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Qualified Immunity: A User's Manual

KAREN M. BLUM*

INTRODUCTION

The qualified immunity defense remains one of the toughest issues for both bench and bar to negotiate as they work their way through the maze of legal doctrines that now envelops litigation under 42 U.S.C. § 1983.[1] The basic formulation of the qualified immunity standard, as it is currently applied, is set out in *Harlow v. Fitzgerald*[2] and *Anderson v. Creighton*.[3] An official performing discretionary functions has qualified

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* Professor of Law, Suffolk University Law School. B.A., 1968, Wells College; J.D., 1974, Suffolk University; LL.M., 1976, Harvard University. The author wishes to express her gratitude to Michael Avery, with whom she spent an exciting sabbatical in the fall of 1991 and from whom she learned a great deal about the "real world" of section 1983. I also want to convey my appreciation to the Federal Judicial Center for the opportunities it has afforded me to teach and to learn from extremely dedicated and hard-working federal judges, magistrate judges and appellate staff attorneys. Finally, my thanks to Dean Paul Sugarman and Suffolk University Law School for their financial and moral support.

1. 42 U.S.C. § 1983 (1982). The statute provides in relevant part:
Every 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 or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.
2. 457 U.S. 800 (1982).
3. 483 U.S. 635 (1987).

immunity from damages liability[4] under § 1983, so long as his or her conduct conforms to what a reasonable official would have believed lawful in light of clearly established law and the information possessed by the particular official at the time of the challenged conduct.[5]

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4. Qualified immunity is not a defense to a claim for injunctive relief. *See, e.g.*, Newman v. Burgin, 930 F.2d 955 (1st Cir. 1991).

A government official may invoke one of two types of immunity from personal liability for damages: absolute or qualified immunity. The Supreme Court has adopted a "functional" approach to immunity, so that whether an official is entitled to absolute or qualified immunity will depend on the function performed by that official in a particular context. Forrester v. White, 484 U.S. 219, 224 (1988). Most government officials are entitled only to qualified immunity. Officials performing judicial, legislative, or prosecutorial functions have been afforded absolute immunity. *See, e.g.*, Mireles v. Waco, 112 S. Ct. 286, 289 (1991) (holding that absolute judicial immunity exists when conduct is in excess of jurisdiction rather than in absence of jurisdiction); Burns v. Reed, 111 S. Ct. 1934, 1940-45 (1991) (holding that prosecutor is absolutely immune for functions performed in probable cause hearing, but only qualified immunity attached to function of giving legal advice to police); Forrester v. White, 484 U.S. 219, 228-29 (1988) (holding that judge has absolute immunity only when acting in judicial, as opposed to adminstrative, capacity); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 406 (1979) (finding absolute immunity for members of regional land planning agency acting in legislative capacity); Stump v. Sparkman, 435 U.S. 349 (1978) (finding absolute immunity for judge acting within jurisdiction); Imbler v. Pachtman, 424 U.S. 409, 424-26 (1976) (finding absolute immunity for prosecutors performing prosecutorial acts); Tenney v. Brandhove, 341 U.S. 367 (1951) (absolute immunity for members of Congress).

See also Watts v. Burkhart, 978 F.2d 269 (6th Cir. 1992) (en banc) (affording absolute immunity to members of state medical licensing board sued in their individual capacities with respect to suspension or revocation of doctor's license); Buckley v. Fitzsimmons, 952 F.2d 965, 967 (7th Cir. 1992) ("[U]nless the act of gathering and evaluating the evidence independently violates someone's rights . . . both witnesses and prosecutors are entitled to the same immunity they possess when they present the evidence in court." The court rejected the defendant's argument that statements made by the prosecutor during a press conference violated his rights because publicity deprived him of a fair bail hearing and trial, and because any injury apart from defamation, which is not actionable under the Constitution, depended on judicial action for which there is immunity.), *cert. granted*, 113 S. Ct. 53 (1992); Antoine v. Byers & Anderson, Inc., 950 F.2d 1471 (9th Cir. 1991) (deciding that a court reporter and her employer enjoyed absolute immunity when the delay in producing transcripts held up the defendant's appeal for four years and only a partial transcript was produced because of loss of tapes), *cert. granted*, 113 S. Ct. 320 (1992).

The Supreme Court has recently held that private persons, named as defendants in § 1983 suits challenging their use of state replevin, garnishment, or attachment statutes later held unconstitutional cannot invoke the qualified immunity available to government officials in such suits. Wyatt v. Cole, 112 S. Ct. 1827 (1992).

5. In *Harlow*, the Supreme Court abandoned the subjective prong of qualified immunity that had been established in Wood v. Strickland, 420 U.S. 308, 322 (1975), which made the state of mind of the official relevant to the immunity inquiry and made disposition of the immunity defense difficult at the summary judgment stage. *Harlow*, 457 U.S. at 815-18. Under *Harlow*, the inquiry became objective: whether the official violated "clearly established statutory or constitutional rights of which a reasonable person would have

The legal literature is filled with articles addressing the policy questions underlying the availability and scope of the defense.[6] This author would tend to agree with those who have concluded that the costs of the defense may outweigh the benefits to such a degree that the defense should be abandoned as an inefficient allocation of resources.[7] The purpose of this

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known." *Id.* at 818.

In *Anderson v. Creighton*, a case involving the question of whether probable cause and exigent circumstances existed to support a warrantless search, the Supreme Court made the facts surrounding the conduct of the officer(s) in the particular situation relevant to the qualified immunity issue. The question became "the objective (albeit fact-specific)" one of "whether a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law and information the searching officers possessed." 483 U.S. at 641.

6. *See, e.g.*, Gary S. Gildin, *Immunizing Intentional Violations of Constitutional Rights Through Judicial Legislation: The Extension of* Harlow v. Fitzgerald *to Section 1983 Actions*, 38 EMORY L.J. 369 (1989); Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597 (1989); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23 (1989); Kathryn R. Urbanya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force*, 62 TEMPLE L. REV. 61 (1989); Henk J. Brands, Note, *Qualified Immunity And The Allocation of Decision-Making Functions Between Judge and Jury*, 90 COLUM. L. REV. 1045 (1990); Mary A. McKenzie, Note, *The Doctrine of Qualified Immunity in Section 1983 Actions: Resolution of the Immunity Issue on Summary Judgment*, 25 SUFFOLK U. L. REV. 673 (1991).

7. In K.H. v. Morgan, 914 F.2d 846 (7th Cir. 1990), Judge Posner made the following comments in dicta:

> The defense of public officer immunity in civil rights damage suits is thought in some quarters a second-best solution to the problems created by imposing tort liability on public officers. The defense is not found in the civil rights statutes themselves, but is a judicial addition to the statutes . . . a creative graft, and viable therefore only if it serves a social purpose. . . .
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> An alternative that is sometimes discussed would be to abolish public officer immunity but couple abolition with the imposition of respondeat superior liability on the public officer's employer. Although rejected in *Monell*, . . . it would be a step no bolder than the creation, and in recent years amplification, of public officer immunity itself. The officer would be liable but so would be his employer; as a practical matter the officer would be even farther off the hook than under existing law plus the practice of indemnity; but this end would be accomplished without denying a recovery to the plaintiff and thereby diluting the deterrent effect of the civil rights laws. Only as a theoretical matter would the employee be worse off because an employer held liable for an employee's torts under the doctrine of respondeat superior is entitled to indemnity from the employee. Practice is more important than theory.

Id. at 850-51.

This author long ago advocated the adoption of *respondeat superior* liability in § 1983 suits. *See* Karen M. Blum, *From* Monroe *to* Monell: *Defining the Scope of Municipal Liability in Federal Courts*, 51 TEMP. L.Q. 409, 413 n.15 (1978). *See also* Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law*

Article, however, is not to debate the validity of the defense as a historical matter nor the soundness of the defense or its scope as a matter of policy. The Article is offered as a "user's manual" to qualified immunity—a map for lawyers and judges who must cross this road frequently in the course of their daily travels.

The Article first outlines the new structure of analysis for qualified immunity as established in *Siegert v. Gilley*[8] and examines some post-*Siegert* case law for the purpose of identifying courts following and not following the mandated *Siegert* analysis. In the context of discussing *Siegert*, attention is devoted to the "heightened pleading standard," its relationship to the issue of qualified immunity, and its role as a common source of confusion between elements of the substantive constitutional claim being asserted and elements of the defense of qualified immunity. Part II addresses how courts decide whether the right allegedly violated was clearly established at the time of the challenged conduct and focuses particularly on how the right is framed and what is viewed as sufficient precedent to establish the right. Part III explores the relevance of factual disputes to the pretrial disposition of the qualified immunity issue and the role of the judge and jury in the process. Part IV examines the availability of interlocutory appeal and the effect on appealability, if any, of a denial of qualified immunity based on the existence of material issues of fact in dispute. Part V deals briefly with the particular problem of the applicability of qualified immunity in Fourth Amendment excessive force cases. In concluding, the Article summarizes and organizes the qualified immunity analysis into a framework which should be helpful to those who have to wind their way through the network as it operates today.

I. Structure of Analysis for Qualified Immunity

In *Siegert*, the plaintiff, a clinical psychologist, brought a *Bivens*[9] action against his supervisor, claiming impairment of future employment prospects due to a defamatory letter of reference sent by the supervisor.[10]

Enforcers' Misconduct, 87 Yale L.J. 447, 455-58 (1978) (arguing § 1983 should be amended to make local government units the proper defendants) ("[T]he good faith defense, imported into [§] 1983 through unwarranted borrowing from the common law, should be abolished."); Rudovsky, *supra* note 6, at 31 n.43 (collecting works of commentators advocating broadened governmental liability in lieu of individual liability).

8. 111 S. Ct. 1789 (1991).

9. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). When a plaintiff claims that her constitutional rights have been violated by an official acting under color of federal law, as opposed to state law, a *Bivens* action is the counterpart to a § 1983 action, with the right and the remedy being derived directly from the Constitution.

10. *Siegert*, 111 S. Ct. at 1791-92.

The Court of Appeals for the District of Columbia dismissed on the grounds plaintiff had not overcome respondent's claim of qualified immunity under that Circuit's "heightened pleading standard."[11]

The Supreme Court held that the claim failed at "an analytically earlier stage of the inquiry into qualified immunity."[12] The plaintiff did not state a claim for the violation of any rights secured by the Constitution.[13] Under *Paul v. Davis*,[14] there was no constitutional protection for one's interest in his reputation, even if facts sufficient to establish malice were pleaded.[15] Chief Justice Rehnquist set out the "analytical structure under which a claim of qualified immunity should be addressed."[16] The first inquiry is whether the plaintiff has alleged the violation of a constitutional right under the law as currently interpreted.[17] This question is purely legal, and it should be resolved before any discovery is allowed.[18]

Decisions from the courts of appeals after *Siegert* reflect an understanding by the majority of the circuits that the analytical framework has changed. In *Enlow v. Tishomingo County*,[19] for example, the court noted that although the typical approach to qualified immunity had been to address the issue of whether the right allegedly violated was clearly established at the time without first inquiring whether the right existed at all, *Siegert* instructs courts to first examine the merits of the plaintiff's underlying constitutional claim.[20] Likewise in *Silver v. Franklin Township*,[21] the Court of Appeals for the Sixth Circuit admonished the district court for its failure to follow "the Supreme Court's directive in *Siegert* . . . that before reaching a qualified immunity issue a court should determine whether there has been a constitutional violation."[22] The district court, without determining whether the Board's action—even accepting the plaintiff's version of it—constituted a violation of the plaintiff's substantive due process rights, had concluded that members of a town Board of Zoning Appeals were immune from liability for a particular

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11. *Id.* at 1791-93.
12. *Id.* at 1791.
13. *Id.*
14. 424 U.S. 693 (1976).
15. *Siegert*, 111 S. Ct. at 1794.
16. *Id.* at 1793 (Chief Justice Rehnquist was joined by Justices White, O'Connor, Scalia, and Souter).
17. *Id.*
18. *Id.*
19. 962 F.2d 501 (5th Cir. 1992).
20. *Id.* at 508 & n.19.
21. 966 F.2d 1031 (6th Cir. 1992).
22. *Id.* at 1035.

zoning decision.[23] The court of appeals held that the plaintiff stated no viable claim under the Constitution, and therefore, there was no need to reach the qualified immunity issue.[24]

Not all courts have digested *Siegert*'s message. For example, in *Wright v. Whiddon*,[25] the court takes an approach which is arguably inconsistent with the analysis required by *Siegert*. The parents of a pretrial detainee who was shot and killed during an attempted escape asserted the use of deadly force violated the detainee's Fourth Amendment rights. The court of appeals, with no mention of *Siegert*, did not decide the question of whether a pretrial detainee could assert an excessive force claim under the Fourth Amendment, but disposed of the case on qualified immunity grounds because "[t]he presence of such doubt about the existence and content of the constitutional right that [the defendant] is alleged to have violated is enough to entitle him to qualified immunity."[26] Rather than first deciding whether a pretrial detainee can state a claim for excessive

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23. *Id.* at 1036.

