An Ethical Obligation to Publish Opinions in Qualified Immunity Cases

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Introduction

Qualified immunity has received an increasing amount of attention over the past few years amidst rising calls for reform against misconduct by government officials such as police officers.[1] Qualified immunity provides a shield against damages liability for government officials who violate a person's constitutional rights as long as those rights were not clearly established at the time of the violation.[2] Many commentators have argued that the doctrine as it is currently applied has allowed government officials to avoid accountability for grave acts of misconduct.[3] Additionally, federal courts have exacting standards as to what constitutes clearly established law, in some situations requiring a previously decided case with nearly identical facts to clearly establish the law.[4] Recently, the foundations of qualified immunity have come into question, raising questions about the continued viability of the doctrine.[5] And the application of qualified immunity in the real world has been shown to have little to no relation to the judicial construction of clearly established law, undermining the Supreme Court's reasoning for keeping the standard.[6]

Further complicating this area of law is that federal courts of appeals vary in their treatment of unpublished decisions in qualified immunity cases.[7] This has

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1. *See, e.g.*, Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point Amid Protests*, N.Y. Times (Oct. 18, 2021), https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html [https://perma.cc/VH6T-LQ3M]; Scott Michelman & David Cole, *A Step Toward Accountability in Policing*, Wall Street Journal (Sept. 10, 2020, 12:17 PM), https://www.wsj.com/articles/a-step-toward-accountability-in-policing-11599754650 [https://perma.cc/KQ7T-7S3B].

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

3. *See, e.g.*, Alexander A. Reinert, *Unpacking a Decade of Appellate Decisions on Qualified Immunity*, Lawfare (Mar. 18, 2021, 10:46 AM), https://www.lawfareblog.com/unpacking-decade-appellate-decisions-qualified-immunity [https://perma.cc/L4DG-NXAJ].

4. Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. Chi. L. Rev. 605, 613 (2020).

5. *See generally* William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45 (2018) (arguing that "[t]he modern doctrine of qualified immunity is inconsistent with conventional principles of law and conventional federal statutes").

6. *See generally* Schwartz, *supra* note 4 (arguing that in practice, appellate court decisions have little impact on policies, procedures, and behaviors of police and police departments).

7. *See*, *e.g.*, 11th Cir. R. 36-2 ("Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority."); 1st Cir. Local R. 32.1.0 (noting that unpublished decisions are not binding

resulted in a system where a court in the past has decided that certain conduct violates the Constitution, but that decision may not be binding precedent in future decisions of that circuit or in other circuits.[8] As Fifth Circuit Judge Don Willet has noted, "[n]o precedent = no clearly established law = no liability. An Escherian Stairwell. Heads defendants win, tails plaintiffs lose."[9] In the qualified immunity context, where cases may establish constitutional violations but remain unpublished, arguments that unpublished decisions do not provide value to other parties do not apply.[10] Instead, unpublished decisions can provide tremendous value in the intensely fact-specific inquiries that courts often undertake to determine whether conduct was clearly established as a constitutional violation at the time.[11] However, in a 2016 systematic review of circuit court cases that address constitutional claims, one in five decisions that recognized a constitutional violation were found to be unpublished.[12]

This Note argues that federal judges should have an ethical duty to publish all opinions that recognize constitutional violations. Part I of this Note explains the current state of the Supreme Court's qualified immunity doctrine. Part II then provides an overview of the treatment of unpublished decisions by various circuit courts in qualified immunity determinations. Part III provides a brief history of and rationale for unpublished opinions and explains why, especially in the qualified immunity context, arguments against publishing certain decisions no longer hold weight. Part IV covers two constitutional avoidance mechanisms that judges can take in qualified immunity cases—choosing not to reach the constitutional question and choosing not to publish opinions that do decide constitutional questions—that have led to a dearth of cases that recognize constitutional violations. Part V reviews recent cases that illustrate some problems of unpublished opinions in qualified immunity cases. Part VI argues that judges should have an ethical obligation under the *Model Code of Judicial Conduct* to publish all cases that recognize constitutional violations in qualified immunity cases. Part VII reviews changes that Congress, the Supreme Court, and circuit courts could make to solve some of the problems illustrated here. Requiring judges to publish all cases that establish constitutional violations would allow those whose constitutional rights

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authority but may be persuasive); Hogan v. Carter, 85 F.3d 1113, 1118 (4th Cir. 1996) (explaining that unpublished opinions do not clearly establish constitutional violations).

8. *See* David R. Cleveland, *Clear as Mud: How the Uncertain Precedential Status of Unpublished Opinions Muddles Qualified Immunity Determinations*, 65 U. MIAMI L. REV. 45, 48–49 (2010).

