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Interlocutory Appeals from Orders Denying Qualified Immunity: Determining the Proper Scope of Appellate Jurisdiction

Kathryn R. Urbonya*

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I. Introduction

The United States Supreme Court and federal courts of appeals have waged war on constitutional tort lawsuits.¹ The playing field is motion prac-

1. See, e.g., David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 549 (1992) (contending that Supreme Court's qualified immunity standard overly protects governmental officials and is inconsistent with Congress's intent); Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 268-69 (1995) (arguing that Supreme Court's use of open-ended standard for qualified immunity allows judges to apply qualified immunity in "arbitrary or biased ways" against plaintiffs); Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115, 116 (1991) (contending that federal courts' "actual application [of the qualified immunity defense] in many cases is completely unjustified by any relevant policy consideration"); Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719, 1720 (1989) (arguing that Supreme Court has used tort rhetoric to "limit the scope of § 1983" civil rights actions); David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 501 (1992) (stating that "[a]s long as the courts and both federal and state government treat police abuse as a series of isolated incidents, or as a regrettable by-product of the war on crime, the Monroes, Rafts and Rodney Kings will continue to pay an unconscionable price for our misguided policies"); Eric Harbrook Cottrell, Note, *Civil Rights Plaintiffs, Clogged Courts, and the Federal Rules of Civil Procedure: The Supreme Court Takes a Look at Heightened Pleading Standards in Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 72 N.C. L. REV. 1085, 1106 (1994) (contending that appellate courts' adoption of heightened pleading standard for constitutional tort actions might encourage officials to disregard constitutional rights because plaintiffs would lose lawsuits under that standard); Matthew V. Hess, Comment, *Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct*, 1993 UTAHL. REV. 149, 203 (1993) (stating that "the full potential of [constitutional tort] remedies has been crippled by overly restrictive judicial rulings and statutes that are unresponsive to social change"); Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 755 (1993) (contending that Supreme Court's interpretation of § 1983 has made lawsuits for plaintiffs almost impossible to win against police officers who have violated the Constitution); Clay J. Pierce, Note, *The Misapplication of Qualified Immunity: Unfair Procedural Burdens for Constitutional Damage Claims Requiring Proof of the Defendant's Intent*, 62 FORDHAM L. REV. 1769, 1772

tice, not the courtroom.² Today, the flurry of pretrial motions engulfs the appellate courts,³ not just the district courts. In the appellate courts, officials have asserted, before a trial has occurred⁴ and sometimes even before discovery,⁵ qualified immunity from paying damages for alleged constitutional violations. In deciding these pretrial appeals, appellate courts have assumed powers that they do not have. They have granted governmental officials qualified immunity by discarding jurisdictional limitations,⁶ rewriting the Federal Rules of Civil

(1994) (arguing that "courts are not justified in increasing procedural burdens beyond the levels normally required under the Federal Rules").

2. See, e.g., *Clinton v. Jones*, 117 S. Ct. 1636, 1651 (1997) (stating that "[m]ost frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant"); Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187, 206-07 (1993) (contending that procedural aspects of qualified immunity defense have confused courts and practitioners); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 67 (1989) (stating that "as the [Supreme] Court has shaped and reshaped the substantive elements of the [qualified immunity] defense, it has had to adjust the procedural rules that control civil rights actions"); Stephen J. Shapiro, *Public Officials' Qualified Immunity in Section 1983 Actions Under Harlow v. Fitzgerald and Its Progeny: A Critical Analysis*, 22 U. MICH. J.L. REFORM 249, 253-54 (1989) (arguing that procedural unfairness of qualified immunity defense requires statutory reform for civil rights actions).

3. 15A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3914.10 n.92 (Supp. 1997) (stating that during three-year study of interlocutory appeals, appellate courts reversed district court orders denying official immunity in more than 70% of cases).

4. See *infra* text accompanying notes 138-74, 183-241 for discussion of these interlocutory appeals.

5. See *infra* text accompanying notes 138-70, 183-85, 187-234 for discussion of these interlocutory appeals.

6. See *infra* text accompanying notes 9, 179-85, 220-21, 235-41. To illustrate, under *Johnson v. Jones*, appellate courts do not have jurisdiction during an interlocutory appeal to consider whether the district court properly determined that the material facts were in dispute. *Johnson v. Jones*, 515 U.S. 304, 313 (1995). Since the Supreme Court's decision in *Johnson*, appellate courts have nevertheless asserted jurisdiction over that very issue. See *Turner v. Scott*, 119 F.3d 425, 427 (6th Cir. 1997). The issue in *Turner* was whether the defendant, a police officer, had known of another officer's abusive behavior in hitting the plaintiff with a gun. *Id.* The district court decided that the plaintiff had presented sufficient evidence for the issue to go to the jury. *Id.* The Sixth Circuit granted qualified immunity, stating that "there is not a scintilla of evidence linking Officer Scott to the harm." *Id.* at 430; see also *Elliott v. Leavitt*, 99 F.3d 640, 642-44 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2512 (1997). In *Elliott*, police officers arrested the plaintiff-decedent for driving while intoxicated. *Id.* at 641. They handcuffed him and put him in their cruiser. *Id.* The officers contended that their 22 shots at the plaintiff-decedent were justified because he appeared to point a gun at him, even though they had just finished searching him. *Id.* at 642. With the suspect now dead, the only surviving witnesses were the police officers. The district court denied summary judgment because material facts were in dispute. *Id.* at 644. Despite *Johnson*, the Fourth Circuit Court of Appeals stated, "As to the material facts here, there is no genuine dispute because the plaintiff has come forward with no evidence." *Id.* Ruling on the merits, the Fourth Circuit determined that the plaintiff had failed to prove a constitutional violation. *Id.*

Procedure⁷ and ignoring institutional restraints.⁸ Appellate courts have robbed

Some courts have also erroneously asserted jurisdiction to decide whether the plaintiff has stated a claim even if such a review requires sifting and weighing the facts the district court found sufficiently supported. *See Sanderfer v. Nichols*, 62 F.3d 151, 154 (6th Cir. 1995). In *Sanderfer*, a prisoner alleged that prison officials were "deliberately indifferent" to her serious medical needs, in violation of the Eighth Amendment. *Id.* The district court ruled that she had demonstrated sufficient evidence to create a material fact as to whether the officials were deliberately indifferent. *Id.* The Sixth Circuit asserted jurisdiction and held that in viewing the evidence in the light most favorable to the plaintiff, the plaintiff had established at most negligence, not deliberate indifference. *Id.* at 155. The appellate court thus considered the sufficiency of the evidence, yet explained that it could do so because it was determining the question of whether the plaintiff had stated a constitutional violation. *Id.* at 153 n.2; *see also* *Edwards v. Giles*, 51 F.3d 155 (8th Cir. 1995). In *Edwards*, the Eighth Circuit Court of Appeals evaluated the sufficiency of the evidence in a motion for summary judgment based on qualified immunity. It held that the plaintiff's affidavit alleging that police officers used excessive force did not provide enough detail as to how the force was unreasonable. *Id.* at 157. The plaintiff had alleged that during the arrest he was not belligerent and that the officers had unreasonably thrown him to the ground, injuring him. *Id.* In contrast, the district court had found material facts in dispute and denied summary judgment based on qualified immunity. *Id.* at 156.

In addition, some courts have unnecessarily expanded their jurisdiction in qualified immunity appeals by reviewing the sufficiency of the evidence question by using the doctrine of pendent appellate jurisdiction. *See infra* note 100 and accompanying text.

7. *See infra* text accompanying notes 143-58 for a discussion of how appellate courts have ignored procedural limitations. To illustrate, some courts have granted qualified immunity on summary judgment by erroneously deciding disputed material facts, in violation of Federal Rule of Civil Procedure 56(c) (stating that summary judgment is proper if material facts are not in dispute and party is entitled to judgment as matter of law). *See, e.g., Lennon v. Miller*, 66 F.3d 416, 422 (2d Cir. 1995). In *Lennon*, the Second Circuit Court of Appeals declared that there were no material facts in dispute and granted qualified immunity to a police officer who had allegedly used unreasonable force in "yank[ing]" a suspect out of a car. *Id.* at 426. Either the court decided that the yank was not too forceful, a factual issue, or it created a per se right for officers to use whatever force is necessary to get a citizen out of a car. *Wilson v. Meeks*, 52 F.3d 1547, 1556 (10th Cir. 1995). In *Wilson*, the Tenth Circuit Court of Appeals resolved disputed material facts in order to grant a police officer qualified immunity for his failure to prevent the plaintiff's death. *Id.* The plaintiff was a suspect, who died either of positional asphyxiation by lying on his stomach with his wrists secured in handcuffs or by suffocation from the "inspiration of blood, dirt, and vomit." *Id.* at 1550. The plaintiff-decedent alleged that police officers were deliberately indifferent to his serious medical needs. *Id.* at 1549. The district court ruled that there were disputed issues of material facts that made deciding the immunity question impossible. *Id.* An officer had refused to take off the handcuffs when requested to do so by a medical technician because the suspect was too bloody. *Id.* at 1550. The appellate court held that the refusal did not evidence deliberate indifference and granted qualified immunity to the arresting officers. *Id.* at 1556; *see also* *Gooden v. Howard County*, 954 F.2d 960, 965 (4th Cir. 1992) (en banc). In *Gooden*, a majority of the Fourth Circuit Court of Appeals erroneously granted qualified immunity for officials for an unlawful arrest on summary judgment by resolving material disputed facts. *Id.* at 964. Although the facts are detailed, the heart of the conflict centered on whether police officers reasonably believed that the plaintiff was a danger to herself and should be arrested. *Id.* at 963-64. They had heard hollering in one of the apartments and investigated. *Id.* at 962-63. The plaintiff responded to their inquiries by stating that she had been ironing clothes and burned herself. *Id.* According to the plaintiff, she showed the officers

constitutionally injured citizens of their day in court by granting motions for dismissal⁹ and summary judgment¹⁰ when the appellate courts lack jurisdiction.

the hot iron, clothes, and the burn mark. *Id.* at 963. In direct contrast, the officers stated that the iron was cold and that there were no clothes or burn mark. *Id.* at 962-63. When they left they heard more shouting by a male and a female, but not in response to each other. *Id.* at 963. Assuming that the plaintiff had multiple personalities, they arrested her. *Id.* at 963-64. The plaintiff argued that she told them that she had been on the telephone talking. *Id.* at 963. The Fourth Circuit clearly believed the officers' version of what happened. *Id.* at 965-66.

Courts have also imposed a heightened pleading standard for civil rights plaintiffs, in violation of Federal Rule of Civil Procedure 8(a)(2). *See* F.R. CIV. P. 8(a)(2) (stating that plaintiff need only provide "short and plain statement of the claim"); *see also* Crawford-El v. Britton, 93 F.3d 813 (D.C. 1996) (en banc), *cert. granted*, 117 S. Ct. 2451 (1997) (reviewing whether District Court for the District of Columbia properly interpreted the qualified immunity defense as requiring plaintiff to meet a "clear and convincing" evidence standard for First Amendment claim raising unconstitutional intent). *See, e.g.*, 1A MARTIN F. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 1.6, at 19 (3d ed. 1997) (stating that courts of appeals have all required plaintiffs to plead "specific factual allegations demonstrating a deprivation of federal rights under color of state law").

One court has also by judicial interpretation "amended" Federal Rule of Civil Procedure 7(a) by suggesting that district courts must order plaintiffs to issue a reply to an official's answer when the answer raises the qualified immunity defense. *See* Schultea v. Wood, 47 F.3d 1427, 1434 (5th Cir. 1995) (en banc) (stating that "[v]indicating the immunity doctrine will ordinarily require such a reply, and district court's discretion not to do so is narrow indeed when greater detail might assist"); *see also* FED. R. CIV. P. 7(a) (stating that court has discretion to "order a reply to an answer").

8. The Supreme Court has specifically and erroneously authorized appellate courts to "find" facts when officials appeal from an order denying summary judgment in which the district court failed to specify the material disputed facts. *Behrens v. Pelletier*, 116 S. Ct. 834, 842 (1996); *Johnson v. Jones*, 515 U.S. 304, 319 (1995). For a discussion of the appellate courts' proper role during appeals from these orders, *see infra* p. 44.

In response to *Behrens* and *Johnson*, many appellate courts have run wild with the new freedom to canvass the record. Some have "supplemented" the district court's articulated, assumed facts. *See, e.g.*, *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996) (stating that "we will begin with the facts found by the district court and supplement them only where necessary to determine if summary judgment should have been granted after proper application of the law to the facts"). Some have found "discretion" to accept the district court's assumed facts. *See, e.g.*, *McMillian v. Johnson*, 88 F.3d 1554, 1563 (11th Cir.), *amended by* 101 F.3d 1363 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2514 (1997). And some, in clear violation of *Johnson*, have explicitly rejected the district court's assumed facts, determining that the district court improperly evaluated the evidence. *See, e.g.*, *Sanderfer v. Nichols*, 62 F.3d 151, 155 (6th Cir. 1995).

9. *See infra* text accompanying notes 183-86 for discussion of why jurisdiction does not exist for these interlocutory appeals. During interlocutory appeals from motions to dismiss, some courts determine that the plaintiff has not stated claim and dismiss the lawsuit. *See, e.g.*, *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1414 (5th Cir. 1997) (en banc) (holding that plaintiff who had allegedly been raped by school custodian did not state constitutional violation). Some appellate courts dismiss suits because the complaint did not state a violation of clearly established law. *See, e.g.*, *Williams v. Alabama State Univ.*, 102 F.3d 1179, 1183 n.4 (11th Cir. 1997) (plaintiff's alleged First Amendment rights were not clearly established); *Foster v. City*

The appellate courts have misread the qualified immunity standard articulated in *Harlow v. Fitzgerald*¹¹ as granting appellate courts the power to change procedural rules and expand their jurisdiction.¹² In *Harlow*, the Supreme Court rewrote the qualified immunity standard to eliminate meritless suits as soon as procedurally possible.¹³ To further this purpose, *Harlow* created an objective reasonableness standard for qualified immunity, one that no longer considered whether officials acted maliciously.¹⁴ *Harlow* discarded malice as a question because it raised a factual issue not capable of resolution in a motion for summary judgment.¹⁵ Under the new qualified immunity standard, officials had immunity if they acted in accordance with a standard of objective reasonableness.¹⁶ Courts were to determine objective reasonableness by examining case law and considering whether the law was clearly established.¹⁷ If officials violated clearly established law, then they would not have immunity; if they did not, they would have immunity.¹⁸ *Harlow* also stated that discovery should not be allowed until a court determines on summary judgment whether the law was "clearly established at the time [the challenged] action occurred."¹⁹

of Lake Jackson, 28 F.3d 425, 427 (5th Cir. 1994). In *Foster*, the plaintiffs alleged that city officials had conspired to deny them their right to access to courts by "concealing and suppressing evidence" during the discovery phase of an automobile accident case that they later settled. *Id.* The Fifth Circuit granted the city officials motion to dismiss, holding that the officials' had qualified immunity. *Id.* at 431. Some appellate courts state that jurisdiction lies to consider either, whether the plaintiff has stated a claim and whether the law was clearly established. *See, e.g., Vaughn v. United States Small Bus. Admin.*, 82 F.3d 684, 685 (6th Cir. 1996).

In addition to motions for dismissal for failure to state a claim or for failure to allege a violation of clearly established law, some courts have also mistakenly asserted jurisdiction from orders denying qualified immunity in a motion for judgment on the pleadings. *See, e.g., Somers v. Thurman*, 109 F.3d 614, 616 & n.3 (9th Cir. 1997) (finding jurisdiction for motion for judgment on pleadings to grant officials qualified immunity because female prison guards' alleged conduct during body cavity search and showering of male plaintiff did not violate clearly established law); *Prater v. Dahm*, 89 F.3d 538, 540 (8th Cir. 1996) (finding jurisdiction to grant officials' motion for judgment on pleadings where prisoner alleged that officials had failed to protect him from inmate they knew to be dangerous).

10. *See infra* Part V.B.2.

11. 457 U.S. 800 (1982).

12. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982). For a discussion of *Harlow*, see *infra* text accompanying notes 56-69.

13. *Harlow*, 457 U.S. at 816-18.

14. *Id.* at 815-18.

15. *Id.* at 816.

16. *Id.* at 818.

