# *SCOTT V. HARRIS* AND THE FUTURE OF SUMMARY JUDGMENT

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## INTRODUCTION

The Supreme Court's decision in *Scott v. Harris*[1] has quickly become a staple in many Civil Procedure courses, and small wonder: everything surrounding the case seems tailor-made for the classroom. The case involved a high-speed car chase, a scenario that many Americans have observed or experienced first-hand. There is a dramatic dash cam video that the majority made available to the public via the Supreme Court website—a first—offering a cinematic presentation of the major events of the dispute that culminates in a tragic and explosive ending.[2] And there is an experiment-based study published in

* Professor of Law, University of Pennsylvania Law School. My thanks to Steve Burbank, Jonah Gelbach, and Cathie Struve for their valuable substantive input on this article, to the Penn Law Fall 2014 Complex Litigation seminar for their careful attention to this work in draft, to Thom Main, the organizers of the festschrift symposium on behalf of Steve Subrin at Northeastern University School of Law, and the Nevada Law Journal for providing me the opportunity to develop these ideas, and of course to Steve Subrin himself, in whose honor this volume is published, for his friendship, his ethical example, and his service to the academy through the scholarly pursuit of knowledge over the decades.

[1] Scott v. Harris, 550 U.S. 372 (2007).

[2] The Court included a link to the video footage in its opinion, *see id.* at 378 n.5, but it appears no longer to be active. Through a different link, the Court maintains a copy of the full video. *See Video Resources*, SUPREME CT. U.S., http://www.supremecourt.gov/media/media.aspx (last visited May 6, 2015). Several copies

the Harvard Law Review by experts on criminal law, psychology, and cultural cognition that calls into doubt the reliance that the *Scott* majority placed on the video's ability to "speak for itself" in answering the questions about risk, danger to the public, and alternatives to deadly force that lay at the heart of their Fourth Amendment ruling.[3] *Scott v. Harris* was an instant classic.

As is often true with instant classics, however, splashy first impressions can mask a more complex state of affairs. At the heart of *Scott v. Harris* lies the potential for a radical doctrinal reformation: a shift in the core summary judgment standard, undertaken to justify a massive expansion of interlocutory appellate jurisdiction in qualified immunity cases.

*Scott* was an interlocutory appeal from a denial of the officer's defensive motion for summary judgment. The content of the factual record in the case was actively contested, and the rulings of the lower federal courts rested in significant part on their conclusion that a genuine dispute existed as to the material facts that the record could support. When the Court took the case and rendered a decision on the merits, it was acting in apparent contravention of its own earlier holding that disputes over "evidence insufficiency" are categorically inappropriate for interlocutory review under the collateral order doctrine in qualified immunity cases.[4] The respondent's merits brief raised the question of appellate jurisdiction,[5] but the Court offered only a perfunctory acknowledgment of the issue,[6] as had the Eleventh Circuit before it.[7] In hearing the appeal and reversing despite this apparent barrier to immediate review, the Court effectuated a silent revolution in interlocutory jurisdiction, reframing substantive elements of the summary judgment and qualified immunity doctrines to accomplish that end.

That reframing begins with the "genuine dispute of material fact" standard in summary judgment practice and its requirement that courts view a discovery record in the light most favorable to the non-moving party by drawing every reasonable inference in that party's favor. As Part I of this article explains, one key passage in *Scott*, if taken seriously, appears to erase the presumption in favor of non-moving parties altogether, while other portions of the opinion push toward a requirement that the plaintiff identify a single "version of the facts" in opposing a summary judgment motion, rather than being able to rely upon the more expansive range of possibilities that the "every reasonable inference"

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of the video footage are available on YouTube. *See Scott v. Harris (USSC 05-1631) Pursuit Video*, YOUTUBE (Sept. 2, 2008), http://www.youtube.com/watch?v=qrVKSgRZ2GY [hereinafter *Scott v. Harris Pursuit Video*] (containing an edited, higher-quality version of the video with key portions of the chase).

[3] Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009).

[4] Johnson v. Jones, 515 U.S. 304, 308, 313 (1995).

[5] Brief for Respondent at 1, *Scott*, 550 U.S. 372 (No. 05-1631), 2007 WL 118977, at *1.

[6] *Scott*, 550 U.S. at 376 n.2.

[7] Harris v. Coweta Cnty., 433 F.3d 807, 811 n.3 (11th Cir. 2005), *rev'd sub nom.* Scott v. Harris, 550 U.S. 372 (2007).

standard ought to vouchsafe. In both respects, the Court weakens the presumption in favor of the non-moving party in summary judgment. Subsequent statements by the Court make clear that *Scott* has not worked an instantaneous revolution. However, developments in the lower federal courts reveal that the uncertainty introduced by the opinion is already eroding this core feature of the summary judgment standard.

The Court introduces this doctrinal instability for a specific purpose: to justify *sub silentio* its expansion of appellate jurisdiction under the collateral order doctrine. The relationship between these doctrines is the subject of Part II. The Court's prior treatment of the collateral order doctrine had appeared to prohibit immediate appeal in qualified immunity cases where the dispute centered on the presence or absence of a genuine dispute of fact in the record. In order to escape that strict limitation, the *Scott* majority assigned the trial court's denial of summary judgment to a new category—rulings that "blatantly contradict" the record and therefore do not count as "genuine" factual disputes at all—thereby circumventing its earlier holdings and justifying resort to the collateral order doctrine. The undermining of the "every reasonable inference" standard described in Part I was instrumental to this expansion of appellate jurisdiction.

The final element of *Scott*'s realignment of the doctrinal landscape involves the qualified immunity doctrine itself and the administration of that doctrine in summary judgment practice—the subject of Part III. As has been much noted, the line between questions of "fact" and questions of "law" is often contested and hard to define.[8] Qualified immunity blurs that line yet further, particularly in cases involving Fourth Amendment claims. In order to decide whether a principle of law was "clearly established" at the time that disputed events took place in such a case, a judge must determine the relationship between a contested factual record in the present lawsuit and the conclusions that a reasonable government official could draw from the fact patterns of prior rulings—an exercise that cannot properly be described as belonging to a strictly defined category of "fact" or "law." The *Scott* majority nonetheless characterizes Fourth Amendment reasonableness analysis as presenting a "pure" question of law, a move that reinforces the Court's expansion of appellate jurisdiction while at the same time encouraging lower federal courts to be more aggressive in using summary judgment to dismiss Fourth Amendment claims.

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[8] *See, e.g.*, Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) (noting "the vexing nature of the distinction between questions of fact and questions of law" and acknowledging the absence of any "rule or principle that will unerringly distinguish a factual finding from a legal conclusion"); Baumgartner v. United States, 322 U.S. 665, 670–71 (1944) ("The phrase 'finding of fact' may be a summary characterization of complicated factors of varying significance for judgment. Such a 'finding of fact' may be the ultimate judgment on a mass of details involving not merely an assessment of the trustworthiness of witnesses but other appropriate inferences that may be drawn from living testimony which elude print. The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based.").

*Scott* is about much more than perceptions of video evidence. The case marks an inflection point in summary judgment practice for all qualified immunity cases, a new direction in the collateral order doctrine, and a potential change of course in the core summary judgment standard that could erode the pathway to trial for plaintiffs in every type of dispute.

## I. *SCOTT V. HARRIS* AND EVERY REASONABLE INFERENCE

### *A. The Origins of the Standard*

The received account of the summary judgment standard holds that a court must consider the factual record in the light most favorable to the non-moving party, drawing every reasonable inference in that party's favor, when deciding whether to grant the motion and pretermit a jury trial. The proposition first appears in these terms among the Supreme Court's cases in a pair of antitrust rulings from 1962 in which the Court reversed orders granting summary judgment motions to the defendants. In the first, *Poller v. Columbia Broadcasting System*, the Court explained that its reversal of the lower court's order proceeded from its examination of "the record on summary judgment in the light most favorable to . . . the party opposing the motion."[9] In the second, *United States v. Diebold*—a short *per curiam* opinion that is cited far more frequently for the point than *Poller*—the Court explained that the rulings of the district court in that case "represent[ed] a choice of inferences to be drawn from the subsidiary facts contained in the affidavits, attached exhibits, and depositions submitted below" and that "[o]n summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." Because "inferences contrary to those drawn by the trial court might [have been] permissible" on the record before it, the Court reversed the order granting summary judgment.[10] In neither case did the Court offer any citation for this formulation of the standard, treating it as well established.

The proposition that non-moving parties are entitled to have every reasonable inference drawn in their favor traces its lineage to the practice of requesting a directed verdict at trial or a judgment notwithstanding the verdict following the return of a jury decision. When reviewing such orders, the Court had long observed that the prerogatives of the jury require the scale to be weighted in favor of the non-moving party. In *Lumbra v. United States*, for example, the Court heard an appeal in a disability insurance case where the United States sought judgment notwithstanding a jury verdict awarded in favor of a former

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[9] Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962). The Court also had this to say about the use of summary procedures in an antitrust dispute: "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Id.*

[10] United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam).

army private pursuing a disability claim. The case posed the question "whether there was any evidence upon which a verdict for petitioner might properly be found," and the posture of the case required the Court to "assume as established all the facts that the evidence supporting petitioner's claims reasonably tends to prove, and that there should be drawn in his favor all the inferences fairly deducible from such facts."[11]

In its first opinion interpreting Rule 56 following the implementation of the Federal Rules of Civil Procedure, the Court drew a connection to directed verdict practice in defining the standard for granting a summary judgment motion, albeit without making explicit reference to favorable inferences for the non-moving party. *Sartor v. Arkansas Natural Gas* involved a dispute over the rate at which a landowner should be compensated for certain natural gas extractions. The case was complicated by the fact that the dispute involved the proper measure of damages, and the original language of Rule 56 left some doubt about whether disputes over damages could be resolved through summary judgment (an ambiguity that was resolved in a subsequent amendment to the Rule).[12] Noting this problem, the Court said of the dispute before it:

> Where the undisputed facts leave the existence of a cause of action depending on questions of damage which the rule has reserved from the summary judgment process, it is doubtful whether summary judgment is warranted on any showing. But at least a summary disposition of issues of damage should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party.[13]

Only "where it is quite clear what the truth is" would summary judgment be appropriate under this standard.[14]

The explicit proposition that the court should draw all inferences in favor of the non-moving party when considering a motion for summary judgment entered the doctrine more gradually. In the notes on Rule 56 contained in the first

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[11] Lumbra v. United States, 290 U.S. 551, 553 (1934). The Court went on to affirm the Second Circuit's reversal of the district court and granted the motion despite its deference to the jury. *See id.* at 560–61. *See also, e.g.*, Gunning v. Cooley, 281 U.S. 90, 94 (1930) ("[I]n determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them.").

[12] Rule 56 originally read, in pertinent part, "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, *except as to the amount of damages*, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56 (1938), *quoted in* Sartor v. Ark. Natural Gas Corp., 321 U.S. 620, 623 (1944). The highlighted language could either be read to mean that summary judgment on a liability issue was appropriate even if a genuine dispute remained as to damages, or that summary judgment was only available as to liability matters and never as to damages. The Rule was amended in 1946 to resolve this ambiguity. *See* FED. R. CIV. P. 56 advisory committee's note (1946 amendment).

