

2010

Clear as Mud: How the Uncertain Precedential Status of Unpublished Opinions Muddles Qualified Immunity Determinations

David R. Cleveland

Valparaiso University School of Law, david.cleveland@valpo.edu

Follow this and additional works at: http://scholar.valpo.edu/law_fac_pubs



Part of the [Civil Procedure Commons](#), [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Courts Commons](#), [Judges Commons](#), [Jurisprudence Commons](#), [Law and Society Commons](#), [Legal Education Commons](#), [Legal History, Theory and Process Commons](#), [Legal Profession Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

David R. Cleveland, *Clear as Mud: How the Uncertain Precedential Status of Unpublished Opinions Muddles Qualified Immunity Determinations*, 65 U. Miami L. Rev. 45 (2010).

This Article is brought to you for free and open access by the Law Faculty Presentations and Publications at ValpoScholar. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.

Clear as Mud: How the Uncertain Precedential Status of Unpublished Opinions Muddles Qualified Immunity Determinations

DAVID R. CLEVELAND*

TABLE OF CONTENTS

I. INTRODUCTION	45
II. CAUSES OF ACTION AGAINST GOVERNMENT OFFICIALS	51
III. QUALIFIED IMMUNITY.....	53
IV. UNPUBLISHED OPINIONS.....	56
V. CIRCUIT COURT PRACTICES VARY REGARDING UNPUBLISHED OPINIONS IN CLEARLY ESTABLISHING LAW	63
A. <i>Circuits that Are Silent on the Issue (1st, 5th, 8th, & D.C.)</i>	64
B. <i>Circuits Where Unpublished Opinions Cannot Be Used To Show Clearly Established Law (4th, 7th, & 11th)</i>	65
C. <i>Circuits Where Unpublished Opinions Likely Cannot Be Used To Show Clearly Established Law (2nd & 10th)</i>	68
D. <i>Circuits Where Unpublished Opinions Likely Can Be Used To Show Clearly Established Law (3rd & 6th)</i>	71
E. <i>The Circuit Where Unpublished Opinions Can Be Used To Show Clearly Established Law (9th)</i>	74
VI. CONCLUSION: UNPUBLISHED OPINIONS SHOULD BE USED IN DETERMINING THE CLEARLY ESTABLISHED LAW.....	76

I. INTRODUCTION

Denying precedential status to unpublished opinions muddles the already unclear law surrounding qualified immunity. Qualified immunity is a defense available to government officials accused of civil rights violations.¹ In fact, it is the most significant and most problematic defense to such claims.² By varying in their treatment of unpublished opinions, particularly on the issue of precedent, the federal circuits have added another layer of uncertainty and inequality to this analysis.³ The

* Associate Professor of Law, Nova Southeastern University, Shepard Broad Law Center. Professor Cleveland would like to express his gratitude to Jamie Cohen for her outstanding research assistance.

1. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“[G]overnment officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

2. MICHAEL AVERY ET AL., *POLICE MISCONDUCT* §§ 2:14, 3:3 (3d ed. 2009) (noting various complexities in both the substantive qualified immunity test and the procedural issues in bringing such claims); 1A MARTIN A. SCHWARTZ, *SECTION 1983 LITIGATION* § 9A.01[A] (2009) (“Qualified immunity is the most common immunity defense asserted in actions brought under 42 U.S.C. § 1983.”).

3. *Compare* D.C. CIR. R. 32.1 (stating that unpublished opinions issued after January 1,

Supreme Court has aptly cautioned in another context that “[l]iberty finds no refuge in a jurisprudence of doubt.”⁴ The federal circuits’ non-uniform practices regarding the precedential status of unpublished opinions has increasingly fostered a jurisprudence of doubt. The effect on the qualified immunity analysis is one concrete example of this doubt. This uncertainty should be removed either by granting these opinions precedential status or by recognizing their value in the qualified immunity analysis.

Individuals who have their civil rights violated by state government officials have a right to bring a suit in federal court for relief.⁵ The federal statute creating that right, now codified at 42 U.S.C. § 1983, was drafted to give effect to the recently passed Fourteenth Amendment and to provide an avenue to enforce federal civil rights even in the face of discriminatory state laws, state law enforcement apathy, or state court procedural barriers.⁶ The statute allows an injured person to make a claim against the person who injured that person directly, avoiding the sovereign immunity claim that would likely bar a claim against the state government itself. It has since been used to seek redress for the violation of a wide variety of federal rights.⁷ A similar cause of action against federal government officials was recognized in *Bivens v. Six Unknown*

2002 may be cited “as precedent”) with 9TH CIR. R. 36-3 (stating, with very limited exceptions, that unpublished opinions have no precedential value).

4. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992).

5. 42 U.S.C. § 1983 (2006) (creating a right to bring suit to enforce constitutional or statutory rights); *see also* SWORD AND SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION 4–5 (Mary Massaron Ross & Edwin P. Voss, Jr. eds., 3d ed. 2006) [hereinafter SWORD AND SHIELD].

6. *Monroe v. Pape*, 365 U.S. 167, 180 (1961).

7. *Johnson v. California*, 543 U.S. 499, 503–04 (2005) (Equal Protection right to be free from racial discrimination); *Devenpeck v. Alford*, 553 U.S. 146, 151 (2004) (Fourth Amendment right to be free from unreasonable search and seizure); *Hope v. Pelzer*, 536 U.S. 730, 735 (2002) (Eighth Amendment right to be free from cruel and unusual punishment); *Dennis v. Higgins*, 498 U.S. 439, 451 (1991) (right to bring an action under the Dormant Commerce Clause); *Tennessee v. Garner*, 471 U.S. 1, 5 (1985) (Fourth Amendment right to be free from deadly force in the apprehension of an unarmed, fleeing, suspected felon); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 536 (1985) (discharge or demotion in government employment without procedural due process); *Burnett v. Grattan*, 468 U.S. 42, 44 (1984) (discrimination in public employment based on race or the exercise of First Amendment rights); *Hudson v. Palmer*, 468 U.S. 517, 520 (1984) (Fifth Amendment takings); *Bell v. Wolfish*, 441 U.S. 520, 523–24 (1979) (substantive due process right to be free of punishment prior to conviction); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 282 (1977) (retaliation for exercise of First Amendment right to free speech); *Ingraham v. Wright*, 430 U.S. 651, 654 (1977) (use of corporal punishment in public schools); *Estelle v. Gamble*, 429 U.S. 97, 98 (1976) (deliberate indifference to the medical needs of prison inmates); *Rochin v. California*, 342 U.S. 165, 172–74 (1952) (Substantive Due Process freedom from government conduct that “shocks the conscience”); *McKinley v. City of Mansfield*, 404 F.3d 418, 422 (6th Cir. 2005) (Fifth Amendment right to freedom from self-incrimination); *see also* *Wilson v. Garcia*, 471 U.S. 261, 274–75 n.31 (1985) (collecting other civil rights contexts in which section 1983 was used to vindicate federal rights).

Named Agents of Federal Bureau of Narcotics.⁸ These actions are very similar, and in regard to the qualified immunity defense, they are identical.⁹

A government official may raise the defense of qualified immunity in these civil rights actions if the official's actions do not violate a "clearly established" right.¹⁰ That is, whether the official violated a federal right and whether that right was clearly established at the time.¹¹ This type of "good faith" immunity from suit for official acts is a venerable one,¹² but its exact contours under federal law were arrived at much more recently.¹³ For example, the question of whether the official's subjective good faith was relevant was decided in 1982,¹⁴ and the level of factual similarity needed to clearly establish the law was clarified as recently as 2004.¹⁵ The application of the qualified immunity defense

8. 403 U.S. 388 (1971).

9. *Wilson v. Layne*, 526 U.S. 603, 609 (1998) ("[T]he qualified immunity analysis is identical under either cause of action.").

10. *Harlow v. Fitzgerald* 457 U.S. 800, 818 (1982); *see also* *Groh v. Ramirez*, 540 U.S. 551, 563–64 (2004); *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (*per curiam*); *Hope*, 536 U.S. at 739–41; *Saucier v. Katz*, 533 U.S. 194, 200–03 (2001); *Crawford-El v. Britton*, 523 U.S. 574, 587–88 (1998); *Elder v. Holloway*, 510 U.S. 510, 512 (1994); *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *Siebert v. Gilley*, 500 U.S. 226, 231 (1991); *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Some governmental officials are entitled to absolute immunity, such as legislators, judges, and prosecutors acting within their traditional official roles. The Supreme Court has taken a functional and very restrictive approach to both deciding who is included in these classes and what activities are traditionally covered by absolute immunity. *Burns v. Reed*, 500 U.S. 478, 486–87 (1991); *Forrester v. White*, 484 U.S. 219, 223–24 (1988); *Malley v. Briggs*, 475 U.S. 335, 340–44 (1986); *see also* *SWORD AND SHIELD*, *supra* note 5, at 444–45 (describing the Supreme Court's "functional approach in determining whether a particular class . . . is entitled to assert an absolute immunity or qualified immunity defense").

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

12. *Wood v. Strickland*, 420 U.S. 308, 316–17 n.8 (1975); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (noting that governmental immunity was a "tradition so well grounded in history and reason" as early as 1871).

13. *Harlow*, 457 U.S. at 818–19 (requiring only objective good faith and thus rejecting former additional requirement of subjective good faith on the part of the defendant asserting immunity); *Hope*, 536 U.S. at 739–41 (requiring a level of prior notice of the right between abstract formulation and precisely analogous facts).

14. *Harlow*, 457 U.S. at 818–19 (requiring only objective good faith and thus rejecting former additional requirement of subjective good faith on the part of the defendant asserting immunity).

15. *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (*per curiam*) (holding that existing cases did not have the requisite factual similarity to the case at bar and demonstrating that the area "is one in which the result depends very much on the facts of each case"). Similarly, as recently as 2009, the Court altered the test by abandoning a prior decision that required courts to take the qualified immunity questions of constitutional violation and clearly established right in that order. *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009) (departing from a prior ruling in *Saucier v. Katz*, 533 U.S. 194 (2001) and holding that courts were free to address the allegation of a constitutional injury or the issue of whether the law was clearly established first as they saw fit). Commentators and Justices alike have tended to view the issue of qualified immunity as a threshold issue that should be addressed before proceeding to the constitutional determination. *See generally* Los

remains a challenging one. For example, in each case the court must determine whether the law was clearly established sufficiently to put the officer on notice of the illegality of the action.¹⁶ Though the Supreme Court has frequently clarified the level of factual similarity between precedent cases and the alleged violation necessary to clearly establish the law, circuit courts have continued to announce varying formulations of how fact-specific the precedent must be.¹⁷ Determining in a given case whether the right is so “sufficiently clear that a reasonable official would understand that [his conduct] violates that right” has proven difficult to administer.¹⁸

However, an even more fundamental ambiguity exists that muddles the qualified immunity analysis. Qualified immunity turns on a determination of what law is clearly established at the time of the incident. Before one can know what the law is, one must know what sources can supply that law. In the qualified immunity context, the sources that can be used to determine clearly established law have never been settled upon.¹⁹ The Supreme Court in *Harlow v. Fitzgerald* set forth the modern test for qualified immunity, which focuses on whether the law was clearly established, but it left unresolved the issue of what sources of law can serve to clearly establish the law.²⁰ The Court has declined to give any explicit guidance on what sources inform determinations of

Angeles Cnty. v. Rettele, 550 U.S. 609, 616–17 (2007) (Stevens, J., concurring) (similarly rejecting the *Saucier* analysis as an “unwise practice of deciding constitutional questions in advance of the necessity of doing so”); *Brosseau*, 543 U.S. at 201 (Justices Breyer, Ginsburg, and Scalia, in their joint concurring opinion, expressed concern that requiring courts to address constitutional injury before qualified immunity “requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (e.g., qualified immunity) that will satisfactorily resolve the case”); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275, 1279 (2006) (citations omitted) (calling *Saucier*’s “rigid ‘order of battle’” a “puzzling misadventure in constitutional dictum”).

