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QUALIFIED IMMUNITY IN SECTION 1983 CASES: THE UNANSWERED QUESTIONS

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The Supreme Court's 1982 decision in Harlow v. Fitzgerald1 sparked "a quiet revolution"2 in the law governing the qualified immunity defense available to state officials in section 1983 suits.3

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1 457 U.S. 800 (1982).


3 42 U.S.C. § 1983 (1982). This statute creates a civil cause of action against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

In Maine v. Thiboutot, 448 U.S. 1 (1980), the Court interpreted the "and laws" language in § 1983 to permit suits alleging the violation of federal statutory rights, as well as those guaranteed by the Constitution. Id. at 4-8. Analysis of the defendant's entitlement to qualified immunity does not differ depending on which type of right was allegedly violated. See Davis v. Scherer, 468 U.S. 183, 194 n.12 (1984). Hereinafter, therefore, references to
Prior to Harlow, qualified immunity had two components: an objective component and a subjective component. Under the so-called objective prong, state officials lost their immunity if they knew or reasonably should have known that they were acting in violation of the plaintiff's constitutional rights. They lost their immunity under the subjective prong if they acted with malice—with the intent either to deprive the plaintiff of some constitutional right or to cause her some other injury. Concerned that disputed questions of fact frequently surrounded the subjective (malice) prong of the defense, thereby preventing disposition of insubstantial cases on summary judgment, the Harlow majority simply abolished the subjective prong. Rather, the Court declared, government officials are protected from liability so long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."

Although some commentators have attacked Harlow on the grounds that it is based on unsubstantiated assumptions and is not sufficiently mindful of the purposes of section 1983, the Court seems committed to the course it charted in Harlow. This Article therefore examines the case from another angle—how is Harlow's formulation of the qualified immunity defense to be implemented? Precisely how is it supposed to work?

Part I of this Article describes the general policies underlying qualified immunity and the Court's decisions defining the scope of the defense. Part II then addresses two unanswered questions concerning Harlow's impact on the substantive content of the qualified immunity defense: Is immunity available to the defendant who actually knows that her conduct is infringing the plaintiff's constitutional rights, even if the law governing those rights is not yet constitutional deprivations will include violations of federal statutory rights actionable under § 1983.

* The "knowledge" component of this standard seems to inject a subjective element into the objective prong. See infra notes 64-70 and accompanying text.


* Id. at 818.

clearly established? And should a court take into account the nature of the defendant's governmental responsibilities and other circumstances surrounding her conduct in determining whether the right she violated was one of which a reasonable person would have known? Finally, Part III discusses two unanswered questions concerning Harlow's impact on the procedures to be used in ruling on qualified immunity claims: Which party bears the burden of proof on the qualified immunity defense? And is the plaintiff denied all opportunity for discovery prior to the court's resolution of the qualified immunity issue?

The Supreme Court's lack of guidance in these areas has left the federal courts of appeals at sea in attempting to answer these questions. Confronted with conflicting signals in Harlow and the Court's subsequent cases, the federal courts have been unable to reach a consensus on any of these issues. Moreover, the lower court opinions tend to be particularly unenlightening because often they do not seem to recognize the very existence of the issues, and almost invariably they make no effort to provide any analysis in support of their conclusions. This Article therefore endeavors to answer these four questions in a way that makes sense given the relevant policy considerations and the Supreme Court precedents.

In analyzing these issues, the Article takes the position that the courts should not mechanically expand the qualified immunity standard articulated in Harlow in order to protect public officials who act unconstitutionally, thereby sacrificing the interests of the innocent victims of those violations. Thus, Harlow and its progeny can and should be read to deny qualified immunity to government officials who actually recognize the unlawfulness of their conduct, even when they might not reasonably have been expected to have that knowledge. Moreover, in applying Harlow's reasonableness requirement and evaluating whether the rights allegedly violated by the defendant were clearly established rights of which a reasonable person would have known, a court should measure the defendant's knowledge against that of the reasonable public official operating under similar circumstances. On a procedural level, Harlow should

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9 Resolution of the qualified immunity question will often be the responsibility of the trial court, although the jury may at times play a role in determining the defendant's entitlement to immunity. See infra note 224.

10 See infra notes 49-54, 90 & 148-53 and accompanying text.
not be interpreted as jettisoning years of judicial experience in dealing with comparable issues: Like other affirmative defenses, therefore, qualified immunity is something the defendant should be required to plead and prove. Similarly, the courts should treat claims of qualified immunity like other pretrial motions and should afford the plaintiff an opportunity to conduct limited discovery relevant to the qualified immunity analysis before ruling in favor of the defendant on that issue.

I. Qualified Immunity: Policies and Precedents

Most state officials who find themselves defending section 1983 suits are entitled to raise the affirmative defense\(^{11}\) of qualified immunity,\(^{12}\) which protects them from liability for any damages\(^{13}\).

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\(^{11}\) See Gomez v. Toledo, 446 U.S. 635, 639-41 (1980) (holding that § 1983 complaint need not allege bad faith on part of defendant or otherwise anticipate defendant's qualified immunity defense in order to state claim for relief).

\(^{12}\) Some state officials are protected by absolute immunity, which "defeats a [§ 1983] suit from the outset, so long as the official's actions were within the scope of the immunity"—that is, so long as the official was acting within the boundaries of the protected function. Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976) (granting state prosecutor absolute immunity). See, e.g., Nixon v. Fitzgerald, 457 U.S. 731 (1982) (president); Stump v. Sparkman, 435 U.S. 349 (1978) (judges); Tenney v. Brandhove, 341 U.S. 367, 372-76 (1951) (legislators). For most executive officials, however, "qualified immunity represents the norm." Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982); see also id. at 812 (leaving open possibility that some presidential aides "entrusted with discretionary authority in such sensitive areas as national security or foreign policy" might be entitled to absolute immunity).

Both qualified and absolute immunity are available only when a § 1983 suit is brought against a state official in her individual capacity, making her personally liable for any damages awarded to the plaintiff. These immunities are not defenses where the defendant is a state or municipality. See Kentucky v. Graham, 473 U.S. 159, 167 (1985); Owen v. City of Independence, 445 U.S. 622, 657 (1980). Nor are they available in a suit against a public employee in her official capacity, which is in essence a suit against the defendant's governmental employer because the employer must pay any damages award. See Graham, 473 U.S. at 165-67. Where a § 1983 suit is brought against a state agency or a state employee is sued in her official capacity for damages, however, the defendant may have a different type of immunity defense under the eleventh amendment. See generally D. Currie, Federal Jurisdiction in a Nutshell 159-87 (2d ed. 1981); 2 R. Rotunda, J. Nowak & J. Young, Treatise on Constitutional Law: Substance and Procedure § 19.31 (1986).

\(^{13}\) State officials normally are not protected by qualified or absolute immunity in suits seeking declaratory or injunctive relief because of the view that such suits are not as likely to chill the defendant's independent exercise of discretion and because of the need to provide some mechanism for the federal courts to prevent violations of constitutional rights by state officials. See Pulliam v. Allen, 466 U.S. 522, 528-42 (1984) (holding that judges are not immune from injunctive suits). The Court expressly limited Harlow's application to suits for civil damages and left open the availability of injunctive or declaratory relief, see Harlow, 457 U.S. at 819 n.34, and the courts of appeals have tended to find that qualified immunity
caused by the violation of the plaintiff’s constitutional rights. The
defense was created in order to accommodate two conflicting policy
corens. On the one hand, the Supreme Court recognized the
need to remedy and deter the deprivation of constitutional rights.
At the same time, however, the Court wished to protect public offi-
cials from being sued for every error in judgment, thereby divert-
ing their attention from their public duties, preventing them from
independently exercising their discretion because of the fear of
damages liability, and discouraging qualified persons from seeking
public office at all.14

The Supreme Court first recognized the qualified immunity de-
fense in Pierson v. Ray,15 a section 1983 suit brought against sev-
eral police officers who arrested the plaintiffs for violating a state
statute subsequently held unconstitutional. The Court held that
the defendants were protected from liability if “they acted in good
faith and with probable cause in making an arrest under a statute
that they believed to be valid.”16 The Court generalized the quali-
fied immunity defense to apply to a broader group of executive
branch officials in Scheuer v. Rhodes,17 defining the defense as
follows:

[I]n varying scope, a qualified immunity is available to
officers of the executive branch of government, the variation being dependent upon the scope of discretion and
responsibilities of the office and all the circumstances as
they reasonably appeared at the time of the action on
which liability is sought to be based. It is the existence of

is not available in suits seeking declaratory or injunctive relief. See, e.g., Lugo v. Alvarado,
819 F.2d 5, 7 (1st Cir. 1987); Littlejohn v. Rose, 768 F.2d 765, 772 (6th Cir. 1985), cert.
denied, 475 U.S. 1045 (1986); Harris v. Pernsley, 755 F.2d 338, 343 (3d Cir.), cert. denied,
474 U.S. 965 (1985); Hall v. Medical College, 742 F.2d 299, 310 (6th Cir. 1984), cert. denied,
469 U.S. 1113 (1985); Hoohuli v. Ariyoshi, 741 F.2d 1169, 1175-76 (9th Cir. 1984); Walker v.
serving that state legislator’s absolute immunity is equally available in § 1983 suits seeking
declaratory or injunctive relief, although noting that, unlike immunity accorded executive
and judicial officials, legislative immunity in § 1983 suits is grounded in part on speech or
debate clause protection given to Members of Congress, which applies to injunctive suits).

14 See, e.g., Harlow, 457 U.S. at 807, 813-14; Wood v. Strickland, 420 U.S. 308, 319-20
(1975).
15 386 U.S. 547 (1967).
16 Id. at 555.
reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.\textsuperscript{18}

This last sentence suggests that qualified immunity has both an objective and a subjective component; that suggestion was confirmed the following year in \textit{Wood v. Strickland},\textsuperscript{19} which articulated the definition of qualified immunity most widely cited until the Supreme Court modified the defense in \textit{Harlow}. \textit{Wood} held that defendants in section 1983 cases were not entitled to qualified immunity if they "knew or reasonably should have known that the action [they] took within [their] sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if [they] took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff]."\textsuperscript{20}

Seven years later, \textit{Harlow} changed this course.\textsuperscript{21} There the Court observed that in many cases the subjective element of the \textit{Wood} standard created disputed questions of fact concerning the defendant's good faith that could not be resolved on summary judgment.\textsuperscript{22} In addition to undermining the general policies supporting the creation of the qualified immunity defense, this inquiry into a public official's subjective motives could well require "broad-ranging discovery" that was "peculiarly disruptive of effective government."\textsuperscript{23} In order to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary

\textsuperscript{18} Id. at 247-48.
\textsuperscript{19} 420 U.S. 308 (1975).
\textsuperscript{20} Id. at 322.
\textsuperscript{21} Although \textit{Harlow} was not a § 1983 suit against state officials, but a suit against federal officials brought directly under the Constitution pursuant to \textit{Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics}, 403 U.S. 388 (1971), the scope of the qualified immunity defense is identical in both § 1983 and \textit{Bivens} cases. See \textit{Davis v. Scherer}, 468 U.S. 183, 194 n.12 (1984) (using \textit{Harlow} analysis in case involving alleged due process violations by Florida Highway Patrol officials); \textit{Butz v. Economou}, 438 U.S. 478, 504 (1978) ("[t]o create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head"). Hereinafter, therefore, this Article will not distinguish between § 1983 suits against state officials and \textit{Bivens} actions against federal officials.
\textsuperscript{22} \textit{Harlow v. Fitzgerald}, 457 U.S. 800, 816 (1982).
\textsuperscript{23} Id. at 817.
judgment,” the Court held that “government officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known.”

Thus, after Harlow, defendants are protected by qualified immunity unless the constitutional right they allegedly violated was a clearly established right at the time they acted. If the right was not clearly established at that point, Harlow noted, “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.” On the other hand, if the law was clearly established at the time, immunity would typically be unavailable, subject to one exception: “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.”

Again, however, “the defense would turn primarily on objective factors.”

Since Harlow, the Court has attempted to clarify some aspects of its new formulation of the qualified immunity defense. Davis v. Scherer described Harlow’s definition of qualified immunity as a “wholly objective” one; “[n]o other ‘circumstances’ are relevant to the issue of qualified immunity” except the objective reasonableness of the defendant’s conduct “as measured by reference to clearly established law.”

In addition, both Mitchell v. Forsyth and Anderson v. Creighton addressed the proper method of ascertaining whether the constitutional right allegedly violated by the defendant was

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24 Id. at 818.
25 See Davis v. Scherer, 468 U.S. 183, 193-97 (1984) (in § 1983 suit alleging violation of due process clause, only relevant inquiry was whether due process rights were clearly established; defendants did not lose their qualified immunity merely because they may have violated some other clearly established statutory or administrative provision).
26 Harlow, 457 U.S. at 818.
27 Id. at 819.
28 Id.
29 Davis, 468 U.S. at 191.
30 Id. (quoting Harlow, 457 U.S. at 818).
"clearly established" at the relevant time. In *Mitchell*, the plaintiff challenged the constitutionality of a warrantless domestic security wiretap authorized by former Attorney General John Mitchell. Mitchell was entitled to qualified immunity, the Court held, because the constitutionality of such wiretaps was "an open question" when Mitchell acted. The Court came to this conclusion in part because the Supreme Court opinion requiring a warrant for such wiretaps had not been issued until more than a year after Mitchell authorized the wiretap. "The decisive fact is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted." Nevertheless, the Court indicated that it did not intend to immunize a public official simply because the constitutional provision at issue had never been expressly held to apply in a case involving identical circumstances; rather, the Court was saying only that immunity was appropriate in *Mitchell* because at the relevant time there was "a legitimate question" whether a warrant was required for such wiretaps.

In *Anderson*, the plaintiffs alleged that an FBI agent's warrantless search of their home had been conducted without probable cause to search and without exigent circumstances to justify the

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33 *Mitchell*, 472 U.S. at 535; see also *Davis*, 468 U.S. at 192 n.10 (although prior Supreme Court decisions had required "some kind of hearing" before employee with protected interest in her job could be discharged, defendants did not violate plaintiff's clearly established due process rights because Court had never specified what kind of hearing must be provided). Cf. Meese, The Law of the Constitution, 61 Tul. L. Rev. 979, 983 (1987) (arguing that Constitution, rather than Court's constitutional interpretations, is pre-eminent, and therefore that Supreme Court decisions do not "establish a supreme law of the land that is binding on all persons and parts of government henceforth and forevermore").

Although only four Justices joined this part of the Court's opinion in *Mitchell*, the other three Justices participating in the decision did not reach the question of the defendant's entitlement to qualified immunity. See *Mitchell*, 472 U.S. at 542 (Stevens, J., concurring in the judgment); id. at 556 n.12 (Brennan, J., concurring in part and dissenting in part).

34 United States v. United States District Court, 407 U.S. 297, 314-21 (1972); see *Mitchell*, 472 U.S. at 530. The Court also reasoned that the constitutionality of warrantless domestic security wiretaps was an open question because the Supreme Court had expressly left the issue unresolved several years earlier in *Katz* v. United States, 389 U.S. 347, 358 n.23 (1967); several district courts had approved such wiretaps; two district court opinions to the contrary had not been decided until after the wiretap authorized by Mitchell had been removed; and such wiretaps had been used since the 1940s. See *Mitchell*, 472 U.S. at 530-34.

35 *Mitchell*, 472 U.S. at 535.

36 Id. at 535 n.12. *Mitchell* also held that an adverse ruling by the district court on the qualified immunity issue, to the extent it turns on a question of law, see infra note 224, is a final order that may be appealed immediately to the court of appeals despite the absence of a final judgment. See *Mitchell*, 472 U.S. at 524-30.
failure to obtain a warrant. In determining whether the defendant had violated the plaintiffs' clearly established constitutional rights, the Court held that the critical question was "the objective (albeit fact-specific) question whether a reasonable officer could have believed [the defendant's] warrantless search to be lawful, in light of clearly established law and the information the searching officer possessed." The defendant would not lose the immunity defense simply because, as a general matter, it had long been established that the fourth amendment permitted warrantless searches of private homes only if the police had both probable cause and exigent circumstances. Rather, the constitutional right allegedly violated by the defendant must have been clearly established "in a more particularized, and hence more relevant, sense: [t]he contours of the right must [have been] sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right." The qualified immunity issue therefore revolved around the specific question whether it was clearly established that, under the particular circumstances of Anderson, the defendant's warrantless search was conducted without probable cause or exigent circumstances. As it had in Mitchell, the Court made clear, however, that it was not extending qualified immunity to a public official simply because there was no prior court decision expressly holding her precise acts unconstitutional; rather, it was holding that she would lose her immunity if "in the light of preexisting law" the unlawfulness of her conduct was "apparent." Although the Court has thus elaborated on the meaning of Harlow's reference to "clearly established" constitutional rights,}

37 Anderson v. Creighton, 107 S. Ct. 3034, 3040 (1987); see also Malley v. Briggs, 475 U.S. 335, 345 (1986) (in determining defendant's entitlement to qualified immunity, relevant question is "whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant").
38 Anderson, 107 S. Ct. at 3039.
39 Id.
40 Id.

The Court has not, however, answered a number of other questions that arise in determining whether the constitutional right allegedly violated by the defendant was clearly
other questions about the substantive scope of the qualified

established at the relevant time. For example, the Court has refused to consider (A) whether a right can be clearly established by district court or court of appeals opinions, or even state court opinions, or whether Supreme Court precedent is required, see, e.g., Harlow v. Fitzgerald, 457 U.S. 800, 818 n.32 (1982) (expressly leaving this question open); Hawkins v. Stein- gut, 829 F.2d 317, 321 (2d Cir. 1987) (district court decision does not clearly establish law in its own circuit, much less in other circuits); Chinchello v. Fenton, 805 F.2d 126, 134 (3d Cir. 1986) (requiring Supreme Court opinion or consensus among courts of appeals); Bonitz v. Fair, 804 F.2d 164, 171 n.8 (1st Cir. 1986) (lower court opinions are also relevant); Benson v. Alphin, 786 F.2d 268, 275 (7th Cir.) (Supreme Court precedent not required), cert. denied, 479 U.S. 848 (1986); Schlothauer v. Robinson, 757 F.2d 196, 197-98 (8th Cir. 1985) (per curiam) (suggesting that Supreme Court precedent is required);

(B) whether the case law clearly establishing the constitutional right must come from the jurisdiction in which the defendant works, or whether cases from other jurisdictions are also relevant, see, e.g., Savidge v. Fincannon, 836 F.2d 898, 908 & n.48 (5th Cir. 1988) (citing D.C. Circuit case, but noting that it was not directly binding on defendants); Knight v. Mills, 836 F.2d 659, 668 (1st Cir. 1987) (decisions from other courts are not binding); Davis v. Holly, 835 F.2d 1175, 1180 (6th Cir. 1987) (noting that decisions from other circuits might be “[i]nstructive,” but that Supreme Court and Sixth Circuit cases were “more pertinent, for purposes of our inquiry”); Daniel v. Taylor, 808 F.2d 1401, 1404 (11th Cir. 1986) (per curiam) (noting that other court of appeals decisions are not binding precedent); Weber v. Dell, 804 F.2d 796, 801 (2d Cir. 1986) (rejecting defendant’s claim of qualified immunity, based on decisions from other courts of appeals), cert. denied, 107 S. Ct. 3263 (1987); Azeez v. Fairman, 795 F.2d 1296, 1301 (7th Cir. 1986) (finding defendant immune despite controlling Eighth Circuit precedent handed down 11 days earlier); Arebaugh v. Dalton, 730 F.2d 970, 973 (4th Cir. 1984) (suggesting that 12 days may have been sufficient time for defendant to have learned of relevant Supreme Court decision); Harris v. Young, 718 F.2d 620, 623 (4th Cir. 1983) (suggesting that some interval is appropriate); and

(C) whether a right is clearly established as soon as a dispositive court opinion is issued, or whether some interval is required until the substance of the court’s decision becomes known to the reasonable public official, see, e.g., Garcia v. Garcia v. Miera, 817 F.2d 650, 657 n.10 (10th Cir. 1987) (five-month interval was sufficient to put defendants on notice of Tenth Circuit decision), cert. denied, 107 S. Ct. 1220 (1988); Williams v. Smith, 781 F.2d 319, 322 (2d Cir. 1986) (reasonable prison official would not have been aware of decision issued less than two months earlier); Schlothauer, 757 F.2d at 197-98 (finding defendant immune despite controlling Eighth Circuit precedent handed down 11 days earlier); Hershey v. City of Clearwater, 834 F.2d 937, 941 n.5 (11th Cir. 1987) (relevant); Chapman v. Pickett, 801 F.2d 912, 924 (7th Cir. 1986) (Easterbrook, J., dissenting) (relevant), vacated and remanded mem., 108 S. Ct. 54 (1987), remanded mem., 840 F.2d 20 (7th Cir. 1988); LeClair v. Hart, 800 F.2d 692, 694 n.3 (7th Cir. 1986) (irrelevant); McSurely v. McClellan, 753 F.2d 88, 100 (D.C. Cir.) (per curiam) (relevant), cert. denied, 474 U.S. 1005 (1985); People of Three Mile Island v. Nuclear Regulatory Comm’rs, 747 F.2d 139, 147 (3d Cir.
immunity defense and the procedures to be used in ruling on claims of qualified immunity have not been addressed. It is to those questions that the Article now turns.