[13] *Sartor*, 321 U.S. at 623–24.

[14] *Id.* at 627.

edition of Moore's Federal Practice, published in 1938 to coincide with the effective date of the Federal Rules of Civil Procedure, the concept does not appear, but Moore does introduce the idea that the supporting papers of the movant and the non-movant should be judged by different standards. The State of New York added a provision for summary judgment to its civil code in 1921, Rule 113 of the Rules of Civil Practice (the scope of which it expanded in 1933), and Professor Moore treats that provision and associated case law as one of the most important antecedents in describing the operation of Federal Rule 56.[15] One issue of concern under Rule 113 involved the possibility of a variance between a claim or defense as detailed in a pleading and the evidence brought forward at summary judgment. Where such a variance arose, the court's response would depend upon whether the party in question was advancing or opposing the motion. "The courts are critical of the papers presented by the moving party," the treatise explains, whereas "Courts are not as critical of the opposing papers as they are of the moving papers."[16]

Early federal court decisions interpreting Rule 56 expanded upon this idea that the moving and non-moving parties were differently situated. In *Weisser v.*

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[15] *See* Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423, 444–51 (1929) (describing New York's adoption of the procedure in 1921); *see also* JAMES WM. MOORE & JOSEPH FRIEDMAN, 3 MOORE'S FEDERAL PRACTICE: A TREATISE ON THE FEDERAL RULES OF CIVIL PROCEDURE 3176–78 (1st ed. 1938) (noting the 1933 expansion of summary judgment in New York and discussing their value as antecedents to Rule 56). Professor Moore's exclusive focus on summary judgment in New York as an antecedent to Federal Rule 56 was misplaced, and perhaps somewhat parochial. Professor Edson Sunderland of the University of Michigan Law School, who was "the chief architect of the rules on discovery, pre-trial conference, and summary judgment," worked from a broader base of doctrinal knowledge in crafting the provision. Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1476 (1987); *see id.* at 1476 n.74 (collecting published and unpublished materials recording Sunderland's influence in the crafting of the discovery rules); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 967 (1987) (discussing Sunderland's role in crafting the discovery rules); *see also* Charles E. Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 10 (1959) ("[T]he several rules for discovery and summary judgment [were] and now remain[] a tribute to Edson's genius."). Professor Sunderland conducted comprehensive investigations into state court discovery practices in the years preceding the adoption of the Federal Rules, and while New York was an important player in his work, other states—including Michigan—also loomed large. Thus, in his article discussing the evolution of discovery in England and surveying contemporary practices among American states, Sunderland explored the relationship between restrictive discovery rules and the role of summary judgment, and he used summary judgment figures from state courts in both New York and Michigan by way of illustration. Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 872–73 (1933). And indeed, the standards for summary judgment that emerged in the state courts of Michigan in the 1930s prefigured the federal standard that would soon follow. *See, e.g.*, People's Wayne Cnty. Bank v. Wolverine Box Co., 230 N.W. 170, 172 (Mich. 1930) (describing summary judgment in Michigan as "a speedy method of determining whether there are any issues of fact in causes arising upon contract, judgment, or statute" and drawing the same connection between the standards for summary judgment and for directed verdict that would later be relied upon by the Supreme Court of the United States in *Sartor*).

[16] MOORE & FRIEDMAN, *supra* note 15, at 3189–90.

*Mursam Shoe Corp.*, before a panel that included Judge Charles E. Clark, another principal drafter of the Rules, the Second Circuit reversed a district court's order granting summary judgment in a contract dispute and explained: "since this case comes up on motion for summary judgment, we must give the plaintiffs the benefit of every doubt."[17] That proposition quickly spread.[18] At the same time, lower federal courts were drawing the connection between summary judgment and directed verdict or JNOV practice, emphasizing the necessary relationship between the two. In one of the earliest statements to this effect under the Federal Rules, a district court in South Dakota granted a plaintiff's motion for summary judgment, explaining:

> The record before me shows conclusively that the payment in question constituted a preferential payment under the Bankruptcy Act, and if no motion for summary judgment had been made and the case were tried in the regular manner, a motion for a directed verdict in favor of the plaintiff would of necessity be granted.[19]

This idea was also taken up widely, and another pair of decisions from the Second Circuit, one written by Judge Clark and the other by Judge Learned Hand,[20] strongly endorsed the linkage between the summary judgment and directed verdict standards a year before the Court's more equivocal statement to the same effect in *Sartor*.[21]

The Eighth Circuit appears to have been the first federal appeals court to draw all these doctrinal strands together by importing the particular language of "all reasonable inferences" from directed verdict practice into the summary judgment standard. Writing a year before the Court's decision in *Sartor* in a case called *Ramsouer v. Midland Valley Railroad Company*, the court of appeals reversed the order of a district court that had granted summary judgment for the defendant on a wrongful death claim.

> We have not reviewed all the evidence bearing upon the particular features stressed by the respective parties, and there is more or less conflict in the testimony, but the issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should

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[17] Weisser v. Mursam Shoe Corp., 127 F.2d 344, 346 (2d Cir. 1942) (footnote omitted).

[18] *See, e.g.*, Toebelman v. Mo.-Kan. Pipe Line Co., 130 F.2d 1016, 1018 (3d Cir. 1942) (citing *Weisser*, 127 F.2d 344).

[19] Culhane v. Jackson Hardware Co., 25 F. Supp. 324, 324 (D.S.D. 1938) (citation omitted).

[20] *See* Engl v. Aetna Life Ins. Co., 139 F.2d 469, 472–73 (2d Cir. 1943) (" 'To say that a false denial, which defendants are unable to justify, must nevertheless put the plaintiff to his common-law proof before a jury, although the result would be a directed verdict in plaintiff's favor as a matter of law, is to exalt the shadow above the substance.' " (quoting Hanna v. Mitchell, 196 N.Y.S. 43, 55 (App. Div. 1922))); Radio City Music Hall Corp. v. United States, 135 F.2d 715, 718 (2d Cir. 1943) ("When a party presents evidence on which, taken by itself, it would be entitled to a directed verdict if believed, and which the opposite party does not discredit as dishonest, it rests upon that party at least to specify some opposing evidence which it can adduce and which will change the result. In this case the defendant should have specified . . . .").

[21] *See supra* notes 12–14 and accompanying text.

> be determined. In considering such a motion as in a motion for a directed verdict, the court should take that view of the evidence most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence. If, when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits.[22]

By the second edition of Moore's Federal Practice, this proposition had been widely accepted, and it was incorporated into the treatise's account of the summary judgment standard[23] and then recited by the Court as the received understanding some years later in *Poller* and *Diebold*.

### *B.* Scott v. Harris *and the Summary Judgment Standard*

*Scott v. Harris* has called into question the stability of this core feature of the summary judgment standard. *Scott* is best known for the Court's treatment of the video evidence in the discovery record—the dash cam recording of the high-speed chase that removed all doubt from the minds of the majority that the use of deadly force to stop Victor Harris was reasonable under the Fourth Amendment. The provocative study by Kahan, Hoffman, and Braman exposing the cultural and social contingency of perceptions of that video has become a staple in discussions about the case.[24] But another passage of *Scott* with great potential doctrinal significance has gone unexamined by academics. If applied literally, this passage appears to subvert a central feature of summary judgment doctrine, and it is already causing mischief in the lower federal courts.

*Scott* came to the Court as an appeal from a denial of summary judgment on a qualified immunity defense. Rejecting the view of the lower federal courts in the case, the majority found that reasonable minds could not differ about the level of dangerousness that Victor Harris posed as he fled the Georgia police, and hence the propriety of the officers' use of deadly force under the Fourth Amendment.[25] In order to reach that result, the majority had to overcome the deference ordinarily due to the non-moving party, and it vaulted this hurdle through reliance upon the video, which it believed "quite clearly contradict[ed] the version of the story told by respondent and adopted by the Court of Appeals."[26] The majority concluded that the lower courts "should have viewed the

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[22] Ramsouer v. Midland Valley R.R. Co., 135 F.2d 101, 105–06 (8th Cir. 1943).

[23] The second edition describes the standard of deference thusly:

> Since it is not the function of the trial court to adjudicate genuine factual issues at the hearing on the motion for summary judgment, in ruling on the motion all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion.

6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 56.15(3) (2d ed. 1948), *quoted in* Patty v. Food Fair Stores of Fla., Inc., 101 So. 2d 881, 883 (Fla. Dist. Ct. App. 1958).

[24] *See generally* Kahan et al., *supra* note 3 (finding "sharp differences of opinion" between 1350 participants after viewing the *Scott v. Harris* high-speed chase video).

[25] Scott v. Harris, 550 U.S. 372, 376, 380 (2007).

[26] *Id.* at 378.

facts in the light depicted by the videotape"[27] and committed reversible error when they failed to do so.

In the process of justifying its conclusion, the majority offered a reformulation of the summary judgment standard that a moment's reflection reveals to be shocking. "At the summary judgment stage," the opinion explains, "facts must be viewed in the light most favorable to the nonmoving party *only if there is a 'genuine' dispute as to those facts*."[28] Rehearsing familiar language from *Matsushita* and *Anderson* describing when a "genuine" dispute of fact might exist, the Court concluded that Victor Harris's version of events was "blatantly contradicted by the record" and hence not entitled to the benefit of any favorable light.[29]

This formulation—"that facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts"—would swallow the entire standard if taken seriously and applied as written. The entire question in a summary judgment motion is whether there is a "genuine" dispute of material fact.[30] The non-movant is entitled to every reasonable inference when determining whether a genuine dispute exists—he enjoys the benefit of that deference when determining whether the standard is satisfied. Saying that "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts" is the equivalent of saying that the non-moving party is entitled to this deference only if he can first show that he will prevail on the motion. A genuine dispute of fact is the very thing concerning which the non-moving party is entitled to have every reasonable inference drawn in his favor. If the non-movant were required to demonstrate a genuine dispute of fact before enjoying the benefit of that deference, then the non-movant would enjoy no deference at all—as, indeed, appears to have happened in *Scott*.

*Scott* was not written as an express statement of revolution in summary judgment practice and, as the materials below explain, the Court still appears to believe that the accepted formulation of the standard retains its vitality. At the same time, it is clear that *Scott* is not a mere aberration. It is necessary to unpack this language, which has been repeated by the Court itself in a subsequent decision[31] and has already begun to distort summary judgment doctrine among the lower federal courts.

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[27] *Id.* 380–81. The Court uses the term "videotape" throughout its opinion, but it seems likely that the dashboard-mounted camera recorded digitally, not on a tape.

[28] *Id.* at 380 (emphasis added).

[29] *Id.* (discussing Matsushita Elec. Indus. v. Zenith Radio, 475 U.S. 574, 586–87 (1986); Anderson v. Liberty Lobby, 477 U.S. 242, 247–48 (1986)).

[30] *See* FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

[31] *See* Ricci v. DeStefano, 557 U.S. 557, 586 (2009) (quoting Scott v. Harris, 550 U.S. 372, 380 (2007)).

