
**DISCRETIONARY FUNCTION, EXTRAORDINARY
CIRCUMSTANCES, AND OTHER NUANCES OF THE
QUALIFIED IMMUNITY DOCTRINE UNDER SECTION 1983**

*Karen M. Blum**

I have spoken a number of times at this conference on the topic of a qualified immunity, usually addressing the issues that arise when qualified immunity is raised in an excessive force case or the cases discussing how courts decide whether the law is clearly established in a particular area. Today, however, I will discuss some nuances of the qualified immunity doctrine that rarely get examined.

The defense of qualified immunity is raised in many cases when an official is being sued in his or her individual capacity for damages. The basic doctrine, according to the Supreme Court in *Harlow v. Fitzgerald*,¹ establishes qualified immunity as an objective standard,² and provides that government officials performing discretionary functions will generally be protected from a damages action, “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would

* Professor of Law, Suffolk University Law School. This Article is based on a transcript of remarks originally delivered by Professor Blum at the Practising Law Institute’s Twenty-Third Annual Conference on § 1983 Civil Rights Litigation, in New York, New York.

¹ 457 U.S. 800 (1982).

² *Id.* at 819. The Court explained that “[t]he public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official’s act.” *Id.*

have known.”³ The doctrine is relatively easy to articulate, but often difficult to apply and engenders different approaches by courts throughout the country.

I. THE DISCRETIONARY FUNCTION REQUIREMENT: THE TRADITIONAL DISCRETIONARY VS. MINISTERIAL DISTINCTION

First, I am going to focus on the concept of what is a discretionary function. With the exception of the Eleventh Circuit,⁴ courts rarely discuss the discretionary function aspect of the doctrine, but it is certainly an area practitioners should consider.

Typically when discussing a discretionary function, we are talking about the kind of distinction made in other areas of the law. In these other areas, a discretionary function is defined as a function that requires the exercise of some discretion or independent judgment *and* we counterpoise that to a ministerial task—one that is simply a function that is performed without any discretion, exercise of judgment or real thought being applied to the process. Thus, if it is a pure ministerial act that gives rise to a plaintiff’s claims, some courts will say that qualified immunity is unavailable.⁵

³ *Id.* at 818.

⁴ *See* Davis v. Williams, 451 F.3d 759, 762 (11th Cir. 2006) (finding that the deputy arrested the plaintiff while performing a discretionary function, thus shifting the burden to the plaintiff to prove qualified immunity did not apply); *see also* Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1263-64 (11th Cir. 2004) (finding that it is binding authority in the Eleventh Circuit to prove that an official was engaged in a discretionary function in order to be eligible for summary judgment due to qualified immunity).

⁵ *See, e.g.*, Groten v. California, 251 F.3d 844 (9th Cir. 2001) (finding that government officials engaged in ministerial acts unprotected by qualified immunity when they refused to allow a plaintiff to apply for certain licenses and gave incorrect application materials); Brooks v. George County, 84 F.3d 157, 165 (5th Cir. 1996).

For instance, in *Groten v. California*,⁶ an individual complained about the refusal to give the plaintiff the proper application materials for licenses, which the individual was seeking. The Ninth Circuit characterized this as a pure ministerial function.⁷ The court reasoned that the defendant was supposed to hand out these application materials and did not.⁸ Therefore, the defendant does not receive qualified immunity for failing to perform that ministerial function.⁹

In *Brooks v. George County*,¹⁰ the Fifth Circuit held that qualified immunity does not come into play where a sheriff had a non-discretionary duty to keep records of work that had been performed by pretrial detainees and to transmit those work records to the board of supervisors so that the pretrial detainees could be paid.¹¹ That is a pure ministerial function; no judgment or discretion was involved.¹² Therefore qualified immunity is unavailable.¹³

In *Hudson v. Hudson*,¹⁴ a police officer failed to arrest a person, despite the existence of a mandatory domestic violence arrest statute. Interestingly, in *Town of Castle Rock v. Gonzales*,¹⁵ decided in 2005, the Supreme Court held that there is no entitlement under

⁶ *Groten*, 251 F.3d 844.

⁷ *Id.* at 851.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Brooks*, 84 F.3d 157.

¹¹ *Id.* at 165.

¹² *Id.*

¹³ *Id.*

¹⁴ *Hudson v. Hudson*, No. 04-2662-DP, 2005 WL 2253612, at *1 (W.D. Tenn. Sept. 14, 2005), *rev'd*, *Hudson v. Hudson*, 475 F.3d 741 (6th Cir. 2007).

¹⁵ 545 U.S. 748 (2005).

state law to have an arrest in these kinds of domestic violence situations.¹⁶ Yet, the district court in *Hudson*, in distinguishing Tennessee's statute from the statute in *Castle Rock*, held that there was no discretion to be exercised.¹⁷ According to the district court, the statute contained an absolute mandatory arrest requirement,¹⁸ which was a pure ministerial task.¹⁹ If there was probable cause to believe that the individual had violated the restraining order, the statute mandated that a policeman should make an arrest.²⁰ In *Hudson*, the officer did not perform the arrest and therefore, the district court found qualified immunity was unavailable.²¹ Not surprisingly, the district court decision has not withstood Sixth Circuit scrutiny.²²

Brooks and *Groten* remain as examples of decisions where courts have drawn the traditional distinction between discretionary

¹⁶ *Id.* at 766-67. The Court explained that a restraining order does not even satisfy the definition of a property interest under the Due Process Clause. *Id.* Instead, a restraining order "arises *incidentally* . . . out of a function that government actors have always performed[,] . . . arresting people who they have probable cause to believe have committed a criminal offense." *Id.*

¹⁷ *Hudson*, 2005 WL 2253612, at *4 ("Tennessee Code Annotated § 36-3-611 mandates that a police officer arrest someone when there is reasonable cause to believe that he has violated a protective order, the arrest is operational, not discretionary, and, therefore, immunity is removed.").

¹⁸ *Id.* ("[W]hen a police officer has probable cause to believe that a restraining order has been violated, an arrest is mandatory.").

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* ("In the instant case, the officers had a statutory mandate to arrest Hudson each and every time that he violated the protective order. . . . Thus, Defendant's are not entitled to qualified immunity.").

²² Since the time of this presentation, *Hudson* has been reversed by the Sixth Circuit. *See Hudson v. Hudson*, 475 F.3d 741, 746 (6th Cir. 2007) ("[T]he enforcement of Tennessee protective orders does not create a property interest protected by the Due Process Clause of the Fourteenth Amendment."). *See also* Dugas v. Jefferson County, 931 F. Supp. 1315, 1321 n.4 (E.D. Tex. 1996) (collecting circuit court cases commenting on the limited scope of the ministerial exception).

versus ministerial kinds of acts—ministerial acts being those that require no exercise of judgment. These courts have concluded that no qualified immunity comes into play with respect to those ministerial acts.

II. AN ALTERNATE APPROACH TO THE DISCRETIONARY FUNCTION ANALYSIS: THE SCOPE OF AN EMPLOYEE’S RESPONSIBILITIES

Some courts, however, ask not whether the acts in question involve an exercise of actual discretion, but whether the acts fall within the employee’s job responsibilities, similar to the protected speech discussion in *Garcetti v. Ceballos*.²³ The question becomes: Is it part of the job description to perform these acts?

Drawing a distinction on the basis of “job description,” between conduct that is discretionary and conduct that is ministerial can be quite difficult. According to this concept, an individual may be performing what we would typically think of as a purely ministerial function, while still being entitled to receive qualified immunity because engaged in job-related duties. Below, I will provide some examples.

