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Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force

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PROBLEMATIC STANDARDS OF REASONABLENESS: QUALIFIED IMMUNITY IN SECTION 1983 ACTIONS FOR A POLICE OFFICER'S USE OF EXCESSIVE FORCE

*Kathryn R. Urbonya**

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INTRODUCTION

In 1985 the United States Supreme Court determined in *Tennessee v. Garner*¹ that a state statute, authorizing the use of deadly force to capture a fleeing

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

felon, violated the fourth amendment² to the United States Constitution.³ Since this decision, plaintiffs have begun to make a new constitutional argument in their claims that state police actions violated their rights under section 1983 of the Civil Rights Act.⁴ Instead of solely alleging a violation of substantive due process under the fourteenth amendment,⁵ which prohibits egregious conduct,⁶

2. U.S. CONST. amend. IV. The fourth amendment provides as follows:

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

Id. The fourth amendment is applicable to the states by the fourteenth amendment. See *Mapp v. Ohio*, 367 U.S. 643, 654-55, 660 (1961) (evidence is inadmissible in state criminal trial that is obtained by searches and seizures in violation of fourth amendment as applied to states by fourteenth amendment) (overruling in part *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949) (fourteenth amendment does not bar use in state criminal trial of evidence obtained through illegal search and seizure even though such search and seizure by state would be counter to fourteenth amendment due process)); U.S. CONST. amend. XIV, § 1.

3. *Garner*, 471 U.S. at 11-12. Some commentators, however, have criticized the Supreme Court's analysis under the fourth amendment. See, e.g., Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 990-91 (1987). Professor Aleinikoff has stated that the decision "does not seem to be about the Fourth Amendment." *Id.* (emphasis in original). He contends that the Court failed to construct a theory for analyzing the cases under the fourth amendment. *Id.* Another commentator has argued that the Court's holding would have been more cogently based on the fourteenth amendment, not the fourth amendment. See Comment, *Law Officer's Use of Deadly Force Against Nondangerous Fleeing Felons Held Violative of the Fourth Amendment—Tennessee v. Garner*, 17 SETON HALL 758, 780-81 (1987). The Court's analysis in *Garner*, however, is consistent with prior opinions discussing the fourth amendment in that it affirms the Court's commitment to balancing interests. See, e.g., *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981) (balancing is "key principle" of fourth amendment).

4. Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), which states that "[e]very person who, under color of . . . [state law], subjects, or causes to be subjected, any citizen . . . to the deprivation of any right . . . secured by the Constitution and laws, shall be liable to the party injured." Section 1983 addresses statutory and unconstitutional violations by individuals acting under color of state law; a *Bivens* action addresses unconstitutional violations by officials acting under color of federal law. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (individual injured by Federal agents in violation fourth amendment rights entitled to redress).

5. U.S. CONST. amend. XIV, § 1. The fourteenth amendment prohibits state officials from depriving a person "of life [or] liberty . . . without due process of law." *Id.* The fifth amendment to the United States Constitution similarly prohibits federal officials. U.S. CONST. amend. V.

6. See *infra* notes 230-36 and accompanying text for a discussion of the type of conduct that violates the fourteenth amendment. Before the *Garner* decision, plaintiffs generally alleged that force used during their arrests violated their right to substantive due process under the fourteenth amendment, which prohibits conduct that shocks the conscience. See, e.g., *Fiacco v. City of Rensselaer*, 783 F.2d 319, 321-26 (2d Cir. 1986) (police officers violated plaintiff's rights under fifth and fourteenth amendments by using excessive force when arresting plaintiff), *cert. denied*, 107 S. Ct. 1384 (1987); cf. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 171, 200 (1987) (prior to *Garner*, few courts sought to determine if force used during arrest violated fourth amendment). Courts considering these substantive due process claims did not consider whether police officers properly could assert the defense of "good faith" or qualified immunity, because conduct that "shocks the conscience" was plainly without justification.

these plaintiffs have alleged that force used by state police officers during their arrests violated the fourth amendment, which prohibits "unreasonable" seizures.⁷ Courts considering fourth amendment claims, however, have disagreed as to whether police officers who use unreasonable force properly may assert qualified immunity,⁸ an affirmative defense currently defined by the

7. See, e.g., *Lester v. City of Chicago*, 830 F.2d 706, 710 (7th Cir. 1987) (proper standard in analyzing excessive force is fourth amendment); *Dodd v. City of Norwich*, 827 F.2d 1, 7-8 (2d Cir. 1987) (plaintiff's claim rested on fourth amendment), *cert. denied*, 108 S. Ct. 701 (1988); *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1507-10 (11th Cir. 1985) (en banc) (claims asserted included fourth amendment violation), *cert. denied*, 476 U.S. 1115 (1986); see also *supra* notes 1-3 and accompanying text for a discussion stating that the fourth amendment is applicable when officers "seize" a person within the meaning of the amendment.

Officers seize an individual "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Michigan v. Chesternut*, 108 S. Ct. 1975, 1979 (1988) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). In *Chesternut*, a majority of the Court rejected the bright-line rule that a seizure occurs only if a person is actually apprehended. *Id.* Officers thus may seize individuals by physically restraining them or by threatening to use force. See, e.g., *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986) (police officers seized plaintiffs by conducting ten-hour unlawful siege of house using helicopters and missiles). But see *Brower v. County of Inyo*, 817 F.2d 540, 546-48 (9th Cir. 1987) (person who was fleeing from police officers and crashed into roadblock was not seized), *cert. granted*, 108 S. Ct. 2869 (1988); *Cameron v. City of Pontiac, Mich.*, 813 F.2d 782, 785 (6th Cir. 1987) (shooting at decedent did not constitute seizure because bullets never hit him as he fatally ran onto highway in attempt to flee from police officers).

8. Some courts have stated that qualified immunity is not a defense to a fourth amendment claim alleging the unlawful use of force during an arrest because the law is clearly established that the use of excessive force is unlawful. See, e.g., *Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir. 1988); *Fernandez v. Leonard*, 784 F.2d 1209, 1217 (1st Cir. 1986); *Vizbaras v. Prieber*, 761 F.2d 1013, 1018-19 (4th Cir. 1985) (Winter J., concurring and dissenting), *cert. denied*, 474 U.S. 1101 (1986); *Clark v. Beville*, 730 F.2d 739, 740 (11th Cir. 1984); *Stanulonis v. Marzec*, 649 F. Supp. 1536, 1545 (D. Conn. 1986); *Skevoftax v. Quigley*, 586 F. Supp. 532, 545 (D.N.J. 1984). See generally *Patzner v. Burkett*, 779 F.2d 1363, 1370 (8th Cir. 1985) (qualified immunity raised as to warrantless arrest claim, but not as to excessive force claim).

Other courts, however, have stated that qualified immunity is a defense to fourth amendment claims alleging unnecessary force during an arrest because a police officer may reasonably, but mistakenly, believe that such force was necessary. See, e.g., *Whitt v. Smith*, 832 F.2d 451, 452-54 (7th Cir. 1987); *White v. Pierce County*, 797 F.2d 812, 816 (9th Cir. 1986); *Acoff v. Abston*, 762 F.2d 1543, 1548-50 (11th Cir. 1985); *Varela v. Jones*, 746 F.2d 1413, 1418 (10th Cir. 1984); *Bauer v. Norris*, 713 F.2d 408, 411 (8th Cir. 1983); *Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 456 F.2d 1339, 1347 (2d Cir. 1972); *Bibbo v. Mulhern*, 621 F. Supp. 1018, 1027 (D. Mass. 1985). Some courts have stated that qualified immunity is a defense to a fourth amendment excessive force claim when a police officer reasonably relies on a statute or a judicial decision that authorizes the use of force. See, e.g., *Washington v. Starke*, 855 F.2d 346, 348 (6th Cir. 1988); *Klein v. Ryan*, 847 F.2d 368, 371-75 (7th Cir. 1988); *Garner v. Memphis Police Department*, 710 F.2d 240, 242 (6th Cir. 1983), *aff'd* *Tennessee v. Garner*, 471 U.S. 1 (1985); *Landrum v. Moats*, 576 F.2d 1320, 1327 n.14 (8th Cir. 1978), *cert. denied*, 439 U.S. 912 (1978); see generally *Brief for United States as Amicus Curiae* at 13 n.13, *Graham v. Connor*, *cert. granted*, 57 U.S.L.W. 3230 (U.S. Oct. 3, 1988) (No. 87-6571) ("An officer is most likely entitled to qualified immunity in a case . . . where he uses force that is allowed under a state law that is only later determined to be unconstitutional."). But see generally *Illinois v. Krull*, 480 U.S. 340, 349-55 (1987) (exclusionary rule applicable when a reasonable officer would have known that statute was unconstitutional).

Other courts have stated that qualified immunity may be a defense. See, e.g., *Heath v. Henning*, 854 F.2d 6, 9 (2d Cir. 1988); *Martin v. Gentile*, 849 F.2d 863, 869 n.7 (4th Cir. 1988); *Fiacco v. City*

Supreme Court as affording immunity when the challenged conduct was "objectively reasonable."⁹ Recent decisions by the Supreme Court interpreting both qualified immunity¹⁰ and the fourth amendment¹¹ complicate resolution of this issue.¹²

Even though section 1983 states that "[e]very person, who under color of [state law], subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws, *shall be liable*,"¹³ the Supreme Court nevertheless has determined that under some circumstances po-

of *Rensselaer*, 783 F.2d 319, 323 (2d Cir. 1986), *cert. denied*, 480 U.S. 922 (1987); *Vizbaras v. Prieber*, 761 F.2d 1013, 1016 (4th Cir. 1985) *cert. denied*, 474 U.S. 1101 (1986); *Coon v. Ledbetter*, 780 F.2d 1158, 1164 n.2 (5th Cir. 1986) (question left open issue whether qualified immunity is defense to constitutional claims based on negligence).

The disagreement among the circuits was recently mirrored in a qualified immunity decision by the Sixth Circuit in *Holt v. Artis*, 843 F.2d 242, 246-47 (6th Cir. 1988). In *Holt*, the court considered a claim that officers used unreasonable force during an arrest in violation of the fourteenth amendment. *Id.* at 244. The majority of the court stated that not only is it clearly established that officers may not use unlawful force during an arrest, but also that officers do not act reasonably when they use more force than is necessary. *Id.* at 246. The dissent agreed that the law clearly prohibits unnecessary force, but disagreed that officers who use unnecessary force are deemed to have acted unreasonably. *Id.* at 247 (Wellford, J., dissenting).

9. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). See *infra* notes 42-143 and accompanying text for a discussion of the qualified immunity standard. Officials performing prosecutorial, judicial, or legislative functions may properly assert absolute immunity as a defense in section 1983 actions. See, e.g., *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutors); *Pierson v. Ray*, 386 U.S. 547 (1967) (judges); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (legislators). When performing these functions, officials are immune from an award of damages, regardless of their motives for acting.

In determining whether officials may properly assert absolute or qualified immunity, the Supreme Court has traditionally focused on the functions performed by the officials, not the status of the officials. See, e.g., *Forrester v. White*, 108 S. Ct. 538, 542, 545 (1988). In *Forrester*, the Supreme Court determined that although judges have absolute immunity for their judicial acts, they might be able to assert qualified immunity for their employment decisions because such decisions are not "judicial acts." *Id.* at 545. Similarly, the kind of immunity available to police officers depends on the function they were performing. See, e.g., *Briscoe v. LaHue*, 460 U.S. 325, 345 (1983) (police officer has absolute immunity for testimony at criminal trial); *White v. Frank*, 680 F. Supp. 629, 638 (S.D.N.Y.) (police officer has qualified immunity for statements made to grand jury), *appeal dismissed*, 855 F.2d 956 (2d Cir. 1988). The Court has generally been reluctant to recognize absolute immunity. See, e.g., *Forrester*, 108 S. Ct. at 542 (use of "qualified immunity" prevents unnecessary broadening of traditional absolute immunity concept).

10. See, e.g., *Anderson v. Creighton*, 107 S. Ct. 3034, 3040 (1987) (qualified immunity for warrantless search); *Malley v. Briggs*, 475 U.S. 335, 339-45 (1986) (qualified immunity for invalid arrest warrant). See *infra* notes 138-211 and accompanying text for a discussion of these cases.

11. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (under some circumstances deadly force may be used to seize a fleeing felon); *United States v. Leon*, 468 U.S. 897, 926 (1984) (evidence illegally seized may be used in a criminal proceeding if the seizure was objectively reasonable). See *infra* notes 166-74, 240-53, 262-95 and accompanying text for a discussion of these cases.

12. This article examines the availability of qualified immunity for the unlawful use of force by state officials in section 1983 actions. Resolution of this issue, however, also resolves the issue of availability of qualified immunity for federal officials in *Bivens* actions because the Supreme Court has stated that the qualified immunity standard for constitutional violations is the same for both state and federal officials. See, e.g., *Butz v. Economou*, 438 U.S. 478, 504 (1978) (court refused to distinguish between suits against state officials and federal officials with regard to immunity).

13. 42 U.S.C. § 1983 (1982) (emphasis added).

lice officers have qualified immunity from suits seeking monetary damages under section 1983 for their unlawful searches and seizures.¹⁴ Since its first decision on immunity in 1951,¹⁵ the Court frequently has redefined the standard.¹⁶

In 1982 the Supreme Court, in *Harlow v. Fitzgerald*,¹⁷ articulated the current standard for qualified immunity after noting that its prior standards had failed to adequately protect officials.¹⁸ It held 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."¹⁹ In promulgating this standard, the Court eliminated from consideration whether officials had acted in subjective bad faith, an element that previously had made qualified immunity unavailable as a defense.²⁰ The Court stated that "objective reasonableness of an official's conduct, as measured by reference to clearly established law,"²¹ would better balance the interests of aggrieved citizens against the interests of state officials and society.²² To determine whether police officers have qualified immunity thus requires an understanding of what the Court means by "objective reasonableness" and "clearly established law" in the context of the fourth amendment.

In two recent decisions, *Malley v. Briggs*²³ and *Anderson v. Creighton*,²⁴ the Supreme Court determined that even if police officers acted unreasonably by arresting a person pursuant to an invalid warrant or by conducting a warrantless

14. See *infra* notes 144-211 and accompanying text for a discussion of the Supreme Court's qualified immunity decisions. Qualified immunity is a defense only to an award of damages; it does not bar plaintiffs from seeking injunctive or declaratory relief. See, e.g., *Prisco v. United States*, 851 F.2d 93, 95 (3d Cir. 1988) (defense of qualified immunity unavailable to actions for prospective relief).

15. *Tenney v. Brandhove*, 341 U.S. 367 (1951). The Supreme Court first set forth a two-part test to determine whether officials may properly assert absolute immunity as a defense. *Id.* at 375-79. The Court considered whether the official had immunity at common law and whether Congress in enacting section 1983 intended to abrogate common law immunity. *Id.* at 376-79. For a discussion of how the Supreme Court has inconsistently applied this two-part test, see Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 745-94 (1987).

16. See *infra* notes 42-211 and accompanying text for a discussion of the Court's redefining of the standards.

17. 457 U.S. 800 (1982).

18. *Id.* at 815-19.

19. *Id.* at 818. It also created an "extraordinary circumstances" exception to the general rule: if officials could prove that they neither knew nor should have known of the relevant legal standard, they would nonetheless have immunity. *Id.* at 819.

20. See *infra* notes 88-91 and accompanying text for a discussion of the Court's elimination of the subjective bad faith standard.

21. *Harlow*, 457 U.S. at 818; see also *Davis v. Scherer*, 468 U.S. 183, 191 (1984) (quoting *Harlow*, 457 U.S. at 818).

22. *Harlow*, 457 U.S. at 815-19. See *infra* notes 97-98 and accompanying text for a discussion of the Court's balancing of interests.

23. 475 U.S. 335 (1986). See *infra* notes 154-77 and accompanying text for a discussion of the *Malley* decision.

24. 107 S. Ct. 3034 (1987). See *infra* notes 178-211 and accompanying text for a discussion of the *Anderson* decision.

search, in violation of the fourth amendment, they nevertheless could assert qualified immunity as a defense if their conduct was "objectively reasonable."²⁵ These decisions indicate that the Court has two definitions of the word "reasonable." One definition relates to the fourth amendment's requirement that conduct be "reasonable;"²⁶ the other definition relates to section 1983's requirement, as interpreted by the Court, that conduct be "objectively reasonable" for police officers to have qualified immunity.²⁷ Because the Court has determined that there are two standards of reasonableness, conduct may be "unreasonable" within the meaning of the fourth amendment but nevertheless "objectively reasonable" for the purpose of qualified immunity.²⁸

The purpose of this article is to focus attention on another fourth amendment claim recently asserted by plaintiffs: the use of excessive force by police officers during an arrest. Section I discusses the evolution of the qualified immunity defense and concludes that the Court in *Harlow* attempted to articulate an objective standard that would require courts to consider only a legal question—whether the challenged conduct violated a clearly established constitutional or statutory right of which a reasonable person would have known.²⁹ The *Harlow* Court asserted that this standard would allow dismissal of insubstantial claims prior to discovery, in contrast to the previous standard that compelled courts to consider the factual issue of an officer's subjective good faith.³⁰ Section II examines the Court's application of the *Harlow* standard to claims asserting a violation of the fourth amendment.³¹ The Court has dramatically modified the *Harlow* reasonableness standard by returning to the fact-specific reasonableness standard of *Procunier v. Navarette*,³² a pre-*Harlow* decision.³³ The modified

25. See *Anderson*, 107 S. Ct. at 3038-42 (invalid warrant); *Malley*, 475 U.S. at 343-46 (warrantless search).

26. See *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985) ("reasonableness" used in terms of fourth amendment); *United States v. Leon*, 468 U.S. 897, 922-25 (1984) ("reasonable" used in both fourth amendment terms and "objectively reasonable" standard). For a discussion of the meaning of the term "reasonable" as applied by courts in considering fourth amendment claims, see *infra* notes 240-53, 262-94 and accompanying text.

27. See *Anderson*, 107 S. Ct. at 3038 (official's personal liability depends on "objective legal reasonableness" of allegedly unlawful conduct); *Malley*, 475 U.S. at 344-46 (standard of objective reasonableness determines applicability of qualified immunity). For a discussion of the meaning of the term "objectively reasonable" conduct as defined by courts in considering qualified immunity motions, see *infra* notes 154-209 and accompanying text.

28. See *supra* notes 26-27 for the Court's two standards of "reasonable." One court has failed to recognize that one definition relates to the standard of reasonableness under the fourth amendment and the other relates to the standard of reasonableness under section 1983. See *Sevigny v. Dicksey*, 846 F.2d 953, 957 (4th Cir. 1988) (qualified immunity standard effectively allows police officers two levels of reasonable misapprehension of constitutionality of conduct in making arrests).

29. See *infra* notes 42-143 and accompanying text for a discussion of the qualified immunity defense.

30. See *infra* notes 97-98 and accompanying text for a discussion of the practical effects of the more recent standards.

31. See *infra* notes 144-211 and accompanying text for a discussion of the Court's application of the *Harlow* standard to fourth amendment claims.

32. 434 U.S. 555 (1977). In *Procunier*, the Supreme Court stated that officials do not have qualified immunity if they failed all three of the following tests: (1) the right they allegedly violated

standard raises both legal and factual issues: it questions what reasonable officials would have done under the circumstances (a legal issue) and it questions what the officials actually knew when they acted (a factual issue).³⁴ With this modification, discovery is generally necessary to resolve the issue of immunity. Section III applies the *Harlow* standard for qualified immunity to claims that police officers used excessive force during an arrest, in violation of the fourth amendment and the substantive due process component of the fourteenth amendment.³⁵ Although it is clearly established that officers who violate fourteenth amendment substantive due process by using excessive force may not assert a qualified immunity defense,³⁶ the question of qualified immunity for fourth amendment claims is less clear.

The article proposes that even though qualified immunity is appropriately available as a defense for other fourth amendment claims, it is an unnecessary defense to a fourth amendment claim challenging the use of excessive force because the standard for liability is identical to the standard for qualified immunity; both question whether a reasonable officer would have believed that the use of force was necessary.³⁷ Because the standards overlap, qualified immunity is an unnecessary defense. Some courts, however, have erroneously distinguished the standard for liability from the standard for immunity; they have stated that a court should determine the factual issues underlying the defense of qualified immunity and that a fact finder should determine the factual issues underlying the

was clearly established; (2) they should have known that the right was clearly established; and (3) they should have known that their conduct violated the right. *Id.* at 562.

33. See *Anderson*, 107 S. Ct. at 3040 (relevant question regarding reasonableness of warrantless search is objective and fact-specific). Justice Stevens, dissenting in *Anderson*, contended that the majority did not interpret or modify the *Harlow* standard but instead made "new law" because it failed to bar immunity when the law clearly established the police officers need both probable cause and exigent circumstances to make a warrantless search. *Id.* at 3043 (Stevens, J., dissenting). He also maintained that the *Harlow* standard is inapplicable when material facts are in dispute and resolution of these facts would determine whether officials had violated a law that is "extremely general," such as whether an officer had probable cause or whether a plaintiff received due process. *Id.* at 3048 n.12 (Stevens, J., dissenting).

Since the Court's decision in *Anderson*, the Sixth Circuit implicitly agreed with Justice Stevens when it interpreted the *Harlow* standard to bar factual inquiries into what officials knew when they acted. See *Duncan v. Peck*, 844 F.2d 1261, 1267 (6th Cir. 1988). The court stated that to permit discovery of what officials knew would be to run "afoul of [the] *Harlow* [standard]." *Id.* Such an interpretation is understandable if one notes that the court did not refer to the *Anderson* decision. But see *Alvarado v. Picur*, 859 F.2d 448, 452 n.6 (7th Cir. 1988) (*Anderson* "did not establish a new principle of law"). For a discussion of the role of discovery in qualified immunity motions after the *Anderson* decision, see *infra* notes 206-10 and accompanying text.

34. For a discussion of the terms "objective" and "subjective," see *infra* note 47.

35. See *infra* notes 213-357 and accompanying text for a discussion of the application of the *Harlow* standard to claims of fourth and fourteenth amendment violations.

36. See *infra* notes 255-59 and accompanying text for a discussion of the lack of availability of the qualified immunity defense for substantive due process violations.

