THE QUALIFIED IMMUNITY DEFENSE: WHAT'S "CLEARLY ESTABLISHED" AND WHAT'S NOT

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Qualified immunity is a defense for an official who is being sued in his or her individual capacity for damages. There is no qualified immunity for claims for injunctive relief, nor can an entity or city raise a qualified immunity defense.[1] According to the United States Supreme Court, qualified immunity is meant to protect individual officials not only from liability, but also from suit.[2]

I. OVERVIEW OF THE DEFENSE

The idea behind the qualified immunity defense is to protect officials from being dragged through a burdensome discovery process and trial on insubstantial claims, or on claims that assert violations of law that were not clearly established at the time of the challenged conduct. If the qualified immunity defense is denied, there is a right to an immediate interlocutory appeal on the question of law raised by qualified immunity.[3] An appeal can be taken at the motion to dismiss

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[1] Morse v. Frederick, 127 S. Ct. 2618, 2642 (2007).

[2] Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982).

[3] Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) (holding a qualified immunity defense is separate from the merits of the action and therefore immediately appealable).

stage, the summary judgment stage, or both.[4] An interlocutory appeal should raise the legal question of whether, assuming the facts are as alleged by the plaintiff (at the motion to dismiss stage), or the evidence is sufficient to support a jury's finding of the facts as alleged by the plaintiff (at the summary judgment stage), the plaintiff has asserted the violation of a clearly established federal right. The interlocutory appeal must not be a challenge to the district court's determination that the evidence was sufficient to raise a genuine issue of fact for trial.[5]

Harlow v. Fitzgerald[6] was a watershed case for qualified immunity, jettisoning what was once a subjective component to the test, but retaining the objective component which could more easily be decided as a matter of law by a judge at the early stages of the litigation. Basically, under *Harlow*, a public official performing a discretionary function enjoys qualified immunity in a civil action for damages, provided his or her conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."[7] In the Eleventh Circuit, the defendants have the initial burden to show that a discretionary function was performed, thus

[4] Behrens v. Pelletier, 516 U.S. 299, 309 (1996) ("[R]esolution of the immunity question may 'require more than one judiciously timed appeal,' because the legally relevant factors bearing upon the *Harlow* question will be different on summary judgment than on an earlier motion to dismiss.").

[5] *Id.* at 313 ("*Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified immunity case . . . ."); Johnson v. Jones, 515 U.S. 304, 319-20 (1995) ("[W]e hold that a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial.").

[6] 457 U.S. 800.

[7] *Harlow*, 457 U.S. at 818.

opening the door for a qualified immunity defense.[8]

II. EXTRAORDINARY CIRCUMSTANCES AND REASONABLE RELIANCE

In *Harlow*, the Court indicated there may be some cases where, although the law was clearly established, "if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained."[9] This rare "extraordinary circumstances" exception is applied generally in the situation where the defendant official has relied on advice of counsel or on a statute, ordinance, or regulation that is presumptively constitutional. In most of the cases, courts hold that reliance on the advice of counsel or a prosecutor is a factor to be considered, but not a determinative factor.[10] A defendant arguing that the prosecutor, or city attorney, advised him that he could engage in the activity or that he had probable cause, is not automatically entitled to qualified immunity. Certainly, where an officer manipulates the facts or misleads the prosecutor to establish probable cause, the officer cannot claim qualified immunity based on the advice then given by the misled prosecutor.[11]

The Second Circuit decision in *Connecticut ex rel. Blumenthal v. Crotty*[12] established the law pertaining to extraordinary cir-

[8] *See* Griffin Indus., Inc. v. Irvin, 496 F.3d 1189, 1199 (11th Cir. 2007).

[9] *Harlow*, 457 U.S. at 819.

[10] *See, e.g.*, Cox v. Hainey, 391 F.3d 25, 34-35 (1st Cir. 2004) ("[T]he fact of the consultation and the purport of the advice obtained should be factored into the totality of the circumstances and considered in determining the officer's entitlement to qualified immunity.")

[11] Sornberger v. City of Knoxville, 434 F.3d 1006, 1016 (7th Cir. 2006).

[12] 346 F.3d 84 (2d Cir. 2003).

cumstances arising from reliance on a statute. If a police officer relies on a statute that is presumptively constitutional and the court declares the statute to be unconstitutional, then the officer will usually have qualified immunity. Reliance on a presumptively valid statute that is not clearly unconstitutional will usually result in qualified immunity even if the court decides the conduct was unlawful.[13]

However, the presumption was not applied in the Tenth Circuit's decision in *Boles v. Neet*.[14] In *Boles*, a prison warden relied on a regulation that required prisoners to wear orange jumpsuits and shoes or slippers when they were being transported. The warden relied on that statute when he denied a prisoner the right to wear religious garb. This turned out to be a violation of the prisoner's rights and the court held the warden was not protected by reliance on the regulation.[15] The warden argued he was entitled to qualified immunity because he relied on the regulation. The court disagreed, holding the regulation implicitly supported his position, but did not explicitly support it, and the prisoner had a clearly established right to practice his religion or wear religious garb.[16]

Likewise, in *Lawrence v. Reed*,[17] a sheriff was denied qualified immunity where he had relied on both a local ordinance and advice of the city attorney. In *Lawrence*, a derelict vehicle ordinance was in effect and the sheriff wanted to clean up a lot that had junk