9. Zadeh v. Robinson, 902 F.3d 483, 499 (5th Cir. 2018) (Willet, J., concurring dubitante).

10. *See* Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L. J. 55, 112 (2016).

11. *See* Cleveland, *supra* note 8, at 60–63.

12. *See* Nielson & Walker, *supra* note 10, at 64. In their article, Nielson and Walker systematically review over 800 published and unpublished circuit court opinions that address qualified immunity. *Id.* at 63. They found some evidence that judges may behave strategically in deciding whether to reach constitutional questions or publish opinions and argue for revising the standards for qualified immunity and that judges should explain and justify their use of discretion in not reaching constitutional questions or not publishing opinions. *Id.* at 63–64.

are violated to show that the law is clearly established and allow them to recover damages from those who violated those rights.

I. THE CURRENT STANDARDS OF QUALIFIED IMMUNITY

In 1871, Congress created a civil right of action against state actors for those whose rights were violated, in 42 U.S.C. § 1983:

> 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. . . . [13]

In theory, this allows people whose rights have been violated by a government actor to recover damages for the violation of those rights. However, the Supreme Court has eliminated liability for government actors unless the constitutional violation at the time of the act was "clearly established."[14]

The Court has held that "[q]ualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances that she confronted."[15] However, what counts as clearly established under the law is very narrow.[16] Practically, plaintiffs need to show that a court in the past has found a constitutional violation for nearly the same act as the one that is alleged.[17]

Complicating matters even further is the Supreme Court's 2009 decision in *Pearson v. Callahan*.[18] In *Pearson*, the Court held that lower court judges could determine that an actor was entitled to qualified immunity because the conduct at question had not been "clearly established" as a constitutional violation at the time without reaching a conclusion as to whether the conduct actually did violate the Constitution.[19] This decision has created a situation where plaintiffs have been greatly harmed by a government actor but are not able to recover damages as a result of that action.[20] And since no constitutional violations have been

13. 42 U.S.C. § 1983 (1871).

14. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("If the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct that was not previously identified as lawful.").

15. Brosseau v. Haugen, 543 U.S. 194, 198 (2004).

16. *See* Schwartz, *supra* note 4, at 607.

17. *Id.*

18. Pearson v. Callahan, 555 U.S. 223 (2009).

19. *Id.* at 236.

20. *See, e.g.*, Jessop v. City of Fresno, 936 F.3d 937, 939 (9th Cir. 2019) (finding that stealing property that was seized pursuant to a warrant was not clearly established as a constitutional violation). In Jessop, officers stole more than $200,000 in property that was seized from the defendant, but the court declined to decide whether this violated the constitution and holding that it was not clearly established that officers could not do that. *Id.* at 939–40.

established, plaintiffs in the future are open to being harmed in the same way without the opportunity to recover damages.[21]

II. TREATMENT OF UNPUBLISHED DECISIONS AMONG CIRCUIT COURTS

Circuit courts' guidelines for when opinions are published are varied. For example, the Eleventh Circuit has a presumption of not publishing opinions unless a majority of the panel decides that an opinion should be published.[22] However, it provides no guidance as to what opinions should be published.[23] The Seventh, Eighth, and Tenth Circuits likewise do not provide guidance on the publication of decisions.[24] On the other hand, in the First Circuit, there is a presumption that all opinions be published unless they do not establish or clarify new law.[25] The Fifth Circuit also has a strong presumption of publishing, noting that "opinions that may in any way interest persons other than the parties to a case should be published."[26]

Following the adoption of Rule 32.1 of the Federal Rules of Appellate Procedure in 2007, courts may no longer prohibit the citation of opinions or orders that are unpublished.[27] However, circuit courts vary in their treatment of unpublished decisions in determinations of qualified immunity, and the Supreme Court has not held precisely what the standard is for clearly establishing constitutional violations.[28]

For example, in the Eleventh Circuit, the law is only "clearly established" if it was decided in a published decision by the Supreme Court, the highest court of the state, or the Eleventh Circuit.[29] In the Fourth Circuit, unpublished decisions as well do not clearly establish constitutional violations.[30] The Sixth Circuit is a little more permissive, explaining that "only in extraordinary cases" may the court look to decisions outside of the Supreme Court or the Sixth Circuit to show that the law is clearly established.[31] The Ninth Circuit is even more permissive, noting that "[e]ven 'unpublished decisions of district courts may inform our qualified immunity analysis.'"[32]

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21. *See* Colin Rolfs, Comment, *Qualified Immunity after* Pearson v. Callahan, 59 UCLA L. REV. 468, 479 (2011).

22. 11th Cir. R. 36-2.

