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Qualified Immunity: The Constitutional Analysis and its Application

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QUALIFIED IMMUNITY: THE CONSTITUTIONAL ANALYSIS AND ITS APPLICATION

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Today I will talk about qualified immunity. I will go through some of the basic material and invite some of the other speakers to jump in whenever appropriate.

Qualified immunity under § 1983 is a defense that applies only for individuals who are sued in their individual capacity.[2] So, local entities cannot raise qualified immunity; an individual sued in his official capacity has no qualified immunity defense.[3] It is a defense only to damages actions, and the Court has said over and over again that it is an immunity not just from liability,

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[2] 63C AM. JUR. 2D *Public Officers and Employees* § 310 (2002) ("Qualified immunity generally only shields a public officer, performing discretionary functions, from activities which do not violate clearly established statutory or constitutional rights of which a reasonable person would have known, or if it was objectively reasonable to believe that his acts did not violate these clearly established rights.").

[3] 15 AM. JUR. 2D *Civil Rights* § 114 (2002); *see also id.* at § 102, which states: "[w]hen an individual is sued in his official capacity, he or she cannot assert absolute or qualified immunity; the only type of immunity available to him is whatever sovereign or Eleventh Amendment immunity may be possessed by the governmental entity of which he is an agent."

but also an immunity from suit.[4] The notion is, the Court tells us, to save these individual officials from being dragged through the discovery process or the trial itself.[5] This is a defense, the Court suggests, that should be decided as early on as possible, generally at the summary judgment stage.[6] If the defense is denied, there is a right to an immediate interlocutory appeal.[7] If an officer raises qualified immunity and moves to dismiss on that basis and then the qualified immunity is denied, there is a right to an immediate interlocutory appeal.[8] If the case gets sent back down and the summary judgment stage is reached, when another motion for summary judgment based on qualified immunity is made and denied, then there is another opportunity for appeal at that stage.[9]

There are cases that involve two levels of officials:

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[4] *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982). The Court stated:

> [T]he recognition of a qualified immunity defense for high executives reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also the need to protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of official authority.

Id. at 807.

[5] *Id.* at 817 ("Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.").

[6] *Id.* at 808.

[7] Mitchell v. Forsyth, 472 U.S. 511, 525 (1985) ("The denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action.").

[8] *Id.*

[9] *Id.*

supervisors and lower-level officials.[10] The *Sorensen v. City of New York* case out of the Second Circuit is not a reported decision, but here, the court said that low-level officials who were merely following orders were not entitled to qualified immunity.[11] They were following a strip search policy that was itself facially invalid and unconstitutional given the clearly established law in the Second Circuit.[12] In other words, the officials could not rely on the fact that they were merely following policy where the policy itself was obviously and clearly unconstitutional.[13] Another case is *Lawrence v. Bowersox* out of the Eighth Circuit.[14] This is a case where lower-level officials at a jail followed orders to use pepper spray on certain prisoners.[15] There was a determination that the use of pepper spray in this way was an exercise of excessive force.[16] However, these lower-level officials did not act maliciously and sadistically; they were simply following orders.[17] Thus, they had qualified immunity because they had not committed a constitutional violation under the Eighth or Fourteenth Amendments, which

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[10] *See* Lawrence v. Bowersox, 297 F.3d 727 (8th Cir. 2002) (involving lower-level officials following the orders of higher-level officials); Sorensen v. City of New York, No. 00-9366, 2002 WL 1758432 (2d Cir. July 30, 2002) (same).

[11] *Sorenson*, 2002 WL 1758432, at *3.

[12] *Id.*

[13] *Id.*

[14] *Lawrence*, 297 F.3d at 727.

[15] *Id.* at 730.

[16] *Id.* at 733.

[17] *Id.*

require malicious and sadistic conduct for an excessive force claim.[18] However, the supervisor who gave the order to use the pepper spray did not have qualified immunity.[19] It is an interesting case if you want to look at it for the distinction between the supervisory official and the lower-level official in a jail setting. The *Ramirez* case is the one in which certiorari was granted and involved a warrant and the fact that material that was included in the affidavit was not included in the warrant.[20] Specifically, the case determined whether there is a requirement to specify the items to be seized on the face of the warrant itself.[21] In this case, there is another interesting distinction made between the line officers and the supervisory official.[22] The Ninth Circuit held that the line officers had no obligation to actually read the warrant.[23] They could rely on the officer in charge to read the warrant and tell them what to do.[24] Thus, the line officers had qualified immunity.[25] However, the court said that the lead officer should have read the warrant.[26] He had a responsibility to look at the warrant and make sure it was not defective on its

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[18] *Id.*
[19] *Lawrence*, 297 F.3d at 733.
[20] Ramirez v. Butte-Silver Bow County, 298 F.3d 1022 (9th Cir. 2002), *cert. granted*, Groh v. Ramirez, 537 U.S. 1231 (2003). Subsequent to this conference, the United States Supreme Court affirmed the Ninth Circuit in Groh v. Ramirez, 540 U.S. 551 (2004).
[21] *Id.* at 1025-26.
[22] *Id.* at 1027-28.
[23] *Id.* at 1028.
[24] *Id.*
[25] *Ramirez*, 298 F.3d at 1028.
[26] *Id.* at 1027.

face.[27] Therefore, the lead officer in that case was denied qualified immunity.[28]

The structure of a qualified immunity analysis, starting in 1991 through the *Saucier v. Katz* case in 2001, has been set forth by the Supreme Court several times.[29] The analysis for the qualified immunity defense should include two parts.[30] The first question should be whether, given the plaintiff's allegations and taking them as true, the plaintiff has asserted the violation of a constitutional right under current law.[31] Only if the answer to that question is in the affirmative does the second part of the analysis get addressed.[32] The second question is whether the law was clearly established at the time of the incident.[33] The law must be clearly established in such a way that a reasonable officer or

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[27] *Id.*

[28] *Id.* at 1028. The denial of qualified immunity was affirmed by the United States Supreme Court in *Groh*, 540 U.S. at 566.

[29] 533 U.S. 194 (2001). The Court stated:

> Our instruction to the district courts and courts of appeals to concentrate at the outset on the definition of the constitutional right and to determine whether, on the facts alleged, a constitutional violation could be found is important. As we have said, the procedure permits courts in appropriate cases to elaborate the constitutional right with greater degrees of specificity. . . . [T]hen proceed to the question whether this general prohibition against excessive force was the source for clearly established law that was contravened in the circumstances this officer faced.

Id. at 207-08.

[30] *Id.* at 201.

[31] *Id.* (stating the threshold question as: "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?").

