Vanderbilt Law Review

Volume 38
Issue 6 *Issue 6 - November 1985*

Article 3

11-1985

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

Edmund L. Carey, Jr.

NOTE

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

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 GOVERNMENT 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 Action: A Procedural Review*, 38 U. MIAMI L. REV. 381, 389-93 (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 Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

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. 42 U.S.C. § 1983 (1982) (emphasis added). A lawsuit that alleges deprivation of constitutional rights by a federal official is known as a *Bivens* action. In Bivens v. Six Unknown Named Agents, 403 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*. Subsequent 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 amendment); 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 published 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.[4] The United States Supreme Court in a series of decisions[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. ORD. 557, 563 (similarly hasing 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. *Cf.* Whitman, *supra* note 1, 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).

4. *See, e.g.*, Aldisert, *supra* note 3, at 563 (a "deluge" of section 1983 cases); Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 903-06 (1983); McCree, *Bureaucratic Justic: An Early Warning*, 129 U. PA. L. REV. 777, 781-82 & n.31 (1981) (calculating that between 1940 and 1980 the per-judge caseload in the district courts nearly doubled while the per-judge caseload in the courts of appeals nearly tripled). *But see* Eisenberg, *supra* note 3, at 526-38 (both quantitative and qualitative burdens on courts of § 1983 cases have been exaggerated, and relatively low percentage of claims are frivolous); Whitman, *supra* note 1, at 28 ("[C]aseload considerations are necessarily secondary to the vindication of [constitutional] rights.").

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 tbe top of a judicial system accused by some of nearing the point of collapse.

Id.; *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.

5. *E.g.*, Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) (noting that environmental statutes providing express remedies supplant any otherwise available action under § 1983); City of Newport v. Facts Concerts, Inc., 453 U.S. 247

designed limits on civil rights actions in response to these concerns.[6] 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*.[7]

Qualified immunity has its roots in the good faith defense available at common law[8] to a police officer defending against a suit for false arrest. In *Pierson v. Ray*[9] 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,[10] and a two-prong test[11] evolved to determine

---

(1981) (punitive damages not available against defendant municipality); Trainor v. Hernandez, 431 U.S. 434 (1977) (stating that comity and federalism bar federal court injunction against civil as well as criminal proceeding in which plaintiff may vindicate constitutional rights).

These cases were countervailing against another trend in § 1983 cases that widened the scope of relief available to plaintiffs. *See, e.g.*, Maine v. Thiboutot, 448 U.S. 1 (1980) (§ 1983 protects both federal statutory rights and constitutional rights; subsequent *Sea Clammers* decision, however, blunted impact of decision); Monell v. Department of Social Servs., 436 U.S. 658 (1978) (municipality not immune from suit under certain conditions; subsequent *City of Newport* decision, however, blunted impact of decision); Mitchum v. Foster, 407 U.S. 225 (1972) (federal anti-injunction act not applicable in § 1983 cases; subsequent *Trainor* and other decisions blunted impact of decision). A series of cases expanding the protection of the fourteenth amendment by selective incorporation of aspects of the Bill of Rights also extended the sweep of § 1983. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968).

6. *See* Parratt v. Taylor, 451 U.S. 527, 544 (1981) (barring prisoner's fourteenth amendment claim for deprivation of property without due process of law when an adequate state tort remedy existed; to hold otherwise would create "a font of tort law"); Maine v. Thiboutot, 448 U.S. 1, 23-25 (1980) (Powell, J., dissenting). *See generally* Nahmod, *The Mounting Attack on Section 1983 and the 14th Amendment*, 67 A.B.A. J. 1586 (1981); Note, *Federalism, Section 1983 and State Law Remedies: Curtailing the Federal Civil Rights Docket by Restricting the Underlying Right*, 43 U. PITT. L. REV. 1035 (1982).

7. 403 U.S. 388 (1971); *see* Davis v. Scherer, 104 S. Ct. 3012, n.12 (1984); Harlow v. Fitzgerald, 457 U.S. 800, 818 n.30 (1982).

8. Pierson v. Ray, 386 U.S. 547, 555-57 (1967); *see* RESTATEMENT (SECOND) OF TORTS §§ 10, 121 (1965); *see also* Butz v. Economou, 438 U.S. 478, 497 (1978) (immunity from § 1983 liability "not constitutionally grounded and essentially a matter of statutory construction").

9. 386 U.S. 547 (1967).

10. Scheuer v. Rhodes, 416 U.S. 232 (1974) (state governor); Wood v. Strickland, 420 U.S. 308 (1975) (local school board members); O'Connor v. Donaldson, 422 U.S. 563 (1975) (state hospital superintendent; the Court described qualified immunity as available to "state officials"). In *Harlow* the Court described its formulation of qualified immunity after *Wood* as a "general statement of the qualified immunity standard." 457 U.S. at 815 n.25.