23. *See* David R. Cleveland, *Local Rules in the Wake of Federal Rule of Appellate Procedure 32.1*, 11 J. APP. PRAC. & PROCESS 19, 40 (2010).

24. *Id.*

25. 1st Cir. Local R. 36.0(b)(1).

26. 5th Cir. R. 47.5.1.

27. FED. R. APP. P. 32.1.

28. *See* Cleveland, *supra* note 8, at 49; Nielson & Walker, *supra* note 10, at 76 ("Unfortunately, the Supreme Court has never definitively declared what weight, if any, should be given to unpublished opinions in determining whether a right is clearly established.").

29. *See, e.g.*, Schantz v. Deloach, No. 20-10503, 2021 WL 4977514 at *4 (11th. Cir. 2021); *id.* at n. 7.

30. *See* Hogan v. Carter, 85 F.3d 1113, 1118 (4th Cir. 1996).

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

32. Drummond v. City of Anaheim, 343 F.3d 1052, 1060 (9th Cir. 2003) (quoting Sorrels v. McKee, 290 F.3d 965, 971 (9th Cir. 2002)).

Circuit courts also vary in whether unpublished decisions issued prior to the adoption of Rule 32.1 are citable.[33] For example, the Second, Seventh, and Ninth Circuits do not allow citation to unpublished decisions issued prior to the establishment of that rule.[34] The Fifth and Sixth Circuits, on the other hand, do not restrict the citation to unpublished opinions that were issued prior to the adoption of the rule in 2007.[35]

As a result, the exact same constitutional violation could happen in each of the other eleven circuits except the Eleventh, and a plaintiff would not be able to show that the law was clearly established because there was no case holding that it was in the Eleventh Circuit.[36]

III. JUSTIFICATIONS FOR THE NON-PUBLICATION OF CERTAIN OPINIONS AND WHY THEY NO LONGER HOLD UP

In the 1970s, the Advisory Council on Appellate Justice's Committee on Use of Appellate Court Energies issued a report proposing that courts start issuing decisions that would not be published.[37] Unpublished decisions would generally be written for a narrow audience of only the parties before the court and could include fewer factual details and explanations of reasoning than published decisions.[38] The reasoning behind this is that the parties before the court are familiar with the details of the case and do not need a more thorough recitation of the facts or explanation of the reasoning behind a decision.[39]

In theory, these unpublished opinions may have little or no precedential value because they are supposed to only apply in cases where the law is already clearly defined, allowing courts more time to write opinions where they need to apply the law to novel sets of facts or to establish new law.[40] This may have served the public as well, ensuring that they did need to wade through volumes of printed and bound cases to find the relevant case law.[41]

There had also been complaints about the great cost of publishing printed opinions.[42] Allowing certain opinions to go unpublished could save in printing costs as well as the cost of the time required to read through many decisions.[43]

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33. Cleveland, *supra* note 23, at 42.

34. *Id*. at 43.

35. 5th Cir. R. 47.5.4; 6th Cir. R. 32.1(a).

36. *See* John C. Jeffries, Jr., *Dunwody Distinguished Lecture in Law: What's Wrong with Qualified Immunity?*, 62 FLA. L. R. 851, 859 (2010).

37. Cleveland, *supra* note 23, at 22.

38. *See* Joseph L. Gerken, *A Law Librarian's Guide to Unpublished Judicial Opinions*, 96 LAW LIBR. J. 475, 477 (2004).

39. *Id*.

40. *Id*.

41. *See* Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 547–48. (1997).

42. *Id*. at 547.

43. *Id*. at 547–48.

However, technological changes have weakened the rationales behind allowing certain opinions to go unpublished.[44] Research is now done through online databases such as Westlaw or LexisNexis rather than through expensive and inconvenient printed and bound volumes. Increases in search technology save time in researching cases, where those researching case law no longer need to wade through printed volumes to find relevant cases.[45]

Most important, as some commentators have noted, is the fact that unpublished opinions are some of the best tools for determining what clearly established law is.[46] Because of the fact-based nature of qualified immunity inquiries, "unpublished opinions provide what the qualified immunity analysis needs most from prior cases—applications of 'extremely abstract rights' to specific factual settings that provide clear guidance to government officials about what rights exist and what conduct violates them."[47] Additionally, due to the large number of unpublished opinions that apply settled, clearly-established law to varying fact patterns, these opinions can be valuable tools for both plaintiffs and government actors alike in determining exactly what conduct is clearly established.[48]

Overall, the arguments for the non-publication of certain qualified immunity cases are very weak. Unpublished opinions can clearly be valuable, especially in the qualified immunity context, in explaining and determining what the law is. And changes in technology, with the switch from print to online legal research, further weaken any justifications for the non-publication of opinions.

