Comments

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Fairness or Fiction: Striking a Balance Between the Goals of § 1983 and the Policy Concerns Motivating Qualified Immunity

Qualified immunity inspires an assortment of metaphors as scholars and judges strive to capture its effect on civil rights in the United States. Some commentators envision qualified immunity as a necessary evil, while others identify the doctrine as a vice suffocating the protection of civil rights. Regardless of how one views qualified immunity, it can hardly be denied that if left unfettered, the doctrine persistently threatens the promise of 42 U.S.C. § 1983—that all persons have a remedy by law when public officials deprive them of rights secured by the Constitution and laws of this country.[1] As a result, the importance of maintaining a careful watch over this judicially created doctrine cannot be overstated. However, the Supreme Court has consistently left unanswered the question of which precedent is relevant to the clearly established law inquiry—the second step in the qualified immunity analysis; consequently, the lower courts have developed their own standards in regard to whether they will consider extracircuit precedent. Leaving this aspect of the doctrine ill-defined weakens § 1983 and its ability to deter civil rights infringements. This Comment argues that a categorical ex-

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[1] *See* 42 U.S.C. § 1983 (2000).

clusion of extracircuit precedent alters the delicate balance between the goals of § 1983 and the policy concerns motivating qualified immunity.

Qualified immunity is arguably one of the most significant obstacles for § 1983 plaintiffs.[2] It provides a shield from litigation and civil damages for government officials performing discretionary functions so long as they could have reasonably believed that their conduct was consistent with the alleged victim's clearly established rights.[3] The question that plagues all who encounter qualified immunity has become: what makes a right clearly established? The first answer to that question came with *Anderson v. Creighton*, in which the Court defined clearly established law as follows:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.[4]

Thus, on a most basic level, requiring that the law be clearly established on the date of the official's conduct functions as a notice requirement—the issue is whether a reasonable official would have understood, based on preexisting case law, that what he was doing was wrong.

However, the test for whether a right is clearly established has continued to take on many forms, especially in regard to the requisite preexisting law. Among the aspects of the test that have changed are the relevance of state decisional law,[5] the necessary level of factual similarity between the relevant precedent and the present issue,[6] and whether federal circuit courts should look to all available decisional law in the absence of binding intracircuit

[2] *See infra* text accompanying notes 17-21. **R**

[3] *See* Anderson v. Creighton, 483 U.S. 635, 638-39 (1987). The Court in *Anderson* vacated a judgment denying qualified immunity to a federal law enforcement officer who had carried out an unlawful search because the officer could have reasonably believed that the search was lawful. *Id.* at 641, 646.

[4] *Id.* at 640 (citation omitted).

[5] *See generally* Richard B. Saphire, *Qualified Immunity in Section 1983 Cases and the Role of State Decisional Law*, 35 ARIZ. L. REV. 621 (1993).

[6] *See, e.g.*, Saucier v. Katz, 533 U.S. 194, 201 (2001) (emphasizing that the inquiry as to whether the law was clearly established "must be undertaken in light of the *specific context* of the case, not as a broad general proposition") (emphasis added).

precedent.[7] This Comment focuses on the last of these considerations: more precisely, on whether extracircuit precedent should be capable of clearly establishing the law such that qualified immunity could be denied. However, because the requisite level of factual similarity and the relevance of nonbinding precedent are often substantially related, this Comment takes into account recent Supreme Court cases regarding the requirements of factual similarity.[8] This Comment argues that although these cases clarified the law on one aspect of qualified immunity in a manner that seemed to favor plaintiffs, the balance is still tilted strongly in favor of defendants.

Thus, Part I provides a brief overview of the background of qualified immunity, including its development and the motivations behind its creation. Part II examines the narrowest approach[9] taken by any of the circuits in regard to the relevance of extracircuit precedent by analyzing a case from the Eleventh Circuit. This Part seeks to demonstrate how the Eleventh Circuit's rule excluding extracircuit precedent skews the qualified immunity analysis too far in favor of defendants. Part III examines another case from the Eleventh Circuit, one that, in contrast to the previous case, was decided after three significant Supreme Court cases that forced courts of appeals to make significant changes to their qualified immunity analyses. Essentially, Parts

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[7] *See, e.g.*, Michael S. Catlett, Note, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031 (2005) (providing an overview of the circuit courts' various approaches regarding extracircuit precedent); Amanda K. Eaton, Note, *Optical Illusions: The Hazy Contours of the Clearly Established Law and the Effects of* Hope v. Pelzer *on the Qualified Immunity Doctrine*, 38 GA. L. REV. 661, 667, 681-90 (2004) (discussing whether case precedent from other circuits can clearly establish the law, while arguing that the Supreme Court's decision in *Hope v. Pelzer* restored the balance between § 1983 plaintiffs and defendants in the Eleventh Circuit); Jonathan M. Stemerman, Case Brief, *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 (2002) (examining the Third Circuit's inability to articulate a clear standard for consideration of extracircuit precedent).

[8] *See Saucier*, 533 U.S. 194; Wilson v. Layne, 526 U.S. 603 (1999); *infra* Part III.A (discussing Hope v. Pelzer, 536 U.S. 730 (2002)).

[9] Under the narrowest approach, for the purposes of deciding whether the law was clearly established at the time the deprivation occurred, the Eleventh Circuit considers only the decisions of the U.S. Supreme Court, the Eleventh Circuit, and the highest court of the pertinent state. Vinyard v. Wilson, 311 F.3d 1340, 1351-52 & n.22 (11th Cir. 2002) (citing Marsh v. Butler County, 268 F.3d 1014, 1032 n.10 (11th Cir. 2001)). The Sixth Circuit employs a slightly broader standard, looking as well to extracircuit precedent where there is extremely precise factual similarity. Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1177 (1988).

II and III seek to answer two primary questions: First, does allowing some circuits to narrowly define relevant precedent that may clearly establish the law detrimentally affect plaintiffs to the extent that the Supreme Court should itself articulate a binding standard with more breadth? And second, even if such a standard was at one time needed, did the Court's recent decisions render such a standard unnecessary? This Comment argues that a narrow standard creates an unwarranted disadvantage for plaintiffs such that a uniform standard regarding the relevance of extracircuit precedent is still vitally necessary.

Part IV argues that a standard approach among all circuits requiring consideration of extracircuit precedent in the absence of binding intracircuit precedent is crucial to the development of civil rights jurisprudence. Federal circuit courts that deny the relevance of extracircuit precedent in determining clearly established law significantly undercut not only plaintiffs' potential successes on the merits, but also the core purposes of § 1983: vindicating and preventing constitutional deprivations that are caused with the state's imprimatur. Finally, Part IV also briefly considers the wisdom of the qualified immunity doctrine, generally, and its seeming inability to adequately balance the competing policy concerns backing plaintiffs and defendants, respectively.

I

UNDERSTANDING QUALIFIED IMMUNITY AND ITS IMPLICATIONS

Section 1983 provides a civil remedy for deprivations of constitutional rights as a result of conduct under color of state law. The statute provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[10]

Originally enacted as the civil section of the Ku Klux Act,[11] the

[10] 42 U.S.C. § 1983 (2000).

[11] Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape*, and the Frontiers Be-*

statute was envisioned as one of great scope by both its proponents and opponents.[12] However, until *Monroe v. Pape*, the statute provided little redress for persons who had been deprived of their rights at the hands of public officials.[13] *Monroe* was essential because it was the case in which the Court resolved an important question regarding the meaning of "under color of," concluding that the phrase included actions taken by public officials in contravention of the law as well as pursuant to the law.[14] However, despite this broadening of the statute's scope, persons deprived of their rights by public officials have continued to face substantial hurdles in the path to achieving redress for those deprivations. The hurdles have included, though are not limited to, sovereign immunity,[15] absolute immunity,[16] and qualified immunity.

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yond, 60 Nw. U. L. Rev. 277, 277 (1965). The Ku Klux Act was debated against the backdrop of the Reconstruction Era, following the Civil War Amendments, and enacted pursuant to the enforcement powers granted by the Fourteenth Amendment. *Id.* at 279 & n.12. An inextricable part of the Act's background was "the presence of vigilante committees in a large section of the nation, defying laws, perhaps even acting effectively as the law, and piling senseless brutality on lawless outrage." *Id.* at 282. The proponents of the Act cited numerous stories concerning the conduct of the Ku Klux Klan and the exacerbation of the situation by the "relative inaction of state and local governments." *Id.* at 280. The Act was described as a means "to protect all persons in the United States in their civil rights, and to furnish the means of their vindication." H.R. Con. Res., 42d Cong., 17 Stat. 13, 14 (1871).

12 Shapo, *supra* note 11, at 282 ("It is obvious from the words spoken on both sides that the framers contemplated a bill of great scope. They wished to expand federal jurisdiction significantly as to offenses which generally had been considered 'local' ones.").

13 *Id.* at 278 (pointing out that the Court's decision in *Monroe* resulted in an "explosion" of civil actions seeking a federal remedy pursuant to § 1983); *see* Monroe v. Pape, 365 U.S. 167 (1961), *overruled in part by* Monell v. Dep't. of Soc. Servs., 436 U.S. 658 (1978).

14 Shapo, *supra* note 11, at 295.

15 Sovereign immunity prohibits suits for damages against the states. *See* Hans v. Louisiana, 134 U.S. 1, 15-16 (1890) (holding that the Eleventh Amendment bars suits brought against the state). However, suits can be brought against state officials in their individual capacities. *See Ex parte* Young, 209 U.S. 123, 159-60 (1908) (narrowing the breadth of *Hans* by holding that an official is stripped of his official capacity when acting unconstitutionally).