[13] *See Crotty*, 346 F.3d at 108-09.
[14] 486 F.3d 1177, 1184 (10th Cir. 2007).
[15] *Boles*, 486 F.3d at 1184.
[16] *Id.*
[17] 406 F.3d 1224 (10th Cir. 2005) (holding reliance on a statute does not, per se, confer qualified immunity on a state officer).

cars on it. The sheriff went to the city attorney and asked for advice on how to properly remove the cars from the property in light of the vehicle ordinance that gave the sheriff permission to do so.[18] The city attorney advised the sheriff that the ordinance applied and that he could remove the vehicles. The sheriff had the cars removed and was sued as a result. The Tenth Circuit held this was a deprivation of property without due process and denied the sheriff the qualified immunity defense.[19] The sheriff argued the ordinance allowed the removal and that the city attorney agreed. But the court disagreed, holding it is common knowledge that an official cannot remove something from another's property without providing due process.[20] The dissent argued the court's decision requires sheriffs, prior to acting, not only to consult the city attorney and read the law personally, but also get the advice of local law professors as to whether his actions are legal.[21]

III. MANDATORY "CONSTITUTIONAL-QUESTION-FIRST" APPROACH TO ANALYSIS

The Supreme Court has long advised lower courts on how to conduct the qualified immunity analysis. Starting with *Siegert v. Gil-*

[18] *Lawrence*, 406 F.3d at 1229.

[19] *Id.* at 1232-33 (applying a reasonableness test to determine qualified immunity and explaining "officers are not always entitled to rely on the legislature's judgment that a statute is constitutional").

[20] *Id.* at 1233.

[21] *Id.* at 1236-39 (Hartz, J., dissenting). Judge Hartz lambasts the majority, arguing *Harlow* was misinterpreted and, as a result, officials like the defendant are forced into untenable situations. Judge Hartz demands to know whether similarly situated officials, to avoid losing their immunity, are to "go to the law library to check whether the City Attorney has misread the cases" or "call a professor at the nearest law school." *Id.* at 1238-39.

ley,[22] the Supreme Court suggested as the better approach, and later mandated as the required approach,[23] that lower courts, when confronted with the qualified immunity defense, first decide whether, under the current law, the plaintiff has asserted the violation of a constitutional right at all.[24] Only if the plaintiff actually states a claim under current law should the lower courts ask whether that law or right was clearly established at the time of the challenged conduct.[25]

This "constitutional-question-first" approach assures that the law will develop and clear standards will be announced to apply to conduct in the future. If the lower courts went directly to the "clearly-established-law" prong of the analysis, without answering the first question, then the law would remain stagnant and unclear, depriving both officials and citizens of established standards governing particular conduct. Thus, the Supreme Court wanted the lower courts to first decide the constitutional merits question on the facts asserted by the plaintiff, or, if at summary judgment stage, on the facts the district court assumes to be supported by the evidence. The court should decide whether this is a protected right under current law first, and only then turn to determining whether the right was

[22] 500 U.S. 226 (1991).

[23] *See, e.g.*, Connecticut v. Gabbert, 526 U.S. 286, 290 (1999) ("[A] court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.").

[24] *Siegert*, 500 U.S. at 232 (establishing the first analytical step as determining whether a clearly established constitutional right was violated, but noting it is a "necessary concomitant to [this] determination" to decide "whether the plaintiff has asserted a violation of a constitutional right *at all*" (emphasis added)).

[25] Scott v. Harris, 127 S. Ct. 1769, 1774 (2007) (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)).

clearly established.[26]

There has been considerable resistance to and criticism of this mandated approach, and my guess is the mandatory nature of the analysis will likely change in the not-too-distant future. It is just a matter of getting the right case before the Court where five votes will agree that this approach is not mandatory and should be adopted where it makes sense.[27] *Mellen v. Bunting*[28] was a case in which the Supreme Court denied certiorari after the Fourth Circuit performed the two-part analysis. The Court of Appeals first decided whether the plaintiff asserted a violation of a constitutional right.[29] This claim challenged the constitutionality of a mandatory supper prayer at the Virginia Military Institute ("VMI"), a public institution. The Court of Appeals found that mandatory prayer violated the First Amendment, but granted qualified immunity to the head of the school, the official being sued in his individual capacity, on the ground that the law was not clearly established at the time.[30]

The Supreme Court denied certiorari but a number of the Justices made comments respecting the denial.[31] Justice Stevens, joined by Justice Ginsburg and Justice Breyer, noted the problem posed by

[26] *Id.*

[27] The Court recently acknowledged "doubt expressed regarding the wisdom of [the] *Saucier*[] decision . . . especially in cases where the constitutional question is relatively difficult . . . ." *Id.* at 1774 n.4. *See also Morse*, 127 S. Ct. at 2641 (Breyer, J., concurring in part and dissenting in part) (noting *Saucier* should be abandoned because it forces courts to pass on constitutional issues even where the case could be determined on the immunity issue with "relative ease"); Wilkie v. Robbins, 127 S. Ct. 2588, 2617 n.10 (2007) (Ginsburg, J., concurring in part and dissenting in part, joined by Stevens, J.) ("As I have elsewhere indicated, in appropriate cases, I would allow courts to move directly to the second inquiry.").

[28] Mellen v. Bunting, 327 F.3d 355 (4th Cir. 2003).

[29] *See Bunting*, 327 F.3d. at 365-68.

[30] *Id.* at 360.