The Court conflates two concepts when it rules against Victor Harris: drawing all reasonable inferences in favor of the non-moving party, and adopting the plaintiff's version of the facts. Indeed, the opinion makes this conflation explicit. After explaining that ordinarily "courts are required to view the facts and draw reasonable inferences 'in the light most favorable to the party opposing' " summary judgment, the Court follows by observing that "[i]n qualified immunity cases, this usually means adopting (as the Court of Appeals did here) the plaintiff's version of the facts."[32] The Court then goes on to conduct its analysis concerning the presumption in favor of the non-moving party as a contest between two competing stories: the plaintiff's "version of the facts" and the events it believes are depicted in the video.[33]

As a descriptive matter, it may be true that lower courts often adopt "the plaintiff's version of the facts"—the single narrative urged by a plaintiff in response to a summary judgment motion—when ruling on defensive requests for summary judgment in qualified immunity cases. As an analytical matter, however, the concepts are distinct. A court can conclude that the version of the facts urged most strongly by the plaintiff is not supported by competent evidence in the discovery record—assuming that the plaintiff indeed urges a single version of the facts in responding to a defensive motion—but nonetheless conclude that a jury could still draw reasonable inferences that would lead to a finding of liability. Indeed, the text of Rule 56 specifies that a court is empowered to conduct an independent review of the discovery record when making such a judgment.[34] Not every case will require an examination of record materials that were not cited in the briefs (as the text also makes clear), but Rule 56 expressly empowers a judge to consider the full range of reasonable inferences that a jury could draw from the record, and a proper application of the summary judgment standard sometimes requires a district court to do so.

Consider the facts of *Scott v. Harris* itself. The "plaintiff's version of the facts" that was accepted by the lower federal courts in conjunction with the summary judgment motion is summarized in the decision of the Eleventh Circuit.

> [T]aking the facts from the non-movant's viewpoint, [respondent] remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. Nor was he a

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[32] *Scott*, 550 U.S. at 378 (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Saucier v. Katz, 533 U.S. 194, 201 (2001)).

[33] *Id.* at 378–80.

[34] Rule 56(c)(3), entitled "*Materials Not Cited*," provides: "The court need consider only the cited materials, but it may consider other materials in the record." FED. R. CIV. P. 56(c)(3). This provision was added in the 2010 amendments to Rule 56. The advisory committee note reads, "Subdivision (c)(3) reflects judicial opinions and local rules provisions stating that the court may decide a motion for summary judgment without undertaking an independent search of the record. Nonetheless, the rule also recognizes that a court may consider record materials not called to its attention by the parties." FED. R. CIV. P. 56 advisory committee's note (2010 amendment).

> threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed [respondent], the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.[35]

The "plaintiff's version of events" here consists of a catalog of the specific details of the chase. The Court takes issue with this account, describing instead a different set of details that it finds "closely resembles a Hollywood-style car chase of the most frightening sort."[36]In rejecting the plaintiff's "version of events," the majority concludes that the lower federal courts improperly narrowed the focus of their analysis to the details that Harris emphasized without also considering other events that were revealed on the videotape, where one sees Harris's car "swerve around more than a dozen other cars, cross the double-yellow line, . . . force cars traveling in both directions to their respective shoulders to avoid being hit[,] . . . run multiple red lights[,] and travel for considerable periods of time in the occasional center left-turn-only lane."[37] Insofar as the "plaintiff's version of events" sought to eliminate those details from all consideration, the Court concludes, that version of events must be rejected.

Perhaps that is correct. But even placing the details emphasized by the Court back into the mix, significant factual questions remain. How much space was there on either side of the highway, and were pedestrians ever in any danger? When Victor Harris "force[d] cars traveling in both directions to their respective shoulders," was he menacing those cars off the road, or did they pull off preemptively when they saw the flashing lights of the police? When Harris ran red lights, were there cars approaching from incoming streets, or did he have a clear field of vision at those intersections? And what of Officer Scott's role in the decision to use deadly force to stop Victor Harris? Were his motivations clear? Officer Scott testified that Harris ran into his car during the portion of the chase in which police almost trapped Harris in a parking lot, a fact that the majority treated as uncontested and emphasized in making the case that Harris posed a danger.[38] But Harris testified in his deposition that it was Scott who caused the contact between the cars, not the other way around, and the video sheds no light on the question.[39] Moments after Harris exited the parking lot, Officer Scott asked to take the lead in the chase so that he could be the one to execute the deadly maneuver. He can be heard on the video saying, "Alright,

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[35] *Scott*, 550 U.S. at 379 (alteration in original) (quoting Harris v. Coweta Cnty., 433 F.3d 807, 815–16 (11th Cir. 2005)).

[36] *Id.* at 380.

[37] *Id.* at 379 (footnote omitted).

[38] *Id.* at 375 ("Respondent evaded the trap by making a sharp turn, colliding with Scott's police car, exiting the parking lot, and speeding off once again down a two-lane highway.").

[39] *See* Harris v. Coweta Cnty., No. CIVA 3:01CV148 WBH, 2003 WL 25419527, at *1 & n.2 (describing Harris's account of the contact that occurred between his car and Officer Scott's car in the parking lot), *aff'd in part and rev'd in part*, 433 F.3d 807 (11th Cir. 2005), *rev'd sub nom.* Scott v. Harris, 550 U.S. 372 (2007).

let me have him, [car] 78, my car's already tore up"[40]—a reference to the minor damage to his patrol car from the encounter in the parking lot. Could a rational jury have found that Officer Scott was acting from a desire for revenge, or out of anger, or from some other unprofessional motive when he jumped ahead to ram Harris's car, calling into question the reasonableness of his actions?

These and many other details of the chase are subject to debate even after a viewing of the video. In some cases, the answers are not clearly depicted, requiring inference and interpretation. As to those matters, the proposition that the non-moving party is entitled to every reasonable inference should still be fully operative, even if "the plaintiff's version of events"—the particular set of facts that Victor Harris emphasized—does not control.

Nonetheless, the Court concludes that the presumption in favor of the non-moving party is suspended altogether as soon as the "plaintiff's version of events" has been rejected. Here are the first and last sentences of that key paragraph:

> At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts. . . . 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.[41]

Rejecting the plaintiff's version of the facts, in this formulation, is equivalent to suspending the presumption in favor of the non-moving party altogether.

This analytical maneuver in *Scott* recalls a similar gesture in a passage of the majority opinion in *Bell Atlantic v. Twombly*, the ruling from that same Term in which the Court upended pleading standards under Federal Rule of Civil Procedure 8(a).[42] *Twombly* turned on the plausibility of the plaintiff's allegation that parallel anticompetitive behavior by regional telecommunications companies was the result of a conspiracy rather than the innocent actions of corporate executives who came to similar but independent conclusions about their best course of action. The plaintiffs had included detailed allegations of the defendants' parallel conduct in their complaint, and while the complaint also contained stand-alone allegations of a conspiracy, it tied the allegation of conspiracy directly to the allegations of parallel conduct in one passage.[43] The

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[40] In the composite version of the video, *Scott v. Harris Pursuit Video*, *supra* note 2, this exchange begins at time index 4:19.

[41] *Scott*, 550 U.S. at 380.

[42] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[43] *See* Consolidated Amended Class Action Complaint at 19, Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02 Civ. 10220), 2003 WL 25629874 ("In the absence of any meaningful competition between the [Regional Bell Operating Companies] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from [Competitive Local Exchange Carriers] within their respective . . . markets . . . Plaintiffs allege upon information and belief that Defendants have entered into a contract, combination or conspiracy . . . .").

sufficiency of parallel conduct as evidence of a conspiracy is one of the main areas of focus throughout the opinion, with the majority characterizing its ruling on the pleadings question as an "antecedent" to its earlier rulings on evidence of parallel conduct at later phases of the litigation process.[44] After identifying the decision of the plaintiffs to "rest their [antitrust] claim on descriptions of parallel conduct and not on any independent allegation of actual agreement" as the principal infirmity of the complaint,[45] the Court drops a footnote and says: "If the complaint had not explained that the claim of agreement rested on the parallel conduct described, we doubt that the complaint's reference to an agreement among the [Incumbent Local Exchange Carriers] would have given the notice required by Rule 8."[46]

Notice the attitude toward potential competing explanations that this passage reveals. The Court does not say, "Had the complaint contained only a bare allegation of conspiracy and not even included the allegations of parallel conduct as context, then *a fortiori* it would have failed to satisfy Rule 8." To the contrary, the Court indicates that excluding the allegations of parallel conduct would have eliminated a flaw in the complaint and strengthened the plaintiff's position, leading the Court to say that they still "doubt" that the complaint would have passed muster even under those more favorable circumstances. In the Court's view, the allegations of parallel conduct made the plaintiffs' antitrust complaint *weaker* than if it had only contained the stand-alone allegation of conspiracy.

How can this be so? Even *Twombly*'s revisionist account of *Conley v. Gibson*[47] reaffirms that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."[48] If the plaintiffs can prove a set of facts consistent with an allegation of conspiracy, what difference does it make if they also include allegations of parallel conduct in their complaint that wind up being extraneous to their claim? The allegations of parallel conduct in the *Twombly* complaint were the pleading equivalent of the "plaintiff's version of the facts" that the majority in *Scott* seized upon when describing how qualified immunity claims should "usually" be administered at summary judgment[49]—a treatment of a dispositive motion standard that improperly constrains the plaintiff's access to relief.

At the pleadings stage, plaintiffs must sometimes engage in educated speculation about the details of a defendant's behavior. So long as the complaint is sufficient on its face, the *Conley* standard has always protected the plaintiff's

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[44] *Twombly*, 550 U.S. at 554–55.
[45] *Id.* at 564.
[46] *Id.* at 565 n.10.
[47] Conley v. Gibson, 355 U.S. 41 (1957).
[48] *Twombly*, 550 U.S. at 563 ("*Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.").
[49] Scott v. Harris, 550 U.S. 372, 378 (2007).

ability to get some of those details wrong at the outset—and, if necessary, to amend the complaint following development of the facts in order to bring it into conformity with the proof that actually emerges. In contrast, *Twombly* essentially held that the plaintiffs had pled themselves out of court by reinforcing their stand-alone allegations of conspiracy with details that the majority believed to be unhelpful to them—a proposition that the Court made explicit when it wrote in a succeeding footnote that "[t]he dissent's quotations from the complaint leave the impression that plaintiffs directly allege illegal agreement; in fact, they proceed exclusively via allegations of parallel conduct."[50] This reformulation of the *Conley* standard introduces a new trap for unwary plaintiffs at the pleadings stage and is unfaithful to Rule 8's direction that pleadings be construed "so as to do justice."[51]

Just so, at the close of discovery, a claimant sometimes confronts a record that contains multiple possibilities and admits of multiple distinct inferences that could support a claim for relief. If she proceeds to trial, the claimant will have to make strategic choices about which theory of the case to present to a jury. At summary judgment, however, the claimant is entitled to every reasonable inference that the discovery record can support, and that includes the possibility of multiple versions of events, any one of which would present a triable case. When *Scott v. Harris* pushes the plaintiff to adopt one "version of events" at summary judgment and then ties its rejection of the deference normally owed to the non-moving party to a finding that this one version of events is "blatantly contradicted" by the record, it deprives the non-moving party of the full measure of the deference it is due under Rule 56.