IV. WHY THE PEARSON STANDARD, COUPLED WITH NON-PUBLICATION OF CASES, LEADS TO UNSETTLED LAW IN QUALIFIED IMMUNITY CASES

Courts have two major ways to avoid establishing precedent that certain conduct violates the Constitution. First, they can avoid answering the question at all, instead deciding that it was not "clearly established" at the time that the conduct at issue violated the Constitution.[49] Second, they can choose not to publish opinions where they did find that conduct violated the Constitution.[50] These two avoidance measures have, in many cases, resulted in a system where plaintiffs are unable to recover even when they have suffered from egregious actions by

44. *Id.* at 556–57.

45. *See* Brian T. Damman, Note, *Guess My Weight: What Degree of Disparity is Currently Recognized Between Published and Unpublished Opinions, and Does Equal Access to Each Form Justify Equal Authority for All?*, 59 DRAKE L. REV. 887, 920–22 (2011).

46. *See, e.g.*, Cleveland, *supra* note 8, at 60–63.

47. *Id.* at 61.

48. *See id.* at 62–63.

49. *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009).

50. *See* Nielson & Walker, *supra* note 10, at 62, 75–76 (discussing the strategic possibilities that judges have in choosing not to publish opinions that reach constitutional questions in qualified immunity cases).

government actors because there are no cases clearly establishing that the conduct violates the Constitution.[51]

In *Pearson v. Callahan*, the Supreme Court narrowed its ruling in *Saucier v. Katz*, allowing lower court judges to avoid reaching the constitutional question of whether the conduct at issue violated a person's rights by instead only deciding whether that conduct was "clearly established" as violating a person's constitutional rights. [52] The Court in *Saucier* had previously held that courts in qualified immunity cases were required to decide two questions: first, whether there was a constitutional violation, and second, whether the conduct at issue was clearly established as a constitutional violation at the time that it occurred.[53]

After some complaints by judges and practitioners that the practice was unnecessary and unworkable,[54] the Court in *Pearson* decided that the test outlined in *Saucier* was too rigid, noting that "[t]he procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case."[55] While the Court did note that requiring lower courts to use the two-step *Saucier* procedure would promote the development of helpful constitutional precedent, the Court returned discretion to judges to decide whether or not to reach the constitutional question.[56]

Even when courts do reach the constitutional question, they can avoid clearly establishing that certain conduct violates the Constitution by not publishing their decisions. As discussed earlier, in some circuits, unpublished decisions do not clearly establish constitutional violations.[57] As a result, a person who experienced the exact same constitutional violation as someone in the past, in the same circuit, could be blocked from recovering damages for that violation.

Taken together, the Supreme Court's narrowing of *Saucier* in *Pearson*, along with policies in various circuits regarding the citation of unpublished decisions and when to publish opinions, can lead to a dearth of cases establishing constitutional violations.

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51. *See, e.g.*, JAY R. SCHWEIKERT, CATO INSTITUTE POLICY ANALYSIS NO. 901, QUALIFIED IMMUNITY: A LEGAL, PRACTICAL, AND MORAL FAILURE 7–8 (Sept. 14, 2020) (highlighting examples in cases to show the intensely fact-specific distinctions that some courts draw in determining whether the conduct at issue was clearly established as a constitutional violation).

52. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

53. Saucier v. Katz, 533 U.S. 194, 201 (2001).

54. *See, e.g.*, *Pearson*, 555 U.S. at 234–35 (discussing critiques of the Saucier rule by some lower court judges and Supreme Court justices).

55. *Id.* at 236–37.

56. *Id.*

57. *See supra* Part II.

V. EXAMPLES OF COURTS CITING UNPUBLISHED DECISIONS IN PART AS TO WHY CONDUCT IS NOT CLEARLY ESTABLISHED AS VIOLATING THE CONSTITUTION

Determining whether a person is eligible for qualified immunity is necessarily a fact-intensive inquiry under current Supreme Court precedent.[58] As a result, the lack of published cases establishing certain constitutional violations can lead to surprising and seemingly unethical results.

For example, in *Jessop v. City of Fresno*, the Ninth Circuit upheld a grant of qualified immunity in a case where officers were alleged to have stolen over $200,000 worth of cash and rare coins during the execution of a search warrant.[59] The court exercised its discretion, without explanation, to only decide whether the conduct at issue was clearly established as a constitutional violation and not reach the question of whether it actually was a constitutional violation.[60] The court noted that the Ninth Circuit had never addressed whether the theft of property that was seized pursuant to a search warrant violated the Fourth Amendment.[61] However, the Fourth Circuit, in an unpublished decision, had addressed the issue, deciding that theft of property that was seized pursuant to a search warrant violated the Fourth Amendment.[62]

Although the Ninth Circuit allows the citation of cases from other circuits, even those that are unpublished, to show that conduct was clearly established as a constitutional violation,[63] the court in *Jessop* decided that it was not clearly established that theft of seized property violated the Constitution.[64] And the court declined to decide whether theft of property seized pursuant to a search warrant was unconstitutional,[65] potentially allowing egregious conduct like this to occur unpunished in the future.

