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Unclearly Establishing Qualified Immunity: What Sources of Authority May Be Used to Determine Whether the Law Is Clearly Established in the Third Circuit

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UNCLEARLY ESTABLISHING QUALIFIED IMMUNITY: WHAT SOURCES OF AUTHORITY MAY BE USED TO DETERMINE WHETHER THE LAW IS "CLEARLY ESTABLISHED" IN THE THIRD CIRCUIT?

I. INTRODUCTION

When an individual's constitutional rights are violated by a state official, they are entitled to bring an action for damages pursuant to 42 U.S.C. § 1983.[1] Section 1983 imposes civil liability upon any person who, acting under the color of state law, deprives another of any rights, privileges or immunities secured by the Constitution or laws of the United States.[2] Accordingly, § 1983 is used as a cause of action for money damages and injunctive relief against those who violate federal constitutional or statutory rights under color of state law.[3] Nevertheless, state and local officials may

1. *See* Wilson v. Layne, 526 U.S. 603, 609 (1999) (explaining that § 1983 allows plaintiffs to recover money damages from government officials who violate their constitutional rights); Procunier v. Navarette, 434 U.S. 555, 561 (1978) (stating that § 1983 exposes state officials to civil damages); *see also* John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 260 (2000) (noting that § 1983 was created by Congress to impose "federal damages liability for violations of federal rights by state officers").

2. *See* 42 U.S.C. § 1983 (2000) (describing scope of section). The applicable part of the statute reads:

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

Id.; *see also* Conn v. Gabbert, 526 U.S. 286, 290 (1999) ("Section 1983 provides a federal cause of action against any person who, acting under color of state law, deprives another of his federal rights.").

3. *See* Robert F. Brown, *Individual Immunity Defenses Under § 1983*, in SWORD & SHIELD REVISITED: A PRACTICAL APPROACH TO SECTION 1983, at 510, 510 (Mary Massaron Ross ed., 1998) (explaining Congress' twofold purpose of enacting § 1983 as deterring public officials from abusing their authority and providing remedy to victims of unconstitutional acts). Because § 1983 serves as protection from state and local officials' abuses of the federal Constitution, most scholars view the statute as also protecting against violations of the Fourteenth Amendment to the United States Constitution. *See, e.g.*, Sheldon H. Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 IOWA L. REV. 1, 1 (1982) (noting that section 1983 "gives individuals a cause of action for damages and injunctive relief against those who violate the fourteenth amendment under color of state law"). *Compare* Charles W. Thomas, *Resolving the Problem of Qualified Immunity for Private Defendants in Section 1983 and* Bivens *Damage Suits*, 53 LA. L. REV. 449, 456 (1992) (noting

be entitled to immunity from suit based on the doctrine of qualified immunity.[4] This immunity exists for government officials so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[5]

Determining when an individual's statutory or constitutional rights are "clearly established" poses problems for officials, lawyers and judges alike.[6] Contributing to this difficulty, the United States Supreme Court has offered only limited guidance on the matter.[7] As a result, a broad

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clear purpose of section 1983 was to provide civil enforcement mechanism for Fourteenth Amendment), *with* Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157, 178-79 (1998) (stating that purpose of § 1983 may be broad or specific). Professor Wells notes that it is possible to interpret § 1983, in light of its background, as providing a remedy only for wrongs that were especially egregious. *See id.* (explaining narrow interpretation is plausible reading of § 1983). Nevertheless, Wells concedes that "[t]he Court seems to endorse the alternative view that by framing the statute in sweeping language . . . Congress indicated a purpose to provide a remedy for the whole panoply of constitutional violations, however extensive the list may become over time." *Id.* at 179; *see also* Lugar v. Edmonson Oil Co., 457 U.S. 922, 934 (1982) (quoting Lynch v. Household Finance Corp., 405 U.S. 538, 545 (1972)) (stating that § 1983 was expressly enacted for purpose of enforcing provisions of Fourteenth Amendment); Monroe v. Pape, 365 U.S. 167, 183 (1961) (holding state officials subject to suit under § 1983 for Fourteenth Amendment violations even if their conduct violated state law).

4. *See* Saucier v. Katz, 533 U.S. 194, 200 (2001) (quoting Mitchell v. Forsyth, 47 U.S. 511, 526 (1985)) (stating that "[q]ualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'").

5. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). For a further discussion of the Supreme Court's interpretation of the "reasonable person" language of *Harlow*, see *infra* notes 27, 30-31 and accompanying text.

6. *See* Brown, *supra* note 3, at 540 (noting that "[w]hat constitutes 'clearly established law' outside of U.S. Supreme Court precedent . . . is simply not clearly established"); Richard B. Saphire, *Qualified Immunity in Section 1983 Cases and the Role of State Decisional Law*, 35 ARIZ. L. REV. 621, 622 (1993) (stating that issue of what sources of authority may be considered to clearly establish law is "[a]mong the most important and difficult issues in qualified immunity law . . . ."); R. George Wright, *Qualified and Civic Immunity in Section 1983 Actions: What Do Justice and Efficiency Require?*, 49 SYRACUSE L. REV. 1, 18 (1998) (discussing difficulty in establishing which decisional law may be used to clearly establish law).

7. *See, e.g.*, Hope v. Pelzer, 122 S. Ct. 2508, 2518 (2002) (suggesting sources of authority other than case law may be used to clearly establish law); United States v. Lanier, 520 U.S. 259, 269-272 (1997) (finding that courts other than Supreme Court may clearly establish law for qualified immunity purposes); *Harlow*, 457 U.S. at 819 n.32 ("[W]e need not define here the circumstances under which 'the state of the law' should be 'evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court.'"); *see also* Capoeman v. Reed, 754 F.2d 1512, 1514 (9th Cir. 1985) (stating belief that Supreme Court has intentionally avoided task of properly defining meaning of "clearly established"); Saphire, *supra* note 6, at 627 (noting that Supreme Court has not provided clear standards for determining where courts may look to determine whether right is clearly established); Wright, *supra* note 6, at 18 (discussing impact of *Lanier* decision on range of courts which may be considered to determine whether law is clearly established); James Flynn Mozingo, Comment, *The Confounding Prong of the* Harlow v. Fitzgerald *Qualified Immunity Test: When is a Constitutional Right Clearly Established*, 17

divergence has emerged in the various United States Courts of Appeals on the range of authority that may be used to clearly establish the law in a qualified immunity analysis.[8] The United States Court of Appeals for the Third Circuit has itself been grappling to determine "a standard by which the bench and the bar can test whether a particular legal principle—that is the particular constitutional right—is '*clearly established*' for purposes of qualified immunity."[9]

This Casebrief focuses on the Third Circuit's consideration of which sources of authority may be used to determine whether a law is "clearly established" for purposes of qualified immunity, concluding that a defined standard is necessary. Part II discusses in detail the history and present state of the doctrine of qualified immunity in the various circuit courts of appeals.[10] Part III examines two recent Third Circuit cases and analyzes their use of applicable sources of authority to determine whether the right at issue was clearly established.[11] Finally, Part IV discusses the conclusions practitioners might draw from these recent Third Circuit decisions.[12]

II. BACKGROUND

When a government official violates the constitutional rights of another person, there are two ways in which that official may be sued for

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AM. J. TRIAL. ADVOC. 797, 806 (discussing Supreme Court's historical avoidance stating clear definition of meaning of "clearly established").

8. *See* Saphire, *supra* note 6, at 628 (stating that in absence of Supreme Court precedent articulating which court decisions may be considered in qualified immunity analysis, lower courts have not been uniform in creating such standards); Charles R. Wilson, *"Location, Location, Location: Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000) (noting that there was "remarkably little consensus among the United States circuit courts concerning how to interpret the term 'clearly established.'"). Saphire notes that the lack of guidance from the Supreme Court has left lower courts to "struggle" with the question concerning which courts may be used to clearly establish a right for purposes of qualified immunity. *See id.* (explaining difficulty faced by lower federal courts over consideration of decisional law from outside of forum circuit in qualified immunity analysis).

9. Brown v. Muhlenberg Township, 269 F.3d 205, 220, *reh'g denied*, 273 F.3d 390 (3d Cir. 2001) (Garth, J., concurring and dissenting); *see also generally* Doe v. Delie, 257 F.3d 309 (3d Cir. 2001) (showing that reasonable jurists may disagree over whether right was clearly established for purposes of qualified immunity). For a further discussion of the Third Circuit's attempt to develop a standard for determining when a right is clearly established for purposes of qualified immunity, see *infra* notes 65-128 and accompanying text.

10. For a further discussion of the history and current application of the doctrine of qualified immunity, see *infra* notes 13-53 and accompanying text.

11. For a further discussion and analysis of recent Third Circuit decisions concerning the consideration of various sources of authority to determine whether the law is clearly established for purpose of qualified immunity, see *infra* notes 54-126 and accompanying text.

12. For a further discussion of the conclusions practitioners should draw from these decisions, see *infra* notes 127-54 and accompanying text.

damages.[13] If the government official is a state or local official, relief is available under 42 U.S.C. § 1983.[14] Alternatively, following the Supreme Court's holding in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[15] a person whose constitutional rights are violated by a federal official may sue that official directly under the Constitution.[16] Neither § 1983 nor *Bivens* creates any new substantive rights.[17] Nevertheless, "virtually any substantive constitutional right" may be pursued under either cause of action.[18] To have their constitutional rights vindicated under ei-

13. For a further discussion of the remedies available to parties injured by a violation of their constitutional rights by governmental officials, see *infra* notes 14-21 and accompanying text.

14. *See* 42 U.S.C. § 1983 (2000) (providing remedy for party injured when state or local government officials violate that party's constitutional rights); *see also* Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U.L. REV. 1, 10 (1997) [hereinafter Chen, *Burdens*] (stating that § 1983 creates cause of action against state and local government officials for their violations of another's constitutional rights).

15. 403 U.S. 388 (1971).

16. *See Bivens*, 403 U.S. at 397 (authorizing damages actions against federal officers for violating Fourth Amendment); *see also* Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 270 (1995) [hereinafter Chen, *Ultimate Standard*] (noting injured party may directly sue federal officials for constitutional violations pursuant to Supreme Court's holding in *Bivens*).

The Third Circuit decisions at issue in this Casebrief involve claims against local government officials under § 1983 and therefore do not implicate the *Bivens* cause of action. Because the qualified immunity analysis under *Bivens* and § 1983 is identical, however, a discussion of *Bivens* and its progeny is important to frame and understand how federal courts resolve the question of what is clearly established law for the purposes of qualified immunity. For additional discussion of the similar qualified immunity analysis under *Bivens* and section 1983, see *infra* note 23 and accompanying text.

17. *See* Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979) (stating that "[§ 1983] is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes"); Chen, *Ultimate Standard*, *supra* note 16, at 270 (explaining that § 1983 and *Bivens* do not create any substantive rights, but instead create causes of action for violations of constitutional rights).

