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Hammering in Screws: Why the Court Should Look beyond Summary Judgment When Resolving Section 1983 Qualified Immunity Disputes

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HAMMERING IN SCREWS: WHY THE COURT SHOULD LOOK BEYOND SUMMARY JUDGMENT WHEN RESOLVING § 1983 QUALIFIED IMMUNITY DISPUTES

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"If the only tool you have is a hammer, you tend to see every problem as a nail." - Abraham Maslow

I. INTRODUCTION

SECTION 1983,[1] qualified immunity, and their relationship to pre-trial disposition motions are common subjects among legal academics.[2] Since 1985, the Supreme Court has consistently advised courts to treat qualified immunity as a question of law and to use summary judgment as a tool with which to resolve qualified immunity disputes. In *Harlow v. Fitzgerald*,[3] the seminal case regarding pre-trial disposition of qualified immunity claims, the Court noted that "[o]n summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred."[4] Furthermore, the Court has held that qualified immunity is a question for the court. In combination, these suggestions have led many lower courts to treat all qualified immunity disputes as if they are identical in character and to resolve them at the summary judgment stage. Yet, not all issues of

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1. *See* 42 U.S.C. § 1983 (1996) (providing federal remedy to plaintiffs who are deprived of constitutional or protected statutory right by person acting under color of state law).

2. *See, e.g.*, David J. Ignall, *Making Sense of Qualified Immunity: Summary Judgment and Issues for the Trier of Fact*, 30 CAL. W. L. REV. 201, 202-04 (1994) (outlining problems inherent in using summary judgment to raise qualified immunity defense).

3. 457 U.S. 800 (1982) (defining qualified immunity as affirmative defense that shields government officials from monetary liability in absence of clearly established law).

4. *Id.* at 818.

qualified immunity are "nails" and summary judgment is often not the most suitable tool with which to resolve qualified immunity issues.

Most scholars who have previously discussed resolution of § 1983 qualified immunity suits through summary judgment focus on qualified immunity's factual nature. They argue that courts will have difficulty resolving qualified immunity disputes before trial because qualified immunity is an inherently fact-based inquiry.[5]

Evidentiary burdens are a related, but seldom discussed aspect of qualified immunity claims.[6] Most courts simply assume that evidentiary burdens are necessary for the resolution of qualified immunity disputes.[7] Nevertheless, courts as a whole have failed to develop a uniform approach to burdens of production and persuasion in § 1983 qualified immunity cases.[8] Five circuit courts require the plaintiff to prove that the defendant is not entitled to qualified immunity.[9] Three circuit courts require the

5. *See, e.g.*, Alan Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 6-8 (1997) ("[C]ourts and commentators alike have failed to appreciate that factual issues are an inherent part of the qualified immunity inquiry, notwithstanding the formal designation of qualified immunity as an issue of law . . . . [T]he intersection of a fact-based qualified immunity doctrine and summary judgment law generates significant conceptual problems."); Mary MacKenzie, Note, *The Doctrine of Qualified Immunity in Section 1983 Actions: Resolution of the Immunity Issue on Summary Judgment*, 25 SUFFOLK U. L. REV. 673, 698 (1991) ("The Supreme Court's directive that federal courts dispose of qualified immunity issues on summary judgment motions presents curious problems. One unresolved question is whether the immunity issue can be decided solely as a matter of law or if the fact-intensive inquiry inherent in the substantive standard precipitates jury resolution.").

6. *See Harlow*, 457 U.S. at 818. (noting that judge may determine whether law was clearly established at time action occurred at summary judgment stage). It seems somewhat surprising that this issue is so often overlooked. The Supreme Court has urged (one might even say instructed) lower courts to try to resolve qualified immunity disputes at the summary judgment stage.

Summary judgment is structured around evidentiary burdens. *See, e.g.*, Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986) (noting that burden in summary judgment is shifted to party opposing motion to demonstrate existence of "genuine issue" for trial); Chen, *supra* note 5, at 91 ("Before courts may apply summary judgment procedure to a particular claim, they must first determine which party bears the burden of persuasion."); Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 84 (1990) (noting that *Celotex* restructures parties' evidentiary burdens at summary judgment to reflect their evidentiary burdens at trial). Thus, it would seem difficult (if not impossible) to resolve summary judgment disputes without first determining which party bears the burden of proof and persuasion at trial.

7. *See generally* Crawford-El v. Britton, No.89cv03076, 1996 WL 525591, at *1 (D.C. Cir. Aug. 28, 1996) (addressing procedure for officers asserting qualified immunity and proper evidentiary burdens).

8. I have categorized the circuits based upon the language employed in recent qualified immunity § 1983 cases that discuss qualified immunity's evidentiary burdens.

9. *See* Douglas v. Dobbs, 419 F.3d 1097, 1100 (10th Cir. 2005) ("When a defendant raises a claim of qualified immunity, the burden shifts to the plaintiff to show that the defendant is not entitled to that immunity."); Mihos v. Swift, 358 F.3d 91, 98 (1st Cir. 2004) ("[F]or the plaintiff to overcome a qualified immunity

defendant to prove that he is entitled to qualified immunity.[10] The Ninth Circuit applies a hybrid approach, requiring that the plaintiff bear the burden of proof on certain aspects of qualified immunity and that the defendant bear the burden of proof on others.[11] D.C. Circuit cases, for the most part, do not indicate which (if either) party bears the burden of proof on questions of qualified immunity. Instead, D.C. Circuit opinions tend to word the issue as if it is simply a question for the court.[12] Finally, the Sixth Circuit opinions alternate between assigning the burden to the plaintiff and assigning the burden to the defendant.[13]

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defense he must show that his allegations, if true, establish a constitutional violation that the right was clearly established and that a reasonable official would have known that his actions violated the constitutional right at issue."); Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force, 379 F.3d 293, 301 (5th Cir. 2004) ("When a governmental official with discretionary authority is sued for damages under section 1983 and properly raises the defense of qualified immunity, the plaintiff bears the burden of rebutting that defense."); Snyder v. Nolen, 380 F.3d 279, 290 (7th Cir. 2004) ("The plaintiff bears the burden of establishing the existence of a clearly established constitutional right."); Crosby v. Monroe County, 394 F.3d 1328, 1332 (11th Cir. 2004) ("Once the official has established that he was engaged in a discretionary function, the plaintiff bears the burden of demonstrating that the official is not entitled to qualified immunity.").

10. *See* Huminski v. Corsones, 396 F.3d 53, 80 (2d Cir. 2004) (placing burden on defendant); Wilson v. Kittoe, 337 F.3d 392, 397 (4th Cir. 2003) ("The burden of proof and persuasion with respect to a claim of qualified immunity is on the defendant official."); Beers-Capitol v. Whetzel, 256 F.3d 120, 142 n.15 (3d Cir. 2001) ("It is the defendant's burden to establish that they are entitled to such immunity. That is, the defendants must show that their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

11. *See, e.g.*, Alford v. Haner, 333 F.3d 972, 977 (9th Cir. 2003) (holding that plaintiff bears burden of proving that law was clearly established and that defendant bears burden of proving "that a reasonable police officer could have believed, in light of the settled law, that he was not violating a constitutional right"), *rev'd sub nom.* Devenpeck v. Alford, 543 U.S. 146, 152-56 (2004) (concluding that Ninth Circuit's rule that offense establishing probable cause must be "closely related" to, and based on same conduct as, offense identified by arresting officer at time of arrest, is inconsistent with Supreme Court precedent); Creighton v. Anderson, 922 F.2d 443, 447 (8th Cir. 1990) ("Once the plaintiff has demonstrated that the law governing the plaintiff's rights was clearly established at the time of the defendant's acts, the defendant has the burden of proof with respect to all other elements of the qualified immunity defense.").

12. *See, e.g.*, Int'l Action Ctr. v. United States, 365 F.3d 20, 24-25 (D.C. Cir. 2004) ("A court performing a qualified immunity inquiry must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right."); Stewart v. Evans, 351 F.3d 1239, 1243 (D.C. Cir. 2003) (same); Lederman v. United States, 291 F.3d 36, 46 (D.C. Cir. 2002) (same); Butera v. Dist. of Columbia, 235 F.3d 637, 646 (D.C. Cir. 2001) (same).

13. *See, e.g.*, Barrett v. Steubenville City Schs., 388 F.3d 967, 970 (6th Cir. 2004) ("The plaintiff . . . thus, bears the ultimate burden of proof to show that the defendant is not entitled to qualified immunity."); Tucker v. City of Richmond, 388 F.3d 216, 220 (6th Cir. 2004) ("Given that qualified immunity is an affirmative defense, the defendants bear the burden of showing that the challenged act was objectively reasonable in light of the law existing at that time.").

One explanation for these variations is that the assignment of evidentiary burdens will depend upon the nature and timing of the defendant's qualified immunity argument.[14] Even when one accounts for these factors, however, variations in appellate courts' approaches to evidentiary burdens in § 1983 qualified immunity remain.

This Article, like its predecessors, discusses evidentiary burdens in § 1983 cases where the defendant has raised a qualified immunity defense. Nevertheless, the criticism and approach of this Article are markedly different from those of previous articles. I argue that both the approaches adopted by circuit courts, as well as those advocated by legal scholars who have previously broached this subject, are flawed.

Essentially, there are two categories of qualified immunity arguments.[15] Defendants might argue that the relevant legal rule at the time of their alleged conduct was vague or unclear.[16] Alternatively, defendants might argue that, given the information in their possession at the time of

To further complicate the issue, Supreme Court opinions addressing which party bears the burden of proof and/or persuasion on issues of qualified immunity appear inconsistent. *Cf.* Behrens v. Pelletier, 516 U.S. 299, 306-07 (1996) (suggesting that plaintiff bears burden of production and persuasion on issues of qualified immunity); Elder v. Holloway, 510 U.S. 510, 511 (1994) (concluding that appellate court, which held that plaintiff must produce "legal facts" demonstrating that law was "clearly established," misconstrued Court's opinion in *Davis* and that "[a] court of appeals reviewing a qualified immunity judgment should . . . use its full knowledge of its own and other relevant precedents"); Anderson v. Creighton, 483 U.S. 635, 641 (1987) ("The principles of qualified immunity that we reaffirm today require that [the defendant] be permitted to argue that he is entitled to summary judgment . . . ."); Davis v. Scherer, 468 U.S. 183, 197 (1984) ("A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue.").

14. For a discussion of how the time and nature of qualified immunity disputes affect evidentiary burdens, see *infra* notes 106-08 and accompanying text.

15. As I note in Part II, to obtain relief pursuant to § 1983, plaintiffs must plead and prove that they were deprived of a protected right. *See* Gomez v. Toledo, 446 U.S. 635, 640 (1980) ("[P]laintiff must allege that some person has deprived him of a federal right and, second, he must allege that the person who has deprived him of that right acted under color of state or territorial law."). Accordingly, a government official can attack a plaintiff's case-in-chief by arguing: (1) that the alleged conduct did not take place; or (2) that the alleged conduct does not amount to a constitutional violation. *See id.* at 638 (detailing plaintiff's cause of action and elements required to prove case). Defendants might also argue that they were not acting under color of state law. *See id.* at 640 (noting that plaintiff must prove that person depriving that right acted under color of state or territorial law). Nonetheless, because defendants forego or, at a minimum, seriously undermines, any argument that they were not acting under color of state law when they raises a qualified immunity defense, this argument is beyond the scope of this paper.

16. *See, e.g.*, Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (establishing that if law was not clear at time that conduct would violate Constitution, then officer should not be liable); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In *Harlow*, the Court eliminated the subjective prong of the good faith qualified immunity defense because it raised a question of fact, thereby making it difficult to resolve questions of qualified immunity before trial. *Id.* at 815-16 (declaring that

the alleged violation, a reasonable officer would (or could) conclude that the conduct was lawful.[17]

Both of these arguments are appropriately dubbed "qualified immunity claims." In both, the court must compare the defendant's alleged conduct against the relevant legal standard to determine whether the defendant is entitled to qualified immunity. Nevertheless, there are important distinctions between the two categories. Arguments falling within the first group will focus on the state of the law at the time of the incident. In contrast, arguments within the second category turn on the factual information that the defendant claims to have had at the time of the incident. Stated differently, the qualified immunity assessment will not depend upon resolution of a factual dispute in the first category. Factual determinations, however, are necessary for resolving qualified immunity disputes that fall in the latter category.