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

17. Within the confines of the Supreme Court rulings, circuit courts have taken expansive, moderate, and restrictive views on what level of similarity must exist. Compare *Brokaw v. Mercer Cnty.*, 235 F.3d 1000, 1022 (7th Cir. 2000) (holding that even in the absence of any prior analogous case-law a clearly established right may exist where a reasonable person would know of the right and of the unconstitutionality of the conduct at issue) with *Burton v. Richmond*, 276 F.3d 973, 976 (8th Cir. 2002) (applying a “flexible standard, requiring some, but not precise factual correspondence” (quoting *J.H.H. v. O’Hara*, 878 F.2d 240, 243 (8th Cir. 1989))) and *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 954 (11th Cir. 2003) (“preexisting caselaw that has applied general law to specific circumstances will almost always be necessary”).

18. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); see also AVERY ET AL., *supra* note 2, at § 2:14 (noting various complexities in both the substantive qualified immunity test and the procedural issues in bringing such claims); SCHWARTZ, *supra* note 2, at § 9A.01[A] (“Qualified immunity is the most common immunity defense asserted in actions brought under 42 U.S.C. § 1983.”).

19. MARK R. BROWN & KIT KINPORTS, CONSTITUTIONAL LITIGATION UNDER § 1983, at 109–10 (2d ed. 2008).

20. *Id.*

clearly established law.²¹ So, while the Supreme Court has referenced lower court decisions in discussing subsequent qualified immunity cases, it has not established whether and to what extent decisions other than its own can clearly establish the law.²² Circuit courts have varying standards for what decisions can clearly establish the law,²³ and in particular, circuit courts are split on whether unpublished opinions may be used to clearly establish the law.²⁴

Though unpublished opinions are plainly decisions of a common law court, traditionally accorded precedential value since the birth of the common law, the federal courts since the mid-1970s have unreflectively relegated them to precedential limbo.²⁵ Many arguments have been marshaled against the practice of denying precedent to unpublished decisions,²⁶ and a recent amendment to the Federal Rules of Appellate Procedure has acknowledged the value of citing these decisions.²⁷ How-

21. *Harlow*, 457 U.S. at 818 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 Courts of Appeals, or of the local District Court.’” (quoting *Procurier v. Navarette*, 434 U.S. 555, 565 (1977))).

22. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 533–35 (1985) (suggesting that two district court cases approving of certain conduct did not clearly establish the law); *Wilson v. Layne*, 526 U.S. 603, 616–17 (1999) (noting that a state appellate decision, two unpublished opinions, and recently decided circuit opinion failed to clearly establish the law in the absence of controlling authority or a consensus of persuasive authority).

23. *Compare Inouye v. Kemna*, 504 F.3d 705, 714 (9th Cir. 2007) (holding that “[a]bsent binding precedent, we look to all available decisional law, including the law of other circuits and district courts, to determine whether the right was clearly established” (quoting *Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir. 1996))) with *Marsh v. Butler Cnty.*, 268 F.3d 1014, 1032–33 n.10 (11th Cir. 2001) (holding that the law can be “clearly establish[ed]” only by decision of the Supreme Court, Eleventh Circuit, or highest state court of the relevant state and rejecting that a “consensus of cases of persuasive authority” may clearly establish the law).

24. *Compare Carver v. Lehman*, 550 F.3d 883, 893 (9th Cir. 2008), amended by 558 F.3d 869 (9th Cir. 2009) (noting that unpublished opinions have long been acceptable sources for determining whether the law is clearly established and that even those whose citation is not explicitly permitted by Federal Rule of Appellate Procedure 32.1 may be cited to establish or refute a claim that the law was clearly established) with *Hogan v. Carter*, 85 F.3d 1113, 1118 (4th Cir. 1996) (stating that unpublished opinions are not precedential and cannot be considered in deciding whether particular conduct violated clearly established law for purposes of qualified immunity). The pre-amended version of *Carver* has been withdrawn from publication.

25. David R. Cleveland, *Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61, 84–90 (2009). The word “unreflective,” though harsh, is justified by the 1973 Committee’s intentional refusal to consider the propriety of its *sub silentio* denial of precedent to some opinions, viewing it as a “morass of jurisprudence.” *See* ADVISORY COUNCIL ON APP. JUSTICE, COMM. ON USE OF APP. CT. ENERGIES, STANDARDS FOR PUBL’N OF JUDICIAL OPINIONS: A REPORT OF THE COMM. ON USE OF APP. CT. ENERGIES OF THE ADVISORY COUNCIL ON APP. JUSTICE, 20–21 (1973) [hereinafter STANDARDS FOR PUBLICATION]. In addition, the adoption of Federal Rule of Appellate Procedure 32.1 continues this practice of avoiding the crucial question. FED. R. APP. P. 32.1 cmt.

26. Cleveland, *supra* note 25, at 106–73.

27. FED. R. APP. P. 32.1 (permitting citation of unpublished opinions issued on or after January 1, 2007).

ever, the precedential value of these decisions remains uncertain.²⁸ This ambiguity has a direct and dire effect on the qualified immunity analysis. The inclusion or exclusion of unpublished opinions as evidence of clearly established law may alter the “contours of the right” and the clarity with which an official would understand that the right has been violated.²⁹ Yet, this is exactly the state of the law. Some circuits acknowledge that these decisions are part of the body of law that speak to the establishment of a right while others choose to overlook these decisions and focus only on published authorities.³⁰ Still other circuits have not established any clear rule regarding the use of unpublished opinions.³¹

This differing treatment of unpublished opinions as a source of law in the qualified immunity analysis injects unnecessary uncertainty into an already complicated legal analysis. Given the importance of both protecting the constitutional rights of those injured at the hands of government officials and protecting government officials acting in good faith from needless litigation,³² a clear rule on the status of unpublished opinions as sources of law should be established.³³ Granting unpublished decisions precedential status would elevate them to their rightful place as circuit court opinions to be used in the qualified immunity analysis. But, even if that is not done, they should be accepted as among the best evidence of what law is clearly established.

This article argues for uniform treatment of unpublished opinions

28. Compare D.C. CIR. R. 32.1 (stating that unpublished opinions issued only by the D.C. Circuit Court of Appeals on or after January 1, 2002, and all unpublished opinions issued on or after January 1, 2007, may be cited for precedential value) with 9TH CIR. R. 36-3 (stating that unpublished opinions have no precedential value except for purposes of claim or issue preclusion).

29. This test of the contours of the right and the clarity with which a government official would know of his conduct's unlawfulness is the qualified immunity inquiry as enunciated in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

30. See *supra* note 25.

31. The First, Fifth, Eighth, and D.C. Circuits have not addressed the issue of whether unpublished opinions may be considered in clearly establishing the law.

32. See 42 U.S.C. § 1983 (2006); *Wood v. Strickland*, 420 U.S. 308, 319–21 (1975) (suggesting a need to protect school board members acting in good faith from liability “for every action which is found subsequently have been violative of a student’s constitutional rights”); *Pierson v. Ray*, 386 U.S. 547, 553–55 (1967) (discussing the rationales for qualified immunity for judges and police officers). This law is commonly called “section 1983” and a claim for relief under it a “section 1983 claim.”

33. While this article confines itself to the issue of how unpublished opinions are used, a Supreme Court ruling on exactly which sources may generally “clearly establish” the law would create beneficial uniformity in an area of law—federal civil rights guarantees—where uniformity is warranted, and simplify an already complicated legal standard. See Michael S. Catlett, Note, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031, 1055–62 (2005); Jonathan M. Stemerman, *Unclearly Establishing Qualified Immunity: What Sources of Authority May be Used to Determine Whether the Law is “Clearly Established” in the Third Circuit?*, 47 VILL. L. REV. 1221, 1244–50 (2002).

in the qualified immunity analysis because they are intrinsically evidence of clearly established law. Part I of this article briefly discusses the civil rights actions provided by 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.³⁴ Part II discusses the contours of the qualified immunity defense. Part III examines the historical and current status of unpublished opinions, particularly in regard to precedential status and their inherent nature as applications of clearly established law. Part IV examines the varying laws of the federal circuit courts of appeals regarding the use of unpublished opinions in the qualified immunity analysis. Part V recommends the use of unpublished opinions in the qualified immunity analysis either because they are precedent or because they are, by their very nature, evidence of clearly established law.

II. CAUSES OF ACTION AGAINST GOVERNMENT OFFICIALS

A person whose civil rights are violated by a government official has a direct cause of action against that official.³⁵ The Civil Rights Act of 1871, now codified at 42 U.S.C. § 1983, provides a plaintiff a direct cause of action against a state or local government official who violates the plaintiff's constitutional or statutorily granted rights:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress³⁶

To obtain relief under section 1983, a plaintiff must demonstrate: (1) the deprivation of a right secured by the Constitution or laws of the United States, and (2) that the deprivation was committed under color of state law.³⁷ The initial purpose of this statute was tripartite. First, it sought to override any state laws promoting invidious discrimination by removing state government officials' ability to claim that discrimination was part of their state law duties.³⁸ Second, it provided a remedy for constitutional injury to those whose state law remedy was inadequate or

34. 403 U.S. 388 (1971).

35. 42 U.S.C. § 1983 (2006); *Bivens*, 403 U.S. at 389. This type of claim is commonly called a "Bivens action" after this case, which first recognized such a cause of action.

36. 42 U.S.C. § 1983. Section 1983 claims have also been permitted based on rights granted under federal treaties. See *Romero v. Kitsap Cnty.*, 931 F.2d 624, 627 n.5 (9th Cir. 1991).

37. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999); *Monroe v. Pape*, 365 U.S. 167, 171 (1961); Catlett, *supra* note 33, at 1037.

38. *Monroe*, 365 U.S. at 173.

illusory, either because of the substance of state law or the procedural barriers it created.³⁹ Third, it created an enforcement mechanism for federal law that would function regardless of the states' unwillingness or inability to enforce the law.⁴⁰

A similar cause of action for claims against federal government officials was recognized by the Supreme Court in *Bivens*: "[Previously,] we reserved the question whether violation of that command by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. Today we hold that it does."⁴¹ In order to obtain relief under a *Bivens* action, a plaintiff must prove that a federal official's actions infringed a right guaranteed by the Constitution.⁴² The purpose of the Court's creation of a *Bivens* action is to give individuals constitutionally injured by federal officers a means of redress, regardless of whether the state law or enforcement mechanism would provide such redress:

[A]s our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."⁴³

Neither cause of action creates any federal right; they merely provide for a cause of action to enforce existing constitutional rights.⁴⁴ These actions have been used to assert violations of a wide variety of constitutional⁴⁵ and statutory rights.⁴⁶ Common claims are for violations

39. *Id.* at 173–74.