18. Chen, *Ultimate Standard*, *supra* note 16, at 270. Despite the broad language of § 1983, "[t]he Supreme Court has, however, limited the scope of § 1983 remedies . . . ." *Id.* at 270 n.45 (analyzing application and success of § 1983 in vindicating wide range of constitutional torts). The Court has limited § 1983's scope in two separate ways. *See id.* (listing various Supreme Court holdings limiting scope of § 1983). First, the Court has, on occasion, narrowly interpreted the language of the statute, mostly in the area of prisoners' rights cases. *See, e.g.*, Heck v. Humphrey, 512 U.S. 477, 486-87 (1994) (holding that, unless their conviction or sentence has been previously held invalid by another court, state prisoners may not employ § 1983 to recover damages for unconstitutional confinement); Presier v. Rodriguez, 411 U.S. 475, 500 (1973) (holding that state prisoners seeking injunctive relief claiming that their incarceration resulted from unconstitutional conduct must bring suit under habeas corpus, not § 1983). Second, the Court has limited the scope of § 1983 by narrowing the definition of constitutional rights. *See, e.g.*, Hudson v. Palmer, 468 U.S. 517, 533 (1984) (denying procedural due process claim under § 1983 for unauthorized intentional deprivation of property where

ther theory, plaintiffs must prove: (1) a right exists, (2) the defendant violated that right under color of federal or state law, and (3) the defendant's acts proximately caused the plaintiff to suffer a cognizable injury.[19]

Proving all three elements, however, does not necessarily entitle a plaintiff to recover money damages.[20] Among the greatest barriers to money damage recovery in constitutional tort actions is qualified immunity.[21] Qualified immunity acts as a shield from suit for government officials unless their conduct was unreasonable in light of clearly established law.[22] Analysis of the qualified immunity defense, whether asserted under § 1983 or under *Bivens*, is the same.[23]

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adequate state law post-deprivation remedy is available); Daniels v. Williams, 474 U.S. 327, 328 (1986) (concluding that due process clause is not implicated by negligent acts of state officials which cause unintended loss or injury, because these acts do not "deprive" person of life, liberty or property under Fourteenth Amendment).

The Supreme Court has also limited the scope of *Bivens* claims, refusing to recognize claims where there are "no special factors counseling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396; *see* Schweiker v. Chilicky, 487 U.S. 412, 423 (1988) (denying *Bivens* action for procedural due process violations under Social Security Act disability provisions where Congress had created independent remedial scheme to restore benefits); Bush v. Lucas, 462 U.S. 367, 390 (1983) (finding no *Bivens* action for federal employees deprived of their First Amendment rights where such employees are covered by congressionally created comprehensive procedural review system); Chappell v. Wallace, 462 U.S. 269, 304 (1983) (denying *Bivens* action for military personnel deprived of Fifth Amendment equal protection rights by superior officers where Congress had established comprehensive internal system for resolving disputes).

19. *See* Chen, *Ultimate Standard*, *supra* note 16, at 271 (citations omitted) (listing elements necessary for plaintiff to prevail in constitutional tort suit).

20. *See id.* (noting that "[i]n addition to establishing the violation of an existing constitutional right, the plaintiff must also maneuver through an elaborate maze of constitutional remedies doctrine that imposes substantial barriers on the road to recovery").

21. *See id.* at 271-72 (describing importance of qualified immunity in preventing plaintiffs from recovering damages from government officials who violate their constitutional rights); David Rukovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 35-36 (1989) (noting significance of qualified immunity as defense to liability from violations of another's civil rights). Qualified immunity does not act as a bar for injunctive relief. *See* Newman v. Burgin, 930 F.2d 955, 957 (1st Cir. 1991) (declaring that defense of qualified immunity cannot be asserted to challenge plaintiff's request for injunctive relief).

22. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (explaining doctrine of qualified immunity). Accordingly, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). The Supreme Court has noted that the purpose of the qualified immunity rule is to support officials' exercise of discretion in the course of their official duties furthering the public interest. *See In re* City of Phila. Litig., 49 F.3d 945, 960 (3d Cir. 1995) (citing *Harlow*, 457 U.S. at 807) (examining competing policy interests and favoring need to protect officials acting in their official capacity).

23. *See* Wilson v. Layne, 526 U.S. 603, 609 (1999) (noting that "the qualified immunity analysis is identical" under either § 1983 or *Bivens*); Johnson v. Frankell, 520 U.S. 911, 914-15 (1997) (applying parallel qualified immunity test to *Bivens*

A. *Qualified Immunity Generally*

In *Wilson v. Layne*,[24] the United States Supreme Court set forth a two-pronged test to determine whether an official is entitled to qualified immunity.[25] Once a defendant in a § 1983 action asserts the defense of qualified immunity, the court must first determine whether the plaintiff's allegations are sufficient to establish a violation of a federal constitutional or statutory right.[26] Provided that the plaintiff's allegations meet the threshold requirement established by the first prong in *Wilson*, the court must next determine whether the right that the defendant's conduct allegedly violated was a clearly established right about which a reasonable official would have known.[27]

The second prong of the qualified immunity analysis thus requires the court to determine whether the right the plaintiff allegedly violated was "clearly established" in a "particularized" sense at the time of the alleged violation.[28] Precise factual correspondence between the right asserted and prior case law, however, is not required for qualified immunity protection to apply to officials.[29] Instead, for a right to be clearly estab-

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action as is applied under § 1983); Butz v. Economou, 438 U.S. 478, 504 (1978) (concluding no distinction should be drawn for purposes of immunity law between suits involving federal officials and suits involving state officials); *see also* Jeffries, Jr., *supra* note 1, at 264 n.23 ("[t]he immunities available to federal officers under *Bivens* are the same as those available to state and local [officials] under § 1983, and the two lines of cases are cited interchangeably."); Wright, *supra* note 6, at 1 n.2 (noting similarity in treatment of issues for purposes of immunity in § 1983 and *Bivens* actions, as well as in cases brought under 18 U.S.C. § 242, known as criminal law version of § 1983).

24. 526 U.S. 603 (1999).

25. *See Wilson*, 526 U.S. at 609 (discussing qualified immunity analysis). Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). "The privilege is '*an immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" Saucier v. Katz, 533 U.S. 194, 200-01 (2001) (quoting *Mitchell*, 472 U.S. at 526) (emphasis in original). Accordingly, the Supreme Court has consistently maintained the necessity of resolving questions of immunity at "'the earliest possible stage in litigation.'" *Id.* at 201 (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curium)).

26. *See Wilson*, 526 U.S. at 609 (quoting Conn v. Gabbert, 526 U.S. 286, 290 (1999)) (describing first prong of qualified immunity analysis).

27. *See id.* (explaining second prong of qualified immunity analysis); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (stating that qualified immunity defense requires official to be shown to have violated clearly established statutory or constitutional rights about which reasonable person would have known).

28. *See* Anderson v. Creighton, 483 U.S. 635, 640 (1987) (describing standard for determining whether right is "clearly established" for qualified immunity purposes).

29. *See id.* at 640 (explaining meaning of "clearly established"). Those seeking to overcome the qualified immunity defense must point to a case of controlling authority in their jurisdiction, which, at the time of the incident, would show that the right allegedly violated was "clearly established." *See Wilson*, 526 U.S. at 617 (noting level of specificity for cases necessary to overcome qualified immunity de-

lished, "the contours of the right must be sufficiently clear [so] that a reasonable official would understand that what he was doing violates that right."[30] Qualified immunity protection thus depends on "the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time [the action] was taken."[31]

Nevertheless, jurisdictions are divided over the range of courts whose decisions should be considered for clearly establishing a given right.[32] One lower court phrased the issue, "[S]hould our reference point be the opinions of the Supreme Court, the Courts of Appeals, District Courts, the state courts, or all of the foregoing?"[33] Recently, the Supreme Court suggested that authority other than case law may be used in determining whether an official's conduct has violated a clearly established law.[34] Still, the Court has yet to create a uniform standard for the lower courts to follow when analyzing the "clearly established" prong of the qualified immunity determination.[35]

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fense). Alternatively, a plaintiff may overcome the qualified immunity defense if he/she can identify at least "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Id.* (same).

30. *Anderson*, 483 U.S. at 640; *see also Harlow*, 457 U.S. at 818-19 (discussing reasonable person standard). The *Anderson* court further noted that to hold a right as being clearly established, the actions of the official need not to have been previously held unlawful, but only that it be apparent in light of pre-existing law. *See Anderson*, 483 U.S. at 640. (citations omitted) (defining meaning of "clearly established").

31. *Wilson*, 526 U.S. at 614 (quotations and citations omitted); *see also Harlow*, 457 U.S. at 818-19. Accordingly, in any qualified immunity case where the plaintiff has alleged the violation of a constitutional right, whether civil liability is imposed on the official depends on whether the plaintiff can make an objective showing that the law was clearly established at the time of the alleged violation. *Cf. Wilson*, 526 U.S. at 614 (explaining qualified immunity protection). The Court further requires that, in order for the right allegedly violated to be deemed clearly established, the right must be "defined at the appropriate level of specificity." *See id.* at 615. For a further discussion of what constitutes "the appropriate level of specificity," see *infra* notes 32-50, 68-101, 106-26, 135-46 and accompanying text.

32. *See* Wright, *supra* note 6, at 18 (discussing which courts count in determining whether particular law is clearly established).

33. Hobson v. Wilson, 737 F.2d 1, 25-26 (D.C. Cir. 1984).

34. *See* Hope v. Pelzer, 122 S. Ct. 2508, 2516-19 (2002) (looking to Eleventh Circuit precedent, state agency regulation and Department of Justice (DOJ) report to determine whether officials' actions violated clearly established law). In *Hope*, an Alabama Department of Corrections (ADOC) inmate brought suit against prison guards alleging that the guards' act handcuffing him to a hitching post on several occasions- one of which lasted seven hours without water or bathroom breaks- violated his Eighth and Fourteenth Amendment rights. *See id.* at 2512-14 (discussing inmate's claims). The Court held that, in addition to circuit court precedent, an ADOC regulation discussing procedures for using a hitching post and a DOJ report informing the ADOC that such a practice is likely unconstitutional "put a reasonable officer on notice that the use of the hitching post under the circumstances alleged by Hope was unlawful." *Id.* at 2518.

35. *Cf. id.* at 2526 (Thomas, J., dissenting) (disputing weight afforded to state agency regulation and federal agency report by majority); United States v. Lanier,

B. *Consideration of Sources of Authority in the Circuit Courts*

The lack of a uniform standard has forced the various United States Courts of Appeals to develop their own standards.[36] Although Supreme Court and forum circuit decisions are considered binding precedent, the lower circuit courts of appeals "have disagreed on whether and the extent to which other kinds of decisional law should be considered" in determining whether the law is clearly established.[37] For example, the Ninth Circuit takes a broad approach considering, in the absence of binding precedent, all decisional law including decisions of other circuit courts of appeals, district courts and state courts.[38] The Eighth Circuit has adopted a similar stance, looking to all decisional law, including Supreme Court, circuit courts of appeals, district courts and state court opinions to find clearly established rights.[39] Taking a slightly less broad approach, the Tenth Circuit considers only Supreme Court, forum court or the highest state court decisions, or clearly established authority from other circuit courts in its determination.[40]

Other circuit courts of appeals have taken a more narrow analytical approach. The strictest approach is that of the Sixth Circuit, which has held that a district court must find binding precedent from the Supreme Court, the Sixth Circuit Court of Appeals or from the district court itself in

520 U.S. 259, 271 (1996) (stating that absence of circuit precedent should not suggest that officials will always retain immunity defense); Jenkins by Hall v. Talladega City Bd. of Educ., 115 F.3d 821, 826 n.4 (11th Cir. 1997) ("The Supreme Court in *Lanier* simply did not address the extent to which decisions of the 'lower courts' must, should, or may be considered in deciding whether a constitutional right has been clearly established . . . ."); Wright, *supra* note 6, at 18 (noting that Supreme Court has offered only limited guidance on range of courts which may be considered).

36. *See* Saphire, *supra* note 6, at 628-32 (discussing development in lower federal courts of decisional law other than Supreme Court and forum circuit opinions which may be considered when determining whether right is clearly established for purposes of qualified immunity).

37. *Id.* at 627-28; *see* Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. REV. 1467, 1510 (1996) (noting that Sixth and Ninth Circuits take "polar opposite" views on question of which decisional law may be considered in qualified immunity analysis).

