PENN STATE LAW REVIEW

Qualified Immunity and Interlocutory Fact-Finding in the Courts of Appeals

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In *Ashcroft v. Iqbal*,[1] the Court held that a district court decision denying defendants' motion to dismiss "turned on an issue of law and rejected the defense of qualified immunity,"[2] and was therefore immediately appealable under the collateral order doctrine that has been applied to purely legal questions tied into denials of qualified immunity.[3] The Supreme Court in *Iqbal* rejected the plaintiff's contention that "a qualified immunity appeal based solely on the complaint's failure to state a claim"[4]—rather than on the "ultimate" qualified immunity issue of whether the acts allegedly committed by the defendants constituted a violation of clearly established law—"is not a proper subject of interlocutory jurisdiction."[5] "[A]ppellate jurisdiction is not so strictly confined,"[6] the Court concluded.

The Court distinguished its previous decision in *Johnson v. Jones*,[7] which held that appellate courts hearing qualified immunity defenses on interlocutory appeal should not address factual disputes.[8] "Evaluating

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1. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).
2. *Id*. at 1946.
3. *See* Mitchell v. Forsyth, 472 U.S. 511, 530 (1985).
4. *Iqbal*, 129 S. Ct. at 1946.
5. *Id*.
6. *Id*.
7. Johnson v. Jones, 515 U.S. 304 (1995).
8. *Id*. at 319-320.

the sufficiency of a complaint is not a 'fact-based' question of law," the *Iqbal* Court concluded, and therefore "the problem the Court sought to avoid in *Johnson* is not implicated here."[9]

The Supreme Court took a similar approach two terms ago in *Scott v. Harris*,[10] a case involving a high-speed chase that resulted in serious injury to the victim. The district court refused to award qualified immunity to police because of many factual matters in dispute. The Eleventh Circuit affirmed, finding that it did not have interlocutory jurisdiction over facts. After viewing videos of the chase and ramming—which were produced by deputies whose cameras automatically filmed the events—Justice Scalia concluded for the Court that the deputies' force was not excessive within the meaning of the Fourth Amendment. In reaching this conclusion, Justice Scalia seemed to modify the holding in *Johnson v. Jones*, finding: "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."[11] "[Harris's] version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape."[12]

What do *Scott* and *Iqbal* do to *Johnson v. Jones* and its limit on interlocutory appellate fact-finding? Obviously, *Iqbal* carves out a broad exception for fact-pleading. How often will this be successfully used to abort constitutional complaints? Assuming that it does not mark a profound change in pleading practice, does *Iqbal* offer more room for interlocutory fact-finding following denials of summary judgment? Or does *Iqbal* represent an implicit rejection of *Harris*?

This Article explores the implications *Iqbal* holds for interlocutory appeals. Unlike *Harris*, which implicitly blurred *Johnson*'s distinction between fact and law, *Iqbal* expressly authorized interlocutory appellate courts to delve into the facts alleged in constitutional complaints. The result is a further erosion of constitutional plaintiffs' ability to try their cases. Even assuming that *Iqbal* got the pleading standard right—a large assumption—governmental defendants will now have at least four federal judges assess the factual worth of constitutional complaints. This will inevitably make it more difficult for plaintiffs to succeed—not only

9. *Iqbal*, 129 S. Ct. at 1947.
10. Scott v. Harris, 550 U.S. 372 (2007).
11. *Id.* at 380.
12. *Id.* at 380-81.

because of the added delay (it will certainly encourage more appeals from denials of dismissals) but also because it will increase the odds of finding insufficient factual pleadings. Because of my basic disagreement with the Supreme Court's qualified immunity doctrine,[13] I find this to be another troubling development in the war on abusive government.

I. THE BASICS OF INTERLOCUTORY APPEAL

The Supreme Court has made clear that qualified immunity presents a legal question demanding prompt judicial attention, not only by a lone district court judge, but also by a three-judge appellate panel and perhaps even the Supreme Court of the United States. The Court in *Hunter v. Bryant*, for example, observed that "[i]mmunity ordinarily should be decided by the court long before trial," rather than be placed "in the hands of the jury."[14] Likewise, in *Saucier v. Katz*, the Court concluded that not only was the defendant entitled to immunity, but "the suit should have been dismissed at an early stage in the proceedings."[15] Both statements emphasize the Court's conclusion that qualified immunity insulates the official not only from an award of money damages, but also from the burdens of suit.

Because the defense of qualified immunity is, in part, a question of law, it naturally creates a "super-summary judgment" right on behalf of government officials. Even when an official is not entitled to summary judgment on the merits—because the plaintiff has stated a proper claim and genuine issues of fact exist—it can still be granted when the law is not reasonably clear.

Even when the law is clear, qualified immunity affords governmental defendants an added layer of factual protection; according to *Anderson v. Creighton*,[16] the governmental defendant must have reasonably known under all the facts and circumstances that her actions were illegal.[17] Thus, even though the law was generally clear, and even though the governmental defendant violated it, immunity is still justified if she could not have reasonably known as a factual matter that she should not have acted as she did.

This double-edged advantage for governmental defendants is magnified, moreover, by the collateral order doctrine, which permits

13. *See* Mark R. Brown, *The Demise of Constitutional Prospectivity: New Life for* Owen?, 79 IOWA L. REV. 273, 289 (1994) (arguing that the "case for immunity" is "overstate[d]").