[32] *Id.*

[33] *Id*

official would understand that what he or she was doing violated that clearly established right.[34]

The first prong of the analysis is a merits question.[35] Has the plaintiff essentially stated a claim upon which relief can be granted under current law? The Court started in 1991 by suggesting to the lower courts that this is the first question to be addressed.[36] In *Sacramento v. Lewis*, the Court indicated, in an explanatory footnote, that this is the better approach.[37] The Court stated that the suggested analysis would help establish the standards so that the courts do not continue to dispose of constitutional claims under the qualified immunity analysis on the theory that the law was not clearly established at the time.[38] When this occurs, the case is essentially over unless there is a claim against the municipality or unless the plaintiff is seeking injunctive relief, in which case there would be no qualified immunity that would be raised.[39] The Court stated that it is important to get the standards established so that in subsequent cases an official will know and understand what the law is.[40]

In *Conn v. Gabbert*, the Supreme Court started using the "must" word; that is, this is what you "must" do.[41] The court

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[34] *Saucier*, 533 U.S. at 202.
[35] *Id.* at 200.
[36] *Id.* at 201.
[37] 523 U.S. 833, 842 n.5 (1998).
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] 526 U.S. 286 (1999).

must first decide whether the plaintiff has stated a claim under current law before the second prong is applied to determine whether that right was clearly established at the time.[42] The *Wilson v. Layne* case is important because that is the case where you see that the Court really means what it was saying.[43] In all of the other cases leading up to *Wilson*, the Court had decided on the first prong; that is, the plaintiff has not asserted a constitutional right. The Court never reached the second question.[44] So, a number of lower courts understood that to mean that if the plaintiff really is asserting no claim under current law, the case may be disposed of easily.[45] It is a decision on the merits and the case will be over. *Wilson* was the ride-along case where the police brought the media with them while executing a warrant in a private home.[46] The question was whether this violated the

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[42] *Id.* at 290 ("[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.") (emphasis added).

[43] 526 U.S. 603 (1999).

[44] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971) (analyzing only whether the plaintiff asserted a violation of a constitutional right and stating that "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."); Butz v. Economou, 438 U.S. 478, 503 (1978) (stating that after a determination that the plaintiff has asserted a constitutional violation, "the court then must address how best to reconcile the plaintiff's right to compensation with the need to protect the decisionmaking processes of an executive department.").

[45] *See* Davis v. Passman, 544 F.2d 865, 873 (5th Cir. 1977) (implying constitutional damages remedy when plaintiff proved a violation of her Fifth Amendment rights).

[46] 526 U.S. at 607.

Fourth Amendment.[47] The Fourth Circuit decided the case the way those cases had typically been decided prior to the Supreme Court's determination that courts must decide the merits question first.[48] The Fourth Circuit refused to decide whether there was a violation of the Fourth Amendment that resulted from the police bringing the media into a private residence.[49] The court instead stated that whatever the law was, it was not clearly established at the time.[50] Thus, the police officers got qualified immunity.[51] The Supreme Court granted certiorari and essentially affirmed, but on a much different basis and using a different analytical approach.[52] The Court stated that first it must be determined whether there was a constitutional violation before it may be determined whether the law was clearly established.[53] In *Wilson*, the Court decided unanimously that when the police officers bring media along when executing a warrant in a private home, the police officers violated the Fourth Amendment.[54] The Court went back to the Magna Carta and back to the traditional notion that "a man's home is his castle."[55] Thus, the Court agreed that the officers' conduct was a violation of the Fourth Amendment.[56]

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[47] *Id.* at 608.
[48] Wilson v. Layne, 110 F.3d 1071, 1073-74 (4th Cir. 1997).
[49] *Id.* at 1075-76.
[50] *Id.* at 1076.
[51] *Id.*
[52] *Wilson*, 526 U.S. at 608.
[53] *Id.* at 609.
[54] *Id.* at 614.
[55] *Id.* at 609 (citing Semayne's Case, 77 Eng. Rep. 194 (K.B. 1604)).
[56] *Id.* at 614.

On question number two, in evaluating whether the right was clearly established at the time the violation occurred,[57] the Court voted eight-to-one that it was not.[58] Justice Stevens disagreed stating that the law was clearly established in such a way that a reasonable officer would understand that his conduct was a violation of the Fourth Amendment.[59] *Wilson* was the first time the Supreme Court had decided that this conduct constituted a constitutional violation.[60] The Court established this principle and these officers got the one free bite; they got qualified immunity because the law was not clearly established at the time.

In *Saucier v. Katz,* the Court reinforced the two-part analysis as the appropriate method for courts to use.[61] There are several examples of courts using this method.[62] For example, the *Sutton* case out of the Third Circuit held that this approach is

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[57] *Wilson*, 526 U.S. at 614 ("Since the police action in this case violated the petitioners' Fourth Amendment right, we now must decide whether this right was clearly established at the time of the search.").

[58] *Id.* at 605-06.

[59] *Id.* at 618-619 (Stevens, J., dissenting) (stating that typical law enforcement officials are competent enough to understand that bringing members of the media into a home during the execution of an arrest warrant was unlawful).

[60] *Id.* at 615-16.

[61] 533 U.S. 194, 200 (2001).

[62] *See* Sutton v. Rasheed, 323 F.3d 236, 250 (3d Cir. 2003) ("We believe that the Supreme Court directive in *Wilson v. Layne* is mandatory."); *see also* Dwan v. City of Boston, 329 F.3d 275, 278 (1st Cir. 2003) ("[D]efendants are entitled to qualified immunity for official action unless (1) their conduct violated . . . constitutional rights and, in addition, (2) the law to this effect was 'clearly established'. . . . *Saucier* contemplates . . . that the reviewing court should begin with the former question."); Wilkinson v. Russell, 182 F.3d 89, 102-03 (2d Cir. 1999) ("A court evaluating a claim of qualified immunity 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all.'").

mandatory because the Supreme Court dictated that the courts must use it.[63] Also in the Fourth Circuit, *Leverette v. Bell*, the court stated that the Supreme Court method must be used.[64] The courts may not bypass the merits question just because it is a tough question or just because the law is unsettled or uncharted in that area.[65] The courts must address the merits question. There are many other cases that support this position.[66]

There are courts that do not use the analysis, such as in *Ehrlich*, which is a recent Second Circuit decision.[67] In these cases the courts stated that they are not going to address the first question, the merits question, when it involves a very difficult and unsettled issue of state law.[68] Essentially, the Second Circuit stated that whether the plaintiff's rights were violated depended upon the way Connecticut defined the rights of a conservator with respect to the property of his ward.[69] The issue involved a

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[63] 323 F.3d at 250.

[64] 247 F.3d 160, 166 (4th Cir. 2001).

[65] *Id.* at 166 n.4.