38. *See* Tribble v. Gardner, 860 F.2d 321, 324 (9th Cir. 1988) (discussing broad standards of Ninth Circuit). The Ninth Circuit has gone so far as to factor into their analysis "a determination of the likelihood that the Supreme Court or this circuit would have reached the same result as courts which had previously considered the issue." *Id.* (citing Capoeman v. Reed, 754 F.2d 1512, 1515 (9th Cir. 1985)); *see also*, Wright, *supra* note 6, at 19 (discussing Ninth Circuit's analytical approach in determining whether law is clearly established in qualified immunity cases).

39. *See* Hayes v. Long, 72 F.3d 70, 73-74 (8th Cir. 1995) (quoting Norfleet v. Ark. Dep't. of Human Servs., 989 F.2d 289, 291 (8th Cir. 1993)) (stating standard for Eighth Circuit).

40. *See* Anya v. Crossroads Managed Care Sys., Inc., 195 F.3d 584, 594 (10th Cir. 1999) (discussing Tenth Circuit's analytical standard).

order to hold that a right is clearly established.[41] The Second and Seventh Circuits both consider district court opinions as evidence of the law but hold that those decisions cannot clearly establish the law of the circuit.[42] Similarly, the Fourth and Eleventh Circuits consider only Supreme Court, forum circuit and highest state court opinions to clearly establish a right for purposes of qualified immunity.[43]

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41. *See* Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1177 (6th Cir. 1988) (listing sources of authority Sixth Circuit will consider when analyzing whether law was clearly established). Nevertheless, the Sixth Circuit stated that in extraordinary cases, decisions of other courts may be used to clearly establish the law. *See id.* (creating exception to narrow focus of sources of authority). The court noted:

> For the decisions of other courts to provide such "clearly established law," these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be 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.

Id.

42. *See* Anderson v. Romero, 72 F.3d 518, 525 (7th Cir. 1995) (declaring that district court cases may be relevant to qualified immunity analysis, but may not by themselves clearly establish law); Jermosen v. Smith, 945 F.2d 547, 551 (2d Cir. 1991) (noting that decision rendered in Southern District of New York cannot, by itself, clearly establish principle of law in Western District of New York). In determining whether a right was clearly established, the Second Circuit examines "whether the right was defined with reasonable specificity; whether the decisional law of the Supreme Court and the applicable circuit court supports its existence; and whether, under preexisting law, a defendant official would have reasonably understood that his acts were unlawful." Horne v. Coughlin, 155 F.3d 26, 29 (2d Cir. 1998) (quotations omitted).

43. *See* Jean v. Collins, 155 F.3d 701, 709 (4th Cir. 1998), *cert. denied*, 531 U.S. 1076 (2001) (en banc) ("courts in this circuit [ordinarily] need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose . . . ."); Jenkins by Hall v. Talladega City Bd. of Educ., 115 F.3d 821, 826 n.4 (11th Cir. 1997) (explaining limited sources of authority which may be considered in that circuit). The court in *Jean* noted that out-of-circuit decisions recognizing a right not yet recognized in the Fourth Circuit will not bar an official from qualified immunity protection. *See Jean*, 155 F.3d at 709 (discussing weight of out-of-circuit authority).

Alternatively, until the recent Supreme Court decision in *Hope*, the Eleventh Circuit required a bright-line test that would put government officials on notice that they were violating a constitutional right. *See* Hope v. Pelzer, 240 F.3d 975, 981 (11th Cir. 2001), *rev'd*, 122 S. Ct. 2508 (2002) (affirming lower court's grant of summary judgment on grounds of qualified immunity and holding that despite unconstitutionality of prison practice, no clear bright-line test was established at time of violation); Hill v. DeKalb Reg'l Youth Det. Ctr., 40 F.3d 1176, 1185 (11th Cir. 1994) (declaring that "[t]o be 'clearly established,' the federal law by which the government official's conduct should be evaluated must be preexisting, obvious and mandatory so that a similarly situated, reasonable government agent would be on notice that his or her questioned conduct violates federal law under the circumstances"). It remains to be seen the effect *Hope* will have on the Eleventh Circuits' qualified immunity analysis. *Cf.* Hope v. Pelzer, 122 S. Ct. 2508, 2515 (2002) (stating that requirement that facts be "materially similar" to situation at bar constituted "rigid gloss" on qualified immunity standard and is inconsistent

C. *The Third Circuit*

Consistent with other circuits, the Third Circuit looks to the Supreme Court and its own decisions to find sufficient authority to declare a right clearly established.[44] Decisions from out-of-circuit courts of appeals may also be considered in the qualified immunity analysis.[45] Nevertheless, whether and to what extent such decisions may be considered in determining whether the law was clearly established remains "a difficult question" for the court.[46] The Third Circuit previously held that district court decisions cannot clearly establish the law of the circuit.[47] Moreover, the court has held that such decisions are not even binding on other district courts within the district.[48] Still, district court opinions may be relevant to the qualified immunity analysis.[49] Conversely, violations of state law are said to be irrelevant to the question of qualified immunity.[50]

Recently, two Third Circuit cases considered the issue of what sources of authority may constitute clearly established law, but neither provided explicit guidance. In *Doe v. Delie*,[51] the Third Circuit concluded that

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with Court precedent). For a discussion of the facts of *Hope*, see *supra* note 34 and accompanying text.

44. *See, e.g.*, Leveto v. Lapina, 258 F.3d 156, 164 (3d Cir. 2001) (looking to Supreme Court and Third Circuit precedent to clearly establish right for purposes of qualified immunity).

45. *Compare* Johnson v. Horn, 150 F.3d 276, 286 (3d Cir. 1998), *overruled on other grounds by* Dehart v. Horn, 227 F.3d 47 (2000) (en banc) (refusing to conclude whether out-of-circuit court decisions may be considered for purposes of qualified immunity analysis because right at issue not clearly established under any standard), *with* Biergegu v. Reno, 59 F.3d 1445, 1459 (3d Cir. 1995) (looking to several out-of-circuit courts of appeals to show that right was clearly established).

46. *Johnson*, 150 F.3d at 286. The *Johnson* court noted, however, that some circuit courts of appeals allow decisions of other circuit courts of appeals to be considered, others consider such decisions only under special circumstances and still others state that such decisions may never be considered at all. *See id.* at 286 n.6 (discussing approaches to consideration of out-of-circuit decisions).

47. *See* Threadgill v. Armstrong World Indus., Inc., 928 F.2d 1366, 1371 (3d Cir. 1991) (discussing precedential value of district court opinions in clearly establishing law for purposes of qualified immunity).

48. *See id.* ("The doctrine of *stare decisis* does not compel one district judge to follow the decision of another.").

49. *See Beiregu*, 59 F.3d at 1459 (looking to district court opinions within Third Circuit, in concert with out-of-circuit courts of appeals decisions, to find law clearly established); Pro v. Donatucci, 81 F.3d 1283, 1289-92 (3d Cir. 1991) (finding law clearly established in case of first impression in Third Circuit by looking to other circuit court opinions and two in-circuit district court opinions); Brown v. Grabowski, 922 F.2d 1097, 1118 n.13 (3d Cir. 1990) (allowing consideration of out-of-circuit decisions and district court opinions of other circuits, but reversing lower court's holding because cited cases were decided after action in question had occurred).

50. *See* D.R. by L.R. v. Middle Bucks Area Vocat'l Tech. Sch., 972 F.2d 1364, 1375-76 (3d Cir. 1992) (en banc) (stating that illegality under state statute neither adds nor subtracts from question of whether state's actions were valid under United States Constitution).

51. 257 F.3d 309 (3d Cir. 2001).

neither state law, nor conflicting out-of-circuit decisions, could satisfy the clearly established element of the qualified immunity doctrine.[52] In *Brown v. Muhlenberg Township*,[53] the Third Circuit considered state law in determining that the right at issue was clearly established.[54] The two cases are also significant for their dissents, which expose a divergence of philosophy over how to create an analytical standard for determining what sources of authority courts may consider to find a law clearly established, as well as the breadth of authority that such a standard would encompass.[55]

III. ANALYSIS

A. *The Third Circuit's Opinion in Doe v. Delie*

1. *Facts and Procedural Posture*

In 1995, prison medical staff informed John Doe that he was HIV-positive.[56] Subsequently, Doe was told that his medical condition would be kept confidential.[57] Nevertheless, Doe alleged that, because of certain procedures permitted by prison officials, his medical condition was not kept confidential.[58] Doe claimed that these practices resulted in his reluc-

52. *See Delie*, 257 F.3d at 323 (affirming district court's grant of motion to dismiss on basis that officials were entitled to qualified immunity).

53. 269 F.3d 205, *reh'g denied*, 273 F.3d 390 (3d Cir. 2001).

54. *See Brown*, 269 F.3d at 211-12 (reversing in part district court's grant of summary judgment on basis that law was clearly established and officer was not entitled to qualified immunity).

55. *See id.* at 219-28 (Garth, J., dissenting and concurring) (noting that issue of how to determine whether right is clearly established is one "which should concern every judge, every police officer and every official who claims qualified immunity . . . ."); Doe v. Delie, 257 F.3d 309, 330-36 (3d Cir. 2001) (Nygaard, J., concurring and dissenting) (setting forth alternative analysis of case law and other sources of authority for determination of whether right at issue was "clearly established"); *see also* Brown v. Muhlenberg Township, 273 F.3d 390, 390 (3d Cir. 2001), *pet. for reh'g denied*, 269 F.3d 205 (3d Cir. 2001) (Garth, J., sur denial of petition for rehearing) (calling for court to "amplify and clarify the qualified immunity standard"). For a further discussion of the significance of the denial of the petition for rehearing in *Brown*, see *supra* note 131 and accompanying text.

56. *See Delie*, 257 F.3d at 311 (discussing Doe's arrival at prison).

57. *See id.* (discussing statements of prison officials to Doe that his medical records would be kept confidential). Additionally, it was further communicated to Doe that medical records relating to his medical condition would be maintained in a separate file from his general prison file. *See id.*

58. *See id.* at 311-12 (discussing prison procedures responsible for breaching confidentiality of Doe's medical condition). Doe alleged three violations of his right to medical confidentiality by prison officials: (1) the informing of guards escorting Doe to and from sick call appointments of his HIV-positive status; (2) the allowance of the clinic door to remain open during Doe's visits to the physician, allowing officers, inmates and guards in the area to see and hear Doe's communications with the physician; and (3) the announcement of Doe's medication loudly enough for others to hear, which allowed inmates to infer Doe's condition. *See id.* at 312 (discussing Doe's claims). Doe filed administrative grievances concerning both the sick call and the medication distribution practices of the prison. *See id.* (describing Doe's prior attempts to seek redress for alleged harm). Nevertheless,

tance to discuss embarrassing symptoms to his doctors and subjected him to psychological harassment and humiliation, forcing him to discontinue his medical treatment.[59]

Filing suit under 42 U.S.C. § 1983 and the Pennsylvania Confidentiality of HIV Related Information Act in the United States District Court for the Western District of Pennsylvania, Doe requested both declaratory and injunctive relief, as well as nominal, compensatory and punitive damages.[60] The defendants moved to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim, asserting that they were entitled to qualified immunity.[61] The district court dismissed Doe's complaint, finding that the officials were entitled to qualified immunity.[62] Subsequently, Doe appealed to the United States Court of Appeals for the Third Circuit.[63] Doe asserted three arguments that his right to medical privacy was clearly established: (1) that by 1995 there existed a growing consensus of precedent from other courts that inmates possess a right to medical privacy; (2) that a class action settlement served as notice to defendants of that right; and (3) that Pennsylvania law created a right to medical privacy for inmates and also served as notice to defendants of that right.[64]

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prison officials, failed to institute any changes in prison procedure. *See id.* (noting lack of response to Doe's requests).