17. *Id.*

18. *Id.* at 818-19.

19. *Id.* at 818. Later in *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987), the Court stated that discovery tailored to the qualified immunity issue would be possible in some circumstances. *See infra* note 212 and accompanying text.

In response to this standard, the appellate courts interpreted *Harlow* as creating procedural freedoms capable of protection on appeal.²⁰ The qualified immunity standard now had two prongs: a defense-to-liability prong and an immunity-from-suit prong.²¹ The defense-to-liability prong freed officials from having to pay damages if they did not violate clearly established rights.²² In contrast, the immunity-from-suit prong gave officials procedural freedom from participating in unnecessary discovery or trials.²³

Following *Harlow*, a significant problem emerged: When would appellate courts have jurisdiction to immediately review pretrial orders denying qualified immunity? Traditionally, federal appellate jurisdiction arises from the final judgment statute, which provides that "courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States."²⁴ Yet, when officials assert qualified immunity, the right to an immediate appeal nevertheless derives from this statute,²⁵ not from the civil rights statute allowing constitutional tort lawsuits against state officials, 42 U.S.C. § 1983,²⁶ nor from the United States Constitution, the source for actions against federal officials.²⁷

Even though the explicit language of the final judgment statute requires "final decisions," the Court has declared that some interlocutory appeals under this jurisdictional statute are nevertheless "final" because of the judicially created "collateral order doctrine."²⁸ Under this doctrine, nonfinal orders are appealable if they fall within "that small class"²⁹ of orders that "[1] conclu-

20. See *infra* text accompanying notes 83-174.

21. See, e.g., *Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985) (plurality opinion).

22. See *infra* text accompanying notes 56-58.

23. See *infra* text accompanying notes 63-76.

24. 28 U.S.C. § 1291 (1994).

25. *Mitchell*, 472 U.S. at 530. Because the right to an interlocutory appeal is a procedural right, state courts hearing constitutional tort lawsuits are free to follow their own interlocutory rules. *Johnson v. Fankell*, 117 S. Ct. 1800, 1805-06 (1997). Thus, when citizens sue officials in state courts that do not provide for interlocutory appeals, qualified immunity is only a defense to liability.

26. But see *Mitchell*, 472 U.S. at 525 (suggesting that this "immunity from suit" came qualified immunity defense itself, not § 1291, final judgment statute). The *Mitchell* decision interpreted the "clearly established" law standard articulated *Harlow* as recognizing "an entitlement not to stand trial under certain circumstances." *Id.*

27. Constitutional tort actions against federal officials are known as *Bivens* actions because of the case that first recognized these lawsuits, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). See generally ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 9.1, at 452-70 (1st ed. 1989) (discussing *Bivens* and its progeny).

28. See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

29. *Id.* (quoted with approval in *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) (plurality opinion)).

sively determine [a] disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] [are] effectively unreviewable on appeal from a final judgment."³⁰

In 1985, the Supreme Court in *Mitchell v. Forsyth*³¹ interpreted the qualified immunity defense under these three jurisdictional requirements of the collateral order doctrine.³² A plurality of the *Mitchell* Court determined that an interlocutory appeal would protect officials' immunity-from-suit.³³ On appeal, a court could consider whether the law was clearly established before allowing discovery or a trial to proceed. If the law was not clearly established, then the official had qualified immunity and thus was not subject either to discovery or a trial.

Since *Mitchell*, appellate courts, including the Supreme Court, have discerned few jurisdictional limits.³⁴ Not until ten years after recognizing the right to an interlocutory appeal in *Mitchell* did the Court in *Johnson v. Jones*³⁵ properly articulate its first jurisdictional limitation.³⁶ In *Johnson*, the Court

30. *Johnson v. Jones*, 515 U.S. 304, 310 (1995) (numbering of elements by *Johnson* Court) (quoting *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (bracketed numbers in original) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

31. 472 U.S. 511 (1985) (plurality opinion).

32. *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (plurality opinion). The number of elements in the collateral order doctrine is unclear. In the seminal decision creating this doctrine, *Cohen v. Beneficial Indus. Loan Corp.*, the Court also stated that the order should raise a "serious and unsettled question." *Cohen*, 337 U.S. at 547. The Court later specified this as "an additional requirement." *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982). Sometimes scholars combine this "additional consideration" with the language requiring the issue to be "important" as creating a distinct fourth factor. See, e.g., Jeffrey D. Hanslick, Comment, *Decisions Denying the Appointment of Counsel and the Final Judgment Rule in Civil Rights Litigation*, 86 NW. U. L. REV. 782, 795 (1992) ("Fourth and finally," under original *Cohen* doctrine the order must raise an important, unsettled issue). Some scholars have argued that the Supreme Court has abandoned this issue. See, e.g., *id.* Even if the issue need not be "unsettled" for the collateral order doctrine to apply, in the context of qualified immunity interlocutory appeals, one can assume that the defense itself raises an important issue, even though the Court has not explicitly discussed "importance" as a distinct fourth factor. See *infra* notes 119-20 and accompanying text. This article assumes the right to be free from unnecessary discovery and trials is one that generally raises an important issue within the meaning of the collateral order doctrine. One can also note the Court's own numbering – it delineated three. See *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 144; see also *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 866 (1994) (referring to "three-pronged test for determining when 'collateral order' appeal is allowed"); *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498 (1989) ("order must satisfy at least three conditions" derived from *Cohen*). But see *Behrens v. Pelletier*, 116 S. Ct. 834, 844 (1996) (Breyer, J., dissenting) (stating that "interest being asserted must be an important one").

33. *Mitchell*, 472 U.S. at 526-27.

34. See *supra* note 9; *infra* text accompanying notes 184-85.

35. 515 U.S. 304 (1995).

36. *Johnson v. Jones*, 515 U.S. 304, 315-18 (1995).

held that no jurisdiction existed for appeals from district court orders denying summary judgment because of disputes as to material facts.³⁷ However, the very next year, in *Behrens v. Pelletier*,³⁸ the Court drastically narrowed the limitation articulated in *Johnson*.³⁹ Such appeals would now lie if district courts also ruled that the law was clearly established.⁴⁰

The purpose of this Article is to define when, under the collateral order doctrine, appellate courts have jurisdiction from interlocutory orders in cases that raise qualified immunity as a defense. Articulating the scope of appellate jurisdiction is important because appellate courts are overprotecting governmental officials and underprotecting constitutionally injured plaintiffs.

The judicially created qualified immunity defense balances conflicting interests. The defense-to-liability prong allows officials to act decisively, knowing liability for their actions arises only if they violated clearly established law. The immunity-from-suit prong protects society's and the officials' interests in not having to spend time defending meritless lawsuits. Opposing these interests is society's and a constitutionally injured plaintiff's interest in seeking redress for violations of clearly established law. Many appellate courts have failed to discern how interlocutory appeals can disrupt this delicate balance. In some circumstances, appellate courts have erroneously decided factual issues for the jury, imposed heightened pleading burdens, and afforded governmental officials the opportunity to create unnecessary delay.

To safeguard the balance of interests struck by qualified immunity, this Article also details an important limit on the erroneous assertion of appellate jurisdiction: the doctrine of frivolity,⁴¹ which allows both appellate courts and district courts to simultaneously possess jurisdiction. This radical construction of jurisdiction is necessary to avoid meritless delays and allow civil rights cases to proceed to trial.

Part II of this Article reveals that qualified immunity as a defense exists solely by judicial creation and interpretation.⁴² Part II examines the creation of the *Harlow* standard for qualified immunity and describes the defense-to-liability prong – whether the law was clearly established, the central issue of

37. *Johnson*, 515 U.S. at 319-20. For a discussion of this case, see *infra* text accompanying notes 90-107, 221, 240-41.

38. 116 S. Ct. 834 (1996).

39. *Behrens v. Pelletier*, 116 S. Ct. 834, 842 (1996).

40. *Id.* For a discussion of *Behrens*, see *infra* text accompanying notes 104-41, 192-99, 240-41.

41. For a discussion of the doctrine of frivolity, see *infra* text accompanying notes 254-58.

42. See Achtenberg, *supra* note 1, at 499 (stating that Supreme Court has used at least five different approaches for determining when qualified immunity is available and not one is consistent with Congress's intent); *infra* Part II (indicating judicial creation of qualified immunity defense).

interlocutory appeals.⁴³

Parts III and IV focus on the Supreme Court's decisions on the collateral order doctrine as applied to the qualified immunity defense.⁴⁴ Part III discusses the Court's expansive view of appellate jurisdiction.⁴⁵ Part IV focuses on the Supreme Court's misguided view of pretrial motions in these interlocutory appeals, particularly motions for dismissal and for summary judgment.⁴⁶

Part V provides a different perspective of interlocutory appeals by finding limits arising from the collateral order doctrine, the Federal Rules of Civil Procedure, and institutional expertise. It applies this different perspective to six different orders denying qualified immunity: (1) orders for dismissal; (2) orders for summary judgment before discovery; (3) orders denying protection from discovery; (4) orders for summary judgment after discovery; (5) orders denying qualified immunity because the defendant was a private person, not an official able to assert immunity; and (6) orders denying qualified immunity that are later declared by the district court to be frivolous.⁴⁷ This section argues, contrary to both *Mitchell* and *Behrens*, that there is no appellate jurisdiction from an order refusing to dismiss based on qualified immunity. Instead, jurisdiction lies from motions for summary judgment, both before and after discovery, in some circumstances. It emphasizes that traditional summary judgment rules apply to these interlocutory appeals. Appellate courts should not invade the province of the district courts and juries by creating their own factual assumptions when district courts deny summary judgment because material facts are disputed. It also indicates a jurisdictional line for appeals from orders denying protection from discovery: jurisdiction lies if the district court postponed deciding whether the law was clearly established until discovery concluded, but jurisdiction does not exist if the district court merely determined that discovery was not overly broad. In addition to appellate jurisdiction for these orders, jurisdiction also lies when a district court determines in a motion for summary judgment before discovery that the defendant is a private person. This type of order is reviewable on an interlocutory appeal because it bars defendants from later raising qualified immunity, except on appeal from a final judgment.

Part V also discusses an important check on these orders – the doctrine of dual jurisdiction for appeals from frivolous orders.⁴⁸ In some circumstances, both the district court and appellate court have jurisdiction: The district court issues an order declaring the appeal to be frivolous and continues its proceed-

43. See *infra* Part II (discussing standard for qualified immunity defense and defense-to-liability prong).

44. See *infra* Parts III-IV (discussing collateral order doctrine decisions).

45. See *infra* Part III (discussing Court's view of appellate jurisdiction).

46. See *infra* Part IV (discussing Court's view of pretrial motions in interlocutory appeals).

47. See *infra* Part V (discussing orders denying qualified immunity).

48. See *infra* Part V (discussing doctrine of dual jurisdiction).

ings, and the appellate court simultaneously addresses the qualified immunity question. This strange jurisdictional creature properly bars officials from taking frivolous appeals. Frivolous appeals simply do not protect the interests safeguarded in *Harlow*'s immunity-from-suit prong.

The Article concludes by reflecting on how appellate courts properly protect the balance struck by the defense of qualified immunity by recognizing their limited, but important, role on interlocutory appeals.⁴⁹

II. *The Immunity-from-Suit Prong Implied in the Harlow Standard of Qualified Immunity*

The qualified immunity defense exists solely by judicial interpretation of Congress's intent.⁵⁰ It applies to both state and federal officials,⁵¹ even though the text of 42 U.S.C. § 1983 states that "[e]very person . . . shall be liable" for constitutional violations⁵² and even though Congress has not passed a statute applying this defense to federal officials. The qualified immunity defense for these officials is the result of the Court's ascertaining Congress's intent in passing § 1983 in 1871 and its silence in permitting constitutional tort actions against federal officials.

Ascertaining Congress's intent in this area has been difficult for the Supreme Court.⁵³ At one point, the Court stated that qualified immunity was dependent upon the "scope of discretion and responsibilities of the office."⁵⁴

49. See *infra* Part VI (concluding on proper balance for qualified immunity)

50. See *supra* note 1 (listing articles on effect of judicial interpretation on qualified immunity).

51. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.30 (1982) (stating that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials" (quoting *Butz v. Economou*, 438 U.S. 478, 504 (1978))).

52. 42 U.S.C. § 1983 (1996). This statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

Id.

53. See *supra* note 1 (listing articles on effect of judicial interpretation on qualified immunity); see also Achtenberg, *supra* note 1, at 535. Professor Achtenberg states that:

Congress did not intend to resolve immunity issues itself, but rather intended to permit the Court to resolve those issues on a case-by-case basis. On the other hand, Congress did not intend to give the Supreme Court unfettered discretion to create immunities based on the Justices' own views of sound public policy.

Id.

54. *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974).

It also stated that officials lose their qualified immunity by acting in two ways: violating undisputed law or acting maliciously.⁵⁵

In 1982, however, the *Harlow* Court revised the qualified immunity standard without an exegesis as to what Congress must have intended.⁵⁶ The Court jettisoned the malicious component of the qualified immunity defense. It retained, however, the other component – whether the official violated undisputed law. This component became the "clearly established" law standard of *Harlow*. In 1987, the Court in *Anderson v. Creighton*⁵⁷ discarded linking the scope of the immunity with the level of responsibility.⁵⁸ Instead, it found that qualified immunity applies to all officials performing "discretionary" tasks.⁵⁹

The *Harlow* Court rejected the malice component on pure policy grounds. It declared that such a factual question was eating away at the time officials had to perform their duties, harming both society and the decision making power of officials. With *Harlow*, procedures suddenly became very important.

In 1982, however, the *Harlow* Court had not yet experienced the effects of its own 1986 summary judgment make-over of Federal Rule of Civil Procedure 56 that occurred in a trilogy of cases: *Matsushita Electric Industrial Co. v. Zenith Radio*,⁶⁰ *Anderson v. Liberty Lobby, Inc.*,⁶¹ and *Celotex Corp. v. Catrett*.⁶² The new view of summary judgment allowed courts to dispose of cases in ways that they could not before. A state-of-mind issue was not always a bar to summary judgment.⁶³ In some cases, the nonmovant would have to provide stronger evidence to oppose summary judgment,⁶⁴ and the movant could point to the absence of factual support for the nonmovant's claim.⁶⁵ Instead of reinterpreting the law of summary judgment as it did in 1986, the *Harlow* Court simply declared that the qualified immunity defense could be

55. *Wood v. Strickland*, 420 U.S. 308, 322 (1975). In *Wood*, the Supreme Court held that a

school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.

Id.

56. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982).

57. 483 U.S. 635 (1987).

58. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

59. *Id.* at 638, 642-43.

60. 475 U.S. 574 (1986).

61. 477 U.S. 242 (1986).

62. 477 U.S. 317 (1986).

63. See *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986).

64. See *Anderson v. Liberty Lobby*, 477 U.S. 242, 256-57 (1986).

65. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

resolved before discovery and on summary judgment.

The *Harlow* Court made four procedural observations. First, courts should not grant discovery until they have decided whether the law was "clearly established" at the time the officials acted.⁶⁶ Second, discovery as to whether officials knew that they were violating a citizen's constitutional rights can be broad ranging and tremendously disruptive.⁶⁷ Third, plaintiffs can easily allege malice and force a trial because, under prior summary judgment law, a single sentence written in casual correspondence was sufficient to create a triable issue of malice.⁶⁸ Fourth, discovery can create thorny separation-of-powers issues.⁶⁹

The Court used these procedural observations to explain why a qualified immunity standard built on "objective reasonableness" was better than the prior malice test. It implied that application of the qualified immunity defense before discovery was an easy task because the clarity of the law determined whether the official acted reasonably. If the law was clear, there was no immunity; if the law was unclear, there was immunity. The Court labeled this standard as "objective" because it measured reasonableness solely through case law, not the inside of the official's head. Objective reasonableness thus became linked with the issue of notice: If the law was clear, the official should have known better; if the law was unclear, the official probably did not know any better.