37. In *Tennessee v. Garner*, 471 U.S. 1 (1985), the Supreme Court defined the fourth amendment standard more specifically when it discussed the use of deadly force by police officers. It defined the scope of this standard by allowing police officers to use deadly force only when they reasonably believe that a fleeing felon poses a serious risk of harm to the officers or others. *Id.* at 11-12. See *infra* notes 240-53, 262-94 and accompanying text for a discussion of this issue.

claim of excessive force, even though the factual issues are the same.³⁸ *Harlow*, however, does not support that distinction; the standards in fact do overlap.³⁹ The fact finder thus should resolve material factual disputes. In doing so, it simultaneously determines whether officials have qualified immunity and whether they violated the fourth amendment by using excessive force during an arrest. By recognizing that the standards for qualified immunity and liability are the same, courts will not confuse the fact finder by trying to explain in a jury instruction how unreasonable conduct nevertheless can be reasonable for the purpose of qualified immunity. By eliminating such confusion, a fair trial can occur—state officials will not get two chances to prove that their conduct was reasonable. When material facts are not in dispute, then the court may determine the issues by considering motions for judgment on the pleadings⁴⁰ or for summary judgment.⁴¹

I. THE DEVELOPMENT OF THE DOCTRINE OF QUALIFIED IMMUNITY: THE COURT'S ATTEMPT TO DEFINE REASONABLE CONDUCT

In *Harlow v. Fitzgerald*,⁴² the United States Supreme Court in 1982 set forth its current standard for qualified immunity: officials performing discretionary functions are not liable if their conduct does not violate a clearly established constitutional or statutory right of which a reasonable person should have known.⁴³ The Court articulated this standard after accepting and rejecting in a series of decisions various elements from its prior qualified immunity standards. It had first allowed then disallowed consideration of subjective good faith;⁴⁴ it had emphasized then ignored the scope of an official's discretion and responsibil-

38. See, e.g., *White v. Pierre County*, 797 F.2d 812, 816 (9th Cir. 1986) (though court must decide if qualified immunity is in issue, jury decides issue of reasonable force); *Skevoilax v. Quigley*, 586 F. Supp. 532, 542 (D.N.J. 1984) (determination of conduct's reasonableness properly left for jury, but court would determine whether qualified immunity defense applied). In section 1983 actions, it is unclear whether a right to a trial by jury exists. The seventh amendment to the United States Constitution provides that a right to a jury trial shall exist "[i]n suits at common law, where the value in controversy shall exceed twenty dollars." U.S. CONST. amend. VII. Federal courts, however, have generally recognized a right to a jury trial when the amount in controversy exceeds twenty dollars. See, e.g., *Dolence v. Flynn*, 628 F.2d 1280, 1282 (10th Cir. 1980) (prisoner entitled to jury trial for § 1983 claim for money damages); see generally *Curtis v. Loether*, 415 U.S. 189, 198 (1974) (seventh amendment applicable to fair housing claim under Title VII for monetary relief).

39. See *infra* notes 261-310 and accompanying text for a discussion of the overlap of the two standards. Because the standards are not distinct, appellate courts should recognize that an order denying qualified immunity for this fourth amendment claim is not an appealable interlocutory order since the issue of immunity is not collateral to the underlying merits of the case. See *infra* notes 317-20 and accompanying text for a discussion of how resolving the qualified immunity issue also resolves the underlying merits.

40. See *infra* note 342 and accompanying text for a discussion of judgment on the pleadings.

41. See *infra* note 343 and accompanying text for a discussion of summary judgment.

42. 457 U.S. 800 (1982).

43. *Id.* at 818. Although the majority in *Anderson v. Creighton* stated that it was reaffirming the *Harlow* standard, *Anderson*, 107 S. Ct. at 3040, the dissent maintained that the majority had discarded the *Harlow* standard. *Id.* at 3043 (Stevens, J., dissenting). See *supra* note 33 for Justice Stevens's reasoning.

44. See *infra* notes 52-118 and accompanying text for a discussion of the Court's change.

ities;⁴⁵ and it had advocated then rejected different tests for determining whether conduct meets the "reasonableness" requirement of qualified immunity.⁴⁶ In making these changes, the Court attempted to create a standard that was "wholly objective,"⁴⁷ one that would allow courts to dismiss insubstantial claims prior to discovery.⁴⁸ The Court eliminated from the standard consideration of an official's subjective good faith and emphasized that a standard of objective, not subjective, reasonableness would better promote the interests protected by the qualified immunity defense.⁴⁹ The Court, however, failed to recognize that at times factual issues, such as what officials knew when they acted, required resolution before the issue of qualified immunity could be determined.⁵⁰ The only factual element that the *Harlow* Court eliminated was the question of whether the officials acted maliciously.⁵¹ Understanding the Court's current standard for qualified immunity requires, however, an examination of its dissatisfaction with prior standards.

In 1967, the Supreme Court established in *Pierson v. Ray*⁵² its first ambiguous qualified immunity standard. It held that the "defense of good faith and probable cause, . . . available to the officers [at] common law . . . for false arrest and imprisonment, is also available [to police officers] in [an] action under § 1983."⁵³ In dictum it also stated that police officers do not have the duty of

45. See *infra* notes 57-63, 76-84 and accompanying text for an examination of the Court's change.

46. See *infra* notes 52-118 and accompanying text for a detailed analysis of the Court's change.

47. See *Davis v. Scherer*, 468 U.S. 183, 191 (1984). There, the Supreme Court interpreted the *Harlow* standard as rejecting "inquiry into [an official's] state of mind in favor of a wholly objective standard." *Id.* The Court's use of the terms "objective" and "subjective" in qualified immunity decisions, however, has been confusing. Compare *Harlow v. Fitzgerald*, 457 U.S. 800, 816-18 (1982) (objective reasonableness of actions may be resolved prior to discovery because official's subjective good faith, a factual issue, not relevant) with *Anderson v. Creighton*, 107 S. Ct. 3034, 3041-42 & n.6 (1987) (determining objective reasonableness of actions may require discovery because what official knew, a factual question, relevant). See also *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985) (*Harlow* standard "purged" qualified immunity doctrine of subjective components); Comment, *Who Will Protect the Police? A Need for Task Specialization in Lower Courts: Malley v. Briggs*, 32 WASH. U.J. URB. & CONTEMP. L. 247, 251 n.29 (1987) (terms "objective" and "subjective" used frequently, but their meanings confused).

The meaning of these terms, however, has varied depending on the Court's interpretation of the *Harlow* standard. See *infra* notes 86-98, 178-211 and accompanying text for a discussion of these interpretations.

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

49. *Id.* at 819.

50. See *infra* notes 204-10 and accompanying text for a discussion of the use of discovery in qualified immunity cases.

51. *Harlow*, 457 U.S. at 817-18. See *infra* notes 89-94 and accompanying text for a discussion of the Court's recognition in *Harlow* that malice is a factual issue thwarting the goal of qualified immunity.

52. 386 U.S. 547 (1967).

53. *Id.* at 557. In *Pierson*, police officers had arrested a group of fifteen black and white ministers for allegedly violating a state statute that prohibited congregating in a public place under circumstances that would cause a breach of the peace. *Id.* at 549-50. The ministers asserted that the statute was unconstitutional and that the police officers had arrested them not because the officers anticipated a breach of the peace, but rather because the ministers had been in a waiting room

"predicting the future course of constitutional law."⁵⁴ The standard was confusing because a determination that the officials had probable cause⁵⁵ meant that the arrests would have been lawful and the officials would have no need to assert qualified immunity as an affirmative defense.⁵⁶

In *Scheuer v. Rhodes*,⁵⁷ the Court dispelled some of the confusion. The Court implied that the phrase "probable cause" signified not fourth amendment probable cause but rather "reasonable" conduct.⁵⁸ The Court explained that the qualified immunity standard requires both subjective good faith and a reasonable belief as to the validity of the challenged action, the latter element determinable through a totality of the circumstances test.⁵⁹ In ascertaining whether particular officials, including police officers, had acted reasonably during a student dem-

designated for whites only. *Id.* at 557. In determining that the police officers could assert qualified immunity as a defense in section 1983 actions if they had acted in good faith and with probable cause, the Court looked to the common law, as it had done in previous cases determining the scope of immunity available to state officials. *Id.* See also *supra* note 15 for a related discussion concerning common-law immunity.

54. 386 U.S. at 557.

55. The fourth amendment requires police officers to have probable cause when they conduct a search or seizure. U.S. CONST. amend. IV. Police officers have probable cause to arrest an individual if "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [person seized] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964). The same standard applies to searches, except that it questions whether there is evidence of the crime in the place to be searched. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 241-46 (1983) (judge issuing warrant for search of car and home had substantial basis for concluding drugs were to be found there).

56. *Pierson*, 386 U.S. at 555-57 (defense of good faith and probable cause available to police officers alleged to have arrested plaintiffs in violation of Constitution). The Court's standard caused confusion. Judge Newman has argued that the Court's reference to probable cause is inexplicable because the ministers in *Pierson* did not assert that the arrest was without probable cause. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 449 (1978). In addition, he interpreted the Court's reference to "good faith" as raising only one issue, whether the officers had relied on a duly enacted statute. *Id.* at 459. See generally Comment, *Malley v. Briggs: Application of the Harlow Objective Reasonableness Test to Section 1983 Liability for Police Officers*, 29 ARIZ. L. REV. 333, 341 (1987) (*Pierson* was based on common law rule that if police officers lack probable cause, they had immunity only if they acted in subjective good faith). Other commentators, however, have interpreted "probable cause" and "good faith" as elements leading the Court to establish an immunity standard composed of both objective and subjective elements. See, e.g., Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 NW. U.L. REV. 526, 555 (1977) (use of both terms misguided and caused much confusion); Note, *Police Immunity from Civil Suit*, 20 CREIGHTON L. REV. 193, 203-04 (1986) (probable cause together with good faith is basis for qualified immunity). In addition, the Second Circuit stated that the Supreme Court's requirement of probable cause did not mean that officers had to establish "probable cause in the constitutional sense," but instead only a "reasonable belief" in the validity of the arrest. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 456 F.2d 1339, 1348 (2d Cir. 1972). The Supreme Court and some commentators have agreed with the Second Circuit's interpretation of *Pierson*'s "probable cause" requirement. See, e.g., *Anderson v. Creighton*, 107 S. Ct. 3034, 3039 (1987); S. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983* § 8.11, at 489 (2d ed. 1986); see *infra* notes 178-210 and accompanying text for a discussion of this point.

57. 416 U.S. 232 (1974).

58. *Id.* at 247-48.

59. *Id.*

onstration, the Court considered "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time."⁶⁰ Under the *Scheuer* standard, officials could properly assert immunity if they had acted both in good faith and reasonably under the circumstances.

The Court stated that this standard furthered the policy underlying all immunity decisions; officials must be able to act decisively, without fear of liability, in enforcing laws that protect the public.⁶¹ The Court explained that the doctrines of absolute and qualified immunity recognize and accept some errors by officials because it is unjust to hold officials liable when they have acted in good faith.⁶² The *Scheuer* standard explicitly recognized the need to relate the scope of an official's discretion with the scope of qualified immunity, a need later rejected by the Court.⁶³

One year after articulating a totality of the circumstances test for determining reasonable conduct (a standard applicable to all officials performing discretionary functions), a majority of the Court in *Wood v. Strickland*⁶⁴ attempted to establish a standard that would apply only to school officials who have allegedly violated a student's constitutional rights.⁶⁵ Four justices, however, dissented, arguing that the Court should adhere to the reasonableness standard set forth in *Scheuer*.⁶⁶ Although both the majority and the dissent agreed that officials must act in subjective good faith,⁶⁷ they disagreed as to the content of *Scheuer*'s second requirement, that officials also act reasonably.⁶⁸ The *Wood* majority, departing from the *Scheuer* standard, stated that a school board member has qualified immunity unless he or she "reasonably should have known that the action he [or she] took within his [or her] sphere of official responsibility would violate the constitutional rights of the student affected."⁶⁹ The majority explained that school officials have a duty to know "clearly established rights," probably including rights that are "settled," "indisputable," "unquestioned," and "basic."⁷⁰ It warned, however, that school board members, like police of-

60. *Id.* at 247.

61. *Id.* at 241.

62. *Id.* at 240.

63. *See Procunier v. Navarette*, 434 U.S. 555, 556-66 (1978) (qualified immunity applied to low-ranking prison officials without regard to their particular scope of discretion).

64. 420 U.S. 308 (1975).

65. *Id.* at 322. In *Wood*, two students alleged a violation of their constitutional right to substantive and procedural due process before their dismissal from school for spiking punch served during a school function. *Id.* at 310-11. The Supreme Court did not find a violation of substantive due process, but remanded the case for a determination of whether there had been a violation of procedural due process. *Id.* at 326-27.

66. *Id.* at 330-31 (Powell, J., dissenting).

67. *See id.* at 321-22 (majority opinion); *id.* at 330-31 (Powell, J., dissenting). The majority described subjective "good faith" as a "belief that [one] is doing right," and the absence of a "malicious intention to cause a deprivation of constitutional rights." *Id.* at 321-22. The Court described malicious conduct when it stated that officials cannot properly assert immunity if they knew that they were violating a plaintiff's clearly established rights. *Id.* at 322.

68. *Id.* at 330-31 (Powell, J., dissenting).

69. *Id.* at 322.

70. *Id.* at 321-22. *See, e.g., Walsh v. Franco*, 849 F.2d 66, 68 (2d Cir. 1988) (government

ficers, do not have a duty to predict "the future course of constitutional law." ⁷¹ The *Wood* standard thus defined the reasonableness prong of qualified immunity by measuring reasonableness in terms of clearly established rights, an interpretation, according to the *Wood* dissent, that limited the availability of qualified immunity.⁷²

In examining the school officials' discretion and responsibilities, the Court, in contrast to its prior decisions, used the official's high position as a reason for narrowing, not expanding, the scope of immunity.⁷³ The Court explained that because school board members should possess a "high degree of intelligence," the *Wood* standard for qualified immunity properly balanced student interests against officials' need to act.⁷⁴

The *Wood* standard for qualified immunity was later applied to other officials.⁷⁵ In applying the standard to prison officials, the Court, in *Procunier v. Navarette*,⁷⁶ adhered to *Wood*'s requirement that officials act in good faith,⁷⁷ but

officials deemed to have knowledge and respect for basic unquestioned constitutional rights). The dissent in *Wood* argued that the majority presumed that its description of rights as "settled" and "indisputable" also encompassed rights that are "basic" and "unquestioned." *Wood*, 420 U.S. at 329 (Powell, J., dissenting). The dissent was prescient in recognizing that these terms would cause semantic nightmares.

71. *Wood*, 420 U.S. at 322 (quoting *Pierson v. Ray*, 386 U.S. 547, 557 (1967)).

72. *Id.* at 327 (Powell, J., dissenting).

73. *Id.* at 320-22. In articulating a special standard of qualified immunity for school officials, the Court rejected its prior approach of determining whether the duties performed by the particular officials are similar to duties performed by other officials who have absolute, not qualified, immunity. Even though the majority recognized that school board members often perform functions similar to the absolutely protected functions performed by legislators, judges, and prosecutors, it nevertheless rejected the school board members' assertion of absolute immunity. *Id.* at 319-20. The majority facetiously concluded that absolute immunity would not "sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy." *Id.* at 320.

74. *Id.* at 320-22.

75. See, e.g., *Butz v. Economou*, 438 U.S. 478, 506-07 (1978) (various federal officials); *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975) (mental health officials); *Procunier v. Navarette*, 434 U.S. 555, 561-62 (1978) (prison officials). See *infra* notes 81-89 and accompanying text for a discussion of *Navarette*. The Court found the *Scheuer* standard applicable to various federal officials. See *Butz v. Economou*, 438 U.S. 478, 507 (1978). In *Butz*, the Court stated, "We . . . hold that, in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer*, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." *Id.* The Court did mention *Wood* and its duty to know clearly established law, but in its holding it relied on *Scheuer*. *Id.* at 484, 485, 498, 506-07.

The Court considered the duties performed by the following federal officials: the secretary and assistant secretary of agriculture, a judicial officer and chief hearing examiner, several officials in the Commodity Exchange Authority, and the department's attorney who prosecuted the plaintiff for failing to comply with the department's financial requirements for sellers of futures. *Id.* at 481-82. In contrast to its analysis in *Wood*, the Court employed a functional analysis, which provided absolute immunity for tasks performed in the capacity of a judge or prosecutor. *Id.* at 508-17. In *Butz*, the Court did not, however, distinguish between the *Scheuer* standard and the *Wood* standard.

76. 434 U.S. 555 (1978).

77. *Id.* at 562. In *Navarette*, a state prisoner alleged that three supervisory prison officials and three of their subordinates had negligently interfered with his outgoing mail, in violation of the first

interpreted *Wood*'s reasonableness requirement to provide broader protection to state officials.⁷⁸

The Court in *Navarette* interpreted *Wood*'s reasonableness requirement as posing three subissues: officials would not have immunity "if the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct, if they . . . should have known of that right, and if they . . . should have known that their conduct violated the constitutional norm."⁷⁹ In considering the first subissue, whether the right was clearly established, the Court found that neither its decisions nor the decisions of the courts of appeals, nor the decisions of the district courts, established the asserted constitutional right.⁸⁰ It determined that because the officials had acted reasonably and with subjective good faith they had qualified immunity.⁸¹ The *Navarette* standard, with its three subissues, greatly expanded the availability of qualified immunity.

In broadly defining *Wood*'s reasonableness requirement, the Court failed to consider how the scope of immunity related to the scope of the officials' discretion and responsibilities.⁸² In his dissent, Justice Stevens properly noted that the majority "seems to rely on an unarticulated notion that prison administrators deserve as much immunity as [other officials]."⁸³ Justice Stevens contended that the Court significantly changed the *Wood* test by failing to focus on the facts of each case.⁸⁴

After its decision in *Navarette*, which expanded *Wood*'s reasonableness standard for qualified immunity, the Court articulated its current standard in *Harlow v. Fitzgerald*.⁸⁵ In *Harlow*, the Court held that "government officials

amendment to the United States Constitution. *Navarette*, 434 U.S. at 556-58. The Court held that the prison officials had qualified immunity because they satisfied both the subjective and objective prongs of the *Wood* test. *Id.* at 565-66. The Court interpreted *Wood*'s "malicious intention" prong as requiring intentional conduct as defined by section 8A of the *Restatement (Second) of Torts*. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 8A (1965)). Section 8A provides that individuals act intentionally if "the consequences are substantially certain to result" from their acts. *Id.* § 8A, at 15.

78. *Navarette*, 434 U.S. at 561-65 (in many cases, effect of *Navarette*'s restrictive application of requirement of clearly settled law will result in absolute immunity). This narrowing caused some commentators to question whether the qualified immunity standard actually afforded absolute immunity. See, e.g., Nahmod, *Constitutional Wrongs Without Remedies: Executive Official Immunity*, 62 WASH. U.L.Q. 221, 243 n.130 (1984).

79. *Navarette*, 434 U.S. at 562.

80. *Id.* at 565. For a discussion of which decisions indicate that a right is clearly established, see *infra* note 130.

81. 434 U.S. at 562. The Court therefore determined that it need not consider the other two subissues. *Id.* at 565 n.13.

82. The Court not only did not consider whether the common law affords officials immunity, but it also did not consider whether the policies underlying section 1983 support a finding of qualified immunity.

83. *Navarette*, 434 U.S. at 569 n.3 (Stevens, J., dissenting).

84. *Id.* at 569.

85. 457 U.S. 800 (1982). In *Harlow*, a former federal employee claimed that two White House aides had conspired with President Nixon and others to deprive him of statutory and constitutional rights. *Id.* at 802. After extensive discovery, *id.* at 803, the district court denied the White House aides' motion for summary judgment, finding that they were not entitled to absolute immunity and that a factual dispute prevented summary judgment. *Id.* at 805-06. The Supreme Court, however,

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."⁸⁶ The Court also stated that when a right is "clearly established," officials may assert extraordinary circumstances as an exception by proving that they neither knew nor should have known of the right.⁸⁷

In articulating the new standard, which the *Harlow* Court described as "essentially" and "primarily" objective,⁸⁸ the majority rejected some aspects of the *Wood/Navarette* standard while adhering to others. It explicitly rejected *Wood*'s subjective good faith requirement because it hypothesized that consideration of this factual issue often forced officials to engage in discovery and to go to trial even if the plaintiffs' claims were insubstantial.⁸⁹ By refusing to consider whether the officials had acted maliciously, the majority stated that motions for summary judgment by officials could be resolved prior to discovery.⁹⁰ The Court, however, explicitly adopted part of the *Wood/Navarette* requirement that the conduct be reasonable. It found that officials would be immune if the violated rights were not clearly established.⁹¹ The Court stated that if the asserted right was clearly established, then the defense of qualified immunity would not be available unless the officials could establish extraordinary circumstances.⁹² The majority noted that "reasonably competent public officials" have a duty to know "the law governing [their] conduct."⁹³ The Court did not, however, explicitly refer to the third subissue posed in *Navarette*—whether the officials should have known that their conduct violated a clearly established constitutional right.⁹⁴

In explaining how to apply the new standard, the Court described the stan-

remanded the case to the lower court to determine whether under certain circumstances the officials had absolute immunity, and if not, whether they had qualified immunity under the new standard set forth in its decision. *Id.* at 813-20.

86. *Id.* at 818.

87. *Id.* at 819.

88. *Id.*

89. *Id.* at 815-18. The Court declared that by eliminating the subjective good faith inquiry from the standard, officials would no longer have to defend "insubstantial suits," a concern the Court discussed six times in its opinion. *Id.* at 813-14, 816, 818, 820 n.36. The Court first expressed this concern in *Butz v. Economou*, 438 U.S. 478, 507 (1978) (insubstantial lawsuits can be quickly terminated under principle of qualified immunity).

90. *Harlow*, 457 U.S. at 817-19. For a discussion of the procedural aspects of raising the defense of qualified immunity, see *infra* notes 311-57 and accompanying text.

91. 457 U.S. at 818-19.

92. *Id.*

93. *Id.*

94. In its brief to the Court in *Anderson v. Creighton*, 107 S. Ct. 3034 (1987), the government argued that *Harlow* did not reject this subissue when promulgating the standard for qualified immunity. Brief for Petitioner at 15-25, *Anderson v. Creighton*, 107 S. Ct. 3034 (1987) (No. 85-1520). To support its argument, the government quoted *Harlow*: "'Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.'" *Id.* at 15 n.8 (quoting *Harlow*, 457 U.S. at 819 (emphasis added in brief)). The *Harlow* Court, however, emphasized that its standard not only focused on the "objective legal reasonableness of an official's

dard as focusing attention on the "objective reasonableness of an official's conduct [, which is to be] . . . measured by reference to clearly established law."⁹⁵ The Court, however, did not define what it meant by "clearly established."⁹⁶

The *Harlow* Court declared that the new "objective" standard properly balanced the interests protected by qualified immunity.⁹⁷ It concluded that the prior standard, by requiring consideration of the factual issue of subjective good faith, had caused unnecessary costs, such as forcing officials to defend meritless claims.⁹⁸

In his concurrence in *Harlow*, Justice Brennan recommended adding a subjective component to the standard,⁹⁹ thus undermining the purpose of the revision. He stated that officials are not only liable when they should have known that they were violating a plaintiff's rights, but also when they actually knew they were violating those rights.¹⁰⁰ He noted that under the *Harlow* standard "some measure of discovery" would be necessary to determine what the officials knew at the time of their actions.¹⁰¹ He also explained that the Court's standard

acts" but also permitted resolution of the issue of immunity prior to discovery. *Harlow*, 457 U.S. at 818.

The Court's decision in *Anderson* indicates that it implicitly adopted the third subissue of *Navarette* as it interpreted the *Harlow* standard to question whether the contours of the asserted right gave officials notice that their conduct was unlawful. See *supra* note 79 and accompanying text for the third subissue posed in *Navarette*. See *infra* notes 204-11 for a discussion of the *Anderson* Court's implicit adoption of this third subissue.

95. *Harlow*, 457 U.S. at 818 (Court did not determine whether its decisions or decisions of other court would be dispositive).

