Quick Termination of Insubstantial Civil Rights Claims: Qualified Immunity and Procedural Fairness

Edmund L. Carey, Jr.
NOTE

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I. INTRODUCTION AND LEGAL BACKGROUND

Following the landmark 1961 decision of Monroe v. Pape,1
civil rights litigation, mostly under 42 U.S.C. § 1983,2
underwent a vast expansion.3 As the number of claims against government offi-

1. 365 U.S. 167 (1961). In Monroe Chicago police had violated plaintiff’s fourth
amendment rights by making a warrantless search and arrest at his home after midnight.
The United States Supreme Court held that citizens had a cause of action under 42 U.S.C.
§ 1983 (1982) against police officials who violated the Constitution while acting “under color
of” state law. The cause of action existed as a supplement to state law remedies and even if
these policemen were acting beyond the scope of their departmental authority.

Federal courts decided only nineteen § 1983 lawsuits from the passage of the Civil
Rights Act of 1871, the predecessor statute of § 1983, until 1936. The courts decided fewer
than 300 cases under § 1983 in 1960, the year before Monroe. See P. Schuck, Suing Govern-
ment app. 1 at 199 (1983). The dramatic effect of Monroe, see infra note 3, was due to
previous restrictive interpretations of the fourteenth amendment, to the expansive dual
holding of the opinion itself, and to its historical position in the turbulent period of federal-
state relations that developed during the desegregation struggles of the 1950’s and 1960’s.
See generally Steinglass, The Emerging State Court § 1983
(1984); Whitman, Constitutional Torts, 79 Mich. L. Rev. 5,
5-7 (1980).

2. 42 U.S.C. § 1983 (1982). This section provides in part:

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

Id.

A § 1983 claim is not available against a federal official because the statute authorizes
claims against persons who act “under color of any statute, ordinance, regulation, custom, or
usage, of any State or Territory or the District of Columbia,” not under color of federal law.
tional rights by a federal official is known as a Bivens action. In Bivens v. Six Unknown
Named Agents, 408 U.S. 388 (1971), the Supreme Court implied a direct right of action
under the fourth amendment for a constitutional wrong by a federal official analogous to
that authorized by § 1983 for the comparable wrong by a state official in Monroe. Subse-
quently decisions implied similar Bivens-style claims against federal officers for deprivations
of other constitutional rights. See, e.g., Carlson v. Green, 446 U.S. 14 (1980) (eighth amend-
ment); Davis v. Passman, 442 U.S. 228 (1979) (fifth amendment).

3. Between 1961, the year of Monroe v. Pape, and 1983, the number of cases filed
annually under § 1983 and Bivens increased from about 500 to about 27,000 (data derived
by author from Administrative Office of the United States Courts, 1961 Annual Report of
the Director, and from Administrative Office of the United States Courts, Federal Judicial
Workload Statistics During the Twelve Month Period Ended Sept. 30, 1983). Most pub-
lished data have overestimated the actual number of § 1983 cases by approximately 20%.
cials increased during the 1960's and 1970's, concern mounted among both judges and commentators that the rising volume of litigation would outstrip the courts' management capabilities and would hamper effective government.\textsuperscript{4} The United States Supreme Court in a series of decisions\textsuperscript{5} in the 1970's and early 1980's

Computation of these statistics must be inferred from other data because the official statistics do not identify § 1983 or Bivens cases as such.

Current reports subcategorize civil rights cases into three major groups: employment-related actions, prisoner petitions, and "other civil rights" cases. An empirical study performed in the Central District of California has demonstrated that the latter two statistical categories are representative of § 1983 cases. See Eisenberg, Section 1983: Doctrinal Foundations and an Empirical Study, 67 CORNELL L. REV. 482, 533-36 (1982) (comparing a first-hand survey of court filings with official data from the same district). Until the late 1970's the official data did not routinely subcategorize civil rights actions. Earlier estimates of § 1983 caseloads based on total civil rights cases, therefore, overestimated the volume by 20-25\%. Compare id. with P. SCHUCK, supra note 1, app. 1 at 199-201 (higher estimate based on total civil-rights claims) and Aldisert, Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload, 1973 LAW & SOC. ORN. 557, 563 (similarly haying estimate on total civil-rights claims).

The derived estimate for the year 1983 applies Eisenberg's findings to the official data. Using these assumptions, a little fewer than one in three (about 26,000 of about 89,000) private federal question cases commenced in 1983 were § 1983 actions. \textsuperscript{4} Compare id. with Eisenberg, supra note 3, at 6 (similar estimate for 1976). About half of the § 1983 cases are prisoner in forma pauperis petitions, which are screened especially for frivolousness under 28 U.S.C. § 1915(d) (1982). See Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 HARV. L. REV. 610, 618-20 (1979).

Several observers have made the point that, whatever one's ideological orientation, concern is appropriate that overburdened courts may give legitimate grievances short shrift. See Bivens v. Six Unknown Named Agents, 403 U.S. 388, 428-29 (1971) (Black, J., dissenting). Justice Black said:

My fellow Justices on this Court and our brethren throughout the federal judiciary know only too well the time-consuming task of conscientiously poring over hundreds of thousands of pages of factual allegations of misconduct by police, judicial, and corrections officials. Of course, there are instances of legitimate grievances, but . . . . \[w\]e sit at the top of a judicial system accused by some of nearing the point of collapse. \textsuperscript{5} See also Turner, supra note 3, at 638 n.144, 640 (meritorious cases sometimes buried; assumptions that most cases are meritless can be "self-fulfilling prophesies"); Whitman, supra note 1, at 26-30.

designed limits on civil rights actions in response to these concerns. One of the limiting doctrines was the development of “good faith” or “qualified” immunity of executive branch government officials from liability for damages. With respect to qualified immunity, the Supreme Court has said that courts should apply the same standards in claims against state or local officials under section 1983 as in claims against federal officials in actions authorized by *Bivens v. Six Unknown Named Agents.*

Qualified immunity has its roots in the good faith defense available at common law to a police officer defending against a suit for false arrest. In *Pierson v. Ray* the Supreme Court first announced the availability of an analogous defense to police officers sued under section 1983 for violating the Constitution by falsely arresting a group of clergymen protesting racial segregation. Subsequent cases expanded the availability of the defense to other executive officers, and a two-prong test evolved to determine

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whether qualified immunity was appropriate. Under this test, an official would receive immunity only if his actions demonstrated both objective reasonableness and subjective good faith. The subjective prong of the “objective-subjective” test proved to be highly fact-intensive; often either trial or extensive discovery was necessary before courts could resolve the issue. In 1982, after the lower courts had failed to heed two earlier suggestions that they employ greater use of summary judgment to strengthen the protection that qualified immunity affords government officials, the Supreme Court took more prescriptive action. In Harlow v. Fitzgerald the Court eliminated the “subjective” prong of the qualified immunity test and declared that the district courts, to effect the quick termination of insubstantial claims, should seek to resolve the issue of qualified immunity on summary judgment without antecedent discovery.

The Harlow Court both altered the substantive law of qualified immunity and established a procedural goal for implementing the defense. This Note will focus primarily on the procedural aspects of the decision. In the three years that have elapsed since Harlow, lower courts have struggled to carry out the Supreme Court’s directive to resolve the qualified immunity issue, if possible, on summary judgment. As a consequence, three distinct but

11. The Court in Wood v. Strickland announced:
[An official] is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [person] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . . .
420 U.S. 308, 322 (1975). Although the phrase “knew or should have known” appears to mix subjective and objective factors, the Court in Harlow described it as an “objective element involv[ing] a presumptive knowledge of and respect for ‘basic, unquestioned constitutional rights,’” reserving the subjective component to the final clause dealing with “‘permissible intentions.’” 457 U.S. at 815 (quoting Wood v. Strickland, 420 U.S. at 322).


15. The terms “substantive” and “procedural” here are used in the sense of “the familiar notion that the rules of substantive law define the rights and duties of persons in their ordinary relations with each other or with the body politic, while procedural rules govern the decisional forms whereby these rights may be maintained or redressed.” F. James & G. Hazard, Civil Procedure § 1.1, at 1 (2d ed. 1977). However, “every legal procedure . . . manifests a substantive policy decision, a choice to weight the coin on one side or another.” Wexler & Effron, Burden of Proof and Cause of Action, 29 McGill L.J. 468, 470 (1984).
interrelated areas of procedural uncertainty have become manifest. First, what are the outer bounds of the ban on factual inquiry into an official's subjective state of mind? Second, which party, plaintiff or defendant, should bear the burden of proof on the issue of qualified immunity? Last, if the district court denies summary judgment to officials claiming qualified immunity, should officials be able to appeal the adverse decision immediately?

In addressing these areas of uncertainty, this Note will focus on Harlow's stated goal of the quick termination of insubstantial claims. This Note will emphasize that this procedural goal is not merely a logical consequence of Harlow's substantive holding, but also a means to maintain a fair balance between Harlow's competing substantive policies of (1) providing for the vindication of meritorious constitutional claims and (2) protecting governmental and judicial efficiency.

In part II this Note will present in greater detail the key holdings of the Harlow opinion and its overall policy orientation. Part III will identify the ways in which lower courts have differed in their reading of Harlow on these three procedural questions; it will reexamine the questions in light of the policies underlying both the Harlow opinion and the relevant procedural vehicles—summary judgment, discovery, burdens of proof, and appealability of decisions. Part III, section A will focus on the scope of subjective discovery permissible before summary judgment, section B on the allocation of the burden of proof, and section C on the appealability of summary judgment denial. The Note also will analyze the effect of the recent Mitchell v. Forsyth decision not only on appealability but also on the interdependent issues of discovery and burden of proof. In conclusion, this Note will propose that the federal courts can best implement the balance of policies inherent in Harlow v. Fitzgerald by a coordinated approach of (1) permitting limited and sometimes supervised discovery before summary judgment, (2) placing upon plaintiffs the burden of proving that the law protecting their rights was clearly established at the time of the asserted violation, and (3) limiting the use of automatic immediate appeal by defendants denied summary judgment.

16. See infra notes 22-36 and accompanying text.
17. See infra notes 37-98 and accompanying text.
18. See infra notes 99-145 and accompanying text.
19. See infra notes 146-253 and accompanying text.
21. See infra notes 202-36 and accompanying text.
judgment, but permitting them enhanced use of certified interlocutory appeal.

II. THE Harlow Opinion and Its Policies

A. Substantive Holding and Procedural Directions

In Harlow the Supreme Court both recast the substantive elements of and specified a three-step procedure for implementing the qualified immunity defense. In substantive terms, the Court catalogued the weaknesses of the subjective prong of the Wood v. Strickland qualified immunity test and declared that "bare allegations of malice" no longer would suffice to subject officials to trial or to burdensome discovery. The new test would rely on the "objective reasonableness of an official's conduct, as measured by...

22. Lower courts often quote the following two paragraphs from the Harlow opinion:

[W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold 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.

Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

457 U.S. at 817-19 (citations and footnotes omitted).

23. 420 U.S. 308 (1975); see supra note 11 and accompanying text.

The Court noted that the subjective element of the Wood v. Strickland good-faith defense "ha[d] proved incompatible with our admonition in [Butz v. Economou, 438 U.S. 478 (1978)] that insubstantial claims should not proceed to trial" because under FED. R. CIV. P. 56 courts had considered subjective good faith a question of fact requiring jury resolution. 457 U.S. at 815-16. As a result, officials had been subjected "to the risks of trial—distraction . . . from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." Id. at 816. Courts also had subjected officials to "peculiarly disruptive" discovery of their subjective motivations because "the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions." Id. at 816.

