

Special Contribution

Is There Hope After *Hope*? Qualified Immunity in the Eleventh Circuit

by Christopher D. Balch*

“Qualified immunity jurisprudence has been turned on its head.”¹ With those words at the beginning of his dissent in *Hope v. Pelzer*,² Justice Thomas uttered with obvious trepidation his perception that the majority of the Supreme Court had so completely disregarded the history and purpose of qualified immunity for public officials that the doctrine was effectively eliminated.³ However, the joyful celebration planned by

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1. *Hope v. Pelzer*, 536 U.S. 730, 748 (2002) (Thomas, J., dissenting).
2. 536 U.S. 730 (2002).
3. *See id.* at 748 (Thomas, J., dissenting).

lawyers for plaintiffs in civil rights suits was short lived.⁴ Qualified immunity is alive and well in the United States Court of Appeals for the Eleventh Circuit and, like Mark Twain, the reports of its death have been greatly exaggerated.⁵

I. QUALIFIED IMMUNITY: HISTORY AND PURPOSE

Title 42 of the United States Code § 1983 provides for civil actions against individuals who commit torts under color of state law.⁶ While the statute provides that every person who deprives someone of federally protected rights, privileges, or immunities “shall be liable” to the person wronged,⁷ the Supreme Court has long held that defenses are available to public actors.⁸ Qualified immunity is yet another in this litany of affirmative defenses.

The doctrine of qualified immunity was first announced in *Harlow v. Fitzgerald*.⁹ The Court held the doctrine was designed to protect public officials from liability unless their conduct violated “clearly established statutory or constitutional rights of which a reasonable person would have known.”¹⁰ The pre-existing law must make the unlawfulness of the official’s conduct readily apparent.¹¹ Qualified immunity was designed, from its inception, to give civil defendants the same protection afforded criminal defendants in the face of vague statutes.¹² In addition, the more practical purpose of qualified immunity was to “avoid excessive disruption of government and permit the resolution of many

4. Richmond Eustis, *Court Rejects Guards’ Immunity*, FULTON COUNTY DAILY REP., June 28, 2002, at 1.

5. THE OXFORD DICTIONARY OF QUOTATIONS 786 (Elizabeth Knowles ed., 1999).

6. 42 U.S.C. § 1983 (2000). This statute provides in part:

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.

7. *Id.*

8. *See, e.g.*, *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) (holding that legislative immunity is a defense to 8 U.S.C. § 43 (1946), reclassified as 42 U.S.C. § 1983 (2000)); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967) (holding that judges are immune from liability under § 1983).

9. 457 U.S. 800 (1982).

10. *Id.* at 818.

11. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

12. *United States v. Lanier*, 520 U.S. 259, 270-71 (1997).

insubstantial claims on summary judgment.”¹³ Qualified immunity is to protect “all but the plainly incompetent or those who knowingly violate the law.”¹⁴

The Court’s opinion in *United States v. Lanier*¹⁵ provides a salient example of the application of qualified immunity and hinted at the outcome of *Hope v. Pelzer*¹⁶ five years later. Judge David Lanier sat as the sole state Chancery Judge for two counties in West Tennessee. From 1989 to 1991, he sexually assaulted five women in his chambers who had cases pending before him or who were there on court business. He was initially charged with eleven counts of violating 18 U.S.C. § 242¹⁷ and was convicted of seven of those charges.¹⁸ Section 242 is the criminal counterpart to 42 U.S.C. § 1983¹⁹ and makes it a criminal offense to willfully deprive a person of a federally protected right or privilege.²⁰ The United States Court of Appeals for the Sixth Circuit, sitting en banc, reversed the conviction, holding that Judge Lanier was not on notice that his conduct might violate a federally protected right of his victims.²¹

The Supreme Court in turn vacated the Sixth Circuit’s judgment and remanded.²² The Court held that some rights are just too plain to raise any sensible question about whether a public official had reasonable notice that his conduct was a violation of clearly established law.²³ In addition, the Court explained that the “fair warning” to which a public official accused of violating 18 U.S.C. § 242 is entitled is the same notice that civil defendants receive by virtue of the qualified immunity defense.²⁴ Thus, *Lanier* provides both an interpretive guide and a landmark for the further application of qualified immunity.