96. For a discussion of the term "clearly established," see *infra* note 135.

97. *Harlow*, 457 U.S. at 815-19. The Court first emphasized that any qualified immunity standard imposes general social costs because it sometimes allows officials to be held liable for their actions. *Id.* at 816. It described these general costs as including the cost of paying for litigation, the cost of distracting public officials from their duties, the cost of deterring qualified people from seeking public office, and the cost of making officials more reluctant to exercise their discretion. *Id.*

98. *Id.* at 816-17. The Court noted that the prior standard afforded plaintiffs the right to conduct extensive discovery. *Id.* at 817. The Court noted that when the defense of qualified immunity involves inquiry into an official's state of mind, summary judgment generally is not possible. *Id.* at 817 n.29: "It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved." *Id.* The Court questioned whether plaintiffs should force officials to explain how their experiences, emotions, and values led them to exercise their discretion. *Id.* at 816-17. The Court also stated that its prior standard caused severe disruption because it allowed plaintiffs to depose not only the officials but also their colleagues. *Id.* at 817.

99. *Id.* at 820-21 (Brennan, J., concurring).

100. *Id.* at 821 (Brennan, J., concurring). One commentator has appropriately noted that the concurrence's proposed revision would perpetuate the problems the Court was attempting to solve by eliminating the subjective good faith inquiry from the qualified immunity defense. See Balcerzak, *Qualified Immunity for Government Officials: The Problems of Unconstitutional Purpose in Civil Rights Litigation*, 95 YALE L.J. 126, 134 n.36 (1985). In *Anderson v. Creighton*, 107 S. Ct. 3034 (1987), the Supreme Court, however, modified the *Harlow* standard in a manner that re-creates the problems that the Court sought to eliminate in *Harlow*. See *infra* notes 204-11 and accompanying text for a discussion of the modification of the *Harlow* standard in *Anderson*.

101. *Harlow*, 457 U.S. at 821 (Brennan, J., concurring). He emphasized, however, that discovery would not be necessary when the law was "so ambiguous" at the time of the alleged violation that no one could thus know that the right existed and when the plaintiff failed to survive a motion

applied to all officials,¹⁰² a viewpoint recently adopted by a majority of the Court.¹⁰³ The *Harlow* standard for qualified immunity was not accepted by the entire Court as was the *Scheuer* standard.¹⁰⁴

After *Harlow*, lower courts were uncertain as to how to apply the new standard. Although the *Harlow* Court had stated that the standard was "essentially" or "primarily" objective,¹⁰⁵ lower courts questioned whether the standard at times permitted inquiry into an officer's state of mind.¹⁰⁶ Two years after *Harlow*, the Court, in *Davis v. Scherer*,¹⁰⁷ attempted to clarify the standard.¹⁰⁸ The *Scherer* Court declared the standard to be "wholly objective"¹⁰⁹ because it afforded immunity when an official's act was objectively reasonable "as measured by clearly established law."¹¹⁰ The Court also announced that "[n]o other 'circumstances' are relevant to the issues of qualified immunity."¹¹¹

Although the Court declared that the *Harlow* standard was to be "wholly objective," the procedural due process claim before the *Scherer* Court did not invite inquiry into an official's state of mind.¹¹² The claim instead required the Court to consider whether the law was "clearly established" and whether the officials had acted unreasonably when they allegedly violated state administrative regulations.¹¹³ The Court determined that although the law clearly indicated that "some kind of a hearing" was necessary before firing the plaintiff,¹¹⁴ it found that it had never specified "minimally acceptable procedures for termina-

to dismiss for failure to state a claim. *Id.* (Brennan, J., concurring). One commentator has argued that officials were liable for violating "fringe rights" under the *Wood* test if they acted maliciously. See Balcerzak, *supra* note 100, at 131 (*Wood* standard had subjective component that denied qualified immunity if official acted with malicious intent and relevant constitutional right not clearly established).

102. *Harlow*, 457 U.S. at 821 (Brennan, J., concurring).

103. See *supra* notes 202-03 and accompanying text for a discussion of this point.

104. See *Scheuer v. Rhodes*, 416 U.S. 232, 233-50 (1974) (unanimous opinion).

105. 457 U.S. at 819.

106. See, e.g., *McElveen v. County of Prince William*, 725 F.2d 954, 957-58 (4th Cir.) (although *Harlow* Court indicated that good-faith defense turns primarily on objective factors, it did not hold that exclusively objective standard was to be applied to claims proceeding to trial), *cert. denied*, 469 U.S. 819 (1984); see also *Krohn v. United States*, 742 F.2d 24, 31 (1st Cir. 1984) (after *Harlow*, defendant's knowledge still relevant in fourth amendment claim asserting official intentionally misrepresented facts in affidavit for warrant).

107. 468 U.S. 183 (1984).

108. *Id.* at 185-97 (Powell, J., joined by Burger, C.J., and White, Rehnquist, and O'Connor, JJ.). Dissenting as to the Court's application of the *Harlow* standard were Justices Blackmun, Brennan, Marshall, and Stevens. *Id.* at 197-206 (Brennan, J., concurring and dissenting).

In *Davis*, state officials had failed to provide a dismissed police officer with a pretermination hearing or a prompt post-termination hearing in violation of the due process clause of the fourteenth amendment to the United States Constitution. *Id.* at 185-89. The officials had also violated clear state administrative regulations. *Id.* at 188-89.

109. *Id.* at 191.

110. *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

111. *Id.*

112. See generally *Daniels v. Williams*, 474 U.S. 327, 340-41 (1986) (Stevens, J., concurring) (procedural due process claim does not require court to consider official's state of mind).

113. *Davis*, 468 U.S. at 190-97.

114. *Id.* at 192 n.10.

tion.”¹¹⁵ The *Scherer* Court found that even though the abstract law was clear, i.e., that there must be “some kind of a hearing,” its application was not clear.¹¹⁶ The Court also established that officials do not act unreasonably simply because they violate state administrative regulations.¹¹⁷ The Court reasoned that considering violations of state law would “disrupt” the proper balance of interests for a variety of reasons: state officials often have difficulty complying with and enforcing the plethora of ambiguous state rules, courts would struggle to interpret them, and officials would then have to defend even frivolous suits.¹¹⁸

The Court’s concern with protecting officials from defending insubstantial suits continued in *Mitchell v. Forsyth*,¹¹⁹ where a plurality of the Court¹²⁰ stated that officials could appeal from a district court’s interlocutory order denying them qualified immunity.¹²¹ In recognizing the right to an immediate appeal, the plurality stated that such an appeal would further the goal of the *Harlow* standard by providing “immunity from suit rather than a mere defense to liability.”¹²² The plurality again characterized the standard as objective, stating that the new standard had “purged qualified immunity . . . of its subjective components.”¹²³ The plurality explained that when a reviewing court evaluates a lower court’s denial of qualified immunity, it considers only the legal question of whether the alleged conduct violated clearly established law.¹²⁴ The *Mitchell* plurality, however, noted that the *Harlow* standard at times may afford a plaintiff the right to discovery prior to resolution of the motion for qualified

115. *Id.*

116. *Id.* at 185-93. The dissent, however, argued that the officials had failed to provide the police officer with “meaningful notice and a reasonable opportunity to be heard,” the essence of the right to due process. *Id.* at 200 (Brennan, J., concurring in part and dissenting in part).

117. *Id.* at 195-96.

118. *Id.* The dissent, however, found that violations of state law provide an objective means of knowing whether officials acted reasonably, a means it found more helpful than the Court’s “*post hoc* parsing of cases.” *Id.* at 204 n.2 (Brennan, J., concurring in part and dissenting in part).

119. 472 U.S. 511 (1985).

120. In *Mitchell*, only seven justices participated in the decision: Justice White wrote the opinion for the Court, in which only Justice Blackmun joined, *id.* at 513-36; four justices concurred and dissented in part, *id.* at 536-58 (Burger, C.J., and O’Connor, Brennan, and Marshall, JJ., concurring in part and dissenting in part).

121. *Id.* at 524-30. For a discussion of interlocutory appeals of qualified immunity motions, see *infra* notes 311-13.

122. 472 U.S. at 526 (emphasis in original).

123. *Id.* at 517.

124. *Id.* at 528. In describing this review, the plurality confusingly described the reviewing court’s task when considering the facts alleged by the plaintiff and the facts alleged by the defendant official. See *id.* The plurality stated that in considering the facts alleged by the plaintiff the reviewing court examines only one issue—whether the law was “clearly established”; however, the plurality implied that a reviewing court considering the facts alleged by the defendant examines two issues—whether the official’s “conduct violated clearly established law” and whether “the law clearly proscribed the actions the [official] claims he took.” *Id.* The plurality’s description probably signifies that even three years after *Harlow* it still was not sure about the relationship between the third prong of *Navarette*—whether the officials should have known that their conduct violated clearly established law—and the first prong of *Navarette*—whether the official violated clearly established law. See *supra* notes 76-84 and accompanying text for a discussion of *Navarette*.

immunity.¹²⁵

In applying *Harlow*, the *Mitchell* plurality discussed how clear the law must be for a court to find an official liable.¹²⁶ Although it found the issue before the Court to be an "open question" because no court had previously declared the challenged conduct unconstitutional,¹²⁷ the plurality warned that courts nevertheless may find officials liable even if there was no decision with identical circumstances.¹²⁸ It stated that a case on point was unnecessary.¹²⁹ The plurality explained that officials have immunity only when there was "a legitimate question" as to the lawfulness of their conduct.¹³⁰ The *Mitchell* plurality helped to define what constituted "clearly established law."

The evolution of the affirmative defense of qualified immunity thus reveals the Court's attempt to articulate a standard that sufficiently protects officials from having to defend insubstantial suits. In setting forth the *Harlow* standard, the Court attempted, but failed, to create a standard that raises only a legal issue. The Court erroneously assumed that officials' subjective knowledge of the law was the only factual issue that could have been relevant to the issue of qualified immunity. Some factual issues, such as what the officials knew when they decided to act, sometimes would need to be established before the issue of qualified immunity could be resolved. The *Harlow* Court did not recognize that these factual issues would often subject officials to discovery, thereby defeating its policy objective.

The evolution of the qualified immunity defense also reveals how the Court has continued to expand the protection available to officials. First, the Court found that officials, who act with some discretion, are immune if they should not have known that they were violating a plaintiff's clearly established constitutional or statutory rights.¹³¹ The Court implicitly rejected the *Scheuer* standard, which considered the position of the officials and related the scope of immunity to the scope of the officials' discretion and responsibilities. Under the *Scheuer*

125. *Mitchell*, 472 U.S. at 526 (*Harlow* recognized that discovery to be avoided if possible). The Court in *Harlow*, however, never hinted that discovery is sometimes appropriate. The Court had stated, "Until [the] threshold immunity question is resolved, discovery should not be allowed." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

126. *Mitchell*, 472 U.S. at 535 & n.12.

127. *Id.* at 534-35. In determining whether a warrantless domestic wiretap conducted for national security purposes violated clearly established law at the time of the wiretap, the Court examined the practice of the Justice Department throughout six administrations and the decisions of the district courts and the courts of appeal. *Id.*

128. *Id.* at 535 n.12.

129. *Id.*

130. *Id.* The difficulty of applying and interpreting the *Harlow* standard was apparent in *Mitchell*. Justice Brennan, joined only by Justice Marshall, properly noted that the attorney general's purpose in conducting the wiretap was a disputed material fact, one barring summary judgment. *Id.* at 543-58 (Brennan, J., concurring). The attorney general had admitted at a hearing before the district court that the wiretap was not done in his capacity as a prosecutor. *Id.* at 515. Justice Brennan contended that this admission did not signify that the tap was not done for the purpose of spying on a political opponent, an act that would violate clearly established law. *Id.* at 556-58 (Brennan, J., concurring).

131. *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982).

standard, the Court had questioned whether officials in positions of responsibility, which typically require a high degree of intelligence, should have known that they were violating a plaintiff's clearly established rights.¹³² In *Harlow*, the Court abandoned such examination.

Second, the Court expanded the scope of immunity by creating a reasonableness standard that would be "measured by reference to clearly established law."¹³³ Officials lose their immunity only when constitutional or statutory rights are "clearly established." Although any immunity standard shelters some constitutional violations, the requirement that such rights be "clearly established" provides officials with extensive protection.¹³⁴ In addition, the Court failed to explain the phrase "clearly established right."¹³⁵ Even though the

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

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

134. Professor Davis has questioned the Court's use of the term "clearly established." 5 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 27:24, at 130 (2d ed. 1984). He has questioned whether courts can distinguish clearly established rights from established rights. *Id.* Even if courts can do so, Davis argued, the Court's standard affords broad immunity. *Id.* He noted that "[l]aw that can be clearly stated in the abstract usually becomes unclear when applied to variable and imperfectly understood facts." *Id.* (quoted with approval in *Illinois v. Krull*, 107 S. Ct. 1160, 1176 (1987) (O'Connor, J., dissenting)).

135. Courts have disagreed as to the degree of factual correspondence required in order to determine that officials violated a clearly established right. Two approaches have been dominant. One requires a relatively strict factual correspondence between the officials' actions and the case law. *See, e.g., Savidge v. Fincannon*, 836 F.2d 898, 910 (5th Cir. 1988) (Gee, J., dissenting) (rights must be so clearly settled and defined that knowledge of their existence is commonplace among the educated and failure to recognize them implies their willful disregard); *Abel v. Miller*, 824 F.2d 1522, 1533 (7th Cir. 1987) (test for immunity should be whether law was clear in relation to specific facts confronting public official when he acted) (quoting *Colaizzi v. Walker*, 812 F.2d 304, 307-08 (7th Cir. 1987); *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir.) (facts must "closely correspond"), *cert. denied*, 107 S. Ct. 172 (1986); *see also Nahmod, supra* note 78, at 253 n.168 (after Supreme Court's decision in *Davis v. Scherer*, "a case on point" seems necessary); *see generally Walsh v. Franco*, 849 F.2d 66, 69 (2d Cir. 1988) (even if both general law and contours of asserted right "clearly delineated," officials may have immunity). The other approach requires officials to "apply general, well-developed legal principles." *Garrett v. Rader*, 831 F.2d 202, 205 n.2 (10th Cir. 1987). *See also Eastwood v. Dept. of Corrections of Oklahoma*, 846 F.2d 627, 630 (10th Cir. 1988) (unlawfulness must be "apparent" in light of pre-existing law); *McConnell v. Adams*, 829 F.2d 1319, 1325 (4th Cir. 1987) (officials must consider clearly established principles), *cert. denied*, 108 S. Ct. 1731 (1988); *People of Three-Mile Island v. Nuclear Regulatory Comm'rs*, 747 F.2d 139, 144 (3d Cir. 1984) (clearly established principles must be violated).

One commentator has noted that a few courts have adopted a third approach, one that requires officials to "discern trends" in the law and to base their conduct on these trends. Comment, *Harlow v. Fitzgerald: The Lower Courts Implement the New Standard for Qualified Immunity under Section 1983*, 132 U. PA. L. REV. 901, 930-32 (1984). This latter approach, however, is inconsistent with the Supreme Court's repeated admonition that officials do not have the duty of "predicting the future course of constitutional law." *Wood v. Strickland*, 420 U.S. 308, 322 (1975) (quoting *Pierson v. Ray*, 386 U.S. 547, 557 (1967)).

Those courts applying the most stringent approach have created an exception to the rule of strict or close factual correspondence, stating that "egregious" conduct may render officials liable even if there is no case law addressing "the specific facts at issue." *Benson*, 786 F.2d at 276 n.18; *accord Bonitz v. Fair*, 804 F.2d 164, 173 n.10 (1st Cir. 1986) (quoting *Benson*, 786 F.2d at 276 n.18)). The Seventh Circuit, which adheres to a strict factual correspondence approach, articulated this exception in response to the problem that arises when the asserted constitutional right requires a

Court stated that officials have immunity if there was a "legitimate question" of

court to balance the interests of the parties. *Benson*, 786 F.2d at 276. The court noted that when it must balance the interests of the parties, the general law may be clearly established, but that the application of the general law is "so fact dependent that the 'law' can rarely be considered 'clearly established.'" *Id.*

In an attempt to define the term "clearly established," some courts and commentators have related it to the Supreme Court's test for determining whether a decision should be applied retroactively in a civil or criminal proceeding. *See, e.g.,* *Acoff v. Abston*, 762 F.2d 1543, 1548-50 (11th Cir. 1985); *Nahmod*, *supra* note 78, at 253-55. In *Griffith v. Kentucky*, 479 U.S. 314 (1987), the Supreme Court recently changed its test for determining whether a decision should be applied retroactively in a criminal proceeding by holding that a decision that constitutes a "clear break" from past precedent should nevertheless be applied retroactively to cases on direct review. *Id.* at 326-28. The Court stated that its prior test considered three factors in determining whether a decision should be applied retroactively: (1) whether the new decision applied settled precedents to a different set of facts; (2) whether the new decision declared that the trial court lacked the authority to convict a defendant; and (3) whether the new decision constituted a clear break with past precedent. *Id.* at 324. The Court stated that an affirmative answer to the first two issues indicates that the decision should be applied retroactively. *Id.* In contrast to its prior decisions, the Court held that a decision that constituted a clear break could be applied retroactively to decisions on direct review. *Id.* at 326-28. It stated that it previously had held that a decision should not be retroactively applied if it constituted a clear break with previous decisions because law enforcement officials would have relied on the prior decisions and retroactive application would adversely affect the administration of justice. *Id.* at 324-25. In rejecting the clear-break exception, the Court found more compelling that the integrity of judicial review requires courts to retroactively apply new decisions. *Id.* at 326-28.

The test for determining whether decisions should be applied retroactively in civil proceeding is similar to the test for retroactivity in criminal proceedings. In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Supreme Court articulated the following three factors for determining retroactivity in civil proceedings: (1) whether the decision establishes a new principle of law; (2) whether the history of the rule in question supports retroactive application; and (3) whether retroactive application would produce "substantial inequitable results." *Id.* at 106-07.

The Eleventh Circuit applied both the civil and the criminal standard when it determined that the Supreme Court's decision in *Tennessee v. Garner*, 471 U.S. 1, 22 (1985), which declared that a state statute authorizing the use of deadly force to stop a fleeing felon violated the fourth amendment, should be applied retroactively in a section 1983 action. *Acoff*, 762 F.2d at 1548-50. It nonetheless stated that the issue of retroactivity is different from the issue of immunity, even though both consider the novelty of the decision. *Id.* at 1549-50. The court implicitly found that even if a decision did not constitute a "clear break," the law may nevertheless not have been clearly established at the time the officials acted. *Id.* at 1548-50. *See generally* *Nahmod*, *supra* note 78 at 253-54 (some if not all factors specified in *Chevron* to be applied in constitutional tort qualified immunity cases).

Thus, the task of defining the term "clearly established" is difficult. The best approach to determining whether a law is clearly established is to require some, but not strict, factual correspondence between the officials' actions and the case law. *See* Comment, *supra*, at 933-34 (flexible approach considering general principles of law better serves purposes of § 1983 than strict factual correspondence approach). As the Third Circuit has stated, to require strict factual correspondence would be to permit "officials one liability-free violation." *People of Three Mile Island*, 747 F.2d at 145. Requiring some factual correspondence is consistent with the Supreme Court's immunity decisions and its recognition in *Griffith* that judicial integrity requires the courts to recognize constitutional violations, even though law enforcement officials may have relied on past decisions. *See supra* notes 85-118 and accompanying text for a discussion of this issue. A duty to extrapolate guidelines from existing case law furthers the policy underlying the enactment of section 1983, to provide a remedy for constitutional violations. Plaintiffs alleging constitutional rights that require the courts to balance the interests of the parties should not be deprived of a remedy simply because the outcome of the balancing process is not always clear. By recognizing that officials have a duty to know and apply general law, courts properly balance the interests protected by the *Harlow* standard of immu-

law, the Court did not specify which courts may indicate that a right is clearly established.¹³⁶ Nor did it explain how to interpret a conflict among the courts, that is, whether for the purpose of qualified immunity officials must comply with their own circuit's interpretation of the law, even if the interpretation conflicts with interpretations by other circuits.¹³⁷

Finally, the Court revealed the extreme breadth of immunity available under *Harlow* when it modified that standard by broadly interpreting the phrase "clearly established law" in the recent cases of *Malley v. Briggs*¹³⁸ and *Anderson v. Creighton*.¹³⁹ In these cases, the Court addressed whether certain fourth amendment rights were clearly established.¹⁴⁰ The Court found that even if a general principle of law was clearly established, officials nonetheless have immunity if reasonable officers would not have known that their actions under the circumstances were unlawful.¹⁴¹ By interpreting *Harlow* as posing two questions—whether the right was clearly established and, if so, whether the officials

nity. This balance thus suggests that officials or their employers should pay the cost of compliance, even if there is the possibility of overdeterrence of official action. See Nahmod, *supra* note 78, at 256-57 (because subjective part of qualified immunity test is gone, it is more important than ever that scope of qualified immunity not be expanded such that there will be less incentive for compliance with fourteenth amendment).

136. The Supreme Court has twice refused to indicate which courts may put officials on notice that a right is clearly established. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.32 (1982); *Procunier v. Navarette*, 434 U.S. 555, 565 (1978). In attempting to resolve this open question, courts have specified different standards. Some courts have stated that decisions by only the Supreme Court, a court of appeals, or a state's highest court may indicate that a right is clearly established. See, e.g., *Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir. 1988); *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980), *cert. denied*, 451 U.S. 969 (1981). Some courts have considered district court opinions in determining whether a right was clearly established. See, e.g., *Bonitz v. Fair*, 804 F.2d 164, 173 (1st Cir. 1986). Others have found that a decision by a district court outside its circuit does not support a finding that a right is clearly established. See, e.g., *Muhammad v. Wainwright*, 839 F.2d 1422, 1424-25 (11th Cir. 1987). Some courts have stated that a right may be clearly established even if the Supreme Court or their own circuit has not specified the right. See, e.g., *Ohio Civil Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988); *Bilbrey v. Brown*, 738 F.2d 1462, 1467 (9th Cir. 1984); *Acoff v. Abston*, 762 F.2d 1543, 1550 (11th Cir. 1985). *But see* *Bilbrey v. Brown*, 738 F.2d 1462, 1473 (9th Cir. 1984) (Kilkenny, J., dissenting) (need controlling authority to establish a right). Some courts have also stated that a ruling from their own circuit court is sufficient to clearly establish a right. See, e.g., *Savidge v. Fincannon*, 836 F.2d 898, 908 (5th Cir. 1988); *Metcalf v. Long*, 615 F. Supp. 1108, 1122 (D. Del. 1985).

137. The courts of appeals of both the Ninth and Tenth circuits have agreed that decisions by other circuits are relevant, but not controlling, in determining whether a right is clearly established. See *Garcia v. Miera*, 817 F.2d 650, 658 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 1220 (1988); *Capoeman v. Reed*, 754 F.2d 1512, 1515 (9th Cir. 1985). The Tenth Circuit explained that the decisions of other courts are not controlling because its circuit is free to recognize a constitutional right explicitly rejected by other circuits. *Garcia*, 817 F.2d at 658. *But see* *Savidge v. Fincannon*, 836 F.2d 898, 910 (5th Cir. 1988) (Gee, J., dissenting) (conflict among circuits indicates that right not clearly established).