Five years later in *Anderson v. Creighton*, the Supreme Court elaborated on what constituted sufficient notice and, in a footnote, reinterpreted *Harlow* to allow discovery in some qualified immunity cases.⁷⁰ In doing so, the Court discussed both aspects of the qualified immunity defense, the defense to liability and the "immunity from suit."⁷¹

With respect to qualified immunity as a defense to liability, the *Anderson* Court indicated that the language of the Fourth Amendment, which prohibits "unreasonable searches and seizures," does not automatically put officials on notice for purposes of the qualified immunity defense.⁷² An official can act unreasonably under the Fourth Amendment, but act reasonably under the *Harlow* standard. The key to distinguishing between these dual standards of reasonableness, according to the *Anderson* Court, was to interpret the *Harlow* qualified immunity standard as requiring more notice than the Fourth Amendment itself.⁷³ Under *Anderson*, qualified-immunity reasonableness focuses on

66. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

67. *Id.* at 817-18.

68. *Id.* at 817 n.29.

69. *Id.* at 817 n.28.

70. *Anderson v. Creighton*, 483 U.S. 635, 639-40, 646 n.6 (1987).

71. *Id.*

72. *Id.* at 643.

73. *Id.*

whether the "contours"⁷⁴ of a constitutional right were sufficiently clear to put officials on notice that their actions were unlawful.

Although no one really knows what constitutes a "contour" of a constitutional right, the *Harlow* standard, as explained by *Anderson*, indicates that case law is what puts officials on notice. For example, under the Fourth Amendment, the clarity of the law is not measured by current police practices in the United States, but rather by reported decisional law. Case law interpreting constitutional rights provides officials with notice.

Although this explanation of the *Harlow* standard made it easier for officials to successfully assert qualified immunity as a defense to liability, the Court appropriately recognized that with respect to the procedural aspect of the defense – the "immunity from suit" – there were some limitations. In a footnote, where the Court frequently buries significant statements, the *Anderson* Court stated that the district court would have to decide whether discovery should be granted before it decides the summary judgment motion for qualified immunity.⁷⁵ This statement sharply contrasted with *Harlow*'s simple statement that the defense of qualified immunity question could be resolved without discovery on a motion for summary judgment.⁷⁶

After *Anderson*, the *Harlow* defense-of-liability prong became more protective of governmental officials and the "immunity of suit" prong had an important gloss. The first prong required courts to more narrowly interpret what constitutes "clearly established" law. The second prong, after *Anderson*, permitted discovery in some circumstances. The difficulty is determining what circumstances create a need for discovery.

Anderson's statement on discovery can also raise an important jurisdictional question for interlocutory appeals. Do appellate courts have jurisdiction to hear qualified immunity motions when discovery is necessary in the case under consideration?⁷⁷ An examination of *Mitchell* and its progeny reveals how the Court views jurisdiction over appeals from orders rendered before and after discovery.

III. The Collateral Order Doctrine: Enlarging Appellate Jurisdiction

Examining the Supreme Court's decisions discussing jurisdiction for interlocutory appeals from orders denying qualified immunity is like looking at a partly completed jigsaw puzzle on a table. Both have a few pieces that are not yet connected to each other. With just four decisions, *Johnson v. Fankell*,⁷⁸

74. *Id.* at 640.

75. *Id.* at 646 n.6.

76. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

77. For a resolution of this issue, see *infra* text accompanying notes 208-09, 220-35.

78. 117 S. Ct. 1800 (1997).

Mitchell v. Forsyth, *Johnson v. Jones*, and *Behrens v. Pelletier*,⁷⁹ a coherent framework for jurisdictional and procedural analysis is lacking.⁸⁰

In its clearest statement of jurisdiction, the *Fankell* Court indicated that the right to an interlocutory appeal from an order denying qualified immunity is a procedural right arising from the final judgment statute.⁸¹ It is not a substantive right created by *Harlow*. Jurisdiction for such appeals, thus, comes from complying with the Court's collateral order doctrine,⁸² a judicially created exception to the final-judgment statute.

Mitchell v. Forsyth and its progeny indicate that some, not all, orders denying qualified immunity meet the three elements of the collateral order doctrine: (1) the issue can be conclusively resolved on appeal, (2) it is an important issue separate from the merits of the case, and (3) it is unreviewable from a final judgment.⁸³ In *Mitchell*, *Johnson*, and *Behrens*, officials filed interlocutory appeals from orders denying qualified immunity in a motion for summary judgment after discovery. In *Mitchell* and *Behrens*, jurisdiction was present.⁸⁴ In *Johnson*, there was no jurisdiction because the order failed to meet the second element, separability.⁸⁵ Discerning jurisdiction is not as simple as looking at the type of procedural motion before a court. What matters is the issue that the court is asked to consider.

In *Mitchell*, a plurality of the Court found jurisdiction because the issue on appeal was whether the law was clearly established. In examining the first element, complete resolution, the plurality stated that this issue was one that could be finally resolved in a "motion for dismissal or summary judgment."⁸⁶ Second, the *Mitchell* plurality determined that the "claim of immunity is conceptually distinct from the merits of the plaintiff's claim."⁸⁷ It viewed the procedural posture of interlocutory appeals as shielding appellate courts from having to resolve the merits. The *Mitchell* plurality stated that appellate courts would not need to evaluate the "correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a

79. 116 S. Ct. 834 (1996).

80. See generally *Johnson v. Fankell*, 117 S. Ct. 1800 (1997) (discussing qualified immunity); *Behrens v. Pelletier*, 116 S. Ct. 834, 838-47 (1996) (same); *Johnson v. Jones*, 515 U.S. 304, 309-15 (1995) (same); *Mitchell v. Forsyth*, 472 U.S. 511, 525-30 (1985) (plurality opinion) (same).

81. *Fankell*, 117 S. Ct. at 1806.

82. See *supra* text accompanying notes 28-30.

83. See *supra* text accompanying notes 28-32.

84. *Mitchell*, 472 U.S. at 530.

85. *Behrens*, 116 S. Ct. at 842; *Johnson*, 515 U.S. at 316-17.

86. *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) (plurality opinion).

87. *Id.* at 527-28.

claim."⁸⁸ They would simply address a separate, resolvable issue — whether the law was clearly established when the official acted. Finally, it added that the right to be free from unnecessary discovery and trials would be unreviewable if officials had to wait to appeal from a final judgment.⁸⁹

Ten years later, the *Johnson* Court found jurisdiction lacking because the issue on interlocutory appeal was whether the plaintiff had offered sufficient evidence for a jury to determine that officials had violated his constitutional right to be free from unreasonable force.⁹⁰ (Later, the *Behrens* Court would interpret the *Johnson* record as not raising the question whether the law was clearly established.⁹¹ Presumably, if the jury had believed the injured citizen's version of what happened, then the officials would have violated clearly established law and would not be entitled to qualified immunity. If it had believed the officials, however, then there was no constitutional violation.)⁹²

The *Johnson* Court determined that the issue raised on appeal was not separate from the merits of the underlying case.⁹³ It recognized that there was a difference between entitlement to an interlocutory appeal and an entitlement to summary judgment.⁹⁴ It explained that *Mitchell*, when "read in context,"⁹⁵ provided that an official was entitled to summary judgment when "discovery fails to uncover evidence sufficient to create a genuine issue."⁹⁶ The right to an interlocutory appeal, in contrast, was dependent upon presenting the appellate court with a legal issue that did not require it to "consider the correctness of the plaintiff's version of facts."⁹⁷ Thus, determining the sufficiency of evidence on appeal is an impermissible review for "correctness."

The *Johnson* Court also made three important observations about the collateral order doctrine. First, it stated that appealability of orders is determined by category, not by balancing the interests of the parties in a specific case.⁹⁸ The place for making policy judgments about appealability was in

88. *Id.* at 528.

89. *Id.* at 527.

90. *Johnson v. Jones*, 515 U.S. 304, 313 (1995).

91. *Behrens v. Pelletier*, 116 S. Ct. 834, 842 (1996).

92. Although the Supreme Court did not discuss this interpretation of the record, it was the officials' position before the Court of Appeals for the Seventh Circuit. *Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (stating that "[d]efendants do not deny that if they beat the plaintiff, as he believes they did, then they lack immunity"), *aff'd in part*, 515 U.S. 304 (1995).

93. *Johnson*, 515 U.S. at 314.

94. *Id.* at 313-14.

95. *Id.*

96. *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

97. *Id.* at 312 (quoting *Mitchell*, 472 U.S. at 528).

98. *Id.* at 315.

delineating specific categories, not in case-by-case adjudication. Categorical distinctions prevent appellate courts from having to assess the need for review whenever an official seeks an interlocutory appeal. In short, the issue raised on appeal would have to be categorically important within the meaning of the collateral order doctrine to warrant an appeal. Second, the *Johnson* Court recognized that in relying appropriately on the expertise of district courts, appellate courts could further the "wise use of appellate resources."⁹⁹ It suggested that appellate courts would probably not invoke the doctrine of pendent appellate jurisdiction to review sufficiency of evidence claims.¹⁰⁰

Third, the Court suggested that appellate courts may have jurisdiction to decide whether the law was clearly established, even when district courts do not indicate the facts they assumed in denying summary judgment motions asserting qualified immunity.¹⁰¹ In such situations, the appellate courts "may have to"¹⁰² review the record to ascertain the facts that the district court assumed in denying the summary judgment motion based on qualified immunity. In doing so, the appellate court does not weigh the evidence. The purpose of this "cumbersome"¹⁰³ review is to use the ascertained "assumed facts" and

99. *Id.* at 317.

100. *Id.* at 318. Under the doctrine of pendent appellate jurisdiction, an appellate court has discretion to review an issue over which it does not have jurisdiction if the issue is intertwined with one issue over which it does have jurisdiction. *See, e.g., Swint v. Chambers County Comm'n*, 514 U.S. 35, 51 (1995) (stating that no pendent appellate jurisdiction would lie from order denying summary judgment for county because it did not raise issue "inextricably intertwined with" the officials' qualified immunity motion). *See generally* Riyaz A. Kanji, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context*, 100 YALE L.J. 511, 511 (1990) (contending that "the collateral order doctrine supports only a narrow extension of appellate jurisdiction to pendent issues"). *But see generally* Clinton v. Jones, 117 S. Ct. 1636, 1651 n.41 (1997) (stating that pendent appellate jurisdiction allowed appellate court to evaluate district court's staying the sexual harassment trial of President Clinton because this issue was sufficiently intertwined with district court's refusal to stay discovery, ironically extending jurisdiction to issue of which official did not seek review).

As applied to qualified immunity appeals, the *Johnson* Court implied that even if the appellate court has jurisdiction over whether the law was clearly established, it would not necessarily review sufficiency of evidence claims by invoking pendent appellate jurisdiction. *Johnson v. Jones*, 515 U.S. 304, 318 (1995). Some courts, however, have nevertheless invoked pendent appellate jurisdiction to address the sufficiency of evidence issue. *See, e.g., McMillian v. Johnson*, 88 F.3d 1554, 1563 (11th Cir.), *amended by* 101 F.3d 1363 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2514 (1997).

101. *Johnson v. Jones*, 515 U.S. 304, 318-19 (1995).

102. *Id.* at 319. Whether the Supreme Court requires appellate courts to review records to ascertain the district court's "assumed" facts is a question of semantics. In *Behrens v. Pelletier*, the Court quoted *Johnson's* language that courts "may have to" do so. *Behrens v. Pelletier*, 116 S. Ct. 834, 842 (1996) "May have to" falls short of the word "must." For a discussion of institutional limits in bar this kind of review, see *infra* text accompanying notes 236-41.

103. *Johnson*, 515 U.S. at 319.

ask the separable question, was the law clearly established. Determining the clarity of the law is one question that an appellate court has jurisdiction over in light of *Mitchell*.

With the separability element as an important jurisdictional limit in *Johnson*, the *Behrens* Court, the very next year, found two ways to significantly expand appellate jurisdiction.¹⁰⁴ First, it narrowly interpreted *Johnson* as stating that appeals sometimes could lie from summary judgment orders denying qualified immunity when material facts are in dispute.¹⁰⁵ Second, it determined that sometimes officials may take more than one interlocutory appeal.¹⁰⁶ It also erroneously suggested that interlocutory appeals would lie from motions to dismiss based on qualified immunity.¹⁰⁷

In *Behrens*, after discovery had concluded, the district court determined that material facts were in dispute and denied the official's motion for summary judgment.¹⁰⁸ The official took an interlocutory appeal, and the district court issued an order stating that the appeal was frivolous.¹⁰⁹ The court of appeals denied jurisdiction, stating that because the official had previously had an interlocutory appeal from his motion to dismiss no appeal would lie.¹¹⁰ With this as the procedural posture of the case, the *Behrens* Court revisited the *Johnson* Court's view of separability.¹¹¹ Specifically, *Behrens* considered whether the district court's determination of material disputed facts bars appellate jurisdiction.¹¹² It also had to address explicitly whether more than one interlocutory appeal would lie under the collateral order doctrine.

In analyzing jurisdiction when material facts are disputed, the Court made an unusually broad statement about summary judgment on interlocutory appeals: "Denial of summary judgment often includes a determination that there are controverted issues of material fact, . . . and [*Johnson*] surely does not mean that *every* such denial of summary judgment is nonappealable."¹¹³ Although the Court's broad statement ignores other reasons courts may deny summary judgment, such as untimely motions, it expressly narrowed the *Johnson* Court's limitation on interlocutory appeals. It did so by stating that just because a district court order indicates that material facts are in dispute does not mean that an interlocutory appeal is per se barred.

104. See *Behrens*, 116 S. Ct. at 840-42.

105. *Id.* at 842.

106. *Id.* at 840-41.

107. *Id.* at 840.

108. *Id.* at 838.

109. *Id.*

110. *Id.*

111. *Id.* at 842.

112. *Id.*

113. *Id.*

The *Behrens* Court asserted that appellate courts can, nevertheless, have jurisdiction if the district court's order decided not only that material facts are in dispute, but also that the law was clearly established.¹¹⁴ Such orders raise two issues. After *Johnson*, the appellate court has no jurisdiction to decide the first issue, the sufficiency of the evidence. However, in light of *Mitchell*, the court has jurisdiction to hear the second issue, the clarity of the law.

The *Behrens* Court implied that appeals from orders with disputed facts invoke a review process similar to that for orders with undisputed facts. First, the appellate court reads the district court's order, which either indicates the undisputed facts or the facts it assumed to be in dispute.¹¹⁵ Second, the appellate court looks at case law and asks whether the law was clearly established with respect to the official conduct, as specified in the undisputed facts or in the "assumed" facts.¹¹⁶ If the law was clear, then the official has no immunity, whether the official's actions were based on undisputed facts or upon the district court's "assumed facts." In the event that the district court did not specify the facts it assumed, an appellate court, under both *Behrens* and *Johnson*, reviews the record to determine what material facts the district court assumed to be in dispute.¹¹⁷

In addition to narrowing the *Johnson* decision, the *Behrens* Court expanded jurisdiction by allowing multiple appeals. In doing so, it did not limit its holding to the unusual facts of the case, nor did it provide a detailed analysis of the three elements of the collateral order doctrine—final resolution, separability, and unreviewability. Although these three elements were implicit in the Court's discussion, what was pronounced was the "importance"¹¹⁸ aspect of the collateral order doctrine, which some commentators have labeled as a fourth element of the doctrine.¹¹⁹ In addition to discussing the importance of the qualified immunity defense, the Court broadly spoke of "finality" and relied on dicta from *Mitchell* to suggest that interlocutory appeals lie from both motions for dismissal and for summary judgment.¹²⁰

114. *Id.*

115. *Id.* at 842.

116. *Id.*

117. *Id.* at 842 (citing *Johnson v. Jones*, 515 U.S. 304, 319 (1995)). Like district courts, appellate courts are not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If material facts are in dispute, then courts are to resolve the disputes in favor of the nonmoving party. *Id.* at 255. When district courts grant summary judgment motions, "[t]here is no requirement that the trial judge make findings of fact." *Id.* at 250. The Supreme Court has nevertheless stated, "In many cases, however, findings are extremely helpful to a reviewing court." *Id.* at 250 n.6.

118. *Behrens v. Pelletier*, 116 S. Ct. 834, 840 (1996).

119. See *supra* note 32 (discussing possible "fourth element" to collateral order doctrine).

120. *Behrens*, 116 S. Ct. at 839 (stating that "[u]nless the plaintiff's allegations state a claim

Before the *Behrens* Court was the second interlocutory appeal from an order denying summary judgment based on qualified immunity. With respect to the question of finality, the Court held that a second interlocutory appeal from a denial of summary judgment based on qualified immunity is not less "final" because of a prior interlocutory appeal seeking dismissal on qualified immunity grounds.¹²¹ Such a conclusion seems obvious. After discovery, the record is fully established and an appellate court can be well situated to address the question of whether the law was clearly established.