40. *Id.* at 174.

41. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

42. Catlett, *supra* note 33, at 1037.

43. *Bivens*, 403 U.S. at 392 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

44. Section 1983 also permits a cause of action based on the violation of federal statutory rights. 42 U.S.C. § 1983 (2006). A *Bivens* action seems limited to constitutional violations.

45. See cases cited *supra* note 7.

46. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284–87 (2002) (holding that any federal statute may be enforced through section 1983 if it unambiguously creates a federal right but some statutes, like the Federal Educational Rights and Privacy Act of 1974, do not create enforceable rights); *Maine v. Thiboutot*, 448 U.S. 1, 4–5 (1980) (explaining that section 1983 permits actions for federal statutes beyond the traditional "civil rights" protections including violation of rights granted by the Social Security Act). Use of a section 1983 action to enforce statutory rights is relatively rare because, to be enforceable through section 1983, the right must be: (1) unambiguously established by Congress and (2) without a congressionally created enforcement mechanism. See BROWN & KINPORTS, *supra* note 19, at 69–70.

of the Fourth Amendment in the criminal law context, the Eighth Amendment in the prison context, and for retaliation for the exercise of First Amendment rights.⁴⁷ The purpose of both section 1983 and *Bivens* actions is to give parties injured by government officials acting under the color of law an avenue to seek redress.⁴⁸ However, to prevent government officials from having to defend frivolous lawsuits or those that would chill government officials' good faith exercise of authority, both section 1983 and *Bivens* actions are subject to the affirmative defense of qualified immunity,⁴⁹ and "the qualified immunity analysis is identical under either cause of action."⁵⁰

III. QUALIFIED IMMUNITY

While some government officials are entitled to absolute immunity for certain official acts, all government officials⁵¹ may claim qualified immunity for conduct that "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."⁵² This protection, formerly known as the "good faith" defense, is well-established.⁵³

The Supreme Court in *Harlow v. Fitzgerald* set forth the modern rule for qualified immunity: "[G]overnment officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."⁵⁴ This provided an objective, reasonable official in the defendant's position with a standard by which to judge the alleged conduct. Thus, the crux of the qualified immunity test is whether the law

47. *SWORD AND SHIELD*, *supra* note 5, at 15–17.

48. *See Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982); *Bivens*, 403 U.S. at 389; *see also SWORD AND SHIELD*, *supra* note 5, at 4–5.

49. *Harlow*, 457 U.S. at 814–19; *see also* *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) ("[T]he threat of litigation and liability will adequately deter federal officers for *Bivens* purposes no matter that they may enjoy qualified immunity").

50. *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (citing *Graham v. Connor*, 490 U.S. 386, 394 n.9 (1989) and *Malley v. Briggs*, 475 U.S. 335, 340 n.2 (1986)).

51. In the Supreme Court alone, qualified immunity has been applied (if not actually granted) to a variety of government officials that carry out executive or administrative government functions. *See Hope v. Pelzer*, 536 U.S. 730, 733 (2002) (prison officials); *Siebert v. Gilley*, 500 U.S. 226, 227–29 (1991) (mental health officials); *Anderson v. Creighton*, 483 U.S. 635, 637–39 (1987) (FBI agents); *Davis v. Scherer*, 468 U.S. 183, 185 (1984) (state highway department officials); *Wood v. Strickland*, 420 U.S. 308, 309–11 (1975) (school officials); *Scheuer v. Rhodes*, 416 U.S. 232, 233–34 (1974) (inter alia the university president and national guard officials).

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

53. *Hamdi v. Rumsfeld*, 542 U.S. 507, 572–73 n.4 (2004) (Scalia, J., dissenting) ("This 'good-faith' analysis is a forebear of our modern doctrine of qualified immunity.").

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

was clearly established such that a reasonable official would have known the conduct to be unlawful.

The Supreme Court has since clarified this standard as requiring only that the unlawfulness of the official's acts be apparent and not requiring prior case law be identical or materially similar. In *Anderson v. Creighton*, the plaintiff sought damages from FBI agents for the warrantless search of his home in violation of his Fourth Amendment rights.⁵⁵ The Court clarified that abrogating qualified immunity requires not only that there is a relevant constitutional right in a general sense, but that the contours of that right must be clear enough that a reasonable official would understand that his actions will infringe it.⁵⁶ *Anderson* also held that identical actions need not have previously been held unlawful, but "in the light of pre-existing law the unlawfulness must be apparent."⁵⁷ In 2002, the Supreme Court again clarified that facts of prior cases need not be "materially similar"⁵⁸ or "fundamentally similar"⁵⁹ to clearly establish the law. Even a total lack of precedent is not a guarantee of qualified immunity if the conduct is patently unconstitutional.⁶⁰ That said, factual similarity of prior cases and the clarity of the established law remains a key issue of dispute in qualified immunity cases.⁶¹

Qualified immunity is intended to protect government officials who act in good faith in carrying out their duties. The public interest in awarding damages to vindicate constitutional rights must be tempered because "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."⁶² In its formulation of the modern qualified immunity test, the Supreme Court in *Harlow* spelled out some of the social costs that militate in favor of a qualified immunity defense:

55. *Anderson*, 483 U.S. at 635.

56. *Id.* at 639–40.

57. *Id.* at 640. The Supreme Court reaffirmed this analysis in *United States v. Lanier*, 520 U.S. 259, 271 (1997).

58. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

59. *Id.* at 740 (quoting *Lanier*, 520 U.S. at 263).

60. See *Groh v. Ramirez*, 540 U.S. 551, 564–65 (2004) (relying upon the particularity requirement of the Fourth Amendment itself as sufficiently establishing that defendant's conduct was unconstitutional); *Anderson*, 483 U.S. at 640 ("This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful.").

61. See *EVERY ET AL.*, *supra* note 2, at § 3:6 ("There is considerable disagreement among the circuits as to how precisely the right must be defined in order to determine whether the right was clearly established at the time of the challenged conduct.").

62. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982); see also *Crawford-El v. Britton*, 523 U.S. 574, 590 (1998) ("[T]here is a strong public interest in protecting public officials from the costs associated with the defense of damages actions.").

These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will “dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.”⁶³

In addition, the lack of such a defense “would deter [an official’s] willingness to execute his office with the decisiveness and the judgment required by the public good.”⁶⁴ In sum, the public policy underlying qualified immunity includes “attracting competent individuals to public sector jobs, encouraging individuals to serve in elected offices, allowing public officials to exercise unfettered discretion in serving the public good, and avoiding exposing public officials to unnecessary litigation that would distract them from their civic responsibilities.”⁶⁵

Qualified immunity is intended to be an immunity not only from liability but from the suit itself.⁶⁶ As the Supreme Court stated in *Mitchell v. Forsyth*, qualified immunity provides “immunity from suit rather than a mere defense to liability”⁶⁷ For the most part, qualified immunity should be determined early in the litigation to relieve officials entitled to immunity from the burden of discovery and litigation.⁶⁸ The social costs that qualified immunity are intended to prevent, i.e., “the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service,”⁶⁹ are only avoided if the determination is made before the defendant is put through the time and expense of trial. Similarly, “*Harlow* emphasizes that even such pretrial matters as discovery are to be avoided if possible, as ‘[i]nquiries of this kind can be peculiarly disruptive of effective government.’”⁷⁰ Likewise, unlike most summary judgment rulings, which are interlocutory and not immediately appealable, an order denying summary judgment on the issue of qualified immunity is immediately appealable.⁷¹ Similarly, the Supreme Court recently held that trial

63. *Harlow*, 457 U.S. at 814 (alteration in original) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

64. *Crawford-El*, 523 U.S. at 590 n.13 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 239–40 (1974)).

65. *SWORD AND SHIELD*, *supra* note 5, at 465.

66. See *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

67. *Id.* (alteration in original).

68. See *Mecham v. Frazier*, 500 F.3d 1200, 1203 (10th Cir. 2007) (“Because qualified immunity is effectively lost if a case is permitted to go to trial, ‘it should be resolved as early as possible.’” (quoting *Oliver v. Woods*, 209 F.3d 1179, 1185 (10th Cir. 2000))).

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

70. *Mitchell*, 472 U.S. at 526 (alteration in original) (quoting *Harlow*, 457 U.S. at 817).

71. See *id.* at 530 (“[A] district court’s denial of a claim of qualified immunity, to the extent

courts' first step in analyzing a claim and defense of qualified immunity may be to address either the question of whether a constitutional violation is alleged or whether the right was clearly established.⁷²

The modern qualified immunity test shields government officials from liability and suit where their conduct does not violate clearly established rights of which a reasonable person would have been aware.⁷³ This inquiry is an objective test, which turns on the objective legal reasonableness of the defendant's actions assessed in light of the law that was clearly established at the time of those actions.⁷⁴ That is, whether a reasonable official would have thought that the actions complained of were reasonable (i.e., constitutional) and based on settled law at that time.⁷⁵ If reasonable officials could disagree, then the law is not clearly established.⁷⁶

The critical inquiry in the qualified immunity analysis is what law was clearly established at the time the defendant official's action was taken. This inquiry requires an examination of the case law, but which cases may be used to determine whether the law is clearly established varies between the circuits. If unpublished opinions are viewed as precedent, they should be used on the same basis as any other circuit decision, but even if they are not, the very characteristics that lead courts to issue them as unpublished makes them ideal for determining the clearly established law.

IV. UNPUBLISHED OPINIONS

Unpublished opinions are not inherently non-precedential, and even if treated as non-precedential, they are by definition evidence of clearly established law. Whether unpublished opinions have precedent, as some argue,⁷⁷ they are undeniably evidence of clearly established law given the publication standards in place in the circuits.⁷⁸

that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment.").

72. See sources cited *supra* note 15.

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

74. See *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

75. See *McCleary v. Navarro*, 504 U.S. 966, 967 (1992); *Hunter v. Bryant*, 502 U.S. 224, 228 (1991).

76. See *Hunter*, 502 U.S. at 228 ("Under settled law, [officers] are entitled to immunity if a reasonable officer could have believed that probable cause existed to arrest [the suspect].").

77. See D.C. CIR. R. 32.1 ("All unpublished orders or judgments of this court . . . entered on or after January 1, 2002, may be cited as precedent."); Cleveland, *supra* note 25, at 70-84.