[66] *See* Cruz v. City of Laramie, 239 F.3d 1183, 1189-90 (10th Cir. 2001) (stating that it is a constitutional violation for police officers to put someone who is obviously visibly distressed, whether on drugs or alcohol, into a hog-tied position; while such excessive force violates the Fourth Amendment, the law was not clearly established at the time, and therefore, the officers had qualified immunity); Thomas v. Roberts, 323 F.3d 950, 956 (11th Cir. 2003) (holding that the school officials should be entitled to qualified immunity because, at that time, there was no case on point making it clear that it was a constitutional violation to strip search students during a theft investigation).

[67] Ehrlich v. Town of Glastonbury, 348 F.3d 48, 57 (2d Cir. 2003).

[68] *Id.* at 57-58.

[69] *Id.* at 58.

difficult and unsettled question of Connecticut state law.[70] The court evaluated the second prong and stated that the law was not clearly established at the time.[71] As a result, the court held that the officials would prevail on the qualified immunity defense.[72] The court justified the holding by explaining that the difficult question of state law was presented in a context that was not terribly well briefed and that the qualified immunity analysis was not binding on the state courts.[73] In other words, the state courts may determine that the state law was misinterpreted and the interpretation was not essential to the holding.[74] Courts in other cases have made similar holdings, such as in *Hudson v. Hall* out of the Eleventh Circuit[75] and *Santana* out of the First Circuit.[76] These courts stated that the merits question does not need to be decided first because it involves a difficult, unsettled question of state law.[77] Therefore, the court will simply evaluate question number two.

The other cases in this vein are mostly out of the Second Circuit and they have taken an approach that suggests that the circuit intends to avoid answering the merits question in cases where it is a constitutional law issue that will come up again most

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[70] *Id.*
[71] *Id.* at 60-61.
[72] *Ehrlich,* 348 F.3d at 61-62.
[73] *Id.* at 56.
[74] *Id.* at 58.
[75] 231 F.3d 1289 (11th Cir. 2000).
[76] Santana v. Calderon, 342 F.3d 18 (1st Cir. 2003).
[77] *Hudson,* 231 F.3d at 1296 n.5; *Santana,* 342 F.3d at 30.

likely in cases where plaintiffs are seeking injunctive relief or in the context of a criminal suppression hearing or in a case where a municipality may be a defendant.[78] In other words, in cases where the issue will be more thoroughly briefed, argued, and considered by the court,[79] there is an aversion to deciding these tough constitutional issues on a motion to dismiss or even on a motion for summary judgment in the qualified immunity context.[80] So, the resistance to evaluating the first prong of *Saucier* still exists in certain kinds of cases.[81]

A word on heightened pleading and qualified immunity; I think the Supreme Court, frankly, has made it relatively clear that heightened pleading is not something that is in existence under the Federal Rules. The *Swierkiewicz* case was a Title VII case.[82] That case reversed the Second Circuit's requirement that plaintiffs, in essence, plead a prima facie case under *McDonnell Douglas* in a complaint in a Title VII case.[83] In a unanimous

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[78] *See* Koch v. Town of Brattleboro, 287 F.3d 162, 166 (2d Cir. 2002) (stating that it was unlikely that the unsettled constitutional law issues would escape review since such issues will often be thoroughly litigated on a motion to suppress in a criminal trial).

[79] *Ehrlich,* 348 F.3d at 56.

[80] *Koch*, 287 F.3d at 166; *Ehrlich,* 348 F.3d at 56-57.

[81] *Ehrlich,* 348 F.3d at 57 (stating that under certain circumstances it is inappropriate to apply the sequential analysis enunciated in *Saucier*).

[82] Swierkiewicz v. Sorema, 534 U.S. 506, 509 (2002).

[83] *Id.* at 508. The Court referred to its decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), which established a rule requiring an employment discrimination complaint to allege facts constituting a prima facie case of discrimination. Under the rule, a plaintiff is required to show "(1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference

opinion, Justice Thomas stated that the Rule 8[84] simplified pleading requirement applies in all civil actions with limited exceptions.[85] The exceptions are the ones that are enunciated in the rules themselves.[86] Rule 9 states that, if a plaintiff is pleading fraud or mistake, the complaint must be plead with particularity.[87] Other than that, the Supreme Court has strongly suggested that there is no heightened pleading requirement.[88] The majority of courts have now abandoned the heightened pleading requirement.[89] However, some courts still insist on a reply under Rule 7[90] and some courts will insist on a more definite statement under Rule 12(e),[91] but they do not insist on a heightened pleading

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of discrimination." *Id.* at 510.

[84] FED. R. CIV. P. 8(a)(2), which provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief."

[85] *Swierkiewicz,* 534 U.S. at 513.

[86] *Id.* at 513 (referring to Federal Rule of Civil Procedure 9(b), which states in pertinent part that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.").

[87] *Id.*at 513.

[88] *Id.* at 515.

[89] *See generally* Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61, 65-66 (1st Cir. 2004); Alston v. Parker, 363 F.3d 229, 233 (3d Cir. 2004); Phillip v. Univ. of Rochester, 316 F.3d 291, 293-94 (2d Cir. 2003) ("These liberal pleading rules apply with particular stringency to complaints of civil rights violations."); Galbraith v. County of Santa Clara, 307 F.3d 1119, 1125 (9th Cir. 2002) ("[N]early all of the circuits have disapproved any heightened pleading standard").

[90] FED. R. CIV. P. 7(a), which states in pertinent part that "[t]here shall be a . . . reply to a counterclaim denominated as such." *See Educadores Puertorriquenos en Accion,* 367 F.3d at 65-66; *Alston*, 363 F.3d at 233.

[91] FED. R. CIV. P. 12(e), which provides in pertinent part that a "party may move for a more definite statement before interposing a responsive pleading."

in the complaint under Rule 8.[92] This is true with the exception, of course, of the Eleventh Circuit where the court held in *Gonzalez v. Reno* that the Eleventh Circuit still adheres to the heightened pleading requirement.[93] In that case, the court relied on a Sixth Circuit opinion that has been overruled by the Sixth Circuit, but that did not seem to bother the Eleventh Circuit.[94]

With respect to state of mind, I just want to briefly point out that there are some circuits in which this issue arises.[95] The cases mostly involve Eighth and Fourteenth Amendment claims or cases that shock the conscience.[96] The question basically is

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[92] *See* Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 164 (1993) ("[A] federal court may [not] apply a 'heightened pleading standard' —more stringent than the usual pleading requirements of Rule 8(a) Federal Rule of Civil Procedure —in civil rights cases alleging municipal liability under . . . § 1983.").

[93] 325 F.3d 1228, 1235 (11th Cir. 2003) (ruling that the heightened pleading requirement for factual allegations in the complaint applies in civil rights cases, "especially those involving the defense of qualified immunity.") (citing GJR Investments, Inc. v. Escambia, 132 F.3d 1359, 1367 (11th Cir. 1998)).