24. 457 U.S. at 817.
reference to clearly established law."\(^\text{25}\)

The Court then laid out the following sequential inquiries by which a district judge would apply the new objective test: (1) What is the applicable federal law whose protection the plaintiff lost when the official undertook the complained-of conduct? (2) Was that law clearly established at the time of the asserted violation? (3) Even if the applicable law was clearly established at the time of the violation, has the official shown that because of extraordinary circumstances he neither knew nor should have known of the relevant legal standard?\(^\text{26}\)

\section*{B. A Balance of Policies}

The Harlow Court viewed qualified immunity as a compromise between competing values.\(^\text{27}\) At one extreme, the Court recognized

\begin{itemize}
  \item \textit{Id. at 818.}
  \item \textit{Id. at 818-19.} Courts applying \textit{Harlow} often have described this analysis as a two-part inquiry, collapsing the factual and legal formulation of step (1) into step (2), while leaving the "extraordinary circumstances" issue as the final step. Other courts, however, have more clearly separated the initial step. \textit{Compare} Batiste v. Burke, 746 F.2d 257, 260 n.3 (5th Cir. 1984) (two-part test: (1) Was the law clearly established? (2) Were there extraordinary circumstances?) and Hobson v. Wilson, 737 F.2d 1, 26 (D.C. Cir. 1984) (bipartite test: (1) whether the right alleged to have been violated was well-established; (2) whether the defendant reasonably should have known of its existence), \textit{cert. denied}, 105 S. Ct. 1843 (1985) \textit{with} Ellsberg v. Mitchell, 709 F.2d 51, 69 (D.C. Cir. 1983) ("Once an official's conduct has been ascertained, the determinative question will be what rules were 'clearly established.'") (emphasis added) and Skevofilax v. Quigley, 586 F. Supp. 532, 538 (D.N.J. 1984) ("whether the law with respect to the conduct in question is settled" (emphasis added)).
  \item Judge Learned Hand issued the classic statement of this tradeoff:
  \begin{quote}
  It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. . . . As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredeemed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.
  \end{quote}
\end{itemize}
the need to provide a “realistic avenue for vindication of constitutional guarantees”\textsuperscript{28} and to deter officials from committing constitutional wrongs.\textsuperscript{29} At the other extreme, the Court recognized “the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.”\textsuperscript{30} According to the Court, absolute immunity would go to one extreme by promoting violations of constitutional guarantees, while no immunity would go to the other extreme by opening the door to the impairment of effective government. The Court placed great emphasis on the costs to government of civil rights lawsuits: the fact that claims “frequently run against the innocent as well as the guilty,”\textsuperscript{31} the expense of litigation, the diversion of official energy, the deterrence of able citizens from seeking public office, and the threat that cowed officials might shy away from “the unflinching discharge of their duties.”\textsuperscript{32}

In relying on qualified immunity as the best compromise between these extremes, the Court assumed that “[i]nsubstantial lawsuits [could] be quickly terminated.”\textsuperscript{33} The Court detailed its concerns about the costs of subjecting officials to the risks of trial\textsuperscript{34} and the “peculiarly disruptive” effect of extensive discovery on

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{28} Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950). One commentator has capsulized Judge Hand’s rationale into three principal arguments favoring the expansion of qualified immunity—(1) it is unfair to penalize an official for wrong decisions when he has a duty to make decisions; (2) lack of immunity could deter both the recruitment and the disinterested performance of capable public officials; and (3) the threat of prosecution could distract official attention from public duties. See Freed, \textit{Executive Official Immunity for Constitutional Violations: An Analysis and a Critique}, 72 Nw. U.L. Rev. 526, 528-30 (1977).
\item \textsuperscript{29} Harlow, 457 U.S. at 814.
\item \textsuperscript{30} Id. at 819.
\item \textsuperscript{31} Id. at 807 (quoting Butz v. Economou, 438 U.S. at 506).
\item \textsuperscript{32} Id. at 814. But see Eisenberg, \textit{supra} note 3, at 536-38 (noting, from empirical study, that “large majority” of nonprisoner cases asserted important interests and many prisoner cases were “not plainly trivial”); Turner, \textit{supra} note 3, at 638 n.144 (assumption of frivolousness a self-fulfilling prophecy).
\item \textsuperscript{33} Harlow, 457 U.S. at 814 (quoting Gregoire v. Biddle, 177 F.2d at 581); \textit{cf.} Eisenberg, \textit{supra} note 3, at 526-33 (empirical study showed burden of litigation actually less than thought and financial recovery minimal); Project, \textit{Suing the Police in Federal Court}, 88 Yale L.J. 781, 809-14 (1979) (noting that litigation had little impact on departmental behavior because most police defendants are indemnified); Schuck, \textit{Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages}, 1980 Sup. Ct. Rev. 281, 307-15 (arguing that fear of litigation promotes self-protective and risk-avoiding behavior, but actual extent unknowable).
\item \textsuperscript{34} Id. at 816.
\end{itemize}
\end{footnotesize}
government efficiency. Finally, the Court noted that although public policy mandated the adoption of an objective “good faith” standard that would permit the resolution of many insubstantial claims on summary judgment, the new test, nonetheless, would provide “no license to lawless conduct” and would continue to furnish protection for constitutional rights.

III. PROCEDURAL FAIRNESS AFTER HARLOW

A. Discovery of Subjective Facts

1. An Absolute Ban on Discovery?

By “defining the limits of qualified immunity essentially in objective terms,” the Harlow majority expressed a strong preference for resolving the qualified immunity issue on summary judgment and for avoiding discovery. The Court, however, did not state this preference in absolute terms. The Court held that officials “generally” would be shielded from liability for civil damages “insofar as their conduct does not violate clearly established . . . rights of which a reasonable person would have known.” The Court also stated that the “extraordinary circumstances” defense, the third step of the three-step inquiry, would “turn primarily on objective

35. Id. at 817. On this point the Court relied upon and quoted extensively from Judge Gerhard Gesell’s concurring opinion in Halperin v. Kissinger, 606 F.2d 1192, 1214-15 (D.C. Cir. 1979), aff’d in part and dismissed in part, 457 U.S. 713 (1981). See 457 U.S. at 817 n.29. Judge Gesell had proposed to deal with the problem by establishing a postdiscovery pretrial screening procedure at which plaintiff would be given the burden of establishing “not merely the existence of a genuine dispute as to some material issue of fact but also, by the preponderance of the evidence or through clear and convincing evidence, that the official failed to act with subjective or objective good faith.” 606 F.2d at 1215. The defendants-petitioners in Harlow urged the Court to accept this approach; the majority, however, chose to develop the new objective test, even though this proposal had not been briefed or carefully considered at oral argument. See The Supreme Court, 1981 Term, 96 HARV. L. REV. 4, 234-35 & nn. 65-66 (1982).

36. 457 U.S. at 819. The Court stated:

The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective reasonableness of an official’s acts. 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. But where an official’s duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken “with independence and without fear of consequences.”

Id. (footnotes omitted) (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)).

37. 457 U.S. at 819.

38. Id. at 818 (emphasis added). For fuller text, see supra note 22.
Moreover, the Court inserted the ban on discovery after discussing inquiries (1) and (2), but before discussing inquiry (3).\footnote{39} The Court made specific reference to rule 56 of the Federal Rules of Civil Procedure in explaining the rationale for eliminating the “subjective” prong of the qualified immunity test.\footnote{40} The Court also pointed out that it had advocated greater use of summary judgment on qualified immunity issues twice before, in \textit{Scheuer v. Rhodes} and \textit{Butz v. Economou}.\footnote{41} In discussing the drawbacks of investigating officials’ subjective intent, the Court assumed that discovery would be “broad-ranging” and “broad-reaching” into the thought processes and judgments of the official as well as into the factors that influence those judgments and processes. These “experiences, values and emotions . . . frame a background in which there often is no clear end to the relevant evidence.”\footnote{42}

As lower courts have sought to implement the new objective standard for qualified immunity,\footnote{43} the effect of \textit{Harlow}'s ban on

\begin{itemize}
\item \textit{Id.} at 818-19 (emphasis added).
\item \textit{Id.}
\item \textit{Id.} at 816 & n.26.
\item \textit{Id.} at 807-08, 819 n.35; see supra note 13 and accompanying text.
\item \textit{Id.} at 816-17.
\end{itemize}

44. \textit{See Comment, Harlow v. Fitzgerald: The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983, 132 U. Pa. L. Rev. 901 (1984).} The most difficult problem for the courts has been to determine the degree of factual correspondence required between the case law establishing a legal standard and the case under consideration. This issue is critically important because the higher the degree of factual correspondence the courts require the less likely the court will find that the matching legal principle was clearly established. By the same token, courts are more prone to consider that a broad legal principle was clearly established. Commentators have suggested three general approaches: (1) to require strict factual correspondence between the precedent case and the instant case; (2) to require that officials apply general legal principles in analogous factual situations; or (3) to require that officials anticipate discernible trends in the law. See \textit{id.} at 923-32. One court has criticized the first approach as a “one bite” rule. \textit{Hixon v. Durbin}, 560 F. Supp. 654, 665 (E.D. Pa. 1983). Another court has commented:

\begin{quote}
It is . . . clear that the right at issue can be defined neither so broadly as to parrot the language of the Bill of Rights, nor so narrowly as to require that there be no distinguishing facts between the instant case and existing precedent. The former reading of \textit{Harlow} would, of course, undermine the premise of qualified immunity that the Government actors reasonably should know that their conduct is problematic. The latter reading, on the other hand, would unquestionably turn qualified into absolute immunity by requiring immunity in any new fact situation. In future cases, courts will of course work through the area between these extremes . . . .
\end{quote}


In the recent case of \textit{Mitchell v. Forsyth}, 105 S. Ct. 2806 (1985), the Court appeared to follow the middle course. Discussing uncertainty and lower court conflicts in the late 1960's and early 1970's about whether warrantless wiretappings for national security purposes were unconstitutional, the Court said:
the use of discovery has become uncertain. The Court had discarded the subjective prong of the good faith test and directed that discovery “should not be allowed” until the lower court resolves the threshold test of immunity.\(^4\) The Court, however, failed to indicate whether it intended the ban on discovery to be absolute. Subsequent cases have revealed a persistent need for some discovery before summary judgment.

2. Persistence of Subjective Inquiries

Frequently the need for discovery is apparent when the court holds that the applicable law was clearly established\(^4\) at the time of the incident, but a defendant official then claims that because of extraordinary circumstances he neither knew nor should have known of the relevant legal standard. \textit{Harlow}, in its majority and concurring opinions, gave ambiguous directions about whether discovery would be appropriate into the nature of these exculpating circumstances, including the official’s state of knowledge of the relevant law.\(^5\) Lower courts have attempted to resolve this ambiguity by using objective factors in a given case when they were available, and by denying summary judgment in cases when the objective factors were not available. Objective factors that the courts have

\[4\] 457 U.S. at 818-19. See \textit{supra} notes 11 & 22 and accompanying text, for descriptions of the old subjective-objective test and of the new objective test for qualified immunity.

\[5\] 457 U.S. at 818. Justice Powell, for the majority, said that this defense would “turn primarily on objective factors.” \textit{Id.} at 819. Justice Brennan, however, concurring with two other justices, said that he agreed with the majority’s substantive standard but thought it “inescapable . . . that some measure of discovery may sometimes be required to determine exactly what a public-official defendant did ‘know’ at the time of his actions.” \textit{Id.} at 820-21 (Brennan, J., concurring). Justice Brennan said that erecting an “impenetrable barrier” to a plaintiff’s discovery “when defendants themselves are prone to assert their goo[d f]aith” would be unfair. \textit{Id.} at 821 (quoting Herbert v. Lando, 441 U.S. 153, 170 (1979)); see Skevofilax v. Quigley, 586 F. Supp. 532, 538 (D.N.J. 1984) (noting that the Brennan concurrence “explicated” the majority view on this point); Heslip v. Lobbs, 554 F. Supp. 694, 701-02 & n.6 (E.D. Ark. 1982) (“It is apparent . . . that \textit{Harlow} . . . clearly allows a court at this juncture to evaluate the defendant’s subjective beliefs in addition to objective factors.”) (citation omitted); see also Nahmod, Constitutionality Accountability in Section 1983 Litigation, 68 Iowa L. Rev. 1, 7 n.53 (1982) (arguing that an official’s actual knowledge in cases when the law is clearly established is still relevant after \textit{Harlow}).
used to resolve exceptional-circumstances claims have included an official's reliance on legal advice, reliance on a statute, the notice-giving effect of a legal judgment, and the recentness of a judgment that clearly established the relevant law. In the absence of a determinative "objective" factor, however, the lower courts generally have concluded that an exceptional-circumstances claim raises subjective matters appropriate for fact-finding at trial.

Considerably more troublesome have been cases in which a plaintiff desired to make a factual inquiry into an official's state of mind during step (1) of the Harlow three-step inquiry. In these cases, the district courts have had to make two related determinations: (1) the law to apply and (2) the factual setting to which the law will apply. To the degree that the court views an official's state of mind as an integral part of Harlow's "threshold inquiry," the court will bar discovery. If the court, however, views an official's state of mind as a factual question, the plaintiff will be able to make the inquiry at trial.

48. See Arnsberg v. United States, 757 F.2d 971, 981-82 (9th Cir. 1985) (noting that advance consultation with assistant U.S. attorney proved that arresting agents had objective good faith); Keeffe v. Library of Congress, 588 F. Supp. 778, 792 (D.D.C. 1984); Wells v. Dallas Indep. School Dist., 576 F. Supp. 497, 509-09 (N.D. Tex. 1983); Zook v. Brown, 575 F. Supp. 72, 77 (C.D. Ill. 1983) ("If an attorney cannot determine that the law forbids certain government action, it cannot be found that individuals untrained in the nuances of constitutional law should have known . . . . "), aff'd in part and remanded in part, 748 F.2d 1161, 1165 (7th Cir. 1984); cf. Dehorty v. New Castle County Council, 560 F. Supp. 889, 893-94 & n.13 (D. Del. 1983) (affidavit of attorney that she did not advise officials of relevant law insufficient to establish objective good faith). As with courts utilizing other objective factors, these courts did not always label attorney advice as an "extraordinary circumstance" but did use the attorney's advice as objective evidence of good faith.


50. See Williams v. Bennett, 689 F.2d 1370, 1385-86 (11th Cir. 1982) (concluding that judgment in earlier litigation involving same state prison system put officials on notice of ongoing constitutional violations), cert. denied, 104 S. Ct. 335 (1983).

51. See Arebaugh v. Dalton, 730 F.2d 970, 972 (4th Cir. 1984) (controlling Supreme Court decision only 12 days before incident; court considered the possibility but did not decide whether to exculpate officials); cf. Musychka v. Tyler, 563 F. Supp. 1061, 1065 (E.D. Pa. 1983) (controlling Supreme Court decision three weeks before incident; possible exculpatory effect of recentness not considered).

