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Qualified Immunity: A View from the Bench

Hon. Frederic Block

QUALIFIED IMMUNITY: A VIEW FROM THE BENCH

*Honorable Frederic Block**

Honorable George C. Pratt:

Our next speaker is Judge Frederic Block. Judge Block is somewhat unique, one of only a few judges of the Eastern District of New York, and probably elsewhere in the country these days, who came to the bench by way of private practice rather than by being a prosecutor or a judge in some other court. The subject for us is a view from the bench.

Honorable Frederic Block:

Well, George, I think that is probably what is unique about me. Nobody ever has the foggiest notion of what I am going to say! I know the hour is late and this is one of the unique opportunities you have to walk out on a federal court judge without having to worry about being sanctioned. I will try to make it as interesting as possible.

Initially, I have to give some recognition to my colleague, Judge Raggi.[1] I am really, in effect, her surrogate. If not for Judge Raggi, I would not have the opportunity to make this presentation, because she would be here today instead of me. Why is that? I guess one thing I can share with you is one of the practical things

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[1] Honorable Reena Raggi is a United States District Court Judge, Eastern District of New York.

that happens from the perspective of judges when we get cases that have to be processed.

You all know, I guess by now, everything there is to know about qualified immunity.[2] You have heard lectures, and have been practicing in the area. It would be inappropriate, certainly redundant, if I were to go over the qualified immunity legal landscape. When I came on the bench, the Crown Heights Civil Rights case[3] was pending. I inherited that case as part of our wonderful system of case assignments to new judges. I really have respect for Judge Raggi, before, during, and after all of this, because if she was inclined to do so, she could have kept that case, as it was her case initially. Frankly, Judge Raggi, thank you for letting me have the opportunity to be here today and speak in your place.

Honorable Reena Raggi:

You have no idea how true that is. Usually Marty likes to assign me to the late time period. These are the steps you have to take to avoid that.

Honorable Frederic Block:

Well, if Judge Raggi had granted qualified immunity in the Crown Heights case, I would not be here today. Judge Raggi decided that it was not up to her to decide the issue of qualified immunity and that the parties would have to engage in discovery.[4] After almost

[2] *See generally* Estate of Rosenbaum v. City of New York, 975 F. Supp. 206 (E.D.N.Y. 1997). Judge Block defined qualified immunity as an affirmative defense that "generally shields governmental officials from liability for damages on account of their performance of discretionary official functions 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* at 215 (further citations omitted).

[3] *Id.*

[4] *Id.* at 214. Judge Raggi "denied the motion, determining implicitly that plaintiffs had pleaded cognizable claims, and commenting that the case was not ripe for summary judgment at that early stage because of the need for discovery." *Id.*

five years of discovery, depositions, and so on through the wonderful case management system involving the magistrate judges, I finally got my hooks into the case. We brought it to a head, and soon thereafter, we rendered our decision on qualified immunity.[5] So what are we talking about? We are talking about the Crown Heights case.[6] Everybody knows about the criminal aspect of it. That was certainly something that appeared in the press many times over for years. I guess a quietus to that has recently been served by the conviction of Lemrick Nelson.[7] Nelson is the person who was initially prosecuted on the state level, before we federalized the prosecution for our colleague Judge Trager.[8]

Honorable George C. Pratt:

Fred, some people do not know the background of that case.

Honorable Frederic Block:

All right. When I discuss the Crown Heights case, I am talking about the civil disturbance that happened as a result of the unfortunate situation in the Hassidic community where the young African-American child, Cato, was killed in an unfortunate automobile accident.[9] As a result of that event, the black community acted out, retaliated to some extent, invaded, you might say, the Crown Heights environment, causing a lot of property

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[5] *Id.* at 226 (holding that "the motion by Dinkins and Brown for dismissal of all federal claims against them on qualified immunity grounds is granted.").

[6] *Id.* at 208-09. The Crown Heights case arose "out of the unrest that gripped the Crown Heights neighborhood of Brooklyn between Monday, August 19 and Thursday, August 22, 1991 . . . ." *Id.*

[7] People v. Nelson, 167 Misc. 2d 665, 647 N.Y.S.2d 438 (N.Y. Crim. Ct. Kings County 1995).

[8] U.S. v. Nelson, 921 F. Supp. 105 (E.D.N.Y. 1996).

