The Fall and Rise of Qualified Immunity: From Hope to Harris

Mark R. Brown

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THE FALL AND RISE OF QUALIFIED IMMUNITY:
FROM HOPE TO HARRIS

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Abstract

In *Mitchell v. Forsyth* (1985) the Court ruled that interlocutory appeals can be taken by government officials from denials of motions for summary judgment based on qualified immunity. *Johnson v. Jones* (1995) ruled that these interlocutory appeals are limited to legal questions, not matters of fact. This limited the effect of its holding in *Anderson v. Creighton* (1987) that some measure of factual similarity between prior reported cases and governmental wrongdoing is necessary to overcome qualified immunity. *Hope v. Pelzer* (2002) further cabined *Anderson* by rejecting the Eleventh Circuit’s conclusion that government wrongdoing must be “materially similar” to conduct previously declared unconstitutional by the courts to support liability.

Qualified immunity’s success rate fell precipitously in the Eleventh Circuit following *Hope*, a decline that was attributable, in large part, to synergy between *Hope* and *Johnson v. Jones*. *Hope* allowed § 1983 plaintiffs to plead facts that more easily withstood qualified immunity. *Johnson* precluded the Eleventh Circuit from questioning these factual allegations. Together these developments made it difficult for appellate courts to award qualified immunity—at least at the interlocutory stage.

The Supreme Court this past term in *Scott v. Harris* (2007) cast doubt over whether *Johnson v. Jones* remains sound—and whether qualified immunity will continue its post-*Hope* wane. In the course of holding that police officers’ intentionally ramming a suspect’s car did not violate the Fourth Amendment, the Court in *Harris* implicitly authorized interlocutory fact-finding by appellate courts in § 1983 cases. Specifically, the Court in *Harris* relied heavily on a videotape of the officers’ actions to conclude that their force was reasonable. Because the same videotape was found to be inconclusive by the District Court and Eleventh Circuit, *Harris* can only mean that interlocutory appellate fact-finding is sometimes permissible. With this increased appellate scrutiny, qualified immunity rates are likely to increase—especially in the Eleventh Circuit.
Executive officials – be they state or federal – performing discretionary functions are personally liable for violating only "clearly established statutory or constitutional rights of which a reasonable person would have known."\(^1\) Put another way, these executive officials are immune from liability for violating constitutional principles that could not have reasonably known. “Qualified immunity,” as this is known, consists of two distinct inquiries: the first is whether “the facts alleged show the officer’s conduct violated a constitutional right?”\(^2\) The second is whether this right was clearly established – so that a reasonable official should have known of it – at the time of the violation. Because “[t]he concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made,”\(^3\) the ultimate question is whether “the officer’s mistake as to what the law requires is reasonable.”\(^4\)

Although qualified immunity’s test can be succinctly stated, the judicially-developed doctrine that surrounds it has caused consternation and confusion. The disputes that surround qualified immunity are, in part, products of its common law pedigree. When it enacted 42 U.S.C. § 1983 as part of the Ku Klux Klan Act of 1871, Congress said nothing about defenses, let alone official immunities. Immunity defenses,

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\(^3\) Id. at 205 (“The question is what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards.”).

\(^4\) Id.
instead, emerged by way of judicial implication. Congress must have known, the argument goes, that post-bellum government officials enjoyed various immunities. Congress consequently must have intended to allow these same, or at least similar, defenses, to constitutional suits under § 1983.

Qualified immunity for executive officials first emerged in 1967 in the case of *Pierson v. Ray*, where the Court ruled that arresting officers sued under the Fourth Amendment were entitled to a defense of “good faith and probable cause.” So long as they are reasonably mistaken, the Court held, police officers are immune from personal liability for arrests that violate the Fourth Amendment. Following *Pierson*, the Court extended this “reasonable mistake” defense to virtually all executive agents, including governors, school officials, presidential aides, and federal law enforcement agents. Perhaps more importantly, the Court let loose the defense from its Fourth Amendment mooring, generalized it, and allowed its assertion in any constitutional context. No

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5 386 U.S. 547, 557 (1967) (“We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983.”).

6 See *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (holding that governor and university president are entitled to qualified immunity based on “all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based”).

7 See, e.g., *Wood v. Strickland*, 420 U.S. 308 (1975) (holding that school officials are entitled to qualified immunity).


10 The Court also dropped the requirement that the official be acting in good faith. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1972). After *Harlow*, the question is simply whether a hypothetical, reasonable person would believe the action to be lawful – regardless of the good faith of the actual wrongdoer.
longer is the question whether the official had reasonable grounds to make an arrest under the Fourth Amendment; it is whether the official should have known that her conduct was lawful.

I. Legal Clarity

Whether an official should have known that her conduct was unlawful is, in large part, a question of legal clarity. Through the first score of years following Pierson the Supreme Court worked its way through several practical problems surrounding this problem, but it avoided answering the ultimate question of how much clarity is needed. In cases like Hunter v. Bryant, for example, the Court concluded under the facts presented that Secret Service agents could not have known that an arrest was illegal; it did not develop a general algorithm to guide lower courts. As the dawn of the new millennium approached, the Court had yet to decide basic issues like whether legal principles must have been previously announced and applied to similar facts, whether they must have been announced by the Supreme Court (or some lower court with binding authority), or whether analogy and deduction would be expected of officials as part of the measuring stick for legal clarity.

It took a criminal case to squarely address these questions. Section 242 of title 18 of the United States Code makes it a crime for an official to willfully violate the constitutional rights of persons within the jurisdiction of the United States. Enacted shortly before § 1983, this criminal statute shares many of its civil cousin’s demands,

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12 502 U.S. 224 (1991) (holding that Secret Service agents were entitled to qualified immunity even if they lacked probable cause to make arrest).
including that wrongdoing be “under color of” law. Because it is a criminal statute, however, § 242 demands more scienter – “willfully” – and allows a Due Process “vagueness” defense not generally available to civil defendants, including those charged under § 1983. Due Process, as any first-year Criminal Law student knows, requires that criminal laws provide adequate notice of criminality. Laws that are not published (or otherwise made available) to the public cannot consistent with Due Process be enforced. Nor can vague laws that no reasonable person can understand.\(^\text{13}\)

Because § 242’s prohibition borrows as its substance constitutional constraints, it presents a prime candidate for Due Process problems. The Constitution’s meaning, after all, is not always clear. It varies with time and changes with the Court. And if it is not clear, it can hardly provide the notice required by Due Process.

The Honorable David W. Lanier, a Chancery Court judge in rural Tennessee, was convicted under 28 U.S.C. § 242 for willfully violating the constitutional rights of several women he had sexually assaulted in his courtroom chambers.\(^\text{14}\) The United States Court of Appeals for the Sixth Circuit reversed these convictions because, it claimed, the judge could not have known that rape violated the Constitution.\(^\text{15}\) No “fundamentally similar”

\(^{13}\text{See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 90 (2d ed. 1986).}\)

\(^{14}\text{See United States v. Lanier, 520 U.S. 259, 261 (1997).}\)

\(^{15}\text{United States v. Lanier, 73 F.3d 1380 (6th Cir. 1996) (en banc). In sum, the court concluded that because the relevant case law explaining that sexual assault amounted to a constitutional violation was murky at the time of Lanier’s wrongs, criminal prosecution under § 242 was improper: “Such an unprecedented, selective application of the statute in this case was possible only by giving the broadest possible construction to the most ambiguous of federal criminal statutes. The indictment in this case for a previously unknown, undeclared and undefined constitutional crime cannot be allowed to stand.” Id. at 1394.}\)
case had ever been handed down by the Supreme Court, and the statute itself says nothing about rape. In the absence of notice, Judge Lanier’s conviction could not stand.

The Supreme Court, in *United States v. Lanier*, reversed on two levels. First, it concluded that decisions of the Supreme Court itself are not needed to provide Due Process’s required warning. The Court had never before limited “the universe of relevant interpretive decisions” to its own opinions, nor did it think that a wise policy. Because of § 242’s historical and analytical links to § 1983, the Supreme Court cited civil constitutional cases for the proposition that Courts of Appeals’ decisions, as well as those of the Supreme Court, can clearly establish constitutional rights.

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16 *Id.* at 1393. The Sixth Circuit relied on *Screws v. United States*, 325 U.S. 91, 104 (1945), for the proposition that only Supreme Court “opinions could provide sufficient notice under § 242 to make ‘specific’ the constitutional right in question.” It stated that “[a]s we interpret the ‘make specific’ requirement, the Supreme Court must not only enunciate the existence of a right, it must also hold that the right applies to a factual situation fundamentally similar to the one at bar.”

17 *See* 520 U.S. at 263 (observing that “the court [of appeals] set aside Lanier's convictions for 'lack of any notice to the public that this ambiguous criminal statute [i.e., § 242] includes simple or sexual assault crimes within its coverage'”).


19 *Id.* at 268 (stating that “a decision of this Court … is [not] necessary in every instance to give fair warning”).

20 *Id.* (stating that no case after *Screws* “has held that the universe of relevant interpretive decisions is confined to our opinions”).

21 *Id.* at 269 (“Although the Sixth Circuit was concerned, and rightly so, that disparate decisions in various Circuits might leave the law insufficiently certain even on a point widely considered, such a circumstance may be taken into account in deciding whether the warning is fair enough, without any need for a categorical rule that decisions of the Courts of Appeals and other courts are inadequate as a matter of law to provide it.”).

22 Two years later, in *Wilson v. Layne*, 526 U.S. 603 (1999), the Court built on this conclusion, searching not only for decisions from the United States Courts of Appeals, but also those from federal District Courts and state appellate courts. Although it ultimately concluded in *Wilson* that the right declared – the Fourth Amendment’s prohibition on police officers’ taking media agents into private homes – was not clearly established, it stated that either “controlling authority in the [plaintiffs’] jurisdiction at the time of the incident” or “a consensus of cases of persuasive authority” could clearly establish constitutional law for purposes of qualified immunity.
The Court in *Lanier* next concluded that the Sixth Circuit’s “fundamentally similar” requirement was too protective of criminal defendants. In this regard, the Supreme Court explained that qualified immunity’s “clearly established” standard is identical to due process’s “fair warning” requirement: “both serve the same objective, and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.”

“To require something clearer than ‘clearly established’ would, then, call for something beyond ‘fair warning’.” The Court accordingly reversed and remanded the prosecution to the Sixth Circuit for further proceedings.

II. Factual Certainty

Legal clarity is necessary but not sufficient to overcome qualified immunity. Ten years before it decided *Lanier*, the Court injected a factual dimension into the qualified immunity problem. Not only must the law clearly state the constitutional rule, a wrongdoer must have reasonably known under all the facts and circumstances that the clearly stated constitutional rule applied. *Anderson v. Creighton* involved federal

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23 520 U.S. at 270-71.

24 *Id.* at 271.

25 After concluding that the Constitution’s prohibition on sexual assault by state actors was clear enough at the time of Lanier’s actions to satisfy the Due Process Clause’s “fair warning” requirement, the Court remanded the case to the Sixth Circuit to reconsider, “to the extent the issue remains open,” whether Lanier was acting “under color of” law. Because Judge Lanier fled to Mexico and thus became a fugitive from justice, the Sixth Circuit on remand never was forced to reconsider its conclusion in *Lanier I* that Judge Lanier acted “under color of” law. Lanier’s fugitive status required that the court simply dismiss his appeal. *See United States v. Lanier*, 123 F.3d 945 (6th Cir. 1997). Lanier was later apprehended in Mexico and deported to the United States to serve his criminal sentence. *See United States v. Lanier*, 201 F.3d 842 (6th Cir. 2000).

agents who conducted a warrantless entry into a home. They invoked qualified immunity as a defense, arguing that they believed they had exigent circumstances. The Court agreed: “The relevant question … is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed.”\textsuperscript{28} Put in a more general way, the Court’s point was that mistaken beliefs about legality can be reasonable and can support qualified immunity. This is so because qualified immunity has a factual dimension; not only must constitutional law be facially clear, it must be clear as applied. Should reasonable minds differ over the law’s proper application, then qualified immunity is in order.

A number of scholars have complained that the fact-specific nature of \textit{Anderson}’s qualified immunity inquiry causes it to sometimes contradict the ultimate question of legality.\textsuperscript{29} This is particularly true in the Fourth Amendment context, which – like qualified immunity – is premised on ad hoc reasonableness. To use the facts of \textit{Anderson}, consider a police officer who decides to enter a home without a warrant. If one concludes that the police officer reasonably (though mistakenly) believed that exigent circumstances justified the warrantless entry, it would seem that there is no violation of the Fourth Amendment. Because there is no illegality, the officer is simply (“defendants might argue that, given the information in their possession at the time of the alleged violation, a reasonable officer would (or could) conclude that the conduct was lawful”).

\textsuperscript{27} 483 U.S. 635 (1987) (holding that federal agents may be entitled to qualified immunity even if they lacked exigent circumstances to justify warrantless entry).

\textsuperscript{28} \textit{Id.} at 640.

not liable and does not need qualified immunity as an affirmative defense. If one concludes, in contrast, that the officer unreasonably believed that exigent circumstances existed, his warrantless entry would violate the Fourth Amendment. Qualified immunity under these facts would prove useful, but because of the officer’s unreasonableness would be precluded. Unless one is willing to recognize that police can be reasonably unreasonable, qualified immunity would seem to be irrelevant in any objective constitutional setting.

Justice Stevens made this point in his dissent in Anderson. Specifically, he complained that the Court had created a “double standard of reasonableness—the constitutional standard already embodied in the Fourth Amendment and an even more generous standard that protects any officer who reasonably could have believed that his conduct was constitutionally reasonable.” These “two layers of insulation from liability,” Justice Stevens complained, are unnecessary, since “[t]he concept of probable cause leaves room for mistakes, provided always that they are mistakes that could have been made by a reasonable officer.”