Other cases likewise illustrate the exacting standards that some courts demand for determining whether conduct is "clearly established" and how unpublished

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58. *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1802 (2018) ("The Court has repeatedly made clear that a plaintiff seeking to show that an officer's conduct was objectively unreasonable must find binding precedent or a consensus of cases so factually similar that every officer would know that their conduct was unlawful.").

59. Jessop v. City of Fresno, 936 F.3d 937, 939–440 (9th Cir. 2019).

60. *Id.* at 940.

61. *Id.*

62. *See* Mom's Inc. v. Willman, 109 F. App'x 629, 636–37 (4th Cir. 2004).

63. Drummond v. City of Anaheim, 343 F.3d 1052, 1060 (9th Cir. 2003) (quoting Sorrels v. McKee, 290 F.3d 965, 971 (9th Cir. 2002)) ("Even 'unpublished decisions of district courts may inform our qualified immunity analysis.'").

64. *Jessop*, 936 F.3d at 942 (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)) ("The Fourth Circuit's unpublished decision in *Mom's*—the only case law at the time of the incident holding that the theft of property seized pursuant to a warrant violates the Fourth Amendment—did not put the constitutional question beyond debate.").

65. *Id.* at 940.

opinions can hurt the ability to determine that.[66] For example, in *Ramirez v. Guadarrama*, the Fifth Circuit reversed a denial of qualified immunity, in part because the plaintiff relied on a number of unpublished cases in an attempt to establish a constitutional violation.[67] In *Ramirez*, officers responded to a man who had doused himself in gasoline, threatening to kill himself and burn down his house.[68] Despite being warned by one officer that tasing the man would light him on fire, another officer fired his taser, striking the man, causing him to burst into flames and die.[69] The court declined to discuss most of the unpublished opinions cited by the plaintiff, which argued that it was clearly established that police could not use deadly force against armed but non-threatening victims,[70] instead focusing most of its time distinguishing the case from published Fifth Circuit decisions.[71] Had the unpublished opinions that were cited been published, the court would have been forced to more thoroughly address the merits of the case.

These cases are a small subset of cases where courts declined to recognize conduct as clearly established because of the lack of published opinions recognizing that conduct as violating the Constitution in the past. Some courts, like the Ninth Circuit in *Jessop*, make the problem even worse by recognizing that another court determined that particular conduct violated the Constitution but declining to recognize it themselves.

VI. WHY JUDGES SHOULD HAVE AN ETHICAL OBLIGATION UNDER THE FEDERAL CODE OF JUDICIAL CONDUCT AND THE MODEL CODE OF JUDICIAL CONDUCT TO PUBLISH ALL CASES THAT CLEARLY ESTABLISH CONSTITUTIONAL VIOLATIONS

Judges are presented with several choices to avoid finding and establishing constitutional violations. First, as explained in *Pearson v. Callahan*, they can avoid reaching the constitutional question and instead decide only that the conduct at issue was not clearly established as a constitutional violation at the time.[72] Second, they can avoid publishing decisions that recognize constitutional violations.[73] Presenting judges with numerous opportunities to avoid reaching constitutional questions, and even when they do so, to avoid publishing decisions, raises concerns that this could lead to judges behaving strategically to avoid criticism or review by the Supreme Court.[74] Instead of reaching more difficult

66. *See, e.g.*, Schantz v. Deloach, No. 20-10503, 2021 WL 4977514, n. 7 (11th Cir. 2021) (noting that unpublished cases that were cited do not constitute "clearly established" law).

67. *See* Ramirez v. Guadarrama, 3 F.4th 129, 135 (5th Cir. 2021).

68. *Id.* at 134.

69. *Id.*

70. Brief for Appellees at 36, Ramirez v. Guadarrama, No. 20-10055 (5th Cir. 2021).

71. *Ramirez*, 3 F.4th at 135–36.

72. *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009).

73. *See* Nielson & Walker, *supra* note 10, at 72–76.

74. *See generally id.* and comments *supra* note 12.

constitutional questions, a court could instead decide to not reach the question and not publish the opinion. Additionally, not reaching constitutional questions and not publishing opinions could make it harder for those who have been harmed to recover damages, preventing in some cases the just result.