78. Most circuits expressly require that an opinion establish a new rule or law or modify an existing rule before publication is permitted. See, e.g., 4TH CIR. R. 36(a)(i) ("Opinions . . . will be published only if the opinion satisfies" one or more standards. One such standard is if an opinion "establishes, alters, modifies, clarifies, or explains a rule of law within [the Fourth] Circuit"); 5TH CIR. R. 47.5.1(a) (requiring an opinion to be published if it "[e]stablishes a new rule of law, alters,

Throughout English and American history, whether an opinion was published was not determinative of its precedential value. That is, even decisions that were difficult for litigants to find could still be brought to a court's attention and urged as precedent laid down to be followed, distinguished, or overruled.⁷⁹ In the mid-1970s, however, to deal with the growing volume of case law in the federal appellate courts, a committee of the federal judiciary created an odd distinction in federal cases that had not been present in common law in England or America.⁸⁰ That distinction was that some cases would be published and citeable and others would be unpublished and unciteable. This essentially created a body of unpublished opinions⁸¹ with traits (non-citeable and non-precedent) unlike any in common law history.⁸² While the Committee's recommendation claimed to have dealt only with whether an unpublished case could be *cited as precedent* and not whether it was *precedent*,⁸³ this was a distinction without a difference. The 1973 Committee plainly

or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked"); 6TH CIR. R. 206(a)(1) (whether an opinion "establishes a new rule of law, or alters or modifies an existing rule of law, or applies an established rule to a novel fact situation" is one criterion to be considered in "determining whether a decision will be designated for publication"); 9TH CIR. R. 36-2(a) (stating that "[a] written, reasoned disposition shall be designated as an OPINION only if it: [inter alia] [e]stablishes, alters, modifies, or clarifies a rule of law"); see also STANDARDS FOR PUBLICATION, *supra* note 25, at 22–23 (proposing the model rule on which these circuit rules are patterned).

79. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 204 (3d ed. 1990) (Even in the earliest days of reporting cases, "[t]he rolls continued to be the most authoritative source of precedents into later times, and it was common for counsel to 'vouch the record' when citing a previous case.").

80. The Advisory Council on Appellate Justice, Committee on Use of Appellate Court Energies (the 1973 Committee), drafted a report entitled *Standards for Publication of Judicial Opinions: A Report of the Committee on Use of Appellate Energies of the Advisory Council on Appellate Justice*, which forms the basis for the present federal unpublication system. In that report, the 1973 Committee proposed issuing some decisions as unpublished and unciteable. When faced with the question of whether this new class of decisions would be precedent, it chose not to examine the issue, its constitutionality, or its practicality, calling it a "morass of jurisprudence." However, removing these decisions from the body of precedent, without ever reflecting on the jurisprudential impact of doing so causes numerous inequities and significant confusion. The unclear status of these unpublished opinions in the qualified immunity analysis is just one of these negative effects on the body of law. See STANDARDS FOR PUBLICATION, *supra* note 25, at 20.

81. Though labeled "unpublished opinions," these opinions are published, not only online but also in printed volumes, such as West's Federal Appendix. This is due in large part to the continuous use of these opinions by practitioners and judges—despite the opinions' citation propriety or precedential status. See Cleveland, *supra* note 25, at 88, 161.

82. See STANDARDS FOR PUBLICATION, *supra* note 25, at 22–23 (proposing the model rule on publication which contravened the common law tradition); see also Cleveland, *supra* note 25, at 84–87 ("[D]eclaring decisions to be unciteable, and moreover, not precedent, was contrary to the entire history of the common law system.").

83. STANDARDS FOR PUBLICATION, *supra* note 25, at 20–21 ("recommend[ing] adoption" of an alternative delineated "[unpublished] opinions may not be cited to support arguments or statements of law, i.e., as precedent, and nothing is said about precedential value").

understood that removing a decision from publication and citation effectively removed it from the body of precedent as well as from view. In fact, it relied on this “correspondence of publication and precedential value on the one hand, and of non-publication and non-precedential value on the other,”⁸⁴ to avoid examining the precedent issue in greater detail. With the recently approved Federal Rule of Appellate Procedure returning these decisions to the body of citeable law, the correspondence may work in reverse—once citeable, they must also be treated as precedent.⁸⁵ However, that has not yet occurred.⁸⁶

The idea that some cases could be decided by unpublished opinions was intended as a safety valve to relieve some of the pressure caused by the volume of cases flowing through the federal courts.⁸⁷ The safety valve has burst; roughly 84% of cases decided by the circuit courts are decided by unpublished opinions.⁸⁸ Federal appellate law is almost entirely made up of unpublished opinions. The sheer number of unpublished decisions, and the percentage of our appellate law that they make up, demands a clearer status and also a more equal one.

In the context of the qualified immunity analysis, particularly in whether they may “clearly establish” the law, there are three aspects of unpublished opinions that make them particularly suited for this purpose. First, unpublished opinions are supposed to be the easy cases—the cases that are mere applications of well-settled law to new facts.⁸⁹ The whole notion of an unpublished opinion is based on the idea that some cases make new law (and should be published) and others merely apply the existing law to new facts so similar to the old that it does not expand or contract the law.⁹⁰ The publication guidelines found in the local rule or internal operating procedures of most circuits, patterned after the 1973 Committee’s recommendation, express this idea: To be unpub-

84. *Id.* at 21.

85. See FED. R. APP. P. 32.1(a)(i).

86. Compare D.C. CIR. R. 32.1 (opinions rendered by the D.C. Circuit on or after January 1, 2002, may be cited for precedential value) with 8TH CIR. R. 32.1A (“Unpublished opinions . . . are not precedent.”).

87. See ADMIN. OFF. OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S. 11 (Mar. 16–17, 1964, U.S. Govt. Printing Off. 1964).

88. See ADMIN. OFF. OF THE U.S. COURTS, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS 52, tbl.S-3 [hereinafter 2006 JUDICIAL BUSINESS], available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2006/tables/s3.pdf> (showing the percentage of unpublished opinions in the twelve-month period ending September 20, 2006, to be 84.1%).

89. See STANDARDS FOR PUBLICATION, *supra* note 25, at 1–3 ([In some cases], “[a] simple order or a brief memorandum may be sufficient to apprise the parties of the result and dispose of the case.”); see also Cleveland, *supra* note 25, at 110–11 (“If th[e] [law-making versus law-applying] dichotomy is meaningful, then one would need only to look at the law-making decisions to know the law and could safely ignore the dispute-resolving cases, which merely apply the law to other circumstances.”).

90. See Cleveland, *supra* note 25, at 110–11.

lished, a decision must break no new ground, establish no new rule of law, and be simply a straightforward application of existing law to facts.⁹¹ For example, the Model Rule on Publication of Judicial Opinions, promoted by the 1973 Committee, was, in pertinent part:

1. Standard for Publication

An opinion of the . . . court . . . shall not be designated for publication unless:

- a. The opinion establishes a new rule or law or alters or modifies an existing rule; or
- b. The opinion involves a legal issue of continuing public interest; or
- c. The opinion criticizes existing law; or
- d. The opinion resolves an apparent conflict of authority.

. . . .

- 5. All opinions that are not found to satisfy a standard for publication as prescribed by section (1) of this rule shall be marked, Not Designated for Publication.⁹²

Circuit court publication standards are generally patterned after this model rule, though most add some additional considerations.⁹³ Some,

91. 1ST CIR. R. 36.0(b)(1) ("In general, the court thinks it desirable that opinions be published and thus be available for citation. The policy may be overcome in some situations where an opinion does not articulate a new rule of law, modify an established rule, apply an established rule to novel facts or serve otherwise as a significant guide to future litigants."); 4TH CIR. R. 36(a) (closely paralleling the proposed Model Rule); 5TH CIR. R. 47.5.1 (closely paralleling the proposed Model Rule); 6TH CIR. R. 206(a) (closely paralleling the proposed Model Rule); 9TH CIR. R. 36-2(a) (closely paralleling proposed Model Rule); D.C. CIR. R. 36(c)(2) (paralleling the proposed Model Rule). *But see* 2D CIR. I.O.P. 32.1.1(a) (stating as a publication guideline only that "when a decision in a case is unanimous and each panel judge believes that no jurisprudential purpose is served by an opinion (i.e., a ruling having precedential effect), the panel may rule by summary order" instead of by opinion); 3D CIR. I.O.P. 5.3 (giving guidance limited to "[a]n opinion, whether signed or per curiam, that appears to have value only to the trial court or the parties is designated as not precedential and is not printed as a slip opinion but, unless otherwise provided by the court, it is posted on the court's internet website. A not precedential opinion may be issued without regard to whether the panel's decision is unanimous and without regard to whether the panel affirms, reverses, or grants other relief."); 11TH CIR. R. 36-2 (stating that the default is not to publish without guidelines for publication, i.e., "[a]n opinion shall be unpublished unless a majority of the panel decides to publish it.") The Seventh Circuit had a very detailed publication guideline rule in place prior to the 1973 Committee's Model Rule proposal (Circuit Rule 28), *see* STANDARDS FOR PUBLICATION, *supra* note 25, at 29–32, and later adopted the Committee's recommendation (now rescinded Circuit Rule 53), and now seems to offer no guidance on what decisions should be published or unpublished. The Eighth Circuit gives no guidance, but merely states that "[t]he panel determines whether the opinion in the case is to be published or unpublished." 8TH CIR. I.O.P. IV.B. The Federal Circuit has an entry of affirmance without opinion rule that speaks not to publication but to the writing of an opinion entirely. FED. CIR. R. 36.

92. STANDARDS FOR PUBLICATION, *supra* note 25, at 22–23.

93. For example, the rule in the Sixth Circuit is, in pertinent part:

(a) Criteria for Publication.

like the First Circuit's, explicitly state that unpublished opinions are statements of clearly established law:

In general, the court thinks it desirable that opinions be published and thus be available for citation. The policy may be overcome in some situations where an opinion does not articulate a new rule of law, modify an established rule, apply an established rule to novel facts or serve otherwise as a significant guide to future litigants.⁹⁴

Likewise, the Tenth Circuit's rule states, "[d]isposition without [published] opinion does not mean that the case is unimportant. It means that the case does not require application of new points of law that would make the decision a valuable precedent."⁹⁵ The Fifth Circuit's rule similarly states:

The publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. However, opinions that may in any way interest persons other than the parties to a case should be published. Therefore, an opinion is published if it:

. . . .
(b) Applies an established rule of law to facts significantly different from those in previous published opinions applying the rule.⁹⁶

In short, the law in unpublished opinions is by definition clearly established; if it were not, the decision would be ineligible for unpublished status. It is a fundamental premise of the concept of unpublished opinions that they do not make new law but only apply the established law.⁹⁷ Ignoring unpublished decisions is ignoring the best evidence of

The following criteria shall be considered by panels in determining whether a decision will be designated for publication in the Federal Reporter:

- (1) whether it establishes a new rule of law, or alters or modifies an existing rule of law, or applies an established rule to a novel fact situation;
- (2) whether it creates or resolves a conflict of authority either within the circuit or between this circuit and another;
- (3) whether it discusses a legal or factual issue of continuing public interest;
- (4) whether it is accompanied by a concurring or dissenting opinion;
- (5) whether it reverses the decision below, unless:
 - (A) the reversal is caused by an intervening change in law or fact, or,
 - (B) the reversal is a remand (without further comment) to the district court of a case reversed or remanded by the Supreme Court;
- (6) whether it addresses a lower court or administrative agency decision that has been published; or,
- (7) whether it is a decision that has been reviewed by the United States Supreme Court.

6TH CIR. R. 206(a).

94. 1ST CIR. R. 36.0(b)(1).

95. 10TH CIR. R. 36.1.

96. 5TH CIR. R. 47.5.1.

97. See STANDARDS FOR PUBLICATION, *supra* note 25, at 1-3 ("[In some cases], a simple order or a brief memorandum may be sufficient to apprise the parties of the result and dispose of the

what the clearly established law is.