The Court (Justice Scalia) responded to Justice Stevens’s complaint by observing that different language could be used to describe the constitutional violation: “Had an

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30 See Alan K. Chen, The Facts About Qualified Immunity, 55 EMORY L.J. 229, 252 (2006) (“Anderson had endorsed the conclusion that an officer can be unreasonable under the substantive Fourth Amendment standard yet reasonable for purposes of qualified immunity (i.e., reasonably unreasonable”).

31 See Jon O. Newman, Suing the Lawbreakers: Proposals to Strengthen § 1983 Damage Remedy for Law Enforcers’ Misconduct, 87 YALE L.J. 447, 460 (1978) (“Surely [an] officer could not reasonably believe there was probable cause for an unlawful arrest, for an unlawful arrest is by definition an arrest for which a prudent police officer could not reasonably believe there was probable cause”).

32 Id. at 648 (Stevens, J., dissenting).

33 Id. at 659.

34 Id. at 660.
equally serviceable term, such as ‘undue’ searches and seizures been employed, what
might be termed the ‘reasonably unreasonable’ argument against application of [qualified
immunity] to the Fourth Amendment would not be available.”

Justice Scalia was not overly concerned with the logical inconsistency in its approach, since the contradiction
could be cured by simply changing the language needed to support one or the other.

Some lower courts, like the Eleventh Circuit, have used Justice Scalia’s
suggestion to distinguish qualified immunity from the underlying constitutional
violations it excuses. For example, the Eleventh Circuit recognizes “arguable” probable
cause as a defense to liability for unconstitutional searches and seizures (including
arrests).

This avoids the patent problem presented by “reasonably unreasonable”
behavior, though it does nothing for the implicit inconsistency (and accompanying
practical problems) that infects the analysis.

Though the Supreme Court has not specifically endorsed this approach, it
reiterated in *Saucier v. Katz*, which involved the reasonableness of a law enforcement
officer’s use of force under the Fourth Amendment, the difference between any

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35 *Id.* at 643. Similarly, in *Hunter v. Bryant*, 502 U.S. 224,228 (1991), which ruled that Secret Service
agents enjoyed qualified immunity even though they lacked probable cause to make an arrest – the Court
summarily concluded that the trial court “should ask whether the agents acted reasonably under settled law
in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can
be constructed five years after the fact.”

36 See, e.g., *Skop v. City of Atlanta*, 485 F.3d 1130, 1137 (11th Cir. 2007) (“even if we determine that the
officer did not in fact have probable cause, we apply the standard of ‘arguable probable cause,’ that is,
whether ‘reasonable officers in the same circumstances and possessing the same knowledge as the
Defendant[ ] could have believed that probable cause existed to arrest’”); *Crosby v. Monroe County*, 394
F.3d 1328 (11th Cir. 2004) (same).

problems raised by *Anderson*).

reasonableness demanded by the Constitution differs and that required by qualified
immunity:

The qualified immunity inquiry ... has a further dimension. The concern of the
immunity inquiry is to acknowledge that reasonable mistakes can be made as to
the legal constraints on particular police conduct. It is sometimes difficult for an
officer to determine how the relevant legal doctrine, here excessive force, will
apply to the factual situation the officer confronts. An officer might correctly
perceive all of the relevant facts but have a mistaken understanding as to whether
a particular amount of force is legal in those circumstances. If the officer’s
mistake as to what the law requires is reasonable, however, the officer is entitled
to the immunity defense. 39

Saucier holds that the substance of immunity’s inquiry into reasonableness differs
from that behind the Fourth Amendment. How different these queries are has yet to be
determined by the Court, though there clearly is a difference. In Brosseau v. Haugen, 40
for instance, where a police officer fired a shot through a car window and seriously
injured a driver who was trying to start the car and escape from the officer, 41 the
Supreme Court summarily concluded that the officer was immune. It came to this
conclusion even though it recognized that the law of excessive force is basically clear 42
and notwithstanding the fact that the officer violated the Fourth Amendment. 43 Brosseau

39 Id. at 205.
41 The District Court dismissed and the Ninth Circuit reversed, holding that Tennessee v. Garner, 471 U.S.
1 (1985), and Graham v. Connor, 490 U.S. 386 (1989), were clearly established.
42 It explained that “the general tests set out in Graham and Garner ... are cast at a high level of generality.”
543 U.S. at 199. Although the Court acknowledged that, “in an obvious case, these standards can ‘clearly
establish’ the answer, even without a body of relevant case law,” (citing Hope v. Pelzer), the Court
concluded that “[t]he present case is far from the obvious one where Graham and Garner alone offer a
basis for decision.” Id. Observing that the parties had identified “only a handful” of relevant lower court
opinions (i.e., three circuit court decisions), the Court noted that these decisions “found no Fourth
Amendment violation when an officer shot a fleeing suspect who presented a risk to others,” and thus
“[t]hese three cases taken together undoubtedly show that this area is one in which the result depends very
much on the facts of each case.” Id.
43 Id. at 598 & n.3 (noting that the Court did not decide whether the officer violated the Fourth
Amendment). Justice Stevens, the lone dissenter, thought that there was “a genuine factual question as to
thus reiterates what the Court stated in Saucier, i.e., that a police officer can reasonably (within the meaning of qualified immunity) violate otherwise clearly established Fourth Amendment dictates.\textsuperscript{44}

One can hardly be faulted for not understanding exactly what the difference is between reasonableness for constitutional and qualified immunity purposes. There would not seem to be much room between reasonably believing one’s conduct is lawful and reasonably believing it is necessary or correct. Imagine if the law allowed a private citizen a defense like that recognized in Anderson, Saucier, and Broseeau: “I may have been negligent, but I was reasonable in believing that I wasn’t.” Civil law and criminal

\textsuperscript{44} In what may be a contradictory decision, the Supreme Court in Groh v. Ramirez, 540 U.S. 551 (2004), held that a federal law enforcement official was not entitled to qualified immunity when he executed a search warrant that violated the Fourth Amendment’s requirement that warrants “particularly describ[e] the place to be searched, and the persons or things to be seized.” Writing for a 5-4 majority, Justice Stevens concluded both that the warrant violated the Fourth Amendment’s particularity requirement, and that the law enforcement officials were not protected by qualified immunity: “[g]iven that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid.”\textit{Id.} at 563. Moreover, the majority noted, “because petitioner himself prepared the invalid warrant, he may not argue that he reasonably relied on the Magistrate’s assurance that the warrant contained an adequate description of the things to be seized and was therefore valid.”\textit{Id.} at 564. Finally, the Court observed that “even a cursory reading of the warrant in this case—perhaps just a simple glance—would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal.”\textit{Id.} In response to the officer’s argument that the search was “the product, at worst, of a lack of due care,” the majority replied that “‘a warrant may be so facially deficient—\textit{i.e.}, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.’”\textit{Id.} at 565. Two of the four dissenters, Justice Kennedy and Chief Justice Rehnquist, agreed that the Fourth Amendment’s particularity requirement had been violated but would have granted the petitioner qualified immunity for his “straightforward mistake of fact.”\textit{Id.} at 567 (Kennedy, J., dissenting). Criticizing the majority for “construing the officer’s error as a mistake of law rather than a mistake of fact,” these two Justices argued that “the essential question here is whether a reasonable officer in petitioner’s position would necessarily know that the warrant had a clerical error in the first place”—that is, “whether an officer can reasonably fail to recognize a clerical error, not whether an officer who recognizes a clerical error can reasonably conclude that a defective warrant is legally valid.”\textit{Id.} at 569. Because the majority rejected this reasoning, it may be that the particularity requirement of the Fourth Amendment, unlike the probable cause requirement and the prohibition on excessive force, does not admit to a double-reasonableness standard for qualified immunity.
law have, for good reason, generally rejected this sort of defense. It not only blurs the definitional line between fault and responsibility, it gives rise to procedural miscues.

III. Procedural Rights

An additional justification for cases like *Anderson* and *Saucier* is that qualified immunity creates not only a substantive defense, but also affords governmental defendants procedural rights. Immunity presents a legal question demanding prompt judicial attention, not only by a lone District Court judge, but also by a three-judge appellate panel and perhaps even the Supreme Court of the United States. The Court in *Hunter v. Bryant*, for example, observed that “[i]mmunity ordinarily should be decided by the court long before trial,”\(^45\) rather than be placed “in the hands of the jury.”\(^46\) Likewise, in *Saucier v. Katz* the Court concluded that not only was the defendant entitled to immunity, “the suit should have been dismissed at an early stage in the proceedings.”\(^47\) Both statements emphasize the Court’s conclusion that qualified immunity insulates the official not only from an award of money damages, but also from the burdens of suit.

The double-reasonableness standard enunciated in *Anderson* (and applied in *Saucier*) can be understood as a prophylactic to protect this procedural right.

Because the defense of qualified immunity is, in part, a question of law, it naturally creates a “super-summary judgment” right on behalf of government officials. Even when an official is not entitled to summary judgment on the merits – because the plaintiff has stated a proper claim and genuine issues of fact exist – it can still be granted


\(^{46}\) *Id.*

when the law is not reasonably clear. Consider *Hunter v. Bryant*, where Secret Service agents who had arrested the plaintiff for allegedly threatening the life of President Reagan were sued under the Fourth Amendment. The District Court refused summary judgment for the defense because genuine issues of material fact surrounded the ultimate question of whether the agents had probable cause. The Supreme Court reversed, finding that summary judgment should have been awarded the agents – not because genuine factual issues were lacking or the claims improper, but because the agents’ enjoyed a right to avoid trial.

This procedural advantage is magnified by the collateral order doctrine, which permits immediate appeals from denials of qualified immunity in federal court. The Supreme Court concluded in *Mitchell v. Forsyth* that the denial of qualified immunity before trial is an appealable collateral order justifying immediate interlocutory review.

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49 In *Saucier v. Katz*, 533 U.S. 194, 208 (2001), – where government officials were charged with using excessive force – the Supreme Court also concluded that genuine factual issues and ultimate illegality did not preclude awarding summary judgment in favor of the defendants before trial.


51 472 U.S. 511, 521 (1985). The Court in *Behrens v. Pelletier*, 516 U.S. 299 (1996), further ruled that qualified immunity can be raised in a Rule 12(b)(6) motion to dismiss before it is again raised in a motion for summary judgment. Given that the Court has consistently referred to qualified immunity as a defense, the holding in *Behrens* appears counter-intuitive. Its use under Rule 12(b)(6) places plaintiffs under pressure to plead its absence, which would seem to transform its absence into an element of the plaintiff’s case rather than a true defense. Because it can be used under Rule 12(b)(6), several lower courts adopted heightened pleading requirements for plaintiffs suing officials under § 1983. The Supreme Court, however, has invalidated these demands in the three cases that have raised the matter. See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (holding that heightened pleading is not required in § 1983 suits against cities and counties); *Crawford-El v. Britton*, 523 U.S. 574 (1998) (holding that heightened evidence standard is not permissible in § suit against officials); *Jones v. Bock*, 127 S. Ct. 910 (2007) (holding that inmates need not satisfy heightened pleading requirements notwithstanding adoption of Prison Litigation Reform Act). Thus, heightened pleading requirements of all sorts for § 1983 cases appear highly suspect if not clearly inappropriate.
The defense can raise qualified immunity at the summary judgment stage and press an immediate appeal should its motion be denied. Qualified immunity’s premier advantage thus lies in the fact that it affords government officials review by (at least) four judges before trial.

*Mitchell* has its bounds. It guarantees government officials interlocutory review of legal issues surrounding qualified immunity, but not factual issues. Resolution of factual questions is reserved – at least at the interlocutory stage – to the judgment of the District Court. The Supreme Court made this clear in *Johnson v. Jones*, \(^5^2\) which involved claims of excessive force employed by five police officers. In response to three of the police officers’ claims that they were not present during the beating, the District Court ruled that genuine issues of fact precluded awards of summary judgment. The Seventh Circuit dismissed the officers’ interlocutory appeal, finding that it had no appellate jurisdiction over factual matters in the absence of separate legal questions. The Supreme Court, in an opinion by Justice Breyer, agreed with the Seventh Circuit: appellate courts should not ordinarily review evidentiary sufficiency on interlocutory appeal. Interlocutory jurisdiction, the Court found, is generally confined to questions of law.

Whether the Court’s holding in *Johnson* is prudential or jurisdictional is unclear. The police officers argued that factual issues often append themselves to legal ones, and thus should just as often fall under an appellate court’s pendent jurisdiction. The Supreme Court’s response was guarded: “Even assuming, for the sake of argument, that it may sometimes be appropriate to exercise ‘pendent appellate jurisdiction’ over such a

matter, it seems unlikely that courts of appeals would do so ...”\textsuperscript{53} It continued: “the court of appeals can simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason.”\textsuperscript{54} Should the lower court fail to make findings or state its assumptions, the Supreme Court reasoned, an appellate court need only review the record to determine “what facts the district court, in the light most favorable to the nonmoving party, likely assumed.”\textsuperscript{55} Whether deemed a jurisdictional bar or a prudential concern, \textit{Johnson v. Jones} establishes that appellate courts cannot engage in independent fact-finding on interlocutory appeal.

\section*{IV. A Microcosm Called the Eleventh Circuit}

Ostensibly applying the principles outlined above, the United States Court of Appeals for the Eleventh Circuit quietly became “the circuit of ‘unqualified immunity’.\textsuperscript{56} From roughly 1990 to 2002, constitutional victims’ chances of winning money damages from government officials’ in the Eleventh Circuit close approached zero. The Eleventh Circuit awarded qualified immunity to government officials in just about every constitutional context imaginable. It used qualified immunity to reject claims arising under the First Amendment’s Free Speech Clause,\textsuperscript{57} the Fourth Amendment’s prohibition on the use of excessive force,\textsuperscript{58} as well as its prohibitions on

\textsuperscript{53} \textit{Id.} at 318.