52. See Hobson v. Wilson, 737 F.2d 1, 26-27 (D.C. Cir. 1984); Losch v. Borough of Parkesburgh, 736 F.2d 903, 910 & n.2 (3d Cir. 1984); McSurely v. McClellan, 697 F.2d 309, 324 & n.24 (D.C. Cir. 1982).

53. See supra notes 26, 44 and accompanying text; see also Musychka v. Tyler, 563 F. Supp. 1061, 1066 (E.D. Pa. 1983) (denying summary judgment to police officers accused of an illegal search in violation of clearly established law when there were "conflicting versions of what defendants actually did").

cial's state of mind as a critical feature of the relevant factual setting rather than an element of good faith, then the door to discovery might swing ajar. In a number of cases after Harlow the lower federal courts have drawn this distinction and have identified unresolved factual issues concerning an official's state of mind requiring either additional discovery or denial of summary judgment. These states of mind have concerned intention, purpose, knowledge, and recklessness.

In Nakao v. Rushen the district court denied summary judgment to officials who conducted a warrantless search of a prisoner's cell and mail. Defendants claimed that the need for prison security made the search justifiable; plaintiff alleged that the officials' real purpose was to assist other nonprison officials in a job-related investigation of the prisoner's wife. The court held that "a rational jury might conclude that the search . . . did not serve a justifiable purpose [and, therefore,] violated clearly established law." In Gannon v. Daley administrative assistants in a state prosecutor's office alleged that officials had fired them because of the assistants' political affiliation, violating their first amendment rights under Branti v. Finkel. The defendant officials admitted that they were

Supp. 1253 (S.D.N.Y. 1982), modified, 732 F.2d 278 (2d Cir. 1984), said:

[R]easonableness of challenged intentional conduct is not the sort of issue which can be resolved by affidavit, especially in suits in which there has been no pre-trial discovery. In suggesting that such a finding may be made at an early stage in the typical Bivens case, the Harlow opinion flies in the face of longstanding authority to the contrary . . . .

Id. at 1266 n.1.


56. See infra notes 57-65 and accompanying text.

57. 545 F. Supp. 1091 (N.D. Cal. 1982).

58. Id. at 1093. In light of Harlow, the Nakao court expressly reconsidered its pre-Harlow denial of qualified immunity on summary judgment on the same evidence. Nakao v. Rushen, 542 F. Supp. 856 (N.D. Cal. 1982). After fuller discovery, the court again denied qualified immunity to defendants and granted plaintiffs partial summary judgment on the issue of liability, holding that the search was "without reference to any justifiable purpose of imprisonment or prison security." Nakao v. Rushen, 580 F. Supp. 718, 722-23 (N.D. Cal. 1984).

Hudson v. Palmer, 104 S. Ct. 3194 (1984), would now appear to bar Nakao's claim. In Hudson the Court held that prisoners have no reasonable expectation of privacy in their cells. Id. at 3200. According to the Court, the fourth amendment provides no protection from cell searches. Id. The Court also held that a prisoner has no fourteenth amendment claim for deprivation of property when an adequate state remedy exists, even if, as in Nakao, the officials act intentionally. See id. at 3202-04.


60. 445 U.S. 807 (1980).
aware of the applicable law, but said that they reasonably believed that it did not apply to the plaintiffs. The court denied summary judgment and set the case for trial, noting that there were unresolved issues of fact regarding (1) the nature of the employees' duties, and (2) whether the defendants should have known that the rule of Branti protected the employees. Drawing a similar distinction in another case concerning a politically motivated discharge, the court in Dehorty v. New Castle County Council also denied a summary judgment for the defendant officials. The United States Court of Appeals for the D.C. Circuit used analogous reasoning to reverse the grant of a motion to dismiss in National Black Police Association, Inc. v. Velde, in which plaintiffs alleged that officials had allowed use of federal funds to support local law enforcement agencies that were accused of discriminating against individuals based on race and sex. The court held that discovery was appropriate and permitted both subjective and objective inquiries into whether defendant officials "knew or should have known" that particular local agencies were discriminating. The courts deemed these inquiries consistent with the purpose of qualified immunity and "not inconsistent with Harlow."

The courts in Nakao, Gannon, Dehorty, and Velde made an implicit distinction between (1) a permissible inquiry into an official's state of mind to establish whether a violation of plaintiff's constitutional rights had occurred, and (2) an inquiry no longer permissible after Harlow to establish a lack of subjective good faith and thereby to defeat qualified immunity. However, in Smith

61. 561 F. Supp. at 1388 & n.32. The court noted: "[T]his case shows that the immunity defense will, even under Harlow, sometimes present issues of fact." Id. at 1388 n.32.

62. 560 F. Supp. 889 (D. Del. 1983). The court said that "[i]n the absence of a factual record [it was] unable to determine whether the defendants knew or should have known that their alleged conduct with respect to the plaintiff would violate the constitutional norm . . . ." Id. at 893-94 (footnote omitted). Although the Dehorty court's use of the "knew or should have known" phrase sounds at first like a Harlow step (3) inquiry, the court also said that the defendants had "offered no extraordinary circumstances to show that they should not have known" of the relevant law. Id. at 893. The court, thus, apparently formulated the issue of whether the defendants "knew or should have known" that the relevant law applied to the plaintiffs as a Harlow step (1) inquiry.


64. Id. at 582-83. The applicability of Harlow principles was squarely before the D.C. Circuit. The Supreme Court in an earlier judgment in Velde had vacated and remanded the case to the circuit court "for further consideration in light of Harlow v. Fitzgerald." Velde v. National Black Police Ass'n, Inc., 458 U.S. 591 (1982) (citation omitted).

65. See also McGee v. Hester, 724 F.2d 88 (8th Cir. 1983) (noting that the jury should determine whether the ruin of plaintiff's business by overzealous state liquor agents was intentional).
in which a Washington reporter alleged officials had tapped his telephone for illegal political purposes rather than for valid national security purposes, the district court refused to allow discovery into defendant officials’ motivations for ordering the tap and granted defendant’s motion for summary judgment. The court acknowledged that an analytical distinction could be drawn between the “purpose” of the tap—an issue of conduct and therefore proper for inquiry—and the “motive” behind the tap—an issue of subjective good faith and therefore improper. The court stated, however, that as a practical matter, proper deposition questions concerning “purpose” or “rationale” would not be separable from improper inquiries into “motive.” The court granted defendants summary judgment on the ground that the “objective record,” without further discovery, revealed a “rational” basis for the officials’ asserted proper motivation.

3. State of Mind and Summary Judgment

Harlow’s procedural goal—the quick termination of insubstantial claims—is virtually identical to the central purpose that underlies the vehicle of summary judgment. Although the Harlow Court certainly changed the substantive standard by which a court is to assess a claim of qualified immunity at summary judgment, the Court gave no indication that it intended to modify the procedural operation of rule 56 of the Federal Rules of Civil Proce-

67. Id. at 714-15. The court said that it would require defendants to produce “some documentation” of the wiretap to show that “a basis for rational national security concerns” existed. The court, however, emphasized the opinion of another court in the same district in a similar wiretapping case, which stated that the Harlow opinion precluded further inquiry into whether national security was “the actual or the only reason for defendant’s conduct.” Id. at 714 (quoting Ellsberg v. Mitchell, No. 1979-72, slip op. at 4 (D.D.C. July 22, 1983) (emphasis in Smith court’s opinion)). The Smith court said its solution was a “workable, if not entirely elegant, solution to the problems presented in ‘improper purpose’ wiretap cases after Harlow . . . . (B)ut . . . Harlow’s insistence on ‘objective’ criteria and the ‘social costs’ of immunity litigation mandate the approach . . . .” 582 F. Supp. at 715.
68. See supra notes 27-36 and accompanying text.
69. “The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.” Notes of Advisory Committee on Rules—1963 Amendment, reprinted in 28 U.S.C. app. at 626 (1982). In Richard v. Credit Suisse, 242 N.Y. 346, 152 N.E. 110 (1926), Judge Cardozo said, “The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial.” Id. at 350, 152 N.E. at .
70. See supra notes 10-14 and accompanying text.
dure. Commentators on federal summary judgment practices often have criticized as ad hoc and unprincipled the courts’ tendencies toward highly specific judgments adapted to the peculiar facts of each case. These commentators have argued that closer judicial attention to the wording and structure of rule 56 would produce more uniform and sound results. Qualified immunity cases also could benefit by increased attention to rule 56.

On summary judgment, courts view the record in the light most favorable to the nonmoving party, drawing all inferences in that party’s favor. Although some courts have placed special em-

71. See Douglas v. Galloway, 568 F. Supp. 966, 971 (S.D.W. Va. 1983) ("Harlow . . . did not change the operation of Rule 56 in immunity cases."), aff’d in part and dismissed in part sub nom. England v. Rockefeller, 739 F.2d 140 (4th Cir. 1984); McSurely v. McClellan, 697 F.2d 309, 321 n.20 (D.C. Cir. 1982); cf. Smith v. Nixon, 582 F. Supp. 709, 713-14 (D.D.C. 1984) ("At the very least it can be said that Harlow renders certain facts no longer ‘material’ within the meaning of Rule 56: ‘subjective motivation’ and ‘intention’ are of no legal significance after Harlow and may not be the subject of inquiry."); see also supra text accompanying notes 41-42 (Harlow Court citing rule 56 in opinion).


73. See Schwarzer, supra note 72, at 467-68 ("anecdotal jurisprudence . . . niggardly application of rule 56"); Sonenshein, State of Mind and Credibility in the Summary Judgment Context: A Better Approach, 78 NW. U. L. Rev. 774, 774-80, 810 (1983) ("a plea for federal courts to simply apply Rule 56, as it was designed to be applied, to every kind of case").

phasis on the language of rule 56 requiring that no "genuine issue as to any material fact" exist for judgment to issue, commentators have urged that courts require a party moving for summary judgment to satisfy only approximately the same evidentiary standard as one moving for a directed verdict. The moving party, in other words, should show that the opposing party would not have enough evidence to convince a reasonable jury of his view on any factual issue material to the case. Whatever the evidentiary standard generally adopted, however, courts traditionally have been reluctant to grant summary judgment when the moving party is peculiarly in possession of relevant evidence or when other circumstances limit the nonmoving party's access to discovery of relevant evidence. These considerations underlie the oft-quoted rule of thumb that summary judgment is usually inappropriate in cases in which a party's state of mind is at issue.

In Harlow the Supreme Court attempted to circumvent evidentiary problems concerning state of mind by excising subjective good faith from the threshold test for qualified immunity. Many post-Harlow lower courts, nonetheless, have persisted in allowing subjective inquiries. This persistence, however, may not pose a great threat to the Harlow goal.


76. Fed. R. Civ. P. 56(c). For fuller text, see supra note 71.

77. E.g., Currie, Thoughts on Directed Verdicts and Summary Judgments, 45 U. Chi. L. Rev. 72, 76-79 (1977); Sonenshein, supra note 73, at 783-86; see also Cooper, Directions for Directed Verdicts: A Compass for Federal Courts, 55 Minn. L. Rev. 903 (1971).

78. See Cooper, supra note 77, at 918-27.

79. See 6 Moore's Federal Practice, supra note 75, at ¶ 56.15[5].

80. E.g., Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 473 (1962) ("[S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."); Landrum v. Moats, 576 F.2d 1320, 1329 (8th Cir.), cert. denied, 439 U.S. 912 (1979).

81. See supra notes 10-14 and accompanying text.

82. See supra notes 45-65 and accompanying text.
4. Proposals for Limited Subjective Discovery

The Harlow opinion apparently contemplated subjective inquiry into whether an official "neither knew nor should have known" the relevant law because of "extraordinary circumstances"—step (3) of the Harlow three-step inquiry. A district court will reach this inquiry only after a determination that the law protecting the plaintiff's rights was clearly established at the time of the incident. The plaintiff's claim must have survived the "clearly established" test of steps (1) and (2). Subjective inquiry, thus, will be limited to a selected subset of cases. In any event, the defendant invites the step (3) subjective inquiry when he undertakes to claim and prove the "extraordinary circumstances" defense.