16 *See, e.g.*, Bogan v. Scott-Harris, 523 U.S. 44, 53-54 (1998) (holding that legislators have absolute immunity for actions taken in the sphere of legislative activity); Briscoe v. LaHue, 460 U.S. 325, 344-46 (1983) (determining that police officer witnesses have absolute immunity); Stump v. Sparkman, 435 U.S. 349, 356-57 (1978) (holding that judges have absolute immunity unless there is a clear absence of all jurisdiction); Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (determining that prosecutors have absolute immunity for activities intimately associated with judicial proceedings).

Absolute and qualified immunity are not distinguishable as to the scope of immunity they each provide; when they are applicable, both forms of immunity provide a complete shield against litigation.[17] The two immunities are better understood in terms of the level of immunity they provide.[18] Thus, although the exact standard may differ depending on the type of public official, absolute immunity generally provides immunity so long as the official acted within the confines of his or her official duties.[19] For example, if a legislator is performing a legislative function or act, he or she has absolute immunity from suit for those official actions.[20] In contrast, public officials who are entitled to qualified immunity will be denied immunity when they have violated the plaintiff's clearly established rights, even if they were acting in their official capacity. Therefore, the range of protected activity is narrower for public officials who are entitled to qualified immunity than for those entitled to absolute immunity.

While sovereign immunity and absolute immunity are considered the most significant barriers to plaintiffs under § 1983, qualified immunity buttresses the stark landscape faced by plaintiffs. At times, qualified immunity may seem more daunting than both sovereign immunity and absolute immunity, both because of its effectiveness and its pervasive availability in civil rights litigation. That is, whereas sovereign and absolute immunity are likely to be identified as barriers at the onset of a plaintiff's investigation into filing suit, determining whether a public official shall receive qualified immunity may require extensive litigation. Thus, a plaintiff must invest a tremendous amount of time and money just to determine whether he or she can even pursue a claim. As a result, qualified immunity has expanded into one of the most litigated and debated doctrines within this area of law.[21]

The Court's first articulation of qualified immunity came in *Scheuer v. Rhodes*, in which the Court explained that for some officials, immunity would be qualified by the specific circum-

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[17] JOHN C. JEFFRIES, JR. ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 57, 68-69 (2000).

[18] *Id.*

[19] *See* cases cited *supra* note 16.

[20] *Bogan*, 523 U.S. at 54 (holding that legislators have absolute immunity for actions taken in the sphere of legislative activity).

[21] Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187, 187 (1993).

stances of the case.[22] Granting absolute immunity to public officials in all circumstances would have been illogical and unfair in light of *Monroe*; extending liability to include official conduct that is contrary to the law necessarily implies that public officials will be liable for their official conduct in at least some circumstances.[23] However, the question today is whether the strength with which the qualified immunity doctrine is applied results in de facto exemption from liability for public officials,[24] yet again deteriorating the goals of § 1983 to little more than rhetoric.

Qualified immunity is meant to balance § 1983's concerns of prevention, compensation, and punishment with the competing concerns of overdeterrence, conservation of government funds, and fairness to defendants.[25] Therefore, implementation of this judicial doctrine requires courts to balance the goals of § 1983 with the goals of qualified immunity. However, it remains to be seen whether such a balance can truly be achieved. The difficulty of this precarious balancing act lies in the imposing power of qualified immunity. The key to the power of qualified immunity is that it acts as a complete shield against litigation for the public official.[26] Once a court establishes that qualified immunity ap-

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[22] 416 U.S. 232, 243 (1974).

[23] *Id.* (quoting Justice Douglas in Monroe v. Pape, 365 U.S. 167, 184 (1961)) ("Since [§ 1983] included within its scope the 'misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law,' government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under its terms.").

[24] *See* 2 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 8:5, at 8-20 (4th ed. 2002) (arguing that the frequency of summary judgment in favor of defendants on the basis of qualified immunity renders "qualified immunity . . . the functional equivalent of absolute immunity").

[25] *See* Anderson v. Creighton, 483 U.S. 635, 638 (1987) ("When government officials abuse their offices, 'action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees.' On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982))); Wood v. Strickland, 420 U.S. 308, 319-20 (1975) ("The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students."); *see also* 2 NAHMOD, *supra* note 24, § 8:1, at 8-4; Craig T. Jones, Hope *for Civil Rights: Plaintiffs Are Starting to Feel the Effects of the Supreme Court's Ruling in* Hope v. Pelzer *as Courts Reexamine Qualified Immunity*, TRIAL, Apr. 2004, at 38, 38.

[26] Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (holding that denial of summary judgment based on qualified immunity is subject to interlocutory appeal because

plies, the claim is dismissed. As a result, qualified immunity not only makes it more difficult for plaintiffs to achieve success on the merits, but also denies them the opportunity to verify the sufficiency of their allegations through procedures such as discovery.[27]

Efforts by the Court to strike the right balance can be seen in the cases that followed *Scheuer*. For example, in *Wood v. Strickland*,[28] the Court attempted to carve out a more defined test for establishing qualified immunity. In *Wood*, school board members and school administrators faced § 1983 claims by three female students who were expelled for the remainder of a semester, a three-month period, after admitting to spiking punch at a school event.[29] In holding that qualified immunity as opposed to absolute immunity, should have been extended to the defendants, the Court stated:

> To be entitled to a special exemption from the categorical remedial language of § 1983 . . . a school board member . . . must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. Such a standard imposes neither an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of § 1983.[30]

The Court's attempt to balance the competing policy concerns inherent in claims brought under § 1983 resulted in its first significant framework for analyzing qualified immunity. The test for qualified immunity initially developed in *Wood* required two parts, a subjective, or good faith, prong, and an objective prong that called for a determination of whether a reasonable official would have known that his or her conduct violated the plaintiff's rights.[31]

In *Harlow v. Fitzgerald*,[32] the Court further refined the test for

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qualified immunity provides "*immunity from suit* rather than a mere defense to liability").

[27] *See id.*

[28] 420 U.S. 308 (1975), *overruled in part by* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[29] *Id.* at 311-12.

[30] *Id.* at 322.

[31] *Id.*; 2 NAHMOD, *supra* note 24, § 8:1, at 8-5.

[32] 457 U.S. 800 (1982).

qualified immunity. Specifically, the Court eliminated the subjective prong of the test.[33] Pro-defendant sentiment seemed to motivate the decision to eliminate the good faith prong of the analysis[34]—the Court noted that litigation costs for public officials were substantially increased by the inclusion of the good faith prong.[35] Furthermore, the Court also sought to minimize "disruption of government" and encourage the "resolution of many insubstantial claims."[36] In conclusion, the Court held that public officials would be "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."[37] Although the current test for qualified immunity primarily revolves around whether the law was clearly established, the test again has two requirements: (1) that the plaintiff suffered a constitutional violation, and (2) that there was a violation of a clearly established right.[38]

Federal courts of appeals apply a variety of approaches in determining the relevance of extracircuit precedent to the question of whether the right was clearly established. The Eighth and Ninth Circuits take the broadest approach. These circuits look to all available decisional law in the absence of binding precedent.[39]

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[33] *Id.* at 819. The Court stated:

> By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences."

Id. (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)) (footnotes omitted).

[34] *See* 2 NAHMOD, *supra* note 24, § 8:5, at 8-16.

[35] *Harlow*, 457 U.S. at 816.

[36] *Id.* at 818.

[37] *Id.*

[38] *E.g.*, Wilson v. Layne, 526 U.S. 603, 609 (1999) (explaining that framing the analysis in this order saves defendants from litigation in baseless claims and "promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public").

[39] *See* Karen M. Blum, *Section 1983: Qualified Immunity*, 714 PRACTISING L. INST. LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES 115, 357, 360 (2004) (citing Boyd v. Benton County, 374 F.3d 773, 781-83 (9th Cir. 2004), and Vaughn v. Ruoff, 253 F.3d 1124, 1129, 1130 (8th Cir. 2001)).

The Ninth Circuit adds a further nuance to the rule, however, where there are relatively few cases on point and none of them are binding.[40] In that instance, to ascertain whether the law is clearly established, the court will make a determination as to the likelihood that the Supreme Court or the Ninth Circuit would have reached the same result in those cases.[41] Taking a similarly broad tact, the test in the Seventh Circuit asks whether the official could have believed that his conduct was proper in light of "all relevant sources of guidance to the law."[42] In contrast, the Eleventh Circuit has continually taken the narrowest approach, even with slight variations in response to the Supreme Court's decision in *Hope*.[43] The Eleventh Circuit considers only binding precedent in determining whether the right was clearly established, taking into account only decisions of the Supreme Court, the Eleventh Circuit, and the highest court in the state in which the case arose.[44]

The Fourth and Sixth Circuits take approaches that are only slightly varied from (and slightly less narrow than) that of the Eleventh Circuit. The Fourth Circuit employs a similar approach to that of the Eleventh Circuit, ordinarily looking to decisions of the Supreme Court, the Fourth Circuit, and the highest court in the state in which the issue arose; however, unlike the Eleventh Circuit, the Fourth Circuit will also look to a "consensus of cases" from other circuits, if such a consensus exists.[45] The Sixth Circuit employs a slightly different standard, looking to the decisions of other courts when they "point unmistakably to the unconstitutionality of the conduct complained of and [are] so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found

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

41 *Id.*

42 *See* Blum, *supra* note 39, at 356-57 (quoting Burgess v. Lowery, 201 F.3d 942, 944-46 (7th Cir. 2000)).