Academic commentators appear not to have recognized the significance of this language in *Scott*,[52] but lower federal courts have begun to grapple with it.

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[50] *Twombly*, 550 U.S. at 564 n.11. The Court's statement here is inaccurate, or at least misleading. As detailed above, the complaint also includes stand-alone allegations of conspiracy—the majority simply discounts those as "conclusory" in nature. *See id*. at 556–557. The majority is responding here to the opening passages of Justice Stevens's dissent, where he frames a critique that evinces a similar instinct.

> In the first paragraph of its 23-page opinion the Court states that the question to be decided is whether allegations that "major telecommunications providers engaged in certain parallel conduct unfavorable to competition" suffice to state a violation of § 1 of the Sherman Act. The answer to that question has been settled for more than 50 years. If that were indeed the issue, a summary reversal . . . would adequately resolve this case. As [we have] held, parallel conduct is circumstantial evidence admissible on the issue of conspiracy, but it is not itself illegal.
>
> Thus, this is a case in which there is no dispute about the substantive law. If the defendants acted independently, their conduct was perfectly lawful. If, however, that conduct is the product of a horizontal agreement among potential competitors, it was unlawful. The plaintiffs have alleged such an agreement and, because the complaint was dismissed in advance of answer, the allegation has not even been denied. Why, then, does the case not proceed?

*Twombly*, 550 U.S. at 570–71 (Stevens, J., dissenting) (citations omitted).

[51] FED. R. CIV. PROC. 8(e).

[52] I am aware of only one commentary on *Scott v. Harris* that mentions this language. It is a student comment, and the reference to the passage occurs only in passing and appears to miss its significance. *See* Forrest Plesko, Comment, *(Im)Balance and (Un)Reasonableness:*

Some lower federal courts, taking direction from *Scott*, have introduced a new component to their summary judgment analysis: a "blatantly contradicts" test that operates prior to, rather than as an interpretation of, the deferential presumption that the non-moving party is supposed to receive. In *Obester v. Lucas Associates*, for example, a district court in Georgia described the standard to be applied at summary judgment in the following terms:

> "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." If the record does not blatantly contradict the nonmovant's version of events, the court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented."[53]

If the court concludes that the record "blatantly contradicts" the plaintiff's story, on this formulation, then the analysis is over: there is no further deferential analysis of the discovery record to determine whether there nonetheless exists a genuine dispute of fact that does not conform precisely to the narrative that the plaintiff has advanced.

Another district court in Nebraska has interpreted the "blatantly contradicts" language to hold that "when [the] record, viewed in its entirety, clearly contradicts one non-moving party's account of disputed events or facts, [the] court need not weigh [the] facts in [that] party's favor at summary judgment."[54] In that same paragraph, the court makes explicit the transformation of the standard, quoting *Scott*'s language about the non-moving party enjoying deference "only if there is a genuine dispute as to [the] facts" and then writing: "*Otherwise*, where the Court finds that 'the record taken as a whole could not lead a rational trier of fact to find for the non-moving party'—where there is no 'genuine issue for trial'—summary judgment is appropriate."[55] A district court in New Mexico, following direction from the Tenth Circuit, qualified its recitation of the established standard of deference to non-moving parties at summary judgment in a similar fashion, saying:

> There are, *however*, limited circumstances in which the Court may disregard a party's version of the facts. This doctrine developed most robustly in the qualified-immunity arena. In *Scott v. Harris*, the Supreme Court concluded that summary judgment was appropriate where video evidence "quite clearly contradicted" the plaintiff's version of the facts.[56]

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*High-Speed Police Pursuits, the Fourth Amendment, and* Scott v. Harris, 85 DENV. U. L. REV. 463, 473 (2007).

[53] Obester v. Lucas Assocs., Inc., No. 1:08-CV-03491-MHS-AJB, 2010 WL 8292401, at *9 (N.D. Ga. Aug. 2, 2010) (citation omitted) (quoting *Scott*, 550 U.S. at 380).

[54] Marksmeier v. Davie, No. 8:09CV30, 2009 WL 2396845, at *4 (D. Neb. July 30, 2009) (providing a parenthetical description of *Scott*, 550 U.S. 372).

[55] *Id.* (emphasis added) (quoting Matsushita Elec. Indus. v. Zenith Radio, 475 U.S. 574, 587 (1986)).

[56] Herrera v. Santa Fe Pub. Sch., 41 F. Supp. 3d 1118, 1246 (D.N.M. 2014) (emphasis added) (citation omitted).

And a district court in Tennessee, finding that an inmate was not entitled to a trial on his claim that prison guards had set him up to be assaulted by fellow inmates, said this about the standard that led it to disregard the plaintiff's affidavit: "Ultimately, if no genuine issue of material fact is raised by the nonmoving party, the Court *must not* view the facts in the light most favorable to the nonmoving party, and summary judgment must be granted."[57] Applying this newfound freedom in a particularly explicit fashion, the court reviewed the record evidence that contradicted the inmate's affidavit and concluded: "As such, when no genuine issue of fact is presented, the Court *may not* view the evidence in the light most favorable to the nonmoving party."[58]

*Otherwise*. *However*. *May not*. *Must not*. These are the words of qualification that indicate that a standard is eroding, and the erosion that has followed the Court's decision in *Scott* has been swift. This is not to impugn the outcomes in these particular cases. For example, in *Maclin v. Tipton County*, the Tennessee case involving an alleged conspiracy by prison officials, the analysis turned on the date when the events in question may have occurred and whether the claim had satisfied the statute of limitations. The inmate's minimal affidavit was the sole evidence offered to refute extensive, objectively verifiable proof that the events took place at an earlier time than he claimed, and indeed that the inmate was no longer incarcerated on the date that would have permitted his claim to be timely.[59] Courts have long grappled with the question of when it is appropriate to discredit a claimant's stand-alone affidavit during summary judgment in the face of significant contradictory evidence, and *Maclin* was certainly a strong candidate. But a correct result in a particular case does not cure the improper erosion of an evidentiary standard. The Tennessee district court discounted the inmate's affidavit without viewing the evidence in the light most favorable to him. It should have reached that result only after drawing all reasonable inferences in his favor—reasonable inferences, not fanciful inferences, but inferences to which a non-movant is always entitled and that claimants are increasingly being denied following *Scott*. In the delicate business of scrutinizing a record and deciding when sympathetic treatment of a plaintiff by a jury would be unreasonable, the formulation of the standard that guides the judge's analysis is a high stakes matter.

Since handing down its decision in *Scott*, the Court has not disavowed this erosion of the summary judgment standard or admitted error in its formulation. But neither has it squarely embraced the revolution that its new account of the standard seems to represent. Instead, it has offered an ambiguous gesture of mitigation. During the 2013–2014 Term, the Court heard two more police excessive force cases. In one, *Tolan v. Cotton*,[60] it granted certiorari solely to cor-

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[57] Maclin v. Tipton Cnty., No. 2:10-cv-02468-cgc, 2011 WL 130161, at *5 (W.D. Tenn. Jan. 14, 2011) (emphasis added).

[58] *Id.* (emphasis added).

[59] *Id.* at *1–2.

[60] Tolan v. Cotton, 134 S. Ct. 1861 (2014) (per curiam).

rect the error of the Fifth Circuit in failing to accord proper deference to the non-moving party—an action that Justices Alito and Scalia protested.[61] The case involved the shooting of an unarmed man, Robert Tolan, whom police had found standing on the porch of his parents' home. The claim of excessive force turned on conflicting testimony from Tolan, his family, and the officer who shot him concerning the manner in which the police treated Tolan's mother during the arrest and the manner in which Tolan responded.[62] In granting summary judgment to the officer on qualified immunity grounds, the Court explained, the lower courts had "credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion"—an action that the Court called "a clear misapprehension of summary judgment standards in light of our precedents."[63] It took the case and reversed summarily in order to correct that clear misapprehension.[64] (The second case, *Plumhoff v. Rickard*, also reiterated the traditional formulation of the summary judgment standard, but it reversed the rulings of the lower federal courts and relied explicitly upon *Scott* in doing so. That case is discussed in the next section.)

Did the Court summarily reverse the Fifth Circuit in *Tolan* in order to send a message about the continuing importance of deferring to non-moving parties in the wake of *Scott*? The separate opinion of Justices Alito and Scalia does suggest that there was some message-sending agenda behind the granting of the petition. Will that mitigating gesture blunt *Scott*'s impact on summary judgment practice? I am skeptical. The ruling of the Fifth Circuit in *Tolan* was so obviously incorrect that the rebuke of a summary reversal does little to clarify the proper boundaries of the standard. The Court made a similar gesture in the pleadings context with *Erickson v. Pardus*, just two weeks after its ruling in *Bell Atlantic v. Twombly*, granting the petition over Justice Scalia's dissent and summarily reversing the Tenth Circuit's dismissal of a prisoner's complaint because the ruling below had "depart[ed] in so stark a manner from the pleading standard mandated by the Federal Rules."[65] Commentators pointed to *Erickson* as a reason to hope that the Court would retreat from the broad implications of *Twombly*, but those hopes quickly proved unfounded.[66] At best, *Erickson* stands as a reminder that even a radical shift in the pleading standard leaves a line that cannot be crossed. *Tolan* may amount to little more for summary judgment.

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[61] *See id.* at 1868–69 (Alito, J., concurring) (criticizing the Court's decision to grant review in the case, though agreeing with its disposition).

[62] *Id.* at 1863–64 (majority opinion).

[63] *Id.* at 1867–68.

[64] *See id.* at 1868 (identifying this departure from precedents as the reason for intervening in the case).

[65] Erickson v. Pardus, 551 U.S. 89, 90 (2007) (per curiam).

[66] *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009) (expanding the scope of the new plausibility standard that *Twombly* introduced into federal pleadings).

## II. *SCOTT V. HARRIS* AND THE COLLATERAL ORDER DOCTRINE

The majority's treatment of appellate jurisdiction in *Scott* is less explicit than its frontal assault on the presumption in favor of the non-moving party, but the shift in paradigm that the opinion may herald is no less dramatic. And, importantly, the two issues are analytically linked. The majority's reframing of the summary judgment standard in *Scott* is the device by which it silently justifies the exercise of appellate jurisdiction, despite the barriers the Court had erected in earlier cases. The result is a reformulation of the collateral order doctrine that may fatally undermine the restraints that have previously prevented government defendants who assert qualified immunity from pursuing immediate appeals where they dispute the inferences that can reasonably be drawn from a contested factual record.