II. The Substantive Reach of Qualified Immunity

The Supreme Court has failed to clarify at least two substantive issues surrounding Harlow’s definition of qualified immunity. First, can immunity be denied the public official who has superior knowledge and therefore actually realizes that her conduct is violating the plaintiff’s constitutional rights, if the reasonable public official would not have that knowledge—even though the defendant’s subjective awareness of the state of the law then becomes relevant in evaluating her entitlement to immunity? Second, in evaluating the objective reasonableness of the defendant’s actions in light of clearly established law, is the appropriate inquiry whether a reasonable public official in the defendant’s circumstances would have been aware that she was acting unconstitutionally—or is the “clearly established” standard more abstract so that the defendant’s particular circumstances are irrelevant and a right is either clearly established or not as to all public officials? This Part examines these questions in turn.

A. The Public Official with Superior Knowledge

Cases may arise in which public officials who acted in violation of the Constitution actually recognized that their conduct was unconstitutional, even though they might not reasonably have been expected to have that knowledge. Such situations may be somewhat unusual, however, because many public officials will have no way of knowing that their actions violated a constitutional right that was not clearly established by the case law. Nevertheless, there have been cases in which defendants had previously been involved in litigation that put them on notice regarding the relevant

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1984) (relevant); Albers v. Whitley, 743 F.2d 1372, 1378 (9th Cir. 1984) (Wright, J., dissenting) (relevant), rev’d on other grounds, 475 U.S. 312 (1986); Arebaugh, 730 F.2d at 972 n.2 (not relevant); Harris, 718 F.2d at 623-24 (relevant). Because these questions involve the definition of which rights can be considered “clearly established,” they are beyond the scope of this Article.

constitutional requirements;\textsuperscript{43} or had been informed by an attorney or some other source that their conduct was unconstitutional;\textsuperscript{44} or had purportedly acknowledged the unlawfulness of their actions.\textsuperscript{45} In addition, if the courts refuse to characterize a constitutional right as clearly established until some interval of time has elapsed

\textsuperscript{43} See, e.g., Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 561-62 (1st Cir.) (qualified immunity denied to defendant prison officials who knew of prior court decree finding prison system unconstitutionally unsafe and ordering specific reforms), cert. denied, 109 S. Ct. 68 (1988); Greater Los Angeles Council on Deafness, Inc. v. Zolin, 812 F.2d 1103, 1109 n.7 (9th Cir. 1987) (in action by deaf plaintiffs alleging unconstitutional deprivation of right to serve as juror, defendant was aware of requirement of reasonable accommodation for handicapped persons because of prior suit brought by prospective jurors with "building-access problems"); Rios v. Lane, 812 F.2d 1032, 1039-40 (7th Cir.) (defendants were or should have been aware of prior litigation against other Illinois Department of Corrections officials involving similar facts), cert. dismissed, 107 S. Ct. 3222 (1987); Harris v. Pernsley, 755 F.2d 338, 343-44 (3d Cir.) (defendant prison officials aggravated overcrowded prison conditions while knowing such conditions had already been adjudicated to be unconstitutional), cert. denied, 474 U.S. 965 (1985); Adams v. Brierton, 752 F.2d 546, 548 n.1 (11th Cir.) (per curiam) (prior litigation put prison official on notice that due process requires hearing before prisoner can be placed in administrative confinement), cert. denied, 474 U.S. 1010 (1985); Jackson v. Hollowell, 714 F.2d 1372, 1376 (5th Cir. 1983) (appellants acknowledged that they actually knew of clearly established constitutional law through prior litigation); Williams v. Bennett, 689 F.2d 1370, 1385-86 (11th Cir. 1982) (involvement in prior litigation concerning constitutional restrictions on prison conditions precluded defendant prison officials from asserting that they reasonably did not know that conditions violated plaintiff's constitutional rights), cert. denied, 464 U.S. 1026 (1984); see also Lappe v. Looffelholz, 815 F.2d 1173, 1183 n.1 (8th Cir. 1987) (Heaney, J., dissenting) (plaintiff alleged that defendants knew of required statutory procedures and their applicability to plaintiff because they had complied with those procedures in previous dealings with him).

\textsuperscript{44} Cf. Zweibon, 720 F.2d at 171 (memos sent to defendant merely made predictions regarding future Supreme Court decisions, rather than describing current state of law), cert. denied, 469 U.S. 880 (1984); Bier v. Fleming, 717 F.2d 308, 312-13 (6th Cir. 1983) (rejecting district court's finding that defendants were so informed), cert. denied, 465 U.S. 1026 (1984).

\textsuperscript{45} See, e.g., Merritt v. Mackey, 827 F.2d 1368, 1373 (9th Cir. 1987) (federal and state officials who terminated plaintiff without hearing knew they were acting outside scope of their authority); Greater Los Angeles Council on Deafness, Inc. v. Zolin, 812 F.2d 1103, 1109 n.7 (9th Cir. 1987) (in action by deaf plaintiffs alleging unconstitutional deprivation of right to serve as juror, defendant acknowledged he was aware of requirement of reasonable accommodation for handicapped persons); Arrington v. McDonald, 808 F.2d 466, 467-68 (6th Cir. 1986) (in action alleging that plaintiff was unconstitutionally detained by police solely to ascertain her identity, defendants admitted that if plaintiff's allegations were true, their conduct was unconstitutional); McSurely v. McClellan, 697 F.2d 309, 321 (D.C. Cir. 1982) (per curiam) (prosecutor allegedly acknowledged publicly that search and arrest warrants were probably invalid); cf. Wilson v. Schillinger, 761 F.2d 921, 930 n.9 (3d Cir. 1985) (defendants merely expressed their belief that plaintiff's civil rights suit might be successful), cert. denied, 475 U.S. 1096 (1986).
following the issuance of a controlling judicial opinion, some public officials may learn of the decision at an earlier point. Similarly, if the courts determine that a constitutional right cannot be deemed clearly established until the Supreme Court or the court of appeals in that jurisdiction has decided the issue, some public officials may be aware of relevant case law from other jurisdictions and thus recognize the unlawfulness of their conduct.

Are such "clever and unusually well-informed" officials entitled to immunity under Harlow's formulation of the defense? The federal courts of appeals have disagreed in interpreting Harlow on this question. In Raffucci Alvarado v. Sonia Zayas, for example, the First Circuit noted that "[t]he standard to be applied in reviewing a qualified immunity claim . . . is not affected by the defendant's particular state of knowledge about the law." In

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46 See supra note 41.
47 See supra note 41.
49 For cases suggesting that the defendant's knowledge that she is acting unlawfully defeats her qualified immunity, see Watertown Equip. Co. v. Norwest Bank Watertown, N.A., 830 F.2d 1487, 1490 (8th Cir. 1987), cert. denied, 108 S. Ct. 1723 (1988); Arrington v. McDonald, 808 F.2d 466, 467-68 (6th Cir. 1986); Perry v. Larson, 794 F.2d 279, 284 n.1 (7th Cir. 1986); Brierley v. Schoenfeld, 781 F.2d 838, 842 (10th Cir. 1986); Haygood v. Younger, 769 F.2d 1350, 1358-59 (9th Cir. 1985) (en banc), cert. denied, 478 U.S. 1020 (1986); Werle v. Rhode Island Bar Ass'n, 755 F.2d 195, 199 n.6 (1st Cir. 1985); Adams v. Brierton, 752 F.2d 546, 548 n.1 (11th Cir.) (per curiam), cert. denied, 474 U.S. 1010 (1985); Kencyatta v. Moore, 744 F.2d 1179, 1185 n.27 (5th Cir. 1984), cert. denied, 471 U.S. 1066 (1985); Krohn v. United States, 742 F.2d 24, 31-32 (1st Cir. 1984); Slakan v. Porter, 737 F.2d 368, 377 (4th Cir. 1984), cert. denied, 470 U.S. 1035 (1985); Czurlanis v. Albanese, 721 F.2d 98, 108 (3d Cir. 1983); Zweibon v. Mitchell, 720 F.2d 162, 171 n.16 (D.C. Cir. 1983), cert. denied, 469 U.S. 880 (1984); Bier v. Fleming, 717 F.2d 308, 313 (6th Cir. 1983), cert. denied, 465 U.S. 1026 (1984); Jackson v. Hollowell, 714 F.2d 1372, 1376 (5th Cir. 1983); National Black Police Ass'n v. Velde, 712 F.2d 569, 582-83 (D.C. Cir. 1983), cert. denied, 466 U.S. 983 (1984); Buller v. Buechler, 706 F.2d 844, 852-53 (8th Cir. 1983); Fujiwara v. Clark, 703 F.2d 357, 359 n.3 (9th Cir. 1983). See also Gildin, supra note 8, at 623; Nahmod, Constitutional Accountability in Section 1983 Litigation, 68 Iowa L. Rev. 1, 8 n.53 (1982).

For cases suggesting that the defendant's knowledge is irrelevant after Harlow, see Poe v. Haydon, 853 F.2d 418, 431 (6th Cir. 1988), cert. denied, 109 S. Ct. 788 (1989); Turner v. Dammon, 848 F.2d 440, 451 (4th Cir. 1988) (Kaufman, J., concurring in part and dissenting in part); Duncan v. Peck, 844 F.2d 1261, 1267 (6th Cir. 1988); Musso v. Hourigan, 836 F.2d 736, 743 (2d Cir. 1988); Bothke v. Fluor Eng'rs & Constructors, Inc., 834 F.2d 804, 810-11 (9th Cir. 1987); Whatley v. Philo, 817 F.2d 19, 20 n.2 (5th Cir. 1987); Raffucci Alvarado v. Sonia Zayas, 816 F.2d 814, 820 (1st Cir. 1987); Halperin v. Kissinger, 807 F.2d 180, 184, 186 (D.C. Cir. 1986); Kompare v. Stein, 801 F.2d 883, 887 (7th Cir. 1986).
50 816 F.2d 818 (1st Cir. 1987).
51 Id. at 820.
Jackson v. Hollowell, by contrast, the Fifth Circuit disposed of the qualified immunity issue with the observation that "[w]e need not determine whether the [defendants] should have known of [plaintiff's] clearly established constitutional right since the [defendants] concede that they were thoroughly familiar with the [relevant] decision and actually knew of the clearly established constitutional law governing their conduct." In fact, conflicting cases on this issue can even be found in the same circuit. Unfortunately, the cases on both sides contain virtually no analysis justifying their conclusions.

Although it may be unfair to impose liability on a public official who makes a "mistake in judgment" or who fails to "anticipate subsequent legal developments," the Supreme Court has recognized that "it is not unfair to hold liable the official who knows or should know that he is acting outside the law." There is little justification for protecting the public official who knowingly violates constitutional rights when doing so means that the innocent victim remains uncompensated and wrongdoing by others remains undeterred. In fact, as the Supreme Court acknowledged over a century ago, such a result is antithetical to the basic notion of public accountability on which our government is premised:

No man in this country is so high that he is above the

53 714 F.2d 1372 (5th Cir. 1983).
54 Id. at 1376 (emphasis deleted).
55 See supra note 49 (citing conflicting cases from D.C., First, Fifth, Sixth, Seventh, and Ninth Circuits). See also Casenote, 20 CREIGHTON L. REV. 193, 211 (1986) (noting first that police officer loses her immunity if she knows or should have known that she did not have probable cause to seek warrant, and then explaining that "[t]he test is not what a particular officer knew, but what a reasonable officer would have known under the circumstances") (hereinafter CREIGHTON Casenote).
56 Butz v. Economou, 438 U.S. 478, 507 (1978) (no liability for "mere mistakes in judgment, whether the mistake is one of fact or one of law").
58 Butz, 438 U.S. at 506-07 (holding that executive officers may not discharge duties in way that they know violates Constitution); see also Perry v. Larson, 794 F.2d 279, 284 n.1 (7th Cir. 1986) (noting that defendant did not argue he was unaware of plaintiff's constitutional rights and that it would be "illogical to extend good faith immunity to a government official who has intentionally violated an individual's constitutional rights"); National Black Police Ass'n v. Velde, 712 F.2d 569, 583 (D.C. Cir. 1983) (inquiry as to defendant's knowledge of the applicable law not inconsistent with Harlow, which precludes subjective inquiry only prior to finding state of law clear and which is meant to protect defendant from liability for honest mistakes), cert. denied, 466 U.S. 963 (1984).
law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.\(^5\)

Notwithstanding this principle, the modern Supreme Court has given ambiguous signals concerning Harlow's impact on this issue. The Court's decision to refashion the qualified immunity defense in Harlow was based on the concern that the subjective prong of the defense often created disputed issues of material fact that prevented the imposition of summary judgment and forced public officials to withstand extensive discovery and trial, even in frivolous cases.\(^5\)\(^9\) By adopting a definition of qualified immunity that protected a public official unless she violated "clearly established statutory or constitutional rights of which a reasonable person would have known," Harlow might therefore have intended to eliminate any subjective inquiry into the defendant's actual state of mind—even as to her knowledge of the state of the law. Otherwise, the Court may have feared, any section 1983 complaint could allege that the defendant had knowingly violated the plaintiff's constitutional rights and thereby avoid summary judgment and subject the defendant to discovery and trial.\(^6\)

Justice Brennan's brief concurring opinion denies, however, that this reading of Harlow was intended. The concurrence, joined by Justices Marshall and Stevens, expressly agreed with the majority's articulation of the qualified immunity standard and went on to explain that the new standard would not immunize the defendant who actually knew she was violating the law, even if she could not reasonably have been expected to have that knowledge.\(^6\)\(^2\) Justice Brennan's observation is not inconsistent with the majority opinion in Harlow, as evidenced both by Harlow's implication that the subjective element the Court was abolishing related to the defendant's malice, rather than her knowledge of the governing case


\(^9\) Harlow, 457 U.S. at 815-16.

\(^6\) Id. at 818.

\(^2\) Cf. id. at 814 n.23 (noting that "dishonest or vindictive motives" can easily be alleged).

\(^6\) See id. at 821 (Brennan, J., concurring). Justice Brennan recognized, however, that in some cases the state of the law may be so ambiguous that a public official could not possibly have "known" that her conduct was unconstitutional. See id.
law, and by language in Supreme Court opinions subsequent to *Harlow.*

*Harlow* attributed the problems created by the qualified immunity defense to "[t]he subjective element" of that defense. The Court defined what it meant by this "subjective" element by quoting from *Wood v. Strickland* as follows:

Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . . ."

The structure of this sentence and the emphasis added by the *Harlow* Court suggest that the Court viewed *Wood*’s "knew or reasonably should have known" language as the objective element of the defense and the "malicious intention" language as the subjective element.

This characterization is, of course, literally incorrect because a subjective standard focuses on the state of mind of the actual person involved, whereas a truly objective standard looks to the state

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Skeptics might point out that, if Brennan’s interpretation of the majority opinion was correct, he would have asked the majority to add language to the opinion clarifying its intent, and the majority would have been willing to do so. The fact that the concurrence received only three votes may indicate that the other five Justices in the majority did not agree with Brennan’s interpretation of the opinion. On the other hand, perhaps the others in the majority agreed with Brennan’s conclusion that qualified immunity does not protect public officials who knowingly act unconstitutionally, and were uncomfortable only with Brennan’s suggestion that the plaintiff be given an opportunity to conduct discovery on the issue of the defendant’s knowledge. See id.; see also infra notes 81-86 & 204-05 and accompanying text. But cf. U. PA. Comment, supra note 41, at 920 (observing that although Brennan’s opinion is "superficially in agreement" with Court’s opinion, it "advocat[es] a substantially different, pro-plaintiff standard" that "could produce results very different from those contemplated by the majority"); Note, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation,* 95 YALE L.J. 126, 133 n.35 (1985) (describing Brennan concurrence as "reformulat[ion]" of majority’s standard and "highly questionable" interpretation of majority opinion) [hereinafter YALE Note].

*Harlow,* 457 U.S. at 815-16.


of mind of the reasonable person. Thus, the phrase “knew or reasonably should have known” contains elements of both subjectivity (“knew”) and objectivity (“reasonably should have known”). But the Harlow Court is not alone in this loose use of language; the “knew or reasonably should have known” portion of Wood’s definition of qualified immunity has widely been referred to as the objective prong of the defense. Therefore, the Court’s description of Harlow in later cases as having “purged qualified immunity doctrine of its subjective components” and as having “rejected the inquiry into state of mind in favor of a wholly objective standard” does not necessarily mean that the defendant’s knowledge

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68 Mitchell v. Forsyth, 472 U.S. 511, 512 (1985); see also Anderson v. Creighton, 107 S. Ct. 3034, 3040 (1987) (noting that Harlow “sought to minimize” “the inquiry into officials’ subjective intent”). The subjective aspect of the qualified immunity defense that Harlow abandoned must be distinguished from the state of mind requirement necessary to prove a deprivation of some constitutional rights, which is not affected by Harlow. See infra note 233.

of the state of the law is now irrelevant to the qualified immunity analysis; those references could relate to the subjective prong ("malicious intention") of Wood's definition of qualified immunity. 70

In justifying the conclusion that the qualified immunity doctrine no longer inquires into the defendant's actual knowledge of the

on objective factors, it does not require that exclusively objective standard be applied), cert. denied, 469 U.S. 819 (1984), cited with approval in Vizbaras v. Prieber, 761 F.2d 1013, 1016 (4th Cir. 1985), cert. denied, 474 U.S. 1101 (1986); but cf. McSurely v. McClellan, 697 F.2d 309, 320 n.19 (D.C. Cir. 1982) (per curiam) (noting that "some elements of [the Harlow] formulation seem inconsistent with the Court's 'holding' that the test is an objective one," but finding no need to "resolve that perplexity here").

70 See, e.g., Cinevision Corp. v. City of Burbank, 745 F.2d 560, 578 n.24 (9th Cir. 1984) (identifying "malicious intent" as subjective component eliminated by Harlow), cert. denied, 471 U.S. 1054 (1985); Barnett v. Housing Auth., 707 F.2d 1571, 1581-82 (11th Cir. 1983) (same); Vand. Note, supra note 41, at 1547 n.11.

Harlow continues to include a subjective element at least in those cases where defendants plead the "extraordinary circumstances" exception: under this exception, public officials who violated clearly established constitutional rights are nevertheless entitled to immunity if they "can prove that [they] neither knew nor should have known of the relevant legal standard." Harlow, 457 U.S. at 819 (emphasis added). Although Harlow admonished that "again, the defense would turn primarily on objective factors," id., the extraordinary circumstances exception clearly requires an evaluation of the defendant's knowledge of applicable legal precedents and thus introduces a subjective element into the qualified immunity doctrine. See, e.g., Jones v. Preuit & Mauldin, 822 F.2d 998, 1000 n.3 (11th Cir.), reh'g en banc granted, 833 F.2d 1436 (11th Cir. 1987); Trejo v. Perez, 693 F.2d 482, 485 n.5 (5th Cir. 1982). The Court's express assertion that a public official's knowledge of applicable legal precedents is relevant to the extraordinary circumstances exception may suggest that the Court intended to impose liability on defendants who knew their conduct was unlawful in the absence of extraordinary circumstances. Given the close correspondence between the language defining the qualified immunity standard (the defendant violated clearly established rights of which a reasonable person would have known) and the language defining the exception (because of some extraordinary circumstance, the defendant neither knew nor should have known of the relevant legal standard), perhaps both definitions should be interpreted to include both a "knew" and a "should have known" component.