[94] *See* Veney v. Hogan, 70 F.3d 917, 922 (6th Cir. 1995) *abrogation recognized by* Goad v. Mitchell, 297 F.3d 497, 502-03 (6th Cir. 2002) ("We conclude that the Supreme Court's decision in *Crawford-El* invalidates the heightened pleading requirement that we enunciated in *Veney*.").

[95] *See* Currier v. Doran, 242 F.3d 905, 915 (10th Cir. 2001) (discussing procedures available for examination of an official's state of mind); Thaddeus-X v. Blatter, 175 F.3d 378, 401 (6th Cir. 1999) (concluding that the subjective prong of an Eighth Amendment claim requires proof of the prison official's state of mind); Rivera v. Senkowski, 62 F.3d 80, 84 (2d Cir. 1995) (holding that "the charged official must act with a sufficiently culpable state of mind").

[96] *Thaddeus-X*, 175 F.3d at 400-01 (holding that Eighth Amendment claims consist of two categories: "conditions of confinement" and "those involving excessive use of government force"); Harris v. Maynard, 843 F.2d 414, 415 (10th Cir. 1988) (holding that "under the due process clause of the Fourteenth Amendment no constitutional deprivation occurs as a result of the negligent acts of prison officials"); Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974) (holding that plaintiff must allege conduct that "shocks the conscience").

whether qualified immunity plays any role in a case where the underlying constitutional violation requires proof of some sort of impermissible state of mind.[97] In other words, is it possible to find that the plaintiff has submitted enough evidence from which a jury may find subjective deliberate indifference, purpose to harm, or malicious and sadistic conduct and at the same time find qualified immunity for an officer?[98] In such a case, an officer must be said to have acted in an objectively reasonable way even though he or she acted with subjective deliberate indifference or maliciously and sadistically with a purpose of causing harm.[99]

A number of circuits have opined on the subject of deliberate indifference claims and determined that if the plaintiff has submitted enough evidence from which a jury can find subjective deliberate indifference, there would be no qualified immunity.[100] However, the Ninth Circuit has stated that there is a

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[97] Tompkins v. Vickers, 26 F.3d 603, 607 (5th Cir. 1994) ("Every Circuit that has considered the question [of the public official's state of mind] has concluded that a public official's motive or intent must be considered in the qualified immunity analysis where unlawful motivation or intent is a critical element of the alleged constitutional violation.").

[98] *See* Lolli v. County of Orange, 351 F.3d 410, 420-21 (9th Cir. 2003) (holding that the prison officers acted with deliberate indifference but were not entitled to qualified immunity); *cf.* Estate of Ford v. Ramirez-Palmer, 301 F.3d 1043, 1045 (9th Cir. 2002) (holding that although the officers may have acted with a deliberate indifference, they were still entitled to qualified immunity).

[99] *See Estate of Ford*, 301 F.3d at 1050 (stating "a reasonable prison official understanding that he cannot recklessly disregard a substantial risk of serious harm, could know all of the facts yet mistakenly, but reasonably, perceive that the exposure in any given circumstance was not that high. In these circumstances, he would be entitled to qualified immunity.").

[100] *See* Cantu v. Jones, 293 F.3d 839, 845 (5th Cir. 2002) (holding that the

role for qualified immunity to play in a deliberate indifference case.[101] The Ninth Circuit has even gone one step beyond where the Eleventh Circuit has gone and said that there is a role for qualified immunity even when malicious and sadistic is the standard.[102] I personally believe those cases are mistaken, particularly with respect to the malicious and sadistic standard. I believe what the Ninth Circuit should have said was that there was no constitutional violation at all. The circuit should not have stated that someone may act maliciously and sadistically and still have acted in an objectively reasonable way. The Eleventh Circuit and the Ninth Circuit, however, have both stated that the qualified immunity defense is available in deliberate indifference cases.[103] The Eleventh Circuit in *Skrtich*[104] and in *Johnson*[105] has stated that there is no qualified immunity defense available in an excessive force claim in the prison context, where the standard is "malicious and sadistic" for the purpose of causing harm.[106]

The next issue is how the courts determine whether the

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officials were not entitled to qualified immunity because they acted with a deliberate indifference); Walker v. Benjamin, 293 F.3d 1030, 1037 (7th Cir. 2002) (same); Beers-Capitol v. Whetzel, 256 F.3d 120, 142 n.15 (3d Cir. 2001) (same).

[101] *Estate of Ford*, 301 F.3d at 1049-50.

[102] Clement v. Gomez, 298 F.3d 898, 903-04 (9th Cir. 2002) (holding that the officials were entitled to qualified immunity and recognizing that malicious and sadistic conduct is the standard).

[103] Carr v. Tatangelo, 338 F.3d 1259, 1275 (11th Cir. 2003) (holding that even though the officials were deliberately indifferent to serious medical needs, they were still entitled to qualified immunity); *Estate of Ford*, 301 F.3d at 1050.

[104] Skrtich v. Thornton, 280 F.3d 1295 (11th Cir. 2002).

[105] Johnson v. Breeden, 280 F.3d 1308 (11th Cir. 2002).

law was clearly established or whether the right was clearly established. First there is an issue of what law controls. In the *Wilson* case where the Court decided that the law was not clearly established, the Court pointed to three sources the plaintiff could use in order to determine whether the law is clearly established.[107] First, the Court stated there might be general principles of constitutional law that have been announced in Supreme Court cases that could apply with obvious clarity to the facts in the case at hand.[108] The second source, which is, of course, the best situation, is to find controlling authority from the same jurisdiction in which the case is being heard.[109] Thus, decision. from the relevant circuit, or decisions of the highest court of the state would clearly establish the law. Finally, the Court suggested that if there is no law from the Supreme Court and no law from the appropriate circuit, a consensus of persuasive authority from other circuits might be an appropriate source for clearly established law.[110]

On the law of other circuits, *Poe v. Leonard* in the Second Circuit seems to say it is not quite clear whether you can look to the law of other circuits.[111] *McClendon* out of the Fifth Circuit is a case where the court reversed or overruled its prior position on

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[106] *Skrtich*, 280 F.3d at 1301; *Johnson*, 280 F.3d at 1321.
[107] Wilson v. Layne, 526 U.S. 603, 615-16 (1999).
[108] *Id.*
[109] *Id.* at 616.
[110] *Id.* at 617.
[111] 282 F.3d 123, 142 n.15 (2d Cir. 2002).