14. Hunter v. Bryant, 502 U.S. 224, 228 (1991).

15. Saucier v. Katz, 533 U.S. 194, 209 (2001).

16. Anderson v. Creighton, 483 U.S. 635 (1987).

17. *Id*. at 640.

immediate appeals from denials of qualified immunity in federal court.[18] The Supreme Court concluded in *Mitchell v. Forsyth*[19] that the denial of qualified immunity before trial is an appealable collateral order justifying immediate interlocutory review. The defense can raise qualified immunity at a preliminary stage in the proceedings—for example, by motions for summary judgment or dismissal under Rule 12(b)(6)—and press an immediate appeal should qualified immunity be denied.

Mitchell's interlocutory appeal mechanism has its bounds. According to the Court in *Johnson v. Jones*,[20] it guarantees government officials interlocutory review of legal issues surrounding qualified immunity but not necessarily of factual issues. Resolution of factual questions is reserved—at least at the interlocutory stage—to the district court. *Johnson* involved Fourth Amendment claims of excessive force against five police officers. In response to three of the police officers' claims that they were not present during the alleged beating, the district court ruled that genuine issues of fact precluded awards of summary judgment. The Seventh Circuit dismissed the police officers' interlocutory appeal, finding that it had no appellate jurisdiction over factual matters in the absence of separate legal questions. The Supreme Court, in an opinion by Justice Breyer, agreed with the Seventh Circuit: appellate courts cannot ordinarily review evidentiary sufficiency on interlocutory appeal. Interlocutory jurisdiction, the Court found, is confined to questions of law.

Whether the Court's holding in *Johnson* is prudential or jurisdictional is unclear. The police officers argued that factual issues often append themselves to legal ones, and thus should just as often fall under an appellate court's pendent jurisdiction. The Supreme Court's response was guarded: "Even assuming, for the sake of argument, that it

18. State courts are free to fashion their own rules on interlocutory appeals. *See* Johnson v. Fankell, 520 U.S. 911, 921 (1997) (holding that Idaho's failure to recognize interlocutory appeals did not offend § 1983).

19. 472 U.S. 511, 521 (1985). The Court in *Behrens v. Pelletier*, 516 U.S. 299 (1996), further ruled that qualified immunity can be raised in a Rule 12(b)(6) motion to dismiss before it is again raised in a motion for summary judgment. Given that the Court has consistently referred to qualified immunity as a defense, the holding in *Behrens* appears counter-intuitive. Its use under Rule 12(b)(6) places plaintiffs under pressure to plead its absence, which would seem to transform its absence into an element of the plaintiff's case rather than a true defense. Because it can be used under Rule 12(b)(6), several lower courts adopted heightened pleading requirements for plaintiffs suing officials under § 1983. *But see* Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) (holding that heightened pleading is not required in § 1983 suits against cities and counties); Crawford-El v. Britton, 523 U.S. 574 (1998) (holding that heightened evidence standard is not permissible in § suit against officials); Jones v. Bock, 549 U.S. 199 (2007) (holding that inmates need not satisfy heightened pleading requirements notwithstanding adoption of Prison Litigation Reform Act).

20. Johnson v. Jones, 515 U.S. 304 (1995).

may sometimes be appropriate to exercise 'pendent appellate jurisdiction' over such a matter, it seems unlikely that Courts of Appeals would do so. . . ."[21] It continued: "the court of appeals can simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason."[22] Should the lower court fail to make findings or state its assumptions, the Supreme Court reasoned, an appellate court need only review the record to determine "what facts the district court, in the light most favorable to the nonmoving party, likely assumed."[23] Whether deemed a jurisdictional bar or a prudential concern, *Johnson v. Jones* established that appellate courts cannot engage in independent fact-finding on interlocutory appeal.

The Circuits following *Johnson* tended to eschew fact-finding on interlocutory appeal because jurisdiction was lacking. In *Hulen v. Yates*, for example, where a district court had denied summary judgment to a defendant who allegedly violated the First Amendment by transferring a public-sector employee, the Tenth Circuit stated that it could "not resolve Defendants' claims that [the plaintiff] cannot show any personal participation by these Defendants in the alleged retaliatory transfer because of his motivation. This is an issue of evidentiary sufficiency, over which we lack jurisdiction in a qualified immunity interlocutory appeal."[24] Similarly, in *Hamilton v. Leavy*, a case involving deliberate indifference to a prisoner's Eighth Amendment rights, the Third Circuit refused to review "the District Court's 'identification of the facts that are subject to genuine dispute,' but instead . . . review[ed] the legal issues in light of the facts that the District Court determined had sufficient evidentiary support for summary judgment purposes."[25]

21. *Id.* at 318 (citations omitted).
22. *Id*. at 319.
23. *Id*.
24. Hulen v. Yates, 322 F.3d 1229, 1240 (10th Cir. 2003).
25. Hamilton v. Leavy, 322 F.3d 776, 782 (3d Cir. 2002). There were exceptions. The Eleventh Circuit, for example, occasionally ignored *Johnson* and engaged in interlocutory fact-finding. Judge Toflat was notorious for this, and has never mended his ways. *See, e.g.*, *Bryant v. Jones*, 575 F.3d 1281, 1294 n. 19 (11th Cir. 2009) (Tjoflat, J.) ("While the Supreme Court in *Johnson* . . . held that appellate courts do not possess jurisdiction over every interlocutory appeal based on a denial of qualified immunity, it narrowly defined the proscribed class of cases as those where a defendant merely contests the merits of the plaintiff's underlying action. In other words, we do not have jurisdiction to entertain such appeals when the defendant's argument is merely, 'I didn't do it.' We are not here presented with such a case.").