Despite this basic difference, courts and scholars usually fail to distinguish these inquiries from one another. This Article argues that judges and scholars unnecessarily focus on the distinction between questions of law and questions of fact when attempting to resolve qualified immunity disputes. As a result, courts often err when assigning evidentiary burdens in § 1983 disputes. The question that courts should concern themselves when resolving qualified immunity claims is whether there is a genuine dispute of material facts or, stated slightly differently, whether the outcome will depend upon the veracity of one party's allegations. Furthermore, summary judgment is not always the most appropriate tool with which to resolve qualified immunity disputes. When determining which procedural tool is best suited to resolve the particular case before them, courts should consider the nature of the dispute.

The Article proceeds as follows: Part II provides a brief history and Supreme Court jurisprudence of § 1983 and qualified immunity. Particular attention is paid to *Harlow*, *Anderson v. Creighton*[18] and *Crawford-El v. Britton*.[19] I argue that *Anderson* complicated qualified immunity arguments, especially those in which the plaintiff alleges a violation of the Fourth Amendment, by allowing defendants to pursue qualified immunity claims based upon factual allegations not contained in the plaintiff's complaint.

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subjective element of good faith defense has been incompatible with proposition that insubstantial claims should not go to trial).

17. *See Brosseau*, 543 U.S. at 205 (using "would"); Hope v. Pelzer, 536 U.S. 730, 739 (2002) (same); Saucier v. Katz, 533 U.S. 194, 210 (2001) (using "could"). The Court has described qualified immunity in two similar, but nonetheless distinct, ways: (1) an officer is entitled to qualified immunity when a reasonable officer *would* not know that the alleged conduct was unlawful; and (2) an officer is entitled to qualified immunity when a reasonable officer *could* conclude that the alleged conduct was legal. *See Brosseau*, 542 U.S. at 205 (recognizing that law must be clearly established to ensure officer has fair notice of proscribed conduct).

18. 483 U.S. 635 (1987).

19. 523 U.S. 574 (1998).

Part III contends that courts and scholars have focused on the wrong issue when determining evidentiary burdens in the pre-trial resolution of qualified immunity disputes. After briefly explaining how questions of law, questions of fact and issues of law application differ from one another, I conclude that legal scholars who reason that qualified immunity is an issue of law application are correct. Nevertheless, I argue that, with regard to evidentiary burdens, it matters little whether qualified immunity is considered a question of law or an issue of law application. The truly pertinent issue is whether resolution of a particular dispute will depend upon the veracity of one party's allegations.

Accordingly, in Part IV, I divide qualified immunity arguments into two broad categories: law-based qualified immunity claims and fact-dependent qualified immunity claims. Through examples, I then explain why evidentiary burdens are unnecessary for law-based claims. Furthermore, I argue that because evidentiary burdens are not necessary in these cases, the pre-trial disposition tools offered in Rule 12 of the Federal Rules of Civil Procedure are well suited for disposition of this type of claim. Part IV.B. explains why evidentiary burdens *are* necessary and important for the resolution of fact dependent claims and argues that defendants who pursue this type of claim should bear the evidentiary burden at summary judgment or trial.

II. SECTION 1983 AND QUALIFIED IMMUNITY

Title 42 U.S.C. § 1983 was enacted to give plaintiffs a federal form of relief against a person acting under color of state law who deprives the plaintiff of a protected right.[20] It reads in pertinent part:

> Every person who, under color of [state law] subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[21]

To obtain relief, plaintiffs "must prove (1) that [they have] been deprived of a constitutional or federal statutory right and (2) that the person who deprived [them] of that right was acting under the color of state law."[22] Although the statute was initially passed in 1871, it was essentially dormant until the 1960s, when the Supreme Court decided *Monroe v. Pape*.[23] Only a few years after the Justices decided *Monroe*, the Supreme

20. 42 U.S.C § 1983 (1996).

21. *Id.*

22. *See* Gomez v. Toledo, 446 U.S. 635, 640 (1980).

23. 365 U.S. 167 (1981). In *Monroe*, the Court held that an individual acting "under color of state law" is liable under § 1983 "whether they act in accordance with their authority or misuse it." *Id.* at 172. Previously, liability was limited to government officials acting within the scope of their authority. *See* Civil Rights Cases, 109 U.S. 3, 17 (1883) ("Civil rights, such as are guaranteed by the constitu-

Court recognized the "good faith," or qualified immunity defense, for the first time.[24]

The Court continued to refine this defense throughout the 1970s. In *Wood v. Strickland*,[25] the Court explained that defendants would be immune from liability if they genuinely thought they were acting within the law and this belief was reasonable.[26] Although *Wood*'s "good faith qualified immunity" defense protected officials from monetary liability, most defendants still had to go to trial to prove that they were entitled to the defense.[27] In an attempt to allow faster resolution of insubstantial claims, and to spare government officials from the burdens of extensive discovery, the Court revamped the "good faith qualified immunity" test by eliminating the "good faith" or subjective prong of the inquiry.[28]

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tion against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority . . . . The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual . . . .").

One might surmise that the "good faith defense" was a reaction to increased liability post-*Monroe*. In *Pierson v. Ray*, 352 F.2d 213 (5th Cir. 1965), a group of ministers participating in the "Freedom Rides" filed a § 1983 claim against local judges and police officers alleging that their arrests and convictions were in violation of the Constitution. *Id.* at 215. In 1967, the Supreme Court held that the statute under which the ministers were arrested was "unconstitutional as applied to similar facts." Pierson v. Ray, 386 U.S. 547, 550 (1967). The ministers, however, were arrested in 1961—four years before the Court handed down its decision. *Id.* at 549. Because it was not clear that the statute was unconstitutional at the time of the plaintiffs' arrest, the defendants argued that "they should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid." *Id.* at 555. Noting that "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause and being mulcted in damages if he does," the Court concluded that "the defense of good faith and probable cause . . . is available to [officers] in [an] action under § 1983." *Id.* at 555-56.

24. *See generally Pierson*, 386 U.S. at 547 (recognizing qualified immunity defense). The Court did not actually use the phrase "qualified immunity" until *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974).

25. 420 U.S. 308 (1975).

26. *Id.* at 322. The Court held that:

> [S]chool board member is not immune from liability . . . under § 1983 if he knew or reasonably should have known that the action he took . . . would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause deprivation of constitutional rights to the student.

Id.

27. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815-17 (1982) (outlining procedure defendant must follow to establish entitlement to good faith qualified immunity defense).

28. *See id.* ("The subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial . . . . [B]are allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery.") (citing Butz v. Economou, 438 U.S. 478 (1978)).

Under the current qualified immunity standard, articulated in *Harlow*, "government officials performing discretionary functions generally are shielded from monetary liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[29] The Court hoped that eliminating qualified immunity's subjective prong would allow courts to resolve questions of qualified immunity before trial.[30] Accordingly, the Justices instructed trial judges to approach qualified immunity claims in the following manner:

> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew, nor should have known, of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.[31]

Relying upon the *Harlow* decision, one might interpret the qualified immunity standard as a three-part inquiry.[32] First, the court must determine whether the defendant was performing a discretionary function. If not, the defendant is not entitled to qualified immunity and the inquiry

29. *Id.* at 818.

30. *See id.* ("Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.").

31. *Id.* It is unclear from the majority opinion in *Harlow* whether an official would be liable if he actually believed his conduct to be illegal. In his concurring opinion, Justice Brennan notes that "[t]his standard would not allow the official who *actually knows* that he was violating the law to escape liability for his actions, even if he could not 'reasonably have been expected' to know what he actually did know." *Id.* at 821 (Brennan, J., concurring). For a discussion of the extraordinary circumstances prong in greater detail, see *infra* notes 31, 36 and accompanying text.

32. *See, e.g.*, Edmund L. Carey, Jr., Note, *Quick Termination of Insubstantial Civil Rights Claims: Qualified Immunity and Procedural Fairness*, 38 VAND. L. REV. 1543, 1567 (1985) ("After *Harlow*, three distinct issues exist in qualified immunity cases; a court may allocate a burden of proof for each issue."); Mary MacKenzie, *supra* note 5, at 694 (explaining that *Harlow* requires three step inquiry to evaluate qualified immunity defenses).

ends there.[33] If the defendant was acting in a discretionary manner, the court proceeds to the second part of the test, which requires the court to determine whether the law was clearly established.[34] If the law was not clearly established, the defendant is entitled to qualified immunity and there is no need to proceed to the third prong of the test.[35] If, however, the law was clearly established, the defendant still has the opportunity to prove that there were extraordinary circumstances and that he or she neither knew, nor should have known, of the clearly established law.[36]

In theory, the qualified immunity test outlined in *Harlow* simplified questions of qualified immunity by allowing the disposition of immunity issues before trial. In practice, however, judges had difficulty applying *Harlow*'s holding because the opinion does not adequately explain what constitutes "clearly established law."[37] Accordingly, the Court has revisited the question of qualified immunity on numerous occasions in an attempt to clarify the doctrine.[38] Post-*Harlow*, the Justices have consistently held

33. *See Harlow*, 457 U.S. at 818 (shielding government officials performing discretionary functions from civil liability).

34. *Id.*

35. *Id.*

36. *Id.* at 819. Since *Harlow* was decided in 1984, the Justices have discussed qualified immunity's "extraordinary circumstances" just once. *See* Anderson v. Creighton, 483 U.S. 635, 648 (1987) (Stevens, J., dissenting) (mentioning that "'extraordinary circumstances' defense left open in *Harlow* for defendant who 'can prove that he neither knew or should have known of the relevant legal standard'") (quoting *Harlow*, 457 U.S. at 819).

37. *See* Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 605-06 n.41 (1989) (noting that Court has not answered many questions regarding whether constitutional right allegedly violated was clearly established at time). Professor Kinports identifies the following questions regarding the definition of "clearly established law" that, as of 1989, the Court had not yet answered:

> For example, the Court has refused to consider (A) whether a right can be clearly established by district court or court of appeals opinions, or even state court opinions, or whether Supreme Court precedent is required; (B) whether the case law clearly establishing the constitutional right must come from the jurisdiction in which the defendant works, or whether cases from other jurisdictions are also relevant; (C) whether a right is clearly established as soon as a dispositive court opinion is issued, or whether some interval is required until the substance of the court's decision becomes known to the reasonable public official; and (D) whether the fact that a dispositive court opinion is issued by a divided court is relevant in determining whether the constitutional right at issue is clearly established.

Id. at 606.

38. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 741 (2002) (concluding that "officials can still be on notice that their conduct violates established law even in novel factual circumstances"); Saucier v. Katz, 533 U.S. 194, 208 (2001) (holding that "question [was] what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards"); *Anderson*, 483 U.S. at 636 (concluding that "[t]he relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law

that a right is clearly established when reasonable officials would understand that their actions would result in a deprivation of a protected right.[39] This definition, however, has raised additional questions, particularly in cases where the plaintiff alleges deprivation of a Fourth Amendment right.[40]

In *Anderson*, the Court was asked to determine whether a defendant is entitled to qualified immunity "if a reasonable officer could have believed that the search comported with the Fourth Amendment."[41] The defendant, a Federal Bureau of Investigation official, conducted a warrantless search of the plaintiff's home.[42] The plaintiff filed a *Bivens* action against the defendant, alleging that the defendant had deprived him of his Fourth Amendment right to be free from unreasonable searches and seizures.[43] Although the defendant conceded that the right in question was clearly established, he argued that he was entitled to qualified immunity because, as a matter of law, "a reasonable officer could have believed the search to be lawful."[44] The appellate court concluded that the defendant was not entitled to qualified immunity because it was "clearly established" that a

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and the information the searching officers possessed"); Malley v. Briggs, 475 U.S. 335, 341 (1986) (holding that officer is entitled qualified immunity when he reasonably, but erroneously, concludes that probable cause is present); Davis v. Scherer, 468 U.S. 183, 190 (1984) (holding that violation of state statute or regulation does not equate to violation of clearly established federal statutory or constitutional right).