Step (1) subjective inquiries raise greater problems. While in some instances the parties and the courts may draw a clear distinction between an inquiry necessary to describe conduct and an inquiry seeking impermissibly to examine good faith, in many cases there will be some overlap. Although the two inquiries may be indistinguishable, at times some discovery may be unavoidable in order to determine whether a constitutional violation has occurred. Courts, for example, have differed on whether the standards that determine if there is probable cause to conduct a search or make an arrest are identical to or merely similar to those gov-

83. See supra notes 46-52 and accompanying text.
84. Harlow, 457 U.S. at 818-19 ("[I]f the official . . . claims extraordinary circumstances and can prove that he neither knew nor should have known . . . , the defense should be sustained.") (emphasis added). For fuller text, see supra note 22.
85. See supra notes 53-65 and accompanying text.
86. See supra notes 66-67 and accompanying text. One court construing eighth amendment cases permitted inquiry into evidence tending to prove deliberate or reckless indifference even though "the same evidence . . . would have been used to defeat a good faith defense under the subjective criteria." William v. Bennett, 689 F.2d 1370, 1386 (11th Cir. 1982), cert. denied, 104 S. Ct. 335 (1984); cf. Miller v. Solem, 728 F.2d 1020, 1025-26 (8th Cir.) (standards different but inquiry into recklessness of conduct entertained), cert. denied, 105 S. Ct. 145 (1984).
87. See Kenyatta v. Moore, 744 F.2d 1179, 1185 (5th Cir. 1984) ("Because the [Harlow] Court did not . . . purge substantive constitutional doctrine of all subjective issues, it did not entirely eliminate subjective inquiry from every qualified immunity analysis: some rights . . . might be violated by actions undertaken for an impermissible purpose but not by the same actions undertaken for permissible purposes.") (footnote omitted), cert. denied, 105 S. Ct. 2141 (1985). The Fifth Circuit cited the necessity of proving intentional racial discrimination as an example. Id. at 1185 n.27; see supra notes 63-67 and accompanying text. An area of potentially great difficulty might be the existence of subjective factors bearing on probable cause in false-arrest or search-and-seizure cases.
erning post-Harlow objective good faith. In each instance, however, there is usually subjective inquiry into the police officer's actual knowledge of certain facts.

Consider three proposed approaches to the problem of subjective discovery in step (1) inquiries. The first approach would continue to bar state-of-mind discovery but would follow the usual rule 56 approach of reading the record in the light most favorable to the plaintiff as the nonmoving party. This approach would reduce initial discovery. As plaintiffs' pleading practices changed to follow the developing case law, however, exaggeration of defendants' conduct might become so commonplace that it would frustrate the Harlow intent. A second approach, which the D.C. Circuit proposed in Hobson v. Wilson, would require plaintiffs who allege that an official has acted with an unconstitutional motive to provide in the complaint some "nonconclusory" evidence of the alleged improper motivation in order to proceed to discovery. The Hobson court's approach would respond to Harlow's concern that "bare allegations of malice should not suffice" to expose officials to the burdens of trial or discovery.

88. Compare Wyler v. United States, 725 F.2d 156, 161 (2d Cir. 1983) (standards for determining these different issues not the same) and Trejo v. Perez, 693 F.2d 482, 487 (5th Cir. 1982) (lack of immunity and illegality of arrest are not necessarily congruent) with Deary v. Three Un-Named Police Officers, 746 F.2d 185, 192 (3d Cir. 1984) ("[W]hile the standards for a constitutional violation and those for denying qualified immunity may be analytically different, . . . both depend upon the jury's answer to the question: was probable cause present?") and Losch v. Borough of Parkesburgh, 736 F.2d 903, 910 (3d Cir. 1984). But see Briggs v. Malley, 748 F.2d 715, 718 (1st Cir. 1984), cert. granted, 105 S. Ct. 2654 (1985) (holding that the standards for probable cause and qualified immunity in fourth amendment cases are the same objective criteria stemming from Harlow). Briggs cited a "suggestion," in United States v. Leon, 104 S. Ct. 3405, 3421 & n.23 (1984). See also Floyd v. Farrell, 765 F.2d 1 (1st Cir. 1985) (similar reasoning); cf. Illinois v. Gates, 103 S. Ct. 2317, 2347 (1983) (White, J., concurring) (similar suggestion in predecessor case to Leon).

89. See supra notes 74-79 and accompanying text.


91. 737 F.2d at 29-31. The court said:

[A]llegations of unconstitutional motive . . . offer[ ] to litigants a possible means to circumvent the new rule, simply by pleading that any act was performed with an intent to violate clearly established constitutional rights and thereby surmounting the threshold test set out in Harlow . . . . [P]laintiffs might . . . as a consequence usher defendants into discovery, and perhaps trial, with no hope of success on the merits. The result would be precisely the burden Harlow sought to prevent.

Id. at 29. See also supra note 67 and accompanying text, for use of the "objective record" by the court in Smith v. Nixon, 582 F. Supp. 709, 714-15 (D.D.C. 1984).

92. Harlow, 457 U.S. at 817-18. The Hobson proposal is a specific application of a general approach, initiated in the Third Circuit but generally prevalent in the federal courts, which requires that plaintiffs plead civil rights complaints "with particularity."
A third approach could provide a desirable compromise. This approach would adhere more closely to the structure of rule 56 and would fulfill better the twin Harlow policies of minimizing government disruption and providing a "realistic avenue for vindication of constitutional guarantees." Once an official had moved for summary judgment on qualified immunity grounds, any discovery by plaintiffs into defendants' state of mind, even if for the limited purpose of defining his step (1) conduct, could proceed only if the court approved the discovery under rule 56(f). Discovery could still take place in cases that the court prescreens, therefore lessening the likelihood of insubstantial claims. The court also could shape the scope of discovery to allow only that discovery necessary to fulfill the required definition of conduct. A liberalized use of rule 56(f) would ensure that plaintiffs would not lose valid constitutional claims for want of critical discovery evidence. This approach also would avoid the dangers that the Harlow Court identified as "peculiarly disruptive of effective government": "broad-ranging" discovery, the "deposing of numerous persons," and the spectre of judicial inquiries "in which there often is no clear end to the relevant evidence."
B. Allocation of the Burden of Proof

1. Multiple Burdens and Conflicting Directions

Before Harlow most lower courts had placed on the defendant officials the burden of proving their right to qualified immunity. In Gomez v. Toledo the Supreme Court had resolved an approach that would combine the second and third proposals disjunctively. Although the Krohn proposal closely tracked the structure of rule 56, the court did not mention rule 56(f) specifically. The First Circuit said:

A plaintiff, before commencing suit, must be prepared with a prima facie case of defendant’s knowledge of impropriety, actual or constructive. In order to defeat a motion for summary judgment, or to impose upon the defendant the burdens of pretrial discovery, a plaintiff must show more than “a mere desire to cross-examine” but must furnish “affidavits or sworn or otherwise reliable statements of witnesses.” Alternatively, but with a much higher burden than is borne by the plaintiff who opposes an ordinary summary judgment motion, a plaintiff may seek permission for discovery, or avoid summary judgment, by making a persuasive showing that affirmative evidence would be available, and giving a valid excuse for non-production. To hold less would defeat the entire purpose of freeing government officials from having to defend insubstantial suits.

Id. at 31-32.


100. Unless otherwise stated, this Note uses “burden of proof” to indicate the burden of persuasion, not the burden of production. Courts and commentators sometimes refer to the burden of persuasion as the “risk of nonpersuasion.” See F. James & G. Hazard, supra note 15, §§ 7.6-7 (2d ed. 1977).

101. For a discussion of the importance of the burden of proof, see generally McCormick on Evidence § 336 (E. Cleary 3d ed. 1984) (“The principal significance of the burden of persuasion is limited to those cases in which the trier of fact is actually in doubt.”). For a discussion of the relative importance of the placement of the burden of proof concerning qualified immunity in § 1983 cases, see S. Nahmoo, Civil Rights and Civil Liberties Litigation § 8.13 (1979). See also Kattan, Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions, 30 Vand. L. Rev. 941, 975 (1977); McClellan & Norcross, Remedies and Damages for Violation of Constitutional Rights, 18 Duq. L. Rev. 409, 446-48 (1980). But see Casto, supra note 49, at 52 n.27 (“The extent to which burden of persuasion on this issue has an actual impact upon litigation is problematical.”).

102. 446 U.S. 635, 638 nn.4-5 (1980). The First Circuit differed from all other circuits in requiring plaintiff to plead the defendant’s lack of good faith.
intercircuit split on whether defendants or plaintiffs possessed the burden of pleading qualified immunity by placing that burden upon defendants. The *Gomez* decision, however, did not address explicitly the question of the burden of persuasion.

In *Harlow* the Court specifically reserved discussion concerning the allocation of the burden of persuasion. Several elements of the opinion, however, did bear at least indirectly on the question. First, the Court noted that in *Gomez* it previously had characterized qualified immunity as an affirmative defense that the defendant official must *plead*. In addition, the Court noted that *Gomez* had *not* decided which party bore the burden of proof. Second, the Court, in an early part of the opinion, discussed defendants’ claims to be absolutely immune under a derivative form of presidential immunity and allocated to the officials the burden of proof on that issue. By analogy defendants would bear the burden of proving their “entitlement” to qualified immunity—that they were acting within the scope of their duties. Third, in describing the third step of the new three-step objective inquiry, the Court said it would sustain the defense if the official “claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard.” The Court’s language strongly implied that the defendant carries the burden of persuasion on an “extraordinary circumstances” claim. Last, by eliminating the subjective prong of the test for qualified immu-

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103. 457 U.S. at 815 n.24.
104.  Id. at 815.
105.  Id. at 815 n.24.
106.  Id. at 812-13 (“[Butz v. Economou, 438 U.S. 478, 506 (1978)] also identifies the location of the burden of proof. [It] rests on the official asserting the claim. . . . He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted.”) (footnotes and citation omitted).
107.  Proving entitlement means to establish that the official was within the scope of his duties. An official remains entitled to qualified immunity only if he acts with the requisite good faith, regardless of how that “good faith” is defined. See *Pierson v. Ray*, 386 U.S. 547, 557 (1967); *Saldana v. Garza*, 684 F.2d 1159, 1163 (5th Cir. 1982), cert. denied, 460 U.S. 1002 (1983).
108.  See supra text accompanying notes 22-26.
109.  457 U.S. at 819 (emphasis added). For fuller text, see supra note 22.
110.  The Court’s language, however, was less than explicit. In the late 1970’s, some courts and commentators believed that the Court, in *O’Connor v. Donaldson*, 422 U.S. 563 (1975), impliedly had placed the qualified immunity burden on defendants, while others thought the Court’s opinion in *Procunier v. Navarette*, 434 U.S. 555 (1978), impliedly placed the burden on plaintiffs. See *Kattan*, supra note 101, at 988; *Sowle, Qualified Immunity in Section 1983 Cases: The Unresolved Issues of the Conditions for Its Use and the Burden of Persuasion*, 55 Tul. L. Rev. 326, 383-95 (1981) and cases cited therein.
111.  See supra notes 11-14 and accompanying text.
nity, the Court altered one of the factors\textsuperscript{112} that courts traditionally rely on in allocating the burden of proof.

Lower courts have not read Harlow uniformly on the burden of proof issue. The courts that have addressed the issue agree that the burden of persuasion will fall upon the defendant who claims that because of extraordinary circumstances he neither knew nor should have known he was violating established constitutional rights.\textsuperscript{113} This approach accords with the way most courts addressed the issue of subjective good faith in the pre-Harlow period.\textsuperscript{114} The courts, however, are divided on whether plaintiff or defendant should bear the burden of persuasion on the issue of whether the applicable law was clearly established at the time of the incident.\textsuperscript{115}

\textsuperscript{112} See infra notes 121-22, 136-39, 144-45 and accompanying text (discussing the “fairness” rationale for burden allocation).

\textsuperscript{113} See, e.g., Arebaugh v. Dalton, 730 F.2d 970, 972 (4th Cir. 1984); Joseph A. v. New Mexico Dep’t of Human Servs., 575 F. Supp. 346, 354 (D.N.M. 1983); Heslip v. Lobbs, 554 F. Supp. 694, 701 n.5 (E.D. Ark. 1982). But see Singer v. Wadman, 556 F. Supp. 181, 277 (D. Utah 1983) (“A plaintiff must further demonstrate an issue of fact as to whether the defendant, based on objective factors, actually knew or should have known that his conduct would violate the plaintiff’s constitutional rights.”). The Singer court did not make clear whether it was speaking of a burden of persuasion or only of the plaintiff’s obligation under Fed. R. Civ. P. 56(e) to respond to the movant’s evidence. For a discussion of the evolving relationship between these two features of summary judgment, see generally Louis, supra note 72.

\textsuperscript{114} See supra note 99 and accompanying text.


Placing the burden on defendant is in accord with the common law notion that a warrantless arrest or seizure is prima facie illegal unless the defendant official establishes an exception to this rule by showing there was probable cause. See Saldana v. Garza, 634 F.2d 1159, 1162 (5th Cir. 1981), cert. denied, 460 U.S. 1012 (1983); Drellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978). Whether this tradition should create a subset of cases within the general category of executive officials for purposes of allocating the burden of proof is problematical. Arrest and search cases comprise a substantial percentage of nonprisoner § 1983 cases. See Eisenberg, supra note 3, at 536 & n.243. Adherence to the common law approach probably underlay the Fifth Circuit’s pre-Harlow approach of keeping the burden on defendant when he was a low-ranking police officer but shifting the burden to plaintiff when defendant was an official of higher rank and discretion. See Sowle, supra note 110, at 396-416, and supra note 99, for the former Fifth Circuit rule. The common law allocation in these cases also follows the probability rationale of burden allocation by placing the burden on the party seeking to prove the exception to the rule. See infra note 120 and accompanying text.
2. Rationales for Burden Allocation

Allocation of the burden of persuasion\textsuperscript{116} is a judicial responsibility\textsuperscript{117} that includes both theoretical and practical considerations.\textsuperscript{118} Three major rationales underlie the modern\textsuperscript{119} approach to burden allocation: probability, fairness, and policy. According to the probability rationale, the party who would benefit by departure from a supposed norm bears the burden of persuasion. To illustrate: most plaintiffs suing for nonpayment of a bill have, in fact, not been paid; therefore, payment of the bill should be an affirmative defense with the burden of persuasion upon the defendant.\textsuperscript{120} Under the fairness rationale the party with "readier access to knowledge about the fact in question" bears the burden of persuasion.\textsuperscript{121} Continuing the bill-payment example, the party who paid the bill is more likely to have access to evidence that will prove that fact;\textsuperscript{122} therefore, this party must sustain the burden of persuasion.