59. *See id.* (explaining Doe's alleged injuries).

60. *See id.* (discussing procedural history and listing relief sought). Doe named in his complaint various prison officials, including Nurse Joan Delie, Health Care Administrator for the prison. *See id.* (listing defendants). Prior to oral argument, Doe was awaiting a retrial of his conviction; he was subsequently acquitted prior to the Third Circuit's entering of judgment on this matter. *See id.* at 313 (discussing Doe's incarceration status). Because of Doe's release from prison, the Third Circuit held that his claims for declaratory and injunctive relief were now moot, but that his claims for nominal and punitive damages were still alive. *See id.* at 314 (noting that claims for monetary damages usually will not fail for mootness).

61. *See id.* at 313 (discussing procedure). On September 21, 1998, the Magistrate Judge issued a Report and Recommendation finding that no constitutional right to privacy of an inmate's medical condition existed. *See id.* at 312 (summarizing history of case in lower courts). Additionally, the magistrate judge recommended to the district court that the defendants' motions to dismiss be granted, primarily on the ground of qualified immunity. *See id.* On December 17, 1998, the district court adopted the Report and Recommendation of the magistrate as the opinion of the court, resulting in the dismissal of all claims against the defendants. *See* Brief for Petitioner at 6, Doe v. Delie, 257 F.3d 309 (3d Cir. 2001) (explaining district court's basis for dismissal).

62. *See Delie*, 257 F.3d at 314 (discussing dismissal of Doe's complaint).

63. *See id.* (discussing appeal). Doe's notice of appeal was filed on January 13, 1999. *See id.*

64. *See id.* at 318 (listing Doe's arguments in support of contention that right to medical privacy existed for inmates in 1995). This Casebrief lists Doe's arguments out of order in order to present Doe's arguments (in light of the Third Circuit's ultimate decision) from the strongest to the weakest. *See id.* at 318-22 (discussing Doe's arguments). Doe's strongest argument that the law was clearly established relied on several cases from circuit courts outside of the Third Circuit,

2. *Majority Opinion of the Third Circuit*

In *Doe v. Delie*, a divided panel of the Third Circuit held that Doe's right to privacy in his medical records had been violated, but dismissed the suit, finding that the officials who violated that right were nevertheless entitled to qualified immunity.[65] In finding that the officials were entitled to qualified immunity, the court held that Doe's right to privacy in his medical records had not been "clearly established" at the time of the violation.[66] The court's division was not limited to the question of whether a right to privacy in one's medical records exists in prison. Rather, a schism also emerged over what sources of authority may be considered in the determination of whether a right in a particular area is clearly established for purposes of qualified immunity.[67]

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as well as district court cases from both within and outside of the Third Circuit. *See* Brief for Petitioner, at 32-37, *Delie*, 257 F.3d at 309 (supplying decisional law to support proposition that right to privacy in medical records for inmates was clearly established in 1995). For a further discussion of the Third Circuit's analysis of decisional law, see *infra* notes 68-77 and accompanying text.

Additionally, in *Austin v. Pennsylvania Department of Corrections*, the very institution sued by Doe- the Pennsylvania Department of Corrections- agreed to keep information regarding inmate's HIV status confidential. 876 F. Supp. 1437, 1453 (E.D. Pa. 1995). Doe asserted that the settlement agreement in *Austin* put the defendants on notice that their disclosure of his confidential HIV information violated his right to privacy. *See Delie*, 257 F.3d at 321-22 (stating Doe's contention "that, in light of the *Austin* settlement, prison officials could not reasonably believe that non-consensual disclosures of an inmate's HIV status were lawful."). For a further discussion of the effect of the *Austin* settlement on the court's qualified immunity analysis, see *infra* notes 78-84.

Moreover, the Pennsylvania Confidentiality of HIV Related Information Act ("the Act") prohibits the non-consensual disclosure of confidential HIV information by any person in the course of providing health or social services. *See* 35 PA. CONS. STAT. ANN. § 7603 (1991). Doe claimed that the Act both created a right to privacy in his medical records and further served to inform the defendants of the existence of that right. *See Delie*, 257 F.3d at 318 (noting Doe's assertion of weight for state statute). For a further discussion of the Third Circuit's analysis of the state statute in its qualified immunity determination, see *infra* notes 85-89.

65. *See* Shannon P. Duffy, *Winning the Battle, Losing the War: Civil Right's Plaintiff's Defeat Is Victory for Those Who Follow*, THE LEGAL INTELLIGENCER, Jul. 23, 2001, at 3 [hereinafter Duffy, *Battle*] (reporting decision of Third Circuit).

66. *See* Doe v. Delie, 257 F.3d 309, 311 (3d Cir. 2001) (announcing disposition of case).

67. *See id.* at 319 (Nygaard, J. concurring and dissenting) (explaining disagreement with majority over whether Doe's right to privacy in his medical records was clearly established at time of violation of his right); Egervary v. Young, 159 F. Supp. 2d 132, 167 (E.D. Pa. 2001) (noting *Delie* court's disagreement whether concurrent violation of state law is relevant when addressing qualified immunity defense); Duffy, *Battle*, *supra* note 65, at 3 (discussing divergent views of court concerning sources of authority available to determine whether right is clearly established). For a further discussion of the division between jurists of the Third Circuit on the question of what sources of authority may properly be used to determine whether the law is clearly established, see *infra* notes 68-101 and accompanying text.

a. Consideration of Circuit Court and District Court Opinions

Writing for the majority, Judge Roth first looked to decisions from the United States Supreme Court and the Third Circuit to determine whether a prisoner's right to medical privacy was clearly established in 1995.[68] After finding an absence of controlling authority from the Supreme Court or within the Third Circuit itself, the majority looked next to decisions from courts of appeals outside of the forum circuit.[69] In surveying the decisional law of other circuit courts as it existed at the time of the alleged violation, the court found conflicting opinions and concluded that they were insufficient to clearly establish the law for purposes of qualified immunity.[70]

The court next looked to district court opinions from both within and beyond the Third Circuit.[71] The court applied a similar analysis to both

68. *See Delie*, 257 F.3d at 321 (finding no binding precedent); *see also* Wilson v. Layne, 526 U.S. 603, 609 (1999) (discussing two-prong qualified immunity analysis).

69. *See Delie*, 257 F.3d at 319-20 (analyzing analogous circuit court cases from outside of forum circuit). For a further discussion of the out-of-circuit court cases analyzed by the Third Circuit for purposes of determining whether Doe's right to privacy in his medical records was clearly established in 1995, see *infra* note 70 and accompanying text.

70. *See id.* at 321 (concluding that right was not clearly established in 1995). The court noted that, at the time that Doe's rights had been violated, no court of appeals had yet held that prisoners retained a constitutional right to privacy in their medical records. *See id.* (describing state of law in circuit courts outside of Third circuit in 1995); *see also* Anderson v. Romero, 72 F.3d 518, 522-24 (7th Cir. 1995) (holding that officers are entitled to qualified immunity and calling existence of constitutional right to medical privacy in prison "an open question" in both 1992 as well as 1995); Camarillo v. McCarthy, 998 F.2d 638, 640 n.2 (9th Cir. 1993) (reserving question of whether HIV segregation policy is constitutional, but holding that officers were entitled to qualified immunity); Moore v. Mabus, 976 F.2d 268, 271 (5th Cir. 1992) (holding HIV segregation policy of prison to be reasonably related to legitimate penological interests); Harris v. Thigpen, 941 F.2d 1495, 1513-21 (11th Cir. 1991) (assuming *arguendo* that HIV-positive inmates enjoy constitutionally protected right to privacy in their medical records, but finding that "the precise nature and scope of the privacy right at issue in this case is rather ill-defined" and upholding state prison policy of segregating HIV-positive inmates).

In addition to an absence of circuit court precedent expressly holding that a constitutional right to medical confidentiality in prison existed at the time Doe's rights were violated, the Third Circuit also pointed out that the Sixth Circuit had expressly held that such a right did not exist in prison. *See Delie*, 257 F.3d at 319 n.7 (noting that Sixth Circuit does not recognize existence of right to medical confidentiality in prison or any other setting); *Compare* J.P. v. DeSanti, 653 F.2d 1080, 1089 (6th Cir. 1980) (holding no right to privacy exists in one's medical records), *with* United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980) (finding right to privacy in medical records); *see also* Doe v. Wiggington, 21 F.3d 733, 733, 740 (6th Cir. 1994) (holding no violation of right to privacy by official's disclosure of prisoner's HIV status).

71. *See Delie*, 257 F.3d at 321 (noting that, for purposes of qualified immunity, district court opinions may be relevant in determining whether right was clearly established). Doe offered several district court cases in support of his assertion that an inmate's right to medical privacy had been clearly established by 1995.

sets of cases, giving no more weight to Third Circuit district court opinions than to those opinions from outside of the circuit.[72] Despite the court's acknowledgment that several district court cases had found that prisoners enjoyed a right to privacy in their medical information, the majority refused to consider these cases as binding precedent.[73] The court conceded

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Compare, e.g., Faison v. Parker, 823 F. Supp. 1198, 1201-02 (E.D. Pa. 1993) (noting that plaintiff had right of privacy for non-disclosure of her medical information contained in presentencing report, but holding that plaintiff's right was not violated), *with* Doe v. Coughlin, 697 F. Supp. 1234, 1238 (N.D.N.Y. 1988) (stating prisoners "must be afforded at least some protection against the non-consensual disclosure of their diagnosis"). For a further discussion of the Third Circuit's analysis of analogous district court opinions, see *infra* notes 72-75 and accompanying text.

72. *See Delie*, 257 F.3d at 320-21 (looking to analogous decisional law in district courts); *see also* Austin v. Pa. Dep't of Corr., 876 F. Supp. 1437 (E.D. Pa. 1995) (accepting negotiated settlement between prison system and inmates including agreement to keep inmates' HIV related information confidential); Clarkson v. Coughlin, 898 F. Supp. 1019, 1041 (S.D.N.Y. 1995) (stating that inmates have "constitutional right to privacy . . . concerning medical information about them" where state failed to provide qualified medical interpreters); Faison v. Parker, 823 F. Supp. 1198, 1202, n.4 (E.D. Pa. 1993) (holding that disclosure of inmate's HIV-positive status in presentence report did not violate constitutional right to privacy, but stating that "plaintiff has a constitutionally protected interest in the non-disclosure of confidential information concerning her HIV status."); Nolley v. County of Erie, 776 F. Supp. 715, 733 (W.D.N.Y. 1993) (finding that prison officials violated plaintiff's right to privacy under Constitution and New York public health law was violated by involuntary segregation and placement of red stickers on inmate's documents); Woods v. White, 689 F. Supp. 874, 876 (W.D. Wis. 1988), *aff'd*, 899 F.2d 17 (7th Cir. 1990) (holding that gratuitous disclosure of prisoner's confidential HIV information to guards and inmates violated prisoner's constitutional right to privacy). There was no attempt by the court to distinguish district court opinions from within the Third Circuit with those from district courts outside of the Third Circuit. *See id.* (applying same analysis to each set of decisional law).