Second, as applications of clearly established law to additional factual settings, unpublished opinions provide what the qualified immunity analysis needs most from prior cases—applications of “extremely abstract rights” to specific factual settings that provide clear guidance to government officials about what rights exist and what conduct violates them.⁹⁸ While the Supreme Court has held that the precise conduct at issue need not have been declared unlawful, the qualified immunity test does require that the unlawfulness of a defendant’s action “be apparent.”⁹⁹ In making this determination, additional information about what conduct has been declared constitutional or unconstitutional provides both putative plaintiffs and government officials with a better understanding of the contours of the federal rights at issue. This is a critical and exceedingly difficult question in the qualified immunity analysis,¹⁰⁰ and it is one which unpublished opinions can help resolve. More opinions applying settled law to differing facts means more factually specific sources from which government officials can judge the reasonableness of any given action. Ignoring unpublished decisions is ignoring the most factually specific evidence of what rights exist and what conduct violates those rights.

Third, the sheer number of unpublished opinions, and the fact that they make up the overwhelming majority of federal opinions, suggests their usefulness in the qualified immunity determination. The qualified immunity analysis is fundamentally a question of what the law was and whether the government official had notice of the unlawfulness of his conduct.¹⁰¹ Because unpublished opinions by definition represent applications of settled law to facts not novel enough to expand or contract the

case.”); see also William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1183 (1978) (“[Unpublished] opinions serving only the dispute-settling function have value only to the parties in the case and the decision-maker below; they have no value to the legal public at large.”).

98. *Anderson v. Creighton*, 483 U.S. 635, 639–40 (1987).

99. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002); accord *Anderson*, 483 U.S. at 640 (citation omitted) (“The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful but it is to say that in the light of pre-existing law the unlawfulness must be apparent.”).

100. *BROWN & KINPORTS*, *supra* note 19, at 112 (“In the twenty-five years since *Harlow* was decided, the federal courts have never agreed on the extent to which [a] plaintiff’s case must be factually similar to the relevant precedents . . .”).

101. In both *Hope*, 536 U.S. at 739, and *United States v. Lanier*, 520 U.S. 259, 265–66 (1997), the Supreme Court analogized the kind of notice government officials should be given in the qualified immunity context to the concept of fair notice in the criminal law context, i.e., where a government official is charged with acting “‘willfully’ and under color of law to deprive a person of rights protected by the Constitution” under 18 U.S.C. § 242.

law, unpublished opinions should be the best data points for putative plaintiffs, government officials, and courts to use in determining whether the law was sufficiently clear and whether the alleged conduct was sufficiently proscribed.¹⁰² This body of opinions, which has the two key characteristics needed to improve the qualified immunity analysis, should not be omitted.¹⁰³ Even a few such opinions could aid in determining what the law was and what it said about the government official's conduct, but the fact that such opinions make up 84% of the federal case law suggests that to decide "clearly established law" in the absence of such decisions is to be myopic in the extreme. To determine what law was clearly established without reference to 84% of that law seems as impossible as determining the picture on a puzzle face with only 16% of the pieces.¹⁰⁴ Even if those pieces are the most important ones, it is the aggregate that makes up the full picture. Even if the importance of the 16% of federal appellate decisions that are published is conceded because they are the only cases changing or establishing the law in a meaningful way, the other 84% that are unpublished must represent the applications of settled law. This 84% makes up the bulk of what a putative plaintiff or government official ought to be concerned with, not a body of law that should be cast aside. Ignoring unpublished decisions is ignoring the vast majority of federal case law and viewing the tapestry of clearly established law from only its most unusual threads.

Unpublished opinions are not only useful in determining what law is clearly established, they are uniquely situated within the federal law to do so. The sheer number of applications of settled law to differing, but

102. For example, under Sixth Circuit Rule 206(a) noted above, no decision that: (1) establishes a new rule of law; (2) alters or modifies an existing rule of law; (3) creates or resolves a conflict or authority either within the circuit or between this circuit and another; or (4) discusses a legal or factual issue of continuing public interest, should be unpublished.

103. This is true even if it is agreed that these decisions lack some characteristic, such as expanding or contracting the law, that genuinely makes them of lesser value than published opinions. Unpublished decisions, as applications of settled law, make them especially well-suited to aid in the qualified immunity analysis. That said, there is certainly an argument to be made that unpublished opinions, like every common law decision, do add to the body of law and ought to be considered precedent for a whole host of reasons. *See generally* Cleveland, *supra* note 25, at 176. While granting unpublished decisions precedential value is the most straightforward, and most jurisprudentially sound, way to resolve the muddling of the qualified immunity analysis, this article takes the federal judiciary's claims about the nature of unpublished opinions at face value in order to more readily persuade it to use them in qualified immunity analysis.

104. This phenomenon has been described with many metaphors including analogizing the common law to a "pointillist painting" with each case representing an individual point. *See* Jon A. Strongman, Comment, *Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value is Unconstitutional*, 50 U. KAN. L. REV. 195, 195 (2001). Collectively, a very detailed picture exists, but the more points removed the less clear the picture becomes, eventually ending in inscrutability. *Id.* This is consistent with the notions of Sir Edward Coke and Sir William Blackstone that it is not the individual cases that matter but the aggregate. *See* Cleveland, *supra* note 25, at 74–78.

not too differing, facts, makes them ideal for telling the parties what the law expects and prohibits. Whether viewed from the perspective of an injured party, a government official trying to discern the best course of action, or a reviewing judge assessing whether the law was clearly established, more decisions showing the law applied to specific facts is better than fewer decisions. All parties are better able to judge the reasonableness of a search incident to arrest, for example, if given a dozen cases evaluating prior searches rather than two.¹⁰⁵ Moreover, even if unpublished opinions are not viewed as precedential, and therefore unable to clearly establish the law themselves, by their very nature they are evidence that law is clearly established.¹⁰⁶ Unfortunately, like their treatment of unpublished opinions generally, the federal circuits vary in their use of unpublished opinions in the qualified immunity analysis. This muddles the substantive test for qualified immunity.

V. CIRCUIT PRACTICES VARY REGARDING THE USE OF UNPUBLISHED OPINIONS IN CLEARLY ESTABLISHING LAW

The Supreme Court has never spelled out what sources of law may clearly establish the law, which has left the circuit courts to develop varying rules. In *Harlow v. Fitzgerald*, the Supreme Court left open the issue of whether lower court decisions may clearly establish the law.¹⁰⁷ The Supreme Court has refused to restrict the sources of law that may clearly establish the law to its own decisions, refusing to adopt “a categorical rule that decisions of the Courts of Appeals and other courts are inadequate as a matter of law” to clearly establish the law.¹⁰⁸ It has likewise referred to a variety of opinions, including appellate, district, unpublished, and state court decisions in examining whether the law was clearly established.¹⁰⁹ In addition, it has attempted to allay circuit fears regarding the use of persuasive authority:

[I]n applying the rule of qualified immunity under 42 U.S.C. § 1983

105. These numbers were not chosen arbitrarily. Two out of twelve cases represent slightly more than 16%—the percentage of federal appellate decisions that are actually published annually. See 2006 JUDICIAL BUSINESS, *supra* note 88.

106. To argue otherwise would be to admit unpublished opinions are being used to make *sui generis* decisions not justified by settled law, an argument that while it has some support, is an untenable position for the federal judiciary itself to take.

107. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.32 (1982) (“[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 Courts of Appeals, or of the local District Court.’” (quoting *Procunier v. Navarette*, 434 U.S. 555, 565 (1978))).

108. *United States v. Lanier*, 520 U.S. 259, 269 (1997).

109. See, e.g., *Wilson v. Layne*, 526 U.S. 603, 616 (1999) (examining state appellate, unpublished federal district, and federal circuit opinions); *Mitchell v. Forsyth*, 472 U.S. 511, 533 (1985) (examining federal district opinions).

and *Bivens* . . . , we have referred to decisions of the Courts of Appeals when enquiring whether a right was "clearly established." Although the Sixth Circuit was concerned, and rightly so, that disparate decisions in various Circuits might leave the law insufficiently certain even on a point widely considered, such a circumstance may be taken into account in deciding whether the warning is fair enough, 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.¹¹⁰

Although none of these cases specifically authorizes or rejects a given source of law in determining what is clearly established, *Wilson v. Layne* contains the clearest enunciation of Supreme Court guidance when it noted that plaintiffs had failed to locate

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.¹¹¹

Despite this guidance, or perhaps because of its lack of a specific command about the exact sources to be considered, circuit courts have taken radically different interpretations of what sources may clearly establish the law.¹¹²

The Supreme Court's own decisions clearly establish the law stated in them, and the circuits uniformly agree that their own binding decisions apply to qualified immunity cases within their circuit.¹¹³ But whether decisions of sister circuits, unpublished decisions, district court decisions, or state court decisions, may play a role in clearly establishing the law varies from circuit to circuit. Given the special nature of unpublished opinions that makes them particularly well-suited to demonstrating clearly established law, the following survey of the circuits pays special attention to how the circuits treat those opinions.

A. *Circuits that Are Silent on the Issue (1st, 5th, 8th, & D.C.)*

Four circuits, the First, Fifth, Eighth, and D.C., are completely silent on whether unpublished opinions may be used to clearly establish the law. None have spoken on the issue directly; however, all four take an expansive view of what sources may clearly establish the law.¹¹⁴ In

110. *Lanier*, 520 U.S. at 269 (citations omitted).

111. *Wilson*, 526 U.S. at 617.

112. See *supra* note 23.

113. See *SWORD AND SHIELD*, *supra* note 5, at 472-73.

114. *El Dia, Inc. v. Rossello*, 165 F.3d 106, 110 n.3 (1st Cir. 1999) (expressing a willingness to look at decisions of other circuits and evaluating them according to "the location and level of the

addition, it seems likely that the D.C. and Fifth Circuits would permit unpublished opinions to be considered given that each has a rule permitting citation and use as precedent of all unpublished opinions issued before or after a certain date.¹¹⁵ No similar clues exist by which to divine the stances the First and Eighth Circuits might take.¹¹⁶

B. *Circuits Where Unpublished Opinions Cannot Be Used To Show Clearly Established Law (4th, 7th, & 11th)*

In three circuits, the Fourth, Seventh, and Eleventh, unpublished opinions have been soundly rejected as evidence of whether the law was clearly established.¹¹⁷ The Fourth Circuit held, in a trio of cases in the 1990s, that unpublished opinions do not clearly establish the law because they are not precedent. In *Torcasio v. Murray*, the plaintiff, a morbidly obese man, alleged that prison officials violated his rights

precedent, its date, its persuasive force, and its level of factual similarity to the facts before this Court"); *McClendon v. City of Columbia*, 305 F.3d 314, 329 (5th Cir. 2002) (en banc) (2003) ("[W]e must consider both this court's treatment of the [basis for imposing liability] and status of this theory in our sister circuits . . ."); *Vaughn v. Ruoff*, 253 F.3d 1124, 1129 (8th Cir. 2001) (noting that the Eighth Circuit "subscribe[s] to a broad view of the concept of clearly established law, and . . . look[s] to all available decisional law, including decisions from other courts, federal and state, when there is no binding precedent in this circuit"); *Moore v. Hartman*, 388 F.3d 871, 885 (D.C. Cir. 2004) (noting that the D.C. Circuit looks to law outside the circuit when there are no cases of "controlling authority").

