individual's right to privacy in medical records and medical information.[251] The *Westinghouse* court stated:

> There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection. Information about one's body and state of health is a matter which the individual is ordinarily entitled to retain within the 'private enclave where he may lead a private life.'[252]

In *Westinghouse*, the Third Circuit stated that governmental intrusion into medical records is allowed only after the government can show that the public interest in disclosure outweighs the individual's privacy

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245. *Id.* at 1515 ("The [*Turner*] Court determined that the standard of review for evaluating prisoners' constitutional claims should be one of reasonableness: when a prison regulation or policy 'impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.'").

246. *Griffin* holds that a probationer maintains residual constitutional rights that are less than what is afforded to an average citizen but nevertheless cannot be stripped without being justified by the "special needs" of the probation system.

247. *Id.* at 1514 ("The threat to family life and the 'emotional enrichment [gained] from close ties with others' ... is quite real when an AIDS victim's diagnosis is revealed. Ignorance and prejudice concerning the disease are widespread; the decision of whether, or how, or when to risk familial and communal opprobrium and even ostracism is one of fundamental importance.").

248. *See infra* Part III.

249. 638 F.2d 570 (3d Cir. 1980).

250. Whalen v. Roe, 429 U.S. 589, 599-600 (1977).

251. *Westinghouse*, 638 F.2d at 571.

252. *Id.*

interest.[253] In determining whether the specific governmental intrusion was constitutional, the court listed the factors relevant to the inquiry:

> the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosures, the degree and need of access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.[254]

The first four *Westinghouse* factors question the nature of the information requested and the potential injury caused by the nonconsensual disclosure of that information.[255] The purpose for these factors is to determine which medical information disclosures are more harmful than others. These factors serve the purpose of drawing a line between nonconsensual disclosure of a trivial matter, such as an employee's allergic tendencies, and disclosure of information that has the ability to harm the employee.

In terms of potential injury and discrimination against the employee, an individual's HIV status is arguably the most sensitive form of medical information.[256] Several federal courts, prior to 1993, commented on the heightened risk of disclosure of HIV information.[257] The Ninth Circuit held that a forced and mandatory AIDS test might violate an inmate's constitutional rights.[258] In *Doe v. Borrough of Barrington*,[259] the federal district court of New Jersey stated:

> The sensitive nature of medical information about AIDS makes a compelling argument for keeping this information confidential. Society's moral judgments about the high-risk activities associated with the disease, including sexual relations and drug use, make the information of the most personal kind. Also, the privacy interest in one's exposure to the AIDS virus is even greater than one's privacy interest in ordinary medical records because the stigma that attaches with the

253. *Id.* at 577.

254. *Id.* at 578.

255. *Id.*

256. *See infra* note 229.

257. *See e.g.*, Doe v. Borough of Barrington, 729 F. Supp 376, 384 (D.N.J. 1990) (stating that an individual's privacy interest in HIV information outweighs that of regular medical information because of the stigma that attaches to the HIV virus); Doe v. Coughlin, 697 F. Supp. 1234 (N.D.N.Y. 1988) (noting that disclosure of HIV information threatens family life and triggers prejudice and ignorance).

258. Walker v. Sumner, 917 F.2d 382 (9th Cir. 1990) (holding that "[prison] authorities cannot rely on general or conclusory assertions to support their policies. Rather, they must first identify the specific penological interests involved and then demonstrate both that those specific interests are the actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interests.").