73. *See Delie*, 257 F.3d at 320 ("We note that Doe has cited several district court cases which concluded, by 1995, that inmates have a right to privacy in their medical information . . . . Of course, all of these opinions are factually and legally distinguishable from the present case.") (citations omitted). In distinguishing the district court cases cited by the plaintiff from the case before them, the majority noted that analogous cases from other circuits produced conflicting decisions. *See id.* at 320-21 (comparing district court cases with similar cases in circuit courts). For example, the court noted that despite the holdings of two district court cases invalidating the segregation of HIV-positive inmates from the general prison population, three analogous circuit court opinions upheld the practice. *See id.* (discussing inmate segregation cases in other circuit courts). *Compare Nolley*, 776 F. Supp. at 733 (holding that prison policy of placing red stickers on inmates' records to denote those prisoners who were HIV-positive and involuntary segregation of such inmates violated constitutional right to privacy of HIV-positive inmates), *and Doe v. Coughlin*, 697 F. Supp. 1234, 1243 (N.D.N.Y. 1998) (stating inmates likely to suffer irreparable harm from involuntary segregation of HIV-positive inmates and granting injunction to halt such practices by prison), *with Camrillo*, 998 F.2d at 640 (reserving question of whether HIV segregation policy is constitutional, but holding that officers were entitled to qualified immunity), *Moore*, 976 F.2d at 271 (holding HIV segregation policy of prison to be reasonably related to legitimate penological interests), *and Harris*, 941 F.2d at 1515-21 (assuming *arguendo* that HIV-positive inmates enjoy constitutionally protected right to privacy in their medical records,

that the decisions may be relevant: "District court opinions may be relevant to the determination of when a right was clearly established for qualified immunity analysis."[74] Nevertheless, the majority noted that district court decisions neither establish the law of the circuit, nor even act as binding precedent for other courts within the district.[75] Moreover, the Third Circuit determined that the collective weight of authorities presented did not rise to a level sufficient to clearly establish the law for qualified immunity purposes.[76] The court concluded that "the absence of binding precedent in this circuit, the doubts expressed by the most analogous appellate holding, together with the conflict among a handful of district court opinions, undermines any claim that the right was clearly established in 1995."[77]

b. Consideration of Class Action Settlement

Doe contended that the class action settlement in *Austin v. Pennsylvania Department of Corrections*[78], put defendants on specific notice that prisoners have a constitutional right to privacy in their medical records.[79] In *Austin*, the Pennsylvania Department of Corrections—the same agency being sued by Doe—agreed as part of a negotiated settlement to keep information concerning inmates' HIV status confidential.[80] The majority

but upholding state prison policy of segregating HIV-positive inmates). Additionally, the court noted that one of the district court opinions cited by the plaintiff had been expressly rejected by a subsequent appellate case in that circuit. *See Delie*, 257 F.3d at 321 (stating that *Woods* decision was "specifically considered and rejected by the Seventh Circuit's opinion in [*Romero*]."). The Third Circuit also distinguished several district court opinions factually. *See id.* (concluding that *Faison* and *Clarkson* were factually and legally distinguishable from case at bar).

74. *Delie*, 257 F.3d at 321. There is precedent in the Third Circuit for such a declaration. *See, e.g.*, Pro v. Donatucci, 81 F.3d 1283, 1289-92 (3d Cir. 1996) (affirming decision where trial court relied on Fifth Circuit opinion and two Third Circuit district court opinions to find right clearly established for purposes of qualified immunity).

75. *See Delie*, 257 F.3d at 321 n.10 (citing Threadgill v. Armstrong World Indus., Inc., 928 F.2d 1366, 1371 (3d. Cir. 1991)) (concluding that district court opinions do not render right clearly established for qualified immunity analysis in Third Circuit).

76. *See id.* at 321 ("[N]one of these decisions, individually or collectively, makes it sufficiently clear to reasonable officials that their conduct violated a prisoner's federal constitutional right").

77. *Id.* (citation omitted).

78. 876 F. Supp. 1437 (E.D. Pa. 1995).

79. *See* Brief for Petitioner, at 12-13, Doe v. Delie, 257 F.3d 309 (3d Cir. 2001) (arguing that *Austin* settlement provides additional support for assertion that reasonable prison officials should have known that their actions violated clearly established law).

80. *See Austin*, 876 F. Supp. at 1453 (discussing terms of settlement). State correctional inmates alleged numerous complaints relating to the conditions of the state prisons, including the medical care and conditions afforded to HIV-positive inmates. *See id.* at 1444-45 (listing inmates' claims). Specifically, among other things, the plaintiff inmates alleged that the Pennsylvania Department of Corrections did not maintain the anonymity of its HIV-positive prisoners and segregated

noted that the *Austin* settlement was significantly factually similar to Doe's case.[81] Nevertheless, the court held that the lower court's approval of the settlement was not a decision on the legal merits of the claims and its conclusion of the existence of an inmates' right to privacy in their medical records was merely dictum.[82] Moreover, the majority stated that a state agency's decision to settle a case cannot clearly establish a federal right.[83] Accordingly, the Third Circuit concluded that the *Austin* settlement, considered individually or collectively with the other cited authorities, was not sufficiently persuasive to clearly establish an inmate's right to medical privacy for purposes of qualified immunity.[84]

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the infected prisoners from other inmates. *See id.* at 1445 (noting specific HIV-related claims asserted by inmates). The plaintiffs claimed that among the various rights violated by these practices was their constitutional right to privacy. *See id.* (listing rights violated by prison practices and conditions). After a lengthy process, a settlement agreement between plaintiff inmates and the Department of Corrections was reached and approved by the district court on January 17, 1995. *See id.* at 1445-47 (explaining procedural history of case). As part of the settlement agreement, the Department of Corrections agreed to keep inmates' medical information regarding their HIV status confidential, and agreed to advocate a policy of "universal precautions" in future negotiations with the union custodial staff. *See id.* at 1453-54 (discussing relevant agreements of defendants).

81. *See Delie*, 257 F.3d at 322 (noting that *Austin* had "significant factual correspondence" to Doe's case). Moreover, the majority noted that the Eighth Circuit held that a class action settlement could clearly establish a constitutional right for qualified immunity purposes. *See id.* (citing Buckley v. Rogerson, 133 F.3d 1125, 1130-31 (8th Cir. 1998)) (discussing weight of settlement clearly establishing inmates' right to medical privacy for qualified immunity purposes).

82. *See Delie*, 257 F.3d at 322 (analyzing *Austin* settlement and minimizing its precedential value).

83. *See id.* (discussing weight of court approved settlement agreement in determining whether law is clearly established for purposes of qualified immunity). The majority noted that the settlement agreement did not provide a decision on the legal merits of the case, but merely approved a settlement. *See id.* (explaining significance of settlement agreement). Additionally, the court explained that the *Austin* court's legal conclusion noting the possible violation of a constitutional right to privacy was only dicta. *See id.* (declaring district court's legal conclusion to be merely dicta). Accordingly, the majority in *Delie* concluded that the language of the district court's opinion relating to the violation of a constitutional right to privacy "was not binding on the parties and it certainly did not clearly establish a constitutional right." *Id. But see* Hope v. Pelzer, 122 S. Ct. 2508, 2516 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)) (noting "general statements of the law are not inherently incapable of giving fair and clear warning" that certain conduct is unlawful even though conduct in question "'has [not] previously been held unlawful'").

84. *See id.* (finding settlement did not constitute authority persuasive enough to clearly establish right). For a further discussion of the Third Circuit's analysis of the weight of authority of the *Austin* settlement agreement, see *supra* note 83 and accompanying text.

c. Consideration of State Law

Lastly, the court considered the weight it should afford to the Pennsylvania Confidentiality of HIV Related Information Act ("the Act").[85] The Act prevents any person who obtains confidential HIV-related information in the course of providing health or social services, or pursuant to consent, from disclosing such information.[86] The Third Circuit declined to accept Doe's assertion that prison officials could not have been acting "reasonably" because they were in violation of a state statute.[87] Instead, the majority explained that Supreme Court precedent stated that qualified immunity protection is not forfeited for a violation of a federal right where an official has failed to comply with a state statute.[88] Because a plaintiff must show a violation of a federal right, the Third Circuit held that a state statute cannot clearly establish a federal right for qualified immunity purposes.[89]

3. *The Dissent*

Despite concurring with Judge Roth that prisoner's enjoy a constitutional right to privacy in their medical information, Judge Nygaard dissented from the holding that the right was not clearly established.[90] Analyzing the same sources of law as the majority, Judge Nygaard concluded that "the combination of the preponderance of the case law, the state statute, and the [*Austin* settlement] clearly established the right in question."[91]

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85. *See* 35 PA. CONS. STAT. ANN. § 7601 *et seq.* (1991). For a further discussion of the relevance of state statutes to the qualified immunity analysis, see *infra* notes 86-89 and accompanying text.

86. *See id.* at § 7607(a) (restricting disclosure of confidential HIV-related information).

87. *See* Doe v. Delie, 257 F.3d 309, 318 (3d Cir. 2001) (noting that state statute is inapplicable in qualified immunity determination).

88. *See id.* at 318-19 (citing Davis v. Scherer, 468 U.S. 183, 195 (1984)) (explaining effect of state statute on qualified immunity defense); *see also* Snowden v. Hughes, 321 U.S. 1, 11 (1944) (alterations in original) ("illegality under the state statute can neither add to nor subtract from [the] constitutional validity [of a state's actions]"). *But see Hope*, 122 S. Ct. at 2516 (stating that state agency regulation, taken together with circuit precedent and federal agency report, were sufficient to make reasonable officials aware that their conduct violated clearly established statutory or constitutional rights). The Third Circuit has also recognized that the violation of a state statute has no effect on the determination of whether an official violated a federal right. *See* D.R. by L.R. v. Middle Bucks Area Vocat'l Tech. Sch., 972 F.2d 1364, 1375-76 (3d Cir. 1992) (en banc) (declaring that legality of action under state statute does not effect validity of such action under federal constitution).

89. *See Delie* 257 F.3d at 318-19 (rejecting appellant's contention that violation of clear state statute may form basis for overcoming defense of qualified immunity).

90. For a further discussion of Judge Nygaard's dissent in *Delie*, see *infra* notes 91-101 and accompanying text.

91. *Delie*, 257 F.3d at 335.

a. Consideration of All Available Case Law

Judge Nygaard first reasoned that the contours of the right were sufficiently clear for prison officials to understand that they were violating Doe's right to medical privacy.[92] Criticizing Judge Roth's analytical approach, Judge Nygaard noted that the Supreme Court has called for analysis of cases of *persuasive* authority rather than *binding* authority in determining whether a qualified immunity defense should be defeated.[93] Accordingly, he called for a broader, more inclusive approach to the question of which courts may clearly establish a right. Following the Eighth Circuit's approach, Judge Nygaard advocated "that '[i]n the absence of binding precedent, a court should look to all available decisional law, including decisions of state courts, other circuits and district courts.'"[94] Applying this approach to the *Delie* case, Judge Nygaard stated that a review of decisions of other United States Courts of Appeals and district court opinions created a "'consensus of cases of persuasive authority'" sufficient to clearly establish the right.[95]

b. Consideration of State Statute and Settlement Agreement to Place Defendants on Notice

Judge Nygaard also disputed the weight that should be given to the state statute that the defendants violated.[96] After analyzing the Act, Judge

92. *See id.* at 331-32 (examining Supreme Court cases affecting prisoner's rights and Third Circuit cases affecting privacy rights in general and concluding that reasonable prison official should have been aware that conduct violated Doe's right to medical confidentiality); *see also* Anderson v. Creighton, 483 U.S. 635, 640 (1987) (stating that for right to be "clearly established," "[t]he contours of the right must be sufficiently clear [so] that a reasonable official would understand that what he is doing violates that right.").