The final judgment rule ordinarily prohibits a party from taking an immediate appeal from the denial of a dispositive motion.[67] In *Mitchell v. Forsyth*, however, the Court carved out a limited exception for qualified immunity cases, permitting immediate appeals from a denial of a defendant's motion to dismiss or motion for summary judgment through the use of the collateral order doctrine.[68] The case involved claims against John Mitchell, Attorney General of the United States under President Richard Nixon, brought by a plaintiff who learned that Mitchell had authorized illegal warrantless wiretaps against him. Mitchell attempted to assert an absolute immunity defense and, in the alternative, claimed qualified immunity. On cross motions for summary judgment, the district court found that Mitchell was only entitled to claim qualified immunity, which the lower court measured against his actual knowledge and good faith, and it denied both motions for summary judgment, finding that genuine issues of fact remained as to Mitchell's state of mind.[69] On appeal, the Court affirmed the rejection of absolute immunity but clarified that the standard for qualified immunity poses a question of objective reasonableness rather than subjective good faith and found that Mitchell was entitled to qualified immunity under that standard.[70]

*Mitchell* presented a record in which the factual issues that the Court determined to be relevant to the immunity question—the circumstances surrounding the Attorney General's authorization of the warrantless wiretap, as distinct from his state of mind when doing so—were acknowledged by all parties to be undisputed.[71] In such a case, the Court held, an immediate appeal from "a dis-

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[67] *See* 28 U.S.C. § 1291 (2012) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .").

[68] Mitchell v. Forsyth, 472 U.S. 511 (1985).

[69] *Id.* at 514–16.

[70] *Id.* at 530–36.

[71] The majority in *Mitchell* was a bit opaque about this feature of the case, but it is clear when viewed in the full context and subsequent treatment of the opinion. After discussing the various circumstances in which a district court might deny summary judgment, some of

trict court's denial of a claim of qualified immunity [is warranted] to the extent that it turns on an issue of law"[72]—by which the Court meant an abstract issue of legal doctrine measured against an agreed upon set of undisputed facts.[73]

Ten years later, in *Johnson v. Jones*, the Court limited the potential scope of the *Mitchell* doctrine. The plaintiff's claim in *Johnson* centered on charges that five police officers had used excessive force while arresting him and had beaten him while he was in custody at the station. If Johnson's allegations were true, then there was no question of qualified immunity: the prohibition against gratuitous physical torture is well established. The dispute in the case concerned the events surrounding the plaintiff's arrest. Three of the officers admitted that they were present when Johnson was arrested and were in the vicinity of the room where he claimed he was beaten, but they denied assaulting him. Johnson pointed to his injuries and relied upon circumstantial evidence to assert that all five officers had either beaten him or " 'stood by and allowed others to beat' " him, either of which he claimed would violate clearly established law.[74] The district court denied the officers' motion for summary judgment, and the officers attempted an immediate appeal. The Court took the case to consider whether the collateral order doctrine was available when a district court denied a motion for summary judgment on grounds of "evidence insufficiency."[75] It concluded the answer was no.

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which involving a dispute on the underlying facts, the Court settled upon the following description of the scenario for which it was authorizing an immediate appeal:

> An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

*Id.* at 528. Justice Brennan, writing in dissent and apparently seeking to map out the limits of the Court's holding, emphasized repeatedly that the Court's ruling spoke only to a case in which the material facts were undisputed. *See, e.g.*, *id.* at 556 (Brennan, J., dissenting in part) ("Even if I agreed with the Court's conclusion that denials of qualified immunity that rest on undisputed facts were immediately appealable and further agreed with its conclusion that Mitchell was entitled to qualified immunity . . . ."). Finally, in its subsequent and unanimous ruling in Johnson v. Jones, 515 U.S. 304 (1995), the Court acknowledged that there was "some language in the opinion that sounds as if it might imply the contrary," but reaffirmed that *Mitchell* dealt only with a case in which an appellate court " 'need not consider the correctness of the plaintiff's version of the facts.' " *Id.* at 313–14 (quoting *Mitchell*, 472 U.S. at 528); *see also id.* at 311 ("[T]he issue appealed [in *Mitchell*] concerned, not which facts the parties might be able to prove, but, rather, whether or not certain given facts showed a violation of 'clearly established' law.").

[72] *Mitchell*, 472 U.S. at 530.

[73] *Id.* at 528 (authorizing immediate appeal in cases where "the defendant's version of the facts" is accepted and the district court nonetheless finds that "the defendant's conduct violated clearly established law").

[74] *Johnson*, 515 U.S. at 307–08 (quoting Application to Petition for Certiorari at 7a).

[75] *Id.* at 308, 313.

The collateral order doctrine emphasizes "separability," requiring that the subject of an immediate appeal "involve[] issues significantly different from those that underlie the plaintiff's basic case."[76] The appellants in *Mitchell* satisfied that requirement by defining the issue on appeal as whether an agreed-upon set of facts violated legal doctrine that was clearly established at the time of the relevant events. The issue for decision was an assessment of the clarity of constitutional doctrine at the time of the events. That question, though inevitably overlapping with the underlying merits of the dispute, was analytically distinct and, more important, would not require the appellate courts to repeat their efforts if they affirmed the denial of summary judgment on the merits and then heard a subsequent appeal on the underlying claim after entry of final judgment following remand.

This separability is not present when the disagreement of the parties centers on the sufficiency of the evidence supporting the plaintiff's allegations. Whether a discovery record raises a genuine dispute of material fact is still a question of law, of course.[77] But the overlap of that determination with the underlying merits of the dispute is significant and unavoidable. The *Johnson* Court explained:

> Where . . . a defendant simply wants to appeal a district court's determination that the evidence is sufficient to permit a particular finding of fact after trial, it will often prove difficult to find any such "separate" question—one that is significantly different from the fact-related legal issues that likely underlie the plaintiff's claim on the merits.[78]

When combined with the lack of any "comparative expertise" on the part of appellate judges to assess a discovery record and the potential for the inquiry to "seem nebulous" in complex cases,[79] the justification for an immediate appeal in this large category of qualified immunity cases becomes significantly weaker. Because appellate courts must "decide appealability for categories of orders rather than individual orders" and not "in each individual case engage in ad hoc balancing" on such questions, the Court found, interlocutory appeals on qualified immunity must be " 'limited to cases presenting neat abstract issues of law.' "[80] The Court concluded its analysis with a seemingly unequivocal statement of its unanimous holding: "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial."[81]

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[76] *Id.* at 313–14.

[77] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (defining the genuine issue of material fact standard).

[78] *Johnson*, 515 U.S. at 314.

[79] *Id.* at 316.

[80] *Id.* at 315, 317 (quoting 15A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3914.10, at 664).

[81] *Id.* at 319–20.

*Johnson* created an obvious problem for the Court in *Scott v. Harris*. The appeal in *Scott* did not come to the Court on a stipulated set of facts or as a pure question of law measured against an assumed record. *Scott* involved a dispute over the record itself. The disagreement between the parties centered on the magnitude of the danger that Harris's flight posed to the public, the risk of harm to other vehicles and pedestrians, and the conditions surrounding the decision by the officers to employ deadly force to stop his car—"the existence, or nonexistence, of a triable issue of fact," which the *Johnson* Court identified as "the kind of issue . . . [as to which] appellate judges enjoy no comparative expertise."[82] Nonetheless, the Court did not explain how the interlocutory appeal in *Scott* was consistent with *Johnson*. Indeed, it did not even cite *Johnson*, providing only a generic reference to *Mitchell v. Forsyth* in a footnote as the entirety of its appellate jurisdiction analysis.[83] The omission was striking.

In *Behrens v. Pelletier*,[84] another qualified immunity case decided the Term following *Johnson*, the Court further refined its collateral order doctrine in terms that further illustrate *Scott*'s destabilizing potential. *Behrens* involved a *Bivens* claim brought by a financial manager, Pelletier, against Behrens, a supervisory agent with the Federal Home Loan Bank Board. Behrens was responsible for terminating Pelletier from a management position in a failing institution, and Pelletier alleged various constitutional violations. The issue in the case was whether an official claiming qualified immunity could pursue two successive interlocutory appeals, one from an order denying a motion to dismiss and another from a later order denying a motion for summary judgment. The Ninth Circuit had held that only one such appeal was available under *Mitchell* and *Johnson*, but the Supreme Court reversed, concluding that both rulings were appealable collateral orders and that the imperative to spare government officials from unwarranted discovery as well as unwarranted trial justified multiple successive appeals.[85]

One of the concerns that had led the court of appeals to prohibit this aggressive use of the collateral order doctrine was the "concern that a second appeal would tend to have the illegitimate purpose of delaying the proceedings."[86] The Court acknowledged the potential for abuse and it reiterated the " 'powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims,' " procedures that the courts below had followed.[87] But the Court then dismissed the significance of this factor to the jurisdictional inquiry, reiterating that questions of appellate jurisdiction must be answered in strictly categorical terms, even when individual cases that appear frivolous might present attractive candidates for *ad hoc* exceptions.

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[82] *Id.* at 316.
[83] Scott v. Harris, 550 U.S. 372, 376 n.2 (2007).
[84] Behrens v. Pelletier, 516 U.S. 299 (1996).
[85] *Id.* at 301–05.
[86] *Id.* at 310.
[87] *Id.* (quoting Abney v. United States, 431 U.S. 651, 662 (1977)).

> In any event, the question before us here—whether there is jurisdiction over the appeal, as opposed to whether the appeal is frivolous—must be determined by focusing upon the category of order appealed from, rather than upon the strength of the grounds for reversing the order. "Appeal rights cannot depend on the facts of a particular case." As we have said, an order denying qualified immunity, to the extent it turns on an "issue of law," is immediately appealable.[88]

Consider the implications of this mode of analysis for the Court's holding in *Scott v. Harris*. Even if the majority believed that Victor Harris's factual contentions regarding danger to other drivers, risk to pedestrians and the like were frivolous, *Behrens* tells us that "the question before [the Court]—whether there is jurisdiction over the appeal, as opposed to whether the appeal is frivolous—must be determined by focusing upon the category of order appealed from, rather than upon the strength of the grounds for reversing the order."[89] Under *Behrens*, an appellate court may only hear an appeal from a denial of summary judgment if "the category of order appealed from" justifies the exercise of jurisdiction. *Scott* justified its refusal to grant the plaintiff the benefit of all reasonable inferences by describing the plaintiff's version of the facts as "blatantly contradicted" by the record. In such a case, the Court held, no genuine question exists that requires deference to the non-moving party. On this view, "blatantly contradicts" cases receive qualitatively different treatment under the core summary judgment standard—they are a different category of case.

What appears to follow is that a denial of summary judgment that "blatantly contradicts" the record in a qualified immunity case is a distinct category of order for purposes of appellate jurisdiction, as well. It is different from an ordinary dispute over contested facts, and different even from a dispute over contested facts in which the position of the plaintiff opposing the motion is frivolous. No other account of the appeal in *Scott* can square the exercise of jurisdiction in that case with the Court's strong and unqualified statements in *Behrens*. Several circuit courts have already adopted such a reading, treating *Scott* as having silently crafted a categorical "exception" to the *Johnson* doctrine for "blatantly contradicted" facts.[90]

The Court itself has not yet acknowledged the problem it has created, nor has it provided any substantial guidance. It certainly has not instructed lower federal courts how they should distinguish between a "frivolous" position on the state of the factual record from a position that "blatantly contradicts" that record, as *Behrens* and *Scott* now appear to require. Rather, the Court's only post-*Scott* statement on appellate jurisdiction following a denial of summary judgment reaffirms the result in *Scott* while offering no analytical direction for the new paradigm that it appears to have embraced.