\textsuperscript{54} \textit{Id.} at 319.

\textsuperscript{55} \textit{Id.}

\textsuperscript{56} Jacob E. Daly, \textit{Statutory Civil Rights}, 53 Mercer L. Rev. 1499, 1556 (2002) (observing that the Eleventh Circuit “has earned a reputation as being the circuit of ‘unqualified immunity’.”).

\textsuperscript{57} See, e.g., \textit{Denno v. School Bd. of Volusia County}, 182 F.3d 780 (11th Cir. 1999) (officials immune for suspending student who brought Confederate flag to school).

\textsuperscript{58} See, e.g., \textit{Vaughan v. Cox}, 264 F.3d 1027 (11th Cir. 2001) (officer immune from liability for using deadly force and shooting into moving vehicle).
unreasonable searches\textsuperscript{59} and seizures,\textsuperscript{60} the Eighth Amendment’s prohibitions on abuse\textsuperscript{61} and unsanitary prison conditions,\textsuperscript{62} and the Fourteenth Amendment’s demand of both procedural\textsuperscript{63} and substantive\textsuperscript{64} Due Process. Perhaps the best evidence of the Eleventh Circuit’s austere approach to liability under § 1983 is its willingness to immunize racial discrimination,\textsuperscript{65} which according to Dean John Jeffries is rarely permissible.\textsuperscript{66}

\textsuperscript{59} See, e.g., Wilson v. Jones, 251 F.3d 1340 (11th Cir. 2001) (officers immune for strip searching detainee arrested for drunk driving).

\textsuperscript{60} See, e.g., Redd v. City of Enterprise, 140 F.3d 1378 (11th Cir. 1998) (officers immune for arresting traveling minister for disorderly conduct).

\textsuperscript{61} See, e.g., Sanders v. Howze, 177 F.3d 1245 (11th Cir. 1999) (failure to prevent suicide by prisoner); Hill v. Dekalb Regional Youth Detention Center, 40 F.3d 1176 (11th Cir. 1994) (officials immune in connection with sexual abuse of youthful detainee by center employees).

\textsuperscript{62} See, e.g., Wilson v. Blankenship, 163 F.3d 1284 (11th Cir. 1998) (prison officials immune for poor prison conditions).

\textsuperscript{63} See, e.g., Harbert Intern, Inc. v. James, 157 F.3d 1271 (11th Cir. 1998) (finding immunity from liability for Procedural Due Process and Fifth Amendment Takings violations).

\textsuperscript{64} See, e.g., Santamorena v. Georgia Military College, 147 F.3d 1337 (11th Cir. 1998) (officials immune from liability for rape of female student on college campus).

\textsuperscript{65} See Stephen B. Bright, Can Judicial Independence be Attained in the South? Overcoming History, Elections, and Misperceptions about the Role of the Judiciary, 14 GA. ST. L.REV. 817, 841-42 (1998) (observing that the Eleventh Circuit has “frequently found those accused of racial discrimination or other constitutional violations to be immune from suit”).

\textsuperscript{66} John C. Jeffries, Jr., Disaggregating Constitutional Torts, 110 YALE L. J. 259, 277 (2000) (“[s]omeone who purposely discriminates against racial minorities cannot claim that he or she reasonably thought such action to be lawful. The defense is irrelevant because it is factually incredible.”). See also Barbara E. Armacost, Qualified Immunity: Ignorance Excused, 51 VAND. L. REV. 583, 591 (1998) (“Today, discrimination against someone because she is African-American or Hispanic is viewed as inherently and obviously ‘bad’ behavior, obviating the need for qualified immunity in a case alleging such discrimination.”). Sister Circuits, in contrast, have uniformly refused to entertain qualified immunity as a defense to charges of discrimination against racial or ethnic minorities. See, e.g., Murphy v. Arkansas, 127 F.3d 750, 755 (8th Cir. 1997) (“it has been clearly established for many years that the Equal Protection Clause prohibits a State, when acting as an employer, from invidiously discriminating between individuals or groups based upon race.”); Tang v. State of Rhode Island, Department of Elderly Affairs, 120 F.3d 325, 327 (1st Cir. 1997) (same).
In *Mencer v. Hammonds*, to use one example, the plaintiff (Mencer) sued under § 1983 claiming that her public-sector employer discharged her because of her race. The District Court denied summary judgment, finding that Mencer had “produced sufficient evidence of conduct violative of the equal protection clause on the part of [the defendant] ... violate[] clearly established law.” On interlocutory appeal, the Eleventh Circuit concluded that it could “review the district court’s preliminary [factual] determination as a means of reaching the issue of clearly established law,” and then determined that the defendant was entitled to qualified immunity.

*Mencer* demonstrates what the Eleventh Circuit repeatedly stated during the 1990s: “only in exceptional cases will government actors have no shield against claims made against them ....” Rather than search for common world understandings, the

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67 134 F.3d 1066 (11th Cir. 1998).

68 See also *Johnson v. City of Fort Lauderdale*, 126 F.3d 1372, 1379 (11th Cir. 1997) (applying qualified immunity to defeat §§ 1981 and 1983 claims based on racial discrimination).

69 Id. at 1068 (quoting District Court).

70 134 F.3d at 1070. It explained that a “denial of qualified immunity at summary judgment necessarily involves two determinations: 1) that on the facts before the court, taken in the light most favorable to the plaintiff, a reasonable jury could find that the defendant engaged in certain conduct, and 2) that the conduct violated ‘clearly established law’ ....” Id. Even though it recognized that the first determination was not appealable, id. (citing *Johnson v. Jones*, 515 U.S. 304 (1995)), the Court concluded that because a “determination of whether the evidence supports finding that a defendant engaged in certain conduct ... is necessary to reach a determination of whether that conduct violated clearly established law,” id., it could review the District Court’s factual analysis.

71 Id. at 1071. See also *Johnson v. City of Fort Lauderdale*, 126 F.3d 1372, 1379 (11th Cir. 1997) (applying qualified immunity to defeat §§ 1981 and 1983 claims based on racial discrimination).

72 *Lassiter v. Alabama University Board of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc). See also *Gonzalez v. Lee Cty. Housing Auth.*, 161 F.3d 1290, 1295 (11th Cir. 1998) (“[t]his circuit has established stringent standards for a plaintiff seeking to overcome the affirmative defense of qualified immunity”). In rare instances, officials were denied immunity. See, e.g., *Lambert v. Fulton County*, 253 F.3d 588 (11th Cir. 2000) (racial discrimination); *Alexander v. Fulton County*, 207 F.3d 1303 (11th Cir. 2000) (racial discrimination); *Braddy v. Florida Department of Law Enforcement*, 133 F.3d 797 (11th Cir. 1998) (sexual harassment).
Eleventh Circuit demanded legal precision and factual identity: "For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances."  

Arguable differences in minor facts proved enough to defeat liability:

*Minor variations* in some facts (the precedent lacks an *arguably significant* fact or contains an additional *arguably significant* fact not in the circumstances now facing the official) might be very important and, therefore, be able to make the circumstances facing an official materially different from the preexisting precedents, leaving the law applicable -- in the circumstances facing the official -- not clearly established when the defendant official acted.

Even patent wrongs in the Eleventh Circuit escaped § 1983’s reach. Judge Barkett’s description of the factual record in *Lewis v. McDade* offers an illustration in the context of gender discrimination:

[The defendant] “ran a DA’s office rife with gender-discrimination,”...

1. berating his female employees with pejorative terms such as “hysterical female,” “bitch,” “blonde bombshell,” “smurfette,” and “bimbette,”
2. photographing his female employees' buttocks,
3. throwing coins and other objects down his female employees' blouses,
4. telling a female employee to uncross and cross her legs again while he watched,
5. stating that the only thing women are good for is "making babies,”
6. saying "women don't have the balls to be prosecutors,” and
7. embarrassing his female employees with statements such as "you can't come in, Rita doesn't have her clothes on," ....

Despite these horrendous facts, which would not have been insulated by qualified immunity in any other Circuit, the Eleventh Circuit ruled that “qualified immunity

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74 Marsh v. Butler County, 268 F.3d 1014, 1032 (11th Cir. 2001) (emphasis added).
75 250 F.3d 1320, 1321 (11th Cir. 2001) (Barkett, J., dissenting from denial of rehearing en banc).
76 Less egregious facts have caused other circuits to deny qualified immunity in the context of sexual harassment. See, e.g., Morris v. Oldham County Fiscal Court, 201 F.3d 784, 800 n.2 (6th Cir. 2000)
protects [the defendant] from civil liability because there [was] no pre-existing case which would have put him on notice ....” Judge Barkett complained to no avail that “a reasonable district attorney, or any other reasonable person, would have known that such outrageous conduct constituted sexual harassment.”

The First Amendment suffered terribly in the Eleventh Circuit. Claims of workplace-retaliation based on speech were rendered frivolous by the Eleventh Circuit’s qualified immunity jurisprudence. Likewise, police were given blank checks to suppress disagreeable speech on cities’ streets and sidewalks. For example, in Gold v. City of Miami a local attorney (Gold) in Miami drove into a bank's parking lot, observed a woman walk to her car parked in a handicapped space, and shouted to a

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77 Id. Regardless of how outrageous that behavior may have been, the majority awarded the defendant immunity “because the facts of this case are not sufficiently similar to any pre-existing case.” Id.

78 Id. at 1321.

79 See Hansen v. Soldenwagner, 19 F.3d 573, 576 (11th Cir.1994) (“Because Pickering requires a balancing of competing interests on a case-by-case basis...only in the rarest of cases will reasonable government officials truly know that the termination or discipline of a public employee violated ‘clearly established’ federal rights.”). By way of contrast, Professor Jeffries has argued that retaliation based on speech provides the perfect paradigm for official liability: “If the courts are to safeguard protected speech against illegal retaliation, they must find a way to encourage such claims and to hear them case by case. For this role, damages actions are ideal.” Jeffries, Disaggregating Constitutional Torts, supra note --, at 287. Compare Myers v. Hasara, 226 F.3d 821 (7th Cir. 2000) (refusing to award qualified immunity in case involving retaliation based on speech).

80 121 F.3d 1442 (11th Cir. 1997).
nearby police officer, "Miami police don't do shit." He was arrested for disorderly conduct. Although the Eleventh Circuit acknowledged that federal courts and Florida’s Supreme Court had on several occasions “reversed convictions for disorderly conduct where a defendant merely directed profane language at police officers,” it nonetheless ruled that the police officers were entitled to qualified immunity. "The fact-intensive nature of the constitutional inquiry," coupled with a lack of "cases clearly establish[ing] that [the suspect's] actions did not constitute legally proscribed disorderly conduct," led the Eleventh Circuit to absolve the officers of liability.

The Eleventh Circuit also employed questionable procedural devices to assist governmental officials’ immunity defenses. The first was a heightened pleading standard. Prior to *Crawford-El v. Britton*, Courts of Appeals had split over the

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81 Id. at 1444.

82 *See, e.g., Lewis v. New Orleans,* 415 U.S. 130 (1974) (striking down New Orleans ordinance making it unlawful for any person "wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police"). Every other Circuit to consider this issue since *Lewis* has found that arrests based on profanity violate clearly established First Amendment standards. *See, e.g., Spiller v. City of Texas City, Police Dept.,* 130 F. 3d 162 (5th Cir. 1997) (no qualified immunity for arresting a motorist who told an off-duty policeman at a gas station to "move his damn truck"); *Knox v. Southwest Airlines,* 124 F. 3d 1103 (9th Cir. 1997) (verbal exchange at airport; demand for officer's name and badge number; refusal to exit immediately after being ordered to do so); *MacKinney v. Nielsen,* 69 F. 3d 1002 (9th Cir. 1995) (writing with washable chalk on public sidewalk; failure to immediately stop); *Guffey v. Wyatt,* 18 F. 3d 869 (10th Cir. 1994) (arrest of referee at hotly-contested high school basketball game); *Gainor v. Rogers,* 973 F.2d 1379 (8th Cir. 1992) (arrest of person walking through downtown carrying a large cross and distributing leaflets); *Enlow v. Tishomingo County,* 962 F. 2d 501, 509-10 (5th Cir. 1992) (on plaintiff's version, inquiry whether the sheriff had a search warrant or an arrest warrant; taking photographs of the officers); *Buffkins v. City of Omaha,* 922 F. 2d 465 (8th Cir. 1990) (calling police officer an "asshole"); *Duran v. City of Douglas,* 904 F. 2d 1372 (9th Cir. 1990) (obscene gestures and yelling profanities); *Bailey v. Andrews,* 811 F. 2d 366 (7th Cir. 1987) (telling officer "I want my damn dog" and "did you shoot my dog?"); *Vela v. White,* 703 F. 2d 147 (5th Cir. 1983) (walking down the street; agitated questioning about arrest).

83 121 F.3d at 1445.