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.[12] 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,[13] the Supreme Court took more prescriptive action. In *Harlow v. Fitzgerald*[14] 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.[15] 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).

12. *Harlow*, 457 U.S. at 815-17.

13. *See* Butz v. Economou, 438 U.S. 478, 507-08 (1978); Scheuer v. Rhodes, 416 U.S. 232, 250 (1974).

14. 457 U.S. 800 (1982).

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[16] 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,[17] section B on the allocation of the burden of proof,[18] and section C on the appealability of summary judgment denial.[19] The Note also will analyze the effect of the recent *Mitchell v. Forsyth*[20] decision not only on appealability but also on the interdependent issues of discovery and burden of proof.[21] 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

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.
20. 105 S. Ct. 2806 (1985).
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.[22] In substantive terms, the Court catalogued the weaknesses of the subjective prong of the *Wood v. Strickland*[23] qualified immunity test and declared that "bare allegations of malice"[24] 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."[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?[26]

B. *A Balance of Policies*

The *Harlow* Court viewed qualified immunity as a compromise between competing values.[27] At one extreme, the Court recognized

---

25. *Id.* at 818.

26. *Id.* at 818-19. Courts applying *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. *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), *cert. denied*, 105 S. Ct. 1843 (1985) *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)).

27. *Harlow*, 457 U.S. at 813-14. Drawing on its earlier discussions in Butz v. Economou, 438 U.S. 478 (1978), and Scheuer v. Rhodes, 416 U.S. 232 (1974), the Court described qualified immunity as "the best attainable accommodation of competing values"—"a balance between the evils inevitable in any available alternative." 457 U.S. at 813-14.

Judge Learned Hand issued the classic statement of this tradeoff:

> 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 unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

the need to provide a "realistic avenue for vindication of constitutional guarantees"[28] and to deter officials from committing constitutional wrongs.[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."[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,"[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."[32]

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

---

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, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 NW. U.L. REV. 526, 528-30 (1977).

28. *Harlow*, 457 U.S. at 814.

29. *Id.* at 819.

30. *Id.* at 807 (quoting Butz v. Economou, 438 U.S. at 506).

31. *Harlow*, 457 U.S. at 814. *But see* Eisenberg, *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, *supra* note 3, at 638 n.144 (assumption of frivolousness a self-fulfilling propbecy).

32. *Harlow*, 457 U.S. at 814 (quoting Gregoire v. Biddle, 177 F.2d at 581); *cf.* Eisenberg, *supra* note 3, at 526-33 (empirical study showed burden of litigation actually less than thought and financial recovery minimal); Project, *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, *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).

33. *Harlow*, 457 U.S. at 814 (quoting Butz v. Economou, 437 U.S. at 507-08). Justice Powell, author of the *Harlow* majority opinion, stressed that "[t]he importance of this consideration hardly needs emphasis." *Id.* at 814 n.23.

34. *Id.* at 816.

government efficiency.[35] 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.[36]

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,"[37] 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."[38] 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*, 452 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.

factors."[39] Moreover, the Court inserted the ban on discovery after discussing inquiries (1) and (2), but before discussing inquiry (3).[40]

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.[41] The Court also pointed out that it had advocated greater use of summary judgment on qualified immunity issues twice before, in *Scheuer v. Rhodes* and *Butz v. Economou*.[42] 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."[43]

As lower courts have sought to implement the new objective standard for qualified immunity,[44] the effect of *Harlow*'s ban on

---

39. *Id.* at 818-19 (emphasis added).

40. *Id.*

41. *Id.* at 816 & n.26.

42. *Id.* at 807-08, 819 n.35; *see supra* note 13 and accompanying text.

43. *Id.* at 816-17.

44. *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 id.* at 923-32. One court has criticized the first approach as a "one bite" rule. Hixon v. Durbin, 560 F. Supp. 654, 665 (E.D. Pa. 1983). Another court has commented:

> 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 *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 . . . .

Hobson v. Wilson, 737 F.2d 1, 26 (D.C. Cir. 1984) (emphasis in original), *cert. denied*, 105 S. Ct. 1843 (1985).

In the recent case of 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.[45] 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[46] 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. *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.[47] 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

---

> We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances. But in cases where there is a legitimate question whether an exception to the warrant requirement exists, it cannot be said that a warrantless search violates clearly established law.

Id. at 2820 n.12.

45. 457 U.S. at 818-19. See *supra* notes 11 & 22 and accompanying text, for descriptions of the old subjective-objective test and of the new objective test for qualified immunity.