13. *Harlow*, 457 U.S. at 818.

14. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

15. 520 U.S. 259 (1997).

16. 536 U.S. 730 (2002).

17. 18 U.S.C. § 242 (2000).

18. 520 U.S. at 261-63.

19. 42 U.S.C. § 1983 (2000); HAROLD S. LEWIS, JR., *CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW*, § 2.12 n.37 (1st ed. 1997).

20. *Lanier*, 520 U.S. at 264.

21. *Id.* at 263 (citing *United States v. Lanier*, 73 F.3d 1380, 1384 (6th Cir. 1996)).

22. *Id.* at 272.

23. *Id.* at 271. As Judge Daughtrey noted in her dissenting opinion in this case: “The easiest cases don’t even arise. There has never been . . . a [§] 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability.” *Id.* (quoting *Lanier*, 73 F.3d at 1410 (Daughtrey, J., dissenting)).

24. *Id.* at 263.

However, a very special aspect of qualified immunity has made the doctrine as much a sword as a shield against claims. In the judicial creation of qualified immunity, the Supreme Court held that it is to be a shield against the burdens of litigation, not just a defense to liability.²⁵ As such, it should be decided as early in the litigation process as possible.²⁶ This also means that legal issues related to qualified immunity should be resolved prior to any trial of the case.²⁷ Thus, the denial of qualified immunity on a motion to dismiss or a motion for summary judgment is immediately appealable, even though there is no final order.²⁸ The right of interlocutory appeal and the purpose of qualified immunity to avoid the rigors of litigation make the defense nearly unique in American jurisprudence.

II. THE UNITED STATES COURT OF APPEALS PUTS A SPIN ON QUALIFIED IMMUNITY

In this circuit, the judges took the instructions of the Supreme Court seriously, and qualified immunity has received exceptional treatment. The immunity became very nearly one of *unqualified* immunity from suit.

While the seeds had been present for a number of years, the real turning point in this circuit's qualified immunity jurisprudence occurred in *Lassiter v. Alabama A&M University*.²⁹ In that case, Circuit Judge J.L. Edmondson, writing for the majority, explained:

For the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that "what he is doing" violates *federal law*. Qualified immunity is a doctrine that focuses on the actual, on the specific, on the details of concrete cases.³⁰

The doctrine of qualified immunity has nothing to do with abstract or general rights in the Court's opinion. Rather, the inquiry requires the trial court to examine the conduct of defendants in light of the specific, factual contexts of prior cases.

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

26. *Id.* at 526; *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam).

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

28. *See, e.g.*, *Behrens v. Pelletier*, 516 U.S. 299, 311-13 (1996).

29. 28 F.3d 1146 (11th Cir. 1994) (en banc).

30. *Id.* at 1149-50 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (emphasis added).

“If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant.”³¹ “The line is not to be found in abstractions—to act reasonably, to act with probable cause, and so forth—but in studying how these abstractions have been applied in concrete circumstances.”³²

In the court’s understanding of the doctrine of qualified immunity, public officials need not seek legal counsel or be lawyers themselves before acting reasonably under the circumstances.³³ “For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates *federal law in the circumstances*.”³⁴ The Eleventh Circuit later held that *United States v. Lanier* did not alter this circuit’s qualified immunity analysis, despite the admonition from the Supreme Court that the Sixth Circuit’s nearly identical standard was too rigid.³⁵

Finally, the database of relevant case law has been restricted by the Eleventh Circuit.³⁶ Not only do the facts of the pending case have to be very nearly on all fours with some past case, the only case law to be considered is that of the United States Supreme Court, the applicable United States court of appeals, and the highest court in the state where the case arose.³⁷ Prior to *Hope*, district judges thought “long and hard”³⁸ before determining that the case was sufficiently factually similar to a prior case from a court with binding authority that established a federally protected right that stripped a defendant of his right to qualified immunity.³⁹

III. HOPE GIVES BRIEF HOPE TO PLAINTIFFS

Whether *Hope v. Pelzer*⁴⁰ is the end of qualified immunity as we know it or simply an admonition to the Eleventh Circuit not to be so

31. *Id.* at 1150 (quoting *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993), modified by 14 F.3d 583 (11th Cir. 1994)).