[9] *Rosenbaum*, 975 F. Supp. at 209. "An automobile escorting the late Lubavitcher Rebbe Menachem Schneerson accidentally struck and killed seven-year-old Gavin Cato." *Id.*

damage, some physical injury to people and, most tragically, stabbed to death, Yankel Rosenbaum.[10]

While the criminal case was being processed, some individual plaintiffs from the Hassidic community (it did not involve a class action), brought this civil rights case against the City of New York, and specifically against Mayor Dinkins and then Police Commissioner Brown.[11]

The theory of liability against the defendants was two-fold. First, there was a violation of due process[12] on the theory that Dinkins and Brown and whoever else was involved in the policing process did not, in effect, take any action to quell the disturbances that were happening as a result of the death of Cato in the Crown Heights community.[13] And not only that, the issue was, specifically, that Dinkins and Brown allegedly adopted a policy of restraint, rather than to be more proactively involved in quelling the riots and the disturbances that were happening back in the Crown Heights community.[14]

This is basically the background. I thought perhaps that most of you knew about it. When I speak to people, as soon as I mention Crown Heights, they recall that unfortunate situation.

So now, years later, we had to decide whether the former mayor and the former police commissioner could be subject to individual liability for their actions or inactions in the course of that regrettable civil disturbance. And that specifically was the subject

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[10] *Id.* "Within hours of Cato's death, Australian rabbinical student Yankel Rosenbaum was attacked by a group of young African-American men and stabbed to death." *Id.*

[11] *Id.*

[12] U.S. CONST. amend. XIV. The Fourteenth Amendment provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law." *Id.*

[13] *Rosenbaum,* 975 F. Supp. at 216. "Plaintiffs claim that their due process rights were violated by the City's alleged implementation of a policy of restraint . . . . " *Id.*

[14] *Id.* "Specifically, [the plaintiffs] charge that by failing to arrest individuals for unlawful assembly and by ignoring pleas for assistance both by individuals and by the community at large, the Police Department emboldened participants in the violence and increased the danger to the Hassidic community." *Id.*

of the decision that I rendered in the *Rosenbaum* case which is in your materials.[15]

What was interesting, I guess, about all of this, is that it was a veritable *tour de force* involving all the issues that you can possibly conjure up when you talk about the application of the principles of qualified immunity.

As you all know, the first assessment that has to be made is to determine and discern what the claimed constitutional right is before we can decide whether or not that right was clearly established, and whether or not the state acted in an objectively reasonable way under the applicable standard. What was the constitutional right? To make that determination, it is necessary to get into the substantive aspects of the law.

Basically, the claim of the plaintiffs was, as I mentioned earlier, that a due process right was allegedly violated. The plaintiffs wanted to go to trial on the theory that Dinkins and Brown and the other police involved actually created or increased the risk of danger to the residents and the plaintiffs in the Crown Heights community by not taking action to quell the riots in the first instance.[16] There was a policy of restraint that the mayor adopted at the time, and I think that probably is true. The issue is whether or not the Mayor could constitutionally, lawfully, stand by, exercise this restraint, and allow the disturbances to go unquelled for two or three days without being held personally accountable in litigation.[17] That basically was the issue.

So, what is fascinating about this is the issue of whether there is a constitutional right, and if so, what are the contours of this constitutional right?

In the first part of our analysis we are dealing with civil disobedience, riots and things of that nature. Of course, we had to analyze the law first in the context of whether there was a constitutional right in existence at the time.

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[15] *Id.*
[16] *Id.*
[17] *Id.*

So, naturally, we had to go back to consider *DeShaney*,[18] where the Supreme Court announced the broad proposition that the state or state actors cannot be held liable if they do nothing at all, and just remain passive.[19]

Specifically, the holding of *DeShaney* is that the due process laws do not require the state to protect the life, liberty and property of its citizens against invasion by private actors.[20] In that case, there was a child abuse situation and the state did not intervene.[21] The state could not be held liable according to the majority opinion [22]

That was the conceptual beginning, and two years after the Crown Heights disturbances, the Second Circuit spoke on the issue in a case called *Dwares v. City of New York.*[23]

There, in a very simple fact pattern involving a motion to dismiss a complaint, the complaint alleged that the police stood by while there was a park disturbance with skinheads allegedly beating up people, while the police were watching.[24] The complaint alleged that the individuals had the approbation and approval of the police because the police and the skinheads had agreed and/or conspired to let the harassment and assault of flag burners continue as long as it did not get totally out of control.[25]

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[18] DeShaney v. Winnebago County Dept. of Social Svcs., 489 U.S. 189 (1989) (holding that generally "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.").