84 Judge Barkett explained in her dissent from the denial of rehearing en banc that the Eleventh Circuit’s approach contradicted the Supreme Court’s opinion in *United States v. Lanier.* See 138 F.3d 886, 887 (11th Cir. 1998) (Barkett, J., dissenting).

propriety of heightened pleading standards in individual-capacity cases filed under § 1983. Following *Crawford-El*, which specifically ruled that heightened evidentiary standards were not permissible, most Circuits abandoned the practice.\(^{86}\) The Eleventh Circuit refused.\(^{87}\)

Next, the Eleventh Circuit refused to look beyond controlling precedent. Contrary to the Supreme Court’s conclusion in *Lanier* that binding precedent was not necessary, and it subsequent statement in *Wilson v. Layne*\(^ {88}\) that qualified immunity requires only that the plaintiff identify either “controlling authority in [its] jurisdiction at the time of the incident which clearly established the rule on which [it] seek[s] to rely,” or “a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful,” the Eleventh Circuit ignored persuasive precedent. Its search for cases with “materially similar” facts was thus confined to published decisions of the Supreme Court, the Eleventh Circuit, and (for some strange reason) the supreme court of the state where the action arose.\(^ {89}\) The result was a

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\(^{86}\) See *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir.2002); *Harbury v. Deutch*, 233 F.3d 596, 611 (D.C. Cir. 2000), rev’d on other grounds sub nom. *Christopher v. Harbury*, 536 U.S. 403 (2002); *Currier v. Doran*, 242 F.3d 905, 916 (10th Cir.); *Nance v. Vieregge*, 147 F.3d 589, 590 (7th Cir.1998); *Goad v. Mitchell*, 297 F.3d 497 (6th Cir.2002); *Trulock v. Freeh*, 275 F.3d 391 (4th Cir. 2001).

\(^{87}\) See, e.g., *GJR Investments, Inc. v. County of Escambia*, 132 F.3d 1359, 1367 (11th Cir.1998). In addition to the Eleventh Circuit, the Fifth Circuit still employs some sort of heightened pleading standard in some civil rights cases. Although the First Circuit in *Judge v. City of Lowell*, 160 F.3d 67, 72-75 (1st Cir.1998), stated its intent to retain a heightened pleading requirement in cases that focus on the defendant’s intent, courts outside the Fifth Circuit have concluded that *Judge* was overturned by *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). See *Greenier v. Pace, Local No. 1188*, 201 F.Supp.2d 172, 177 (D. Me.2002); *Gallardo v. DiCarlo*, 203 F.Supp.2d 1160, 1163-64 (C.D.Cal.2002).

\(^{88}\) 526 U.S. 603, 617 (1999).

\(^{89}\) See *Hamilton v. Cannon*, 80 F.3d 1525, 1531-32 n.7 (11th Cir. 1996); *D’Aguanno v. Gallagher*, 50 F.3d 877, 881 n. 6 (11th Cir.1995) ("The remaining cases on which plaintiffs rely do not come from the U.S. Supreme Court, the Eleventh Circuit Court of Appeals, or the Florida Supreme Court and, therefore, cannot show that plaintiffs’ right to due process was clearly established."); *Jenkins v. Talladega City Board of Education*, 15 F.3d 821 (11th Cir. 1997) (en banc); *Marsh v. Butler County*, 268 F.3d 1014, 1032 n.10 (11th
vanishingly small vision of fair warning. Every other circuit to address the matter has concluded, at least since Wilson, that a consensus of persuasive cases defeats qualified immunity.

Third, unlike most Circuits, the Eleventh Circuit maintained an eagerness, even after Johnson v. Jones, to review factual sufficiency on interlocutory appeal. In Mencer v. Hammonds, for example, the plaintiff (Mencer) sued under § 1983 claiming a racially motivated discharge. The District Court denied summary judgment, finding that Mencer had “produced sufficient evidence of conduct violative of the equal protection clause on the part of [the defendant to] ... violate[] clearly established law.” On interlocutory appeal, the Eleventh Circuit concluded that it was authorized to “review the district court’s preliminary [factual] determination as a means of reaching the issue of clearly established law.” It explained that a “denial of qualified immunity at summary appeal, the Eleventh Circuit concluded that it was authorized to “review the district court’s preliminary [factual] determination as a means of reaching the issue of clearly established law.”

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90 Compounding the Eleventh Circuit’s cramped vision of relevant precedent in Florida is its refusal to recognize that Florida’s Courts of Appeal are empowered to render binding decisions on a state-wide basis. See Pardo v. State, 596 So.2d 665, 666-67 (Fla.1992) (“[I]n the absence of interdistrict conflict, district court decisions bind all Florida trial courts.”).

91 See, e.g., Rogers v. Pendleton, 249 F.3d 279, 287 (4th Cir. 2001) (citing Wilson, 526 U.S. at 617); Butera v. District of Columbia, 235 F.3d 637, 652 (DC Cir. 2001) (“the court must determine whether the Supreme Court, the District of Columbia Circuit, and, to the extent that there is a consensus, other circuits have spoken clearly on the lawfulness of the conduct at issue.”) (emphasis added); Jacobs v. Chicago, 215 F.3d 758, 767 (7th Cir. 2000) (same); Doe v. Delio, 257 F.3d 309, 332 (3rd Cir. 2001) (Nygaard, J., concurring and dissenting) (“I believe that a ‘consensus of cases of persuasive authority’ had been established by 1995.”) (citing Wilson, 526 U.S. at 617) (emphasis added). Several circuits reached this conclusion before the Supreme Court’s decision in Wilson. See, e.g., Shabazz v. Coughlin, 852 F.2d 697, 701 (2d Cir. 1988); Vaughn v. Ruoff, 253 F.3d 1124, 1130 (8th Cir. 2001); Capoeman v. Reed, 754 F.2d 1512, 1514-15 (9th Cir. 1985).

92 134 F.3d 1066 (11th Cir. 1998).

93 Id. at 1068.

94 134 F.3d at 1070.
judgment necessarily involves two determinations: 1) that on the facts before the court, taken in the light most favorable to the plaintiff, a reasonable jury could find that the defendant engaged in certain conduct, and 2) that the conduct violated ‘clearly established law’ .”\textsuperscript{95} Even though it recognized that the first determination was not appealable,\textsuperscript{96} the Court concluded that because a “determination of whether the evidence supports finding that a defendant engaged in certain conduct ... is necessary to reach a determination of whether that conduct violated clearly established law,”\textsuperscript{97} it could review the District Court’s factual analysis. Contrary to the District Court’s finding, the Eleventh Circuit found insufficient evidence of discrimination and awarded the defendant qualified immunity.\textsuperscript{98}

The Eleventh Circuit by the early part of this century thus presented a worst-case scenario for constitutional plaintiffs. In no other Circuit were § 1983 plaintiffs subjected to the gauntlet of substantive and procedural hurdles presented in the Eleventh Circuit.

V. The “Hitching” of Larry Hope

Larry Hope was an inmate assigned to a chain gang at the Limestone Correctional Facility in Alabama. Twice in 1995 he was handcuffed to a "hitching post”\textsuperscript{99} as

\textsuperscript{95} Id.

\textsuperscript{96} Id. (citing \textit{Johnson v. Jones}, 515 U.S. 304 (1995)).

\textsuperscript{97} Id.

\textsuperscript{98} Id. at 1071. \textit{See also Stanley v. City of Dalton}, 219 F.3d 1280 (11\textsuperscript{th} Cir. 2000) (finding insufficient evidence on interlocutory appeal).

\textsuperscript{99} The hitching post is a horizontal bar “made of sturdy, non-flexible material” placed either 45 or 57 inches above the ground. \textit{Austin v. Hopper}, 15 F.Supp.2d 1210, 1241 (M.D. Ala. 1995). “Hope was cuffed standing to a hitching post, with his arms at approximately head level, in the hot sun for seven hours with no shirt, metal cuffs, only one or two water breaks, and no bathroom breaks. At one time, prison guards brought a cooler of water near him, let the prison dogs drink from the water, and then kicked the cooler over at Hope's feet.” 240 F.3d at 978. According to Alabama Department of Corrections (DOC) policy, it
punishment for disruptive behavior. \textsuperscript{100} "Hope was cuffed ... with his arms at approximately head level, in the hot sun for seven hours with no shirt, metal cuffs, only one or two water breaks, and no bathroom breaks. At one time, prison guards brought a cooler of water near him, let the prison dogs drink from the water, and then kicked the cooler over at Hope's feet." \textsuperscript{101} Hope sued his tormentors under § 1983 and the Eighth Amendment, only to have his case – like so many other civil rights cases in the Eleventh Circuit – dismissed because of qualified immunity. \textsuperscript{102}

On appeal, the Eleventh Circuit concluded that while "cuffing an inmate to a hitching post for a period of time extending past that required to address an immediate danger or threat is a violation of the Eighth Amendment," \textsuperscript{103} "a factfinder [could] conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious," \textsuperscript{104} and that the hitching post's illegality "could be inferred from [prior] opinions," \textsuperscript{105} the defendants were still entitled to qualified immunity. "Despite the unconstitutionality of the prison practice and, therefore, the guards' actions, there was no clear, bright-line test established in 1995 that would survive our circuit's qualified immunity analysis." \textsuperscript{106}

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\textsuperscript{100} Hope v. Pelzer, 240 F.3d 975, 977 (11th Cir. 2001).

\textsuperscript{101} Id. at 978.

\textsuperscript{102} Id. at 977.

\textsuperscript{103} Id. at 980.

\textsuperscript{104} Id. at 978.

\textsuperscript{105} Id. at 981.

\textsuperscript{106} Id.
unlawful handcuffing prisoners to fences, rather than posts, the Eleventh Circuit explained that "it is important to analyze the facts in ... [prior] cases, and determine if they are 'materially similar' to the facts in the case in front of us."[107] “[A]nalogous” facts, the Court concluded, like using a fence instead of a post, are not enough.[108]

The Supreme Court granted certiorari[109] and reversed in no uncertain terms: “the Court of Appeals required that the facts of previous cases be ‘materially similar to Hope's situation’. This rigid gloss on the qualified immunity standard ... is not consistent with our cases.”[110] It continued:

officials can still be on notice that their conduct violates established law even in novel factual circumstances. ... Although earlier cases involving “fundamentally similar” facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with “materially similar” facts. ... [T]he salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional.[111]

The Eleventh Circuit’s error in Hope and earlier cases, like Jenkins v. Talladega City Board of Education,[112] and Lassiter v. Alabama A & M,[113] rested in its myopic focus...

107 Id.
108 Id.
111 Id. at 740.
112 115 F.3d 821 (11th Cir. 1997) (en banc). In the years leading up to Hope v. Pelzer, lower courts throughout the United States had (because of the Court’s holding in Lanier) abandoned both their quests for “similar” cases and their limited visions of acceptable authority. The Eleventh Circuit was the lone holdout. Jenkins was one of the first Eleventh Circuit cases to arise post-Lanier. The Eleventh Circuit (sitting en banc) addressed whether teachers who twice strip-searched two elementary students in a vain quest for allegedly stolen money were entitled to qualified immunity. The court concluded they were. Although its analysis, which demanded a previously decided, “materially similar” case – one that “dictate[s], that is, truly compel[s] (not just suggest[s] or allow[s] or raise[s] a question about), the...
on factual identity. The Supreme Court made clear in *Hope* – as it did previously in *Lanier* – that factual similarity is not the touchstone of qualified immunity. The “salient question” is “fair warning.”\(^\text{114}\) This “fair warning,” moreover, is judged under the same minimal standards applied to criminal defendants under the Due Process Clause.\(^\text{115}\) It “give[s] officials ... the same protection from civil liability ... that individuals have traditionally possessed in the face of vague criminal statutes.”\(^\text{116}\)

VI. **Hope in the Eleventh Circuit**

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\(^\text{113}\) 28 F.3d 1146 (11th Cir. 1994) (en banc), overruling in part 3 F.3d 1482 (11th Cir. 1993). In *Lassiter*, the *en banc* court awarded qualified immunity to university officials who dismissed a teacher without affording him due process. The teacher, Lassiter, claimed that under *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Supreme Court’s then-twenty-year-old precedent that helped reshape the procedural rights of public-sector workers, he was entitled to hearing before being discharged. Lassiter argued that a written contract and personnel manual created a “legitimate claim of entitlement,” which required that university officials hold a hearing. The District Court dismissed Lassiter’s claims against the officials based on qualified immunity. CITE. The Eleventh Circuit initially reversed, concluding “the law was clear that an employee with a contractual expectation of continued employment had a property interest in that employment.” CITE. “Because the law was clearly established,” the panel explained, “the [defendants’] ... assertion that the contract is unclear is relevant only to Lassiter’s ability to prove his claim. An uncertainty in the facts does not give rise to qualified immunity.” CITE. The *en banc* Court, however, overturned the panel’s decision. Even though it found that “[n]o new rules need to be announced to decide this case,” CITE, the Court still concluded that the defendants were entitled to immunity. “For the law to be clearly established ..., the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant’s place, that ‘what he is doing’ violates federal law.” CITE. “Because it was not established as a matter of law in Alabama that either the contract’s words or the manual’s words or both would support a property right for Lassiter, the law was also not clearly established that Lassiter was, when defendants acted, due a hearing.” CITE.

\(^\text{114}\) 536 U.S. at 740.


\(^\text{116}\) *Hope*, 536 U.S. at 740 n.10.
Several Circuits immediately employed *Hope*’s reasoning to reject qualified immunity.\(^{117}\) This did not prove true, however, in the Eleventh Circuit; at least not at first.

In the aftermath of *Hope*, the Supreme Court vacated and remanded three Eleventh Circuit opinions for reconsideration. In all three, the Eleventh Circuit on remand, while offering lip-service to *Hope*, awarded the defendants qualified immunity. All three cases involved egregious violations and would have come out differently in any other circuit. In *Willingham v. Loughnan*,\(^{118}\) police officers shot an unarmed woman (Willingham) eight times after she threw a knife and glass at a police dog that was attacking her brother. Rejecting the jury’s findings that this force was unnecessary and excessive, as well as the conclusion of the District Court and a prior appellate panel that the police should have known better, the Court found that the officers were entitled to immunity. Not only did *Hope* not change the specific outcome in *Willingham*, Judge Edmondson went so far as to claim that it did not “change the preexisting law of the Eleventh Circuit much.”\(^{119}\)

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\(^{117}\) See, e.g., *Suboh v. District Attorneys Office of Suffolk District*, 298 F.3d 81 (1st Cir. 2002) (denying qualified immunity where custody was unlawfully transferred to grandparents who fled with child); *Loria v. Gorman*, 306 F.3d 1271 (2d Cir. 2002) (denying qualified immunity in fourth amendment context); *Atkinson v. Taylor*, 316 F.3d 257 (3d Cir. 2003) (denying qualified immunity to prison guards who subjected prisoner to environmental tobacco smoke); *Burchett v. Kiefer*, 310 F.3d 937 (6th Cir. 2002) (denying qualified immunity where suspect detained in police car for three hours with closed windows in ninety degree heat); *Bell v. Johnson*, 308 F.3d 594 (6th Cir. 2002) (denying qualified immunity where guard seized prisoners legal papers and medical dietary material); *Hawkins v. Holloway*, 316 F.3d 777 (8th Cir. 2003) (denying qualified immunity where sheriff pointed loaded gun at deputies); *Roska v. Peterson*, 304 F.3d 982 (10th Cir. 2002) (denying qualified immunity where police summarily seized child).