The Court has not attempted to identify the type of circumstances it would find "extraordinary," and there has been very little discussion of this exception in the case law. Examples of circumstances that the lower courts and commentators have suggested might be sufficient to call this exception into play are cases where the defendant followed counsel's advice in acting as she did, see Watertown Equip. Co. v. Norwest Bank Watertown, N.A., 830 F.2d 1437, 1495 (8th Cir. 1987), cert. denied, 108 S. Ct. 1723 (1988); Vand. Note, supra note 41, at 1555 & n.48; where the defendant had no access to legal advice, see Nahmod, supra note 8, at 251; where the precedent clearly establishing the constitutional right violated by the defendant was only recently decided, see Arebaugh v. Dalton, 730 F.2d 970, 972-73 (4th Cir. 1984); Skevofilax v. Quigley, 586 F. Supp. 532, 541 n.8 (D.N.J. 1984); and where the defendant acted in reliance on statutory authority, a superior's order, or standard operating procedures, see Lowe v. Letsinger, 772 F.2d 308, 314 (7th Cir. 1985); Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336, 1348-49 (7th Cir. 1985) (opinion of Coffey, J.).
state of the law, the District of Columbia Circuit observed in Halperin v. Kissinger that "[t]his sort of knowledge-related malic-
cious intention was what the facts of Harlow presented, and what
the most explicit portions of the opinion specifically addressed."\(^7\) Actually, however, neither party in Harlow made any allegation as
to whether or not the defendants realized they were violating Fitz-
gerald's constitutional rights; thus, the case did not raise the ques-
tion of the availability of qualified immunity in a situation where a
government official has such knowledge. Rather, the issue
presented in Harlow was whether the defendants were engaged in
a conspiracy to dismiss Fitzgerald from his job in retaliation for his
testimony before a congressional committee concerning cost over-
runs at the Pentagon\(^2\)—the type of malicious intent to injure the
plaintiff that comprised the subjective prong of the Wood test.

Moreover, the Harlow Court declined to rule on the defendants' 
claim to qualified immunity, preferring to remand to the district
court because that court was more familiar with the record and
better able to make any necessary additional findings.\(^3\) If, as
Halperin v. Kissinger suggested, Harlow meant to eliminate any
consideration of the defendants' subjective awareness of the state
of the law, and Fitzgerald's argument against the defendants' as-
sertion of immunity was based on the defendants' knowledge that
they acted unconstitutionally, the Harlow Court would have sim-
ply granted the defendants qualified immunity. The Court would
have seen no reason to remand the case for additional factual find-
ings or scrutiny of the record because Fitzgerald's only basis for
opposing immunity would have already been rejected.\(^4\)

Finally, the Court's subsequent cases on the qualified immunity

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\(^7\) Halperin v. Kissinger, 807 F.2d 180, 186 (D.C. Cir. 1986) (emphasis deleted).

\(^2\) See Nixon v. Fitzgerald, 457 U.S. 731, 734, 736 (1982). Both Nixon and Harlow in-
volved the same allegations by the plaintiff, but against different defendants. See Harlow,
457 U.S. at 802.

\(^3\) See Harlow, 457 U.S. at 819-20.

\(^4\) Another District of Columbia Circuit decision, which interprets Harlow to deny quali-
ﬁed immunity to defendants who actually realized that their conduct was unconstitutional,
points for support to the language in Harlow providing that public ofﬁcials " 'generally are
shielded from liability' " unless they violate clearly established constitutional rights of
which a reasonable person would have known and that " 'bare allegations' " of malice
should not be sufﬁcient to expose public ofﬁcials to the burdens of discovery and trial.
Zweibon v. Mitchell, 720 F.2d 162, 171 n.16 (D.C. Cir. 1983) (quoting Harlow, 457 U.S. at
818, 817) (emphasis added by D.C. Cir.), cert. denied, 469 U.S. 880 (1984); see also VAND.
Note, supra note 41, at 1552.
doctrine support Justice Brennan’s interpretation of Harlow.\footnote{70} In Malley v. Briggs, the Court observed that qualified immunity “provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”\footnote{76} Likewise, in his separate opinion in Malley, Justice Powell, the author of Harlow, described Wood’s “knew or should have known” standard as simply another way of saying that public officials are immune unless they violate clearly established constitutional rights of which a reasonable person would have known—Harlow’s definition of qualified immunity.\footnote{77} Powell’s opinion was joined by Justice Rehnquist; significantly, therefore, two members of the Court who tend to support a more expansive qualified immunity defense\footnote{78} have expressly recognized that Harlow preserved the so-called objective prong of the Wood standard. Moreover, even in Anderson v. Creighton, where the Court said that a defendant’s “subjective beliefs about [the constitutionality of her conduct] are irrelevant,”\footnote{79} the Court also quoted with approval the language in Malley indicating that those who knowingly violate the law are not shielded by qualified immunity.\footnote{80}

The policy concerns underlying the Court’s modification of the qualified immunity doctrine do not require the conclusion that a public official’s knowledge of the state of the law is now irrelevant to her entitlement to immunity. Harlow’s criticism of the subjective element of the qualified immunity defense was based on the

\footnote{70} Justice Brennan observed that Harlow would not protect a defendant with actual knowledge of the unconstitutionality of her conduct. See supra notes 62-63 and accompanying text.

\footnote{76} Malley v. Briggs, 475 U.S. 335, 341 (1986) (emphasis added). The only separate opinion in Malley was an opinion concurring in part and dissenting in part, authored by Justice Powell and joined by Justice Rehnquist. That opinion expressed its agreement with the language cited in text, id. at 349; thus, this language was adopted by all nine members of the Court.

\footnote{77} See id. (Powell, J., concurring in part and dissenting in part).

\footnote{78} See, e.g., id. at 349-54 (Powell, joined by Rehnquist, criticized majority for remanding, rather than ruling that defendant police officer was entitled to qualified immunity, and for giving insufficient weight to fact that magistrate gave defendant warrants authorizing plaintiffs’ arrest); Butz v. Economou, 438 U.S. 478, 518-30 (1978) (Rehnquist, J., concurring in part and dissenting in part) (Rehnquist dissented from majority’s holding that Department of Agriculture officials are entitled only to qualified immunity, rather than absolute immunity); Wood v. Strickland, 420 U.S. 308, 327-31 (1975) (Powell, J., concurring in part and dissenting in part) (Powell, joined by Rehnquist, criticized majority’s opinion for imposing excessively harsh standards on school board members subjected to § 1983 suits).


\footnote{80} Id. at 3038.
"special costs to 'subjective' inquiries of [that] kind."81 Given that immunity is typically available only to public officials performing discretionary functions82 and that such discretionary decisions "almost inevitably are influenced by the decisionmaker's experiences, values, and emotions,"83 the Court noted, "[j]udicial inquiry into subjective motivation . . . may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues."84 Such discovery may intrude on "‘traditionally protected areas, such as [public officials'] deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels.'”85

Such concerns are substantially alleviated, however, when the relevant subjective inquiry focuses on whether the defendant knew she was acting unconstitutionally, rather than on whether her action was malicious and intended to do some injury to the plaintiff. When knowledge of the governing case law is the only issue, the defendant's reasons for acting as she did and most of her thought processes, deliberations, and communications with others are irrelevant; the only question is what she knew about the state of the law. Any deposition taken by the plaintiff would thus focus solely on that question, and the only people other than the defendant who could likely be subjected to discovery would be those who had briefed the defendant on the relevant law. Such discovery can hardly be considered "broad-ranging" and "peculiarly disruptive of effective government."86

Moreover, the values on the other side of the balance—ensuring the vindication of constitutional rights and punishing those who knowingly act in violation of the Constitution—should not be forgotten. Thus, Harlow and the Court's subsequent opinions on the qualified immunity doctrine can, and should, be interpreted to

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81 Harlow, 457 U.S. at 816.
82 See, e.g., id.; Davis v. Holly, 835 F.2d 1175, 1178 (6th Cir. 1987); Kompare v. Stein, 801 F.2d 883, 887 (7th Cir. 1986); People of Three Mile Island v. Nuclear Regulatory Comm'rs, 747 F.2d 139, 143 (3d Cir. 1984); Sampson v. King, 693 F.2d 566, 569 (5th Cir. 1982).
83 Harlow, 457 U.S. at 816.
84 Id. at 817.
85 Id. at 817 n.29 (quoting Halperin v. Kissinger, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring), aff'd by an equally divided Court, 452 U.S. 713 (1981)).
86 Harlow, 457 U.S. at 817; see also infra notes 229-31 and accompanying text.
leave room for a subjective inquiry limited to the defendant's knowledge of the state of the law. Qualified immunity should not excuse the public official who realizes that her conduct violates the Constitution, even if the unconstitutionality of that conduct is not yet clearly established.\textsuperscript{87}

B. The Reasonable Public Official

In evaluating whether a defendant violated clearly established rights of which a reasonable public official would have known,\textsuperscript{88} the question arises whether the courts should examine the issue in the abstract, or, alternatively, should consider what a reasonable person in the defendant's circumstances would have known.\textsuperscript{89} Cases from each of the federal courts of appeals have implied that the defendant's knowledge is to be measured against that of the reasonable person in her circumstances, or the reasonable police officer/prison warden/teacher, etc.\textsuperscript{90} Almost without exception,

\textsuperscript{87} This approach will not encourage public officials to engage in willful blindness and refrain from seeking legal advice regarding the constitutionality of their conduct. Defendants who have access to legal advice or to other information concerning the state of the relevant case law may well lose their immunity because they should have realized that their actions were unconstitutional—because a reasonable public official in those same circumstances would have so known. See infra notes 101-04 and accompanying text.

\textsuperscript{88} See Harlow, 457 U.S. at 818. Some courts apparently construe this language to immunize a defendant unless the reasonable public official would have realized that the right at issue was clearly established. See, e.g., Davis v. Holly, 835 F.2d 1175, 1179 (6th Cir. 1987) ("[t]he question is whether, at that time, a reasonable person in the defendants' position would have known that a mental patient had a clearly established constitutional right to be free from grossly negligent or reckless administrative and/or supervisory practices exposing her to an undue risk of sexual attack") (emphasis deleted); Deary v. Three Un-Named Police Officers, 746 F.2d 185, 192 (3d Cir. 1984) (using same language in evaluating reasonableness of police officer's arrest). This interpretation extends qualified immunity too far. Immunity should be unavailable if the right was clearly established at the time the defendant acted, and a right should be deemed clearly established so long as a reasonable public official would have known of the existence of the right at the relevant time. It should not be necessary for the reasonable public official to know in addition that the right was a clearly established one.

\textsuperscript{89} Although Anderson v. Creighton, 107 S. Ct. 3034 (1987), raised similar issues, the question discussed in this Part focuses on defining the "reasonable official," while Anderson focused on whether a particular right was "clearly established." See supra notes 32 & 37-40 and accompanying text.

\textsuperscript{90} See, e.g., Schlegel v. Bebout, 841 F.2d 937, 945 (9th Cir. 1988); Savidge v. Fincannon, 836 F.2d 898, 909 (5th Cir. 1988); Davis v. Holly, 835 F.2d 1175, 1179 (6th Cir. 1987); Ramirez v. Webb, 835 F.2d 1153, 1156 (6th Cir. 1987); Dominque v. Telb, 831 F.2d 673, 676 (6th Cir. 1987); Martin v. Malhoit, 830 F.2d 237, 260 (D.C. Cir. 1987); McConnell v. Adams, 829 F.2d 1319, 1325-26 (4th Cir. 1987), cert. denied, 108 S. Ct. 1731 (1988); Garionis v. Newton,
however, these cases have offered no explanation or justification for that observation. Nevertheless, this approach makes sense and is not inconsistent with Supreme Court precedent.

Certainly, an abstract conceptualization of the qualified immunity defense totally removed from the facts of the particular case would be appropriate if the only goal were to find a qualified immunity standard that was easy to apply at the early stages of litigation. Under such an abstract approach to qualified immunity, the court would decide that constitutional right X was not clearly established until date Y. Any public official who violated that right after that date would lose her qualified immunity—barring, of course, her successful plea that extraordinary circumstances impeded her awareness of the governing case law.9 Similarly, any official who violated that right before the crucial date would be protected by qualified immunity—unless she actually knew that her conduct was unconstitutional.92 Once the court decided that date Y was the critical date, future claims of qualified immunity based on similar constitutional violations could be decided quickly. Such an


9 See supra note 70.

92 See supra notes 42-87 and accompanying text.
abstract approach would also alleviate the concern expressed in *Anderson v. Creighton* that "[a]n immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide."\(^9\)

Nevertheless, this abstract notion of the qualified immunity defense would achieve simplicity of application and provide assurance to public officials only at the price of precision, creating a substantial risk of underprotecting and undercompensating the victims of civil rights violations and underdeterming the infringement of constitutional rights. Obviously, public officials with no legal training cannot fairly be held to a standard that requires them to have the same knowledge of applicable case law as a lawyer could be expected to have. As the Fifth Circuit noted in *Saldana v. Garza*,\(^6\) a section 1983 suit against two police officers whose arrest of the plaintiff on charges of "public" intoxication was allegedly illegal because the plaintiff was on his own property rather than in a public place at the time of the arrest:

If we are to measure official action against an objective standard, it must be a standard which speaks to what a reasonable officer should or should not know about the law he is enforcing and the methodology of effecting its enforcement. Certainly we cannot expect our police officers to carry surveying equipment and a Decennial Digest on patrol; they cannot be held to a title-searcher’s knowledge of metes and bounds or a legal scholar’s expertise in constitutional law.\(^5\)
At the same time, however, a lawyer can be held to a higher standard of knowledge and understanding of the governing precedents. The state attorney general, for example, can reasonably be expected to know more about current constitutional doctrine than the cop on the beat.\textsuperscript{96} Thus, a constitutional right may become clearly established for the state attorney general before it becomes clearly established for local police officers. An objective qualified immunity standard that fails to differentiate between the reasonable police officer and the reasonable state attorney general will necessarily have one of two effects: either it will unfairly subject a police officer to liability when the reasonable police officer in her shoes would not have known she was acting in violation of the Constitution, or it will improperly exempt a state attorney general when the reasonable person in her circumstances would have been aware of the unconstitutionality of her conduct.\textsuperscript{97}

A more specific concept of the "reasonable person" standard is applied in the related area of civil tort law, from which the Supreme Court has frequently borrowed in resolving issues arising in section 1983 cases.\textsuperscript{98} Commenting on the definition of the "reasonable person" used in tort suits, Dean Prosser observed, "[t]he conduct of the reasonable person will vary with the situation with which he was confronted. The jury must therefore be instructed to take the circumstances into account . . . ."\textsuperscript{99} The same reasoning is

\textsuperscript{96} See Benson v. Scott, 734 F.2d 1181, 1190 (7th Cir.) (Swygert, J., concurring in part and dissenting in part), cert. denied, 469 U.S. 1019 (1984).

\textsuperscript{97} The latter possibility appears more likely because, in the former case, the defendant police officer may be able to take advantage of the extraordinary circumstances exception and argue that as the result of some such circumstance, she neither knew nor should have known of the clearly established constitutional right at issue. See supra note 70.


equally applicable to constitutional tort cases.

If qualified immunity is unavailable when the defendant acted in violation of clearly established constitutional rights of which a reasonable person in her circumstances would have known, what "circumstances" must be examined in analyzing the defendant's entitlement to qualified immunity? Three relevant considerations come to mind: the defendant's legal training or access to legal advice; her rank and responsibilities; and the time constraints under which she operated.

Obviously, whether the defendant is a lawyer is of key importance. Similarly, a public official who has actually received legal advice, or who has access to such advice, may fairly be held to

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100 For examples of opinions apparently recognizing this factor as a relevant circumstance in evaluating a defendant's qualified immunity, see Wood v. Strickland, 420 U.S. 308, 331 (1975) (Powell, J., concurring in part and dissenting in part) (noting that school board members "possess no unique competency in divining the law"); Davis v. Holly, 835 F.2d 1175, 1182 (6th Cir. 1987) (noting that nonlawyer defendants would have needed "quite extraordinary familiarity with the contents of the Federal Reporter" to be aware of a relevant decision from another circuit); Sourbeer v. Robinson, 791 F.2d 1094, 1109 (3d Cir. 1986) (Weis, J., dissenting) (arguing that because defendants had no legal training, they would not have been able to identify interests at issue as constitutionally protected, despite majority holding that law was clearly established), cert. denied, 107 S. Ct. 3276 (1987); Ross v. Reed, 719 F.2d 689, 696 n.8 (4th Cir. 1983) (remarking that difference of opinion between plaintiff's attorney and state Attorney General as to constitutionality of conduct of defendant prison officials indicated law was not clearly established); Buller v. Buechler, 706 F.2d 844, 852 (8th Cir. 1983) (attorney who instituted unconstitutional garnishment procedure on client's behalf may be liable to debtor because attorney is in better position than client to know if garnishment statute is constitutional); Green v. White, 693 F.2d 45, 48 (8th Cir. 1982) (prison official who was not attorney not expected to know of change in law regarding inmate's right to wear long hair), cert. denied, 462 U.S. 1111 (1983); see also cases cited supra in notes 95-96. But cf. Raffucci Alvarado v. Sonia Zayas, 816 F.2d 818, 820 (1st Cir. 1987) (rejecting plaintiffs' argument that defendant's legal experience was relevant factor in determining whether law was clearly established, but apparently only in context of concluding that defendant's actual knowledge was irrelevant to qualified immunity analysis under Harlow).

101 For examples of cases rejecting claims of qualified immunity when the defendants had received legal advice informing them that their planned conduct was unconstitutional, see Cunningham v. City of Overland, 804 F.2d 1066, 1069 (8th Cir. 1986) (because city attorney had unequivocally told defendants they would violate clearly established law by denying plaintiff merchant's license, qualified immunity was unavailable); Llaguno v. Mingey, 739 F.2d 1186, 1197 (7th Cir. 1984) (where police officers had twice been told by prosecutor that there was insufficient evidence to detain plaintiff, they could not claim qualified immunity), rev'd en banc on other grounds, 763 F.2d 1560 (7th Cir.), cert. dismissed, 478 U.S. 1044 (1986). For discussion of the argument that the defendant waives the attorney-client privilege as to such discovery by asserting the qualified immunity defense, see infra note 206.

102 For examples of opinions apparently recognizing this factor as a relevant circumstance
a higher standard of knowledge of the applicable constitutional law. The same rationale applies to government officials who have received special training or other information about the area of the law at issue.

Although lawyers and those with access to information about the governing case law should be expected to have greater awareness of the applicable precedents, public officials without such expertise or resources can be required to remain informed to some extent about the state of the law relevant to their duties. As the Sixth Circuit recognized in Glasson v. City of Louisville, "[t]he law does not ex-

in evaluating a defendant's qualified immunity, see Wood v. Strickland, 420 U.S. 308, 331 (1975) (Powell, J., concurring in part and dissenting in part) (noting that few school board members have access to legal advice); Jones v. Preuit & Mauldin, 808 F.2d 1435, 1442 (11th Cir.) (noting that because “defendants obtained the assistance of a lawyer who should have explained to them the import” of existing case law, defendants should have known their conduct was unconstitutional), vacated in part on other grounds on reh'g, 822 F.2d 998 (11th Cir.), reh'g en banc granted, 833 F.2d 1436 (11th Cir. 1987); Blackburn v. Snow, 771 F.2d 556, 570 (1st Cir. 1985) (observing that defendant “consulted no legal or professional authority” before imposing unconstitutional strip search policy); see also Freed, supra note 90, at 557 (suggesting that failure to seek available legal advice should preclude immunity); Kattan, supra note 95, at 985 (same). But see Blackburn v. Snow, 771 F.2d at 575 n.1 (Aldrich, J., dissenting) (arguing that because Harlow focuses on whether or not relevant law was clearly established, defendant's failure to seek legal advice is irrelevant).

Some courts and commentators view the inaccessibility of legal advice as an extraordinary circumstance that justifies the defendant's failure to recognize that she was violating clearly established constitutional rights, rather than as a relevant consideration in determining whether the rights she violated were in fact clearly established. See supra note 70. For the defendant who had no access to legal advice, it makes little difference whether the court considers that factor as one of the relevant circumstances in determining what a reasonable public official in the defendant's circumstances would have known about the state of the law, as advocated here, or as an exceptional circumstance explaining the defendant's unfamiliarity with clearly established law. In both cases, the unavailability of legal advice militates in favor of immunizing the defendant from liability. On the other hand, the defendant who had ready access to legal advice obviously cannot use that factor to support her claim of extraordinary circumstances. In her case, therefore, unless the availability of legal advice is considered one of the relevant circumstances in applying the “reasonable person” language of the qualified immunity standard, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), it will not figure into the court's analysis of the immunity question. As explained in text, that would be an unfortunate result because the accessibility of legal advice is important in determining a public official's entitlement to qualified immunity.