A. Varrone v. Bilotti

In *Varrone v. Bilotti*,²⁴ the Second Circuit held that even if

²³ 126 S. Ct. 1951 (2006). *Garcetti* was a First Amendment decision where the Supreme Court held that a government attorney, who was disciplined for writing a memo relating to his official duties, did not have a First Amendment claim. *Id.* at 1962. Thus, the attorney’s memo was not considered protected speech under the First Amendment and his communications did not insulate the attorney from his employer’s managerial discipline. *Id.*

²⁴ 123 F.3d 75 (2d Cir. 1997).

subordinate officers performed a ministerial function by conducting a strip search that was ordered by a supervisor, the search was protected by qualified immunity.²⁵ The search was ministerial as opposed to discretionary because the subordinates just followed their orders.²⁶ The subordinates had no discretion as to whether or not to perform the search; they completed the task they were told to perform.²⁷ The court explained that the subordinate officers' ministerial acts would be protected by qualified immunity because such acts were performed in the course of their job-related duties, so long as the supervisor's order was facially valid.²⁸

B. *Holloman v. Harland*

In 2004, the Eleventh Circuit reviewed an interesting case, *Holloman v. Harland*,²⁹ which raised the question of whether certain conduct by a school official might be protected by the doctrine of qualified immunity. In *Holloman*, two First Amendment³⁰ claims were made; one was a free speech claim and the other was an Establishment Clause claim. The facts in *Holloman* involved a

²⁵ *Id.* at 82. (“Realistically, those two officers had no choice but to carry out the order they received, which was facially valid. It would be anomalous to provide qualified immunity to the higher ranking officers who ordered the strip search, but to deny it to the subordinates who carried out the order.”).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* The court did not entertain the question of whether the ministerial-discretionary function distinction is still a valid distinction because even though their conduct was solely ministerial, the order was facially valid and issued by a superior officer who was protected by qualified immunity, thus blanketing the subordinate officers. *Id.*

²⁹ 370 F.3d 1252.

³⁰ U.S. CONST. amend. I states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” See *Holloman*, 370 F.3d at 1259-60.

student who complained that punishment administered for raising his arm and fist during the pledge of allegiance violated his rights of free speech and expression under the First Amendment. The student also claimed that the teacher violated the Establishment Clause of the First Amendment because she began each school day with encouragement of prayer.

The Eleventh Circuit, a circuit which embraces the qualified immunity doctrine, held that the teacher could invoke qualified immunity as to the free speech claim because the teacher acted within her job description when she sanctioned or punished the student for what she perceived as his misbehavior.³¹ Although the teacher did not prevail on the qualified immunity defense, because it was clearly established that the teacher could not punish a student for raising his fist during the pledge, qualified immunity was still available.³² In other words, the teacher's actions were considered to be a discretionary function because she acted within her duties, imposing a sanction for what she considered to be misbehaving in the classroom.³³

On the other hand, the court said it is not part of the teacher's

³¹ *Holloman*, 370 F.3d at 1266-67. The court applied a two-prong analysis to determine whether the teacher can be afforded qualified immunity. *Id.* The first prong is whether the defendant was "performing a function that, *but for* the alleged constitutional infirmity, would have fallen with[in] his legitimate job description." *Id.* (emphasis added). The second prong is "whether he is executing a job related function . . . in an authorized manner." *Id.*

³² *Id.* at 1270 (holding that *Holloman* had a constitutional right to engage in "non-disruptive expression in a classroom environment" and that this right was clearly established when the defendants punished him therefore stripping the defendants of summary judgment on their qualified immunity claims).

³³ *Id.* at 1267 (stating that although the teacher is not allowed to violate the students' First Amendment rights, she was fulfilling a legitimate job-related function by punishing him for which she may seek qualified immunity).

job description to promote prayer in the classroom.³⁴ Hence, the teacher could not assert qualified immunity for the Establishment Clause claim.³⁵ The subtle distinction discussed in this case, whether the individual was performing a function that was part of the job description, determines under what circumstances an official in the Eleventh Circuit may raise the qualified immunity defense.

C. **Rodriguez v. McClenning**

Another important qualified immunity case from the Southern District of New York, *Rodriguez v. McClenning*,³⁶ arose when a guard sexually assaulted an inmate. Obviously, even if the guard raised qualified immunity, the guard probably would not prevail on that ground. The Southern District, however, held that qualified immunity clearly did not apply.³⁷ The court stated that the guard could not assert qualified immunity “because the sexual assault of a prison inmate is outside the scope of the correction officer’s official duties.”³⁸ Clearly, the guard did not engage in a discretionary function.³⁹

³⁴ *Id.* at 1283.

³⁵ *Id.* (holding that defendant was not entitled to qualified immunity on the Establishment Clause claim because she failed to establish that promotion of prayer fell within her duties or job related activities as a teacher).

³⁶ 399 F. Supp. 2d 228 (S.D.N.Y. 2005).

³⁷ *Id.* at 238.

³⁸ *Id.* Instead of performing a frisk in a manner that McClenning would reasonably believe to be lawful, he instead acted knowingly outside the scope of his duties as a correctional officer, and thus is afforded no qualified immunity protection. *Id.* at 238-39.

³⁹ *Id.*

III. THE “EXTRAORDINARY CIRCUMSTANCES” EXCEPTION TO QUALIFIED IMMUNITY

In *Harlow*, the Court indicated that there may be some cases where, although the law was clearly established, “if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained.”⁴⁰ The extraordinary-circumstances cases commonly fall into one of two categories: (1) reliance on advice of counsel or prosecutor and (2) reliance on state laws or local ordinances.

A. Reliance on the Advice of Counsel: *Miller v. The Administrative Office of the Courts and Silberstein v. City of Dayton*

In two recent Sixth Circuit cases, the defendant officials raised reliance on the advice of counsel in support of the qualified immunity defense. The court of appeals granted qualified immunity in one case and denied it in the other.

In *Miller v. Administrative Office of the Courts*,⁴¹ the defendants, a court administrator and a judge, relied on advice they received from the City Attorney, the Personnel Director, and the Director of the Administrative Office of the Courts, all of whom told them that the plaintiff was a non-tenured employee who could be

⁴⁰ 457 U.S. at 819. *See also* 15 AM. JUR. 2D *Civil Rights* § 118 (2006). Extraordinary circumstances may warrant application of qualified immunity, even though the defendant clearly violated a constitutional right against the plaintiff. *Id.* To prove an official acted under extraordinary circumstances, the official must prove that the official “neither knew nor should have known of the relevant legal standard” and the official’s conduct was objectively reasonable. *Id.*

⁴¹ 448 F.3d 887 (6th Cir. 2006).

fired without the process afforded to tenured employees. It turned out that the advice was mistaken, but the defendants, who unconstitutionally terminated the plaintiff, could assert qualified immunity because they conducted a reasonable pre-termination investigation and, given the information they received from the City Attorney and others, “a reasonable officer would not have clearly known that terminating Miller without the procedures required only for tenured employees was unlawful.”⁴²

In *Silberstein v. City of Dayton*,⁴³ defendant board members relied on the advice of counsel and various other officials who told them that a particular attorney was an unclassified employee and could be fired without the requisite process. The board fired or demoted the attorney. The court held that the board members simply could not “cloak themselves in [qualified] immunity simply by delegating their termination procedure decisions to their legal department A reasonably competent public official is presumed to know the law governing his or her conduct.”⁴⁴ Although *Miller* and *Silberstein* appear to be inconsistent, and there is no attempt to distinguish *Silberstein* by the *Miller* panel, one gets the sense that the court in *Miller* believed the defendants had made a good faith attempt to get the facts straight before terminating the plaintiff, while the court in *Silberstein* was of the impression that the defendants in that case were merely seeking “self-serving legal memoranda before

⁴² *Id.* at 896.