39. *See, e.g.*, *Anderson*, 483 U.S. at 641 (holding that officer should not be held liable when official reasonably, but mistakenly, believes probable cause is present). More recent Supreme Court cases hold that the law is "clearly established" when reasonable officials have "fair notice" that the alleged conduct is unconstitutional. *See* Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (noting that reasonableness is judged against backdrop of law at time of officer's conduct); *see also Hope*, 536 U.S. at 740 ("[Q]ualified immunity operates to ensure that before they are subject to suit, officers are on notice that their conduct is unlawful."). "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right." *Id.* at 40.

40. *See* Kinports, *supra* note 37, at 618 ("In evaluating whether a defendant violated clearly established rights of which a reasonable public official would have known, the question arises whether the courts should examine the issue in the abstract, or, alternatively, should consider what a reasonable person in the defendant's circumstances would have known.").

41. 483 U.S. at 637.

42. *See id.*

43. *See id.* A *Bivens* action is similar to a § 1983 action but it is brought against federal, rather than state, officials. *See generally* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 396-97 (1971) (authorizing actions against federal officials similar to those authorized under § 1983). The qualified immunity defense is available to defendants in either type of action. *See Anderson*, 483 U.S. at 649 n.2 ("Those precedents provide guidance for causes of action based directly on the Constitution, for 'it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.'") (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 n.30 (1982)).

44. *Anderson*, 483 U.S. at 650.

warrantless search of a home without probable cause and exigent circumstances violated the Fourth Amendment.[45] Furthermore, the court of appeals refused to consider the defendant's argument that, while it is clearly established that a warrantless arrest is unconstitutional absent an exception to the Fourth Amendment warrant requirement, given the factual situation confronting the defendant at the time of the alleged conduct, a reasonable official might believe the defendant's action to be legal.[46]

On certiorari, the Supreme Court held that "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[47] Accordingly, when determining whether a government official is entitled to qualified immunity, "the relevant question . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed."[48] Furthermore, "the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials."[49]

The Justices may have believed that their opinion in *Anderson* would clarify the qualified immunity standard enunciated in *Harlow*. Nevertheless, *Anderson* actually complicates qualified immunity inquiries, particularly those in which plaintiffs claim a deprivation of their Fourth Amendment rights. First, because *Anderson* was decided on the basis of qualified immunity rather than the underlying Fourth Amendment claim, the opinion implicitly suggests that, although the defendant's search was unreasonable (i.e., in violation of the Fourth Amendment), the defendant was entitled to qualified immunity because a reasonable officer could have believed the search to be reasonable.[50] Relying on *Anderson*, several circuit courts have concluded that qualified immunity is available to defendants when there is *arguable probable cause* for an arrest, even in the absence of actual probable cause.[51] "Arguable probable cause exists if, under all of

45. *See* Creighton v. City of St. Paul, 766 F.2d 1269, 1277 (8th Cir. 1985) (concluding that defendant violated Fourth Amendment because defendant was aware of "exigent circumstances doctrine" and did not have probable cause to enter plaintiff's home).

46. *See Anderson*, 483 U.S. at 640-41 (explaining that officer must make unreasonable search or seizure to violate Fourth Amendment). *See generally* Graham v. Connor, 490 U.S. 386, 396 (1999) (explaining that officer might not be held liable if officer reasonably believed actions were legal).

47. *Anderson*, 483 U.S. at 640.

48. *Id.* at 641.

49. *Id.*

50. *Id.*

51. *See, e.g.*, Harris v. Coweta County, 433 F.3d 807, 821 (11th Cir. 2005) (holding that qualified immunity was not available to officer who did not have

the facts and circumstances, an officer reasonably could—not necessarily would—have believed that probable cause was present."[52] In short, some circuit courts have concluded that qualified immunity affords officers greater protection than does the Fourth Amendment reasonableness standard because its standard is less stringent.[53]

With that said, the Supreme Court has never held that a defendant violated the Fourth Amendment by arresting a § 1983 plaintiff without probable cause but that, nevertheless, the defendant is entitled qualified immunity because there was "arguable probable cause." Stated slightly differently, the Supreme Court has not held that defendants' actions were unreasonable under the Fourth Amendment but, nevertheless, that the defendants were entitled to qualified immunity because their actions were reasonable under the standard enunciated in *Harlow*.

In *Anderson* and *Saucier v. Katz*,[54] the Court concluded that the defendant was entitled to qualified immunity because a reasonable official *could* have concluded that there was probable cause for the search or seizure.[55]

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arguable probable cause to believe that suspect posed imminent threat of serious harm), *reh'g denied*, 175 Fed. Appx. 328 (11th Cir. 2006); Smith v. Cupp, 430 F.3d 766, 776 (6th Cir. 2005) (holding that district court was correct in rejecting motion for summary judgment based on qualified immunity because there was no threat of serious harm to others when force was used); Walker v. City of Pine Bluff, 414 F.3d 989, 993 (8th Cir. 2005) (noting that no reasonable officer would have arguable probable cause to arrest onlooker and should be denied motion for qualified immunity protection); Crosby v. Monroe County, 394 F.3d 1328, 1332-33 (11th Cir. 2004) (noting question is not whether there is actual probable cause, but whether there is arguable probable cause).

52. *Crosby*, 394 F.3d at 1332; *see, e.g.*, Cottrell v. Caldwell, 85 F.3d 1480, 1485 n.1 (11th Cir. 1996) ("[W]hen the claim is that a search and seizure or arrest violated the Fourth Amendment, qualified immunity depends upon whether arguable probable cause existed."). "More specifically, the qualified immunity issue in such cases is not whether probable cause existed, but whether a reasonable officer possessing the information the defendant officer possessed could have believed it did." *Id.* at 1485 n.1. In contrast, actual probable cause exists if the arresting officers could believe, under all the facts and circumstances presented to them, that probable cause existed. *Crosby*, 394 F.3d at 1332-33 (citing Durruthy v. Pastor, 351 F.3d 1080, 1089 (11th Cir. 2003) and Montoute v. Carr, 114 F.3d 181, 184 (11th Cir. 1997)).

53. *See, e.g.*, Oliveira v. Mayer, 23 F.3d 642, 649 n.2 (2d Cir. 1994) (quoting Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339, 1348-49 (2d Cir. 1972)) (stating distinction between reasonableness in Fourth Amendment and immunity defense contexts "has been explained as resting on less stringent reasonable man standard . . . ."); *see also* Gamble v. Moran, No. CV-90-00137-PMP, 1995 WL 35530, at *2 (9th Cir. Feb. 8, 1994) (finding officer protected by qualified immunity under Fourth Amendment reasonableness standard and Fourth Amendment standard less stringent than Eighth Amendment standard); Moore v. Marketplace Rest., Inc., 754 F.2d 1336, 1348 n.15 (7th Cir. 1985) (quoting *Bivens*, 456 F.2d at 1348)) (explaining that reasonable man standard applicable to tort actions against government agents is less stringent than Fourth Amendment standard).

54. 533 U.S. 194 (2001).

55. *See id.* at 204 (finding qualified immunity applies if officer makes reasonable mistake in probable cause inquiry); *Anderson*, 483 U.S. at 641 (stating officers

The Court was unable to decide the underlying Fourth Amendment violation because either the defendant or the Court had abandoned that argument.[56] Regardless of whether courts apply an arguable probable cause standard or not, *Anderson*'s "double reasonableness" standard complicates qualified immunity litigation when the plaintiff alleges deprivation of a Fourth Amendment right.[57]

Second, *Anderson* also has the potential to protract qualified immunity litigation by considering factual allegations and information not contained in the plaintiff's complaint. One of the primary goals of *Harlow* was to "permit the resolution of many insubstantial claims on summary judgment."[58] Explicitly, *Harlow* only eliminates one factual issue—the subjective element of the good faith qualified immunity defense.[59] Implicitly, however, *Harlow*'s aim seems to be the elimination of all factual inquiries or disputes from § 1983 qualified immunity analysis.[60] As the Court explained in *Mitchell v. Forsyth*,[61] "*Harlow* . . . recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question of whether the conduct of which the plaintiff complains violated clearly established law."[62] In short, *Harlow* circumvented the trappings of factual disputes by basing its analysis on the plaintiff's allegations.[63] *Anderson*, however, makes it clear that "in-

entitled to argue, based on qualified immunity principles, that they were entitled to summary judgment on grounds that they could reasonably have believed search was lawful).

56. *See* Saucier v. Katz, 533 U.S. 194, 208 (2001) (explaining that Court granted certiorari only to determine qualified immunity issue); *Anderson*, 483 U.S. at 637 (granting certiorari to answer qualified immunity question). *See generally*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 10.3.2 (4th ed. 2003) (noting that Court may hear all issues presented or limit its review to particular issues when granting certiorari).

57. *See* SHELDON H. NAHMOD, 2 CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 8.06 (3d ed. 1991) (noting that *Anderson*'s requirement that courts determine "whether the defendant violated clearly settled law in the particular case . . . is typically a fact-specific one and it introduces some complexity into *Harlow* summary judgment procedure and its relation to discovery").

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

59. *See id.* at 818-19 (explaining that qualified immunity defense turns primarily on objective factors).

60. *See id.* at 816 (describing subjective good faith as question of fact). In *Harlow*, the court notes that "Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment." *Id.* The Court then proceeds to instruct judges to resolve qualified immunity at summary judgment. *See id.* at 818 (stating qualified immunity question should be resolved prior to discovery). One would think that the justices knew that disposition of qualified immunity arguments at summary judgment would only be possible if all material factual disputes were eliminated.

61. 472 U.S. 511 (1985).

62. *Id.* at 526.

63. *See id.* (explaining defendant entitled to dismissal prior to discovery if plaintiff's allegations do not state claim of violation of clearly established law). The rule of *Harlow* "focuses on the character of the plaintiff's legal claim and, when properly invoked, protects the government executive from spending his time

formation possessed by the [government] official" is relevant to qualified immunity analysis, even when that information is not contained in the plaintiff's complaint.[64]

Accordingly, in some § 1983 qualified immunity disputes courts must look beyond the plaintiff's allegations to the defendant's pleadings to determine whether the government official is entitled to qualified immunity.[65] This inevitably complicates qualified immunity inquiries—not only must courts consider whether, based upon the plaintiff's allegations, the defendant deprived the plaintiff of a clearly established right, but under *Anderson*, courts must also consider whether, based upon the defendant's allegations, he or she is entitled to qualified immunity.[66] Furthermore, because the defendant's entitlement to qualified immunity may depend upon the veracity of the defendant's allegations as compared to plaintiff's allegations, resolution of the qualified immunity issue may require a trial or, at a minimum, discovery.[67]

To reconcile *Harlow* (which directs courts to resolve qualified immunity issues before discovery and as early in the case as possible) with *Anderson* (which recognizes that qualified immunity is a fact-specific inquiry) several circuit courts adopted heightened pleading requirements in § 1983 qualified immunity cases.[68] Courts applying heightened pleading

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in depositions, document review, and conferences about litigation strategy." Anderson v. Creighton, 483 U.S. 635, 651 (1987) (Stevens, J., dissenting). In fact, "*Harlow* implicitly assumed that many immunity issues could be determined as a matter of law before the parties had exchanged depositions, answers to interrogatories, and admissions." *Id.* (Stevens, J., dissenting).

64. *See id.* at 641, 658 (Stevens, J., dissenting) (noting that "factual predicate" for defendant's argument is not found in complaint, but rather in affidavits filed in support of summary judgment motion).