259. 729 F. Supp. 376, 384 (D.N.J. 1990)

> disease. The potential for harm in the event of a nonconsensual disclosure is substantial.[260]

Further, in *Doe v. Coughlin*,[261] the federal district court for the Northern District of New York stated:

> Each [seropositive prisoner] is fully aware that he is infected with a disease which at the present time has inevitably proven fatal. In the court's view there are few matters of a more personal nature, and there are few decisions over which a person could have a greater desire to exercise control, than the manner in which he reveals that diagnosis to others . . . [t]he threat to family life and the 'emotional enrichment [gained] from close ties to others' . . . is quite real when an AIDS victim's diagnosis is revealed. Ignorance and prejudice concerning the disease are widespread; the decision of whether, or how, or when to risk familial and communal opprobrium and even ostracism is one of fundamental importance.[262]

E. *Herring's Two Flaws*

It was clearly established in 1993 that a government official could not impinge upon the constitutional rights of a probationer without the justification of a legitimate governmental purpose.[263] Moreover, it was also clearly established in 1993 that courts only allow government infringement of an individual's medical information where there is a finding "that the societal interest in disclosure outweighs the privacy interest on the specific facts of the case."[264] Thus, the Tenth Circuit's decision in *Herring* is flawed in two key respects. First, to grant the defendant qualified immunity, the Tenth Circuit applied a narrow construction of "clearly established" rights—a construction that was antithetical to Tenth Circuit precedent since *Medina*.[265]

Second, because of the consequent narrow qualified immunity analysis, the Tenth Circuit effectively removed from consideration Supreme Court and circuit authorities that sufficiently establish that (a) a probationer's constitutional rights cannot be impinged unless "justified by the 'special needs' of the probation system,[266] and (b) there exists a privacy

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260. *Id.*

261. 697 F. Supp. 1234 (N.D.N.Y. 1988).

262. *Id.* at 1237-38.

263. Griffin v. Wisconsin, 483 U.S. 868 (1987); Turner v. Safley, 482 U.S. 78 (1987).

264. U.S. v. Westinghouse, 638 F.2d 570, 578 (3d Cir. 1980).

265. In *Lawmaster*, the circuit held that the right in question needs to be defined with some degree of generality in order to give plaintiffs the ability to rebut a defendant's qualified immunity defense. Lawmaster v. Ward, 125 F.3d 1341, 1351 (10th Cir. 1997) Further, in *Anaya*, the circuit expanded the range of sources it was willing to consider in determining whether a law was "clearly established" at the time of the conduct in question. Anaya v. Crossroads Managed Care Sys., Inc., 195 F.3d 584, 594-95 (10th Cir. 1999).

266. Griffin v. Wisconsin, 483 U.S. 868, 875 (1987); *see also* Herring v. Keenan, 218 F.3d 1171, 1182 (10th Cir. 2000) (Seymour, J. dissenting).

interest in one's medical records and medical information, especially so when the information pertains to one's HIV status.[267]

More specifically, the Tenth Circuit ignored the Supreme Court's decisions in *Turner* and *Griffin*, which both stand for the proposition that prisoners and probationers retain their constitutional rights despite their status within either the penological or probationary system.[268] *Turner* established a "rational connection" balancing test that forces the government to justify any impingement upon the constitutional rights of prisoners by proving that the restriction is "rationally connected" to a penological or objective.[269] Likewise, *Griffin* affirmatively holds that a probationer has a constitutional right to privacy that can be impinged only upon a showing of a "special need of the probation system."[270] The *Herring* court failed to even mention the existence of either constitutional balancing test.

Second, the *Herring* court made no mention of the Third Circuit's decision in *Westinghouse*,[271] which recognized a constitutional right to privacy regarding one's medical records and medical information, or the Eleventh Circuit's determination in *Harris v. Thigpen*, which emphasized the "significant privacy interest" triggered by an individual's HIV status.[272] *Westinghouse* outlined a seven-factor balancing test to help determine the types of medical records and information that require protection from divulgence without consent.[273] As stated above, the *Herring* court's narrow qualified immunity standard caused it to sweep these other circuit decisions under the rug.