103 For an example of a case apparently recognizing this factor as a relevant circumstance in evaluating a defendant's qualified immunity, see Creamer v. Porter, 754 F.2d 1311, 1319 (5th Cir. 1985) (defendant police officers had received classroom instruction on proper searches and seizures); see also Gildin, supra note 8, at 603.

104 See, e.g., Gildin, supra note 8, at 603 (mentioning consultation with other public employees as relevant consideration); Kattan, supra note 95, at 984-88 (noting that police officers may receive periodic reports concerning legal developments affecting their jobs).
pect police officers to be sophisticated constitutional or criminal lawyers, but because they are charged with the responsibility of enforcing the law, it is not unreasonable to expect them to have some knowledge of it. Just as the goal of deterring crime leads the courts to reject ignorance of the law as an acceptable defense in criminal cases, so preserving the deterrent effect of section 1983 dictates that ignorance of the law should not exempt public officials from liability in civil rights cases.

Similarly, the public official without legal training who consults an attorney and is erroneously advised that her proposed actions are constitutional is not automatically entitled to qualified immunity. The defendant's reliance on such advice is certainly a relevant factor suggesting that she, as a nonlawyer, could not reasonably have known she was acting in violation of the Constitution.

105 Glasson v. City of Louisville, 518 F.2d 899, 910 (6th Cir.), cert. denied, 423 U.S. 930 (1975); see also Wood v. Strickland, 420 U.S. 308, 322 (1975) (observing that qualified immunity standard requiring school board member to be aware of clearly established constitutional rights affecting her students does not put "an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties"); Sourbeer v. Robinson, 791 F.2d 1094, 1104 n.8 (3d Cir. 1986) (noting that defendants' lack of legal training did not immunize them from liability), cert. denied, 107 S. Ct. 3276 (1987).

106 See, e.g., W. LaFave & A. Scott, Criminal Law 413-14 (2d ed. 1986).

107 See Kattan, supra note 95, at 983; Theis, "Good Faith" as a Defense to Suits for Police Deprivations of Individual Rights, 59 Minn. L. Rev. 991, 1020-21 (1975); cf. Misner, Limiting Leon: A Mistake of Law Analogy, 77 J. Crim. L. & Criminology 507 (1986) (analogizing good faith exception to fourth amendment's warrant requirement, which is similar to qualified immunity defense, to mistake of law doctrine).

108 See, e.g., Shank v. Naes, 773 F.2d 1121, 1125-26 (10th Cir. 1985) (in suit alleging unconstitutional arrest and detention, police officers' reliance on County Attorney's advice helped establish officers' good faith and reasonableness); Tanner v. Hardy, 764 F.2d 1024, 1027 (4th Cir. 1985) (whether and when defendant prison officials received legal advice and degree of mature consideration that attorney accorded matter are important to qualified immunity inquiry); Arnsweg v. United States, 757 F.2d 971, 982 (9th Cir. 1985) (police officers' reliance on advice of counsel entitled them to immunity when reasonable attorneys could disagree about controlling law and therefore police officers could not reasonably have been expected to determine independently the constitutionality of attorney's advice), cert. denied, 475 U.S. 1010 (1986); Tubbesing v. Arnold, 742 F.2d 401, 407 (8th Cir. 1984) (noting that defendants "acted in good faith following their attorney's advice" in granting qualified immunity); McElveen v. County of Prince William, 725 F.2d 954, 958 n.5 (4th Cir.) (characterizing reliance on advice of counsel as evidence of good faith), cert. denied, 469 U.S. 819 (1984); Wentz v. Klecker, 721 F.2d 244, 247 (8th Cir. 1983) (in relying on counsel's advice when discharging state employee without hearing, official acted in good faith and did not violate clearly established rights); Bier v. Fleming, 717 F.2d 308, 313 (6th Cir. 1983) (advice of counsel gave defendant "reason to believe" he was performing in "reasonable and appropriate manner"), cert. denied, 465 U.S. 1026 (1984); cf. Brewer v. Blackwell, 692 F.2d 387,
But the Supreme Court held in *Malley v. Briggs* that a police officer who seeks a warrant is not necessarily immune from damages liability if a magistrate mistakenly issues the warrant without sufficient probable cause.  

Likewise, the public official who is informed by counsel that her conduct is constitutional is not entitled to immunity if her reliance on that advice is unreasonable—if, for example, the applicable case law was clear enough that the reasonable public official in the defendant’s circumstances would have realized that she was acting in violation of constitutional norms.

The relevant question, however, is what a reasonable public official in the defendant’s circumstances would have known and not what a legal scholar would have known.

The defendant’s position and rank in the governmental hierarchy is a second relevant circumstance in determining the familiarity with legal doctrine that can reasonably be expected of her. Although a defendant of higher rank who exercises more discretion arguably should be entitled to a greater scope of immunity, that rule should not be mechanically applied. In fact, in some circum-

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399 n.18 (5th Cir. 1982) (leaves open for trial court to decide on remand whether defendant is entitled to qualified immunity based on advice of counsel). But see Okeson v. Tolley School Dist. No. 25, 766 F.2d 378, 380 (8th Cir. 1985) (McMillian, J., dissenting) (arguing that whether defendant consulted attorney is largely irrelevant because under *Harlow*, qualified immunity defense usually fails if law was clearly established).

*109 Malley v. Briggs, 475 U.S. 335, 345-46 (1986)* (police officer forfeits qualified immunity if reasonably well-trained officer in her position would have known that her affidavit in support of warrant request failed to establish probable cause and that she therefore should not have applied for warrant because defendant’s conduct in such a case is not reasonable and creates unnecessary danger of unlawful arrest); cf. United States v. Leon, 468 U.S. 897, 922-23 & n.23 (1984) (adopting similar standard in determining appropriateness of good faith exception to fourth amendment’s warrant requirement).

*110 See, e.g., Watertown Equip. Co. v. Norwest Bank Watertown, N.A., 830 F.2d 1487, 1495-96 (8th Cir. 1987), cert. denied, 108 S. Ct. 1723 (1988); Shank v. Naes, 773 F.2d 1121, 1125 (10th Cir. 1985); Tanner v. Hardy, 764 F.2d 1024, 1027 (4th Cir. 1985); Harden v. Adams, 760 F.2d 1158, 1166 n.3 (11th Cir.), cert. denied, 474 U.S. 1007 (1985); Arnsberg v. United States, 757 F.2d 971, 982 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986); McElveen v. County of Prince William, 725 F.2d 954, 958 n.5 (4th Cir.), cert. denied, 469 U.S. 819 (1984); Wentz v. Klecker, 721 F.2d 244, 247 (8th Cir. 1983); *see also* Perry v. Larson, 794 F.2d 279, 284 (7th Cir. 1986); Bueno v. City of Donna, 714 F.2d 484, 494-95 (5th Cir. 1983); *cf. W. LaFAve & A. Scott, supra note 106, at 419-20* (attorney’s advice that defendant’s action is legal is not recognized as defense in criminal cases); 2 R. Rotunda & J. Nowak, *Treatise on Constitutional Law: Substance and Procedure §19.28, at 83* (Supp. 1987) (punitive damages should not be awarded against private defendant in § 1983 suit if defendant relied in good faith on attorney’s advice, but should not be precluded if attorney’s advice was not credible).
stances high-level officials can be held to a higher standard than lower-echelon employees.

In *Scheuer v. Rhodes*,\(^{111}\) the Court observed that high-level public officials whose responsibilities require numerous discretionary judgments are entitled to greater protection than those officials whose jobs involve less complex tasks and the use of less discretion in accomplishing those tasks.\(^{112}\) The Court explained, "[i]n the case of higher officers of the executive branch . . . , the inquiry is far more complex since the range of decisions and choices—whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions—is virtually infinite."\(^{113}\) The Court therefore held that one of the relevant circumstances in determining whether a particular defendant was protected by the qualified immunity defense was "the scope of discretion and responsibilities of the office."\(^{114}\) Eight years later, the Court implied in *Harlow* that this doctrine retained some validity, observing that *Scheuer* had "acknowledged that high officials require greater protection than those with less complex discretionary responsibilities."\(^{115}\) Perhaps relying on this language, some courts of appeals have noted that even after *Harlow* high-level defendants whose responsibilities require the exercise of considerable discretion may be entitled to a greater degree of immunity.\(^{116}\)

Broader immunity might be appropriate for high-level officials in order to ensure that fear of liability does not deter them from in-


\(^{112}\) Id. at 246-47.

\(^{113}\) Id. at 246.

\(^{114}\) Id. at 247. The critical fact is not the defendant's title or rank in the governmental hierarchy, but the nature of her duties and the extent to which they require the exercise of discretion. See id.; McCann, *supra* note 69, at 136 n.122 (noting that police officers, teachers, and other "first tier government officials" may exercise considerably more discretion than their immediate superiors and other "middle management official[s]").


\(^{116}\) See, e.g., *De Abadia v. Izquierdo Mora*, 792 F.2d 1187, 1191 (1st Cir. 1986) (employment decisions at "higher levels" are essential to effective implementation of important government policies and, as such, are type of action for which wide discretion under qualified immunity is appropriate); *Coleman v. Frantz*, 754 F.2d 719, 732 (7th Cir. 1985) (Gordon, J., dissenting) (noting that defendant sheriff "did not act as executive endowed with broad discretion" and responsibilities; therefore, he was not entitled to "as comprehensive a range of discretion under the qualified immunity doctrine as high executive officials"); *Crowder v. Lash*, 687 F.2d 996, 1006-07 (7th Cir. 1982) (type of immunity depends on "scope of . . . discretion and responsibilities of . . . office"); see also *Harv. 1981 Term, supra* note 8, at 231 n.41 (citing *Scheuer* in discussing current status of qualified immunity doctrine).
dependently exercising their discretion in the public interest. Nevertheless, higher-ranking officials should not automatically be afforded greater protection than their lower-level subordinates. Once Harlow focused the qualified immunity inquiry on the defendant's knowledge of clearly established law, the justification for immunizing high-level officials in a wider range of cases seems less compelling. In fact, public officials of higher rank are more likely to have the staff and resources necessary to keep them informed of recent legal developments.

In addition, greater freedom of choice, which Scheuer recognized often characterizes higher-level positions, means that such officials are less likely to be constrained by directions from their superiors or other restrictions that limit the permissible range of their decisions. The police officer who arrests a suspect on instructions from her sergeant, pursuant to standard police department procedure, or in reliance on applicable state statutes or regula-

118 See, e.g., Sourbeer v. Robinson, 791 F.2d 1094, 1109 (3d Cir. 1986) (Weis, J., dissenting) (describing Attorney General as an “individual with legal training who had extensive support personnel to assist in a highly professional evaluation of existing law”), cert. denied, 107 S. Ct. 3276 (1987); Kattan, supra note 95, at 984-85 (arguing that higher-level personnel may have duty to acquaint themselves with relevant law before acting in areas raising constitutional questions and that consultation with counsel should be required at policymaking level).
119 See Scheuer, 416 U.S. at 247; see also supra note 113 and accompanying text.
120 See, e.g., Scheuer, 416 U.S. at 250 (recognizing “good-faith obedience to orders of their superiors” as one relevant factor in evaluating claims of qualified immunity); Sourbeer, 791 F.2d at 1110 (Weis, J., dissenting) (same); Dorsey v. Moore, 719 F.2d 1263, 1264 (5th Cir. 1983) (state official who removed child from plaintiffs' home pursuant to supervisor's and court's approval acted in good faith and thus was entitled to qualified immunity); Freed, supra note 90, at 558-59 (suggestions that reliance on directives of authorized superiors should entitle official to immunity as matter of law).
121 See, e.g., Sullivan v. Town of Salem, 805 F.2d 81, 87 (2d Cir. 1986) (if officers relied on established town policy, qualified immunity would be available to them); Vizbaras v. Prieber, 761 F.2d 1013, 1016 (4th Cir. 1985) (defendant police officers' reliance on standard operating procedures regarding use of force was properly considered by jury in determining appropriateness of qualified immunity under Harlow), cert. denied, 474 U.S. 1101 (1986); Heller v. Bushey, 759 F.2d 1371, 1373-74 (9th Cir. 1985) (police officer's compliance with department policy regarding use of force entitled him to qualified immunity), rev'd per curiam on other grounds sub nom. City of Los Angeles v. Heller, 475 U.S. 796 (1986); Dykes v. Hosemann, 743 F.2d 1488, 1504 (11th Cir. 1984) (Hill, J., dissenting) (arguing qualified immunity should protect state official who acted pursuant to statutory duty and followed customary practice and procedure, which did not require him to give notice to plaintiff prior to custody hearing, despite plaintiff's allegations that official participated in conspiracy to deprive her of constitutional right to notice), reh'g en banc granted, 776 F.2d 942 (11th Cir. 1985).
tions may have less reason to suspect that she is acting unconstitutionally than the high-level official who has greater autonomy in making her decisions. Under such circumstances, the police officer is not protected by qualified immunity if her failure to recognize the unlawfulness of the supervisor’s instruction or the state statute is unreasonable. Just as the public official who violates state law

122 See, e.g., Chilicky v. Schweiker, 796 F.2d 1131, 1138 (9th Cir. 1986) (defendants who allegedly acted unconstitutionally in terminating plaintiff’s disability benefits relied on Congressionally mandated termination procedure, presidential directive to implement program, and “administrative policy guideline instructing Social Security Administration officials to ignore certain case authority”), rev’d on other grounds, 108 S. Ct. 2460 (1988); Malachowski v. City of Keene, 787 F.2d 704, 714 (1st Cir.) (qualified immunity protected defendant who acted in reliance on state statutory law), cert. denied, 479 U.S. 828 (1986); Benson v. Allphin, 786 F.2d 268, 278 (7th Cir.) (because defendants acted pursuant to state statute, the validity of which had never been challenged, “it is difficult to see how the defendants could conclude that they were violating the clearly established First Amendment rights of the plaintiff”), cert. denied, 479 U.S. 828 (1986); Schlothauer v. Robinson, 757 F.2d 196, 197-98 (8th Cir. 1985) (per curiam) (“because the officers acted in accordance with Nebraska law and because police officers are not charged with predicting the future course of constitutional law,” they were entitled to qualified immunity); Evers v. County of Custer, 745 F.2d 1196, 1203 (9th Cir. 1984) (defendants “acted according to a reasonable interpretation” of state statute and were thus entitled to qualified immunity); Kennerly v. United States, 721 F.2d 1252, 1259-60 (9th Cir. 1983) (in action by Indian tribal member alleging due process was violated when funds were withdrawn from his Indian money account, tribal officials who acted pursuant to federal regulations were entitled to qualified immunity where constitutional deficiencies of regulations were wholly beyond their control or direct knowledge); Zeigler v. Jackson, 716 F.2d 847, 849-50 (11th Cir. 1983) (per curiam) (state officials reasonably believed state law required them to deny plaintiff’s application for police training); Trejo v. Perez, 693 F.2d 482, 484-85 (5th Cir. 1982) (police officer who acted in reliance on state statute not declared unconstitutional for another two years did not behave unreasonably and was therefore immune); Green v. White, 693 F.2d 45, 48 (8th Cir. 1982) (prison official may rely on state regulations regarding permissible hair length for prisoners), cert. denied, 462 U.S. 1111 (1983); Kattan, supra note 95, at 994-95 (arguing that “burden of compensating the victim should be directed at supervisory personnel, who are in a better position to question the validity” of unconstitutional statutes); cf. O’Connor v. Donaldson, 422 U.S. 563, 577 (1975) (under pre-Harlow formulation of qualified immunity standard, remanding for court of appeals to consider defendant’s claim of reliance on state law in connection with qualified immunity defense).

123 See, e.g., Fields v. City of Omaha, 810 F.2d 830, 834-35 (8th Cir. 1987) (refusing to grant qualified immunity to police officer who arrested plaintiff for violating unconstitutional loitering ordinance, despite finding that “no doubts had surfaced regarding the con-
does not necessarily forfeit qualified immunity,\(^{124}\) so the official's compliance with state law is not necessarily controlling on the question of immunity. Nevertheless, the fact that the defendant's action was based on standard procedures or a supervisor's orders is relevant in determining whether a reasonable person under the same circumstances would have realized that her conduct was unconstitutional.\(^{125}\) In many cases, such an argument is more likely to be available to lower-level public officials.

Additionally, decisions and actions by high-level officials often affect a broader group of people, creating the danger of a more widespread violation of constitutional rights. As the Court noted in Butz v. Economou, "the greater power of such officials affords a greater potential for a regime of lawless conduct."\(^{126}\) Although the police officer's arrest of a suspect without probable cause violates that individual's fourth amendment rights, any decision made by the United States Attorney General regarding arrest policies is much more likely to "offer opportunities for unconstitutional ac-

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\(^{124}\) See Davis v. Scherer, 468 U.S. 183, 193-96 (1984) (only issue for qualified immunity purposes is whether constitutional right allegedly violated by defendants was clearly established; thus, defendants' violation of well-established state regulation is irrelevant to immunity inquiry); see also supra note 25 and accompanying text.

\(^{125}\) Some cases treat the defendant's reliance on such factors as an extraordinary circumstance that justifies her failure to recognize that she was violating clearly established constitutional rights, rather than as a relevant consideration in determining whether the rights she violated were in fact clearly established. See supra notes 70 & 102.

tion on a massive scale."\(^{127}\) Recognizing this broader potential for civil rights violations, the reasonable high-level official should be expected to take greater precautions to ensure that the actions she is contemplating are constitutional before proceeding to implement those plans.

The extent to which the defendant was forced to act hastily is a third factor to be considered in determining whether she was as cognizant of applicable legal precedents as the reasonable public official in her circumstances would have been.\(^{128}\) As Justice Powell noted in his separate opinion in Malley v. Briggs, police officers are forced to "make judgment calls over which reasonable officers could differ" because they "often operate 'in the midst and haste of a criminal investigation.' "\(^{129}\) Higher-level public officials, by contrast, may act under less pressing time constraints when making many decisions.\(^{130}\) The luxury of time may more frequently provide the high-ranking official with an opportunity to ascertain the legality of her actions that would not have been available had she needed to come to a quick decision.

These factors—the defendant’s legal training or access to legal advice, her rank and responsibilities, and the time constraints under which she operated—are the three primary “circumstances”

\(^{127}\) Id.; see, e.g., Dellums v. Powell, 561 F.2d 242, 247 (D.C. Cir.) (high-level Justice Department and White House officials, including Attorney General, allegedly conspired to violate Constitution in connection with arrest and detention of approximately 1200 persons during peaceful protest of Vietnam War), cert. denied, 434 U.S. 880 (1977).

\(^{128}\) See, e.g., Halperin v. Kissinger, 606 F.2d 1192, 1212 (D.C. Cir. 1979) (considering time demands and emergency situation in granting President qualified immunity in action alleging unconstitutional wiretap), aff’d by an equally divided Court, 452 U.S. 713 (1981); Foster v. Zeeko, 540 F.2d 1310, 1314 (7th Cir. 1976) (noting that police officers are often required to act in haste); Laverne v. Corning, 522 F.2d 1144, 1149-50 (2d Cir. 1975) (noting that while quick action was not required by building inspectors accused of unconstitutional warrantless inspection, such haste would be relevant factor in determining reasonableness of belief that conduct was lawful); Glasson v. City of Louisville, 518 F.2d 899, 908 (6th Cir.) (noting that police officers may be acting in “urgency of a street confrontation and not in the contemplative atmosphere of judicial chambers”), cert. denied, 423 U.S. 930 (1975); Freed, supra note 90, at 557; McCann, supra note 69, at 135.


\(^{130}\) See, e.g., Kattan, supra note 95, at 985; McCann, supra note 69, at 135-36. Of course, this is not invariably true. See, e.g., Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (in deciding to deploy the Ohio National Guard during Kent State tragedy, Governor and other high-level executive officials were acting in “atmosphere of confusion, ambiguity, and swiftly moving events”).
a court should consider in determining whether a public official in
the defendant's circumstances would have known that her conduct
was violating constitutional norms.\textsuperscript{131} Although such an inquiry fo-
cuses the court's attention on the characteristics of the particular
defendant and thus may require some development of the factual
record,\textsuperscript{132} a more generalized, abstract approach to the qualified
immunity question is necessarily less precise and operates at the
expense of either blameless public officials or innocent victims of
constitutional violations. \textit{Harlow}'s instruction that "insubstantial
claims"\textsuperscript{133} should be resolved in the defendant's favor on summary
judgment does not compel such a result.