65. *See id.* at 641 (Stevens, J., dissenting) (stating officers are allowed to argue they are entitled to qualified immunity as matter of law).

66. *See id.* (Stevens, J., dissenting) (finding qualified immunity determination requires considering officers' allegations).

67. *See* Crawford-El v. Britton, 523 U.S. 574, 598 (1998) (noting that plaintiff will be entitled to discovery in cases where, at discretion of district judge, plaintiff meets "hurdles" of asserting more specific factual allegations of "improper motive causing cognizable injury" and establishing that "official's conduct violated clearly established law").

68. *See, e.g.*, Ramirez v. Dep't of Corrs., 222 F.3d 1238, 1241 (10th Cir. 2000) (quoting Dill v. City of Edmond, 155 F.3d 1193, 1204 (10th Cir. 1998)) (applying heightened pleading standard in qualified immunity cases); Judge v. City of Lowell, 160 F.3d 67, 73-75 (1st Cir. 1998) (finding *Crawford-El* "permitted an approach . . . calling for the pleading of specific facts from which to infer illegal motive"), *overruled by* Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61 (1st Cir. 2004); Edgington v. Mo. Dep't of Corrs., 52 F.3d 777, 779 (8th Cir. 1995) ("Complaints seeking damages against governmental officials, however, are subject to a heightened standard of pleading with sufficient specificity to put defendants on notice of the nature of the claim."); Brown v. Frey, 889 F.2d 159, 170 (8th Cir. 1989) (quoting Martin v. Malhoyt, 830 F.2d 237, 254 (D.C. Cir. 1987)) (concluding that heightened standard applies to enable governmental officials to prepare response and, where appropriate, summary judgment motion on qualified immunity grounds). *But see, e.g.*, Trulock v. Freeh, 275 F.3d 391, 405 (4th Cir. 2001)

standards have reasoned that they are an important means by which "to eliminate nonmeritorious claims on the pleadings and to protect public officials from protracted litigation involving specious claims" in qualified immunity disputes.[69]

A similar, but distinct, problem arises in § 1983 cases in which the alleged constitutional deprivation requires proof of a defendant's specific motive. As the D.C. Circuit Court explained in *Crawford-El*, "[t]o allow the plaintiff to engage in discovery, in order to carry his burden of establishing a basis for inferring improper motive, would violate *Harlow*'s determination to protect the official from discovery until the qualified immunity issue has been resolved."[70] To resolve this friction, the court adopted a heightened pleading standard in § 1983 cases where the alleged constitutional deprivation requires proof of motive or intent.[71] Noting that "[n]either the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provide any support for imposing the clear and convincing burden of proof on plaintiffs either at the summary judgment stage or in the trial itself," the Supreme Court concluded that a "change [in] the burden of proof for an entire category of claims would stray far from the traditional limits on judicial authority."[72] Even assuming that *Crawford-El* only invalidates heightened pleading standards when the plaintiff's underlying constitutional claim requires proof of motive, the opinion has important implications for both the Federal Rules of Civil Procedure and qualified immunity analysis.[73]

("[T]here is no heightened pleading standard in qualified immunity cases."); Nance v. Vieregge, 147 F.3d 589, 590 (7th Cir. 1998) (explaining that "[c]ivil rights complaints are not held to a higher standard than complaints in other civil litigation").

69. *See* Arnold v. Bd. of Educ. of Escambia County Ala., 880 F.2d 305, 309 (11th Cir. 1989).

70. Crawford-El v. Britton, 93 F.3d 813, 820 (D.C. Cir. 1996), *vacated*, 523 U.S. 574 (1998).

71. *See* Crawford-El v. Britton, 523 U.S. 574 (1998) (noting heightened pleading standard "prevent[s] serious invasion of the defendant's time unless the plaintiff can, without discovery, offer specifics of his case as to defendant's motivation").

72. *See id.* at 594.

73. *See id.* at 597 (explaining that if there were need to frame new rules of law based on distinction between constitutional claims that require proof of improper motive and those that do not, "presumably Congress either would have dealt with the problem . . . or will respond to it in future legislation"). The Court discusses qualified immunity in *Crawford-El* because the lower court relied on *Harlow*'s policy discussion of qualified immunity to rationalize its "clear and convincing" evidence standard in § 1983 cases where the underlying constitutional claim required proof of motive or intent. *See Crawford-El*, 93 F.3d at 815 (stating judgment for defendant is appropriate unless clear and convincing evidence on official's state of mind is presented at summary judgment or trial).

III. THE DISTINCTION BETWEEN QUESTIONS OF LAW AND QUESTIONS OF FACT

In *Crawford-El*, the Court takes care to point out that proof of motive is a question of fact and a part of the plaintiff's case-in-chief but qualified immunity is a separate "essentially legal question."[74] The distinction between questions of law and questions of fact has confounded courts and legal scholars for more than a century.[75] As the Supreme Court recognized in *Pullman-Standard v. Swint*,[76] "we [have] yet [to identify] a rule or principle that will unerringly distinguish a factual finding from a legal conclusion."[77] One scholar has attributed this confusion to two sources: "First, courts assume that the properly affixed characterization necessarily determines which legal actor is assigned the decisionmaking task. Second, the two categories have been used to describe at least three distinct functions: law declaration, fact identification and law application."[78] He described these categories in the following manner:

> Law declaration involves "formulating a proposition [that] affects not only the [immediate] case . . . but all others that fall within its terms." In a strict sense, then, law declaration yields only what we commonly think of as "law"—conclusions about the existence and content of governing legal rules, standards, and principles. The important point about law is that it yields a proposition that is general in character. Fact identification, by contrast, is a case-specific inquiry into what happened here. It is designed to yield only assertions that can be made without significantly implicating the governing legal principles. Such assertions, for example, generally respond to inquiries about who, when, what, and where—inquiries that can be made "by a person who is ignorant of the applicable law." Law application, the third function, is residual in character. It involves relating the legal standard of conduct to the facts established by the evidence . . . . *Linking the rule to the conduct is a complex psychological process, one that often involves judgment* . . . . [I]n contrast to the generalizing feature of law declaration, law application is situation-specific.[79]

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74. *Crawford-El*, 523 U.S. at 589 (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)) (concluding that qualified immunity raises essentially legal question, separate from questions of fact).

75. *See generally* James B. Thayer, *Law and Fact in Jury Trials*, 4 HARV. L. REV. 147 (1890) (discussing difficulties of distinguishing between questions of fact and questions of law).

76. 456 U.S. 273 (1982).

77. *Id.* at 288.

78. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 234 (1985).

79. *Id.* at 236 (footnotes omitted) (emphasis added).

Much of the difficulty in distinguishing between questions of law and questions of fact stems from the third category: law application, which may also be referred to as mixed questions of law and fact.[80] Although, in truth, there may be three types of legal issues—(1) questions of law, (2) questions of fact and (3) questions of law application—many procedural issues hinge upon whether an issue is categorized as a question of law or a question of fact.[81] Accordingly, even when courts are faced with what is clearly a mixed question of law and fact or a law application issue, they are confined to these two categories and must decide whether to treat the issue as a legal question or a factual inquiry.[82] The distinction between questions of law and questions of fact is no less complex within the context of the qualified immunity doctrine; therefore, it is of little surprise that § 1983 scholars have written hundreds of pages discussing this precise issue.[83]

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80. *See, e.g.*, WILLIAM W. SCHWARZER ET AL., *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441, 456 (1991) (discussing application of law to facts). Although the terms "mixed question of law and fact" and "an issue of law application" are often used interchangeably, some legal scholars have found it useful to distinguish between the two. Law application, the more general of the two terms, refers to the task of linking the facts of a specific case to a more general legal standard. *See id.* at 455 (explaining application of law when facts are undisputed). A mixed question of law and fact may be viewed as a subset of law application issues. "When the application of a rule of law depends upon the resolution of disputed historical facts . . . [the law application issue] becomes a mixed question of law and fact." *Id.* at 456.

81. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 242 n.2 (2001) (Scalia, J., dissenting) ("[J]udges shall 'decide all relevant questions of law.'" (quoting Administrative Procedure Act, 5 U.S.C. § 706 (2000))); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 446 (1996) (Stevens, J., dissenting) (quoting Dimick v. Schiedt, 293 U.S. 474, 490-91 (1935)) (explaining that jury's function is to decide questions of fact). The assignment of issues to the judge or jury, the availability of interlocutory appeals and appellant standards of review are all determined by whether a particular issue is a question of law or a question of fact.

82. *See, e.g.*, Miller v. Fenton, 474 U.S. 104, 113-14 (1985) (stating that decision to label as question of law, question of fact or mixed question of law and fact "is sometimes as much a matter of allocation as it is of analysis"). As Justice O'Connor explained in *Miller*:

> At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.

Id. at 114.

83. *See, e.g.*, Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 DRAKE L. REV. 539, 593-94 (1998) (discussing impossibility of characterizing issue as purely question of law or fact); Martin A. Schwartz, *Fundamentals of Section 1983 Litigation*, 17 TOURO L. REV. 525, 541-42 (2001) (discussing difficulty in determining "whether the immunity appeal presents a question of fact or a question of law").

Although the Supreme Court has held that qualified immunity is a question of law,[84] several legal scholars have challenged this assertion, arguing that qualified immunity is a mixed question of law and fact or an issue of law application.[85] One commentator argues that questions of qualified immunity always fall into the "mixed question" category of issues.[86] This commentator reasons:

> As with any reasonableness standard, all qualified immunity inquiries are inevitably fact-dependent, at least in part, because the reasonableness of a government official's conduct must be evaluated with reference to some set of facts. Courts can assess whether a particular act violates a "clearly established" right only by comparing the existing case law to an undisputed description of that act. Entitlement to qualified immunity, therefore, must be viewed as a mixed question of law and fact.[87]

It is not particularly difficult to explain the difference between the Court's characterization of qualified immunity as a question of law and a commentator's argument that qualified immunity is a mixed question of law and fact. As discussed in the preceding pages, the law/fact distinction is necessary to determine the role of legal actors, the availability of interlocutory appeals and the standard of appellant review.[88] Accordingly, courts are essentially obliged to categorize qualified immunity as a question of law or a question of fact. The conclusion that qualified immunity is a question of law simply reflects the Court's policy decision that judges rather than juries are better suited to resolve the mixed questions that qualified immunity issues present.[89] Much of the confusion surrounding

84. *See, e.g.*, Elder v. Holloway, 510 U.S. 510, 516 (1994) ("Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of 'legal facts.'").

85. *See, e.g.*, Chen, *supra* note 5, at 7 ("Entitlement to qualified immunity . . . must be viewed as a mixed question of law and fact."); Richard D. Moreno, *Louisiana's Constitutional Agencies: Plenary Powers or "Constitutional Illusions of Being a Fourth Branch of Government"?*, 51 LA. L. REV. 875, 907 (1991) ("Because the qualified immunity is necessarily a mixed question of fact and law, the officer cannot avoid the suit, as he might with absolute immunity."); Sheldon H. Nahmod, *The Restructuring of Narrative and Empathy in Section 1983 Cases*, 72 CHI.-KENT L. REV. 819, 827 (1997) ("However, the objective reasonableness inquiry is not solely a legal one: it is a law application question, or a mixed question of law and fact."); Paul D. Watson, *Qualified Immunity: Should a Judge or Jury Decide Who Prevails in the Battle Between Government Efficiency and Constitutional Rights?*, 20 STETSON L. REV. 1035, 1051 (1991) ("When the defense of qualified immunity is raised in a § 1983 action, the court may be confronted with a mixed question of law and fact.").

86. *See* Chen, *supra* note 5, at 7 (arguing that qualified immunity must be considered mixed question of law and fact).

87. *Id.* at 6-7 (footnotes omitted).

88. *See id.* at 88-89 (discussing distinction between questions of law, questions of fact and mixed questions of law and fact).