24. *Id.* In addition to *Enlow* and *Silver*, there are a number of post-*Siegert* decisions discussing and applying the new analytical framework established in that case. *See, e.g.*, Pena v. Gardner, 976 F.2d 469, 471 (9th Cir. 1992) (holding that when a complaint lacked facts sufficient to state a claim under § 1983, consideration of qualified immunity was premature); Maldonado v. Josey, 975 F.2d 727, 729 (10th Cir. 1992) ("As a threshold inquiry to qualified immunity, we first must determine whether [the plaintiff's] allegations, even if accepted as true, state a claim for violation of any rights secured under the United States Constitution."); Gordon v. Kidd, 971 F.2d 1087, 1093 (4th Cir. 1992) ("In analyzing the appeal of a denial of summary judgment on qualified immunity grounds, it is necessary first to identify the specific constitutional right allegedly violated."); Get Away Club, Inc. v. Coleman, 969 F.2d 664, 666 (8th Cir. 1992) ("In *Siegert*, . . . the Supreme Court clarified the proper analysis for determining when a public official is entitiled to qualified immunity. First, [plaintiff] must assert a violation of its constitutional rights . . . . If no constitutional right has been asserted, [plaintiff's] complaint must be dismissed."); Mozzochi v. Borden, 959 F.2d 1174, 1179 (2d Cir. 1992) ("The first step is to determine whether the alleged conduct violates any constitutionally protected right at all. Conduct that does not violate any constitutional right certainly does not violate a constitutional right that was 'clearly established' at the time the conduct occurred."); Frohmader v. Wayne, 958 F.2d 1024, 1026 n.3 (10th Cir. 1992) ("Identification of the controlling constitutional principles and evaluation of the defendant's compliance therewith is, as a matter of analysis, the threshold question to be resolved when qualified immunity is asserted." (citing Spielman v. Hildebrand, 873 F.2d 1377, 1385 (10th Cir. 1989)); Elliott v. Thomas, 937 F.2d 338, 342 (7th Cir. 1991) ("Deciding just when it became 'clearly established' that public officials could not do something that the Constitution allows them to do is silly."); Anderson v. Alpine City, 804 F. Supp. 269, 277 (D. Utah 1992) ("The court cannot determine whether qualified immunity applies until it first determines that there has been a violation of a constitutional right."); Pride v. Kansas Highway Patrol, 793 F. Supp. 279, 283 n.3 (D.Kan. 1992) ("Because the threshold requirement of establishing a constitutional violation is not met, the qualified immunity analysis necessarily terminates at this point.").

25. 951 F.2d 297 (11th Cir. 1992).

26. *Id.* at 300.

force under the Fourth Amendment, the court, ignoring *Siegert*, exclusively addressed whether the right was clearly established at the time.[27]

Siegert promises a resolution to a serious problem created by the traditional application of the immunity doctrine. Under the qualified immunity analysis commonly applied prior to *Siegert*,[28] courts could and would avoid deciding the issue of whether particular conduct violated constitutional law as presently interpreted, if, at the time of the challenged conduct, the right allegedly violated was not clearly established. This process frequently resulted in cases disposed of on qualified immunity grounds, with no resolution of the underlying constitutional claim.[29]

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27. *Id.* For other decisions that are arguably inconsistent with the Court's directive in *Siegert*, see Woodward v. City of Worland, 977 F.2d 1392, 1401 (10th Cir. 1992):

> We do not take the occasion here to decide whether an outside third party or co-employee could ever be liable for sexual harassment under § 1983 and the Equal Protection Clause. We resolve this case simply by noting that the Officers here were not violating clearly established law under the Equal Protection Clause when they acted as they did with respect to [plaintiffs].

See also Erickson v. United States, 976 F.2d 1299, 1301 (9th Cir. 1992):

> Fundamental principles of judicial restraint require federal courts to consider nonconstitutional grounds for decision prior to reaching constitutional questions. . . . Thus, a federal court should decide constitutional questions only when it is impossible to dispose of the case on some other ground. . . . Because the doctrine of qualified immunity disposes of this case, we do not reach the question whether the individual defendants violated [plaintiff's] constitutional rights.

28. Some courts, even prior to *Siegert*, were doing the analysis that *Siegert* mandates. *See, e.g.*, Brown v. Grabowski, 922 F.2d 1097, 1110 (3d Cir. 1990) (holding that the inquiry into whether the asserted constitutional right to assistance in gaining access to the civil courts was clearly established at the time, would seem to encompass an inquiry into whether the right was recognized at all), *cert. denied*, 111 S. Ct. 2827 (1991); Snell v. Tunnell, 920 F.2d 673, 696 (10th Cir. 1990) ("Once a defendant raises the defense of qualified immunity, plaintiffs must come forward with facts or allegations to show both that the defendants alleged conduct violated the law and that the law was clearly established when the alleged violation occurred." If the plaintiff cannot produce enough evidence to show that the challenged conduct violated law "as presently interpreted," then it is unnecessary to consider whether the law was clearly established at the time.).

29. *See, e.g.*, Long v. Norris, 929 F.2d 1111, 1115 (6th Cir. 1991):

> We need not define in this case precisely what level of individualized suspicion is required in the context of prison visitor searches. The question before the court is not whether the proper standard should be reasonable suspicion . . . or probable cause, but whether a constitutional right to be free from strip and body cavity search absent probable cause was clearly established at the time of the searches.

See also Rudovsky, *supra* note 6, at 53-55 (discussing cases in which courts have addressed the qualified immunity issue but left the constitutional issue undecided).

Because qualified immunity is not available as a defense to claims for injunctive relief, *see* note 4 *supra*, and is not available to local governments sued under § 1983, Owen v. City of Independence, 445 U.S. 622 (1980), a new constitutional doctrine could be announced in cases including these kinds of claims. *But see* Rudovsky, *supra* note 6, at 55-56 (discussing

Siegert clearly changes the approach most courts were taking in qualified immunity cases and mandates resolution of the constitutional question. To the extent that the merits of plaintiff's constitutional claim are in issue at the threshold stage of the qualified immunity analysis, *Siegert* calls into question language in *Mitchell v. Forsyth*,[30] where the Supreme Court stated that in reviewing the denial of qualified immunity on interlocutory appeal, an appellate court need not determine "whether the plaintiff's allegations actually state a claim."[31] In the wake of *Siegert*, attention to the adequacy of plaintiff's underlying claim is required as an initial step in the qualified immunity inquiry.[32]

Although Rule 8 of the Federal Rules of Civil Procedure has been construed to require only "notice pleading,"[33] a number of courts impose a "heightened pleading requirement" in § 1983 cases. The higher standard is most often applied when one or more of the following factors exists: (1) individual defendants have a potential immunity defense,[34] (2) state

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the problems with reliance on these kinds of claims for development of constitutional doctrine).

30. 472 U.S. 511 (1985). The Court in *Forsyth* held that a pretrial denial of qualified immunity is immediately appealable under the collateral order doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). For an interlocutory order to be appealable under *Cohen*, the order must conclusively determine the matter in question, address an issue separate from and collateral to the merits of the case and be effectively unreviewable after a final judgment in the case. *Forsyth*, 472 U.S. at 525-527.

31. *Forsyth*, 472 U.S. at 528.

32. Note that to the extent that *Siegert* requires a court to focus on the merits of the underlying claim, the rationale of allowing interlocutory appeals under the collateral order doctrine for orders denying qualified immunity might be strained.

33. Conley v. Gibson, 355 U.S. 41, 47 (1957). Rule 8(a)(2) provides that a complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2) (1987).

34. Although the Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800 (1982), and Gomez v. Toledo, 446 U.S. 635 (1980), has indicated that qualified immunity is an affirmative defense, a number of courts require plaintiffs to plead enough facts about the violation of a "clearly established" right so as to defeat a defendant's anticipated claim of qualified immunity. *See, e.g.*, Sawyer v. County of Creek, 908 F.2d 663, 665-66 (10th Cir. 1990); Elliot v. Perez, 751 F.2d 1472, 1481-82 (5th Cir. 1985).

See also Oladeinde v. City of Birmingham, 963 F.2d 1481, 1485 (11th Cir. 1992):

> [W]e want to use this opportunity to repeat that, 'in an effort to eliminate nonmeritorious claims on the pleadings and to protect public officials from protracted litigation involving specious claims, we, and other courts, have tightened the application of Rule 8 to § 1983 cases.' . . . In pleading a section 1983 action, some factual detail is necessary, especially if we are to be able to see that the allegedly violated right was clearly established when the allegedly wrongful acts occurred. We also stress that this heightened Rule 8 requirement—as the law of the circuit—must be applied by the district courts. (citation omitted);

Jackson v. City of Beaumont Police Dept., 958 F.2d 616, 620 (5th Cir. 1992) ("[T]his circuit requires that § 1983 plaintiffs meet heightened pleading requirements in cases . . .

of mind is an essential element of the underlying constitutional claim,[35] (3) a conspiracy is alleged,[36] or (4) local government liability is asserted.[37]

Although the majority in *Siegert* avoided the issue by disposing of the case on grounds the plaintiff stated no claim for relief, four Justices who did confront the question approved of the "heightened pleading standard" when the state of mind of the defendant is an essential component of the underlying constitutional claim.[38] However, the four

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in which an immunity defense can be raised. . . . We have consistently held that plaintiffs who invoke § 1983 must plead specific facts that, if proved, would overcome the individual defendant's immunity defense. . . ."); Hunter v. District of Columbia, 943 F.2d 69, 75-77 (D.C. Cir. 1991) ("[T]he heightened pleading requirement is not contingent upon the existence of a substantively distinct qualified immunity 'defense,' . . . . When a plaintiff claims that an officer used excessive force, the heightened pleading standard demands that he make 'nonconclusory allegations of evidence' sufficient to demonstrate that the force used actually was unreasonable.").

35. *See e.g.*, Branch v. Tunnell, 937 F.2d 1382 (9th Cir. 1991). The plaintiff alleged that an officer violated his Fourth amendment rights by deliberately or recklessly misleading the magistrate to obtain search warrants. The court adopted a heightened pleading standard and allowed supporting allegations of motivation supportable by direct or circumstantial evidence. *Id.* at 1386-87; Pueblo Neighborhood Health Ctrs. v. Losavio, 847 F.2d 642 (10th Cir. 1988) ("Where the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to specific evidence that the official's actions were improperly motivated.").

36. *See, e.g.*, Crabtree v. Muchmore, 904 F.2d 1475, 1481 (10th Cir. 1990).

37. Plaintiffs attempting to impose liability upon a governmental unit pursuant to Monell v. Department of Social Servs., 436 U.S. 658 (1978), may be required to plead with particularity the existence of an official policy or custom which can be causally linked to the claimed underlying violation. *See, e.g.*, Strauss v. City of Chicago, 760 F.2d 765 (7th Cir. 1985).

See also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 954 F.2d 1054, 1057 (5th Cir. 1992), *cert. granted*, 112 S. Ct. 2989 (1992):

> Since Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985), [t]his circuit has, without fail, applied the heightened pleading requirement in cases in which the defendant-official can raise the immunity defense. . . . In Palmer v. City of San Antonio, 810 F.2d 514, 516-17 (5th Cir. 1987), a panel of this court extended the heightened pleading requirement into the municipal liability context.

In *Leatherman*, the Fifth Circuit upheld the dismissal of a complaint against a governmental entity for failure to plead with the requisite specificity. "While plaintiffs' complaint sets forth the facts concerning the police misconduct in great detail, it fails to state any facts with respect to the adequacy (or inadequacy) of the police training." 954 F.2d at 1058. In his specially concurring opinion, Judge Goldberg noted and discussed criticism of the heightened pleading requirement. He acknowledged the challenge encountered by plaintiffs who are required to provide specific facts and evidence of inadequate training prior to any discovery. Although "impressed by the wealth of authority plaintiffs cite in support of their position, I politely decline [plaintiffs'] invitation to reexamine the wisdom of this circuit's heightened pleading requirement." 954 F.2d at 1060-61 (Goldberg, J., concurring specially).

38. Siegert v. Gilley, 111 S. Ct. 1789, 1795 (1991) (Kennedy, J., concurring in the judgment); *id.* at 1800-01 (Marshall, J., joined by Blackmun and Stevens, JJ., dissenting).

Justices rejected the District of Columbia Circuit Court's "direct evidence" requirement and instead required nonconclusory allegations of subjective motivation supported by *either* direct *or* circumstantial evidence.[39] If this threshold is satisfied, then limited discovery may be allowed.

In *Elliott v. Thomas*,[40] Judge Easterbrook of the Court of Appeals for the Seventh Circuit noted the potential conflict between a "heightened pleading requirement" and the relatively minimal requirements set out by Federal Rules of Civil Procedure 8 and 9(b),[41] but resolved the apparent inconsistency by "deprecat[ing] the expression 'heightened pleading requirement' and speak[ing] instead of the minimum quantum of proof required to defeat the initial motion for summary judgment."[42] The plaintiff need not anticipate an immunity defense in her pleadings, but once the defense is raised in the answer and defendants move for summary judgment on qualified immunity grounds, the plaintiff must produce "'specific, nonconclusory factual allegations which establish [the necessary mental state] or face dismissal.'"[43]

Judge Easterbrook's portrayal of the "heightened pleading requirement" as the burden of proof which plaintiffs are required to meet under summary judgment principles,[44] a burden which is imposed *after*, rather than *at*, the initial pleading stage, makes sense and helps eliminate some of the confusion and tension permeating the relationship between the

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39. *Id.*

40. 937 F.2d 338 (7th Cir. 1991). *Elliott* was one of two cases consolidated for appellate purposes. The other was *Propst v. Weir*. Although much of the discussion that follows stems from issues that arose in the facts of *Propst*, the case will be referred to as *Elliott*.

41. Judge Easterbrook observed:

> Rule 8 establishes a system of notice rather than fact pleading; Rule 9(b) says that motive and intent may be pleaded generally; Rule 56 requires a court acting on a motion for summary judgment to draw all reasonable inferences favorable to the party opposing the motion. A 'heightened pleading requirement' in constitutional cases appears to conflict with all three rules.

Id. at 345. Judge Easterbrook's concerns are shared by Judge Patrick Higginbotham of the Fifth Circuit. *See* Elliot v. Perez, 751 F.2d 1472, 1482-83 (5th Cir. 1985) ("[N]otice pleading concepts rest on acceptance of the idea that one may sue now and discover later.").