Courts in the Fifth and Third Circuits either have placed the burden on the plaintiffs or at least have removed the burden from the defendants. See Sampson v. King, 693 F.2d 566, 569 (5th Cir. 1982); see also Berg & Dryden, The Modification of the Qualified Immunity Test: An Analysis of Harlow v. Fitzgerald's Effect on Actions Under 42 U.S.C. § 1983, 33 Fed'n Ins. Couns. Q. 353, 360 (1983) (concluding that Harlow shifts burden to plaintiff).

The Third Circuit has said that the defendant "has the burden of pleading and proving qualified immunity, [but] the objective standard as announced in Harlow allows a court to cut short the inquiry into a defendant's state of mind and to grant summary judgment in 'insubstantial' claims." Losch v. Borough of Parkesburgh, 736 F.2d 903, 909 (3d Cir. 1984) (footnotes omitted). Perhaps if a court perceived the issue as one purely of law the court might resolve the issue without argument from either party; then neither party would seem to have a burden to carry. This perception, however, would confuse the burden of production with the burden of persuasion. If a possibility remains for the decisionmaker to be in doubt, someone must bear the risk of nonpersuasion. See supra notes 100-01. In addition, determination of the applicable legal standard inevitably involves some inquiry into the factual setting. See supra notes 53-66 and accompanying text; see also Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) ("Nor do we yet know of any rule or principle that will unerringly distinguish a factual finding from a legal conclusion.").

\textsuperscript{116} See supra notes 100-01 (definition and importance of the burden of persuasion).

\textsuperscript{117} See MCCORMICK ON EVIDENCE, supra note 101, § 336.

\textsuperscript{118} Id. § 337, at 949 (stating that rules assigning burdens owe their development "partly to traditional happen-so and partly to considerations of policy").

\textsuperscript{119} The seminal modern authority for allocation of the burden of persuasion is Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan. L. Rev. 5 (1959). See F. James & G. Hazard, supra note 15, § 7.8; MCCORMICK ON EVIDENCE, supra note 101, § 337; Bridge, Burdens Within Burdens at a Trial Within a Trial, 23 B.C.L. Rev. 927, 929-34 (1982) (all relying on Cleary for their analyses).


\textsuperscript{121} F. James & G. Hazard, supra note 15, § 7.8, at 252.

\textsuperscript{122} See Bridge, supra note 118, at 933.
allocation use the burden of persuasion as a frank "handicap" to discourage the making of a "disfavored contention." In the bill-payment example, a judiciary that approved of bill payment, and was suspicious of spurious claims of payment, would place the burden upon defendant. Finally, courts also consider in allocating the burden of persuasion: (1) the character—affirmative or negative—of the proposition, (2) determination of the party to whom a proposition is essential, and (3) the general rule that the burden of persuasion should follow the burden of pleading a given issue. Influential commentators, however, have rejected these considerations as having little importance.

3. The "Clearly Established" Test: A Plaintiff's Burden?

After Harlow three distinct issues exist in qualified immunity cases; a court may allocate a burden of proof for each issue. Of the three issues, Harlow appears to direct the defendant to carry

123. See F. James & G. Hazard, supra note 16, § 7.8, at 252.
124. "This is no more than a play on words, since practically any proposition may be stated in either affirmative or negative form." Cleary, supra note 119, at 11. In qualified immunity cases, for example, one could state either that the law was clearly established or that the official was in doubt. Both statements are affirmative propositions.
125. "This does no more than restate the question." Id.
126. The same general considerations of policy, fairness, and convenience affect the allocation of both burdens, so that they often, but not inevitably, parallel each other. See F. James & G. Hazard, supra note 15, § 7.8. Generally, the moving party has the burden of persuasion. Shifting the burden of persuasion to the nonmovant, however, violates no firm principle. "The issue, rather, 'is merely a question of policy and fairness based on experience in the different situations.'" Keyes v. School Dist. No. 1, 413 U.S. 189, 209 (1973) (quoting J. WIGMORE, EVIDENCE § 2486, at 275 (3d ed. 1940)).
127. See authorities cited supra note 119. The majority opinion in Gomez v. Toledo, 446 U.S. 635 (1980), which allocated the burden of pleading qualified immunity to defendants, rested partly on a statutory analysis of § 1983. The Court held that the statute, by its terms, requires that a plaintiff allege only two things to state a claim for relief: (1) deprivation of a federal right and (2) action under color of state or territorial law. A defendant, therefore, claiming qualified immunity seeks an exception to the statute and, under pleading principles, raises a "matter constituting an avoidance or affirmative defense." 446 U.S. at 640 (quoting FED. R. Civ. P. 8(c)).

128. See supra notes 26, 106-15 and accompanying text.
the burden of proving: (1) that he was acting within the scope of his office, and (2) if appropriate, that "extraordinary circumstances" existed so that the official neither knew nor should have known of the relevant law. Harlow did not allocate explicitly the remaining burden of proving the other or "threshold" issue—whether the applicable law was clearly established at the time of the incident.

The major rationales of burden allocation and the major policies underlying Harlow generally support placing the burden of proof on this unresolved issue upon the plaintiff. First, the probability rationale, the weakest of the three, would presume that public officials know their constitutional duties and are responsible for constitutional violations occurring as a result of their actions. Once a public official has shown that he was acting within the scope of his duties, the public official also should bear the onus of proving the exception to the rule. Second, the fairness rationale supports placing the burden on the plaintiffs. Because Harlow generally has stripped away subjective considerations from the Wood v. Strickland test for qualified immunity, any special access a defendant official might have to subjective evidence concerning his state of mind ought to have less relevance. To the extent that Harlow has reduced the importance of these subjective factors, under the fairness rationale, courts are less unfair when re-

129. See supra notes 106-07 and accompanying text.
130. This burden could arise only if the court has held that a violation of "clearly established" rights did occur. See supra notes 108-10 and accompanying text.
131. This issue, of course, contains two elements corresponding to the first two steps of the Harlow three-step inquiry: determining the law applicable to the relevant facts and determining whether that law was clearly established at the time of the incident. See supra notes 26, 44 and accompanying text. The Harlow Court spoke of these two related inquiries only as issues "the judge appropriately may determine." 457 U.S. at 818. For fuller text, see supra note 22.
132. See supra notes 119-27 and accompanying text.
133. See supra notes 27-36 and accompanying text.
134. But see infra notes 144-45 and accompanying text (discussing reservation about this conclusion).
135. "[A] reasonably competent public official should know the law governing his conduct." Harlow, 457 U.S. at 819; see also supra note 120 and accompanying text (probability rationale).
136. See supra notes 10-14 and accompanying text.
137. But see supra notes 53-66 and accompanying text (allowing subjective inquiries into conduct, but not into motivation); infra notes 144-45 and accompanying text (caveat regarding fairness and adequacy of discovery).
138. See supra notes 121-22 and accompanying text.
139. But see infra notes 144-50 and accompanying text (discussing relationship between fairness and adequacy of discovery).
quiring the plaintiff to prove the official’s “bad faith” in a primarily objective manner.

Last, the policy rationale strongly supports placing the burden of proof on the plaintiff. The Harlow Court’s concern that “insubstantial lawsuits undermine the effectiveness of government as contemplated by our constitutional structure,”140 coupled with the Court’s hope that the lower courts could resolve many of these claims on summary judgment,141 places a civil rights plaintiff in the position of advancing a “disfavored contention.”142 This strong policy rationale favors placing the burden on plaintiff; the policy consideration would outweigh the probability rationale for placing the burden upon defendant, especially if fairness required no contrary result. Indeed, the Court implicitly may have allocated the burden to plaintiff in a subsequent qualified immunity case, Davis v. Scherer.143

If plaintiffs are to bear the burden of persuasion on the threshold “clearly established” issue, the relationship between the adequacy of discovery and the allocation of the burden of persuasion becomes particularly important. To the extent that courts require close factual correspondence between the instant case and earlier cases arguably establishing the relevant precedent,144 they should permit plaintiffs a reasonable amount of discovery145 to establish the requisite factual similarity. Otherwise the fairness rationale would increasingly favor placing the burden of proof upon the defendants.

C. Appealability of Summary Judgment Denial

1. Summary Judgment Denial as a Nonfinal Decision

The doctrine requiring finality of decision146 before appeal has

140. Harlow, 457 U.S. at 819-20 n.35.
141. Id. at 818.
142. See supra text accompanying note 123.
143. 104 S. Ct. 3012, 3021 (1984) (“A plaintiff . . . may overcome the defendant official’s qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue.”) (emphasis added). But see supra note 110 (discussing hazards of assuming implied allocation of burden).
144. See supra note 44.
145. See supra notes 83-93 and accompanying text; see also Sonenshein, supra note 73, at 785-86 (emphasizing need to relate required standard of proof to party’s access to facts).
146. 28 U.S.C. § 1291 (1982). The statute provides: “The courts of appeal . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court. . . .” Id. (emphasis added).
been “the dominant rule in federal appellate practice.”147 The fundamental policy underlying this rule is the avoidance of piecemeal litigation148 and its resultant inequities149 and inefficiencies.150 As a general rule,151 denial152 of a motion for summary judgment is not a final decision for purposes of appeal; therefore, the denied party has no right153 of immediate appeal. In the usual case,154 denial of

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148. In Cobbledick v. United States, 309 U.S. 323 (1940), the Supreme Court noted: Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.

Id. at 325.

149. See id.; Note, Appealability, supra note 147, at 351-53.

150. See Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981); 15 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3907, at 432-33 (1976) [hereinafter cited as Federal Practice & Procedure]. In addition to stressing the greater efficiency that a single unified review provides, the Risjord Court also emphasized the “deference that appellate courts owe to the trial judge.” Risjord, 449 U.S. at 374. “Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system.” Id.


152. A party often may appeal the grant of a motion for summary judgment immediately, depending upon the relationship of the decided issue to any remaining issues in a case. See Ardoin v. J. Ray McDermott & Co., 641 F.2d 277, 278-79 (5th Cir. 1981). An interlocutory adjudication under rule 56 becomes final only if the decisionmaker enters the judgment under Fed R. Civ. P. 54(b). See 6 Moore’s Federal Practice, supra note 75, ¶ 56.20(1). Because a court that grants a motion for qualified immunity on summary judgment may enter that judgment under rule 54(b), courts often hear these cases on appeal. See Ellsberg v. Mitchell, 709 F.2d 51, 55 & n.20 (D.C. Cir. 1983), cert. denied, 104 S. Ct. 1316 (1984); cf. Thompson v. Betts, 754 F.2d 1243 (5th Cir. 1985) (holding grant of summary judgment motion for absolute immunity not immediately appealable because court did not enter rule 54(b) order).

153. “The traditional view is that the U.S. Constitution does not create a right to appellate review but instead leaves that matter, like the creation of inferior federal courts and their jurisdiction, to Congress.” Federal Civil Appellate Jurisdiction: An Interlocutory Restatement, 47 Law & Contemp. Probs. 13, 19 (Spring 1984) (footnote omitted) [hereinafter cited as Appellate Jurisdiction].

154. On rare occasions, courts have made exceptions to this rule in cases concerning the enforcement of statutes. See 6 Moore’s Federal Practice, supra note 75, ¶ 56.21(2).
the motion merely postpones a decision on the issue until trial;\(^{155}\) appellate consideration may then be unnecessary should the movant later prevail. In any event, the appellate court’s deliberation on the issue should be wiser when based upon a full record developed during trial.\(^{156}\)

Because summary judgment denial is not a final decision, defendants seeking immediate appeal must do so under one of two major applicable exceptions.\(^{157}\) They may request the district court judge to certify the decision as an appealable interlocutory order,\(^{158}\) or they may seek to qualify for appeal under the judicial exception to the final decision rule known as the collateral order doctrine.\(^{159}\)

2. Limited Guidance and Conflicting Policies

Before Harlow, the fact-intensive nature of the “objective-subjective” test under Wood v. Strickland\(^ {160}\) had made the considerations governing appealability of summary judgment denial in general\(^ {161}\) equally applicable to denial of qualified immunity.\(^ {162}\)

\(^{155}\) “[D]enial of a motion for a summary judgment because of unresolved issues of fact . . . is strictly a pretrial order that decides only one thing—that the case should go to trial.” Switzerland Cheese Ass’n, Inc. v. E. Horne’s Market, Inc., 385 U.S. 23, 25 (1966) (construing 28 U.S.C. § 1292(a)(1) in a case appealing denial of summary judgment of motion seeking a permanent injunction); see also Appellate Jurisdiction, supra note 153, at 190.