⁴³ 440 F.3d 306 (6th Cir. 2006).

⁴⁴ *Id.* at 318.

taking action that may violate a constitutional right.”⁴⁵

**B. Reliance on the Advice of a Prosecutor:
Armstrong v. City of Melvindale, Cox v. Hainey,
and Sornberger v. City of Knoxville**

The Sixth Circuit case of *Armstrong v. City of Melvindale*,⁴⁶ dealt with reliance on the advice of a prosecutor. In *Armstrong*, a prosecutor advised law enforcement officers that a warrant was constitutionally permissible. The court granted qualified immunity to the officers because their reliance on the prosecutor’s advice, even though it turned out that the warrant was unconstitutional, was objectively reasonable.⁴⁷

In *Cox v. Hainey*,⁴⁸ the First Circuit held that an official’s reliance on a prosecutor or counsel’s advice is only one factor the court will consider as part of its qualified immunity analysis.⁴⁹ The court added that, while reliance is an important factor in the analysis, the court will consider the totality of the circumstances.⁵⁰ The First Circuit expressed its desire to encourage officers to continue to seek a prosecutor’s advice, but did not make such reliance a determinative factor that would result in an automatic “qualified immunity

⁴⁵ *Id.*

⁴⁶ 432 F.3d 695 (6th Cir. 2006).

⁴⁷ *Id.* at 702 (holding that although the defendants wrongfully believed that probable cause supported the warrant, the reliance on the advice of the prosecutor was not unreasonable).

⁴⁸ 391 F.3d 25 (1st Cir. 2004).

⁴⁹ *Id.* at 35 (“[T]he mere fact that an officer secures a favorable pre-arrest opinion from a friendly prosecutor does not automatically guarantee that qualified immunity will follow. Rather, that consultation comprises only one factor, among many, that enters into the totality of the circumstances relevant to the qualified immunity analysis.”).

⁵⁰ *Id.*

stamp.”⁵¹

In *Sornberger v. City of Knoxville*,⁵² the Seventh Circuit did not extend qualified immunity. The court stated that even if officers receive a prosecutor’s approval for an arrest, there is no qualified immunity where the officers manipulated the evidence or lied about what the real evidence was.⁵³ The court held that the officers could not receive qualified immunity even though the prosecutor advised the officers that probable cause for an arrest existed.⁵⁴

C. Extraordinary Circumstances Presented Because of Defendant’s Reliance on a State Law or Local Ordinance

The other extraordinary circumstance that might support a finding of qualified immunity, even where there has been a violation of a clearly established right, arises when the defendant claims that he or she was “just following the law,” a law that is not facially unconstitutional and that has not yet been held unconstitutional as applied to the facts confronting this official. There are a number of cases raising the “just following the law” justification as an extraordinary circumstance.

⁵¹ *Id.*

⁵² 434 F.3d 1006 (7th Cir. 2006).

⁵³ *Id.* at 1014-16. The court held that the officers did not engage in a “good-faith seeking of legal advice.” *Id.* at 1016. “Rather, the record is susceptible to the view that the officers themselves realized the weakness of their case, and therefore manipulated the available evidence to mislead the state prosecutor into authorizing [the defendant’s] arrest.” *Id.*

⁵⁴ *Id.* at 1016 (explaining that the officer’s conduct created issues of fact as to whether or not the officers acted in reasonable reliance on the advice of prosecutors).

i. Way v. County of Ventura

In the Ninth Circuit case of *Way v. County of Ventura*,⁵⁵ the court held that police officers could receive qualified immunity where they were relying on a departmental policy, which allegedly complied with a state statute, in conducting a strip search.⁵⁶ The statute required reasonable suspicion to conduct a strip search or visual body cavity search of someone arrested for a misdemeanor, but excepted from the reasonable suspicion requirement persons charged with weapons, controlled substances or violence offenses.⁵⁷ The police officers argued that the department policy complied with the statute.⁵⁸ While the court found the search of plaintiff to be unconstitutional, the officers were entitled to qualified immunity because they relied on a statute that had not yet been held unconstitutional and that was not unconstitutional on its face.⁵⁹

⁵⁵ 445 F.3d 1157 (9th Cir. 2006).

⁵⁶ *Id.* at 1158-60, 1163.

⁵⁷ CAL. PENAL CODE § 4030 (West 2007) provides in relevant part: “No person arrested and held in custody on a misdemeanor . . . except those involving weapons, controlled substances or violence . . . shall be subjected to a strip search or visual body cavity search prior to placement in the general jail population” The statute provides that all searches must be conducted with “reasonable suspicion based on specific and articulable facts to believe such a person is concealing a weapon or contraband, and a strip search will result in the discovery of the weapon or contraband.” *Id.*; *see also Way*, 445 F.3d at 1160 n.2.

⁵⁸ *Way*, 445 F.3d at 1160, 1163.

⁵⁹ *Id.* at 1163. The court explained that:

In these circumstances, we cannot conclude that a reasonable officer would necessarily have realized that relying on a Department policy that excepted arrestees being held on controlled substance offenses from the general prohibition on strip searches, and subjecting Way to a strip search with visual cavity inspection pursuant to it, was unconstitutional.

Id.

ii. *Roska v. Sneddon*

In *Roska v. Sneddon*,⁶⁰ the court held that relying on the statute is a factor, but it is not determinative in applying qualified immunity, especially when the officials “failed to actually comply with the statute upon which they purportedly relied.”⁶¹ The Tenth Circuit explained that officials could not assert a qualified immunity defense if they did not even follow the statute which was claimed to provide qualified immunity.⁶²

iii. *Connecticut v. Crotty*

In *Connecticut v. Crotty*,⁶³ the Second Circuit held that the enforcement of a presumptively valid statute creates a heavy presumption in favor of qualified immunity.⁶⁴ Even if it turns out in retrospect that the statute is unconstitutional and the conduct was unconstitutional, if an official relies on a statute that is presumptively constitutional, the official will receive qualified immunity.⁶⁵

iv. *Vives v. City of New York*

In *Vives v. City of New York*,⁶⁶ the Second Circuit granted qualified immunity to police officers who evidently relied on a New

⁶⁰ 437 F.3d 964 (10th Cir. 2006).

⁶¹ *Id.* 978.

⁶² *Id.*

⁶³ 364 F.3d 84 (2d Cir. 2003) (invalidating a New York statute prohibiting nonresidents who held New York commercial lobstering permits from removing lobsters from certain areas in New York waters).

⁶⁴ *Id.* at 104.

⁶⁵ *Id.*

⁶⁶ 405 F.3d 115 (2d Cir. 2005).

York penal statute that made communications illegal, if made with the intent to harass, annoy, threaten or alarm another person in a manner likely to cause annoyance or alarm.⁶⁷ The New York statute is problematic, constitutionally speaking, but the New York State courts have not yet held that statute to be unconstitutional.