93. *See Delie*, 257 F.3d at 331-32 (Nygaard, J., concurring and dissenting) (explaining weight of authority needed to overcome qualified immunity defense). Accordingly, Judge Nygaard stated that although a single district court opinion cannot clearly establish a right, a consensus of Supreme Court, Courts of Appeals and several other district court opinions is sufficient to create notice to officials that their actions violate a clearly established right. *See id.* (describing decisional authority sufficient to place officials on notice). For example, Judge Nygaard saw a significant consensus of persuasive authority in several cases which Judge Roth had concluded were sufficiently distinguishable from the case at bar to find the right at issue "clearly established." *See id.* at 332 (Nygaard, J., concurring and dissenting) (concluding that Fifth and Eleventh Circuits recognized right to privacy in medical information of inmates) (citing Moore v. Mabus, 976 F.2d 268 (5th Cir. 1992); Harris v. Thigpen, 941 F.2d 1495 (11th Cir. 1991)).

94. *Delie*, 257 F.3d at 333 (quoting Norfleet v. Ark. Dep't of Human Servs., 989 F.2d 289, 291 (8th Cir. 1993) (alteration in original)). For a further discussion of the sources of law the Eighth Circuit considers in its qualified immunity analysis, see *supra* note 39 and accompanying text.

95. *Delie*, 257 F.3d at 332-33 (Nygaard, J., concurring and dissenting) (quoting Wilson v. Layne, 526 U.S. 603, 616 (1999)).

96. *See id.* at 333-34 (Nygaard, J., concurring and dissenting) (analyzing effect of state statute on determination of whether law is clearly established for purposes of qualified immunity); *see also* Hope v. Pelzer, 122 S.Ct. 2508, 2516 (2002) (using

Nygaard concluded that the statute's language was clear enough to put the defendants on notice that prisoners have a right to privacy in their medical information.[97] Thus, Judge Nygaard concluded that a state statute may be considered when determining whether an official is entitled to qualified immunity.[98]

Additionally, Judge Nygaard argued that the settlement agreement in *Austin* provided further evidence that officials should have been aware that they were violating Doe's right to privacy.[99] Judge Nygaard argued that the opinion clearly warned the officials that nonconsensual disclosure of inmate's HIV related information risked violating the inmates' constitutionally protected rights.[100] Accordingly, Judge Nygaard reasoned that,

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authority, other than court precedent, to determine whether reasonable officers would be aware their conduct violated clearly established rights). Judge Nygaard explained that Judge Roth had misinterpreted Supreme Court precedent. *See Delie*, 257 F.2d at 334 (disagreeing with Judge Roth's assertion of state statute's irrelevancy in qualified immunity analysis of federal claims). The majority had relied on *Davis v. Scherer* for the proposition that qualified immunity is not abrogated by the violation of a clear state statute by state or local officials. *See id.* at 318-19 (citing Davis v. Scherer, 468 U.S. 183, 195 (1984)) (discussing effect of state law on federal constitutional claim). Nevertheless, Judge Nygaard argued that *Davis* did not involve a question of what authorities may be considered in a qualified immunity analysis, but rather whether the right alleged to have been violated must be a federal right. *See Delie*, 257 F.3d at 334 (Nygaard, J., concurring and dissenting) (quoting Elder v. Holloway, 510 U.S. 510, 515 (1994)) (explaining *Davis* decision). Accordingly, Judge Nygaard reasoned, the Court did not bar consideration of a state statute when determining whether a reasonable official would have been aware they were violating a federal right. *See Delie*, 257 F.3d at 334-35 (arguing for allowing consideration of violations of clear state statutes in qualified immunity analysis).

97. *See id.* at 334 (Nygaard, J., concurring and dissenting) (analyzing statute). Judge Nygaard summarized his position: "Because no exception [in the Act] is made for adult prisoners, and all other exceptions are clearly stated, the Department of Corrections should have known by March 1991 that prisoners possess a right to the privacy of their HIV related information." *Id.*

98. *See id.* (explaining usefulness of state statutes in qualified immunity analysis). Judge Nygaard argued:

> [A]lthough a state statute will not, *by itself*, place an official on notice of a federal right, to me such a statutory right should raise the official's awareness that a parallel federal right may exist . . . . If a state statute clearly articulates a right, and places those within its jurisdiction on notice of that right and if that right, perfectly coincides with a federally protected right, then why would we not consider the statute's existence when determining whether the offender should have known of the federal right? . . . Regardless of how a person learned of the right, and regardless of whether she thought she was violating state or federal law, she knew that a right existed and that she was violating it.

Id. at 334-35

99. *See id.* at 335 (arguing that court should consider *Austin* settlement to establish that officials were on notice of Doe's privacy rights); *see also* Austin v. Pa. Dep't of Corr., 876 F. Supp. 1437, 1453 (E.D. Pa. 1995) (confirming Department of Corrections' agreement to keep medical information concerning inmates' HIV status confidential).

100. *See* Doe v. Delie, 257 F.3d 309, 336 (3d Cir. 2001) (Nygaard, J., concurring and dissenting) ("This decision alone *directly* notified Appellees of their obli-

taken together, the preponderance of cases of persuasive authority that existed in 1995, the state statute and the *Austin* settlement agreement clearly established Doe's right to privacy in his medical records.[101]

B. *The Third Circuit's Opinion in Brown v. Muhlenberg Township*

1. *Factual and Procedural History*

In *Brown v. Muhlenberg Township*, a town police officer intentionally and repeatedly shot a house pet without any provocation or knowledge that the dog belonged to the family who lived next door to the shooting and was available to take the wayward animal into their custody.[102] The dog's owners brought suit under 42 U.S.C. § 1983 against the officer who shot the dog, the township and the chiefs of police alleging that the defendants violated their Fourth and Fourteenth Amendment rights.[103] The defendants filed a motion for summary judgment, which the district court granted.[104] The dog's owners appealed to the Third Circuit.[105]

2. *The Majority Opinion*

The Third Circuit held that genuine issues of material fact existed as to whether the officer's shooting of the dog was an unreasonable seizure within the meaning of the Fourth Amendment, precluding summary judgment for the officer on the basis of qualified immunity.[106] Writing for the majority, Judge Stapleton, assuming the facts asserted by the dog's owners

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gation to protect Doe's privacy right."); *see also Austin*, 876 F. Supp. at 1466 (discussing possible ramifications of nonconsensual disclosure of inmates' confidential HIV-related medical information). The use of non-binding precedent suggesting that certain conduct may be unconstitutional was recently endorsed by the Supreme Court as a means of placing officials on notice that such conduct is unlawful. *See Hope*, 122 S. Ct. at 2518 (concluding that DOJ report condemning Alabama's use of hitching post lent support to view that alleged use of hitching post by prison officials violated Eighth Amendment prohibition against cruel and unusual punishment).

101. *See Delie*, 257 F.3d at 335 (Nygaard, J., concurring and dissenting) (advocating broad, inclusive review of all decisional authority when determining whether right alleged is clearly established). Similarly, the Supreme Court in *Hope* held that the totality of non-binding precedent suggesting the unlawfulness of certain conduct, taken together with binding precedent, was sufficient to place reasonable officials on notice that their conduct violated clearly established law. *See Hope*, 122 S. Ct. at 2516-18 (explaining that totality of authority "put a reasonable official on notice that the use of the hitching post under the circumstances alleged by Hope was unlawful.").

102. *See* Brown v. Muhlenberg Township, 269 F.3d 205, 209, *reh'g denied*, 273 F.3d 390 (3d Cir. 2001) (discussing factual history).

103. *See id.* at 210 (discussing plaintiffs' claims).

104. *See id.* at 208 (discussing procedural history).

105. *See* Shannon P. Duffy, *Suit Against Officer Who Shot Dog Revived*, LEGAL INTELLIGENCER, Oct. 15, 2001, at 1 (reporting history of case). Previously, the district court had dismissed all claims. *See id.* (same).

106. *See Brown*, 269 F.3d at 211 (reversing district court decision as to claim against officer for violating Fourth Amendment).

to be true, stated that a reasonable officer would have known that such actions violated the law.[107] The court looked first at Supreme Court precedent to determine the existence of a right to be free from unreasonable seizures of property.[108] Although the Third Circuit concluded that this right was clearly established,[109] no Third Circuit precedent was available to determine whether it was clearly established that the killing of a dog constituted an unreasonable seizure of property.[110] Instead, the Third Circuit looked to state law to determine that dogs were property.[111] Finding that Pennsylvania law clearly established that dogs are personal property, the majority concluded that, in accordance with Supreme Court precedent, the killing of the dog was a seizure under the Fourth Amendment.[112]

After determining the existence of the Fourth Amendment right claimed, the court next turned to whether the officer could have believed his conduct to be lawful in light of the clearly established law at the time of the violation.[113] The majority noted that Supreme Court precedent

107. *See id.* (concluding that officer did not establish that he was entitled to qualified immunity).

108. *See id.* at 209 (considering Supreme Court opinions to clearly establish right against unreasonable seizures); *see also* United States v. Jacobsen, 466 U.S. 109, 113 (1984) (defining seizure within meaning of Fourth Amendment to be when "there is some meaningful interference with an individual's possessory interests in that property"); United States v. Place, 462 U.S. 696, 701 (1983) (finding that personal property is protected under Fourth Amendment and holding that detention of luggage violated Fourth Amendment prohibition against unreasonable seizures).

109. *See Brown*, 269 F.3d at 209 (citing U.S. CONST. amend. IV) (establishing, for purposes of qualified immunity, existence of right against unreasonable seizures of property). Additionally, the Third Circuit noted that the meaning of "seizure" was clearly established, as was the proposition that destroying property may constitute a "seizure". *See id.* (citing *Jacobsen*, 466 U.S. 109, 113 (1984)) (laying foundation for declaring Fourth Amendment protection against unreasonable seizures of property clearly established for purposes of qualified immunity analysis).

110. *See Brown*, 269 F.3d at 211-12 (failing to discuss any Third Circuit decision with binding authority).

111. For a further discussion of the Third Circuit's consideration of state law to determine whether law was clearly established in *Brown*, see *infra* note 112 and accompanying text.

112. *See id.* (quoting 3 PA. CONS. STAT. ANN. § 459-601(a) (2001)) ("'All dogs are . . . declared to be personal property and subjects of theft.'"). In addition to the state statute, the majority considered two Pennsylvania Superior Court cases in support of their contention that the officer's actions violated the Fourth Amendment. *See Brown*, 269 F.3d at 210 (citing Miller v. Peraino, 626 A.2d 637, 640 (Pa. Super. Ct. 1993); Daughen v. Fox, 539 A.2d 858, 864 n.4 (Pa. Super. Ct. 1988); Saphire, *supra* note 6 at 631-37 (discussing, generally, consideration of state decisional law in qualified immunity analysis). Moreover, though not included in the analysis as lending support for the claim that the officer's actions constituted a Fourth Amendment violation, the Third Circuit noted that it now joined two other circuits in declaring the same. *See Brown*, 269 F.3d at 210 (noting existence of two analogous decisions in other circuits.

113. *See id.* at 211 (analyzing officer's qualified immunity defense).

clearly established that destruction of property constituted a seizure.[114] Additionally, the court held that in light of the state statute, "a reasonable law enforcement officer . . . would have realized that a person's dog is his personal property under Pennsylvania law."[115] Lastly, the court concluded that sufficient cases of persuasive authority existed to conclude that a reasonable officer would have known their actions in this case violated the Fourth Amendment.[116] Accordingly, the Third Circuit found that the officer was not entitled to qualified immunity.[117]

3. *The Dissent*

Judge Garth opened his dissent by noting that the question of when a law is "clearly established" for purposes of qualified immunity is still unsettled in the Third Circuit.[118] Additionally, Judge Garth expressed dismay at the majority's failure to announce a standard for determining whether a particular right is clearly established.[119] Nevertheless, he "strongly urge[d]" the adoption of "a balancing process" to make such determinations.[120] Judge Garth recommended that the following factors be considered in the balancing process: (1) whether the right was defined with reasonable specificity; (2) whether relevant precedent concerning that right existed from either the Supreme Court or Third Circuit; (3) in the absence of such precedent, whether there have been *persuasive* appellate court decisions of other circuit courts supporting the existence of the right; and (4) under these conditions, whether reasonable officials would have known that their conduct was unlawful in light of the pre-existing law.[121] After applying these factors and analyzing whether the officer's

114. *See id.* (noting Supreme Court had well established law relating to seizures of property); *see also, e.g.*, United States v. Jacobsen, 466 U.S. 109, 113 (1984) (defining "seizure" within meaning of Fourth Amendment).