\(^{118}\) 261 F.3d 1178 (11th Cir. 2001), vacated, 536 U.S. 730 (2002), affirmed on remand, 321 F.3d 1299, 1300 (11th Cir. 2003).

\(^{119}\) Id. at 1300.
Thomas v. Roberts\textsuperscript{120} involved schoolchildren who were strip-searched by school officials in a vain quest to recover $26. Although the Court had "little trouble concluding" that the searches were unconstitutional, were “highly intrusive ... [and] clearly represent[ed] a 'serious intrusion upon the student's personal rights,'"\textsuperscript{121} it still awarded the officials qualified immunity. The court\textsuperscript{122} ignored a decade’s worth of precedent invalidating strip searches in the absence of particularized suspicion.\textsuperscript{123}

In Vaughan v. Cox,\textsuperscript{124} police shot into a truck without warning and seriously wounded a passenger when the truck’s driver failed to immediately pull over. Even though a jury could have found that the victim was not a threat of any kind, and that deadly force was unnecessary and excessive, Judge Cox (both before and after Hope) concluded that the officers were entitled to qualified immunity. Judge Noonan, visiting from the Ninth Circuit, dissented: “it is difficult to discern why, if police officers in Tennessee and Minnesota and Connecticut were on notice that the use of lethal force to restrain a suspect is unreasonable, Georgia police officers should be supposed slow to have learned.”\textsuperscript{125}

\begin{itemize}
\item \textsuperscript{120} 261 F.3d 1160 (11th Cir. 2001), \textit{vacated}, 536 U.S. 953 (2002), \textit{affirmed on remand}, 323 F.3d 950 (11th Cir. 2003).
\item \textsuperscript{121} 261 F.3d at 1168-69.
\item \textsuperscript{122} \textit{See also Jenkins v. Talladega City Bd. of Educ.}, 95 F.3d 1036 (11th Cir. 1996), \textit{reversed}, 115 F.3d 821 (11th Cir. 1997) (en banc) (concluding that officials who strip-searched elementary students were immune).
\item \textsuperscript{124} 264 F.3d 1027 (11th Cir. 2001), \textit{vacated}, 536 U.S. 953 (2002), \textit{affirmed on remand}, 316 F.3d 1210 (11th Cir. 2003).
\item \textsuperscript{125} \textit{Id.} at 1215 (Noonan, J., dissenting).
\end{itemize}
Nine months after deciding Vaughan, the panel granted rehearing sua sponte and inexplicably reversed itself: “Taking the facts as alleged by [the plaintiff], an objectively reasonable officer … could not have believed that he was entitled to use deadly force to apprehend [the plaintiffs].”

Contrary to Judge Edmondson’s admonition in Willingham, Vaughan’s remarkable about-face foreshadowed change in the trenches of the Eleventh Circuit. Between June 28, 2002 (when Hope was handed down) and the end of the 2006 calendar year (when the Supreme Court granted review in Scott v. Harris), the Eleventh Circuit awarded qualified immunity only about half the time. This reflects a significant deviation from the pre-Hope landscape, where the denial of qualified immunity was “exceptional” and § 1983 plaintiffs seldom succeeded against non-institutional governmental actors. Indeed, during this interval the Eleventh Circuit only reversed a final judgment in favor of a § 1983 plaintiff once because of qualified immunity. On at least sixteen occasions, in contrast, it overturned final judgments in favor of § 1983 defendants who were awarded qualified immunity.

126 343 F.3d 1323 (11th Cir. 2003).

127 127 S. Ct. 468 (Oct. 27, 2006).

128 Using Westlaw’s database of reported and unreported opinions, I uncovered more than 200 Eleventh Circuit opinions that mentioned qualified immunity between June 28, 2002 and the end of the 2006 calendar year (when the Supreme Court granted review in Scott v. Harris). After filtering the cases through three criteria—i.e., they either (1) awarded judgment to the defendant on interlocutory appeal (meaning that qualified immunity was pivotal); (2) awarded judgment because of qualified immunity; or (3) rejected qualified immunity—122 decisions remained. Qualified immunity was awarded in 63 of these cases.

129 See Willingham v. Loughnan, 321 F.3d 1259 (11th Cir. 2003), aff’d 261 F.3d 1178 (2001) (awarding qualified immunity to police in excessive force case following jury verdict for plaintiff). The Eleventh Circuit also affirmed a judgment as a matter of law awarded to a defendant by the District Court following a jury verdict for the plaintiff in Lafavors v. Jenne, slip op., No. 03-62153 (11th Cir. 2006).

130 See Akins v. Fulton County, 420 F.3d 1293 (11th Cir. 2005) (reversing summary judgment for defendant based on qualified immunity in speech setting); Few v. Cobb County, 147 Fed. Appx. 69 (11th Cir. 2005) (reversing summary judgment in excessive force case); Vineyard v. Wilson, 311 F3d 1340 (11th Cir. 2002) (reversing summary judgment in excessive force case); Vaughan v. Cox, 343 F.3d 1323 (11th Cir. 2003) (reversing summary judgment in excessive force case), reversing 264 F.3d 1027 (11th Cir. 2001) (awarding
The Eleventh Circuit’s change cuts across a large array of constitutional violations. Though the frequency of awarding immunity varies with constitutional rights, see Table 1, the Eleventh Circuit began allowing constitutional claims to proceed that prior to Hope would not have survived summary judgment. This is not to say that the Eleventh Circuit became plaintiff-friendly—it’s immunity rates, for example, still far exceeded those in the Sixth Circuit during a comparable time period—but immunity was much less common in the Eleventh Circuit.

The immunity rates for the most common § 1983 claims in the Eleventh Circuit (using the criteria described above) are as follows: First Amendment free-speech cases resulted in qualified immunity 59% of the time;¹³¹ Fourth Amendment excessive force


cases resulted in qualified immunity 54% of the time;\textsuperscript{132} Fourth Amendment search and seizure cases resulted in qualified immunity 62% of the time;\textsuperscript{133} Eighth Amendment

\textit{Arrowwood}, 180 Fed. Appx. 883 (11\textsuperscript{th} Cir. 2006) (reverses denial of qualified immunity); \textit{Gardner v. City of Camilla}, 186 Fed. Appx. 860 (11\textsuperscript{th} Cir. 2006) (same); \textit{Fry v. Hillsborough County School Board}, 190 Fed. Appx. 810 (11\textsuperscript{th} Cir. 2006) (affirms qualified immunity).

\textsuperscript{132} Fifteen of the 28 cases reported resulted in immunity. \textit{See Robinson v. Arragueta}, 415 F.3d 1252 (11\textsuperscript{th} Cir. 2005) (affirms qualified immunity in excessive force case); \textit{Vineyard v. Wilson}, 311 F.3d 1340 (11\textsuperscript{th} Cir. 2002) (reverses qualified immunity in pepper-spray case); \textit{Gonzalez v. Reno}, 325 F.3d 1228 (11\textsuperscript{th} Cir. 2003) (reverses denial of qualified immunity); \textit{McCormick v. City of Ft. Lauderdale}, 333 F.3d 1234 (11\textsuperscript{th} Cir. 2003) (alternatively uses qualified immunity to affirm summary judgment for police officer); \textit{Dalrymple v. Reno}, 334 F.3d 991 (11\textsuperscript{th} Cir. 2003) (reverses denial of qualified immunity); \textit{Vaughan v. Cox}, 343 F.3d 1323 (11\textsuperscript{th} Cir. 2003) (reversing award of qualified immunity), \textit{reversing} 264 F.3d 1027 (2001) (awarding qualified immunity); \textit{Carr v. Tatangelo}, 338 F.3d 1259 (11\textsuperscript{th} Cir. 2003) (affirms award of qualified immunity); \textit{Willingham v. Loughnan}, 321 F.3d 1299 (11\textsuperscript{th} Cir. 2003) (awarding qualified immunity), \textit{affirming} 261 F.3d 1178 (2001) (awarding qualified immunity); \textit{Durruthy v. Pastor}, 351 F.3d 1080 (11\textsuperscript{th} Cir. 2003) (reversing denial of qualified immunity); \textit{Garrett v. Athens-Clarke Co.}, 378 F.3d 1274 (11\textsuperscript{th} Cir. 2004) (reversing denial of qualified immunity); \textit{Kessinger v. Herrington}, 381 F.3d 1243 (11\textsuperscript{th} Cir. 2004) (finding that law of excessive force was not clearly established); \textit{Mercado v. City of Orlando}, 407 F.3d 1152 (11\textsuperscript{th} Cir. 2005) (reversing award of qualified immunity); \textit{Harris v. Coweta County}, 406 F.3d 1307 (11\textsuperscript{th} Cir. 2005) (affirming denial of qualified immunity); \textit{Crosby v. Monroe County}, 394 F.3d 1328 (11\textsuperscript{th} Cir. 2005) (affirming award of qualified immunity); \textit{Bozeman v. Orum}, 422 F.3d 1265 (11\textsuperscript{th} Cir. 2005) (affirming denial of qualified immunity); \textit{Troupe v. Sarasota County}, 419 F.3d 1160 (11\textsuperscript{th} Cir. 2005) (affirming denial of qualified immunity in deadly force case); \textit{Few v. Cobb County}, 147 Fed. Appx. 69 (11\textsuperscript{th} Cir. 2005) (reversing award of qualified immunity); \textit{Sharpley v. Raley}, 153 Fed. Appx. 624 (11\textsuperscript{th} Cir. 2005) (affirming denial of qualified immunity); \textit{Mesadieu v. Llorea}, 153 Fed. Appx. 669 (11\textsuperscript{th} Cir. 2005) (affirming award of qualified immunity); \textit{Sullivan v. City of Pembroke Pines}, 161 Fed. Appx. 906 (11\textsuperscript{th} Cir. 2006) (affirms award of qualified immunity); \textit{LaFavors v. Jenne}, No. 05-14410, slip op. (11\textsuperscript{th} Cir. 2006) (affirms denial of qualified immunity); \textit{Lavender v. Bunn}, 164 Fed. Appx. 962 (11\textsuperscript{th} Cir. 2006) (affirms denial of qualified immunity); \textit{Bashir v. Rockdale Co.}, 445 F.3d 1323 (11\textsuperscript{th} Cir. 2006) (reverses award of qualified immunity); \textit{Bryant v. Witkowski}, 175 Fed.Appx. 297 (11\textsuperscript{th} Cir. 2006) (affirms denial of qualified immunity); \textit{Baltimore v. City of Albany}, 183 Fed. Appx. 891 (11\textsuperscript{th} Cir. 2006) (reverses denial of qualified immunity); \textit{Jones v. City of Atlanta}, 192 Fed. Appx. 894 (11\textsuperscript{th} Cir. 2006) (reverses award of qualified immunity); \textit{Johnson v. Oligivie}, 200 Fed. Appx. 948 (11\textsuperscript{th} Cir. 2006) (affirms denial of qualified immunity); \textit{Walker v. City of Riviera Beach}, 212 Fed. Appx. 835 (11\textsuperscript{th} Cir. 2006) (affirms denial of qualified immunity).