46. Step (2) of the three-step *Harlow* inquiry, *supra* text accompanying note 26.

47. 457 U.S. at 818. Justice Powell, for the majority, said that this defense would "turn primarily on objective factors." *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." *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. *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 *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, *Constitutional 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 *Harlow*).

used to resolve exceptional-circumstances claims have included an official's reliance on legal advice,[48] reliance on a statute,[49] the notice-giving effect of a legal judgment,[50] and the recentness of a judgment that clearly established the relevant law.[51] 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.[52]

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.[53] 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.[54] If the court, however, views an offi-

---

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); Keefe v. Library of Congress, 588 F. Supp. 778, 792 (D.D.C. 1984); Wells v. Dallas Indep. School Dist., 576 F. Supp. 497, 508-09 (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.

49. *See* King v. City of Fort Wayne, 590 F. Supp. 414, 424-26 (N.D. Ind. 1984); *see also* Casto, *Innovations in the Defense of Official Immunity Under Section 1983*, 47 TENN. L. REV. 47, 96-97 (1979) (noting that an official may reasonably rely on the constitutionality of a statute).

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.* Muzychka 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* Muzychka 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").

54. *See, e.g.*, Donahoe v. Watt, 546 F. Supp. 753, 756 (D.D.C. 1982), *aff'd mem.*, 713 F.2d 864 (D.C. Cir. 1983). Criticizing this approach, the court in Dale v. Bartels, 552 F.

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.[55] 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.[56]

In *Nakao v. Rushen*[57] 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."[58] In *Gannon v. Daley*[59] 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*.[60] 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.

55. *See* Smith v. Nixon, 582 F. Supp. 709, 712, 714 (D.D.C. 1984) ("conduct" still appropriate for factual inquiry after *Harlow*; "subjective motivation" and "intention" not appropriate).

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 tbat 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.

59. 561 F. Supp. 1377 (N.D. Ill. 1983).

60. 445 U.S. 507 (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.[61] Drawing a similar distinction in another case concerning a politically motivated discharge, the court in *Dehorty v. New Castle County Council*[62] 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*,[63] 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*."[64]

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,[65] 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.

63. 712 F.2d 569 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 2180 (1984).

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 89 (8th Cir. 1983) (noting that the jury should determine whether the ruin of plaintiff's business by overzealous state liquor agents was intentional).

v. Nixon,[66] 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.[67]

3. State of Mind and Summary Judgment

Harlow's procedural goal—the quick termination of insubstantial claims[68]—is virtually identical to the central purpose that underlies the vehicle of summary judgment.[69] Although the *Harlow* Court certainly changed the substantive standard by which a court is to assess a claim of qualified immunity at summary judgment,[70] the Court gave no indication that it intended to modify the procedural operation of rule 56 of the Federal Rules of Civil Proce-

---

66. 582 F. Supp. 709 (D.D.C. 1984).

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.[71] 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.[72] These commentators have argued that closer judicial attention to the wording and structure of rule 56 would produce more uniform and sound results.[73] 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.[74] 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 he 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 he the subject of inquiry."); *see also supra* text accompanying notes 41-42 (*Harlow* Court citing rule 56 in opinion).

Rule 56 provides in pertinent part:

> (c) MOTION AND PROCEEDINGS THEREON. . . . The adverse party prior to the day of hearing may serve opposing affidavits. 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 as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .
>
> (e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.
>
> (f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

FED. R. CIV. P. 56(c), (e), (f).

72. *See* Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 746 (1974); Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 466-67 (1983). *See generally* Bauman, *A Rationale of Summary Judgment*, 33 IND. L.J. 467 (1958) (discussing the role of summary judgment); Clark, *The Summary Judgment*, 36 MINN. L. REV. 567 (1952) (discussing the purpose and usefulness of summary judgment).

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").

74. Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 473 (1962), *cited in* Harlow v. Fitzgerald, 457 U.S. at 816 n.26. Post-*Harlow* courts generally have continued to endorse this view. *See, e.g.*, Muzychka v. Tyler, 563 F. Supp. 1061, 1064 (E.D. Pa. 1983); Dehorty v.

phasis[75] on the language of rule 56 requiring that no "genuine issue as to any material fact"[76] 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.[77] 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.[78] 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.[79] 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.[80]

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.[81] Many post-*Harlow* lower courts,[82] nonetheless, have persisted in allowing subjective inquiries. This persistence, however, may not pose a great threat to the *Harlow* goal.

New Castle County Council, 560 F. Supp. 889, 894 n.14 (D. Del. 1983); *see also* Donohoe v. Watt, 546 F. Supp. 753, 756 (D.D.C. 1982), *aff'd mem.*, 713 F.2d 864 (D.C. Cir. 1983).

75. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 156 (1970); United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); 6 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 56.15[1.-0] n.3 (2d ed. 1985) [hereinafter cited as MOORE'S FEDERAL PRACTICE] and cases cited therein. At times this emphasis has led courts to withhold summary judgment if they had the "slightest doubt" whether the movant was entitled to judgment. C. WRIGHT, THE LAW OF FEDERAL COURTS § 99, at 666 (4th ed. 1983) ("a rather misleading gloss" on the rule language); Sonenshein, *supra* note 73, at 777.

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 (1978).

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

82. *See supra* notes 46-65 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.[83] 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.[84]

Step (1) subjective inquiries raise greater problems. While in some instances the parties and the courts may draw a clear distinction[85] 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[86] some discovery may be unavoidable in order to determine whether a constitutional violation has occurred.[87] 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 thougb "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 bearings on probable cause in false-arrest or search-and-seizure cases.

erning post-*Harlow* objective good faith.[88] 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.[89] This approach would reduce initial discovery. As plaintiffs' pleading practices changed to follow the developing case law,[90] 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*,[91] 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.[92]

---

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) ("[A]lthough [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.

90. *See* Hobson v. Wilson, 737 F.2d 1, 29 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1843 (1985).

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." 737

A third approach could provide a desirable compromise. This approach would adhere more closely to the structure of rule 56[93] and would fulfill better the twin *Harlow* policies of minimizing government disruption and providing a "realistic avenue for vindication of constitutional guarantees."[94] 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).[95] Discovery could still take place in cases that the court prescreens,[96] 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.[97] 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": "broadranging" discovery, the "deposing of numerous persons," and the spectre of judicial inquiries "in which there often is no clear end to the relevant evidence."[98]

F.2d at 30 & n.87. For a criticism of this requirement, see Jennings, *The Relationship of Procedure to Substance in Civil Rights Actions Under Section 1983: No Cause for Complaint?*, 12 SETON HALL L. REV. 1, 14-18 (1981).

93. This suggested approach finds support in the language of rule 56 requiring a nonmoving party to "set forth specific facts showing that there is a genuine issue for trial" to avoid adverse judgment and allowing the court to deny summary judgment and to permit "depositions . . . or discovery . . . or [to] make such other order as is just" if it appears the nonmoving party cannot otherwise present "facts essential to justify his opposition." FED. R. CIV. P. 56(e), (f). For a more complete text of rule 56, see *supra* note 71.

Courts also could combine this approach with the *Hobson* court's approach requiring particularity of pleading. *See supra* notes 91-92 and accompanying text.

94. 457 U.S. at 813-14; *see supra* notes 27-36 and accompanying text (policies of *Harlow*).

95. For full text of rule 56(f), see *supra* note 71.

96. Although in one sense the heightened supervision entailed in this suggestion might increase the workload of district courts, plaintiffs' attorneys likely would hesitate to make frivolous discovery requests lest they incur the wrath of the court. Thus, a net increase in discovery requests may never occur. *See* FED. R. CIV. P. 56(g) (providing sanctions, including contempt and attorneys' fees, for affidavits presented in "bad faith or solely for the purpose of delay"); *cf.* Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1302-03 (1978) (overriding goal of discovery must he just and full disclosure); Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 424-31 (1982) (potential for due process problems in heightened pretrial judicial role).

97. Discovery under rule 56(f) is inherently less extensive in scope than general discovery obtainable under rule 26. First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 298 (1968).

98. 457 U.S. at 816-17; *see supra* text accompanying note 43.

In Krohn v. United States, 742 F.2d 24 (1st Cir. 1984), the First Circuit suggested an

B. Allocation of the Burden of Proof

1. Multiple Burdens and Conflicting Directions

Before *Harlow* most lower courts had placed on the defendant officials[99] the burden of proving[100] their right to qualified immunity.[101] In *Gomez v. Toledo*[102] 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 "(a)ffidavits 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.

99. *See* Gildin, *The Standard of Culpability in Section 1983 and Bivens Actions: The Prima Facie Case, Qualified Immunity and the Constitution*, 11 HOFSTRA L. REV. 557, 596 n.214 (1983) and cases cited therein. Courts in the Seventh and First Circuits were divided concerning the allocation of the burden of pleading qualified immunity. *Compare* Chavis v. Rowe, 643 F.2d 1281, 1288 (7th Cir.) (burden on defendant), *cert. denied*, 454 U.S. 907 (1981) *and* DeVasto v. Falierty, 658 F.2d 859, 865 (1st Cir. 1981) (burden on defendant) *with* Whitley v. Seibel, 613 F.2d 682, 685 (7th Cir. 1980) (burden on plaintiff) *and* Soto v. Chardon, 514 F. Supp. 339, 345-50 (D.P.R. 1981) (burden on plaintiff), *cert. denied*, 459 U.S. 989 (1982). The Fifth Circuit placed the burden on defendant when he had little discretionary authority and on plaintiff when the defendant was a high-ranking official with considerable discretion. *See* Douthit v. Jones, 619 F.2d 527, 534 (5th Cir. 1980); *see also* Note, *Qualified Immunity for Public Officials Under Section 1983 in the Fifth Circuit*, 60 TEX. L. REV. 127, 131-37 (1981).