In the *Vives* decision, the Second Circuit held that it would not decide whether the statute was unconstitutional, even though Supreme Court precedent dictates that courts must first discuss whether a constitutional violation occurred before addressing the application of qualified immunity.⁶⁸ However, because the Second Circuit has resisted following this analysis, especially when deciding whether the constitutional question turns on an interpretation of state law which will serve only as dicta, the court skipped any discussion on the statute's constitutionality, and held that the officers could receive qualified immunity because New York courts had facially upheld the statute.⁶⁹ While the New York statute is probably unconstitutional, it had not yet been called into question and the *Vives* court refused to consider the statute's constitutionality.⁷⁰ Judge

⁶⁷ *Id.* at 118-19.

⁶⁸ *Id.* at 116-19. The Supreme Court has articulated a two part test. *See Saucier v. Katz*, 533 U.S. 194, 200 (2001). First, the Court must ask whether a constitutional violation occurred based upon the facts alleged. *Id.* If there has been no constitutional violation, then the Court need not proceed to the second step--the immunity inquiry. *Id.* If a constitutional violation occurred, then the Court must ask whether the right was clearly established. *Id.*

⁶⁹ *Vives*, 405 F.3d at 118 n.7. "We do not need to reach the constitutional question because we are reluctant to pass on the issue in *dicta* and because the parties did not genuinely dispute the constitutionality of [the statute]" *Id.* The court went on to explain that several New York courts explicitly declined to find the statute at issue unconstitutional. *Id.* at 118. The court held "that the District Court's denial of qualified immunity to defendants was improper [and it did not need to] . . . reach the question of whether [the New York statute] survive[d] constitutional scrutiny, but save[d] that question for another day." *Id.*

⁷⁰ *Id.* at 118-19.

Cardamone wrote a dissent in *Vives*, where he argued that the court should address the issue, the constitutionality of this statute on the merits, or else numerous cases in the same area will arise.⁷¹ According to Judge Cardamone, courts should set out the standards so that it is known what is clearly lawful and unlawful in later cases.⁷²

v. Field Day, LLC v. County of Suffolk

A recent Second Circuit case, *Field Day, LLC v. County of Suffolk*,⁷³ involved an as applied challenge to New York's Mass Gathering Law,⁷⁴ brought by plaintiff concert promoters who were denied a permit for a music festival planned to be held in a public park in Riverhead, New York.⁷⁵ The public officials argued on a motion to dismiss that they were entitled to qualified immunity because they acted in reliance on the Mass Gathering Law, a statute that had not been held unconstitutional. Field Day, however, claimed that the defendant officials acted in an impermissible, discriminatory way because they selectively enforced the Mass Gathering Law. Thus, according to Field Day, reliance on the facially valid statute should not provide qualified immunity where government officials'

⁷¹ *Id.* at 121 (Cardamone, J., concurring in part, and dissenting in part) (“[T]his is precisely the type of constitutional issue that will repeatedly escape review by federal courts. . . . Thus, police officers--like the defendants in this case--will *always* lack ‘fair notice’ of the law’s unconstitutionality and will *always* be entitled to qualified immunity.”).

⁷² *Id.*

⁷³ 463 F.3d 167 (2d Cir. 2006).

⁷⁴ The Mass Gathering Law was enacted in the wake of the 1969 Woodstock Music Festival and was intended to insure adequate safety and public health conditions at such mass gatherings. N.Y. PUB. HEALTH LAW § 225(5)(o) (McKinney 2007).

⁷⁵ *Field Day*, 463 F.3d at 171.

conduct violated First Amendment rights because it was motivated by a “dislike for rock music concerts and their fans.”⁷⁶ In *Field Day*, the court made a distinction between facial challenges versus as-applied challenges.⁷⁷ The court held that while the Mass Gathering Law has not been held unconstitutional on its face, officials will not receive the protection of qualified immunity if they misapply the law or apply it in a constitutionally invalid way.⁷⁸ The bottom line here is that “a constitutional law must be enforced in a constitutional manner”⁷⁹ if officials seek to prevail on qualified immunity.

vi. Lawrence v. Reed

The *Lawrence v. Reed*⁸⁰ case, a Tenth Circuit decision, is one which involves a local derelict vehicle ordinance that evidently allowed police officers to tow or pick-up junk cars that were left on the streets or on lots for a certain period of time. The ordinance was unconstitutional,⁸¹ but the sheriff spoke to the city lawyer and asked, “Does the statute apply to the cars left on a person’s land?” The

⁷⁶ *Id.*

⁷⁷ *Id.* at 174-75. A “facial challenge” to a statute considers the text of the statute, but “not its application to the particular circumstances of an individual.” *Id.* (citing *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 770 n.11 (1988)). “An ‘as-applied challenge,’ on the other hand requires an analysis of the facts of a particular case to determine whether the application of a statute, even one constitutional on its face, deprived the individual to whom it was applied of a protected right.” *Id.* (citing *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006)).

⁷⁸ *Id.* at 192 (explaining that the defendants’ assertions of the Mass Gathering Law’s constitutional firmness confuse the concept of facial constitutionality with unconstitutional application).

⁷⁹ *Id.* at 193 (quotations omitted).

⁸⁰ 406 F.3d 1224 (10th Cir. 2005).

⁸¹ *Id.* at 1230 (“On the due process issue, the court found that the derelict vehicle ordinance violated due process because it allowed the city to deprive Mrs. Lawrence of her property without a hearing.”).

lawyer responded, “Yes, it does. You can go tow these cars away and clean up that lot.” The sheriff, in return, did exactly that.

The statute on its face clearly applied to the situation. The sheriff received the city lawyer’s approval and towed the cars. Despite his reliance on both the statute and advice of counsel, the Tenth Circuit held the sheriff could not receive qualified immunity because the sheriff “should have known his conduct was unlawful.”⁸² An individual must receive a hearing before the sheriff could take the property away.⁸³ Thus, the statute on its face was unconstitutional and certainly the application was unconstitutional.⁸⁴ The dissenting judge in the case chastised the majority of the panel for sending out a message that before sheriffs and police officers rely on a statute and the advice of counsel to engage in certain conduct, they should also call a law professor at the nearest law school to see if the proposed action is legal.⁸⁵

⁸² *Id.* at 1235-36 (reversing the district court’s finding that the sheriff was protected by qualified immunity because the sheriff should have known that his conduct was unlawful).

⁸³ *Id.* at 1233 (“[S]ome form of hearing is required before an individual is finally deprived of a property interest.” (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976))). The *Eldridge* test balances the following:

First the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Eldridge, 424 U.S. at 335.

⁸⁴ *Lawrence*, 406 F.3d at 1230. The district court held, and the petitioner did not dispute, that the ordinance presented a violation of constitutionally protected rights to due process. *Id.* The petitioner also did not dispute that he violated rights of the respondent that were clearly established as being protected by the Fourth and Fourteenth Amendments. *Id.* His only contention was that there were extraordinary circumstances that prevented him from knowing the clearly established law, meaning he would be entitled to qualified immunity. *Id.*

⁸⁵ *Id.* at 1239 (Hartz, J., dissenting). See also the interesting debate between the majority

vii. *Sampson v. City of Schenectady*

Sampson v. City of Schenectady,⁸⁶ a Northern District of New York decision, involved police officers who picked up a suspect without arresting him. Instead, the officers drove the suspect far outside the outskirts of town and dropped him off without his shoes in some wooded area. The individual sued the police officers and the City of Schenectady. The police officers claimed qualified immunity and said, “We were doing what we were trained to do, and it is part of our policy. We should get qualified immunity because it is an official relocation policy.”