The Court, however, in dicta provided expansive statements supporting the belief that interlocutory appeals would also lie from motions to dismiss.¹²² Neither the majority nor the dissent thought that appeals from motions to dismiss should be per se barred under the collateral order doctrine.¹²³ The dissent only argued that an official should have only one appeal.¹²⁴ It did not argue that such an appeal should only come from an order denying summary judgment.¹²⁵

The Court appeared to merge the final resolution element with the unreviewability element. It emphasized that motions to dismiss and motions for summary judgment raise different issues.¹²⁶ A motion to dismiss, according to the Court, raises the question whether the "conduct *as alleged in the complaint*" violated clearly established law.¹²⁷ A summary judgment motion questions whether the evidence indicates a violation of clearly established law.¹²⁸ Because of these differences, the Court suggested that officials may need interlocutory appeals from both motions.¹²⁹ The question of whether such appeals raise unreviewable issues is, however, different from the question of

of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery") (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

121. *Id.* at 839.

122. *Id.* at 840. The Court explained how to review interlocutory appeals from motions to dismiss: "[I]t is the defendant's conduct *as alleged in the complaint* that is scrutinized for 'objective legal reasonableness.'" *Id.* The Court also broadly stated:

It is no more true that the defendant who has unsuccessfully appealed denial of a motion to dismiss has no need to appeal denial of a motion for summary judgment, than it is that the defendant who has unsuccessfully *made* a motion to dismiss has no need to *make* a motion for summary judgment.

Id.

123. *Id.*; see also *id.* at 843 (Breyer, J., dissenting).

124. *Id.* at 844 (Breyer, J., dissenting).

125. *Id.*

126. *Id.* at 840.

127. *Id.*

128. *Id.* at 842.

129. *Id.* at 840.

whether a particular motion *conclusively* determines an issue, as required by the collateral order doctrine.¹³⁰

With respect to the second element, separability, the Court stated in a footnote that appellate courts should not resolve this issue by comparing the two interlocutory appeals to each other.¹³¹ Instead, according to the Court, separability focuses on whether the asserted issue for review, qualified immunity, is separate from the merits, not from a potential future appeal or from a prior appeal.¹³² Such a point is sound, but comparison of the appeals should be relevant for determining the issue of final resolution, not separability.

The third element, unreviewability, was implicit in the Court's discussion of the different procedural questions for motions to dismiss and motions for summary judgment.¹³³ The Court found that the qualified immunity issue raised in a motion to dismiss would not be reviewed in a motion for summary judgment.

The "fourth element," the importance of the issue for interlocutory review, seemed to be the centerpiece for both the majority¹³⁴ and dissent.¹³⁵ For the majority, the "immunity of suit" prong of *Harlow* created an interest that merited the protection of multiple appeals.¹³⁶ For the dissent, the *Harlow* qualified immunity standard did not create an "anti-discovery right"¹³⁷ to be protected on interlocutory appeal.

In addition to these elements, the Court considered dicta in *Mitchell* to justify multiple appeals.¹³⁸ In *Mitchell*, a plurality of the Court stated that officials asserting qualified immunity are "entitled to dismissal before the commencement of discovery"¹³⁹ or may be "entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts."¹⁴⁰ The *Behrens* Court used this language from *Mitchell* to justify multiple appeals. In sharp contrast, the *Johnson* Court referred to this summary judgment language in *Mitchell* as discussing only the entitlement to summary judgment, not to the entitlement to an interlocutory appeal.¹⁴¹

130. See *supra* text accompanying notes 28-32.

131. *Behrens v. Pelletier*, 116 S. Ct. 834, 840 n.3 (1996).

132. *Id.*

133. *Id.* at 840.

134. *Id.* at 839-40.

135. *Id.* at 844 (Breyer, J., dissenting).

136. *Id.* at 840.

137. *Id.* at 845 (Breyer, J., dissenting).

138. *Id.* at 839.

139. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

140. *Behrens v. Pelletier*, 116 S. Ct. 834, 839 (1996) (quoting *Mitchell*, 472 U.S. at 526).

141. *Johnson v. Jones*, 515 U.S. 304, 313-314 (1995).

The Court has thus suggested in *Mitchell* and its progeny that interlocutory appeals would sometimes lie both from motions for dismissal as well as for summary judgment. In *Johnson*, the Court made an important distinction. An entitlement to summary judgment can be different from the right to an interlocutory appeal.¹⁴² The interlocutory appeal requires the appellate court to have jurisdiction under the collateral order doctrine. In contrast, the summary judgment motion only examines the two elements for summary judgment, the absence of material disputed facts and entitlement to judgment as a matter of law. An examination of the Court's comments on procedures shows how it has interpreted the immunity-of-suit prong to justify early dismissal or summary judgment.

*IV. The Supreme Court's View of the Appellate Record:
Motions for Dismissal and Summary Judgment Raising Qualified Immunity*

During interlocutory appeals from orders denying qualified immunity, the Supreme Court has broadly interpreted and sometimes implicitly rewritten the Federal Rules of Civil Procedure. Perhaps these interpretative problems have occurred because the Court has only generally referred to motions for dismissal and motions for summary judgment, not to specific rules. The applicable Rules are Rule 12(b)(6),¹⁴³ which provides for dismissal when plaintiffs fail to state a claim; Rule 12(c),¹⁴⁴ which provides for judgment on the pleadings; and Rule 56(c),¹⁴⁵ which provides for summary judgment. The Court has generally discussed procedure with respect to both prongs of the qualified immunity defense – the defense-of-liability prong and the immunity-of-suit prong. Placing the Court's procedural comments in the framework of the typical course of litigation involves motions to dismiss, motions for summary judgment before discovery, and motions for summary judgment after discovery.

A. Motions to Dismiss

The traditional rules of procedure require plaintiffs to provide "a short and plain statement of the claim" in their complaints,¹⁴⁶ and officials are to raise

142. *Id.* at 317-18.

143. FED. R. CIV. P. 12(b)(6) (providing for dismissal when plaintiffs fail "to state a claim upon which relief can be granted").

144. FED. R. CIV. P. 12(c) (stating that judgment on pleadings does not allow court to consider materials outside pleadings).

145. FED. R. CIV. P. 56(c) (stating that summary judgment is allowed if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law").

146. FED. R. CIV. P. 8(a)(2).

the affirmative defense of qualified immunity in their answers.¹⁴⁷ The Court's suggestion of a "heightened pleading" standard for plaintiffs conflicts with these traditional rules.¹⁴⁸ Under the Court's suggested "heightened pleading" standard, plaintiffs are to anticipate that officials will raise this defense in their answer and, thus, should specifically allege facts that reveal that the law was clearly established when the officials violated their constitutional rights.¹⁴⁹

In addition to this reworking of the Federal Rules, the Court also suggested in *Siebert v. Gilley*¹⁵⁰ that courts should first decide whether plaintiffs have stated constitutional violations before determining whether the law was clearly established.¹⁵¹ The need to initially decide whether plaintiffs have stated constitutional violations is not clear¹⁵² because, since *Siebert*, the Court has

147. FED. R. CIV. P. 8(c); see *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (holding that qualified immunity is affirmative defense that plaintiffs do not need to anticipate in their complaints).

148. The Supreme Court in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit* rejected applying a heightened pleading standard to lawsuits against local governmental entities. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). The Court did, however, specifically leave open whether there is a heightened pleading standard for plaintiffs asserting violations of their constitutional rights by officials sued in their individual capacity. *Id.* at 166. In three opinions, the Court suggested that such a standard is applicable. In *Mitchell v. Forsyth*, a plurality of the Court stated that, "[u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1993). In two decisions since *Leatherman*, the Court in dicta discussed motions to dismiss. In *Behrens v. Pelletier*, the Court declared that in a motion for dismissal "it is the defendant's conduct as alleged in the complaint that is scrutinized for 'objective legal reasonableness.'" *Behrens v. Pelletier*, 116 S. Ct. 834, 840 (1996). In *Johnson v. Fankell*, the Court stated that, "when the complaint fails to allege a violation of clearly established law . . . [the qualified immunity defense] provides the defendant with an immunity from the burdens of trial as well as a defense to liability." *Johnson v. Fankell*, 117 S. Ct. 1800, 1803 (1997). When hinting that a heightened pleading standard would apply, the Court thus judicially "amended" the Federal Rules of Procedure to further *Harlow*'s goal of ridding meritless suits.

149. For a detailed discussion of the heightened pleading issue, see Karen M. Blum, *Heightened Pleading: Is There Life After Leatherman*, 44 CATH. U.L. REV. 59, 71-95 (1994). Professor Blum contends that "[n]o special pleading burden should be placed on plaintiffs in section 1983 individual capacity suits." *Id.* at 92. See generally Eric Kugler, *A 1983 Hurdle: Filtering Meritless Civil Rights Litigation at the Pleading Stage*, 15 REV. LITIG. 551, 562-65, 576 (1996) (advocating Congress amend Federal Rules of Civil Procedure to require plaintiffs to provide reply to official's answer that asserts qualified immunity).

150. 500 U.S. 226 (1991).

151. *Siebert v. Gilley*, 500 U.S. 226, 232 (1991) (stating court of appeals should have first decided whether plaintiff had stated claim).

152. Justice Kennedy's concurrence in *Siebert* appropriately rejected requiring courts to first decide whether the plaintiff has stated a claim when officials assert qualified immunity. *Id.* at 235 (Kennedy, J., concurring) (stating that "it seems to reverse the usual ordering of issues to tell the trial and appellate courts that they should resolve the constitutional question first").

failed to follow its own ruling.¹⁵³ For example, in both *Hunter v. Bryant*¹⁵⁴ and *Buckley v. Fitzsimmons*,¹⁵⁵ the Court addressed the immunity issue without determining whether the officials had violated the Constitution.¹⁵⁶

Under the Court's procedural perspective, appellate courts are to examine plaintiffs' complaints and ask whether the allegations state a violation of clearly established law. In doing so, courts are to assume that the facts as alleged by the plaintiff are true.¹⁵⁷ If allegations do not state a violation of clearly established law, then officials are entitled to dismissal. Dismissal is also possible under *Siebert* if the complaint does not allege a constitutional violation.¹⁵⁸

B. Motions for Summary Judgment Before Discovery

In *Harlow v. Fitzgerald*, the Court reformulated the qualified immunity standard to eliminate meritless cases in motions for summary judgment before discovery.¹⁵⁹ Yet, as the Court has noted both in *Johnson v. Fankell* and *Anderson v. Creighton*, some cases cannot be dismissed before discovery.¹⁶⁰

See generally Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (advocating principle of resolving case on nonconstitutional grounds if possible). In response to *Siebert*'s ordering of the issues, several courts have wisely not followed the Court's ruling. *See, e.g.,* DiMeglio v. Haines, 45 F.3d 790, 799 (4th Cir. 1995) (stating court should be able to resolve case "on the most expedient ground"). One scholar has correctly noted that the proper procedure for determining whether the plaintiff has stated a claim is a motion for dismissal under Federal Rule of Civil Procedure 12(b)(6). Chen, *supra* note 1, 280 n.107 (1995) (stating that "[i]t is clear to me that the Court's characterization of its immunity analysis in *Siebert* is misguided, for that ordering of decision making suggests that the Court is not engaged in qualified immunity analysis at all").

153. *See, e.g.,* *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Hunter v. Bryant*, 502 U.S. 224 (1991).

154. 502 U.S. 224 (1991).

155. 509 U.S. 259 (1993).

156. *See* *Buckley v. Fitzsimmons*, 509 U.S. 259, 267 n.3 (1993); *Hunter v. Bryant*, 502 U.S. 224, 228 (1991).

157. *Behrens v. Pelletier*, 116 S. Ct. 834, 840 (1996).

158. *Siebert v. Gilley*, 500 U.S. 226, 229-30 (1991). In *Siebert*, the Court considered an appeal from a district court's order, which denied the official's motion to dismiss or, in the alternative, for summary judgment. *Id.* at 229. The official took an interlocutory appeal when the district court ruled that discovery could proceed. *Id.* at 230. The Court of Appeals for the District of Columbia determined that the plaintiff failed to state a constitutional violation. *Id.* The Court then determined that the plaintiff's allegations were insufficient to overcome the qualified immunity defense. *Id.* at 230-31.

159. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

160. *Johnson v. Fankell*, 117 S. Ct. 1803, 1803 n.2 (1997) (stating that "when a case can be dismissed on the pleadings or in an early pre-trial stage, qualified immunity also provides officials with the valuable protection from 'the burdens of broad-ranging discovery'" (quoting

In *Anderson*, the Court suggested how courts should decide whether to grant discovery.¹⁶¹ It also noted, that if courts were to grant discovery, they should tailor it to the immunity question.¹⁶²

The *Anderson* Court offered a two-part inquiry for determining when to grant discovery under the circumstances of that case.¹⁶³ The first question focuses on the plaintiffs' allegations; the second focuses on the official's "admitted" conduct.¹⁶⁴ The court is to examine whether each states a violation of clearly established law.¹⁶⁵

If the plaintiff fails to allege a violation of clearly established law, then the official is entitled to "dismissal prior to discovery."¹⁶⁶ This view is consistent with how the Supreme Court has suggested that courts view motions for dismissal on qualified immunity grounds. Courts assume that the allegations are truthful and determine whether the challenged actions are ones "that a reasonable officer could have believed lawful."¹⁶⁷ If they are, then the official would be entitled to qualified immunity because the official would not have violated clearly established law.

If the plaintiffs' allegations are sufficient, then the court examines the official's asserted conduct and questions whether the official's version of what happened indicates a violation of clearly established law. If it does, then in light of the qualified immunity standard as interpreted by the Court, the official would not have qualified immunity.

The *Anderson* Court proceeded to address the more common situation — when the plaintiff's allegations state a violation of clearly established law and the official's version does not indicate a violation of clearly established law.¹⁶⁸ In that situation, a court should grant discovery.¹⁶⁹ As the *Anderson* Court noted, this discovery is not broad-ranging. Instead, it is to be narrowly focused on the resolution of factual issues to aid in deciding the immunity question in a motion for summary judgment after discovery.¹⁷⁰

Harlow, 457 U.S. at 818)); *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987).

161. *Anderson*, 483 U.S. at 646 n.6.

162. *Id.*

163. At issue in *Anderson* was a warrantless search for a fugitive. An FBI agent had allegedly entered the plaintiffs' home searching for a person who did not reside there. The plaintiffs alleged that the search violated the Fourth Amendment. *Id.* at 637.

164. *Id.* at 646 n.6.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

C. Motions for Summary Judgment After Discovery

When a district court denies summary judgment, asserting qualified immunity after discovery has occurred, its order may specify different underlying bases for its decisions: (1) it may only state that material facts are in dispute; (2) it may state that the facts are not in dispute and that the law was clearly established; or (3) it may state that material facts are disputed and that the law was clearly established. The Supreme Court considered the first scenario in *Johnson* and did not find appellate jurisdiction.¹⁷¹ With respect to the second and third situations, the Court in *Behrens v. Pelletier*¹⁷² impliedly found them indistinguishable.¹⁷³ *Behrens* and *Johnson* also provided that even if the district court's order does not specify which facts are in dispute, an appellate court may review the entire record on appeal. This review would be to hypothetically reconstruct the district court's assumed facts.¹⁷⁴ Thus, even if district courts do not specify the assumed facts for summary judgment, an appellate court is to view the record in a light more favorable to the plaintiff and ask the central question for interlocutory appeals: Was the law clearly established in light of the facts hypothesized by the appellate court?

Whether an appellate court has jurisdiction to hear an interlocutory appeal from a motion to dismiss or from a motion for summary judgment is a complex matter, one that also invites consideration of the Federal Rules of Civil Procedure. An examination of the Court's interpretation of the collateral order doctrine reveals that the Court is expanding appellate jurisdiction and ignoring some of the Rules of Civil Procedure.

V. The Proper Scope of Interlocutory Appeals from Orders Denying Qualified Immunity

The Supreme Court and appellate courts have ignored important limits on their jurisdiction.¹⁷⁵ Limits come from the Rules of Civil Procedure, the Seventh Amendment,¹⁷⁶ a more narrow interpretation of the collateral order doctrine, and appropriate deference to district courts and Congress. If courts adhered to these limits, they would have jurisdiction for appeals from some

171. *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995).