138. 475 U.S. 335 (1986).

139. 107 S. Ct. 3034 (1987).

140. For a discussion of *Malley*, see *infra* notes 154-77 and accompanying text; for a discussion of *Anderson*, see *infra* notes 178-211 and accompanying text.

141. *Anderson*, 107 S. Ct. at 3038-39; *Malley*, 475 U.S. at 344-45. See *infra* notes 144-211 and accompanying text for a discussion of this issue.

should have known that their conduct was unconstitutional—the Court modified and expanded the *Harlow* immunity standard.¹⁴² It implicitly adopted the reasonableness requirement of *Navarette*, a decision that caused some commentators to question whether this new immunity standard in practice provided absolute immunity.¹⁴³

II. THE COURT'S RECENT APPLICATION OF *HARLOW* TO ALLEGED FOURTH AMENDMENT VIOLATIONS

The Court has continued to expand the scope of qualified immunity. In *Malley v. Briggs*¹⁴⁴ and *Anderson v. Creighton*,¹⁴⁵ the Court applied the *Harlow v. Fitzgerald*¹⁴⁶ standard to two different fourth amendment claims. In *Malley*, an official allegedly violated the fourth amendment by arresting individuals pursuant to an invalid warrant;¹⁴⁷ in *Anderson*, the alleged violation was a warrantless search unsupported by probable cause and absent exigent circumstances.¹⁴⁸ Although in both cases the alleged conduct was unreasonable within the meaning of the fourth amendment and the applicable fourth amendment law was clearly established, the Court stated that conduct unreasonable under the fourth amendment nevertheless could be objectively reasonable for the purpose of granting qualified immunity.¹⁴⁹ In finding immunity possible under such circumstances, the Court implicitly interpreted *Harlow* as incorporating the third prong of *Procunier v. Navarette*'s¹⁵⁰ reasonableness test—whether the officers should have known that their conduct was unconstitutional.¹⁵¹ By looking to *Navarette*, the Court expanded the scope of immunity under *Harlow* by holding that officers may have immunity if they reasonably, though erroneously, believe that their actions under the specific circumstances do not violate clearly established general principles of fourth amendment law.¹⁵² In defining the *Harlow* standard to include a fact-specific issue—whether the officers should have known that their conduct was unlawful—a majority of the Court for the first time acknowledged that discovery was sometimes necessary before the issue of qualified immunity could be resolved.¹⁵³ Discovery was now permissible be-

142. See *Anderson*, 107 S. Ct. at 3042; *Malley*, 475 U.S. at 344-46.

143. See, e.g., Nahmod, *supra* note 78, at 222 (in doing away with subjective part of qualified immunity test, Supreme Court went far towards converting qualified to absolute immunity).

144. 475 U.S. 335 (1986).

145. 107 S. Ct. 3034 (1987).

146. 457 U.S. 800 (1982).

147. *Malley*, 475 U.S. at 337-39. See *infra* notes 154-77 and accompanying text for a discussion of this case.

148. *Anderson*, 107 S. Ct. at 3037-38. See *infra* notes 178-211 and accompanying text for a discussion of this case.

149. *Anderson*, 107 S. Ct. at 3040-41; *Malley*, 475 U.S. at 344-46. See *infra* notes 154-211 and accompanying text for a discussion of these cases.

150. *Procunier v. Navarette*, 434 U.S. 555 (1978).

151. *Id.* at 562. See *supra* notes 76-84 and accompanying text for a discussion of *Navarette*.

152. See *Anderson*, 107 S. Ct. at 3039 (qualified immunity protects official action unless action's unlawfulness apparent). See *infra* notes 180-84 and accompanying text for a discussion of how *Anderson* expanded the scope of immunity.

153. See *Anderson*, 107 S. Ct. at 3042 n.6 (discovery may be necessary where defendant's ver-

cause of the need to determine the subjective, factual issue of what the officials knew when they acted. The modified *Harlow* standard has both objective and subjective components: it questions whether a reasonable officer would have acted similarly and what the individual officer actually knew before acting.

In *Malley v. Briggs*, the Supreme Court determined that police officers who obtain an invalid arrest warrant¹⁵⁴ from a magistrate may assert qualified, but not absolute, immunity,¹⁵⁵ because the *Harlow* standard of qualified immunity sufficiently protects officers by affording them immunity unless they violated clearly established law.¹⁵⁶ The Court also explained how to apply the *Harlow* standard in that context by relying on *United States v. Leon*,¹⁵⁷ in which the Court applied the *Harlow* standard in criminal proceedings.¹⁵⁸

The *Malley* Court recognized that the *Harlow* standard affords broad protection to police officers because they have immunity unless their mistake was objectively unreasonable.¹⁵⁹ The Court found that the standard appropriately balances the need to protect police officers for their objectively reasonable mistakes against the need to make them carefully evaluate their decision to get a warrant.¹⁶⁰ In interpreting the *Harlow* standard, a standard that it had described as "objective," the Court peculiarly described the scope of protection in subjective terms, finding no immunity for "those who knowingly violate the law."¹⁶¹

After determining the *Harlow* standard of qualified immunity provided ap-

sion of facts differs from plaintiff's version, and defendant alleges conduct that reasonable officer could have believed lawful). See *supra* notes 94-103 and *infra* notes 204-11 and accompanying text for discussions of the Court's concern with the problems presented by a fact-specific defense.

154. In dictum, the Court stated that police officers have the same degree of immunity whether they seek arrest or search warrants. *Malley*, 475 U.S. at 344 n.6.

155. *Id.* at 343-45. In determining whether police officers have absolute immunity, the Court considered the traditional two questions: whether at common law police officers would have had immunity for an unlawful arrest, and if so, whether Congress intended in enacting section 1983 to afford immunity. *Id.* at 339-40. The Court considered the officer's argument that his act in obtaining a warrant was similar to acts performed by complaining witnesses and by prosecutors, who, according to the officer, had absolute immunity at common law. *Id.* at 340-41. The Court noted, however, that at common law complaining witnesses did not have absolute immunity and that it should thus be reluctant to interpret section 1983 as supporting a claim for absolute immunity because the language of the statute did not provide for any immunity. *Id.* In addition, the Court stated that even though prosecutors have absolute immunity, police officers may assert only qualified immunity because the function of a police officer in obtaining a warrant is different from the function of a prosecutor in initiating criminal proceedings. *Id.* at 341-45.

156. *Id.* at 343.

157. 468 U.S. 897 (1984).

158. *Id.* at 345-46 (citing *Leon*, 468 U.S. at 922-23 & n.23). See *infra* notes 166-74 and accompanying text for a discussion of this case. The *Harlow* standard for qualified immunity in *Malley* furthered the goal of granting summary judgment when the claim is insubstantial because the factual question of what the officer knew may be resolved by examining the affidavit to the warrant. When officers make warrantless arrests, however, the factual issue of knowledge may prohibit the granting of summary judgment even when claims are "insubstantial."

159. *Malley*, 475 U.S. at 343-45.

160. *Id.* at 345-46.

161. *Id.* at 341.

propriate protection, the *Malley* Court discussed its application.¹⁶² It properly noted that summary judgment was possible in that context, thus effectuating the goal of *Harlow* to protect officials from frivolous suits.¹⁶³ It stated that the police officer had qualified immunity if his conduct was "objectively reasonable."¹⁶⁴ Even though the law was clearly established that police officers need probable cause to obtain a search warrant, the Court nevertheless determined that conduct unreasonable within the meaning of the fourth amendment could be objectively reasonable for the purpose of granting qualified immunity. By adopting two standards of reasonableness, the Court extended the scope of immunity available under *Harlow*; officials would have immunity even if the general principles of law were clearly established. It implicitly adopted *Navarette*'s standard of reasonableness, which questioned whether officials should have known that their conduct was unconstitutional.¹⁶⁵

The Court, however, never acknowledged that it had adopted two standards of reasonableness, nor that the fourth amendment law was clearly established. In determining what constitutes objectively reasonable conduct, the Court found controlling its decision in *United States v. Leon*,¹⁶⁶ in which it explicitly adopted two standards of reasonableness in criminal proceedings.¹⁶⁷

In *Leon*, the Court articulated two standards of reasonableness as it created a good faith exception to the exclusionary rule,¹⁶⁸ a judicially created remedy that prohibits the prosecution from introducing illegally seized evidence during a criminal proceeding.¹⁶⁹ The *Leon* Court stated that even if a search was unreasonable within the meaning of the fourth amendment, the evidence seized pursuant to an invalid warrant may be admitted if the police officer's seizure was "objectively reasonable."¹⁷⁰ In creating an objective good faith exception to the exclusionary rule, the Court tied its application of the exclusionary rule to the application of the *Harlow* qualified immunity standard. The Court stated that an officer's reliance upon a magistrate's decision to issue a warrant must be "objectively reasonable," as defined by the *Harlow* standard.¹⁷¹ In making this con-

162. *Id.* at 343-46. One commentator has agreed that the Court erred in failing to find that reliance on a magistrate's decision is per se objectively reasonable. Comment, *supra* note 47, at 258-59. The commentator argued that the *Malley* decision implicitly requires police officers to have legal education because the Court determined that police officers could not rely on a magistrate's determination of probable cause. *Id.* Although the Court has recognized that the term "probable cause" cannot be "reduced to a neat set of legal rules," *Illinois v. Gates*, 462 U.S. 213, 232 (1983), it has nevertheless emphasized that nonlawyers can determine whether probable cause exists. See, e.g., *Shadwick v. City of Tampa*, 407 U.S. 345, 352 (1972) (municipal clerk and grand juries able to determine whether probable cause exists).

163. *Malley*, 475 U.S. at 340-41.

164. *Id.* at 344-45.

165. See *supra* notes 76-81 and accompanying text for a discussion of the *Navarette* reasonableness standard.

166. 468 U.S. 897 (1984), cited in *Malley*, 475 U.S. at 344.

167. *Leon*, 468 U.S. at 913-26.

168. *Id.*

169. *Id.* at 906.

170. *Id.* at 922.

171. *Id.* at 922 n.23.

nection,¹⁷² the *Leon* Court stated that police officers must have a reasonable knowledge of the law.¹⁷³ The Court framed the question as "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization."¹⁷⁴

The *Leon* decision, which applied the *Harlow* standard for determining objectively reasonable conduct to the exclusionary rule, became the basis for the Court's decision in *Malley*. As in *Leon*, the *Malley* Court rejected the officer's argument that reliance upon a warrant is per se objectively reasonable.¹⁷⁵ It similarly proposed that the standard for qualified immunity considers how a "reasonably well trained officer" would have acted.¹⁷⁶ In contrast to *Leon*, however, the Court stated that officials would lose their defense of immunity if their reliance on the warrant application was "unreasonable," instead of "entirely unreasonable."¹⁷⁷

172. Both the majority and the dissent discerned the linking of the good faith exception to the exclusionary rule with the *Harlow* standard for qualified immunity. See *id.* at 922-23 & n.23; *id.* at 977 n.35 (Stevens, J., dissenting). In his dissent, Justice Stevens noted that when the good faith exception to the exclusionary rule is applicable, a plaintiff whose fourth amendment rights have been violated will be unable to vindicate those rights under section 1983. *Id.* (Stevens, J., dissenting).

173. *Id.* at 920-21 n.20. Some courts have attempted to describe the knowledge that police officers must have:

Police officers can be expected to have a modicum of knowledge regarding the fundamental rights of citizens. Lawlessness will not be allowed to pervade our constabularies. However, in holding our law enforcement personnel to an objective standard of behavior, our judgment must be tempered with reason. If we are to measure official action against an objective standard, it must be a standard which speaks to what a reasonable officer should or should not know about the law he is enforcing and the methodology of effecting its enforcement. Certainly we cannot expect police officers to carry surveying equipment and a Decennial Digest on patrol; they cannot be held to a title-searcher's knowledge of metes and bounds or a legal scholar's expertise in constitutional law.

Saldana v. Garza, 684 F.2d 1159, 1165 (5th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983), *quoted with approval in* *Tarantino v. Baker*, 825 F.2d 772, 774-75 (4th Cir. 1987). Although courts have recognized that police officers need not be experts in constitutional law, they have nevertheless recognized that qualified immunity focuses attention on what a reasonable officer would have known. See, e.g., *Walsh v. Franco*, 849 F.2d 66, 69 (2d Cir. 1988) (quoting *Salahuddin v. Coughlin*, 781 F.2d 24, 27 (2d Cir. 1987) ("'Officials are held to have constructive knowledge of established law'"); *Sevigny v. Dicksey*, 846 F.2d 953, 957 (4th Cir. 1988) (police officer who falsely arrested person deemed to have known information that would have been reasonably discoverable by officer acting reasonably under the circumstances).

174. *Leon*, 468 U.S. at 922 n.23.

175. *Malley v. Briggs*, 475 U.S. 335, 345 (1986). The Court also explained that police officers are responsible for their own actions and may not be freed from liability simply because the magistrate was incompetent. *Id.* at 344 n.7, 345.

176. *Id.* at 345.

177. *Id.* In *Leon*, the Court stated that an officer does not act reasonably when "relying on a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Leon*, 468 U.S. at 923 (quoting *Brown v. Illinois*, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring in part)).

In *Briggs v. Malley*, 748 F.2d 715, 721 (1st Cir. 1984), *aff'd*, 475 U.S. 335 (1986), the First Circuit court articulated a standard that afforded police officers limited immunity. *Id.* It held that "only where an officer is 'constitutionally negligent,' that is, where the officer should have known that the facts recited in the affidavit did not constitute probable cause, will liability attach." *Id.*

The *Malley* Court's interpretation of the *Harlow* standard was not surprising because the *Leon* Court had previously discussed the *Harlow* standard. *Malley*, like *Leon*, stated that reliance on a warrant must be objectively reasonable. In *Anderson v. Creighton*,¹⁷⁸ a warrantless search case, the Court's interpretation of the *Harlow* standard was not inextricably tied to its decisions in *Leon* and *Malley*.¹⁷⁹ In determining that police officers could assert qualified immunity for a warrantless search of an individual's home, the *Anderson* Court expanded the scope of immunity by broadly interpreting *Harlow*'s standard of objective reasonableness for fourth amendment claims.¹⁸⁰ The expansion occurred because of the Court's definition of "clearly established law,"¹⁸¹ its unwillingness to be controlled by the language of the fourth amendment,¹⁸² its explicit rejection of relating the scope of immunity to an official's discretion and responsibilities,¹⁸³ and its recognition that discovery at times may be necessary to resolve summary judgment motions asserting qualified immunity.¹⁸⁴

In *Anderson*, the Court interpreted the *Harlow* standard which required courts to determine objective reasonableness by considering whether the rights asserted by the plaintiff were clearly established.¹⁸⁵ In recognizing that fourth amendment claims are often difficult to resolve,¹⁸⁶ the Court refused to hold police officers liable even if their actions violated a clearly established, abstract principle of fourth amendment law.¹⁸⁷ The *Anderson* Court noted that in the case before it the abstract law was clearly established, i.e., a warrantless search of an individual's home absent both probable cause and exigent circumstances violates the fourth amendment.¹⁸⁸ It found that qualified immunity is not available as a defense only if a reasonable police officer would have known that the particular circumstances did not constitute both probable cause and exigent cir-

(emphasis in original). The court declared that reliance on a warrant is reasonable if the facts alleged in the affidavit supporting the warrant application "fall into the *grey area* appropriate for judicial determination." *Id.* (emphasis supplied).

178. 107 S. Ct. 3034 (1987).

179. See *Malley*, 475 U.S. at 345 (if reasonably well-trained officer would have known that affidavit failed to establish probable cause, and that officer should not have applied for warrant, immunity will not protect officer); *United States v. Leon*, 468 U.S. 897, 913 (1984) (where officer reasonably relied on warrant later found invalid, qualified immunity applied). See *supra* notes 166-74 and accompanying text for a discussion of *Leon*.

180. *Anderson*, 107 S. Ct. at 3039-42. See *infra* notes 185-211 and accompanying text for a discussion of *Anderson*.

181. See *Anderson*, 107 S. Ct. at 3038-39. See *infra* notes 185-90 and accompanying text for a discussion of this issue.

182. See *Anderson*, 107 S. Ct. at 3041. See *infra* notes 195-99 and accompanying text for a discussion of this issue.

183. See *Anderson*, 107 S. Ct. at 3040-41. See *infra* notes 202-03 and accompanying text for a discussion of this issue.

184. See *Anderson*, 107 S. Ct. at 3042 n.6. See *infra* notes 204-11 and accompanying text for a discussion of this issue.

185. See *Anderson*, 107 S. Ct. at 3038-40. See *supra* notes 89-90 and accompanying text for a discussion of discovery.

186. *Anderson*, 107 S. Ct. at 3041.

187. *Id.* at 3039 n.2.

188. *Id.* at 3039-40.

cumstances.¹⁸⁹ The Court stated the defense fails when the law makes it “apparent” that the challenged conduct was unlawful.¹⁹⁰ The defense thus protects unlawful conduct, but not clearly unlawful conduct.

In stating that officers may have qualified immunity even when they lack probable cause, the Court did not interpret the *Harlow* standard as did many of the lower federal courts.¹⁹¹ The lower courts properly had noted that fourth amendment law clearly establishes that an arrest or a search requires probable cause.¹⁹² Some courts also had correctly noted that the standards for probable cause and for immunity both question whether the officers’ beliefs were reasonable.¹⁹³ They maintained that to ask twice the question whether the officers’ beliefs were reasonable is to invite confusion.¹⁹⁴

In applying the *Harlow* standard of objective reasonableness, the *Anderson* Court, however, did not perceive any confusion. It refused to be restrained by the language of the fourth amendment¹⁹⁵ prohibiting unreasonable searches and seizures. The Court explicitly approved two standards of reasonableness for fourth amendment claims. Conduct “unreasonable” within the meaning of the fourth amendment, it reasoned, may nevertheless be “objectively reasonable” for the purpose of qualified immunity.¹⁹⁶ The Court approved these standards for two reasons. First, the Court deemed the use of the word “reasonable” in defining both standards to be only a matter of semantics, not substance; if the fourth amendment had prohibited “undue” searches and seizures, then there would not be two standards of reasonableness.¹⁹⁷ In addition, by combining all civil rights claims arising under the Constitution, the Court contended that the *Harlow* standard requires the Court to reasonably accommodate the interests of the indi-

189. *Id.* at 3040-42.

190. *Id.* at 3039.

191. *See, e.g., McIntosh v. Arkansas Republican Party*, 816 F.2d 409, 413 (8th Cir.) (no qualified immunity where no probable cause), *vacated*, 825 F.2d 184 (8th Cir. 1987) (en banc) (remanded to district court in light of *Anderson v. Creighton*); *Llaguno v. Mingey*, 763 F.2d 1560, 1569 (7th Cir. 1985) (*Harlow* rule followed); *Deary v. Three Un-Named Police Officers*, 746 F.2d 185, 192 (3d Cir. 1984) (reasonableness and probable cause direct qualified immunity); *Clark v. Beville*, 730 F.2d 739, 740 (11th Cir. 1984) (good faith actions yield qualified immunity); *Trejo v. Perez*, 693 F.2d 482, 488 n.10 (5th Cir. 1982) (only reasonable ignorance precludes liability). *But see Floyd v. Farrell*, 765 F.2d 1, 4-5 (1st Cir. 1985) (liability ensues only if there was “clearly” no probable cause); *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 456 F.2d 1339, 1347-48 (2d Cir. 1972) (immunity if reasonable belief and good faith proved).

192. *See, e.g., McIntosh*, 816 F.2d at 413 (that probable cause is necessary for arrest is clearly-established fourth amendment law); *Deary*, 746 F.2d at 192 (if arrest lacks probable cause, it is in violation of clearly established law).

193. *See, e.g., Llaguno*, 763 F.2d at 1569 (probable cause question depends on what officers reasonably believed; immunity question depends on whether officers reasonably believed they were acting reasonably).

194. *See, e.g., id.* (to instruct jury twice that officer-defendants would be exonerated if defendants had reasonable beliefs would confuse jury).

195. *See Anderson*, 107 S. Ct. at 3041 (“regardless of the terminology used, the precise content of most of the Constitution’s civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable”).

196. *Id.*

197. *Id.*

vidual and the government, regardless of the language of the amendment forming the basis of the civil rights claim.¹⁹⁸ The Court, therefore, determined that a finding of liability under the fourth amendment did not preclude inquiry as to whether the challenged conduct was nevertheless objectively reasonable.¹⁹⁹

The *Anderson* Court's reasons, however, are unpersuasive. Its facile substitution of the word "undue" for the word "unreasonable" is unconvincing. By assuming that the word "undue" is a synonym for "reasonable," the Court concluded that there are not two different standards emerging from its interpretation of the word "unreasonable." Yet, even if the word "undue" is a synonym, courts nevertheless would face the equally impossible task of trying to split "semantic hairs"; they would have to try to distinguish between "undue" searches and seizures under the fourth amendment and objectively "unreasonable" searches and seizures for the purpose of qualified immunity. In other words, there would appear to remain, in effect, two virtually indistinguishable standards of reasonableness. Even more flawed is the Court's gross generalization that the word "reasonable" is linked to most constitutional rights because the rights represent a "[reasonable] accommodation between governmental need and individual freedom."²⁰⁰ This type of generalization severely undermines the Court's tradition of carefully defining and distinguishing the standards for liability under various amendments.²⁰¹

The *Anderson* Court also expanded the scope of liability by explicitly finding that the *Harlow* standard applies to all officials acting with discretion, regardless of the scope of their discretion and responsibilities.²⁰² The Court found that tailoring immunity to the scope of an official's duties would not provide the umbrella of security needed for an official to act decisively.²⁰³

In broadly defining the *Harlow* standard, the Court, however, found it necessary to modify its previous interpretation of *Harlow*.²⁰⁴ Although it stated that the resolution of insubstantial claims prior to discovery was the "driving force behind *Harlow*'s substantial reformation of qualified-immunity princi-

198. *Id.*

199. *Id.*

200. *Id.* at 3041.

201. For example, the Court has recognized that officials violate the eighth amendment if they use wanton and unnecessary force during a prison riot and if they are deliberately indifferent to a prisoner's medical needs. See *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986) (no eighth amendment violation where prison officials did not use wanton and unnecessary force to quell prison riot); *Estelle v. Gamble*, 429 U.S. 97, 104-08 (1976) (no eighth amendment violation where physician's conduct did not amount to deliberate indifference to prisoner's medical needs). The Court's broad statement in *Anderson* suggests that officials who violate these more stringent standards might be able to assert qualified immunity as a defense if the Court were to erroneously interpret the eighth amendment as representing a "reasonable" accommodation of interests. Immunity under these circumstances is improper.

202. 107 S. Ct. at 3040-41. In *Harlow v. Fitzgerald*, however, only the concurrence advocated applying the standard across the board to all officials. *Harlow*, 457 U.S. at 821 (Brennan, J., concurring).

203. *Anderson*, 107 S. Ct. at 3040-41.