89. *See Elder*, 510 U.S. at 516 (finding qualified immunity presents question of law); Mitchell v. Forsyth, 472 U.S. 511, 528 (1985) (stating that "claim of immunity

the "true nature" of qualified immunity could have been averted had the Court simply recognized that qualified immunity is a mixed question of law and fact that will be treated as a question of law.[90]

As previously mentioned, the assessment that qualified immunity raises a mixed question of law and fact or an issue of law application will affect many of the "procedural" issues that arise in § 1983 cases. Although often overlooked, the law/fact characterization has an equally important effect on the allocation of the burdens of production and persuasion. Burdens of production and persuasion are evidentiary burdens. The former dictates which party must present evidence of a particular fact, while the latter determines which party is required to persuade the jurist of the truth of the allegation.[91] Because evidentiary burdens only play a role in factual disputes, they are inapplicable when the issue confronting the court is a pure question of law.[92] Stated inversely, evidentiary burdens are

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is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated" and finding defendant's claim of immunity is question of law); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (concluding immunity question should be answered prior to discovery).

90. *See, e.g.*, Hunter v. Bryant, 502 U.S. 224, 228 (1991) (explaining why qualified immunity decision should not be left in hands of jury). Early Supreme Court decisions discussing qualified immunity simply noted that qualified immunity is a question for the court. This, quite rightfully, implies that qualified immunity is not truly a question of law but an issue that the court has decided to treat as a question of law (i.e., it is to be decided by the judge). In contrast, later opinions make the mistake of characterizing qualified immunity as a question of law, adding unnecessary confusion to an already difficult subject area. *See, e.g.*, Johnson v. Jones, 515 U.S. 304, 312 (1995) (discussing *Mitchell*'s finding that qualified immunity is only legal question and appeals courts do not need to consider plaintiff's allegations).

91. *See* Dep't of Labor v. Greenwich Collieries, 512 U.S. 267, 272-76 (1994) (explaining differences between burden of production and burden of persuasion). The Court has addressed the meaning of "burden of proof" and "burden of persuasion" on several occasions. *See id.* at 274-75 (discussing opinions finding that burden of proof is defined as burden of persuasion). The burden of proof is synonymous with the burden of persuasion and the party to whom this burden is assigned must convince the decision-maker of the ultimate issue. *See id.* (discussing "emerging consensus" that burden of proof is synonymous with burden of persuasion). Accordingly, "if the evidence is evenly balanced, the party that bears the burden of persuasion must lose." *Id.* at 272.

In contrast, the burden of production requires a party to come forward with evidence. *See id.* (defining burden of production). Generally, the burden of production or persuasion remains with the moving party. *See* Thomas R. Lee, *Pleading and Proof: The Economics of Legal Burdens*, 1997 BYU L. REV. 1, 1 (1997) (finding that "[c]onventional doctrine assigns [ ] burdens to the party whose case the issue in question is 'essential' or to the party who must establish the 'affirmative proposition'"). Thus, the plaintiff bears the evidentiary burdens on the elements of his claim and, generally, the defendant bears the evidentiary burdens on the elements necessary to establish an affirmative defense. *See id.* (discussing traditional tests courts utilize to assign burdens).

92. *See* Irwin R. Kramer, *The Qualified Immunity Vaccine: Preventing and Fighting Section 1983 Suits Against Public Officials*, 23 SUFFOLK U. L. REV. 965, 979 n.67 (1989) ("While the debate over the evidentiary burden of proof presents an interesting issue, its practical significance diminished after *Harlow* since the immunity defense now rests largely on a pure question of law.").

only relevant when there is a factual question. Because qualified immunity presents a "mixed question," it is not immediately obvious whether, and if so how, evidentiary burdens factor into qualified immunity analysis.

Scholars addressing this issue have not reached uniform conclusions regarding the role of evidentiary burdens in qualified immunity cases. Some scholars suggest that evidentiary burdens are inapplicable.[93] Others view evidentiary burdens as necessary to the resolution of qualified immunity disputes.[94] Scholars reaching the former conclusion tend to focus on the Supreme Court's designation of qualified immunity as a question of law.[95] Scholars reaching the latter conclusion often focus on the fact-based nature of the qualified immunity inquiries.[96]

Both camps, however, are focused on the wrong issue. As I seek to demonstrate in Part IV of this Article, the appropriate question is whether the particular qualified immunity argument at bar turns upon a factual determination. This conclusion, in turn, will inform the court which procedural tool is best suited to resolve the § 1983 qualified immunity dispute.

IV. *SMITH V. BROWN*: THE INTERACTION OF § 1983 QUALIFIED IMMUNITY ARGUMENTS, EVIDENTIARY BURDENS AND PROCEDURAL DISPOSITION TOOLS

Following the Court's decision in *Anderson*, there are essentially two variations of qualified immunity arguments.[97] First, defendants may argue that the law in existence at the time of their actions was so vague that

93. *See, e.g.*, NAHMOD, *supra* note 57, § 8.19 ("As to the question of the existence of clearly settled law, to speak of a burden of proof with its evidentiary emphasis appears misplaced. After all, whether clearly settled law exists is an issue of law for the court."). *But see, e.g., id.* (noting that *Anderson* may "implicate evidentiary considerations").

94. *See, e.g.*, Chen, *supra* note 5, at 95 ("[T]he question cannot be answered in the abstract; it must be related to some set of facts, whether the plaintiff's allegations, the defendants' version of the facts after discovery, or the fact finder's conclusions. Thus, the assignment of an evidentiary burden may still be necessary to adjudicate the defense.").

95. *See, e.g., id.* (criticizing assignment of evidentiary burdens to any party when "underlying issue is the clarity of the constitutional rights asserted in the plaintiff's claim"). "If that is true, then what does it mean for a party to have the burden of persuasion—an evidentiary standard—on a (supposedly) purely legal question?" *Id.*

96. *See, e.g.*, NAHMOD, *supra* note 57, § 8.19 (discussing contexts where evidentiary burdens are appropriately considered).

97. *See, e.g.*, Gomez v. Toledo, 446 U.S. 635, 640-41 (1980) (describing burden of pleading on defendant and qualified immunity arguments available to officials); Chavez v. City of Santa Fe Hous. Auth., 606 F.2d 282, 283 n.3 (1979) ("Defendants also argue that the allegedly proprietary nature of the governmental activity in this case prevents the Housing Authority's actions from being conducted under 'color of state law' for purposes of § 1983."). As I note in Part II, to obtain relief pursuant to § 1983, plaintiffs must plead and prove that they were deprived of a protected right. Accordingly, defendants can attack the plaintiff's case-in-chief by arguing (1) that the alleged conduct did not take place or (2) that the alleged conduct

neither they, nor any reasonable official, would realize that their actions would deprive the plaintiff of a protected right.[98] Additionally, defendants might argue that, given the information in their possession at the time of the alleged violation, a reasonable officer would (or could) conclude that the conduct was lawful.[99] In both, the court must compare the facts of the specific case against the relevant legal standard to determine whether the defendant is entitled to qualified immunity.

Under the first argument, the defendant does not dispute the plaintiff's factual allegations. Instead, the defendant's qualified immunity claim focuses on the state of the law at the time of the incident. In contrast, arguments within the second category turn on the factual information the defendant claims to have had at the time of the incident. The defendant may or may not dispute the plaintiff's factual account; regardless, the defendant wants to introduce additional facts that tend to demonstrate that in this particular situation, a reasonable officer possessing the same information as the defendant possessed could have believed the conduct to be lawful at the time of the incident. In all likelihood, these factual allegations will not appear in the plaintiff's complaint (nor any of the documents accompanying the complaint). Furthermore, the qualified immunity determination will usually depend upon the veracity of the defen-

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does not amount to a constitutional violation. *See Gomez*, 446 U.S. at 640-41 (discussing nature of qualified immunity defense).

A defendant might also argue that he was not acting under color of state law. *See Chavez*, 606 F.2d at 283 n.3 (rejecting defendants' "color of state law" argument). Nevertheless, because a defendant forgoes or, at minimum, seriously undermines, any argument that he was not acting under color of state law when he raises a qualified immunity defense, this argument is beyond the scope of this paper.

In addition to attacking the plaintiff's case-in-chief, the defendant may also plead qualified immunity. Qualified immunity may be premised on one of three arguments: (1) an unsettled or vague legal standard, (2) a mistake of fact or (3) the presence of extraordinary circumstances. *See* Groh v. Ramirez, 540 U.S. 551, 566-67 (2004) (Kennedy, J., dissenting) (explaining that defendant may argue for qualified immunity when defendant was "unaware of existing law and how it should be applied," "misunderst[ood] important facts about the search and assess the legality of his conduct based on that misunderstanding" or "misunderst[ood] elements of both the facts and the law"); Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982) ("[I]f the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the [qualified immunity] defense should be sustained.").

98. *See* Wilson v. Layne, 526 U.S. 603, 617 (1999) (concluding that officers who allowed media to accompany them to execute arrest warrant violated Fourth Amendment but were nevertheless entitled to qualified immunity because "the state of the law . . . was at best undeveloped").

99. *See* Anderson v. Creighton, 483 U.S. 635, 641 (1987) (explaining that Anderson's subjective beliefs about search were irrelevant). "The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." *Id.*

dant's factual allegations. [100] For the aforementioned reasons, I will refer to the first argument as a "law-based" qualified immunity argument and the latter as a "fact-dependent" qualified immunity claim.

Courts often classify both arguments as questions of law and assume that the evidentiary burdens should be allocated identically in each circumstance.[101] When one actually applies these arguments, the differences

100. *See* Saucier v. Katz, 533 U.S. 194, 202 (2001) ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."); *Anderson*, 483 U.S. at 641 (concluding that relevant fact-specific question is whether reasonable officer would have believed warrantless search to be lawful in light of available law).

The second category of qualified immunity claims, which focuses on the information possessed by the defendant, might assume several forms. First, that the information in the defendant's possession, although correct, could lead reasonable officials to believe that their conduct was lawful (e.g., arguable probable cause). *See Groh*, 540 U.S. at 566 (Kennedy, J., dissenting) (quoting *Anderson*, 483 U.S. at 641) (stating officer is entitled to qualified immunity if reasonable officer could have believed search was lawful in light of information officer possessed). Second, that defendants may claim neither they nor a reasonable official in their position would appreciate the unlawfulness of their conduct because they had a reasonable, but nonetheless, mistaken view of the facts and subsequently evaluates the legality of their conduct on the basis of that erroneous view. *See id.* at 566-67 (Kennedy, J., dissenting) (citing Arizona v. Evans, 514 U.S. 1 (1995)) ("Alternatively, [the officer] may misunderstand important facts about the search and assess the legality of his conduct based on that misunderstanding.").

And finally, a defendant might argue that due to extraordinary factual circumstances specific to his situation (e.g. reliance on legal counsel) a reasonable officer could believe the conduct was lawful. *See Harlow*, 457 U.S. at 819 ("Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained."); Ross v. City of Memphis, 423 F.3d 596, 604 n.3 (6th Cir. 2005) ("[R]eliance on counsel's legal advice only constitutes a qualified immunity defense under 'extraordinary circumstances.'"); Buonocore v. Harris, 134 F.3d 245, 253 (4th Cir. 1998) (citing Hollingsworth v. Hill, 110 F.3d 733, 741 (10th Cir. 1997)) (concluding that reliance on counsel's advice does not alone constitute extraordinary circumstance).

Although most circuit courts treat "extraordinary circumstances" as an inquiry distinct from the clearly established law issue, some opinions suggest that "extraordinary circumstances" are just one of many factors in determining whether a reasonable official in the defendant's position would have known that the conduct was illegal. *See, e.g., Harlow*, 457 U.S. at 819 (stating that qualified immunity defense based on extraordinary circumstances turns on objective factors); Mimics, Inc. v. Vill. of Angel Fire, 394 F.3d 836, 846 (10th Cir. 2005) ("Ordinarily, when the law is clearly established the qualified immunity defense will fail unless the defendant demonstrates 'extraordinary circumstances . . . such that defendant was so prevented from knowing that his actions were unconstitutional that he should not be imputed with knowledge of an admittedly clearly established right.'" (quoting Cannon v. City & County of Denver, 998 F.2d 867, 871 (10th Cir. 1993))). For the purposes of this article, the relevant distinction is between "fact-based" and "law-based" qualified immunity claims. Accordingly, I have grouped extraordinary circumstances arguments with other fact-dependent arguments, although, doctrinally, it may be more appropriate to consider them a separate category.