[19] *Id.* at 197. *See also* Pearson v. Miller, 988 F. Supp. 848 (M.D. Pa. 1997). "In general, there is no constitutional duty on the part of the state to protect citizens from abuses or crimes committed by other private citizens." *Id.* at 852.

[20] *DeShaney*, 489 U.S. at 197.

[21] *Id.* at 189. In *DeShaney*, a young boy suffered repeated beatings from his father. *Id.* While county child welfare authorities were indeed alerted and took steps to protect the child, he was never taken into protective custody. *Id.* Eventually, the father beat the child to the point where he suffered permanent brain damage and the mother sued the county for failure to protect her son. *Id.*

[22] *Id.* at 202.

[23] 985 F.2d 94 (2d Cir. 1993).

[24] *Id.* at 96.

[25] *Id.* at 97.

The Second Circuit, commenting on *DeShaney*, created what we now refer to as the "State-created danger" due process right.[26]

Specifically, the Second Circuit read *DeShaney* as providing for a due process right when the state "[i]n some way had assisted in creating or increasing the danger to the victim."[27]

The Second Circuit allowed the complaint to survive because of allegations that the police actually were conspiring with the skinheads, permitting them to act up a little bit, so long as they stayed in control. That was enough to create a factual issue that could go forward as to whether or not the activity by the police created or increased the danger to victims.[28]

That happened in 1993. What about the Crown Heights disturbance? So, we had to decide, first of all, was there a constitutional right? And we held yes, there was a constitutional right.[29]

Basically, I stated that if the plaintiffs contend simply that the City failed to respond to requests from the Hassidic community for additional police protection due to the Crown Heights disturbances, such a claim would arguably be barred by *DeShaney*, which was decided two years before the Crown Heights disturbances.[30]

I said, however, that the thrust of the plaintiffs' argument was different. They alleged that the defendants, by the inappropriate implementation of a policy of restraint simply by Dinkins and the police commissioner, actually exacerbated the danger to the Hassidic community and rendered the community more vulnerable to violence by private actors, making reference to *Dwares*.[31]

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[26] Estate of Rosenbaum v. City of New York, 975 F. Supp. 206, 218 (E.D.N.Y. 1997).

[27] *Dwares*, 985 F.2d at 99.

[28] *Id.* "Thus in the present case, the complaint asserted that the defendant officers, indeed had made the demonstrators more vulnerable to assaults." *Id.*

[29] *Rosenbaum*, 975 F. Supp. at 218.

[30] *Id.* at 217.

[31] *Id.* "In *Dwares* . . . the Second Circuit read *DeShaney* as providing for a due process right in those circumstances where the state 'in some way had assisted in creating or increasing the danger to the victim.'" *Id.* (citing Dwares v. City of New York, 985 F.2d 94, 99 (2d Cir. 1993)).

So, I just wondered and I do not think the case has yet come before any court, if you have abject civil disturbance and the police are there on the scene and they take no action and there is no particular policy whatsoever, but they see violence and their presence is prominent, does the mere presence of the police act to embolden the actors to the point where the rioters can say, "Look we're sanctioned here. We can go ahead because the police are not really effectively interfering. They are standing there. They are watching us." How that would play out, I do not know.

Can you bring litigation whenever you have any civil disturbance, and if so, to what extent do you say that the state actors have aided the third parties, have emboldened them, have increased the risk of danger?

All of those issues are subsumed in this scenario. What was initially fascinating, before we even got to the analysis of qualified immunity, was to identify the state constitutional right, because you have to start off with that before you decide whether or not it was clearly established, and whether or not it was objectively reasonable behavior on the part of the individuals who are being sued.[32]

I do not know what the disturbance law will be in the future but we came very close to the issue in Crown Heights. I let the complaint survive because I thought there were sufficient allegations and sufficient evidence there to warrant the case going forward to trial before a jury against the City of New York on the issue of whether the proactive actions of Dinkins and Brown actually did create danger or increase the risk of danger.