115. D.C. CIR. R. 32.1 ("All unpublished orders or judgments of this court . . . entered on or after January 1, 2002, may be cited as precedent."); 5TH CIR. R. 47.5.3 ("Unpublished opinions issued before January 1, 1996, are precedent. Although every opinion believed to have precedential value is published, an unpublished opinion may be cited pursuant to FED. R. APP. P. 32.1(a)."). But see 5TH CIR. R. 47.5.4 ("Unpublished opinions issued on or after January 1, 1996, are not precedent."). But this correlation is not necessarily predictive. Compare 4TH CIR. R. 32.1 (leaving open the possibility that an unpublished opinion may have precedential value) with *Hogan v. Carter*, 85 F.3d 1113, 1118 (4th Cir. 1996) (denying unpublished opinions any use in determining clearly established law).

116. One might speculate that they would not consider them given their circuit rules denying precedent, Local Rule 36.0(a) and Local Rule 32.1A, respectively. However, this direct correlation of precedent to use in the qualified immunity analysis is belied by the Ninth Circuit, which was historically the most adverse to according unpublished opinions citation or precedent. Yet, the Ninth Circuit has traditionally considered unpublished opinions in the qualified immunity analysis. See *Inouye v. Kemna*, 504 F.3d 705, 714 (9th Cir. 2007) (holding that "[a]bsent binding precedent, we look to all available decisional law, including the law of other circuits and district courts, to determine whether the right was clearly established").

117. See *Wilson v. Layne*, 141 F.3d 111, 124 n.6 (4th Cir. 1998) (en banc), *aff'd*, 526 U.S. 603 (1999) ("[W]e are loathe to cite to unpublished opinions, see Local Rule 36(c), nor will we consider them to be evidence that a right is or is not clearly established."); *Hogan*, 85 F.3d at 1118 ("Since unpublished opinions are not even regarded as binding precedent in our circuit, such opinions cannot be considered in deciding whether particular conduct violated clearly established law for purposes of adjudging entitlement to qualified immunity."); *Torcasio v. Murray*, 57 F.3d 1340, 1347 (4th Cir. 1995) ("[C]itation of unpublished opinions seems an unusually ineffective, and even counterproductive, means of demonstrating that a given proposition of law was 'clearly established.'").

under the Rehabilitation Act and the Americans with Disabilities Act by denying his requests for special prison accommodations.¹¹⁸ The Fourth Circuit harshly disapproved of the plaintiff's citation to unpublished opinions to prove that the right was clearly established,¹¹⁹ stating: "We generally look with disfavor upon citation of unpublished dispositions . . . as citation of *unpublished* opinions seems an unusually ineffective, and even counterproductive, means of demonstrating that a given proposition of law was 'clearly established.'"¹²⁰ The Fourth Circuit reiterated this perspective in *Hogan v. Carter*, in which it stated:

Since unpublished opinions are not even regarded as binding precedent in our circuit, such opinions cannot be considered in deciding whether particular conduct violated clearly established law for purposes of adjudging entitlement to qualified immunity. We could not allow liability to be imposed upon public officials based upon unpublished opinions that we ourselves have determined will be binding only upon the parties immediately before the court.¹²¹

Similarly, in *Wilson v. Layne*, the Fourth Circuit held that unpublished opinions, as non-precedents, could not be used to clearly establish the law.¹²² Whether the Circuit has wavered from this highly restrictive rule after the Supreme Court's review and rejection of a categorical rule against using non-binding sources is unclear.

The Seventh Circuit also ties the issue of whether unpublished decisions may be used to demonstrate clearly established law to their status as non-binding precedent.¹²³ While there is only a single Seventh Circuit opinion on the issue, albeit predating *Wilson v. Layne*, it is clear in its

118. *Torcasio*, 57 F.3d at 1342.

119. *Id.* at 1347-48.

120. *Id.*

121. *Hogan*, 85 F.3d at 1118.

122. *Wilson*, 141 F.3d at 124. Actually, the court makes a statement that is frightful in its implications:

It seems logical that repeated decisions refusing to recognize a right would be evidence that the right was not clearly established even if the opinions were unpublished. However, it is well known that judges may put considerably less effort into opinions that they do not intend to publish. Because these opinions will not be binding precedent in any court, a judge may be less careful about his legal analysis, especially when dealing with a novel issue of law. For this reason we are loathe to cite to unpublished opinions, *see* Local Rule 36(c), nor will we consider them to be evidence that a right is or is not clearly established.

Id. at 124 n.6. This comment, in a single footnote, suggests that a majority of Fourth Circuit judges believed that unpublished opinions were being used to deal with novel issues of law and perhaps carelessly so.

123. *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995) ("Taken together with other evidence, [unpublished opinions] might show that the law had been clearly established. But by themselves they cannot clearly establish the law because . . . they are not authoritative as precedent.").

disapproval of unpublished, non-binding authority as clearly establishing a right.¹²⁴ In *Anderson v. Romero*, the plaintiff was a prison inmate who became infected with the AIDS virus while confined in a state penitentiary.¹²⁵ The plaintiff brought suit against prison officials under section 1983, alleging that the prison officials caused him to be put in an isolated cell and denied him various privileges because of his HIV-positive status.¹²⁶ In conducting a qualified immunity analysis, the court stated “that district court decisions cannot *clearly* establish a constitutional right,” reasoning that such decisions “by themselves . . . cannot clearly establish the law because, while they bind the parties by virtue of the doctrine of *res judicata*, they are not authoritative as precedent.”¹²⁷ In dicta, the Seventh Circuit applied this reasoning to unpublished decisions of the circuit court, stating, “[t]he unpublished decisions of this court have no weight as precedent. . . . although we cannot find any cases on the point, we are confident that an unpublished decision cannot elevate the decision that it affirms to the status of circuit precedent.”¹²⁸

Two developments crucial to the use of unpublished opinions have occurred since the rulings noted above. First, the Supreme Court’s decision in *Wilson v. Layne* refused to categorically reject lower court, unpublished, and persuasive authority as a source of clearly establishing the law.¹²⁹ Second, the tide has turned against the wholesale marginalization of unpublished opinions, as evidenced by their universal citeability after Federal Rule of Appellate Procedure 32.1.¹³⁰ Whether either the Fourth or Seventh Circuit has changed course or will change course is unknown; at this time, no recent cases address whether they have changed their practice on the use of unpublished opinions to clearly establish the law.

Post-*Wilson*, the Eleventh Circuit adopted a very restrictive view of what types of decisions may be considered in determining clearly established law.¹³¹ In *Marsh v. Butler County*, county prisoners brought a

124. *Id.*

125. *Id.* at 520.

126. *Id.*

127. *Id.* at 525.

128. *Id.*

129. *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (suggesting that “a consensus of persuasive authority such that a reasonable officer could not have believed that his actions were lawful” could suffice).

130. FED. R. APP. P. 32.1 (not allowing the prohibition or restriction of unpublished opinions issued on or after January 1, 2007).

131. *Marsh v. Butler Cnty.*, 268 F.3d 1014, 1032–33 n.10 (11th Cir. 2001) (refusing to interpret *Wilson v. Layne* as requiring consideration of non-binding sources of law or any “consensus of cases of persuasive authority,” and holding that Eleventh Circuit law can be clearly established only by decisions of the U.S. Supreme Court, the U.S. Court of Appeals for the Eleventh Circuit, and the highest state court for the relevant state).

claim against the sheriff for injuries they received at the hands of fellow prisoners.¹³² In its discussion of how factually similar precedent cases must be, the court opined that it would look only to decisions of the United States Supreme Court, the Eleventh Circuit Court of Appeals, and decisions of the highest court of the relevant state.¹³³ The Court rejected any reading of *Wilson v. Layne* that would permit a "consensus of cases of persuasive authority" to clearly establish the law.¹³⁴ Its reasoning for this was that "[e]ach jurisdiction has its own body of law, and splits between jurisdictions on matters of law are not uncommon."¹³⁵ This reasoning is flawed in two respects. First, such splits of authority would serve to indicate that the law is not clearly established, and the lack of a split would bolster the case in favor of clearly established law. Second, when it comes to federally guaranteed civil rights, uniformity should be seen as a goal, particularly for section 1983 and *Bivens* actions, which were intended to give effect to federal rights across the country.

The Fourth and Seventh Circuit rules regarding the use of unpublished opinions may be different post-*Wilson*, but there is no case law yet to indicate that. It is possible that they will follow the Eleventh Circuit's unabashed restrictive approach, which allows only binding authority to be used in the qualified immunity analysis. For the Eleventh Circuit's part, unpublished opinions hold no sway in determining whether the law was clearly established and are unlikely to do so absent an en banc or Supreme Court mandate.

C. *Circuits Where Unpublished Opinions Likely Cannot Be Used To Show Clearly Established Law (2nd & 10th)*

In two circuits, the Second and Tenth, it is most likely that unpublished opinions may not be used to clearly establish the law.¹³⁶ While not as definitive in their rejection of unpublished opinions as the Fourth or Seventh Circuits, these two circuits have ruled in a manner that casts

132. *Id.* at 1023. Under Alabama law, the sheriff was responsible "for the jail's general supervision and control." *Id.*

133. *Id.* at 1032-33 n.10.

134. *Id.*

135. *Id.*

136. See *Mechem v. Frazier*, 500 F.3d 1200, 1206 (10th Cir. 2007) (stating that "unpublished opinion[s] . . . provide[] little support" for a claim that the law was clearly established); *Cerrone v. Brown*, 246 F.3d 194, 202 (2d Cir. 2001) (citing *Townes v. City of New York*, 176 F.3d 138, 144 (2d Cir. 1999) for the proposition that only Supreme Court and binding Second Circuit authority may be looked to while suggesting that district and unpublished circuit opinions were not useful); cf. *Williams v. Bitner*, 455 F.3d 186, 193 (3d Cir. 2006) (rejecting a Sixth Circuit unpublished opinion on the grounds that it was not precedential within the Sixth Circuit).

some doubt on their willingness to look to unpublished opinions in determining whether the law was clearly established.

The Second Circuit has made only vague statements about its treatment of opinions in the qualified immunity determination. In *Cerrone v. Brown*, the court was faced with the question of whether the law requiring probable cause to detain and question a police officer was clearly established.¹³⁷ The investigating officers claimed that probable cause was unnecessary because Cerrone was a police officer—a government employee—and being investigated for conduct related to his employment.¹³⁸ The defendants offered an unpublished district court opinion, which had been affirmed by an unpublished table decision, but the court found it unavailing, noting via parenthetical that “only Supreme Court and Second Circuit precedent are relevant to whether a right is clearly established.”¹³⁹ However, in *Tellier v. Fields*, a *Bivens* action decided one year prior to *Cerrone*, the Second Circuit did not rule out the use of unpublished opinions entirely.¹⁴⁰ In *Tellier*, the plaintiff argued that he was held by federal officials in administrative detention without review hearings, which violated his constitutional rights.¹⁴¹ In an attempt to demonstrate that this right was not clearly established, the defendants relied upon many unpublished opinions from “distant circuits.”¹⁴² While the court refused to view them as convincing, it did so based on their distance and lack of relevance rather than their status as unpublished decisions.¹⁴³ In fact, the court seemed open to the use of non-binding law, which would include unpublished opinions, as long as they “clearly foreshadow”¹⁴⁴ a certain ruling, stating, “the absence of a decision by this court or the Supreme Court directly addressing the right at issue ‘will not preclude a finding that the law was clearly established’”¹⁴⁵ In the face of these two decisions, neither of which makes a definitive statement and each of which points in a different direction, it is difficult to determine the Second Circuit’s rule on the use of unpublished opinions in the qualified immunity analysis. Given that the *Cerrone* decision is more recent and more directly confronts the issue, it is likely that the Second Circuit will not look to unpublished opinions for clearly established law.