\textsuperscript{133} Eighteen of 29 reported cases resulted in immunity. \textit{See Dahl v. Holley}, 312 F.3d 1228 (11\textsuperscript{th} Cir. 2002) (affirming award of qualified immunity); \textit{Knight v. Jacobson}, 300 F.3d 1272 (11\textsuperscript{th} Cir. 2002) (reversing denial of qualified immunity); \textit{Thomas v. Roberts}, 323 F.3d 950 (11\textsuperscript{th} Cir. 2003) (awarding qualified immunity), \textit{affirming} 261 F.3d 1160 (2001); \textit{McCray v. City of Dothan}, No. 01-15756, slip op. (11\textsuperscript{th} Cir. 2003) (affirming denial of qualified immunity); \textit{Wood v. Kesler}, 323 F.3d 872 (11\textsuperscript{th} Cir. 2003) (reversing denial of qualified immunity); \textit{Holmes v. Kucynda}, 321 F.3d 1069 (11\textsuperscript{th} Cir. 2003) (reversing award of qualified immunity); \textit{Killmon v. City of Miami}, 199 Fed. Appx. 796 (11\textsuperscript{th} Cir. 2006) (affirming denial of qualified immunity); \textit{Evans v. City of Zebulon}, 351 F.3d 485 (11\textsuperscript{th} Cir. 2003) (reversing denial of qualified immunity), \textit{on reh’g}, 407 F.3d 1272 (2005) (affirming denial of qualified immunity for manner of search); \textit{Durruthy v. Pastor}, 351 F.3d 1080 (11\textsuperscript{th} Cir. 2003) (reversing denial of qualified immunity); \textit{Storck v. City of Coral Springs}, 354 F.3d 1307 (11\textsuperscript{th} Cir. 2003) (affirming award of qualified immunity); \textit{Kingsland v. City of Miami}, 369 F.3d 1210 (11\textsuperscript{th} Cir. 2003) (reversing award of qualified immunity), \textit{on reh’g}, 382 F.3d 1220 (2004) (same); \textit{O’Rourke v. Hayes}, 378 F.3d 1201 (11\textsuperscript{th} Cir. 2004) (affirming denial of qualified immunity); \textit{Tropical Aviation Ground Service v. Jenne}, 128 Fed. Appx. 99 (11\textsuperscript{th} Cir. 2005) (affirming denial of qualified immunity); \textit{Migut v. Flynn}, 131 Fed. Appx. 262 (11\textsuperscript{th} Cir. 2005) (affirming award of
prison conditions cases resulted in qualified immunity 44% of the time;\textsuperscript{134} Fourteenth Amendment Procedural Due Process claims resulted in qualified immunity 67% of the time;\textsuperscript{135} Fourteenth Amendment Substantive Due Process claims resulted in qualified immunity 71% of the time;\textsuperscript{136} Equal Protection claims premised on racial discrimination

\textsuperscript{134} Seven out of sixteen reported cases resulted in immunity. \textit{See} Grady v. Haley, 304 F.3d 1329 (11\textsuperscript{th} Cir. 2002) (reversing award of qualified immunity); Cottone v. Jenne, 326 F.3d 1352 (11\textsuperscript{th} Cir. 2003) (affirming denial of qualified immunity for some defendants and awarding qualified immunity to others); Gary v. Modena, No. 05-16973, slip op. (11\textsuperscript{th} Cir. 2006) (reversing award of qualified immunity); Cagle v. Sutherland, 334 F.3d 980 (11\textsuperscript{th} Cir. 2003) (reversing denial of qualified immunity); Magluta v. Samples, 375 F.3d 1269 (11\textsuperscript{th} Cir. 2004) (reversing dismissal based on qualified immunity); Purcell v. Toombs County, 400 F.3d 1313 (11\textsuperscript{th} Cir. 2005) (reversing denial of qualified immunity); Boszeman v. Orum, 422 F.3d 1265 (11\textsuperscript{th} Cir. 2005) (affirming denial of qualified immunity); Snow v. City of Citronelle, 420 F.3d 1262 (11\textsuperscript{th} Cir. 2005) (reversing award of qualified immunity); Kimbell v. Clayton County, 170 Fed. Appx. 663 (11\textsuperscript{th} Cir. 2006) (affirming denial of qualified immunity); Valdes v. Crosby, 450 F.3d 1231 (11\textsuperscript{th} Cir. 2006) (affirming denial of qualified immunity); Moore v. Cullman County, No. 05-13297, slip op. (11\textsuperscript{th} Cir. 2006) (affirming denial of qualified immunity); Brown v. Smith, 187 Fed. Appx. 947 (11\textsuperscript{th} Cir. 2006) (affirming denial of qualified immunity); Mullins v. Cobb County Board of Commissioners, 202 Fed. Appx. 364 (11\textsuperscript{th} Cir. 2006) (reversing denial of qualified immunity); McReynolds v. Alabama Department of Youth Services, 204 Fed. Appx. 819 (11\textsuperscript{th} Cir. 2006) (reversing dismissal based on qualified immunity); Nichols v. Maynard, 204 Fed. Appx. 826 (11\textsuperscript{th} Cir. 2006) (reversing denial of qualified immunity).

\textsuperscript{135} Four out of six cases resulted in immunity. \textit{See} Vineyard v. Wilson, 311 F.3d 1340 (11\textsuperscript{th} Cir. 2002) (awarding qualified immunity); Doe v. Kearney, 329 F.3d 1286 (11\textsuperscript{th} Cir. 2003) (affirming award of qualified immunity); Smith v. Siegelman, 322 F.3d 1290 (11\textsuperscript{th} Cir. 2003) (reversing denial of qualified immunity); Grayden v. Rhodes, 345 F.3d 1225 (11\textsuperscript{th} Cir. 2003) (reversing denial of qualified immunity); Washington v. Baver, 149 Fed. Appx. 867 (11\textsuperscript{th} Cir. 2005) (affirming award of qualified immunity); Hyland v. Kolhage, 158 F.3d 194 (11\textsuperscript{th} Cir. 2005) (reversing award of qualified immunity); Chasse v. McCrane, 174 Fed. Appx. 473 (11\textsuperscript{th} Cir. 2006) (affirming denial of qualified immunity).

\textsuperscript{136} Five out of seven cases resulted in qualified immunity. \textit{See} Dacosta v. Nwachuka, 304 F.3d 1045 (11\textsuperscript{th} Cir. 2002) (reversing denial of qualified immunity); Lumley v. City of Dade City, 327 F.3d 1186 (11\textsuperscript{th} Cir. 2003) (reversing denial of qualified immunity); Omar v. Lindsey, 334 F.3d 1246 (11\textsuperscript{th} Cir. 2003) (affirms denial of qualified immunity); Kirkland v. Greene County Board of Education, 397 F.3d 903 (11\textsuperscript{th} Cir. 2005) (affirming denial of qualified immunity).
resulted in qualified immunity 20% of the time;\textsuperscript{137} and Equal Protection claims premised on gender discrimination resulted in qualified immunity 67% of the time.\textsuperscript{138}

In the Sixth Circuit, by way of comparison,\textsuperscript{139} qualified immunity rates look like this for the same constitutional violations: First Amendment speech cases resulted in qualified immunity 33% of the time;\textsuperscript{140} Fourth Amendment excessive force cases resulted in qualified immunity 20% of the time;\textsuperscript{2003} (affirming denial of qualified immunity); Ray v. Foltz, 370 F.3d 1079 (11th Cir. 2004) (reversing denial of qualified immunity); Tinker v. Beasley, 429 F.3d 1324 (11th Cir. 2005) (reversing denial of qualified immunity); Maldonado v. Snead, 168 Fed. Appx. 373 (11th Cir. 2006) (affirming award of qualified immunity).


\textsuperscript{138} Two out of three cases resulted in qualified immunity. \textit{See} Snider v. Jefferson State Community College, 344 F.3d 1325 (11th Cir. 2003) (affirming award of qualified immunity in context of same-sex harassment); Stuart v. Jefferson County Department of Human Resources, 152 Fed. Appx. 798 (11th Cir. 2005) (concluding that right to be free from gender discrimination is clear and denying qualifying immunity); Williams v. Board of Regents of University System of Georgia, 441 F.3d 1287 (11th Cir. 2006) (affirming award of qualified immunity in context of sexual harassment).

\textsuperscript{139} The Sixth Circuit survey was conducted using the same criteria described above from October 1, 2005 to July 31, 2007. Different dates were used because the Sixth Circuit study was prepared for a separate presentation at the Ohio State Bar Association’s 2007 Federal Bench and Bar Conference in Columbus, Ohio (October 4-5, 2007).

\textsuperscript{140} Six out of 18 cases resulted in qualified immunity. \textit{See} Akridge v. Wilkinson, 178 Fed. Appx. 474 (6th Cir. 2006) (affirms grant of qualified immunity in Pickering-type case because law was not “clear enough”); Brentwood Academy v. TSSAA, 442 F.3d 410 (6th Cir. 2006) (holds that high school athletic association officials are immune even though they violated the First Amendment because law not clear); Harris v. Detroit Public Schools, 245 Fed. Appx. 437 (6th Cir. 2007) (holding that voluntary resignation from public-sector employment not an adverse employment decision actionable under Pickering); Haynes v. City of Circleville, 474 F.3d 357 (6th Cir. 2007) (reversed denial of qualified immunity because plaintiff did not satisfy Garcetti); Barnes v. Wright, 449 F.3d 709 (6th Cir. 2006) (reversed denial of qualified immunity because of Hartman v. Moore); Silberstein v. City of Dayton, 440 F.3d 306 (6th Cir. 2006) (reversed denial of qualified immunity because no violation under Pickering); Teri Lynn Enterprise v. Pickell, 203 Fed. Appx. 687 (6th Cir. 2006) (reversed denial of qualified immunity because of insufficient facts); Logsdon v. Hains, 492 F.3d 334 (6th Cir. 2007) (reversed dismissal where plaintiff was arrested for protesting abortion; law of free speech is clear); Cate v. City of Rockwood, 241 Fed. Appx. 231 (6th Cir. 2007) (no qualified immunity for retaliatory discharge); Lane v. City of LaFollette, 490 F.3d 410 (6th Cir. 2007) (same); Center for Bio-Ethical Reform v. Springboro, 477 F.3d 807 (6th Cir. 2007) (reversed grant of qualified immunity because First Amendment principles are clear); Leonard v. Robinson, 477 F.3d 347 (6th Cir. 2007) (reversed award of qualified immunity for police officer who arrested plaintiff for cursing in
in qualified immunity 26% of the time;\textsuperscript{141} Fourth Amendment search and seizure cases resulted in qualified immunity 59% of the time;\textsuperscript{142} Eighth Amendment prison conditions

\textsuperscript{141} Five out of nineteen cases resulted in qualified immunity. See Roberts v. Manigold, 240 Fed. Appx. 675 (6th Cir. 2007) (holding that taser could be excessive force); Bouggess v. Mattingly, 482 F.3d 886 (6th Cir. 2007) (law of excessive force is clear); Gill v. Loericchio, No. 06-1659, slip op. (6th Cir. 2007) (affirms denial of qualified immunity and eschews fact-finding even though video was present); Griffith v. Coburn, 473 F.3d 650 (6th Cir. 2007) (reversed grant of qualified immunity because of factual issues); McKenna v. City of Royal Oak, 469 F.3d 559 (6th Cir. 2007) (affirms denial of qualified immunity); Pigram v. Chaudoin, 199 Fed. Appx. 509 (6th Cir. 2006) (affirms denial of qualified immunity); Smoak v. Hall, 460 F.3d 768 (6th Cir. 2006) (affirms denial of qualified immunity); Ahkhateeb v. Charter Twp. Of Waterford, 190 Fed. Appx. 443 (6th Cir. 2006) (affirms denial of qualified immunity); Shreve v. Jessamine Cty., 453 F.3d 681 (6th Cir. 2006) (reversed grant of qualified immunity); Sigley v. City of Parma Heights, 437 F.3d 527 (6th Cir. 2006) (reversed award of qualified immunity); Ciminiello v. Streicher, 434 F.3d 461 (6th Cir. 2006) (reversed award of qualified immunity holding that beanbag shot at victim could be excessive); Smith v. Cupp, 430 F.3d 766 (6th Cir. 2005) (affirms denial of qualified immunity); Howser v. Anderson, 150 Fed. Appx. 533 (6th Cir. 2005) (affirms denial of qualified immunity); Harper v. Anweg, 231 Fed. Appx. 405 (6th Cir. 2007) (finding that no genuine issue of fact was presented); Humphrey v. Mabry, 482 F.3d 840 (6th Cir. 2007) (reversed denial of qualified immunity); Ontha v. Rutherford County, 222 Fed. Appx. 498 (6th Cir. 2007) (reversed denial of qualified immunity to supervisory official); Livermore v. Labelan, 476 F.3d 397 (6th Cir. 2007) (reversed denial of qualified immunity because insufficient evidence); Bing v. City of Whitehall, 456 F.3d 555 (6th Cir. 2006) (reversed denial of qualified immunity); Talman v. Elizabethtown Police Department, 167 Fed. Appx. 459 (6th Cir. 2006) (even if excessive force was used, court holds that police have qualified immunity).

\textsuperscript{142} Thirteen out of 22 cases resulted in immunity. See Harper v. Anweg, 231 Fed. Appx. 405 (6th Cir. 2007) (affirming District Court’s finding that probable cause supported arrest); Humphrey v. Mabry, 482 F.3d 840 (6th Cir. 2007) (reversing District Court and awarding qualified immunity to officers who relied on communications with other officers to make stop—even thought they had no probable cause); Nelson v. Riddle, 217 Fed. Appx. 456 (6th Cir. 2007) (reversed district court’s denial of qualified immunity because court of appeals found probable cause for arrest); Franklin v. Miami University, 214 Fed. Appx. 509 (6th Cir. 2007) (same); Smoak v. Hall, 460 F.3d 768 (6th Cir. 2006) (same); Nails v. Riggs, 195 Fed. Appx. 303 (6th Cir. 2006) (holds that even though police officer violated Fourth Amendment he could reasonably have believed he had probable cause); Bing v. City of Whitehall, 456 F.3d 555 (6th Cir. 2006) (reversed denial of qualified immunity by district court and held that police had probable cause); Causey v. Bay City, 442 F.3d 524 (6th Cir. 2006) (reversed denial of qualified immunity because court of appeals finds exigent circumstances justifying warrantless search); Baranski v. Fifteen Unknown Agents of the Bureau of Alcohol, Tobacco and Firearms, 452 F.3d 433 (6th Cir. 2006) (held that reliance on warrant that did not comply with particularity requirement entitled agents to qualified immunity); Armstrong v. City of Melvindale, 432 F.3d 695 (6th Cir. 2006) (reversed denial of qualified immunity because of reliance on defective warrant), or properly relied on an indictment. See Barnes v. Wright, 449 F.3d 709 (6th Cir. 2006)
cases resulted in qualified immunity 42% of the time; 143 Fourteenth Amendment Procedural Due Process claims resulted in qualified immunity 63% of the time; 144 and Fourteenth Amendment Substantive Due Process claims resulted in qualified immunity

(holds that indictment is conclusive proof of probable cause and thus arresting officer is entitled to qualified immunity);

Logsdon v. Hains, 492 F.3d 334 (6th Cir. 2007) (reversed district court’s dismissal and concluded both that Fourth Amendment law on arrest is clear and police did not have probable cause);

Srisavath v. City of Brentwood, 2007 WL 1805773 (6th Cir. 2007) (affirmed district court’s denial of qualified immunity because facts were at issue and law was clear);