42. *Elliott*, 937 F.2d at 345.

43. *Id.* at 344-45 (citing Justice Kennedy's opinion in *Siegert*, 111 S. Ct. at 1795 (Kennedy, J., concurring in the judgment)). Judge Easterbrook agreed with Justice Kennedy's view that circumstantial, as well as direct, evidence should be allowed to support the allegations. 937 F.2d at 345.

44. For a comprehensive treatment of the history, development, and application of summary judgment principles, see William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441 (1992). *See also* Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

Federal Rules of Civil Procedure governing pleading and the misnamed "heightened pleading requirement."

Although *Elliott* removes one source of confusion by making clear that plaintiffs do not have to "anticipate and plead around" the defense of qualified immunity,[45] the opinion appears to embrace another common source of confusion: the failure to distinguish between the substantive law controlling the question of liability when a claim requires proof of impermissible motive and the law applicable to the qualified immunity defense.[46]

One of the cases on appeal in *Elliott* involved a plaintiff who claimed she was transferred from one position to another as a means of punishing her for speech she believed was protected by the First Amendment. The defendants contended the transfer was motivated by legitimate concerns about disruption in working conditions.[47] The court noted the distinction between "the role of intent in defining the violation [and] the role of intent in ascertaining whether particular conduct was clearly unlawful at the time."[48] However, the court then blurred the distinction when concluding that, absent plaintiff's production of specific, nonconclusory factual allegations of subjective motivation, defendants would be entitled to judgment on qualified immunity grounds.[49]

In a case in which subjective motivation is an essential element of the plaintiff's substantive constitutional claim,[50] and the plaintiff fails to

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45. 937 F.2d at 345.

46. *See, e.g.,* Gainor v. Rogers, 973 F.2d 1379, 1390 (8th Cir. 1992) (Loken, J., dissenting):

> There is an issue lurking here that the Supreme Court has not yet addressed: if the plaintiff's constitutional claim is based upon the defendant's bad motives . . . and if the undisputed facts demonstrate that the defendant had an objectively reasonable basis for his conduct, can this alleged bad motive defeat summary judgment on qualified immunity grounds?

47. *Elliott*, 937 F.2d at 341, 343.

48. *Id.* at 344. *See also* Fiorenzo v. Nolan, 965 F.2d 348, 351-52 (7th Cir. 1992):

> In *Wade v. Hegner*, 804 F.2d 67 (7th Cir. 1986), we held that *Harlow* requires the district court to conduct a two-part analysis when state of mind is at issue: '(1) Does the alleged conduct set out a constitutional violation? and (2) Were the constitutional standards clearly established at the time in question?' *Id.* at 70. Intent is relevant to the first inquiry. *Id.*

Accord, Auriemma v. Rice, 910 F.2d 1449, 1453 (7th Cir. 1990) (en banc) ("[W]hen intent is crucial to a party's claim . . . the court's consideration of intent is relevant to the determination of whether a constitutional violation exists but not in deciding if the constitutional standard was clearly established.").

49. *Elliott*, 937 F.2d at 344-45.

50. When the underlying constitutional claim has no state of mind requirement, it is clear that "bad faith" or improper motive is irrelevant to both the constitutional claim as well as the qualified immunity analysis. *See, e.g.,* Pritchett v. Alford, 973 F.2d 307,

meet his or her summary judgment burden of proof on the state of mind element, the result should be summary judgment for the defendant *on the merits*, not on qualified immunity grounds. Qualified immunity is irrelevant if the plaintiff cannot make out a constitutional violation.[51]

As a practical matter, in some cases the distinction will be insignificant; however, in many cases the distinction will make a difference. In cases in which both a governmental entity and an individual are sued, summary judgment for the individual defendant on qualified immunity grounds does not dispose of a claim brought under *Monell v. Department of Social Services*[52]

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315 (4th Cir. 1992) ("Illegal motive on the officer's part need not . . . be shown in order to defeat a qualified immunity defense to a Fourth Amendment claim which itself has no motive element."). *Compare* Corum v. University of N.C., 413 S.E.2d 276, 286 (N.C. 1992) ("Where the 'clearly established law' contains a subjective element . . . of motive or intent, it is a part of the summary judgment analysis.").

51. *See, e.g.*, Monroe v. Mazzarano, No. 90-C-5696, 1992 WL 199829, *13 (N.D. Ill.)(Rovner, J.) (unreported case):

> [T]he only purpose for which state of mind is considered in a qualified immunity analysis is to determine whether the defendant's alleged conduct, if true, would amount to a violation of the plaintiff's constitutional rights. . . . [T]his can only be the case where . . . intent to violate those rights is an element of the constitutional claim. . . .
>
> Subsequent decisions of the Seventh Circuit have made crystal clear that a defendant's 'improper motivation'. . . simply is not considered when a court is determining whether a defendant is protected by qualified immunity.

See also Sanchez v. Sanchez, 777 F. Supp. 906, 916 (D. N.M. 1991):

> With all due respect to the Circuit, this Court believes that . . . the Circuit has unnecessarily confused the nature of the qualified immunity analysis in cases of this sort. Like the First, Second, Third, Seventh, Eighth and Ninth Circuits, this Circuit should maintain a firm distinction between the plaintiff's burden of proof under the applicable substantive law and a defendant's entitlement to qualified immunity. When there is no proof to support a plaintiff's claim that a facially neutral act was infected by a defendant's constitutionally impermissible motive, the defendant is entitled to summary judgment because he has committed no act for which he can be held liable. In such situations the qualified immunity analysis is simply irrelevant.

52. 436 U.S. 658 (1978). In *Monell*, the Supreme Court overruled Monroe v. Pape, 365 U.S. 167 (1961), to the extent that *Monroe* had held that local government units could not be sued as "persons" under § 1983. *Monell* holds that local government units may be sued for damages, as well as declaratory and injunctive relief, whenever

> the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover . . . local governments . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's decisionmaking channels.

Id. at 690-91. *Monell* rejects government liability based on the doctrine of *respondeat superior*. Thus, a government body cannot be held liable under § 1983 merely because it employs a tortfeasor. *Id.* at 691-92. *See generally* Karen M. Blum, Monell, DeShaney, and

against the governmental entity.[53] Furthermore, in such context, the plaintiff cannot take an interlocutory appeal from the court's *grant* of qualified immunity to the individual defendant, whereas a dismissal of the claim against the individual defendant on the merits would make the order a final judgment ripe for immediate appeal.[54]

II. When Is a Right "Clearly Established?"

Assuming a plaintiff is able to get by the first hurdle in the qualified immunity analysis by asserting the violation of a constitutional right under the law as presently construed, the next step requires the plaintiff to prove that the law regarding this right was clearly established at the time

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Zinermon: *Official Policy, Affirmative Duty, Established State Procedure, and Local Government Liability Under Section 1983*, 24 Creighton L. Rev. 1 (1990); Karen M. Blum, *From* Monroe *to* Monell: *Defining the Scope of Municipal Liability in Federal Courts*, 51 Temp. L.Q. 409 (1978).

In Owen v. City of Independence, 445 U.S. 622 (1980), the Court held that a government defendant has no qualified immunity from compensatory damages liability.

53. Given the law on qualified immunity, a government body could still be subject to liability under *Monell* for a constitutional violation when the individual officer is able to invoke qualified immunity as a defense to the § 1983 claim against her. *See, e.g.*, Dodd v. City of Norwich, 815 F.2d 862, 868 (2d Cir. 1987) (on rehearing), *cert. denied*, 484 U.S. 1007 (1987); Palmerin v. City of Riverside, 794 F.2d 1409, 1415 (9th Cir. 1986).

Courts sometimes confuse the consequences that flow from two very different determinations. If the court concludes that there is no underlying constitutional violation, then City of Los Angeles v. Heller, 475 U.S. 796 (1986), would dictate no liability on the part of any defendant. In *Heller*, the Supreme Court made clear that if there is no constitutional violation, there can be no liability, either on the part of the individual officer or the government body. The Court held that "[i]f a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point." *Id.* at 799.

If, however, the determination is that there is no liability on the part of the individual official because of the applicability of qualified immunity, it does not necessarily follow that there has been no constitutional violation and that the municipality cannot be liable. *See, e.g.*, Doe v. Sullivan County, Tenn., 956 F.2d 545, 554 (6th Cir. 1992) ("To read *Heller* as implying that a municipality is immune from liability regardless of whether the plaintiff suffered a constitutional deprivation simply because an officer was entitled to qualified immunity would . . . represent a misconstruction of its holding and rationale."); Munz v. Ryan, 752 F. Supp. 1537, 1551 (D. Kan. 1990) (finding no inconsistency in ruling that an official is entitled to qualified immunity but holding the municipality liable for any constitutional violations if caused by the final policymaker).

54. If the case were disposed of completely by dismissal of the particular constitutional claim on the merits, appeal would be available under 28 U.S.C. § 1291, which provides that courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts. If other claims were to proceed against other defendants or indeed, if other claims were to proceed against the same defendant, the order of dismissal could be appealed if certified under Fed. R. Civ. P. 54(b) (1987).

of the challenged conduct.[55] In *Anderson v. Creighton*,[56] the Supreme Court announced that for the right to be clearly established, "[t]he 'contours' of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . [I]n light of pre-existing law the unlawfulness must be apparent."[57]

A number of courts have held that when the right in question is subject to a balancing test, the right will rarely be found clearly established.[58] In such cases, a plaintiff should strive to find case law that presents facts as closely analogous to her situation as possible.[59]

In most cases, the answer to the question of whether the right was clearly established will be a function of how narrowly the "contours" of the particular right are drawn when framing the inquiry. A few examples help illustrate how the framing of the question affects the outcome of

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55. Although qualified immunity is a defense which must be pleaded by the defendant, Gomez v. Toledo, 446 U.S. 635, 640 (1980), once the defendant raises qualified immunity, the burden of proof is on the plaintiff to show that the right allegedly violated was clearly established at the time of the challenged conduct. *See, e.g.*, Dixon v. Richer, 922 F.2d 1456, 1460 (10th Cir. 1991).

In Elder v. Holloway, 975 F.2d 1388, 1390 (9th Cir. 1992), the court affirmed the district court's grant of qualified immunity on the basis that the law was not clearly established at the time. The court held that:

> [i]n an adversary system where the plaintiff has the burden of showing that a specific right was clearly established in the law, if the court "gets it wrong" because the universe of cases proffered by the plaintiff in support of his claim that the right was clearly established turns out to be less than all of the potentially relevant legal facts, the plaintiff has invited whatever error occurs.

Id. at 1395.

56. 483 U.S. 635 (1987).

57. *Id.* at 640.

58. *See, e.g.*, Medina v. City and County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992) ("In determining whether the law was clearly established, we bear in mind that allegations of constitutional violations that require courts to balance competing interests may make it more difficult to find the law 'clearly established' when assessing claims of qualified immunity."); Frazier v. Bailey, 957 F.2d 920 (1st Cir. 1992) (relying on Myers v. Morris, 810 F.2d 1437, 1462 (8th Cir. 1987), *cert. denied*, 484 U.S. 828 (1987) and Benson v. Allphin, 786 F.2d 268, 276 (7th Cir. 1986), *cert. denied*, 479 U.S. 848 (1986)) (concluding that a right subject to a balancing test can rarely be found 'clearly established' and finding that the right of familial integrity is such a right); Borucki v. Ryan, 827 F.2d 836, 848 (1st Cir. 1987) ("[W]hen the law requires a balancing of competing interests, . . . it may be unfair to charge an official with knowledge of the law in the absence of a previously decided case with clearly analogous facts."); Franz v. Lytle, 791 F. Supp. 827, 833 (D. Kan. 1992) ("The qualified nature of the right to familial integrity, requiring government officials to balance certain rights against others, makes it 'difficult, if not impossible, for officials to know when their conduct has violated "clearly established law." ' ") (citing *Frazier*, 957 F.2d at 931).

59. *See, e.g.*, Bartlett v. Fisher, 972 F.2d 911, 918 n.3 (8th Cir. 1992) ("Factually analogous cases are highly relevant to the qualified immunity inquiry when the constitutional right in question is subject to a balancing test.").

the qualified immunity analysis. In *Mozzochi v. Borden*,[60] the plaintiff sued officials claiming his prosecution under a criminal harassment statute was motivated by the impermissible purpose of desiring to chill his First Amendment rights.[61] The district court denied qualified immunity, framing the question "as whether 'a citizen possessed a clearly established constitutional right not to have his speech regulated because the state actor disagreed with its content.'"[62] As the court of appeals noted, when formulated at this level of generality, "the question answers itself."[63] *Anderson* requires a more fact-specific framing of the question. The court reformulated the question, incorporating the undisputed facts, as follows:

> [T]he qualified immunity question is whether, at the time the alleged acts took place, it was clearly established that an individual's constitutional rights were violated when a criminal prosecution, supported by probable cause, was initiated in an attempt to deter or silence the exercise by the criminal defendant of his right to free speech, but without the effect of actually deterring or silencing the individual.[64]

Not surprisingly, the court concluded that this right was not clearly established and the defendant was entitled to summary judgment on qualified immunity grounds.[65]

In *White v. Taylor*,[66] the plaintiff sued the Chief of Police and the City of Morton, Mississippi, claiming that he had been arrested without probable cause and detained for an unreasonable period without a determination of probable cause by a neutral magistrate.[67] The Chief of Police raised the qualified immunity defense both by way of a motion to dismiss and by motion for summary judgment. The defense was denied, the case tried to a jury, and a verdict rendered in favor of the defendants on all claims except the unreasonable detention claim against the Chief. The Chief then appealed.[68] The Court of Appeals for the Fifth Circuit

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60. 959 F.2d 1174 (2d Cir. 1992).