II. ENTER *SCOTT V. HARRIS*

The Eleventh Circuit's decision in *Harris v. Coweta County*,[26] further illustrated appellate courts' application of *Johnson v. Jones.* In *Harris*, county deputies had chased a motorist (Harris) who was clocked driving 73 mph in a 55-mph-zone. Because Harris refused to stop, a deputy (Scott) eventually decided to ram him and force him off the road. The resulting crash caused serious injuries to Harris and left him a quadriplegic.[27]

Harris sued Scott (and the county) under § 1983 for excessive force. Because Scott purposely rammed Harris, his action was clearly a Fourth Amendment event. The claim raised by Harris was whether the deputy's actions were excessive under the Fourth Amendment. Scott moved for summary judgment based on qualified immunity. The district court refused to award summary judgment because of genuine issues of material fact and Scott took his interlocutory appeal. The Eleventh Circuit, "view[ing] the facts in the light most favorable to the non-moving party, and draw[ing] all reasonable inferences in his favor," concluded that summary judgment was not warranted.

The Supreme Court reversed in *Scott v. Harris.*[28] In reaching the merits, Justice Scalia implicitly modified the holding in *Johnson v. Jones*: sometimes appellate courts can engage in interlocutory fact-finding.[29] Where the plaintiff's version of events is "utterly discredited by the record," the appellate court can disregard it.[30]

Only Justice Stevens dissented: "If two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court's characterization of events."[31] Regarding Justice Scalia's interpretation of the video, Justice Stevens observed that "three judges on the Court of Appeals panel apparently did view the videotapes entered into evidence and described a very different version of events."[32]

What did *Scott* do to *Johnson v. Jones*? Harris argued before the Supreme Court that it lacked appellate jurisdiction over factual issues—

26. Harris v. Coweta County, 406 F.3d 1307 (11th Cir. 2005), *aff'd on rehearing*, 433 F.3d 807 (11th Cir. 2005), *rev'd*, 550 U.S. 372 (2007).

27. If the reader has fifteen minutes or so, she may want to view the digital video attached to the Supreme Court's opinion in *Scott*, 550 U.S. at 372 (http://www.supremecourtus.gov/opinions/06slipopinion.html) (As a matter of trivia, this marks the first time the Supreme Court attached a video to an opinion.).

28. Scott v. Harris, 550 U.S. at 372.

29. *Id.* at 380.

30. *Id.* at 380-81.

31. *Id.* at 396 (Stevens, J., dissenting).

32. *Id.* at 395.

like the reasonableness of the force used against him. Neither the majority nor the dissent mentioned the matter or cited *Johnson v. Jones*. Hence, the Supreme Court obviously felt it had jurisdiction regardless of the interlocutory nature of the appeal.[33]

Even though it obviously created tension with *Johnson v. Jones*, *Scott* was generally given a limited reach by the Courts of Appeals. It was not generally treated as a blank check to engage in de novo fact-finding. Rather, district courts' findings of genuine issues of material fact continued to draw deference and respect on interlocutory appeal.[34]

Still, some courts took a different path, holding that *Scott* authorized fact-finding to determine whether a civil rights plaintiff's alleged facts were "blatantly contradicted by the record." In *Bass v. Goodwill*, for example, where a prisoner challenged prison conditions, the court observed that "even in an appeal of the denial of qualified immunity, we need not accept the district court's factual determinations to the extent that they are 'blatantly contradicted by the record, so that no reasonable jury could believe [them].'"[35] The Tenth Circuit flatly stated that *Johnson v. Jones* was a "dead letter in light of *Scott v. Harris*."[36] Thus, appellate courts were free to inquire on interlocutory appeal whether a plaintiff's version of events was "blatantly contradicted" by the record.[37] Even the Sixth Circuit, which had staunchly refused before *Scott* to

33. I address this matter more fully in Mark R. Brown, *The Fall and Rise of Qualified Immunity: From* Hope *to* Harris, 9 NEV. L.J. 185, 219-220 (2009).

34. *See, e.g.*, Culosi v. Bullock, 2010 WL 610625 (4th Cir., Feb. 22, 2010) (finding in deadly force setting that it had no interlocutory jurisdiction under *Johnson*); Scott v. Venegas, 320 Fed. Appx. 265 (5th Cir. 2009) (holding that disputed issues deprive court of interlocutory jurisdiction); Williams v. Sirmons, 307 Fed. Appx. 354 (11th Cir. 2009) (holding that probable cause presented factual issue that precluded interlocutory jurisdiction); Anderson Group, LLC v. Lenz, 336 Fed. Appx. 21 (2d Cir. 2009) (holding that appellate court had no interlocutory jurisdiction over facts); Tennison v. City and County of San Francisco, 548 F.3d 1293 (9th Cir. 2008) (finding no jurisdiction to engage in interlocutory fact-finding); Pillow v. City of Lawrenceburg, 319 Fed. Appx. 347, 349 (6th Cir. 2008) ("To the extent an argument in this setting merely quibbles with the district court's *factual* assessment of the record, we do not have jurisdiction to review it.") (emphasis in original).