172. *Behrens v. Pelletier*, 116 S. Ct. 834, 842 (1996).

173. See *supra* text accompanying notes 108-17 (discussing Supreme Court's perspective on motions for summary judgment after discovery in which district court denies qualified immunity as defense).

174. See *supra* text accompanying notes 103, 115-17.

175. See *supra* text accompanying notes 6-12; *supra* notes 6-9.

176. U.S. CONST. amend. VII (providing that "the right of trial by jury shall be preserved").

orders denying summary judgment, before¹⁷⁷ and after discovery,¹⁷⁸ and no jurisdiction for appeals from orders denying motions to dismiss¹⁷⁹ on qualified immunity grounds, nor from orders denying judgment on the pleadings.¹⁸⁰

A. Orders for Dismissal

The Supreme Court's recent decision in *Behrens* erroneously suggested that interlocutory appeals would lie from denials of motions to dismiss raising qualified immunity as a defense. In this decision, without analysis of the Federal Rules of Civil Procedure, the Court assumed that such motions properly raised the central qualified immunity question – whether the law was clearly established when the official acted. Instead of discussing the Rules, the Court briefly examined the three elements of the collateral order doctrine: finality, separability, and unreviewability. It found that interlocutory appeals from motions to dismiss met all three requirements. In contrast, the Federal Rules of Civil Procedure and a narrower construction of the collateral order doctrine support finding no interlocutory jurisdiction for appeals from orders denying qualified immunity on a motion to dismiss.

When officials file motions under Federal Rule of Civil Procedure 12, they are generally seeking to dismiss the action because the plaintiff failed to allege a violation of clearly established law. Two provisions are common: Rule 12(b)(6),¹⁸¹ motion to dismiss for failure to state a claim, and Rule 12(c),¹⁸² motion for judgment on the pleadings.

1. Motions to Dismiss for Failure to State a Claim

Under the traditional view of Rule 12(b)(6), a district court would have to consider only whether the plaintiff stated a claim. Because qualified immunity is an affirmative defense, officials must plead it in their answers.¹⁸³ With the injection of the qualified immunity defense in the answer, a motion for dismissal under Rule 12(b)(6) based on qualified immunity is improper because it goes outside the traditional scope of the rule – whether the plaintiff has alleged a claim.

Interlocutory appeals will not lie from such motions despite the Supreme Court's statement in *Siegert v. Gilley* that in considering the qualified immunity

177. See *infra* text accompanying notes 200-09.

178. See *infra* text accompanying notes 236-41.

179. See *infra* text accompanying notes 181-86.

180. See *infra* text accompanying notes 187-199.

181. See *supra* note 143.

182. See *supra* note 144.

183. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

defense, courts should first consider whether the plaintiff has stated a claim.¹⁸⁴ First, under the Federal Rules of Civil Procedure, the qualified immunity defense cannot be raised in a motion to dismiss for failure to state a claim. Second, *Siebert* assumed that the reviewing court had jurisdiction to decide whether the law was clearly established. The collateral order doctrine requires the issue raised on an interlocutory appeal to be separate from the merits. Because a motion to dismiss for failure to state a claim raises a question only about the merits, it is not reviewable within the terms of the collateral order doctrine.

Furthermore, courts should also note when interpreting the collateral order doctrine as to appeals from motions to dismiss that the discussion of motions to dismiss in *Behrens* was dicta. At issue was whether a summary judgment motion after discovery was final within the meaning of the collateral order doctrine. Even though the record did raise the question of multiple appeals, the Court's comments on appeals from motions to dismiss are different from its determination that more than one appeal is possible.¹⁸⁵ For example, appeals may lie from some summary judgment motions both before and after discovery.¹⁸⁶

Thus, under the appellate courts' erroneous heightened pleading standard, not only have the courts rewritten pleading rules, but they have also expanded jurisdiction without serious consideration as to the separability element necessary for appellate review under the collateral order doctrine. There simply is no appellate jurisdiction to review a motion to dismiss for failure to state a constitutional violation.

2. *Motions for Judgment on the Pleadings*

Appellate courts also do not have jurisdiction to hear interlocutory appeals from orders denying qualified immunity from motions for judgment on the pleadings. The problem for the reviewing court does not lie with procedural rules, but rather with the collateral order doctrine.

In a motion for judgment on the pleadings under Rule 12(c), courts typically consider two pleadings—the plaintiff's complaint and the defendant's

184. *Siebert v. Gilley*, 500 U.S. 226, 232 (1991). For a discussion of *Siebert*, see *supra* text accompanying notes 150-52, 158.

185. For example, in the related area of absolute immunity, the Court heard an interlocutory appeal from President Clinton that argued neither for absolute immunity nor qualified immunity; the President simply argued that under absolute immunity jurisprudence, a deferral both of discovery and trial was appropriate until he completed his second term. *Clinton v. Jones*, 117 S. Ct. 1636, 1640 (1997). The Court's rejection of the President's request for deferral surely does not bar him from asserting qualified immunity and seeking any interlocutory appeals that comply with the procedural rules and the collateral order doctrine.

186. See *infra* text accompanying notes 200-09, 236-41.

answer.¹⁸⁷ Under Rule 7, a district court has discretion to order the plaintiff to reply to the defendant's answer.¹⁸⁸ When the district court has so ordered, a motion for judgment on the pleadings would consider the complaint, the answer, and the reply.

Although this motion allows officials to raise qualified immunity in their answers, the plaintiff need not anticipate the affirmative defense in the complaint. The plaintiff may, however, address the immunity question in a reply. To further *Harlow's* goal of getting rid of meritless suits as soon as possible, one appellate court has infringed upon the district court's discretion to order a reply.¹⁸⁹ It has suggested that in most cases the reply must be forthcoming.¹⁹⁰

Under the traditional rules of procedure, plaintiffs need not plead with specificity in the complaint and district courts have discretion to order replies. If in a given case the district court had the discretion to order a reply and did so, then the qualified immunity issue would be procedurally raised as provided for under the rules.

The next question would be whether the order denying qualified immunity from a motion for judgment on the pleadings meets the three elements of the collateral order doctrine. In contrast to the Supreme Court's interpretation of the collateral order doctrine in *Behrens*, courts should recognize that such appeals meet the final resolution and separability elements, but do not meet the unreviewability element of the collateral order doctrine.

The separability element is always met when the issue before the appellate court is whether the law was clearly established when the official took the challenged action. The *Mitchell* plurality first explained that such an issue is separable from the merits because it does not ask two questions: whether the plaintiff's allegations are "correct" or whether the plaintiff has stated a claim. A review for "correctness" is a review examining the sufficiency of the evidence, an issue that explores the merits of the case and is thus not separable.¹⁹¹ Similarly, whether the plaintiff has stated a claim is a merits question. Yet, if the appellate court has jurisdiction to decide the clearly established issue, it has discretion to decide whether the plaintiff has stated a claim, because this latter issue is logically a part of the qualified immunity question. If there is no constitutional violation at all, then the law could not have been clearly established that the official acted in violation of the Constitution. But whether there was a constitutional violation and whether there was

187. See *supra* note 144.

188. See *supra* note 7.

189. *Schultea v. Wood*, 47 F.3d 1427, 1428-29 (5th Cir. 1995) (en banc). For a discussion of *Schultea*, see *supra* note 7.

190. *Schultea*, 47 F.3d at 1433.

191. *Johnson v. Jones*, 515 U.S. 304, 313-15 (1995).

a violation of a clearly established right are still separate questions, and the second question is not a "merits" issue.

Similarly, when the issue before the appellate court is whether the law was clearly established, the finality element is met whether officials assert qualified immunity as to a single claim or multiple claims. When reviewing a single claim, if the court decides that the law was not clearly established, it finally resolves a disputed issue that is separate from the merits. When a court considers multiple claims, it may grant qualified immunity as to some claims and not to others. The Supreme Court in *Behrens* properly recognized that jurisdiction exists over appeals from orders denying qualified immunity for multiple claims.¹⁹² To hold otherwise would be to give plaintiffs the power to deny interlocutory review and to nullify the immunity-from-suit prong by simply appending a claim for which qualified immunity clearly does not apply, such as a claim for equitable relief.¹⁹³

If, however, the appellate court determines, based on the plaintiff's allegations, that the law was clearly established, then officials may raise qualified immunity later in the lawsuit – by motions for summary judgment before and after discovery¹⁹⁴ and by motions for judgment as a matter of law.¹⁹⁵ This ability to raise the qualified immunity defense repeatedly is why courts need to consider the third element for jurisdiction under the collateral order doctrine – unreviewability.

The *Behrens* Court did not have to specify how many appeals were possible. Before the court was the question of an interlocutory appeal from a denial of motion for summary judgment after discovery. It failed, however, to discuss the purpose of the final judgment statute – opposition to piecemeal appeals.¹⁹⁶ It simply did not see a piecemeal problem on the horizon. It naively stated that decisional law reflects that officials do not take multiple interlocutory appeals. Although case law did indicate the rarity of multiple appeals, the

192. *Behrens v. Pelletier*, 116 S. Ct. 834, 841-42 (1996).

193. *Id.* at 842.

194. *See infra* text accompanying notes 200-09, 236-41.

195. FED. R. CIV. P. 50 (providing that courts may grant judgment as matter of law during trials and after trials). *See, e.g.*, *Spann v. Rainey*, 987 F.2d 1110, 1113-14 (5th Cir. 1993) (determining interlocutory appeal would lie after district court ordered new trial because official still has defense to liability, even if asserted for first time); *Rellergert v. Cape Girardeau County*, 924 F.2d 794, 796 (8th Cir. 1991) (stating that official may raise qualified immunity during "trial and after judgment"); *Rakovich v. Wade*, 850 F.2d 1180, 1206 (7th Cir. 1988) (same); *Krause v. Bennett*, 887 F.2d 362, 368 n.3 (2d Cir. 1989) (same).

196. *See, e.g.*, Robert J. Martineau, *Defining Finality and Appealability By Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 726 (1993) (stating that "Chief Justice Marshall . . . surmised that Congress intended the final judgment rule to be a mechanism to avoid 'all the delays and expense incident to a repeated revision' of fragmented appeals of a single issue") (quoting *United States v. Bailey*, 34 U.S. (9 Pet.) 354, 355 (1835)).

reason they were not common should have been apparent to the Court. Many courts of appeal, like the lower court in *Behrens*,¹⁹⁷ had previously interpreted the final judgment statute to bar multiple appeals.¹⁹⁸

The *Behrens* Court found that appeals from "motions to dismiss" using a heightened pleading standard and from motions for summary judgment both met the unreviewability element. To justify its conclusion, the Court simply restated the questions asked by the motions, using its procedural bending of Rule 12. (The motion to dismiss questions whether the plaintiff has stated a violation of clearly established law, and the motion for summary judgment examines the evidence in light most favorable to the plaintiff and asks whether the law was clearly established.) *Behrens* linked the need for review with the presence of multiple motions provided by the Rules of Civil Procedure. It suggested that just because an official loses a motion to dismiss does not mean the official has no need to make a motion for summary judgment.

A more narrow interpretation of the reviewability requirement suggests that interlocutory appeals lie from motions for summary judgment before discovery, but not from motions for judgment on the pleadings or motions to dismiss.¹⁹⁹ Although each motion can be brought before discovery and asks the same reviewable question (Was the law clearly established?), the motion for summary judgment can be brought before discovery. The motion for summary judgment allows the plaintiff to submit affidavits to elaborate on the simple and plain statement in the complaint, as allowed by the Federal Rules of Civil Procedure. In examining these three motions, appellate courts should determine the unreviewability element to be met only by the motion for summary judgment before discovery. Appellate courts would properly afford deference to Congress, who enacted the final judgment statute and the Federal Rules of Civil Procedure.

B. Orders for Summary Judgment Before Discovery

The Supreme Court has stated that the qualified immunity defense can be resolved in summary judgment motions both before²⁰⁰ and after discovery.²⁰¹

197. *Pelletier v. Federal Home Loan Bank*, 968 F.2d 865, 870 (9th Cir. 1992) (stating that "[o]ne such interlocutory appeal is all that a government official is entitled to and all that we will entertain"), *rev'd sub nom. Behrens v. Pelletier*, 116 S. Ct. 834, 842 (1996).

198. The *Behrens* decision thus reversed the one-interlocutory appeal rule in numerous circuits. *See, e.g., Abel v. Miller*, 904 F.2d 394, 396-97 (7th Cir. 1990) (stating that single appellate review as to whether there shall be trial is sufficient and that "[u]nless courts of appeals are careful, appeals on the authority of *Mitchell* could ossify civil rights litigation").

199. *See supra* text accompanying notes 183-98.

200. *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982).

201. *Behrens v. Pelletier*, 116 S. Ct. 834, 842 (1996).

In doing so, it clearly indicated that officials may have two summary judgment motions and that the distinction between the two is the presence or absence of discovery. Although repetitive summary judgment motions are generally not permitted under Rule 56,²⁰² the Supreme Court has suggested two motions in the context of qualified immunity. The first motion is the more difficult of the two to understand because motions for summary judgment after discovery are commonplace. Motions for summary judgment before discovery asserting qualified immunity raise difficult procedural and jurisdictional questions on appeal.

1. Procedural Interpretations

Under Rule 56(c), district courts focus on two major issues: whether there are material disputed facts and whether the movant is entitled to judgment as a matter of law. In discussing summary judgment motions before discovery, the Court in *Harlow* and *Anderson* considered only how the qualified immunity defense could be successfully asserted as a matter of law. If the law was not clearly established, then immunity was available on a motion for summary judgment before discovery.

When officials move for summary judgment before discovery, their motions may be built on different views of the plaintiff's complaint and ability to support the allegations in the complaint. Three situations are probably common: (1) the officials believe that even under the plaintiff's version of what happened, they did not violate clearly established law; (2) even if the plaintiff's version of what happened indicates a violation of clearly established law, she does not have evidence to support her version; or (3) the officials do not adopt the plaintiff's version of what happened and argue that under their version of the facts the law was not clearly established.

The first situation may be what the *Harlow* Court envisioned when it stated in dicta, "[u]ntil the threshold immunity question is resolved, discovery should not be allowed." The threshold immunity question is whether the law was clearly established. In a summary judgment motion before discovery, a

202. See, e.g., *Enlow v. Tishomingo County*, 962 F.2d 501, 507 (5th Cir. 1992) (permitting interlocutory appeal from second summary judgment motion that occurred after discovery). In *Enlow*, the Fifth Circuit Court of Appeals discussed that the second summary judgment motion must offer an "expanded record." *Id.* at 506. The second motion must be different otherwise an appeal from the second motion would make "a mockery of the requirement that notice to appeal must be perfected within thirty days after the date of entry of the judgment or order." *Id.* at 506 (citing FED. R. APP. P. 4(a)(1)); see also *Armstrong v. Texas State Bd. of Barber Exam'rs*, 30 F.3d 643, 644 (5th Cir. 1994) (determining that there was no jurisdiction from order that denied summary judgment on qualified immunity because it was indistinguishable from district court's prior order denying official's motion to dismiss on qualified immunity grounds). See generally 11 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 56.10[7] (3d ed. 1997) (stating summary judgment is permissible if second motion is "sufficiently distinct" from first).

plaintiff has not had an opportunity to develop a detailed evidentiary trail to prove her version. The lack of discovery is not as problematic if officials contend that for the sake of this prediscovery motion the plaintiff's version of the facts governs and that they are entitled to summary judgment as a matter of law because the law was not clearly established. Although under summary judgment rules, the moving party (the official in a civil rights action) does not have to assume the truth of the nonmovant's factual allegation, the moving party may nevertheless do so.²⁰³

If the motion for summary judgment before discovery assumes the truthfulness of the plaintiff's allegations, then it would be similar to the Court's overly broad view of motions to dismiss.²⁰⁴ Both would assume the plaintiff's allegations are true and ask whether the law was clearly established. Yet, at this procedural stage, a plaintiff may submit affidavits to rebut the qualified immunity defense.²⁰⁵

Under the second situation, officials are not assuming the truthfulness of the plaintiff's version of what happened. Instead, they are focusing on the evidentiary support for the plaintiff's version. Traditional summary judgment motions can focus on evidentiary insufficiency, probably because discovery has occurred. In contrast, such a focus by officials asserting qualified immunity may be problematic when discovery has not occurred.²⁰⁶ Without discovery, a plaintiff would need to engage in "informal discovery," in which the plaintiff attempts to gather evidence on her own. If the claim before the court indicates that important information lies solely in the official's reach, then the district court judge may apply Rule 56(f)²⁰⁷ and authorize limited discovery.