61. *Id.* at 1175.

62. *Id.* at 1178.

63. *Id.* (citing Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.")).

64. *Id.* at 1179.

65. *Id.* at 1180. The court actually concluded that the plaintiff's allegations stated no constitutional claim. *Id.* Thus, under Siegert v. Gilley, 111 S. Ct. 1789 (1991), the court should have ordered summary judgment on the merits.

66. 959 F.2d 539 (5th Cir. 1992).

67. *Id.* at 540.

68. *Id.* at 541.

concluded that the Chief of Police was entitled to qualified immunity as a matter of law.

> [W]hile we think the law was clearly established on May 29, 1987 that a warrantless misdemeanor arrestee had a right to a prompt determination of probable cause, . . . we hold the contours of that right were not sufficiently clear so that a reasonable law enforcement officer would have known that such a person, arrested late at night in a city without a night magistrate, could not be held overnight before taking the arrestee before a magistrate.[69]

Even within the same circuit, there is not always agreement on whether the contours of the right have been clearly established. In *Rich v. City of Mayfield Heights*,[70] the plaintiff sued individual police officers and the city after a pretrial detainee attempted suicide in the city jail. Included among the plaintiff's claims were allegations of the individual police officers' deliberate indifference to medical needs. The thrust of the plaintiff's complaint was that the detainee had not been cut down immediately when discovered hanging from his jail cell door. Instead, a dispatcher had been asked to call a fire department rescue squad for assistance. The district court denied qualified immunity on the claim of deliberate indifference to medical needs, and the officers pursued an interlocutory appeal.[71] The Court of Appeals for the Sixth Circuit found that although the pretrial detainee had a due process right to adequate medical care, this generalized right did not establish the more particularized "right of a pretrial detainee to be cut down by police officers when discovered hanging in a jail cell."[72]

About one month after *Rich* was decided, another panel of the Sixth Circuit rendered a split opinion in *Heflin v. Stewart County*.[73] *Heflin*, like *Rich*, was a suit brought by relatives of a pretrial detainee who was found hanging in his cell and was not cut down and did not receive cardio-pulmonary resuscitation (CPR) immediately. On facts which were somewhat more egregious than those in *Rich*,[74] the majority of the panel

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69. *Id.* at 546.
70. 955 F.2d 1092 (6th Cir. 1992).
71. *Id.* at 1093.
72. *Id.* at 1097-98.
73. 958 F.2d 709 (6th Cir. 1992).
74. The detainee in *Heflin* was found by a deputy sheriff. His hands and feet were tied together, a rag stuffed in his mouth, and his feet were touching the floor. Although offers were made to help the Deputy cut Heflin down, he ordered people out of the cell until an emergency medical team arrived. At that point, the Sheriff ordered pictures to be taken of the hanging body before it was cut down. *Id.* at 711-12.

held that "[t]he unlawfulness of doing nothing to attempt to save [the inmate's] life would have been apparent to a reasonable official in [defendants'] position" in light of pre-existing law.[75] Judge Kennedy, in dissent, cited *Rich* in support of her position that "the right of hanging victims displaying no vital signs to be immediately cut down and administered CPR by jail officials was [not] clearly established such that a reasonable official would have known of it."[76]

Apart from the question of how fact-specific a court may get in framing the right for the qualified immunity inquiry, there is also the issue of what law a court will consider in determining whether the particularized right is clearly established. Once the contours of the right have been defined, the most compelling proof of the right being clearly established will be recognition by the Supreme Court or by courts of appeals.[77] Where such controlling precedent is lacking, the question is to what extent courts will look to other circuits or state law to clearly establish a right.

The Sixth Circuit Court of Appeals has taken the hardest line on this issue. In *Marsh v. Arn*,[78] the court observed that "when there is no controlling precedent in the Sixth Circuit our court places little or no value on the opinions of other circuits in determining whether a right is clearly established."[79] For noncontrolling precedent to be the source of clearly established law in the Sixth Circuit, such decisions "must . . . point unmistakenly to the unconstitutionality of the [challenged] conduct."[80] For example, in *Daugherty v. Campbell*,[81] the court held that where the very conduct in question, a visual body cavity search of a prison visitor without reasonable suspicion, had been declared unconstitutional by every circuit addressing the issue in similar cases, the contours of the right were clearly established.[82]

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75. *Id.* at 717.

76. *Id.* at 719 (Kennedy, J., dissenting).

77. *See* Jensen v. Conrad, 747 F.2d 185, 194 (4th Cir. 1984) (looking to other courts of appeals to decide whether clearly established right existed), *cert. denied*, 470 U.S. 1052 (1985); Williamson v. City of Virginia Beach, 786 F. Supp. 1238, 1261-62 (E.D. Va. 1992).

78. 937 F.2d 1056 (6th Cir. 1991).

79. *Id.* at 1069. *See also* Hall v. Shipley, 932 F.2d 1147, 1150 (6th Cir. 1991); Eugene D. v. Karman, 889 F.2d 701, 706 (6th Cir. 1989), *cert. denied*, 496 U.S. 931 (1990).

80. Ohio Civil Serv. Employees Ass'n. v. Seiter, 858 F.2d 1171, 1177 (6th Cir. 1988) (The unconstitutionality of the conduct must "be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting.").

81. 935 F.2d 780 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 939 (1992).

82. *Id.* at 787.

In *Johnson-El v. Schoemehl*,[83] a case of a pretrial detainee complaining of prison conditions, defendants made the argument that for the law to be clearly established, the particular conduct of the officials must have been held unlawful by that circuit or another court "with direct jurisdiction over the institution."[84] Although the Eighth Circuit agreed attention to cases within the circuit was important and the existence of precedent within the circuit would be relevant in determining whether and to what degree an official would be aware of the law, the court, nonetheless, rejected the per se rule offered by defendants.[85]

In the Seventh, Ninth, and Tenth Circuits, there is more flexibility in looking at noncontrolling precedent. The approach in these circuits is to look to "all available decisional law" in determining whether a right has been clearly established.[86] Although the Seventh and Tenth Circuits are willing to look to decisional law from other circuits, those decisions must make the unlawfulness of the official's conduct apparent.[87] The approach in the Ninth Circuit does not appear to require the non-controlling precedent to be as solidly developed.

In *Wood v. Ostrander*,[88] the Ninth Circuit held that a police officer owed a duty of care under the due process clause of the Fourteenth Amendment to a woman who was left abandoned on a highway after the officer arrested the driver of the car in which she was a passenger.[89]

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83. 878 F.2d 1043 (8th Cir. 1989).

84. *Id.* at 1049.

85. *Id.*

86. Romero v. Kitsap County, 931 F.2d 624, 629 (9th Cir. 1991) (quoting Ward v. County of San Diego, 791 F.2d 1329, 1332 (9th Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987)). *See* McDonald v. Haskins, 966 F.2d 292, 294 (7th Cir. 1992) (deciding that case on "all fours" is not required and allowing the plaintiff to rely on precedent from Third Circuit to demonstrate the law was clearly established); Patrick v. Miller, 953 F.2d 1240, 1249 (10th Cir. 1992) ("The law may be found clearly established by reference to decisions from other circuits."); Henderson v. DeRobertis, 940 F.2d 1055, 1058-59 (7th Cir. 1991) (indicating that court should look to whatever decisional law is available to decide whether the right is clearly established). *See also* Courson v. McMillian, 939 F.2d 1479, 1498 n.32 (11th Cir. 1991):

> [C]learly established law in this circuit may include court decisions of the highest state court in the states that comprise this circuit as to those respective states, when the state supreme court has addressed a federal constitutional issue that has not been addressed by the United States Supreme Court or the Eleventh Circuit.

87. *See, e.g.*, Patrick v. Miller, 953 F.2d 1240, 1249 (10th Cir. 1992) ("We consider the law to be 'clearly established' when it is well developed enough to inform the reasonable official that his conduct violates that law."); Henderson v. DeRobertis, 940 F.2d 1055, 1059 (7th Cir. 1991) ("[U]ntil a particular constitutional right has been stated so that reasonably competent officers would agree on its application to a given set of facts, it has not been clearly established.").

88. 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 341 (1990).

89. *Id.* (indicating the standard is "deliberate indifference").

The woman was subsequently raped when trying to make her way home. In denying qualified immunity to the officer, the court relied on one analogous decision from the Seventh Circuit to conclude that the law was clearly established that the officer owed a duty of protection to the plaintiff in this situation.[90] In *Hilliard v. City and County of Denver*,[91] the Tenth Circuit, when confronted with essentially the same facts as in *Wood*, concluded that the existence of two opinions from other circuits was not sufficient to make the law clearly established in the Tenth Circuit that a duty to protect could be imposed outside of a custodial context.[92]

In the absence of controlling precedent from the Fourth Circuit Court of Appeals on the question of whether the law from other circuits may be considered in the "clearly established law" inquiry, the court in *Williamson v. City of Virginia Beach*[93] opted for the Eighth Circuit's approach, which rejected a per se rule that controlling precedent must exist for a claim to be valid. The court reasoned this approach "provide[d] the best balance of the competing interests at stake."[94] The court in *Williamson* viewed the Eighth Circuit's approach as a middle ground between the Sixth Circuit's insistence on Supreme Court or Sixth Circuit precedent and the Seventh and Ninth Circuits' willingness to consider "all available decisional law."[95]

This "common sense" approach does not allow officials to escape liability for unlawful conduct merely because the issue is one of first impression in that circuit.[96] Although a single decision from another federal or state court would presumably not suffice to put an official on notice as to the unlawfulness of her particular conduct, if other circuits have proscribed similar conduct to such an extent that a reasonable official would be aware of the law, then the law is clearly established.[97]

III. The Relevance of Factual Disputes to the Pretrial Disposition of Qualified Immunity: Role of the Judge Versus the Role of the Jury

In *Hunter v. Bryant*,[98] the Supreme Court admonished the Ninth Circuit Court of Appeals for what had become a common practice in

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90. *Id.* at 591-94. In the case relied upon, White v. City of Rochford, 592 F.2d 381, 383-85 (7th Cir. 1979), the court held that police had an affirmative duty to protect children left abandoned in a car on a busy freeway after police arrested the children's uncle for drag racing.

91. 930 F.2d 1516 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 656 (1991).

92. *Id.* at 1520.

93. 786 F. Supp. 1238 (E.D. Va. 1992).

94. *Id.* at 1262.

95. *Id.*

96. *Id.*

97. *Id.*

98. 112 S. Ct. 534 (1991) (per curiam). The Court reversed a judgment of the Ninth

that circuit: sending the qualified immunity issue to the jury.[99] In criticizing the approach taken by the Ninth Circuit, the Supreme Court made the following observations:

> The Court of Appeals' confusion is evident from its statement that '[w]hether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment . . . based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach.' 903 F.2d at 721. This statement of law is wrong for two reasons. First, it routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial. . . . Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.[100]

The Court's message is clear.[101] In the absence of a genuine dispute about material facts, the question of whether a reasonable official could have believed her conduct to be lawful, in light of clearly established

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Circuit denying qualified immunity to federal agents who had arrested, without probable cause, someone they suspected of threatening the President's life. *Id.* at 537.

99. *Id.* at 536-37. For examples of this practice in the Ninth Circuit, see Barlow v. Ground, 943 F.2d 1132, 1139 (9th Cir. 1991) (holding that the question of whether reasonable official would know she is violating clearly established law was question for jury), *cert. denied*, 112 S. Ct. 2995 (1992); Floyd v. Laws, 929 F.2d 1390, 1394 (9th Cir. 1991) (holding that the trial court did not abuse its discretion by issuing jury instruction on qualified immunity); Ting v. U.S., 927 F.2d 1504, 1511 (9th Cir. 1991) (holding that the issue of qualified immunity could not be resolved as a matter of law in light of the factual conflict surrounding the shooting but was a jury question); Thorstead v. Kelly, 858 F.2d 571 (9th Cir. 1988) (holding that qualified immunity is a jury issue).

100. *Bryant*, 112 S. Ct. at 536-37.

101. Indeed, in the wake of *Bryant*, the Ninth Circuit has recognized that the Supreme Court has expressly rejected the approach previously taken in that Circuit. In Act Up!/ Portland v. Bagley, 971 F.2d 298 (9th Cir. 1992), the court noted:

> We interpret *Bryant* to hold that the question of whether a reasonable officer could have believed his conduct was proper under established law is a question of law that must be determined by the district court at the earliest possible point in the litigation. Where the facts underlying the qualified immunity determination are not in dispute, the determination should be made at summary judgement.

Id. at 301. *See also* Tachiquin v. Stowell, 789 F. Supp. 1512, 1520 (E.D. Cal. 1992) ("The question of whether a reasonable officer would have concluded that he had probable cause for an arrest under the circumstances is not ordinarily a question of fact for the jury.").

But see Coates v. Daugherty, 973 F.2d 290, 293 (4th Cir. 1992) ("As [defendants] apparently requested, the magistrate judge instructed the jury on the qualified immunity question. Neither party challenges the propriety of submitting this question to the jury nor the contents of the instruction; thus we do not consider these questions here.").

law and the circumstances surrounding the particular incident, is a question of law for the court to decide. Most federal courts, even prior to *Bryant*, had been treating the qualified immunity issue as a question of law when the facts were undisputed.[102] Thus, when no material facts relevant to the immunity defense are in dispute, the issue should be disposed of prior to trial.