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[88] *Id.* at 311 (citations omitted); *see also* Johnson v. Jones, 515 U.S. 304, 315 (1995) ("We of course decide appealability for categories of orders rather than individual orders.").

[89] *Behrens*, 516 U.S. at 311.

[90] *See, e.g.*, Moldowan v. City of Warren, 578 F.3d 351, 370–71 (6th Cir. 2009); Blaylock v. City of Phila., 504 F.3d 405, 414 (3d Cir. 2007).

In *Plumhoff v. Rickard*, the Court heard an appeal from a dispute involving a fatal shooting in a high-speed police chase.[91] The driver, Rickard, was killed along with his passenger when police shot into the car fifteen times as Rickard attempted to flee after having been brought to a stop and surrounded. Officers shot three times into the car while Rickard was trapped, then a dozen more times after he pulled the car around and attempted to escape once again. The driver's heir brought suit, claiming excessive force—in particular, that the twelve shots that the police fired as the car was driving away were unjustified—and the district court denied the officers' motion for summary judgment, finding that the evidence was inconclusive about the risk that the driver posed to the officers and to the public.[92] The Sixth Circuit heard an immediate appeal from the denial of the officers' motion. Before turning to the Supreme Court's ultimate treatment of the issue, it is worth examining how events unfolded in the court of appeals, for that court's disposition of the appeal exemplifies the dilemma confronting lower federal courts following *Scott*.

In an earlier decision, the Sixth Circuit had found that *Scott* created an implicit category of exceptions to the *Johnson* doctrine that permits an immediate appeal on the grounds that the discovery record "blatantly contradicts" the ruling of the district court.[93] The officers in *Plumhoff* invoked that doctrine as the basis for their interlocutory appeal. A motions panel of the Sixth Circuit initially dismissed the appeal for lack of jurisdiction under *Johnson*, but then vacated its ruling and transferred the entire case to a merits panel. The merits panel concluded that the record evidence, which included partial video footage of the shooting,[94] supported the district court's conclusion that reasonable jurors could disagree about the level of danger that Rickard posed and hence the reasonableness of the officers' use of multiple gunshots to end the incident. *A fortiori*, the court found that the district court's ruling did not "blatantly contradict" the discovery record.[95] It then confronted the question of what disposition was appropriate in light of that conclusion, since its conclusion that that the district court's ruling did not "blatantly contradict" the record would seem to indicate that it lacked jurisdiction to hear the appeal at all.

> Usually, when we review an appeal from a denial of qualified immunity, we dismiss the appeal for lack of jurisdiction if the immunity was denied on the basis of genuine factual disputes. After *Scott*, however, it would appear that an in-

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[91] Plumhoff v. Rickard, 134 S. Ct. 2012 (2014).

[92] *Id.* at 2017–18.

[93] *See Moldowan*, 578 F.3d at 370–71 (setting forth a "blatantly and demonstrably false" exception to the *Johnson* doctrine).

[94] *Plumhoff*, 134 S. Ct. at 2021. Portions of the video are incorporated into a CNN news report about the case. *See Police Appeal Suit for Deadly Force During Chase!*, YOUTUBE (Mar. 3, 2014), http://www.youtube.com/watch?v=JTfGkVQz208.

[95] *See* Estate of Allen v. City of West Memphis, 509 Fed. Appx. 388, 389–91 (6th Cir. 2012), (describing the litigation position of the officers and the sequence of events before the Sixth Circuit Court of Appeals), *rev'd sub nom.* Plumhoff v. Rickard, 134 S. Ct. 2012 (2014).

> terlocutory appeal of a denial of qualified immunity which makes a good faith *Scott* claim requires us to review the record. After this review if we reach the same conclusion as did the district judge, as we do here, it would seem that what we are doing is affirming that judgment. Whether we call it a dismissal for lack of jurisdiction or an affirmance of the denial of qualified immunity, the result is the same.[96]

The Sixth Circuit's attempt to navigate this doctrinal conundrum fails to grasp the extent of the problem. Once a case is before a merits panel on appeal in a given case, it may be correct that dismissing for lack of jurisdiction is functionally indistinguishable from affirming the denial of qualified immunity. Both dispositions result in a remand to the district court for trial. But what are the systemic implications of this new category of collateral order appeal? Does the interlocutory jurisdiction of a federal appellate court in a qualified immunity case now turn on whether a government official can assert a "good faith" argument that the district court's ruling is not merely incorrect but stands in blatant contradiction of the record, as the Sixth Circuit suggests? What is the objective standard for distinguishing between an "ordinary" case in which an appeals court might disagree with the district court's assessment of the reasonable inferences that the record can support but would have no jurisdiction to review that ruling under *Johnson*, and a *Scott* case in which the defendant can say "in good faith" that the district court was so wrong as to blatantly contradict the record, thereby conferring jurisdiction for an immediate appeal? Since the appellate court's jurisdiction in such a case depends upon the "blatantly contradicts" standard, how should the court go about conducting its review on the merits? If the appeals court concludes that the district court was incorrect in its summary judgment ruling but cannot say that its ruling "blatantly contradicted" the record—assuming for the moment that such a fine distinction is one that appellate courts could actually administer—what is the appropriate disposition? Should the appellate court issue a ruling on the merits even so, reverse the district court, and dismiss the case, thereby giving the defendant the interlocutory relief on a fact-intensive dispute that *Johnson* had previously foreclosed? Or should the appellate court dismiss for lack of jurisdiction and send the case back to the district court for trial, even though the appellate court—having conducted a detailed review of the record—does not believe that any trial should occur, wasting the time and effort that the appellate court will have expended in the thorough review of the record necessitated by the first appeal? In either circumstance, the appellate courts have been forced to assume the institutional costs that *Johnson* insisted upon avoiding. The Court's treatment of the collateral order doctrine in *Scott* does not merely craft a narrow exception to the rule in *Johnson*. In practical terms, it threatens to eviscerate that rule in qualified immunity cases. How are the lower federal courts to avoid the doctrinal collision that these two rulings have provoked?

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[96] *Id.* at 393 (citations omitted).

The Supreme Court provided none of these answers when it heard the appeal in *Plumhoff*, reversing the Sixth Circuit on the merits of its summary judgment ruling (and once again disagreeing sharply with all the lower federal court judges in their assessment of the record evidence in a police car-chase dispute). Its opinion therefore does not address the question of how an appellate court should respond when a defendant improperly invokes this new collateral order doctrine, nor even what standard applies to that threshold determination. The Court's opinion does take up the issue of appellate jurisdiction in an affirmative posture, but its discussion sheds little light. After describing the basics of the collateral order doctrine in qualified immunity cases and summarizing the limits that *Johnson* places on that doctrine, the Court offers these two paragraphs to explain the propriety of appellate jurisdiction in *Plumhoff*.

> The District Court order in this case is nothing like the order in *Johnson*. Petitioners do not claim that other officers were responsible for shooting Rickard; rather, they contend that their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law. Thus, they raise legal issues; these issues are quite different from any purely factual issues that the trial court might confront if the case were tried; deciding legal issues of this sort is a core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an undue burden.
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> The District Court order here is not materially distinguishable from the District Court order in *Scott v. Harris*, and in that case we expressed no doubts about the jurisdiction of the Court of Appeals under [28 U.S.C.] § 1291. Accordingly, here, as in *Scott*, we hold that the Court of Appeals properly exercised jurisdiction, and we therefore turn to the merits.[97]

"Confounding" would be a polite term for this explanation; "nonsense" might be closer to the mark. The first paragraph flatly mischaracterizes the ruling of the district court and the court of appeals, both of which centered on the extent of the danger that Rickard presented to the officers and the public when his car was trapped by police and the circumstances surrounding the decision of the officers to shoot into the car a dozen times when Rickard began to escape. These are questions of fact, and they were actively contested. The case was not presented to the lower courts on the basis of stipulated or agreed upon facts as a pure question of Fourth Amendment law or qualified immunity, as the Court's description suggests. The second paragraph then invokes *Scott*. Never mind whether the order under review in *Plumhoff* was "not materially distinguishable" from the order in *Scott*, as the Court asserts. The citation to *Scott* is analytically empty, for the Court did not provide any analysis of appellate jurisdiction in that case. *Scott* contains only a boilerplate citation to *Mitchell v. Forsyth* and no discussion of *Johnson* at all.[98] On this important and unsettled question of appellate jurisdiction, *Plumhoff* essentially says, "We did this in *Scott*—though we did not tell you why—so now we're going to do it again." This succession of empty rulings calls to mind the trenchant words of Justice Souter dissenting

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[97] *Plumhoff*, 134 S. Ct. at 2019–20.

[98] Scott v. Harris, 550 U.S. 372, 376 n.2 (2007).

in *Alden v. Maine*: "The sequence of the Court's positions prompts a suspicion of error, and skepticism is confirmed by scrutiny of the Court's efforts to justify its holding."[99]

One key element of the Court's deflection of the appellate jurisdiction question in *Plumhoff* warrants particular attention. It appears in the first paragraph of the passage quoted above, where the Court characterizes the disputed issue in the case as purely "legal" in nature and "quite different from any purely factual issues that the trial court might confront if the case were tried."[100] Eschewing the language of "blatant contradiction," the Court instead focuses on the nature of the Fourth Amendment inquiry underlying the plaintiff's claim. That maneuver exemplifies a third major element of the network of doctrines that *Scott* has helped to shift: the pressure that qualified immunity places upon courts to treat factual disputes as questions of law appropriate for summary judicial resolution, particularly in cases that assert claims of improper search or seizure under the Fourth Amendment.

## III. *SCOTT V. HARRIS* AND THE CATEGORIZATION OF THE QUALIFIED IMMUNITY DEFENSE

The shifts that *Scott v. Harris* has set in motion in summary judgment and interlocutory appellate review are striking. But the fault lines that made those shifts possible were already buried within the doctrine of qualified immunity. Two elements of the qualified immunity defense apply pressure for just the kind of change that the Court has initiated in *Scott*.

### *A. The Plaintiff's Version of Events and Clearly Established Law*

The first element of the doctrine relates to the "plaintiff's version of events" approach to framing a summary judgment inquiry, discussed in Part I. Qualified immunity requires a court to determine whether the illegality of an officer's conduct was "clearly established" at the time of the challenged events. *Harlow v. Fitzgerald* makes clear that the standard by which that clarity is measured is an objective one—the state of the law that a reasonable official would have known, as reflected in binding precedent—rather than a subjective standard that measures good faith.[101] This formulation of the standard pushes trial courts to adopt a single version of events against which they can perform the comparison with established case law.

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[99] Alden v. Maine, 527 U.S. 706, 761 (1999) (Souter, J., dissenting).

[100] *Plumhoff*, 134 S. Ct. at 2019.