204. *Id.* at 3038-41. See *supra* note 33 for a discussion of the Court's modification of the *Harlow* standard.

ples,"²⁰⁵ the Court determined that the *Harlow* standard at times requires courts to grant discovery.²⁰⁶ Under the modified *Harlow* standard, discovery was possible because the *Anderson* Court had added the fact-specific prong of *Navalette*—whether police officers should have known that their conduct, in light of the particular circumstances confronting them, constituted a fourth amendment violation.²⁰⁷ By refusing to impose liability upon officials if their conduct violated only abstract fourth amendment law, the *Anderson* Court reasoned that discovery becomes necessary to resolve the issue of qualified immunity.²⁰⁸ This was a new step for the Court.²⁰⁹ Even in *Malley*, where the Court considered specific circumstances and not just abstract law, the Court could easily ascertain the facts without permitting discovery by reading the affidavit accompanying the warrant application.²¹⁰

In applying the *Harlow* standard to a warrantless search, the *Anderson* Court thus greatly expanded the scope of immunity available to police officers. It made clear that the *Harlow* standard applies to police officers' actions and that objective reasonableness must be measured in terms of a reasonable officer's knowledge of the "contours" of clearly established rights, not a reasonable of-

205. *Anderson*, 107 S. Ct. at 3039 n.2.

206. *Id.* at 3042 n.6. The Court found that discovery would be necessary in this case if the actions alleged by the police officer were actions that a reasonable officer could have believed to be lawful, and these actions differed from the actions alleged by the plaintiff. *Id.* See *supra* notes 85-90 and accompanying text for a discussion of the Court's concern with resolution of the qualified immunity issue prior to discovery.

207. *Id.* at 3040; see also *Hodorowski v. Ray*, 844 F.2d 1210, 1216-17 (5th Cir. 1988) (after *Anderson*, court must consider two issues: generality of relevant rule of law and clarity of rule's application to alleged facts). See *supra* note 79 and accompanying text for a listing of the three issues in *Navarette*.

208. *Anderson*, 107 S. Ct. at 3042 n.6.

209. In *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988), a decision not referring to the *Anderson* opinion, the Sixth Circuit interpreted the *Harlow* standard as barring the fact-specific inquiry of what officials knew when they acted. *Id.* at 1267 & n.8. The court stated that such an inquiry would require discovery, which the *Harlow* standard prohibits. *Id.*

210. *Malley v. Briggs*, 475 U.S. 335, 338 (1986). Most states have adopted rules similar to Rule 41(c) of the Federal Rules of Criminal Procedure, FED. R. CRIM. P. 41(c), which requires that oral testimony in support of an affidavit be recorded. See, e.g., *State v. Adkins*, 346 S.E.2d 762, 767 (W. Va. 1986) (W. VA. R. CRIM. P. 41(c) is "substantially identical" to federal Rule 41(c)); Note, *The Constitutionality of the Use of Unrecorded Oral Testimony to Establish Probable Cause for Search Warrants*, 70 VA. L. REV. 1603, 1605 n.12 (1984) (citing cases holding that otherwise insufficient warrant application cannot be supplemented by unrecorded oral testimony). Courts have recognized that requiring the contemporaneous recording of oral testimony promotes judicial efficiency because courts may then easily ascertain what the officer knew when executing the warrant. *Adkins*, 346 S.E.2d at 767. Courts have also recognized that such a rule protects constitutional rights, stating that "[t]he probable cause requirement would be significantly weakened if a court can rely on the recollection of those concerned to support a probable cause finding long after the search warrant has been issued." *United States v. Hittle*, 575 F.2d 799, 802 (10th Cir. 1978). Some courts, however, have failed to recognize the benefits of the rule; they have allowed the officer who sought the warrant and the magistrate who issued it to testify at a suppression hearing as to what the officer said in support of the application for a warrant. See, e.g., *Fowler v. State*, 128 Ga. App. 501, 503, 197 S.E.2d 502, 503 (information supporting finding of probable cause may be presented to magistrate by means of oral testimony), *cert. denied*, 414 U.S. 1000 (1973); Note, *supra*, at 1607 n.22 (citing cases holding that oral warrant testimony need not be recorded).

ficer's knowledge of clearly established rights. The Court, however, did not provide any analytical tools for determining what constitutes the "contours" of a constitutional right. It reiterated that liability attaches to actions that were apparently unlawful.²¹¹ Nevertheless, the Court's unwillingness to be restrained by the language of the fourth amendment and its acceptance of two standards of reasonableness do not resolve the issue of whether qualified immunity is available to other fourth amendment claims.

III. APPLYING THE *HARLOW* STANDARD FOR QUALIFIED IMMUNITY TO EXCESSIVE FORCE CLAIMS ARISING FROM AN ARREST

When subject to force during an arrest, plaintiffs in actions arising under section 1983 of the Civil Rights Act²¹² have alleged violations of both the fourth²¹³ and fourteenth amendments.²¹⁴ Courts have disagreed about whether qualified immunity is available as a defense to these claims.²¹⁵ The United States Supreme Court's decisions in *Anderson v. Creighton*²¹⁶ and *Malley v. Briggs*²¹⁷ provide the framework for analyzing whether officials have qualified immunity when they use excessive force during an arrest.

As discussed in the previous section, in both *Anderson* and *Malley*, the Court recognized two standards of reasonableness, one relating to the fourth amendment claim, the other relating to the issue of qualified immunity under section 1983.²¹⁸ Determining whether conduct was objectively reasonable for the purpose of immunity requires consideration of the clarity of the law; objective reasonableness is to be "measured by reference to clearly established law."²¹⁹ After *Anderson*, this determination involves consideration not only of the general law but also of the "contours" of the asserted right, which must be "sufficiently clear" to notify officials of unlawful conduct.²²⁰ Although it is unclear how to ascertain the contours of a right, courts generally have studied decisions by the United States Supreme Court and circuit courts in determining the clarity of the law.²²¹ In addition, because the *Harlow* standard was designed to afford officials a pretrial resolution of the issue,²²² courts must also consider

211. 107 S. Ct. at 3039.

212. 42 U.S.C. § 1983 (1982).

213. U.S. CONST. amend. IV. See *infra* notes 237-53 and accompanying text for a discussion of this issue.

214. U.S. CONST. amend. XIV, § 1. See *infra* notes 230-36 and accompanying text for a discussion of this issue.

215. See *supra* note 8 for a discussion of this issue.

216. 107 S. Ct. 3034 (1987); see *supra* notes 178-211 and accompanying text for a discussion of *Anderson*.

217. 475 U.S. 335 (1986); see *supra* notes 154-77 and accompanying text for a discussion of *Malley*.

218. See *supra* notes 196-99 for the discussion of the Court's recognition of two standards of reasonableness.

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

220. *Anderson*, 107 S. Ct. at 3039.

221. See *supra* note 136 for a discussion of this issue.

222. See *supra* notes 89-98 and accompanying text for a discussion of this issue.

the procedural and substantive aspects of the defense when determining whether officials have qualified immunity.

Application of the *Harlow* standard to excessive force claims under the fourth and fourteenth amendments indicates that qualified immunity is not available as a defense. It is not a defense to a violation of the substantive due process component of the fourteenth amendment because under that amendment conduct is actionable only if egregious.²²³ Because the immunity defense applies only to objectively reasonable conduct, it does not shelter conduct that is egregious; such conduct signifies a greater degree of culpability and it is per se objectively unreasonable.

Nor is qualified immunity a defense to a fourth amendment excessive force claim.²²⁴ It is an unnecessary defense because the fourth amendment standard for liability and the standard for qualified immunity overlap. Both standards raise the same issue—whether a reasonable officer would have believed that the force used was necessary.²²⁵ Resolving the issue of fourth amendment liability automatically resolves the issue of qualified immunity.

A. The General Standard of Liability for the Use of Force During an Arrest: Claims Based on the Fourth and Fourteenth Amendments

Decisions by the United States Supreme Court²²⁶ and the lower courts²²⁷ concerning excessive force claims under the fourth and fourteenth amendments indicate that the general standard for liability under these amendments is well established: The fourteenth amendment prohibits egregious conduct,²²⁸ and the fourth amendment prohibits unreasonable conduct.²²⁹

223. See, e.g., *Johnson v. Glick*, 481 F.2d 1028, 1030 (2d Cir.) (permitting action against prison guard for unprovoked attack), *cert. denied*, 414 U.S. 1033, 1033 (1973). See *infra* notes 230-36, 254-59 and accompanying text for a discussion of substantive due process.

224. See, e.g., *Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir. 1988) (no qualified immunity for police officer who in March 1985 fatally shot fleeing felon because Sixth Circuit in 1983 had declared use of such force unconstitutional). But see *Klein v. Ryan*, 847 F.2d 368, 371-75 (7th Cir. 1988) (qualified immunity for police officer who in May 1983 shot fleeing felon because state court had not declared that state statute, which authorized use of deadly force, to be unconstitutional). See also *supra* note 8 for a review of the different courts of appeals decisions regarding the availability of the qualified immunity defense in fourth amendment excessive force claims.

225. See *infra* notes 240-53, 262-353 and accompanying text.

226. See *infra* notes 231, 240-44 and accompanying text.

227. See *infra* notes 232-36, 246-52 and accompanying text.

228. See, e.g., *Rochin v. California*, 342 U.S. 165, 172 (1952) (illegally breaking into accused's bedroom, forcibly attempting to remove capsules which accused had swallowed, and directing physician to induce vomiting was conduct prohibited by fourteenth amendment). See *infra* notes 230-36 and accompanying text for a discussion of substantive due process protection under the fourteenth amendment.

229. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 7 (1988) (apprehension by use of deadly force is seizure subject to reasonableness requirement of fourth amendment). See *infra* notes 237-53 and accompanying text for the fourth amendment standard. Plaintiffs, however, may not recover twice for an injury incurred during an arrest. See generally *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305-10 (1986) (trial court improperly allowed jury to assess duplicative damages by instructing them to consider inherent value of constitutional right in addition to considering actual losses); *Carter v. Rogers*, 805 F.2d 1153, 1157 (4th Cir. 1986) (only one recovery for act

1. Fourteenth Amendment Claims

In examining claims that the use of force during an arrest violated the fourteenth amendment, courts have considered whether the alleged conduct violated a plaintiff's right to substantive due process.²³⁰ To define the standard of liability, courts generally have relied on two decisions, the United States Supreme Court's decision in *Rochin v. California*²³¹ and Judge Friendly's decision for the Second Circuit in *Johnson v. Glick*.²³² In *Rochin*, the Supreme Court stated that conduct that "shocks the conscience" violates the due process clause of the fourteenth amendment.²³³ Recognizing the difficulty of determining when conduct is egregious under this standard, Judge Friendly, in *Johnson v. Glick*, articulated the following four factors to aid courts in examining substantive due process claims based on the alleged use of excessive force:

[1] the need for the application of force, [2] the relationship between the need and the amount of force that was used, [3] the extent of injury inflicted, and [4] whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.²³⁴

Most courts have used these factors in determining whether plaintiffs have alleged substantive due process claims;²³⁵ they have not, however, always required plaintiffs to prove that officials acted maliciously.²³⁶

Although courts have not uniformly applied the *Glick* factors, they have

forming bases of state assault and battery claim and federal excessive force claim); *Fowler v. Carrollton Pub. Library*, 799 F.2d 976, 982 (5th Cir. 1986) ("[b]ecause § 1983 damages are based on a principle of compensation, a characterization of plaintiff's loss which permits duplicative recovery for one type of harm is not allowed"). Plaintiffs should base their claim upon the fourth amendment, not the fourteenth amendment, since the fourth amendment standard of liability is less stringent than the fourteenth amendment standard of liability. See *infra* notes 230-53 and accompanying text for a discussion of this point.

230. See *infra* notes 235-36 and accompanying text.

231. 342 U.S. 165 (1952).

232. 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973).

233. *Rochin*, 342 U.S. at 172.

234. *Glick*, 481 F.2d at 1033.

235. See, e.g., *Fernandez v. Leonard*, 784 F.2d 1209, 1216 (1st Cir. 1986) (FBI agent violated hostage's rights under *Glick* analysis when he "[g]unned down . . . innocent hostage without reason or provocation"); *Coon v. Ledbetter*, 780 F.2d 1158, 1163 (5th Cir. 1986) (failure to use *Glick* analysis resulted in improper blending of simple negligence and claimed deprivation of constitutional rights); *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1500-01 (11th Cir. 1985) (en banc) (use of *Glick* factors proper in addressing substantive due process claim of plaintiffs who were beaten and shot by police), *cert. denied*, 106 S. Ct. 1970 (1986); *Wilson v. Beebe*, 770 F.2d 578, 582-83, 586 (6th Cir. 1985) (en banc) (*Glick* factors to be considered where officer's weapon accidentally discharged, injuring plaintiff who was being handcuffed); see generally *Justice v. Dennis*, 834 F.2d 380, 383 & n.4 (4th Cir. 1987) (en banc) (*Glick* factors are relevant to all excessive force claims, whether based on fourth, eighth, or fourteenth amendment).

236. See, e.g., *O'Neil v. Krzeminski*, 839 F.2d 9, 11 n.1 (2d Cir. 1988) (plaintiff need not prove malice to establish constitutional tort); *Fiacco v. City of Rensselaer*, 783 F.2d 319, 325 (2d Cir. 1986) (officials liable if force was unreasonable, unnecessary, or violent or they should have known that force was excessive), *cert. denied*, 107 S. Ct. 1384 (1987); *Coon v. Ledbetter*, 780 F.2d 1158, 1163 (5th Cir. 1986) (although malice is a factor, gross negligence is actionable). But see *Martin v.*

recognized that the factors indicate whether the alleged conduct was egregious. Thus, the fourteenth amendment standard is a clearly established general principle of law.

2. Fourth Amendment Claims

Courts also have considered whether the use of force during an arrest violated the fourth amendment.²³⁷ In attempting to define what constitutes an unreasonable seizure under that amendment most courts have relied on the United States Supreme Court's decision in *Tennessee v. Garner*;²³⁸ some courts also have relied on the four factors set out in Judge Friendly's opinion in *Johnson v. Glick*.²³⁹

In *Tennessee v. Garner*, the Supreme Court recognized that the fourth amendment prohibits "unreasonable" seizures by officials.²⁴⁰ The Court stated that officials "seize" a person within the meaning of the fourth amendment whenever they restrain that person's ability to walk away.²⁴¹ To determine the constitutionality of a seizure, the Court asserted, a court must consider the totality of the circumstances²⁴² when balancing "the nature and quality of the in-

Malhoyt, 830 F.2d 237, 261 n.76 (D.C. Cir. 1987) ("intent to inflict harm" is one element of substantive due process claim).

The Supreme Court has stated that negligent conduct does not violate substantive due process. See *Davidson v. Cannon*, 474 U.S. 344, 347 (1986) (negligence does not work deprivation within meaning of Due Process Clause). It has specifically left open the question of whether gross negligence or recklessness violates substantive due process. See *Daniels v. Williams*, 474 U.S. 327, 334 n.3 (1986) ("this case affords us no occasion to consider whether something less than intentional negligence such as recklessness or 'gross negligence' is enough to trigger the protection of the Due Process Clause"). Some courts have erroneously interpreted the Court's decisions in *Davidson* and *Daniels* as stating that only intentional conduct violates substantive due process. See, e.g., *Wilson v. Cross*, 845 F.2d 163, 165 (8th Cir. 1988) ("constitutional tortfeasor must have acted intentionally because negligence is not actionable under § 1983"). The Supreme Court recently granted review to determine whether malice, the fourth *Glick* factor, is a necessary element of excessive force claims based on the fourteenth and fourth amendment to the United States Constitution. *Graham v. Connor*, 57 U.S.L.W. 3270 (U.S. Oct. 3, 1988).

237. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (use of deadly force in apprehension of suspect is seizure for purpose of fourth amendment). See *infra* notes 240-53 and accompanying text for a discussion of the fourth amendment standard.

238. 471 U.S. 1 (1985). See, e.g., *Young v. City of Killeen*, 775 F.2d 1349, 1352-53 (5th Cir. 1985) (*Tennessee v. Garner* establishes fourth amendment standard for use of deadly force by police officer). See *infra* notes 240-48 and accompanying text for a discussion of *Garner*.

239. 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973). See, e.g., *Graham v. City of Charlotte*, 827 F.2d 945, 948 (4th Cir. 1987) (in excessive force claim, need to show force applied maliciously and sadistically for purpose of causing harm), *cert. granted sub nom.* *Graham v. Connor*, 109 S. Ct. 54 (1988); *Patzner v. Burkett*, 779 F.2d 1363, 1371 (8th Cir. 1985) (*Glick* factors to be used to determine if excessive force used in arrest). See *infra* notes 240-53 and accompanying text for a discussion of the fourth amendment standard.

240. *Garner*, 471 U.S. at 7.

241. *Id.*; see also *Michigan v. Chesternut*, 108 S. Ct. 1975, 1979 (1988) (person is seized "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave") (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

242. *Garner*, 471 U.S. at 8-9.

trusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'"²⁴³ In examining whether officers may use deadly force to seize a fleeing suspect, the Court held that the fourth amendment permitted the use of deadly force as a reasonable response if the suspect threatened the officers with a weapon or if the officers had "probable cause to believe that [the suspect had] committed a crime involving the infliction of serious physical harm."²⁴⁴

The *Garner* decision thus clearly established the general legal principle that the use of unreasonable force by officials violates the fourth amendment.²⁴⁵ In addressing excessive force claims based on the fourth amendment, many courts have quoted the language used by the Court in *Garner*²⁴⁶ or have specified factors to be considered in balancing the interests of the parties.²⁴⁷ These courts have interpreted the *Garner* standard as questioning whether the officers' conduct was objectively reasonable.²⁴⁸

Courts, however, have disagreed as to whether they should apply the factors specified in *Johnson v. Glick*, a decision discussing a violation of substantive due process, to claims based on the fourth amendment.²⁴⁹ The Fifth Circuit and

243. *Id.* at 8 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

244. *Id.* at 11-12.

245. *Id.* at 7. The Supreme Court described the fourth amendment standard of liability for the use of deadly force to seize a fleeing suspect, a standard not violated if an officer using deadly force reasonably believes that deadly force is necessary. *Id.* at 11-12. The Court, however, did not consider whether the lower court was correct in determining that the officer who shot the suspect had qualified immunity because he reasonably relied on the state statute, which authorized the use of deadly force. *Garner v. Memphis Police Dep't*, 710 F.2d 240, 242-43 (6th Cir. 1983), *aff'd*, *Tennessee v. Garner*, 471 U.S. 1 (1985). In *Garner v. Memphis Police Dep't*, the officer testified that he had been taught that state law authorized the use of deadly force under the circumstances presented to him. *Id.* at 241. The court's decision specifically addressed the constitutionality of the state statute, not whether the officer had reasonably relied on the statute. *Id.* at 246-47.

246. *See, e.g.*, *Lester v. City of Chicago*, 830 F.2d 706, 711 (7th Cir. 1987) (quoting *Garner*, 471 U.S. at 7-9).

247. *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1502 (11th Cir. 1985) (en banc) (balancing requires the court to consider "'the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted'") (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)), *cert. denied*, 476 U.S. 115 (1986).

248. *See, e.g.*, *Heath v. Henning*, 854 F.2d 6, 9 (2d Cir. 1988) (in *Garner* analysis, primary focus is on objective reasonableness of officer's actions); *Lester*, 830 F.2d at 711 ("Fourth Amendment test measures a seizure's objective reasonableness under the circumstances."). For a decision not relying on *Garner*, but applying an objectively reasonable standard, *see Gilmere*, 774 F.2d at 1501 (affirming district court's finding that police officer's belief his life was in danger was not objectively reasonable and could not justify killing).

249. *Compare Lester v. City of Chicago*, 830 F.2d 706, 714 (7th Cir. 1987) (malice instruction constitutes reversible error) with *Jamieson v. Shaw*, 772 F.2d 1205, 1210-11 (5th Cir. 1985) (malice inquiry is proper under the fourth amendment). *See infra* notes 248-53 and accompanying text for the varying interpretations of the fourth amendment standard. Even courts within the same circuit characterize the relationship between *Garner* and *Glick* differently. *Compare Jamieson v. Shaw*, 772 F.2d 1205, 1209-12 (5th Cir. 1985) (both standards balance same interests) with *Hinojosa v. City of Terrell*, 834 F.2d 1223, 1229 n.7 (5th Cir. 1988) (*Garner* standard is "slightly different standard" than that in *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981), which is similar to *Glick* standard).

one panel of the Fourth Circuit have determined that all of the *Glick* factors, including whether officials acted maliciously, aid courts in determining what constitutes "reasonable" conduct within the meaning of the fourth amendment.²⁵⁰ A different panel of the Fourth Circuit and the Courts of Appeals of the Second, Seventh, and District of Columbia Circuits have determined that the application of the *Glick* factors to fourth amendment claims is improper because the *Garner* standard requires courts to determine officials' objective good faith and the final *Glick* factor requires courts to determine officials' subjective good faith.²⁵¹ The Eighth Circuit has combined the *Garner* and *Glick* standards, holding that officials are liable if they acted unreasonably or if they used force for an improper purpose.²⁵²

Although courts disagree as to how to interpret the *Garner* decision, the Supreme Court in that case, as it had in *Rochin v. California*, clearly established a general principle of law: liability attaches when officials use unreasonable force. Even though the general standards of liability for fourth and fourteenth amendment claims are clearly established, officials may be immune if the "contours" of these rights fail to give officials notice that their use of force was unlawful.²⁵³ Whether qualified immunity is available as a defense also requires

250. For the Fifth Circuit's position, see, e.g., *Jamieson*, 772 F.2d at 1210 (quoting *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981)). Another panel of the Fifth Circuit has determined that the *Garner* decision is applicable only in determining the liability of municipalities for fourth amendment violations, not the liability of officers. *Hendrix v. Matlock*, 782 F.2d 1273, 1275 (5th Cir. 1986). For the decision by a Fourth Circuit panel, see *Graham v. City of Charlotte*, 827 F.2d 945, 948 (4th Cir. 1987), cert. granted sub nom. *Graham v. Conner*, 57 U.S.L.W. 3230 (U.S. Oct. 3, 1988) (No. 87-6571).

251. For the decision by a panel of the Fourth Circuit, see *Martin v. Gentile*, 849 F.2d 863, 869 (4th Cir. 1988) (*Glick* analysis rejected, reasonableness under fourth amendment is wholly objective standard as in *Garner*). For the decision by the Second Circuit, see *Heath v. Henning*, 854 F.2d 6, 9 (2d Cir. 1988) (jury instructions based on *Glick* standards rejected as *Garner* standards focus on objective reasonableness of officer's actions consistent with fourth amendment analysis). For the decision by the Seventh Circuit, see *Lester*, 830 F.2d at 712-14 (subjective inquiry to determine if officer acted with malice incompatible with fourth amendment "objectively reasonable" analysis). See also Freyermuth, *Rethinking Excessive Force*, 1987 DUKE L.J. 692, 699 (1987) (malice is not factor in determining whether force was unreasonable). But see *Jones v. Board of Police Comm'rs*, 844 F.2d 500, 504 (8th Cir. 1988) (malice instruction does not constitute plain error when plaintiff alleged substantive due process claim arising from force during arrest). For a decision by the District of Columbia Circuit, see *Martin v. Malhoyt*, 830 F.2d 237, 261 n.76 (D.C. Cir. 1987) (*Glick* standard rejected in favor of *Garner* standard where more specific constitutional command protects interest).