100. Unless otherwise stated, this Note uses "burden of proof" to indicate the hurden of persuasion, not the burden of production. Courts and commentators sometimes refer to the burden of persuasion as tbe "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) ("[T]he 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. NAHMOD, CIVIL RIOHTS 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[103] 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*.[104] In addition, the Court noted that *Gomez* had *not* decided which party bore the burden of proof.[105] Second, the Court, in an early part of the opinion,[106] 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"[107] 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,[108] 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."[109] The Court's language strongly implied[110] that the defendant carries the burden of persuasion on an "extraordinary circumstances" claim. Last, by eliminating the subjective prong[111] of the test for qualified immu-

---

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. 1012 (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, 393-95 (1981) and cases cited therein.

111. *See supra* notes 11-14 and accompanying text.

nity, the Court altered one of the factors[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.[113] This approach accords with the way most courts addressed the issue of subjective good faith in the pre-*Harlow* period.[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.[115]

---

112. *See infra* notes 121-22, 136-39, 144-45 and accompanying text (discussing the "fairness" rationale for burden allocation).

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, 595 F. Supp. 181, 277 (D. Utah 1982) ("A plaintiff must further demonstrate an issue of fact as to whether the defendant, hased 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.

114. *See supra* note 99 and accompanying text.

115. *See supra* text accompanying note 22. Courts in the D.C., Sixth, Eighth, and Tenth Circuits have placed this burden on defendant. *See* Tuttle v. City of Oklahoma City, 728 F.2d 456, 458 (10th Cir. 1984), *rev'd on other grounds*, 105 S. Ct. 2427 (1985); Buller v. Buechler, 706 F.2d 844, 850 (8th Cir. 1983); Alexander v. Alexander, 706 F.2d 751, 753-54 (6th Cir. 1983); Ellsberg v. Mitchell, 709 F.2d 51, 66-69 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1316 (1984). District courts in the Second and Seventh Circuits also have placed the hurden on defendant. *See* Boussom v. City of Elkhart, 567 F. Supp. 1382, 1389 (N.D. Ind. 1983); Visser v. Magnarelli, 542 F. Supp. 1331, 1337 n.11 (N.D.N.Y. 1982).

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, 684 F.2d 1159, 1162 (5th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983); Dellums 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 398-416, 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[116] is a judicial responsibility[117] that includes both theoretical and practical considerations.[118] Three major rationales underlie the modern[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.[120] Under the fairness rationale the party with "readier access to knowledge about the fact in question" bears the burden of persuasion.[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;[122] therefore, this party must sustain the burden of persuasion. Courts that adhere to the policy rationale for burden

---

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.").

116. *See supra* notes 100-01 (definition and importance of the burden of persuasion).

117. *See* MCCORMICK ON EVIDENCE, *supra* note 101, § 336.

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

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).

120. *See* Cleary, *supra* note 119, at 12-14. One commentator criticised this rationale for using the probabilities twice against a burdened party. *See* Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807, 817-18 (1961).

121. F. JAMES & G. HAZARD, *supra* note 15, § 7.8, at 252.

122. *See* Bridge, *supra* note 119, at 933.

allocation use the burden of persuasion as a frank "handicap" to discourage the making of a "disfavored contention."[123] 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,[124] (2) determination of the party to whom a proposition is essential,[125] and (3) the general rule that the burden of persuasion should follow the burden of pleading a given issue.[126] Influential commentators, however, have rejected these considerations as having little importance.[127]

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.[128] Of the three issues, *Harlow* appears to direct the defendant to carry

---

123. *See* F. JAMES & G. HAZARD, *supra* note 15, § 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)).

While the factors relied upon in *Gomez* have obvious relevance in allocating the burden of *pleading*, they do not necessarily extend to the burden of *persuasion*. *See* Cleary, *supra* note 119, at 8-9. For the common law approach to rules and their exceptions in allocating the burden of persuasion, see also *supra* note 116.

The *Gomez* Court's other rationale rested on the subjective prong of the pre-*Harlow* test for qualified immunity, stressing plaintiff's lack of access to an official's beliefs. The change in *Harlow* to an objective standard, coupled with the ready disjunction of the burdens of pleading and persuasion, limits the influence of the reasoning in *Gomez* upon post-*Harlow* allocation of the burden of persuasion. *See Harlow*, 457 U.S. at 815 n.24 (reserving the burden of proof despite *Gomez*).

