CLEARLY NOT ESTABLISHED: DECISIONAL LAW AND THE QUALIFIED IMMUNITY DOCTRINE

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[I]t is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.[1]

—Oliver Wendell Holmes (1931)

INTRODUCTION

The "fair warning" that Justice Holmes spoke of those many years ago might also be referred to as "notice." "Notice" is defined as the "definite legal cognizance, actual or constructive, of an existing right or title."[2] The requirement that notice be given is fundamental to the legal concept of due process.[3] As a result, it is often essential that notice be given in order for an individual to successfully defend himself.[4] Notice is also required before property interests are disturbed, assessments are made, and penalties are imposed.[5]

In the criminal arena, notice exists and due process is satisfied when criminal acts are sufficiently defined such that an individual would be aware of the illegality of his actions in advance.[6] One should not be deprived of liberty and stigmatized with a criminal label unless that individual has prior notice of the rules

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1. McBoyle v. United States, 283 U.S. 25, 27 (1931).
2. BLACK'S LAW DICTIONARY 1087 (7th ed. 1999).
3. Lambert v. California, 355 U.S. 225, 228 (1957).
4. *Id.*
5. *Id.*
6. Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 592 (1998).

under which his conduct will be subsequently judged.[7] Accordingly, "criminal statute[s] must be sufficiently definite to give notice of the required conduct to one who would avoid [their] penalties . . . ."[8] In reality, most criminal defendants do not have "actual notice" of the illegality of their actions prior to the commission of their crimes.[9] However, that fact does not prevent the imposition of punishment in most cases because the illegality of a defendant's actions is frequently evident from the nature of the crime itself.[10] Furthermore, the idea that ignorance of the law is no excuse is deeply rooted in our system of jurisprudence.[11] Therefore, the absence of "actual notice" only becomes important in the rare situation in which nothing about the defendant's conduct would have inherently warned him or her that such activity was illegal.[12]

Although notice issues are somewhat rare where criminal punishment is being imposed, they are much more prevalent in cases where a citizen claims that a government official's actions violated his federal rights[13] and, in response, the official asserts a qualified immunity defense. Because qualified immunity is intended to protect public officials from personal liability for carrying out their official duties, courts focus, in part, on whether the official should have foreseen the risk of liability at the time he acted.[14] Predictable liability is of the utmost importance in constitutional tort cases because society and the law alike favor

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7. John C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Structures*, 71 VA. L. REV. 189, 211 (1985) ("The concern is . . . whether the ordinary . . . law-abiding individual would have received some signal that his or her conduct risked violation of the penal law."); *see also* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.").

8. Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952).

9. *See* Jeffries, *supra* note 7, at 208.

10. *See* Armacost, *supra* note 6, at 622. For example, one cannot claim that he should not be punished for killing another human being simply because he did not read the statute that defines and criminalizes homicide.

11. *See*, *e.g.*, Bryan v. United States, 524 U.S. 184, 196 (1998); Ratzlaf v. United States, 510 U.S. 135, 149 (1994); Cheek v. United States, 498 U.S. 192, 200 (1991); Pope v. Illinois, 481 U.S. 497, 518 (1987); Liparota v. United States, 471 U.S. 419, 441 (1985); United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 563 (1971); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910).

12. *See* Lambert v. California, 355 U.S. 225, 229–30 (1957); *see also* Bartlett v. Alameida, 366 F.3d 1020, 1023–24 (9th Cir. 2004) (applying *Lambert* to overturn a conviction for failing to register as a sex offender); United States v. Holland, 810 F.2d 1215, 1222–23 (D.C. Cir. 1987) (admitting that ignorance of the law may be an excuse where legislation criminalizes "wholly passive" conduct by a person who is "unaware of any wrongdoing").

13. These cases are commonly referred to as "constitutional torts." *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 728 (1999) (Scalia, J., concurring in part and concurring in the judgment) (noting that the Court has "commonly described [§ 1983] as creating a 'constitutional tort'" and listing citations to prior cases that had done so).

14. Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. REV. 1467, 1502 (1996).

action on the part of government officials in the face of ambiguity.[15] Evidence of this preference for action can be found in the U.S. Supreme Court's declaration that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[16]

This focus on predictability, however, only partially explains the omnipresence of notice issues in qualified immunity cases. An additional explanation is that criminal law is more likely than constitutional law to circumscribe the types of behavior that everyone actually knows is wrong.[17] Also, criminal law is generally more lucid and understandable than constitutional law.[18] Another explanation is that criminal law is more stable than constitutional law and as a result is easier to know and retain.[19] Finally, qualified immunity cases are more likely to involve conduct for which individuals might reasonably be ignorant of the law and are also less likely to involve inherently illegal conduct on the part of the allegedly culpable party.[20]

The qualified immunity doctrine also places greater emphasis on "notice" because of the competing societal interests the doctrine strives to accommodate.[21] First, constitutional tort actions protect citizens' federal rights by providing them with a damages remedy when overzealous government officials cross the line and violate their federal rights.[22] Weighing directly against that interest, however, is

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15. *Id.* (explaining that if liability were unpredictable when the official acts, he should not have to choose between liability for failing to act and liability for acting); *see also* Scheuer v. Rhodes, 416 U.S. 232, 241 (1974) (observing that one policy consideration pervades the immunity analysis: "the public interest requires decisions and action to enforce laws for the protection of the public").

16. Malley v. Briggs, 475 U.S. 335, 341 (1986).

17. Armacost, *supra* note 6, at 622. Armacost posits that this answer is wrong because there are many criminal prohibitions that do not parallel our intuitions about what is right and wrong. On the other hand, she asserts that there are also constitutional violations that one would inherently know were wrong without actual notice of illegality. An example is when a prison employee deliberately ignores a severely ill prisoner's need for medication. *Id.*

18. *Id.* Armacost argues that this explanation is inadequate because there are many criminal statutes that are very complex and difficult to understand. In addition, she points out that there are many areas of constitutional law that are clear and well settled. *Id.* at 623.

19. *Id.* Armacost suggests that this argument fails because the extensive proliferation of regulatory statutes shows that the criminal law is not stable and predictable. Furthermore, there are areas of constitutional law that are stable and change only incrementally. *Id.*

20. *Id.* at 624. Armacost's thesis is that notice in qualified immunity cases serves as a proxy for fault where only knowledge that the conduct is illegal makes the defendant's actions blameworthy. These are the same types of cases in which notice is required in the criminal context. *Id.*

21. *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

22. *See id.* The Supreme Court has explained that in some cases an action for money damages against a government official may be the only way a citizen can effectively vindicate his constitutional guarantees. *See* Bivens v. Six Unknown Named Agents of Fed.

the need to protect government officials making discretionary decisions from frivolous lawsuits and to protect the "public interest in encouraging the vigorous exercise of official authority."[23] The accompanying costs of permitting government officials to be sued in their personal capacities are numerous[24] and include the expense of litigation, the diversion of officials' attention away from their public duties, and the deterrence of able citizens from pursuing or accepting public office.[25] Therefore, in order to protect government officials against frivolous lawsuits, the Supreme Court has sought to fashion a qualified immunity standard that quickly disposes of such lawsuits.[26]

One method of ensuring the quick disposition of frivolous lawsuits is to require those who bring constitutional tort actions to demonstrate that the allegedly culpable government official had prior notice as to the illegality of his actions. Employing this method, the Supreme Court requires parties who bring constitutional tort actions against government officials to show that it would be clear to a reasonable official that the conduct in question was unlawful in the particular situation.[27] This standard requires courts to inquire into whether the official violated clearly established statutory or constitutional rights of which a reasonable person would have been aware.[28] If, prior to an official's actions, the right he violated was clearly established by statute or case law, the official is exposed to personal liability.[29] On the other hand, if the right had not been clearly established prior to his actions, the official is free from personal liability.[30] Although this inquiry sounds somewhat straightforward, in practice it has created a number of recurring issues.

First, courts routinely struggle with the determination of the proper level of generality at which the law must be established.[31] For instance, it is both well known and established in a very broad sense that government officials cannot violate citizens' Fourth Amendment rights.[32] However, in order for government officials to have meaningful notice, the qualified immunity analysis must be conducted at a greater level of detail. For example, despite the fact that most people know law enforcement officials may not act in contravention of the Fourth

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Bureau of Narcotics, 403 U.S. 388, 410 (1971) ("For people in Bivens' shoes it is damages or nothing.").

23. *Harlow*, 457 U.S. at 807 (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)).

24. *See id.* at 814 (explaining that "claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole").

25. *Id.*

26. *See Butz*, 438 U.S. at 507–08; *see also* Hanrahan v. Hampton, 446 U.S. 754, 765 (1980) (Powell, J., concurring in part and dissenting in part).

27. Saucier v. Katz, 533 U.S. 194, 202 (2001).

28. *Harlow*, 457 U.S. at 818.

29. *See Saucier*, 533 U.S. at 201.

30. *Id*.

31. Meyer, *supra* note 14, at 1506.

32. *See* Wilson v. Layne, 526 U.S. 603, 609 (1999) ("Both *Bivens* and § 1983 allow a plaintiff to seek money damages from government officials who have violated his Fourth Amendment rights.").

Amendment in a broad sense, it was once unclear whether they did so in a more particularized sense by bringing members of the media into citizens' homes to observe and record the execution of arrest warrants.[33] The level of generality at which a particular right is articulated will often have a profound impact on the final outcome of a case.[34]

Second, courts grapple with the issue of whether officials can be "reasonably unreasonable" in determining whether probable cause exists or the application of force is necessary.[35] Both the probable cause and excessive force standards look to whether the official's conduct was "reasonable" under the circumstances.[36] If the official's conduct was unreasonable, it is counterintuitive to then have to inquire whether the conduct was "reasonably unreasonable."[37] However, it appears in essence that is what the Supreme Court has commanded lower courts to do.[38]

Third, courts wrestle with determining how much factual similarity must exist between the facts giving rise to a pending lawsuit and the facts found in prior decisions.[39] Making the issue an especially difficult one is the fact that the U.S. Supreme Court has declared that a uniform standard of required factual similarity

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33. *See id*. at 616–18 (granting qualified immunity to officers because the cases prior to 1992 did not clearly establish that media entry into homes during a police ride-along violated the Fourth Amendment).

34. *See* Anderson v. Creighton, 483 U.S. 635, 639 (1987) ("[I]f the test of 'clearly established law' were to be applied at this level of generality, . . . [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.").

35. Meyer, *supra* note 14, at 1506.

36. *Id.*; *see also* Graham v. Connor, 490 U.S. 386, 388 (1989) (holding that claims of excessive force in the context of arrests or investigatory stops should be analyzed under the Fourth Amendment's "objective reasonableness standard," not under substantive due process principles); *see also* Maryland v. Pringle, 540 U.S. 366, 371 (2003) ("To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause.").