203. Such a procedure is similar to the *Behrens* Court's handling of disputed material facts on interlocutory appeals. *Behrens v. Pelletier*, 116 S. Ct. 834, 842 (1996). In *Behrens*, the Court instructed appellate courts to decide whether the official is entitled to summary judgment by using the district court's assumed facts, those that the district court found sufficiently supported. *Id.*

204. See *supra* text accompanying notes 146-58.

205. Thus by considering summary judgment before discovery, courts would not necessarily have to impose a heightened pleading standard for writing complaints.

206. In *Siegert v. Gilley*, 500 U.S. 226 (1991), only Justice Kennedy thought that there was no problem because he labeled qualified immunity a "substantive defense" derived from *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Yet, in *Johnson v. Fankell*, 117 S. Ct. 1800 (1997), he joined the Court to label the right to an interlocutory appeal a procedural right. To distinguish substance from procedure, one may note that state courts in § 1983 actions must consider the qualified immunity defense if properly raised, but they do not have to grant interlocutory appeals from orders denying qualified immunity. See, e.g., *Rose v. Howlett*, 496 U.S. 356 (1990).

207. FED. R. CIV. P. 56(f). This rule affords district courts discretion in allowing further development of the facts. The rule provides:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a

The third type of motion also raises discovery problems. In this situation, because the record is so undeveloped, a district court may similarly rule that discovery is necessary before resolving the clearly established law question. With these contrasting "positional" postures for summary judgment motions before discovery, the next question is whether an appellate court would have jurisdiction from orders denying qualified immunity arising from these motions.

2. *Jurisdictional Interpretation*

With respect to the three motions, jurisdiction will lie when discovery is not necessary to resolve the motion for summary judgment. The first motion is free from a discovery problem because it assumes, for purposes of this summary judgment motion, that the plaintiff's allegations govern. The second and third motions can raise discovery problems.

If courts assume the truthfulness of the plaintiff's allegations in a motion for summary judgment before discovery, then the only question raised on interlocutory appeal is whether these allegations state a violation of clearly established law. This issue meets all three jurisdictional elements—final resolution, separability, and unreviewability.

First, if the appellate court reverses the district court's decision and determines that the law was not clearly established, then the appellate court would be conclusively determining the qualified immunity issue. The official would have qualified immunity from the claim under consideration. Second, such an issue is separate from the merits of the case. It does not require courts to determine whether the plaintiff has stated a claim or whether the evidence is sufficient to support the plaintiff's claim.

Third, it is also technically unreviewable at a later procedural stage. In a motion for summary judgment before discovery, officials are seeking not only freedom from paying damages and a trial, but more importantly, freedom from discovery. Such a determination before discovery is possible if the court uses the plaintiff's version of what happened.

In contrast, the second type of summary judgment motion before discovery invites the appellate court to determine evidentiary insufficiency. This type of review would fail to meet the separability requirement of the collateral order doctrine, as properly noted in *Johnson*.²⁰⁸ What is missing in this motion is a challenge to whether the law was clearly established.

continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Id.

208. *Johnson v. Jones*, 515 U.S. 304, 313-15 (1995). For a discussion of the separability problem, see *supra* text accompanying note 191.

The third kind of motion may raise a discovery problem because the officials and the plaintiff may dispute the material facts. This is the hypothetical situation posed in *Anderson*, where the Court authorized tailored discovery.²⁰⁹ If officials assert that the law was not clearly established and do not adopt the plaintiff's version, a district court may issue an order postponing its decision until discovery has occurred. Typically officials would then seek protection from discovery. If denied, they may attempt to appeal the order denying protection. Addressing the jurisdictional issue for the third summary judgment motion is thus linked to the appealability of discovery orders.

C. Orders Granting Discovery

According to both *Harlow v. Fitzgerald* and *Anderson v. Creighton*, the qualified immunity defense sometimes makes discovery unnecessary and sometimes requires tailored discovery.²¹⁰ The propriety of discovery depends upon the official's acceptance or rejection of the plaintiff's facts. Under *Harlow*, district courts may decide a summary judgment motion based on qualified immunity before discovery has occurred.²¹¹ Under *Anderson*, district courts are to order tailored discovery if the plaintiff alleges a violation of clearly established law and the officials contend that they did not do what the plaintiff alleges and that their true actions did not violate clearly established law.²¹² When district courts allow discovery to proceed, officials will often file motions for protection from discovery. Some of these orders fulfill the requirements of the collateral order doctrine.²¹³ Others do not.²¹⁴

A district court's order denying protection from discovery often occurs in two situations. First, district courts sometimes order discovery after denying an official's motion to dismiss on qualified immunity grounds.²¹⁵ (Complying with current procedural rules, officials should raise qualified immunity in

209. *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987).

210. *Anderson*, 483 U.S. at 646 n.6; *Harlow*, 457 U.S. at 818-19.

211. *Harlow*, 457 U.S. 818.

212. *Anderson*, 483 U.S. at 646 n.6. When district courts before discovery determine whether the law was clearly established based on the complaint and the supporting affidavits, they typically are faced with two contrasting stories of what happened. In these situations, under the plaintiff's version of the facts, the official violated clearly established law; under the official's version, no constitutional violation occurred, or if one did, the law was not clearly established. At this point, district courts properly deny the official's summary judgment motion raising qualified immunity and allow tailored discovery. *Id.*

213. See *infra* text pp. 37-39.

214. See *infra* text pp. 39-40.

215. If officials did not move for summary judgment before discovery, an appellate court may interpret their failure as waiving their right to appeal at that procedural stage. Another interlocutory appeal would protect their right to be free from trial after discovery has occurred.

motions for summary judgment before discovery, not in motions to dismiss.)²¹⁶ Second, district courts sometimes postpone deciding officials' motions to dismiss based on qualified immunity until discovery has concluded. In the first situation, the orders denying protection from discovery raise the general prohibition against allowing interlocutory appeals from discovery orders and are rarely appealable.²¹⁷ The second situation implicates the finality issues of motions for summary judgment before discovery and should be appealable²¹⁸ unless such an appeal would be frivolous.²¹⁹

1. *Discovery After Denying Qualified Immunity*

When district courts deny qualified immunity in motions for summary judgment before discovery, they have issued an order from which an interlocutory appeal would lie, as long as the appeal is not frivolous. In this appeal, the appellate court can vindicate a right protected by the immunity-from-suit prong – the right to be free from avoidable discovery. If the appellate court disagrees with the district court, then the officials will have immunity and be free from discovery. If the appellate court agrees with the district court, implicit in the court's ruling is that discovery should go forward.

Yet, the *Anderson* Court indicated that when the facts of a case warrant discovery, such discovery should be tailored to the qualified immunity question. *Anderson* thus suggests that officials should not be subject to overly broad discovery. Thus, even if discovery is permissible, officials sometimes seek protection from overly broad discovery.²²⁰ Under the collateral order doctrine, appellate courts should determine that they lack jurisdiction to hear these appeals.

This doctrine requires courts to consider whether the asserted right to be free from overly broad discovery is an important issue that meets the elements of finality, separability, and unreviewability. How one applies these factors

216. See *supra* text accompanying notes 183-86, 200-09.

217. 15B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3914.23 (2d ed. 1992) (stating that although discovery orders have provided "a superb testing illustration of the final judgment rule at work," "the rule remains settled that most discovery rulings are not final"). But see Elizabeth G. Thornburg, *Interlocutory Review of Discovery Orders: An Idea Whose Time Has Come*, 44 SW. L.J. 1045, 1047 (1990) (arguing that "interlocutory review of discovery orders is not the demon that commentators fear").

218. See *infra* text accompanying notes 232-33.

219. See *infra* text accompanying notes 257-62.

220. See, e.g., *Gaines v. Davis*, 928 F.2d 705, 707 (5th Cir. 1991) (stating that "immediate appeal is available for discovery orders which are either avoidable or overly broad"); *Lion Boulos v. Wilson*, 834 F.2d 504, 507 (5th Cir. 1987) (stating that Supreme Court's decisions in *Harlow* and *Mitchell* indicate "that qualified immunity does not shield government officials from all discovery but only from discovery which is either avoidable or overly broad").

depends ultimately on how one characterizes the official's appeal. One interpretation is that the immunity-from-suit prong supports finding three interests to be protected on interlocutory appeals: freedom from discovery, freedom from overly broad discovery, and freedom from an unnecessary trial. To support such an interpretation, one would need to broadly read *Anderson's* admonition against overly broad discovery.

A better interpretation is to see the interest in being free from overly broad discovery as peripheral to the clear right to be free from discovery which, as *Anderson* noted, is a limited right. Under this interpretation, appellate review of the scope of discovery is not an "important" issue within the meaning of the collateral order doctrine. The official's concern is sufficiently distinguishable from the typical discovery concerns. Even though *Harlow* found civil rights actions to be significantly different from the typical lawsuits, once a district court has properly determined that discovery should proceed, the civil rights lawsuit resembles the ordinary lawsuit. In that situation, appellate courts should defer to the expertise of the trial courts in tailoring discovery. District courts should not lose control of lawsuits nor should officials flood appellate courts with multiple appeals from discovery rulings.

Such appeals do not satisfy all three elements of the collateral order doctrine. Under the first element, finality may not be present because the course of discovery may require multiple interventions by the district court. The district court controls the course of discovery. The final judgment rule would militate against allowing such piecemeal appeals.

Under the second element, such orders are separate from the merits. Yet, they could invite appellate courts to pore over depositions to determine the scope of discovery. Although the Court in *Johnson* permitted appellate courts to do so when district courts fail to specify the assumed facts in denying officials' summary judgment motion based on qualified immunity, it did find this practice to be "cumbersome" and permissible under those limited circumstances.²²¹ To allow such a practice with orders denying protection from discovery would unduly infringe upon the district court's expertise in trial management and the appellate court's role in resolving only fully developed issues.

The third element, unreviewability, is more difficult. After discovery has concluded, any harm that the official suffered as a result of overly broad discovery is complete. The *Harlow* Court's transformation of the qualified immunity standard was to further the goal of preventing officials from answering unnecessary interrogatories and attending depositions. In short, the scope of discovery is unreviewable. Yet, even if courts were to review the district court's granting of discovery, such review is generally limited to an abuse of

221. *Johnson v. Jones*, 515 U.S. 304, 319 (1995).

discretion.²²² This standard is built on the recognition of the trial court's expertise in processing cases. With this heightened standard for review, few appeals would be successful.

Although *Anderson* clearly expressed a concern about limiting discovery, interlocutory appeals should not lie from orders denying protection from discovery if the district court's order followed an order denying qualified immunity in a summary judgment motion before discovery. In the event that district courts permit unreasonably broad discovery, officials should invoke mandamus.²²³ This procedure gives appellate courts discretion to hear such appeals without "simultaneously opening the door to review of similar questions in all future cases."²²⁴

2. Discovery After Refusing to Decide Qualified Immunity Issue

District courts also deny motions for protection from discovery for the stated reason that further factual development will aid them in resolving a prior motion for summary judgment that raised qualified immunity.²²⁵ At this procedural stage, the district courts are making two rulings: one to deny protection from discovery and one to defer deciding whether the law was clearly established.²²⁶ The first ruling raises the general issue of appealing from

222. See, e.g., *Graham v. Gray*, 827 F.2d 679, 681 (10th Cir. 1987) (stating that "[a]lthough the decision on a motion to dismiss or a motion for summary judgment clearly 'turns on an issue of law,' . . . a trial court's decision to allow or deny discovery is discretionary, and subject to review only for abuse of discretion") (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)).

223. 15B WRIGHT ET AL., *supra* note 217, at 132-33 (stating that "mandamus is used with some regularity").

224. *Id.* at 132.

225. See, e.g., *Workman v. Jordan*, 958 F.2d 332, 336 (10th Cir. 1992) (stating that "an order is not immediately appealable if it defers a decision on a qualified immunity claim because the claim turns, at least partially, on a fact question"); *Andre v. Castor*, 963 F. Supp. 1169, 1171 (M.D. Fla. 1997) (holding that appeal was frivolous because official sought protection from discovery before district court ruled on qualified immunity).

226. See, e.g., *Wicks v. Mississippi State Employment Servs.*, 41 F.3d 991, 994 (5th Cir. 1995) (determining that interlocutory appeal would lie from order denying protection from discovery when district court had not ruled on official's motion to dismiss). But see *Whalen v. County of Fulton*, 19 F.3d 828, 830 (2d Cir. 1994) (determining that interlocutory appeal would not lie from order that denied qualified immunity in summary judgment "motion without prejudice to its renewal after further discovery").

Sometimes officials may struggle to distinguish between a district court's deferral of the qualified immunity decision from a district court's failure to respond to a motion for qualified immunity. See, e.g., *Gosnell v. City of Troy*, 979 F.2d 1257, 1260 (7th Cir. 1992) (stating that "because the order of the district court is entirely silent as to qualified immunity," the appellate court faced "jurisdictional limbo"). In *Gosnell*, the Seventh Circuit Court of Appeals properly held that it lacked jurisdiction from an order that did not decide that the law was clearly established. *Id.* at 1261. The court stated that when officials are not certain as to whether a

orders granting discovery.²²⁷ In sharp contrast, the second ruling draws the district court into the conflict between the primary goal of *Harlow* – to decide whether the law was clearly established before discovery²²⁸ – and the need for discovery in a particular case.²²⁹

When considering motions for summary judgment before discovery, a district court's view of the facts depends upon how the official moves for summary judgment. If the official challenges the plaintiff's evidentiary sufficiency, then discovery may be necessary. If discovery is necessary, then the district court would not be violating *Harlow*'s goal, freedom from unnecessary discovery. It is possible for the district court to be wrong, however, in its determination that discovery is necessary.

At that procedural stage, the district court has not made any determination as to the clarity of the law, the typical issue for interlocutory appeal. One means of getting review before discovery goes forward is for officials to adopt, *arguendo*, the plaintiff's version of the facts and ask the district court to determine the clarity of the law.²³⁰ If officials do not seek review in this manner, then perhaps discovery is necessary (or they have waived their right to an appeal).²³¹

If the district court refuses to decide the clarity of law question using the plaintiff's version of the facts and still orders discovery, then an interlocutory appeal will lie from the district court's subsequent order denying protection from discovery.²³² In so ruling, a district court would be ignoring *Harlow*'s

district court has decided qualified immunity, they should file a "motion to reconsider or clarify." *Id.* at 1260.

227. See *supra* text accompanying notes 217, 220-24.

228. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982).

229. *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987).

230. See *supra* p. 35.

231. See *Auster Oil & Gas, Inc. v. Stream*, 835 F.2d 597, 601 (5th Cir. 1988) (finding waiver when officials did not mention qualified immunity in "pretrial order, or in oral or written motions for directed verdict"); *Ivey v. Wilson*, 832 F.2d 950, 957 (6th Cir. 1987) (finding waiver because official did not timely object to magistrate's report); *Justice v. Town of Blackwell*, 820 F.2d 238, 240-41 (7th Cir. 1987) (determining that interlocutory appeal would not lie when official waived qualified immunity defense by failing to timely raise it in his answer; in alternative, even if jurisdiction existed, determining that district court did not abuse its discretion in failing to allow official to amend answer). But see generally *Yates v. City of Cleveland*, 941 F.2d 444, 449 (6th Cir. 1991) (finding no waiver where trial court made no determination of frivolousness or waiver, even though official "did not raise the qualified immunity defense until a full five years after the filing of the complaint, and days before the trial was scheduled to commence").

232. See, e.g., *Workman v. Jordan*, 958 F.2d 332, 336 (10th Cir. 1992) (holding that appellate courts have jurisdiction from "orders postponing a decision" on motion to dismiss). But see *Wicks v. Mississippi State Employment Servs.*, 41 F.3d 991, 997 (5th Cir. 1995). In *Wicks*, the Fifth Circuit Court of Appeals added one limitation to appellate jurisdiction when a district court refuses to decide the clarity of law. *Id.* If the plaintiff's complaint meets a

limits on discovery. When such a postponement is for the stated purpose of allowing factual development, an interlocutory appeal should lie.