Now, we also gave Dinkins and Brown qualified immunity.[33] I read about the case in the paper afterwards. I guess as a political person, Dinkins won by putting the best spin on things. He told the press that Judge Block found that he was not at all responsible for this situation and that the court completely exonerated him. Of course we know that is not so, since we know that the concept of a

[32] *See* Roniger v. McCall, 22 F. Supp.2d 156 (S.D.N.Y. 1998). "In determining the availability of a qualified immunity defense, the rights alleged to have been violated must be identified, and a determination as to whether they were 'clearly established' must be made." *Id.* at 162 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

[33] *Rosenbaum*, 975 F. Supp. at 226.

person's constitutional right is one thing, and whether the individual is entitled to qualified immunity is something entirely different.[34]

We need to understand that there is a difference in the dichotomy between the right that we are talking about and whether or not the jury can find that right was violated on one hand, and the separate and discrete issue of whether qualified immunity should nonetheless attach to the individuals who are allegedly individually responsible.

I let the case go forward against the City. Why is it that we gave qualified immunity to Dinkins and Brown? Well, basically we applied the basic qualified immunity law.[35]

Initially, we had to decide even though there was a constitutional right that, under *Dwares* and *DeShaney*, had to be litigated, whether the contours of that right were so sufficiently defined and understood that they would be clearly established. Therefore we had to examine established law and decide the case on that basis in terms of the qualified immunity analysis.

How then, do we establish whether or not the law was clearly established and the contours of a constitutional right? Well, we are told by the Second Circuit that we have to look at the Supreme Court cases and other circuit cases in the country to see whether the right was reasonably specified, so to speak, and to sort of get a sense of what is out there.[36] We had to make that type of inquiry in

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[34] *Id.* at 215. "A decision on qualified immunity is separate and distinct from the merits of the case . . . . Immunity contemplates exemption from liability that would otherwise exist on the merits." *Id.* (citing Lassiter v. Alabama, 28 F.3d 1146, 1151 (11th Cir. 1994)).

[35] *See generally* Anderson v. Creighton, 483 U.S. 635 (1987). Under this doctrine, "public officials are shielded from liability for civil damages if they establish that (1) their conduct did not violate clearly established rights of which a reasonable person would have known; or (2) that it was 'objectively reasonable to believe that their acts did not violate clearly established rights.'" Glendora v. Pinkerton Sec. and Detective Serv., 25 F. Supp.2d 447, 453 (S.D.N.Y. 1998).

[36] *Rosenbaum*, 975 F. Supp. at 218. To determine whether a constitutional right is clearly established, consider the following factors:

> (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.

the context of this case to determine whether this constitutional right was clearly established. We held that it was not, that in *Dwares* the right existed, but the contours of that right were not clearly established. It is rare to go through this type of exercise because usually rights are pretty clearly established.

The second part of the litigation dealt with the claim that there was a violation of the equal protection rights of the Hassidim, of the Jewish people.[37] There were allegations that Dinkins and Brown had some anti-Semitic leanings, that they favored the blacks to the detriment of the Jewish folks, and that equal protection was clearly established in that context.[38]

I felt, of course, that Dinkins' and Brown's actions were objectively reasonable.[39] The standard for objective reasonableness is whether people similarly situated, other mayors, other police officers, other police, if you are dealing with a police situation generally, whether they can reasonably disagree with the action taken by the official.[40] If they can reasonably disagree, then the law says that you have to find that their actions were objectively reasonable.

So the issue of disagreement, I think, is paramount here. They had testimony that was taken during the deposition process where the officials said they thought the policy of restraint was indicated. Other officials said, for example, "No, we should have gone in there with a more aggressive policy right away, and if we had, all of this property damage and personal injury could have been prevented."

Even though a jury, if the case went to trial, could have determined that there was a violation of the right, the judge deciding the issue of qualified immunity could certainly determine

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Id. (citing McEvoy v. Spencer, 124 F.3d 92 (2d Cir. 1997)).

[37] *Id.* at 224.

[38] *Id.*

[39] *Id.*

[40] *See* Kia P. v. McIntyre, 2 F. Supp.2d 281 (E.D.N.Y. 1998). "Even if the scope of the plaintiff's rights and the defendant's conduct were established at the time of the alleged violation, a government officer will nonetheless be protected from liability if officers of reasonable competence could disagree on the legality of the defendant's actions." *Id.* (further citations omitted).

that there was a reasonable debate among people who were, under similar circumstances, similarly positioned. I think that was pretty clear in this case.