43 *See infra* Part III.C (discussing how the Eleventh Circuit standard regarding nonbinding precedent has remained substantially unchanged for a large segment of cases, in spite of the new framework articulated by the Eleventh Circuit in response to *Hope v. Pelzer*, 536 U.S. 730 (2002), and *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002)).

44 *Vinyard*, 311 F.3d at 1351 & n.22 (citing Marsh v. Butler County, 268 F.3d 1014, 1032 n.10 (11th Cir. 2001)).

45 *See* Owens v. Lott, 372 F.3d 267, 279-80 (4th Cir. 2004), *cert. denied*, 543 U.S. 1050 (2005).

wanting."[46]

II

GIVING DEFENDANTS A HEAD START IN THE ELEVENTH CIRCUIT

A. An Examination of Courson v. McMillian*: Adhering to a Narrow Standard*

This Part seeks to examine the effects of the narrow approach taken by the Eleventh Circuit in regard to the relevance of extracircuit precedent in determining whether a public official's conduct violated clearly established law. In 1991, the Eleventh Circuit decided *Courson v. McMillian*[47] and articulated its unwillingness to consider nonbinding, extracircuit precedent. In *Courson*, the court reversed the district court's denial of summary judgment, holding that Lieutenant Jim Roy was entitled to qualified immunity.[48] The facts in *Courson* were not extraordinary or particularly egregious; instead, the case presented a factual scenario with a high likelihood of repetition. The plaintiff, Sharon Courson, was riding in a vehicle with two intoxicated male companions at around 10:00 p.m. one evening.[49] One of the intoxicated men was driving when Roy pulled over the car for speeding; Roy also suspected that the vehicle had been seen in the vicinity of nearby marijuana fields.[50] Because one of the men became verbally abusive and belligerent to Roy, he requested backup.[51] As a result, by the time Courson's companions were arrested for resisting arrest, disorderly intoxication, obstruction of justice, assault on law enforcement officers, and battery on a police officer, three or four patrol cars were present at the scene.[52]

After being arrested, Courson's male companions were taken away in a patrol car, but not before they refused to allow Courson to use the car to return home.[53] The car was then towed away, leaving Courson without means to get home.[54] Courson

[46] Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1177 (6th Cir. 1988).
[47] 939 F.2d 1479 (11th Cir. 1991).
[48] *Id.* at 1482.
[49] *Id.*
[50] *Id.* at 1483.
[51] *Id.*
[52] *Id.* at 1483-84.
[53] *Id.* at 1484 & n.7.
[54] *Id.* at 1484.

did not ask for a ride home, nor did Roy offer to give her one or arrange for another patrol car to do so.[55] Instead, Courson walked to the guard house of a nearby resort and called a friend to pick her up at about midnight.[56] Courson brought a complaint against Roy and the sheriff, alleging, in pertinent part, that Roy's conduct had violated her Fourth, Fifth, and Fourteenth Amendment rights due to use of excessive force[57] and abandonment.[58]

The court explained that in order to avoid summary judgment, Courson must show that the defendant was "not entitled to qualified immunity legally or that there is a genuine issue of material fact regarding the defendant's conduct as being violative of the clearly established law governing the case."[59] The framework applied by the Eleventh Circuit called for a determination of whether the public official acted within his scope of authority, and if so, the burden shifted to the plaintiff to demonstrate that the defendant's conduct violated clearly established law.[60] The court would then evaluate the second part of the framework using two analytical subparts: (1) "whether the applicable law was clearly established when the governmental action in question occurred," and (2) "whether there is a genuine issue of fact concerning [whether] the government official's conduct [was] in violation of [that] clearly established law."[61]

After evaluating Courson's other claims, the court reached the issue of whether she had made the requisite showing to defeat Roy's claim to qualified immunity as to the abandonment claim. The court stated simply:

> No Supreme Court or Eleventh Circuit precedent existed in May, 1985, concerning a law enforcement officer's abandoning a passenger in a vehicle which was impounded and the other occupants arrested. Under qualified immunity analysis in this circuit, Roy is entitled to qualified immunity because a law enforcement officer cannot be held to a standard of conduct

[55] *Id.* at 1484 n.7.

[56] *Id.* at 1484-85.

[57] This analysis will focus only on the court's discussion of the abandonment claim.

[58] *Courson*, 939 F.2d at 1485.

[59] *Id.* at 1487.

[60] *Id.*

[61] *Id.* at 1487-88. This framework appears in reverse order to the order established by the Supreme Court in *Wilson v. Layne*, 526 U.S. 603 (1999), in which the Court mandated that courts first determine whether a violation occurred, and then determine if that violation was of clearly established law. *See infra* text accompanying notes 79-89.

> which is unsettled by the Supreme Court or this circuit . . . .[62]

The court conceded that its "analytical result may be viewed as harsh from a humanitarian perspective,"[63] but before making this concession, the court acknowledged extracircuit decisional law on the same subject in an extensive footnote.[64] This acknowledgment is perplexing considering the court's standpoint on extracircuit precedent. One can surmise that the court's willingness to identify contrary decisions from the Ninth and Seventh Circuits[65] stemmed in part from its desire to point to a Tenth Circuit decision,[66] based on far more egregious facts,[67] with a conclusion similar to its own.[68]

Another possibility for the inclusion of this analysis of extracircuit precedent can be found in the court's paraphrasing of the holding from the Tenth Circuit's decision in *Hilliard v. City & County of Denver*: "The *Hilliard* court found that the fact that [the Seventh and Ninth Circuits] had found a constitutional duty on the part of officers who abandoned passengers in cars when the driver was arrested and the car impounded represents the essence of a legal question whose answer is not clearly established."[69] Here, the court seems to imply that the existence of differing opinions among the courts of appeals as to whether the law is clearly established settles the question. That is, the divergence of outcomes necessarily renders the law *not* clearly estab-

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[62] *Courson*, 939 F.2d at 1497-98 (footnote omitted). Note that this excerpt from the court's analysis also identifies the required factual similarity for clearly establishing the law. *See id.* To clearly establish the law so that the court could reasonably expect that a reasonable officer in Roy's position would have understood that what he was doing violated Courson's rights, the precedent had to identify nearly the same factual scenario as that experienced by Courson. *See id.* Thus, a case decided prior to May 1985 must have demonstrated the unlawfulness of abandoning a passenger where the vehicle was impounded and the other occupants arrested. *See id.* at 1497.

[63] *Id.* at 1498.

[64] *Id.* at 1497 n.31.

[65] The court discusses *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), and *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979).

[66] *See* Hilliard v. City & County of Denver, 930 F.2d 1516 (10th Cir. 1991).

[67] The court in *Courson* paraphrased the experience of the plaintiff in *Hilliard* as follows: "After the determination that the female passenger was too intoxicated to drive, the car in which she and her arrested companion were riding was impounded, and she was left in a high crime area. She subsequently was sexually assaulted and found the next morning naked, bleeding and barely conscious." 939 F.2d at 1497 n.31.

[68] *See id.* at 1497 n.31.

[69] *Id.* (internal quotation marks omitted) (quoting *Hilliard*, 930 F.2d at 1520).

lished. Furthermore, at least in the Eleventh Circuit, even a consensus of cases on one side would not be able to overcome the presumption presented by the divergence. Does such a standard promote the goals of either § 1983 or qualified immunity? It seems clear that anything short of compensation and vindication for violations of constitutional rights does not serve the goals of § 1983. However, the more difficult question is whether this standard truly promotes the goals of qualified immunity. If the Eleventh Circuit's rule fails to serve the goals of qualified immunity, while simultaneously undermining the goals of § 1983, such a rule should not be tolerated.

B. The Eleventh Circuit's Rule Does Little to Fulfill the Purposes of Qualified Immunity

If qualified immunity has the dual purposes of ensuring that defendants had constructive notice and weeding out frivolous claims, we might expect that a state actor would only be immune from litigation when one or both of these purposes is served. Thus, applying these themes to *Courson*, we may ask whether it makes sense to extend qualified immunity to a defendant like Lieutenant Roy. Roy's conduct was not particularly egregious—he did not hurt the plaintiff, or even deny a request for a ride home. Very simply, he failed to offer Courson a ride or ensure that she got home safely. As a result, the outcome in this case may seem fair.[70] Courson endured little actual harm from her encounter with the police.[71] In fact, she may have had difficulty demonstrating any damages, assuming she could win on the merits. That is, even in the absence of the Eleventh Circuit's rule, Courson still would have faced a significant challenge in attempt-

[70] However, the fairness of finding Roy liable for damages and the fairness of granting him immunity from litigation are distinct issues.

[71] One should note that the actual harm endured by the plaintiff as a result of the defendant's conduct should not matter at this stage in the litigation. The resulting harm should only be considered as to establishing damages. Under § 1983, the injury is the violation itself; to establish a prima facie case the plaintiff need only demonstrate that the defendant caused the deprivation of a legally cognizable right. Yet, one cannot ignore the court's insinuation as it calmly noted:

> Courson lost no time from work as a result of this incident. She testified that she was not physically injured during her detention by Roy, that she suffered no physical consequences, and that she had no medical treatment and received no medication for any condition resulting from this incident. Courson's only residual effect from the experience is her claimed mistrust of police officers.

Courson, 939 F.2d at 1485 (footnotes omitted).

ing to defeat qualified immunity. As a result, excluding extracircuit precedent contributes minimally to the doctrine's ability to serve its purposes because they are already adequately served by the requirements of factual similarity and the actual occurrence of a deprivation.