101. *See Wilson*, 526 U.S. at 614-17 (determining whether law was clearly established at time of official action); *Anderson*, 483 U.S. at 639 (finding whether official

reveal themselves. As this section of the Article demonstrates, when disposition of qualified immunity claims does not depend upon the evidence, but is simply judged on the basis of the plaintiff's allegations, summary judgment is not the best procedural tool with which to resolve the dispute. To demonstrate how these two categories of qualified immunity arguments differ from one another, I have created the following fact pattern:[102]

> Tim Smith has filed a § 1983 complaint against Officer Brown. He alleges that Officer Brown, acting under color of state law, deprived him of his Fourth Amendment right to be free from unreasonable seizure when the officer arrested him on the porch of the Idaho home he shared with his fraternal twin brother, Jim Smith. Jim Smith was wanted on several Florida warrants. Although they did not have a warrant, Officer Brown and several other officers went to the brothers' home to arrest Jim Smith after learning that he was in town. Tim Smith claims that the officers surrounded his home and ordered that Mr. Smith come out. When Tim Smith emerged from the home he was arrested.
>
> More specifically, the plaintiff claims that, absent an exception to the Fourth Amendment's warrant requirement, police must have a warrant to arrest a suspect in the suspect's home.[103] Although Tim Smith was arrested outside of his home, he claims that ordering him from his home to arrest him is, in effect, the

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may be held liable turns on "objective legal reasonableness" of action and whether legal rules were "clearly established" at time of action).

102. This fact pattern is based loosely upon the facts presented in *Elder v. Holloway*, 510 U.S. 510 (1994).

103. *See* Donovan v. Dewey, 452 U.S. 594, 599 n.6 (1981) (citing Steagald v. United States, 451 U.S. 204 (1981)) ("Absent consent or exigent circumstances, a private home may not be entered to conduct a search or effect an arrest without a warrant."); Payton v. New York, 445 U.S. 573, 590 (1980) (finding that "absent exigent circumstances, [the entrance to the house] may not reasonably be crossed without a warrant"); Johnson v. United States, 333 U.S. 10, 17 (1948) (stating that officer who enters home to arrest must have "some valid basis in law for the intrusion"). The Fourth Amendment declares:

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

U.S. CONST. amend. IV. The Supreme Court, however, has recognized several exceptions to the Fourth Amendment's warrant requirement. These exceptions fall into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view and *Terry* investigative stops. *See Warrantless Searches and Seizures*, 91 GEO. L.J. ANN. REV. CRIM. PROC. 36, 36 (2003) (listing exceptions to Fourth Amendment's warrant requirement). The last four categories apply to searches of persons and property rather than arrest. *See id.* (discussing exceptions to both search and arrest warrant requirements).

equivalent of arresting him in his home.[104] He further alleges that his arrest was not justifiable under any of the recognized exceptions to the Fourth Amendment warrant requirement and, accordingly, the arrest is a clear violation of the Fourth Amendment.

SCENARIO 1: THE LAW-BASED QUALIFIED IMMUNITY ARGUMENT

Officer Brown claims that, at the time of the plaintiff's arrest, it was not clear that ordering a suspect from his home in order to execute an arrest in the absence of a warrant was a violation of the Fourth Amendment and, accordingly, that he is entitled to qualified immunity. In this scenario, Officer Brown does not dispute the plaintiff's factual allegations. Instead, he argues that, even if the plaintiff's allegations were true, previous cases did not make it clear that ordering suspects from their homes to execute an arrest warrant violates the Fourth Amendment.[105] As such, the defendant's argument focuses on the legal rule in effect at the time of the alleged conduct and the qualified immunity determination will depend upon the plaintiff's allegations and the court's assessment of the law at the time of the incident. It will not depend upon the truth of either the defendant's or the plaintiff's allegations.

This is a prime example of law application. It requires the court to link the facts of a specific case, *Smith v. Brown*, to a more general legal rule, the Fourth Amendment reasonableness requirement. The applicable evidentiary requirements and the standard of review will depend upon when and how the defendant presents his qualified immunity argument.[106] The

104. *See* United States v. Al-Azzawy, 784 F.2d 890, 893 (9th Cir. 1985) (holding that officers who arrested individuals outside of their home after ordering them to come out have, nonetheless, "arrested [them] inside [their] residence without a warrant").

105. *See, e.g.*, Illinois v. McArthur, 531 U.S. 326, 335 (2001) (citing United States v. Santana, 427 U.S. 38, 42 (1976)) (concluding that person standing in threshold of house is "in a public place" for purposes of Fourth Amendment, subjecting that person to arrest without warrant permitting entry into home). *McArthur*, however, is distinguishable from *Smith v. Brown*. In the former case, the suspect voluntarily left the interior of his home and went on the porch to talk with the police. *See id.* at 329 (stating that suspect left and reentered trailer two or three times while officer spoke with him). During the course of the conversation between the officers and the defendant, the police asked the defendant for consent to search his home. *See id.* When he declined, two officers left to obtain a search warrant. *See id.* A third officer remained at the house and told the defendant "that he could not reenter the trailer unless a police officer accompanied him." *Id.* Regardless, at the time of the alleged conduct, the Supreme Court had not addressed the specific issue at hand—whether ordering suspects from their homes to execute a warrantless arrest violates the Fourth Amendment.

106. *See, e.g.*, Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (discussing when defendant is entitled to summary judgment). In *Mitchell* the Court stated the following:

defendant may present a qualified immunity claim as a motion to dismiss, a motion for judgment on the pleading, a motion for summary judgment (either before or after discovery) or as a defense at trial.[107] The Supreme Court, however, indicated that "a ruling on [the qualified immunity] issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive."[108]

A. *Rule 12(b)(6) of the Federal Rules of Procedure: A Motion to Dismiss*

In Scenario 1, if the defendant moved to dismiss the plaintiff's claim pursuant to Rule 12(b)(6),[109] he would argue that the plaintiff's complaint failed to state a claim upon which relief could be granted.[110] This argument may assume one of two forms. First, the defendant might argue that, assuming the truth of the plaintiff's allegations, the alleged incident does not amount to a constitutional violation.[111] Alternatively, the defendant might argue that, taking the plaintiff's allegations as true, even if his actions violated the Constitution, it is clear from the face of the plaintiff's complaint that the right plaintiff claims he was deprived of was not clearly established at the time of the alleged conduct.[112]

The purpose of Rule 12(b)(6) is "to allow the court to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus spare litigants the burdens of unnecessary pretrial and trial activity."[113] In order to appraise the sufficiency of a complaint pursuant to a Rule 12(b)(6) motion, courts follow the rule that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt

> Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.

Id. (citation omitted) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

107. *See* KAREN M. BLUM & KATHRYN R. URBONYA, SECTION 1983 LITIGATION 85-89 (1998) (discussing qualified immunity claims at different stages of discovery and trial).

108. Saucier v. Katz, 533 U.S. 194, 200 (2001).

109. *See* FED. R. CIV. P. 12(b)(6) (authorizing courts to dismiss actions for failure to state claim upon which relief can be granted).

110. *See, e.g.*, McKenna v. Wright, 386 F.3d 432, 435-36 (2d Cir. 2004) (explaining defendant's argument that plaintiff did not establish case for relief to be granted).

111. *See Saucier*, 533 U.S. at 201 (exploring substance of constitutional violations).

112. *See, e.g.*, *McKenna*, 386 F.3d at 437 (dismissing defendant's argument that plaintiff's right is not clearly established). Because this Article focuses on qualified immunity dispositions, I will limit the discussion to the latter argument.

113. Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., 988 F.2d 1157, 1160 (D.C. Cir. 1993).

that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[114] Generally, trial courts will not consider evidence outside of the plaintiff's complaint when ruling on a 12(b)(6) motion to dismiss.[115] Yet, some circuits have held that the trial court may grant a defendant's motion to dismiss "when the face of the complaint clearly reveals the existence of a meritorious affirmative defense."[116]

When deciding whether a 12(b)(6) dismissal is warranted, the court must merely determine whether the complaint itself is legally sufficient.[117] The court is not to weigh the evidence that might be presented at trial.[118] Accordingly, a motion to dismiss tests only the sufficiency of the complaint and places no evidentiary burdens on the plaintiff.

Nevertheless, several appellate courts speak in terms of burdens when faced with a law-based qualified immunity dispute at the motion to dismiss

114. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

115. *See* 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (2d ed. 1990) (explaining considerations involved in evaluation of motions to dismiss).

116. 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1357 (West 2006) (quoting Eniola v. Leasemcomm Corp., 214 F. Supp. 2d 520, 525 (D. Md. 2002)) (exploring some circuits' response to defendant's motion to dismiss).

117. *See, e.g.*, Smith v. Cash Store Mgmt., Inc., 195 F.3d 325, 327-28 (7th Cir. 1999) (holding that trial court erred in dismissing claim because "assessing factual support for suit is not office of Rule 12(b)(6)" (quoting Johnson v. Revenue Mgmt. Corp., 169 F.3d 1057, 1059 (7th Cir. 1999))); Ordinance 59 Ass'n v. U.S. Dep't of Interior Sec'y, 163 F.3d 1150, 1152 (10th Cir. 1998) (noting that, upon review of 12(b) motion to dismiss, appellate court will accept complaint's allegations as true and "consider whether complaint, standing alone, is legally sufficient to state claim upon which relief may be granted"); Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985) ("The court's function on a Rule 12(b)(6) motion is not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient.").

118. *See* Pirraglia v. Novell, Inc., 339 F.3d 1182, 1187 (10th Cir. 2003) (noting that court's function "is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted"); Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999) (explaining that purpose of Rule 12(b)(6) motion is to "test sufficiency of complaint"); *see also* Yuhasz v. Brush Wellman, Inc., 341 F.3d 559, 562 (6th Cir. 2003) (concluding that purpose of motion is "to enable defendants to challenge . . . legal sufficiency of complaints without subjecting themselves to discovery"); *Johnson*, 169 F.3d at 1059 (explaining that evidence shall not be weighed).

stage.[119] For example, in *O'Rourke v. Hayes*,[120] the Eleventh Circuit described the standard for resolving a motion to dismiss based upon qualified immunity. Only if the plaintiff alleges the violation of a clearly established constitutional right does the complaint survive a motion to dismiss on qualified immunity grounds.[121] The Court explained:

> Once a government official demonstrates that he is potentially entitled to qualified immunity, the burden shifts to the plaintiff to demonstrate that the official is not actually entitled to it. *The plaintiff must show that the defendant violated a constitutional right, and that the right was clearly established at the time of the alleged violation.* When qualified immunity is asserted in the context of a motion to dismiss, we look to the pleadings to see if the plaintiff has successfully alleged the violation of a clearly established right.[122]

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119. *See, e.g.*, Lybrook v. Members of Farmington Mun. Sch. Bd. of Educ., 232 F.3d 1334, 1337 (10th Cir. 2000) (explaining that in response to qualified immunity defense, plaintiff must "identify a clearly established statutory or constitutional right of which a reasonable person would have known, and then allege facts to show . . . defendant's conduct violated that right") (quoting Breidenbach v. Bolish, 126 F.3d 1288, 1291 (10th Cir. 1997))); *see also* Mihos v. Swift, 358 F.3d 91, 102 (1st Cir. 2004) (setting forth three-part test for determining when public official is entitled to qualified immunity). The court in *Mihos* reasoned:

> Drawing on Supreme Court precedent and our own case law, we employ a three-part test when determining if a public official is entitled to qualified immunity: (1) whether plaintiff's allegations, if true, establish a constitutional violation; (2) whether that right was clearly established at the time of the alleged violation; and (3) whether a similarly situated reasonable official would have understood that the challenged action violated the constitutional right at issue.