252. *Patzner v. Burkett*, 779 F.2d 1363, 1371 (8th Cir. 1985) (citing *Bauer v. Norris*, 713 F.2d 408, 411-12 (8th Cir. 1983)).

253. This latter inquiry could also be stated in terms similar to the issue presented in *Malley v. Briggs*—whether a reasonably well-trained officer would have known that the use of force was unlawful. Some courts have paraphrased other portions of the *Malley* decision in framing the inquiry. See, e.g., *Tarantino v. Baker*, 825 F.2d 772, 775 n.2 (4th Cir. 1987) (qualified immunity available to officer if legal norm allegedly violated not "clearly established as to particular actions taken at time he acted"); *Robison v. Via*, 821 F.2d 913, 921 (2d Cir. 1987) (qualified immunity available if "it was objectively reasonable for the officer to believe that probable cause existed or . . . [if] officers of reasonable competence could disagree on whether the probable cause test was met").

courts to consider the relationship between the standards of liability and the *Harlow* standard for qualified immunity.

B. The Contours of the Fourth and Fourteenth Amendment Rights to be Free from Excessive Force: The Relationship Between the Standards of Liability and the Harlow Standard for Qualified Immunity

1. Fourteenth Amendment Claims: Distinct Standards

Although excessive force claims are fact-specific, generally requiring courts to consider the totality of the circumstances, the contours of the fourteenth amendment right are nonetheless sufficiently clear to apprise officials of which actions violate a person's right to substantive due process. Even courts that grant immunity, unless there was close factual correspondence between case law and the officials' challenged actions, recognize that close correspondence is not necessary when official conduct is egregious.²⁵⁴ In other words, reasonable officials know that the law clearly prohibits egregious unconstitutional conduct.

Although the availability of qualified immunity usually requires two inquiries—a determination of the general standard of liability and a determination of the contours of the asserted right—these inquiries merge when plaintiffs raise substantive due process claims. Even though conflicts among the circuit courts of appeal regarding the scope of a constitutional right are generally relevant in arguing that a right is not clearly established,²⁵⁵ such conflicts do not support an officer's assertion of qualified immunity for fourteenth amendment substantive due process claims because conduct that violates any of the fourteenth amendment standards is not effectively reasonable for the purpose of qualified immunity.²⁵⁶ For example, when courts apply all four *Glick* factors to substantive due process claims, qualified immunity is not available because the final factor, malice, is inconsistent with the *Harlow* standard, which bars immunity if officials should have known that their conduct was unconstitutional.²⁵⁷ Even

254. See, e.g., *Benson v. Allphin*, 786 F.2d 268, 276 n.18 (7th Cir.) (there may be situations in which actions are so egregious that results of balancing test will be foregone conclusion), *cert. denied*, 107 S. Ct. 172 (1986); see also *supra* note 135.

255. See *Garcia v. Miera*, 817 F.2d 650, 658 (10th Cir. 1987) (conflict among circuit courts of appeal relevant but not controlling to *Harlow* inquiry), *cert. denied*, 108 S. Ct. 1220 (1988). See *supra* note 137 for a discussion of the relevance of circuit court decisions.

256. See generally *Wood v. Sunn*, 865 F.2d 982, 987 (9th Cir. 1988) (finding of deliberate indifference under eighth amendment bars finding that official's conduct was objectively reasonable for purpose of immunity).

257. See, e.g., *Coon v. Ledbetter*, 780 F.2d 1158, 1164 (5th Cir. 1986) (qualified immunity is not available for malicious conduct); see generally *Harlow v. Fitzgerald*, 457 U.S. 800, 821 (1982) (Brennan, J., concurring) (officials who knew their conduct was unconstitutional do not have immunity even if reasonable officers would not have known that conduct was unlawful). But see *Bailey v. Turner*, 736 F.2d 963 (4th Cir. 1984). In *Bailey v. Turner*, the Fourth Circuit upheld the jury's inconsistent findings under the eighth amendment. *Id.* at 965-66. In evaluating a prison official's use of mace to control a prisoner, the jury found liability under the eighth amendment using four *Glick* factors and nevertheless found qualified immunity. *Id.* at 965-66, 970 n.8. Such an inconsistent finding can only be reconciled by noting that the court used the *Glick* factors to determine what was

courts that apply only the first three factors—the amount of force, the relationship between the amount of force and the need for the force, and the extent of the injury—often use these three factors to create an inference of malice,²⁵⁸ also negating officials' claims that their conduct was objectively reasonable. Finally, qualified immunity is not available even when courts do not require plaintiffs to prove malice because the general standard of liability for substantive due process claims requires egregious conduct, conduct that is clearly not objectively reasonable for the purpose of qualified immunity.

A fourteenth amendment violation indicates that officials had notice that their actions were unlawful,²⁵⁹ that there was no legitimate question regarding the propriety of their actions, and that reasonably well-trained officers would have known that the actions were unreasonable. The fourteenth amendment standard for liability is different from and more stringent than the objective reasonableness standard for qualified immunity. Therefore, qualified immunity is never a defense available to a fourteenth amendment excessive force claim.

2. Fourth Amendment Claims: Overlapping Standards

To determine the contours of the fourth amendment right to be free from excessive force requires consideration of *Tennessee v. Garner*²⁶⁰ and the significance of conflicting interpretations of that case. *Garner* indicates the contours of the fourth amendment by defining the fourth amendment's general standard of reasonableness as encompassing the issue of whether a reasonable officer would have believed that the use of force was necessary. The intercircuit conflict concerning the fourth amendment interpretation, however, does not support the finding that the contours of the fourth amendment are too ambiguous to put police officers on notice that the use of unreasonable force violates the fourth amendment. The contours of the fourth amendment right are clear; courts have either imposed upon the fourth amendment the more stringent fourteenth amendment standard or they have interpreted the fourth amendment as questioning whether conduct was objectively reasonable. Qualified immunity would not be a defense when courts erroneously consider under the fourth amendment whether the conduct was malicious because malicious conduct is per se objectively unreasonable for the purpose of qualified immunity.²⁶¹ Qualified immu-

"reasonable under the circumstances," *id.* at 965, and that the jury may have inferred that the official "reasonably" relied on a state statute that authorized the use of mace against prisoners. *Id.* at 970 n.9.

258. See, e.g., *Garcia v. Miera*, 817 F.2d 650, 655 n.7 (10th Cir. 1987) (malice or sadism element redundant because when amount of force used caused injuries so severe and was so disproportionate to need presented that conscience was shocked, malice or sadism should be presumed), *cert. denied*, 108 S. Ct. 1220 (1988).

259. See generally *Benson v. Allphin*, 786 F.2d 268, 276 n.18 (7th Cir.) (when constitutional right requires court to balance interests of plaintiff and state, liability may nevertheless attach, "even though prior case law may not address the specific facts at issue," when official's "actions are so egregious that the result of the balancing will be a foregone conclusion") (emphasis supplied), *cert. denied*, 107 S. Ct. 172 (1986).

260. 471 U.S. 1 (1985).

261. See, e.g., *Jamieson v. Shaw*, 772 F.2d 1205, 1210 (5th Cir. 1985) (*Glick* factors, which

nity is an unnecessary defense when courts properly interpret the *Garner* standard as questioning whether the use of force was objectively unreasonable because the standards are the same for finding a fourth amendment violation and for deciding immunity. In addition, the courts' discussion of excessive force claims reveals the unusual nature of these claims. Because they are fact-specific, requiring discovery and the fact finder to determine the credibility of the parties, the procedural safeguards created by the *Harlow* standard are impossible to apply.

a. *The Contours of the Fourth Amendment Right*

The *Garner* Court questioned whether the use of deadly force was objectively reasonable. Although the *Garner* opinion did not refer to the *Glick* factors in describing how to determine the constitutionality of a seizure, it set forth a standard that included three of the *Glick* factors: the amount of force used, the relationship between the amount of force and the need for force, and the extent of the injury.²⁶² The Court asserted that it "must balance the nature and quality of the intrusion on the individual's fourth amendment interests against the importance of the government's interests alleged to justify the intrusion."²⁶³ In examining the use of deadly force to stop a fleeing suspect, the *Garner* Court evaluated the need for the force in considering the government's interest in law enforcement, and it examined the extent of the injury in assessing the intrusiveness of a seizure.²⁶⁴

In weighing the extent of the intrusion against the government's need to stop a suspect with deadly force, the Court focused on an officer's justification for the use of deadly force. The Court did not hold that deadly force is never necessary, but rather confined its inquiry to the reason for the use of deadly force as it balanced the suspect's interests against the interests of the government. The Court's standard does not require the plaintiffs to prove that police officers acted maliciously, the fourth *Glick* factor. The motive of the officer is

question whether use of force was malicious, express test "similar" to *Garner* standard). Whether the Ninth Circuit also considers malice in determining whether force was unreasonable is unclear. In *White v. Pierce County*, 797 F.2d 812 (9th Cir. 1986), the court did not mention the *Garner* decision as it detailed the following factors for determining whether the use of force during an arrest violated the fourth amendment: "the officer's safety, the motivation for the arrest, and the extent of the injury." *Id.* at 816. The court's reference to the officer's motivation is ambiguous because this factor could question whether the arrest was malicious or whether the force used by the officer was in response to seriousness of the alleged crime. See also *Smith v. City of Fontana*, 818 F.2d 1411, 1416 (5th Cir.) (uses same factors to interpret *Garner's* reasonableness standard), *cert. denied*, 108 S. Ct. 311 (1987).

262. *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985). In *Garner*, the Court frequently refers to "the extent of the intrusion" and the intrusiveness of the seizure. *Id.* at 7-11. In *Lester v. City of Chicago*, 830 F.2d 706 (7th Cir. 1987), the Seventh Circuit stated, however, that the extent of a plaintiff's injuries was not a factor in determining whether the use of force during an arrest violated the fourth amendment. *Id.* at 712. Accord *Freyermuth*, *supra* note 251, at 699. The Seventh Circuit did state that it was a factor in determining the amount of damages. *Id.*

263. *Garner*, 471 U.S. at 8 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

264. *Id.* at 8-12.

not a factor because the fourth amendment inquiry is generally objective.²⁶⁵

The *Garner* Court thus interpreted the fourth amendment standard of reasonableness as questioning whether a reasonable officer under the circumstances would have believed that deadly force was necessary. Unless a fleeing felon presents a risk of harm to police officers or others, an officer's belief that deadly force is necessary is per se unreasonable. The *Garner* decision also implicitly defines the contours of fourth amendment claims regarding the use of excessive nondeadly force; the use of nondeadly force to effect or maintain an arrest is reasonable if a reasonable officer would have believed that the use of such force was necessary.²⁶⁶ This inquiry requires courts to consider the same factors: the amount of force, the relationship between the amount of force and the need for the force, and the extent of the injury. The fact that the force in question is nondeadly does not change the standard; it only affects how courts weigh the three factors. This application of *Garner* thus comports with the Court's fourth amendment balancing approach.

The *Garner* decision also suggests that the fourth amendment standard of liability does not question merely whether a police officer used unnecessary force; it also questions whether a reasonable police officer would have believed that the force used was necessary. Police officers are not liable under the fourth amendment for "every push and shove they make."²⁶⁷ The standard affords them discretion to act decisively. In balancing the interests of the parties under

265. See, e.g., *Lester*, 830 F.2d at 712 (objectively reasonable seizure does not violate fourth amendment despite the officer's bad intent); accord *Martin v. Gentile*, 849 F.2d 863, 868-69 (4th Cir. 1988) (fourth amendment reasonableness standard is wholly objective); see also *O'Neil v. Krzeminski*, 839 F.2d 9, 11 n.1 (2d Cir. 1988) (amendment forming basis of claim not specified, but malice not a necessary element to establish that force used during arrest was unconstitutional); see generally *Turner v. Dammon*, 848 F.2d 440, 444-47 (4th Cir. 1988) (objective fourth amendment standard applies to claim that police officers harassed business owners with unnecessary administrative searches).

The Supreme Court has emphasized that the fourth amendment provides an objective standard when considering the constitutionality of searches. See, e.g., *Scott v. United States*, 436 U.S. 128, 138 (1978) (in examining searches, courts have applied a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved). Even when courts are confronted with claims that stops by police officers were a pretext, they have nevertheless examined the constitutionality of the stops in objective terms. See, e.g., *United States v. Smith*, 799 F.2d 704, 708 (11th Cir. 1986) (issue is whether under the circumstances "a reasonable officer *would* have made the seizure in the absence of illegitimate motivation") (emphasis in original).

The Supreme Court has also applied an objective standard when criminal defendants assert that police officers either lied or were reckless in detailing the facts supporting their warrant applications. *Franks v. Delaware*, 438 U.S. 154, 171 (1978). The Court stated that the defendants would be entitled to a hearing if, after the challenged statements were excluded, the remaining facts were insufficient to support the warrant. *Id.* at 171-72.

266. Courts have applied the *Garner* standard to excessive force claims arising from the use of nondeadly force. See, e.g., *Lester*, 830 F.2d at 710-12 (court rejects "shocks the conscience" standard and applies objective fourth amendment analysis).

267. *Martin v. Gentile*, 849 F.2d 863, 869 (4th Cir. 1988). Decisions by courts that have determined that the negligent use of excessive force does not violate the fourth amendment also indicate that the standard of liability demands more than that the force was unnecessary. See, e.g., *Dodd v. City of Norwich*, 827 F.2d 1, 7-8 (2d Cir. 1987) (seizures conducted in negligent manner not unreasonable unless officer's conduct intentional), *cert. denied*, 108 S. Ct. 701 (1988).

the fourth amendment, courts recognize the need for such discretion when they consider the state's interest in law enforcement.²⁶⁸

The *Garner* standard thus duplicates the *Harlow* standard of objective reasonableness. Both standards are fact-specific and question whether a reasonable officer would have believed that the force used was necessary.²⁶⁹ Nevertheless, the fourth amendment standard for liability and the qualified immunity standard could be distinguished if *Garner* and *Anderson* were interpreted as supporting two standards of reasonableness regarding fourth amendment claims of excessive force during an arrest. This interpretation is based on the Court's reference to "probable cause" in *Garner*:

Where the officer has *probable cause* to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is *probable cause* to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.²⁷⁰

The Court's reference to probable cause is ambiguous. It could refer either to the fourth amendment standard of probable cause or to the less stringent standard of objective good faith recognized in *Malley*²⁷¹ and *Anderson*.²⁷² If the "probable cause" language were interpreted as denoting the fourth amendment standard of probable cause, then the standard for immunity would be different. Under this interpretation, police officers who lacked fourth amendment probable cause to believe that they were confronted with the circumstances specified in *Garner* could act reasonably for the purpose of qualified immunity, according to the Court's decisions in *Anderson* and *Malley*. Scrutiny of the *Garner* decision and the Court's use of the term in *Pierson v. Ray*²⁷³ reveals, however, that the Court probably meant the less stringent standard of objective reasonableness, even though "probable cause" is a term of art in constitutional law.

In *Garner* both the majority and the dissent questioned whether the officer reasonably believed that the use of force was necessary.²⁷⁴ The majority stated that the police officer "could not reasonably have believed that [the decedent]

268. See, e.g., *Martin*, 849 F.2d at 868-69 (in balancing nature and quality of intrusion against governmental interest, due regard must be given to need for officers to make split-second judgments regarding force needed for arrest).

269. The similarity between the standard is apparent when one paraphrases the language from the Court's decision in *Anderson*: "The relevant question in this case . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the force used] to be lawful, in light of clearly established law and the information the [arresting] officers possessed." *Anderson v. Creighton*, 107 S. Ct. 3034, 3040 (1987).

270. *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985) (emphasis supplied).

271. See *supra* notes 154-77 and accompanying text for a discussion of *Malley*.

272. See *supra* notes 178-211 and accompanying text for a discussion of *Anderson*.

273. 386 U.S. 547 (1967). See *supra* notes 52-56 and *infra* notes 278-81 and accompanying text for a discussion of *Pierson*.

274. *Garner*, 471 U.S. at 21; *id.* at 25-33 (O'Connor, J., dissenting).

posed any threat.”²⁷⁵ It later stated that the police officer “did not have probable cause to believe that [the decedent] . . . posed any physical danger to himself or others.”²⁷⁶ The majority also referred to a report by the Commission on Accreditation for Law Enforcement Agencies that prohibited the use of deadly force unless the police officer “‘reasonably believes that the action is in defense of human life.’”²⁷⁷ The *Garner* Court seemed to find the terms “probable cause” and “reasonable belief” to be synonymous.

In *Pierson v. Ray*,²⁷⁸ the Court also implicitly found the terms interchangeable.²⁷⁹ According to the Court, police officers have qualified immunity if they acted in good faith and had “probable cause” to make the arrests.²⁸⁰ If the Court had meant “probable cause” as defined by the fourth amendment, then there would have been no need to assert qualified immunity as a defense because there would have been no fourth amendment violation. In using the term “probable cause,” the Court likely meant “reasonable belief.”²⁸¹

Some circuit decisions support the view that the fourth amendment standard articulated in *Garner* mirrors the *Harlow* standard of objective reasonableness.²⁸² In response to *Garner*, the Seventh Circuit has set forth the following fourth amendment standard: “a police officer’s use of force in arresting a suspect violates the [fourth amendment] if, judging from the totality of the circumstances at the time of the arrest, the officer used greater force than was reasonably necessary to make the arrest.”²⁸³ The Fourth Circuit also has described the standard as questioning whether “a reasonable officer” would have thought the force used was necessary.²⁸⁴ That court interpreted the fourth amendment standard as one of “objective reasonableness,” requiring courts to

275. *Id.* at 21.

276. *Id.*

277. *Id.* at 18 (quoting COMMISSION ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, INC., STANDARDS FOR LAW ENFORCEMENT AGENCIES 1-2 (1983)).

278. 386 U.S. 547 (1967).

279. *Id.* at 555-57.

280. *Id.*

281. *See id.* at 555 (police officers who unlawfully conducted arrests pursuant to unconstitutional statute immune if they reasonably believed statute to be valid).

282. *See, e.g.,* *Lester v. City of Chicago*, 830 F.2d 706, 713-14 (7th Cir. 1987) (fourth amendment standard question, whether seizure was objectively reasonable); *Justice v. Dennis*, 834 F.2d 380, 384-88 (4th Cir. 1987) (en banc) (Phillips, J., dissenting) (fourth amendment standard when determining whether seizure was objectively reasonable), *petition for cert. filed*, 57 U.S.L.W. 3016 (U.S. Feb. 2, 1988) (No. 87-1422); *see also* *Sherrod v. Berry*, 827 F.2d 195, 201 (7th Cir. 1987) (upheld jury instruction stating that deadly force was permissible under the fourth amendment if officer “reasonably believed that the use of such force was necessary to prevent death or great bodily harm to himself”), *vacated and opinion below rev’d on other grounds*, 856 F.2d 802 (7th Cir. 1988) (en banc); *see generally* *Stevens v. Corbell*, 832 F.2d 884, 890 (5th Cir. 1987) (concerning substantive due process claim, “The law is and was clear in allowing a police officer to use only the amount of force he honestly believes is needed.”), *cert. denied*, 108 S. Ct. 2018 (1988). *But see* *Young v. City of Killeen*, 775 F.2d 1349, 1353 (5th Cir. 1985) (determining whether officer acted in good faith and reasonably believed that force was necessary not the same as determining whether force was reasonable).

283. *Lester*, 830 F.2d at 713.

284. *Martin v. Gentile*, 849 F.2d 863, 869 (4th Cir. 1988).

determine the amount of force "objectively reasonable in light of the facts and circumstances."²⁸⁵ Similarly, other Fourth Circuit judges have approved of jury instructions questioning whether the force used was "reasonably necessary."²⁸⁶ These judges approved of a jury instruction that paraphrased the *Harlow* standard for immunity. The instruction required the jury to consider whether "a reasonable and prudent officer would have applied [the same degree of force] in effecting the arrest under the circumstances disclosed in [the] case."²⁸⁷

The Eleventh Circuit also has interpreted *Garner*'s objective reasonableness test by specifying the following factors for courts to balance in determining whether the use of force was unreasonable: the scope of the intrusion, the place and manner in which it was conducted, and the officer's justification for using force.²⁸⁸

Some circuit courts, however, have not elaborated on the fourth amendment standard expressed in *Garner*,²⁸⁹ and other courts have indirectly discussed the fourth amendment standard by finding that the *Garner* decision did not apply to the excessive force claim asserted.²⁹⁰ Some courts have held that the *Garner* standard is not applicable when officers were negligent; without explanation, they have required a greater degree of culpability.²⁹¹ One court erro-

285. *Id.*

286. *Justice*, 834 F.2d at 386 (Phillips, J., dissenting, joined by Winter & Ervin, JJ.). The judges found that the following instruction stated the *Garner* standard:

The plaintiff . . . claims that excessive force was used by [the] Defendant . . . in connection with his arrest. A person, even if he is being lawfully arrested, has a constitutional right to be free of excessive force. An officer is entitled to use such force as a reasonable person would think is required to take one into custody, and this may include such physical force as is reasonably necessary to subdue a person who is struggling with an officer. However, an officer is not allowed to use any force beyond that reasonably necessary to accomplish his lawful purpose. Thus if you find Defendant used greater force than was reasonably necessary in the circumstances of this case, you find that the Defendant is liable for a violation of the Plaintiff's constitutional rights.

Id. The jury instruction approved by these judges paraphrases the one proposed by Michael Avery and David Rudovsky, M. AVERY & D. RUDOVSKY, POLICE MISCONDUCT: LAW AND LITIGATION § 13.3(d), at 13-7 (1987).

287. 834 F.2d at 386 (Phillips, J., dissenting, joined by Winter & Ervin, JJ.).

288. *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1502 (11th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1115 (1986).

289. *See Dugan v. Brooks*, 818 F.2d 513, 516 (6th Cir. 1987) (unreasonable force violates fourth amendment, which requires court to balance interests of parties); *Griffin v. Hilke*, 804 F.2d 1052, 1056 (8th Cir. 1986) (deadly force to stop fleeing felon permissible if officer has "probable cause to believe that [felon] poses a significant threat of death or serious physical injury to the officer or others"), *cert. denied*, 107 S. Ct. 3184 (1987); *see also Leber v. Smith*, 773 F.2d 101, 105 (6th Cir. 1985) (police officer who unintentionally shot and paralyzed suspect by falling while having gun cocked acted reasonably), *cert. denied*, 475 U.S. 1084 (1986).

290. *See, e.g., Dodd v. City of Norwich*, 827 F.2d 1, 7-8 (2d Cir. 1987) (fourth amendment not implicated when officer negligently uses force), *cert. denied*, 108 S. Ct. 701 (1988); *Brower v. Inyo County*, 817 F.2d 540, 546-47 (9th Cir. 1987) (fourth amendment analysis requires court to balance interest of parties and to determine whether seizure was reasonable), *cert. granted*, 108 S. Ct. 2869 (1988).