32. *Id.* (quoting *Barts v. Joyner*, 865 F.2d 1187, 1194 (11th Cir. 1989)).

33. *Hamilton v. Cannon*, 80 F.3d 1525, 1532 (11th Cir. 1996).

34. *Lassiter*, 28 F.3d at 1150 (emphasis added).

35. *Jenkins ex rel Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n.4 (11th Cir. 1997).

36. Interestingly, this aspect of Eleventh Circuit jurisprudence was accepted without discussion by the Supreme Court in *Hope v. Pelzer*, 536 U.S. 730, 736, 741-46 (2002).

37. *Hamilton*, 80 F.3d at 1531 n.7.

38. *Lassiter*, 28 F.3d at 1149.

39. *Id.*

40. 536 U.S. 730 (2002).

harsh or rigid in its analysis remains to be seen. It could also be that the case presented such appalling or egregious facts, like in *United States v. Lanier*,⁴¹ that the facts themselves shocked the majority's judicial conscience. Which it is, or if it is either, cannot yet be said, but an examination of the facts and the Court's application of law is nonetheless instructive.

Larry Hope was an inmate in the Alabama Department of Corrections. He was twice chained to a horizontal bar of sturdy, nonflexible material placed between four and five feet above the ground. Inmates were handcuffed to this bar in a standing position and remained in that position with their hands at about face level. The bar was used any time an inmate was disruptive on a work detail. On the second occasion that Hope was chained to the "hitching post," his shirt was removed, and he was left in the late spring sun for seven hours. Not only was Hope sunburned from this experience, he suffered from having his arms over his head the entire time (as he was only slightly taller than the bar). The sun's heat warmed the handcuffs to the point that they were hot and caused pain, and the sun heated the bar, which caused additional radiant heat to burn the inmate. On one occasion during this second experience, a guard taunted Hope by giving water to some dogs in the prison yard before tipping the cooler over and spilling water on the ground in front of Hope.⁴²

In affirming the grant of summary judgment to the individual defendants, the Eleventh Circuit first addressed a question left unanswered by the district court: Whether or not the conduct alleged constituted a constitutional violation?⁴³ The court of appeals concluded that shackling an inmate to a post in the manner described constituted cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.⁴⁴ However, following the analysis defined by the court's precedent, the court concluded that the individual defendants were entitled to qualified immunity because no prior binding case provided adequate notice to the defendants that what they were doing in the circumstances violated clearly established law.⁴⁵

The Supreme Court granted certiorari⁴⁶ and reversed.⁴⁷ The Court concluded, as it had in *Lanier* when addressing the Sixth Circuit's

41. 520 U.S. 259 (1997).

42. 536 U.S. at 732-35.

43. *Hope v. Pelzer*, 240 F.3d 975, 976-77 (11th Cir. 2001).

44. *Id.* at 979-80.

45. *Id.* at 981.

46. *Hope v. Pelzer*, 534 U.S. 1073 (2002).

47. 536 U.S. at 748.

analysis under 18 U.S.C. § 242, that the Eleventh Circuit's approach was too rigid and applied the "factual similarity" requirement of the clearly established law analysis too narrowly.⁴⁸ The Court's return to, and substantial reliance on, its opinion in *Lanier* was neither surprising nor unanticipated. Both cases involved factual situations that appear to have shocked the justices. Both cases involved narrowly drawn and rigidly applied analyses by the courts of appeals. Both cases resulted in the Court's finding of clearly established law when no prior case existed that was factually similar to the instant action, in seeming contradiction to the requirements in *Anderson v. Creighton*⁴⁹ and in *Harlow v. Fitzgerald*.⁵⁰

IV. A LITTLE SAUCE IS ADDED TO THE MIX

The previous year, however, the Supreme Court had decided *Saucier v. Katz*.⁵¹ In that appeal from the United States Court of Appeals for the Ninth Circuit, the Court reiterated its prior holdings that qualified immunity is to be decided on very specific factual inquiries.⁵² We find our conundrum in the intersection of *Saucier* and *Hope*.