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,[129] and (2) if appropriate, that "extraordinary circumstances" existed so that the official neither knew nor should have known of the relevant law.[130] *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.[131]

The major rationales of burden allocation[132] and the major policies[133] underlying *Harlow* generally support placing the burden of proof on this unresolved issue upon the plaintiff.[134] 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.[135] 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,[136] any special access a defendant official might have to subjective evidence concerning his state of mind ought to have less relevance.[137] To the extent that *Harlow* has reduced the importance of these subjective factors, under the fairness rationale,[138] courts are less unfair[139] 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 discovery[145] 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 decision[146] 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 estahlished at the time of the conduct at issue.") (emphasis added). *But see supra* note 110 (discussing hazards of assuming implied allocation of hurden).

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 litigation[148] and its resultant inequities[149] and inefficiencies.[150] As a general rule,[151] denial[152] of a motion for summary judgment is not a final decision for purposes of appeal; therefore, the denied party has no right[153] of immediate appeal. In the usual case,[154] denial of

147. 9 MOORE'S FEDERAL PRACTICE, *supra* note 75, ¶ 110.06 (2d ed. 1985). The finality principle has its roots in common law. *See* Metcalfe's Case, 11 Coke 38, 40 (1614). The First Judiciary Act incorporated this principle. Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84. *See generally* Note, *The Finality Rule for Supreme Court Review of State Court Orders*, 91 HARV. L. REV. 1004, 1005-12 (1978); Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351 (1961) [hereinafter cited as Note, *Appealability*].

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 barassment 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 tbe 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 tbat appellate courts owe to tbe 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.*

151. *See* Pacific Union Conference of Seventh-Day Adventists v. Marshall, 434 U.S. 1305 (Rehnquist, Circuit Justice 1977); 6 MOORE'S FEDERAL PRACTICE, *supra* note 75, ¶ 56.21[2] (2d ed. 1985); Annot., 17 L. Ed. 2d 886 (1966).

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 tbese cases on appeal. *See* Ellsberg v. Mitchell, 709 F.2d 51, 56 & 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, § 3907, 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 Coopers & Lybrand v. Livesay, 437 U.S. 463, 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 jurisdiction[164] 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 standard[167] 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 *Harlow*[170] and the policies generally governing appealability[171] 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-

---

appeal of qualified immunity claim denied on summary judgment and noting that defendants did "not seriously contend" that the denial was appealable), *cert. denied*, 453 U.S. 913 (1981).

163. 457 U.S. at 805-06.

164. *Id.* at 806 n.11.

165. 457 U.S. 731, 741-43. Fitzgerald had alleged in a *Bivens* suit that President Nixon and two of his top aides, the *Harlow* defendants, had conspired to fire him from a management analyst job in the Department of Defense in retaliation for his testimony about cost overruns to a congressional committee. *See Nixon*, 457 U.S. at 733-40; *Harlow*, 457 U.S. at 802-05.

166. *Harlow*, 457 U.S. at 811-13.

167. *Id.* at 818-19; *see supra* notes 11-14 and accompanying text.

168. *See* Krohn v. United States, 742 F.2d 24 (1st Cir. 1984); Evans v. Dillahunty, 711 F.2d 828 (8th Cir. 1983); McSurely v. McClellan, 697 F.2d 309 (D.C. Cir. 1982).

169. *See* Powers v. Lightner, 752 F.2d 1251 (7th Cir. 1985); Kenyatta v. Moore, 744 F.2d 1179 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 2141 (1985); Forsyth v. Kleindienst, 729 F.2d 267 (3d Cir. 1984), *aff'd in part and rev'd in part*, 105 S. Ct. 2806 (1985); Bever v. Gilhertson, 724 F.2d 1083 (4th Cir.), *cert. denied*, 105 S. Ct. 349 (1984).

170. *See supra* notes 27-36 and accompanying text.

171. *See supra* notes 148-50 and accompanying text.

cials be free from the risks of unnecessary trial or discovery.[172] Courts rejecting appealability, on the other hand, noted that the focus of the *Harlow* opinion was on the termination of *insubstantial* claims,[173] not the termination of all civil rights suits against government officials. The Supreme Court granted certiorari in *Mitchell v. Forsyth*[174] to resolve this intercircuit split.

3. Denial of Qualified Immunity

(a) Appeal as a Collateral Order Exception

Despite the fundamental nature of the final decision rule,[175] it has both statutory[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[177] in the 1978 Supreme Court decision of *Coopers & Lybrand v. Livesay*.[178] The *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."[179]

---

172. *See, e.g., Krohn*, 742 F.2d at 28 (stating that courts can effect *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").