The court disagreed and refused to grant the officer’s qualified immunity because the police officers could not “allow their city policy and negligent training claims to cloak their unlawful conduct with the veil of objective reasonableness.”⁸⁷

D. The Distinction between a Supervisor and a Line Officer in the “Just Following Orders” Defense

A number of cases make a distinction between line officers and their supervisor in applying what may be called a “just following orders” defense. Often we discuss qualified immunity without discussing the differences between a supervisor and a line officer.

and the dissent in *Leonard v. Robinson*, No. 05-1225, 2007 WL 283832, at *6 (6th Cir. Feb. 2, 2007) (holding no qualified immunity for a police officer who relied on a number of statutes in arresting a speaker at a public meeting “because the laws cited by [the officer were] either facially invalid, vague, or overbroad when applied to speech (as opposed to conduct) at a democratic assembly where the speaker is not out of order.”).

⁸⁶ 160 F. Supp. 2d 336 (N.D.N.Y. 2001).

⁸⁷ *Id.* at 350. The court held that the defendants could not claim that negligent training and unlawful policy by the municipality were “extraordinary circumstances” that would entitle them to qualified immunity for actions that violated clearly established constitutional

Importantly, a line officer is sometimes entitled to qualified immunity, while a supervisor is not. Therefore, it is necessary to pay attention to what role these particular individuals were playing in the specific factual scenario.

i. Motley v. Parks

For instance, in *Motley v. Parks*,⁸⁸ the Ninth Circuit held that the lead officer might have a greater responsibility for ensuring that the warrant is not defective. The lead officer should look at the warrant, read the warrant, and make sure everything is in order. The line officers may not have to review the warrant. The fact that a prosecutor and a judge sign off on this warrant will not necessarily protect the lead officer in this situation because such actions do not make reliance reasonable; it is the lead officer's responsibility to make certain everything is in order.⁸⁹

ii. Evett v. Deep East Texas Regional Narcotics Trafficking Task Force

The Fifth Circuit has held that it will not require a supervisor to do something that is impracticable. In *Evett v. Deep East Texas Regional Narcotics Trafficking Task Force*,⁹⁰ the court explained that requiring the supervising officer at the scene to “personally seek out

rights. *Id.*

⁸⁸ 432 F.3d 1072, 1081 (9th Cir. 2005) (“The officers who lead the team that executes a warrant are responsible for ensuring they have lawful authority ‘Line officers, on the other hand, are required to do much less.’” (quoting *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022, 1027-28 (9th Cir. 2002))).

⁸⁹ *Id.* (quoting *Ramirez*, 298 F.3d at 1027-28).

⁹⁰ 330 F.3d 681, 689-90 (5th Cir. 2003).

all the available information from all participating law enforcement officers before approving an arrest would not have been practicable.”⁹¹ Thus regarding unintentional oversights, here the supervisor was entitled to qualified immunity.⁹²

iii. Sorensen v. City of New York

In *Sorensen v. City of New York*,⁹³ a case out of the Second Circuit, the court explained that sometimes “[a]lthough . . . low-level employees have been granted qualified immunity where they followed orders promulgated by their supervisors, immunity has been granted only when the orders were facially valid.”⁹⁴ The strip search policy involved in *Sorensen*, the court held, was obviously unlawful.⁹⁵ Any officer, including a line officer, should have understood that this policy was unconstitutional and the officers could not receive qualified immunity even though they were “just following orders.”⁹⁶

iv. Lawrence v. Bowersox

*Lawrence v. Bowersox*⁹⁷ was an Eighth Amendment⁹⁸ case arising out of a pepper spraying incident at a correctional center. The

⁹¹ *Id.* at 690.

⁹² *Id.*

⁹³ 42 F. App’x 507 (2d Cir. 2002).

⁹⁴ *Id.* at 511.

⁹⁵ *Id.* (“The strip-search policy at issue here, however, had twice been declared unconstitutional by this court, and so was not facially valid.”).

⁹⁶ *Id.* (holding that it was simply unreasonable to believe that this strip search was constitutional and therefore qualified immunity is not applicable).

⁹⁷ 297 F.3d 727 (8th Cir. 2002).

⁹⁸ U.S. CONST. amend. VIII states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

jury found the prison guard, the lower level officer here, not liable because the standard of culpability on the underlying constitutional claim was whether the officer used force “maliciously and sadistically” for the purpose of causing harm.⁹⁹ The lower level officer did not violate the Constitution because he did not act with the requisite malice, but simply did what his supervisor told him to do. However, the supervisor who ordered, what the court referred to as, this unnecessary pepper spray shower, did not get qualified immunity because a jury could find that he was deliberately indifferent to the risk of harm created by the pepper spray and engaged in conduct that clearly violated the Eighth Amendment.¹⁰⁰

v. *Groh v. Ramirez*

In *Groh v. Ramirez*,¹⁰¹ the Supreme Court held that a lead officer could not claim qualified immunity after executing a search warrant that lacked particularity because the Fourth Amendment¹⁰² on its face provides clear notice that a warrant must particularly spell out the items to be seized and searched.¹⁰³ The Ninth Circuit, in denying qualified immunity to the lead officer, noted a distinction between the

⁹⁹ *Bowersox*, 297 F.3d at 733.

¹⁰⁰ *Id.* at 732 (“[F]ailing to protect inmates from a foreseeable attack violates the Eighth Amendment when an official is deliberately indifferent to a substantial risk of serious harm.” (quotations omitted)).

¹⁰¹ 540 U.S. 551 (2004).

¹⁰² U.S. CONST. amend. XIV states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

¹⁰³ *Groh*, 540 U.S. at 557, 563-64. “The *Fourth Amendment* by its terms requires

lead officer and line officers.¹⁰⁴ According to the Ninth Circuit, officers who lead the team might have more of a responsibility for ensuring they have the lawful authority to carry out the warrant, unlike line officers who do not always see or read the warrant and often rely on their supervisor's word in terms of the warrant's validity.¹⁰⁵ As long as the conduct engaged in is not facially or clearly unconstitutional, there might be a distinction drawn between the supervisors and the low-level officials.

vi. DeToledo v. County of Suffolk

In a case out of the District Court in Massachusetts, *DeToledo v. County of Suffolk*,¹⁰⁶ women jail guards strip searched pretrial detainees arrested for non-violent felonies. The searches were conducted pursuant to a written directive that had been set out by the Suffolk County Sheriff's Department. Somewhat begrudgingly, the court accepted the "just following orders" defense, holding that qualified immunity extended to these lower level prison guards.¹⁰⁷ The court found that strip searching non-violent felony arrestees was unconstitutional because it did not provide for reasonable or individualized suspicion, but it was not clearly unconstitutional.¹⁰⁸ The court afforded deference to prison officials, commenting that the

particularity in the warrant, not in the supporting documents." *Id.* at 557.

¹⁰⁴ *Ramirez v. Butte Silver Bow County*, 298 F.3d 1022 (9th Cir. 2002), *aff'd* *Groh v. Ramirez*, 540 U.S. 551 (2004).

¹⁰⁵ *Id.* at 1027-28.

¹⁰⁶ 379 F. Supp. 2d 138 (D. Mass. 2005).

¹⁰⁷ *Id.* at 149.

¹⁰⁸ *Id.* at 147 ("[A] strip search of an arrestee 'ordinarily' requires a reasonable suspicion that the arrestee is concealing contraband, weapons, or evidence on her person." (citing *Savard*, 338 F.3d at 29)).