[31] Bunting v. Mellen, 541 U.S. 1019 (2004).

an "unwise judge-made rule under which courts must decide whether the plaintiff has alleged a constitutional violation before addressing the question whether the defendant state actor is entitled to qualified immunity."[32] Justice Scalia, joined by then Chief Justice Rehnquist, dissented from the denial of certiorari, urging that "this general rule [of refusing to entertain an appeal by a party on an issue as to which he prevailed] should not apply where a favorable judgment on qualified-immunity grounds would deprive a party of an opportunity to appeal the unfavorable (and often more significant) constitutional determination."[33] Likewise, a number of lower court judges have been critical of the mandatory constitutional-question-first approach, suggesting that courts be allowed to avoid deciding a tough constitutional question where there is a lack of a strong record and briefs.[34]

Despite the criticism leveled at the approach, it does remain

[32] *Id.* (explaining the constitutional-question-first approach is an inflexible rule requiring "premature adjudication of constitutional issues" and relaxing the rule could resolve Justice Scalia's "perceived procedural tangle").

[33] *Id.* at 1023 (Scalia, J., dissenting, joined by Rehnquist, C.J.).

[34] *See, e.g.*, McClish v. Nugent, 483 F.3d 1231, 1253 n.1 (11th Cir. 2007) (Anderson, J., concurring specially) (criticizing the mandatory constitutional-question-first approach and noting that "twenty-eight states and Puerto Rico have recently urged the Supreme Court in an amicus brief to reconsider its mandatory *Saucier* approach to qualified immunity" (citing Brief for the State of Illinois et al. as Amici Curiae Supporting Petitioner, *Scott*, 127 S. Ct. at 1769 (No. 05-1631), 2006 WL 3747719)); Robinette v. Jones, 476 F.3d 585, 593 n.8 (8th Cir. 2007) ("[T]he 'law's elaboration from case to case,' would be ill served by a ruling here, where the parties have provided very few facts to define and limit any holding on the reasonableness of the execution of the arrest warrant." (citation omitted)); Buchanan v. Maine, 469 F.3d 158, 168 (1st Cir. 2006) ("We do not think the law elaboration purpose will be well served here, where the Fourth Amendment inquiry involves a reasonableness question which is highly idiosyncratic and heavily dependent on the facts."); Hydrick v. Hunter, 449 F.3d 978, 988 (9th Cir. 2006) (repeating the observation that "a motion to dismiss on qualified immunity grounds puts the court in the difficult position of deciding 'far-reaching constitutional questions on a nonexistent factual record' " (quoting Kwai Fun Wong v. United States, 373 F.3d 952, 957 (9th Cir. 2004))); Lyons v. City of Xenia, 417 F.3d 565, 583 (6th Cir. 2005) (Sutton, J., concurring, joined by Gibbons, J.) (urging the Supreme Court to "permit lower courts to make reasoned departures from *Saucier*'s inquiry where principles of sound and efficient judicial administration recommend a variance").

mandated, and there are many examples of courts following the "rigid 'order of battle.' "[35] For example, in *Harveston v. Cunningham*[36] the Ninth Circuit held, on the first prong of the analysis, that a jury could find that the use of pepper spray on an individual who was handcuffed was objectively unreasonable. The court went on to grant qualified immunity on the clearly-established prong of the test, concluding that, although the suspect was handcuffed, he was still resisting, and a reasonable officer could have believed the use of pepper spray under such circumstances was lawful.[37]

Another example, from the Eleventh Circuit, is *McClish v. Nugent*[38] which held one cannot "assume an answer to the first question in order to avoid difficult constitutional issues."[39] The court decided a tough issue involving an individual who stood on the threshold of his home, opened the door when an officer knocked, and was pulled outside. The man, who was then outside of his home, was arrested, but the police did not have a warrant. Is that a legitimate arrest in light of the Fourth Amendment protection against warrantless arrests inside one's home? While the court held that this was a violation of the Fourth Amendment, the law was not clearly established, so the officer was entitled to qualified immunity.[40] If a similar situation arises again, at least in the Eleventh Circuit, an officer engaged

[35] Brosseau v. Haugen, 543 U.S. 194, 201-02 (2004) (Breyer, J., concurring, joined by Scalia, J. and Ginsburg, J.).

[36] 216 F. App'x. 682 (9th Cir. 2007).

[37] Harveston, 216 F. App'x at 685.

[38] 483 F.3d 1231, 1238.

[39] *McClish*, 483 F.3d at 1238.

[40] *Id.* at 1248. For reasoning that leads to the opposite conclusion on the constitutional question, see McKinnon v. Carr, 103 F.3d 934, 935-36 (10th Cir. 1996).

in such conduct would not be entitled to qualified immunity; the law is now clearly established that this conduct violates the Fourth Amendment.

The Supreme Court has consistently framed the qualified immunity analysis as involving two steps. The first question is whether there is a constitutional violation asserted at all, and the second question is whether the law was clearly established such that a reasonable officer or official would understand that his or her conduct violates that right. There are some circuit courts of appeals, however, that seem to prefer a waltz to the two-step. The First Circuit adds a third step: "whether an objectively reasonable official would have believed that the action taken violated that clearly established constitutional right."[41] The Sixth Circuit has a third step in some cases and not in others.[42] This third step can be considered an elaboration of the second step. Some courts treat the three-part analysis as func-

[41] *See* Wilson v. City of Boston, 421 F.3d 45, 52 (1st Cir. 2005) (prescribing a three-part test).

[42] *See* Miller v. Administrative Office of the Courts, 448 F.3d 887 (6th Cir. 2006).