Moreover, a more abstract qualified immunity standard is not
required by the Supreme Court's decisions. \textit{Harlow} itself does not
directly discuss this issue; the only relevant portion of the opinion
is the Court's reference to \textit{Scheuer v. Rhodes}, which suggests that
the \textit{Harlow} Court envisioned continued application of a variable
qualified immunity analysis depending on the nature of the de-
fendant's governmental responsibilities.\textsuperscript{134}

The Court's later opinion in \textit{Davis v. Scherer},\textsuperscript{135} however, might
be read as casting some doubt on this conclusion. The plaintiff in
that case claimed that the defendants had violated his due process
rights by discharging him from his job without the requisite proce-
dural safeguards. The Court was critical of the district court's sug-

\textsuperscript{131} For a discussion of other circumstances that courts have suggested may be relevant in
determining the level of familiarity with applicable case law that can reasonably be expected
of the defendant, see Wood v. Strickland, 420 U.S. 308, 331 (1975) (Powell, J., concurring in
part and dissenting in part) (whether defendant is compensated for her public employ-
ment); Creamer v. Porter, 754 F.2d 1311, 1319 (5th Cir. 1985) (number of years of experi-
ence on job); Folsom Inv. Co. v. Moore, 681 F.2d 1032, 1037 (5th Cir. 1982) (whether defend-
ant is public official or private citizen sued under \textsection{1983} because
she conspired with
government employee to violate plaintiff's constitutional rights); cf. LaFave, "The Seductive
L. Rev. 895, 914-15 (arguing, in context of good faith exception to fourth amendment's war-
rant requirement, which is analogous to qualified immunity, that police officer's actual
knowledge concerning insufficiency of warrant application should be one relevant circum-
stance in determining what reasonable officer in her circumstances would have known).

\textsuperscript{132} See HARv. 1981 Term, supra note 8, at 234 n.63; see also infra notes 206-08 and ac-
companying text.

\textsuperscript{133} Harlow v. Fitzgerald, 457 U.S. 800, 816, 818 (1982).

\textsuperscript{134} See id. at 807 (observing that \textit{Scheuer} "acknowledged that high officials require
greater protection than those with less complex discretionary duties"); see also supra notes 111-16 and accompanying text.

\textsuperscript{135} 468 U.S. 183 (1984).
gestion, based on Scheuer, that the defendants' entitlement to qualified immunity depended upon "the 'totality of the circumstances' surrounding [the plaintiff's] separation from his job." Rather, the Court admonished, qualified immunity rests entirely upon the "objective reasonableness of [the defendants'] conduct as measured by reference to clearly established law.' No other 'circumstances' are relevant to the issue of qualified immunity."

By holding that no "circumstances" other than the state of the law are relevant, however, Davis did not decide that the courts are barred from asking what a reasonable person in the defendant's circumstances would have known about the governing case law. That question was not presented to the Court in Davis, and the language quoted above appears in a portion of the opinion intended to emphasize that the "circumstance" of the defendant's subjective state of mind is no longer relevant to qualified immunity analysis after Harlow. Aside from indicating that the Harlow standard is an objective one, Davis made no effort to define the precise nature of the objective inquiry. Even if the only relevant "circumstance" in evaluating a claim of qualified immunity is the objective reasonableness of the defendant's conduct, a court may still implement that objective test by measuring the defendant's

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136 Id. at 191. Scheuer v. Rhodes had held that the qualified immunity available to public officials varied depending upon "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." 416 U.S. 232, 247 (1974) (emphasis added).

137 Davis, 468 U.S. at 191 (quoting Harlow, 457 U.S. at 818) (citation omitted). 

138 The Court's entire discussion is as follows:

The District Court's analysis of appellants' qualified immunity, written before our decision in Harlow v. Fitzgerald, rests upon the "totality of the circumstances" surrounding appellee's separation from his job. This Court applied that standard in Scheuer v. Rhodes. As subsequent cases recognized, the "totality of the circumstances" test comprised two separate inquiries: an inquiry into the objective reasonableness of the defendant official's conduct in light of the governing law, and an inquiry into the official's subjective state of mind. Harlow v. Fitzgerald rejected the inquiry into state of mind in favor of a wholly objective standard. Under Harlow, officials "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." Whether an official may prevail in his qualified immunity defense depends upon the "objective reasonableness of [his] conduct as measured by reference to clearly established law." No other "circumstances" are relevant to the issue of qualified immunity. 

Id. at 190-91 (citations omitted) (emphasis added).
conduct against what would be expected of a reasonable person in like circumstances. Moreover, the Court’s subsequent decisions indicate that Davis does not dictate the answer to this question. In Malley v. Briggs, a section 1983 suit against a state trooper who allegedly violated the plaintiffs’ fourth amendment rights by arresting them without probable cause, the Court noted that the defendant’s immunity depended upon “whether a reasonably well-trained officer in [defendant’s] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.” The separate opinion by Justice Powell, the author of Harlow, agreed with that standard, thereby suggesting that qualified immunity analysis depends upon the circumstances confronting the defendant at the time she acted and that one relevant circumstance is the nature of her governmental position. Anderson v. Creighton, which involved another fourth amendment claim against a law enforcement official, gives somewhat ambiguous signals on this issue. First, the Court indicated that the relevant question in determining the defendant’s entitlement to qualified immunity was whether a “reasonable officer” could have believed that her search was lawful, given the established law and the information she possessed. Later on the very same page, however, the Court expressed its reluctance “to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials’ duties or the precise character of the particular rights alleged to have been violated.” Again, the content of the reasonable person standard was not directly before the Court in Anderson; rather, the Court’s primary concern was how precisely the right allegedly violated by the defendant is to be defined for qualified immunity purposes. Moreover, these apparently contradictory statements can be reconciled.

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139 Malley v. Briggs, 475 U.S. 335, 345 (1986) (emphasis added); see also id. at 341 (immunity unavailable if “no reasonably competent officer would have concluded that a warrant should issue”).
140 See id. at 349 (Powell, J., concurring in part and dissenting in part).
142 Id. at 3040 (emphasis added); see also id. at 3038 (citing “reasonable officer” language in Malley, 475 U.S. at 341), and id. at 3043 (Stevens, J., dissenting) (“reasonable person in [defendant’s] position”).
143 Anderson, 107 S. Ct. at 3040.
144 See supra notes 37-40 and accompanying text.
by an approach that does not make the defendant’s qualified immunity turn on the “precise” nature of her responsibilities but does take into account the “general” contours of her position in the government. A court must conduct at least that limited inquiry into the circumstances under which the defendant was operating in order to evaluate fairly whether the reasonable public official in those same circumstances would have known that she was acting unconstitutionally.\footnote{See supra notes 94-99 and accompanying text.}

Thus, the Court’s decisions do not foreclose a qualified immunity analysis that asks whether the reasonable public official in the defendant’s circumstances would have realized that her conduct was unconstitutional. Interpreting Harlow to permit such an inquiry is critical in order to ensure that the immunity doctrine protects only those public officials who are as cognizant of constitutional norms as they reasonably can be expected to be and who therefore deserve to be shielded from damages liability.

III. THE PROCEDURAL ASPECTS OF QUALIFIED IMMUNITY

In addition to these questions concerning the substantive scope of the qualified immunity defense, the Supreme Court has failed to clarify two aspects of the procedures to be used under Harlow in resolving a defendant’s claim to immunity. First, which party has the burden of proof? Must the plaintiff prove that the defendant breached clearly established constitutional norms, or must the defendant prove that the rights allegedly violated were not clearly established at the time she acted? Second, to what extent is the plaintiff permitted to conduct discovery prior to the court’s determination of the defendant’s entitlement to qualified immunity? The following discussion addresses these two questions.

A. Burden of Proof

Although the Supreme Court indicated in Gomez v. Toledo that qualified immunity is an affirmative defense that the defendant has the burden of pleading,\footnote{Gomez v. Toledo, 446 U.S. 635, 639-41 (1980).} the Court has never expressly decided which party bears the ultimate burden of proof.\footnote{The term “burden of proof” has been used to refer to two separate burdens: the burden of producing evidence on an issue so as to avoid a directed verdict on that issue, and the burden of persuasion.} Neither
the federal courts of appeals nor the commentators have reached agreement on the proper placement of the burden of proof. In fact, in almost every circuit, one finds decisions reaching contrary results on this question. In Schlegel v. Bebout, for example, the Ninth Circuit held that the defendants were “entitled to immunity if they [could] prove that a reasonable . . . official could have believed that the action taken was lawful, in light of clearly estab-

148 For examples of cases suggesting that the plaintiff has the burden of proof, see Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 645 (10th Cir. 1983); Abel v. Miller, 824 F.2d 1522, 1534 (7th Cir. 1987); Whatley v. Philo, 817 F.2d 19, 20 (5th Cir. 1987); Lutz v. Weld County School Dist. No. 6, 784 F.2d 340, 342-43 (10th Cir. 1986) (per curiam); Backlund v. Barnhart, 778 F.2d 1386, 1389 (9th Cir. 1985); Sprecher v. Von Stein, 772 F.2d 16, 18 (2d Cir. 1985) (per curiam); Littlejohn v. Rose, 768 F.2d 765, 772 (6th Cir. 1985), cert. denied, 475 U.S. 1045 (1986); Wilson v. Schillinger, 761 F.2d 921, 930 (3d Cir. 1985), cert. denied, 475 U.S. 1096 (1986); Green v. White, 693 F.2d 45, 47 (8th Cir. 1982), cert. denied, 462 U.S. 1111 (1983); cf. Flinn v. Gordon, 775 F.2d 1551, 1553 (11th Cir. 1985) (defendant has burden of proving that she was acting within scope of discretionary authority when alleged constitutional violation occurred; burden then shifts to plaintiff to rebut qualified immunity defense by showing that defendant violated clearly established constitutional rights), cert. denied, 476 U.S. 1116 (1986); Saldana v. Garza, 684 F.2d 1159, 1163 (5th Cir. 1982) (same), cert. denied, 460 U.S. 1012 (1983). See also Vand. Note, supra note 41, at 1568-70.

For examples of cases suggesting that the defendant has the burden of proof, see Schlegel v. Bebout, 841 F.2d 937, 945 (9th Cir. 1988); Rykers v. Alford, 832 F.2d 895, 899 (5th Cir. 1987); Watertown Equip. Co. v. Norwest Bank Watertown, N.A., 830 F.2d 1487, 1490 (8th Cir. 1987), cert. denied, 105 S. Ct. 1723 (1985); Kovats v. Rutgers State Univ., 822 F.2d 1303, 1312-13 (3d Cir. 1987); Jones v. Preuit & Mauldin, 803 F.2d 1435, 1442 (11th Cir.), vacated in part on other grounds on reh'g, 822 F.2d 1436 (11th Cir. 1987); Arrington v. McDonald, 803 F.2d 466, 467 (6th Cir. 1986); Tanner v. Hardy, 764 F.2d 1024, 1027 (4th Cir. 1985); Heller v. Bushey, 759 F.2d 1371, 1373 n.1 (9th Cir. 1985), rev'd per curiam on other grounds sub nom. City of Los Angeles v. Heller, 475 U.S. 796 (1986); Crane v. State of Texas, 769 F.2d 412, 428 n.17 (5th Cir.), vacated in part on other grounds on reh'g, 766 F.2d 193 (5th Cir.) (per curiam), cert. denied, 474 U.S. 1020 (1985); Arebaugh v. Dalton, 730 F.2d 970, 972 (4th Cir. 1984); Tuttle v. City of Oklahoma City, 728 F.2d 456, 458 (10th Cir. 1984), rev'd on other grounds, 471 U.S. 808 (1985); B.C.R. Transp. Co. v. Fontaine, 727 F.2d 7, 10 (1st Cir. 1984); Wyler v. United States, 725 F.2d 156, 159 (2d Cir. 1983); Zweibon v. Mitchell, 720 F.2d 162, 174 n.19 (D.C. Cir. 1983), cert. denied, 469 U.S. 880 (1984); Buller v. Buechler, 706 F.2d 844, 850 (5th Cir. 1983); Alexander v. Alexander, 706 F.2d 751, 754 (6th Cir. 1983); Chavez v. Singer, 698 F.2d 420, 421 (10th Cir. 1983). See also Gildin, supra note 8, at 594-98; Kattan, supra note 95, at 986-89 (pre-Harlow); Tex. Note, supra note 67, at 141-44 (pre-Harlow).

149 See supra note 148 and infra note 152 (citing conflicting cases from all but Fourth Circuit).
lished law.”¹¹⁰ In Backlund v. Barnhart, by contrast, the same court observed that “to survive summary judgment, a plaintiff . . . must show that the defendant violated a particular ‘clearly established’ right.”¹¹¹ Sometimes conflicting signals even appear within the same opinion.¹¹²

Ascertaining the lower courts’ views on this issue is further impeded because the decisions often use phrases such as “the plaintiff has not demonstrated” or “the defendant must show” without any indication whether the court intends to specify which party has the burden of proof or is simply choosing its words carelessly, without recognizing their potential impact on the burden of proof question.¹¹³ Moreover, even those opinions that are obviously meant to allocate the burden of proof almost invariably fail to include any discussion or explanation of the outcome.

Nevertheless, the relevant policy considerations point in favor of placing the burden of proof on the defendant. One method often used to allocate the burden of proof on any given issue is to impose the burden on the party that has “readier access” to the facts relevant to that issue.¹¹⁴ Admittedly, each party has equal access to

¹¹⁰ Schlegel v. Bebout, 841 F.2d 937, 945 (9th Cir. 1988).
¹¹¹ Backlund v. Barnhart, 778 F.2d 1386, 1389 (9th Cir. 1985).
¹¹² For cases containing language supporting placement of the burden of proof on both the plaintiff and the defendant, see Knight v. Mills, 836 F.2d 659, 666, 667 (1st Cir. 1987); Kompare v. Stein, 801 F.2d 883, 886, 892 (7th Cir. 1986); Lojuk v. Johnson, 770 F.2d 619, 628 (7th Cir. 1985), cert. denied, 474 U.S. 1087 (1986); Gray v. Bell, 712 F.2d 490, 496, 505 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984). See also Hyson v. City of Chester, 827 F.2d 932, 935 (3d Cir. 1987) (although defendant has burdens of pleading and proof, plaintiff can defeat defendant’s qualified immunity claim only by showing that those rights were clearly established at time of conduct at issue), cert. denied, 108 S. Ct. 702 (1988).
¹¹³ For a few examples, see Knight, 836 F.2d at 666, 667; Kompare, 801 F.2d at 892; Lojuk, 770 F.2d at 628; Gray, 712 F.2d at 505.
¹¹⁴ F. JAMES & G. HAZARD, CIVIL PROCEDURE § 7.8, at 324 (3d ed. 1985); McCormick, supra, note 147, at 950. In some cases, a party may be required to shoulder the burden of proof on an issue as to which her opponent has superior knowledge. See id.; Tex. Note, supra note 67, at 141 n.97. Typically, however, this happens in cases where “the consideration arising from greater access to evidence is overcome by a feeling that a charge of wrongdoing should in fairness be proven by the party making it.” F. JAMES & G. HAZARD, supra, at 324. See, e.g., Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (interpreting securities laws to require plaintiffs to prove intent to deceive or defraud on part of defendant in civil damages suit challenging fraudulent securities scheme). That rationale is inapplicable in the qualified immunity context because the qualified immunity defense is not an attempt by the plaintiff to prove wrongdoing on the defendant’s part—the plaintiff will have to make that showing at trial in order to prove the defendant deprived her of a constitutional right and thus to
the legal research materials necessary to construct the argument that certain conduct is or is not proscribed by clearly established law. But the defendant clearly has sole control over information concerning both her knowledge of the relevant case law and the nature of her governmental responsibilities, access to legal advice, and other circumstances that are critical in determining whether a reasonable public official in her circumstances would have recognized the unconstitutionality of her conduct. Because these factors must be taken into account in ruling on a qualified immunity claim, the defendant's superior access to the relevant information suggests that the burden of proof should be placed on her.

Moreover, the Court's decision in Gomez to require the defendant to shoulder the burden of pleading the qualified immunity defense was based in part on the Court's observation that "[a]s reme-

support her claim for damages. Rather, the qualified immunity defense is an attempt by the defendant to prove that any wrongdoing on her part was not so egregious as to violate clearly established constitutional rights.

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155 See Gomez v. Toledo, 446 U.S. 635, 641 (1980) (noting under pre-Harlow formulation of qualified immunity standard that plaintiff may not know what defendant believed about legality of conduct, and explaining further that defendant's belief may be based on "state or local law, advice of counsel, administrative practice, or some other factor of which the official alone is aware").
154 See supra notes 42-145 and accompanying text. If the approach suggested in Part II is rejected, so that a court ruling on the defendant's claim of qualified immunity does not inquire whether the defendant actually knew that her conduct was unconstitutional and evaluates only whether the law was clearly established in the abstract, without reference to the particular circumstances confronting the defendant, the placement of the burden of proof is of less consequence. In that event, qualified immunity more often becomes a pure question of law—was the constitutional right allegedly infringed by the defendant clearly established on the date of the purported violation? The court can ask the parties to brief that legal question, but responsibility for resolving the issue lies with the court; technically, therefore, perhaps neither party has the burden of proof. See Dominic v. Telb, 831 F.2d 673, 676-77 (6th Cir. 1987); see also infra note 224. But cf. Vand. Note, supra note 41, at 1567 n.115 (noting that one party must "bear the risk of nonpersuasion" because of possibility that court will be in doubt even on this purely legal question).
153 This conclusion is not foreclosed by the principle that no party should be required to prove a negative. That maxim was applied primarily in older cases and generally is not considered by modern courts in allocating the burden of proof, see McCormick, supra note 147, at 949, perhaps because language can easily be manipulated to state either an affirmative or a negative proposition. See F. James & G. Hazard, supra note 154, §7.8, at 322; McCormick, supra note 147, at 949. For example, demonstrating that the law was not clearly established when the defendant acted involves proving a negative, whereas proving that the law was ambiguous at the relevant time creates no such difficulty.
dial legislation, § 1983 is to be construed generously to further its primary purpose.\textsuperscript{160} This observation implicates another policy consideration that supports placing the burden of proof on the defendant.\textsuperscript{160} If the statute is to be "construed generously" to further its underlying purpose—to "‘vindicat[e] cherished constitutional guarantees’"\textsuperscript{161}—the burden of proving the qualified immunity defense should fall on the defendant. Qualified immunity protects even those public officials who admittedly violated constitutional norms, so long as those rights were not clearly established at the time. Therefore, defendants who wish to take advantage of the exception to section 1983's general aim of compensating and deterring such deprivations that the qualified immunity doctrine creates should be forced to prove their entitlement to that exception.\textsuperscript{162} There is no countervailing public policy consideration that outweighs these legislative goals and mandates that the plaintiff shoulder the burden of proof on the qualified immunity issue.

Likewise, the Supreme Court's qualified immunity decisions do not require that the plaintiff prove qualified immunity is unwarranted. In fact, by characterizing qualified immunity as an "affirmative defense" or an "immunity" from liability, the Court implies that it is a matter to be proved by the defendant.\textsuperscript{163} Gomez v. Toledo held that the defendant has the burden of raising the defense, so that a well-pleaded complaint need not mention qualified immunity,\textsuperscript{164} but Gomez did not discuss the burden of proof. Justice Rehnquist concurred in the majority's opinion on

\textsuperscript{160} Gomez v. Toledo, 446 U.S. 635, 639 (1980); see also Felder v. Casey, 108 S. Ct. 2302, 2307 (1988) (observing that § 1983 "is to be accorded 'a sweep as broad as its language' ") (quoting United States v. Price, 383 U.S. 787, 801 (1966)).

\textsuperscript{161} See Gildin, supra note 8, at 597. In addition, Gomez relied for support on analogous areas of the law where the burden of pleading is imposed on the defendant, see Gomez, 446 U.S. at 641 & n.8; the defendant likewise has the burden of proof on those issues. Gildin, supra note 8, at 598.

\textsuperscript{162} Gomez, 446 U.S. at 639 (quoting Owen v. City of Independence, 445 U.S. 622, 651 (1980)).