291. *See, e.g., Dodd*, 827 F.2d at 7 (reasonableness standard not applied in accidental shooting because otherwise it would result in fourth amendment violation based on negligence); *Young v. City*

neously determined that the fourth amendment was not implicated when officers used deadly force *after* placing handcuffs on a suspect.²⁹² Some courts have also erroneously determined that plaintiffs were not seized within the meaning of the fourth amendment when they were fatally injured after a highspeed auto chase²⁹³ or after hitting a roadblock that the driver allegedly did not see because police officers had blinded him with light as he approached the roadblock.²⁹⁴

Courts interpreting the *Garner* decision have questioned whether the officers reasonably believed that the force used was necessary and have not focused attention on the *Garner* Court's reference to "probable cause." The *Garner* decision and its progeny indicate the contours of the fourth amendment right—a seizure involving the use of deadly force is reasonable if the officers reasonably believed that the suspect threatened their safety or the safety of others, and a seizure involving the use of nondeadly force is reasonable if the officers reasonably believed that the degree of force used was necessary to maintain or effect an arrest. Thus, the standard for liability for a fourth amendment excessive force claim duplicates the standard for qualified immunity.

Although the *Garner* decision and the decisions by lower courts interpreting it describe the contours of the fourth amendment, courts may disagree on the clarity of these contours for two reasons: fourth amendment excessive force claims require courts to balance the interests of the parties and each claim is fact-specific.²⁹⁵ Although the judicial process of balancing often provides for an

of Killeen, 775 F.2d 1349, 1353 (5th Cir. 1985) (negligence alone insufficient to constitute fourth amendment violation).

292. *Dodd*, 827 F.2d at 7. Other courts and commentators have found that the fourth amendment protects plaintiffs after they have been arrested. See, e.g., *Justice v. Dennis*, 834 F.2d 380 (4th Cir. 1987) (en banc) (Phillips, J., dissenting) (fourth amendment applicable to pretrial detainees), *petition for cert. filed*, 57 U.S.L.W. 3041 (U.S. Feb. 2, 1988) (No. 87-1422); *Lester v. City of Chicago*, 830 F.2d 706, 713 n.7 (7th Cir. 1987) (*Garner* standard applicable to arrested person as long as in presence of arresting officers); *Spell v. McDaniel*, 824 F.2d 1380, 1384 n.3 (4th Cir. 1987) (fourth amendment preferred basis for examining claims arising from use of force during arrest or while attempting to maintain custody), *cert. denied*, 108 S. Ct. 752 (1988); *Freyermuth*, *supra* note 251, at 701-05 (fourth amendment applicable to pretrial detainees); see generally *Burch v. Apalachee Community Mental Health Serv.*, 840 F.2d 797, 807 (11th Cir. 1988) (en banc) (Clark, J., concurring) (fourth amendment applicable to mental patient detained in hospital).

Courts have disagreed about whether the fourth amendment is the sole basis for recovery when plaintiffs are injured during an arrest. Compare *Lester*, 830 F.2d at 714 (fourth amendment is sole ground for claim alleging excessive force during arrest) with *Jones v. Board of Police Comm'rs*, 844 F.2d 500, 504 (8th Cir. 1988) (substantive due process claim based on force during an arrest) and *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1500-04 (11th Cir. 1985) (en banc) (both fourth amendment and substantive due process grounds for unlawful force claims), *cert. denied*, 476 U.S. 1115, 1124 (1986).

293. See *Galas v. McKee*, 801 F.2d 200, 202-04 (6th Cir. 1986) (restraint on plaintiff's ability to leave was not accomplished by police officer's show of authority, but was result of plaintiff's choice to disregard that authority, resulting in car accident).

294. See *Brower*, 817 F.2d at 546-47 (plaintiff not seized because his freedom of movement was never restrained, and plaintiff's choice to avoid restraint is not seizure). But see *Jamieson v. Shaw*, 772 F.2d 1205, 1209-11 (5th Cir. 1985) (roadblock causing injury to passenger constituted seizure).

295. See, e.g., *Tarantino v. Baker*, 825 F.2d 772, 775 (4th Cir. 1987). In *Tarantino*, the Fourth Circuit aptly described the problem of the fourth amendment:

The meaning of the fourth amendment, at least when stated in broad philosophical terms,

unpredictable outcome,²⁹⁶ the outcome for this particular fourth amendment claim is significantly more predictable²⁹⁷ than the outcome of a claim alleging that officers lacked probable cause, also a fact-specific claim. The outcome of an excessive force claim is more predictable because it simply requires a common sense determination that the conduct was unreasonable under the circumstances, a determination frequently made by the fact finder. The determination of whether officers had probable cause, on the other hand, requires consideration of whether the officers had sufficient reasons to believe that a crime was committed and that the defendant committed it. This latter determination notoriously has engendered vehement disputes among the courts. The Supreme Court has explained that "[t]here are so many variables in the probable-cause equation that one determination will seldom be a useful 'precedent' for another."²⁹⁸ Recognizing two standards of reasonableness makes more sense when courts frequently cannot agree as to whether officers had probable cause.²⁹⁹

In *Pierson v. Ray*,³⁰⁰ *Mitchell v. Forsyth*,³⁰¹ *Malley v. Briggs*,³⁰² and *Ander-*

is relatively clear. The precise action or combination of actions, however, which will infringe a particular suspect's fourth amendment rights is often difficult for even the constitutional scholar to discern because the legal doctrine has developed and continues to develop incrementally.

Id.

296. See generally Aleinikoff, *supra* note 3, at 982 (balancing is "theory of interpretation created to bring realism to law and to limit subjectivity in constitutional interpretation"; yet it "seems more and more manipulative").

297. The issue of liability generally depends on the fact finder's determination of the credibility of the parties—that is, whether the fact finder believes the plaintiff's or the officer's version of what happened. See, e.g., *Hall v. Ochs*, 817 F.2d 920, 921-22, 925-26 (1st Cir. 1987) (jury believed plaintiffs' version); *Patzner v. Burkett*, 779 F.2d 1363, 1371 (8th Cir. 1985) (appellate court believed plaintiff's version and set aside summary judgment in favor of deputies). A jury trial is generally necessary to resolve factual disputes. See, e.g., *Lester v. City of Chicago*, 830 F.2d 706, 707-09 (7th Cir. 1987) (remand for new trial on excessive force claim; plaintiff's version of facts differed from that of officer's); *Robison v. Via*, 821 F.2d 913, 923-24 (2d Cir. 1987) (where conflicting accounts of use of force given, summary judgment improper and resolution of conflicting accounts was for jury); *Bibbo v. Mulhern*, 621 F. Supp. 1018, 1021-24 (D.C. Mass. 1985) (evidence adduced by plaintiff could support a finding that constitutional rights were violated).

298. *Illinois v. Gates*, 462 U.S. 213, 238 n.11 (1983).

299. See, e.g., *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 456 F.2d 1339, 1348-49 (2d Cir. 1972) (Lumbard, J., concurring) (probable cause is difficult legal issue to resolve). Judge Lumbard of the Second Circuit Court of Appeals explained that the lesser standard of reasonableness is the reasonable person standard of tort law and that this standard is appropriate when the court considers whether to impose liability upon officers for their lack of probable cause:

This second and lesser standard is appropriate because, in many cases, federal officers cannot be expected to predict what federal judges frequently have considerable difficulty in deciding and about which they frequently differ among themselves. It would be contrary to the public interest if federal officers were held to a probable cause standard as in many cases they would fail to act for fear of guessing wrong.

Id. at 1349. This lesser standard of reasonableness is harmonious with the Supreme Court's admonition that police officers do not have a duty to predict the future of constitutional law. See *supra* text accompanying note 54.

300. 386 U.S. 547 (1967). See *supra* notes 52-56 and accompanying text.

301. 472 U.S. 511 (1985). See *supra* notes 119-30 and accompanying text.

302. 475 U.S. 335 (1986). See *supra* notes 154-77 and accompanying text.

son v. Creighton,³⁰³ two standards of reasonableness were applied to other fourth amendment claims. In *Anderson*, the Court explicitly recognized two such standards, declaring that even if an official's conduct was unreasonable within the meaning of the fourth amendment, the conduct could be objectively reasonable for the purpose of qualified immunity.³⁰⁴ The *Anderson* Court determined that law enforcement officials could reasonably but mistakenly conclude that they had both probable cause and exigent circumstances supporting their warrantless search.³⁰⁵ The Court focused on what the officer knew before deciding to act, stating the issue as "whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed."³⁰⁶ According to the *Anderson* Court, the issue was not only objective (would a reasonable officer have acted similarly?), but also fact-specific (what did the officer know?). The Court's focus on the officer's reasonable belief is also consistent with its decisions addressing qualified immunity for other fourth amendment claims.³⁰⁷

The lower courts have also interpreted the *Harlow v. Fitzgerald*³⁰⁸ standard for qualified immunity as questioning whether the force used was objectively reasonable.³⁰⁹ In discussing the objective reasonableness standard for qualified immunity, the Eleventh Circuit also noted that the qualified immunity standard does not question merely whether the force used was necessary, but also whether the officers reasonably believed that the force used was necessary.³¹⁰

Thus, the *Harlow* standard for qualified immunity and the fourth amendment standard for excessive force claims overlap; both standards question whether the officer's belief that a certain amount of force was necessary is objectively reasonable.

b. Substantive and Procedural Aspects of Overlapping Standards

Although the fourth amendment standard of liability and the qualified im-

303. 107 S. Ct. 3034 (1987). See *supra* notes 178-211 and accompanying text for a discussion of *Anderson*.

304. *Anderson*, 107 S. Ct. at 3041.

305. *Id.* at 3039.

306. *Id.* at 3040.

307. See *supra* notes 52-56, 119-30, 154-77 and accompanying text for the Court's qualified immunity decisions in *Pierson*, *Mitchell*, and *Malley*.

308. 457 U.S. 800 (1982).

309. See, e.g., *Whitt v. Smith*, 832 F.2d 451, 452-54 (7th Cir. 1987) (must consider specific factual situation to determine whether officer reasonably but mistakenly concluded that probable cause was present); *White v. Pierce County*, 797 F.2d 812, 816 (9th Cir. 1986) (reasonableness of force analyzed in light of objective factors); *Acoff v. Abston*, 762 F.2d 1543, 1548-50 (11th Cir. 1985) (immunity where conduct does not violate rights of which reasonable person would have known); *Bledsoe v. Garcia*, 742 F.2d 1237, 1240 (10th Cir. 1984) (force not privileged if in excess of what "actor reasonably believes to be necessary"); *Bauer v. Norris*, 713 F.2d 408, 411 (8th Cir. 1983) (whether defendant uses force that would appear necessary to reasonable person).

310. See *Clark v. Evans*, 840 F.2d 876, 881 (11th Cir. 1988). In *Clark*, the court stated "[T]he proper question is not whether in fact the escape could reasonably have been prevented in a less violate manner; rather, the issue is whether a reasonable officer with the information available to [the officer] could have believed that less violent means were not reasonably available." *Id.*

munity standard overlap, determining whether qualified immunity is available as an affirmative defense to a charge of excessive force requires consideration of the substantive and procedural aspects of qualified immunity. In setting forth the *Harlow* standard, the Court has stressed the procedural aspects of the issue, emphasizing the courts should resolve the issue of qualified immunity before granting discovery.³¹¹ Furthermore, it has determined that an order denying qualified immunity is an appealable interlocutory order because the question of immunity is collateral to the merits of the underlying claims.³¹² Although the Supreme Court has found the issue of qualified immunity to be collateral to the issue of liability for other fourth amendment claims,³¹³ courts should recognize that the issue of qualified immunity is *not* collateral to a fourth amendment excessive force claim. The issue of qualified immunity is identical, not collateral, to the issue of fourth amendment liability. Both raise the fact-specific question of whether a reasonable officer would have believed that the force used was necessary under the circumstances. When material facts are not in dispute, motions for judgment on the pleadings³¹⁴ and for summary judgment³¹⁵ challenging the plaintiff's fourth amendment claim adequately protect officers because the fourth amendment standard of liability balances the state's interest in law enforcement against a plaintiff's interest in personal security.³¹⁶ Therefore, a defense of qualified immunity is superfluous.

Courts, however, generally have distinguished the standard for fourth amendment liability from the standard for qualified immunity, stating that resolution of the qualified immunity issue is "conceptually distinct" from resolution of the underlying claim.³¹⁷ The qualified immunity standard is conceptually distinct in that it raises unique issues: it questions whether the general law clearly was established and whether the contours of the asserted right are sufficiently clear to give officers notice that their conduct was unlawful.³¹⁸ A plural-

311. See, e.g., *Anderson*, 107 S. Ct. at 3039 n.2, where the Court stated that the "driving force behind *Harlow*'s substantial reformation of qualified-immunity principles [was] that 'insubstantial claims' against government officials be resolved prior to discovery and on summary judgment if possible." *Id.* See *supra* notes 85-90 and accompanying text for a discussion of the Court's emphasis on avoiding unnecessary discovery. One court has stated that qualified immunity may be raised as a defense at any time because the defense is to shield officials from unnecessary costs and trials. *Easter House v. Felder*, 852 F.2d 901, 916 n.16 (7th Cir.) (permitting dismissal of suit on summary judgment at early stage of proceedings to protect public officials against burdens of unwarranted litigation), *vacated pending rehearing en banc*, 861 F.2d 494 (1988).

312. *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985) (plurality opinion). See *supra* notes 119-24 and accompanying text for a discussion of *Mitchell*.

313. See *supra* notes 178-211 and accompanying text.

314. See *infra* note 342 for a discussion of judgment on the pleadings.

315. See *infra* note 343 for a discussion of summary judgment.

316. See *supra* notes 267-68 and accompanying text.

317. *Mitchell*, 472 U.S. at 527. See also *Whitt v. Smith*, 832 F.2d 451, 454 (7th Cir. 1987) (quoting *Mitchell*, 472 U.S. at 527). But see generally Note, *Lynch v. Cannatella: An Inconsistent Application of Qualified Immunity*, 62 TUL. L. REV. 820, 824-27 (1988) (courts often confuse underlying claim with issue of qualified immunity).

318. See *Mitchell*, 472 U.S. at 524-30 (correctness of plaintiff's version of facts is immaterial; rather, court must determine whether legal norms allegedly violated by defendant were clearly established or whether law clearly proscribed defendant's actions); see generally *Anderson*, 107 S. Ct. at

ity of the Supreme Court reasoned that the resolution of whether the law was clearly established "does not entail a determination of the 'merits' of [a] plaintiff's claim that [a] defendant's actions were in fact unlawful."³¹⁹

Once courts recognize that the fourth amendment prohibits unreasonable seizures and that the contours of the fourth amendment indicate that officers reasonably must believe that the use of force was necessary, they should acknowledge that, in resolving the qualified immunity issue, they are resolving the merits of the plaintiff's claim. The standards overlap completely and are not distinct because an officer has qualified immunity and complies with the fourth amendment if a reasonable officer would have believed that the officer's use of force was necessary.³²⁰

The standards have not overlapped in cases in which the Supreme Court has determined that qualified immunity is a defense for other fourth amendment claims. In *Mitchell v. Forsyth*,³²¹ a plurality of the Court determined that qualified immunity was available for an unconstitutional wiretap because at the time of the challenged action it was not clearly established that a warrantless wiretap conducted for the purpose of monitoring a domestic threat to national security was unconstitutional.³²² In *Pierson v. Ray*³²³ and *Malley v. Briggs*,³²⁴ the Court distinguished between the fourth amendment standard and the standard for qualified immunity. It determined that qualified immunity was available for an unconstitutional arrest if officers had "probable cause" to arrest the plaintiff, a standard less stringent than the fourth amendment standard of probable cause.³²⁵ In these cases, the less stringent standard of "probable cause" was met

3039 (contours must be "sufficiently clear" to put officials on notice that conduct was unlawful). Some courts, for example, have stated that the fact finder should first determine whether an officer had probable cause and the court should then determine whether the law was clearly established. *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988) (judge made determination of immunity only after jury returned verdict on issue of probable cause). One court has erroneously stated that a court should determine whether law was clearly established and the fact finder should determine whether a reasonable official would have known that the conduct violated clearly established law. *See Brady v. Gebbie*, 859 F.2d 1543, 1556 (9th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3522 (U.S. Jan. 30, 1989). Determining whether the law was clearly established is a task peculiarly suited for courts, not fact finders.

319. *Mitchell*, 472 U.S. at 529 n.10.

320. The Supreme Court's recognition of two standards of reasonableness for other fourth amendment claims has unfortunately been misconstrued by some courts: they often fail to delineate the fourth amendment standard because they address only the single issue of whether a reasonable officer could have believed the conduct to be lawful. *See, e.g., Ohio Civil Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988) (to determine whether conduct was unconstitutional under fourth amendment would be to render "advisory opinion"); *Ostabutley v. Welch*, 857 F.2d 220, 224 (4th Cir. 1988) (inquiry limited to whether officer could reasonably believe that action was permissible under clearly established constitutional principles). Avoiding the issue of liability thus does little to clarify the scope of qualified immunity.

321. 472 U.S. 511.

322. *Id.* at 530-35.

323. 386 U.S. 547 (1967).

324. 475 U.S. 335 (1986).

325. *See Malley*, 475 U.S. at 344-47; *Pierson*, 386 U.S. at 555-57. *See supra* notes 154-77 and

if the officer's belief was reasonable.³²⁶ Qualified immunity thus was available if the officer reasonably believed that probable cause was present, but the officer violated the fourth amendment if probable cause in fact was not present. The Court applied two standards of reasonableness in *Anderson v. Creighton*³²⁷ not only to the issue of probable cause but also to the question of whether the officer reasonably believed that exigent circumstances were present.³²⁸ The *Anderson* Court determined that the officer could have qualified immunity for a warrantless search if he reasonably believed that both probable cause and exigent circumstances were present.³²⁹ The Court's adherence to two standards of reasonableness in all these cases did not compel it to resolve the merits of the underlying claim as it addressed whether qualified immunity was available.

In contrast to these fourth amendment claims, a single standard of reasonableness applies to excessive force claims asserted under the fourth amendment. Although a majority of the Supreme Court has not discussed whether qualified immunity is available when the qualified immunity standard overlaps with the substantive standard of liability, some judges have cogently argued that, when the standards overlap, qualified immunity is not a defense.³³⁰ In *Anderson*, Justice Stevens argued in his dissent that a court should not instruct the jury on immunity when the standards overlap. He contended that allowing officers to assert qualified immunity as a defense would be to give officers "two bites at the apple."³³¹ He maintained that the fourth amendment standard of liability protects the state's interest in law enforcement and that allowing officers to assert qualified immunity would compel courts to count the state's interest twice and a person's privacy interest only once.³³² In addition, he asserted that if a jury were to determine the availability of qualified immunity, it would be confused by

accompanying text for a discussion of *Malley*; *supra* notes 52-56 and accompanying text for a discussion of *Pierson*.

326. See *Malley*, 475 U.S. at 345 (question is whether reasonably well-trained officer would have known that affidavit failed to establish probable cause); *Pierson*, 386 U.S. at 557 (verdict for officers would follow if jury found that officers reasonably believed in good faith that arrest was constitutional). Professors Nahmod and Schwartz have similarly distinguished the qualified immunity standard from the standard for liability for an erroneous arrest or search. See S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, § 8.11, at 489 (2d ed. 1986) ("reasonable belief in the legal validity of an arrest and search was a different and less restrictive standard than probable cause"); M. SCHWARTZ & J. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSE, AND FEES § 7.16, at 172-73 (1986).

327. 107 S. Ct. 3034 (1987).

328. *Id.* at 3038-39.

329. *Id.*

330. See, e.g., *id.*, at 3049-54 (Stevens, J., dissenting, joined by Brennan and Marshall, JJ.) (withdrawing qualified immunity as defense will encourage training of officers to distinguish between what officer considers reasonable and what Constitution deems reasonable); Newman, *supra* note 56 at 461 (section 1983 actions suffer shortcomings, such as wrong defenses, wrong plaintiffs, wrong defendants, wrong burdens of proof, and wrong measures of damages).

331. *Anderson*, 107 S. Ct. at 3052 n.20 (Stevens, J., dissenting) (quoting *Llaguno v. Mingey*, 763 F.2d 1560, 1569 (7th Cir. 1985) (en banc)).

332. *Id.* at 3052 (Stevens, J., dissenting). Another judge, however, has argued that counting the state's interest twice is proper because the *Harlow* qualified immunity standard recognizes the need to give officials broad discretion for their "split-second judgments." *Llaguno v. Mingey*, 763 F.2d

the overlapping standards.³³³

Some courts, however, have allowed officers two bites at the apple even when they recognize that the standards overlap.³³⁴ They have reasoned that even though a jury generally determines whether the use of force was reasonable within the meaning of the fourth amendment, a court should resolve the issue of reasonableness because the Supreme Court in *Harlow* "converted what were largely factual determinations into determinations of law."³³⁵

The Supreme Court's opinion in *Anderson v. Creighton*,³³⁶ however, does not indicate that the *Harlow* standard for qualified immunity raises only a legal question to be decided by the judge.³³⁷ In *Anderson*, the Court discussed the procedural aspects of qualified immunity.³³⁸ The Court recognized the significance of factual disputes in determining whether a court could resolve the issue of qualified immunity.³³⁹ It noted that a court could, as a matter of law, determine whether an officer had qualified immunity if it had to consider only the plaintiff's allegations or only the defendant's allegations.³⁴⁰ Immunity would be

1560, 1576 (7th Cir. 1985) (en banc) (Coffey, J., concurring and dissenting) (determining availability of qualified immunity for mistaken judgments as to probable cause).

333. *Anderson*, 107 S. Ct. at 3053 n.20 (Stevens, J., dissenting); accord Newman, *supra* note 56, at 460.

334. See, e.g., *Skevofilax v. Quigley*, 586 F. Supp. 532, 542 (D.N.J. 1984) (jury determines whether officer did in fact violate law only after court declares law to be firmly established); accord *White v. Pierce County*, 797 F.2d 812, 816 (9th Cir. 1986) (question of reasonableness of force used in arrest usually for jury, but trial court must decide issue on summary judgment where qualified immunity at issue).

335. *Skevofilax*, 586 F. Supp. at 542. Other courts have stated that once a determination is made that the law was clearly established, the fact finder should resolve the issue of qualified immunity by determining whether the officer had a reasonable belief that the force used was necessary. See, e.g., *Thorstead v. Kelley*, 858 F.2d 571, 575-76 (9th Cir. 1988) (question of whether reasonable officer could reasonably believe that conduct was legal is fact-specific and therefore appropriate for jury). The issue presented to the fact finder under these circumstances, however, is identical to the issue of liability under the fourth amendment.

336. 107 S. Ct. 3034 (1987).

337. Cf. *Halperin v. Kissinger*, 807 F.2d 180, 189 (D.C. Cir. 1986). The *Halperin* court stated that the *Harlow* standard "did not . . . alter the burden that Rule 56(c) of the Federal Rules of Civil Procedure places on the movant to demonstrate, as a condition of summary judgment, that the objective inquiry raises 'no genuine issue as to any material fact.'" *Id.* (quoting FED. R. CIV. P. 56(c)).

338. 107 S. Ct. at 3042 n.6. The Court reiterated the procedural scheme first articulated in *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (plurality) (defendant pleading qualified immunity entitled to dismissal prior to discovery where plaintiff fails to allege violation of law or to summary judgment post-discovery where no genuine issue regarding occurrence of violation exists). The Court, however, did not detail the procedures for determining whether an official may assert the exceptional circumstances exception of *Harlow*. See *supra* notes 87, 92 and accompanying text for a discussion of the exceptional circumstances exception and the necessary procedure for its utilization. This exception, however, may require resolution of factual disputes. See, e.g., *Barnett v. Housing Auth. of Atlanta*, 707 F.2d 1571, 1582-83 (11th Cir. 1983) (success of "extraordinary circumstances" claim dependent on defendant's proof of justifiable ignorance regarding relevant legal standard).