> In determining whether a law enforcement officer is shielded from civil liability due to qualified immunity, this court typically employs a two-step analysis: "(1) whether, considering the allegations in a light most favorable to the party injured, a constitutional right has been violated, and (2) whether that right was clearly established." This court occasionally considers a third step in the qualified immunity analysis, in addition to the two steps listed above. . . . When utilized, this third step requires an inquiry into "whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights."

Id. 893-96. *See* Causey v. City of Bay City, 442 F.3d 524, 528 n.2 (6th Cir. 2006) ("[T]his court occasionally employ a three-step qualified immunity analysis, as opposed to the two-step analysis . . . . The third step is 'whether the plaintiff offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.' " (internal citations omitted)).

tionally identical to the *Saucier* two-part analysis,[43] however, Judge Howard, in his concurring opinion in *Higgins*, argues otherwise.[44] Judge Howard stated that there could be a different outcome in some cases based on this third step. In essence, he believes the third step is part of the merits question. Judge Howard conceived of a situation where a court finds a constitutional deprivation at step one, but at step three decides the conduct was objectively reasonable and thus gives the officer qualified immunity. In such a situation, the court should not have decided there was a deprivation at step one.[45] In other words, if the conduct was in fact objectively reasonable at step one, Judge Howard would argue there is no constitutional violation. He believes step three is unnecessary and opens up the possibility for inconsistent results.

A case out of the Second Circuit, *Walczyk v. Rio*,[46] also used a third step, but phrased it differently than the First Circuit. "Even if the right at issue was clearly established in certain respects . . . an officer is still entitled to qualified immunity if 'officers of reasonable competence could disagree' on the legality of the action at issue in its particular factual context."[47] After the court went through the steps, Judge Sotomayor's concurring opinion made some especially good points.[48] Judge Sotomayor said this third step unnecessarily confused

[43] *See* Higgins v. Penobscot County Sheriff's Dep't, 446 F.3d 11, 15 (1st Cir. 2006) (Howard, J., concurring).

[44] *Id.* at 17.

[45] *Id.*

[46] 496 F.3d 139 (2d Cir. 2007).

[47] *Walczyk*, 496 F.3d at 154 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

[48] *Id.* at 165-71 (Sotomayor, J., concurring).

the analysis.[49] She argued that it permits the court to decide official conduct was reasonable even after finding it violated clearly established law of which a "a reasonable officer should have known."[50] For those who litigate in the Second Circuit and other circuits who prefer the waltz over the two-step, be aware that the third step tends to favor defendants in Section 1983 cases because it provides defendants with yet another opportunity to succeed on qualified immunity grounds.

IV. DISCOVERY PRIOR TO RESOLUTION OF QUALIFED IMMUNITY

Defendants routinely object to any sort of discovery by the plaintiff before the qualified immunity issue is resolved. In some cases, limited discovery may be needed on the qualified immunity issue to properly establish the contours of the right in question. A court may defer its decision on the immunity question, allow limited discovery to achieve the requisite factual development and decide the issue on summary judgment. In *Crawford-El v. Britton*,[51] the Supreme Court noted that qualified immunity should serve to protect public officials from "the costs of 'broad-reaching' discovery," but also recognized that "limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity."[52]

[49] *Id.* at 171.
[50] *Id.* at 169.
[51] 523 U.S. 574 (1998).
[52] *Crawford-El*, 523 U.S. at 593 n.14.

For example, the Second Circuit case *Iqbal v. Hasty*[53] involved a citizen of Pakistan who was arrested, detained, convicted, and deported shortly after September 11. His complaint was not about the arrest, detention, nor the deportation, but rather that he was tortured when he was being held. One of the issues raised was whether the warden of the prison had qualified immunity. The Second Circuit remanded the case to the district court, stating that limited discovery would be appropriate to determine the personal involvement of certain high-level officials named as defendants and discovery of high-level officials might be postponed until discovery of front-line officials was completed.[54] Courts generally limit discovery to facts that are necessary to decide the qualified immunity issue.

Hagan v. City of Cleveland,[55] from the Northern District of Ohio, is an interesting case because it is a good example of a court allowing discovery on a very limited basis. The decedent was pursued by police officers, resulting in a shooting.[56] The officer who shot the decedent claimed there was a struggle for the officer's gun and, fearing for his own safety, the officer shot the decedent.[57] The plaintiff wanted extensive discovery to reconstruct the events, step-by-step as they occurred, which eventually culminated in the shooting.[58] The district court refused, allowing only limited discovery with regard to evidence directly related to the disputed events taking

[53] 490 F.3d 143 (2d Cir. 2007).
[54] *Iqbal*, 490 F.3d at 177-78.
[55] No. 1:06CV2507, 2007 WL 893825 (N.D. Ohio Mar. 22, 2007).
[56] *Hagan*, 2007 WL 893825 at *5.
[57] *Id.*
[58] *Id.* at *7.

place at the location of the shooting.[59]

Some cases involve a municipality, which is not entitled to receive qualified immunity.[60] A court may decide to let discovery proceed with respect to the municipality and stay discovery with respect to individual defendants. A court could also somehow limit discovery so as not to violate the protection afforded the individual defendant by the qualified immunity defense. In *Alice L. v. Dusek*,[61] the Fifth Circuit allowed discovery to proceed against an individual defendant with respect to Title IX claims asserted against the school district, although the individual defendant was on appeal from a denial of qualified immunity with respect to section 1983 claims asserted against her in her individual capacity.[62]

V. DETERMINING WHEN LAW IS CLEARLY ESTABLISHED

In *Wilson v. Layne*,[63] the plaintiff argued that police officers violated the Fourth Amendment when they brought a Washington Post reporter with them into a private home during the execution of a warrant.[64] The Supreme Court unanimously held there was a violation of the Fourth Amendment.[65] The Court went as far back as 1604 to *Semayne's Case*,[66] and to Blackstone's Commentaries, both es-

[59] *Id.* at *8.