37. Meyer, *supra* note 14, at 1506. The Supreme Court, in *Saucier v. Katz*, confronted this very issue in the context of an excessive force claim. 533 U.S. 194, 199–200 (2001). In holding Officer Katz liable, the Ninth Circuit fused the qualified immunity question with the unreasonable force question. *Id.* The Supreme Court reversed, explaining that officers can have mistaken beliefs as to the existence of probable cause or the need for force, and yet still be protected by qualified immunity in the event that the mistaken belief was reasonable. *Id.* at 206.

38. *See Saucier*, 533 U.S. at 205 ("An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.").

39. *See* Hope v. Pelzer, 536 U.S. 730, 741 (2002) (rejecting the Eleventh Circuit's requirement that the facts from previous cases be "materially similar" to the facts of the case at hand); *see also* United States v. Lanier, 520 U.S. 259, 269–70 (1997) (rejecting the Sixth Circuit's requirement that the facts from the current case and the factual situations from prior decisions be "fundamentally similar").

would be insufficient to give fair warning in every instance.[40] Therefore, courts are forced to adjust their qualified immunity analysis in an *ad hoc* manner, giving the entire process a rather arbitrary feel at times.

Finally, courts substantially disagree over which authoritative sources may be used to show "clearly established" law.[41] Because the Supreme Court has failed to articulate a single approach,[42] the lower courts employ a number of conflicting standards.[43]

Generally, this Note explores the differing views on which sources of authority can be used to show "clearly established law" and their effects on constitutional tort litigants. More specifically, Part I describes the elements of a § 1983 or a *Bivens* cause of action[44] against a government official and the history of the Supreme Court's qualified immunity jurisprudence. Part II discusses the lack of Supreme Court guidance in this area and surveys which authorities can be used to show "clearly established" law in the Third, Sixth, Ninth, and Eleventh Circuits. Part III propounds that the differing standards for which sources can be used has a predominately negative effect on constitutional tort litigants. And finally, Part IV puts forth a uniform standard for determining when the law is "clearly established."

I. ELEMENTS OF A CAUSE OF ACTION AGAINST GOVERNMENT OFFICIALS AND THE DEVELOPMENT OF THE SUPREME COURT'S QUALIFIED IMMUNITY JURISPRUDENCE

One who feels a government official's actions have infringed upon his federal rights may bring a lawsuit against that government official in federal or state court. If the official is employed by a state or local government, the plaintiff may plead a cause of action pursuant to 42 U.S.C. § 1983.[45] On the other hand, if

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40. *Lanier*, 520 U.S. at 271 ("In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question . . . ." (internal citations omitted)).

41. *See, e.g.*, Hatch v. Dep't. for Children, Youth, & Their Families, 274 F.3d 12, 23 (1st Cir. 2001) (explaining that courts must look not only to Supreme Court precedent but to all available case law in order to determine the contours of a particular right); Wilson v. Layne, 141 F.3d 111, 114 (4th Cir. 1998), *aff'd*, 526 U.S. 603 (1999) (clarifying that the law is clearly established only when it has been decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the forum state).

42. *See infra* notes 88–111 and accompanying text.

43. *See infra* notes 112–57 and accompanying text.

44. *See infra* note 46 and accompanying text.

45. 42 U.S.C. § 1983 (2000) reads, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or

the official is employed by the federal government, the plaintiff must bring a *Bivens* action.[46] Regardless of which cause of action is employed, the government official's exposure to personal liability often turns on whether he is entitled to either absolute[47] or qualified immunity.[48]

A. Elements of a § 1983 or Bivens *Action Against Government Officials*

In order to obtain relief under § 1983, a plaintiff must establish: (1) that he was deprived of a right secured by the Constitution or laws of the United States, and (2) that the alleged deprivation was committed under color of state law.[49] Section 1983 is merely a procedural device used to vindicate legal rights established by the Constitution or laws of the United States.[50] Therefore, in order to satisfy the first element, the cause of action must be based on an independent source of legal rights, such as the Eighth Amendment.[51] Additionally, the "under

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> 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 . . . .

Section 1983 was originally passed as section 1 of the Civil Rights Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2000)). *See* 42 U.S.C. § 1983. It was adopted as part of the Civil Rights Act of 1871, in the wake of the Reconstruction Amendments to the Constitution. Known as the "Ku Klux Klan Act," it was specifically designed to halt a wave of lynchings of African Americans that had occurred under guise of state and local law. *See* H.R. REP. No. 105-323, pt. 1, at 32 (1997).

46. An action against a federal official for the deprivation of one's constitutional rights is named a "*Bivens* action" for the Supreme Court case that originally recognized such a cause of action, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). In that case, Justice Brennan held that the plaintiff was entitled to recover money damages for any of the agents' violations of his Fourth Amendment rights. *Id.* at 397.

47. Certain government officials are absolutely immune from liability for their actions and decisions while in office. *See* Bogan v. Scott-Harris, 523 U.S. 44, 48–49 (1998) (describing absolute legislative immunity); *see also* Buckley v. Fitzsimmons, 509 U.S. 259, 273–74 (1993) (describing absolute prosecutorial immunity); Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982) (describing absolute presidential immunity); Pierson v. Ray, 386 U.S. 547, 553–54 (1967) (describing absolute judicial immunity). However, a discussion of the circumstances in which government officials are entitled to absolute immunity is beyond the scope of this Note.

48. Although government officials are technically held personally liable, governments often indemnify their employees against personal liability. *See* John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50 n.16 (1998) (explaining that police officers, when surveyed, generally answer that they do not personally know of any officer that has not been indemnified by his or her agency for § 1983 claims).

49. Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49–50 (1999).

50. Wilson v. Spain, 209 F.3d 713, 715 (8th Cir. 2000).

51. The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

color of state law" element excludes purely private conduct from the reach of § 1983, irrespective of how discriminatory or wrongful the private conduct.[52]

Bivens allows an individual to sue a federal official in his individual capacity directly under the Constitution.[53] Therefore, in order to obtain relief pursuant to a *Bivens* action, a plaintiff must only prove that a federal official's actions infringed upon a right guaranteed by the U.S. Constitution.[54]

Although an individual may be successful in establishing the elements of a § 1983 or *Bivens* cause of action, he must nonetheless accomplish the difficult task of establishing that the government official is not entitled to qualified immunity and as a result is shielded from personal liability.[55]

B. The Early Supreme Court Cases and the Mixed Objective-Subjective Standard

As early as 1967, in *Pierson v. Ray*, the U.S. Supreme Court recognized that government officials should be entitled to a qualified defense when sued in their personal capacities.[56] Although the Court did not speak specifically in terms of qualified immunity, it held that "the defense of good faith and probable cause . . . available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the actions under § 1983."[57] The Court also clarified that if the jury found that the officers believed in good faith that the arrest was constitutional, then a verdict for them should follow, even though the arrest was in fact unconstitutional.[58] Finally, the Court announced that an "officer is not charged with predicting the future course of constitutional law."[59]

Two subsequent cases further refined the standard governing the qualified immunity defense. In *Scheuer v. Rhodes*,[60] Chief Justice Burger, writing for the Court, extended the availability of qualified immunity to the acts of governors and other high executive officers in the wake of the Kent State tragedy.[61] He also clarified that the existence of qualified immunity depended upon two showings:

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52. *Sullivan*, 526 U.S. at 50.

53. 403 U.S. at 397.

54. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001) (elucidating that *Bivens* recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights); *see also* Butz v. Economou, 438 U.S. 478, 486 (1978) ("*Bivens* established that compensable injury to a constitutionally protected interest could be vindicated by a suit for damages invoking the general federal-question jurisdiction of the federal courts . . . .").

55. *See* Wilson v. Layne, 526 U.S. 603, 614–18 (1999) (holding that the officers' actions were violative of the plaintiffs' Fourth Amendment rights but that the officers were nonetheless entitled to qualified immunity because they had not violated clearly established statutory or constitutional rights of which a reasonable person would have known).

56. 386 U.S. 547, 557 (1967).

57. *Id.*

58. *Id.*

59. *Id.*

60. 416 U.S. 232 (1974).

61. *Id.* at 234, 248.

first, reasonable grounds for the belief formed at the time and in light of all the circumstances; and second, a good-faith belief that the actions taken were appropriate.[62] Therefore, in order to determine whether a government official was protected by qualified immunity, the lower courts had to analyze whether the official's actions were objectively reasonable under the first prong and subjectively reasonable under the second.[63]

A year later, *Wood v. Strickland*[64] reconfirmed that the qualified immunity standard consisted of both an objective and a subjective prong. In that case, the Court announced that a school board member would be immune from liability under § 1983 unless he knew, or should have known, that his actions would infringe upon the affected student's constitutional rights, or unless he acted with the malicious intention to violate the student's rights.[65] The case also saw the first mention of "clearly established" rights within the qualified immunity analysis.[66] After the *Wood* decision, the mixed objective and subjective standard continued to guide the Court's analysis for another seven years.[67]

C. The Supreme Court Abandons the Subjective Prong

In identifying qualified immunity as the most effective device for balancing the interests of citizens with the interests of government officials,[68] the Court relied on the assumption that the *Scheuer* standard would permit frivolous lawsuits to be dismissed quickly.[69] However, the problem with the *Scheuer* standard was that the official's subjective good faith was considered by many courts to be a question of fact, thereby requiring a jury determination.[70] Often, therefore, the availability of the qualified immunity defense could not be

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62. *Id.* at 247–48.

63. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) ("Decisions of this Court have established that the 'good faith' defense has both an 'objective' and a 'subjective' aspect.").

64. 420 U.S. 308 (1975).

65. *Id.* at 322.

66. *See id.* ("A compensatory award will be appropriate . . . if the school board member has acted . . . with such disregard of the student's *clearly established* constitutional rights . . . ." (emphasis added)).

67. The Court, in *Wood*, limited its holding to the circumstances in which immunity would be available to a school board member in the context of school discipline. *Id.* However, subsequent cases quoted the *Wood* formulation as a general statement of the qualified immunity standard. *See, e.g.*, Baker v. McCollan, 443 U.S. 137, 139 (1979); Procunier v. Navarette, 434 U.S. 555, 562–63 (1978).

68. *See* Butz v. Economou, 438 U.S. 478, 506–07 (1978) (recognizing that an action for damages against an official is an important means of vindicating constitutional guarantees and "that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment").

69. *See id.* at 507–08 (expressing the belief that the *Scheuer* standard combined with a properly supported motion for summary judgment will ensure that officials are not harassed by frivolous lawsuits).

70. Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982).

determined at the summary judgment stage,[71] regardless of whether the lawsuit was frivolous or not.[72]

Eight years later, in *Harlow v. Fitzgerald*, the Court finally recognized that there was a need to adjust the qualified immunity standard.[73] As a result, the Court held that bare allegations of malice were insufficient to subject officials to the costs of discovery and trial.[74] Furthermore, it clarified 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."[75] The Court explained that the focus on objective reasonableness alone would permit the resolution of frivolous claims at the earliest stages of a lawsuit.[76] Also, the new standard would allow trial judges, on motions for summary judgment, to determine what the applicable law is and whether it was clearly established at the time the official acted.[77] However, little or no guidance was provided as to when or how the law is "clearly established."

That changed with the decision in *Anderson v. Creighton*,[78] in which the plaintiff was seeking damages from FBI agents for the warrantless search of his home.[79] Justice Scalia, writing for the Court, clarified that the level of generality at which the relevant legal rule is articulated determines the operation of the "objective legal reasonableness" test.[80] Accordingly, the contours of the individual's right must be clear enough that a reasonable official would understand that his actions will infringe upon it.[81] Finally, Justice Scalia made clear that there is no requirement that the identical actions in question must have previously been held unlawful, but that "in the light of pre-existing law the unlawfulness must be apparent."[82] Although several refinements in the qualified immunity and clearly established law standards were still forthcoming, these general principles are still applicable today.

One such change in the qualified immunity standard came in *Siegert v. Gilley*.[83] In that case, the Court added that before a court disposes of a case because a particular constitutional right was not "clearly established," it must first

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71. The issue of whether an official is entitled to qualified immunity is typically resolved via a motion for summary judgment on the part of the official. *See, e.g.*, Groh v. Ramirez, 540 U.S. 551, 555–56 (2004); Chavez v. Martinez, 538 U.S. 760, 765 (2003); Hope v. Pelzer, 536 U.S. 730, 735 (2002).

72. *Harlow*, 457 U.S. at 816.

73. *Id.* at 814–15.

74. *Id.* at 817–18.

75. *Id.* at 818.

76. *Id.*

77. *Id.*

78. 483 U.S. 635 (1987).

79. *Id.* at 637.

80. *Id.* at 639.

81. *Id.* at 640.

82. *Id.*

83. 500 U.S. 226 (1991).

determine whether that constitutional right exists and whether a violation of it has been shown.[84] This new requirement and the usual "objective reasonable test" combined to create the modern qualified immunity standard.[85] Under that standard, a government official is entitled to qualified immunity unless the plaintiff establishes that a constitutional right was violated on the facts alleged and that it should have been clear to a reasonable official that the conduct was unlawful in the situation in question (in other words, the right was "clearly established").[86]

II. THE LACK OF SUPREME COURT GUIDANCE AND THE RESULTING VARIATION IN THE STANDARDS EMPLOYED BY THE THIRD, SIXTH, NINTH, AND ELEVENTH CIRCUITS

As of yet, the Supreme Court has not articulated a clear standard as to which sources of decisional law lower courts can turn to when addressing the "clearly established" prong within the qualified immunity analysis.[87] As a result, the U.S. Courts of Appeals differ in their use of other circuits' decisions, district court opinions, and state decisional law.

A. The Supreme Court's Hands-Off Approach

While *Harlow* clarified that officials are immune from civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights,"[88] the Court did not address which sources of decisional law courts should reference when deciding whether the law was clearly established.[89] The Court has since clarified that decisions of the controlling circuit should be

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84. *Id.* at 232. This requirement has created a bit of controversy within the Court. *See infra* note 102.

85. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001).

86. *Id.*; *see also* Hope v. Pelzer, 536 U.S. 730, 736, 739 (2002).

87. The Supreme Court continues to decline opportunities to provide further guidance regarding the "clearly established law" prong of the qualified immunity analysis. In late June 2005, the U.S. Department of Justice filed a Petition for a Writ of Certiorari in the Supreme Court that asked whether the law at issue had been clearly established at the time the allegedly constitutional actions took place. *See* Petition for Writ of Certiorari at 1, Hartman v. Moore, __ U.S. __, 125 S. Ct. 2977 (2005) (No. 04-1495), 2005 WL 1123566. The Supreme Court granted certiorari as to the constitutional question but not as to the qualified immunity question. *See* Hartman v. Moore, __ U.S. __ at __, 125 S. Ct. 2977, 2978 (2005) ("Petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia granted limited to Question 1 presented by the petition.").

88. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

89. *See id.* at 819 n.32 ("[W]e need not define here the circumstances under which 'the state of the law' should be 'evaluated by reference to the opinions of this Court, of the Court of Appeals, or of the local District Court.'") The Court stated that it was following the approach it had taken in *Procunier v. Navarette*, 434 U.S. 555, 565 (1978). It is interesting to note that the Court did not mention state court opinions in either case.

For an interesting discussion of the role of state court decisions in deciding whether a right was clearly established, see Richard B. Saphire, *Qualified Immunity in Section 1983 Cases and the Role of State Decisional Law*, 35 ARIZ. L. REV. 621 (1993).

referenced.[90] It also implied a willingness to look to cases outside the controlling circuit to those issued by other unspecified courts.[91] Moreover, it made clear that appellate courts may reference case law not referenced by the parties in their briefs or the lower courts in their decisions.[92]

In *Wilson v. Layne*,[93] the U.S. Supreme Court came as close as it ever has to explicitly articulating a standard for lower courts to use in referencing decisional law. In *Wilson*, homeowners brought § 1983 and *Bivens* actions against law enforcement officials after the police brought members of the media into their home to observe and record the officers' attempted execution of an arrest warrant on the homeowners' son.[94] The Fourth Circuit determined that qualified immunity protected the officers from civil liability.[95] The Supreme Court began its analysis by holding that the homeowners had shown that the officers violated their Fourth Amendment rights.[96] The Court then considered whether those Fourth Amendment rights were clearly established at the time of the search.[97] Specifically, the Court inquired as to "whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed."[98] The plaintiffs employed a state intermediate court decision, two unpublished district court decisions, and a Sixth Circuit decision in their attempt to demonstrate the clearly established unlawfulness of the officers' conduct.[99]

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90. United States v. Lanier, 520 U.S. 259, 268–69 (1997) ("[W]e think it unsound to read [*Screws v. United States*, 325 U.S. 91 (1945),] as reasoning that only this Court's decisions could provide the required warning."). The Court reasoned that it had previously referred to courts of appeals decisions when deciding whether a right was "clearly established." *Id.* at 269 (citing to Mitchell v. Forsyth, 472 U.S. 511, 533 (1985); Davis v. Scherer, 468 U.S. 183, 191–92 (1984); Elder v. Holloway, 510 U.S. 510, 516 (1994)).

91. *See Lanier*, 520 U.S. at 269 ("Although . . . disparate decisions in various Circuits might leave the law insufficiently certain . . . , such a circumstance may be taken into account . . . , without any need for a categorical rule that decisions of the Courts of Appeals and other courts are inadequate as a matter of law to provide it."); *see also* R. George Wright, *Qualified and Civic Immunity in Section 1983 Actions: What Do Justice and Efficiency Require?*, 49 SYRACUSE L. REV. 1, 18 (1998).

92. Elder v. Holloway, 510 U.S. 510, 516 (1994) (reasoning that the question of whether a federal right was clearly established is a question of law that must be reviewed *de novo* on appeal, and therefore, "[a] court engaging in review of a qualified immunity judgment should . . . use its 'full knowledge of its own [and other relevant] precedents'" (quoting Davis v. Scherer, 468 U.S. 183, 192 n.9 (1984) (second alteration in original))).

93. 526 U.S. 603 (1999).

94. *Id.* at 606–08.

95. *See* Wilson v. Layne, 141 F.3d 111, 115–17 (4th Cir. 1998), *aff'd*, 526 U.S. 603 (1999).

96. *See Wilson*, 526 U.S. at 614.

97. *See id.*

98. *Id.* at 615.

99. *See id.* at 616.

The Supreme Court rejected the plaintiffs' arguments and held that the officers were entitled to qualified immunity.[100] In so doing, the Court explained:

> Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely, *nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful*.[101]

Although the Courts of Appeals have interpreted this statement in differing ways,[102] it does seem to imply that decisional law from courts outside the circuit in which the case originates may be used to show a clearly established right when the Court deems such cases to constitute "a consensus." However, we cannot know for sure because, subsequent to *Wilson*, the Court provided little express guidance as to which decisional sources may be used to show clearly established law.[103]

The Supreme Court's recent qualified immunity case, *Brosseau v. Haugen*,[104] however, provides additional support for the proposition that courts can consider other circuits' decisions in deciding the "clearly established" prong. That case involved a plaintiff's § 1983 action against an officer who shot the plaintiff in the back while he was fleeing the scene of a crime.[105] The Court, after skipping over the question of whether a constitutional violation occurred,[106]

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100. *See id.* at 617 (finding that "the law on third-party entry into homes was [not] clearly established in April 1992").

101. *Id.* (emphasis added). Apparently, the plaintiffs' citation to a state intermediate court decision, two unpublished district court decisions, and a Sixth Circuit decision, in the Court's eyes, did not constitute such a consensus. *Id.*

102. *See* McClendon v. City of Columbia, 305 F.3d 314, 329 (5th Cir. 2002) (overruling the statement, from a prior case, that "we are confined to precedent from our circuit or the Supreme Court" in deciding whether a right was clearly established because it was inconsistent with the Supreme Court's method of analysis in *Wilson*). *But see* Marsh v. Butler County, 268 F.3d 1014, 1033 n.10 (11th Cir. 2001) (en banc) (reaffirming that the Eleventh Circuit only looks to decisions of the U.S. Supreme Court, the Eleventh Circuit, and the highest court of the pertinent state because it "[does] not understand *Wilson v. Layne* to have held that a 'consensus of cases of persuasive authority' from other courts would be able to establish the law clearly" (internal citations omitted)).

103. *See* Saucier v. Katz, 533 U.S. 194, 209 (2001) (failing to address whether decisional law was sufficient to show a clearly established right because "neither respondent nor the Court of Appeals [had] identified any case demonstrating a clearly established rule prohibiting the officer from acting as he did"); *see also* Groh v. Ramirez, 540 U.S. 551, 563–64 (2004) (holding that an officer was not entitled to qualified immunity since the warrant he relied on was so deficient that no reasonable officer could have presumed it to be valid); Hope v. Pelzer, 536 U.S. 730, 741–42 (2002) (concluding that the law was established based on binding Eleventh Circuit precedent, an Alabama Department of Corrections regulation, and a Department of Justice report).

104. __ U.S. __, 125 S. Ct. 596 (2004).

105. *Id.* at 597–98.