So I think that Dinkins and Brown should not have been held personally responsible. I did not have to decide whether we had qualified immunity on the basis of objective reasonableness because I said the right was not clearly established. I did it somewhat gratuitously, because who knows if the case will be appealed.

In the summary judgment qualified immunity arena, the collateral order rule applies in the Second Circuit. The Second Circuit will and does take jurisdiction even though it is technically a non-final determination whenever summary judgment is denied.

There was a second substantive component to this case, as I mentioned before, which was the equal protection argument.[41] For equal protection, one must assert a constitutional right that involves a motive.[42] A subjective aspect was now interjected in the case.

Was Dinkins motivated to discriminate against the Jewish people? That is the inherent equal protection issue of this particular case. The right was clearly established.

There is no question that everybody knows you cannot intentionally discriminate against any race, religion, minorities, *et cetera*.[43] But what was unique about this aspect of the case was simply that we were dealing with the issue of how do you apply the concept of objective reasonableness when you are dealing with a constitutional right which says a principal element requires a subjective aspect-- namely, motive to discriminate.

The Second Circuit and other courts have wrestled with this recently. The current posture of the Second Circuit requires, in such situations, a particularized showing of discrimination-- a

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[41] *Rosenbaum*, 975 F. Supp. at 223.

[42] *Id.* "It is well established that in order to prove an equal protection violation, a plaintiff must demonstrate that a discriminatory purpose was a motivating factor in the government decision." *Id.* (further citation omitted).

[43] U.S. CONST. amend. XIV. The Equal Protection Clause provides in pertinent part: "[N]or deny to any person within its jurisdiction the equal protection of the laws." *Id.*

heightened standard.[44] This was most recently reaffirmed by the Second Circuit in a case called *Hemphill v. Schott*[45] this past April.[46] The court in *Hemphill* stated, referring to the *Dwares* case, that "where the state actors actually contributed to the vulnerability of the plaintiff, or where the state actors aided and abetted a private party in the deprivation of a plaintiff's civil rights, a violation of the Due Process Clause does occur."[47]

This reinforces conceptually the concept of aiding and abetting in the deprivation of civil rights and it continues discussing the concept of particularized showing when you are dealing with subjective elements as an essential aspect of your constitutional claim entitlement.

I mention this because in *Crawford-EL v. Britton*,[48] a case decided three weeks after the Second Circuit decided *Hemphill*, the Supreme Court held that there is no heightened evidentiary requirement.[49] They rejected the clear and convincing standard when dealing with a substantive constitutional claim that involves a subjective element.[50]

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[44] *See* Blue v. Koren, 72 F.3d 1075 (3d Cir. 1995). In such situations, the Second Circuit requires plaintiffs to "proffer particularized evidence of direct or circumstantial facts . . . supporting the claim of an improper motive." *Id.* at 1084.

[45] 141 F.3d 412 (2d Cir. 1998).

[46] *Id.* The Second Circuit held that:

> Hemphill's claim against the Officers under the Due Process Clause should survive a claim of qualified immunity. "Where, as here, a constitutional claim contains a subjective component, many courts have imposed on plaintiffs what they describe as a heightened standard, requiring them to provide specific allegations or direct evidence of the required state of mind in order to avoid summary judgment based on the defense of qualified immunity."

Id. at 419 (citing Blue v. Koren, 72 F.3d 1075, 1082-83 (2d Cir. 1995)).

[47] *Id.*

[48] 118 S. Ct 1584 (1998).

[49] *Id.* at 1596.

[50] *Id.* at 1595. The Supreme Court commented that "[n]either the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provides any support for imposing the clear and convincing burden of proof on plaintiffs either at the summary judgment stage or in the trial itself." *Id.*

Clearly, what effect does *Crawford-EL* have on the Second Circuit's decisions? Recently, as you know, *Hemphill* seemed to establish an extra responsibility or extra burden on the plaintiff to show that there is some sort of heightened or particularized showing that is necessary to sustain your case in the face of the defendant's motion for summary judgment.[51]

I am not so sure that the final word has been written on that subject but I had to deal with it also in the context of *Rosenbaum*.

We found that there was no particularized showing because we said that the plaintiffs had the burden, and they did not really come forward and show that Dinkins and Brown really had any anti-Semitic leanings.[52] There was not a sufficient particularized showing to allow the case to go forward.