35. Bass v. Goodwill, 2009 WL 4642367, *4 (10th Cir. Dec. 9, 2009) (citing *Scott* and *Blossom v. Yarbrough*, 429 F.3d 963, 967 (10th Cir.2005)). *See also* Boyd v. City of Hermosa Beach, 321 Fed. Appx. 584, 586 (9th Cir. 2009) ("this is not a case in which one side's version of events is "blatantly contradicted by the record.").

36. Price-Cornelison v. Brooks, 524 F.3d 1103, 1119 n.1 (10th Cir. 2008).

37. Rhoads v. Miller, 2009 WL 3646078 (10th Cir. Nov. 5, 2009) (court inquires of whether inmate's claim was blatantly contradicted by the record); Green v. Post, 574 F.3d 1294 (10th Cir. 2009) (in high speed pursuit case appellate court watches video to determine if light was red and concludes contrary to plaintiff's claim that it was yellow); Weatherford ex rel. Thompson v. Taylor, 347 Fed. Appx. 400 (10th Cir. 2009) (appellate court may inquire of blatant contradiction).

engage in interlocutory fact-finding,[38] opined that "logic dictates that *Scott* must have modified *Johnson*'s language about jurisdiction to reach the result it did."[39] Thus, in *Moldowan v. City of Warren*, it stated that "[i]n trying to reconcile *Scott* with the Supreme Court's edict in *Johnson* this Court has concluded that 'where the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a court of appeals may say so, even on interlocutory appeal.'"[40]

Some courts in the aftermath of *Scott* appeared to limit interlocutory fact-finding to appeals that have the benefit of videos. For instance, in *Mecham v. Frazier*,[41] which involved a successful interlocutory appeal following the district court's denial of qualified immunity to two police officers who had allegedly used excessive force, the Tenth Circuit cited *Scott* in noting that "[t]he facts are in little doubt since [the] squad car was equipped with a dashboard camera which recorded the incident."[42] Similarly, in *Marvin v. City of Taylor*,[43] which came to the court on interlocutory appeal, the Sixth Circuit used police video footage that accompanied an arrest to independently judge the reasonableness of the officers' force.[44]

In contrast, where there was no video, several courts ruled that *Scott* did not apply. The Third Circuit so held in *Blaylock v. City of Philadelphia*,[45] which involved an allegedly false arrest and excessive use of force by several police officers. Following the district court's denial of summary judgment, the Third Circuit on interlocutory appeal observed that "*Scott* would thus appear to support the proposition that, in this interlocutory appeal, we may exercise some degree of review over the District Court's determination. . . ."[46] However, the Third Circuit also observed that "the Court [in *Scott*] had before it a videotape of undisputed authenticity depicting all of the defendant's conduct and all of the necessary context that would allow the Court to assess the reasonableness of that conduct."[47] "Such a scenario may represent the outer limit of the principle of *Johnson v. Jones*—where the trial court's

38. *See, e.g.,* Hanson v. City of Fairview Park, 2009 WL 3351751 (6th Cir. Oct. 20, 2009) (finding no jurisdiction to engage in interlocutory fact-finding).
39. Wysong v. City of Heath, 260 Fed. Appx. 848, 853 (6th Cir. 2008).
40. Moldowan v. City of Warren, 578 F.3d 351, 370-71 (6th Cir. 2009).
41. Mecham v. Frazier, 500 F.3d 1200 (10th Cir. 2007).
42. *Id.* at 1202 n.2.
43. Marvin v. City of Taylor, 509 F.3d 234 (6th Cir. 2007).
44. *Id.* at 240 (stating that "we exercise *de novo* review, and considering that all parties appear to agree that the video files before this Court should have been before the District Court, this Court will assess the officers' entitlement to qualified immunity based upon the videos").
45. Blaylock v. City of Philadelphia, 504 F.3d 405 (3d Cir. 2007).
46. *Id.* at 414.
47. *Id.*

determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a court of appeals may say so, even on interlocutory review."[48] Because it did not "have a situation in which 'opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it,'"[49] the court found that it lacked appellate jurisdiction.[50]

One might argue that *Scott* is limited to the Fourth Amendment, where mixed questions of law and fact are the norm. Because these issues are ultimately reviewed independently by courts of appeals,[51] after all, they should be reviewed de novo on interlocutory appeal, too.[52] *Ornelas v. United States*[53] arguably supports this proposition. There, the Supreme Court ruled that the ultimate question of whether probable cause supports a search is to be addressed independently on appeal: "We think independent appellate review of these ultimate determinations of reasonable suspicion and probable cause is consistent with the position we have taken in past cases. We have never, when reviewing a probable-cause or reasonable-suspicion determination ourselves, expressly deferred to the trial court's determination."[54]

Though this interpretation of *Scott* has some appeal—given the case's Fourth Amendment contours—it seems to prove too much. The Supreme Court, after all, has not ruled that excessive force is to be treated the same way probable cause is addressed on appeal. Lower

48. *Id.*

49. *Id*.