This denial of protection raises the same issue as does a decision denying summary judgment before discovery. In the order denying protection, the district court implicitly rules against the official, implying that there is no right to determine whether the law was clearly established before granting discovery. In an order denying qualified immunity in a motion for summary judgment before discovery, the district court's ruling is explicit. Under these circumstances, a refusal to decide is tantamount to deciding that the immunity-from-suit prong does not protect officials from unnecessary discovery.

In taking an interlocutory appeal from a denial based on a refusal to decide, officials create a difficult issue for appellate courts to resolve. Appellate courts must decide whether they should resolve the question on appeal — whether the law was clearly established — even though the district court has not first answered this question. In contrast to the typical appeal, the appellate court is unable to evaluate a district court's discussion of the qualified immunity defense because it does not exist. The district court's refusal to decide thus resulted in no opinion for review.

Some appellate courts decide the qualified immunity question, even though the district court did not address the question.²³³ Such an approach aids the timely disposition of the case. Yet, the appellate court might not have all the information before it as would a district court. The plaintiff may have not yet submitted affidavits to support the general allegations in the complaint.

The better approach is for the appellate court to remand to the district court.²³⁴ Such an order would compel the district court to decide the issue of

heightened pleading standard and discovery is necessary, then the district court need not rule on the qualified immunity standard. *Id.* The *Wicks* court clearly stated it was not imposing a "requirement that the district court must rule on a motion to dismiss prior to the allowance of discovery in all situations." *Id.* at 997 n.27. The Fifth Circuit's concern is valid, but instead of creating confusion as to the need for district courts to rule on the qualified immunity issue, it should recognize that a denial of qualified immunity at one procedural stage does not mean that officials are barred from raising qualified immunity later. *See, e.g., Behrens v. Pelletier*, 116 S. Ct. 834, 839 (1996). If the discovery is clearly necessary and the officials appeal, district courts have the authority to certify such an appeal as frivolous. *See infra* text accompanying notes 257-62. A better interpretation of *Wicks* is that in determining that the plaintiff's allegations met the (erroneous) heightened pleading standard, the district court has ruled that the plaintiff's allegations state a violation of clearly established law. This order would thus be appealable, if one interprets it as arising from a motion for summary judgment before discovery. *See supra* text accompanying notes 200-07.

233. *See, e.g., Gallegos v. City & County of Denver*, 984 F.2d 358, 362 (10th Cir. 1993); *Collins v. School Bd. of Dade County*, 981 F.2d 1203, 1206 (11th Cir. 1993); *Valiente v Rivera*, 966 F.2d 21, 24 (1st Cir. 1992).

234. *See, e.g., Francis v. Coughlin*, 849 F.2d 778, 780 (2d Cir. 1988) ("When a district court fails to address an immunity defense, it is generally appropriate to remand the case with

whether the law was clearly established. If the district court denied immunity, then an interlocutory appeal might lie again. One important tool available to district courts is the ability to certify an appeal as frivolous.²³⁵ Thus, if a district court certifies the second appeal as frivolous, a second appeal would not lie from the same question at the same procedural stage. Once discovery occurs, the next issue is whether an interlocutory appeal will lie from a summary judgment order again denying qualified immunity.

D. Orders for Summary Judgment After Discovery

When district courts deny qualified immunity in a motion for summary judgment after discovery, the factual record is more developed. Under a motion for summary judgment raising qualified immunity, district courts consider whether there are disputed material facts and whether the official is entitled to judgment as a matter of law. The easy case for an interlocutory appeal is when the district court determines that there are no disputed material facts and denies qualified immunity. Such an appeal raises a single issue, for which appellate courts clearly have jurisdiction—did the district court err in determining that the law was clearly established. Yet, when district courts rule that material facts are disputed and deny qualified immunity, the question of whether an interlocutory appeal lies is significantly more difficult. Jurisdiction turns on whether appellate courts can address the clarity of law issue when material facts are disputed.

In *Behrens v. Pelletier*, the Court offered two procedural solutions, one proper and the other an institutional nightmare.²³⁶ Under the first procedural solution, appellate courts use the "assumed" facts, those that the district court explicitly stated in its order denying qualified immunity.²³⁷ The "assumed" facts are those that the district court found to be "sufficiently supported."²³⁸ The appellate court then asks whether those "assumed" facts indicate a violation of clearly established law. If they do not, then the official has qualified immunity. If they do, the official does not have immunity.

instructions to rule on the matter."); *Musso v. Hourigan*, 836 F.2d 736, 742 (2d Cir. 1988) (stating that remand is appropriate even if appellate court decides qualified immunity defense as to other claims considered by district court); *Craft v. Wipf*, 810 F.2d 170, 171 (8th Cir. 1987) (stating that appellate court has jurisdiction but should remand for district court to first determine whether law was clearly established); *Helton v. Clements*, 787 F.2d 1016, 1017 (5th Cir. 1986) (same). See generally *Behrens v. Pelletier*, 116 S. Ct. 834 (1996) (remanding for court of appeals to determine whether law was clearly established in light of "assumed" facts).

235. See *infra* text accompanying notes 251-74.

236. *Behrens v. Pelletier*, 116 S. Ct. 834, 842 (1996).

237. *Id.*

238. *Id.*

The second procedural solution applies when the district court does not specify what facts it assumed.²³⁹ Both *Johnson* and *Behrens* permit appellate courts to "undertake a cumbersome review of the record to determine what facts the district court . . . assumed."²⁴⁰ After reviewing the record, the appellate court articulates the presumed facts and decides the clearly established law question.

The first procedural solution broadly protects the right to interlocutory appeals, without encroaching upon the district court's expertise in deciding whether facts are material and disputed. It avoids the problem of separability by using the evidence that the district court found sufficiently supported. It does not ask, however, the appellate court to determine what in fact happened.

The second procedural solution is a serious encroachment of the trial court's function and the traditional practice of allowing the lower court to first decide an issue. The *Johnson* Court initially recognized the trial courts' expertise and the appellate courts' scarce resources. Yet, it, like *Behrens*, surprisingly created this bizarre solution.

A sound solution is for appellate courts to use the facts the district court articulated in its order. Even this approach is more easily applied in theory than in practice. In using the articulated assumed facts, the appellate courts should not feel free to supplement them.²⁴¹ To do so creates serious separability problems. With this more narrow review, courts are able to properly review the question of whether the law was clearly established in light of these assumed facts. Such review fulfills all three elements of the collateral order doctrine.

When officials appeal from district court orders that fail to specify the assumed facts, a better practice is for the appellate court to either summarily dismiss for lack of jurisdiction or remand with direction to provide the "assumed facts." Such an appeal cannot fulfill the separability requirement of the collateral order doctrine. When the case returns to the district court, the judge can specify the facts. An interlocutory appeal would then lie, unless the district court certifies the appeal as frivolous.

In summary, interlocutory appeals lie from orders denying qualified immunity because the district court determined that the law was clearly established. Such orders can occur in motions for summary judgment before discovery if the officials adopt the plaintiff's version of the facts for the purpose of the motion. Orders denying qualified immunity can also occur as a result of prediscovery motions denying summary judgment in two situations:

239. *Id.*

240. *Id.* at 842 (quoting *Johnson v. Jones*, 515 U.S. 304, 319 (1995)).

241. See *supra* note 8 (citing cases where federal courts of appeal have erroneously ignored district court's expertise in specifying assumed facts).

Either there are no material disputed facts or, if disputed facts do exist, the district court's order specifies assumed facts. Additionally, interlocutory appeals can lie from orders denying protection from discovery when the district court also refuses to decide whether the law was clearly established.

Supplementing these jurisdictional complexities are appeals from orders declaring that a defendant is not an "official," but rather a private person not entitled to qualified immunity. Although these appeals do not raise the traditional clearly-established-law question for review, they nevertheless assert the same interests and are generally reviewable on appeal.

E. Appeals from Orders Determining Defendant Was Not an "Official"

As the states continue to engage in privatization of their official duties, such as allowing private corporations to run their prisons, appellate courts may be flooded with interlocutory appeals from orders declaring that a defendant was a "private" person not entitled to qualified immunity.²⁴² Such orders do not address the central qualified immunity question on appeal – whether the law was clearly established. Instead they raise a different collateral issue – whether the defendant was an official. Such orders can meet the three elements of the collateral order doctrine depending upon how the defendants raise the issue procedurally.²⁴³

In *Wyatt v. Cole*²⁴⁴ and *Richardson v. McKnight*,²⁴⁵ the Supreme Court never discussed whether an interlocutory appeal would lie from an order dismissing the qualified immunity defense because the defendant was a private actor.²⁴⁶ In both cases, they addressed the merits of the appeal, not the question of jurisdiction. *Wyatt* held that private defendants cannot assert qualified immunity as a defense.²⁴⁷ It suggested that if another defense were available to them, it would only provide a defense to liability, not an immunity from suit.²⁴⁸ In *Richardson*, a sharply divided Court held that the defendants, prison guards who were employed by a private corporation, could not assert qualified

242. See, e.g., *Richardson v. McKnight*, 117 S. Ct. 2100, 2102-03 (1997) (declaring that privately employed prison guards are not entitled to immunity provided to their governmental counterparts).

243. In reviewing an order denying official status, appellate courts should again note that qualified immunity is a defense that can be first evaluated in a motion for summary judgment before discovery, rather than in a motion to dismiss. See *supra* text accompanying notes 177-209.

244. 504 U.S. 158 (1992).

245. 117 S. Ct. 2100 (1997).

246. See *Wyatt v. Cole*, 504 U.S. 158 (1982); *Richardson v. McKnight*, 117 S. Ct. 2100 (1997).

247. *Wyatt*, 504 U.S. at 168.

248. *Id.* at 169.

immunity as a defense.²⁴⁹ In doing so, it explicitly left the door open for other private actors to assert immunity.²⁵⁰

In light of *Wyatt* and *Richardson*, the question of whether the defendant is an official is tremendously important and difficult to decide. If the district court erroneously decides the status question, officials would lose their immunity from suit just as if the district court had determined that the law was clearly established. Such an order would subject the official to discovery and a trial. An interlocutory appeal from this type of order safeguards the same interests protected by the immunity-from-suit prong of the qualified immunity defense. As such, it raises an important issue that is final, separate from the merits, and unreviewable on appeal from a final judgment.

Even when orders procedurally meet the elements of the collateral order doctrine, another judicially created doctrine can significantly limit appellate jurisdiction—the doctrine of frivolous appeals. An examination of the frivolity doctrine in qualified appeals reveals how courts can discern jurisdiction and further the purposes of the immunity-from-suit prong.

F. Orders Declaring Appeal to Be Frivolous: The Dual Jurisdiction of the District and Appellate Courts

The right to be free from discovery and a trial, created by the immunity-from-suit prong, is similar to the right to be free from being twice prosecuted for the same offense,²⁵¹ a right protected by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.²⁵² Both exist to safeguard a defendant's right to be free from an unnecessary trial; qualified immunity also seeks to bar unnecessary discovery.²⁵³ As a result of this similarity, the Supreme Court²⁵⁴ and lower courts²⁵⁵ have applied the doctrine of frivolous

249. *Richardson*, 117 S. Ct. at 2107-08.

250. *Id.* at 2108 (stating that "we have answered the immunity question narrowly, in the context in which it arose). The Court also noted that "[t]he case does not involve a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." *Id.*

251. See, e.g., *Behrens v. Pelletier*, 116 S. Ct. 834, 841 (1996) (stating that interlocutory appeals raising qualified immunity and double jeopardy are "analogous"); *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992) (stating that similarity justifies adoption of jurisdictional rules of double jeopardy interlocutory appeals to qualified immunity appeals); *Stewart v. Donges*, 915 F.2d 572, 577 n.5 (10th Cir. 1990) (same); *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989) (same).

252. U.S. CONST. amend. V (providing that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb").

253. See *supra* text accompanying notes 159-70.

254. See *Behrens*, 116 S. Ct. at 840-41.

255. See, e.g., *Dickerson v. McClellan*, 37 F.3d 251, 252 (6th Cir. 1994); *Chuman*, 960

appeals in double jeopardy cases to interlocutory appeals raising qualified immunity as a defense.

The purpose of the frivolity doctrine is to allow discovery or trials to go forward because there is no colorable claim that an appeal would vindicate the asserted right, whether under the Double Jeopardy Clause²⁵⁶ or under the qualified immunity defense.²⁵⁷ This frivolity doctrine allows the appellate court and the district court to have jurisdiction simultaneously in some circumstances.²⁵⁸ To discern when the two courts simultaneously possess jurisdiction requires an examination of the traditional rule of jurisdiction in just one court and the need for a limited application of this "dual jurisdiction."²⁵⁹

Under the traditional divestiture rule, once an official files a timely notice of appeal, a district court loses jurisdiction.²⁶⁰ The purposes of this judge-made rule are creating clarity in resolving who has jurisdiction and avoiding unnecessary duplication of efforts.²⁶¹ The federal courts, using their supervisory powers, crafted an exception to the divestiture rule when they created the frivolity doctrine for interlocutory appeals.²⁶²

In the context of interlocutory appeals asserting double jeopardy, the need for simultaneous jurisdiction emerged when a criminal defendant filed an interlocutory appeal from the district court's denial of his double jeopardy motion.²⁶³ Under the traditional divestiture rule, the district court would lose

F.2d at 105; *Stewart*, 915 F.2d at 577 n.5; *Apostol*, 870 F.2d at 1339.

256. See, e.g., *United States v. LaMere*, 951 F.2d 1106, 1108 (9th Cir. 1991); *United States v. Bradley*, 905 F.2d 1482, 1485-86 (11th Cir. 1990); *United States v. Dunbar*, 611 F.2d 985, 987-88 (5th Cir. 1980). See generally *United States v. Claiborne*, 465 U.S. 1305, 1306 (1984) (declining review of dual jurisdiction doctrine as applied to claim of selective prosecution).

257. See, e.g., *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992); *Stewart v. Donges*, 915 F.2d 572, 577 (10th Cir. 1990); *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989).

258. See, e.g., *Apostol*, 870 F.2d at 1338-39 (finding dual jurisdiction for some qualified immunity interlocutory appeals); *Dunbar*, 611 F.2d at 988 (finding dual jurisdiction for some double jeopardy interlocutory appeals). For a discussion of what courts mean by "dual jurisdiction," see *infra* text accompanying notes 259-74.

259. See, e.g., *LaMere*, 951 F.2d at 1108 (stating that when criminal defendant files timely notice of appeal, district court "loses its power to proceed . . . until the appeal is resolved" (quoting *United States v. Claiborne*, 727 F.2d 842, 850 (9th Cir. 1984))).

260. *Id.* (stating that divestiture rule is "a judge made rule originally devised in the context of civil appeals to avoid confusion or waste of time resulting from having the same issues before two courts at the same time" (quoting *Claiborne*, 727 F.2d at 850)).

261. *Id.*

262. See *Abney v. United States*, 431 U.S. 651, 662 n.8 (1977) (urging federal appellate courts to use their supervisory powers to "establish summary procedures . . . to weed out frivolous claims of former jeopardy").

263. See, e.g., *United States v. Dunbar*, 611 F.2d 985, 988 (5th Cir. 1980). In *Dunbar*, the Fifth Circuit Court of Appeals clearly stated the need to modify the rule of jurisdiction in one court:

jurisdiction upon the criminal defendant's filing a notice of appeal.²⁶⁴ On appeal, the appellate court would consider whether the Double Jeopardy Clause barred the trial. Without the concept of dual jurisdiction, a district court could lose jurisdiction simply by the defendant's filing a frivolous interlocutory appeal.²⁶⁵ If the district court acted without jurisdiction, any conviction would be void.²⁶⁶

To allow the criminal trial court to proceed, appellate courts use their supervisory powers to create the notion of dual jurisdiction.²⁶⁷ Under the frivolity doctrine, a district court can retain jurisdiction if it conducts a hearing, writes an order, and specifies why the appeal is frivolous.²⁶⁸ Once this is done, the district court retains jurisdiction to proceed.