First, Courson probably would have had great difficulty meeting the factual similarity requirement. She would have had to establish that her facts and those of *White v. Rochford*,[72] from the Seventh Circuit, were similar enough to allow *White* to clearly establish the law.[73] Yet *White* may have been distinguishable from Courson's case because it involved minor children.[74] In addition, Courson would have had to persuade the court to follow the Ninth Circuit's decision in *Wood v. Ostrander*[75] as opposed to the Tenth Circuit's decision in *Hilliard*.[76] Although neither case could have been used to clearly establish the law because both were decided after Courson's encounter with Roy,[77] the two cases present contrasting interpretations of whether *White* could clearly establish the law in Courson's circumstances.

Second, even if Courson could have demonstrated a clearly established right not to be abandoned by police, she would have had to persuade the court that Roy's conduct violated that clearly established right. The court could have held that even if there is a right not to be abandoned by the police, that right does not place on patrol officers an affirmative duty to offer and provide a ride home when a ride is not requested. Therefore, Cour-

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[72] 592 F.2d 381 (7th Cir. 1979).

[73] *See supra* note 65 and accompanying text (noting the court's discussion of *White*).

[74] 592 F.2d at 382 (denying qualified immunity to police officer defendants after they left three minor children in a vehicle along a Chicago freeway upon arresting their uncle for drag racing, despite the uncle's pleas that the police give the children a ride home).

[75] 879 F.2d 583 (9th Cir. 1989); *see also supra* note 65 and accompanying text.

[76] *Compare* Hilliard v. City & County of Denver, 930 F.2d 1516, 1518 (10th Cir. 1991) (granting qualified immunity because the law was not clearly established where the plaintiff's companion was arrested for driving under the influence of intoxicants and the plaintiff was ordered not to drive due to her own intoxication and left by police in a high crime area where she was found in the morning after being raped), *with Wood*, 879 F.2d at 586, 591 (denying qualified immunity because the law was clearly settled where a woman was left without mode of transportation in a high-crime area after police arrested her companion for driving under the influence and impounded the car).

[77] *See Hilliard*, 930 F.2d 1516 (decided in 1991); *Wood*, 879 F.2d 583 (decided in 1989).

son may not have seen the balance tip momentously in her favor with a change of the Eleventh Circuit's rule.

However, this is not to say that the Eleventh Circuit's rule is of no import. Instead, because Courson's case probably would have had the same result regardless of whether the court's analysis included extracircuit precedent, one can infer that the goals of qualified immunity are adequately served by its other doctrinal elements. Because the rule lacks both the intent and effect of serving the goals of qualified immunity, it distorts the precarious balance the Supreme Court has attempted to strike between the goals of § 1983 and the goals of qualified immunity.

III

SHIFTS IN THE LANDSCAPE OF QUALIFIED IMMUNITY JURISPRUDENCE

A. Have the Supreme Court's Recent Cases Modified the Qualified Immunity Analysis to the Extent That a Sufficient Equilibrium Has Been Reached?

The Supreme Court has decided three significant qualified immunity cases since the Eleventh Circuit made its ruling in *Courson*.[78] First, in *Wilson v. Layne*, the Court made clear that qualified immunity analysis requires a particular procedural order.[79] In evaluating a claim for qualified immunity, a court must first decide whether the plaintiff has suffered a deprivation of a constitutional right, and then determine whether the right in question was clearly established.[80] The Court noted that this framework spared defendants from drawn-out litigation when a deprivation had not occurred and "promote[d] clarity in the legal standards for official conduct, to the benefit of both the officers and the general public."[81] On first glance, framing the analysis in this order may seem odd. However, as the Court would later emphasize more fervently in *Saucier v. Katz*,[82] the framework's order was intended to underscore the increased level of difficulty faced by one who progressed to the second step of demonstrating

[78] *See* Hope v. Pelzer, 536 U.S. 730 (2002); Saucier v. Katz, 533 U.S. 194 (2001); Wilson v. Layne, 526 U.S. 603 (1999).

[79] *Wilson*, 526 U.S. at 609.

[80] *Id.* (citing Conn v. Gabbert, 526 U.S. 286, 290 (1999)).

[81] *Id.*

[82] *Saucier*, 533 U.S. 194.

that the law was clearly established.[83] Furthermore, in the absence of such an order, courts could grant qualified immunity by determining that the right was not clearly established without ever answering the question of whether the defendant's conduct amounted to a deprivation.[84] Thus, prior to *Wilson*, courts were able to avoid making decisional law that created a clearly established right.[85]

For example, in *Wilson*, the Supreme Court pointed out that the Fourth Circuit had avoided the issue of whether the defendant's conduct[86] had violated the Fourth Amendment.[87] Instead, the court had affirmed summary judgment based on qualified immunity because the defendant's conduct allegedly violated a right that was not clearly established.[88] As a result, if the Supreme Court had not granted certiorari, not only would the plaintiffs have lost on summary judgment,[89] but also the law would have remained unsettled as to whether the actions of police in this circumstance violated the Fourth Amendment. Therefore, although the reasoning behind framing the analysis in this order was motivated primarily by the desire to keep government officials from enduring unwarranted litigation, the framework also benefits future plaintiffs.

In 2001, the Supreme Court decided *Saucier v. Katz*, which reiterated the importance of deciding the issue of qualified immu-

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[83] *See infra* notes 90-95 and accompanying text.

[84] *See, e.g.*, Courson v. McMillian, 939 F.2d 1479 (11th Cir. 1991) (granting qualified immunity without determining whether the defendant's conduct constituted a violation).

[85] The Court noted in *Saucier* that one of the purposes of framing the analysis in this order was to allow for the development of clearly established law. *See* 533 U.S. at 201 ("The law might be deprived of this explanation [of whether defendant's conduct constituted a violation] were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.").

[86] *Wilson*, 526 U.S. at 607-08 (noting that defendants were federal law enforcement officers who had brought members of the media into the plaintiffs' home while attempting to execute an arrest warrant for the plaintiffs' son).

[87] *Id.* at 608.

[88] *Id.*

[89] Note that the plaintiffs in *Wilson* still lost on the basis of qualified immunity. *Id.* (affirming the judgment of the Fourth Circuit based on different reasoning). Although the Court determined that the defendant's actions amounted to a Fourth Amendment violation, *id.* at 614, the Court further held that "it was not unreasonable for a police officer in April 1992 to have believed that bringing media observers along during the execution of an arrest warrant (even in a home) was lawful," *id.* at 615.

nity using two distinct analytical steps.[90] The Ninth Circuit had conflated the two steps in this particular excessive force case.[91] The court had erroneously determined that because both the question of whether the officers used excessive force and the question of whether the law was clearly established required a determination of the objective reasonableness of the officers' actions, it was unnecessary to address the questions separately.[92] However, the Ninth Circuit erred in more than just a procedural way; according to the Supreme Court, the Ninth Circuit's analysis failed to distinguish the different levels of factual specificity required for each step in the qualified immunity framework.[93] The two steps in the analysis could not be collapsed into one because "the question whether the right was clearly established must be considered on a more specific level" than the question whether a constitutional right was violated.[94] In effect, this decision reinforced the factual specificity required for precedent to clearly establish the law; that is, the second step in the analysis must be evaluated "in light of the specific context of the case, not as a broad general proposition."[95] Like *Wilson*, *Saucier* seemed to be motivated by conservatism; however, in contrast to *Wilson*, *Saucier* can be seen as nothing other than a detriment to plaintiffs. The case seemed to substantially heighten the standard required for plaintiffs to defeat qualified immunity—not only did the framework consist of two distinct steps, but the Supreme Court made clear that it intended the second step to be much more difficult than the first.[96] Thus, although plaintiffs would continue to benefit from the framework's contribution to the development of clearly established law, the requisite factual similarity for the

[90] 533 U.S. at 200.

[91] *Id.*

[92] *Id.* at 199-200.

[93] *Id.* at 200.

[94] *Id.*

[95] *Id.* at 201.

[96] The Supreme Court stated:

> In this litigation, for instance, there is no doubt that *Graham v. Connor* clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. . . . The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*.

Id. at 201-02 (emphasis added) (citations omitted).

second step would be a considerable task for plaintiffs to surmount.

The next year, in 2002, the Court slightly reined in the factual specificity requirement with its decision in *Hope v. Pelzer*.[97] The Court faced an egregious set of facts that clearly stood in contrast to the Eighth Amendment, applicable state law, and state prison policies, yet the defendants had been granted qualified immunity by the lower courts.[98] Larry Hope, an inmate in the Alabama prison system, had engaged in an altercation with a guard while on a work squad in the summer of 1995.[99] To punish Hope, the guards handcuffed him, shirtless, to a hitching post[100] for seven hours.[101] They gave him water only one or two times, and allowed him no bathroom breaks.[102] Additionally, to taunt Hope about his thirst, one of the guards gave water to some dogs, and then kicked over a water cooler near Hope.[103] The Eleventh Circuit held that the first inquiry of the qualified immunity analysis had been met: the plaintiff had demonstrated that using the hitching post to punish inmates violated the Eighth Amendment.[104] However, on the second inquiry, the court determined that the precedent establishing a violation lacked the requisite material similarity to clearly establish the law.[105] Material similarity was the standard used by the Eleventh Circuit for examining the factual similarity of preexisting law. The court required that "the federal law by which the government official's conduct should be evaluated must be preexisting, obvious and mandatory, and established, not by abstractions, but by cases that are materially similar to the facts in the case in front of us."[106]

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97 536 U.S. 730 (2002).

98 *See id.*

99 *Id.* at 734-35.

100 The Court noted that in 1995, Alabama was the only state that used hitching posts to punish inmates for refusing to work or disrupting work squads. *Id.* at 733.