50. *Id*. *See also* Green v. New Jersey State Police, 246 Fed. Appx. 158, 159 n.1 (3d Cir. 2007) (noting that unlike in Scott the videos were "inconclusive on several of the key disputed facts"); Rhoads v. Miller, 2009 WL 3646078 (10th Cir. Nov. 5, 2009) (holding in excessive force case that appellate court lacked jurisdiction because no video blatantly contradicted plaintiff's proof); Green v. Post, 574 F.3d 1294, 1297 n.4 (10th Cir. 2009) (in high speed pursuit case appellate court watches video to determine if light was red—concludes it was yellow).

51. This was the government's response in *Scott v. Harris*. When asked whether the Supreme Court was bound by lower courts' version of the facts, the government responded at oral argument that "the answer to that question was provided in . . . *Ornelas versus United States*, a decision by this Court in 1996 that came up in the context of . . . a direct criminal appeal involving the question of probable cause. And this Court set forth very clearly that . . . [the] legal question about whether those facts reasonably give rise to probable cause is an independent [question subject to] de novo review." Scott v. Harris, 550 U.S. 372 (2007) (Rebuttal by Petitioner at 54-55).

52. This seemed to be the Fifth Circuit's implicit approach in *Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572 (5th Cir. 2009), which involved a high speed chase much like that in *Harris*. The court engaged in fact-finding on interlocutory appeal and awarded the police qualified immunity. Judge Garwood dissented to say that facts were in dispute, there was no video, and the matter should have been left to the District Court in the first instance.

53. Ornelas v. United States, 517 U.S. 690 (1996).

54. *Id.* at 697.

courts have not commonly ignored *Johnson v. Jones* simply because an ultimate question of excessive force was raised under the Fourth Amendment.[55] Whether force is reasonable within the constitutional meaning of the term would thus, given the precedent at the time *Scott* was decided, seem to pretty clearly present a factual issue subject to the usual standards of review on appeal, including that announced in *Johnson v. Jones*.[56]

Perhaps more troubling, this interpretation of *Scott* would not only empower appellate courts to sift through denials of summary judgments

55. In *Cowan v. Breen*, 352 F.3d 756 (2d Cir. 2003), for example, the estate of a motorist who was fatally shot by police brought suit for excessive force. The police officer unsuccessfully moved for qualified immunity in the district court and then took an interlocutory appeal to the Second Circuit. Finding that qualified immunity—"whether it was reasonable for [the police officer] to believe that his life or person was in danger"—constituted the "very question upon which [it and the district court] found there are genuine issues of material fact" *Id.* at 764. The Second Circuit affirmed. Although it had jurisdiction to address the interlocutory appeal, it had no authority to revisit the District Court's assessment of the facts.

The Third Circuit reached this same conclusion in *Rivas v. City of Passaic*, 365 F.3d 181 (3d Cir. 2004), another excessive force case. Following the district court's denial of summary judgment based on qualified immunity, police charged with excessive force took an interlocutory appeal to the Third Circuit. The court stated that "if a defendant in a constitutional tort case moves for summary judgment based on qualified immunity and the district court denies the motion, we lack jurisdiction to consider whether the district court correctly identified the set of facts that the summary judgment record is sufficient to prove. . . ." *Id*. at 192 (quoting Ziccardi v. City of Philadelphia, 288 F.3d 57, 61 (3d Cir. 2002)). Because a "reasonable jury could find from these facts that [the victim] did not present a threat to anyone's safety," *id.* at 200, the Third Circuit affirmed the lower court's denial of summary judgment. *See also* Beier v. City of Lewiston, 354 F.3d 1058 (9th Cir. 2004) (suggesting that interlocutory appeal does not even lie in excessive force case).

56. In *Kent v. Katz*, 312 F.3d 568 (2d Cir. 2002), for example, the Second Circuit affirmed a district court's refusal to award summary judgment and refused to resolve factual issues that surrounded the reasonableness of an arrest. Likewise, in *Gray-Hopkins v. Prince George's County*, 309 F.3d 224, 229 (4th Cir. 2002), an excessive force case arising under the Fourth Amendment, the Fourth Circuit stated that "to the extent that the appealing official seeks to argue the insufficiency of the evidence to raise a genuine issue of material fact—for example, that the evidence presented was insufficient to support a conclusion that the official engaged in the particular conduct alleged—we do not possess jurisdiction under § 1291 to consider the claim." *See also* Hulen v. Yates, 322 F.3d 1229, 1240 (10th Cir. 2003) (stating that appellate court could "not resolve Defendants' claims that [the plaintiff] cannot show any personal participation by these Defendants in the alleged retaliatory transfer because of his motivation. This is an issue of evidentiary sufficiency, over which we lack jurisdiction in a qualified immunity interlocutory appeal."); Hamilton v. Leavy, 322 F.3d 776, 782 (3d Cir. 2002) (stating that appellate court could not review "the District Court's 'identification of the facts that are subject to genuine dispute,' but instead . . . review[ed] the legal issues in light of the facts that the District Court determined had sufficient evidentiary support for summary judgment purposes."); Cavalieri v. Shepard, 321 F.3d 616, 618 (7th Cir. 2003) ("we have no appellate jurisdiction to the extent disputed facts are central to the case"); Atkinson v. Taylor, 316 F.3d 257, 261 (3d Cir. 2003) (same).