I want to give you a sense separate and apart from the intrigues of the law in this area, which I find fascinating, about how we process these matters as district court judges. Maybe I can make somewhat of a special contribution, or particularized contribution here, to give you some insight into what was already mentioned – that this case was initially before Judge Raggi.

There was an early-on motion to dismiss. That was all right because we know that qualified immunity should be shaken out of the trees as quickly as possible in keeping with one of the underlying concepts -- that public officials should not have to sit by and hire lawyers and spend a lot of grief, a lot of time, a lot of energy, while the case is being litigated for three or four years on the merits, before they can have the qualified immunity issue determined.[53]

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[51] *Hemphill*, 141 F.3d at 419-20.

[52] Estate of Rosenbaum v. City of New York, 975 F. Supp. 206 (E.D.N.Y. 1997). The Court found that "the evidence proffered by plaintiffs in support of their claims that the policy was unusual or was discriminatorily motivated is conclusory at best." *Id.* at 224.

[53] *Id.* at 215. "Qualified immunity protects government officials from the burdens of defending expensive, but ultimately insubstantial, lawsuits and also guards against the risk that 'fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.'" *Id.* (citing Anderson v. Creighton, 483 U.S. 635, 638 (1987)).

In this particular case, there was extensive pretrial discovery because the whole process continued for four or five years.[54] So the application was originally made to Judge Raggi who denied the motion of qualified immunity summary judgment, on the grounds that there were a lot of facts that, in fairness to the parties, particularly, in fairness to the plaintiffs, they should have an opportunity to engage in discovery to see whether or not they would be able to oppose that application.[55]

Judge Raggi invoked Rule 26[56] and set the case for discovery, quite wisely and correctly.[57] District court judges have a lot of power to deal with issues of immunity, short of having this matter come to a full-blown litigation scenario.[58]

Let's discuss Rule 26 discovery powers. We can have limited discovery.[59] If somebody has a real qualified immunity issue, you

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[54] *Id.* at 214. "Approximately four years of discovery followed." *Id.*

[55] *Id.* "The Court did, however, dismiss the complaint as against the Police Department because, as an agency of the City, it was not subject to separate suit." *Id.* at 214 n.10.

[56] FED. R. CIV. P. 26. Rule 26 provides in pertinent part: "Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties [certain initial disclosures]." *Id. See also* Crawford-EL v. Britton, 118 S. Ct. 1584 (1998). "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery." *Id.*

[57] *See generally* Crawford-EL v. Britton, 118 S. Ct. 1584 (1998). "Of course, the judge should give priority to discovery concerning issues that bear upon the qualified immunity defense, such as the actions that the official actually took, since that defense should be resolved as early as possible. " *Id.* at 1597.

[58] *Rosenbaum*, 975 F. Supp. at 215. "Provided that there are no material issues of fact, the question of whether a reasonable officer should have known that he or she acted unlawfully is a question for the Court and not for the jury and is properly resolved on a motion for summary judgment." *Id.*

[59] FED. R. CIV. P. 26 (b)(2). Rule 26 (b)(2) provides in pertinent part:

> By order or by local rule, the court may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: . . . (iii) the burden of expense of the proposed discovery outweighs its likely

have to come to the judge and get the judge's attention or the magistrate judge's attention and say, "Look, let's have some limited discovery. I do not want to be subject to the expense of an enormous discovery schedule." We should focus -- and in fact, it is the appropriate decision to make on the discrete issues that deal with the motion for qualified immunity and I will make a decision as soon as we complete this discovery.[60]

Now sometimes discovery is not necessary. Sometimes it is apparent on the face of a complaint, that the plaintiff has alleged sufficient allegations, or that even if those allegations are true, nonetheless you would be entitled to summary judgment.[61] Defendant can look at the complaint and make a 12(b)(6)[62] motion to dismiss and make a qualified immunity argument in the context of that motion, prior to the answer. If the complaint is in such a posture that summary judgment will be indicated well, so be it. If it is not in that type of posture, defendant may want to submit some documentary material to indicate that it is the type of case that does not require any elaborate discovery. Defendant can ask the court to

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> benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Id.

[60] *Crawford*, 118 S. Ct. at 1596. The Court stated:

> When a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense. It must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings.

Id.

[61] FED. R. CIV. P. 56 (c). Rule 56 (c) provides in pertinent part: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.*

[62] FED. R. CIV. P. 12 (b)(6). Rule 12 (b)(6) provides in pertinent part: "[T]he following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . ." *Id.*

convert the 12(b)(6) motion to a summary judgment motion on proper notice and deal with it on that basis.