Duncan v. Jackson, 243 Fed. Appx. 890 (6th Cir. 2007) (affirms denial of qualified immunity because of factual issues surrounding search and clarity of the law);

McGrav v. Madison Township, 231 Fed. Appx. 419 (6th Cir. 2007) (affirmed denial of qualified immunity because law of arrest is clear);

Keeton v. Metropolitan Government of Nashville, 228 Fed. Appx. 522 (6th Cir. 2007) (affirmed district court’s denial of qualified immunity because law of warrantless entry is clear);

Center for Bio-Ethical Reform v. Springboro, 477 F.3d 807 (6th Cir. 2007) (reversed award of qualified immunity because law of arrest is clear);

Jennifer v. City of Royal Oak, 202 Fed. Appx. 892 (6th Cir. 2007) (affirmed denial of qualified immunity because factual issues surrounded probable cause);

Swieckici v. Delgado, 463 F.3d 489 (6th Cir. 2006) (reversed award of qualified immunity because factual issues existed);

Gregory v. City of Louisville, 444 F.3d 725 (6th Cir. 2006) (affirmed denial of qualified immunity because factual issues surrounded probable cause);


143 Five out of thirteen cases resulted in qualified immunity. See Perez v. Oakland County, 466 F.3d 416 (6th Cir. 2006) (notwithstanding factual issues and assumed constitutional violation, court holds that defendant could not have reasonably known that victim was suicide risk); or (2) the factual records did not support Eighth Amendment claims. See, e.g., Speers v. County of Berrien, 196 Fed. Appx. 390 (6th Cir. 2006) (reversed denial of qualified immunity by district court because facts do not support charge);

Clark-Murphy v. Foreback, 439 F.3d 280 (6th Cir. 2006) (reversed denial of qualified immunity);

Williams v. McLemore, 247 Fed. Appx. 1 (6th Cir. 2007) (holds that law is clear on failure to protect inmate and factual issues precluded qualified immunity);

Hollenbaugh v. Maurer, 217 Fed. Appx. 409 (6th Cir. 2007) (Eighth Amendment and Fourteenth Amendment right to medical assistance is clear; qualified immunity denied);

Cooper v. County of Washtenaw, 222 Fed. Appx. 459 (6th Cir. 2007) (reversed award of qualified immunity because law on suicide is clear);

Carlton v. Turner, No. 05-1009, slip op. (6th Cir. 2006) (reversed award of qualified immunity; prohibition on infliction of wanton pain on inmate is clearly established);


144 Five out of eight cases resulted in qualified immunity. See Thomas v. Cohen, 453 F.3d 657 (6th Cir. 2006) (affirms award of qualified immunity because tenants had no protected property interest);

Hall v. City of Cookeville, 157 Fed. Appx. 809 (6th Cir. 2005) (reversed denial of qualified immunity because no property interest); (2) no deprivation occurred, see Harris v. Detroit Public Schools, 245 Fed. Appx. 437 (6th Cir. 2007) (holds that voluntary resignation is not a deprivation);

Cox v. Drake, 241 Fed. Appx. 237 (6th Cir. 2007) (holds that voluntary decision to vacate residence is not a deprivation); (3) the property interest was not clearly established, see Corbett v. Garland, 228 Fed. Appx. 525 (6th Cir. 2007) (reversed denial of qualified immunity because property interest in job not clear);

Miller v. Administrative Office, 448 F.3d 887 (6th Cir. 2006) (affirms qualified immunity because tenure was not clear); or (4) procedural protections were not clear. See Revis v. Meldrum, 489 F.3d 273 (6th Cir. 2007) (affirms award of qualified immunity because sheriff could not reasonably now that summary eviction violated Due Process);

Stringfield v. Graham, 212 Fed. Appx. 530 (6th Cir. 2007) (reversed award of qualified immunity because factual issues surrounded property interest);

There were no relevant racial or gender discrimination claims that raised or resulted in qualified immunity, suggesting that in these contexts immunity remains rare in the Sixth Circuit.

The change in the Eleventh Circuit cannot be attributed to changes in its heightened pleading requirement or its limited view of precedent, since post-\textit{Hope} it continued to abide by these doctrines. The only change in the Eleventh Circuit was \textit{Hope}. As a by-product, \textit{Hope} forced the Eleventh Circuit to squarely face the problem of factual challenges on interlocutory appeal. Prior to \textit{Hope}, facts were relatively unimportant in the Eleventh Circuit; regardless of what the plaintiff alleged, he likely could not point to a “materially similar” case sufficient to satisfy the Eleventh Circuit’s demanding standard. After \textit{Hope}, however, immunity could not be meted out based on the lack of materially similar reported cases and factual allegations became important.

Two-thirds (38 of 59) of the cases rejecting qualified immunity were handed down at an interlocutory stage. Many of the Eleventh Circuit’s judges recognized that \textit{Johnson v.}

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\textsuperscript{145} All six cases resulted in qualified immunity. \textit{See Meals v. City of Memphis}, 493 F.3d 720 (6\textsuperscript{th} Cir. 2007) (reversed denial of qualified immunity because high speed chase did not shock the conscience); \textit{Smith v. Williams-Ash}, 173 Fed. Appx. 363 (6\textsuperscript{th} Cir. 2005) (reversed denial of qualified immunity because social worker’s conduct did not shock); or constituted only passive behavior that was not actionable under the Constitution. \textit{See Draw v. City of Lincoln Park}, 491 F.3d 550 (6\textsuperscript{th} Cir. 2007) (holds that failure to stop drag race is not actionable under Fourteenth Amendment); \textit{Mitchell v. McNeil}, 487 F.3d 374 (6\textsuperscript{th} Cir. 2007) (holds that plaintiff had no right to be free from police loaning squad car to informant); \textit{Koultz v. Merciez}, 477 F.3d 442 (6\textsuperscript{th} Cir. 2007) (reversed denial of qualified immunity because no right to be free from police conduct releasing drunk driver); \textit{Jackson v. Schultz}, 429 F.3d 586 (6\textsuperscript{th} Cir. 2005) (reversed denial of qualified immunity because no state-created danger).

Jones controlled factual issues on interlocutory appeal.\textsuperscript{147} And without authority to resolve factual disputes, qualified immunity rates decreased significantly in the Eleventh Circuit.

VII. Chasing Harris

The Eleventh Circuit’s decision in \textit{Harris v. Coweta County},\textsuperscript{148} illustrates the Eleventh Circuit’s post-\textit{Hope} qualified immunity analysis. In \textit{Harris}, county deputies chased a motorist (Harris) who was clocked doing 73 mph in a 55-mph-zone. Because Harris refused to stop, a deputy (Scott) eventually decided to ram him and force him off the road. The resulting crash caused serious injuries to Harris and left him a quadriplegic.\textsuperscript{149}

Harris sued Scott (and the county) under § 1983 for excessive force. Because Scott purposely rammed Harris, his action was clearly a Fourth Amendment event. The claim raised by Harris was whether the deputy’s actions were excessive under the Fourth Amendment. Scott moved for summary judgment based on qualified immunity. The District Court refused to award summary judgment because of genuine issues of material

\textsuperscript{147} Not all judges sitting on the Eleventh Circuit agreed that \textit{Johnson v. Jones} limited appellate power to resolve facts. Partly for this reason, immunity rates varied widely among judges on the Eleventh Circuit after \textit{Hope}. Judge Anderson voted to award immunity 39\% of the time (six out of nineteen cases); Judge Barkett’s rate was only 16\% (three out of nineteen cases); Judge Birch awarded immunity 46\% of the time (eleven out of 24 cases); Judge Black’s rate was 39\% (seven out of eighteen cases); Judge Carnes’s rate was 48\% (fifteen out of 31 cases); Judge Dubina’s was 30\% (six out of 20 cases); Judge Edmonson’s was 78\% (fourteen out of eighteen cases); Judge Fay’s was 10\% (one out of ten cases); Judge Hill’s was 50 \% (three out of six cases); Judge Hull’s was 57\% (twelve out of 21 cases); Judge Kravitch’s was 64\% (seven out of eleven cases); Judge Marcus’s was 50\% (twelve out of 24 cases); Judge Pryor’s was 53\% (nine out of seventeen cases); Judge Roney’s was 50\% (two out of four cases); Judge Tjoflat’s was 69\% (twenty out of 29 cases); and Judge Wilson’s was 39\% (eleven out of 28 cases).

\textsuperscript{148} 406 F.3d 1307 (11th Cir.), \textit{affirmed on rehearing}, 433 F.3d 807 (2005), \textit{reversed}, 127 S. Ct. 1769 (2007).

\textsuperscript{149} If the reader has fifteen minutes or so, she may want to view the digital video attached to the Supreme Court’s opinion in \textit{Scott v. Harris}, 127 S. Ct. 1769 (2007) (http://www.supremecourtus.gov/opinions/06slipopinion.html) (As a matter of trivia, this marks the first time the Supreme Court attached a video to an opinion).
fact and Scott took his interlocutory appeal. The Eleventh Circuit, “view[ing] the facts in the light most favorable to the non-moving party, and draw[ing] all reasonable inferences in his favor,” concluded that summary judgment was not warranted.

The Supreme Court reversed in *Scott v. Harris.* After viewing videos of the chase and ramming—which were produced by deputies whose cameras automatically filmed the events—Justice Scalia concluded for the Court that the deputies’ force was not excessive within the meaning of the Fourth Amendment. In reaching this conclusion, Justice Scalia implicitly modified the holding in *Johnson v. Jones:* “When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.”

“[Harris’s] version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.”

Only Justice Stevens dissented: “If two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court’s characterization of events.” Regarding Justice Scalia’s interpretation of the video, Justice Stevens observed that “three judges on the Court of Appeals panel apparently did

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151 *Id.* at 1776.
152 *Id.*
153 *Id.* at 1785 (Stevens, J., dissenting).
view the videotapes entered into evidence and described a very different version of events.”

What does Scott do to Johnson v. Jones? Harris argued before the Supreme Court that it lacked appellate jurisdiction to over factual issues—like the reasonableness of the force used against him. Neither the majority nor the dissent mentioned the matter or cited Johnson v. Jones. Hence, the Supreme Court obviously felt it had jurisdiction regardless of the interlocutory nature of the appeal.

The Circuits following Johnson had uniformly eschewed fact-finding on interlocutory appeal because jurisdiction was lacking. In Hulen v. Yates, for example, where a District Court had denied summary judgment to a defendant who allegedly violated the First Amendment by transferring a public-sector employee, the Tenth Circuit stated that it could “not resolve Defendants' claims that [the plaintiff] cannot show any personal participation by these Defendants in the alleged retaliatory transfer because of his motivation. This is an issue of evidentiary sufficiency, over which we lack jurisdiction in a qualified immunity interlocutory appeal.” Similarly, in Hamilton v. Leavy, a case involving deliberate indifference to a prisoner’s Eighth Amendment rights, the Third Circuit refused to review “the District Court’s ‘identification of the facts that are subject to genuine dispute,’ but instead ... review[ed] the legal issues in light of the facts that the District Court determined had sufficient evidentiary support for summary judgment purposes.”

154 Id.

155 322 F.3d 1229 (10th Cir. 2003).

156 322 F.3d 776, 782 (3rd Cir. 2002).
Of course, one might attempt to distinguish *Scott v. Harris*. For example, one might first claim that the Supreme Court is different from the lower appellate courts. Even though the lower federal courts do not have interlocutory appellate jurisdiction to engage in fact-finding, the Supreme Court can take matters up immediately under its more sweeping appellate powers.

Most appeals are lodged in the Supreme Court under 28 U.S.C. § 1254(1), which authorizes the Court to unilaterally take cases from the United States Courts of Appeals “before or after rendition of judgment.” Still, even though § 1254(1) authorizes the Supreme Court to take cases before judgment, these appeals must still be properly lodged “in” the Court of Appeals first. “A case is properly ‘in’ the court of appeals if the judgment of the district court is an appealable order or otherwise falls within the jurisdiction of the courts of appeals.” Thus, the Supreme Court’s appellate jurisdiction under § 1254(1) derives from the Court of Appeals’ jurisdiction; if the latter has no jurisdiction, then neither does the former. “If there was a jurisdictional defect that would preclude the court of appeals from reaching the merits of the appeal, that defect


158 See ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 76 (8th ed. 2002) (“it is also necessary that the appeal, even though docketed in the court of appeals, be properly ‘in’ that court at the time when the petition for certiorari before judgment is filed”).

159 Id. (citing United States v. Nixon, 418 U.S. 683, 690-92 (1974)).

160 See STERN, supra note 157, at 76 (“Put differently, what the Supreme Court is asked to do by way of granting certiorari before judgment is to render the kind of judgment on the merits of the appeal that the Court of Appeals could have rendered.”).
likewise would prevent the Supreme Court from resolving the merits upon the grant of certiorari before judgment.”

A better jurisdictional argument rests with 28 U.S.C. § 1651, the All Writs Act. This statute has been used on rare occasions to take cases from District Courts when appeals are not otherwise proper. For example, in United States v. Nixon the government argued that its interlocutory appeal to the Supreme Court was proper either under § 1254(1) (because an interlocutory appeal was properly lodged in the Court of Appeals) or § 1651 (regardless of whether a proper appeal was pending below).

According to the government in Nixon, “the All Writs Act … authorizes the Court to issue extraordinary writs like the ‘common law writ of certiorari’ to a lower court, and this power has been used when cases were found not to be pending ‘in’ a court of appeals.” The Supreme Court noted that because jurisdiction was proper under 1254(1), it did not have to “decide whether other jurisdictional vehicles are available.”