on interlocutory appeal, it would also invite appellate courts to independently review evidentiary sufficiency following final judgment. As things stand, a district court's final conclusion—whether by bench or a properly instructed jury—that a police officer used unreasonable force is ordinarily subject to deferential review on appeal.[57] The traditional approach has been to inquire whether enough evidence was presented to support the verdict; not whether the verdict is correct.[58]

Before *Iqbal*, *Scott*'s reach therefore appeared limited. The presence of a conclusive video in the context of an ultimate issue (such as the reasonableness of a police officer's force under the Fourth Amendment) that blatantly contradicted the plaintiff's factual allegations could justify

57. *See, e.g.*, United States v. Harris, 293 F.3d 863 (5th Cir. 2002) (concluding in criminal civil rights case against police officer for using excessive force that jury's finding of unreasonable force was supported by sufficient evidence).

58. This does not mean that district courts have blank checks to deny summary judgments to government officials just because there are genuine issues of material fact as to constitutional issues. Qualified immunity doctrine still requires that where the controlling law was unsettled summary judgment is in order. And even when the underlying law is clear, an official might still reasonably (though mistakenly) believe that his actions are lawful. This can hold true, moreover, even though the ultimate factual conclusion (reasonableness of force, for example) is genuinely at issue. The Supreme Court explained this latter possibility in the context of excessive force in *Saucier v. Katz*, 533 U.S. 194 (2001). There, in the course of removing a demonstrator from a military base, the officer allegedly delivered the demonstrator a "gratuitously violent shove." Observing that the ultimate reasonableness of this shove was genuinely at issue, the district court denied the officer's motion for summary judgment based on qualified immunity. The Ninth Circuit affirmed on the ground that the questions of ultimate reasonableness for Fourth Amendment and qualified immunity purposes were one and the same (and both for the jury). The Supreme Court reversed, concluding that there was room between the questions. Even if the officer had shoved the demonstrator in a constitutionally unreasonable fashion, he could have still reasonably believed it to be necessary for purposes of qualified immunity. Notwithstanding that a jury would have had sufficient evidence to return a verdict for the plaintiff, the district court still could have awarded the officer qualified immunity. Because the Court in *Saucier* went on to determine that the agents' conduct was not unreasonable for purposes of qualified immunity, one might argue that it offers support for the power of appellate courts to entertain ultimate factual questions on interlocutory appeal—at least where the factual matter is one of ultimate reasonableness for purposes of qualified immunity. Such a reading, however, is not compelled, and would seem to be a bit of a stretch. The Court, after all, granted certiorari on the purely legal question of whether "reasonableness" is necessarily coterminous under the Fourth Amendment and qualified immunity. Neither party raised *Johnson v. Jones* as a potential problem, and the Court never mentioned it either during argument or in its opinion. The facts, according to the Court, were largely "uncontested." Rather than engage in any fact-finding, the Court simply accepted the plaintiff's facts and ruled that on these uncontested facts the defendants could have believed they were entitled to use minimal force. A better reading of *Saucier*, therefore, is simply that the officers' uncontested use of de minimus force was reasonable within the meaning of qualified immunity. Read in this fashion, *Saucier* says little about interlocutory jurisdiction over "ultimate" factual disputes.

de novo review by an interlocutory appellate court. *Johnson v. Jones*'s prohibition on interlocutory fact-finding was otherwise preserved.

III. APPLICATION AND IMPACT OF *IQBAL V. ASHCROFT*

Iqbal does not claim that *Johnson* was overruled by *Harris.* Indeed, *Iqbal* does not even mention *Harris.* Justice Kennedy's unanimous conclusion that the Court had interlocutory jurisdiction went to great lengths to explain why pleading is different. Justice Kennedy explained his reasoning this way: "The concerns that animated the decision in *Johnson* are absent when an appellate court considers the disposition of a motion to dismiss a complaint for insufficient pleadings."[59] Although he acknowledged that "the categories of 'fact-based' and 'abstract' legal questions used to guide the Court's decision in *Johnson* are not well defined,"[60] the decision to deny the defendants' motion to dismiss "falls well within the latter class."[61] He reasoned that the case required an appellate court to "consider[] only the allegations contained within the four corners of [the plaintiff's] complaint,"[62] and that the decision whether a complaint "has the 'heft' to state a claim is a task well within an appellate court's core competency."[63] "Evaluating the sufficiency of a complaint is not a 'fact-based' question of law,"[64] Justice Kennedy concluded, and therefore "the problem the Court sought to avoid in *Johnson* is not implicated here."[65]

Relying on this distinction, the Eighth Circuit in *Heartland Academy Community Church v. Waddle* opined that *Iqbal* "foreclosed . . . [an] attempted end-run around *Johnson.*"[66] *Iqbal,* the court observed, proved that in terms of fact-finding—as opposed to fact-pleading—*Johnson*'s prohibition on interlocutory jurisdiction remained the rule.