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

174. 105 S. Ct. 2806 (1985), *aff'g in part and rev'g in part* Forsyth v. Kleindienst, 729 F.2d 267 (3d Cir. 1984). The Court granted certiorari on the same issue in a second case from the Eleventh Circuit but later remanded the case for further consideration in light of the the Supreme Court's opinion in *Mitchell*. *See* Jasinski v. Adams, 745 F.2d 70 (11th Cir. 1984) (mem.) (dismissing an appeal from the Southern District of Florida), *vacated and remanded*, 105 S. Ct. 3518 (1985). Like *Mitchell*, *Jasinski* was a *Bivens* action.

175. *See supra* notes 146-50 and accompanying text.

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.

177. The lines of cases derive from Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), *see supra* note 159, and Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848). *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 *Cohen* in its restated formulation of the collateral order doctrine in Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). *See infra* text accompanying notes 178-79.

178. 437 U.S. 463 (1978).

179. *Id.* at 468.

(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[180] whose resolution courts merely were postponing to trial. If the case presented no disputed issues of fact[181] and the court was ruling primarily on a question of law,[182] 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.[183]

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.[184] 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,

---

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.6 (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."[185]

Last, denial of qualified immunity had to be "effectively unreviewable on appeal from a final judgment"[186] in order to satisfy the fourth *Livesay* criterion. In the analogous area of absolute immunity, the Supreme Court had held on three occasions that orders denying absolute immunity were appealable immediately.[187] Those cases turned upon whether the rights asserted would be lost irrevocably if the denials were not appealable.

In *Abney v. United States*[188] and *Helstoski v. Meanor*[189] the Supreme Court recognized that absolute freedom from trial on grounds of double jeopardy or legislative immunity would be lost irrevocably[190] if courts did not permit immediate appeal of pretrial denial of those claims. Later decisions that focused on other defendants' claims to be free from trial, however, construed this freedom narrowly.[191] Nonetheless, because these cases involved criminal appeals 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

---

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 admitted or clear and the order involved only an exercise of discretion as to the amount of security, . . . appealability would present a different question.

Id. The importance of the issue has been an unpredictable element of the criteria for collateral orders to which the Supreme Court has accorded varying attention over the years. The Court in *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 requirement in *Nixon*, 457 U.S. at 742-43. *But see* Moses H. Cone Hosp. v. Mercury Constr. Co., 460 U.S. 1 (1983) (describing the *Livesay* doctrine as having three criteria and not testing for importance).

186. *Livesay*, 437 U.S. at 468. For fuller quotation, see *supra* text accompanying note 179.

187. *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).

188. 431 U.S. 651, 656-62 (1977).

189. 442 U.S. 500, 506-07 (1979).

190. *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 . . . ."

191. *See* United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982) (per curiam) (vindictive prosecution claim for immunity); United States v. MacDonald, 435 U.S. 851 (1978) (speedy trial clause claim). In *Hollywood Motor Car* the Court said the defendant's asserted right to be free from vindictive prosecution was "simply not one that must be upheld 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.

law."[192] The Court generally has applied a "practical"[193] 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."[194]

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."[195] 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."[196]

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.[197] In *Kenyatta v. Moore*[198] the Fifth Circuit had said that a district court's holding that a plaintiff's rights were

---

192. Flanagan v. United States, 104 S. Ct. 1051, 1054 (1984) (quoting *Hollywood Motor Car*, 458 U.S. at 265); *see* Cobbledick v. United States, 309 U.S. 323, 325 (1940).

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).

194. United States v. MacDonald, 435 U.S. 850, 860 (1978) (emphasis added), *cited with approval in Hollywood Motor Car*, 458 U.S. at 267-69.

195. *Powers*, 752 F.2d at 1256. Judge Wisdom elaborated on the distinction:

> [T]he 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.

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)).

196. *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.

197. *See supra* notes 27-36 and accompanying text (policies of *Harlow*).

198. 744 F.2d 1179 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 2141 (1985).

clearly established under the relevant legal standard at the time of the conduct in question should be sufficient protection itself against insubstantial claims.[199] 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.[200] 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 . . . ."[201]

(2) *Mitchell v. Forsyth*

In *Mitchell v. Forsyth*[202] 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. 105 S. Ct. 2806 (1985). The case stemmed from a warrantless wiretapping in 1970-1971 that John Mitchell, then attorney general of the Untied 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 tbe 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 tbe 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). *See* 105 S. Ct. at 2818-20.

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 tbe 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."[203] Qualified immunity, thus, is "in fact an entitlement not to stand trial under certain circumstances,"[204] and, therefore, a decision by a district court to deny qualified immunity is "effectively unreviewable on appeal from a [later] final judgment."[205]

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 siguificant 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[206] 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."[207] 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.[208] Furthermore, any "factual overlap" between the two issues is no more than a court would find in absolute immunity cases.[209]

---

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;[210] the plaintiff brought no claim for injunctive relief. The Court noted that it expressed "no opinion"[211] on a Fourth Circuit rule[212] that denial of qualified immunity is not appealable when plaintiff has claims for injunctive relief that must be adjudicated at trial regardless.[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.[214]

The second limitation of the *Mitchell* holding is its emphasis on the "purely legal" nature of the appealable issue.[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-

---

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.