101 *Id.* at 734-35. The Supreme Court found that because inmates placed on the hitching post were forced to remain standing with their arms raised, being handcuffed to the hitching post caused significant strain on the body. *Id.* at 735 n.2 (citing Austin v. Hopper, 15 F. Supp. 2d 1210, 1248 (M.D. Ala. 1998)). In addition, inmates tended to suffer substantial pain from burns when shackled to the hitching post because the handcuffs and the post became hot from the sun. *Id.* (citing *Austin*, 15 F. Supp. 2d at 1248).

102 *Id.* at 735.

103 *Id.*

104 *Id.* at 736.

105 *Id.*

106 *Id.* (internal quotation marks omitted) (quoting Hope v. Pelzer, 240 F.3d 975, 981 (11th Cir. 2001)).

In response, the Supreme Court held that the "materially similar" standard employed by the Eleventh Circuit placed a "rigid gloss on the qualified immunity standard" that was inconsistent with Supreme Court precedent.[107] The Court pointed to *United States v. Lanier*,[108] a case that involved 42 U.S.C. § 242,[109] the criminal law counterpart to § 1983.[110] The Court in *Lanier* had determined that the defendants were entitled to "fair warning" that their conduct violated a constitutional right of the victim, and that this standard was identical to the notice requirement for qualified immunity.[111] In *Hope*, the Court reemphasized the identical nature of the notice requirements for the two statutes.[112] Because the notice requirements are identical, *Lanier* establishes that material similarity is not always necessary: even in novel factual circumstances, officials can be on notice that their conduct violates clearly established law.[113] Furthermore, analogous cases can clearly establish the law, even if the facts differ somewhat between the prior case law and the circumstances at issue in the present case.

Although the Court struck down the Eleventh Circuit's standard of material similarity because it interpreted the factual similarity requirement too strictly, it did not address the Eleventh Circuit's rule regarding applicable precedent.[114] Nevertheless, some writers have argued, in effect, that *Hope* mandated a change not only in the Eleventh Circuit's materially similar standard, but also in its rule excluding extracircuit precedent.[115]

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107 *Id.* at 739.

108 520 U.S. 259 (1997).

109 Now codified at 18 U.S.C. § 242 (2000), the criminal statute provides: "Whoever, under color of any law . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned not more than one year, or both . . . ."

110 *Hope*, 536 U.S. at 739-40.

111 *Id.* (citing *Lanier*, 520 U.S. at 270-71).

112 *Id.* at 740.

113 *Id.* at 740-41.

114 *See Hope*, 536 U.S. 730; Christopher D. Balch, *Is There Hope After* Hope*? Qualified Immunity in the Eleventh Circuit*, 54 MERCER L. REV. 1305, 1309 & n.36 (2003) (noting that the Eleventh Circuit's standard restricting the relevant case law was "accepted without discussion" in *Hope*).

115 *See, e.g.*, Eaton, *supra* note 7, at 689-90 (arguing that the Court's holding in *Hope* "created a broader, more flexible interpretation of clearly established law and the jurisdictions from which it can be derived," which, paired with the ruling that the materially similar requirement was improper, corrected the pro-defendant imbalance in the Eleventh Circuit). Eaton bases her conclusion on the assertion that the

However, it seems clear that the Court's primary motivation in *Hope* was to soften an analysis that had become far too strict. In fact, the outcome of *Hope* may actually be tied to one phrase in the opinion, a phrase that relies more on common sense and humanity than precedent: "The obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment."[116] Thus, the Court seems willing, at least, to caution courts against using the analysis so strictly that defendants can be granted qualified immunity even where their conduct is obviously wrong.

B. The Aftermath: Evaluating the Eleventh Circuit's Response

The focal point of the Eleventh Circuit's response to the preceding cases is *Vinyard v. Wilson*, in which it unveiled a new qualified immunity framework.[117] As is required by *Saucier*, the Eleventh Circuit evaluated a qualified immunity claim by first looking to see whether the conduct alleged constituted a violation of the plaintiff's rights, then proceeded to determine whether the right was clearly established.[118] After determining

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holding in *Hope* relied on "binding Eleventh Circuit precedent . . . and a consensus of all other Circuits concerning the use of hitching posts as prison punishment." *Id.* at 688. In support of this assertion, Eaton cites *Hope* at pages 741-42. *Id.* at 688 n.164. However, the case law (excluding Supreme Court cases) relied on by the Court in those pages of *Hope* is limited to *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), which the Court notes is binding on the Eleventh Circuit because it was decided prior to 1981. *Hope*, 536 U.S. at 742. Eaton further states that the Court's holding was also based, in part, on "the fact that no other circuit permitted the use of the device," citing pages 743-45 of *Hope*. Eaton, *supra* note 7, at 688 & n.165. However, although the Court acknowledges that Alabama was the only state using hitching posts against inmates as of 1995, *Hope*, 536 U.S. at 733, the Court never asserts that it is relying on this fact to support its holding, *see Hope*, 536 U.S. at 743-46. Instead, the Court states:

> Even if there might once have been a question regarding the constitutionality of this practice, the Eleventh Circuit precedent of *Gates* and *Ort*, as well as the DOJ report condemning the practice, put a reasonable officer on notice that the use of the hitching post under the circumstances alleged by Hope was unlawful.

Id. at 745-46. However, this analysis should not be taken as an assertion that *Hope* and other Supreme Court cases do not point to a problem with the Eleventh Circuit's approach. Instead, it is simply an effort to point out that the Supreme Court has not mandated a different approach.

[116] *Id.* at 745; *see also* Balch, *supra* note 114, at 1310 (speculating briefly on whether the decision is attributable to the egregiousness of the facts).

[117] *See* Vinyard v. Wilson, 311 F.3d 1340 (11th Cir. 2002).

[118] *Id.* at 1346.

that the defendant's conduct violated the plaintiff's rights, the court laid the groundwork for evaluating the second inquiry of whether the right was clearly established.[119] The court identified three types of situations in which a court can say that a defendant had notice or "fair warning."[120]

First, the court described a category of cases it labeled as "obvious clarity" cases, in which "the words of a federal statute or federal constitutional provision may be so clear and the conduct so bad that case law is not needed to establish that the conduct cannot be lawful."[121] Second, the court identified another type of obvious clarity case that, in contrast to the first type, relies on case law.[122] Here, although the conduct does not, for example, violate a constitutional provision on its face, the case law may have articulated a broad legal principle that is not tied to the particular set of facts and thus clearly establishes the law in the current instance, such that the defendant had notice.[123] Lastly, when case law fails to provide a broad legal principle that can be applied to the present facts, the court will look to case law that is tied to the particular facts.[124] Therefore, plaintiffs who cannot put themselves into one of the first two categories find themselves in much the same place as the majority of plaintiffs before *Saucier* and *Hope*. For these plaintiffs to demonstrate that the defendant's conduct violated a clearly established right, or that he or she had notice, they must still be able to point to cases with sufficient factual similarity to their own.[125]

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119 *Id.* at 1350-52.

120 *Id.*

121 *Id.* at 1350.

122 *Id.* at 1351.

123 *Id.* The court provides the following example:

> [I]f some authoritative judicial decision decides a case by determining that "X Conduct" is unconstitutional *without tying* that determination to a particularized set of facts, the decision on "X Conduct" can be read as having clearly established a constitutional principle: put differently, the precise facts surrounding "X Conduct" are immaterial to the violation.

Id.

124 *Id.*

125 *See id.* at 1351-52 & n.22 ("[W]hen case law is needed to clearly establish the law applicable to the pertinent circumstances, we look to decisions of the U.S. Supreme Court, . . . the Eleventh Circuit, and the highest court of the pertinent state." (internal quotation marks omitted) (quoting Marsh v. Butler County, 268 F.3d 1014, 1032 n.10 (11th Cir. 2001))). It is important to note that because *Marsh* was decided in 2001, it preceded the Supreme Court's decision in *Hope*, which was decided in 2002. Thus, the Eleventh Circuit did not interpret *Hope* as mandating a change in its rule.

Thus, for most plaintiffs, *Vinyard* had no effect on the Eleventh Circuit's rule. Essentially, by carving qualified immunity cases into three categories in which the law can be clearly established, the court only slightly dwindled the number of cases that will be affected by the rule. The court noted that it believed that most case law would fall into the third category because most judicial precedent is tied to a particular set of facts.[126] Furthermore, the court stated that there is a presumption against broad legal principles; for case law of this type to clearly establish the law, it must do so with such obvious clarity that "*every* objectively reasonable government official facing the circumstances would know that the official's conduct *did* violate federal law when the official acted."[127] Thus, realistically, it seems that most qualified immunity cases will fall into the first or the third categories.

However, only rarely will cases fall into the first category; for a case to fall into the first category, the facts must truly alarm the court and clearly stand in contrast to a constitutional or statutory right. Thus, although *Hope* ensured that defendants whose conduct is clearly wrong and results in serious harm will likely not be granted qualified immunity, most plaintiffs will still be left searching for a factually similar case to establish that an objectively reasonable officer would have known his or her conduct was wrong.[128] As a result, most plaintiffs will be in the same position they were in before *Wilson*, *Saucier*, and *Hope*: they will still be bound to the Eleventh Circuit's rule excluding extracircuit precedent and will face a significant burden in proving that the defendant had notice.

C. An Analysis of Grayden v. Rhodes*: Demonstrating the Effects of the Eleventh Circuit's Rule*

In contrast to Sharon Courson's case, which likely reached the proper result regardless of the rule's unfairness, *Grayden v. Rhodes*[129] clearly demonstrates the harsh consequences of the Eleventh Circuit's rule. The *Grayden* plaintiffs brought due process claims against the Chief of the City of Orlando's Code En-

[126] *Id.* at 1351-52.