[60] *See, e.g.*, Goldberg v. Town of Rocky Hill, 973 F.2d 70, 73-74 (2d Cir. 1992) (citing Owen v. City of Independence, 445 U.S. 622 (1980)).

[61] 492 F.3d 563 (5th Cir. 2007).

[62] *Alice L.*, 492 F.3d at 565. *See also* Tubar v. Clift, No. C05-1154JCC, 2006 WL 521683, at *2-4 (W.D. Wash. Mar. 2, 2006) (allowing discovery to proceed against a municipality while limiting discovery as to individual officers raising qualified immunity).

[63] 526 U.S. 603 (1999).

[64] *Wilson*, 526 U.S. at 607-08.

[65] *Id.* at 614.

[66] (1604) 77 Eng. Rep. 194, 195 (K.B.).

pousing the concept that a man's home is his castle.[67] In the second part of the analysis, the Court held that the law was not clearly established. Justice Stevens disagreed and argued the law *was* clearly established in such a way that an officer would have understood bringing the press into a private home was a violation of the Constitution.[68]

The Court pointed to three sources that might clearly establish the law. One was decisions of the Supreme Court that stated either general principles or principles on point applicable to the facts of the particular case. The second was controlling authority from the jurisdiction—that circuit's court of appeals or the highest court of the state in which the case was sitting. Finally, the Court indicated that, absent controlling precedent from one's own circuit, one could look outside the jurisdiction for "a consensus of cases of persuasive authority."[69] In the absence of controlling authority, the majority of circuits will consider cases from other jurisdictions on the clearly-established-law prong of the analysis. Neither the Second Circuit nor the Eleventh Circuit will consider case law from other circuits in deciding whether the law was clearly established.[70] The Second Circuit

[67] *Wilson*, 526 U.S. at 609-10 (citing WILLIAM BLACKSTONE, 4 COMMENTARIES *223).

[68] *Id.* at 619-21 (Stevens, J., concurring in part and dissenting in part).

[69] *Id.* at 617 (majority opinion).

[70] *See, e.g.*, Pabon v. Wright, 459 F.3d 241, 255 (2d Cir. 2006) ("When neither the Supreme Court nor this court has recognized a right, the law of our sister circuits and the holdings of district courts cannot act to render that right clearly established within the Second Circuit."); Vinyard v. Wilson, 311 F.3d 1340, 1348 & n.11 (11th Cir. 2002) ("Although we cite and examine other circuits' and district courts' decisions under the first prong of *Saucier*, we point out that these decisions are immaterial to whether the law was 'clearly established' in this circuit for the second prong of *Saucier*."); Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821, 827 n.4 (11th Cir. 1997) ("In this circuit, the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose.").

has a specific test to identify clearly established law.[71]

In *Saucier v. Katz*,[72] *Hope v. Pelzer*,[73] and *Brosseau v. Haugen*,[74] the Supreme Court addressed the problem of defining the contours of the right in the Fourth Amendment and Eighth Amendment contexts. It is no accident that these three cases came from the Ninth and Eleventh Circuit because these circuits are clearly on the edge in terms of defining the right for qualified immunity purposes. In the Ninth Circuit, prior to *Saucier*, an excessive force case would almost always go to a jury because it was considered clearly established that the use of objectively unreasonable force was excessive and violated the Fourth Amendment. Whether a particular use of force was objectively unreasonable was generally a question of fact for the jury.[75] In the Eleventh Circuit, very few cases went to a jury. The law was never clearly established unless there was a case with "materially similar facts."[76]

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[71] The Second Circuit follows a three-factor test to determine when a right is "clearly established" for the purposes of a qualified immunity analysis:

> (1) whether the right in question was defined with "reasonable specificity"; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful.

Jermosen v. Smith, 945 F.2d 547, 550 (2d Cir. 1991).

[72] 533 U.S. 194.

[73] 536 U.S. 730 (2002).

[74] 543 U.S. 194 (2004).

[75] Note that in *Scott*, the Supreme Court held that where the facts are undisputed, the Fourth Amendment question of objective reasonableness is a "pure question of law." *Scott*, 127 S. Ct. at 1776 n.8.

[76] *See, e.g.*, Ensley v. Soper, 142 F.3d 1402, 1406 (11th Cir. 1998) ("Any case law that a plaintiff relies upon to show that a government official has violated a clearly established right must pre-date the officer's alleged improper conduct, involve materially similar facts, and 'truly compel' the conclusion that the plaintiff had a right under federal law."); Lassiter v. Alabama A & M Univ., 28 F.3d 1146, 1150 (11th Cir. 1994) ("For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow

In *Saucier*, *Hope*, *and Brosseau*, the Supreme Court talks out of both sides of its mouth. The Court criticized the Ninth Circuit for being too loose in its analysis and advised that the court should consider more facts and define the right with more particularity. Would an objectively reasonable officer in these particular circumstances understand that his or her conduct violated a constitutional right? In *Brosseau*, the Court reversed the denial of qualified immunity on prong two of the analysis because the plaintiff pointed to no case that "squarely govern[ed]" the situation confronting Officer Brosseau in that case, "whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight."[77]

In *Hope*, the plaintiff alleged that he was handcuffed to a hitching post for seven hours in the hot sun, without bathroom breaks and with no or very little water.[78] The Eleventh Circuit held that the alleged conduct violated the Eighth Amendment, but affirmed the district court's grant of qualified immunity on the clearly-established-law prong of the analysis.[79] The Supreme Court granted certiorari and agreed with the Eleventh Circuit's conclusion that the plaintiff had asserted a violation of the Eighth Amendment.[80] The Court reversed, however, as to the grant of qualified immunity. The Court explained:

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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*.").