“ ‘following orders’ defense is not intuitively appealing, but also not shocking in a correctional environment strongly influenced by military values of hierarchy and obedience to orders.”¹⁰⁹

vii. Killmon v. City of Miami

In an Eleventh Circuit case, *Killmon v. City of Miami*,¹¹⁰ non-violent mass protesters were arrested while leaving the scene of the protest. The protestors were doing what another officer had told them to do, essentially following his directions to proceed out of the area by walking along the railroad tracks. Other officers, pursuant to an order given by their supervisor, arrested the protestors for walking along the tracks. The court held that the officers were not entitled to qualified immunity, rejecting the “just following orders” defense because the officers had the same knowledge as everyone else.¹¹¹ In other words, they were not just following orders blindly, but were witnesses to the whole thing. The officers and their supervisor were witnesses to the same events unfolding and knowledge of the instructions given by the other policeman could be imputed to all officers. The court explained that it was “reasonable to infer that the Officers and their commander were aware that the dispersing protesters had been directed onto the railroad tracks by other police officers, which means that the Officers should have known that the

¹⁰⁹ *Id.* at 149.

¹¹⁰ 199 F. App’x 796 (11th Cir. 2006).

¹¹¹ *Id.* at 800. Here, the officers were with Captain Brooks the entire time and therefore “it is unreasonable for an officer to rely upon the fellow-officer rule to determine that probable cause exists.” *Id.*

Protesters were not on the tracks willfully.”¹¹² Overall, the courts are not big fans of the “just following orders” defense. If the conduct is something that any reasonable officer would understand is unconstitutional, then the fact that he or she is “just following orders” may not take a lower level officer far with some courts, particularly if the order has obvious problems on its face.

IV. QUALIFIED IMMUNITY AND PRIVATE ACTORS

Let me touch on a topic that arises in a number of cases, and again, it is an area that we do not usually talk about, but it has to do with qualified immunity and private actors.

A. General Application of Qualified Immunity to Private Individuals

In *Wyatt v. Cole*,¹¹³ the Supreme Court held that private defendants in § 1983 suits challenging their use of state replevin, garnishment or attachment statutes later held unconstitutional, could not invoke the qualified immunity defense available to government officials in such suits.¹¹⁴ In a Second Circuit case, *Toussie v. Powell*,¹¹⁵ the court held that if a private defendant conspires with state officials to violate constitutional rights, that defendant will not be protected by qualified immunity.¹¹⁶ In *Toussie*, the Republican Party of Brookhaven, in Suffolk County, pressured the local zoning

¹¹² *Id.* at 800.

¹¹³ 504 U.S. 158 (1992).

¹¹⁴ *Id.* at 168.

¹¹⁵ 323 F.3d 178 (2d Cir. 2003).

¹¹⁶ *Id.* at 180.

board to take away licenses, variances, or building permits that had been granted to plaintiff. Similar to *Wyatt*, the court held that the individual private actors, regardless of state involvement, were really out for their own personal gain.¹¹⁷ There is some kind of personal motive here; the individual is not just someone who is following an order. The court held that private individuals pressuring the zoning board, or conspiring with state officials to further their own interests, should not receive qualified immunity.¹¹⁸

Note that a good faith defense may be available to a private individual even if the person cannot claim qualified immunity. Most circuits that have addressed that question have extended such individuals the good faith defense.¹¹⁹ One of the big differences between qualified immunity and the good faith defense is that qualified immunity involves an objective test, while the good faith defense is subjective in nature. Also, qualified immunity is a question of law for the judge, while good faith is generally a question of fact for the jury. Further, denial of the good faith defense does not

¹¹⁷ *Id.* at 183. The court held that “a party chairman is not entitled to qualified immunity (a) on the basis of his position alone or (b) for advocating that local government take a particular legal or adjudicative action.” *Id.*

¹¹⁸ *Id.*

¹¹⁹ On remand in *Wyatt*, the Court of Appeals for the Fifth Circuit held that “private defendants, at least those invoking ex parte prejudgment statutes, should not be held liable under § 1983 absent a showing of malice and evidence that they either knew or should have known of the statute’s constitutional infirmity.” *Wyatt v. Cole*, 994 F.2d 1113, 1120 (5th Cir. 1993). See also *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 699 (6th Cir. 1996) (“The attorney defendants do, however, retain a good faith defense to the plaintiffs’ *Bivens* claim. The *Wyatt* Court expressly left open the question of whether private parties acting under color of law could raise such a defense.”); *Jordan v. Fox, Rothschild, O’Brien, & Frankel*, 20 F.3d 1250, 1276-77 (3d Cir. 1994) (“[We] conclude ‘good faith’ gives state actors a defense that depends on their subjective state of mind, rather than the more demanding objective standard of reasonable belief that governs qualified immunity.”).

give rise to a right to the interlocutory appeal that accompanies a denial of qualified immunity. So there is quite a bit of difference there.

B. Private Individuals Acting Pursuant to State Order or Request

A number of courts have afforded qualified immunity to a private individual engaged in some kind of a government function pursuant to a state order or request. These courts have held that private individuals performing a government function are entitled to qualified immunity if a state official who performed the same function would have been entitled to qualified immunity.¹²⁰ In these cases, the concept is that the private person is acting under color of law for purposes of § 1983.¹²¹

In *Warner v. Grand County*,¹²² for example, police officers arrested two women on possession of marijuana charges and brought them into the jail where no female deputy was on duty. At that time, a female director of a crisis center was at the jail for some other purpose, and the officers asked her if she would conduct a strip search of the arrestees. The court held she would be able to assert qualified immunity as a defense because she performed the search at

¹²⁰ See *Rodrigues v. Furtado*, 950 F.2d 805, 815 (1st Cir. 1991). A private doctor acting under color of state law performed a vaginal cavity search pursuant to a search warrant. *Id.* at 808. The court held that the doctor was entitled to the qualified immunity that police would have received if they had conducted the search. *Id.* at 815. See also *Marshall v. Columbia Lea Regional Hospital*, 345 F.3d 1157, 1180 (10th Cir. 2003) (agreeing that “private parties or police officers relying on the orders or determinations of other law enforcement officials are entitled to qualified immunity because such reliance is ‘objectively reasonable.’”).

¹²¹ 42 U.S.C. § 1983 (2000).

¹²² 57 F.3d 962 (10th Cir. 1995).

the behest of an officer who himself was entitled to qualified immunity because the law was not clearly established at the time that such a search was unconstitutional.¹²³

In *Bartell v. Lohiser*¹²⁴ a mother sued Lutheran Social Services and the Family Independence Agency for terminating her parental rights in violation of federal and state laws. The court held that employees of Lutheran Social Services could assert qualified immunity because of the closely monitored non-profit interrelationship between the state agency, the Family Independence Agency, and the private agency—the Lutheran Social Services.¹²⁵ The court was persuaded that the rationale underlying qualified immunity was especially applicable to the delicate decisions that had to be made by the private actors involved, noting that:

Decisions pertaining to the welfare of a child, which may, as in this case, result in the termination of the natural bond between parent and child, require the deliberate and careful exercise of official discretion in ways that few public positions can match. The necessity that this delicate process not be overburdened with encumbering litigation comports

¹²³ *Id.* at 967. *Accord* *Young v. Murphy*, 90 F.3d 1225, 1236 (7th Cir. 1996) (holding that a private physician hired by the office of county public guardian to evaluate competency of attorney's client was entitled to assert defense of qualified immunity); *Eagon v. City of Elk City*, 72 F.3d 1480, 1490 (10th Cir. 1995)

Because defendant Nelda Burch was not “invok[ing] state law in pursuit of private ends,” Wyatt is inapplicable. Instead, Ms. Burch was performing a government function pursuant to a government request--determining what displays would, and would not, be allowed at Christmas in the Park. Under Warner, she is entitled to qualified immunity “if a state official would have been entitled to such immunity had he performed the function himself.”