The problem actually starts with the Court's opinion in *Anderson*. There, the Court expanded on its "clearly established" pronouncement in *Harlow* and required a two-step approach to the question of whether a public official was immune from suit.⁵³ First, a reviewing court must answer the question of whether, on the facts alleged, a constitutional violation has even occurred.⁵⁴ If, and only if, a constitutional violation has occurred need a court ever proceed to answer the question of whether the right was sufficiently established in a factually specific manner to put the officer on notice that his conduct was untenable at the time he acted.⁵⁵

In *Katz v. United States*,⁵⁶ the Ninth Circuit affirmed the district court's judgment denying defendant officer's motion for summary judgment on the excessive force claim.⁵⁷ The court concluded that qualified immunity was inappropriate when the underlying constitution-

48. *Id.* at 739.

49. 483 U.S. 635 (1987).

50. 457 U.S. 800 (1982).

51. 533 U.S. 194 (2001).

52. *Id.* at 200.

53. 483 U.S. at 639.

54. *Id.* at 639-40; *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

55. 483 U.S. at 640.

56. 194 F.3d 962 (9th Cir. 1999).

57. *Id.* at 970-71.

al violation required a finding of reasonableness, and it need not undertake a separate qualified immunity inquiry once a finding of the constitutional violation had been made.⁵⁸ In rejecting this facially appropriate standard,⁵⁹ the Supreme Court reiterated the heavy burden such an argument faces in the qualified immunity context.⁶⁰ Officers are entitled to make reasonable mistakes and not surrender their qualified immunity.⁶¹ In the Court's words, "Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes 'hazy border between excessive and acceptable force.'"⁶² The factual specificity required by the Court to show the force used was excessive is both precise and detailed. In the face of this holding, can *Hope* be reconciled? Perhaps.

V. SAUCIER PLUS HOPE EQUALS WHAT, PRECISELY?

Saucier can easily be read as a fundamental disagreement between the Supreme Court and the conclusion by the Ninth Circuit panel about whether the plaintiff had even stated a constitutional violation.⁶³ Similarly, *Hope* can be read merely as a set of facts that appalled the Court and, when coupled with little dispute (at least between the Supreme Court and the court of appeals) over the existence of a constitutional violation, resulted in sloppy judicial opinion writing.⁶⁴ Either suggestion is too simplistic, even if it may be accurate.

It appears, rather, that neither the Ninth nor the Eleventh Circuit was applying a correct standard, and each opinion was written for the particular judicial audience who made the legal error. The problem is that the Eleventh Circuit heard the speech given to the Ninth Circuit before it was reversed in its own case. So what is a court of appeals to do in the face of seemingly conflicting directions? Follow the last order given? Try to synthesize a rule that complies with both opinions? A

58. *Id.* at 967-68.

59. This is essentially a reassertion of the argument rejected in *Anderson* that an officer cannot reasonably act unreasonably. 483 U.S. at 643. There, the Creightons argued that the inquiry into the officer's reasonable conduct in performing a warrantless search was foreclosed by the finding that there was a constitutional violation. *Id.*

60. *Saucier*, 533 U.S. at 203 (citing *Anderson*, 483 U.S. at 642).

61. *Id.* at 205.

62. *Id.* at 206 (quoting *Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919, 926-27 (11th Cir. 2000)). This citation to *Priester* becomes important when trying to reconcile *Saucier* and *Hope*.

63. *Id.* at 208 (citing *Graham v. Conner*, 490 U.S. 386, 396 (1989) (explaining that not every push or shove committed by a police officer results in a constitutional tort)).