This Part will first give an overview of the codes that apply to federal judges and then examine specific provisions of those codes, arguing that judges should have an ethical duty to publish opinions that establish constitutional violations.

Federal district and circuit judges are guided by the Code of Conduct for United States Judges (the Federal Code).[75] The Federal Code of Conduct was first adopted by the Judicial Conference of the United States in 1973,[76] shortly after the publication of the American Bar Association's *Model Code of Judicial Conduct* (the *Model Code*) in 1972.[77] There are differences between the two codes, but the canons most applicable here—regarding the diligent performance of duties and the promotion of confidence in the judiciary—are fairly similar. While neither code is technically binding on judges, and there is essentially no enforcement mechanism for violations,[78] they both can provide guidance for how judges should behave, and the Federal Code and *Model Code* can be used as models in judicial decision-making.

A. COMPETENCE, DILIGENCE, AND COOPERATION

Canon 3 of the Federal Code requires that judges "should perform the duties of the office fairly, impartially, and diligently"[79] while Canon 2 of the *Model Code* requires that "[a] judge shall perform judicial and administrative duties, competently and diligently."[80] Proponents of unpublished decisions argue that not publishing some decisions saves a court precious time and resources that could be better applied to novel, complex cases.[81] However, it seems that this justification does not pan out. Instead, caseload volume has only a weak correlation with publication rates.[82]

Additionally, arguing that courts can choose to devote less time to some cases raises questions of whether a judge is acting diligently in that judge's judicial duties. An attorney representing a client would not be able to say they were too busy to adequately and fully represent that client.[83] Judges, likewise, should not

75. CODE OF CONDUCT FOR U.S. JUDGES, Introduction (2019).

76. *Id.*

77. Russell R. Wheeler, *A Primer on Regulating Federal Judicial Ethics*, 56 ARIZ. L. REV. 479, 500 (2014).

78. *See id.* at 500–505.

79. CODE OF CONDUCT FOR U.S. JUDGES, Canon 3 (2019).

80. MODEL CODE OF JUDICIAL CONDUCT, Canon 2 (2020) [hereinafter MODEL CODE].

81. *See, e.g.*, Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533, 538–39 (2020).

82. *See id.* at 554.

83. *See* Lawrence J. Fox, *Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility?*, 32 HOFSTRA L. REV. 1215, 1225 (2004).

be able to make excuses for decisions that are not fully developed or well-reasoned.

There may also be evidence that judges choose to publish or not publish decisions strategically, seeking to avoid establishing precedent or review from the Supreme Court.[84] This would clearly violate both Canons as judges behaving in this way are not acting impartially or diligently. Rather, they are acting in their own self-interest instead of prioritizing the interests of the parties of the case.

One possible downside of requiring opinions that establish constitutional violations to be published is that it could lead to more strategic behavior by judges. Instead of reaching a constitutional decision but choosing not to publish, judges could instead just choose not to reach the constitutional question at all. This, however, would violate the Canons, raising problems of competence, diligence, and impartiality.

B. PROMOTING CONFIDENCE IN THE JUDICIARY

Canon 2A of the Federal Code requires that "[a] judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"[85] while Rule 1.2 of the *Model Code* requires that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary. . . ."[86] Not publishing decisions that establish constitutional violations undermines confidence in the judiciary.

Not publishing a decision generally signals that the case involved simple issues of clearly established law. However, there is evidence that some unpublished decisions do in fact involve unsettled, novel areas of law, raising questions of the motivations behind the decisions not to publish.

For example, in *Baltimore v. City of Albany*, the Eleventh Circuit recognized a constitutional violation but did not publish its opinion.[87] In *Baltimore*, an arresting officer struck Baltimore in the head with a heavy flashlight, causing him to fall to the ground and resulting in a serious injury.[88] Notably, the court acknowledged that "there is a dearth of case law in this circuit to support the proposition that the use of a flashlight to strike an arrestee over the head necessarily constitutes deadly force."[89] The court found that in this case, it did amount to excessive force, resulting in a constitutional violation.[90]

However, instead of publishing its decision, clarifying that striking a person in the head with a heavy flashlight does constitute deadly force, the court chose not

84. *See* Nielson & Walker, *supra* note 10, at 63–64.
85. CODE OF CONDUCT FOR U.S. JUDGES, Canon 2A (2019).
86. MODEL CODE R. 1.2.
87. Baltimore v. City of Albany, 183 Fed. App'x. 891, 898 (11th Cir. 2006).
88. *Id.*
89. *Id.*
90. *Id.*

to publish. Unpublished decisions do not clearly establish constitutional violations in the Eleventh Circuit.[91] By explicitly noting the lack of case law in the Eleventh Circuit that establishes this violation and still choosing not to publish the decision, the court is undermining confidence in the judiciary by making it harder to show that particular conduct is clearly established as a constitutional violation.