[127] *Id.* at 1351 (emphasis added).

[128] Balch, *supra* note 114, at 1315-16 (arguing that *Hope* did not signal the demise of qualified immunity as some, such as Justice Thomas, had speculated because most litigants will find themselves in much the same position as litigants before *Hope*).

[129] 345 F.3d 1225 (11th Cir. 2003).

forcement Bureau for his failure to provide them with contemporaneous notice of their right, as tenants, to appeal his condemnation and eviction decisions.[130] As a threshold matter, the court determined that the plaintiffs were entitled to contemporaneous notice.[131] Even if exigent circumstances justified eviction without pre-deprivation notice, they did not justify eviction without post-deprivation notice.[132] The court reasoned that the significant interests of the tenants in knowing immediately of their right to appeal outweighed the interests of the government.[133] Specifically, knowing immediately of that right could have had a considerable effect on the alternative housing arrangements that the evicted tenants made.[134] For example, some tenants may have chosen to forgo making permanent, long-term alternative plans with the hope that they would succeed in appealing the condemnation and eviction.[135] The defendant argued that the city ordinance granting a right to appeal constituted sufficient statutory notice;[136] however, the court held that based on the exigent circumstances of the eviction, affirmative, contemporaneous notice was necessary to satisfy the plaintiffs' due process rights.[137]

In making its determination on the first inquiry, the court relied "on the standard for notice established by the Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*, as well as [its] practical understanding of statutory notice."[138] In doing so, the court also rejected the applicability of *Memphis Light, Gas & Water Division v. Craft*,[139] which, according to the plaintiffs and the dissent,[140] placed an affirmative duty on the defendant to provide contemporaneous notice of the right to appeal.[141] Rejecting *Memphis Light* as controlling precedent was important because it laid the groundwork for the court's willingness to

130 *Id.* at 1227.
131 *Id.* at 1237.
132 *Id.* at 1237-38.
133 *Id.* at 1237.
134 *Id.*
135 *Id.*
136 *Id.* at 1238 n.18.
137 *Id.* at 1244.
138 *Id.* at 1242 (citation omitted).
139 436 U.S. 1 (1978).
140 *See Grayden*, 345 F.3d at 1250-51 (Birch, J., concurring in part and dissenting in part).
141 *See id.* at 1240-42 (majority opinion).

grant qualified immunity to the defendant. Although the court came to the same conclusion regarding contemporaneous notice as the Court in *Memphis Light*, doing so while rejecting *Memphis Light* allowed the court to hold that the right was not clearly established, and, therefore, that the defendant did not have fair warning.[142] In contrast, had the court deemed *Memphis Light* the controlling case, it would have been hard-pressed to then hold that *Memphis Light* did not clearly establish the law and give fair warning to a reasonable code enforcement officer that his conduct was unlawful.

Thus, although statutory notice was technically insufficient, and relying on it constituted a deprivation of the plaintiffs' rights, the court held that a reasonable code enforcement officer would have believed that failing to post contemporaneous notice of the tenants' right to appeal was lawful; therefore, the right was not clearly established at the time of eviction.[143] In reaching this second conclusion, the court relied primarily on *City of West Covina v. Perkins*, in which the Supreme Court upheld the sufficiency of statutory notice.[144] The court asserted that despite Supreme Court cases pointing to a right to immediate post-deprivation notice,[145] one cannot deny that *West Covina* could have given a reasonable code enforcement officer the impression that statutory notice was sufficient.[146] Lastly, the court disposed of a Sixth Circuit case on point, *Flatford v. City of Monroe*,[147] noting that it could not clearly establish the law.[148] The plaintiffs argued that although *Flatford* could not clearly establish the law, it was particularly persuasive because it relied exclusively on Supreme Court cases[149] to determine that failure to provide post-depriva-

142 *Id.* at 1250-51 (Birch, J., concurring in part and dissenting in part).

143 *Id.* at 1244-45 (majority opinion).

144 *Id.* at 1240, 1245 (citing City of W. Covina v. Perkins, 525 U.S. 234 (1999)). According to the *Grayden* court, in *West Covina* the Court upheld the sufficiency of statutory notice in a case in which police officers had seized the plaintiffs' property pursuant to a valid search warrant. *Id.* at 1240. The plaintiffs had unsuccessfully attempted to retrieve their seized property, and they filed suit alleging that West Covina had failed to provide adequate notice of the available remedies. *Id.*

145 The plaintiffs argued that *Barry v. Barchi*, 443 U.S. 55 (1979), and *Fuentes v. Shevin*, 407 U.S. 67 (1972), require "immediate post-deprivation notice of their right to contest the condemnation." *Id.* at 1245. Note that at this point in the analysis, the court also reiterated its rejection of *Memphis Light*. *Id.*

146 *Id.*

147 17 F.3d 162 (6th Cir. 1994).

148 *Grayden*, 345 F.3d at 1245.

149 *See* cases cited *supra* note 145.

tion due process to emergency evictees had violated the plaintiffs' clearly established rights.[150] The court rejected this argument, distinguishing *Flatford* because that case did not consider the effects of statutory notice as recognized by *West Covina* and, further, it predated *West Covina*.[151]

The court's disregard of *Flatford*'s importance is striking because the court's analysis regarding the sufficiency of statutory notice is entirely illogical, and it demonstrates that there remains a substantial need for a rule mandating the consideration of extracircuit precedent. First, in *Flatford*, the statutory notice was inadequate under the circumstances and it was unreasonable for the code enforcement officer to believe otherwise.[152] Thus, perhaps the Sixth Circuit never addressed statutory notice in that case because it was not relevant due to its inherent inadequacy. If a person has a right to *contemporaneous* notice, statutory notice could never be sufficient.[153] Determining that the evictees were due contemporaneous notice, the court necessarily had to recognize that, under the circumstances, the plaintiffs could not have been expected to suddenly become aware that a city ordinance provided them with a right to appeal their emergency evic-

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150 *Grayden*, 345 F.3d at 1245.

151 *Id.*

152 The Eleventh Circuit's willingness to ignore *Flatford* is even more remarkable when one examines the factual similarity of the two cases. In *Flatford*, the city building inspector had ordered an emergency eviction of the apartment building inhabited by the plaintiffs after condemning the building as hazardous. *Flatford*, 17 F.3d at 165. In contrast to the Eleventh Circuit, the Sixth Circuit held:

> It is too plain for argument that the Flatfords, who were barred from entering their home, have at least a clearly-established right to process of the sort . . . afforded to their landlord. We hold that [the defendant]'s actions were objectively unreasonable, and therefore affirm the district court's denial of qualified immunity . . . .

Id. at 169.

153 *See Grayden*, 345 F.3d at 1256 (Birch, J., concurring in part and dissenting in part). In particular, Judge Birch stated:

> As my colleagues express so effectively, "[t]he law does not entertain the legal fiction that every individual has achieved a state of legal omniscience," or that every citizen "know[s] all of the law all of the time." Indeed, low-income tenants evicted from their homes without prior notice cannot be charged with knowledge of narrow statutory procedures buried deep within city ordinances . . . .

Id. (alterations in original) (quoting the majority opinion in *Grayden*, 345 F.3d at 1243). According to the dissent, the majority answers this question by distinguishing "the questions [of] whether and when such notice must be provided from the *method* of delivering that notice, whether it be statutory or personal." *Id.* at 1251.

tion.[154] Furthermore, because *West Covina* did not address contemporaneous notice, the fact that *Flatford* predated *West Covina* should not have been dispositive.[155] Nevertheless, the court held that although the plaintiffs had a right to contemporaneous notice of their right to appeal, the defendant would have been reasonable in believing that statutory notice was sufficient.

Second, although the court touted its procedural bar mandating exclusion of *Flatford*, it also purported to give substantive reasons for excluding the case. Like the court in *Courson*,[156] it seemed unwilling to altogether ignore nonbinding precedent that was on point. In contrast to *Courson*, however, the court's disposal of the extracircuit case was not relegated to an extensive footnote.[157] Instead, the court distinguished the case in-text on the two bases discussed above: that it did not address statutory notice and that it predated *West Covina*.[158] But if *Flatford* simply could not clearly establish the law, distinguishing it away seems unnecessary; that is, unless *Flatford* clearly demonstrates that the plaintiffs' interpretation of *Memphis Light* was well-founded, the court had little reason for attempting to reinforce the irrelevance of the case.[159] Here, unlike the situation in *Courson*, inclusion of extracircuit precedent may have compelled a different result.[160] Specifically, *Flatford* has the requisite factual similarity to clearly establish the law—thus, giving fair warning to the defendant—and it is consistent with *Memphis Light*, a binding Supreme Court case.[161] Therefore, the court's dismissal

154 *See id.* at 1256 (distinguishing *West Covina* and arguing against the adequacy of statutory notice).

155 *See supra* note 144 (explaining that *West Covina* addressed seizure of property pursuant to a valid search warrant). In attacking the majority's reliance on *West Covina*, Judge Birch highlighted the stark distinctions between the "condemnation order of an administrative officer in the context of a civil code violation and the seizure of property by police grappling with the inherent exigencies of a criminal homicide investigation." *Grayden*, 345 F.3d at 1256 (Birch, J., concurring in part and dissenting in part). Judge Birch further noted that the situation in *West Covina* lacked "the sense of urgency and confusion associated with the permanent and irretrievable loss of a person's home, land or other basic necessity." *Id.*

156 *See supra* notes 63-69 and accompanying text.