If the complaint fails to satisfy the threshold requirement of stating a constitutional claim under *Siegert* or fails to allege facts from which the court could conclude that the right allegedly violated was clearly established at the time, then the qualified immunity issue can be disposed of on a motion to dismiss. Even if the plaintiff states a claim and the court decides the law was clearly established at the time, summary judgment would be appropriate if the court concludes that, given the undisputed facts, a reasonable official in defendant's position could have understood her conduct to be lawful.

The Supreme Court has emphasized the desirability of disposing of the immunity defense "long before trial,"[103] but such early disposition may be difficult or impossible when the facts are undeveloped or when material facts remain in dispute. The *Anderson* "fact-specific" inquiry makes the particular conduct of the official relevant in the qualified immunity analysis. When the law in a particular case is found to be clearly established, whether a reasonable official would have understood that her particular conduct was unlawful will depend upon the facts and information the officer possessed at the time of the conduct.

In some cases, factual disputes can be resolved prior to trial simply by allowing limited discovery to proceed on the facts crucial to the qualified immunity defense.[104] Rather than deny qualified immunity at this early stage (which inevitably leads to delay and more expense in the

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102. *See, e.g.*, Snell v. Tunnell, 920 F.2d 673, 696 (10th Cir. 1990) (deciding qualified immunity is a legal, not a factual, issue which must be resolved in the first instance by the trial court); Finnegan v. Fountain, 915 F.2d 817, 821 (2d Cir. 1990) (holding that application of qualified immunity is ultimately a question of law for the court to decide); Rakovich v. Wade, 850 F.2d 1180, 1204 (7th Cir. 1988) (en banc) (deciding that qualified immunity is question of law for district judge and not jury).

103. *Bryant*, 111 S. Ct. at 537. *See also* Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987) (noting that qualified immunity should be disposed of in "earliest possible stage of litigation"); Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (stating that qualified immunity "is an *immunity from suit* rather than a mere defense to liability; . . . it is effectively lost if a case is erroneously permitted to go to trial.").

104. The Court in *Anderson* recognized that some limited discovery on the immunity issue might be required before a defendant's motion for summary judgment could be decided. The Court noted that "if the actions [defendant] claims he took are different from those [plaintiffs] allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before [defendant's] motion for summary judgment on qualified immunity grounds can be resolved." 483 U.S. at 646 n.6.

form of an interlocutory appeal),[105] the district court should simply defer its decision on qualified immunity until the material facts are sufficiently developed or clarified so that a decision can be made at the summary judgment stage.[106]

In many cases, however, material issues of fact will remain in dispute and will have to be decided by a jury. It is worth stressing at this point that not every factual dispute is a dispute about a *material* issue of fact.[107] A material fact is one which must be resolved to decide the qualified immunity issue. A material fact is a dispositive fact. Clearly, a material factual issue does not exist if the plaintiff has failed to allege the violation of a constitutional right sufficient to survive the threshold requirement of *Siegert*.[108] Likewise, if a plaintiff's allegations, though disputed, are taken as true but, even on plaintiff's version of the facts, the defendant is entitled to qualified immunity as a matter of law, then the facts in dispute are not material and should not preclude summary judgment.[109]

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105. The problems of abuse, delay, and costs of interlocutory appeals based upon Mitchell v. Forsyth, 472 U.S. 511 (1985), have been the subject of discussion by some courts. *See e.g.*, Yates v. City of Cleveland, 941 F.2d 444, 448-49 (6th Cir. 1991); Abel v. Miller, 904 F.2d 394, 396 (7th Cir. 1990); Apostol v. Gallion, 870 F.2d 1335, 1338-39 (7th Cir. 1989). *See also* discussion *infra* Part IV.

106. *See, e.g.*, Act Up!/Portland v. Bagley, 971 F.2d 298, 301-02 (9th Cir. 1992) ("[T]he court is obliged to make every effort to develop the record to the extent necessary to make the determination at [the summary judgment] stage."); Mee v. Ortega, 967 F.2d 423, 430 & n.5 (10th Cir. 1992) (holding that factual disputes on the record required more development before a ruling on qualified immunity would be appropriate) ("If, at any point before trial, it appears to the district court that, as a matter of law, a reasonable parole officer could have believed [plaintiff's] continued incarceration lawful, summary judgment would be appropriate."); Workman v. Jordan, 958 F.2d 332, 336 (10th Cir. 1992) (holding that a court may allow limited discovery to develop or clarify facts needed to rule on qualified immunity claim and defer decision on qualified immunity); Howell v. Evans, 922 F.2d 712, 717-18 (11th Cir. 1991) (holding that when factual development is necessary, it can be achieved through discovery prior to trial, while still preserving opportunity to determine legal issues and to appeal before trial).

107. For an excellent discussion of how to determine "materiality" for summary judgment purposes, see Schwarzer et al., *supra* note 44, at 476.

108. *See, e.g.*, Adams v. St. Lucie County Sheriff's Dep't, 962 F.2d 1563, 1566 n.1 (11th Cir. 1992) (agreeing with the district court's observation that factual disputes do not preclude summary judgment if plaintiff's complaint does not allege a violation of clearly established law); Bennett v. Parker, 898 F.2d 1530, 1532 (11th Cir. 1990) (holding that no material issues of fact are in dispute if the plaintiff's evidence fails to establish a constitutional violation).

109. *See, e.g.*, Cartier v. Lussier, 955 F.2d 841, 845 (2d Cir. 1992) (holding that if, even when all facts as alleged by the nonmoving party are regarded as true, the moving party is still entitled to judgment as a matter of law, then factual disputes, however genuine, are not material, and their presence will not preclude summary judgment); Rozek v.

When historical facts[110] material to the issue of qualified immunity remain in dispute, summary judgment is inappropriate and a jury should decide those facts.[111] It is important to understand that a defendant does not lose his or her immunity simply because the qualified immunity issue cannot be disposed of on summary judgment.[112] If the qualified immunity issue is not resolved at the summary judgment stage, it is subject to disposition during trial, on a directed verdict motion, or even after trial on a motion for a judgment notwithstanding the verdict.[113] When factual issues remain for the jury, the best way to accomplish jury resolution of the facts while maintaining the court's control over the legal question of qualified immunity is to submit special interrogatories to the jury that will provide answers to the facts dispositive of the immunity defense.[114]

Topolnicki, 865 F.2d 1154, 1157 (10th Cir. 1989) (Issues of fact in dispute were not material "because even if they were resolved in [plaintiff's] favor, defendants . . . would still be entitled to qualified immunity for their handling of the investigation and prosecution."); Bailey v. Kenney, 791 F. Supp. 1511, 1519 (D. Kan. 1992) ("[A]ccepting plaintiff's version of the disputed facts, the court finds that reasonable officers could have believed the fugitive to have been at plaintiff's residence.").

110. A historical fact has been defined as "a thing done, an action performed, or an event or occurrence." Schwarzer et al., *supra* note 44, at 455.

111. *See, e.g.,* Pritchett v. Alford, 973 F.2d 307, 313 (4th Cir. 1992):

> [T]he narrow threshold question whether a right allegedly violated was clearly established at the appropriate level of inquiry and at the time of the challenged conduct is always a matter of law for the court, hence is always capable of decision at the summary judgment stage. Whether the conduct allegedly violative of the right actually occurred or, if so, whether a reasonable officer would have known that that conduct would violate the right, however, may or may not be then subject to determination as a matter of law. If there are genuine issues of historical fact respecting the officer's conduct or its reasonableness under the circumstances, summary judgment is not appropriate, and the issue must be reserved for trial.

112. *See, e.g.,* Buenrostro v. Collazo, 973 F.2d 39, 45 & n.8 (1st Cir. 1992):

> In this case, there seem to be additional facts, not yet fully developed and-or resolved, which could potentially inform the ultimate decision on qualified immunity. Hence, the defendants remain free to adduce additional proof at trial in an effort to demonstrate that they, or some among them, should be held harmless from damages by the doctrine of qualified immunity.

113. Adams v. St. Lucie County Sheriff's Department, 962 F.2d 1563, 1567 n.2 (11th Cir. 1992).

114. *See, e.g.,* Warlick v. Cross, 969 F.2d 303, 305 (7th Cir. 1992):

> The question of a defendant's qualified immunity is a question of law for the court, not a jury question. . . When the issue of qualified immunity remains unresolved at the time of trial, . . . the district court may properly use special interrogatories to allow the jury to determine disputed issues of fact upon which the court can base its legal determination of qualified immunity.;

Stone v. Peacock, 968 F.2d 1163, 1166 (11th Cir. 1992):

> The law is now clear . . . that the defense of qualified immunity should be

Because of the emphasis placed on early establishment of qualified immunity, courts sometimes will ignore the principles normally applied in summary judgment practice. A comparison of two cases from the First and Fourth Circuits helps to illustrate the problem. In *Prokey v. Watkins*,[115] the plaintiff, an undercover police officer, alleged that defendants conspired to arrest her without probable cause. The facts in the case were "complex, intricate and in key areas contested."[116] In affirming the denial of defendants' motion for summary judgment on qualified immunity grounds, the Court of Appeals for the First Circuit articulated the very important distinction between the legal issue of qualified immunity and issues of disputed material facts. As the court stated:

> Whether . . . a reasonable policeman, on the basis of the information known to him, could have believed there was probable cause is a question of law, subject to resolution by the judge not the jury. . . . [I]f what the policeman knew prior to the arrest is genuinely in dispute, and if a reasonable officer's perception of probable cause would differ depending on the correct version, that factual dispute must be resolved by a fact finder.[117]

An interesting case to contrast with *Prokey* is *Gooden v. Howard County*.[118] In *Gooden*, police officers responding to complaints of a

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decided by the court, and should not be submitted for decision by the jury. . . . If there are disputed issues of fact concerning qualified immunity that must be resolved by a full trial and which the district court determines that the jury should resolve, special interrogatories would be appropriate.;

Warren v. Dwyer, 906 F.2d 70, 76 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 431 (1990):

> If there are unresolved factual issues which prevent an early disposition of [qualified immunity] defense, the jury should decide these issues on special interrogatories. The ultimate legal determination whether, on the facts found, a reasonable officer should have known he acted unlawfully is question of law better left for court to decide.

115. 942 F.2d 67 (1st Cir. 1991).

116. *Id.* at 73.

117. *Id. See also* Gainor v. Rogers, 973 F.2d 1379, 1385 (8th Cir. 1992):

> The cases are legion in this and other circuits which establish that where there are genuine issues of material fact surrounding an arrestee's conduct it is impossible for the court to determine, as a matter of law, what predicate facts exist to decide whether or not the officer's conduct clearly violated established law.;

Enlow v. Tishomingo County, 962 F.2d 501, 510 (5th Cir. 1992) (When facts relied on to establish probable cause for arrest were in dispute, "[w]hether or not [defendant could] claim qualified immunity from [plaintiff's] Fourth Amendment claims remain[ed] a fact-disputed issue."); Frohmader v. Wayne, 958 F.2d 1024, 1028 (10th Cir. 1992) ("Courts may not resolve disputed questions of material fact in order to grant summary judgment . . . . [C]ourts, at the summary judgment level, are required to take the facts and reasonable inferences in the light most favorable to the party opposing summary judgment.").

118. 954 F.2d 960 (4th Cir. 1992) (en banc).

disturbance in an apartment complex took the plaintiff into protective custody for emergency psychiatric evaluation. The officers' conclusion that the plaintiff was the source of the disturbance was mistaken, and plaintiff brought suit under 42 U.S.C. § 1983 alleging, *inter alia*, a violation of her Fourth Amendment right to be free from seizure without probable cause of mental illness.[119] In a narrowly divided vote, the majority of the en banc court reversed a divided panel opinion[120] which had affirmed the district court's denial of qualified immunity to the police officers.[121]

The majority admitted that the underlying events giving rise to the officers' conduct on the evening in question were a matter of dispute; the plaintiff's version of what happened differed significantly from the defendants' account of the facts.[122] Furthermore, the majority acknowledged that there was evidence to suggest that a neighbor (other than the one who complained of noises coming from plaintiff's apartment) had informed the officers that the disturbance came from a couple arguing in the apartment below the complaining neighbor's, rather than from the plaintiff's apartment above.[123] There was also evidence that the officers had investigated a domestic dispute in the apartment below, took information and filed a report.

The majority minimized the importance of the factual disputes, taking the position that the "inevitable confusion" that commonly results when witnesses to an incident give different accounts as to what occurred "need not signify a difference of triable fact."[124] The relevant inquiry was stated

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119. The court acknowledged that the "general right to be free from seizure unless probable cause exists was clearly established in the mental health seizure context." *Id.* at 968.

120. Five of the 11 judges sitting en banc dissented from the majority opinion. 954 F.2d at 970 (Phillips, J., joined by Ervin, C.J., and Murnaghan, Sprouse, Butzner, JJ., dissenting).

121. Gooden v. Howard County, 917 F.2d 1355 (4th Cir. 1990).

122. *Gooden*, 954 F.2d 962-63. The facts are rather detailed, but the important disputes can be summarized. The defendants claimed that when they responded to a neighbor's second complaint about a loud disturbance coming from the apartment above her, they also thought they heard a loud scream coming from the plaintiff's apartment. When they proceeded to investigate, the plaintiff explained that she had been ironing and had burned herself. The plaintiff stated that she showed the defendants the hot iron, clothes on the ironing board, and a red mark on her arm. The officers claimed the iron was cold, no clothes were on the board, and they saw no evidence of a burn. After returning to the neighbor's downstairs apartment, the officers claimed to have heard another loud disturbance, including a male voice and a female voice, but never simultaneously. The officers concluded that plaintiff had a multiple personality and that she should be taken into custody to prevent her from harming herself. Plaintiff claimed that she informed the officers that she had been on the phone with her mother and a friend.