This is not an outlier case.[92] Professor Merritt McAlister categorizes decisions like these as "publishable decisions"—decisions that meet the typical requirements of published decisions but remain unpublished—and notes that these decisions "may be alarming and suggestive of unpublication gamesmanship."[93] Combining this with the findings by Nielson and Walker that some judges may strategically decide not to publish decisions,[94] it raises the risk that not publishing certain decisions undermines the public's confidence in the judiciary.

Not publishing decisions that recognize constitutional violations also signals that the court does not take violations of constitutional rights seriously, especially in circuits where the law is only clearly established through published decisions. By choosing not to publish decisions that recognize constitutional violations, a court is harming both potential plaintiffs—who could use the case to show that the law was clearly established—and government employees—who could use the case to determine what the law is. This could further erode public trust in the judicial system.

In order to reassure members of the public that they are not acting strategically by not publishing decisions—and to ensure that there is not constitutional stagnation in caselaw—judges should publish more opinions that recognize constitutional violations.

VII. RECOMMENDATIONS FOR THE FUTURE

Increasing the number of published cases that recognize constitutional violations ensures that plaintiffs whose rights have been violated have the opportunity to recover damages from those who violated their rights. In order to achieve this, there are several steps that various actors can take to address this issue. First, the Federal and *Model Codes* can be updated to clarify the obligation to publish more opinions. Second, Circuit Courts can change their rules regarding unpublished

91. *See, e.g.*, Schantz v. Deloach, No. 20-10503, 2021 WL 4977514, n. 7 (11th Cir. 2021).

92. *See* Nielson & Walker, *supra* note 10, at 64 ("[M]ost strikingly, one in five decisions recognizing a new constitutional right is not published. . . .").

93. *See* McAlister, *supra* note 81, at 568–70 (Publishable decisions are those that "often satisfy the various criteria for publication, including . . . applying an established rule in a novel context . . . [and] are the product of first-tier appellate process, including full briefing and oral argument.") While McAlister does not discuss *Baltimore* specifically, the opinion in *Baltimore* would satisfy his definition: it received the benefit of briefing and oral argument, and, as noted by the court, applies existing law in a novel context. *See Baltimore*, 183 Fed. App'x at 898 (noting the lack of caselaw addressing this specific set of facts but finding that the conduct at issue did violate the constitution); *Id.* at n.11 (noting the presence of oral argument).

94. *See* Nielson & Walker, *supra* note 10, at 63–64.

opinions and clearly established law and provide a presumption of publication, especially in qualified immunity cases. Third, the Supreme Court could resolve the disparate treatment of unpublished opinions by circuit courts, and, more broadly, reform qualified immunity. Finally, Congress could provide more resources for the judiciary to address arguments against publishing more opinions.

A. UPDATES TO THE FEDERAL CODE AND MODEL CODE

As addressed in Part VI, judges should have an obligation under both the Federal Code and *Model Code* to publish all opinions that recognize constitutional violations in qualified immunity cases. To make this clearer, the American Bar Association could make changes to the *Annotated Model Code of Judicial Conduct* explaining this requirement. Additionally, the Judicial Conference could make similar changes to the Code of Conduct for United States Judges. While neither is technically binding on judges, these changes could provide a strong signal to judges about their ethical obligations.

B. ACTIONS BY CIRCUIT COURTS

As noted, circuit courts vary in how they decide whether to publish decisions and whether unpublished decisions "clearly establish" constitutional violations.[95] Absent Congressional or Supreme Court action, circuit courts on their own can update their standards to allow the citation of more cases that clearly establish constitutional violations. As discussed earlier, justifications for not allowing the citation of unpublished cases to show that conduct was clearly established no longer hold up.[96] Courts could be more permissive, as the Ninth Circuit is, allowing the citation of unpublished opinions, and opinions from other circuits, to clearly establish law.[97]

Courts could also require the publication of more opinions. Notably, the Eleventh Circuit has a presumption of not publishing cases,[98] which is an outlier among the other circuits and does not seem to provide much value, especially since unpublished decisions can be helpful to the general public. All circuits could instead change their rules and practices to reflect those of the First and Fifth Circuits, which have strong presumptions of publication.[99]

Courts could also require judges to explain and justify their decisions not to publish cases. Requiring an explanation encourages judges to reconsider their decision whether to publish a case, potentially leading to more thoughtful decisions.

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95. *See supra* Part II.

96. *See supra* Part III.