Is the Eighth Circuit's conclusion—essentially making lemonade out of *Iqbal*'s lemons—sound? Probably not. I doubt that Justice Kennedy meant to cabin *Harris*'s extension of interlocutory fact-finding by holding that interlocutory review of fact-pleading is proper. Instead, I view *Iqbal* as implicitly extending the "idea" of *Harris*—the idea being

59. *Iqbal*, 129 S. Ct. at 1947.
60. *Id*.
61. *Id*.
62. *Id*.
63. *Id*.
64. *Id*.
65. *Id*.
66. Heartland Academy Community Church v. Waddle, 595 F.3d 798, 808 (8th Cir. 2010).

that procedural rules are disposable in the face of justifiable ends—from denials of summary judgment to denials of motions to dismiss.

The former, after all, have historically proven more successful for government officials. Before *Iqbal*, appellate courts were loathe to hear fact-bound Rule 12(b)(6) claims on interlocutory appeal. This was true even after *Bell Atlantic v. Twombly*,[67] which ostensibly required all plaintiffs—including those proceeding under § 1983[68]—to plead plausible facts. The Seventh Circuit, for example, in *Khorrami v. Rolince* rejected the governmental defendant's claim on interlocutory appeal that *Twombly* authorized it to "look at the complaint for ourselves and decide whether [the plaintiff] can make such a showing."[69] Instead, before *Iqbal*, appellate courts sitting in an interlocutory capacity tended to simply accept plaintiffs' alleged facts as true—the same standard imposed under *Johnson v. Jones*.

Iqbal makes it clear that interlocutory appellate courts must apply a more demanding standard to fact-pleading. Pleaded facts cannot be taken at face value—which was the standard that was commonly applied under *Johnson v. Jones.* Rather, constitutional plaintiffs must plead "'sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[70] Thus, the frequency of fact-based appeals from denials of Rule 12(b)(6) motions is sure to increase after *Iqbal*. What was once a little-used procedural device—taking an interlocutory appeal from a denial of a 12(b)(6) motion based on insufficient factual pleadings—will likely become much more common.

Along with the increased frequency of "plausibility" appeals will come an increase in the frequency of qualified immunity. Rather than just having one judge scrutinize a plaintiff's complaint, governmental defendants are now entitled to having three more (at least) review the

67. Bell Atlantic v. Twombly, 550 U.S. 544 (2007).

68. *But see* Erikson v. Pardus, 551 U.S. 89 (2007) (per curiam) (finding that inmate's § 1983 complaint satisfied *Twombly* and thereby suggesting that the latter did not really apply to § 1983 cases).

69. 539 F.3d 782, 788 (7th Cir. 2008). *See also* Al-Kidd v. Ashcroft, 580 F.3d 949 (9th Cir. 2009) ("As we have recognized in the past, interlocutory review of a Rule 12(b)(6) motion to dismiss puts our court in the difficult position of deciding 'far-reaching constitutional questions on a nonexistent factual record.'"); Weise v. Casper, 507 F.3d 1260, 1264 (10th Cir. 2007) ("If a district court cannot rule on the merits of a qualified immunity defense at the dismissal stage because the allegations in the pleadings are insufficient as to some factual matter, the district court's determination is not immediately appealable.").

70. *Al-Kidd*, 580 F.3d at 956 ("because Ashcroft chose to exercise his right to appeal before a fuller record could be developed, we proceed as we must in a review of all Rule 12(b)(6) motions, accepting as true all facts alleged in the complaint, and drawing all reasonable inferences in favor of the plaintiff. To avoid dismissal under Rule 12(b)(6), a plaintiff must aver in his complaint 'sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'").

complaint. If two of these three find the pleading inadequate, dismissal under the guise of qualified immunity will result. Even assuming that *Iqbal* has the standard right—an assumption that I do not share—the odds of qualified immunity must increase.

Proponents of qualified immunity will argue that *Iqbal* simply increases the chances of "getting it right." After all, whether in the district court or on appeal, the point is to properly apply whatever pleading standard exists. So long as the appeal helps avoid a needless trial, it is worth the price. *Iqbal*, then, is akin to a referee or umpire relying on instant video replay to determine whether a foot falls out-of-bounds or home run went foul. Accuracy justifies any cost.

The reality, however, is that accuracy is rarely worth all the costs. If it were, referees and umpires would always be staring at instant replays. Coaches would be given unlimited "challenge" flags. Games would never end. Whether in sports or law, society recognizes that accuracy must be balanced against temporal costs, the price of additional personnel, and the benefit of orderly processes.

In the context of litigation, this translates into the final judgment rule, which ordinarily prohibits losing parties from taking piecemeal appeals. Courts across the country generally recognize that interlocutory appeals—getting it right as soon as possible—are not worth the cost.

"Getting it right," then, cannot be accepted as a gainsay justification for dispensing with any and all procedures. Like it or not, interlocutory appeal is frowned upon because it is disruptive, time-consuming and costly. Interlocutory fact-finding, as recognized in *Johnson v. Jones*, is even more so. And contrary to Justice Kennedy's conclusion, so is interlocutory review of fact-pleading. On balance, I do not believe that this kind of interlocutory review will be worth the candle.