[77] *Brosseau*, 543 U.S. at 200-01.

[78] *Hope*, 536 U.S. at 734-35.

[79] *Id.* at 736.

[80] *Id.* at 737.

> Our opinion in *Lanier* thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in *Lanier*, we expressly rejected a requirement that previous cases be "fundamentally similar." 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. Accordingly, pursuant to *Lanier*, the 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.[81]

The Court held that fair warning was given as to the unconstitutionality of the use of the hitching post for punitive purposes. First, the Court suggested that its own Eighth Amendment precedent gave respondents fair warning that their conduct was unconstitutional.[82] Second, binding Eleventh Circuit precedent clearly established that handcuffing inmates to fences and cells for long periods of time was impermissible punishment.[83] The Court found unreasonable the distinction drawn by the court of appeals between handcuffing an inmate to a fence or cell for a prolonged period and handcuffing him to a

[81] *Id.* at 741.

[82] *Id.* See Whitley v. Albers, 475 U.S. 312, 319 (1986) (finding unnecessary and wanton infliction of pain constitutes cruel and unusual punishment); Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (finding inflictions of pain without penological justification violate Eighth Amendment).

[83] *Hope*, 536 at 742-43 (citing Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974)). Cases decided by the Fifth Circuit before 1981 are binding in the Eleventh Circuit today. *See* Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981). The Court also noted *Ort v. White*, 813 F.2d 318, 324 (11th Cir. 1987), which stood for the premise that "physical abuse directed at [a] prisoner after he terminate[s] his resistance to authority would constitute an actionable eighth amendment violation." The Court found this premise clearly applicable to Hope's case.

hitching post for seven hours, a distinction that "expose[d] the danger of a rigid, overreliance on factual similarity."[84]

Plaintiffs will cite to *Hope*. All that is needed is "fair warning" for the law to be clearly established. The defendants point to the language from *Saucier* and *Brosseau*, cases where the Supreme Court has required the right to be framed with more particularity and with facts that would indicate to a reasonable officer that his conduct violated the Fourth Amendment. There is something for everyone in the language of the Supreme Court, which is part of the confusion surrounding qualified immunity.

There is a case in the Eleventh Circuit that serves as a good framework for conducting the clearly-established-law analysis. In *Vinyard*, the court identifies three ways in which "fair and clear notice can be given."[85] First, there may be a case of "obvious clarity" where words of a federal statute or constitutional provision are so clear and the conduct so bad that anyone would know this was a violation of clearly established law.[86] For example, in *Tekle v. United States*,[87] more than twenty police officers surrounded an eleven-year-old boy. Is there any need to have weapons drawn and put the boy in handcuffs for twenty minutes? The court says that conduct is clearly unlawful. In *Jennings v. Jones*,[88] a case from the First Circuit, a police officer increased the use of force by twisting the plaintiff's ankle, even after the plaintiff became compliant, until the ankle broke.

[84] *Hope*, 536 U.S. at 742.
[85] *Vinyard*, 311 F.3d at 1350-53.
[86] *Id.* at 1350.
[87] 511 F.3d 839, 850 (9th Cir. 2007).
[88] 499 F.3d 2, 6 (1st Cir. 2007).

These are cases where a court may conclude that a reasonable officer would understand the alleged conduct is unlawful even without a similar case on point.

In the second category, there may exist broad statements of the law or principles rendered in prior decisions on a set of facts different from those before the court, but those principles can be applied "with obvious clarity" to the case currently in front of the court.[89] One example is the Second Circuit case of *Jones v. Parmley*.[90] In *Jones*, the Second Circuit held that general principles announced by the Supreme Court with respect to police interference with demonstrations and the requirement that there be "clear and present danger" presented by the demonstrators before such interference was justified, applied with obvious clarity to the facts in the case before it. Given the overall orderly, peaceful nature of the protest, reasonable officers would have known that charging the crowd and arresting protesters indiscriminately violated clearly established law.[91]

Holloman ex rel. Holloman v. Harland[92] is also a good example of a court applying general principles of law announced in Supreme Court decisions to a case involving a different factual setting. In *Holloman*, the Eleventh Circuit held that the principles flowing from the Supreme Court decisions in *Tinker v. Des Moines Independent Community School District*[93] and *Burnside v. Byars*,[94] cases in-

[89] *Vinyard*, 311 F.3d at 1351.
[90] 465 F.3d 46 (2d Cir. 2006).
[91] *Jones*, at 60-61.
[92] 370 F.3d 1252 (11th Cir. 2004).
[93] 393 U.S. 503 (1969).
[94] 363 F.2d 744 (5th Cir. 1966).

volving a student's right to free expression, applied with obvious clarity to the situation where a teacher punished a student for raising his arm in a fist during recitation of the Pledge of Allegiance.[95]