64. See 536 U.S. at 748-49 (Thomas, J., dissenting).

brief examination of what the circuit was doing provides substantial insight into these questions.

VI. THE ELEVENTH CIRCUIT STRUGGLES TO COMPLY

The place to start in this query is with another case, *Vaughan v. Cox*,⁶⁵ which the Supreme Court reversed and remanded for consideration in light of *Hope v. Pelzer*.⁶⁶ Vaughan alleged that Deputy Cox of the Coweta County Sheriff's Office used unconstitutionally excessive force in shooting him. Vaughan was a passenger in a red pickup truck being driven by Rayson. A truck of similar description had been reported stolen from a service station by a white male wearing a white t-shirt. Vaughan matched the description of the suspect. When the deputies attempted to stop the truck, the driver rammed Cox's vehicle and began driving erratically. Cox, in an effort to disable the truck or the driver, fired three shots, and the third shot hit Vaughan, paralyzing him instantly.⁶⁷ Vaughan then filed suit, claiming that, under *Tennessee v. Garner*,⁶⁸ Cox used excessive force.⁶⁹ In both the original panel opinion and on remand, the court of appeals concluded that a constitutional violation could be shown on the facts proved at summary judgment.⁷⁰ Similarly, both cases concluded Cox was entitled to qualified immunity.⁷¹

The distinction the court of appeals relied upon is that the rule announced by the Supreme Court in *Garner* is too broad to provide notice to officers in the heat of chasing a fleeing felony suspect that firing shots at the suspect's vehicle to disable it is constitutionally forbidden.⁷² The court conceded that "[a]lthough a general constitutional rule 'may apply with obvious clarity to the specific conduct in question' in limited circumstances [and] conclude[d] that the rule announced in *Garner* d[id] not apply with 'obvious clarity' to Deputy Cox's conduct in this case."⁷³

65. 264 F.3d 1027 (11th Cir. 2001), *rev'd*, 536 U.S. 953 (2002), *reinstated and supplemented by* 316 F.3d 1210 (11th Cir. 2003).

66. *Vaughan v. Cox*, 536 U.S. 953 (2002).

67. 264 F.3d at 1031-32.

68. 471 U.S. 1 (1985).

69. 264 F.3d at 1032. It is beyond reasonable dispute that a suspect is seized, within the meaning of the Fourth Amendment, when force is applied to restrict the movement of the suspect. *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

70. 264 F.3d at 1035; 316 F.3d at 1212.

71. 264 F.3d at 1037; 316 F.3d at 1214.

72. 316 F.3d at 1213.

73. *Id.* (quoting *Lanier*, 520 U.S. at 271).

Here, the Eleventh Circuit applied *Saucier v. Katz*⁷⁴ to the apparent exclusion of the admonition in *Hope* that the standard required for the law to be “clearly established” should not be rigidly applied.⁷⁵ On remand, the majority of the Eleventh Circuit panel gave little guidance about the reasons for its conclusion. The stinging dissent argued that the panel majority ignored *Hope* in its entirety.⁷⁶ For the present, it is not a constitutional tort for law enforcement officers to fire their weapons into an occupied vehicle when the vehicle contains fleeing felony suspects, the vehicle has crashed into the pursuing police vehicles, and the suspect is driving erratically.⁷⁷ Apparently this conduct is sufficiently dangerous, as a matter of law, to make the shooting lawful.⁷⁸ This case is likely bound for the Supreme Court once again. Whether certiorari is granted again will be interesting to watch.

Perhaps as instructive as *Vaughan* is *Vinyard v. Wilson*.⁷⁹ The panel in that case took great pains to reconcile the court’s precedent with the instructions of the Supreme Court in *Saucier* and *Hope*.⁸⁰ The Eleventh Circuit, sitting en banc, agreed with the Supreme Court that officers are entitled to “fair warning” that the challenged conduct violates federally protected rights before qualified immunity is surrendered by the officer.⁸¹ The court in *Vinyard* then identified three categories of “clearly established” law: (1) statutes or constitutional provisions that facially establish whether the pertinent conduct is unlawful, (2) case law not stringently tied to particular facts that may be applied broadly to a number of factual situations,⁸² and (3) case law tied to a factual circumstance that is not “distinguishable in a fair way.”⁸³ This analysis is apparently unique in the case law.