what law controls.[112] In *McClendon*, the court stated that after *Wilson*, the law of other circuits would be an appropriate source if there were no law in the Fifth Circuit.[113] In *Vinyard v. Wilson*, from the Eleventh Circuit, the court takes the position that it will look to the law of other circuits on the first prong of the analysis; that is, whether the plaintiff has stated the violation of a constitutional right which amounts to the merits question.[114] However, the court will not look to the law of other circuits on the second prong of the analysis, whether the right was clearly established.[115] The Eleventh Circuit's position on this is simply that officials will not be required to read *The Federal Reporter* and look at cases from all around the country.[116] Other circuits seem to require that, in essence, but the Eleventh Circuit stated it will not be required until the Supreme Court makes a decision that dictates such a rule.[117] In the Second Circuit, under *Hanrahan,* it is not quite clear what will be relevant in terms of district court decisions.[118] In the Third Circuit under *Doe v. Delie*, district court opinions may be relevant.[119] The Eighth and

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[112] McClendon v. City of Columbia, 305 F.3d 314, 329 (5th Cir. 2002).
[113] *Id.* at 327 n.9.
[114] 311 F.3d 1340, 1348 n.11 (11th Cir. 2002).
[115] *Id.*
[116] Marsh v. Butler County, 268 F.3d 1014, 1033 n.10 (11th Cir. 2001).
[117] *Id.*
[118] Hanrahan v. Doling, 331 F.3d 93, 98 n.6 (2d Cir. 2003) (noting that the "extent to which district court decisions may be taken into account in evaluating whether a right is clearly established for qualified immunity purposes is far from clear.").
[119] 257 F.3d 309, 321 (3d Cir. 2001).

Ninth Circuits will review all relevant law, even the law of other circuits, if there is no Supreme Court opinion and if there is no case from their own circuit.[120] A number of other circuits do that as well.[121]

In two recent cases, the Supreme Court has attempted to give guidance on the question of how the contours of the right should be defined for the purpose of qualified immunity.[122] The *Saucier* case, of course, was the case that went up to the Supreme Court from the Ninth Circuit.[123] This case raised the question of whether qualified immunity applied in a Fourth Amendment excessive force case.[124] Specifically, the issue was whether an objectively reasonable law officer could engage in objectively unreasonable conduct under the Fourth Amendment, yet still believe that his conduct was objectively reasonable.[125] The answer to the question is "yes," after the Supreme Court's decision in *Saucier*.[126] *Saucier* was about a 60-year-old veterinarian and animal rights activist who protested at the

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[120] *See* Boswell v. County of Sherburne, 849 F.2d 1117, 1121-22 (8th Cir. 1988) (relying on the law of the Tenth and Second Circuits); Thompson v. Souza, 111 F.3d 694, 701 (9th Cir. 1997) (relying on the law of the Seventh and Eighth Circuits).

[121] *See McClendon*, 305 F.3d at 327 n.9; Blake v. Wright, 179 F.3d 1003, 1007 (6th Cir. 1999) ("A right is clearly established if there is binding precedent from the Supreme Court, the Sixth Circuit, or the district court itself, or case law from other circuits which is directly on point.").

[122] Hope v. Pelzer, 536 U.S. 730, 739-41 (2002); Saucier v. Katz, 533 U.S. 194, 200-01 (2001).

[123] *Saucier*, 533 U.S. at 200.

[124] *Id.* at 197.

[125] *Id.* at 205-06.

Presidio while Al Gore gave a speech about opening it as a national park.[127] The veterinarian believed that the government would be experimenting on animals in the Presidio.[128] He got out of his chair as Al Gore started to speak to unfurl a banner that read, "Please Keep Animal Torture Out of Our National Parks."[129] As he did so, two military police officers whisked him away, tossed him in a van, and he was later released.[130] The veterinarian said he was not injured when they tossed him in the van because he caught his fall with his arm.[131] This case somehow made it up to the Supreme Court even though there was a video showing that the person who was the named as the defendant, Saucier, was not the guy who shoved him in the van.[132] Justice O'Connor continued to call the video[133] to the plaintiff's attention by indicating that she had seen the video and that the defendant did not shove the plaintiff.[134] However, the issue was whether the qualified immunity defense was available in this case.[135] The Court held that the qualified immunity analysis and the Fourth Amendment analysis are distinct.[136] Qualified

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[126] *Id.* at 207-08.
[127] *Id.* at 197.
[128] *Saucier*, 533 U.S. at 197.
[129] *Id.*
[130] *Id.* at 198.
[131] *Id.*
[132] Oral argument at 29-30, Saucier v. Katz, 533 U.S. 194 (2001) (No. 99-1977).
[133] *Id.*
[134] *Id.*
[135] *Saucier*, 533 U.S. at 197.
[136] *Id.* at 204.

immunity may protect an officer, even an officer who uses objectively unreasonable force under the Fourth Amendment.[137] This is because the officer may not have been aware of the legal constraints on such conduct.[138] A jury may decide that an officer's use of pepper spray was objectively unreasonable or an officer's use of a hog-tie was objectively unreasonable, but the legal constraints on either or both types of conduct may or may not be clear. In other words, a jury may decide that the officer's use of a particular restraint or technique in a certain situation was unreasonable under the Fourth Amendment.[139] However, an officer will be protected by qualified immunity if the legal restraints on that conduct were not clear at the time.[140]

Saucier also dealt with how specifically or narrowly the right should be defined.[141] The language in *Saucier* states that it has to be clear to a reasonable officer that his conduct was unlawful in the situation he confronted; it must be a factually

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[137] *Id.* at 201-02 (citing Graham v. Connor, 490 U.S. 386 (1989)).
[138] Anderson v. Creighton, 483 U.S. 635, 640 (1987) (concluding that although entry into a private home is constitutionally unreasonable, it will not give rise to liability if a reasonable officer could have believed it was reasonable).
[139] *See* Mantz v. Chain, 239 F.Supp.2d 486, 499 (D.N.J. 2002) (holding that a reasonable fact-finder could conclude that the use of pepper spray was unreasonable); Cruz v. City of Laramie, 239 F.3d 1183, 1190 (10th Cir. 2001) (holding that the officers who "hog-tied" the decedent were acting unreasonably).
[140] *Anderson*, 483 U.S. at 640 (stating that an official action is protected by qualified immunity if the right the official is said to have violated was not clearly established).
[141] *Saucier*, 533 U.S. at 201.

specific kind of question.[142] In my opinion, the Ninth Circuit and the Eleventh Circuit represented two extremes in terms of qualified immunity.[143] In the Ninth Circuit, almost all excessive force cases went to the jury. Very rarely would there be a grant of qualified immunity at summary judgment in an excessive force case.[144] In the Eleventh Circuit, no case went to the jury if the defense of qualified immunity was raised.[145] The Eleventh Circuit has been called the land of "unqualified immunity," and that, to a degree, is true. For example, *Hope v. Pelzer* was the hitching post case.[146] A prisoner was tied to a hitching post in Alabama in the hot sun all day without a shirt and was allowed no water or

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[142] *Id.* at 202.