211. *Id.* at 2812 n.5.

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 (1984). 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).

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.").

In Adams v. Jasinski, 105 S. Ct. 3518 (1985) (mem.), *vacating and remanding* 745 F.2d 70 (11th Cir. 1984), the Court remanded denial of qualified immunity to the Eleventh Circuit "for further consideration in light of" the decision in *Mitchell*. In *Adams*, interestingly, plaintiff has an outstanding claim for injunctive relief. Petition for a Writ of Certiorari at 4 n.2, *Adams*.

214. A WESTLAW sampling of qualified immunity cases qualitatively confirms this observation.

215. 105 S. Ct. at 2816 n.9.

pealable 'final decision' . . . ."[216] While both the *Mitchell* and *Harlow* Courts have characterized the new objective approach to qualified immunity as "essentially" legal,[217] the lower courts may have more trouble fitting this concept to the facts of specific cases.[218] At the least, some defendants who claim "extraordinary circumstances" as part of their qualified immunity defense may not be eligible for appeal.[219]

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.[220] The Court implied that the courts usually should accept the plaintiffs' version.[221] In this sense, the loss plaintiffs incurred on the appealability issue in *Mitchell* could produce reciprocal gains in the area of discovery,[222] in allocation of the burden of proof,[223] and in the very characterization of the "legal" issue.[224]

The Court also used *Mitchell* to clarify earlier dictum from *Harlow*[225] which indicated that discovery should not take place until a court resolves the threshold issue of qualified immunity. This approach had appeared to confiict with the usual workings of rule 56.[226] After *Mitchell*, courts using the new approach[227] should not

---

216. *Id.* at 2817 (emphasis added).

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 Kenyatta v. Moore, 744 F.2d 1179, 1185-86 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 2141 (1985), in which the Fifth Circuit used this as an alternative ground for denying the appeal. In *Kenyatta* the defendants had injected a "subjective" issue of fact into the case by pleading "extraordinary circumstances" as an alternative to their principal assertion that the relevant law was not clearly established. 744 F.2d at 1185-86.

220. *Mitchell*, 105 S. Ct. at 2816; *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.

221. *Mitchell*, 105 S. Ct. at 2816-17 n.9.

222. *See supra* notes 89-90 and accompanying text (accepting plaintiff's factual assertions in lieu of permitting discovery).

223. *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).

224. *See supra* note 44 and accompanying text.

225. 457 U.S. at 818; *see supra* note 22.

226. *See supra* notes 71-80 and accompanying text (discovery preceding summary judgment).

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[228] to determine whether the facts are in dispute[229] 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.[230] 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.[231]

The final limitation on the impact of *Mitchell* could come if the decision results in a flood of appeals to the circuit courts.[232] 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[233] 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[234] that a case present the higher standard of a "serious and unsettled question."[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.[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).[237] Appeal under this

---

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. 1968) (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 reivew).

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).

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 781-82 & n.3 (per-judge caseload in courts of appeal has increased even more than in district courts); *supra* notes 148-50 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 ouly 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. 1982)). Plaintiff's atterneys replied that the government's information on the D.C. Circuit was "ineaningless" 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*.

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.

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.[238] 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 advanc[ing]" the "ultimate termination of the litigation."[239] Although application of these principles by the district courts has been somewhat uneven,[240] 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.[241] If there were important unresolved issues of fact, the court could deny certification.[242] The qualified immunity issue probably would be "controlling" because of the substantial impact it would have on the course of the litigation.[243] The requirement that there be "substantial ground for difference of opinion" safeguards *Harlow*'s goal of the early elimination of possibly insubstantial claims,[244] 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.*

239. *Id. See generally* Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607 (1975) (hereinafter cited as Note, *Interlocutory Appeals*).

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

---

245. H.R. REP. No. 1667, 85th Cong., 2d Sess. 1 (1958).

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.

249. 28 U.S.C. § 1292(b) (1982).

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 inte 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 expessly 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,[252] 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.[253]

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.[254] *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.[255] 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).[256]

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-

---

denial of a motion to dismiss).

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 substantive 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.

257. *See supra* notes 74-80, 93-98, 113, 145 and accompanying text.
258. *See supra* notes 44, 53-67 and accompanying text.
259. *See supra* notes 115, 121-22, 136-39, 144-45 and accompanying text.
260. *See supra* notes 160-62, 180-82, 239-42 and accompanying text.
261. *See supra* notes 44, 220-31 and accompanying text.