137. *Cerrone*, 246 F.3d at 196.

138. *Id.* at 199–200.

139. *Id.* at 202 (citing *Townes*, 176 F.3d at 144).

140. *Tellier v. Fields*, 280 F.3d 69, 86 (2d Cir. 2000) (examining the unpublished decisions in an effort to distinguish them rather than brushing them off as unpublished).

141. *Id.* at 74.

142. *Id.* at 86.

143. *See id.*

144. *Id.* at 84 (quoting *Varrone v. Bilotti*, 123 F.3d 75, 79 (2d Cir. 1997)).

145. *Id.* (quoting *Shabazz v. Coughlin*, 852 F.2d 697, 701 (2d Cir. 1988)).

The Tenth Circuit has issued only two opinions from which to draw a conclusion regarding its treatment of unpublished opinions in the qualified immunity analysis.¹⁴⁶ In *Mecham v. Frazier*, Mecham brought a section 1983 action alleging that two state troopers used excessive force during her roadside arrest.¹⁴⁷ In her attempt to defeat defendants' claim of qualified immunity, Mecham cited to an unpublished opinion "to support her position that, at the time of her arrest, the law was clear that the force used in her case was excessive."¹⁴⁸ After rejecting the decision as not analogous, the court stated that, even if the facts were analogous, "[a]n unpublished opinion . . . provides little support for the notion that the law is clearly established"¹⁴⁹ Of course, the court explicitly states that unpublished opinions provide *little* support rather than *no* support, which leaves the question of where the Tenth Circuit stands somewhat open. The Tenth Circuit states a more direct disapproval of using unpublished opinions to determine clearly established law in *Green v. Post*.¹⁵⁰ It does so, however, in a dicta footnote that conflates circuit court unpublished opinions with district court unpublished opinions.¹⁵¹ Still, while its refusal to examine unpublished opinions in determining clearly established law is weakly supported, the footnote is strongly worded: "In determining whether the law was clearly established, we have held that we may not rely upon unpublished decisions."¹⁵² Given this strong language, this is likely to become the Tenth Circuit's position.¹⁵³

The Second and Tenth Circuits, though they have spoken since the Supreme Court decided *Wilson v. Layne*, have not explicitly followed that decision's broad acceptance of a wide variety of sources for clearly establishing the law. While neither circuit has spoken in clear terms,

146. See *Green v. Post*, 574 F.3d 1294, 1305–06 (10th Cir. 2009); *Mecham v. Frazier*, 500 F.3d 1200, 1206 (10th Cir. 2007).

147. *Mecham*, 500 F.3d at 1202.

148. *Id.* at 1206.

149. *Id.*

150. *Green*, 574 F.3d at 1305–06.

151. *Id.* at 1305 n.10.

152. *Id.* (citing *Medina v. City & Cnty. of Denver*, 960 F.2d 1493, 1498–99 (10th Cir. 1992)) (noting that an unpublished *district court* decision may not be relied on to clearly establish the law "because that ruling was unpublished").

153. This either misunderstands or does not accept the federal judiciary's official conception of unpublished opinions as containing only applications of settled law evidenced by its own Tenth Circuit Local Rule 36.1, which states, "[d]isposition without opinion does not mean that the case is unimportant. It means that the case does not require application of new points of law that would make the decision a valuable precedent." 10TH CIR. R. 36.1; see also *Jordan v. Fed. Bureau of Prisons*, 191 F. App'x 639, 650 (10th Cir. 2006) ("In determining whether an atypical deprivation occurred, we acknowledge most of our decisions are unpublished, but conclude they lend some persuasive value on material issues not addressed in a published decision and assist in the disposition of the issues in this case.").

both seem to lean toward rejecting, or at least marginalizing, unpublished opinions as a source that may demonstrate clearly established law.

D. *Circuits Where Unpublished Opinions Likely Can Be Used To Show Clearly Established Law (3rd & 6th)*

In two circuits, the Third and Sixth, case law seems to allow the use of unpublished opinions in clearly establishing the law. But, they have not unambiguously made that the law of the circuit.¹⁵⁴ For example, the Third Circuit has only a single decision dealing with the use of an unpublished decision to clearly establish the law, and that decision does not state a clear rule for whether such opinions are usable.¹⁵⁵ Though it rejects the unpublished opinion proffered by the defendants in that case, it suggests a broad view of what kind of opinions may be used to clearly establish the law.¹⁵⁶ In *Williams v. Bitner*, a Muslim inmate, who was forced to handle pork as part of his kitchen duties, brought suit against prison officials claiming a violation of his First Amendment right to free exercise of religion.¹⁵⁷ The defendants, claiming that the law in this regard was not clearly established, offered an unpublished Sixth Circuit case denying a similar claim.¹⁵⁸ The Third Circuit stated that this single unpublished decision did not undermine the weight of authority establishing the law as clearly established because the Supreme Court and the three circuits with published opinions had unanimously ruled in favor of a right similar to that alleged by Williams.¹⁵⁹ In doing so, the court noted that while district court decisions do not establish precedent for the circuit, “such opinions nonetheless may be relevant to the ‘clearly established’ determination.”¹⁶⁰ Thus, *Williams* applies a similar expansive reasoning to unpublished opinions, suggesting that the Third Circuit

154. See *Williams v. Bitner*, 455 F.3d 186, 193 n.7 (3d Cir. 2006) (holding that nonbinding opinions “nonetheless may be relevant to the ‘clearly established’ determination”); *McCloud v. Testa*, 97 F.3d 1536, 1555 n.28 (6th Cir. 1996) (finding value in unpublished decisions specifically because they represent circuit court judgments of how settled law applies to specific examples). But see *Ohio Civil Serv. Emps. Ass’n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988) (“[T]o find a clearly established constitutional right, a district court must find binding precedent.”).

155. *Williams*, 455 F.3d at 193.

156. *Id.* at 192–93, n.7 (demonstrating a willingness to consider district court opinions and cases from other circuits).

157. *Id.* at 187. Williams was “fired from his kitchen job, cited for misconduct, and punished accordingly.” *Id.* He also brought claims under the Fourteenth Amendment and the Religious Land Use and Institutionalized Persons Act. *Id.*

158. *Id.* at 193.

159. *Id.* at 193–94. The basis for the court’s rejection of the Sixth Circuit’s unpublished opinion, however, was that unpublished opinions have little or no precedential value in the Sixth Circuit.

160. *Id.* at 193 n.7 (“[D]istrict court opinions do play a role in the qualified immunity analysis.” (citing *Doe v. Delie*, 257 F.3d 309, 321 n.10 (3d Cir. 2001))).

will at least consider them in determining whether the law was clearly established.¹⁶¹

The Sixth Circuit has a single strong declaration and defense of using unpublished opinions to determine whether the law is clearly established,¹⁶² but dicta in other cases weaken that strong stance.¹⁶³ The Sixth Circuit opinion in *McCloud v. Testa* contains the most well-reasoned statement by a federal appellate court of why unpublished opinions should be used to determine clearly established law, while other Sixth Circuit opinions imply that such opinions should not be used because they are not binding statements of law.¹⁶⁴ In *McCloud v. Testa*, the plaintiffs, former government employees, brought a section 1983 claim alleging violations of their First Amendment right to be free from dismissal based on their political affiliation.¹⁶⁵ A critical question in that case was whether the positions plaintiffs held were the types of jobs for which political affiliation was a reasonable part of the job qualification and whether the law was clearly established on that point.¹⁶⁶ While normally dismissal based on political affiliation would violate the First Amendment, the Supreme Court in *Branti v. Finkel* carved out an exception for jobs where political affiliation was a reasonable part of the job qualification.¹⁶⁷ The Sixth Circuit reviewed Supreme Court decisions, Sixth Circuit published decisions, and a trio of unpublished Sixth Circuit decisions to determine that the law was clearly established.¹⁶⁸ Anticipating that some may view the court's use of unpublished opinions in determining whether the law was clearly established as "problematic," the court explained its reason for doing so at length.¹⁶⁹ First, the court explained that because unpublished opinions, by definition, represent the well-settled law, "cases the court properly decides not to designate for publication should generally be uncontroversial and establish no new

161. *Id.* at 193.

162. *McCloud v. Testa*, 97 F.3d 1536, 1555 n.28 (6th Cir. 1996) ("[T]he use made of [unpublished] cases here is appropriate for two important reasons. . . . We think . . . that unpublished opinions, because they show how our court dealt with concrete disputes, are more persuasive than the purely hypothetical examples we have invented and so merit consideration.").

163. *See supra* note 154.

164. *Compare McCloud*, 97 F.3d at 1555 n.28 with *Ohio Civil Serv. Emps. Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988) ("to find a clearly established constitutional right, a district court must find binding precedent") and *Bell v. Johnson*, 308 F.3d 594, 611 (6th Cir. 2002) ("unpublished cases are not binding precedent. . . . Thus, the unpublished opinions cited in *McLaurin* could not have [clearly established the law].").

165. *McCloud*, 97 F.3d at 1541.

166. *Id.* at 1546-47.

167. *Id.* *See also* *Branti v. Finkel*, 445 U.S. 507 (1980).

168. *McCloud*, 97 F.3d at 1553-55.

169. *Id.* at 1555 n.28.

precedent.”¹⁷⁰ Second, the court notes that the unpublished opinions serve as additional applications of that settled law in a manner that is very helpful to determine where the case at bar falls into existing law:

The unpublished cases we cite only serve as real-life examples to demonstrate that some job positions can be situated with relative ease in relation to the *Branti* exception. This reinforces the point we make below at greater length that, in many cases, there need not be an opinion specifically addressing the job position at issue in a particular case before it is possible to conclude that this position is clearly within or outside of the *Branti* exception.¹⁷¹

The Sixth Circuit panel in *McCloud* recognized that more data points make for a clearer, more reliable, and more useful picture of the state of the law. In addition, the court rejected the notion that the lesser precedential status of unpublished opinions made them any less suitable for determining what law was clearly established:

[W]e offer a number of examples below about jobs that can be clearly positioned in relation to the *Branti* exception. These citations to unpublished cases can be considered as having only the same persuasive force as the hypothetical examples we have devised. We think, however, that unpublished opinions, because they show how our court dealt with concrete disputes, are more persuasive than the purely hypothetical examples we have invented and so merit consideration.¹⁷²

The court here recognized that whatever precedential value, or lack thereof, accorded unpublished decisions, they reflect actual judgments by a panel of the circuit that should be used to judge actions that follow them.

This well-reasoned decision, and the sensible use of unpublished opinions it makes, has never been directly contradicted. However, opinions both before and after it have suggested a more restrictive standard. For example, in *Ohio Civil Service Employees Ass’n v. Seiter*, the court seemed to require binding authority,¹⁷³ which unpublished opinions in the Sixth Circuit traditionally are not.¹⁷⁴ Likewise, in *Bell v. Johnson*,

170. *Id.*

171. *Id.*

172. *Id.*

173. *Ohio Civil Serv. Emps. Ass’n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988) (“[T]o find a clearly established constitutional right, a district court must find binding precedent . . .”).