123. *Id.* at 964.

124. *Id.* at 965.

as: "What matters is whether the officers acted reasonably upon the reports available to them and whether they undertook an objectively reasonable investigation with respect to that information in light of the exigent circumstances they faced."[125]

Having so formulated the relevant question, the majority then apparently ignored the significance of factual disputes concerning which reports were available to the officers and what information they possessed at the time they took the plaintiff into custody. Instead, the court determined that there was "little dispute . . . about what the officers perceived," or the reasonableness of their perceptions.[126]

To conclude that the officers reasonably believed their conduct to be lawful, given the information they possessed at the time, the majority either dismissed as immaterial any dispute between the plaintiff and the officers about the historical facts of what occurred that evening, as well as the testimony of the neighbor, or the majority simply engaged in fact finding, deciding the historical facts and inferences to be drawn from them in favor of the officers.[127]

As the dissent in *Gooden* observes: "The importance of this case . . . lies in the classic problem it poses of accommodating qualified immunity doctrine's preference for pre-trial establishment of the defense, with summary judgment's insistence that, desirable as this may be, it cannot be done if genuine issues of fact material to the defense exist."[128]

Throughout its opinion, the majority repeatedly stressed the purpose and policy underlying qualified immunity, emphasizing each time the deference to be accorded officers who must make on-the-scene judgment calls in the performance of their duties.[129] *Gooden* is indeed a case in

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125. *Id.*

126. *Id.* The majority's determination that the officers' investigation uncovered no other possible sources for the noise, *id.* at 966, seems contradictory to its earlier acknowledgement that the officers had been informed of a domestic dispute, had investigated that incident and filed a report. *Id.* at 964.

127. As the dissent put it:

> [T]he majority essentially, though without ever saying so, shifts the burden to the plaintiff as nonmovant, either resolving conflicting inferences arising from conflicting versions of critical historical facts in favor of the defendants in an exercise of raw fact-finding, or simply sweeping aside as immaterial the existence of flat conflict in the evidence as forecast on certain critical issues.

Id. at 972 (Phillips, J., dissenting).

128. *Id.* at 974 (Phillips, J., dissenting).

129. The court first noted that an en banc hearing was granted "to underscore the reasonable latitude accorded law enforcement officers in the performance of their duties." *Id.* at 962. Shortly thereafter, the court stated that the doctrine of qualified immunity had been developed "with the express purpose of according police officers latitude in exercising what are inescapably discretionary functions replete with close judgment calls." *Id.* at 964.

which Seventh Amendment concerns about having juries decide disputed historical facts appear to be given less weight when balanced against the policy concerns underlying the judicially crafted qualified immunity defense. As the dissent suggests, the majority in *Gooden* "succumbed to what may be a rather widespread temptation to put another finger on the scale favoring pretrial establishment of immunity—by skewing summary judgment doctrine."[130]

IV. Availability of Interlocutory Appeal

In *Mitchell v. Forsyth*,[131] the Supreme Court held that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision'" under the

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Later in its opinion, the court declared, "the basic purpose of qualified immunity . . . is to spare individual officials the burdens and uncertainties of standing trial in those instances where their conduct would strike an objective observer as falling within the range of reasonable judgment." *Id.* at 965.

130. *Id.* at 974 (Phillips, J., dissenting). For what may be considered another example of this tendency to "tip the scales" in favor of a pretrial finding of qualified immunity, see Cross v. City of Des Moines, 965 F.2d 629, 632 (8th Cir. 1992) ("If a case involves a question of whether probable cause existed to support an officer's actions, the case should not be permitted to go to trial if there is any reasonable basis to conclude that probable cause existed.") (citing *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991)).

In a subsequent panel opinion of the Fourth Circuit, the court rejected defendant's reliance on *Gooden* to support his claim that the district court had erred in not granting his motion for summary judgment or a directed verdict on qualified immunity grounds. Rainey v. Conerly, 973 F.2d 321 (4th Cir. 1992). The court in *Rainey* observed:

> This case is distinguishable from this court's recent decision in *Gooden*. In *Gooden*, the *en banc* court addressed a similar situation in which the applicability of qualified immunity arguably depended on resolution of conflicting versions of the facts. The majority ultimately concluded that resolution of what actually happened was irrelevant to the qualified immunity claim, because the appropriate focus was on the perceptions of the officers. . . .
>
> Unlike *Gooden* where what actually happened did not need to be resolved by the trier of fact in order to reach a decision on the applicability of qualified immunity, in this case a determination of what actually happened is absolutely necessary to decide whether [defendant] could reasonably have believed that his actions were lawful. [Defendant] does not claim, as did the officers in *Gooden*, that he operated under a mistaken, but reasonable, perception of the facts. Instead, the crux of the dispute revolves entirely around the level of force utilized by [defendant] in removing [plaintiff] from the vestibule. . . . The determination of what actually happened depends exclusively on an assessment of the credibility of the respective witnesses. This assessment is a disputed issue of fact and, therefore, cannot be resolved on summary judgment or directed verdict.

Id. at 324.

131. 472 U.S. 511 (1985). Some courts refer to the case as *Mitchell*, others as *Forsyth*. For purposes of this Article, the case will be referred to in text as *Forsyth*, although quotations in footnotes may refer to either party name.

collateral order doctrine.[132] As noted earlier, language in *Forsyth* stating that an appellate court need not decide "whether the plaintiff's allegations actually state a claim"[133] appears inconsistent with the Court's directive in *Siegert* to address the constitutional issue as a threshold to the qualified immunity analysis.

Furthermore, since *Forsyth* was decided before *Anderson* made facts surrounding challenged conduct a relevant part of the immunity analysis, the issue that *Forsyth* envisions as reviewable on interlocutory appeal is "a purely legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law."[134] *Anderson* adds another question of law which must be reviewed on interlocutory appeal: whether a reasonable official, given the information possessed by the defendant, would have known that her particular conduct violated a clearly established constitutional right.

There is general agreement that if the defense is "I didn't do it," an interlocutory appeal will not lie from a denial of summary judgment. Obviously, such a defense goes to the very merits of the case and has nothing to do with qualified immunity.[135]

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132. *Id.* at 530. See *supra* notes 30-32 and accompanying text for discussion of the collateral order doctrine.

133. *Id.* at 528.

134. *Id.* at 528 n.9.

135. *See, e.g.*, Kulwicki v. Dawson, 969 F.2d 1454, 1461 n.7 (3d Cir. 1992):

> We note that an appeal from a denial of immunity where factual issues remain is distinct from that where the defendant official denies taking the actions at issue. Unlike a claim of official immunity, the 'I didn't do it' defense relates strictly to the merits of the plaintiff's claim, and is therefore not immediately appealable.;

Crawford-El v. Britton, 951 F.2d 1314, 1317 (D.C. Cir. 1991):

> We note that some of [defendant] Britton's arguments on appeal take the form of a simple denial — an 'I didn't do it' defense. Immediate review of the district court's treatment of those issues is beyond the scope of *Mitchell's* exception, which exists to supply early review of the law 'clearly established' at the relevant time.;

Elliott v. Thomas, 937 F.2d 338, 342 (7th Cir. 1991):

> It would extend *Mitchell* well beyond its rationale to accept an appeal containing nothing but a factual issue. . . . *Mitchell* did not create a general exception to the finality doctrine for public employees. Every court that has addressed the question expressly has held that *Mitchell* does not authorize an appeal to argue 'we didn't do it.' We join them.;

Johnson v. Estate of Laccheo, 935 F.2d 109 (6th Cir. 1991) (Guy, J., dissenting). Judge Guy criticized the majority for failing:

> to differentiate between a true qualified immunity motion, which when denied may be the subjection [sic] of an interlocutory appeal . . . and a regular summary judgment motion, which cannot be appealed when denied . . . . [I]f what the officer actually did, as opposed to the legal effect of what he did, is the basis

Some confusion and conflict exists about the availability of interlocutory appeal when qualified immunity has been denied because of material issues of fact in dispute. There is case law in both the Second and Eleventh Circuits holding that when a qualified immunity summary judgment motion is denied because of material issues of fact in dispute, no jurisdiction exists to hear an interlocutory appeal.[136] The majority of circuits, however, do exercise jurisdiction over such appeals.[137]

> of the dispute, . . . then we evaluate a district court's ruling as well as the right to interlocutory appeal by the same standards we use in reviewing any other type of summary judgment.

Id. at 113.

See also Unwin v. Campbell, 863 F.2d 124, 137-141 (1st Cir. 1988) (Breyer, J., dissenting). Judge Breyer presents a strong argument for the view that a defendant is not entitled to a 'qualified immunity' interlocutory appeal in respect to a pure fact-based 'evidence sufficiency' ruling.

136. *See, e.g.,* Cartier v. Lussier, 955 F.2d 841, 844-45 (2d Cir. 1992) (holding if factual determination is necessary predicate to resolution of qualified immunity issue, interlocutory review is not available); Wright v. Whiddon, 951 F.2d 297, 299 n.1 (11th Cir. 1992) (Although in this case there was no dispute about the underlying historical facts, the court noted that "[t]here is some conflict in our precedent whether we have jurisdiction over the denial of a qualified immunity summary judgment motion if the motion is denied because of a factual dispute."); Moffitt v. Town of Brookfield, 950 F.2d 880, 884 (2d Cir. 1991) (holding if a factual determination is necessary to the resolution of the issue of qualified immunity, immediate appeal is not permitted); Stewart v. Baldwin County Board of Education, 908 F.2d 1499, 1506-07 (11th Cir. 1990) (affirming denial of summary judgment where availability of qualified immunity turned on question of fact, but noted that several panels of this circuit have indicated that proper disposition in this context is to dismiss appeal for want of jurisdiction); Bennett v. Parker, 898 F.2d 1530 (11th Cir. 1990).

But see Burrell v. Board of Trustees of Georgia Military College, 970 F.2d 785, 787-88 (11th Cir. 1992) ("Even assuming . . . that some facts remain disputed in this case, the mere existence of a factual quarrel does not affect the appealability of a denial of qualified immunity.").

137. Kulwicki v. Dawson, 969 F.2d 1454, 1460-61 (3d Cir. 1992) (recognizing that "Courts of Appeals do not take a uniform view of appellate jurisdiction over denials of immunity"). The court concluded:

> [o]ur jurisdiction to hear immunity appeals is limited only where the district court does not address the immunity question below, or where the court does not base its decision on immunity *per se* . . . . Insofar as there may be issues of material fact present in a case on appeal, we would have to look at those facts in the light most favorable to the non-moving party.

Id.; Austin v. Hamilton, 945 F.2d 1155, 1157 (10th Cir. 1991) (deciding that interlocutory appellate jurisdiction existed under *Forsyth*, even though a district court based its denial of motion on a finding that disputed material facts existed in the case); Johnson v. Hay, 931 F.2d 456, 459-60 (8th Cir. 1991) (holding that the court had jurisdiction to hear the appeal of an order denying the defendant's motion for summary judgment on qualified immunity grounds even though the appeal presented an issue that is not purely legal and concluding that a genuine issue of material fact existed as to whether a prison pharmacist

The justification is compelling for allowing interlocutory appeals under *Forsyth* from denials of qualified immunity on grounds that disputed issues of material fact preclude the granting of summary judgment. When a district court denies qualified immunity at the summary judgment stage because of genuine issues of material fact in dispute, the question of the materiality of the facts in dispute is a question of law.[138] The facts in dispute are material only if they are dispositive of the immunity issue; that is, if, viewing the facts and the inferences to be drawn from them in the light most favorable to the plaintiff, the conclusion is that a reasonable official would have understood that the defendant's alleged conduct violated clearly established law.

Ultimately, any denial of qualified immunity, whether or not the facts are in dispute, rests on the determination of a question of law, whether the facts as alleged by either the plaintiff or defendant support a claim that a reasonable official would have understood the conduct in question violated clearly established law.[139] A court's *deferral* of a qualified immunity decision to allow limited discovery and facilitate pretrial resolution of the issue should not be immediately appealable.[140]

At the motion to dismiss stage, if a court frames its order as a denial of qualified immunity, as opposed to a deferral of its decision pending a motion for summary judgment, the defendant runs a risk by taking an interlocutory appeal at this point. An appellate court faced with an interlocutory appeal from a denial of qualified immunity at the motion to dismiss stage has only the plaintiff's allegations in the complaint to review. Courts are reluctant to dismiss a complaint this early in the process if there are any facts alleged by the plaintiff which, if proved, would support the conclusion that the defendant violated a clearly es-

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reasonably could have believed that he was not violating the plaintiff's constitutional rights by refusing to fill prescriptions); Cinelli v. Cutillo, 896 F.2d 650, 653-54 (1st Cir. 1990) (deciding that the court of appeals had jurisdiction to review a district court's denial of qualified immunity on grounds that a genuine issue of material fact existed and explaining that in such review a court must examine discovered facts regarding the defendant's conduct relevant to the immunity claim, and, applying normal summary judgment principles, determine whether a genuine issue does or does not exist as to qualified immunity).

138. Cartier v. Lussier, 955 F.2d 841, 844-45 (2d Cir. 1992) (deciding whether disputed facts are material to resolving the applicability of the doctrine is a legal question subject to de novo review).

139. Chief Judge Tjoflat makes a persuasive case for this proposition in Bennett v. Parker, 898 F.2d 1530, 1534-37 (11th Cir. 1990) (Tjoflat, C.J., concurring).