[143] *See, e.g.*, Lewis v. Sacramento County, 98 F.3d 434, 445 (9th Cir. 1996) (concluding that it was up to the jury to decide, based on the facts, whether a grant of qualified immunity was proper); Ansley v. Heinrich, 925 F.2d 1339, 1341 (11th Cir. 1991) (holding that a jury should seldom, if ever, be instructed on qualified immunity).

[144] *Compare* Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 922 (9th Cir. 2001) (holding that the grant of summary judgment with respect to the claim of excessive force was not error), *with* Santos v. Gates, 287 F.3d 846, 853 (9th Cir. 2002) (concluding that determining whether the use of particular force is reasonable requires a fact-finder to balance the individual's interest that were compromised with the government's interest at stake and therefore did not grant summary judgment) *and Lewis*, 98 F.3d at 445 (stating that there was still a triable issue of facts regarding the rights of the plaintiff being violated and thus the grant of summary judgment as per qualified immunity was improper).

[145] *See, e.g.*, Stone v. Peacock, 968 F.2d 1163, 1166 (11th Cir. 1992) ("The law is now clear . . . that the defense of qualified immunity should be decided by the court, and should not be submitted for decision by the jury."); Ansley v. Heinrich, 925 F.2d at 1348 ("[Q]ualified immunity is a question of law for the court to decide preferably on pretrial motions . . . ").

[146] 536 U.S. 730 (2002).

bathroom breaks.[147] The question was whether this conduct constituted cruel and unusual punishment.[148] The Eleventh Circuit in *Hope* stated that although a jury could find an Eighth Amendment violation, there was no case on point which clearly established the law.[149] In fact, there was a case on point,[150] but because the case involved cuffing a prisoner to a cell door rather than to a hitching post, it was not factually close enough to satisfy the Eleventh Circuit's stringent test. At any rate, the Eleventh Circuit granted qualified immunity in that case and then the Supreme Court granted certiorari.[151] The Supreme Court reversed the Eleventh Circuit decision and indicated that the Eleventh Circuit was too rigid in its evaluation.[152] The question was whether the officer had fair warning.[153]

In my opinion, the Supreme Court was trying to rein in what I think were the two aberrant circuits; one was way off the scale in terms of always granting qualified immunity; one was way off the scale in terms of never granting qualified immunity. The Supreme Court implied that there must be a middle of the

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[147] *Id.* at 734-35.
[148] *Id.* at 737-38.
[149] Hope v. Pelzer, 240 F.3d 975, 981-82 (11th Cir. 2001).
[150] Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974) (holding that the shackling of prisoners to cell bars for punitive purposes violated the Eighth Amendment). Fifth Circuit cases decided prior to 1981 are binding precedent on the Eleventh Circuit. *See Hope*, 240 F.3d at 979, 981 (applying case law from the Fifth Circuit to determine whether the prison guards violated clearly established statutory or constitutional rights).
[151] *Hope*, 240 F.3d at 976, *cert. granted*, 534 U.S. 1073 (2002).
[152] *Hope*, 536 U.S. at 739.
[153] *Id.* (citing *Saucier*, 533 U.S. at 206).

road. I think, if you put *Hope* and *Saucier* together, the result is what I call the "Goldilocks" test; it cannot be too big, it cannot be too small, it cannot be too hot, it cannot be too cold. There has to be some kind of medium ground. At any rate, the Court in *Hope* rejected the requirement that there must be some "fundamentally similar," or factually identical kind of case on point.[154] The Court stated that officials may be on notice the conduct is unlawful even in novel factual circumstances.[155]

With respect to supervisors and low-level officials, in *Poe v. Leonard*, the Second Circuit makes it clear that, for a supervisor to be held liable and denied qualified immunity, both the law allegedly violated by the street-level officer and the supervisory liability doctrine on which the plaintiff is relying must be clearly established.[156] There is an implied two-level, clearly established requirement in cases involving low-level officials and supervisors.[157]

JUDGE BLOOM: I am sorry to interrupt, Karen, but that case kills me. This is a state trooper who was making a video.

PROFESSOR BLUM: I did not say the court was right in granting qualified immunity.

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[154] *Id.* at 741.
[155] *Id.*
[156] 282 F.3d 123, 134 (2d Cir. 2002).
[157] *Id.* at 134.

JUDGE BLOOM: Basically, a state trooper was supposed to make a video to train new state troopers about situations and how to handle situations, and he used that opportunity to sort of make his own little pornographic movie of another state trooper.[158] He set up the video camera in another room, and while she was undressing to change into the next wardrobe for the next scene, he had the tape going. In that case, the issue was whether the person who supervised the state trooper and who was given the job to make the movie had enough clues or was filled in enough to know that the state trooper would behave in that manner.[159] Now, you just talked about *Hope*, and *Hope* said not to be so strict.[160] Everyone can agree that the act of using a hitching post in the middle of July in the middle of Alabama was severe conduct. In *Poe*, I had a hard time believing that the supervisor should have known that the state trooper had a predisposed personality to create videos while on the job with his colleagues. I do not know how anybody would ever meet that sort of test.

PROFESSOR BLUM: That is the test for supervisory liability.

JUDGE BLOOM: But this was a qualified immunity supervisory liability. It is a two-prong test; it is more than two-prong.[161]

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[158] *Id.* at 129.
[159] *Id.*
[160] 536 U.S. at 739.
[161] *Poe*, 282 F.3d at 134.

PROFESSOR BLUM: The theory of supervisory liability would have to be that the supervisor had actual or constructive knowledge of it and acquiesced to it. Is that correct?

PROFESSOR SCHWARTZ: The holding in *Poe v. Leonard* is that the plaintiff had to overcome, in effect, two qualified immunity hurdles in order to establish personal liability on the supervisor.[162] The first is to show that the underlying constitutional right was clearly established and the second is to show that the principle of supervisory liability that the plaintiff is relying upon in this case was clearly established.[163] As far as I know, the United States Supreme Court has never required that. All of the Supreme Court qualified immunity decisions speak about the constitutional right being clearly established, not the principle of § 1983 jurisprudence being clearly established.[164] When you go down that road, it might not only be a principle of supervisory liability, it might also be a principle of causation. Also, do the other rules of § 1983 litigation have to be clearly established? That is why I asked whether you think this case was

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[162] *Id.*

[163] *Id.* at 142.