[101] Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982) (rejecting standard of malice or subjective bad faith and holding that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

If a court is confronted with a discovery record that contains many ambiguities and might allow for multiple variations on the unfolding of the key events in the dispute, how can it decide whether there is sufficient evidence to raise a genuine dispute about whether the actions of the officer violated clearly established law? In such a case, it is not enough to find that there are genuine questions about whether the officer engaged in one of several possible courses of conduct that would violate the Constitution or a federal statute. *Harlow* entitles the officer to escape the burden of trial unless there is competent evidence that he violated specifically identified norms that were clearly established at the time of the incident. It is often difficult for a trial court to perform this analysis against a range of possible interpretations of a discovery record, attempting to measure multiple factual inferences against clearly established law. The task is all the more difficult for an appeals court, further removed from the record and the manner in which it took shape. There is an inherent tension between the range of inferences to which a plaintiff should be entitled at summary judgment and the task of administering a claim of qualified immunity when confronted with an ambiguous record.

A decision from the Sixth Circuit illustrates the interaction of these forces. In *Romo v. Largen*, the court heard an interlocutory appeal from an order denying summary judgment in a suit alleging false arrest by a police officer.[102] The officer, Largen, found the plaintiff, Romo, in his parked truck sleeping off a night of drinking. Largen claimed to have seen Romo's truck passing another vehicle in a dangerous fashion moments before finding him in the parking lot. When confronted, Romo denied the accusation, explaining that he had been resting in his truck all night and did not even have the keys, which his brother had taken before leaving Romo to sleep off the alcohol. Largen also claimed that the hood of Romo's car was warm despite the chilly weather, indicating that the engine had recently been running. He arrested Romo for drunk driving. As he took Romo into custody, he looked for the keys to the truck but could not find them. At the station, he filed a police report in which he claimed that he had executed a U-turn to follow Romo's truck when he saw it perform the dangerous maneuver "and then pulled behind it . . . into the parking lot" where it stopped, never losing sight of the vehicle. Later, however, Officer Largen changed his account, admitting that he did not actually follow the truck but "lost sight of it" between the time of the dangerous maneuver and the time that he came upon Romo in the parking lot. Romo continued to deny all these assertions and insisted that Largen was lying about the hood of his truck being warm. Law enforcement officials eventually conceded that Romo had not been driving his truck at all when Largen arrested him.[103] Romo then sued for arrest without probable cause in violation of the Fourth Amendment.

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[102] Romo v. Largen, 723 F.3d 670, 674 (6th Cir. 2013).
[103] *See id.* at 673.

The district court's review of the testimony and other evidence led it to conclude that there were "at least three basic narratives possible from what's going on here," as the Sixth Circuit summarized when describing the record compiled below:

> The first [possibility] is that Largen fabricated the background story. That he never really did see a truck pass a semi on the right over the railroad track . . . [and] simply happened upon this truck in a parking lot, [saw] somebody sleeping in there, and then . . . made up the whole [rest of the] story. . . .
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> . . . .
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> The second possible narrative is that Largen's story, including the warm hood, is entirely correct. . . .
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> . . . [O]n the third possible narrative . . . Largen made up the part about the warm hood and the warm engine, but then he really did see a Dodge truck pull alongside the semi on the railroad tracks, saw it in his rear-view mirror, but didn't have continuous contact, and the colors of the trucks were different.[104]

The district court found that the record left genuine questions about which of these possible stories might be correct, and it denied summary judgment. On the question of qualified immunity, the district court did not provide a detailed analysis of the various scenarios as measured against controlling case law on probable cause. Rather, the court explained its order from the bench as follows:

> "[O]n the facts of this case there's enough uniqueness, enough in the mix to say that the question of whether a reasonable officer could have mistakenly concluded there was probable cause should go to the jury, and that's really what it looks like to me." . . . "[I]t's not some big glaring thing I can point to, but it's my whole parsing of the record and collection of these significant little things that add up to a fairly big significant hole, I think, in the defense theory on this for summary judgment."[105]

In his appeal, Largen asserted that he was entitled to qualified immunity on either the second or the third scenario, emphasizing that a "reasonable but mistaken belief that Romo was driving the pickup truck [he] observed commit a traffic violation" would entitle him to the protection of qualified immunity. He insisted that the record could not lead a reasonable jury to conclude that he had fabricated his entire story.[106]

The Sixth Circuit declined to undertake a careful parsing of these scenarios, finding that "the district court's treatment of the first scenario is sufficient for affirmance" because the appellate court was "required by the limitations on interlocutory appeals of qualified immunity denials to accept the district court's finding that a genuine dispute of material fact existed as to whether Largen fabricated the whole or a part of his story."[107] But the district court did not find that there was a genuine dispute as to whether Officer Largen made up his story

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[104] *Id.* (internal quotation marks and alterations omitted).

[105] Brief on Appeal of Defendant-Appellant at 7–8, *Romo*, 723 F.3d 670 (No. 12-1870), 2012 WL 4835377, at *8 (quoting District Court Transcript).

[106] *Romo*, 723 F.3d at 674.

[107] *Id.*

altogether. Its ruling was more amorphous. And the difference between a complete fabrication and a partial fabrication could have been dispositive. Finding a man in a parked truck and making up a story to justify a drunk driving arrest is clearly an unconstitutional false arrest under established precedent. Making a reasonable mistake about whether a drunk man sitting in a parked car had just been involved in a dangerous driving incident and then inventing some details in hopes of covering up misplaced bravado at the arrest scene is a closer call and may not have constituted a clearly established case of false arrest, even though the fabrications themselves were clearly improper.

Perhaps there was a genuine dispute as to whether Officer Largen made up his entire story, or at least whether he invented enough of the details to make clear that the arrest was improper under established law. But neither the district court nor the Sixth Circuit parsed the record closely enough to provide confidence in that result. The demands of the qualified immunity doctrine place pressure upon courts to force an ambiguous factual record into neat lines by insisting that the plaintiff select one "version of events" to compare against clearly established law. When courts resist that pressure, as in *Romo*, the results can be analytically unsatisfying. The dilemma is inherent to the structure of qualified immunity doctrine.

The attentive reader will also ask how this case was before the Sixth Circuit on interlocutory appeal in the first place. The appeal involved an ambiguous record as to which the district court had found a basis for genuine dispute concerning the competing stories of the parties.[108] The Sixth Circuit did not find that the record "blatantly contradicted" the district court's conclusion, nor even that the defendant had made a good faith argument to that effect.[109] Why did *Johnson* not foreclose this appeal? Here too the Sixth Circuit relied upon the "plaintiff's version of events," this time to justify its own appellate authority. The court behaved as though Largen had accepted Romo's narrative in its entirety and had argued that qualified immunity should shield him from liability even if he had invented his entire story. Largen argued no such thing. He based his appeal on the assertion that he saw a truck driving dangerously and made a reasonable mistake in believing that Romo was the driver.[110] But the Sixth Circuit would have lacked jurisdiction to hear the appeal if it had recognized that there was a genuine dispute about which version of events was true, with some versions supporting a violation of clearly established law and other versions leaving room for doubt, so it forced the case into a simplified frame and improperly heard the appeal rather than dismissing for lack of jurisdiction with a one-line citation to *Johnson*. The same force that pushes courts to use a single version of events as their point of reference in performing the qualified

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[108] *See supra* text accompanying notes 102–05.

[109] *See supra* text accompanying note 107; *see also* Estate of Allen v. City of West Memphis, 509 Fed. Appx. 388, 393 (6th Cir. 2012) (defining "good faith" standard for appeals based on *Scott v. Harris*).

[110] *See* Brief on Appeal of Defendant-Appellant, *supra* note 105, at 22.

immunity analysis also encourages them to hear interlocutory appeals on the merits where the only appropriate course of action is to dismiss.[111]

Justice Scalia was not wrong when he wrote in *Scott* that reading the record in the light most favorable to the non-moving party in a qualified immunity case "usually means adopting . . . the plaintiff's version of the facts."[112] As a practical matter, adopting the plaintiff's version of events and asking whether it is supported by competent evidence is the easiest way to undertake the comparison that qualified immunity requires between a factual record and the fact-patterns in the applicable precedent. But structuring the analysis in that manner will often lead courts to force an ambiguous record into boxes with artificially crisp lines and neat corners. The advent of the "blatantly contradicts" doctrine promises to embolden appellate courts to exercise even broader jurisdiction and undertake yet more aggressive review of summary judgment denials, as the Court itself did in *Scott* and *Plumhoff*.

### *B. Reasonableness Under the Fourth Amendment*

The second fault-line in qualified immunity doctrine relates to the underlying substantive law that frequently controls in cases where the defense is asserted: the Fourth Amendment's prohibition against "unreasonable searches and seizures."[113] What type of question does this reasonableness standard call upon a court to answer? Is it a question of law, or a question of fact? There is a neat theoretical answer to this question and a more complicated reality. One of the dynamics at work in cases like *Scott v. Harris* and *Plumhoff v. Rickard* is an attempt by the Supreme Court to force lower courts to adhere more closely to the neat theoretical account of the doctrine in this class of cases.

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[111] Judge Jeffrey Sutton wrote a long and forceful concurring opinion in *Romo* in which he argued that *Scott* imposed new constraints on *Johnson*, significantly expanding interlocutory appeals in qualified immunity cases. Judge Sutton believed that *Johnson* should be limited to the "prototypical 'he said, she said' fact disputes, in which the defendants . . . refuse to accept the truth of what the plaintiffs . . . say happened." *Romo*, 723 F.3d at 678 (Sutton, J., concurring). In such cases, he said, appellate courts still lack interlocutory jurisdiction. In contrast, the Judge argued, "when a district court determines that there is a 'genuine issue of fact' for trial by drawing an inference in favor of the plaintiff"—rather than by relying upon the plaintiff's testimony or other direct evidence—appellate courts should have the power to exercise interlocutory review. *Id.* Judge Sutton acknowledged that this reading of *Johnson* would makes its limitations "frequently inapplicable," significantly increasing the power of appellate courts to hear interlocutory appeals in qualified immunity cases. But, he said, he offered the proposal "to salvage, not bury, the [*Johnson*] decision." *Id.* at 687. Judge Sutton is correct that *Scott* poses a challenge to the stability of the *Johnson* doctrine, a challenge that has only intensified with the Court's ruling in *Plumhoff* (decided after *Romo*). Indeed, the Sixth Circuit is one of the places of greatest instability at the moment because of the "good faith *Scott* claim" doctrine of appellate jurisdiction that it appears to have adopted. *See Estate of Allen*, 509 Fed. Appx. at 393. Whether Judge Sutton's proposal to curtail *Johnson* and authorize a significantly larger number of interlocutory appeals represents the best solution to that challenge is far from clear.

[112] Scott v. Harris, 550 U.S. 372, 378 (2007).

[113] U.S. CONST. amend. IV.

In theory, the reasonableness standard frames an objective legal standard. As the Court put the matter in *Scott*, "once we have determined the relevant set of facts . . . the reasonableness of [an officer's] actions . . . is a pure question of law."[114] On this account, the finder of fact must assess the record and determine what actually happened in the disputed incident, but the court must make a "legal" judgment about whether those events satisfy a reasonableness standard. At trial, this means that a judge should enter a directed verdict if she concludes that the facts urged by plaintiff, even if true, do not constitute objectively unreasonable actions by the defendant. At summary judgment, it means that the judge should enter judgment for the defendant if she concludes that the events as to which the plaintiff has shown a genuine dispute of fact would not entitle him to judgment even if proven.[115] That is the theory.