It is this third category of law that causes the most litigation and is likely the most common.⁸⁴ And, it is this same category in which the

74. 533 U.S. 194 (2001).

75. 316 F.3d at 1212.

76. *Id.* at 1214-15 (Noonan, J., dissenting). Interestingly, Judge Noonan is from the Ninth Circuit and was sitting by designation. He dissented from the earlier panel opinion as well. *See* 264 F.3d at 1037.

77. 316 F.3d at 1214.

78. *Id.*

79. 311 F.3d 1340 (11th Cir. 2002).

80. *Id.* at 1350.

81. *See id.* (citing *Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1031 (11th Cir. 2001) (en banc); *Hope*, 536 U.S. at 740; *Saucier*, 533 U.S. at 205).

82. *Id.* at 1350-51.

83. *Id.* at 1352 n.23 (quoting *Saucier*, 533 U.S. at 202).

84. *Id.* at 1351-52 (“We believe that most judicial precedents are tied to particularized facts and fall into this category.”).

Court in *Hope* recognized that sometimes “a very high degree of prior factual particularity may be necessary.”⁸⁵

For a constitutional right to be clearly established, its contours “must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.”⁸⁶

Thus, the confusion created by the Court in *Hope* is at least tacitly acknowledged to exist by the majority’s own opinion.⁸⁷

Vinyard provides a neatly drawn paradigm for plaintiffs to follow when attempting to prove that the conduct of public officials is constitutionally prohibited. The court provides a precise delineation of the types of cases in which it will find the law to be clearly established.⁸⁸ If any one of the three categories is satisfied, qualified immunity will not be granted to the individual defendant.⁸⁹

VII. CONCLUSION

This is where we are in qualified immunity jurisprudence at the end of 2002: Cases in which the facts are beyond the “hazy border” between acceptable and unacceptable conduct will most likely be the cases in which courts will find either “obvious clarity” or sufficient prior notice in earlier decisions that the conduct is unlawful, thus, stripping the defendant of qualified immunity. *United States v. Lanier*⁹⁰ and *Hope v. Pelzer*⁹¹ are easy examples of the “obvious clarity” type of situation. *Hope* may also be an example of the second kind of “fair notice” case in which the underlying or previously announced rule is not tied to sufficient facts to limit the scope of its application.⁹² Then, the more

85. 536 U.S. at 741 (quoting *Lanier*, 520 U.S. at 270-71).

86. *Id.* at 739 (citations omitted).

87. See *Vinyard*, 311 F.3d at 1353 n.24.

Throughout this opinion, we discuss not only *Hope*, but also the Supreme Court’s qualified immunity decisions in *Saucier*, *Lanier*, and *Anderson*. We *must* do so because *Hope* does not purport to overrule, modify, or even question anything the Supreme Court had earlier said about qualified immunity. The Supreme Court decisions preceding *Hope* are still good law.

Id. (emphasis added).

88. *Id.* at 1350-53.

89. *Id.* at 1350.

90. 520 U.S. 259 (1997).

91. 536 U.S. 730 (2002).

92. See *Vinyard*, 311 F.3d at 1354 n.27.

prevalent types of cases arise in which the rule is tied to facts and a high degree of factual specificity is required. If, on the other hand, the facts are fairly distinguishable, then the law is not clearly established for that particular situation confronted by the particular officer. This is not precisely where defendants found themselves in 1994 after *Lassiter v. Alabama A&M University*,⁹³ but it is not that far away either. It is, nonetheless, a far cry from the demise of qualified immunity jurisprudence predicted by Justice Thomas in his dissent in *Hope*.

93. 28 F.3d 1146 (11th Cir. 1994) (en banc).