Id. (citation omitted).

¹²⁴ 215 F.3d 550 (6th Cir. 2000).

¹²⁵ *Id.* at 557.

entirely with the *Harlow* Court's formulation of the purposes of qualified immunity protection.¹²⁶

C. **Richardson v. McKnight and Its Progeny**

In *Richardson v. McKnight*,¹²⁷ the Supreme Court held that prison guards, who are employees of private prison management corporations, are not entitled to raise qualified immunity when prisoners bring § 1983 suits against them.¹²⁸

The Court was careful to note three caveats to its opinion in *Richardson*. First, the Court decided only the question of immunity. The Court did not address the underlying question as to whether there can be liability under § 1983 for these private prison employees even though they work for a private corporation.¹²⁹ Many courts, however, have addressed the issue and hold that private prison management corporations and their employees are subject to suit under § 1983.¹³⁰ Even though the employees cannot raise the qualified immunity defense, they can be subjected to suit under the statute. The private employees are acting under color of state law for § 1983 purposes, because by incarcerating individuals they are performing a traditionally exclusive state function.¹³¹

In *Schneider v. Donald*,¹³² the court urged reconsideration of

¹²⁶ *Id.*

¹²⁷ 521 U.S. 399 (1997).

¹²⁸ *Id.* at 412.

¹²⁹ *Id.* at 413.

¹³⁰ *See, e.g.*, *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003); *Street v. Corrections Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996); *Ancata v. Prison Health Servs.*, 769 F.2d 700, 703 (11th Cir. 1985).

¹³¹ *Rosborough*, 350 F.3d at 461 (“Clearly, confinement of wrongdoers-though sometimes delegated to private entities-is fundamentally a governmental function.”).

¹³² No. CV 305-158, 2006 WL 1344587 (S.D. Ga. May 12, 2006).

whether private prison management corporations and their employees should be subject to suit under § 1983.¹³³ When constitutional violations are committed by officials acting under color of federal law, the aggrieved plaintiff cannot bring a § 1983 action, but must file a *Bivens* action.¹³⁴ In *Correctional Services Corp. v. Malesko*,¹³⁵ the Supreme Court held that a private prison corporation, running a federal prison, cannot be sued in a *Bivens* action.¹³⁶ However, the Court left open the question of whether the employees of that private prison, in the federal context, could be sued in a *Bivens* action.

Two circuits have addressed the question of whether private prison employees could be sued in a *Bivens* action: the Fourth Circuit, in *Holly v. Scott*,¹³⁷ and the Tenth Circuit, in *Peoples v. Corrections Corp. of America*.¹³⁸ The Fourth and the Tenth Circuits refuse to imply a *Bivens* remedy in actions against federal private prison employees. Both circuits hold that where there are adequate

¹³³ *Id.*, at *8. Specifically, the court stated that:

For prisoners, whereas their counterparts in federal private prison facilities may have no remedy at all in federal court for constitutional violations, and whereas their counterparts in state-run prison facilities must overcome the qualified immunity defense, prisoners in state private prison facilities may file under Section 1983 and not be concerned about the qualified immunity hurdle. The Court finds no reason for a prisoner in a state private facility to be in a more favorable position than his counterparts in state-run facilities or in federal facilities.

¹³⁴ *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

¹³⁵ 534 U.S. 61 (2001).

¹³⁶ *Id.* at 63 (“We decide here whether the implied damages action first recognized in *Bivens* should be extended to allow recovery against a private corporation operating a halfway house under contract with the Bureau of Prisons.” (citation omitted)).

¹³⁷ 434 F.3d 287 (4th Cir. 2006).

¹³⁸ No. Civ.A. 02-3298-CM, 2004 WL 2278667 (D. Kan. Mar 26, 2004) (refusing to imply a *Bivens* cause of action for a prisoner held in a private prison facility when there exists an alternative cause of action arising under either state or federal law against the individual defendant for the injury inflicted), *aff’d by equally divided en banc court*, 449 F.3d 1097 (10th Cir. 2006).

state remedies available, as there were in *Holly* and *Peoples*, it is not necessary to imply a *Bivens* remedy and courts should be careful about implying the *Bivens* remedy in such instances.¹³⁹ The Fourth Circuit went one step beyond the Tenth Circuit, however, and also held that these private prison employees for federal prisons do not act under color of law.¹⁴⁰ Essentially they are not federal government employees, and so you cannot bring a *Bivens* suit at all.¹⁴¹

The second caveat in *Richardson* is that the Court did not address the situation of a private individual who is briefly associated with a government body serving as an adjunct to the government in an essential government activity or acting under close official supervision.¹⁴² For instance, in cases where the doctor is ordered to do the body cavity search or the crisis center director is ordered to do the frisk, there may still be qualified immunity available to these private actors even after *Richardson*.

In the wake of the Fourth Circuit's opinion in *Holly*, it remains an open question, at least in the Fourth Circuit, as to whether you can sue private prison employees under § 1983 at all. Most

¹³⁹ *Holly*, 434 F.3d at 296-97. The *Holly* court agreed with the *Peoples* decision in holding that “an inmate in a privately run federal correctional facility does not require a *Bivens* cause of action where state law provides him with an effective remedy. . . . This is not a circumstance under which the extension of a judicially implied remedy is appropriate.” *Id.* Prior to *Holly*, the *Peoples* court held that because the United States Supreme Court set forth very “restrictive standards . . . for maintaining a *Bivens* action in *Malesko*, . . . it is unlikely [that] plaintiff could maintain a *Bivens* action against the individual CCA employees, especially when alternative remedies are available to him.” *Peoples*, 2004 WL 2278667 at *4.

¹⁴⁰ *Holly*, 434 F.3d at 288 (“We decline to extend the *Bivens* cause of action to these circumstances, both because the actions of the private prison employees are not fairly attributable to the federal government and because the inmate has adequate remedies under state law for his alleged injuries.”).

¹⁴¹ *Id.*

¹⁴² *Richardson*, 521 U.S. at 413.

circuits have adopted the Fifth Circuit's position, that these private prison management corporations and their employees can be sued under § 1983, even though the employees cannot raise qualified immunity after *Richardson*.¹⁴³

Finally, the Court in *Richardson* did not decide whether the private defendants were entitled to assert a "good faith" defense.¹⁴⁴ As noted earlier,¹⁴⁵ most circuits that have addressed this question have allowed the private actors to raise good faith as a defense.

V. PROCEDURAL ASPECTS OF THE QUALIFIED IMMUNITY DEFENSE

Finally, I would like to discuss some additional procedural aspects that we do not typically discuss. The defense of qualified immunity is a defense available only to individuals sued in their individual capacity in suits for damages. Hence, cities, towns, and entities cannot raise the qualified immunity defense.¹⁴⁶

The Supreme Court has explained that qualified immunity is a defense not just from liability, but it is a defense from suit and burdensome discovery.¹⁴⁷ Thus, qualified immunity should be raised and disposed of early in the litigation, whenever possible. The goal is

¹⁴³ *Rosborough*, 350 F.3d at 461 ("We agree with the Sixth Circuit and with those district courts that have found that private prison-management corporations and their employees may be sued under § 1983 by a prisoner who has suffered a constitutional injury.").

¹⁴⁴ *Richardson*, 521 U.S. at 413.