106. The Court's decision to assume away the "constitutional violation" prong is particularly ironic considering it has required lower courts to decide the constitutional

addressed the question of whether the state of the law at the time was such that a reasonable officer in Brosseau's shoes would have known that the shooting was in contravention of the Fourth Amendment.[107] Although the case was before the Court on a writ of certiorari to the Ninth Circuit,[108] the officer argued that cases from the Eighth and Sixth Circuits established that a law enforcement official may shoot a fleeing suspect when he presents a risk to others.[109] On the other hand, the plaintiff argued that the officer was put on notice of the illegality of her actions by a Seventh Circuit case.[110] In holding that the officer was entitled to qualified immunity, the Court concluded that "[t]he cases by no means 'clearly establish' that Brosseau's conduct violated the Fourth Amendment."[111] Therefore, it appears at the very least that cases from other circuits may be referenced when determining whether or not the law was clearly established at the time of an official's actions. However, because the Supreme Court referenced such cases in its determination that the law *was not* clearly established, it remains unclear whether decisions from other circuits may be used to show that the law *was* clearly established.

B. The Courts of Appeals' Differing Standards

With little or no guidance from the U.S. Supreme Court, the U.S. Courts of Appeals have continuously struggled to shape their own standards regarding which decisional law is relevant.[112] As should be expected, the resulting standards vary from circuit to circuit.[113] What follows is an explanation of the standards currently employed by the Third, Sixth, Ninth, and Eleventh Circuits.[114]

1. Third Circuit—No Clear Standard

Like the Supreme Court, the Third Circuit has provided little express guidance as to where it will look to determine whether the law was "clearly established" at the time an official commits a constitutional violation.[115] In fact, on

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question prior to deciding the "clearly established" question. *See Saucier*, 533 U.S. at 201. At least three members of the Court expressed concern that such a requirement "makes little administrative sense and can sometimes lead to a constitutional decision that is effectively insulated from review." *See Brosseau*, __ U.S. at __, 125 S. Ct. at 600–01 (Breyer, J., concurring).

107. *Brosseau*, __ U.S. at __, 125 S. Ct. at 599–600.

108. *See* Brosseau v. Haugen, 339 F.3d 857 (9th Cir. 2003).

109. *Brosseau*, __ U.S. at __, 125 S. Ct. at 600.

110. *Id.*

111. *Id.*

112. As one circuit has aptly framed the question: "[S]hould our reference point be the opinions of the Supreme Court, the Courts of Appeals, District Courts, the state courts, or all of the foregoing?" Hobson v. Wilson, 737 F.2d 1, 25–26 (D.C. Cir. 1984).

113. *See* Saphire, *supra* note 89, at 622–23 (explaining that the federal circuit courts have differed in their approach to considering the decisions of federal courts outside the circuit in which the court lies).

114. The Author chose these four circuits because, for the most part, they are representative of the standards employed by the other eight circuits.

115. *See* Jonathan M. Stemerman, *Unclearly Establishing Qualified Immunity: What Sources of Authority May Be Used to Determine Whether the Law is "Clearly*

at least two occasions the question sparked a dissension within the circuit.[116] It is clear that the Third Circuit will look to decisions issued by the Supreme Court and itself during the qualified immunity analysis.[117] Although it is evident that it will also take into account various other sources of law,[118] it is not clear when nonbinding law will be used or what weight such law will be accorded.

The Third Circuit's opinion in *Brown v. Muhlenberg Township*[119] is one interesting example of what can happen when courts are forced to apply such an amorphous standard. In *Brown*, the owners of a rottweiler shot to death by a police officer brought suit against the officer, the chief of police, the police department, and the township.[120] The dog's owners brought suit under § 1983, claiming that the defendants violated their Fourth and Fourteenth Amendment rights.[121] The court first held that the plaintiffs had shown a violation of their constitutional

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Established" in the Third Circuit?, 47 VILL. L. REV. 1221, 1230 (2002) (surveying which sources of law the Third Circuit will consider in determining whether the law was clearly established).

The Second Circuit also seems to lack a clear standard on the use of case law from other circuits to determine whether the law was clearly established. *See* Poe v. Leonard, 282 F.3d 123, 142 n.15 (2d Cir. 2002). While some Second Circuit opinions seem to indicate only Supreme Court and its own decisions are relevant, other opinions look to decisions from outside the Second Circuit during the qualified immunity analysis. *Compare* Wright v. Smith, 21 F.3d 496, 500 (2d Cir. 1994) (analyzing "whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question"), *with* Varrone v. Billoti, 123 F.3d 75, 79 (2d Cir. 1997) (relying on First, Fifth, and Eighth Circuit decisions in finding that the law was clearly established).

116. *See* Doe v. Delie, 257 F.3d 309, 330 (3d Cir. 2001) (Nygaard, J., concurring in part and dissenting in part); Brown v. Muhlenberg Twp., 269 F.3d 205, 219 (3d Cir. 2001) (Garth, J., concurring in part and dissenting in part).

117. *See* Doe v. Groody, 361 F.3d 232, 243–44 (3d Cir. 2004) (considering Supreme Court and Third Circuit case law in finding a violation of clearly established law); *see also* Martinez-Sanes v. Turnbull, 318 F.3d 483, 491 (3d Cir. 2003) (looking to Supreme Court and Third Circuit decisions in finding clearly established law).

118. *See Brown*, 269 F.3d at 211 n.4 ("If the unlawfulness of the defendant's conduct would have been apparent to a reasonable official based on the current state of the law, it is not necessary that there be binding precedent from this circuit so advising."); *see also* Rivas v. City of Passaic, 365 F.3d 181, 200 (3d Cir. 2004) (taking into account a Third Circuit case and two Seventh Circuit cases in declaring that the law was clearly established); Kopec v. Tate, 361 F.3d 772, 777–78 (3d Cir. 2004) (discussing Fifth, Sixth, Ninth, and Tenth Circuit cases in finding clearly established law); Leveto v. Lapina, 258 F.3d 156, 166, 172–73 (3d Cir. 2001) (considering decisions from the Supreme Court, the Second Circuit, the Third Circuit, the Fifth Circuit, the Eighth Circuit, the Eleventh Circuit, and the D.C. Circuit along with an unpublished Sixth Circuit decision, a Northern District of California decision, and a treatise in concluding that the law was not clearly established). *But see Delie*, 257 F.3d at 319, 321 n.10 (clarifying that neither state statutes nor district court opinions can clearly establish the law of the circuit but that district court opinions do play a role in the qualified immunity analysis).

119. 269 F.3d 205 (3d Cir. 2001).

120. *Id.* at 208–09.

121. *Id.* at 209, 213.

rights as required by the first prong of the qualified immunity analysis.[122] Turning to the "clearly established" prong, the court first referenced a Pennsylvania statute in determining that it was clearly established that one's dog is personal property.[123] Next, the court reasoned that U.S. Supreme Court precedent clearly established that destruction of property constitutes a seizure under the Fourth Amendment and that it is therefore unlawful for an officer to destroy a citizen's personal property absent the existence of a substantial public interest in destruction.[124] Finally, the court pointed to one Eighth Circuit case and one Ninth Circuit case to support the idea that the officer should have known his actions were unlawful at the time he acted.[125] As a result, the Third Circuit held that the district court erred in granting the officer qualified immunity.[126]

In a critical dissent, Judge Garth began by taking the majority to task for failing to articulate a clear standard for determining when particular constitutional rights are "clearly established."[127] Rather than merely criticize, however, Judge Garth suggested his own standard for deciding the second qualified immunity prong.[128] Under that standard, a court would balance the following factors in determining whether there was a violation of clearly established law:

> (1) Was the particular right which was alleged to have been violated specifically defined, or did it have to be constructed from analogous general precepts?; (2) Has that particular right ever been discussed or announced by either the Supreme Court or by this Circuit?; (3) If neither the Supreme Court nor this Circuit has pronounced such a right, have there been *persuasive* appellate decisions of other circuits—and by that I mean more than just one or two—so that the particular right could be said to be known generally?; (4) Were the circumstances under which such a right was announced of the nature that an official who claimed qualified immunity would have, acting objectively under pre-existing law, reasonably understood that his act or conduct was unlawful?[129]

Using this proposed standard, Judge Garth argued that the law was not clearly established when the officer shot the dog and, therefore, he was entitled to

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122. *Id.* at 211.

123. *Id.* The specific statute relied upon was section 459-601(a) of the Pennsylvania annotated statutes, which reads in part, "All dogs are . . . declared to be personal property and subjects of theft." *Id.* (quoting 3 PA. CONS. STAT. ANN. § 459-601(a) (2001)). The *Brown* court's reliance on this statute is particularly interesting considering the statement in *Doe v. Delie* that state statutes cannot clearly establish the law in the Third Circuit. *See supra* note 118.

124. *Brown*, 269 F.3d at 211.

125. *Id.* at 210.

126. *Id.* at 212.

127. *Id.* at 220 (Garth, J., concurring in part and dissenting in part).

128. *See id.*

129. *Id.* (emphasis in original) (internal citations omitted). Judge Garth notes that his proposed standard is similar to that crafted by the Second Circuit in *Horne v. Coughlin*. *See id.* at 220 n.4 (citing *Horne*, 155 F.3d 26, 29 (2d Cir. 1998)).

qualified immunity.[130] To this day, the Third Circuit is yet to adopt a clear standard.

2. Sixth Circuit—Semi-Narrow Standard

Unlike the Third Circuit, the Sixth Circuit has articulated a standard for determining when the law is clearly established for the purpose of qualified immunity.[131] In fact, the circuit has set out a well-defined hierarchy for its courts to use when utilizing decisional law from various jurisdictions.[132] Under that hierarchy, the Sixth Circuit looks first to Supreme Court decisions, then to decisions of the Sixth Circuit and other courts within the circuit, and finally to decisions of other circuits.[133] Ordinarily, to find a clearly established right, a district court within the Sixth Circuit must find binding precedent from the Supreme Court, the Sixth Circuit Court of Appeals, or itself.[134] However, the decisions of other courts can clearly establish a principle of law if they "both point unmistakably to the unconstitutionality of the conduct complained of and [are] so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting."[135] Although there need not be a relevant decision from the Supreme Court or the Sixth Circuit in order to find clearly established law,[136] it is only in extraordinary circumstances that the Sixth Circuit will look beyond its own decisions and those of the Supreme Court.[137] Therefore, government officials operating in the Sixth Circuit are able to tailor their conduct in accordance with a more finite pool of judicial pronouncements.

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130. *Id.* at 228. Subsequent to the issuance of the opinion in *Brown*, the officer involved filed a petition for rehearing, which was denied. *See* Brown v. Muhlenberg Twp., 273 F.3d 390, 390 (3d Cir. 2001). In a published Opinion Sur Denial of Petition for Rehearing, Judge Garth criticized the *Brown* majority and the entire Third Circuit for failing to discharge its obligation to articulate a standard for the second prong of the qualified immunity test. *See id.* at 390–91.