\textsuperscript{163} See Kattan, supra note 95, at 988; TEX. Note, supra note 67, at 143-44; cf. VAND. Note, supra note 41, at 1568 (noting that burden of proof is often used as "‘handicap' to discourage the making of a 'disfavored contention' ") (quoting F. JAMES & G. HAZARD, supra note 154, at 252 (2d ed. 1977)).

\textsuperscript{164} Gomez, 446 U.S. at 639-41. Fed. R. Civ. P. 8(c), for example, lists a number of affirmative defenses that must be both pleaded and proved by the defendant. See 2A J. MOORE, J. LUCAS & G. GROTHEER, MOORE'S FEDERAL PRACTICE ¶ 8.27[2], at 8-181 (2d ed. 1987).

\textsuperscript{164} Gomez, 446 U.S. at 639-41.
the understanding that the Court was not deciding the burden of proof question, and the Harlow Court indicated that Gomez had left open the proper placement of the burden of proof. Nevertheless, by requiring the defendant to plead the qualified immunity defense, Gomez suggests that the defendant should also have the burden of proof because traditionally the burden of proof follows the burden of pleading. Consistent with this general rule, the federal courts tended to place the burden of proving qualified immunity on the defendant before Harlow revised the defense.

Harlow itself did not indicate any intent to alter that practice. In fact, Harlow also characterized qualified immunity as an affirmative defense and expressly reaffirmed Gomez. The Court did suggest, however, that the defendant has the burden of proof when invoking the extraordinary circumstances exception to the qualified immunity defense: "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." Requiring the defendant to prove the extraordinary circumstances exception arguably supports placing the burden of proving the defense itself on the defendant. That inference is justified by the close correspondence between the qualified immunity standard and the extraordinary circumstances exception: immunity is available unless the defendant violated

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165 Id. at 642 (Rehnquist, J., concurring).
167 See, e.g., F. JAMES & G. HAZARD, supra note 154, § 4.5, at 196-97; id. § 7.8, at 322-23; McCormick, supra note 147, at 948. Although there are some exceptions to this general rule, they typically arise in diversity cases where the court follows Fed. R. Civ. P. 8(c) and requires the defendant to plead a certain defense, but then applies the state's substantive law and imposes the burden of proof on the plaintiff as to that issue. See McCormick, supra note 147, at 949 (citing contributory negligence as example); see also J. MOORE, J. LUCAS & G. GROTHeER, supra note 163, § 8.27[2]. But see 2 R. ROTUNDA, J. NOWAK & J. YOUNG, supra note 12, § 19.30 (arguing that rationale on which Gomez is based is no longer applicable since Harlow reformulated qualified immunity standard).
168 See, e.g., Gildin, supra note 8, at 596 & n.214, 623 n.387; Kattan, supra note 95, at 987 & n.238; VAND. Note, supra note 41, at 1566 & n.115.
169 Harlow, 457 U.S. at 815.
170 Id. at 819 (emphasis added). The lower courts have interpreted this language as placing the burden of proof on the defendant at least with respect to the extraordinary circumstances exception. See, e.g., Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336, 1348 (7th Cir. 1985) (opinion of Coffey, J.); Arebaugh v. Dalton, 730 F.2d 970, 972 (4th Cir. 1984); Trejo v. Perez, 693 F.2d 482, 485 n.5, 488 n.10 (5th Cir. 1982).
171 See Alexander v. Alexander, 706 F.2d 751, 754 (6th Cir. 1983).
clearly established constitutional rights of which a reasonable person would have known, and the exception comes into play when, as the result of some extraordinary circumstance, the defendant neither knew nor should have known of the relevant legal standard. Given the similarity of the two inquiries, separating the burdens of proof does not make sense.

The Court’s post-Harlow cases have not specifically addressed the issue, although a number of the lower courts that have placed the burden of proof on the plaintiff have seized on language in some of those decisions that arguably implies an opinion on the question. In Davis v. Scherer, the Court observed that “[a] plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official’s qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue.” This sentence cannot be considered dispositive, however, given that it appears in the summation paragraph at the very end of an opinion that did not directly discuss the issue.

Even less conclusive is the Court’s remark in Mitchell v. Forsyth that “[u]nless 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.” Although this language indicates that a public official is immune from liability unless the court concludes that the actions the plaintiff ascribes to the defendant violated the plaintiff’s clearly established constitutional rights, it does not say that the burden of proving that those actions contravened clearly established law falls on the plaintiff. Any other reading of this language would be contrary to the holding in Gomez that a well-pleaded section 1983 complaint need not rebut the defendant’s possible qualified immunity defense.

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172 Harlow, 457 U.S. at 818-19; see also supra note 70.
173 Davis v. Scherer, 468 U.S. 183, 197 (1984) (emphasis added). For examples of cases relying on this language, see Abel v. Miller, 824 F.2d 1522, 1534 (7th Cir. 1987); Martin v. D.C. Metro. Police Dept', 812 F.2d 1425, 1434 n.19 (D.C. Cir. 1987); Lutz v. Weld County School Dist. No. 6, 784 F.2d 340, 342-43 (10th Cir. 1986) (per curiam); see also Vand. Note, supra note 41, at 1570 & n.143.
175 For a discussion of the relevance of Mitchell’s language to the question whether the plaintiff is permitted to conduct discovery prior to resolution of the qualified immunity issue, see infra notes 213-24 and accompanying text.
Finally, the Court has expressly held that public officials have the burden of proving their entitlement to absolute immunity in section 1983 suits.176 There appears to be no justification for distinguishing between the two types of immunity available in such cases,177 and in fact the Court has suggested none, observing generally in Dennis v. Sparks, "[t]he immunities of state officials that we have recognized for purposes of § 1983 are the equivalent of those that were recognized at common law, and the burden is on the official claiming immunity to demonstrate his entitlement."178 Indeed, if any such distinction were drawn, it would be particularly anomalous to place on the defendant the burden of proving the absolute immunity defense, which is meant to be more protective of public officials than the qualified immunity defense.

The policies explaining Harlow's reformulation of the qualified immunity standard—specifically, the concern that public officials must be protected from the threat and distractions of insubstantial lawsuits179—do not mandar a contrary result.180 These are the same policy considerations underlying the doctrine of absolute immunity,181 and the defendant has the burden of proving that defense. Moreover, these policies may have justified the Court's revision of the qualified immunity defense, but they do not dictate where the burden of proof should lie. The Court elected to protect public officials from insubstantial civil rights suits by imposing a

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176 See, e.g., Harlow, 457 U.S. at 812; Butz v. Economou, 438 U.S. 478, 506 (1978); see also supra note 12.
177 See Gildin, supra note 8, at 596; Vand. Note, supra note 41, at 1555.
178 Dennis v. Sparks, 449 U.S. 24, 29 (1980) (citations to cases discussing both absolute and qualified immunity omitted).
179 See, e.g., Harlow, 457 U.S. at 816-19.
180 But see Vand. Note, supra note 41, at 1570.
181 See, e.g., Stump v. Sparkman, 435 U.S. 349, 363-64 (1978) (absolute immunity enables judges to perform duties without fear of suit); Imbler v. Pachtman, 424 U.S. 409, 423 (1976) (absolute common-law immunity for prosecutors is based on concerns that "harassment by unfounded litigation would cause a deflection of the [official]'s energies from his public duties," and that prosecutor would "shade his decisions instead of exercising . . . independence of judgment").
relatively lenient standard—after Harlow, qualified immunity protects defendants who acted unconstitutionally, so long as their conduct was not so egregious as to violate clearly established constitutional rights. At the same time, Harlow continued to recognize that public officials are presumed to know the law governing their conduct and explicitly voiced an intent to “provide no license to lawless conduct.”182 “Where an official could be expected to know that certain conduct would violate statutory or constitutional rights,” the Court said, she “should be made to hesitate.”183 If a defendant cannot prove that her actions satisfied that minimal demand, the case can hardly be considered one of the “insubstantial” civil rights suits that were of concern to the Harlow Court.

B. Discovery

Given Harlow’s fear that the “broad-ranging discovery” necessitated by the subjective prong of the qualified immunity standard could be “peculiarly disruptive of effective government,”184 as well as its admonition that the courts should endeavor to resolve questions of qualified immunity on summary judgment,185 is the plaintiff in a section 1983 case permitted to conduct any discovery before the court rules on the defendant’s claim of qualified immunity? Neither the federal courts of appeals nor the commentators have reached agreement on this question: Some indicate that discovery should not begin prior to resolution of the qualified immunity issue,186 whereas others envision the opportunity for at least

182 Harlow, 457 U.S. at 819; see also Butz v. Economou, 438 U.S. 478, 506-07 (1978) (“we see no substantial basis for holding ... that executive officers generally may with impunity discharge their duties ... in a manner that they should know transgresses a clearly established constitutional rule”); Wood v. Strickland, 420 U.S. 308, 321-22 (1975) (for immunity purposes, defendant’s conduct measured on standard that assumes knowledge of “basic, unquestioned constitutional rights”). Cf. VAND. Note, supra note 41, at 1569 (observing that presumption that public officials are aware of their constitutional duties argues in favor of requiring defendants to prove qualified immunity defense).
183 Harlow, 457 U.S. at 819.
185 Harlow, 457 U.S. at 815-16.
some discovery.\textsuperscript{187}

In \textit{Smith v. Nixon}, for example, the District of Columbia Circuit held that the defendants should not have been required to provide the plaintiffs with the FBI logs of the wiretap put on the plaintiffs' telephone, despite the plaintiffs' assertion that the logs "'reveal[ed] an interest in everything but national security leaks'" and thus controverted the defendants' claim that the wiretap did not violate clearly established rights because it was installed for valid national security purposes.\textsuperscript{188} In \textit{Lion Boulos v. Wilson}, by contrast, the Fifth Circuit permitted limited discovery relevant to the qualified immunity issue because the pleadings gave conflicting accounts of the defendants' inspection of the plaintiffs' property; the court reasoned that the plaintiffs were entitled to conduct discovery in order to support their argument that the defendants had violated clearly established rights by coercing the plaintiffs' agents into consenting to the inspection.\textsuperscript{189} Again, one finds conflicting opinions on this question even within the same circuit.\textsuperscript{190}

Admittedly, \textit{Harlow} contains some language suggesting the Court's intent to bar all discovery before disposition of the qualified immunity question.\textsuperscript{191} In addition, such an approach might seem particularly appropriate if, as advocated in the prior discus-
sion, the defendant has the burden of proving the qualified immunity defense.\textsuperscript{102} Nevertheless, this reading of \textit{Harlow} and its progeny is unjustifiably strict, and the plaintiff should be permitted to conduct at least the limited discovery pertinent to the defendant’s claim of qualified immunity before the court resolves that question against the plaintiff. Specifically, discovery should be allowed when necessary to clarify the facts of the particular case in order to determine whether those facts involve a violation of clearly established law; to ascertain whether the defendant knew her conduct was unconstitutional; or to determine whether she was acting under particular circumstances that must be considered in evaluating whether a reasonable public official in those circumstances would have known she was violating the Constitution. Such discovery will be helpful to a court analyzing the defendant’s entitlement to qualified immunity and is not barred by the Supreme Court’s precedents or the policies underlying those decisions.

In fact, a contrary reading of \textit{Harlow}—to effect a total ban on discovery—would not conform to \textit{Harlow}’s expectation that government officials will frequently prevail on the qualified immunity defense after filing motions for summary judgment, thereby avoiding the distractions and disruptions of trial. Given the Court’s re-

\textsuperscript{102} Obviously, however, if the plaintiff is required to prove that the defendant is not protected by qualified immunity, prohibiting the plaintiff from conducting discovery before undertaking to satisfy that burden is particularly inappropriate. Conversely, if no discovery is permitted prior to resolution of the qualified immunity issue, requiring the plaintiff to shoulder the burden of proof is especially unfair. Cf. \textit{Celotex Corp. v. Catrett}, 477 U.S. 317, 326 (1986) (where plaintiff had burden of proof on question at issue in defendant’s summary judgment motion, plaintiff had already conducted discovery and therefore “no serious claim [could] be made that [plaintiff] was in any sense ‘railroaded’ by a premature motion for summary judgment”). \textit{Celotex} held that a summary judgment motion filed by one party on an issue as to which the other party will have the burden of proof at trial must specify those portions of the record indicating the absence of a genuine issue of material fact, but need not be supported by any proof negating the opponent’s position on that issue. Summary judgment will then be granted, assuming there has been adequate opportunity for discovery, unless the party opposing summary judgment makes a showing sufficient to establish the existence of a genuine issue for trial. \textit{See id.} at 322-24. Accordingly, if the burden of proof on the qualified immunity defense falls on the plaintiff, a defendant who moves for summary judgment on qualified immunity grounds must indicate why she believes there is no factual dispute on any issue relevant to the qualified immunity analysis; to avoid summary judgment, the plaintiff must respond with affidavits or other evidence supporting her argument that the defendant violated her clearly established constitutional rights. In this event, however, \textit{Celotex} mandates that the plaintiff first be given an opportunity to conduct the discovery necessary to make this showing.
luctance to define "clearly established" rights abstractly, without reference to the facts of a particular case, a court will often be compelled to deny the public official's summary judgment motion unless the relevant facts are uncovered during discovery.\textsuperscript{193}

In \textit{Anderson v. Creighton}, for example, the plaintiffs alleged that the defendant conducted an unlawful warrantless search of their home without probable cause or exigent circumstances; the defendant claimed qualified immunity, arguing that he thought a fugitive suspected of robbing a bank earlier that day was hiding in the plaintiffs' home.\textsuperscript{194} If the defendant's entitlement to qualified immunity had turned on whether a warrantless search in the absence of probable cause and exigent circumstances violated clearly established law, the defendant would surely have lost because the fourth amendment had long established the plaintiffs' general right to be free from warrantless searches unless the police had both probable cause to search and exigent circumstances to justify the failure to obtain a search warrant.\textsuperscript{195} The Court therefore concluded that the crucial issue for qualified immunity purposes was the "fact-specific" question whether a reasonable officer could have believed the warrantless search was permissible, "in light of clearly established law and the information the searching officers possessed."\textsuperscript{196}

Thus, a police officer who wished to claim qualified immunity in an analogous case would need to support her motion for summary judgment with an affidavit setting forth the facts confirming both her belief that a fugitive was hiding at the plaintiff's home and her fear that the suspect might flee during the time required to obtain a search warrant. Because such information is often within the sole control of the police department, the plaintiff could not fairly be expected to respond to the defendant's allegations without deposing the defendant or conducting some other form of discovery.

\textsuperscript{193} \textit{See}, e.g., \textit{Dominque v. Telb}, 831 F.2d 673, 677 (6th Cir. 1987) (noting that where facts are unclear and existence of constitutional violation turns on which set of facts is believed, court can permit discovery and then attempt to resolve issue on summary judgment); \textit{U. Pa. Comment}, supra note 41, at 919-20 (court's ruling on defendant's motion for summary judgment may depend on how closely facts of that case correspond to facts of prior cases, thus requiring some discovery and development of factual record); \textit{Yale Note}, supra note 63, at 145 n.73 (same).


\textsuperscript{195} \textit{Id.} at 3039.

\textsuperscript{196} \textit{Id.} at 3040.
aimed at ascertaining the accuracy of the affidavit.197 Therefore, unless the facts alleged in the defendant’s affidavit were insufficient to establish probable cause and exigent circumstances, so that the court could conclude that qualified immunity did not protect the defendant,198 some opportunity for discovery would have to be afforded to the plaintiff before the court ruled on the motion.

Likewise, in *Mitchell v. Forsyth*, the defendant claimed that he authorized the wiretap challenged by the plaintiff in order to gather national security information.199 The Court concluded that the defendant was entitled to qualified immunity because at the time, it had not yet been clearly established that warrantless domestic national security wiretaps violated the fourth amendment.200 In so ruling, the Court accepted a finding made by the district court—after a hearing—that the wiretap was in fact moti-

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197 *See* Martin v. Malhoyt, 830 F.2d 237, 256-57 (D.C. Cir. 1987) ("‘blanket restriction on all discovery prior to the resolution of the qualified immunity issue' could in some circumstances unfairly penalize plaintiffs seeking ‘‘crucial facts . . . in the control of the opposing party’’") (quoting Martin v. D.C. Metro. Police Dep’t, 812 F.2d 1425, 1436-37 (D.C. Cir. 1987) (quoting Black Panther Party v. Smith, 661 F.2d 1243, 1278 (D.C. Cir. 1981), vacated and remanded with directions to dismiss, 458 U.S. 1118 (1982))) (emphasis in original); *see also*, e.g., *Anderson*, 107 S. Ct. at 3048-49 (Stevens, J., dissenting) (because facts supporting defendant's immunity defense appear in defendant's affidavits rather than plaintiff's complaint, plaintiff must be able to use discovery to test accuracy and completeness of those facts); Fed. R. Civ. P. 56(f) (when facts necessary to support plaintiff's opposition to summary judgment are not available, plaintiff can file affidavit to that effect, and trial court can then either deny summary judgment or grant continuance to enable plaintiff to conduct discovery); 6 J. Moore & J. Wicker, *Moore's Federal Practice* (pt. 2) ¶ 56.15[5] (2d ed. 1988) (observing that courts are typically reluctant to grant motion for summary judgment when party opposing motion has limited access to relevant evidence); 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil* § 2730, at 238 (2d ed. 1983) (summary judgment is inappropriate means of resolving issue relating to state of mind because relevant information "generally is within the exclusive knowledge of one of the litigants"); *Jennings*, *supra* note 184, at 13, 17. For examples of cases discussing the application of Fed. R. Civ. P. 56(f) to summary judgment motions based on the qualified immunity defense, see *Sinclair v. Schriber*, 834 F.2d 103, 104-05 (6th Cir. 1987); *Martin v. Malhoyt*, 830 F.2d at 255-57; *Martin v. D.C. Metro. Police Dep’t*, 812 F.2d at 1436-38; *Wyler v. United States*, 725 F.2d 156, 160 (2d Cir. 1983); *see also infra* note 244 and accompanying text.

198 *See, e.g.,* Specht v. Jensen, 832 F.2d 1516, 1525 (10th Cir. 1987) (even if defendant police officer was told by private citizen that writ of assistance used to justify search of plaintiff's property was equivalent to search warrant, that fact did not establish defendant's entitlement to qualified immunity because writ indicated on its face that it was not search warrant), *reh'g en banc* granted on other grounds, 837 F.2d 940 (10th Cir. 1988).


200 Id. at 530-35.
vated by national security concerns. Again, the actual motive underlying the authorization of a wiretap is a fact solely within the knowledge of the defendant; a court could not fairly grant the defendant's motion for summary judgment in such a case if the court had not given the plaintiff an opportunity to conduct discovery on that issue.

In a similar case, in the absence of discovery, the plaintiff could file an affidavit in opposition to the motion for summary judgment, claiming that she was aware of no legitimate national security reason to wiretap her telephone and providing some nonconjectural reason to believe that the wiretap was installed as a result of the defendant's opposition to her completely harmless political activities. Given that the fourth amendment would recognize no exception to the warrant requirement for such a wiretap and that the court would be forced to resolve the parties' dispute about the reasons for the wiretap in favor of the plaintiff, the defendant's motion for summary judgment would necessarily be denied in that case. The court could justify granting summary judgment only if discovery had uncovered evidence that resolved the controversy about the wiretap's actual purpose.

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201 Id. at 535 n.13. In their separate opinion, however, Justices Brennan and Marshall disputed that the trial court had made any such "finding." They noted that the court had merely accepted Mitchell's assertion that the wiretap was part of a national security investigation in the context of denying his claim to absolute prosecutorial immunity; it had not purported to reject the plaintiff's argument that the wiretap was installed for political, rather than national security, reasons. See id. at 556-58 (Brennan, J., concurring in part and dissenting in part).