Yet another example of a court holding that general principles declared in one setting could clearly establish the law in a different factual context is *Landis v. Cardoza*.[96] In *Landis*, the district court concluded that Sixth Circuit decisions in cases involving the unwarranted use of pepper spray applied with obvious clarity in a case of an unwarranted use of a Taser.[97] Because it was clearly established that police officers must refrain from using pepper spray on an unresisting person, the *Landis* court, considering pepper spray analogous to Tasers, denied the officers qualified immunity.[98]

Where the facts before the court do not present conduct that is clearly unlawful under the wording of the statutory or Constitutional provision invoked, and where general principles of law do not apply with obvious clarity to this different set of facts, the Eleventh Circuit in *Vinyard* suggests that "precedent that is tied to the facts" of the present case will be needed to give "fair and clear notice" of the unlawful nature of the conduct.[99] This may involve cases where the court determines that no officer could ascertain from the general principles that certain conduct violated those general principles. To

[95] *Holloman*, 370 F.3d at 1278-79.

[96] 515 F. Supp. 2d 809 (E.D. Mich. 2007).

[97] *Landis*, at 814-15.

[98] *Id.* *Landis* involved death that resulted from a man allegedly resisting arrest. In denying summary judgment to the police officers, the judge noted the decedent was allegedly beat with nightsticks, stunned with a Taser, hit with pepper spray and held with his head under water while handcuffed. *Id.* at 812-13.

[99] *Vinyard*, 311 F.3d at 1350-51 (emphasis omitted).

properly put the officer or official on notice, a more fact-specific kind of precedent must be in place, precedent that cannot be distinguished in a fair way from the facts of the present case. For example, in *Campbell v. Galloway*,[100] the Fourth Circuit held that the broad legal principle "that public employees may not be fired on a basis that infringes on their First Amendment rights" was insufficient to give a reasonable chief of police notice that plaintiff's speech in the present case was on a matter of public concern and protected.[101]

VI. ROLE OF THE JUDGE AND JURY IN QUALIFIED IMMUNITY

Often, qualified immunity cannot be resolved prior to trial or without trial, especially in excessive force cases, where commonly there will be genuine issues of material fact in dispute that need to be resolved by a jury. When there is a trial, the question is what becomes of the qualified immunity defense; who decides what and how? Does the jury decide the qualified immunity issue if it still exists? If so, how? If not, then how does the court decide the issue of qualified immunity as a matter of law after the jury has decided the facts?

In a recent decision, *Zellner v. Summerlin*,[102] the Second Circuit stated that qualified immunity is a question of law to be decided by the judge. If there are material issues of fact in dispute, they can

[100] 483 F.3d 258 (4th Cir. 2007).

[101] *Id.* at 271.

[102] 494 F.3d 344 (2d Cir. 2007). Similarly, in *Hosty v. Carter*, the Seventh Circuit concluded that general principles of law with respect to the free speech rights of students would not put a reasonable dean on notice that demand for review before the university would pay a student publication's printing bills violated the First Amendment. *Hosty v. Carter*, 412 F.3d 731, 738-39 (7th Cir. 2005).

be sent to the jury through special interrogatories. In fact, the Second Circuit has made it clear that if the defendant raises the qualified immunity defense and wants it to survive throughout the jury trial, hoping to make a post-trial motion on the qualified immunity issue once the jury has come back, then the defendant is responsible for requesting that the jury be asked the necessary questions for the court to decide the qualified immunity issue.[103]

In *Lee v. McCue*,[104] the court held that it is the defendant's burden to request special interrogatories that would elicit the necessary factual findings from the jury that would serve as the basis for the court's qualified immunity determination. If the defendant fails to do so, the court, in deciding the post-trial motion on qualified immunity, is going to take the facts in the light most favorable to the plaintiff. How the jury decided the facts, in other words, is based on how the jury could have construed them in the light most favorable to the plaintiff. The important point is that the court, in deciding the qualified immunity issue post-trial, will view the facts from the plaintiff's perspective unless the defendant puts specific questions to the jury and gets answers that would be unfavorable to the plaintiff's case.

There are also cases where the Second Circuit has said the district court should put the qualified immunity question about objective reasonableness to the jury. In the recent case *Higazy v. Templeton*,[105] decided after *Zellner*, the court of appeals implied qualified

[103] *Id.* at 368.
[104] No. 04-civ-6077, 2007 WL 2230100, at *1 (S.D.N.Y. July 25, 2007).
[105] 505 F.3d 161 (2d Cir. 2007).

immunity is an issue that can go to the jury. *Higazy*, a post-9/11 case, involved a young Middle Eastern man whose parents put him up in the Millennium Hilton Hotel, across from the Twin Towers, while he was going to school. After the hotel was evacuated on 9/11, hotel security discovered a short wave radio transceiver—the type that can be used to communicate with commercial aircraft—evidently in the safe of the room where Higazy had been staying, along with Higazy's passport and a copy of the Koran. Upon returning to the hotel months later, Higazy was confronted by police. An FBI agent informed the boy that he was being arrested on a material witness warrant.[106] After Higazy had been detained for a long period of time as a material witness, it became apparent the transceiver belonged to a commercial pilot who had been staying at the hotel. As a result, Higazy brought a *Bivens* suit against the federal agent, and the court held that a reasonable jury could have concluded that a reasonable officer would have understood that he was violating the plaintiff's constitutional right against compelled self-incrimination when he coerced a confession that would have been used in a criminal case. The court viewed the question of objective reasonableness as a "mixed question of law and fact," which could be decided as a matter of law where the relevant facts were undisputed, but which should go to a jury when the facts were in dispute.[107]