131. *See* Higgason v. Stephens, 288 F.3d 868, 876 (6th Cir. 2002); *see also* Hamilton v. Myers, 281 F.3d 520, 531 (6th Cir. 2002). The D.C. Circuit appears to utilize a standard somewhat similar to that employed by the Sixth Circuit. *See* Moore v. Hartman, 388 F.3d 871, 885 (D.C. Cir. 2004) (clarifying that "[t]he law of other circuits may be relevant to qualified immunity, but only in the event that no cases of 'controlling authority' exist in the jurisdiction where the challenged action occurred"). The D.C. Circuit also looks to the law of the highest court in the state in which the case arose. *See* Lederman v. United States, 291 F.3d 36, 48 (D.C. Cir. 2002).

132. *See* Walton v. City of Southfield, 995 F.2d 1331, 1336 (6th Cir. 1993).

133. *Id.*

134. *Id.*

135. *Id.* (citing Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1177 (6th Cir. 1988)).

136. Key v. Grayson, 179 F.3d 996, 1000 (6th Cir. 1999) (citing Chappel v. Montgomery County Fire Protection Dist. No. 1, 131 F.3d 564, 579 (6th Cir. 1997); McCloud v. Testa, 97 F.3d 1536, 1556 (6th Cir. 1996)).

137. *Walton*, 995 F.2d at 1336; *Key*, 179 F.3d at 1000.

3. Ninth Circuit—Broad Standard

The Ninth Circuit currently employs a standard for determining the existence of clearly established rights that is as broad or broader than that employed by any other circuit.[138] The Ninth Circuit begins its inquiry by looking to binding precedent.[139] If the right was previously clearly established by decisional authority of the Supreme Court or the Ninth Circuit, the inquiry ends.[140] In the absence of binding precedent, the Ninth Circuit will "look to whatever decisional law is available to ascertain whether the law is clearly established."[141] This includes decisions of state courts, other circuits, and district courts.[142] Even unpublished district court opinions may inform the Ninth Circuit's analysis.[143] When there are relatively few cases on point, none of which are binding, courts in the Ninth Circuit must determine "the likelihood that the Supreme Court or [the Ninth Circuit] would have reached the same result as courts which had previously considered the issue."[144] In order to make such a determination, courts in the Ninth Circuit must examine the legal analysis of outside courts and compare it to the Ninth Circuit's analysis in related but factually different situations.[145] Somehow, the Ninth Circuit expects government officials, who normally have had little or no legal training, to do so as well.

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138. The First, Fifth, Seventh, Eighth, and Tenth Circuits each employ a standard very similar to that used by the Ninth Circuit. *See* McClendon v. City of Columbia, 305 F.3d 314, 329 (5th Cir. 2002) (clarifying that under the second prong of the qualified immunity analysis, it is appropriate for a court to look to the law of other circuits when neither the Fifth Circuit nor the Supreme Court has spoken); Hatch v. Dep't for Children, Youth & Their Families, 274 F.3d 12, 23 (1st Cir. 2001) (instructing that in order to determine the contours of a particular right, courts "must look not only to Supreme Court precedent but to all available case law"); Denius v. Dunlap, 209 F.3d 944, 951 (7th Cir. 2000) ("In the absence of controlling precedent, we broaden our survey to include all relevant caselaw . . . ."); Buckley v. Rogerson, 133 F.3d 1125, 1129 (8th Cir. 1998) ("In the absence of binding precedent, a court should look to all available decisional law, including decisions of state courts, other circuits, and district courts."); Medina v. City & County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992) ("[T]here 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.").

139. *See* Capoeman v. Reed, 754 F.2d 1512, 1514 (9th Cir. 1985).

140. Boyd v. Benton County, 374 F.3d 773, 781 (9th Cir. 2004).

141. *Capoeman*, 745 F.2d at 1514; *see also Boyd*, 374 F.3d at 781; Sorrels v. McKee, 290 F.3d 965, 970 (9th Cir. 2002).

142. Drummond v. City of Anaheim, 343 F.3d 1052, 1060 (9th Cir. 2003); Malik v. Brown, 71 F.3d 724, 727 (9th Cir. 1995).

143. *Sorrels*, 290 F.3d at 971; *see also* Bahrampour v. Lampert, 356 F.3d 969, 977 (9th Cir. 2004); *Drummond*, 343 F.3d at 1060.

144. *Capoeman*, 754 F.2d at 1515.

145. *Id.*

4. Eleventh Circuit—Narrow Standard

The Eleventh Circuit employs the narrowest standard in determining what constitutes "clearly established" law.[146] In certain circumstances, a relevant federal statute or constitutional provision is specific enough that the law in the Eleventh Circuit is deemed to be clearly established, even in the total absence of case law.[147] If the conduct is not so egregious as to violate some federal statute or constitutional provision on its face, the Eleventh Circuit then turns to case law, which it divides into two separate categories.[148]

The first category consists of those cases that contain broad statements of principle not tied to particularized facts.[149] After their issuance, these judicial decisions can be referenced to show clearly established law in a wide variety of future factual circumstances.[150] However, in order to do so, such a broad principle must clearly establish the law "with obvious clarity" so that every objectively reasonable government official would know that the official's conduct is in violation of federal law when he acts.[151]

The second category consists of precedent that is closely tied to the facts.[152] Within this category, the Eleventh Circuit will only look to decisions of the U.S. Supreme Court, the U.S. Court of Appeals for the Eleventh Circuit, and the highest court of the state in which the incident giving rise to the lawsuit occurred.[153] When this type of precedent is used in an attempt to show clearly

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146. The Fourth Circuit's standard is identical to the Eleventh Circuit's standard. *See* Wallace v. King, 626 F.2d 1157, 1161 (4th Cir. 1980) (opining that the law is clearly established when it has "been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state"); *see also* Wilson v. Kittoe, 337 F.3d 392, 402–03 (4th Cir. 2003) (same); Edwards v. City of Goldsboro, 178 F.3d 231, 251 (4th Cir. 1999) (same); Robinson v. Balog, 160 F.3d 183, 187 (4th Cir. 1998) (same).

147. *See* Lassiter v. Ala. A & M Univ., Bd. of Trs., 28 F.3d 1146, 1150 n.4 (11th Cir. 1994) (explaining that "[w]e leave open the possibility that occasionally the words of a federal statute or federal constitutional provision will be specific enough . . . to overcome qualified immunity even in the absence of case law"), *abrogated in part by* Holloman v. Harland, 370 F.3d 1252 (11th Cir. 2004); *see also* Vinyard v. Wilson, 311 F.3d 1340, 1350 (11th Cir. 2002) (stating that "the words of a federal statute or federal constitutional provision may be so clear and the conduct so bad that case law is not needed to establish that the conduct cannot be lawful").

148. *See Vinyard*, 311 F.3d at 1351–52.

149. *Id.* at 1351.

150. *Id.* A blanket declaration by the Supreme Court that it is unconstitutional to place prisoners in the stocks would be an example of such a statement of broad principle. An official who subsequently decides to place a prisoner in the stocks will be liable since the unconstitutionality of his or her conduct is independent of the factual circumstances in which the official acted.

151. *Id.*

152. *Id.*

153. Thomas v. Roberts, 323 F.3d 950, 955 (11th Cir. 2003); *Vinyard*, 311 F.3d at 1351, 1352 n.22; Marsh v. Butler County, 268 F.3d 1014, 1032 n.10 (11th Cir. 2001) (en banc). The Eleventh Circuit continues to use this standard despite arguments by plaintiffs that it is overly narrow. For example, in *Thomas*, the plaintiffs argued that the language in

established law, the Eleventh Circuit also determines whether the precedent is "fairly distinguishable" from the circumstances facing an official.[154] If a fact-specific precedent is "fairly distinguishable" from such circumstances, it cannot clearly establish the law in that particular official's case and qualified immunity applies.[155] Conversely, if a fact-specific precedent is not "fairly distinguishable," in other words, if it is "materially similar" to the circumstances facing an official, then it can clearly establish the law.[156]

Since most cases do not establish a broad principle of law,[157] and only decisions of the U.S. Supreme Court, the Eleventh Circuit, and the pertinent state court of last resort can be used to show clearly established law, government officials enjoy a high degree of protection within the Eleventh Circuit.

III. THE SUPREME COURT MUST REMEDY THE INCONSISTENCIES SURROUNDING WHICH SOURCES OF DECISIONAL LAW MAY "CLEARLY ESTABLISH" CONSTITUTIONAL RIGHTS

While in certain circumstances intercircuit splits may be beneficial,[158] the split among the circuits as to which decisional sources may be utilized to show clearly established law is detrimental. First, unjust results are produced when the standards employed among the various circuits are not uniform.[159] Second, the inconsistencies cause problems for litigants in circuits that have failed to articulate a clear standard.[160] Although the U.S. Supreme Court should only step in and provide uniformity in the case where a split's drawbacks outweigh its benefits,[161] this is one such split.

Wilson v. Layne, 526 U.S. 603, 617 (1999), established that a "consensus of cases of persuasive authority" from other circuits may create clearly established law. *Thomas*, 323 F.3d at 955. In rejecting that argument, the court pointed to the *Marsh* decision, in which the court explained that it did not understand *Wilson* to have held that a consensus of cases of persuasive authority would be able to establish the law clearly. *Id.* In so holding, the *Marsh* court explained that "[w]e do not expect public officials to sort out the law of every jurisdiction in the country." 268 F.3d at 1032 n.10.

154. *Vinyard*, 311 F.3d at 1352.

155. *Id.*

156. *Id.*

157. *See id.* ("[F]or judge-made law, there is a presumption against wide principles of law.").

158. *See infra* notes 162–71 and accompanying text.

159. *See infra* notes 177–83 and accompanying text.

160. *See infra* notes 184–91 and accompanying text.

161. *See* J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CAL. L. REV. 913, 930–31 (1983). Judge Wallace proposes an interesting equation when determining whether a circuit split is desirable or not. *See id.* at 930. That equation is V = Q - (D + U), where V = the value of intercircuit conflict, Q = the improvement in quality of the resulting rule, D = the sum of the cost of the delay in producing a definitive answer, and U = the cost of the resultant uncertainty. *Id.* When V is negative, intercircuit splits are unacceptable, and where V is positive, they are at least tolerable. *Id.* at 930–31.