202 Harlow did nothing to alter the general rule that, in ruling on a motion for summary judgment, the court "ordinarily must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party," and must not grant the motion unless "there is no genuine issue as to any material fact." Harlow v. Fitzgerald, 457 U.S. 800, 816 n.26 (1982) (quoting Fed. R. Civ. P. 56(c)). For examples of cases discussing the application of this rule to summary judgment motions based on the qualified immunity defense, see Green v. Carlson, 826 F.2d 647, 650, 651 (7th Cir. 1987); Robison v. Via, 821 F.2d 913, 921 (2d Cir. 1987); Trapnell v. Ralston, 819 F.2d 182, 184 n.1 (8th Cir. 1987); Bailey v. Andrews, 811 F.2d 366, 371 (7th Cir. 1987); Daniel v. Taylor, 803 F.2d 1401, 1402 (11th Cir. 1986) (per curiam); Fernandez v. Leonard, 784 F.2d 1209, 1213 (1st Cir. 1986); Fludd v. United States Secret Serv., 771 F.2d 549, 554 (D.C. Cir. 1985) (per curiam); Arnaberg v. United States, 757 F.2d 971, 981 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986); Mcgee v. Hester, 724 F.2d 89, 91 (8th Cir. 1983); McSurely v. McClellan, 697 F.2d 309, 321 & n.20 (D.C. Cir. 1982) (per curiam).

203 For other examples of cases where the facts relevant to the qualified immunity inquiry were in dispute, see Turner v. Dammon, 848 F.2d 440, 452-53 (4th Cir. 1988) (Kaufman, J., concurring in part and dissenting in part); Lion Boulos v. Wilson, 834 F.2d 504, 508-09 (5th
In addition to discovery aimed at clarifying the facts of the particular case, discovery is appropriate prior to disposition of the defendant's claim of immunity when, even though the relevant law was not clearly established at the time, an issue arises as to whether or not the defendant actually realized that her conduct violated the plaintiff's constitutional rights. Because qualified immunity should not protect the defendant who knew that her actions were unlawful, and because information concerning the extent of the defendant's knowledge of the governing case law is a matter peculiarly within the defendant's control, the plaintiff must be given an opportunity to conduct limited discovery on this question in order to respond to the defendant's claim of immunity.

Finally, discovery must be conducted prior to resolution of the qualified immunity question regarding the particular "circumstances" of the case relevant in determining whether a reasonable public official in those same circumstances would have recognized the unlawfulness of her conduct. The defendant obviously has control over information concerning the nature of her governmental responsibilities, the accessibility of legal advice, and the time.

Cir. 1987); Kovats v. Rutgers State Univ., 822 F.2d 1303, 1313-14 (3d Cir. 1987); Reardon v. Wroan, 811 F.2d 1025, 1030 (7th Cir. 1987) (per curiam); Hutchinson v. Grant, 796 F.2d 288, 290-91 (9th Cir. 1986); Jasinski v. Adams, 781 F.2d 843, 847-48 (11th Cir. 1986) (per curiam); Fludd v. United States Secret Serv., 771 F.2d 549, 553 (D.C. Cir. 1985) (per curiam); Harden v. Adams, 760 F.2d 1158, 1165-67 (11th Cir.), cert. denied, 474 U.S. 1007 (1985); Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336, 1347 (7th Cir. 1985); Deary v. Three Un-Named Police Officers, 746 F.2d 185, 192 (3d Cir. 1984); Benson v. Scott, 734 F.2d 1181, 1189-91 (7th Cir.) (Swygert, J., concurring in part and dissenting in part), cert. denied, 469 U.S. 1019 (1984); Espanola Way Corp. v. Meyerson, 690 F.2d 827, 830 (11th Cir. 1982), cert. denied, 460 U.S. 1039 (1983); see also Kattan, supra note 95, at 968 n.149 (determining whether police officer reasonably believed she had probable cause to arrest requires examination of facts of case).

See supra notes 42-87 and accompanying text.


For examples of cases concluding that the defendant waived the attorney-client privilege as to such discovery by asserting the qualified immunity defense, see Hearn v. Rhay, 68 F.R.D. 574, 580-83 (E.D. Wash. 1975); See also Haymes v. Smith, 73 F.R.D. 572, 577 (W.D.N.Y. 1976); Jennings, supra note 184, at 31-34 (arguing that privilege may not extend to communications between lower-level public employees and government attorneys); cf. GAB Business Servs., Inc. v. Syndicate 627, 809 F.2d 755, 762 & n.11 (11th Cir. 1987) (applying Hearn in dispute involving insurance claim where defendant raised issue requiring testimony concerning its attorneys' conduct); United States v. Exxon Corp., 94 F.R.D. 246, 248-49 (D.D.C. 1981) (applying Hearn in suit to recoup overcharges in sale of oil where defendant raised affirmative defense of good faith reliance on governmental regulations).
constraints under which she operated, all of which must be considered in analyzing her entitlement to qualified immunity. The plaintiff cannot be expected to rebut, nor the court to evaluate, the defendant's allegations concerning those circumstances without some measure of discovery.

Permitting a plaintiff to conduct such discovery prior to the court's ruling on the qualified immunity issue is not inconsistent with the relevant Supreme Court precedents. Although the Harlow majority stated rather definitively at one point, "[u]ntil this threshold immunity question is resolved, discovery should not be allowed," this language cannot be taken at face value for three reasons: Harlow itself seemed to envision the need for some discovery; subsequent Supreme Court opinions have evinced a more permissive attitude towards discovery; and the policy considerations of concern to the Harlow Court do not mandate a total prohibition on all discovery.

By the time Harlow reached the Supreme Court, the plaintiff had been conducting discovery for almost eight years, and the question of the appropriateness of a complete ban on discovery was not directly before the Court. In fact, even at that stage of the proceedings, the Court was unwilling to rule on the defendants' claim to qualified immunity. Rather, the Court remanded the case to the trial court because it was "more familiar with the record so far developed and also . . . better situated to make any such further findings as may be necessary."

If a public official's entitlement to qualified immunity were an issue that could be resolved

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207 See supra notes 88-145 and accompanying text.
208 See Gildin, supra note 8, at 591; cf. Harv. 1981 Term, supra note 8, at 234 n.63 (observing that, as was true in Harlow itself, factual questions may arise concerning scope of defendant's responsibilities, objective reasonableness of her beliefs regarding legality of her conduct, and other considerations relevant in applying objective element of qualified immunity standard).

Some courts and commentators have observed that discovery is also appropriate where the defendant claims that some extraordinary circumstance prevented her from realizing that her conduct was violating the plaintiff's clearly established rights. See Lugo v. Alvarado, 819 F.2d 5, 7 n.2 (1st Cir. 1987); Vand. Note, supra note 41, at 1554-55 (citing as examples of extraordinary circumstances many of the factors characterized here as circumstances relevant in determining whether public official acting under same circumstances as defendant would have recognized unlawfulness of her conduct); see also supra note 70.
210 Id. at 805.
211 Id. at 820.
prior to any discovery, there would appear to be no reason why the Court could not have disposed of the issue itself in Harlow without needing to have any greater familiarity with "the record" or to make any further "findings."\footnote{212}

In addition, the Supreme Court’s post-Harlow decisions have suggested that discovery may be appropriate prior to resolution of the qualified immunity issue, although they have not conclusively indicated the Court’s views on the issue. Mitchell v. Forsyth, for example, interpreted Harlow as emphasizing that "such pretrial matters as discovery are to be avoided if possible."\footnote{213} Moreover, like Harlow, Mitchell was a case where the plaintiff had already been afforded an opportunity to conduct discovery for an extended period of time—in that case, for five and one-half years.\footnote{214}

Nevertheless, the Mitchell Court did suggest a narrower concept of the proper scope of discovery when it observed that "[u]nless 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."\footnote{215} The Court

\footnote{212 See, e.g., 6 J. Moore & J. Wicker, supra note 197, ¶ 56.27[1] - [2], at 56-857 to -861 (appellate court may order that judgment be entered in favor of appellant where trial court erroneously denied summary judgment).

Harlow’s stated preference for deciding qualified immunity claims on motions for summary judgment, see Harlow, 457 U.S. at 818, is also inconsistent with a ban on discovery. Although a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim is resolved solely on the pleadings, and therefore can be decided before the initiation of discovery procedures, a summary judgment motion under rule 56 presumes that the factual record has been developed through discovery and even requires the plaintiff to respond to the motion with something more than the allegations in her complaint. See Fed. R. Civ. P. 56(e), (e); \textit{Yale Note}, supra note 63, at 144 n.72; see also infra note 241.

Finally, Harlow’s primary concern seemed to be that “bare allegations of malice” should not be sufficient to subject public officials to the burdens of trial or of “broad-reaching discovery.” Harlow, 457 U.S. at 817, 818. Arguably, then, the Court left open the permissibility of limited discovery that cannot be characterized as “broad-reaching” in cases where the plaintiff produces more than “bare allegations” to support her opposition to qualified immunity. See \textit{Lion Boulos v. Wilson}, 834 F.2d 504, 507 (5th Cir. 1987) (noting that qualified immunity doctrine does not protect defendant from all discovery, but only from that which is “either avoidable or overly broad”); Martin v. D.C. Metro. Police Dep’t, 812 F.2d 1425, 1438-39 (D.C. Cir. 1987) (Edwards, J., concurring) (permitting “carefully circumscribed discovery,” but not “‘protracted discovery’”) (quoting Hobson v. Wilson, 737 F.2d 1, 30 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985)); Lynch v. Cannatella, 810 F.2d 1363, 1369 (5th Cir. 1987) (barring only “unnecessary discovery”); \textit{Kompare v. Stein}, 801 F.2d 883, 889 (7th Cir. 1986) (prohibiting only “unwarranted discovery”).


\footnote{214} Id. at 515.

\footnote{215} Id. at 526 (emphasis added).}
continued, however, "[e]ven if the plaintiff's complaint adequately alleges the commission 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."\textsuperscript{216}

This language is very puzzling. On the one hand, it appears to suggest that discovery is not permitted before disposition of defense motions for summary judgment based on the qualified immunity defense, but only before resolution of a different type of summary judgment motion—those based on the theory that, even if the actions described in the complaint violated clearly established law and thus are not protected by qualified immunity, the defendant was not the one who committed those acts. Because the latter type of summary judgment motion was not at issue in \textit{Mitchell}, however, that interpretation of the Court's language seems unreasonable.\textsuperscript{217}

Alternatively, then, the Court may have been suggesting that qualified immunity can be raised either on a motion to dismiss, decided solely on the pleadings, or on a motion for summary judgment, decided after discovery. So long as the complaint adequately states a claim of violation of clearly established law, and thus survives the motion to dismiss, the plaintiff is permitted to conduct discovery before the court rules on the defendant's motion for summary judgment based on qualified immunity. Later in the opinion, however, the \textit{Mitchell} Court noted that an appellate court considering a defendant's interlocutory appeal from the trial court's rejection of her qualified immunity defense "need not consider the correctness of the plaintiff's version of the facts, nor even determine \textit{whether the plaintiff's allegations actually state a claim},"\textsuperscript{218} suggesting that the Court did not view assertions of qualified immunity as motions to dismiss for failure to state a claim under rule 12(b)(6) of the Federal Rules of Civil Procedure.

\textsuperscript{216} \textit{Id.}

\textsuperscript{217} Mitchell admitted that he had authorized the wiretap challenged by the plaintiff, \textit{id.} at 514; thus, the only issue was whether the unconstitutionality of the wiretap was clearly established at the time Mitchell acted, \textit{id.} at 530. \textit{See also} Velasquez v. Senko, 813 F.2d 1509, 1511 (9th Cir. 1987) (distinguishing summary judgment motion which argued that defendants were not present during allegedly illegal raid and did not participate in planning raid from summary judgment motion based on qualified immunity).

\textsuperscript{218} \textit{Mitchell}, 472 U.S. at 528 (emphasis added).
Moreover, elsewhere in the opinion, Mitchell quoted language from Harlow indicating that qualified immunity claims are to be resolved on motions for summary judgment.\footnote{Id. at 526 (quoting Harlow, 457 U.S. at 818).}

The lower courts have generally considered qualified immunity on motions for summary judgment,\footnote{See, e.g., Specht v. Jensen, 832 F.2d 1516, 1525 (10th Cir. 1988), \textit{reh’g en banc granted on other grounds}, 837 F.2d 940 (10th Cir. 1988), \textit{cert. denied}, 109 S. Ct. 792 (1989); Domíque v. Telb, 831 F.2d 673, 677 (6th Cir. 1987); Fullman v. Graddick, 739 F.2d 553, 560 (11th Cir. 1984); cf. Green v. Maraio, 722 F.2d 1013, 1018 (2d Cir. 1983) (observing that qualified immunity typically cannot be resolved on motion to dismiss).} although some courts have permitted public officials to raise the defense on motions to dismiss as well.\footnote{See, e.g., Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 646 (10th Cir. 1988); Kaiter v. Town of Boxford, 836 F.2d 704, 708 (1st Cir. 1988); Sinclair v. Schriber, 834 F.2d 103, 104 (6th Cir. 1987); Domíque v. Telb, 831 F.2d 673, 677 (6th Cir. 1987); Kennedy v. City of Cleveland, 797 F.2d 297, 299 (6th Cir. 1986), \textit{cert. denied}, 479 U.S. 1103 (1987); Harris v. Pernsley, 755 F.2d 338, 343-44 (3d Cir.), \textit{cert. denied}, 474 U.S. 965 (1985); Green v. Maraio, 722 F.2d 1013, 1018-19 (2d Cir. 1983).} These cases and the ambiguous language in Mitchell can best be reconciled by permitting the defendant to move to dismiss based on the qualified immunity defense where she argues that, even if all the facts alleged in the complaint are true, she is protected from liability because she did not violate any clearly established constitutional norms. Dismissing the case on qualified immunity grounds at that stage of the proceedings is not contrary to the holding in Gomez v. Toledo\footnote{Arguably, Gomez' holding that qualified immunity is an affirmative defense, so that a well-pleaded § 1983 complaint need not rebut the defendant's possible immunity, means that a defendant's motion to dismiss based on qualified immunity must necessarily fail; if so, Mitchell's suggestion that qualified immunity can be decided on a motion to dismiss is inconsistent with Gomez. Nevertheless, the attempt to reconcile the two opinions that is suggested in the text is the best way for the courts to make sense of both cases, especially if the defendant files an answer pleading the qualified immunity defense without having previously moved to dismiss as permitted by Fed. R. Civ. P. 12(b), some courts will treat her subsequently filed motion to dismiss as a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) on the theory that she should have asserted any motion to dismiss prior to answering the complaint. See 2A J. Moore, J. Lucas & G. Grotheer, supra note 163, ¶ 12.05, at 12-34 to -35.} that the defendant bears the burden of pleading the qualified immunity defense: the motion will be granted only if the defendant pleads and proves, based on the facts appearing on the face of the complaint, that she did not violate any clearly established constitutional rights.\footnote{446 U.S. 635 (1980).}
fendant is unwilling to accept all the facts alleged in the complaint, however, her motion should be characterized as one for summary judgment, and discovery may be required to clarify the facts.  

Given that the Mitchell Court evidenced no intent to retreat from Harlow's reaffirmation of Gomez. See supra note 169 and accompanying text.

Moreover, the characterization of an issue as an affirmative defense does not mean it cannot be raised on a motion to dismiss under Fed. R. Civ. P. 12(b); the federal courts generally permit a defendant to move to dismiss based on an affirmative defense "where the defense appears on the face of the complaint itself." 2A J. Moore, J. Lucas & G. Grotheer, supra note 163, ¶ 8.23, at 8-209. For example, the defendant in a § 1983 case has the burden of pleading and proving her entitlement to absolute immunity, see supra notes 176-78 and accompanying text, but a court will grant the defendant's motion to dismiss a case on absolute immunity grounds where it is apparent from the complaint that she is protected by absolute immunity. See, e.g., Stump v. Sparkman, 435 U.S. 349, 354-55 (1978); see also Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976) (noting that absolute immunity "defeats a suit at the outset").

See Sinclair v. Schriber, 834 F.2d 103, 104 (6th Cir. 1987) (summary judgment was denied because issues of fact remained that could "only be fully elucidated by further discovery"); Dominque v. Telb, 831 F.2d 673, 677 (6th Cir. 1987) (if complaint itself is ambiguous such that court can find defendant violated Constitution under one possible set of facts, but not under another, discovery must be conducted before resolution of qualified immunity claim on summary judgment).

Mitchell also suggested that the Court views qualified immunity as a purely legal question that is to be decided by the trial court. See Mitchell v. Forsyth, 472 U.S. 511, 526, 528 n.9, 530 (1985); see also Harlow, 457 U.S. at 818 (many claims can be resolved on summary judgment, with the court determining both what the applicable law is and whether that law was clearly established). This suggestion may indicate that the Court envisioned that discovery would be unnecessary before the legal question of the defendant's entitlement to qualified immunity is resolved. A number of federal courts of appeals have likewise noted that qualified immunity involves a question of law to be determined by the court. See, e.g., Dominque v. Telb, 831 F.2d 673, 677 (6th Cir. 1987); Jones v. Preuit & Mauldin, 822 F.2d 993, 1000 (11th Cir.), reh'g en banc granted, 833 F.2d 1436 (11th Cir. 1987); Stow v. Cochran, 819 F.2d 864, 869 n.4 (8th Cir. 1987); Hall v. Ochs, 817 F.2d 920, 924 (1st Cir. 1987); Warren v. City of Lincoln, Nebraska, 816 F.2d 1254, 1261 (8th Cir.), reh'g en banc granted, 825 F.2d 176 (8th Cir. 1987); Thorne v. City of El Segundo, 802 F.2d 1131, 1138 (9th Cir. 1986); White v. Pierce County, 797 F.2d 812, 815 (9th Cir. 1986); Stein v. Board of New York, 792 F.2d 13, 18 (2d Cir.), cert. denied, 479 U.S. 984 (1986); Donta v. Hooper, 774 F.2d 716, 719 (6th Cir. 1985) (per curiam), cert. denied, 107 S. Ct. 3261 (1987); Llaguno v. Mingey, 763 F.2d 1560, 1569 (7th Cir. 1985) (en banc), cert. dismissed, 478 U.S. 1044 (1986); McKinley v. Trattles, 732 F.2d 1320, 1324 (7th Cir. 1984); Czurlanis v. Albanese, 721 F.2d 98, 108 n.8 (3d Cir. 1983); Windsor v. The Tennessean, 719 F.2d 155, 165 (6th Cir. 1983), cert. denied, 469 U.S. 826 (1984); National Black Police Ass'n v. Velde, 712 F.2d 569, 574 (D.C. Cir. 1983), cert. denied, 466 U.S. 963 (1984); Yale Note, supra note 63, at 131-32.

Admittedly, in many cases immunity may raise purely legal questions that the court can resolve before trial because the facts relevant to the immunity issue will not be in dispute. Nevertheless, a defendant's entitlement to qualified immunity potentially raises factual questions concerning exactly what actions she took, what she knew about the state of the applicable constitutional law, and whether the reasonable person in her circumstances
This reading of Mitchell is consistent with the more liberal attitude towards discovery that the Court took in Anderson v. Creighton, the most recent Supreme Court opinion discussing the issue and the only one of the three cases where the plaintiffs had been denied any opportunity to conduct discovery. In Anderson, the Court relied on Mitchell's interpretation of Harlow as calling for the disposition of qualified immunity claims "prior to discovery and on summary judgment if possible." The Court later ex-

would have recognized the unlawfulness of her conduct. See, e.g., Anderson v. Creighton, 107 S. Ct. 3034, 3040 (1987) (characterizing qualified immunity question as a "fact-specific" one); Mitchell, 472 U.S. at 528 ("the resolution of these legal questions will entail consideration of the factual allegations that make up the plaintiff's claim for relief"). In cases where one of these factual issues is controverted, see, e.g., supra note 203, the immunity question cannot be resolved on summary judgment, see supra note 202 and accompanying text, and the parties have a seventh amendment right to a jury trial on the issue. See, e.g., Laskaris v. Thornburgh, 733 F.2d 260, 263-64 (3d Cir.) (plaintiffs in § 1983 suit seeking damages as well as equitable relief are entitled to jury trial), cert. denied, 469 U.S. 886 (1984); Dolence v. Flynn, 628 F.2d 1280, 1282 (10th Cir. 1980) (same); Hildebrand v. Board of Trustees, 607 F.2d 705, 708-09 (6th Cir. 1979) (same). In such cases, the defendant can raise the qualified immunity defense at trial, and the jury can resolve the immunity issue after receiving appropriate instructions from the trial judge concerning the state of the relevant law at the time the defendant acted. See, e.g., Tomer v. Gates, 811 F.2d 1240, 1242 (9th Cir. 1987) (per curiam) (suggesting that defendants may raise qualified immunity claims at trial even after being denied summary judgment on that issue); Kennedy v. City of Cleveland, 797 F.2d 297, 300, 306 (6th Cir. 1986) (same), cert. denied, 479 U.S. 1103 (1987).