On the assumption that *Iqbal's* pleading standard is intended to be minimal and forgiving, interlocutory review should seldom result in a reversal of a district court's denial of a Rule 12(b)(6) motion. I suspect, then, that *Iqbal* will encourage a large number of meritless fact-pleading appeals, while rarely resulting in reversals of district court decisions. Accuracy will be only marginally enhanced; the appellate docket's increase will be significant.

It could be, however, that Justice Kennedy intends his *Iqbal* standard to have more bite. This certainly seems to be the fear of plaintiffs' lawyers on the private side of the divide; and it may prove true. Assuming that *Iqbal*'s pleading standard is meant to drastically increase pleading standards in constitutional litigation, interlocutory appeals would seem to make more sense. Appellate courts will more often need to correct district court decisions, and there will be more to the accuracy side of the ledger. It is too soon to determine whether this

is where *Iqbal* is headed, but my sense from listening to comments from the bench and bar at this Symposium is that lower courts are not likely to aggressively pursue this path.

Regardless of whether *Iqbal* emerges with more teeth than *Twombly*, I suspect that it will not cause a sea-change in the way constitutional cases are pleaded. For "public-sector" plaintiffs' lawyers (those who sue government under § 1983 and *Bivens*), *Iqbal*'s pleading standard does not significantly increase the hazard of not pleading a proper constitutional complaint. Granted, the Court ruled that the constitutional plaintiffs in *Iqbal* did not live up to this new standard, but I do not see that as general or systemic result. The reason is simple: § 1983 and *Bivens* have been subjected to de facto heightened pleading requirements for quite some time. These cases are generally pleaded with more specificity than garden-variety complaints. *Iqbal*, therefore, does not demand much more than what was already required.

Of course, some will point to the Supreme Court's three opinions, *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,[71] *Crawford-El v. Britton*,[72] and *Jones v. Bock*,[73] which ostensibly collectively refuse to authorize increased pleading requirements in constitutional cases.[74] The Court, however, has never squarely ruled that constitutional plaintiffs suing governmental officials for damages cannot be subjected to heightened pleading standards. *Leatherman* involved a suit against local government, *Britton* addressed evidentiary standards, and *Bock* involved the Prison Litigation Reform Act. None addressed the standard for pleading around qualified immunity. Given this gap, the Eleventh Circuit continues to impose a heightened pleading requirement on constitutional plaintiffs who are faced with qualified immunity defenses.[75] The Fifth Circuit also continues to impose a heightened standard—at least some of the time.[76] Several circuits implicitly

71. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) (holding that heightened pleading is not required in § 1983 suits against cities and counties).

72. Crawford-El v. Britton, 523 U.S. 574 (1998) (holding that heightened evidence standard is not permissible in § suit against officials).

73. Jones v. Bock, 549 U.S. 199 (2007) (holding that inmates need not satisfy heightened pleading requirements notwithstanding adoption of Prison Litigation Reform Act).

74. *See also* Erikson v. Pardus, 551 U.S. 89 (2007) (per curiam) (finding that inmate's § 1983 complaint satisfied *Twombly* and thereby suggesting that the latter's heightened pleading standard did not really apply to § 1983 cases).

75. *See, e.g.*, Keating v. City of Miami, 598 F.3d 753 (11th Cir. 2010).

76. *See, e.g.*, Floyd v. City of Kenner, 351 Fed. Appx. 890, 893 (5th Cir. 2009) ("In reviewing those claims, we are guided both by the ordinary pleading standard and by a heightened one."). The *Floyd* court pointed to qualified immunity to justify its heightened standard. Because qualified immunity can be raised in a motion to dismiss,

demanded more of § 1983 plaintiffs long before *Twombly* and *Iqbal* came along. And even in those circuits where the rule was clear—no heightened pleading[77]—one suspects that most lawyers erred on the side of caution. In sum, constitutional plaintiffs' lawyers have become used to heightened pleading requirements; *Iqbal* does not present much of a change for them.

As for *Harris*, I suspect that *Iqbal* will encourage more interlocutory fact-finding on appeal; not less. Together, *Harris* and *Iqbal* represent a basic distrust of the district courts' collective abilities to protect governmental defendants. Both cases point to more—not less—interlocutory review. *Johnson v. Jones* may not, as the Tenth Circuit claimed,[78] be a "dead letter." But its preference for efficiency and respect for district court fact-finding appears to be on life-support.

IV. CONCLUSION

Iqbal is meaningful in several ways. First and foremost, it reflects a contrived effort to protect high-ranking officials from charges connected with the government's war on terror. Second, its sua sponte rejection of supervisory liability rewrites a significant aspect of the law of constitutional litigation. Third, its new pleading standard materially alters commonly understood requirements in private-sector litigation. Fourth, its nod toward interlocutory review of fact-finding—through pleading as well as proof—will make it more difficult for constitutional victims to have their day in court. Last, but not least, *Iqbal*'s interlocutory fact-pleading-review-mechanism needlessly heaps additional burdens on what is already an over-burdened appellate court system. For all these reasons, *Iqbal* is a disaster.

plaintiffs are naturally encouraged to anticipate it in their complaints—thus creating a heightened pleading effect.

77. *See, e.g.*, Galbraith v. County of Santa Clara, 307 F.3d 1119, 1125 (9th Cir. 2002).

78. Price-Cornelison v. Brooks, 524 F.3d 1103, 1119 n.1 (10th Cir. 2008).