174. *See, e.g., Bell v. Johnson*, 308 F.3d 594, 611 (6th Cir. 2002) (“It is well-established law in this circuit that unpublished cases are not binding precedent.”); *see also Salamek v. Comm’r of Soc. Sec.*, 221 F.3d 828, 833 (6th Cir. 2000) (“*Ernst* is not binding precedent because the opinion is unpublished.”); *Cattin v. Gen. Motors Corp.*, 955 F.2d 416, 431 n.14 (6th Cir. 1992) (“Defendants’ reliance on our unpublished opinion . . . is misplaced. *Miller*, as unpublished and not a binding precedent, is clearly distinguishable from this case.”).

the Sixth Circuit stated that a number of unpublished decisions, and a published decision that cited them, were contrary to the great weight of published authority and therefore ineffective in clearly establishing the law.¹⁷⁵ While this decision is clear that unpublished opinions are insufficient in the face of clearly established published law to the contrary, the implication is made that because they are not precedent, they cannot clearly establish the law.¹⁷⁶ Despite these opinions implying otherwise, the Sixth Circuit seems to permit the use of unpublished opinions in determining clearly established law.¹⁷⁷

While neither the Third nor Sixth Circuit has the most unequivocal position on the use of unpublished opinions in this context, it seems most likely that each permits, and will continue to permit, citation to unpublished opinions as part of the analysis.

E. *The Circuit Where Unpublished Opinions Can Be Used To Show Clearly Established Law (9th)*

Only the Ninth Circuit has unequivocally stated a willingness to use unpublished opinions to assess whether the law was clearly established.¹⁷⁸ The Ninth Circuit follows an expansive approach to determining clearly established law, which includes reference to "all decisional law" including unpublished circuit and district court opinions.¹⁷⁹ This approach gives maximum guidance to parties and courts about what the law is and allows a reviewing court to make a fully informed determination about what the law was at the time of the alleged conduct. In *Prison Legal News v. Cook*, the Ninth Circuit reviewed two unpublished district court opinions in determining whether a prison regulation violated clearly established law.¹⁸⁰ The plaintiffs, Prison Legal News ("PLN")

175. *Bell*, 308 F.3d at 611 ("[T]he unpublished cases cited in *McLaurin* could not have provided any assurance to a reasonable official . . . particularly in light of clear published authority to the contrary.").

176. *Id.*

177. This is consistent with the Sixth Circuit's willingness to look at other persuasive authority, such as the law of other circuits, in determining whether the law is clearly established. See *Walton v. City of Southfield*, 995 F.2d 1331, 1336 (6th Cir. 1993) (citation omitted) ("In inquiring whether a constitutional right is clearly established, we must 'look first to decisions of the Supreme Court, then to decisions of this court and other courts within our circuit, and finally to decisions of other circuits.'").

178. See *Prison Legal News v. Lehman*, 397 F.3d 692, 701–02 (9th Cir. 2005) ("In determining whether PLN's rights in this case were clearly established . . . we may look at unpublished decisions and the law of other circuits, in addition to Ninth Circuit precedent."); *Sorrels v. McKee*, 290 F.3d 965, 971 (9th Cir. 2002) ("[U]npublished decisions of district courts may inform our qualified immunity analysis.").

179. *Inouye v. Kemna*, 504 F.3d 705, 714 (9th Cir. 2007) (holding that "[a]bsent binding precedent, we look to all available decisional law, including the law of other circuits and district courts, to determine whether the right was clearly established").

180. *Prison Legal News v. Cook*, 238 F.3d 1145, 1152 (9th Cir. 2001).

and prisoners who subscribed to its newsletter, challenged a prison regulation restricting prisoners' receipt of PLN's non-profit subscription newsletter.¹⁸¹ As part of its analysis of the clearly established law, the court looked at two unpublished opinions approving of the prison policy.¹⁸² This practice was later reaffirmed and more explicitly included all unpublished opinions in *Prison Legal News v. Lehman*.¹⁸³ In *Lehman*, the court noted that, "[i]n determining whether PLN's rights in this case were clearly established . . . we may look at unpublished decisions and the law of other circuits, in addition to Ninth Circuit precedent."¹⁸⁴ The Ninth Circuit repeatedly approved of this use of all decisional law, including unpublished opinions, in determining clearly established law,¹⁸⁵ and unlike the Sixth Circuit, there are no restrictive cases to cast doubt on the Circuit's view of the issue. Indeed, evidence suggests that government officials in the Ninth Circuit look to unpublished opinions, in addition to published ones, in setting policy to avoid infringing others' constitutional rights.¹⁸⁶ In *Bahrapour v. Lampert*, Oregon Department of Corrections ("ODC") officials argued to the trial court that their conduct was reasonable and that they were entitled to qualified immunity in part because they had looked to the Ninth Circuit's unpublished opinions on the issue in crafting prison regulations. The court stated: "The district court determined that in forming its regulations, ODC properly relied on unpublished opinions, despite their lack of binding precedential effect. ODC argues before this Court that unpublished decisions can be considered in determining whether the law was clearly established. We agree."¹⁸⁷

Prior to the passage of Federal Rule of Appellate Procedure 32.1, the Ninth Circuit was perhaps the most restrictive regarding citation and use of unpublished opinions,¹⁸⁸ yet it has been nearly alone in its care-

181. *Id.* at 1146–48.

182. *Id.* at 1152 ("Although unpublished decisions carry no precedential weight, Department Officials may have relied on these decisions to inform their views on whether the regulation was valid and whether enforcing it would be lawful.").

183. *Prison Legal News v. Lehman*, 272 F. Supp. 2d 1151, 1163 (W.D. Wash. 2003) ("A court may consider unpublished opinions in the qualified immunity analysis"), *aff'd*, 397 F.3d 692 (9th Cir. 2005).

184. *Prison Legal News v. Lehman*, 397 F.3d 692, 701–02 (9th Cir. 2005).

185. See *Hopkins v. Bonvicino*, 573 F.3d 752, 775 (9th Cir. 2009); *Inouye v. Kemna*, 504 F.3d 705, 714 (9th Cir. 2007); *Lehman*, 397 F.3d at 701–02; *Bahrapour v. Lampert*, 356 F.3d 969, 977 (9th Cir. 2004); *Drummond v. City of Anaheim*, 343 F.3d 1052, 1060 (9th Cir. 2003); *Sorrels v. McKee*, 390 F.3d 965, 971 (9th Cir. 2002); *Cook*, 238 F.3d at 1152.

186. *Bahrapour*, 356 F.3d at 977 (approving of Oregon Department of Corrections' use of unpublished opinions to guide their understanding of clearly established law); *Cook*, 238 F.3d at 1152.

187. *Bahrapour*, 356 F.3d at 977.

188. See *Hart v. Massanari*, 266 F.3d 1155, 1159, 1180 (9th Cir. 2001) (on an order to show cause why counsel should not be disciplined for citing to an unpublished opinion contrary to then

fully reasoned distinction between precedential value and utility in demonstrating clearly established law.

VI. CONCLUSION: UNPUBLISHED OPINIONS SHOULD BE USED IN DETERMINING THE CLEARLY ESTABLISHED LAW

Unpublished opinions should be used to determine if the law is clearly established. This is true whether or not they are accorded any precedential status. If unpublished opinions are merely applications of well-settled law to facts that do not require any expansion or retraction of the scope of law, then they are ideal sources for determining what law is clearly established in the "fact-specific" manner called for by the qualified immunity test.¹⁸⁹ Unpublished decisions are by definition applications of settled law; they apply that law to factual settings that again, by virtue of qualifying for an unpublished opinion, are routine rather than questionable. Finally, the volume of unpublished opinions means that they can provide additional data for all parties to judge their conduct that is simply unavailable from the relatively small number of published opinions.

In addition to these reasons, which follow from the very nature of unpublished decisions, there are other reasons for a uniform rule requiring the use of unpublished opinions in clearly establishing the law. First, drawing only from the relatively small number of published decisions means that the contours of the rights and government officials' knowledge of the lawfulness of their conduct are less clear. Fewer cases yield fewer applications of the law, which means a greater level of abstraction and less certainty about the scope of constitutional rights. This area of law in particular would benefit from greater certainty. Second, variation among circuits may lead to varying civil rights and qualified immunity protections depending upon the level of abstraction at which these rights are viewed. This variation works a particular hardship on the organizations of government officials that operate across multiple circuits, such as the Federal Bureau of Prisons, because they are subject to differing standards—and in many circuits cannot even know what sources of law

local rule 36-3 forbidding citation of such opinions). The Ninth Circuit was also the most vocally opposed to the adoption of Federal Rule of Appellate Procedure 32.1 liberalizing citation of unpublished opinions. See Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang Over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1451 (2005) (citations omitted) ("80% of the comments opposing Rule 32.1—came from judges, clerks, lawyers, and others who work or formerly worked in the Ninth Circuit. . . . Obviously, there had been an organized campaign to generate comments opposing Rule 32.1, as many of those comments repeated—sometimes word-for-word—the same basic 'talking points' that had been distributed by opponents of the rule.").

189. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

may be setting those standards.¹⁹⁰ Finally, while the bulk of this article proceeds from the premise that unpublished opinions are what the federal judiciary officially says they are—routine applications of settled law to facts not worthy even of published opinion and therefore not precedent—the better view, argued for at length elsewhere,¹⁹¹ is that unpublished opinions are precedential, in which case they ought to be treated like any other decision of the circuit and made part of the qualified immunity analysis.

The uncertain status to which unpublished opinions have been relegated needlessly muddles the qualified immunity analysis. If these decisions were granted precedential status, which they should be based on common law principles, common legal conceptions, and the Constitution,¹⁹² this detrimental uncertainty would end.¹⁹³ Even if unpublished opinions are not granted such status, their very nature makes them the ideal tool for determining what the clearly established law is and how it has been applied. As noted by *McCloud v. Testa* and numerous Ninth Circuit decisions, even if one views non-precedential unpublished opinions as lacking the imprimatur of the circuit court sufficiently to clearly establish the law themselves, they are, by meeting the circuit guidelines for being unpublished, evidence of well-settled law.¹⁹⁴ A uniform rule should be adopted by the Supreme Court that clarifies the place of unpublished opinions within the qualified immunity test.

190. See generally Catlett, *supra* note 33, at 1052–53 (“[A] federal official’s chances of facing liability should not increase or decrease based on the locality in which his actions took place.”).

191. Cleveland, *supra* note 25, at 106–73.

192. *Id.* at 129–62.

193. Though uncertainty of another kind, whether the “consensus of cases of persuasive authority” stated by *Wilson v. Layne* is mandatory, or entirely optional, as the Eleventh Circuit believes, would remain and should also be resolved. See generally Catlett, *supra* note 33, at 1062; Stemerman, *supra* note 33, at 1250.

194. And if they are not well-settled law applied to facts that neither expand nor contract the law, but rather, misstatements, misapplications, expansions, or contractions of the law, the American federal justice system has significant problems far beyond the ambiguity in the qualified immunity analysis.