157 *See supra* note 64 and accompanying text.

158 *See Grayden*, 345 F.3d at 1245.

159 *See id.* at 1251-52 & n.4 (Birch, J., concurring in part and dissenting in part).

160 *See supra* Part I.

161 *See Grayden*, 345 F.3d at 1251 n.4 (Birch, J., concurring in part and dissenting in part) ("Under 'current American law,' the rule in *Memphis Light* is unmistakable. Sister courts have held that those summarily evicted through condemnation procedures are entitled to contemporaneous notice of their right to appeal.") (citing

of *Flatford* seems more than just thorough; it seems defensive.

The court's desire to defend its dismissal of *Flatford* may have been motivated, in part, by the dissent's attack on the Eleventh Circuit's rule of exclusion. In addition to finding error in the majority's reliance on *West Covina* and its dismissal of *Memphis Light*, as explained above, the dissent questioned the wisdom and validity of the Eleventh Circuit's rule.[162] In summary, not only can it be argued that *Memphis Light* should have controlled in *Grayden*, but also that *Flatford* convincingly supported the plaintiffs' assertion that the right to contemporaneous notice under these circumstances was clearly established. Therefore, qualified immunity should have been denied in *Grayden*.

IV

MAKING THE CASE FOR A UNIFORM APPROACH

This Comment acknowledges that qualified immunity furthers important objectives of the judiciary. Absent some type of qualified immunity, § 1983 would likely open the courts up to an onslaught of frivolous claims. Qualified immunity also seeks to shield public officials from litigation when a court determines that they were not on notice that what they were doing was wrong. The wisdom of this approach is subject to many different interpretations; however, one can hardly deny that federal courts would find difficulty in managing dockets that could not be narrowed in some way. Furthermore, the costs of litigating every claim brought against public officials would likely have a drastic effect on already strained municipal and state budgets. These concerns should not be overlooked. However, these concerns should also not be allowed to override the purposes of § 1983 itself. Allowing federal circuit courts to implement an absolute

Flatford v. City of Monroe, 17 F.3d 162, 169 (6th Cir. 1994); McGee v. Bauer, 956 F.2d 730, 737-38 (7th Cir. 1992); and Wilson v. Health & Hosp. Corp., 620 F.2d 1201, 1214-15 (7th Cir. 1980)).

[162] *See id.* Judge Birch stated the following in a footnote:

> It is true that, thus far, we look only to our own precedent and the decisions of the United States Supreme Court and the supreme court of the relevant state in this circuit to determine whether law is clearly established. Language in a number of fairly recent Supreme Court opinions, however, has signaled a different approach.

Id. (citing Hope v. Pelzer, 536 U.S. 730, 747 n.13 (2002); Wilson v. Layne, 526 U.S. 603, 617 (1999); United States v. Lanier, 520 U.S. 259, 269 (1997); Elder v. Holloway, 510 U.S. 510, 516 (1994); Anderson v. Creighton, 483 U.S. 635, 646 (1987); and Marsh v. Butler County, 268 F.3d 1014, 1031 n.9 (11th Cir. 2001)).

rule excluding extracircuit precedent privileges the availability of qualified immunity over the vindication of valid § 1983 claims. Excluding extracircuit precedent goes beyond that which is necessary to weed out frivolous claims and ensure fairness to defendants.

First, as demonstrated in *Courson*, the Eleventh Circuit's rule adds an unnecessarily harsh slant to the qualified immunity analysis. Requiring close factual similarity to clearly settle the law, in all but the most obviously unlawful circumstances, substantially burdens most plaintiffs while also ensuring that defendants have fair warning. If factual similarity were insufficient as a means of ensuring the goals of qualified immunity, it seems that the use of the defense would have waned considerably in circuits that apply a less stringent rule. Furthermore, expanding the breadth of the sources the courts may consider is not necessarily a detriment to all defendants. Specifically, the more cases a court considers, the greater the chance that defendants will be able to point to cases in contrast to the precedent proffered by plaintiffs.[163]

Second, few defendants ever have actual notice that they are violating someone's clearly established rights. Instead, the clearly established law inquiry creates a fiction in which we expect that a reasonable official would have known that preexisting case law prohibited his or her conduct. In effect, the law assumes that he or she had fair warning because the case law exists. Such an expectation is not unfamiliar; similarly, as to criminal defendants, there is the oft-stated rule that ignorance of the law is no excuse.[164] This fiction can hardly be considered less fair simply because it derives from extracircuit precedent that must still meet the demands of factual similarity. However, some people may argue that it is unfair—questioning whether we should expect po-

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[163] R. George Wright, *Qualified and Civic Immunity in Section 1983 Actions: What Do Justice and Efficiency Require?*, 49 SYRACUSE L. REV. 1, 19 (1998). According to Professor Wright:

> It may be tempting for courts to assume that the greater the number of courts that may be looked to, the greater the protection of basic rights. After all, the more courts that may be drawn upon, the more likely a factually and legally similar prior case has arisen. Similar prior cases, of course, are a primary way of clearly establishing the law.
>
> A larger number of prior cases, from a wider range of separate jurisdictions, is, however, a mixed blessing for civil rights plaintiffs.

Id.

[164] For a brief comparison of notice in the criminal arena and under qualified immunity, see Catlett, *supra* note 7, at 1031-32.

lice officers, for example, to know about cases from all across the country. But again, this doctrine is not motivated merely by practical expectations of fairness to defendants. In reality, notions of fairness and practicality compete under § 1983.

For example, consider again the implication of *Monroe v. Pape*. This pivotal case opened up the breadth of the statute, making public officials liable for deprivations of constitutional rights so long as the deprivations occurred under color of state law. For the first time, the Court adhered to the plain language of § 1983, which mandates such breadth.[165] However, *Monroe* put public officials and public entities at great risk of financial liability and put federal courts at great risk of being bogged down by lawsuits. Furthermore, the Court was greatly concerned by the risk of overdeterrence, fearing that few people would risk such liability to pursue a public service career. The Court responded to these concerns with qualified immunity. The Court attempted to limit the number of suits that could achieve success while simultaneously taking the risk that some meritorious claims would fall to summary judgment. Thus, practicality, more than fairness, has motivated the Court's effort to balance vindication of plaintiffs' rights against its serious policy concerns. Moreover, if the Court is to trouble itself with fairness, perhaps it should first think of what is fair to the people who have had their rights deprived by public officials. After all, the statute asks the Court to do no less. The statute itself provides no immunity; its plain directive is that victims of such deprivations have a remedy by law.[166]

However, qualified immunity does hinge, in part, on the fact that we do not want to punish state actors whose duties require them to make highly discretionary decisions unless they were on notice that their conduct violated a person's rights.[167] In theory,

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165 *See supra* notes 13-14 and accompanying text.

166 *See* 42 U.S.C. § 1983 (2000). The statute states in pertinent part:

> Every person who, under color of [state law] subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Id.

167 *See* Hope v. Pelzer, 536 U.S. 730, 739 (2002) ("As we have explained, qualified immunity operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." (internal quotation marks omitted) (quoting Saucier v. Katz, 533 U.S. 194, 206 (2001))); Harlow v. Fitzgerald, 457 U.S. 800, 807

the applicability of the defense comes down to a question of fairness: whether it is fair to hold X official accountable for violating Y's rights. Accordingly, the articulation of the test has come to revolve around the settled nature of Y's rights rather than X's conduct. We ask whether the law was clearly settled to the extent that we can reasonably *expect* X to have known that what he or she was about to do was wrong, regardless of whether he or she actually knew.[168] Therefore, realistically, the geographic origin of the available decisional law is unlikely to relate to whether the defendant can truly and fairly be expected to have known that what he or she was doing violated someone's rights.

Furthermore, as the Supreme Court has made clear by cutting out the good faith prong of the analysis, qualified immunity is not just about fairness; qualified immunity also serves the goals of weeding out frivolous claims and minimizing disruption of government due to litigation.[169] While these goals are certainly important arguments for the necessity of qualified immunity, they should not be allowed to motivate the circumvention of liability in meritorious claims. Plaintiffs face a severe and unwarranted disadvantage as a consequence of the Eleventh Circuit's rule. The result of this standard is nothing short of a deck stacked against plaintiffs who have suffered verifiable injuries at the hands of state actors. Such a high standard for defeating qualified immunity causes the doctrine itself to resemble the type of systemic problem that § 1983 was devised to combat. As the Court stated in *Monroe*, one of the aims of § 1983 "was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."[170] Yet for many plaintiffs in the Eleventh Circuit, it seems that qualified immunity

(1982) (noting that recognition of qualified immunity reflects an attempt to balance the importance of a damages remedy to protect the rights of citizens with "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority") (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)).

168 However, some judges draw a fine line, expecting state actors to be on notice that their conduct is unlawful based on case law, yet not expecting them to analyze the cases and make necessary distinctions. *See* Wood v. Ostrander, 879 F.2d 583, 604 (9th Cir. 1989) (Carroll, J., dissenting) ("Just as the police officers are not held to the standards of legal scholars, neither should they be expected to analyze and parse an opinion (*that they never heard of*) utilizing the legal skills and reasoning of an appellate judge.") (emphasis added).

169 *See supra* notes 34-38 and accompanying text.

170 Monroe v. Pape, 365 U.S. 167, 174 (1961), *overruled in part by* Monell v. Dep't. of Soc. Servs., 436 U.S. 658 (1978).

transforms § 1983 into a remedy that is itself available in theory, but unavailable in practice.[171] Therefore, a uniform standard mandating the breadth of the clearly established law inquiry is necessary to ensure that a judicially created doctrine does not eviscerate § 1983.