[164] *See* Chavez v. Martinez, 538 U.S. 760, 766 (2003) (stating that in deciding whether qualified immunity should be granted in a § 1983 case, courts must first determine whether the right violated was clearly established); Davis v. Scherer, 468 U.S. 183, 197 (1984) (concluding that a "plaintiff who seeks damages for violation of . . . statutory rights may overcome . . . qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue.").

correctly decided. The First Circuit said the same thing.[165]

PROFESSOR BLUM: The First Circuit took the same position, that is correct. If the individual supervisor is being sued in his individual capacity, it must be a constitutional violation against him.[166] If you utilize the *Saucier* analysis with the first element being whether the plaintiff has stated a claim, I think the analysis must determine what makes a supervisor liable, and then whether it was it clearly established.

PROFESSOR SCHWARTZ: Is there a principle of supervisory liability that subjects the supervisor to liability? That is one question. Why is it necessary to ask whether it is clearly established or not? The second question is whether the constitutional right was clearly established. In the Second Circuit you must go through both questions.[167]

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[165] *See* Wilson v. Town of Mendon, 294 F.3d 1, 6 (1st Cir. 2002) ("A supervisory officer may be held liable for the behavior of his subordinate officers where his 'action or inaction [is] affirmatively linked . . . to that behavior in the sense that it could be characterized as supervisory encouragement, condonation or acquiescence *or* gross negligence amounting to deliberate indifference.' ").

[166] O'Neill v. Baker, 210 F.3d 41, 47 (1st Cir. 2000) (holding that it must be shown that the supervisor possessed the state of mind for the particular constitutional violation).

[167] *Poe*, 282 F.3d at 126 ("[I]n order for a supervisor to be held liable under § 1983, both the law allegedly violated by the subordinate and the supervisory liability doctrine under which the supervisor is sought to be held liable, must be clearly established.").

PROFESSOR CHEMERINSKY: The only thing I would interject here is that there is no Supreme Court case that has dealt with the issue of supervisory liability.

PROFESSOR BLUM: Correct. That is the problem.

PROFESSOR CHEMERINSKY: There are hundreds of lower court cases, and there is some conflict among them.[168] I think the underlying issue is that the Supreme Court has not taken up supervisory liability.

PROFESSOR BLUM: If you look at the supervisory liability cases, they are decided or handled in very much the same way as *City of Canton* liability against an entity is handled.[169] I think

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[168] *Compare* Doe v. City of Roseville, 296 F.3d 431, 440 (6th Cir. 2002) (holding that a supervisor's mere failure to act is not sufficient to impose supervisory liability and that liability must be based on active, unconstitutional behavior), *with* Ottman v. City of Independence, 341 F.3d 751, 761 (8th Cir. 2003) ("[A] supervisor incurs liability for a violation of a federally protected right when the supervisor is personally involved in the violation or when the supervisor's corrective inaction constitutes deliberate indifference toward the violation."), *and* Mena v. City of Simi Valley, 332 F.3d 1255, 1270 n.19 (9th Cir. 2003) (citing Redman v. County of San Diego, 942 F.2d 1435, 1446 (9th Cir. 1991)) ("Supervisory liability may be found in civil rights actions even if the supervisors in question are not directly involved in the acts leading to the constitutional deprivation.").

[169] City of Canton v. Harris, 489 U.S. 378 (1989). *See* Hayden v. Grayson, 134 F.3d 449 (1st Cir. 1998). The court held that the defendant municipality could be held liable under § 1983 for "failure to train" its employees only if it amounted to 'deliberate indifference to the rights of persons with whom the police come into contact,' and was 'closely related' to the constitutional injury. Evidence must show that the municipality knew that the risk was so obvious when they hired the employee that failure to train him would result in

there is a question whether that is legitimate. In other words, *City of Canton* is not about a constitutional violation, it is about statutory liability.[170]

PROFESSOR CHEMERINSKY: We are talking about the causation of crime. When you think of post *City of Canton*, there is *Bryan County v. Brown*[171] with the Supreme Court imposing a very strict causation requirement on cities liable for deliberate indifference. The Court stated that it has to be predictable and an exact kind of behavior.[172] That seems much like what the Second Circuit is saying in *Poe* in the context of supervisory liability. I think it is troubling in both contexts, but I think there is an analogy.

PROFESSOR BLUM: There are examples from other circuits of

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continued violations or if the initial risk was not obvious, it learned of a serious reoccurrence, but did not take the action to provide necessary training. *Id.* at 456; Manarite v. City of Springfield, 957 F.2d 953, 956 (1st Cir. 1992) stating that:

> when liability for serious harm or death . . . is at issue, a plaintiff must demonstrate 'deliberate indifference' by showing (1) an unusually serious risk of harm (self-inflicted harm, in a suicide case), (2) defendant's actual knowledge of (or, at least, willful blindness to) that elevated risk, and (3) defendant's failure to take obvious steps to address that known, serious risk.

[170] *City of Canton,* 489 U.S. at 380 (holding that a municipality can be held liable for constitutional violations under a statute).

[171] 520 U.S. 397 (1997).

[172] *Id.* at 409-10.

how they handle the issue of "clearly established."[173] In the *S.G.* case out of the Third Circuit, a school's prohibition on speech threatening violence and use of firearms was not a violation of clearly established law,[174] nor was it a violation of the First Amendment.[175] The *Trulock v. Freeh* case out of the Fourth Circuit is a good example of how difficult these decisions are sometimes.[176] *Trulock* involved a case where federal agents, in a *Bivens*[177] action, went to an apartment which was shared by a man and woman who were both government employees.[178] The woman allowed the agents into the apartment, so she consented to them entering the apartment, which she shared.[179] The agents wanted to search a computer, which she also shared with the man.[180] The agents wanted to search the computer for the man's computer files.[181] The woman allowed them access to the computer; she gave consent to that.[182] The man's computer files were protected under a password lock system.[183] The agents

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[173] *See* S.G. v. Sayreville Bd. of Educ. 333 F.3d 417 (3d Cir. 2003); Trulock v. Freeh, 275 F.3d 391 (4th Cir. 2001).
[174] *Sayreville Bd. of Educ.*, 333 F.3d at 423.
[175] *Id.* at 422.
[176] 275 F.3d at 391.
[177] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (holding that an individual may bring a civil suit against a federal officer for damages stemming from a constitutional violation).
[178] *Trulock*, 275 F.3d at 397-98.
[179] *Id.* at 398.
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Trulock*, 275 F.3d at 398.

broke the password and searched his computer files.[184] The Fourth Circuit decided that the agents' search was a Fourth Amendment violation because it was conducted without the man's consent.[185] However, it was not clearly established, at the time, that the agents' conduct of breaking the password to search the locked computer files would violate the constitution.[186] The dissent in the case pointed out that there was another case about a mother giving consent to the police to search her son's room, where there was a locked footlocker, and the court held that breaking into the locked footlocker was a Fourth Amendment violation.[187] The dissent stated that the law was clearly established by that case and the police should have understood that the password locked files on the computer were similar to the locked footlocker.[188] However, the majority of the panel on the Fourth Circuit stated that a police officer would not likely make that connection, so the cases are not similar enough to clearly establish the law.[189]