Id. at 102.

120. 378 F.3d 1201 (11th Cir. 2004).

121. *See id.* at 1206 (concluding that probation officer was not entitled to qualified immunity because conduct was clearly established as unconstitutional).

122. *Id.* (citations omitted) (emphasis added); *see also* Flagner v. Wilkinson, 241 F.3d 475, 480 (6th Cir. 2001) (holding asserted constitutional right of Hasidic Jew not to submit to prison grooming policy was not clearly established at time prison officers took action). In *Flagner*, the court noted the following:

> Under this framework, to plead a proper claim under 42 U.S.C. § 1983, "a plaintiff must identify a right secured by the United States Constitution and the deprivation of that right by a person acting under color of state law," such that "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right."

Id. at 480 (internal citations omitted). This approach may be attributable to the Supreme Court's language in *Crawford-El*. There, the Court noted that to determine whether the defendant is entitled to qualified immunity "the court must determine whether, assuming the truth of the plaintiff's allegations, the official's conduct violated clearly established law." *See* Crawford-El v. Britton, 523 U.S. 574, 598 (1998). Nonetheless, the Court only made this statement after explaining how courts might require plaintiffs to "put forward specific, nonconclusory factual allegations that establish improper motive." *See id.*

This approach is problematic in several respects. The suggestion that either party bears a burden of proof in this context is nonsensical.[123] Furthermore, courts following this approach, in essence, have introduced a heightened pleading standard in § 1983 cases.[124]

1. *Evidentiary Burdens and the Law-Based Qualified Immunity Claim*

Under *Elder v. Holloway*,[125] neither party "bears the burden" of identifying relevant case law.[126] Rather, the court should consider all relevant precedent, even if the parties failed to identify the specific case upon which the court's determination depends.[127] In short, at the motion to dismiss stage, qualified immunity determinations will depend upon the court's understanding of clearly established law and the allegations contained in the plaintiff's complaint. It does not turn on the veracity of either party's allegations.

Proper evaluation of § 1983 qualified immunity claims at the motion to dismiss stage simply requires that trial judges review the allegations of the plaintiff's complaint and determine whether the defendant deprived the plaintiff of a clearly established right. The court's inquiry will focus on the relevant legal standard at the time of the plaintiff's arrest. This inquiry is not as simple as it may appear initially. In *Saucier*, the Supreme Court issued the following statement regarding clearly established law:

> If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate . . . . This is not to say that the formulation of a general rule is beside the point, nor is it to insist the courts must have agreed upon the precise formulation of the standard. Assuming, for instance, that various courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case

123. One might even argue that it is doubly nonsensical to speak of evidentiary burdens in this context. First, evidentiary burdens are inapplicable to the resolution of law-based qualified immunity claims—the evidence is not in dispute. Second, as a more general matter, it is usually inappropriate to assign evidentiary burdens at the 12(b)(6) stage of litigation. As discussed in the preceding paragraphs, the purpose of Rule 12(b)(6) is to test the *legal* sufficiency of the plaintiff's allegations. The plaintiff does not have to produce evidence in support of his allegations. It is sufficient that he makes the allegations in his complaint. Accordingly, evidentiary disputes and burdens are largely irrelevant at this stage of litigation.

124. For a discussion of the heightened pleading requirements imposed by courts in qualified immunity cases, see *supra* notes 68-73, *infra* notes 136-42 and accompanying text.

125. 510 U.S. 510 (1994).

126. *See id.* at 516 (concluding that burden of production does not rest solely upon plaintiff or defendant).

127. *See id.* ("A court engaging in review of a qualified immunity judgment should therefore use its 'full knowledge of its own [and other relevant] precedents.'" (quoting Davis v. Scherer, 468 U.S. 183, 192 n.9 (1984))).

> at hand, the officer would not be entitled to qualified immunity based simply on the argument that courts had not agreed on one verbal formulation of the controlling standard.[128]

While *Saucier* makes it clear that the "clearly established law" rule does not require a court to have previously rendered a decision on a dispute presenting an identical fact pattern, it fails to provide a bright line rule for determining when an officer has "fair notice" that his conduct is unlawful.[129]

A trial court's decision regarding the propriety of qualified immunity will largely depend upon how it defines "relevant case law."[130] Returning to the fact pattern outlined earlier in Part IV, if the plaintiff were to allege all of the facts discussed, the court's determination will depend upon what case law that particular court considers relevant. For example, in *United States v. Al-Azzawy*,[131] the Ninth Circuit held that by ordering the defendant to come out of his home, the officers who arrested him had effectively "arrested [him] inside his residence without a warrant."[132] In contrast, in *Illinois v. McArthur*,[133] the Supreme Court discussed an earlier decision in which it held "that a person standing in the doorway of a house is 'in a public place' and hence subject to arrest without a warrant permit-

128. *See* Saucier v. Katz, 533 U.S. 194, 202-03 (2001) (evaluating appropriateness of qualified immunity where defendant is not on proper notice).

129. *See* Hope v. Pelzer, 536 U.S. 730, 753-54 (2002) ("Certain actions so obviously run afoul of the law that an assertion of qualified immunity may be overcome even though court decisions have yet to address 'materially similar' conduct. [For example,] 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.'"); Melissa M. Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law Under the Antiterrorism and Effective Death Penalty Act*, 54 CATH. U. L. REV. 747, 762 (2005) (considering clearly established language of tort law in reference to governmental qualified immunity doctrine); Leah Chavis, *Qualified Immunity After* Hope v. Pelzer*: Is "Clearly Established" Any More Clear?*, 26 U. ARK. LITTLE ROCK L. REV. 599, 613-14 n.103 (2004) (challenging policy rationales underlying qualified immunity); Amanda K. Eaton, *Optical Illusions: The Hazy Contours of the Clearly Established Law and the Effects of* Hope v. Pelzer *on the Qualified Immunity Doctrine*, 38 GA. L. REV. 661, 667 (2004) (examining relationship between clearly established law and principles of fair notice).

130. *Compare* Flint v. Ky. Dep't of Corrs., 270 F.3d 340, 347 (6th Cir. 2001) (quoting Daugherty v. Campbell, 935 F.2d 780, 784 (6th Cir. 1991)) (explaining that court must look first to Supreme Court, then to decisions of that court and other courts within its circuit, and finally to decisions of other circuits when determining whether right is "clearly established" for purposes of qualified immunity defenses), *with* Hope v. Pelzer, 240 F.3d 975, 981 (11th Cir. 2001) (quoting Hill v. Dekalb Reg'l Youth Det. Ctr., 40 F.3d 1176, 1185 (11th Cir. 1994)) (holding that "to be 'clearly established,' the federal law by which the government official's conduct should be evaluated must be preexisting, obvious and mandatory so that a similarly situated, reasonable government agent would be on notice that his or her questioned conduct violates federal law under the circumstances"), *overruled by* Hope v. Pelzer, 536 U.S. 730 (2002).

131. 784 F.2d 890 (9th Cir. 1985).

132. *See id.* at 893 (detailing warrantless arrest).

133. 531 U.S. 326 (2001).

ting entry of the home."[134] If the court considers the Ninth Circuit's opinion in *Al-Azzawy* as the relevant case law, then the court is more likely to deny the defendant's motion to dismiss than it would be if it simply looked at Supreme Court opinions on the issue. It would seem that appellate courts considering case law from their sister courts and district courts are more likely to determine that the law was "clearly established" than are circuit courts that limit the inquiry to Supreme Court jurisprudence.[135]

2. *Covert Heightened Pleading Requirements in § 1983 Cases*

Once the court has identified the relevant case law, it may still be difficult for the court to "link" the plaintiff's allegations to the applicable legal rule if the plaintiff's complaint is not specific regarding the facts surrounding the alleged deprivation. Several courts explicitly adopted heightened pleading standards in § 1983 litigation to force § 1983 plaintiffs to include specific factual allegations in their complaints.[136] Equally problematic, several appellate courts consider a Rule 12(b)(6) dismissal appropriate when the plaintiff fails to allege facts that, if proven, would violate *clearly* established law.

In *Gomez v. Toledo*,[137] the Court held that "the burden of pleading [qualified immunity] rests with the defendant [and there is] . . . no basis for imposing on the plaintiff an obligation to anticipate such a defense by stating in [the] complaint that the defendant acted in bad faith."[138] In effect, by requiring the plaintiff's complaint to allege a violation of a *clearly* established law rather than simply a violation of law, appellate courts circumvented one of the basic premises of *Gomez*—a plaintiff need not anticipate the defendant's qualified immunity claim when drafting the

134. *See id.* at 335 (citing United States v. Santana, 427 U.S. 38, 42 (1976)) (describing court's interpretation of "public place" for purposes of arrest warrant).

135. If for no other reason, courts that consider cases outside of their circuit will have more cases to consider and, accordingly, are more likely to encounter similar cases.

136. *See, e.g.*, GJR Inv., Inc. v. County of Escambia, 132 F.3d 1359, 1367 (11th Cir. 1998) ("In examining the factual allegations in the complaint, we must keep in mind the heightened pleading requirements for civil rights cases, especially those involving the defense of qualified immunity.").

137. 446 U.S. 635 (1980).

138. *Id.* at 640 (citation omitted); *see* Fullman v. Graddick, 739 F.2d 553, 556-57 (11th Cir. 1984) ("[M]ore than mere conclusory notice pleading is required . . . . [A] complaint will be dismissed as insufficient where the allegations it contains are vague and conclusory."); *see also* Veney v. Hogan, 70 F.3d 917, 922 (6th Cir. 1995) (holding that complaint must "include the specific, non-conclusory allegations of facts that will enable the district court to determine that those facts, if proved, will over-come the defense of qualified immunity").

As noted in Part II, the Court eliminated the bad faith prong of qualified immunity in *Harlow v. Fitzgerald*. See *supra* Part II (describing history of qualified immunity doctrine). The Court's reasoning in *Gomez* still applies to the situation described—i.e., requiring that the plaintiff's complaint alleges a violation of clearly established law. *See* Crawford-El v. Britton, 523 U.S. 574, 598 (1998) (citing *Gomez* for proposition that plaintiff is not required "to anticipate the immunity defense").

complaint—and introduced a heightened pleading standard to the § 1983 doctrine. In essence, courts requiring plaintiffs to specifically allege a violation of clearly established law when they first file their complaint are requiring plaintiffs to anticipate the defendant's qualified immunity defense and draft the complaint accordingly. This approach ignores both *Crawford-El* and the purpose of Rules 7(a)[139] and 12(e)[140] of the Federal Rules of Civil Procedure.

If the court is unable to determine the question of qualified immunity on the basis of the plaintiff's complaint, then the court should deny the defendant's motion to dismiss. This is true even if the plaintiff's complaint is too vague or broad for the court to determine the availability of qualified immunity.[141] If the plaintiff's allegations are too vague or too broad for the court to determine whether the right in question was clearly established, Rule 7(a) and 12(e) offer the court its only form of recourse. As the Supreme Court explained in *Crawford-El*:

> [T]he court may order a reply to the defendant's or a third party's answer under Federal Rule of Civil Procedure 7(a), or grant the defendant's motion for a more definite statement under Rule 12(e). Thus, the court may insist that the plaintiff "put forward specific, nonconclusory factual allegations" that establish improper motive causing cognizable injury in order to survive a pre-discovery motion for dismissal or summary judgment.[142]

Should the court exercise either of these options, it should not treat the disposition as a motion to dismiss, but as a judgment on the pleadings.

B. *Rule 12(c) of the Federal Rules of Civil Procedure: A Motion for Judgment on the Pleadings*

Rule 12(c)[143] may appropriately be considered the "red headed step child" of federal civil procedure—it is often overlooked as a method of

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139. FED. R. CIV. P. 7(a) (listing types of pleadings allowed in federal system).