IV. ANALYSIS: THE IMPLICATIONS OF MEDINA WITH TEETH

Like the flaws, the implications of the Tenth Circuit's decision in *Herring v. Keenan*[274] are two-fold. First, the decision may cause negative social ramifications due to its treatment of the constitutional right to privacy regarding a person's HIV positive status. The decision, to the con-

267. The Third Circuit, in *U.S. v. Westinghouse* interpreted the Supreme Court's decision in *Whalen* to encompass an individual's right to privacy in medical record and medical information, *see Westinghouse*, 638 F.2d at 571. Moreover, in *Harris v. Thigpen*, the Eleventh Circuit stated that one HIV status triggers a "significant privacy interest" that is "of fundamental importance," *see* Harris v. Thigpen, 941 F.2d 1495, 1514 (11th Cir. 1991).

268. Griffin v. Wisconsin, 483 U.S. 868 (1987); Turner v. Safley, 482 U.S. 78, 84 (1987).

269. *Turner*, 482 U.S. at 84.

270. *Griffin*, 483 U.S. at 875.

271. *Id.* at 570.

272. *Harris*, 941 F.2d at 1514.

273. Hence, if these medical records/information are such that require protection, a person's divulgence of the records/information without the patient's consent would be deemed a constitutional violation. *See generally id.* at 578-579 (applying the seven-factor test to the conduct at bar with the underlying inference that if the balance tips in favor of protection, the non-consensual divulgence of the records/information would be a constitutional violation).

274. 218 F.3d 1171 (10th Cir. 2000).

trary, does not stand for the proposition that a constitutional right to privacy in an individual's HIV status has not been judicially recognized. Rather, it purports that the right was not "clearly established" circa 1993.[275]

In coming to the decision that the right to privacy in a probationer's HIV status was not "clearly established" in 1993, the *Herring* court went directly against Tenth Circuit qualified immunity analysis precedent. In *Lawmaster* and again in *Anaya*, the Tenth Circuit consistently broadened the scope of sources they were willing to consider in the determination whether a right was "clearly established" for qualified immunity purposes.[276] Moreover, in *Lawmaster*, the Tenth Circuit also recognized the need to define the right in question with a lesser degree of particularity to facilitate a plaintiff's attempt to defeat a government official's qualified immunity defense.[277] The *Herring* court had a choice. It could follow precedent and define the right with a lesser degree of particularity so that the precise factual scenario would not have to have been previously ruled upon. Or it could do what it did and turn the precedent on its head and define the right narrowly, requiring that the precise factual scenario be specifically ruled upon in either the Supreme Court or the Tenth Circuit. Even though the *Herring* court refrains from elucidating any policy based views or rationale regarding an individual's right to privacy in his or her HIV status, its decision to defy precedent speaks volumes. In the final analysis, the public policy message sent by the Tenth Circuit is clear—action certainly speaks louder than words. The *Herring* court changed its qualified immunity analysis in order to protect a government official who, in direct violation of internal policy, informed an HIV positive probationer's employer and family of his HIV status. In changing the analysis, the *Herring* court looked at the case through a microscope and eliminated from view numerous sources that would have served as the "clearly established" authority that a "reasonable official" would be expected to know about. Despite the fact that in 1994 the Tenth Circuit recognized that there is a constitutional right to privacy regarding disclosure by a peace officer of an arrestee's HIV test results,[278] *Herring*

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275. *Id.* at 1176. *Herring* states that an individual's right to privacy in his or her HIV information was established in 1994.

276. In *Lawmaster*, the Tenth Circuit held that "the shield of qualified immunity is pierced if in light of pre-existing law, the unlawfulness of the conduct is apparent to the officer." Lawmaster v. Ward, 125 F.3d 1341, 1350 (10th Cir. 1997). In *Anaya*, the Tenth Circuit broadened its definition of the scope of the sources from which "clearly established" law may arise. For example, the *Anaya* court looked to other circuit cases, cases decided by the Colorado Supreme Court, and the civil forfeitures laws in determining the applicable "authority" in determining whether a right in actually "clearly established." *See* Anaya v. Crossroads Managed Care Sys. Inc., 195 F.3d 584, 594-95 (10th Cir. 1999).

277. *Lawmaster*, 125 F.3d at 1351.