Sometimes what is often overlooked, is that we have a Rule 43(e) issue.[63] Now, I have implemented this rule, but not in the context of qualified immunity, though I think it can be employed whenever there is a motion made before a district court judge.

We can have a separate, discrete, factual hearing on any particular issue that might resolve the litigation. So, there are all of these types of procedural tools that you can use and pull out of your tool box to avoid having an extensive, elaborate trial until you actually get to the heart of the issue that will decide your case. It is particularly appropriate and recommended that these tools be used when we talk about qualified immunity.

If there is no jury issue involved, and if there was just a simple, factual inquiry that had to be explored before I can resolve the summary judgment qualified immunity issue, I might implement Rule 43(e).[64] If there was a jury issue that was involved, which invariably is the case, clearly, whether I can convene the jury just to decide that one issue, I guess theoretically I can; though, I don't think one would do it. It would be an awkward situation. Theoretically, it can be done.

Judgment on the pleadings can be converted to motions for summary judgment under 56 (c).[65] Rule 56 specifically provides that if summary judgment is not appropriate at the time that it is made, it can be held in abeyance or it can be denied without leave to reconstitute it.[66] Many times I hold it in abeyance to have the

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[63] FED. R. CIV. P. 43 (e). Rule 43 (e) provides in pertinent part: "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions." *Id.*

[64] *See id.*

[65] *See supra* note 61 and accompanying text.

[66] FED. R. CIV. P. 56 (f). Rule 56 (f) provides in pertinent part:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

parties engage in discovery to give them the opportunity to explore matters.[67]

So we have to be mindful of the fact that when dealing with qualified immunity, one must think of how to get the issue resolved early-on before the district court, and of what tools there are in the tool box, the litigation tool box, the procedural tool box, that can be pulled out in order to do this.

The Supreme Court, as I mentioned in *Crawford-EL*, specifically refers to discovery technique, where we can shape and structure it, so that we can focus on the issues that need to be focused upon to resolve some qualified immunity matters.[68]

One may also require a reply under 7(a).[69] There can be an application to require the plaintiff to make a more definite and specific statement under the federal rules.[70] This is another tool to try to get the issue before the court.

Also, defendant can, if seeking to dismiss based upon qualified immunity, tell the judge that defendant does not admit to the truth of certain things, but for the purpose of qualified immunity defendant will accept everything the plaintiff says as true. Let the plaintiff put forth whatever the plaintiff believes is indicated to

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Id.

[67] Crawford-EL v. Britton, 118 S. Ct. 1584 (1998). "The judge does, however, have discretion to postpone ruling on a defendant's summary judgment motion if the plaintiff needs additional discovery to explore 'facts essential to justify the party's opposition.'" *Id.* at 1597 n.20 (citing FED. R. CIV. P. 56 (f)).

[68] *Id.* at 1597.

[69] FED. R. CIV. P. 7 (a). Rule 7 (a) provides in pertinent part: "[T]he court may order a reply to an answer . . . ." *Id.*

[70] FED. R. CIV. P. 12 (e). Rule 12 (e) provides in pertinent part: "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading . . . ." *Id.* *See also* Crawford-EL v. Britton, 118 S. Ct. 1584 (1998). The United States Supreme Court stated that "the court may insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment." *Id.* at 1596-97 (citing Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)).

avoid qualified immunity, accept it as true, and in any event, defendant will maintain that he or she is still entitled to qualified immunity. And it does not mean that those facts are true, but given the plaintiff's allegations, and given the plaintiff's position, the best spin that possibly can be given all the inferences that the plaintiff is entitled to, you can still reach the issue of qualified immunity.[71] Defendant should come to court and present these scenarios to the court to get the matter resolved in the first instance.

From the plaintiff's perspective, I think the plaintiff would always want to say that there are issues of fact, and that there are a number of cases that have been decided on the grounds that qualified immunity summary judgment is premature; that there are indeed issues of fact which should preclude the award of qualified immunity. So, plaintiff would always want to focus on that. Plaintiff would have to make sure that the issue of fact that is proposed to the court would truly make a difference.

[71] *Crawford-EL*, 118 S. Ct. at 1597. "To do so, the court must determine whether, assuming the truth of the plaintiff's allegations, the official's conduct violated clearly established law." *Id.*