339. 107 S. Ct. at 3042 n.6.

340. *Id.* In *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985), the Fifth Circuit erroneously interpreted the Court's decision in *Harlow* and amendments to the Federal Rules of Civil Procedure as

proper if the actions alleged by the plaintiff were ones that "a reasonable officer could have believed to be lawful," and immunity would be improper if the actions alleged by the defendant were not ones that a reasonable officer could have believed to be lawful.³⁴¹ Resolving immunity by a motion for judgment on the pleadings³⁴² or for summary judgment³⁴³ would be possible because no factual

imposing upon plaintiffs a duty to clearly specify the facts forming the basis of their alleged constitutional violations. *See id.* at 1477-82. *Accord* *Freedman v. City of Allentown*, 853 F.2d 1111, 1114-15 (3d Cir. 1988) (complaint must specify harmful conduct causing plaintiff's injury). The Fifth Circuit noted that Rule 11 of the Federal Rules of Civil Procedure, FED. R. CIV. P. 11, compels an attorney to reasonably investigate the basis of a claim before filing it and that Rule 12(e), FED. R. CIV. P. 12(e), allows federal judges to compel plaintiffs to submit a more definite statement. 751 F.2d at 1481-82. The court, however, failed to refer to the Supreme Court decision in *Gomez v. Toledo*, 446 U.S. 635, 638-42 (1980), in which the Court discussed the elements of a claim under section 1983. In *Gomez*, the Court stated that because qualified immunity is an affirmative defense, a plaintiff needs to allege only two elements—(1) a deprivation of a federal right, (2) by a person acting under color of state law. *Id.* at 640.

341. *Anderson*, 107 S. Ct. at 3042 n.6.

342. Rule 12(c) of the Federal Rules of Civil Procedure provides that a party may move for judgment on the pleadings after the pleadings are closed. FED. R. CIV. P. 12(c). The pleadings include the complaint and the answer. FED. R. CIV. P. 7(a). Because qualified immunity is an affirmative defense, officials seeking to assert qualified immunity as a defense must raise it in their answer. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *see also* FED. R. CIV. P. 8(c) (defendant must plead matter constituting affirmative defense). Failure to plead qualified immunity in an answer constitutes a waiver of the defense. *See, e.g., Frett v. Government of Virgin Islands*, 839 F.2d 968, 973 n.1 (3d Cir. 1988) (failure to plead affirmative defense results in involuntary waiver). Many courts have erroneously considered qualified immunity defenses in determining whether to grant an official's motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, which allows courts to dismiss claims that fail to "state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6); *see, e.g., Dominique v. Telb*, 831 F.2d 673, 677 (6th Cir. 1987) (defendant can challenge sufficiency of complaint under 12(b)(6) by asserting qualified immunity). These courts have not required officials to file an answer asserting qualified immunity as a defense. *See, e.g., Gutierrez v. Municipal Court*, 838 F.2d 1031, 1052 (9th Cir. 1988) (motion to dismiss for failure to state claim and motion for judgment on the pleadings are alternatives to asserting qualified immunity as defense); *Dominique*, 831 F.2d at 677 (prior to asserting qualified immunity defense, defendant can challenge sufficiency of complaint). Confusion as to the proper motion to assert in raising qualified immunity as a defense probably occurred as result of the plurality's statement in *Mitchell* that "the denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity" satisfies two of the requirements for finding an order appealable under the collateral orders doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985).

343. Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is proper if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Recently the Supreme Court addressed the standards for granting summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-28 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-57 (1986).

In *Liberty Lobby*, the Court discussed what is a "genuine" issue of fact. It stated that a genuine issue of fact exists when there is "sufficient disagreement to require submission to a jury," but not when the "evidence is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52. It noted that this standard is the same as the standard for determining whether to grant a directed verdict. *Id.* at 251. Accordingly, the Court held that in resolving a motion for summary judgment, a trial court must assume that the nonmoving party's evidence is true, draw all justifiable inferences in the nonmoving party's favor, and evaluate the evidence in light of the substantive standard of proof applicable at trial. *Id.* at 254-55. If the quantum of evidence is not sufficient to enable a reasonable

dispute would exist. Under these circumstances, the goal of the *Harlow* standard—to dismiss insubstantial suits prior to discovery—is attainable.

The *Anderson* majority explained that discovery may sometimes be necessary.³⁴⁴ It noted that, if the plaintiff alleges actions that a reasonable officer would not have believed to be lawful and if the defendant alleges actions that a reasonable officer would have believed to be lawful, discovery is then appropriate *prior* to resolving the issue of immunity.³⁴⁵ The Court explained that discovery under these circumstances should be “tailored” to the question of immunity.³⁴⁶

In recognizing the need for discovery, the *Anderson* Court did not explain what a court should do when discovery fails to resolve what actions were taken by the officer.³⁴⁷ The Court did not specify the nature of the qualified immunity

jury to find for the nonmoving party, then any issue of fact is not “genuine” and the court should grant the motion for summary judgment. *Id.* at 255.

In *Celotex*, the Court addressed the procedural aspects of summary judgment. The Court stated that Rule 56 does not require a party moving for summary judgment to support its motion with affidavits. *Celotex*, 477 U.S. at 3223-24. The Court explained that when the nonmoving party has the burden of proof at trial on a dispositive issue, the moving party may discharge its burden by demonstrating “that there is an absence of evidence [in the existing record] to support [an essential element of] the nonmoving party’s case.” *Id.* After the moving party makes this initial showing, the burden shifts to the nonmoving party “to go beyond the pleadings” and designate “‘specific facts showing that there is a genuine issue for trial.’” *Id.* at 324 (quoting FED. R. CIV. P. 56(e)). Under *Liberty Lobby*, the sufficiency of this showing is evaluated in light of the substantive standard of proof applicable at trial.

The Court in *Celotex* noted that if the nonmoving party cannot make the requisite showing because of lack of discovery, the trial court is either to deny or continue the motion until discovery is completed. *Id.* at 326 (citing FED. R. CIV. P. 56(f)). This interpretation of Rule 56 is applicable when officials assert immunity. *See, e.g.,* Halperin v. Kissinger, 807 F.2d 180, 188-89 (D.C. Cir. 1986) (*Harlow* standard did not alter procedures for moving for summary judgment). *But see* Elliott v. Perez, 751 F.2d at 1483 (Higginbotham, J., concurring) (*Harlow* standard permits courts to dismiss claims even when discovery might have allowed plaintiffs to allege meritorious claims).

For further discussion of the implications of *Liberty Lobby* and *Celotex*, see generally Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 6 REV. LITIGATION 263 (1987) (new liberal standard for granting summary judgment turns process into mini-trial on paper); Note, *Civil Procedure—Requirement of Affirmative Evidence by Party Moving for Summary Judgment—Celotex Corp. v. Catrett*, 35 U. KAN. L. REV. 831 (1987) (use of summary judgment motion will diminish as result of *Celotex* decision); Comment, *Federal Summary Judgment: The “New” Workhorse for an Overburdened Federal Court System*, 20 U.C. DAVIS L. REV. 955 (1987) (examines *Liberty Lobby* and *Celotex* decisions and concludes procedural safeguards necessary to ensure adequate discovery and notice at summary judgment level).

344. *Anderson*, 107 S. Ct. at 3042 n.6. The plurality in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), first noted that discovery might be necessary prior to resolving the issue of qualified immunity. *Id.* at 526. The plurality, however, inappropriately referred to the *Harlow* decision as support for this proposition. *Id.* The *Mitchell* plurality stated, “*Harlow* emphasizes that even such pretrial matters as discovery are to be avoided *if possible*, as ‘inquiries of this kind can be peculiarly disruptive of effective government.’” *Id.* (emphasis supplied) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982)).

345. *Anderson*, 107 S. Ct. at 3042 n.6.

346. *Id.*

347. *Id.* The Court tersely stated, “[D]iscovery may be necessary before *Anderson*’s motion for summary judgment on qualified immunity grounds can be resolved.” *Id.* The issue before the Court in *Anderson*, however, was whether the lower court “erred by refusing to consider [the officer’s] argument that he was entitled to summary judgment on qualified immunity grounds if he could

defense—whether a judge or jury should determine whether the alleged actions were ones that a reasonable officer could have believed to be lawful. Even though the standard for qualified immunity overlaps with the standard for liability under the fourth amendment, some courts have distinguished the standards by determining that the judge resolves the issue of qualified immunity.³⁴⁸ Other courts have determined that the jury should resolve the issue.³⁴⁹ Although a jury generally resolves factual disputes, the Court's emphasis in *Harlow*, *Mitchell*, and *Davis* that the *Harlow* standard is "wholly objective" has clouded the recognition that the standard could also be fact-specific.

The *Harlow* decision merely eliminated from the qualified immunity standard a single factual issue—whether the officers knew that they had acted unlawfully. It did not transform factual issues into legal questions.³⁵⁰ Justice

establish as a matter of law that a reasonable officer could have believed the search to be lawful." *Id.* at 3038 (emphasis supplied).

348. See, e.g., *White v. Pierce County*, 797 F.2d 812, 815 (9th Cir. 1986) (judge determines existence of probable cause); *Schultz v. Thomas* 649 F. Supp. 620, 622-23 (E.D. Wis. 1986) (where police acted with probable cause, qualified immunity issue not for jury), *rev'd on other grounds*, 832 F.2d 108 (7th Cir. 1987); *Garcia v. Wyckoff*, 615 F. Supp. 217, 223 (D.C. Colo. 1985) (qualified immunity is question of law because *Garner* requires courts to balance interests of parties); *Skevoiflax v. Quigley*, 586 F. Supp. 532, 542 (D.N.J. 1984) (judge resolves qualified immunity issue).

349. See, e.g., *Fiacco v. City of Rensselaer*, 783 F.2d 319, 325 (2d Cir. 1986) (question of good faith defense submitted to jury), *cert. denied*, 480 U.S. 922 (1987); *Vizbaras v. Prieber*, 761 F.2d 1013, 1016 (4th Cir. 1985) (use of excessive force by police a question for jury), *cert. denied*, 474 U.S. 1101 (1986); see generally *Klein v. Ryan*, 847 F.2d 368, 371 (7th Cir. 1988) ("[I]f there are issues of disputed fact upon which the question of immunity turns . . . the case must proceed to trial.") (quoting *Green v. Carlson*, 826 F.2d 647, 652 (7th Cir. 1987)); *Schlegel v. Bebout*, 841 F.2d 937, 945 (9th Cir. 1988) ("existence of a reasonable belief that [the] conduct was lawful, viewed in light of clearly established law, is a question for the trier of fact"). See also *Holt v. Artis*, 843 F.2d 242, 247 (6th Cir. 1988) (Wellford, J., dissenting) (unreasonableness of defendant's actions cannot be determined as matter of law); *White*, 797 F.2d at 816-17 (Schroeder, J., dissenting) (where conflicting inferences of fact existed and trial court denied summary judgment on immunity issue, appellate court should not act as trier of fact to resolve conflicting inferences in favor of police officers).

350. Although the *Harlow* Court recognized that the factual issue of an official's subjective good faith often required extensive discovery and frequently precluded a court from granting an official's motion for summary judgment, *Harlow*, 457 U.S. at 815-17, it did not implicitly approve of transforming factual questions into questions of law. Judge Schwarzer has noted, however, that for more than three hundred years judges have struggled to define what constitutes an issue of fact and what constitutes an issue of law. Schwarzer, *Summary Judgment under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 469 (1984). According to Judge Schwarzer, an issue of fact questions whether "a thing was done or [whether] an event occurred." *Id.* at 470. An ultimate fact is a mixed question of law and fact, one that is outcome determinative. *Id.* Judge Schwarzer has classified ultimate facts into three categories: those that should be decided by a jury, those that should be decided by a court, and those that may be decided by either a jury or a court. *Id.* at 472-74. In the first category, he stated that the following issues should be decided by a jury: "whether a person had reasonable cause, acted within a reasonable time or can be charged with notice." *Id.* at 472. These issues are similar to the issue presented when a plaintiff alleges that the use of force during an arrest violated the fourth amendment and when a police officer asserts qualified immunity as a defense. See also *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1508 (11th Cir. 1985) (en banc) (Tjoflat, J., concurring in part and dissenting in part) (fourth amendment standard of liability presents mixed question of fact and law; it questions what facts were available to officer, a factual determination, and it questions the reasonableness of officer's response, a legal determination), *cert. denied*, 476 U.S. 1115, 1124 (1986). Judge Schwarzer maintained that a jury should

Scalia, the author of the majority opinion in *Anderson*, properly questioned in a decision rendered prior to his joining the Court whether "the expansive language of [the *Harlow*, *Mitchell*, and *Davis* decisions] is to be taken seriously."³⁵¹ He emphasized that although the Court described its standard as "objective," the *Harlow* standard did not alter the procedures for moving for summary judgment.³⁵² He declared that after *Harlow* an official moving for summary judgment on the ground of qualified immunity still had the burden of demonstrating "that the objective inquiry raise[d] 'no genuine issue as to any material fact.'"³⁵³

Justice Scalia inferred from *Harlow* and its progeny that the issue of qualified immunity could sometimes be resolved prior to discovery and that sometimes it could not.³⁵⁴ The Court's decisions in *Harlow*, *Mitchell*, and *Davis* emphasized that the qualified immunity issue could be resolved prior to discovery. As Justice Stevens soundly noted in his *Anderson* dissent, the *Harlow* Court simply "assumed that many immunity issues could be determined as a matter of law before the parties had exchanged depositions, answers to interrogatories, and admissions."³⁵⁵ The issue of immunity could be resolved under these circumstances when the law was not clearly established and when a court examined only the plaintiff's or only the defendant's allegations, as discussed above.³⁵⁶ Such issues could be decided as a matter of law and qualified immunity could be immunity from suit, not a mere defense to liability.

Nevertheless, when factual issues are intertwined with resolution of the immunity question, then discovery may be necessary and qualified immunity may only be a defense to liability, not an immunity from suit.³⁵⁷ Under these cir-

decide these issues because such issues generally require ad hoc decision making and such decisions turn on an "assessment of human behavior [that is] within the common experience of jurors." Schwarzer, *supra*, at 472.

351. *Halperin v. Kissinger*, 807 F.2d 180, 185 (D.C. Cir. 1986).

352. *Id.* at 188-89.

353. *Id.* at 189 (quoting FED. R. CIV. P. 56(c)). In *Rich v. Dollar*, 841 F.2d 1558 (11th Cir. 1988), the Eleventh Circuit detailed the procedures associated with a motion for qualified immunity. *Id.* at 1563-65. The court stated that officials must first prove that the challenged act required them to exercise discretion. *Id.* at 1563-64. The burden then shifts to the plaintiff to establish that the actions violated clearly established law. *Id.* at 1564. If the law was clearly established and there is "a genuine issue of material fact as to whether the [official] actually engaged in conduct that violated clearly-established law," then the plaintiff is entitled to discovery. *Id.* at 1563. If discovery reveals that there is no genuine issue of material fact, then summary judgment is proper. *Id.* If a genuine issue of material fact exists, summary judgment is improper. *Id.* at 1564-65. If the law was not clearly established, then the official is entitled to summary judgment, even if factual disputes exist. *Id.*

354. *Anderson v. Creighton*, 107 S. Ct. 3034, 3042 n.6 (1987) (if officer's alleged actions are such as reasonable officer could believe lawful, no discovery necessary; if alleged actions are not such as reasonable officer could believe lawful, and officer's version differs from plaintiff's, discovery may be necessary).

355. *Id.* at 3045 (Stevens, J., dissenting).

356. See *supra* notes 338-43 and accompanying text for a discussion of the procedures associated with the qualified immunity defense.

357. See *Anderson*, 107 S. Ct. at 3045 & n.3 (Stevens, J., dissenting). In his dissent, Justice Stevens argued that when factual issues are present, the *Harlow* standard for qualified immunity does not apply because it was designed to afford immunity from suit. *Id.* (Stevens, J., dissenting). In

cumstances, qualified immunity is a defense to be decided at trial because of the *Anderson* Court's expansive definition of what constitutes "clearly established law." By defining it to encompass the clarity of the "contours" of the asserted right, the Court allowed resolution of the qualified immunity issue to be fact-specific. The *Anderson* Court could have promoted its asserted "wholly objective" standard by only questioning whether the law was clearly established that the officer needed probable cause and exigent circumstances to justify a warrantless search of a third-party home. The Court instead expanded the scope of qualified immunity and allowed factual inquiries by also questioning whether the particular actions taken by the officer were within the contours of the fourth amendment.

The fact-specific nature of the qualified immunity issue is also apparent in excessive force claims based on the fourth amendment. In contrast to the fourth amendment claims discussed by the Court in its analysis of the *Harlow* standard for qualified immunity, this fourth amendment claim raises the same issue as that presented by the *Harlow* standard: would a reasonable officer have believed that the force was necessary? When a jury determines the facts underlying an excessive force claim, it also resolves the issue of qualified immunity. The standards for liability and immunity overlap. Qualified immunity is thus an unnecessary defense when material factual disputes are present.

CONCLUSION

When alleging that officers used excessive force during an arrest, plaintiffs have asserted violations of both the fourteenth amendment, which prohibits conduct that shocks the conscience, and the fourth amendment, which prohibits unreasonable conduct. Courts have agreed that officers who violate the fourteenth amendment may not assert the affirmative defense of qualified immunity, which shields officers from liability if their conduct was objectively reasonable. Courts have disagreed, however, as to whether officers who use unreasonable force during an arrest may properly assert the defense of qualified immunity. The disagreement has arisen because the Supreme Court has adopted two standards of reasonableness for fourth amendment claims. It has stated that conduct "unreasonable" within the meaning of the fourth amendment may nevertheless be "objectively reasonable" for the purpose of qualified

the alternative, he soundly argued that even if immunity were available when there is a factual dispute, a jury should resolve the factual disputes and the issue of immunity. *Id.* at 3047 & n.10 (Stevens, J., dissenting).

Some courts have properly recognized that the jury should determine factual disputes, especially when liability for an excessive force claim depends on determining the credibility of the witnesses. *See, e.g.,* *Hall v. Ochs*, 817 F.2d 920, 925 (1st Cir. 1987) (dicta) (in some circumstances, reasonable courts could disagree whether force used was excessive, and qualified immunity issue for jury). Some courts, however, have erroneously made their own factual findings. *See generally* *Herren v. Bowyer*, 850 F.2d 1543, 1544-47 (11th Cir. 1988) (summary judgment granted on excessive force claim even though material facts disputed); *Patton v. Przybylski*, 822 F.2d 697, 700-01 (7th Cir. 1987) (official's motion for dismissal for failure to state claim granted because court did not find plaintiff's allegations "believable").

immunity.³⁵⁸

The history of the qualified immunity defense indicates the Court's interest in protecting officials from frivolous civil rights suits. The Court first articulated a standard that denied immunity if officials had acted maliciously or if they had violated clearly established constitutional or statutory rights.³⁵⁹ It later eliminated subjective good faith as a factor in its attempt to articulate a qualified immunity standard that would be "wholly objective," one that would allow courts to dispose of insubstantial suits prior to discovery.³⁶⁰ The Court recognized that the issue of qualified immunity could be resolved as a matter of law in three situations: (1) if the law pertaining to the plaintiff's claims was not clearly established, then the officer had immunity; (2) if the facts as alleged by the plaintiff indicated that a reasonable officer could have believed the conduct to be lawful, then the officer had qualified immunity; and (3) if the facts as alleged by the defendant indicated that a reasonable officer could not have believed the conduct to be lawful, then the officer did not have immunity.³⁶¹

Recently, however, the Court has expanded the scope of immunity by recognizing that the standard for qualified immunity was also fact-specific. According to the Court, officials have qualified immunity even if the general principle of law relied on by the plaintiff was clearly established.³⁶² Officials have qualified immunity, the Court reasoned, if the "contours" of the asserted right were not sufficiently clear to give officials notice that their conduct was unlawful.³⁶³ The Court recognized that under some circumstances discovery would be necessary before the immunity issue could be resolved.³⁶⁴

In applying the current standard for qualified immunity to excessive force claims alleging a violation of the fourth amendment, courts should recognize that qualified immunity is an unnecessary defense because the standard for qualified immunity is identical to the fourth amendment standard for liability. Both the general principle of law and the contours of the fourth amendment right to be free from excessive force are established; the fourth amendment prohibits unreasonable force, and it questions whether a reasonable officer would have believed that the force used was necessary. Courts may simultaneously deter-

358. See *Anderson v. Creighton*, 107 S. Ct. 3034, 3041 (1987) (qualified immunity extends to officers who allegedly violated fourth amendment); *Malley v. Briggs*, 475 U.S. 335, 344 (1986) (*Leon* standard of objective reasonableness defines qualified immunity protecting officer accused of unconstitutional arrest); see also *supra* notes 154-211 and accompanying text for a discussion of the two standards of reasonableness.

359. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) (official's deprivation of constitutional rights of another with malicious intent defeats qualified immunity); see also *supra* notes 42-143 and accompanying text for a discussion of the Court's evolving standards for immunity.

360. See *Harlow*, 457 U.S. at 815-20 (substantial cost in form of money and manpower prohibits inquiry into subjective good faith); see also *Davis v. Scherer*, 468 U.S. 183, 191 (1984) (objective reasonableness of official's conduct only relevant inquiry impacting application of qualified immunity).

361. *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1984) (plurality).

362. *Anderson v. Creighton*, 107 S. Ct. 3034, 3038-39 (1987).

363. *Id.* at 3039.

364. *Id.* at 3042 n.6.

mine the issue of immunity and liability by a motion for judgment on the pleadings or for summary judgment when the facts as alleged by the plaintiff indicate that a reasonable officer would have believed that the use of force was necessary or if the facts as alleged by the defendant indicate that a reasonable officer would not have believed that the use of force was necessary. When the facts alleged by the parties conflict—that is, when the facts alleged by the plaintiff indicate that a reasonable officer would not have believed that the force was necessary—then material facts are in dispute and discovery is necessary. Courts should recognize that when the fact finder determines the issue of liability under the fourth amendment, it automatically determines the issue of qualified immunity.

In this unique fourth amendment context, qualified immunity therefore is an unnecessary defense. Although the Supreme Court has permitted a qualified immunity defense for other fourth amendment violations, in those decisions the standard for liability did not duplicate the standard for qualified immunity.³⁶⁵ Because of the potential for confusion, a jury should not be instructed on the issue of qualified immunity when the plaintiff alleges that the use of force violated the fourth amendment. The standard for liability in this situation fully protects the balance of interests represented by the standard for qualified immunity.

365. See *Anderson v. Creighton*, 107 S. Ct. 3034, 3040 (1987) (principles of qualified immunity permit defendant's summary judgment argument that warrantless search of home was reasonable); *Malley v. Briggs*, 475 U.S. 335, 345-46 (1986) (qualified immunity does not apply to officer who is issued arrest warrant based on application that reasonably well-trained officer would know failed to establish probable cause).