A. The Good Splits

Conflict among the circuit courts with regard to a particular legal issue is not always something that should be avoided at all costs.[162] Sometimes a legal issue is better fleshed out when it is considered by multiple judges with differing viewpoints.[163] As Judge J. Clifford Wallace of the Ninth Circuit Court of Appeals has aptly noted, "The many circuit courts act as the 'laboratories' of new or refined legal principles . . . providing the Supreme Court with a wide array of approaches to legal issues and thus, hopefully, with the raw material from which to fashion better judgments."[164] Moreover, our vast country with its many regional differences may also benefit from federal law that takes those differences into account.[165]

The differing circuit standards as to which jurisdictional sources of law may be used in the qualified immunity analysis are no longer beneficial. The split's potential benefits have already been realized because it has been in existence for so long. Courts have struggled with the issue for more than twenty years,[166] and nearly every circuit has definitively weighed in.[167] As a result, the Supreme Court has a number of different standards from which to choose.[168] Plenty of discussion regarding the benefits and drawbacks of each standard has occurred in the lower courts.[169] Therefore, any marginal benefit that might result from leaving the circuit split intact is negligible.[170] Moreover, the ability of claimants to enforce their federal rights, which is partially governed by the strength of the qualified immunity defense available to government officials, does not benefit from regional differences.[171]

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162. *See id.* at 929.

163. *See id.* Justice Stevens expressed the same view in a speech given in response to national concern over the Supreme Court's caseload. *See* Todd E. Thompson, *Increasing Uniformity and Capacity in the Federal Appellate System*, 11 HASTINGS CONST. L.Q. 457, 457, 468 (1984) (citing Justice John Paul Stevens, Remarks before the Am. Judicature Soc'y Annual Banquet (Aug. 6, 1982)).

164. Wallace, *supra* note 161, at 929.

165. *Id.* at 930. Judge Wallace notes that a field such as water rights might be one area of law where regional variation would be advantageous. *Id.*

166. *See, e.g.*, Capoeman v. Reed, 754 F.2d 1512, 1514 (9th Cir. 1985); Hobson v. Wilson, 737 F.2d 1, 26 (D.C. Cir. 1984), *overruled in part on other grounds by* Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993); Wallace v. King, 626 F.2d 1157, 1161 (6th Cir. 1980).

167. *See supra* notes 112–57 and accompanying text.

168. *See supra* notes 112–57 and accompanying text.

169. *See* Brown v. Muhlenberg Twp., 269 F.3d 205, 220 (3d Cir. 2001) (Garth, J., concurring in part and dissenting in part); Jean v. Collins, 155 F.3d 701, 709 (4th Cir. 1998), *cert. granted, judgment vacated on other grounds*, 526 U.S. 1142 (1999).

170. *See* Thompson, *supra* note 163, at 469 ("Since four federal judges must examine an issue before it is passed on by a single court of appeals, it is unlikely that examination by three or more courts will discover subtleties missed by the first two.").

171. Thompson doubts that varying local needs really do support conflicts among the circuits. *See id.* at 468. First, he thinks it unlikely that federal law can be responsive to regional differences especially at the circuit court level. *Id.* Second, he thinks that "it is the

B. The Bad Splits

Not only do circuit splits have benefits, but they also have considerable drawbacks.[172] In fact, the disadvantages of circuit splits are much easier to identify than the advantages.[173] Those disadvantages include "the sense of injustice caused by different interpretations of ideally uniform federal law, the advantage given to litigants able to forum shop, and the uncertainty and unpredictability engendered in circuits which have not yet ruled on the issues."[174] As discussed below, litigants on both sides of § 1983 and *Bivens* actions are considerably disadvantaged by the lack of U.S. Supreme Court guidance on which sources of decisional law are pertinent to the qualified immunity analysis.[175]

1. The Costs of the Differing Standards Among the Circuits

Although the articulation of a clear standard is a step forward within each individual circuit, the existence of clear standards that vary among the circuit courts is still problematic. The U.S. Supreme Court, in fact, includes the existence of an intercircuit split among the sanctioned reasons to grant a writ of certiorari.[176] In the context of qualified immunity, the variation in standards among the circuit courts creates a number of problems.

First, the lack of uniformity in what should ideally be uniform federal law creates a sense of injustice.[177] This sense of injustice is particularly powerful in the context of § 1983 and *Bivens* actions where one is seeking to enforce his or her civil rights.[178] Those civil rights are typically enshrined within the Constitution,

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essence of federal law that it be applied and enforced uniformly throughout the nation." *Id.* This is especially true when citizens' civil rights are involved.

172. *See* Wallace, *supra* note 161, at 930; *see also* Stemerman, *supra* note 115, at 1247–50; Thompson, *supra* note 163, at 468.

173. Wallace, *supra* note 161, at 930.

174. Thompson, *supra* note 163, at 468. Additionally, Judge Wallace posits that intercircuit conflicts have a primarily negative effect on multicircuit actors, such as the federal government and corporations. Wallace, *supra* note 161, at 931. This is important considering federal officials are often the ones seeking qualified immunity. *See, e.g.*, Wilson v. Layne, 526 U.S. 603, 608 (1999); Siegert v. Gilley, 500 U.S. 226, 229 (1991); Anderson v. Creighton, 483 U.S. 635, 637 (1987).

175. *See infra* notes 176–91 and accompanying text.

176. *See* SUP. CT. R. 10(a) (stating that the U.S. Supreme Court may grant a writ of certiorari in a case if "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

177. Thompson, *supra* note 163, at 468; Wallace, *supra* note 161, at 930.

178. *See* Owens v. Okure, 488 U.S. 235, 249 (1989) (observing that "claims brought under § 1983 include 'discrimination in public employment on the basis of race or the exercise of First Amendment rights, discharge or demotion without procedural due process, mistreatment of schoolchildren, deliberate indifference to the medical needs of prison inmates, the seizure of chattels without advance notice or sufficient opportunity to be heard'" (quoting Wilson v. Garcia, 471 U.S. 261, 273 (1985))).

which is intended to apply equally to all.[179] For example, the strength of one's Eighth Amendment right to be free from cruel and unusual punishment must not vary from state to state. Likewise, a federal official's chances of facing liability should not increase or decrease based on the locality in which his actions took place. However, both the odds that a claimant will be successful in vindicating an alleged infringement upon his federal rights and the chances that an official will be held personally liable both vary from circuit to circuit under the current state of the law.[180] In the end, the only way to effectively remedy the problem is for the U.S. Supreme Court to step in and provide uniformity.

Another cost resulting from the differing circuit standards is that the door is open to forum shopping by litigants.[181] While this only becomes a problem when a federal official performs his duties in multiple circuits, it is a problem nonetheless. When jurisdiction is available[182] and venue is appropriate[183] in

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179. *See* Zadvydas v. Davis, 533 U.S. 678, 694 (2001) (remarking that "'all persons within the territory of the United States are entitled to the protection of the Constitution").

180. A comparison between the standards employed by the Ninth and Eleventh Circuits illustrates the problem. As already mentioned, in determining whether a constitutional right was clearly established, the Ninth Circuit takes a broad approach and looks to all available decisional law, while the Eleventh Circuit takes a strict approach and looks only to cases of the U.S. Supreme Court, the Eleventh Circuit, and the pertinent state court of last resort. *See supra* Part II.B. While no quantitative analysis has been undertaken to determine a claimant's likelihood of overcoming a qualified immunity defense in each respective circuit, the Ninth Circuit's standard, which allows a claimant to utilize decisions from an unlimited number of jurisdictions, would likely result in relatively more findings that there was a clearly established right. *See supra* Part II.B.2. Conversely, the Eleventh Circuit's standard, which restricts claimants to three jurisdictional sources, likely results in relatively fewer findings of a clearly established right, and therefore, more grants of summary judgment in officials' favor. *See supra* Part II.B.4. No matter which of the two circuits is examined, there is a greater chance that one of the parties to the litigation is going to perceive that an injustice has occurred when he or she realizes that a broader or stricter standard is used elsewhere.

181. *See* Thompson, *supra* note 163, at 468; Wallace, *supra* note 161, at 930.

182. All district courts have subject matter jurisdiction over all § 1983 and *Bivens* actions since they arise "under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2002). Furthermore, personal jurisdiction will be available in the judicial district in which the defendant resides or in the judicial district where the constitutional violation occurred. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471–72, 476 (1985). For example, if an FBI agent resides in Arizona but travels to the Southern District of New York to serve a search warrant and in the process of so doing is alleged to have violated a suspect's constitutional rights, a court in Arizona or New York will be able to exercise subject matter and personal jurisdiction over the FBI agent.

183. Because a district court's jurisdiction over § 1983 and *Bivens* actions results from the existence of a federal question, venue will be appropriate either in the judicial district where the defendant resides or in the judicial district in which a substantial part of the events giving rise to the cause of action occurred. *See* 28 U.S.C. § 1391(b) (2002). For example, if an ATF agent resides in Idaho but travels to the Middle District of Tennessee to serve a search warrant and in the process of so doing is alleged to have violated a suspect's constitutional rights, venue will be appropriate in either the District of Idaho or the Middle District of Tennessee.

multiple circuits, the circuit most amenable to § 1983 and *Bivens* actions will likely dictate where a claim is ultimately filed. The question of which circuit employs the most beneficial standard for determining whether the law was clearly established will play a central role in that determination. Because the resolution of the "clearly established" prong is often outcome determinative, in some cases, therefore, the choice of forum is as well. Under our federal system, a claimant's chances of recovery and an official's likelihood of personal liability must not significantly increase or decrease based upon the simple choice of where to file suit. However, the only way to remedy this negative state of affairs is for the Supreme Court to clearly announce which sources of decisional law may be referenced when deciding the question of qualified immunity.

2. The Costs in Those Circuits That Have Failed to Articulate a Clear Standard

The lack of U.S. Supreme Court guidance creates additional costs in those circuits that, as of yet, have failed to articulate a clear standard.[184] Those costs are primarily engendered by the uncertainty and unpredictability of having no clear standard to guide litigants and judges in their quest for clearly established law.[185]

One result of the uncertainty and unpredictability is that litigants and courts alike are forced to parse through a never-ending amount of case law from any number of jurisdictions in order to find those decisions that might support their respective positions. Logically, in the absence of a clear standard, each party is going to cite as many cases as possible, from as many jurisdictions as possible, to show that the law is, or is not, clearly established. This "Odyssean quest"[186] results in wasted judicial and legal resources. Fewer resources would be expended if litigants had a clear idea as to which jurisdictions are, and are not, pertinent in the qualified immunity analysis.

Moreover, in the absence of a clear standard, it is difficult for litigants to evaluate their likelihood of success.[187] That success often depends on the extent to which a court is willing to look to case law mined from other jurisdictions.[188] With no clear standard, litigants are left to wonder whether such case law will even be considered. Furthermore, when the particular circuit does decide that it is finally time to articulate a clear standard, litigants' future success will depend on which standard is ultimately adopted.[189]

Finally, the lack of a clear standard leaves the final disposition of § 1983 and *Bivens* claims and defenses "to the personal prejudices of the judge or judges

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184. *See* Wallace, *supra* note 161, at 930; *see also* Stemerman, *supra* note 115, at 1247–50; Thompson, *supra* note 163, at 468.