278. A.L.A. v. West Valley City, 26 F.3d 989 (10th Cir. 1994) (establishing in the Tenth Circuit in 1994, that an arrestee has a constitutional right to privacy in the nondisclosure of his HIV information).

strikes a blow to the public's confidence that the court stands behind the policy that underlies its 1994 decision.

Besides *Herring's* public policy implications, this analysis seeks to discuss the long-term effects of the court's narrow qualified immunity analysis and its potential to halt the creation of new civil or constitutional rights in the Tenth Circuit. In *Herring*, the Tenth Circuit unleashed a new breed of qualified immunity analysis: *Medina* with sharper teeth. Not only did the court require that a Supreme Court or Tenth Circuit decision exist that was on point,[279] but, contrary to Tenth Circuit precedent,[280] it also required a strict factual similarity between the case at bar and a previously decided case.[281] Looking for precedent under a microscope, the court granted the defendant qualified immunity because it was unable to find a Supreme Court or Tenth Circuit case that specifically held that a probationer has a constitutional right to privacy regarding the limited disclosure of his or her HIV positive status by his or her probationer to family members and employers.[282]

The decision in *Herring*, however, took the qualified immunity analysis in the Tenth Circuit to a level unimaginable even by *Medina* standards. Under a strict *Medina* analysis, the Tenth Circuit would likely take notice of the Supreme Court precedent in *Turner* and *Griffin* and at least acknowledge the need to conduct a "rational connection" balancing test to determine whether the impingement was justified by a legitimate goal of the probation system. Even under *Medina*, the Tenth Circuit would recognize that in 1993, it was entirely inimical to a prisoner's or a probationer's constitutional right to privacy to sanction an alleged right to privacy violation without conducting the proper balancing test.

Additionally, *Herring's* strict factual setting requirement turned *Medina* on its head. The gravity of the court's new standard is evident by the fact that the nonconsensual disclosure of a probationer's HIV status stood in direct violation of a probation system rule requiring consent prior to any such disclosure.[283] "In making the disclosures to Mr. Herring's family and employer, Ms. Keenan acted contrary to *every* written guideline addressing the disclosure of confidential medical information contained in the U.S. Probation Manual, which serves as the 'authorita-

279. While the majority initially states that a right is clearly established when there is a Supreme Court or Tenth Circuit opinion on point, or that the plaintiff's proposition is supported by the weight of authority from other courts, the decision later only mentions the need for the first two and drops the latter from consideration. *See* Herring v. Keenan, 218 F.3d 1171, 1176 (10th Cir. 2000).

280. *See* discussion *infra* Part I, I.A.2, I.A.3, I.A.4.

281. *Herring*, 218 F.3d at 1179 (stating that "[n]one of the cases identified by the plaintiff involved a limited disclosure by a probation officer to a probationer's sister and restaurant employer of voluntarily exposed information . . . ").

282. *Id.*

283. Herring v. Keenan, 218 F.3d 1171, 1173 (10th Cir. 2000).

tive standard for community supervision of federal offenders."[284] (emphasis added) In her dissenting opinion in *Herring*, Judge Seymour discussed the Supreme Court's decision in *Griffin* that upheld as proper a search conducted within the residence of a probationer.[285] Judge Seymour concluded that *Griffin* held that the search was "reasonable within the meaning of the Fourth Amendment because *it was conducted pursuant to a valid regulation governing probationers*, which was itself justified by the special needs of the probation system..."[286] Judge Seymour made the point that under a properly construed *Griffin* analysis, there is no way Keenan would have been granted qualified immunity. Judge Seymour stated:

> [H]ere, however, we are asked to review the independent action of a probation officer which was *directly contrary to* the published guidelines of the U.S. Probation Office. Ms. Keenan cannot plausibly argue that her random, unauthorized and illegal conduct provides a basis for a legitimate or reasonable governmental interest sufficient to warrant the intrusion on Mr. Herring's privacy which occurred here."[287]

Griffin required that the restriction be justified by a special need of the probation system. Likewise, *Turner* required that a "'valid, rational connection' between the regulation and a legitimate government interest put forward to justify it"[288] must exist.