The decision in *Husain v. Springer*[108] also implied that the jury could hear the qualified immunity issue. The Second Circuit

[106] *Id.* at 165.
[107] *Id.* at 170 (citing Oliveira v. Mayer, 23 F.3d 642 (2d Cir. 1994)).
[108] 494 F.3d 108 (2d Cir. 2007).

held that the nullification of a school election based on content published in the college newspaper violated the student journalists' clearly established First Amendment rights, but that a jury could find that the college president should be afforded qualified immunity if it was reasonable for her to believe her actions were lawful.[109] To get a sense of the confusion created when the issue of qualified immunity is given to the jury, take a look at *Stephenson v. Doe*.[110] In *Stephenson*, the Second Circuit confronted inconsistent verdicts that resulted from the trial court having given both the substantive Fourth Amendment excessive force issue and the qualified immunity issue to the jury. In remanding for a new trial, the court of appeals advised the district court that "[t]he court should charge the jury on excessive force, but not on qualified immunity. If the jury returns a verdict of excessive force against [the defendant], the court should then decide the issue of qualified immunity."[111]

There are many jury-or-judge qualified immunity questions, and *Curley v. Klem*,[112] from the Third Circuit, has a very good summary of the positions of the circuits on this issue. According to the *Curley* court, "[t]he First, Fourth, Seventh, and Eleventh Circuits have all indicated that qualified immunity is a question of law reserved for the court," whereas "[t]he Fifth, Sixth, Ninth, and Tenth Circuits have permitted the question to go to juries."[113] The "[p]recedent from the Second and Eighth Circuits can be viewed as being on

[109] *Husain*, 494 F.3d at 131-34.
[110] 332 F.3d 68 (2d Cir. 2003).
[111] *Stephenson*, 332 F.3d at 80.
[112] 499 F.3d 199 (3d Cir. 2007).
[113] *Curley*, 499 F.3d at 208.

both sides of the issue, with the evolution being toward reserving the question for the court."[114]

The merits issue in *Curley* turned on whether the officer made a reasonable mistake of fact. If the officer's mistake was reasonable, then that goes to the merits, and there was no Fourth Amendment violation. The qualified immunity question, on the other hand, turned on whether the officer was reasonable in thinking his conduct did not violate the plaintiff's clearly established rights.[115] *Curley* was a mistaken identity case, where a New Jersey state trooper mistook a Port Authority officer for a suspect and shot him. The state trooper was involved in the high-speed pursuit of a man who shot another officer on the New Jersey Turnpike and fled to the George Washington Bridge. The man who was pursued by the trooper tried to blaze through the tollbooth at the bridge, but smashed into another car and then decided to kill himself. His body was evidently lying on the front seat of his wrecked car, and the airbags had deployed when he crashed.

After the crash, a Port Authority officer stationed at the bridge approached the car—and because he'd heard the radio traffic about the shooting on the Turnpike, he had his gun drawn. The state trooper, still in pursuit, then appeared, exited his car, and approached the wrecked car with the now-deceased suspect still inside. At this point, however, there becomes a controverted factual issue: Did he look in? Should he have? Was it reasonable for him not to look in? If he did, could he have seen the body and known the man was dead?

[114] *Id.* at 209.
[115] *Id.* at 225.

As the trooper approached the car, the trooper saw the Port Authority officer, but did not recognize him—it was night, the Port Authority officer was not wearing his hat, and, like the suspect, was a black male—and fired at him. Again, there was a question of fact. Could the trooper have seen the emblem on the Port Authority officer's shirt?

After a convoluted procedural history, the case finally went to the jury with ten special interrogatories addressing the factual disputes surrounding Officer Klem's approach to the suspect's car and his subsequent confrontation with Curley. In addition, the jury was given a separate liability verdict sheet with four questions, three regarding the objective reasonableness of Klem's actions and one directed at causation. Upon reaching the Third Circuit, two out of the three judges on the panel decided that even though it looked as if the trial judge intended to give the qualified immunity issue to the jury, the jury's answers to the liability questions reflected no constitutional violation on the merits.[116] Judge Roth, in dissent, was of the opinion that the trial court did put the issue of qualified immunity to the jury and that constituted error. He interpreted the answers to the liability questions as having established that there was a constitutional violation.[117] *Curley* exemplifies the confusion that ensues when juries are given questions of qualified immunity.

While there is case law going both ways on this, the ultimate issue of qualified immunity should not be given to the jury. It creates nothing but chaos. In *Curley*, the Third Circuit, like the Second Cir-

[116] *Id.* at 215.
[117] *Id.* at 223 (Roth, J., dissenting).

cuit in *Stephenson*, adopted the view that "the court, not a jury, should decide whether there is immunity in any given case."[118] Where qualified immunity is still in play when a case goes to trial, the jury should be given special interrogatories to resolve the key factual disputes, but the ultimate legal question of qualified immunity should be left to the judge.

[118] *Curley*, 499 F.3d at 223. *See also* Bradley v. Jusino, No. 04 Civ. 8411, 2008 WL 417753, at *1 (S.D.N.Y. Feb. 14, 2008). While "substantial evidence [may have] support[ed] the jury's determination that Jusino was entitled to qualified immunity, the Court erred in submitting the question . . . to the jury. Under . . . *Stephenson*, and its progeny, Jusino's qualified immunity defense was a question of law for the Court to resolve." *Id.* at *4 (internal citation omitted).