Accordingly, a number of federal courts have observed that analyzing the defendant's right to qualified immunity may require resolution of factual questions. See, e.g., Green v. Carlson, 826 F.2d 647, 652 (7th Cir. 1987); Bilbrey by Bilbrey v. Brown, 738 F.2d 1462, 1467 (9th Cir. 1984); Ellsberg v. Mitchell, 709 F.2d 51, 69 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984); McSurely v. McClellan, 697 F.2d 309, 321 n.20 (D.C. Cir. 1982) (per curiam), cert. denied, 474 U.S. 1005 (1985). These courts have reasoned that immunity may therefore be an issue to be resolved by the jury. See, e.g., Schlegel v. Bebout, 841 F.2d 937, 945 (9th Cir. 1988); Cooper v. Dyke, 814 F.2d 941, 947 (4th Cir. 1987); Hartley v. Fine, 780 F.2d 1383, 1387-88 (8th Cir. 1985); Corbitt v. Andersen, 778 F.2d 1471, 1476 (10th Cir. 1985); Vizbaras v. Prieber, 761 F.2d 1013, 1016 (4th Cir. 1985), cert. denied, 474 U.S. 1101 (1986); Lavicky v. Burnett, 758 F.2d 468, 475 (10th Cir. 1985), cert. denied, 474 U.S. 1101 (1986); Wilson v. Attaway, 757 F.2d 1227, 1246-47 (11th Cir. 1985); Deary v. Three Un-Named Police Officers, 746 F.2d 185, 192-93 (3d Cir. 1984); Bass v. United States Dep't of Agric., 737 F.2d 1408, 1414 (5th Cir. 1984); Bailey v. Turner, 736 F.2d 963, 972 (4th Cir. 1984); B.C.R. Transp. Co. v. Fontaine, 727 F.2d 7, 10 (1st Cir. 1984); cf. O'Connor v. Donaldson, 422 U.S. 563, 577 (1975) (suggesting that qualified immunity under pre-Harlow formulation was to be analyzed by jury); Lutz v. Weld County School Dist. No. 6, 784 F.2d 340, 343 (10th Cir. 1986) (per curiam) (although qualified immunity standard is to be applied by court, jury determines applicability of extraordinary circumstances exception); Lilaguno v. Mingoy, 763 F.2d 1560, 1569 (7th Cir. 1985) (en banc) (same), cert. dismissed, 478 U.S. 1044 (1986); Joseph v. Brierton, 739 F.2d 1244, 1249 (7th Cir. 1984) (same).


Id. at 3039 n.2 (emphasis added) (citing Harlow, 457 U.S. at 818-19).
plained that the trial court could dismiss the plaintiffs' suit prior to any discovery if the actions the plaintiffs ascribed to the defendant were actions that a reasonable police officer could have believed were lawful—that is, actions that did not violate clearly established law of which a reasonable police officer would have known. If, however, the parties disagreed as to the nature of the defendant's conduct, discovery "tailored specifically to the question of [the defendant's] qualified immunity" might be necessary before the court could rule on the defendant's motion for summary judgment on qualified immunity grounds.\(^{226}\)

*Mitchell* and *Anderson* thus suggest that *Harlow* did not erect a complete prohibition to discovery before resolution of the qualified immunity issue in section 1983 cases. Rather, the public official's entitlement to immunity must be analyzed prior to the onset of discovery only where possible. Nevertheless, it might be argued that reading *Harlow* to effect a total ban on discovery is crucial in order to assuage the *Harlow* Court's concerns about the disruptive effects of "broad-reaching discovery."\(^{229}\) Certainly, given those concerns, the scope of discovery permitted prior to a ruling on the defendant's claim of qualified immunity should be somewhat limited. Indeed, the discovery must be tailored exclusively to the qualified immunity issue.

At least the discovery necessary to clarify the defendant's knowledge of the governing case law and the objective circumstances under which she acted can be conducted without violating the Court's prohibition of "broad-reaching" discovery. Unlike discovery aimed at uncovering evidence about the subjective prong of the pre-*Harlow* qualified immunity standard, which asked whether the defendant maliciously intended to violate the plaintiff's constitutional rights or to cause her some other injury, it cannot be said that there is "no clear end to the relevant evidence" with respect to the type of discovery at issue here.\(^{230}\) In attempting to determine whether the purpose behind a public official's discretionary decision was a malicious one, the plaintiff may have needed to engage in a broad inquiry into the official's "experiences, values, and

\(^{227}\) *See* id. at 3042 n.6.

\(^{228}\) *Id.*

\(^{229}\) *Harlow*, 457 U.S. at 818.

\(^{230}\) *Id.* at 817.
emotions," her "‘deliberations preparatory to the formulation of government policy[,] and [her] intimate thought processes and communications.’” The discovery advocated here, however, would not involve such an extensive inquiry. Rather, discovery would be limited to the narrower and more concrete areas of the defendant’s knowledge of the governing case law and the objective circumstances under which she acted.

The same limits may be more difficult to impose, however, with respect to discovery aimed at ascertaining the facts of the case. Mitchell, for example, required analysis of the defendant’s motivation for authorizing the wiretap challenged by the plaintiff. Like discovery intended to probe the defendant’s malice, this type of discovery may require a broader inquiry into the defendant’s deliberations, thought processes, and emotions that Harlow sought to avoid. Nevertheless, the Court has declined to define the concept of clearly established rights at a general, abstract level, but has opted instead to apply a more particularized standard—to ask whether the law was sufficiently clear that the defendant should have known that her precise conduct was unconstitutional. Given that the Court has chosen this route, development of the factual record and thus some measure of discovery must be undertaken to enable the courts to conduct this fact-intensive inquiry. Otherwise, when faced with a dispute concerning the nature of the defendant’s conduct or the state of mind accompanying that conduct, the courts will be forced to deny any defense motion for

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231 Id. at 816, 817 n.29 (quoting Halperin v. Kissinger, 606 F.2d 1192, 1214 (1979) (Gesell, J., concurring), aff’d by an equally divided Court, 452 U.S. 713 (1981)).

232 See Anderson, 107 S. Ct. at 3038-40; see also supra notes 37-39 and accompanying text.

233 Although § 1983 itself does not contain any culpability requirement, the plaintiff may be required to prove that the defendant acted with a certain state of mind in order to establish the deprivation of the particular constitutional right at issue. See Parratt v. Taylor, 451 U.S. 527, 534-35 (1981). Thus, for example, a public official violates the equal protection clause only if she intends to discriminate. See Washington v. Davis, 426 U.S. 229, 239-41 (1976). Likewise, she violates the eighth amendment’s prohibition of cruel and unusual punishment only if she acts with deliberate indifference. See Estelle v. Gamble, 429 U.S. 97, 106 (1976). See also Daniels v. Williams, 474 U.S. 327 (1986) (procedural due process is not implicated by merely negligent acts). The courts have not always been careful to distinguish these subjective elements of the plaintiff’s prima facie case from the subjective prong of the qualified immunity defense, which involved an intent to deprive the plaintiff of a constitutional right or to cause her some other injury and which the Court abolished in Harlow. See Yale Note, supra note 63, at 137-43. After Harlow, the qualified immunity analysis focuses
Some courts have dealt with this dilemma by requiring section 1983 complaints to allege facts with greater particularity than prescribed by rule 8 of the Federal Rules of Civil Procedure. Based on their perception that a substantial number of section 1983 suits are frivolous, these courts have directed that such complaints must state specific facts, rather than conclusory allegations, that support the request for relief. This requirement has also been applied specifically to allegations concerning the defendant’s motives: before the plaintiff is entitled to subject the defendant to discovery, she must state with particularity the allegations upon which on whether the defendant’s alleged conduct violated a clearly established constitutional right. Unless discovery has indicated that the plaintiff cannot reasonably controvert the defendant’s denial of unconstitutional motive, so that there is no genuine dispute regarding this issue, the court must presume that the plaintiff can prove all allegations made in her complaint, including those pertaining to the defendant’s unconstitutional purpose. See supra note 202 and accompanying text. See, e.g., Poe v. Haydon, 833 F.2d 418, 430-32 (6th Cir. 1988), cert. denied, 109 S. Ct. 788 (1989); Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 648 (10th Cir. 1988); Musso v. Hourigan, 836 F.2d 736, 743 (2d Cir. 1988); Wade v. Hegner, 804 F.2d 67, 69-70 (7th Cir. 1986); Wright v. South Arkansas Regional Health Center, Inc., 800 F.2d 199, 202-05 (8th Cir. 1986); Lowe v. City of Monrovia, 775 F.2d 998, 1011 (9th Cir. 1985), amended, 784 F.2d 1407 (9th Cir. 1986); Kenyatta v. Moore, 744 F.2d 1179, 1185 (5th Cir. 1984), cert. denied, 471 U.S. 1066 (1985); Losch v. Borough of Parkesburg, Pa., 736 F.2d 903, 907, 909-10 (3d Cir. 1984); Scott v. Greenville County, 716 F.2d 1409, 1423 n.24 (4th Cir. 1983); see generally YALE Note, supra note 63, at 134-35, 144-47.

234 Fed. R. Civ. P. 8(a)(2) requires that a complaint contain only “a short and plain statement of the claim showing that the pleader is entitled to relief.”


It is not obvious that the courts have authority to impose this requirement in the face of contrary implications in Fed. R. Civ. P. 8(a)(2), as well as in Fed. R. Civ. P. 9, which imposes special pleading requirements with respect to certain matters, such as fraud or mistake, but expressly exempts allegations of malice, intent, and knowledge from such requirements. See Fed. R. Civ. P. 9(b). See Elliott, 751 F.2d at 1483 (Higginbotham, J., concurring); Jennings, supra note 184, at 14 n.72; Wingate, supra, at 688, 692-93; cf. Kennedy v. City of Cleveland, 797 F.2d 297, 299 n.2 (6th Cir. 1986) (suggesting that notice pleading is acceptable in § 1983 cases), cert. denied, 479 U.S. 1103 (1987).
she bases her claim that the defendant acted with the state of mind necessary to give rise to a constitutional violation.\textsuperscript{236}

Enforcing this requirement will protect a defendant claiming qualified immunity from "a fishing expedition in government waters"\textsuperscript{237} that the plaintiff vaguely hopes will uncover evidence of a constitutional deprivation. At the same time, it will alleviate Harlow's concern 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."\textsuperscript{238}

This particularity requirement should not, however, be interpreted as placing the burden of pleading qualified immunity on the plaintiff. Gomez v. Toledo expressly held that the defendant has the burden of pleading qualified immunity and explained that the complaint need contain only two allegations—that the plaintiff was deprived of some federal right, and that the person who violated that right acted under color of state law.\textsuperscript{239} Nevertheless, some courts have suggested that the complaint must state with particularity the facts necessary to rebut the defendant's claim of qualified immunity.\textsuperscript{240} That requirement can be reconciled with Gomez only if it means that the complaint must particularly describe the actions taken by the defendant and the state of mind accompanying those actions so that the defendant can then argue that, even if those allegations are true, she did not violate the plaintiff's clearly established rights. Under Gomez, however, the complaint need not use the words "clearly established," need not allege that the defendant knew she was violating the plaintiff's constitutional rights, and need not claim that a public official in the defendant's circum-


\textsuperscript{238} Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982). Nevertheless, the courts should not apply this particularity requirement with excessive zeal in cases where the relevant information is in the hands of the defendant, and they should liberally grant leave to amend to plaintiffs whose complaints do not satisfy this requirement. See, e.g., Brown v. Texas A & M Univ., 804 F.2d 327, 334 (5th Cir. 1986); Yale Note, supra note 63, at 146 n.77.

\textsuperscript{239} Gomez v. Toledo, 446 U.S. 635, 640 (1980); see also supra note 164 and accompanying text.

\textsuperscript{240} See, e.g., Dominque v. Telb, 831 F.2d 673, 676 (6th Cir. 1987); Lynch v. Cannatella, 810 F.2d 1363, 1376 (5th Cir. 1987); Brown v. Texas A & M Univ., 804 F.2d 327, 333 (5th Cir. 1986); Elliott v. Perez, 751 F.2d 1472, 1482 (5th Cir. 1985).
stances would have recognized the unlawfulness of her actions. 241

241 This approach does not mean, however, that a defendant's motion for summary judgment will be denied simply because the plaintiff opposes the motion with the unsupported assertion that the defendant knew she was acting in violation of the Constitution, or that a public official in the defendant's circumstances—with equivalent access to legal advice, for example—would have realized that her actions were unlawful. Although the plaintiff's complaint need not raise these issues, Fed. R. Civ. P. 56(e) provides that when the defendant files an adequately supported motion for summary judgment, the plaintiff's opposition to that motion may not simply rely upon the general allegations in the complaint. Rather, the plaintiff must submit affidavits or other evidence that "set[s] forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). For examples of cases discussing the application of this rule to summary judgment motions based on the qualified immunity defense, see Garcia by Garcia v. Miera, 817 F.2d 650, 658 (10th Cir. 1987), cert. denied, 103 S. Ct. 1220 (1983); White by White v. Pierce County, 797 F.2d 812, 814-15 (9th Cir. 1986); Sprecher v. Von Stein, 772 F.2d 16, 18-19 (2d Cir. 1985); Tubbesing v. Arnold, 742 F.2d 401, 405-06 (8th Cir. 1984); Miller v. Solem, 728 F.2d 1020, 1023-26 (8th Cir.), cert. denied, 469 U.S. 841 (1984); Wyler v. United States, 725 F.2d 156, 160-81 (2d Cir. 1984); Hall v. United States, 704 F.2d 246, 251 (6th Cir.), cert. denied, 464 U.S. 1002 (1983).

Thus, the procedures advocated here do not create the danger that "a complaint with artfully-pleaded facts would eliminate the possibility of qualified immunity, even in cases where discovery later revealed that the plaintiff's initial allegations were incorrect, incomplete, or misleading." Green v. Carlson, 826 F.2d 647, 651 (7th Cir. 1987); see also, e.g., Harlow, 457 U.S. at 817 n.29 ("It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense."); Hobson v. Wilson, 737 F.2d 1, 29 (D.C. Cir. 1984) (cases involving allegations of unconstitutional motive give plaintiffs opportunity to avoid dismissal simply by pleading intent to violate Constitution), cert. denied, 470 U.S. 1084 (1985). Deserving defendants will have ample opportunity to obtain summary judgment even if they have the burden of proving their entitlement to qualified immunity and even if they must submit to limited discovery relevant to the qualified immunity analysis.

For example, in cases where the constitutional right violated by the defendant was not clearly established at the relevant time, the defendant can support her summary judgment motion with an affidavit claiming that she did not realize she was acting unconstitutionally. The court may then grant summary judgment if, after discovery, the plaintiff is unable to produce specific facts that call the credibility of the defendant's affidavit into question; the plaintiff cannot escape summary judgment merely by denying the truth of the defendant's affidavit and hoping that the jury will reject the defendant's testimony concerning her lack of knowledge of the relevant law. See 10A C. Wright, A. Miller & M. Kane, supra note 197, § 2726, at 118-19 ("specific facts must be produced in order to put credibility in issue so as to preclude summary judgment"); id. § 2730, at 237-38 ("the fact that a party desires to have an affiant's statements tested by a jury, in and of itself, will not preclude a grant of the [summary judgment] motion"). Rather, evidence offered in opposition to the defendant's summary judgment motion must "have the force needed to allow a jury to rely on it"; accordingly, the court may disregard any evidence that is "too incredible to be believed." Id. § 2727, at 170; see also 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice (pt. 1) ¶ 56.15[3], at 56-266 to -276 (2d ed. 1988) (summary judgment motion may be granted if movant would be entitled to directed verdict based on evidence presented in support of motion; opponent cannot avoid summary judgment based on mere hope that contrary evidence will develop at trial, but must produce facts that are material and nonconjectural).

On the other hand, the court will deny the defendant's motion for summary judgment if
With this qualification, then, the special pleading requirement for section 1983 cases can be a useful tool to limit discovery to cases where the complaint already provides some assurance that the plaintiff's grievance is a legitimate one.

Even the circumscribed scope of discovery advocated here will obviously be more burdensome for the public official than no discovery at all. The defendant's interest in avoiding discovery and the public interest in the effective functioning of government officials, are not, however, the only relevant policies to consider. The plaintiff's interest in vindicating the violation of her constitutional rights, and the public interest in ensuring that government officials respect those rights, must also be accommodated. If the plaintiff is compelled to respond to the defendant's claim of qualified immunity without any prior opportunity to discover relevant facts exclusively within the defendant's control, meritorious section 1983 claims will not survive motions for summary judgment. This result is incompatible with the very purposes of section 1983 and is not required by Harlow's concern that "insubstantial" claims be dismissed in the early stages of litigation so as to protect innocent public officials from the distractions of discovery and trial.

Moreover, if the defendant believes that the discovery sought by the plaintiff is unnecessarily disruptive of her public responsibilities or is not sufficiently tailored to the qualified immunity question, she can ask the trial court to issue a protective order. The court may likewise exercise its power under rule 56(f) of the Federal Rules of Civil Procedure to restrict the scope of discovery to its doubts about the credibility of the defendant's affidavit lead it to conclude that a genuine issue exists as to the defendant's entitlement to qualified immunity. See 10A C. Wright, A. Miller & M. Kane, supra note 197, § 2726, at 113-15. But the plaintiff must provide some indication that the defendant was mistaken, dishonest, biased, unaware, or unsure of the facts in order to create such an issue of credibility; the plaintiff typically will not be able to insist on a trial on the theory that the opportunity to cross-examine the defendant during a deposition was insufficient. See 6 J. Moore & J. Wicker, supra note 197, ¶ 56.15[4], at 56-295 to -99; id. ¶ 56.15[5], at 56-311.

See, e.g., Hobson v. Wilson, 737 F.2d 1, 30-31 (D.C. Cir. 1984) ("in some circumstances plaintiffs are able to paint only with a very broad and speculative brush at the pre-discovery stage"), cert. denied, 470 U.S. 1084 (1985); see also supra note 197 and accompanying text. But see Smith v. Nixon, 807 F.2d 197, 203 (D.C. Cir. 1986) (agreeing as empirical matter that meritorious claims will be dismissed, but concluding that that result is necessary price of immunity); Elliott v. Perez, 751 F.2d 1472, 1483 (5th Cir. 1985) (Higginbotham, J., concurring) (same).

Harlow, 457 U.S. at 816, 818.
that necessary to enable the plaintiff to respond to the defendant's summary judgment motion.\textsuperscript{244}

\textbf{CONCLUSION}

Although \textit{Harlow}'s decision to revise the qualified immunity standard by deleting the subjective prong of the defense may have been justifiable in order to shield public officials from frivolous section 1983 suits, the courts must not lose sight of the purpose of section 1983. The Supreme Court created the affirmative defense of qualified immunity to prevent the imposition of liability in cases where a public official makes a "mere mistake[] in judgment, whether the mistake is one of fact or one of law," in the course of exercising the discretion that her public responsibilities require her to exercise.\textsuperscript{245} At the same time, Congress enacted section 1983 to ensure that deprivations of constitutional rights would be redressed and deterred. For many victims of constitutional violations, "it is damages or nothing."\textsuperscript{246} Therefore, the proper scope of immunity requires a "balance between the evils inevitable in any available alternative."\textsuperscript{247}

To this end, \textit{Harlow} and its progeny should be read to deny qualified immunity to a public official who is guilty of acting in violation of the Constitution if she actually realized that her conduct was unconstitutional, or if the reasonable public official acting under the same circumstances would have recognized the unconstitutionality of that conduct. In addition, this affirmative defense should be available only if the defendant is able to establish the requisite elements of the defense, and only after the plaintiff is given a reasonable opportunity to conduct the discovery necessary to support her opposition to the defendant's claim of immunity. This accommodation of the competing considerations will shield

\textsuperscript{244} See, e.g., Marcus, supra note 235, at 486-89 (although plaintiff's request for rule 56(f) discovery should be liberally granted, scope of discovery permitted need not be extensive, and request need not be granted at all unless plaintiff shows discovery sought is likely to produce information that suggests inappropriateness of summary judgment and that could not have been obtained earlier through exercise of due diligence); see also supra note 197 and accompanying text.


\textsuperscript{247} \textit{Harlow}, 457 U.S. at 813.
those public officials deserving of protection from "insubstantial lawsuits,"248 while at the same time ensuring that government officials may not "with impunity discharge their duties in a way that is known to them to violate the United States Constitution or in a manner that they should know transgresses a clearly established constitutional rule."249