In the context of qualified immunity interlocutory appeals, district courts similarly need to retain jurisdiction when appeals are frivolous. The Supreme Court in *Behrens v. Pelletier* appropriately adopted this doctrine as an important check upon multiple interlocutory appeals.²⁶⁹ The goal of the doctrine is to prevent officials from using unnecessary delay as a tactical advantage.²⁷⁰

The jurisdictional issues under the frivolity doctrine are not simple. To ascertain the district court's jurisdiction is easy, but to ascertain the appellate court's simultaneous jurisdiction is complex. The district court retains juris-

The divestiture of jurisdiction rule, applied in conjunction with [double jeopardy interlocutory appeals], would enable a criminal defendant to unilaterally obtain a trial continuance at any time prior to trial by merely filing a double jeopardy motion, however frivolous, and appealing the trial court's denial thereof.

Id.; see also *Claiborne*, 727 F.2d at 851 (stating that "[a] ritualistic application of the divestiture rule in the [double jeopardy] context conflicts with the public policy favoring rapid adjudication of criminal prosecutions" (quoting *United States v. Leppo*, 634 F.2d 101, 104 (3d Cir. 1980))).

264. See, e.g., *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (stating that "[t]he filing of a notice of appeal is an event of jurisdictional significance — it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal").

265. See, e.g., *United States v. Powell*, 24 F.3d 28, 31 (9th Cir. 1994); *United States v. LaMere*, 951 F.2d 1106, 1108 (9th Cir. 1991).

266. See, e.g., *Dunbar*, 611 F.2d at 986-87; see also *Stewart v. Donges*, 915 F.2d 572, 578 n.8 (10th Cir. 1990) (voiding a civil trial because district court lacked jurisdiction by failing to issue a frivolity order).

267. See, e.g., *LaMere*, 951 F.2d at 1108; *United States v. Bradley*, 905 F.2d 1482, 1485-86 (11th Cir. 1990); *Dunbar*, 611 F.2d at 987-88.

268. See, e.g., *Bradley*, 905 F.2d at 1486; *United States v. Hines*, 689 F.2d 934, 936-37 (10th Cir. 1982).

269. *Behrens v. Pelletier*, 116 S. Ct. 834, 841 (1996).

270. *Id.* (stating that certifying appeals as frivolous enable district court to retain jurisdiction and minimizes disruption of ongoing proceedings).

diction by issuing its frivolity determination,²⁷¹ but it does not have the power to dismiss a notice of appeal.²⁷² Two views of appellate jurisdiction currently exist. The better view finds simultaneous jurisdiction only when officials seek a stay or mandamus.²⁷³ The other view finds appellate jurisdiction implicit in the notice of appeal, in which the official seeks review of the district court's order denying qualified immunity.²⁷⁴

In the normal course of litigation, officials petition appellate courts for a stay of discovery or trial proceedings. The purpose of seeking the stay or mandamus is to protect the interests safeguarded by the immunity-from-suit prong of the qualified immunity defense. Motions for a stay or mandamus give the appellate court jurisdiction to resolve three issues: whether to stay discovery or a trial;²⁷⁵ whether the appeal is frivolous;²⁷⁶ and if the appeal is not frivolous, whether the official has qualified immunity.²⁷⁷

In addressing whether to grant a stay or issue mandamus, appellate courts may use two distinct modes of analysis. Under the first approach, they could

271. See, e.g., *Stewart v. Donges*, 915 F.2d 572, 577 (10th Cir. 1990) (stating that presence of district court's written findings of frivolity creates a "bright jurisdictional line between the district court and the circuit court").

272. See *Dickerson v. McClellan*, 37 F.3d 251, 252 (6th Cir. 1994) (stating that "district courts have a ministerial duty to forward to the proper court of appeals any notice of appeal which is filed" (citing FED. R. APP. P. 3(d))).

273. See, e.g., *Marks v. Clarke*, 102 F.3d 1012, 1017 (9th Cir. 1997) (stating that "[a]fter applying to the district court for a stay, the [officials'] should have applied to this court for a discretionary stay to prevent the district court from proceeding to trial"); *Chan v. Wodnicki*, 67 F.3d 137, 139 (7th Cir. 1995) (stating that appellate jurisdiction is possible by official's "asking us to stay the trial"); *Chuman v. Wright*, 960 F.2d 104, 105 n.1 (1992); *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989) (stating that "[a] party aggrieved by a finding of frivolousness or forfeiture [of the qualified immunity defense] . . . may seek a stay from this court, for we have jurisdiction to determine our jurisdiction"); *United States v. Farmer*, 923 F.2d 1557, 1565 (11th Cir. 1991) (stating that appellate jurisdiction exists from order denying double jeopardy because criminal defendant filed "emergency motion to stay the retrial pending consideration of the interlocutory appeal").

274. See *Langley v. Adams County*, 987 F.3d 1473, 1476 (10th Cir. 1993) (finding dual jurisdiction, after district court found appeal of one of four defendants to be frivolous and official did not seek stay). See generally *Dickerson*, 37 F.3d at 252 (stating appellate court always has jurisdiction to determine whether notice of appeal was valid, where official did not seek a stay from frivolity order).

275. See *infra* text accompanying notes 278-79.

276. See, e.g., *Stewart*, 915 F.2d at 578 n.6 (stating that after filing stay official may argue on appeal that interlocutory appeal is not frivolous).

277. See, e.g., *Chan v. Wodnicki*, 67 F.2d 137, 139 (7th Cir. 1995) (stating that "[t]he claim of immunity survives the denial of a stay"); *Stewart v. Donges*, 915 F.2d 572, 578 n.6 (10th Cir. 1990) (stating that denial of stay "at the appellate level would ordinarily be without prejudice to the right of the defendant to argue the lack of frivolousness of his interlocutory appeal when the matter is considered by the appellate courts on its merits").

apply the traditional view that such relief is extraordinary and could generally deny it using summary procedures.²⁷⁸ There are two advantages to this approach. First, it maintains the view that such remedies are extraordinary,²⁷⁹ furthering a consistent interpretation of stays and mandamus. Second, it reveals deference to the expertise of the district court. Presumably district courts are well situated to determine if on the eve of trial such appeals are merely dilatory.

A contrasting and better approach is for the appellate court to use its determination of whether the appeal is frivolous to determine whether to grant the stay.²⁸⁰ If the district court were correct, then the appellate court could summarily dismiss for lack of jurisdiction. In that case, because of the concept of dual jurisdiction, all district court proceedings conducted during the appeal would have been with jurisdiction. The theory for the dismissal is that an appeal from a frivolous order is a "nullity."²⁸¹

If, however, the appeal was not frivolous, then the appellate court should grant a stay to protect the officials' rights to be free from unnecessary discovery and trials. By granting a stay after finding no frivolity, the appellate court is implicitly recognizing that the remaining qualified immunity issue before it is no different from other interlocutory appeals asserting qualified immunity. Granting a stay would then eliminate the district court's dual jurisdiction.

Even if an official does not seek a stay, one court has suggested that its jurisdiction arises from the denial of qualified immunity.²⁸² Under this approach, both courts still have jurisdiction. The district court's jurisdiction comes from writing its frivolity determination and the appellate court's jurisdiction from the denial of qualified immunity.²⁸³ In short, a court always

278. See, e.g., *Stewart*, 915 F.2d at 578 n.6 (stating that standards for seeking stay are "very high" and that officials may later on appeal argue without prejudice that their appeal was not frivolous).

279. See, e.g., *Chan*, 67 F.3d at 139 (stating that denying this request for "extraordinary relief" does not "express any view of the merits of the underlying appeal"); *Stewart*, 915 F.2d at 578 n.6.

280. See, e.g., *United States v. Farmer*, 923 F.2d 1557, 1565 n.17 (11th Cir. 1991) (stating that "[t]his court denied the motion to stay thus ruling on the district court's finding of frivolousness").

281. See, e.g., *Chan*, 67 F.3d at 139 (stating that "[a] frivolous appeal is a nullity . . . ; it does not engage the jurisdiction of the court of appeals, just as a frivolous suit does not engage the jurisdiction of the district court").

282. *Langley v. Adams County*, 987 F.2d 1473, 1477 (10th Cir. 1993) (finding jurisdiction even though official did not seek stay, when considering interlocutory appeals of three other officials).

283. See *Langley*, 987 F.2d at 1477. In *Langley*, without analysis the Tenth Circuit Court of Appeals discussed dual jurisdiction:

Once a district court so certifies a qualified immunity appeal as frivolous and thus regains jurisdiction, that does not affect our jurisdiction. "Rather, both the district

has "jurisdiction to determine [its] jurisdiction."²⁸⁴ During this type of an appeal, issues raised on interlocutory appeal can become moot.²⁸⁵ For example, the rights to be free from both discovery and a trial can become moot if the trial concludes before appellate review.²⁸⁶ At that point, the only qualified-immunity issue remaining is the defense to liability, an issue that can be raised on appeal from the final judgment.

Presumably, when officials do not seek a stay or mandamus, the appellate court's jurisdiction can arguably be similar to jurisdiction under the traditional view of stays and mandamus, where appellate courts often deny such relief. In those situations, the appellate courts do not stop the district court's proceedings, and the appellate courts need to resolve whether the appeal is frivolous before deciding whether qualified immunity is available. If the appeal was frivolous, both courts would dismiss for a lack of jurisdiction. But if the courts did not find the appeal frivolous, then the option of staying proceedings is arguably lost. The only benefit of such an interlocutory appeal for officials is that an appellate court could resolve the immunity in the official's favor, ending the lawsuit. The problem with this view of dual jurisdiction is that it fails to recognize the significance of a district court's frivolity determination. Rarely, one hopes, would district courts be so misguided that they could not distinguish among a frivolous claim, a nonfrivolous claim to immunity later found debatable, and a nonfrivolous claim later found successful.

In addition to resolving the issue of appellate jurisdiction after a district court issues a frivolity order, appellate courts may face the task of ascertaining jurisdiction when district courts issue more than one frivolity determination. After each procedural motion, the official could erroneously attempt to take an interlocutory appeal. A district court may thus be faced with the task of issuing multiple frivolity determinations in a given case. Similarly, if the appellate court has not intervened, the proceedings in the district court may later suggest that an interlocutory appeal was proper. Thus, both district courts and appellate courts need to know when an interlocutory appeal will lie.

court and court of appeals shall have jurisdiction to proceed. Thus the defendant is entitled ultimately to appellate review."

Id. (quoting *United States v. Hines*, 689 F.2d 934, 937 (10th Cir. 1982)).

284. *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989). Yet, in *Apostol*, the Seventh Circuit required officials to seek a stay to invoke review of the denial of qualified immunity. *Id.*

285. *See, e.g., Chan v. Wodnicki*, 67 F.3d 137, 139-40 (7th Cir. 1995) (stating that denial of stay was not on merits and thus it had jurisdiction to address qualified immunity, except for mootness caused by concluded trial).

286. *Id.*

VI. Conclusion

An interlocutory appeal from an order denying qualified immunity is a powerful procedural tool for officials sued for violating a citizen's constitutional rights. On appeal, officials may benefit from rulings that bar discovery, bar a trial, or bar recovery for their constitutional violations. Officials get this protection because qualified immunity is not only a defense to liability, but also an immunity from suit—one that officials can raise numerous times before the district court and sometimes during interlocutory appeals. As a result, injured citizens may never have their day in court.

These potent appeals lie because of the judicially created collateral order doctrine, which allows appeals in some circumstances before final judgment. The purpose of the interlocutory appeal is to protect the interests safeguarded by the immunity-from-suit prong of the *Harlow* qualified immunity standard—an official's freedom from unnecessary discovery and trial. In theory, qualified immunity benefits society. It allows officials to work instead of being tied up in legal proceedings. In practice, courts have misconstrued qualified immunity, allowing it to infringe upon the proper roles of district courts, juries, and Congress. One important check on officials' undue delay of pretrial proceedings and trials is the doctrine of frivolous appeals.

Ascertaining when appellate jurisdiction lies for interlocutory appeals raising qualified immunity requires wading through the jurisdictional and procedural morass created by the Supreme Court. The Court's jurisprudence contains serious jurisdictional and procedural errors. First, it has rewritten the Rules of Civil Procedure to suggest that interlocutory appeals can lie from motions to dismiss. Second, it permits appellate courts to do the district courts' job. When the district court fails to specify the facts it assumed in denying a motion for summary judgment raising qualified immunity, it invites the appellate court to pore through depositions, interrogatories, and affidavits. The purpose of this extensive review of the record is for the appellate court to determine what facts the record required the district court to assume. Third, the Court failed to properly interpret the elements of the collateral order doctrine when it suggested that appeals lie from motions to dismiss and allowed appellate courts to make their own assessment of the assumed facts. The Court's discussion impermissibly expands appellate jurisdiction, an area for Congress to regulate.

The courts of appeal have similarly viewed their jurisdiction with few limits. Some have granted appeals from motions to dismiss. Others have resolved material disputed facts. Still others have failed to give appropriate deference to the district court when supplementing the district court's assumed facts in summary judgment motions or in discarding the district court's assumed facts.

The confusion resulting from both the Supreme Court's jurisprudence and the lower courts' response is clear. A critical examination of the Rules of Civil Procedure and the collateral order doctrine, coupled with respect for the roles of trial courts, juries, and Congress supports the following jurisdictional and procedural observations.

First, multiple interlocutory appeals are possible because officials can properly raise qualified immunity in motions for summary judgment both before discovery and after discovery. An interlocutory appeal may also lie from some orders denying protection from discovery. When a district court explicitly refuses to address whether the law was clearly established until discovery has occurred, an appeal will lie if the official invites the district court to resolve the clarity issue by using the plaintiff's version of the facts. Also appealable is an order in which the district court determines that the defendant was not an "official." Such a ruling means that the defendant cannot assert qualified immunity as a defense. Each of these orders is consistent with the traditional interpretations of the Rules of Civil Procedure and the collateral order doctrine.

Second, interlocutory appeals do not lie from every order denying qualified immunity. For example, an interlocutory appeal will not lie from a motion to dismiss, unless one is willing to have the Supreme Court judicially rewrite the Rules of Civil Procedure, a task appropriately assigned to Congress.²⁸⁷ If the appellate court were to grant qualified immunity, it would violate Rule 8(a)(2), which authorizes notice pleading. Appeals from such motions to dismiss are also not final under 28 U.S.C. § 1291, the basis for the judicially created collateral order doctrine.

Third, when the district court determines that there are material disputed facts, appellate courts should examine "all of the conduct which the District Court deemed sufficiently supported" and ask whether the law was clearly established. By limiting itself to these assumed facts, the appellate court resolves an issue for which it has jurisdiction. Combing the appellate record for its own facts creates jurisdictional problems. The task of determining the assumed facts is perilously close to delving into the merits of the claim, creating a separability problem under the collateral order doctrine.

Fourth, an interlocutory appeal can lie even after a district court issues an order stating that the appeal is frivolous. Under the concept of dual jurisdiction, both the district court and the appellate court can simultaneously have jurisdiction in some circumstances. After denying qualified immunity, a district court can retain jurisdiction even though an official files a notice of appeal. The district court retains jurisdiction by writing an order explaining why the

287. The rewriting of the Rules of Civil Procedure is a task assigned to the United States Supreme Court, on recommendation of the Judicial Conference, which relies on the Standing Committee. This latter committee relies on the Advisory Committee. Congress may veto what the Supreme Court promulgates.

appeal is frivolous. To avoid simultaneous jurisdiction, the official must apply to the appellate court for a stay or mandamus to stop proceedings in the district court. In deciding whether to grant the stay, appellate courts should first decide if the appeal is frivolous. If it is, then the appellate court should dismiss for a lack of jurisdiction. If it is not frivolous, the appellate court should grant a stay. After granting the stay, it would probe more deeply the qualified immunity question that the district court thought was frivolous.

The difficult task in determining whether to allow an interlocutory appeal from a denial of qualified immunity is one facing not only appellate courts but also district courts, the front line of civil rights litigation. Prior to the Supreme Court's decision in *Behrens*, many courts of appeals had a rule of allowing officials to take only one interlocutory appeal. *Behrens*' authorization will encourage officials to seek more than one interlocutory appeal. District courts will then have to determine which appeals are frivolous. In doing so, the doctrine of dual jurisdiction for frivolous appeals could be an incredibly important check on unnecessary interlocutory appeals.