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

116. *See id.* (reasoning that sufficient binding precedent existed to clearly establish law for purposes of qualified immunity); *see also*, 3 PA. CONS. STAT. ANN. § 459-601(a) (2001) (establishing that dogs are property under Pennsylvania law); *Jacobsen*, 466 U.S. at 113 (discussing contours of Fourth Amendment); United States v. Place, 462 U.S. 696, 701 (1983) (discussing unreasonable seizures).

117. *See Brown*, 269 F.3d at 212 (holding officer did not establish entitlement to qualified immunity defense).

118. *See id.* at 219 (Garth, J., dissenting and concurring) (stating that issue has divided court and should concern judges, lawyers and officials).

119. *See id.* at 220 (expressing concern for majority's failure to announce standard for determination of whether particular constitutional rights are clearly established for purposes of qualified immunity).

120. *See id.* (proposing factors to be balanced in determination of "clearly established" prong of qualified immunity analysis).

121. *Id.* (citations omitted). The Second Circuit has adopted a similar standard of analysis. *See* Horne v. Coughlin, 155 F.3d 26, 29 (2d Cir. 1998) (adopting three factor balancing test). The Second Circuit declared:

> In determining whether a right was clearly established at the time defendants acted, we examine whether the right was defined with reasonable specificity; whether the decisional law of the Supreme Court and the ap-

shooting of the dog violated a clearly established Fourth Amendment right, Judge Garth concluded that the law was not clearly established.[122]

Additionally, Judge Garth criticized the majority's holding for "diluting the 'clearly established' prong of the qualified immunity defense."[123] Citing *Delie*, he stated that the Third Circuit cannot look to state law, district court opinions or opinions of other circuit courts when declaring whether a right is clearly established for purposes of qualified immunity.[124] Noting the lack of precedent in the Third Circuit concerning the right and action in question, Judge Garth explained that the authority weighed against the plaintiffs.[125] Looking at the totality of the authority presented, Judge Garth concluded that the law was not clearly established, and thus he stated that he would grant the officer qualified immunity.[126]

IV. PRACTICAL APPLICATION: NO CLEAR STANDARD, BUT EMERGING TRENDS

A. *No Clear Articulation of a Standard for Determining Whether a Right Is Clearly Established*

A right is clearly established for purposes of qualified immunity when the contours of the right are sufficiently clear so that a reasonable official would understand that their actions violate that right.[127] Because the Supreme Court has not provided sufficient guidance in defining what

> plicable circuit court supports its existence; and whether, under preexisting law, a defendant official would have reasonably understood that his acts were unlawful.

Rodriguez v. Phillips, 66 F.3d 470, 476 (2d Cir. 1995).

122. *See* Brown v. Muhlenberg Township, 269 F.3d 205, 220-21, *reh'g denied*, 273 F.3d 390 (3d Cir. 2001) (Garth, J., dissenting and concurring) (applying factors to present case).

123. *See id.* at 222 (calling majority decision "unanalytic" and stating that decision makes bad law).

124. *See id.* at 221 (explaining sources of authority not to be considered when determining whether law is clearly established in Third Circuit). Judge Garth further stated that out-of-circuit precedents are non-binding and thus cannot "clearly establish" the law in the Third Circuit for purposes of qualified immunity. *See id.* at 224 (explaining relevancy of non-Third Circuit authority in determining whether law is clearly established in Third Circuit). Other circuits have taken similar positions. *See, e.g.*, Hansen v. Soldenwagner, 19 F.3d 573, 578 n.6 (11th Cir. 1994) ("the case law of one other circuit cannot settle the law in this circuit to the point of it being 'clearly established.'"); Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1177 (6th Cir. 1988) (creating strict guidelines for acceptance of decisions of other circuits for purposes of clearly establishing law in Sixth Circuit).

125. *See Brown*, 269 F.3d at 222, 224 (noting absence of Third Circuit precedent). Judge Garth explained that the court had previously held that officials were entitled to qualified immunity in *Delie*, in part, because there was no authority within the Third Circuit to which the court could look. *See id.* at 224 (discussing *Delie*).

126. *See id.* at 228 (stating belief that disposition in lower court was correct).

127. *See* Anderson v. Creighton, 483 U.S. 635, 640 (1987) (explaining meaning of "clearly established"). For a further discussion of the definition of "clearly established," see *supra* notes 27-31 and accompanying text.

sources of authority may establish the contours of a right in a qualified immunity analysis, lower courts have been left to articulate their own standards.[128] Although several circuit courts of appeals have attempted to articulate such a standard for determining what sources of authority determine whether a right has been clearly established, the Third Circuit has not yet followed suit.[129]

This failure has, in turn, created uncertainty among judges, lawyers and officials in determining which sources of authority may be considered under the qualified immunity analysis in the Third Circuit.[130] Rather than attempt to remedy this problem immediately, the Third Circuit appears content to slowly shape its standard for determining the "clearly established" prong of the qualified immunity analysis.[131] Additionally, in light of a recent Supreme Court decision, the majority's view in *Delie* concerning the weight afforded to certain types of non-binding authority is

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128. Wilson, *supra* note 8, at 448 ("Absent Supreme Court precedent offering more direct guidance on the meaning of the nebulous 'clearly established' standard, we will likely continue to see substantial disparities among the lower courts working to develop the substantive law of qualified immunity."). For a further discussion of the Supreme Court's lack of guidance to lower courts concerning development of a standard for determining when the law is clearly established for purposes of qualified immunity, see *supra* notes 7, 34 and accompanying text.

129. *See generally* Doe v. Delie, 257 F.3d 309 (3d Cir. 2001) (failing to articulate clear standard); *Brown*, 269 F.3d at 205 (same); *see also* Johnson v. Horn, 150 F.3d 276, 286 (3d Cir. 1998), *overruled on other grounds by* Dehart v. Horn, 227 F.3d 47 (2000) (en banc) ("We need not answer this difficult question."). For a further discussion of how other circuit courts of appeals' have articulated standards for determining when a right is clearly established for purposes of qualified immunity, see *supra* notes 37-43 and accompanying text.

130. *See, e.g.*, Egervary v. Young, 159 F. Supp. 2d 132, 167-69 (E.D. Pa. 2001) (analyzing concurrent violation of state law in claim under federal right "because the Court of Appeals may ultimately find this contention relevant to the qualified immunity analysis").

131. *See Brown*, 273 F.3d at 390-91 (Garth, J., sur denial of petition for rehearing) (expressing disappointment in Third Circuit's failure to utilize opportunity to create and articulate parameters of "clearly established" standard, but noting that *Delie* court approached some aspects of standard); *Delie*, 257 F.3d at 322 (refusing to consider state law or district court opinions as sources of binding authority). Although the court in *Brown* refused to outline a standard, the *Delie* court touched on some of the parameters of a standard for the "clearly established" prong, namely dealing with state law and district court opinions. *See generally Delie*, 257 F.3d at 309 (discussing use of state law and district court opinions in determination of "clearly established" prong of qualified immunity analysis). Nevertheless, Judge Garth's opinion sur denial petition for rehearing of the *Brown* decision states that "the panel majority" – Judge Stapleton and Judge Scirica– are "committed to [their] position" on the qualified immunity standard. *See Brown*, 273 F.3d at 390 (Garth, J., sur denial of petition for rehearing). The denial of the officer's petition for en banc rehearing further shows that the majority of the judges in the Third Circuit agree with the panel majority in *Brown* that there is no need to amplify and clarify the "clearly established" prong of the qualified immunity analysis. *Cf. id.* at 390 (noting that majority of judges on Court of Appeals for Third Circuit feel differently than Judge Garth).

open to question.[132] In the absence of a clearly articulated standard, however, it is difficult for judges, attorneys and officials alike to determine whether certain actions are "clearly established" violations of federal rights.[133]

B. *Parameters of a Standard Are Emerging*

Looking to the decisions in *Delie* and *Brown*, practitioners are presented with a foundation upon which a Third Circuit standard can be built.[134] *Delie* establishes that district court opinions are not binding precedent, but may be relevant to the "clearly established" prong of the qualified immunity analysis.[135] Additionally, *Delie* stands for the proposition that a state statute cannot clearly establish a federal right for purposes of qualified immunity.[136] *Brown*'s significance stems from its finding that the officer's actions violated clearly established constitutional principles despite the absence of precedent within the Third Circuit itself.[137]

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132. *Compare* Hope v. Pelzer, 122 S. Ct. 2508, 2516-18 (2002) (holding that state agency regulation setting guidelines for handcuffing inmates to hitching posts and federal agency report condemning that conduct, in addition to binding circuit precedent decrying such conduct, sufficient to put reasonable officials on notice that their conduct violated clearly established federal rights), *with Delie*, 257 F.3d at 318-22 (holding that state statute forbidding disclosure of HIV-related information by state officials and settlement agreement noting that such conduct was likely unconstitutional, in addition to out-of-circuit precedent declaring such conduct unconstitutional, insufficient to place reasonable officials on notice that their conduct violated clearly established law). Nevertheless, because of the differences in the circumstances of each case and the differences in authority used to determine whether reasonable officials would have been aware their conduct was unlawful, it is unclear whether the *Delie* majority's conclusions run counter to the Supreme Court's holding in *Hope*. For a further discussion on the fact-sensitive nature of qualified immunity determinations, see *infra* notes 145-54.

133. *Cf. Brown*, 269 F.3d at 219 (Garth, J., dissenting and concurring) (stating that failure to clearly articulate standard for determining whether constitutional rights are clearly established at time of alleged violation should be of concern to all judges, police officers and state officials); *Johnson*, 150 F.3d at 286 (calling placement of authoritative value on out-of-circuit court opinions a "difficult question").

134. For a further discussion of the emerging standards of the qualified immunity analysis, see *infra* notes 135-44 and accompanying text.

135. *See Delie*, 257 F.3d at 321 & n.10 (admitting that district court opinions may be relevant to "clearly established" determination in qualified immunity analysis, but noting that such decisions cannot establish law of circuit and are not binding on other district courts within district). *But see Brown*, 269 F.3d at 212 n.4 (concluding that *Delie* "holds only that conflicting and materially distinguishable district court decisions did not render right clearly established in the Third Circuit").

136. *See Delie*, 257 F.3d at 319 (declaring that state statute cannot "clearly establish" federal right in qualified immunity analysis). *But see In re* City of Phila. Litig., 49 F.3d 945, 970 (3d. Cir. 1995) (stating "state law could help define the scope of federal law").

137. *See Brown*, 269 F.3d at 209-212 (looking to Supreme Court precedent to show that contours of unreasonable seizures within meaning of Fourth Amendment are clearly established and to Pennsylvania statutory law to show individual's possessory interest in their dog).