In practice, the administration of a Fourth Amendment claim is much less neat. As the Court has frequently said, the line between a question of law and a question of fact is often elusive. In *Pullman-Standard v. Swint*, for example, the Court acknowledged "the vexing nature of the distinction between questions of fact and questions of law" and the lack of clear guidance in drawing such distinctions in the administration of highly fact-bound standards.[116] The Court went on to hold that the key question for decision in that case—whether a set of historical practices at a segregated manufacturing plant indicated that the employee seniority system was designed with an intent to disadvantage Black workers in violation of the Civil Rights Act of 1964—was a pure question of fact, not a mixed question of fact and law, and hence was subject to deferential clear error review on appeal.[117] In *Brown v. Plata*, the Court heard an appeal from the ruling of a three-judge panel finding that overcrowding in the California prison system had been the "primary cause" of Eighth Amendment violations, a requirement under the Prison Litigation Reform Act of 1995 ("PLRA").[118] Unlike in *Pullman-Standard*, the Court in *Plata* concluded that the ultimate issue in the case was a mixed question of fact and law. Even so, it found that deference was appropriate.

> With respect to the three-judge court's factual findings, this Court's review is necessarily deferential. It is not this Court's place to duplicate the role of the trial court. The ultimate issue of primary cause presents a mixed question of law and fact; but there, too, the mix weighs heavily on the fact side. Because the district court is better positioned to decide the issue, our review of the three-judge court's primary cause determination is deferential.[119]

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[114] *Scott*, 550 U.S. at 381 n.8.

[115] *See* FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact *and the movant is entitled to judgment as a matter of law*.") (emphasis added).

[116] Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982).

[117] *Id.*; *see also* FED. R. CIV. P. 52(a)(6).

[118] Brown v. Plata, 131 S. Ct. 1910, 1923 (2011); *see also* 18 U.S.C. § 3626(a)(3)(E)(i) (2012) ("primary cause" requirement of the PLRA).

[119] *Plata*, 131 S. Ct. at 1932 (citations, internal quotation marks, and alterations omitted).

The Court has acknowledged the difficulty of drawing this fact-law distinction since the Federal Rules first took effect. In a 1944 decision involving an attempt by the federal government to revoke an immigrant's certificate of naturalization, *Baumgartner v. United States*, the Court described the fluid nature of such determinations and the unhelpfulness of labels and theoretical categories, establishing a vocabulary that the Court continues to use in cases like *Plata* and *Pullman-Standard*.

> The phrase "finding of fact" may be a summary characterization of complicated factors of varying significance for judgment. Such a "finding of fact" may be the ultimate judgment on a mass of details involving not merely an assessment of the trustworthiness of witnesses but other appropriate inferences that may be drawn from living testimony which elude print. The conclusiveness of a "finding of fact" depends on the nature of the materials on which the finding is based. The finding even of a so-called "subsidiary fact" may be a more or less difficult process varying according to the simplicity or subtlety of the type of "fact" in controversy. Finding so-called ultimate "facts" more clearly implies the application of standards of law. . . . Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of "fact" that precludes consideration by this Court. Particularly is this so where a decision here for review cannot escape broadly social judgments . . . . Deference properly due to the findings of a lower court does not preclude the review here of such judgments. This recognized scope of appellate review is usually differentiated from review of ordinary questions of fact by being called review of a question of law, but that is often not an illuminating test and is never self-executing.[120]

The reasonableness of an officer's use of force under the Fourth Amendment is one of those mixed questions of fact and law that occupies a position of epistemological indeterminacy. When a trial judge is confronted with a record in which there is room for disagreement about how best to interpret contested evidence, there will often be no clear distinction between the inferences one can draw concerning what actions were taken or what events occurred, on the one hand, and the assessment of whether those actions or events were reasonable under the circumstances, on the other. In a car chase like that involved in *Scott* or *Plumhoff*, for example, the Court tells us that the "relevant set of [subsidiary] facts"—the riskiness of the driver's actions, the degree of danger that the driver presented to the officers or the general public, and the alternatives to deadly force that were available to the officers—are all questions of fact, whereas "the reasonableness of [the officer's] actions" in light of these factors "is a pure question of law."[121] But the Court admits in the same opinion that such determinations of reasonableness require "slosh[ing] . . . through [a] fact-bound morass."[122]

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[120] Baumgartner v. United States, 322 U.S. 665, 670–71 (1944) (citation omitted).
[121] Scott v. Harris, 550 U.S. 372, 381 n.8 (2007).
[122] *Id.* at 383.

Consider the difference between the Court's treatment of the Eighth Amendment PLRA question in *Brown v. Plata* and the Fourth Amendment reasonableness question in *Scott v. Harris*—with the Court finding that the "mixed question of law and fact" in a dispute over prison conditions in *Plata* "weighs heavily on the fact side"[123] and requires deferential review, but insisting that the "relevant set of facts" in a police chase in *Scott* were entirely distinct from the "pure question of law"[124] presented in the summary judgment motion. This difference in treatment is a matter of policy, not epistemology. The Court made a policy judgment in *Scott* that summary judgment rulings by district courts in Fourth Amendment qualified immunity cases should always be subject to non-deferential appellate review, despite the fact-bound morass that many such rulings entail. That policy decision performs several important doctrinal functions in the qualified immunity setting.

First, attaching the label "pure question of law" to a Fourth Amendment reasonableness determination encourages district judges to be more aggressive in using summary judgment to prevent claims against government officials from going to trial. It is a natural inclination to react to an ambiguous factual record as the trial judge did in *Romo v. Largen* when he explained, "'[O]n the facts of this case there's enough uniqueness, enough in the mix to say that the question of whether a reasonable officer could have mistakenly concluded there was probable cause should go to the jury,'"[125] without distinguishing carefully between how best to interpret the factual record and how best to assess the reasonableness of the officer's actions under different possible interpretations of that record. Likewise, in *Scott v. Harris*, the lower federal courts and Justice Stevens in dissent both believed that the degree of danger in Victor Harris's driving and the justification for using deadly force in light of that danger constituted "a question of fact best reserved for a jury."[126] It was in response to that belief that the majority insisted upon the "pure question of law" formulation.[127] *Scott* insisted upon the "legal" character of Fourth Amendment questions to push lower federal courts toward more robust enforcement of the qualified immunity defense. This aspect of the opinion is not a matter of the essence of the question presented, nor is it a pure interpretation of the summary judgment standard. It is a policy decision driven by the interests underlying the qualified

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[123] *Plata*, 131 S. Ct. at 1932 (internal quotation marks omitted).

[124] *Scott*, 550 U.S. at 381 n.8.

[125] Brief on Appeal of Defendant-Appellant, *supra* note 105, at 7 (quoting District Court Transcript).

[126] *Scott*, 550 U.S. at 395 (Stevens, J., dissenting); Harris v. Coweta Cnty., 433 F.3d 807, 815 (11th Cir. 2005), *rev'd sub nom.* Scott v. Harris, 550 U.S. 372 (2007) ("We reject the defendants' argument that Harris' driving must, as a matter of law, be considered sufficiently reckless to give Scott probable cause to believe that he posed a substantial threat of imminent physical harm to motorists and pedestrians. This is a disputed issue to be resolved by a jury.").

[127] *Scott*, 550 U.S. at 381 n.8.

immunity defense—an application of a procedural doctrine in light of substantive policy priorities.[128]

Second, the "pure question of law" designation makes it possible for the Court to exercise interlocutory appellate jurisdiction in a wider array of qualified immunity cases, despite the many problems with this application of the collateral order doctrine described in Part II above. That consequence is on display in *Plumhoff v. Rickard*, where the Court attempts to force its appellate jurisdiction precedents into artificially neat categories, insisting that its holding in *Johnson* involved a "question of fact" only because of a disagreement about which of several police officers were responsible for an alleged beating, whereas the interpretation of a video recording and other evidence concerning an acknowledged shooting as in *Plumhoff* raises "legal issues" that are "quite different from any purely factual issues that the trial court might confront if the case were tried."[129] It is impossible to square this assertion with the Court's admission in *Scott* that Fourth Amendment disputes require appellate courts to "slosh . . . through [a] factbound morass"[130]—precisely the type of "legal issue" that had previously been deemed categorically inappropriate for collateral order review because they are not "separable" from the questions that will remain for trial if the court of appeals reverses.[131] Confronted with the nonsensicality of its appellate jurisdiction ruling in *Scott*, the Court doubles down in *Plumhoff* by attaching the equally nonsensical label "pure question of law" to the "factbound morass" of Fourth Amendment disputes.

Both of these fault lines are specific to the doctrine of qualified immunity. The collateral order rule that sometimes permits an immediate appeal when a defense of qualified immunity is rejected depends entirely upon the policies underlying the defense, and the pressure to adopt a single version of events to measure against clearly established law is a product of the defense's specific doctrinal requirements. In a civil justice system that values transsubstantive procedural rules, however, doctrinal adjustments that begin in one setting have a tendency to migrate.[132] Two members of the Court apparently believed that they were issuing a holding specific to antitrust law when they joined the majority ruling that upended pleading standards in *Bell Atlantic v. Twombly*, but it took just two years for the Court to apply its new plausibility standard to a claim of unconstitutional discrimination in *Ashcroft v. Iqbal*.[133] *Scott* was decided in the same year as *Twombly*. Just two years later, in the Term that gave

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[128] *See generally* Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027 (2013) (setting forth a general approach to the interpretation of procedural doctrines in light of the substantive policies underlying a dispute).

[129] Plumhoff v. Rickard, 134 S. Ct. 2012, 2019 (2014).

[130] *Scott*, 550 U.S. at 383.

[131] Johnson v. Jones, 515 U.S. 304, 313–14 (1995).

[132] *See* Wolff, *supra* note 128, at 1033–47 (discussing this dynamic in relation to *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)).

[133] Ashcroft v. Iqbal, 556 U.S. 662 (2009).

us *Iqbal*, the Court reiterated *Scott*'s reformulation of the summary judgment standard—that a non-moving party is entitled to have the record viewed in the most favorable light only after convincing the court that there is a "genuine" dispute of material fact—in a case involving claims of illegal discrimination in the workplace.[134] *Scott* did not work an immediate revolution, as *Twombly* did, but the parallels are ominous.

## CONCLUSION

Lower federal courts are already struggling to interpret the holding of *Scott v. Harris* while faithfully applying the presumption in favor of the non-moving party and hewing to the strict limitations on interlocutory jurisdiction that the Court has long demanded. Without further clarification from the Court, it is not yet clear whether they will succeed in that effort. And without careful attention to the substantive law context in which the Court set these changes in motion, *Scott*'s destabilizing effects may spread. The full impact of *Scott v. Harris* on the future of summary judgment has yet to be felt.

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[134] *See* Ricci v. DeStefano, 557 U.S. 557, 586 (2009).