185. *See* Wallace, *supra* note 161, at 930; *see also* Thompson, *supra* note 163, at 468.

186. This phrase was coined by The Hon. Harvie Wilkinson, III of the U.S. Court of Appeals for the Fourth Circuit. *See* Jean v. Collins, 155 F.3d 701, 709 (4th Cir. 1998).

187. Stemerman, *supra* note 115, at 1248–49.

188. *See supra* note 180 and accompanying text.

189. *See supra* note 180 and accompanying text.

evaluating the case as to the weight of each authority cited."[190] For example, a judge who favors civil rights claimants will be more willing than a wholly impartial judge to look to other jurisdictions for case law that supports the existence of a clearly established right. Similarly, a judge who favors government officials may be less willing than other judges to look to case law derived from other jurisdictions. And because the makeup of the three-judge panels, which hear appeals, varies from case to case, the reasoning and analysis employed in one case may be irreconcilable with the reasoning and analysis employed in another.[191]

IV. SUGGESTING A UNIFORM STANDARD FOR DETERMINING WHETHER THE LAW WAS "CLEARLY ESTABLISHED"

In resolving this harmful circuit split, the U.S. Supreme Court needs to adopt a standard that furthers the goal of qualified immunity—achieving a balance between citizens' vindication of constitutional rights and the need to protect government officials from frivolous lawsuits.[192] The following Part is divided into two subparts. Subpart A briefly suggests a standard by which the "clearly established" inquiry should be governed, and subpart B explains the suggested standard in greater detail.

A. The Proposed Standard

In trying to decide whether a constitutional right is "clearly established," courts should first determine whether the official's actions were obviously unconstitutional. If so, the inquiry should end, and qualified immunity should not be available.[193] If not, the court should consider the following factors: (1) Has the

190. Stemerman, *supra* note 115, at 1248.

191. *See id.* at 1248 (giving an example of this phenomenon from the Third Circuit).

192. *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

193. *See* Brokaw v. Mercer County, 235 F.3d 1000, 1022 (7th Cir. 2000) (explaining that a plaintiff "can establish a clearly established constitutional right by showing that the violation was so obvious that a reasonable person would have known of the unconstitutionality of the conduct at issue"); *see also* Rowe v. City of Fort Lauderdale, 279 F.3d 1271, 1280 n.10 (11th Cir. 2002). A case should only be decided on this prong of the suggested standard in extremely rare situations. In fact, an official's behavior needs to shock the conscience in an objective sense in order for a case to be decided on this particular prong. This prong must not create an open door for judges sympathetic to constitutional tort claimants to hold officials personally liable when a search of prior case law unearths little in the way of clearly established principles. *Accord* Hope v. Pelzer, 536 U.S. 730, 753 (2002) (Thomas, J., dissenting) ("The right not to suffer from 'cruel and unusual punishments' is an extremely abstract and general right. In the vast majority of cases, the text of the Eighth Amendment does not, in and of itself, give a government official sufficient notice of the clearly established Eighth Amendment law applicable to a particular situation. Rather, one must look to case law to see whether 'the right the official is alleged to have violated [has] been "clearly established" in a more particularized, and hence more relevant, sense . . . .'" (internal citation omitted)).

particular constitutional right ever been announced in binding precedent?;[194] (2) If binding precedent has not pronounced such a constitutional right, has a consensus of cases (more than one or two) from federal circuit courts or the pertinent state court of last resort[195] announced the particular constitutional right?;[196] (3) Was the right pronounced as a broad statement of principle, or was the pronouncement closely tied to the particularized facts of the prior case?;[197] (4) How recently was the constitutional right pronounced?

B. A More Detailed Explanation of the Proposed Standard

The obvious benefits of the proposed standard are that it would provide uniformity, help eliminate forum shopping, and decrease uncertainty in those courts that have not yet articulated a clear standard.[198] However, a more specific understanding of its benefits will be realized only through a more detailed explanation of its individual components.

1. Were the Official's Actions Obviously Unconstitutional?

The first prong of the suggested standard recognizes that certain conduct on the part of government officials is so egregious that no reasonable official could believe that such conduct is constitutional.[199] In such a situation, prior case law, which holds the particular action in question unconstitutional, is not required in order to put the official on "fair notice."[200] This idea traces its origins to the

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194. *See* Horne v. Coughlin, 155 F.3d 26, 29 (2d Cir. 1998) (considering "whether the decisional law of the Supreme Court and the applicable circuit court support . . . [a right's] existence" as part of the clearly established law inquiry).

195. When the Author refers to the "pertinent state court of last resort," he is referring to the state court of last resort in whichever state the alleged constitutional violation took place.

196. *See* Brown v. Muhlenberg Twp., 269 F.3d 205, 220 (3d Cir. 2001) (Garth, J., concurring in part and dissenting in part) (suggesting that the Third Circuit should determine whether "there [have] been persuasive appellate decisions of other circuit courts . . . so that the particular right could be said to be known generally").

197. *See* Vinyard v. Wilson, 311 F.3d 1340, 1351–52 (11th Cir. 2002) (classifying prior cases between those that announce "broad statements of principle" and those that are "tied to particularized facts").

198. *See supra* Part III.B.1–2.

199. *See* Deorle v. Rutherford, 272 F.3d 1272, 1285–86 (9th Cir. 2001) ("[N]otwithstanding the absence of direct precedent, the law may be, as it was here, clearly established. Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct."); *see also Vinyard*, 311 F.3d at 1350 ("[T]he words of a federal statute or federal constitutional provision may be so clear and the conduct so bad that case law is not needed to establish that the conduct cannot be lawful."); Denius v. Dunlap, 209 F.3d 944, 951 (7th Cir. 2000) ("In some rare cases, where the constitutional violation is patently obvious, the plaintiff may not be required to present the court with any analogous cases . . . .").

200. *See* Amanda K. Eaton, Note, *Optical Illusions: The Hazy Contours of the Clearly Established Law and the Effects of* Hope v. Pelzer *on the Qualified Immunity Doctrine*, 38 GA. L. REV. 661, 700 (2004) ("Any reasonable officer would or should

criminal law,[201] where certain acts are considered so egregious that they are considered inherently unlawful.[202] For instance, when one kills, rapes, or tortures another human being, notice of illegality is inferred based on the brutal nature of the crimes themselves.[203] The prosecution, therefore, is not expected to show that the defendant, prior to the commission of his crime, was aware of the particular statute under which he or she is eventually charged. Because the clearly established law standard is synonymous with the fair notice standard employed in criminal law, "the protection for inherently unlawful actions should be no greater in the qualified immunity context than in the criminal law context."[204] An official must not benefit from the nonexistence of a published decision where his or her behavior was obviously in contravention of the Constitution.[205] Therefore, if a court finds that a government official's actions were so egregious as to be inherently unconstitutional, the "clearly established" requirement is satisfied even in the absence of prior case law specifically holding such actions unconstitutional.[206] Accordingly, the government official is not entitled to qualified immunity.[207] On the other hand, if an official's actions were not so egregious as to be inherently unconstitutional, courts must consider four additional factors in determining whether the law was "clearly established."[208]

2. Has the Constitutional Right Been Pronounced In Binding Precedent?

When binding precedent clearly articulates the unconstitutionality of a certain action, that precedent will usually deprive a government official of qualified immunity if he or she acts contrary to it. However, which binding

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know . . . that strip-searching two second grade schoolchildren for seven dollars was a violation of their rights, even if no other officer had ever attempted to do the same before.").

201. The Supreme Court, on several occasions, has said that the fair notice required in the qualified immunity analysis is the same as the fair notice required in the criminal law context. *See, e.g.*, United States v. Lanier, 520 U.S. 259, 270 (1997); *see also* Hope v. Pelzer, 536 U.S. 730, 739 (2002).

202. *See supra* note 10 and accompanying text; *see also* Eaton, *supra* note 200, at 699.

203. *See* Armacost, *supra* note 6, at 594–95; *see also* Eaton, *supra* note 200, at 699–700.

204. Eaton, *supra* note 200, at 700. Professor Meyer makes another interesting argument for why officials in certain situations should not be entitled to qualified immunity, even in the absence of prior case law holding their particular actions unconstitutional. She argues that the official's conduct may be so obviously unconstitutional that prior cases holding so may be unpublished since circuits typically do not publish "run of the mill" cases. *See* Meyer, *supra* note 14, at 1518. As a result, if prior case law was required, some officers who make egregious but "run of the mill" mistakes would not be held liable. *Id.*

205. *See* Meyer, *supra* note 14, at 1520 ("The better approach to qualified immunity would acknowledge the extrajudicial source of commonsense values that guides the interpretation of constitutional principles, making some actions just seem obviously wrong, regardless of the accidental existence of a published decision arising from a similar set of facts.").

206. *Supra* note 193.

207. *See supra* note 86 and accompanying text.

208. *Supra* Part IV.B.

precedent is used varies according to which forum the case is decided in.[209] If the decision is made in federal court, case law from the U.S. Supreme Court and the circuit in which the action is brought is considered binding.[210] On the other hand, if the decision is made in state court, case law from the U.S. Supreme Court, the highest pertinent state court, and the intermediate state courts of appeal are considered binding.[211]

The use of binding precedent to determine the availability of qualified immunity makes sense for several reasons. First, the U.S. Supreme Court consistently looks to its own opinions and those of the controlling circuit in order to determine whether a right was clearly established.[212] The lower courts do likewise.[213] Moreover, this approach comports with the doctrine of precedent.[214] Finally, government officials and their employers must be encouraged to keep abreast of binding court decisions that directly affect them.[215] Although the

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209. Since actions brought pursuant to § 1983 and *Bivens* involve questions of federal and constitutional law, the federal courts may exercise federal question jurisdiction over them. *See* 28 U.S.C. § 1331 (2002). However, if a plaintiff brings such an action in state court, and the case is not removed to federal court, the state court is free to rule on the federal issues pursuant to its general jurisdiction. *See* Howlett v. Rose, 496 U.S. 356, 367 (1990) ("Federal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature.").

210. *See* Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 59 (1st Cir. 1999) ("[T]he Supreme Court 'has admonished the lower federal courts to follow its directly applicable precedent . . . .'") (quoting Figueroa v. Rivera, 147 F.3d 77, 81 n.3 (1st Cir. 1998)); *see also* United States v. Hahn, 359 F.3d 1315, 1345 (10th Cir. 2004) (per curium) (Murphy, J., dissenting) ("[T]he term 'binding precedent' means Supreme Court or Tenth Circuit precedent that *compels* a certain outcome." (emphasis in original)); Bowen v. United States, 192 F.2d 515, 517 (5th Cir. 1951) (clarifying that, until overruled, the Supreme Court's decisions are controlling on the lower federal courts).