\(^{156}\) See 15 Federal Practice & Procedure, supra note 150, § 3007, at 432-33; Note, Appealability, supra note 147, at 351-52.

\(^{157}\) In addition to trying the two major routes of appeal discussed infra in notes 175-250 and accompanying text, a litigant also could attempt to invoke the extraordinary aid of a reviewing court by seeking supervisory mandamus under the All Writs Statute, 28 U.S.C. § 1651 (1982). See Richardson Merrell, Inc. v. Koller, 105 S. Ct. 2757, 2763 (1985). The writ, however, is reserved for clear abuses of judicial discretion or usurpations of judicial power; the party is not to use the writ as a substitute for appeal. See Schlagenhauf v. Holder, 379 U.S. 104 (1964). Use of the writ, therefore, would seem inappropriate for an adverse decision on an issue of recurring importance.

\(^{158}\) Certification is available under 28 U.S.C. § 1292(b) (1982). See infra notes 237-50 and accompanying text.

\(^{159}\) Arising from a “practical rather than technical construction” of 28 U.S.C. § 1291, the collateral order doctrine excepts from the final decision rule a “small class [of decisions] which finally determine [sic] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). The test underwent some revision in Cooper v. Lybrand v. Livesay, 437 U.S. 465, 468 (1978). See infra notes 177-79 and accompanying text (description of Livesay restatement).

\(^{160}\) 420 U.S. 308, 322 (1975); see supra notes 11 & 23.

\(^{161}\) See supra notes 151-59 and accompanying text.

\(^{162}\) See Forsyth v. Kleindienst, 599 F.2d 1203, 1209 (3d Cir. 1979) (refusing to allow
Harlow itself dealt only peripherally with appealability. The case actually came to the Supreme Court on writ of certiorari appealing a summary judgment denial on grounds of absolute immunity.163 The Court asserted its jurisdiction164 over the case without lengthy discussion, noting that the Court already had held summary judgment denial of absolute presidential immunity immediately appealable in Harlow’s companion case, Nixon v. Fitzgerald.165 After redefining qualified immunity and holding that the Harlow defendants were entitled to have their claims to qualified immunity adjudicated under the new test, the Court vacated the judgment and remanded the case to the district court for application of the objective standard.166

Harlow’s conversion of qualified immunity to an objective standard167 reopened the issue of the appealability of a summary judgment denial. The circuits that confronted this problem after Harlow were divided on the question. Three circuits held that defendants could appeal immediately under the collateral order exception,168 and four circuits held that defendants could not appeal immediately.169 Each circuit recognized that the policies underlying Harlow170 and the policies generally governing appealability171 should play a critical role in the determination of this issue. The courts, however, focused on different features of the Harlow policies and hence arrived at divergent outcomes for different reasons. Courts permitting appeals pointed to Harlow’s concern that offi-
cials be free from the risks of unnecessary trial or discovery.\textsuperscript{172} Courts rejecting appealability, on the other hand, noted that the focus of the \textit{Harlow} opinion was on the termination of insubstantial claims,\textsuperscript{178} not the termination of all civil rights suits against government officials. The Supreme Court granted certiorari in \textit{Mitchell v. Forsyth}\textsuperscript{174} to resolve this intercircuit split.

3. Denial of Qualified Immunity

\textit{(a) Appeal as a Collateral Order Exception}

Despite the fundamental nature of the final decision rule,\textsuperscript{175} it has both statutory\textsuperscript{176} and judicial exceptions. The judicial exception, the collateral order doctrine, is a narrow exception that has its roots in two different lines of cases that converged\textsuperscript{177} in the 1978 Supreme Court decision of \textit{Coopers \& Lybrand v. Livesay}.\textsuperscript{178} The \textit{Livesay} doctrine restricts the exception to a “small class” of orders that “conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment.”\textsuperscript{179}

\textsuperscript{172} See, e.g., Krohn, 742 F.2d at 28 (stating that courts can effect \textit{Harlow}'s interest in avoiding trial in cases with insubstantial claims only by permitting immediate appeal); McSurely, 697 F.2d at 316 (emphasizing that interlocutory review must be available “to ensure that government officials are fully protected against unnecessary trials”).

\textsuperscript{173} See, e.g., Kenyatta, 744 F.2d at 1184 (noting that courts trangress \textit{Harlow}'s interests only if claim is insubstantial); see also Forsyth, 729 F.2d at 273-74.


\textsuperscript{175} See supra notes 146-50 and accompanying text.

\textsuperscript{176} The principal statutory exception is 28 U.S.C.A. § 1292(a) (Supp. 1985), which provides interlocutory appeal for certain orders granting or refusing injunctive relief.

\textsuperscript{177} The lines of cases derive from Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), \textit{see supra} note 159, and Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848). \textit{Forgay} concerned the immediate transfer of property at issue in the case; the Court appears to have combined its notion of avoiding irreparable harm with the criteria enumerated in \textit{Cohen} in its restated formulation of the collateral order doctrine in \textit{Coopers \& Lybrand v. Livesay}, 437 U.S. 463 (1978). \textit{See infra} text accompanying notes 175-79.

\textsuperscript{178} 437 U.S. 463 (1978).

\textsuperscript{179} \textit{Id.} at 468.
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(1) The Collateral Order Doctrine Before Mitchell

During the three-year period following Harlow, the circuits had applied these four Livesay criteria to test whether denial of qualified immunity merited immediate appeal under the collateral order doctrine. First, the courts' decisions indicate that whether summary judgment conclusively determined the issue depended on whether unresolved issues of material fact existed whose resolution courts merely were postponing to trial. If the case presented no disputed issues of fact and the court was ruling primarily on a question of law, then qualified immunity denial could satisfy the first criterion. Second, although the issues involved in resolving qualified immunity claims might have been conceptually separate from the merits of the main case, in the courts' analyses, often these issues appeared closely linked.

Third, no court disputed the importance of the issue of qualified immunity as a general proposition, but some courts wondered whether the issue was important enough in every case to justify a potentially burdensome increase in the appellate caseload immediate appeals would trigger. In Kenyatta v. Moore, for example, the United States Court of Appeals for the Fifth Circuit distinguished between the legal importance of the issue of appealability of qualified immunity denial and the legal importance of qualified immunity denial as a recurring issue. The court said: "If . . . we hold denials of summary judgment appealable per se, the right to appeal will be assured in a large number of cases that present no significant legal issues, for . . . [many qualified immunity cases] involve only the application of settled principles, not important,

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180. See Jensen v. Conrad, 747 F.2d 185, 187 n.1 (4th Cir. 1984) (refusing to allow appeal of qualified immunity denial when trial court had concluded that evidence concerning defendants' activities was insufficient and had permitted plaintiffs to continue discovery), cert. denied, 105 S. Ct. 1754; Evans v. Dillahunty, 711 F.2d 828, 830 (8th Cir. 1983) (indicating that courts should allow appeal only if "essential facts are not in dispute" and determination of immunity is "solely a question of law").

181. In Evans the court said this criterion would be satisfied if the trial court made "specific findings of fact, or if the parties stipulate[d] to the relevant facts." 711 F.2d at 830; see Schwarzer, supra note 72, at 469-81, 489-93.

182. But see supra notes 53-55 and accompanying text, for difficulties in characterizing the objective test as one purely of law.

183. Especially in the absence of discovery, this might be difficult for a reviewing court to predict. See Kenyatta, 744 F.2d at 1185 (noting that inseparable intertwining of plaintiff's claims and qualified immunity defenses is "typical"); Williams v. Collins, 728 F.2d 721, 726 n.5 (5th Cir. 1984) (stating that "qualified immunity issues are more closely entwined with the merits of a case than are issues of absolute immunity").

184. See Forsyth v. Kleindienst, 729 F.2d at 274.
unresolved legal issues.\textsuperscript{185}

Last, denial of qualified immunity had to be “effectively unre-
viewable on appeal from a final judgment”\textsuperscript{186} in order to satisfy the
fourth Livesay criterion. In the analogous area of absolute immu-
nity, the Supreme Court had held on three occasions that orders
denying absolute immunity were appealable immediately.\textsuperscript{187} Those
cases turned upon whether the rights asserted would be lost irre-
vocably if the denials were not appealable.

In Abney v. United States\textsuperscript{188} and Helstoski v. Meanor\textsuperscript{189} the
Supreme Court recognized that absolute freedom from trial on
grounds of double jeopardy or legislative immunity would be lost
irrevocably\textsuperscript{190} if courts did not permit immediate appeal of pretrial
denial of those claims. Later decisions that focused on other defen-
dants’ claims to be free from trial, however, construed this freedom
narrowly.\textsuperscript{191} Nonetheless, because these cases involved criminal ap-
peals their precedential value for the qualified immunity issue is
probably limited. The Supreme Court has said repeatedly that the
final decision rule is “at its strongest in the field of criminal

\textsuperscript{185} Kenyatta, 744 F.2d at 1186; cf. Cohen, 337 U.S. at 547. The Cohen Court said:
But we do not mean that every order fixing security is subject to appeal. Here it is the
right to security that presents a serious and unsettled question. If the right were admit-
ted or clear and the order involved only an exercise of discretion as to the amount of
security, . . . appealability would present a different question.

\textit{Id.} The importance of the issue has been an unpredictable element of the criteria for collat-
eral orders to which the Supreme Court has accorded varying attention over the years. The
Court in \textit{Cohen} emphasized the “serious and unsettled question” requirement. The Court
then did not remark on the issue in Livesay and in Risjord, but the Court reemphasized the
Co., 460 U.S. 1 (1983) (describing the Livesay doctrine as having three criteria and not
testing for importance).

\textsuperscript{186} Livesay, 437 U.S. at 468. For fuller quotation, see \textit{supra} text accompanying note
179.

\textsuperscript{187} \textit{See} Nixon v. Fitzgerald, 457 U.S. 731 (1982); Helstoski v. Meanor, 442 U.S. 500
(1979) (speech and debate clause immunity); Abney v. United States, 431 U.S. 651 (1977)
(double jeopardy clause immunity).

\textsuperscript{188} 431 U.S. 651, 656-62 (1977).

\textsuperscript{189} 442 U.S. 500, 506-07 (1979).

\textsuperscript{190} \textit{See} Abney, 431 U.S. at 662. The Court said: “[T]hese aspects of the guarantee’s
protection would be lost if the accused were forced to ‘run the gauntlet’ a second time
before an appeal could be taken . . . .”

(vindicitive prosecution claim for immunity); United States v. MacDonald, 435 U.S. 851
(1978) (speedy trial clause claim). In \textit{Hollywood Motor Car} the Court said the defendant’s
asserted right to be free from vindictive prosecution was “simply not one that must be up-
held prior to trial if it is to be enjoyed at all.” 458 U.S. at 270. The Court distinguished
between “a right not to be tried and a right whose remedy requires the dismissal of the
charges.” 458 U.S. at 269.
The Court generally has applied a "practical" approach to the final decision rule. Even in criminal cases the Court has recognized that protection should be given to "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." In *Powers v. Lightner* the United States Court of Appeals for the Seventh Circuit said that qualified immunity, unlike absolute immunity, does not entail "a right to be free from trial." The court rejected defendants' argument that denials of qualified and absolute immunity should be treated as equally appealable "simply because both forms of immunity respond to the dangers of exposing government officials to the risks of trial." In *Krohn v. United States*, however, the United States Court of Appeals for the First Circuit held that, despite the differences between absolute and qualified immunity, an official whom a court denied appeal in a qualified immunity case would have the benefits of *Harlow* "cancelled out." Ultimately, *Harlow*-based decisions whether to permit appeal from denial of qualified immunity appeared to turn on how much protection a court deemed necessary to safeguard officials against insubstantial claims. In *Kenyatta v. Moore* the Fifth Circuit had said that a district court's holding that a plaintiff's rights were

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193. See *Cohen*, 337 U.S. at 546 ("The Court has long given § 1291 this practical rather than a technical construction.") (emphasis added), quoted with approval in *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152 (1964).


195. Powers, 752 F.2d at 1256. Judge Wisdom elaborated on the distinction: "The rights encompassed by the doctrines of qualified and absolute immunity are not coextensive. The "purpose behind absolute immunity is as much to protect the relevant persons from a trial on their actions as it is to protect them from the outcome of trial." Those who enjoy absolute immunity are therefore entitled to defeat the suit at the outset. By contrast, whether qualified immunity protects against trial depends upon the circumstances of the official's actions."

196. Id. (citations and footnotes omitted) (quoting Briggs v. Goodwin, 569 F.2d 10, 59 (D.C. Cir. 1977) (Wilkey, J., dissenting), cert. denied, 437 U.S. 904 (1978)).

197. *Krohn*, 742 F.2d at 28 (quoting *Abney*, 431 U.S. at 662 n.7). An important procedural distinction between the two forms of immunity had been that absolute immunity could defeat a claim on a motion to dismiss. Parties, however, must have pleaded and supported qualified immunity as an affirmative defense, even though *Harlow*'s objective standard appeared to have foreshortened this process. *See infra* notes 220-31 and accompanying text.

clearly established under the relevant legal standard at the time of the conduct in question should be sufficient protection itself against insubstantial claims. Although the validity of the Kenyatta approach depends on a certain level of confidence in the sagacity of the trial court, respect for the decisionmaking capacity of the trial court is one of the three major policies underlying the final decision rule. As the Kenyatta court emphasized: “Judges are not infallible, and errors may be anticipated in application of the Harlow standard like any other. Nevertheless, few if any district judges are likely to mistake insubstantial claims for violations of clearly established rights . . . .”