Arguing that the Supreme Court in Scott v. Harris took appellate jurisdiction even though the matter was not properly “in” the Eleventh Circuit would seem largely hypothetical, since the Petition sought review under § 1254 and the Court granted

\footnotesize{161 Id.}


\footnotesize{163 418 U.S. 683, 690-92 (1974).}

\footnotesize{164 Supplement Brief for the United States on Appellate Jurisdiction, U.S. v. Nixon, at 15 (June 1974).}

\footnotesize{165 418 U.S. at 692 n.7.}
certiorari without ever mentioning § 1651.\(^{166}\) Harris argued in his Response that the Court lacked jurisdiction under *Johnson v. Jones* and § 1254,\(^ {167}\) and Scott failed to reference § 1651 in his Reply.\(^ {168}\) Coupled with the fact that “orders that are not appealable by reason of their interlocutory nature … may not ordinarily be reviewed through any of the extraordinary writs,”\(^ {169}\) it would seem highly doubtful that *Scott* can be distinguished as a Supreme Court case taken up under the All Writs Act.

Second, *Scott* might be limited to interlocutory appeals that have the benefit of videos. For instance, in *Mecham v. Frazier*,\(^ {170}\) which involved a successful interlocutory appeal following the District Court’s denial of qualified immunity to two police officers who had allegedly used excessive force, the Tenth Circuit cited *Scott* in noting that “[t]he facts are in little doubt since [the] squad car was equipped with a dash-board camera which recorded the incident.”\(^ {171}\) Similarly, in *Marvin v. City of Taylor*,\(^ {172}\) which came to the court on interlocutory appeal, the Sixth Circuit used police video footage that accompanied an arrest to independently judge the reasonableness of the officers’ force.\(^ {173}\)

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\(^{166}\) 127 S. Ct. 468 (2006).

\(^{167}\) Brief for Respondent at 1-3 (Jan. 15, 2007).

\(^{168}\) See Petitioner’s Reply Brief (Feb. 13, 2007).

\(^{169}\) STERN, supra note 157, at 586.

\(^{170}\) 500 F.3d 1200 (10th Cir. 2007).

\(^{171}\) Id. at 1202 n.2.

\(^{172}\) 509 F.3d 234 (6th Cir. 2007).

\(^{173}\) Id. at 240 (stating that “we exercise de novo review, and considering that all parties agree that the video files before this Court should have been before the District Court, this Court will assess the officers’ entitlement to qualified immunity based upon the videos”).
In contrast, where there is no video, it may be that Scott does not apply. The Third Circuit so held in Blaylock v. City of Philadelphia, which involved an allegedly false arrest and excessive use of force by several police officers. Following the District Court’s denial of summary judgment, the Third Circuit in interlocutory appeal observed that “Scott would thus appear to support the proposition that, in this interlocutory appeal, we may exercise some degree of review over the District Court’s determination ....” However, the Third Circuit also observed that “the Court [in Scott] had before it a videotape of undisputed authenticity depicting all of the defendant’s conduct and all of the necessary context that would allow the Court to assess the reasonableness of that conduct.” “Such a scenario may represent the outer limit of the principle of Johnson v. Jones—where the trial court’s determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a court of appeals may say so, even on interlocutory review.” Because it did not “have a situation in which ‘opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it,’” the court found that it lacked appellate jurisdiction.

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174 504 F.3d 405 (3d Cir. 2007).
175 Id. at 414.
176 Id.
177 Id.
178 Id.
179 Id. See also Green v. New Jersey State Police, 246 Fed. Appx. 158, 159 n.1 (3d Cir. 2007) (noting that unlike in Scott the videos were “inconclusive on several of the key disputed facts”).
Third, one might argue that Scott should be limited to mixed questions of law and fact that are reviewed independently by courts of appeals.180 In Ornelas v. United States,181 for example, the Supreme Court ruled that the ultimate question of whether probable cause supported a search was to be addressed independently on appeal: “We think independent appellate review of these ultimate determinations of reasonable suspicion and probable cause is consistent with the position we have taken in past cases. We have never, when reviewing a probable-cause or reasonable-suspicion determination ourselves, expressly deferred to the trial court's determination.”182

Though this interpretation of Scott is appealing—given the case’s Fourth Amendment contours—it runs into two problems: one is precedent while the other is scope. First, the Supreme Court has not decided whether the ultimate question of excessive force is akin to probable cause for purposes of appellate review. Lower courts, moreover, have not commonly ignored Johnson v. Jones simply because an ultimate question of excessive force was raised under the Fourth Amendment.183 Whether force is

180 This was the government’s response in Scott v. Harris. When asked whether the Supreme Court was bound by lower courts’ version of the facts, the government responded at oral argument that “the answer to that question was provided in … Ornelas versus United States, a decision by this Court in 1996 that came up in the context of … a direct criminal appeal involving the question of probable cause. And this Court set forth very clearly that … [the] legal question about whether those facts reasonably give rise to probable cause is an independent [question subject to] de novo review.” Scott v. Harris, 127 S. Ct. 1769 (2007) (Rebuttal by Petitioner at 54-55).


182 Id. at 695.

183 In Cowan v. Breen, 352 F.3d 756 (2d Cir. 2003), for example, the estate of a motorist who was fatally shot by police brought suit for excessive force. The police officer unsuccessfully moved for qualified immunity in the District Court and then took an interlocutory appeal to the Second Circuit. Finding that qualified immunity – “whether it was reasonable for [the police officer] to believe that his life or person was in danger” – constituted the “very question upon which [it and the District Court] found there are genuine issues of material fact,” id. at 764, the Second Circuit affirmed. Although it had jurisdiction to address the interlocutory appeal, it had no authority to revisit the District Court’s assessment of the facts.
reasonable within the constitutional meaning of the term would thus, given the precedent at the time Scott was decided, seem to pretty clearly present a factual issue subject to the usual standards of review on appeal, including Johnson v. Jones.\(^{184}\) Were Scott designed to upset this settled approach, one would expect some sort of explanation. Instead, the Supreme Court’s silence suggests that it believed its holding fit neatly into the established order.

Second, this interpretation of Scott would not only empower appellate courts to sift through denials of summary judgments on interlocutory appeal, it would also invite appellate courts to independently review evidentiary sufficiency following final judgment. This is a lot more medicine than mentioned in Scott. As things stand, a

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\(^{184}\) In Kent v. Katz, 312 F.3d 568 (2d Cir. 2002), for example, the Second Circuit affirmed a District Court’s refusal to award summary judgment and refused to resolve factual issues that surrounded the reasonableness of an arrest. Likewise, in Gray Hopkins v. Prince George’s County, 309 F.3d 224, 229 (4th Cir. 2002), an excessive force case arising under the Fourth Amendment, the Fourth Circuit stated that “to the extent that the appealing official seeks to argue the insufficiency of the evidence to raise a genuine issue of material fact – for example, that the evidence presented was insufficient to support a conclusion that the official engaged in the particular conduct alleged – we do not possess jurisdiction under § 1291 to consider the claim.” See also Hulen v. Yates, 322 F.3d 1229 (10th Cir. 2003) (stating that appellate court could “not resolve Defendants’ claims that [the plaintiff] cannot show any personal participation by these Defendants in the alleged retaliatory transfer because of his motivation. This is an issue of evidentiary sufficiency, over which we lack jurisdiction in a qualified immunity interlocutory appeal.”); Hamilton v. Leavy, 322 F.3d 776, 782 (3d Cir. 2002) (stating that appellate court could not review “the District Court’s ‘identification of the facts that are subject to genuine dispute,’ but instead ... review[ed] the legal issues in light of the facts that the District Court determined had sufficient evidentiary support for summary judgment purposes.”); Cavalieri v. Shepard, 321 F.3d 616, 618 (7th Cir. 2003) (“we have no appellate jurisdiction to the extent disputed facts are central to the case”); Atkinson v. Taylor, 316 F.3d 257, 261 (3d Cir. 2003) (same).
District Court’s final conclusion—whether by bench or a properly instructed jury—that a police officer used reasonable or unreasonable force is subject to deferential review on appeal.\footnote{See, e.g., United States v. Harris, 293 F.3d 863 (5th Cir. 2002) (concluding in criminal civil rights case against police officer for using excessive force that jury’s finding of unreasonable force was supported by sufficient evidence).} The question is whether enough evidence was presented to support the verdict; not whether the verdict is correct. \textit{Scott} would not appear to change this. Rather, it would only seem to hold—consistent with accepted appellate practice—that where a verdict for a § 1983 plaintiff is “blatantly contradicted by the record”—it should be set aside.\footnote{This does not mean that District Courts have blank checks to deny summary judgments to government officials just because there are genuine issues of material fact as to constitutional issues. Qualified immunity doctrine still requires that where the controlling law was unsettled summary judgment is in order. And even when the underlying law is clear, an official might still reasonably (though mistakenly) believe that his actions are lawful. This can hold true, moreover, even though the ultimate factual conclusion (reasonableness of force, for example) is genuinely at issue. The Supreme Court explained this latter possibility in the context of excessive force in \textit{Saucier v. Katz}, 533 U.S. 194 (2001). There, in the course of removing a demonstrator from a military base, the officer allegedly delivered the demonstrator a “gratuitously violent shove.” Observing that the ultimate reasonableness of this shove was genuinely at issue, the District Court denied the officer’s motion for summary judgment based on qualified immunity. The Ninth Circuit affirmed on the ground that the questions of ultimate reasonableness for Fourth Amendment and qualified immunity purposes were one and the same (and both for the jury). The Supreme Court reversed, concluding that there was room between the questions. Even if the officer had shoved the demonstrator in a constitutionally unreasonable fashion, he could have still reasonably believed it to be necessary for purposes of qualified immunity. Notwithstanding that a jury would have had sufficient evidence to return a verdict for the plaintiff, the District Court still could have awarded the officer qualified immunity. Because the Court in \textit{Saucier} went on to determine that the agents’ conduct was not unreasonable for purposes of qualified immunity, one might argue that it offers support for the power of appellate courts to entertain ultimate factual questions on interlocutory appeal—at least where the factual matter is one of ultimate reasonableness for purposes of qualified immunity. Such a reading, however, is not compelled, and would seem to be a bit of a stretch. The Court, after all, granted certiorari on the purely legal question of whether “reasonableness” is necessarily coterminous under the Fourth Amendment and qualified immunity. Neither party raised \textit{Johnson v. Jones} as a potential problem, and the Court never mentioned it either during argument or in its opinion. The facts, according to the Court, were largely “uncontested.” Rather than engage in any fact-finding, the Court simply accepted the plaintiff’s facts and ruled that on these uncontested facts the defendants could have believed they were entitled to use minimal force. A better reading of \textit{Saucier}, therefore, is simply that the officers’ uncontested use of de minimus force was reasonable within the meaning of qualified immunity. Read in this fashion, \textit{Saucier} says little about interlocutory jurisdiction over “ultimate” factual disputes.} The most plausible explanation for \textit{Scott}, then, is a combination of the second and third distinctions. The presence of a conclusive video in the context of an ultimate issue
(such as the reasonableness of a police officer’s force under the Fourth Amendment) justifies de novo review by an interlocutory appellate court. This preserves Johnson v. Jones for all other historical facts (and even ultimate facts in the absence of videos), and also recognizes existing standards of review in the context of final judgments.

CONCLUSION

Following Hope, the Eleventh Circuit was no longer able to rely on minor distinctions between pleaded facts and reported findings in other cases to justify immunity. Appellate judges on the Eleventh Circuit who were interested in awarding qualified immunity as soon as possible began resolving facts on interlocutory appeal. Many of the judges on the Eleventh Circuit thus expressed an eagerness to ignore or distinguish Johnson v. Jones. Armed with the authority to resolve factual controversies on interlocutory appeal, these judges on the Eleventh Circuit continued to award qualified immunity at a relatively high rate even after Hope. To be sure, the frequency of qualified immunity decreased in the Eleventh Circuit following Hope. But it still remained quite high when compared with, say, the Sixth Circuit.

Some judges on the Eleventh Circuit, like those who wrote for the Eleventh Circuit in Harris, adhered to Johnson v. Jones. By holding that factual issues could

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187 See, e.g., Lumley v. City of Dade City, 327 F.3d 1186 (11th Cir. 2003) (delving into factual record to refute plaintiff’s allegation on interlocutory appeal); Cagle v. Sutherland, 334 F.3d 980 (11th Cir. 2003) (engaging in fact-finding to reverse denial of qualified immunity); Wood v. Kesler, 323 F.3d 872 (11th Cir. 2003) (engaging in fact-finding to reverse denial of qualified immunity); Garrett v. Athens-Clarke County, 378 F.3d 1274 (11th Cir. 2004) (weighing evidence in excessive force case); Kessinger v. Herrington, 381 F.3d 1243 (11th Cir. 2004) (same); Kimbell v. Clayton County, 170 Fed. Appx. 663 (11th Cir. 2006) (holding that whether genuine issue of facts exists is a legal question that can be addressed on interlocutory appeal); Paullin v. City of Loxley, 171 Fed. Appx. 773 (11th Cir. 2006) (peruses record to address denial of summary judgment independently); Mullis v. Cobb County, 202 Fed. Appx. 364 (11th Cir. 2006) (addresses facts to reverse denial of qualified immunity); Purcell v. Toombs County, 400 F.3d 1313 (11th Cir. 2005) (using factual matters to reverse denial of qualified immunity in prison condition case).

188 See, e.g., Kadalie v. Board of Regents of University of Georgia, 171 Fed. Appx. 770 (11th Cir. 2006) (stating that Johnson v. Jones precludes appellate court from addressing factual issues); Tepper v.
not be addressed on interlocutory appeal, these judges greatly reduced the frequency of qualified immunity. The overturning of Harris by the Supreme Court, however, is sure to encourage more intense factual review on interlocutory appeal in the future—both on the Eleventh Circuit189 and elsewhere. The result is sure to be more qualified immunity in the future.

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189 See, e.g., Long v. Slaton, 508 F.3d 576 (11th Cir. 2007) (reversing District Court’s denial of summary judgment in excessive force case).