The *Herring* court's narrow analysis caused it to miss the seven-part balancing test set forth in *Westinghouse*[289] as well. *Westinghouse's* first four factors are dedicated to determining the nature of the medical information and the potential injury to an individual if that information is disclosed.[290] Undoubtedly, one's HIV positive information is the most sensitive type of medical information and its disclosure without consent poses a potential harm that can devastate the life and emotional well being of the individual.

The *Herring* court's decision to grant the probation officer qualified immunity leads one to question the modern court's stance on the rights of those afflicted with the HIV virus. While the social ramifications of this decision on the rights of HIV victims is muted by the court's decision one year after the conduct at issue in *Herring*,[291] it is peculiar that the court would turn its recent qualified immunity doctrine on its head to

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284. *Herring*, 218 F.3d at 1182 (J. Seymour, dissenting).
285. *Id.* at 1183-84.
286. *Id.*
287. *Herring*, 218 F.3d at 1184 (J. Seymour, dissenting).
288. Turner v. Safley, 482 U.S. 78, 89-91 (1987).
289. U.S. v. Westinghouse, 638 F.2d 570, 577 (3d Cir. 1980).
290. *Id.*
291. A.L.A. v. West Valley City, 26 F.3d 989 (10th Cir. 1994) (holding that an individual holds a constitutional right to privacy regarding his or her HIV status).

protect a probation officer who clearly and blatantly violated the constitutional privacy rights of her probationer.

CONCLUSION: THE MISSING VOICE

After *Herring*, the possibility of the Tenth Circuit independently recognizing the existence of a new constitutional right may be nonexistent. Under its *Herring* qualified immunity standard, the Tenth Circuit has effectively decided to relinquish all circuit authority to establish new laws in response to novel social problems. One commentator feared that *Medina* had developed a narrow qualified immunity analysis that effectively removed the Tenth Circuit's ability to create new civil and constitutional rights. The commentator wrote:

> In conclusion, *Medina* changed the Tenth Circuit's handling of the qualified immunity issue. Those cases that actually cite the *Medina* rule uniformly hold there is no clearly established duty. Most of the clearly established rights from cases prior to *Medina* would probably not survive a post-*Medina* analysis . . . [w]hen there is clearly established weight of authority in other circuits, the Tenth Circuit will follow suit. This not only cedes Tenth Circuit decision-making to other circuits, but, in a sense, undermines the independence of the circuit courts. This is particularly problematic because one of the strongest predicates for United States Supreme Court review is the resolution of circuit splits. Therefore, the *Medina* rule tends to belay Supreme Court review . . . [t]herefore, it is likely the *Medina* rule . . . will slow the development of civil rights law...[292]

Similarly, requiring that the conduct and facts be strictly analogous to conduct and facts previously deemed unlawful by the Supreme Court or another Tenth Circuit decision really means that no right or law will ever be clearly established in the Tenth Circuit unless such a right or law was previously established by the Supreme Court. One of the functions of the circuit courts is to decide novel issues with the potential for circuit disagreement. Likewise, one of the functions of the Supreme Court is to survey the areas of circuit disagreement and grant certiorari to settle the disputed questions of law. As a result of *Herring*, however, the Tenth Circuit has effectively taken itself out of the mix. If the Tenth Circuit chooses to follow *Herring* in future qualified immunity cases, not only will the potential for legal development in this area of law be dormant, but the overall legal discourse between the circuits and the Supreme Court over pressing legal and social matters will be impaired by the Tenth Circuit's missing voice. On the flip side, if the Tenth Circuit chooses to revert back to its broader pre-*Herring* qualified immunity analysis, its decision to look at *Herring* the way that it did begs the ques-

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292 Meeker, *supra* note 24, at 133.

tion of their tenuous stance regarding the right to privacy in an individual's HIV status.

Colin Barnacle