(2) Mitchell v. Forsyth

In Mitchell v. Forsyth the Supreme Court resolved the intercircuit division, decreeing that immediate appeal is necessary to

199. Id. at 1184 (“The trial itself transgresses the interests protected by qualified immunity only if the claim is insubstantial, and the defendant-official has nothing to appeal if he has failed to persuade a district judge that his defense is well-founded.”).
200. See supra notes 149-50 and accompanying text.
201. 744 F.2d at 1184. But see Krohn v. United States, 742 F.2d 24, 28 (1st Cir. 1984), for the opposing approach to the insubstantiality issue. The First Circuit held that qualified immunity should be appealable routinely to effectuate Harlow’s policy against insubstantial lawsuits, provided the claim to immunity was “plausible.”
202. Mitchell v. Forsyth, 471 U.S. 111, 125 (1985). The case stemmed from a warrantless wiretapping in 1970-1971 that John Mitchell, then attorney general of the United States, authorized to investigate a group called the East Coast Conspiracy to Save Lives. The group allegedly plotted to blow up tunnels underneath federal buildings in Washington, D.C. and to kidnap National Security Adviser Henry Kissinger. The qualified immunity issue was whether the law was clearly established at the time that there was no authority for warrantless national security wiretaps. Accepting the plaintiff’s suspicions that Mitchell’s true motives were political, wiretapping for those purposes clearly was outlawed at the time. Accepting the former attorney general’s statement in deposition that he was motivated by national security concerns, the law barring this type of wiretapping did not become clearly established until a year after Mitchell’s actions, when the Supreme Court decided United States v. United States Dist. Ct., 407 U.S. 297 (1972).

The case had a long and convoluted procedural history. See Mitchell, 105 S. Ct. at 2809-12. Discovery lasted five-and-a-half years, and the District Court had ruled against the defendant’s claims for absolute and for qualified immunity both before and after Harlow. Id. at 2810-11. On the post-Harlow appeal, the Third Circuit had accepted appellate jurisdiction on the absolute immunity issue and ruled against Mitchell on the merits. The court, however, had held the qualified immunity denial unappealable for lack of jurisdiction under 28 U.S.C. § 1291. Forsyth v. Kleindienst, 729 F.2d 267 (3d Cir. 1984).

The Supreme Court granted certiorari on three issues: (1) whether the attorney general had absolute immunity for national security wiretapping; (2) if not, whether qualified immunity denial was appealable immediately; and (3) if so, whether the attorney general was entitled to qualified immunity. The Court held that (1) Mitchell was not absolutely immune; (2) the District Court’s denial of qualified immunity was immediately appealable; and (3) Mitchell was entitled to qualified immunity from damages.
protect officials from the danger of insubstantial claims and that appeal of qualified immunity denial thus is appeal of a collateral order. The Court squarely rejected both the Kenyatta dictum, that the considered opinion of one judge on the “clearly established” question is safeguard enough against insubstantial claims, and the Powers distinction between the degrees of immunity from trial that qualified and absolute immunity afford. The Court held that summary judgment denial of qualified immunity met the requirements of the collateral order doctrine. The Court noted that qualified immunity is “an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.”

Qualified immunity, thus, is “in fact an entitlement not to stand trial under certain circumstances,” and, therefore, a decision by a district court to deny qualified immunity is “effectively unreviewable on appeal from a [later] final judgment.”

Only seven Justices participated. Justice Powell, who wrote for the Harlow majority, was ill. Justice Rehnquist, who had been a Justice Department policymaker at the time of the wiretapping, apparently recused himself. Four Justices agreed that there was no absolute immunity (Chief Justice Burger and Justices O'Connor and Stevens dissenting); four Justices agreed that the qualified immunity issue was appealable (Justices Brennan and Marshall dissenting, with Justice Stevens not reaching the issue); and four Justices agreed that there was qualified immunity (Justices Brennan, Marshall, and Stevens not reaching the issue, but Justice Brennan's separate opinion not accepting the Court's characterization of the attorney general's motivations). Justice White wrote for the Court.

Although only four members of the Court embraced the holding on appealability, it seems likely that Justice Powell, the Harlow author, and probably Justice Rehnquist would agree. But cf. Pacific Union Conference of Seventh-Day Adventists v. Marshall, 434 U.S. 1305 (Rehnquist, Circuit Justice 1977) (holding that denials of summary judgment generally are unappealable).

203. 105 S. Ct. at 2816 (emphasis in original).

204. Id. at 2815. The Court also described qualified immunity as “an entitlement not to stand trial or face the other burdens of litigations, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law.” Id. at 2816.

205. Id. In his dissent, Justice Brennan labeled the majority's reasoning conclusory, sarcastically noting that “the Court may believe that italicizing the words 'immunity from suit' clarifies its rationale.” He argued that “the evils suggested by the Court [do not] pose a significant threat,” expressed Kenyatta-like confidence in trial judges' abilities to identify insubstantial claims, and suggested greater use of § 1292(b) as an alternative. Id. at 2829-31 (Brennan, J., dissenting in part); see infra notes 237-50 and accompanying text (discussing 28 U.S.C. § 1292(b) certification).

Justice Brennan also expressed “fear that today's decision will give government officials a potent weapon to use against plaintiffs, delaying litigation endlessly with interlocutory appeals. The Court's decision today will result in denial of full and speedy justice to those plaintiffs with strong claims on the merits and a relentless and unnecessary increase in the caseload of the appellate courts.” 105 S. Ct. at 2831 (Brennan, J., dissenting in part) (footnote omitted).
The Court held that the denial of summary judgment also satisfied the other two criteria for the collateral order exception. First, denial of qualified immunity "conclusively determine[s] the disputed question" no matter which version of the facts of a case the trial court accepts at summary judgment. If the court accepts the facts as asserted by the defendant, nothing in the subsequent course of the case will change the court's ruling on the immunity issue. Alternatively, the court may rule that, accepting the plaintiff's asserted facts, the defendant is not immune. If the plaintiff later fails to prove those facts, the court has "finally and conclusively determine[d] the defendant's claim of right not to stand trial on the plaintiff's allegations." Second, the Court held that a summary judgment denial satisfies the requirement that the appealed issue be separate from the merits because a claim of qualified immunity is "conceptually distinct from the merits of the plaintiff's claim" that the defendant official has violated his rights. Furthermore, any "factual overlap" between the two issues is no more than a court would find in absolute immunity cases.

206. As in other cases in which the Court has held an issue appealable, the Court deemphasized the "important issue" criterion, here to the point of never mentioning the Livesay formulation at all. In describing the general criteria for appeal as a collateral order, the Court cited the Cohen formulation, see supra note 159, but omitted Cohen's separate statement concerning the desirability of "a serious and unsettled question," see supra note 185. Cf. Richardson-Merrell, Inc. v. Koller, 105 S. Ct. 2757 (1985) (analyzing appealability of an order denying attorney disqualification using all four Livesay criteria; court decided case two days before Mitchell).

The Court did describe absolute immunity for the attorney general as an "important [issue] we have hitherto left unanswered" and explained that the Court took certiorari on the appealability issue because of the intercircuit split. 105 S. Ct. at 2812; see supra notes 167-74 and accompanying text. The Court, nonetheless, did not deal explicitly with the "important issue" criterion.

207. 105 S. Ct. at 2816. Justice Brennan, dissenting, did not address the issue of finality because he considered denial of qualified immunity to be neither "completely separate from the merits" nor "effectively unreviewable from a final judgment." Id. at 2825 (Brennan, J., dissenting in part) (quoting Livesay, 437 U.S. at 468).

208. 105 S. Ct. at 2816 (emphasis added).

209. Id. at 2817 & n.10. In dissent, Justice Brennan said the application of this criterion should result in the "straightforward preclusion" of interlocutory appeals. He argued that the Court had substituted "for the traditional test of completely separate from the merits a vastly less stringent analysis of whether the allegedly appealable issue is not identical to the merits." Id. at 2826-27 (Brennan, J., dissenting in part) (emphasis in original). The new "toothless standard" disserved the purposes underlying the separability requirement and would result in "repetitious appellate review" of closely related issues. Id. at 2827-28 (Brennan, J., dissenting in part).
(3) Implications of Mitchell

Mitchell v. Forsyth establishes a clear rule on immediate appealability of some qualified immunity denials, but the decision’s sweep may be more limited than first appears. First, the case concerned only a claim for damages;\footnote{190} the plaintiff brought no claim for injunctive relief. The Court noted that it expressed “no opinion”\footnote{211} on a Fourth Circuit rule\footnote{212} that denial of qualified immunity is not appealable when plaintiff has claims for injunctive relief that must be adjudicated at trial regardless.\footnote{213} Defendant officials going to trial anyway on an injunctive claim have a weaker argument that absence of appeal on their defeated claim for immunity would vitiate their Harlow-given freedom from burdensome trial or discovery. Section 1983 and Bivens cases commonly contain claims for both injunctive relief and damages.\footnote{214}

The second limitation of the Mitchell holding is its emphasis on the “purely legal” nature of the appealable issue.\footnote{215} The Court concluded: “[A] district court’s denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an ap-

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\footnote{210}. Plaintiff Forsyth did still have an outstanding claim for damages under 18 U.S.C. § 2520, to which qualified immunity does not attach. See Respondent’s Brief in Opposition to Petition for Writ of Certiorari, Mitchell v. Forsyth, 105 S. Ct. 2806 (1985). The Court did not comment on this outstanding claim.

\footnote{211}. Id. at 2812 n.5.

\footnote{212}. See England v. Rockefeller, 739 F.2d 140 (4th Cir. 1984); Bever v. Gilbertson, 724 F.2d 1083 (4th Cir.), cert. denied, 105 S. Ct. 349 (1985). A strong dissent in Bever noted that this holding might induce plaintiffs to add frivolous injunctive claims routinely to defeat possible appeals of qualified immunity denials. 724 F.2d at 1091 (Hall, J., dissenting); see also Tubessing v. Arnold, 742 F.2d 401 (8th Cir. 1984) (permitting appeal despite outstanding claim for injunctive relief).

\footnote{213}. Whether Mitchell’s characterization of qualified immunity as “immunity from suit” could lead to the decisions application to injunctive claims is conjectural. The law appeared to be settled that qualified immunity protects officials only from damages, not from injunctive relief. See Wood v. Strickland, 420 U.S. at 314-15 n.6 (noting that “immunity from damages does not ordinarily bar equitable relief as well”); Gannon v. Daley, 561 F. Supp. 1377, 1387 n.27 (N.D. Ill. 1983) (collecting lower court cases). But cf. Harlow, 457 U.S. at 819 n.34 (“We emphasize that our decision applies only to suits for civil damages. . . . We express no view as to the conditions in which injunctive or declaratory relief might be available.”).


\footnote{214}. A WESTLAW sampling of qualified immunity cases qualitatively confirms this observation.

\footnote{215}. 105 S. Ct. at 2816 n.9.
pealable 'final decision' . . . ." While both the Mitchell and Harlow Courts have characterized the new objective approach to qualified immunity as "essentially" legal, the lower courts may have more trouble fitting this concept to the facts of specific cases. At least, some defendants who claim "extraordinary circumstances" as part of their qualified immunity defense may not be eligible for appeal.19

Plaintiffs may find some solace in the Mitchell Court's suggestion that, to resolve factual disputes and thus crystallize qualified immunity into a "purely legal" issue, district courts will need to accept in toto one of the parties' versions of the facts.20 The Court implied that the courts usually should accept the plaintiffs' version.21 In this sense, the loss plaintiffs incurred on the appealability issue in Mitchell could produce reciprocal gains in the area of discovery,22 in allocation of the burden of proof,23 and in the very characterization of the "legal" issue.24

The Court also used Mitchell to clarify earlier dictum from Harlow25 which indicated that discovery should not take place until a court resolves the threshold issue of qualified immunity. This approach had appeared to conflict with the usual workings of rule 56.26 After Mitchell, courts using the new approach27 should not

216. See supra notes 47-54 and accompanying text.
217. Id. at 2816 ("essentially legal"); Harlow, 457 U.S. at 819 ("defining the limits of qualified immunity essentially in objective terms . . . a test that focuses on the objective legal reasonableness of an official's acts.").
218. See supra notes 47-54 and accompanying text.
219. See supra notes 89-90 and accompanying text (accepting plaintiff's factual assertions in lieu of permitting discovery).
220. See supra notes 134-45 (noting that even if plaintiff has the burden, if the issue is a legal one with the facts assumed, the burden is less weighty).
221. Id. at 2817 (emphasis added).
222. See supra notes 47-54 and accompanying text.
223. Id. at 2816 ("essentially legal"); Harlow, 457 U.S. at 819 ("defining the limits of qualified immunity essentially in objective terms . . . a test that focuses on the objective legal reasonableness of an official's acts.").
224. See supra text at note 207. The Court apparently was referring to the usual procedure on a motion to dismiss or on summary judgment when the plaintiff is the nonmovant. See supra notes 74-78 and accompanying text.
226. See supra text at note 207. The Court apparently was referring to the usual procedure on a motion to dismiss or on summary judgment when the plaintiff is the nonmovant. See supra notes 74-78 and accompanying text.
227. The Court's pertinent dictum was:

Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. Even if the plaintiff's complaint adequately alleges the commission
allow discovery until plaintiff survives a qualified immunity claim on a motion to dismiss; on this motion the court should assess the adequacy of the plaintiff's claim to a violation of clearly established law by assuming the facts as asserted by the plaintiff. If the defendants raise the issue of qualified immunity on a motion for summary judgment, however, the court should use the customary rule 56 approach. The court should scrutinize the appropriate materials in the record to determine whether the facts are in dispute and whether the court, as a matter of law, should or should not issue the judgment. After Mitchell, therefore, the Court appears to contemplate discovery before summary judgment for qualified immunity cases in a way the Harlow Court had hoped to avoid. Thus, defendants seeking to avoid burdensome discovery may need to raise claims of qualified immunity in a rule 12(b)(6) motion at the outset of the case.