If the Supreme Court is to turn qualified immunity in a new direction, it has two main options. First, the Court could adopt a standard already in place in one of the circuits. For example, it could adopt a relatively broad standard, like that of the Eighth and Ninth Circuits, looking to all available decisional law in the absence of binding precedent;[172] the Sixth Circuit's narrower standard, considering nonbinding precedent only when it points "unmistakably to the unconstitutionality of the conduct complained of and [the decision was] so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting;"[173] or the Fourth Circuit's approach of looking to a consensus of cases from other circuits, if one exists, in the absence of binding precedent.[174]

Second, the Court could modify or combine these approaches to find the best balance. For instance, pieces from the Fourth, Sixth, and Ninth Circuits' approaches taken together may provide an ideal approach. The Ninth Circuit's rule includes a methodology for approaching situations in which there is no binding precedent and there are very few extracircuit cases on point.[175] Where there are relatively few cases on point, and none of them are binding, the Ninth Circuit makes a determination as to the

171 *See* Wright, *supra* note 163, at 32 ("The cost, in the broadest sense, to plaintiffs of currently having no practical recourse for many violations of important federal rights can rightly be said to be enormous. This single striking fact should no longer be minimized.").

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

173 Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1177 (6th Cir. 1988). Note, however, that the Sixth Circuit could be considered narrower than the Eleventh Circuit for reasons other than its relative openness to extracircuit precedent. *See* Stemerman, *supra* note 7, at 1228 ("The strictest approach is that of the Sixth Circuit . . . ."). Specifically, the Sixth Circuit considers cases from the Supreme Court, the Sixth Circuit, and the relevant district court. *See Ohio Civil Serv. Employees Ass'n*, 858 F.2d at 1177. Therefore, in notable contrast to the Eleventh Circuit, it will not consider the decisions of the highest court of the state in which the case arose. *See id.*

174 *See* Owens v. Lott, 372 F.3d 267, 279-80 (4th Cir. 2004), *cert. denied*, 543 U.S. 1050 (2005).

175 *Capoeman*, 754 F.2d at 1514.

likelihood that it or the Supreme Court would have reached the same result in the extracircuit case.[176] Using this approach, the Ninth Circuit is able to ensure that one or two anomalous cases do not lead to a determination that the law was clearly established when it may still be unsettled. Such a result seems to be one of the main motivations behind limiting extracircuit precedent's effect on the outcome of the clearly established law inquiry.[177] Although the Sixth Circuit's approach is narrower than the Ninth Circuit's approach, precisely defining the type of extracircuit precedent capable of clearly establishing the law, it attempts to quell the fear that one atypical decision could clearly establish the law.[178] By combining these approaches, the Court could develop a standard that diminishes this concern while allowing extracircuit precedent that is on point to clearly establish the law in the appropriate circumstances.

A combined approach could provide a framework that mirrors the authoritative weight that should be given to the precedent. Courts would first look to binding precedent from the Supreme Court, the appropriate circuit court, decisions from the district court in which the case arose, and the highest state court in the state in which the case arose. In the absence of binding precedent, the courts would look to all available decisional law, taking into account certain factors, including: whether a consensus of cases points to a particular conclusion, the extent of the factual similarity of the available decisional law, and the likelihood that the Supreme Court or the pertinent circuit court would have come to the same decision as that found in the prior cases.

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176 *See id.* Professor R. George Wright of the Cumberland School of Law at Samford University has noted the risks of such an approach. Wright, *supra* note 163, at 20-22. For example, the court could find cases that are on point upholding the right, yet still hold that the right was not clearly established by stating that the Ninth Circuit or the Supreme Court would have come to a different conclusion as to those prior decisions. *Id.* at 21. Furthermore, the court could also conclude that although the Ninth Circuit would have come to the same result, the Supreme Court would have come to a contrary conclusion, and thus the right was not clearly established. *Id.* By combining the Ninth Circuit's approach to the approaches of the Sixth and Fourth Circuits, the goal is to alleviate some of these risks.

177 *See Ohio Civil Serv. Employees Ass'n*, 858 F.2d at 1176 ("A single idiosyncratic opinion from the court of appeals for another circuit was hardly sufficient to put the defendants on notice of where this circuit or the Supreme Court might come out on the issue in question.") (quoting Davis v. Holly, 835 F.2d 1175, 1182 (6th Cir. 1987)). The Fourth Circuit's approach, looking to extracircuit precedent only when there is an *existing consensus* of cases on point, seems to be motivated by a similar concern. *See Owens*, 372 F.3d at 279-80 (emphasis added).

178 *See Ohio Civil Serv. Employees Ass'n*, 858 F.2d at 1176.

When a consensus of cases cannot be found, one or two novel cases may clearly establish the law only to the extent that they point unmistakably to the unconstitutionality of the conduct complained of and to the extent that the decision was clearly foreshadowed by applicable direct authority. Furthermore, where a clear consensus of cases points in one direction, only binding precedent, or a determination that the Supreme Court or the applicable circuit court would have come to a contrary conclusion based on binding precedent, may establish that such a consensus is misdirected. Allowing a clear consensus of cases to clearly establish the law seems entirely consistent with the Court's directive to determine on an essential level whether the public official had fair warning that his or her conduct violated someone's rights. If courts across the country have determined that certain conduct violates a constitutional right, then it seems illogical to argue that it would be unfair to reasonably expect the official to be aware that his or her conduct was wrong.[179]

CONCLUSION

Although the approach described above is complex and multifaceted, its core principle is the abolishment of a bright-line rule excluding extracircuit precedent from the clearly established law inquiry. Any new approach must diminish the ability of qualified immunity to undercut the protection of constitutional rights provided by § 1983.[180] Therefore, even if the Court hesitates to provide an entire framework for evaluating the weight of the available case law, which would, of course, be subject to varied interpretations, the Court can take a rather simple step toward

[179] *See supra* text accompanying note 164 and contiguous discussion (acknowledging the argument that it is unfair to reasonably expect public officials to know of cases that are decided in other jurisdictions). Michael S. Catlett also suggests an alternative approach that considers whether a consensus of cases exists. *See* Catlett, *supra* note 7, at 1055-62.

[180] If the standard cannot be redefined to achieve a better balance, a more drastic change may be necessary. For example, Professor Wright has argued that qualified immunity should be abolished, acknowledging the issue of applicable sources of authority as one of qualified immunity's many problems. Wright, *supra* note 163, at 29-33. Professor Wright's proposed alternative would involve expanding liability for municipalities, while abolishing not only qualified immunity, but also all civil suits against individual employee actors in their personal capacities. *Id.* at 29. Instead, such suits would be brought against the employing municipality. *Id.* He asserts that by revising the current law of municipal liability and abolishing qualified immunity, fairness to all parties can be achieved without the inefficiencies and injustices of qualified immunity. *Id.* at 30.

softening another rigid gloss on the qualified immunity doctrine.[181] This step may simply be a decision that states that the Eleventh Circuit's rule is too harsh, making clear that the Court does not interpret the qualified immunity precedent to permit a categorical exclusion of nonbinding precedent.[182] While such a decision would still leave lower courts to develop their own analytical standard and determine the weight to be given to extracircuit precedent, it would be more consistent with the Court's efforts to achieve the appropriate balance in § 1983 jurisprudence.[183] Until the Court takes such action, lower courts are left

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[181] *See* Hope v. Pelzer, 536 U.S. 730, 739 (2002) (labeling the Eleventh Circuit's previous standard of "material similarity" a "rigid gloss on the qualified immunity standard").

[182] Such an argument is not implausible. For example, the Fourth Circuit's rule derives from *Wilson v. Layne*, 526 U.S. 603, 617 (1999). *Owens*, 372 F.3d at 279. *Wilson* arguably supports the contention that the Court supports consideration of extracircuit precedent. 526 U.S. at 617 (affirming the lower court's order granting qualified immunity to the defendants). The Court in *Wilson* stated:

> Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident that 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.

Id. (emphasis added). Similarly, Judge Birch, dissenting in *Grayden*, cited several Supreme Court cases addressing qualified immunity for the proposition that the Eleventh Circuit's rule is inconsistent with Supreme Court precedent. Grayden v. Rhodes, 345 F.3d 1225, 1251 n.4 (11th Cir. 2003) (Birch, J., concurring in part and dissenting in part). Among the cases cited by Judge Birch are:

> *Hope*, 536 U.S. at 747 n.13 (noting in its qualified-immunity analysis that there were "apparently no decisions on similar facts from other Circuits"); *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (refusing to find that "the law on third-party entry into homes" was clearly established, in part because no cases either in the relevant jurisdiction *or* from "a consensus of cases of persuasive authority" had been presented); *United States v. Lanier*, 520 U.S. 259, 269 (1997) (observing that, although "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 [to government officials] is fair enough"); *Id.* at 269 (stating that when "applying the rule of qualified immunity," the Court has "referred to decisions of the *Courts* of Appeals when enquiring whether a right was 'clearly established'") (emphasis added); *Elder v. Holloway*, 510 U.S. 510, 516 (1994) (counseling a lower court to "use its 'full knowledge of its own [*and other relevant*] precedents'" in a qualified immunity analysis) (alteration in original) (emphasis added) (citation omitted); *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (referring to "current *American* law" when describing reasonableness for qualified immunity purposes) (emphasis added).

Id. (parallel citations omitted).

[183] *See supra* notes 25-27 and accompanying text.

with the power to undermine § 1983's promise of vindication for, and deterrence of, civil rights deprivations caused with the imprimatur of state law and power.