¹⁴⁵ See *supra* note 119 and accompanying text.

¹⁴⁶ See *Owen v. City of Independence*, 445 U.S. 622 (1980).

¹⁴⁷ *Crawford-El v. Britton*, 523 U.S. 574, 597-98 (1998). 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 discretion in a way that protects the substance of the qualified immunity defense. It must exercise its discretion so that officials are not

to save officials from being dragged through a burdensome, cumbersome § 1983 suit. If the defense is denied, the official has a right to an interlocutory appeal at the motion to dismiss and summary judgment stages—to the extent those appeals raise a question of law.

According to the Supreme Court, qualified immunity is an affirmative defense, which means it must be raised by the defendant.¹⁴⁸ Some circuits have allowed the defense to be raised for the first time at summary judgment, treating that summary judgment motion as an amendment to the answer. *Garland v. Catoe*,¹⁴⁹ *Garcia v. Johnson*,¹⁵⁰ and *Eddy v. Virgin Islands Water and Power Authority*¹⁵¹ are all examples of that. Once the defense is raised, then the burden is typically shifted to the plaintiff, and the plaintiff must then show or establish that the conduct is a violation of a clearly established right.¹⁵²

One must be very careful because a judge's individual practice rules are quite important. I do not know how many of you have tried cases before Judge McMahon in the Southern District of New York, but Judge McMahon has an important Individual Practice Rule. The Individual Practice Rule requires any defendant who plans to claim qualified immunity "to file a pro-forma motion for summary

subjected to unnecessary and burdensome discovery or trial proceedings.

¹⁴⁸ *Id.* at 586-87 (citing *Gomez v. Toledo*, 446 U.S. 635, 639-41 (1980)).

¹⁴⁹ No. CA 4:00-3024-19BF, 2001 WL 34681751, at **11-12 (D. S.C. Nov. 7, 2001).

¹⁵⁰ No. 94-1360, 1995 WL 492879, at *7 (10th Cir. Aug. 18, 1995).

¹⁵¹ 256 F.3d 204, 210 (3d Cir. 2001) ("We agree with the conclusions of the First and Sixth Circuits that the defense of qualified immunity is not necessarily waived by a defendant who fails to raise it until the summary judgment stage.").

¹⁵² See *Armstrong v. City of Melvindale*, 432 F.3d 695, 699 (6th Cir. 2006) ("[T]he 'burden of proof is on the plaintiff to show that defendant[s] [are] not entitled to qualified immunity.'" (quoting *Sheets v. Mullins*, 287 F.3d 581, 586 (6th Cir. 2002))).

judgment on that sole ground with the answer; depose the plaintiff and file papers in support of the motion within 30 days thereafter, and obtain a decision on the motion before conducting any further discovery.”¹⁵³ Furthermore, a plaintiff who brings an action in Judge McMahon’s court, where qualified immunity will be asserted or is ordinarily asserted, must send a copy of Judge McMahon’s rule to her adversary.¹⁵⁴ When defense counsel receives a copy of the rule, the defense counsel must take the aforementioned steps or else he risks losing the qualified immunity defense.¹⁵⁵ *Lee v. McCue*,¹⁵⁶ for instance, is a case that involves this important rule.

There are a number of judges, evidently, who are using this practice. Obviously, these individual rules are important if you are litigating cases in front of a particular court. Be certain to check not only your local rules, but your individual judge’s rules.

The final thing I would like to discuss is the heightened pleading requirement. For years the courts imposed a heightened pleading requirement on plaintiffs in civil rights case, especially when qualified immunity was going to be raised as a defense. The Supreme Court has made it very clear that there is no heightened pleading requirement for civil actions¹⁵⁷ other than that laid out under

¹⁵³ See IND. PRACTICES OF J. MCMAHON, R. 3(C) (2006), available at http://www1.nysd.uscourts.gov/cases/show.php?db=judge_info&id=66.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ 410 F. Supp. 2d 221, 225 (S.D.N.Y. 2006).

¹⁵⁷ In *Jones v. Bock*, 127 S. Ct. 910 (2007), its most recent pronouncement, the Court noted that “[i]n a series of recent cases, we have explained that courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns.” *Id.* at 919, 920 (citing *Hill v. McDonough*, 126 S. Ct. 2096 (2006); *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993)).

Rule 9 of the Federal Rules of Civil Procedure.¹⁵⁸ Every circuit except the Eleventh Circuit has abandoned heightened pleading.

A recent case is *Thomas v. Independence Township*,¹⁵⁹ decided by the Third Circuit. In *Thomas*, the Third Circuit held that heightened pleading is not required, but the district court should insist on a motion for a more definite statement if the court believes that a defendant raising qualified immunity needs to flush out the facts with more particularity.¹⁶⁰ Some courts do it through the reply, ordering a reply under Rule 7(a) of the Federal Rules of Civil Procedure.¹⁶¹ The Seventh Circuit, in an opinion written by Judge Easterbrook, held that, “ ‘[any] decision declaring this complaint is deficient because it does not allege X is a candidate for summary reversal, unless X is on the list in Federal Rule 9(b).’ ”¹⁶² Conversely, if you practice in the

¹⁵⁸ FED. R. CIV. P. 9(b) (“In all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.”).

¹⁵⁹ 463 F.3d 285 (3d Cir. 2006).

¹⁶⁰ *Id.* at 289. The court stated:

Today, we make clear that a qualified immunity determination must be made in light of the specific factual context of the case, and when a complaint fashioned under the simplified notice pleading standard of the Federal Rules does not provide the necessary factual predicate for such a determination, the district court should grant a defense motion (whether formally or informally made) for a more definite statement regarding the facts underlying the plaintiff’s claim for relief.

Id.

¹⁶¹ FED. R. CIV. P. 7(a) states:

There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

¹⁶² *Tompkins v. Women’s Cmty. Inc.*, No. 06-2164, 2006 WL 3147366, at *1 (7th Cir. Nov. 1, 2006) (quoting *Pratt v. Tarr*, 464 F.3d 730, 731 (7th Cir. 2006)).

Eleventh Circuit, *Gonzalez v. Reno*¹⁶³ is an important decision because the Eleventh Circuit is the only circuit that still insists on heightened pleading if there will be a qualified immunity defense in play.¹⁶⁴

Finally, as practicing attorneys you should be aware of the difference between the standards for a motion to dismiss and a motion for summary judgment in the qualified immunity context. When you get to summary judgment, it is not enough for the plaintiff to assert facts upon which one could say that a clearly established right has been violated. There has to be evidence to support those allegations. Thus, regular summary judgment rules apply at the summary judgment stage.¹⁶⁵

¹⁶³ 325 F.3d 1228 (11th Cir. 2003).

¹⁶⁴ *Id.* at 1233 (“It is therefore appropriate for a district court to grant the defense of qualified immunity at the motion to dismiss stage if the complaint ‘fails to allege the violation of a clearly established constitutional right.’ ” (quoting *Chesser v. Sparks*, 248 F.3d 1117, 1121 (11th Cir. 2001))).

¹⁶⁵ *See, e.g., Velez-Rivera v. Agosto-Alicea*, 437 F.3d 145, 151 (1st Cir. 2006) (“[N]otice pleading is sufficient for a claim to survive a motion to dismiss, but plaintiffs bear a heavier burden at the summary judgment stage.”); *McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004) (“A party endeavoring to defeat a lawsuit by a motion to dismiss for failure to state a claim faces a ‘higher burden’ than a party proceeding on a motion for summary judgment.”).