The final limitation on the impact of Mitchell could come if the decision results in a flood of appeals to the circuit courts. Some appellate courts might view denial of qualified immunity as an “important” issue the first few times a case reaches them. However, given the volume of civil rights litigation at both the district and appellate court levels, and given the frequency of qualified immunity claims the courts could quickly lose patience with the

of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts. 105 S. Ct. at 2816 (emphasis added) (citation omitted).

228. “The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue . . . .” FED. R. CIV. P. 56(c). For fuller text, see supra note 71.

229. There should be “no genuine issue as to any material fact.” FED. R. CIV. P. 56(c); see supra notes 207, 220 and accompanying text.

230. Of course, this approach does not mean that the Mitchell Court was endorsing discovery into the defendants' state of mind. The permitted discovery should be limited to “whether the defendant in fact committed those acts,” not whether he possessed pre-Harlow subjective good faith. Harlow, 105 S. Ct. at 2816. The Mitchell Court's approach, however, apparently tolerates subjective discovery aimed at determining whether a constitutional violation has occurred. See supra notes 85-88 and accompanying text; see also supra notes 89-92 and accompanying text (discussing proposals to control exaggerated pleading by plaintiffs).

231. A court, of course, has the discretion to treat a rule 12(b)(6) motion to dismiss as a rule 56 motion for summary judgment if “matters outside the pleading are presented to the court.” FED. R. CIV. P. 12(b).

232. See supra notes 184-85 and accompanying text.

233. See supra notes 3, 4 and accompanying text. A WESTLAW search on Aug. 24, 1985, revealed 296 cases in the United States district courts and 206 cases in the courts of appeal after Harlow in which qualified immunity was a summary judgment issue.
issue and insist\textsuperscript{234} that a case present the higher standard of a "serious and unsettled question."\textsuperscript{235} Routinely deciding that qualified immunity denials are appealable could impair judicial efficiency by fragmenting the course of litigation in the district courts and by substantially increasing the caseload of the appellate courts.\textsuperscript{236}

(b) Certified Interlocutory Appeal as a Superior Alternative

An alternative means of appeal for officials denied qualified immunity lies in seeking certification for interlocutory appeal by the district court under 28 U.S.C. § 1292(b).\textsuperscript{237} Appeal under this

\textsuperscript{234} See Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, 455 F.2d 770, 773 (2d Cir. 1972) (noting importance of whether a decision "will settle a point once and for all . . . or will open the way for a flood of appeals concerning the propriety of a district court's ruling on the facts of a particular suit"); Donlon Indus. v. Forte, 402 F.2d 935, 937 (2d Cir. 1969) (considering "whether . . . an appellate decision will settle the matter not simply for the case in hand but for many others"); see also Phillips, The Appellate Review Function: Scope of Review, 47 LAW & CONTEMP. PROBS. 1, 2 (1984) (discussing corrective and preventive functions of appellate review).

\textsuperscript{235} Nixon v. Fitzgerald, 457 U.S. 731, 742 (1982) (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. at 546). Clear authority, however, has developed for not permitting appeals in cases when the right is "admitted or clear" and only an application of settled law to specific facts is at issue. See Cohen, 337 U.S. at 547 (quoted more fully at note 185).

\textsuperscript{236} See Forsyth, 729 F.2d at 274 (permitting appeals would "open the sluices to a flood of interlocutory appeals crushing us") (quoting Forsyth v. Kleindienst, 700 F.2d 104, 110 (3d Cir. 1983) (opinion sur grant of stay) (Sloviter, J., dissenting)); see also McCree, supra note 4, at 751-52 & n.3 (per-judge caseload in courts of appeal has increased even more than in district courts); supra notes 146-50 and accompanying text (discussing policies of final decision rule).

The Mitchell Court heard conflicting arguments from the parties regarding the effect of immediate appealability. The government argued that concerns about appellate caseload were misplaced. No federal defendant, and only one state defendant, had taken an immediate appeal in the D.C. and Eighth Circuits in the periods that followed the cases granting defendants that right. Reply Brief for the Petitioner, Mitchell v. Forsyth (citing Evans v. Dillahunty, 711 F.2d 828 (8th Cir. 1983) and McSurely v. McClellan, 697 F.2d 309 (D.C. Cir. 1983)). Plaintiff's attorneys replied that the government's information on the D.C. Circuit was "meaningless" because the information concerned only federal defendants; plaintiff's attorneys predicted that a large number of state defendants who sued under § 1983 would appeal for the delay value alone. Brief for the Respondent at n.11, Mitchell v. Forsyth.

\textsuperscript{237} 28 U.S.C. § 1292(b) (1982). This statute provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order . . .: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

\textit{Id.} (emphasis in original).
statutory exception is more limited than under section 1291; lower courts do not stay proceedings automatically during pendency of the appeal, and the application of the exception requires the discretionary approval of both the district and circuit courts. In order to qualify, the order must (1) involve a "controlling question of law," for which there is (2) "substantial ground for difference of opinion," and (3) immediate appeal should be capable of "materially advancing" the "ultimate termination of the litigation." Although application of these principles by the district courts has been somewhat uneven, under certain circumstances denial of qualified immunity after Harlow would appear to satisfy each of the criteria.

Under the post-Harlow objective standard for qualified immunity, the issue would be one primarily of law. If there were important unresolved issues of fact, the court could deny certification. The qualified immunity issue probably would be "controlling" because of the substantial impact it would have on the course of the litigation. The requirement that there be "substantial ground for difference of opinion" safeguards Harlow's goal of the early elimination of possibly insubstantial claims, and appeal would "materially" advance the termination of the litigation if the appellate court reversed the lower court's denial of qualified immunity. Indeed, the legislative history describes a category of cases illustrating these criteria that aptly fits qualified immunity:

238. Id.
240. See Note, Interlocutory Appeals, supra note 239, at 630. One problem has been that some courts have interpreted the legislative history to certify only cases involving "exceptional circumstances." See id. at 625-28. The Supreme Court appeared to endorse this view in dicta in Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978).
241. See supra notes 49-51, 167-68 and accompanying text.
242. See Kenyatta v. Moore, 744 F.2d 1179 (5th Cir. 1984); see also Bever v. Gilbertson, 724 F.2d 1083 (4th Cir.), cert. denied, 105 S. Ct. 349 (1984). Trial courts denied certification in both cases. In Bever, plaintiff also had an unresolved claim for injunctive relief. See supra notes 211-14 and accompanying text (noting that Bever court also denied collateral order exception under § 1291).
243. This "would seem, at a minimum, to require that reversal result in an immediate effect on the course of the litigation and in some saving of resources either to the court system or to the litigants." Note, Interlocutory Appeals, supra note 239, at 618. Some courts have treated the "controlling question" requirement as a subspecies of the "materially advance . . . the litigation" requirement. See 9 MOORE'S FEDERAL PRACTICE, supra note 75, ¶ 110.22(2), at 260.
244. See supra notes 27-36 and accompanying text.
"cases where a long trial would be necessary for the determination of liability or damages upon a decision overruling a defense going to the right to maintain the action."^{245}

The D.C. Circuit suggested, before *Mitchell v. Forsyth*, that section 1292(b) certification is a "particularly appropriate" way to deal with the immediate appeal of a summary judgment denial of motions for qualified immunity.\(^{246}\) Although *Mitchell* assures appeal under section 1291 for damages-only cases when the qualified immunity issue is "essentially" legal,\(^{247}\) there may be a substantial number of cases still not qualifying under section 1291 that would meet the section 1292(b) criteria. These would be cases seeking both damages and an injunction as well as cases posing recurring legal issues.\(^{248}\)

Section 1292(b) would place defendants seeking appeal under the thumb of the same district court that already has held against them on the merits of the issue appealed. Courts, however, should be able to recognize cases involving close calls on which there is "substantial" ground for a difference of opinion.\(^{249}\) Nevertheless, defendants arbitrarily denied appeal under section 1292(b) might have no further recourse. Courts generally have held that neither appeal under section 1291 nor a writ of mandamus is available to parties who have been refused section 1292(b) certification.\(^{250}\)

A final means by which an official denied qualified immunity might obtain immediate appellate review is by pendent appellate jurisdiction.\(^{251}\) If a defendant appealed an otherwise unappealable

246. McSurely v. McClellan, 697 F.2d 309, 316 n.12 (D.C. Cir. 1982); see also Evans v. Dillahunty, 711 F.2d 828 (8th Cir. 1983). One commentator has made an analogous suggestion that courts permit appeals from otherwise unreviewable discovery orders. See 9 *Moore's Federal Practice*, supra note 75, ¶ 110-13(2), at 156-57 (suggesting a "liberal construction of 28 U.S.C. § 1292(b)").
247. See supra note 217 and accompanying text.
248. See supra notes 210-14, 232-36 and accompanying text.
250. See Note, Interlocutory Appeals, supra note 239, at 633-34 & n.11; see also supra note 157 (extraordinary nature of writ of supervisory mandamus). This rather harsh attitude toward parties whom the court refuses § 1292(b) certification appears to flow from the policy underlying the statute’s enactment into law in 1958. One commentator has described this policy as one "exclusively" of judicial efficiency, with no account taken of possible hardship to parties, whose interests are given weight in § 1291 appeals. See Note, Interlocutory Appeals, supra note 239, at 611.
251. The Supreme Court has neither expressly approved nor disapproved this practice. Compare *Abney v. United States*, 431 U.S. 651, 663 (1977) (disapproving pendent appellate jurisdiction in a criminal case) with *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940) (exercising pendent jurisdiction, in a civil case, over an otherwise unappealable
summary judgment motion for qualified immunity together with, for example, an appealable denial of a motion for absolute immunity, after assuming jurisdiction of the absolute immunity issue, a reviewing court could exercise its discretion in the name of judicial economy to review the qualified immunity issue as well.

IV. Conclusion

The courts have yet to fashion the optimum procedural means to implement the substantive policies of Harlow v. Fitzgerald. Courts may best maintain Harlow's desired balance between protecting constitutional rights and avoiding disruption of effective government by harmonizing Harlow's goal of early termination of insubstantial claims with the policies underlying the pretrial procedures invoked. When appropriate, the courts should permit limited discovery into an official's subjective state of mind in order to identify the relevant factual circumstances of a constitutional violation or the basis for a defendant's "extraordinary circumstances" defense. Harlow's adoption of an objective standard for qualified immunity justifies shifting to the plaintiff the burden of persuading the court that the law protecting his rights was clearly established at the time of the alleged violation, as long as the court does not place undue limits on his discovery of inaccessible facts. Finally, even after Mitchell v. Forsyth, courts should not allow officials denied qualified immunity on a motion for summary judgment in cases that include claims for injunctive relief to appeal automatically under the collateral order exception to 28 U.S.C. § 1291. Their rights to be "free from trial" are not at issue because trial is inevitable on the injunctive claim. Moreover, courts can protect adequately the defendants' right to be free of the burdens that insubstantial lawsuits impose by an enhanced use of certification of interlocutory appeal under 28 U.S.C. § 1292(b).

In fashioning a coherent framework for the effectuation of the Harlow policies, courts should be sensitive to possible interactions among factors common to these several procedural devices. For ex-

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252. This is not uncommon in § 1983 and Bivens cases. See Forsyth v. Kleindienst, 729 F.2d at 269.
253. See Metlin v. Palestra, 729 F.2d 353 (5th Cir. 1984) (exercising pendent appellate jurisdiction over qualified immunity question).
254. See supra notes 68-98 and accompanying text.
255. See supra notes 131-45 and accompanying text.
256. See supra notes 167-250 and accompanying text.
ample, a party's access to discovery may influence allocation of the
burden of proof, and vice versa.257 Similarly, characterization or
classification of factual issues may affect the range of permissible
discovery,258 allocation of the burden of proof,259 and appealability
of summary judgment denial.260 Finally, the procedural stage of
the litigation may influence the court's formulation of the substan-
tive legal proposition at issue in the qualified immunity claim.261
Careful attention to this procedural framework can provide a fair
and efficient means to effectuate Harlow's substantive adjustment
to the law of qualified immunity.

EDMUND L. CAREY, JR.