211. *See* Auto Equity Sales, Inc. v. Super. Ct., 369 P.2d 937, 939 (Cal. 1962) ("[A]ll tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction."); *see also* State v. Guzman, 842 P.2d 660, 665 (Idaho 1992) (explaining that a decision of the Idaho Court of Appeals "becomes the precedential law of [Idaho], and all tribunals inferior to the Court of Appeals are obligated to abide by [its] decisions.").

212. *See, e.g.*, Groh v. Ramirez, 540 U.S. 551, 564–65 (2004) (looking to Supreme Court case law in determining the law was clearly established); Hope v. Pelzer, 536 U.S. 730, 741–42 (2002) (looking to binding Eleventh Circuit precedent in determining the law was clearly established).

213. *See, e.g.*, Owens v. Lott, 372 F.3d 267, 280 (4th Cir. 2004) (looking to Supreme Court and Tenth Circuit decisions in determining the law was not clearly established); Medina v. City & County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992) (same).

214. Saphire, *supra* note 89, at 645 ("[A]ssumptions derived from the doctrine of precedent would require the district court to follow its circuit's precedents.").

215. This is especially true considering U.S. Supreme Court and circuit court decisions are now usually posted on the Internet the same day as the decision is issued. *See, e.g.*, http://www.supremecourtus.gov/opinions/opinions.html (last visited Nov. 7, 2005) (posting U.S. Supreme Court opinions); http://www.ca3.uscourts.gov/recentop/week/recprec.htm (last visited Nov. 7, 2005) (posting Third Circuit opinions); http://www.ca11.

existence of binding precedent announcing a particular constitutional protection will usually result in a finding of a "clearly established" right, the nonexistence of such precedent does not end the inquiry.

3. Is There a Consensus of Cases From Federal Circuits or the Highest Pertinent State Court Establishing the Particular Right?

Not only should courts consider the existence of binding decisions, but they must also consider the decisions of other circuits and the pertinent state court of last resort. In so doing, courts must ask whether there was a consensus[216] of cases announcing a particular federal right such that a reasonable officer would have known his or actions were unlawful. Again, which case law is pertinent when considering this factor depends on whether the current action is being decided in federal or state court.[217] If a federal court is making the decision, it must look to the case law of outside circuits and of the pertinent state court of last resort.[218] On the other hand, if a state court is making the decision, it must look to all federal circuit court decisions. A state court need not look to decisions of the pertinent state court of last resort because it will have already done so under the prior factor.[219]

The notion that federal courts should consider cases from outside circuits recognizes that an official must not benefit merely because the existence of a specific constitutional right happens not to have been adjudicated in his home circuit. Furthermore, the U.S. Supreme Court has implicitly indicated on several occasions that the decisions of outside circuits play a role in the qualified immunity analysis.[220] On the other hand, government officials must not be forced to monitor district court decisions, published or unpublished, or to read every circuit's constitutional decisions. Rather, at least three or four nonbinding decisions from different courts establishing a particular constitutional right should exist before the official is said to have been fairly warned.

Not only should federal courts look to outside circuit case law, but they should also consider the constitutional decisions of the pertinent state court of last resort. State officials must not escape the applicability of all state court decisions

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uscourts.gov/opinions/index.php (last visited Nov. 7, 2005) (posting Eleventh Circuit opinions).

216. "Consensus" is defined as "group solidarity in sentiment and belief." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 482 (Philip Babcock Gove ed., 1993). Therefore, more than one or two cases should be required in order to constitute a "consensus."

217. *See supra* notes 209–11 and accompanying text.

218. For example, if a qualified immunity case is being decided by the U.S. Court of Appeals for the Eighth Circuit and was filed in district court in Minnesota, the Eighth Circuit should look for a consensus of cases from all circuits but the Eighth and should also look to cases from the Minnesota Supreme Court.

219. *See supra* note 211 and accompanying text.

220. *See supra* notes 101, 108–11 and accompanying text.

simply because an action is brought in or removed to federal court.[221] Furthermore, federal court use of state court decisions recognizes that Court as of late has justifiably had "very strong notions of comity and respect for state court decision making."[222] Finally, giving state court decisional law a role in federal courts pays homage to the fact that state courts were intended to, and do, play a significant role in the adjudication of federal rights.[223] It recognizes that state court judges are just as competent, and sometimes more competent, than federal judges at discerning constitutional rights and protections. However, at some point, comity and respect gives way to the goal of ensuring that government officials have fair warning as to the illegality of their actions before they are held personally liable. Therefore, only the highest pertinent state court's constitutional adjudications should be considered.

Although state courts are not bound by the federal courts of appeals' interpretations of federal law,[224] they should still give great weight to those interpretations as a matter of good government, fairness, respect, and convenience.[225] In fact, several state courts already do so.[226] For example, in *Seibring v. Parcell's Inc.*,[227] the Illinois Appellate Court explained that "in cases premised on alleged section 1983 violations as to which there are no pertinent Illinois Supreme Court or United States Supreme Court decisions, we choose to follow Seventh Circuit decisions . . . ."[228] Again, however, since we cannot expect government officials to keep current on all lower federal court decisions, state courts should only look to the federal circuit courts to try and find a consensus of cases.

4. Was the Constitutional Right Pronounced as a Broad Statement of Principle, or was the Pronouncement Closely Tied to the Particularized Facts of the Case?

Not only must courts concern themselves with whether a particular constitutional right originated in binding or nonbinding precedent, they must also examine in what manner the right was pronounced. Government officials are much more likely to have fair warning as to the illegality of their actions when prior case law clearly pronounces the existence of a constitutional right in a particularized

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221. Saphire, *supra* note 89, at 644 ("There is no apparent reason why [state] officials should not be expected and entitled to look to state courts for guidance in determining their duties to the citizens they serve.").

222. *Id.* at 642.

223. *See id.* at 641 ("While the enhanced role of the federal courts in the enforcement of federal law diminished the concomitant role of the state court, it did not eliminate it.").

224. *See* 1 STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS § 5.4, at 5-26 n.104 (1991) (noting that "the [Supreme] Court has never interpreted stare decisis to require state courts to follow decisions of lower federal courts").

225. *Cf.* Saphire, *supra* note 89, at 657.

226. *See* 1 STEINGLASS, *supra* note 224, § 5.4, at 5-27 to 5-30.

227. 532 N.E.2d 1335 (Ill. App. Ct. 1989).

228. *Id.* at 1340.

sense.[229] For example, if the Fourth Circuit were to hold that bringing members of the media into a home during the execution of an arrest warrant, no matter the circumstances, violates the Fourth Amendment, and officers subsequently bring members of the media along anyway, clearly they should be stripped of qualified immunity.

On the other hand, assume the Fourth Circuit holds that it is a violation of the Fourth Amendment to bring members of the tabloid media into a professional athlete's home during the execution of an arrest warrant at night when it is a near certainty that the athlete is at home. Police subsequently bring a member of the news media into a suspected drug lord's home during the execution of a search warrant in the middle of the day when no one is believed to be present. If a court subsequently decides that the officers' actions violated the homeowners' Fourth Amendment rights in the latter situation, the officers should nonetheless be entitled to qualified immunity because the highly factual nature of the holding in the former case is insufficient to confer adequate notice in the latter. In other words, when the previous holding is closely tied to the facts of a particular case, government officials are less likely to have fair warning.[230] However, cases that have very specific factual holdings may still give fair warning to government officials, so long as the situation that the official faced is not "fairly distinguishable" from the facts of the prior case.[231]

5. How Recently was the Constitutional Right Pronounced?

In order to be more realistic and fair, courts should also take into account the amount of time that has passed since the constitutional right was

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229. *See* Hope v. Pelzer, 536 U.S. 730, 741 (2002) (clarifying that "in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question").

230. This idea was implicitly recognized in *Hope* when the Supreme Court explained that "[i]n some circumstances . . . a very high degree of prior factual particularity may be necessary." *Id.* at 740–41. It was also expressed in *Saucier v. Katz* when Justice Kennedy explained:

> In this litigation, for instance, there is no doubt that *Graham v. Connor* clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. Rather, we emphasized in *Anderson* "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."

533 U.S. 194, 201–02 (2001) (internal citations omitted).

231. *See Saucier*, 533 U.S. at 202 (stating that if "various courts have agreed that certain conduct is a constitutional violation under facts not *distinguishable in a fair way* from the facts presented in the case at hand, the officer would not be entitled to qualified immunity . . . ." (emphasis added)); *see also* Pace v. Capobianco, 283 F.3d 1275, 1283 (11th Cir. 2002).

pronounced.[232] It is certainly more realistic to believe that a reasonable government official will have fair warning of a constitutional right if it is pronounced one year prior to his actions, rather than one week prior. In determining whether enough time has passed since a particular right was established, courts should consider the issuing "court's geographical proximity to the defendant government official, the frequency of the sort of litigation at issue generally or for persons doing the defendant's job, . . . the length of time the legal decision has been available, and the common-sensical or difficult nature of the legal issues involved."[233]

CONCLUSION

Federal and state officials that perform discretionary functions face a myriad of difficult and complex dilemmas every day. Often times, the decision as to which actions are appropriate are made in split seconds and under extreme pressure.[234] As a result, it is inevitable that those decisions will occasionally result in the deprivation of citizens' constitutional rights. However, the desire to promote the vigorous exercise of governmental authority has resulted in government officials being immune from personal liability unless their actions at the time were contrary to clearly established law.

The U.S. Supreme Court's continued failure to give clear guidance as to which sources of decisional law count in the qualified immunity analysis, however, has resulted in much confusion. Under the current state of the law, it is not clearly established as to how lower courts should determine whether the violated law was clearly established. This unclear standard is harmful to citizens and government officials alike. In failing to define when government officials will be deemed to have "fair warning" and, as a result, subject to personal liability, the U.S. Supreme Court has failed to heed Justice Holmes' command that "so far as possible the line should be clear."[235] This failure is of particular import considering the central role that notice plays in the qualified immunity context.[236]

This Note suggests a standard that appropriately balances the needs of citizens whose constitutional rights have been violated with the needs of government officials. The proposed standard not only employs common sense principles, but it also incorporates much of the limited guidance that the Supreme Court has provided on the issue thus far. Regardless of which standard the U.S. Supreme Court eventually adopts, it is evident that the "clearly established law" prong is in dire need of refinement. Until the time comes when such refinement is

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232. *See* Wright, *supra* note 91, at 23 (suggesting a similar standard "[a]s a matter of fairness and realism").

233. *Id.* at 24–25.

234. *See* Graham v. Connor, 490 U.S. 386, 396–97 (1989) (reminding lower courts that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation").

235. McBoyle v. United States, 283 U.S. 25, 27 (1931).

236. *See supra* notes 13–26 and accompanying text.

provided, § 1983 and *Bivens* litigants will be forced to navigate the murky waters of the qualified immunity doctrine on their own.