140. *See, e.g.*, Workman v. Jordan, 958 F.2d 332, 335-36 (10th Cir. 1992) (holding that when a court allows limited discovery to develop or clarify facts needed to rule on a qualified immunity claim and defers decision on qualified immunity, such an order is not immediately appealable, but if the district court postpones its decision on qualified immunity until trial, the order is appealable).

tablished right.[141] Furthermore, the defendant is not likely to be afforded an opportunity to pursue a subsequent pretrial interlocutory appeal on the issue of qualified immunity.[142]

Because a *Forsyth* appeal divests the district court of jurisdiction to proceed with the trial,[143] there is considerable potential for abuse of the process by defendants who seek to delay the trial at plaintiff's expense. In *Apostol v. Gallion*,[144] Judge Easterbrook, expressing concern that defendants might invoke *Forsyth* appeals unjustifiably for such purpose, suggested that trial courts certify such appeals as frivolous and proceed with the trial.[145] Faced with a finding of frivolousness by the district court, the defendant would have to seek a stay from the court of appeals in order to bring the trial to a halt.[146] The district court must provide

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141. *See, e.g.*, McMath v. City of Gary, Ind., 976 F.2d 1026, 1031 (7th Cir. 1992) ("Although raising qualified immunity in a motion to dismiss . . . is permissible, it means that the only facts before [the court of appeals] in ruling on the motion are those alleged in the complaint, which must be taken as true."); Doe v. State of Louisiana, 974 F.2d 36, 37 (5th Cir. 1992):

> On review of a district court's denial of dismissal for failure to state a claim for which relief can be granted, we must accept as true all well-pleaded facts. The complaint is not subject to dismissal "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." (citations omitted) The same is true when immunity is urged in a motion to dismiss.;

Pelletier v. Federal Home Loan Bank, 968 F.2d 865, 871 (9th Cir. 1992):

> If the district court determines that the defendant's entitlement to qualified immunity is not established at the motion to dismiss stage, he appeals at his peril. He may appeal immediately or he may answer the complaint and defer pursuit of his qualified immunity claim, and of appellate review of any denial of that claim, until it appears that a motion for summary judgment would be appropriate.

142. *See, e.g.*, Abel v. Miller, 904 F.2d 394, 397 (7th Cir. 1990) (holding that sequential appeals of pretrial orders denying qualified immunity are not authorized under *Forsyth*).

143. Apostol v. Gallion, 870 F.2d 1335, 1338 (7th Cir. 1989). Plaintiffs who resist a defendant's motion to stay the trial while the interlocutory appeal is pending and who fail to pursue a certification of frivolousness from the district court, may find themselves in the unfortunate position of plaintiff in Stewart v. Donges, No. 91-2073, 1992 WL 317622 (10th Cir. Nov. 6, 1992), who was denied any attorneys' fees for trial preparation and a trial that went forward after defendant had filed a notice of appeal. Holding the plaintiff "responsible for the district court proceeding with the trial," *id.* at *6, without jurisdiction, the court noted that "[t]his case exemplifies the precise problem that the Supreme Court in *Forsyth* was trying to avoid." *Id.*

144. 870 F.2d 1335 (7th Cir. 1989).

145. *Id.* at 1339. The court also observed that defendants might waive or forfeit their right not to be subject to trial by waiting "too long after denial of summary judgment," or "using claims of immunity in a manipulative fashion." *Id.*

146. *Id.*

a reasoned finding to accompany its certification of frivolousness,[147] and the Seventh Circuit has advised that "[t]he stamp of frivolity should only be used when a *Forsyth* appeal is 'unfounded.'"[148]

V. Qualified Immunity and Fourth Amendment Excessive Force Claims

Because there is still considerable disagreement about whether the qualified immunity defense makes sense in the Fourth Amendment excessive force context, it is worth noting the nature of the problem and some of the recent case law in this area.[149]

A necessary starting point for judges and lawyers involved in an excessive force case is to understand in what context the force was used to determine the appropriate constitutional standard. As the Tenth Circuit has noted:

> In determining whether a § 1983 claim involving excessive force by law enforcement officers has been stated the court must apply a constitutional standard. Three alternative constitutional standards have been utilized: 1) the Eighth Amendment's ban on cruel and unusual punishment; 2) the Fourth Amendment standard of 'objective reasonableness'; . . . and 3) the Fourteenth Amendment substantive due process standard which protects against use of excessive force that amounts to punishment.[150]

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147. *Id.*

148. McMath v. City of Gary, Ind., 976 F.2d 1026, 1031-32 (7th Cir. 1992).

149. For an excellent and more detailed analysis of the problem, see Urbanya, *supra* note 6.

150. Culver v. Town of Torrington, 930 F.2d 1456, 1460 (10th Cir. 1991). Discussion of the standards applied in the Fourteenth Amendment substantive due process context and the Eighth Amendment context is beyond the scope of this Article. The Supreme Court has yet to definitively establish the Fourteenth Amendment due process standard for excessive force claims. Multiple standards (e.g., recklessness, deliberate indifference, intentional conduct, conduct "shocking the conscience") have been articulated by the lower federal courts. *See, e.g.,* Frohmader v. Wayne, 958 F.2d 1024, 1027 (10th Cir. 1992) (Referring to *Glick* factors (see *infra* notes 151-52 and accompanying text) in deciding whether the force was excessive under due process clause, the court noted: "[t]he due process standard is more onerous than the Fourth Amendment reasonableness standard since the former requires, in addition to undue force, personal malice amounting to an abuse of official power sufficient to shock the conscience.").

See also Redman v. County of San Diego, 942 F.2d 1435, 1443 (9th Cir. 1991):

> We therefore hold that deliberate indifference is the level of culpability that pretrial detainees must establish for a violation of their personal security interests under the fourteenth amendment. We also hold that conduct that is so wanton or reckless with respect to the "unjustified infliction of harm as is tantamount to a knowing willingness that it occur," *Whitley*, 475 U.S. at 321, . . . will also

Prior to *Tennessee v. Garner*[151] and *Graham v. Connor*,[152] the majority of federal courts treated all excessive force claims as governed by a single standard: the standard set out by Judge Friendly in *Johnson v. Glick*.[153] Under this standard, established in a substantive due process context, courts would consider four factors: (1) the need for force, (2) the relationship between the need and the amount of force used, (3) the extent of injury inflicted, and (4) whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the purpose of causing harm.[154]

After *Garner* and *Graham*, it is clear that the Fourth Amendment is the sole source of protection for a plaintiff who has been subjected to force in the context of "an arrest, investigatory stop, or other 'seizure'" of a free citizen.[155] The Fourth Amendment standard is one of "objective reasonableness," which requires the challenged conduct to be evaluated by looking at the totality of the circumstances from the perspective of a reasonable officer at the scene.[156]

Although *Anderson* makes it clear that qualified immunity is available as a defense to a Fourth Amendment claim of an unreasonable search, *Graham* leaves open the question of whether qualified immunity would apply in the excessive force case.[157] Because the Fourth Amendment

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> suffice to establish liability because it is conduct equivalent to a deliberate choice. . . . This may be termed "reckless indifference.";

Salazar v. City of Chicago, 940 F.2d 233, 238-39 (7th Cir. 1991) (holding that deliberate indifference is the proper standard for pretrial detainees). Deliberate indifference, in this circuit, is synonymous with intentional or criminally reckless conduct. *Id.* at 238.

For the standard in Eighth Amendment excessive force cases, see Hudson v. McMillian, 112 S. Ct. 995 (1992). The Court adopted the standard established in Whitley v. Albers, 475 U.S. 312 (1986), concerning force used in the context of a prison riot. The Court held the *Whitley* standard applicable "whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause." *Hudson*, 112 S. Ct. at 999. In those circumstaces, "the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Id.*

151. 471 U.S. 1 (1985).

152. 490 U.S. 386 (1989).

153. 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973).

154. *Id.* at 1033.

155. *Graham*, 490 U.S. at 388.

156. *Id.* at 396. The factors to be considered include: (1) the severity of the crime, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether the suspect is actively resisting arrest or attempting to flee. *Id.* But see Moore v. Gwinnett County, 967 F.2d 1495, 1498-99 (11th Cir. 1992), in which the court determined "objective reasonableness" in a Fourth Amendment context by consideration of the *Glick* factors.

157. *See Graham*, 490 U.S. at 399 n.12 ("[T]he officer's *objective* 'good faith'—that is, whether he could reasonably have believed that the force used did not violate the

excessive force inquiry is governed by the same "objective reasonableness" standard as the qualified immunity inquiry, a number of courts and commentators have suggested that the qualified immunity defense is redundant in this context and does not apply.[158] Those adhering to this view would frame the question on the merits and the qualified immunity question in the same way: was the officer's conduct objectively reasonable given the totality of the circumstances?[159]

Fourth Amendment—may be relevant to the availability of the qualified immunity defense to monetary liability under § 1983."). Because the defense was not raised in *Graham*, the Court did not address the issue.

158. *See, e.g.*, Hopkins v. Andaya, 958 F.2d 881, 885 n.3 (9th Cir. 1992) (per curiam) ("In Fourth Amendment unreasonable force cases, unlike in other cases, the qualified immunity inquiry is the same as the inquiry made on the merits."); Quezada v. County of Bernalillo, 944 F.2d 710, 718 (10th Cir. 1991):

> While qualified immunity is a powerful defense in other contexts, in excessive force cases the substantive inquiry that decides whether the force exerted by police was so excessive that it violated the Fourth Amendment is the same inquiry that decides whether the qualified immunity defense is available to the government actor.;

Hunter v. District of Columbia, 943 F.2d 69 (D.C. Cir. 1991) (Noting that several courts have concluded that qualified immunity is not available as a defense to Fourth Amendment excessive force actions under the objective reasonableness test of *Graham*, the court declared: "We too doubt whether a substantively distinct qualified immunity defense would be available to an officer acting after *Graham*, but we need not resolve that question here."); Yates v. City of Cleveland, 941 F.2d 444, 450 (6th Cir. 1991) (Suhrheinrich, J., concurring):

> I believe generally . . . that qualified immunity is not available in excessive force cases. . . . It seems to this writer that qualified immunity has no relevance unless there is excessive force, for if there is no excessive force, the officer acted in an objectively reasonable manner under the circumstances and there is no constitutional violation. It also seems that once you have determined the need for the defense of [qualified immunity], ... as a matter of law . . . the officer has acted unreasonably . . . and has violated clearly established law.

See also Jackson v. Hoylman, 933 F.2d 401, 402 (6th Cir. 1991) (acknowledging that the district court's conclusion that qualified immunity turns on the same objective reasonableness standard as does a claim of excessive force); Street v. Parham, 929 F.2d 537, 540-41 (10th Cir. 1991) (holding it was error for a jury to be instructed regarding qualified immunity defense after it found force used was unreasonable because after a jury concludes excessive force has been used, the inquiry is over and the question of objective reasonableness is foreclosed); Dixon v. Richer, 922 F.2d 1456, 1463 (10th Cir. 1991) ("[I]n excessive force claims asserted under the Fourth Amendment, the qualified immunity question is usually answered in the Fourth Amendment inquiry."); Berry v. City of Phillipsburg, Kansas, 796 F. Supp. 1400, 1404 (D. Kan. 1992) ("[I]n passing on a claim of excessive force in violation of the Fourth Amendment, the constitutional inquiry of reasonableness is the same inquiry that determines whether qualified immunity is available to the state actor in his individual capacity."); McDonald v. Haskins, 966 F.2d 292, 293 (7th Cir. 1992) ("[T]he relation between *Graham*'s purely objective test for excessive force claims and the comparable approach adopted in *Harlow v. Fitzgerald* for determining qualified immunity . . . is somewhat uncertain."). *See generally* Urbanya, *supra* note 6.

159. *See* Mahoney v. Kesery, 976 F.2d 1054, 1057 (7th Cir. 1992) (Judge Posner,

The majority of courts, however, find qualified immunity equally applicable in all Fourth Amendment contexts, including excessive force cases.[160] The qualified immunity defense is considered to provide an extra layer of protection to the officer, beyond her defense on the merits.[161] The qualified immunity question is not simply whether the officer's conduct was objectively reasonable under the circumstances, but is whether a reasonable officer *could have believed* his or her conduct to be lawful (i.e., objectively reasonable) under the circumstances.[162]

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somewhat puzzled by an analysis that calls for addressing the question of whether there was probable cause for an officer to believe he had probable cause, suggests that in a case challenging probable cause for an arrest, "the issue of immunity and the principal issue on the merits are one and the same.").

160. *See* Posr v. Doherty, 944 F.2d 91, 95 (2d Cir. 1991) (a qualified immunity defense is available to a police officer to meet claim of excessive force); Slattery v. Rizzo, 939 F.2d 213 (4th Cir. 1991) ("There is no principled reason not to allow a defense of qualified immunity in an excessive use of force claim."). The court decided the critical issue was whether a reasonable police officer could have had probable cause to believe that the appellee posed an immediate and deadly threat. *Id.* at 216; Hammer v. Gross, 932 F.2d 842, 850 (9th Cir. 1991) (rejecting the plaintiff's argument that an officer who has used unreasonable force cannot, by definition, have acted reasonably); Hamm v. Powell, 893 F.2d 293, 299 (11th Cir. 1990) (qualified immunity is available in excessive force cases); Brown v. Glossip, 878 F.2d 871, 873 (5th Cir. 1989) (finding no principled distinction between availability of qualified immunity as a defense to unreasonable searches and seizures and as a defense to excessive force claim under the Fourth Amendment); Ellis v. City of Indianapolis, 800 F. Supp. 733, 738 (S.D. Ind. 1992) ("If, based on the undisputed facts of the incident, a reasonable officer in [defendant's] position could have believed use of deadly force against [plaintiff] was constitutional, then [defendant] is entitled to immunity for his conduct.").