Feathers v. Aey out of the Sixth Circuit is a case where the police officer received a dispatch communication telling him to pick up somebody who might have a gun.[190] The officer was to

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[184] *Id.*
[185] *Id.* at 403.
[186] *Id.*
[187] *Id.* at 408 (Michael, J., dissenting) (citing United States v. Block, 590 F.2d 535 (4th Cir. 1978)).
[188] *Trulock,* 275 F.3d at 408-09 (Michael, J., dissenting).
[189] *Id.* at 409.
[190] 319 F.3d 843, 846 (6th Cir. 2003).

perform a *Terry* stop[191] and question the person.[192] It was later discovered that the dispatcher obtained the information from an anonymous source, which would not, under *Terry*, provide reasonable suspicion for a valid *Terry* stop.[193] An uncorroborated, anonymous source called in the tip.[194] However, the officer who made the stop received qualified immunity because the court stated that the officer had no way of knowing that the dispatcher's information came from an anonymous source.[195] In that situation, it was not clearly established that what the officer was doing violated the Fourth Amendment.[196]

Another example is *Vaughan v. Cox*, which was decided twice by the Eleventh Circuit and three times in total.[197] This was a case involving a high-speed pursuit.[198] These fellows allegedly stole a truck.[199] They were headed down I-85 in the state of Georgia.[200] At approximately nine o'clock in the morning, a sheriff, sitting in his car, saw the truck towing two watercraft

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[191] Terry v. Ohio, 392 U.S. 1 (1968) (holding that when a police officer has reason to suspect criminal activity he has the right to conduct a limited search of the suspected individual that will not constitute a violation of that individual's Fourth Amendment rights).
[192] *Feathers,* 319 F.3d at 846.
[193] *Id.* at 850.
[194] *Id.*
[195] *Id.* at 851.
[196] *Id.*
[197] 343 F.3d 1323, 1325 (11th Cir. 2003).
[198] *Id.* at 1326.
[199] *Id.*
[200] *Id.*

behind it and believed the truck was stolen.[201] There were two individuals in the truck.[202] The sheriff moved his car in front of the truck and attempted to stop it, but was unsuccessful.[203] The truck was proceeding at eighty miles an hour down the thruway, not weaving in and out, just traveling at that speed.[204] Finally, the sheriff positioned his car parallel with the truck, rolled down the window and, without giving any warning, fired shots into the truck.[205] One of the shots hit a passenger in the truck. As a result of the shooting, the passenger is now a paraplegic.[206] The Eleventh Circuit, in the first trial, stated that a jury could find the sheriff's conduct was excessive force, but granted qualified immunity because there was no similar case on point.[207] *Hope v. Pelzer* was decided in the interim. In this case, the petitioner, Vaughan, was granted certiorari and the Court remanded for reconsideration in light of the *Hope* decision.[208] In fact, the Supreme Court made similar decisions with two other Eleventh Circuit cases. In every one of the cases, including the strip search of the fifth graders, the Eleventh Circuit reinstated its original opinion and held that its qualified immunity decisions were accurate. The circuit stated that it was following exactly

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[201] *Id.*
[202] *Vaughan*, 343 F.3d at 1326.
[203] *Id.*
[204] *Id.* at 1327.
[205] *Id.*
[206] *Id.*
[207] Vaughan v. Cox, 264 F.3d 1027, 1036 (11th Cir. 2001).
[208] *Id., cert. granted*, 536 U.S. 953 (2002).

what the Supreme Court had set forth and the cases were all decided in the same way.[209] Thus, the case was essentially over. The plaintiff's attorney petitioned for certiorari again in the Supreme Court, but did not ask for a rehearing.[210]

The day before Labor Day, I was searching on Westlaw and I saw the *Vaughan* case come up. The panel had re-visited the case and made a different determination.[211] This time the Eleventh Circuit denied qualified immunity.[212] After evaluating the plaintiff's allegations, taking them to be true, the circuit held that the plaintiff was proceeding down the highway, was unarmed and was a non-dangerous felon.[213] Further, the court held that *Tennessee v. Garner*[214] would have provided fair warning to the sheriff that he could not just shoot at a person in that situation.[215]

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[209] *See* Thomas v. Roberts, 261 F.3d 1160 (11th Cir. 2001), *cert. granted,* 536 U.S. 953 (2002), *vacated by, remanded by* 323 F.3d 950 (11th Cir. 2003) (holding that a school official was entitled to qualified immunity since there was no clear warning that the actions of performing the strip search were illegal and such actions did not rise to egregious conduct); Willingham v. Loughnan, 261 F.3d 1178 (11th Cir. 2001), *cert. granted,* 537 U.S. 801 (2002), *vacated by, remanded by* 321 F.3d 1299 (11th Cir. 2003) (holding that a police officer was entitled to qualified immunity after using deadly force on an individual who attempted to murder one police officer and assaulted another, was not under police control, and who was nearby a source of weapons).

[210] Vaughan v. Cox, 316 F.3d 1210 (11th Cir.), *cert. denied,* 539 U.S. 904 (2003), *vacated by, superseded by* 343 F.3d 1323 (11th Cir. 2003).

[211] *Vaughan,* 343 F.3d at 1325.

[212] *Id.* at 1333.

[213] *Id.* at 1330.

[214] 471 U.S. 1 (1985) (holding a Tennessee statute unconstitutional that allowed the use of deadly force against apparently unarmed, nondangerous fleeing suspects).

[215] *Vaughan,* 343 F.3d at 1329-30.

The other interesting thing about that case is that the panel was comprised of two Eleventh Circuit judges and one Ninth Circuit judge, Judge Noonan.[216] He wrote a dissent that stated that it would be difficult to believe that even in Coweta County, Georgia, the sheriff could not understand that acting "so stupidly and so unconstitutionally" was a violation of someone's rights.[217] The *Vinyard* case is a good Eleventh Circuit case where the Court goes into great detail in setting out the scheme for determining whether the law is clearly established or not.[218]

Very often, genuine issues of material fact will need to be determined before the qualified immunity issue can be resolved. I think the best approach is to give special interrogatories to the jury on those issues of fact. The judge should then decide the ultimate legal question of whether, given the jury's findings of fact, qualified immunity should apply.

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[216] *Vaughan*, 264 F.3d at 1029.

[217] *Id.* at 1039 (Noonan, J., dissenting).

[218] Vinyard v. Wilson, 311 F.3d 1340, 1350-52 (11th Cir. 2002).

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