97. *See* Drummond v. City of Anaheim, 343 F.3d 1052, 1060 (9th Cir. 2003) (noting that unpublished opinions may clearly establish constitutional violations).

98. 11th Cir. R. 36-2.

99. *See* 1st Cir. Local R. 36(b)(1); 5th Cir. R. 47.5.1.

Explanations could also provide distinctions for why this case is different from other cases, helping potential plaintiffs or defendants in the future.

C. SUPREME COURT ACTION

To address the dearth of qualified immunity cases that clearly establish constitutional violations, the Supreme Court could clarify whether unpublished opinions, and opinions from other circuits, clearly establish law. This would harmonize the differing treatment of unpublished decisions by the various circuits. The Court could also encourage a presumption of publication by lower court judges, especially in constitutional matters.

More broadly, the Supreme Court could take action to reform qualified immunity overall. The Court has recently signaled that it may recognize that the current state of qualified immunity results in situations where people whose constitutional rights have been violated in egregious ways cannot recover damages from the person who violated that right.

For example, in *Taylor v. Riojas*, the Court held that some actions are so egregious that they obviously violate the Constitution.[100] In *Taylor*, the Court vacated the Fifth Circuit's decision granting qualified immunity in a case where an inmate was held in a cell that "was covered, nearly floor to ceiling, in '"massive amounts" of feces'" for six full days and then moved into a second cell that had no toilet except for a clogged drain in the floor.[101] The Fifth Circuit had granted immunity, reasoning that it was not clearly established that "'prisoners couldn't be housed in cells teeming with human waste' 'for only six days.'"[102] The Supreme Court held that a reasonable officer, presented the facts here, should have known that this violated the Constitution.[103] This may open up more opportunities for plaintiffs to recover from constitutional violations.

However, the Court in two more recent case overruled a lower court's grant of qualified immunity, holding that the law was not clearly established that the conduct at issue violated the Constitution and declining to say whether it actually did violate the Constitution.[104] The Court could take action to restrict or eliminate the usage of qualified immunity, but many commentators are not optimistic about this scenario.[105]

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100. Taylor v. Riojas, 592 U.S. ___ (2020) (slip op., at 3).

101. *Id.* at 1.

102. *Id.* at 1–2.

103. *Id.* at 3.

104. *See* Rivas-Villegas v. Cortesluna, 595 U.S. ___ (2021) (slip op., at 4); City of Tahlequah v. Bond, 595 U.S. ___ (2021) (slip op., at 3).

105. *See, e.g.*, Jay Schweikert, *The Supreme Court Won't Save Us from Qualified Immunity*, CATO INSTITUTE (Mar. 3, 2021, 4:58 PM), https://www.cato.org/blog/supreme-court-wont-save-us-qualified-immunity?queryID=60daf1f95d82d0c979bf6b704b57da26 [https://perma.cc/D3PE-P8K2?type=image].

D. CONGRESSIONAL ACTION

Because the Supreme Court has been reluctant to update, modify, or eliminate qualified immunity, Congressional action may be required to correct it. Congress established the right to sue government actors for constitutional violations in 42 U.S.C. § 1983. The Supreme Court, without any further action from Congress, established qualified immunity to limit the liability for government actors who violate a person's constitutional rights.[106] Congress could completely eliminate or pare back qualified immunity, making the standards that the Court set it in *Harlow v. Fitzgerald* and *Pearson v. Callahan* no longer relevant. Congress has recently considered the issue, but it seems unlikely to address it anytime soon.[107]

To address arguments that requiring the publication of more decisions is too burdensome on judges, Congress could increase funding for the judiciary. Congress could also increase the number of judges to reduce the caseload of individual judges, allowing them more time to work on opinions that are to be published. However, it is unclear that a judge's workload significantly impacts decisions to publish cases.[108]

CONCLUSION

Judges should have an ethical obligation to publish all opinions that recognize constitutional violations in qualified immunity cases. The value of unpublished opinions to the general public, plaintiffs, and government employees is very high, especially in the context of qualified immunity. And justifications for the non-publication of opinions no longer hold weight. Unpublished opinions in qualified immunity cases address important constitutional questions and help those whose rights have been violated recover damages from those who violated those rights. Finally, they provide guidance to government actors and courts as to what the law is to help them make decisions.

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

107. *See* Marianne Levine & Nicholas Wu, Lawmakers Scrap Qualified Immunity Deal in Police Reform Talks, POLITICO (Aug. 17, 2021, 5:38 PM), https://www.politico.com/news/2021/08/17/lawmakers-immunity-police-reform-talks-505671 [https://perma.cc/HR23-2H7R].

108. *See* McAlister, *supra* note 81, at 554.