161. As David Rudovsky has pointed out, one danger of this extra layer of protection is that a whole body of subconstitutional law will develop in the Fourth Amendment context. Cases will be decided and disposed of on the basis of whether a reasonable officer could have believed he violated the Fourth Amendment reasonableness standard. "[T]he fourth amendment soon would be quite unknown, and the controlling standards would reflect the immunity rule, rather than the established concept of probable cause." Rudovsky, *supra* note 6, at 53.

See, e.g., Malley v. Briggs, 475 U.S. 335, 344-45 (1986) (holding that officers seeking arrest warrants are entitled to qualified immunity unless "the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable."); Hoffman v. Reali, 973 F.2d 980, 985 (1st Cir. 1992) ("The issue in this case . . . is not whether [defendant] *in fact* had probable cause but whether his conclusion to that effect was sufficiently reasonable to afford him the protection of qualified immunity."); Thompson v. Reuting, 968 F.2d 756, 760 (8th Cir. 1992) ("The issue is not whether the affidavit actually establishes probable cause, but rather whether the officer had an objectively reasonable belief that it established probable cause."); Moore v. Gwinnett County, 967 F.2d 1495, 1497 (11th Cir. 1992):

> [T]he question before us . . . is not precisely whether probable cause existed in fact. When a law enforcement officer seeks summary judgment on the basis of qualified immunity, we only must ask whether, viewing the facts in a light favorable to the non-movant, there was *arguable* probable cause for the arrest.

162. Slattery v. Rizzo, 939 F.2d 213, 216 (4th Cir. 1991).

The clearest case for the availability of qualified immunity in the Fourth Amendment excessive force action is one in which the substantive constitutional standard controlling at the time of the challenged conduct differs from the standard governing the conduct in question under current law. A number of cases in the wake of *Graham* involve uses of force which, at the time of the events in question, were governed by the substantive due process standard of *Glick*, but which now are controlled by the Fourth Amendment objective reasonableness standard of *Graham*.[163] An officer's use of force in a particular context may be subjected to Fourth Amendment scrutiny under *Graham* in deciding whether plaintiff alleges a violation of a constitutional right under current law, but if the objective reasonableness standard was not established in the given context at the time of the conduct in question, qualified immunity should protect the officer, unless a reasonable officer would have understood her conduct to be unlawful under the standard then controlling.[164]

VI. Conclusion

Siegert changes the structure of the qualified immunity analysis, and *Bryant* insists that the immunity issue be resolved by the court as long before trial as possible. Because qualified immunity is an affirmative

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163. *See, e.g.,* Frohmader v. Wayne, 958 F.2d 1024, 1027 (10th Cir. 1992) (holding that although the Fourth Amendment objective reasonableness standard was controlling for purpose of assessing whether the plaintiff stated a constitutional claim for postarrest, prehearing use of excessive force, the availability of qualified immunity was determined by the law clearly established at the time, which was the substantive due process standard); Austin v. Hamilton, 945 F.2d 1155, 1162 (10th Cir. 1991) ("[F]ourth amendment standards govern the evaluation of defendants' qualified immunity defense for conduct in connection with plaintiffs' initial arrest, while substantive due process principles control the issue as to any excessive force employed thereafter."); Hannula v. City of Lakewood, 907 F.2d 129, 131 (10th Cir. 1990) ("While *Graham* sets forth the test for determining whether excessive force has occurred, it does not necessarily state the proper test for determining a defendant's qualified immunity from a claim of excessive force.") The test, for qualified immunity purposes, was under substantive due process standard in effect at time of challenged conduct. *Id.*

164. *See, e.g.,* King v. Chide, 974 F.2d 653, 657 (5th Cir. 1992) ("Although the standard for determining reasonableness in excessive use of force cases has evolved considerably since the date of conduct in question, objective reasonableness of challenged conduct must be judged by the standard that existed at time of conduct in question."); Fraire v. City of Arlington, 957 F.2d 1268, 1274 (5th Cir. 1992) (affirming qualified immunity, measuring the objective reasonableness of the defendant's conduct against excessive force standards in existence at the time in the Fifth Circuit); Finnegan v. Fountain, 915 F.2d 817, 821 (2d Cir. 1990) (holding that even if a jury finds the defendant to have used constitutionally excessive force, it is for the court to determine whether the unlawfulness of his conduct should have been apparent to defendant at the time).

defense, it must be pleaded by the defendant or it may be waived.[165] A defendant may invoke qualified immunity to avoid the burdens of discovery by making a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).[166] When the defendant raises the qualified immunity defense by way of a motion to dismiss, the Court of Appeals for the Eleventh Circuit has noted:

> At this early stage in the proceedings, the Rule 12(b)(6) defense and the qualified-immunity defense become intertwined. Under Rule 12(b)(6), defendants can defeat plaintiffs' cause of action if the complaint 'fails to state a claim upon which relief can be granted.' . . . Under the qualified-immunity defense, defendants are immune from liability and even from trial if plaintiffs' complaint fails to state a violation of 'clearly established statutory or constitutional rights of which a reasonable person would have known.' . . . And as the Supreme Court has stated, '[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.'[167]

If the complaint fails *Siegert's* threshold inquiry in the qualified immunity analysis and does not allege the violation of a constitutional right under current law, then the complaint should be dismissed and

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165. Siegert v. Gilley, 111 S. Ct. 1789, 1793 (1991); Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982); Gomez v. Toledo, 446 U.S. 635, 640-41 (1980). *See also* Buenrostro v. Collazo, 973 F.2d 39, 44 (1st Cir. 1992) ("Qualified immunity is . . . an affirmative defense, and the 'right' to have it determined in an intermediate appeal can be waived if it is not properly asserted below."); Kennedy v. City of Cleveland, 797 F.2d 297, 300 (6th Cir. 1986) ("Since immunity must be affirmatively pleaded, it follows that failure to do so can work a waiver of the defense."), *cert. denied*, 479 U.S. 1103 (1987).

FED. R. CIV. P. 8(c) (1987) requires that any matter "constituting an avoidance or affirmative defense" be set forth affirmatively in a responsive pleading.

166. *See, e.g.*, D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1368 n.7 (3d Cir. 1992) (en banc):

> This court stated in *Black v. Bayer*, 672 F.2d 309 (3d Cir. 1982), that the affirmative defense of qualified immunity could not be successfully asserted through a 12(b)(6) motion since it must be developed by affidavits at the summary judgment stage or at trial . . . We think that subsequent Supreme Court rulings have so undermined the rule enunciated in that case, that it is no longer viable.;

Jordan v. Fox, Rothschild, O'Brien & Frankel, 787 F. Supp. 471, 480 (E.D. Pa. 1992) ("Where, as here, a defendant contends that under the facts alleged in the complaint he is entitled to qualified immunity, there is no practical reason not to permit him to proceed by way of a motion to dismiss.").

167. Oladeinde v. City of Birmingham, 963 F.2d 1481, 1485 (11th Cir. 1992) (citing *Siegert*, 111 S. Ct. 1789 (1991)).

judgment entered for the defendant *on the merits*. A dismissal at this stage on the basis that the plaintiff has not alleged the violation of a constitutional right at all should not be treated as an order merely granting qualified immunity, from which no appeal can be taken, but should be viewed as a 12(b)(6) dismissal on the merits from which final judgment the plaintiff may appeal.

If the complaint passes the *Siegert* threshold, the defendant may still avoid the burdens of discovery if the complaint does not allege the violation of a constitutional right that was clearly established at the time of the conduct giving rise to the cause of action. *Anderson* demands that the contours of the right be framed with sufficient clarity so that a reasonable official would have understood the unlawfulness of her conduct. The court, in most cases, will be able to answer the question of whether the right was clearly established prior to any discovery. If no such right was clearly established, then the defendant should prevail on the motion to dismiss on qualified immunity grounds.[168]

In some cases, limited discovery may be needed on the qualified immunity issue in order to properly establish the contours of the right in question. A court may defer its decision on the immunity question, allow limited discovery to achieve the requisite factual development, and decide the immunity issue on summary judgment.[169]

At the summary judgment stage, the plaintiff must clear three hurdles. First, the plaintiff must satisfy *Siegert*'s threshold requirement and allege the violation of a constitutional right under current law. Second, plaintiff must prove that the contours of the right allegedly violated were clearly established at the time of the challenged conduct. Third, the plaintiff must set forth specific facts and evidence from which the court can conclude that a reasonable official, given the information possessed by the defendant at the time, would have understood the alleged conduct violated plaintiff's clearly established right.

It is at the third step in the summary judgment inquiry that factual disputes most often occur. These disputes often revolve around the circumstances, the facts known by the officer at the time, and the conduct of the officer. If, even accepting plaintiff's version of the facts, the court would still conclude that a reasonable officer could have believed his conduct lawful, then there is no issue of material fact and summary judgment should be entered.

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168. Depending on what other claims or parties are involved in the case, this dismissal may result in final judgment from which a plaintiff's appeal would lie.

169. *See, e.g.*, Mee v. Ortega, 967 F.2d 423, 430 (10th Cir. 1992) (factual disputes required more development before the district court could rule on qualified immunity); Lewis v. City of Ft. Collins, 903 F.2d 752, 758 (10th Cir. 1990).

The more common scenario exists when, given plaintiff's version of the facts, there would be no qualified immunity, while under defendant's version of the facts, qualified immunity would be available. Under this scenario, genuine issues of material fact exist. Assuming plaintiff has carried his or her burden of coming forward with "the minimum quantum of proof" needed to defeat the motion for summary judgment, the court should look at the facts in the light most favorable to the plaintiff (the nonmoving party), deny summary judgment on qualified immunity grounds, and let the case go to trial.

At this point the defendant has lost his or her immunity from suit, and an interlocutory appeal under *Forsyth* will be available. Given the approach outlined above, a district court's denial of a qualified immunity summary judgment motion must embrace the following conclusions of law:

(1) The plaintiff has asserted a valid constitutional claim upon which relief may be granted;
(2) The constitutional right defendant allegedly violated was clearly established at the time of the challenged conduct;
(3) When the facts are undisputed, a reasonable officer, given the facts and circumstances confronting this officer at the time, would have understood her conduct to have violated plaintiff's clearly established right;
(4) When the facts are in dispute:
    (a) looking at the facts in the light most favorable to the plaintiff, a reasonable officer would have understood her conduct to have violated plaintiff's clearly established constitutional rights OR
    (b) even accepting the defendant's version of the facts, a reasonable officer would have understood her conduct to have violated plaintiff's clearly established constitutional rights.

These legal conclusions, inherent in any denial of qualified immunity on a motion for summary judgment, are the questions of law to be reviewed on a *Forsyth* appeal. Even when a court's only articulated reason for denying summary judgment is because there are material issues of fact in dispute, the assumption must be that these questions have been answered affirmatively. The question of law on which the denial of immunity turns is whether the facts in dispute are material to the issue of qualified immunity. The facts in dispute are material only if accepting plaintiff's version of the facts would result in the denial of qualified immunity.[170]

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170. *See* Cartier v. Lussier, 955 F.2d 841, 845 (2d Cir. 1992).

A reversal on any one issue will result in judgment for the defendant. If the appellate court decides that the district court erred in reaching the first conclusion (that the plaintiff asserted a valid constitutional claim), then there should be a judgment for defendant on the merits. A reversal on any other basis should result in a grant of immunity from suit for that officer.

Finally, it must be remembered that a pre-trial denial of qualified immunity, even if affirmed on appeal, or even if no appeal is pursued, does not mean that the officer has lost his qualified immunity from liability.[171] The qualified immunity defense may still be raised at trial by way of a motion for a directed verdict, or after trial by way of a motion for a judgment notwithstanding the verdict.[172] Furthermore, special interrogatories may be put to the jury on the issues of fact determinative of the qualified immunity issue, allowing the judge to decide the ultimate legal question of whether, given the facts as decided by the jury, qualified immunity from liability is available to the official.[173]

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171. *See, e.g.*, Apostol v. Gallion, 870 F.2d 1335, 1339 (7th Cir. 1989) ("[T]he right not to pay damages and the right to avoid trial are distinct aspects of immunity, and the former may be raised on appeal at the end of the case even if defendants bypass their right to appeal under *Forsyth* before trial."); Pesek v. City of Brunswick, 794 F. Supp. 768, 792 (N.D. Ohio 1992):

> The defense of qualified immunity thus allows a government official to invoke the 'historic right' to be free from liability for money damages, as well as from litigation itself. Consequently, where the trial court rejects the defense on the motions, the § 1983 defendant remains free to raise it again as a defense to liability.

172. *See, e.g.*, Sims v. Metropolitan Dade County, 972 F.2d 1230, 1234 (11th Cir. 1992):

> Implicit in the district court's order [denying qualified immunity without prejudice] is a conclusion that, although [plaintiff's] allegations suffice to survive a motion for summary judgment, he may be unable to adduce sufficient evidence to survive a motion for a directed verdict based on qualified immunity. [I]f the district court had been correct in denying the Defendants' motion for summary judgment, it would not have been error to allow the Defendants to reassert the qualified immunity contention during the trial.

See also Feliciano-Angulo v. Rivera-Cruz, 858 F.2d 40, 48 (1st Cir. 1988) ("We emphasize . . . that while we uphold the denial of qualified immunity at this stage in the proceedings, this does not prevent the qualified immunity defense from being further considered . . . when the record is more complete.").

173. *See, e.g.*, Adams v. St. Lucie County Sheriff's Dep't, 962 F.2d 1563, 1579 n.8 (Edmondson, J., dissenting) ("[A]part from finding qualified immunity on a directed verdict or a JNOV, the judge can and, when needed, should use special verdicts or written interrogatories to the jury to resolve disputed facts before the judge rules on the qualified-immunity question.").