Accordingly, prior Third Circuit decisions have held, and *Delie* and *Brown* have reinforced, that the absence of binding precedent in the Third Circuit does not preclude a finding that the law was clearly established.[138] Instead, all that is needed is "some, but not precise, factual correspondence between relevant precedents and the conduct at issue."[139] Still, the question of what law constitutes the sources of the relevant precedents remains unanswered in the Third Circuit.[140] Moreover, practitioners should note that qualified immunity determinations are extremely fact sensitive.[141] Whether and to what extent any non-binding precedent may be considered in a qualified immunity analysis is dependent on its factual and legal correspondence to the case in question.[142]

C. *Difficulties Facing Practitioners in the Absence of a Clearly Articulated Standard*

Practitioners face several difficulties arising from the lack of a clearly articulated standard for determining whether the law is "clearly established" for purposes of qualified immunity.[143] In the absence of controlling authority, practitioners must present the court with "a consensus of cases of persuasive authority such that a reasonable [official] could not have believed that his actions were lawful."[144] The persuasiveness of the authority is predicated on its factual and legal similarity to the case at

138. *See Delie*, 257 F.3d at 321 n.11 (stating "absence of circuit precedent does not mean an official will always retain the immunity defense"); *Brown*, 269 F.3d at 212 (holding officer not entitled to qualified immunity despite absence of Third Circuit precedent); *see also* Good v. Dauphin County Soc. Servs. for Children & Youth, 891 F.2d 1087, 1092 (3d Cir. 1989) (noting right may be clearly established even if no law directly on point exists).

139. Bieregu v. Reno, 59 F.3d 1445, 1459 (3d Cir. 1995) (quoting *In re* City of Phila. Litig., 49 F.3d at 970); *see Good*, 891 F.2d at 1092 (noting that Third Circuit does not require precise factual correspondence between right asserted and prior case law).

140. *See Brown*, 269 F.3d at 220 (Garth, J., dissenting and concurring) (noting that Third Circuit has not yet announced standard for determining which sources of authority may be considered for purposes of determining whether law is clearly established in qualified immunity analysis).

141. *See* Saucier v. Katz, 533 U.S. 194, 205 (2001) ("It is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts."); Chen, *Burdens*, *supra* note 14, at 79 (noting qualified immunity defense is fact-based, "creat[ing] problems in establishing a coherent analytical approach to adjudicating the defense"); Saphire, *supra* note 6, at 622 (explaining that fact-sensitive nature of qualified immunity analysis creates difficulty in determining whether particular source of authority clearly establishes law).

142. *Cf. Delie*, 257 F.3d at 320 (refusing to consider district court opinions in qualified immunity analysis, in part, because "all of these opinions are factually and legally distinguishable from the present case").

143. For a further discussion of the difficulties faced by practitioners due to the absence of a clearly articulated standard for determining whether a right is clearly established for purposes of qualified immunity, see *infra* notes 144-57 and accompanying text.

144. Wilson v. Layne, 526 U.S. 603, 617 (1999).

bar.[145] Nevertheless, the subjective nature of determinations under the "clearly established" prong, absent a clear standard, leaves the fates of client's claims and defenses under § 1983 to the personal prejudices of the judge or judges evaluating the case as to the weight of each authority cited.[146]

For example, it is difficult to reconcile the majority's refusal in *Delie* to consider a state statute in its analysis of the "clearly established" prong with the majority's consideration of a state statute under the same prong of the qualified immunity analysis in *Brown*.[147] In fact, Judge Stapleton's analysis of the state statute's role in the qualified immunity analysis in *Brown* appears to parallel Judge Nygaard's analysis of the state statute's role in his dissent in *Delie*.[148] In each case, other judges on the panel disagreed with the analysis.[149] Additionally, because it is unclear whether

145. *See* Chen, *Ultimate Standard*, *supra* note 16, at 264 ("[A] court's assessment of whether a constitutional right is clearly established depends entirely on what constitutional rights *are* and precisely how they are articulated and defined . . . [thus], the examination of substantive constitutional law remains extremely relevant to cases in which government officials assert qualified immunity as a defense."). *But see* Wilson, *supra* note 8, at 475 (noting that some courts "permit the general principles enunciated in cases factually distinct from the case at hand to 'clearly establish' the law" and are "much more likely to deny qualified immunity to government actors in a variety of contexts").

146. *See, e.g.*, Hope v. Pelzer, 240 F.3d 975, 982 (11th Cir. 2001), *rev'd* 122 S. Ct. 2508 (2002) (holding that prison officials were entitled to qualified immunity because, at time of alleged violation, no case law existed that was legally and factually similar to clearly establish that leaving inmate cuffed to hitching post when he no longer presented danger violated Eighth Amendment); *see also* Chen, *Ultimate Standard*, *supra* note 16, at 328 (noting that arbitrary or biased decision making is possible when determining whether right is clearly established). For a further discussion of the "clearly established" prong of the qualified immunity analysis, see *supra* notes 27-35 and accompanying text. For a further discussion of the importance of judicial philosophy on the analysis of claims under the "clearly established" prong, see *infra* notes 151-54 and accompanying text.

147. For a further discussion of the Third Circuit's consideration of state statutes in its qualified immunity analysis in *Doe* and *Brown*, see *supra* notes 85-89, 96-98, 111-12 and accompanying text.

148. *Compare* Brown v. Muhlenberg Township, 269 F.3d 205, 211, *reh'g denied* 273 F.3d 390 (3d Cir. 2001) ("we believe that, at least after the enactment of [the state statute] in 1983, a reasonable law enforcement officer in [the officer's] position would have realized that a person's dog is his personal property under Pennsylvania law"), *with* Doe v. Delie, 257 F.3d 309, 335 (3d Cir. 2001) (Nyggard, J., concurring and dissenting) ("Appellees were clearly notified by the 1991 statute that Doe was entitled to the privacy of his medical records under state law."). Judge Garth has remained consistent, giving state statutes no consideration in his qualified immunity analysis. *See Delie*, 257 F.3d at 323 (Garth, J., dissenting and concurring) (agreeing with Judge Roth's analysis affirming lower court ruling that officials were entitled to qualified immunity); *Brown*, 269 F.3d at 221 (Garth, J., dissenting and concurring) (noting that courts in Third Circuit cannot look to state law to clearly establish law for purposes of qualified immunity).

149. *See Delie*, 257 F.3d at 330-36 (Nygaard, J., concurring and dissenting) (dissenting from majority opinion that law was not clearly established); *Brown*, 269 F.3d at 219-28 (Garth, J., dissenting and concurring) (dissenting from majority opinion that law was clearly established).

and to what extent out-of-circuit and district court opinions may be sufficient to clearly establish the law, practitioners may find it difficult to evaluate the likelihood of success of their § 1983 claim.[150]

The absence of a clearly articulated standard, coupled with the highly fact-sensitive nature of the qualified immunity analysis, often allows the philosophical views of the judge or judges hearing the case to decide the outcome.[151] For example, a judge taking a broad view of the sources of authority that may be considered is more likely to favor the plaintiff's position.[152] Conversely, judges taking a more narrow view of the sources of authority that may be considered are more likely to conclude that particular rights have not been clearly established for purposes of qualified immunity.[153] Accordingly, when determining the likelihood of success of a claim in a case where qualified immunity is asserted, practitioners must

150. For a further discussion of whether and to what extent opinions of district courts and out-of-circuit courts may be relevant to determining whether a right is clearly established for purposes of qualified immunity in the Third Circuit, see *supra* notes 68-77 and accompanying text. For further discussion of the difficulties with evaluation of the likelihood of success of a § 1983 claim, see *infra* notes 151-54 and accompanying text.

151. *Cf. generally Brown*, 269 F.3d 205 (holding in majority opinion that officer's actions were unreasonable in light of clearly established law, while dissenting opinion reaches opposite conclusion); Wilson, *supra* note 8, at 447 (discussing "philosophically complex" nature of determining when rights are clearly established). The dissents in both *Delie* and *Brown* show that even reasonable jurists may not always agree on whether or not the law is clearly established for purposes of qualified immunity. *See Delie*, 257 F.3d at 330-36 (Nygaard, J., concurring and dissenting) (dissenting from majority opinion that law was not clearly established); *Brown*, 269 F.3d at 219-28 (Garth, J., dissenting and concurring) (dissenting from majority opinion that law was clearly established). Accordingly, the outcome of a qualified immunity defense is likely dependent on the philosophy of the judge or judges hearing the case. *Cf. Delie*, 257 F.3d at 309 (noting that court was divided on whether right was clearly established and even whether right existed at all); Chen, *Burdens*, *supra* note 14, at 104 (concluding that doctrine requires detailed factual inquiries and "doctrinal gymnastics" of judges when determining whether qualified immunity applies in particular circumstance); Wilson, *supra* note 8, at 455, 475 (stating that definition of "clearly established" chosen by particular court will determine outcome of court's inquiry into whether government actor may be held civilly liable for conduct that violates Constitution).

152. *See, e.g., Delie*, 257 F.3d at 335 (Nygaard, J., concurring and dissenting) (looking to district court and out-of-circuit opinions, state statute and settlement agreement to find right clearly established). A broad consideration of sources of authority may lead a judge to the conclusion that a reasonable official would have been aware of the right. *See id.* (noting state statute and settlement agreement put defendants on notice of existence of right); *cf.* Chen, *Ultimate Standard*, *supra* note 16, at 328 (stating circumstances where pro-plaintiff judge may "have leeway" under qualified immunity analysis to find law clearly established).

153. *See Delie*, 257 F.3d at 322 (concluding out-of-circuit and district court cases cited were not persuasive, and refusing to consider state statute and settlement agreement in holding right not clearly established); Hope v. Pelzer, 240 F.3d 975, 982 (11th Cir. 2001), *rev'd*, 122 S. Ct. 2508 (2002) (holding prison officials entitled to qualified immunity because no bright-line rule establishing constitutional violation at issue existed). Similarly "a decisionmaker with a decidedly progovernment bias can recharacterize virtually all constitutional violations as

look not only to the strength of the authorities that support their position, but also to the doctrinal position of the decision maker.[154]

V. CONCLUSION

The Third Circuit has thus far failed to establish a clearly articulated standard concerning the sources of authority that may be properly considered when determining whether the law is clearly established for purposes of qualified immunity.[155] Although the foundations of a standard may be emerging, in the absence of any clearly articulated standard, the success of an assertion of qualified immunity is largely dependent on the doctrinal leanings of the judge or judges hearing the case.[156] Until the Supreme Court or Third Circuit announces a standard for judges, practitioners and officials to follow, in the absence of binding precedent, the question of whether a right is clearly established in the Third Circuit will remain unclear.[157]

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within the realm of what a 'reasonable official' might have thought to be legal." Chen, *Ultimate Standard*, *supra* note 16, at 293.

154. *See* Wilson, *supra* note 8, at 455, 473 (discussing how narrow or broad definition of "clearly established" chosen by court determines outcome of court's determination of case); Chen, *Ultimate Standard*, *supra* note 16, at 328 (describing broad discretion of decisionmakers in qualified immunity determinations under flexible approaches to analysis).

155. *See Brown*, 269 F.3d at 220 (Garth, J., concurring and dissenting) (explaining that Third Circuit has not yet clearly articulated standard for determining whether right is clearly established for purposes of qualified immunity).

156. For a further discussion of the emerging trends used in deciding which sources of authority may be considered when determining whether the law was clearly established for purposes of qualified immunity, see *supra* notes 134-42 and accompanying text. For a further discussion of the effect of judicial philosophy in the qualified immunity analysis, see *supra* notes 151-54 and accompanying text.

157. *See Brown*, 269 F.3d at 219 (Garth, J., concurring and dissenting) (noting that absence of standard should concern judges, lawyers and officers). For a further discussion of the difficulties of determining whether a law is clearly established for purposes of qualified immunity in the absence of a clearly articulated standard, see *supra* notes 127-54.