140. FED. R. CIV. P. 12(e) (granting right to make motion for more definite statement when pleading is so "vague and ambiguous" that party "cannot reasonably be required to frame a responsive pleading").

141. *See* United Ins. Co. of Am. v. B.W. Rudy, Inc., 42 F.R.D. 398, 401 (E.D. Pa. 1967) (citing Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 235 (1959)) (concluding that remedy for vague complaint is not motion to dismiss, but motion for more particular statement of claim); *see also* Beascoechea v. Sverdrup & Parcel and Assocs., 486 F. Supp. 169, 174 n.5 (E.D. Pa. 1980) (same).

142. *See Crawford-El*, 523 U.S. at 598 (explaining that court has discretion to protect substance of qualified immunity defense).

143. *See* FED. R. CIV. P. 12(c) (providing procedure for judgment on pleadings).

resolving legal disputes.[144] As the authors of Federal Practice and Procedure explain:

> [A] Rule 12(c) motion is designed to provide a means of disposing of cases when the material facts are not in dispute between the parties and a judgment on the merits can be achieved by focusing on the content of the competing pleadings, exhibits thereto, matters incorporated by reference in the pleadings, whatever is central or integral to the claim for relief or defense, and any facts of which the district court will take judicial notice.[145]

Like a motion to dismiss, Rule 12(c) decisions do not depend upon the truth of the parties' allegations but on the allegations themselves. Most circuit courts apply the same standard of review to 12(c) motions that they use when resolving 12(b) motions.[146] Accordingly when deciding a motion for judgment on the pleadings, the court will "view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party."[147]

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144. *See id. See generally* 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1369 (4th ed. 2004) ("[T]here probably is little need for retaining the judgment on the pleadings as a separate procedure for testing the sufficiency of the pleadings.").

Rule 7(a) of the Federal Rules of Civil Procedure provides a brief list of permissible pleadings. FED. R. CIV. P. 7(a) (listing complaint, answer, reply to counterclaim, answer to cross-claim if answer contains cross-claim, third-party complaint if person not original party is summoned and third-party answer if third-party complaint is served as only pleadings allowed). Accordingly, in the absence of a counterclaim, cross-claim or third party complaint, the pleadings are closed when the defendant submits an answer. *Id.* Further, a defendant must submit an answer within twenty days of being served with the summons and complaint. *See id.*; *see also* Bradley Scott Shannon, *Action Is an Action Is an Action Is an Action*, 77 WASH. L. REV. 65, 112 (2002) (considering party responsibilities for summons and complaint). If, however, the defendant files a 12(b)(6) motion to dismiss, the answer is due within ten days after notice of the court's decision. *See* FED. R. CIV. P. 12 (stating procedural requirements and consequences of Rule 12(b) motion).

145. 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1367 (3d ed. 1998) (footnote omitted) (explaining Rule 12(c) motions).

146. *See* Aspenwood Inv. Co. v. Martinez, 355 F.3d 1256, 1259 (10th Cir. 2004) ("A decision by the district court granting a defense motion for judgment on the pleadings is reviewed *de novo*, using the same standard of review applicable to a Rule 12(b)(6) motion."); *see also* Millea v. Brown, No. 92-2734, 1993 WL 118072, at *2 (7th Cir. Apr. 14, 1993) ("A Rule 12(c) motion for judgment on the pleadings is generally subject to the same standard of review as a Rule 12(b)(6) motion to dismiss for failure to state a claim."); Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1192 (9th Cir. 1989) ("Because the motions are functionally identical, the same standard of review applicable to a Rule 12(b) motion applies to its Rule 12(c) analog.").

147. 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1368 (West 2006) (discussing Federal Rule 12(c) and explaining significant number of federal courts have reached this conclusion).

Because the trial court will apply the same standard on a 12(c) motion as it would on a 12(b) motion, a motion on the judgment brought by Officer Brown should lead the court to the same conclusion it would reach if Officer Brown filed a motion to dismiss.[148] The results might differ, however, if Officer Brown's 12(c) motion raises new factual information. Then, absent a concession by the plaintiff regarding the truth of the defendant's allegations, the court should deny the defendant's motion for judgment on the pleading.[149] Furthermore, if the defendant were to raise factual information upon which the qualified immunity defense depended and the plaintiff disputed the defendant's allegations, then the defendant's argument would move from the law-based category of arguments to the fact-dependent category and should be treated as a motion for summary judgment.

C. *Summary Judgment and Trial*

The Court has indicated on several occasions that trial judges can and should resolve qualified immunity disputes at the summary judgment stage and, when possible, before discovery. [150] This directive ignores both the purpose and form of summary judgment.

The primary purpose of civil jury trials is to resolve factual disputes.[151] Summary judgment serves a related function. As the Supreme Court noted in *Celotex v. Catrett*,[152] "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses . . . ."[153] In short, summary judgment is intended to

148. *See generally id.* (explaining significant number of federal courts have held same standard should apply).

149. *See* 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1370 (3d ed. 1998) ("In considering motions under Federal Rule 12(c), district courts frequently indicate that a party moving for a judgment on the pleadings impliedly admits the truth of its adversary's allegations and the falsity of its own assertions that have been denied by that adversary.").

150. *See, e.g.*, Saucier v. Katz, 533 U.S. 194, 195 (2001) ("[T]he goal of qualified immunity to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment."); Wyatt v. Cole, 504 U.S. 158, 178-79 (1992) ("And so I see no reason that the trial judge may not resolve a summary judgment motion premised on such a good-faith defense, just as we have encouraged trial judges to do with respect to qualified immunity claims."); Harlow v. Fitzgerald, 457 U.S. 800, 815-19 (1982) (abandoning subjective element of qualified immunity defense to avoid excessive disruption of government and to permit resolution of insubstantial claims on summary judgment).

151. *See* Colgrove v. Battin, 413 U.S. 149, 157 (1973) ("[T]he purpose of the jury trial in criminal cases [is] to prevent government oppression and, in criminal and civil cases, to assure a fair and equitable resolution of factual issues . . . ." (citation omitted)).

152. 477 U.S. 317 (1986).

153. *See id.* at 323-24 (discussing moving for summary judgment without supporting affidavits). Stated bluntly, summary judgment "is the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events." *See* Schacht v. Wis. Dep't of Corrs., 175 F.3d 497, 504 (7th Cir. 1999).

determine whether there is a genuine issue of material fact and, if so, civil trials are designed to resolve those disputes. When it is apparent that there is not a genuine issue of material fact, as is the case in law-based qualified immunity claims, trial and summary judgment (both pre-discovery and post-discovery) seem ill-suited tools with which to resolve cases.[154]

Both summary judgment dispositions and trials are structured around the parties' evidentiary burdens. Where, as here, the defendant pursues a law-based qualified immunity claim procedural tools that depend upon the assignment of evidentiary burdens are problematic in at least two respects. First, absent a factual dispute, evidentiary burdens are inapplicable and it is senseless to assign them to the parties in this type of scenario.[155] Furthermore, and perhaps more importantly, the assignment of "evidentiary" burdens in law-based qualified immunity claims ignores Supreme Court precedent on the issue.

In *Elder*, the plaintiff brought a § 1983 suit against several officers after he sustained permanent injuries during the course of a warrantless arrest.[156] The officers pled qualified immunity, arguing that at the time of the plaintiff's arrest, it was not clearly established that ordering suspects from their homes to execute an arrest was a deprivation of their Fourth Amendment right to be free from unreasonable searches and seizures.[157] Although the plaintiff cited to several cases which, he argued, should have notified the officers that their actions would deprive him of a clearly established Fourth Amendment right, the district court held that the law was not clearly established and the defendants were entitled to qualified immunity.[158]

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154. *But see* 10A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2725 (3d ed. 1998) (claiming that if there is no genuine issue of material fact, Rule 56(c) allows for immediate disposition). The difficulty of this position is that it assumes there are only two types of questions—questions of law and questions of fact. While it is true that "when the only issues to be decided in the case are issues of law, summary judgment may be granted," it does not necessarily follow that if the absence of questions of facts means that there are only questions of law and summary judgment is appropriate—issues of law application may remain. *Id.* Furthermore, the authors' conclusion does not seem to consider either the structure or purpose of summary judgment, which, as noted above, focuses largely on factual disputes and evidentiary burdens.

155. *See* Elder v. Holloway, 975 F.2d 1388, 1392 (9th Cir. 1991), *rev'd*, 510 U.S. 510 (1994) (exploring plaintiff's role in responding to requests for qualified immunity). In *Elder*, the Ninth Circuit held that "in opposing an official's request for judgment based on qualified immunity, the plaintiff's burden includes identifying the universe of relevant statutory or decisional law from which the court can determine whether the right allegedly violated was clearly established." *Id.* at 1393. The Supreme Court unanimously reversed the Ninth Circuit's judgment, holding that appellate courts should consider relevant precedents, even if the parties and the district court failed to identify them. *See Elder*, 510 U.S. at 516 (reversing Ninth Circuit judgment).

156. *See Elder*, 510 U.S. at 516.

157. *See id.*

158. *See id.* (holding that if law is not clearly established qualified immunity does not apply).

Unbeknownst to the plaintiff, the district court and presumably the defendants, the Ninth Circuit had decided a similar case, *Al-Azzawy*, in 1985, two years before the plaintiff was injured.[159] In *Al-Azzawy*, the Ninth Circuit held that officers who arrested the plaintiff outside of the plaintiff's home after ordering him to come out had, for all practical purposes, "arrested [him] inside his residence without a warrant."[160] Although *Al-Azzawy* "clearly established" that officers could not circumvent the Fourth Amendment's warrant requirement by ordering suspects to come out of their homes, the court reasoned that a § 1983 "plaintiff's burden in responding to a request for judgment based on qualified immunity is to identify the universe of statutory or decisional law from which the [district] court can determine whether the right allegedly violated was clearly established."[161] Accordingly, under the appellate court's opinion in *Elder*, if plaintiffs fail to identify potentially relevant case law, they have not met their "burden of showing that the constitutional right purportedly violated was clearly established at the time of the official's conduct" and the defendant is entitled to qualified immunity.[162]

Approximately three years later, the Supreme Court unanimously reversed the Ninth Circuit's decision.[163] The Court noted that "w hether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of 'legal facts.'"[164] Although the Court does not explicitly address evidentiary burdens in § 1983 qualified immunity disputes, the opinion implicitly suggests that it is improper for trial courts to assign evidentiary burdens in law-based qualified immunity claims.

Despite the implications of *Elder*, lower courts continue to assign the parties evidentiary burdens in qualified immunity disputes—even in scenarios like this, where the defendant pursues a law-based qualified immunity argument.[165] One explanation for lower courts' tendency to speak in

159. *See* United States v. Al-Azzawy, 784 F.2d 890, 893 (9th Cir. 1985) (holding that warrantless arrest and search of residence were justified by exigent circumstances).

160. *See id.* at 893 (explaining defendant's arrest inside his residence).

161. *See* Elder v. Holloway, 975 F.2d 1388, 1392 (9th Cir. 1991), *rev'd*, 510 U.S. 510 (1994) (exploring plaintiff's role in responding to requests for qualified immunity).

162. *See Elder*, 510 U.S. at 516 (evaluating defendant's entitlement to qualified immunity).

163. 163 *See id.* at 511 (concluding that appellate court must produce "legal facts" demonstrating law was clearly established).

164. *Id.* (citing Mitchell v. Forsyth, 472 U.S. 511, 528 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.").

165. *See, e.g.*, Douglas v. Dobs, 419 F.3d 1097, 1101 (10th Cir. 2005) ("A plaintiff may not simply allege a Fourth Amendment violation in the abstract, but must demonstrate through relevant prior cases that a defendant's actions 'in a more

terms of evidentiary burdens, even when the facts are not in dispute, is that they are trying to force qualified immunity disputes into a summary judgment mold. Summary judgment is structured around the evidentiary burdens the parties will bear at trial.[166]

In the absence of evidentiary burdens, it is unclear how courts are to structure summary judgment proceedings. Accordingly, courts "adopt" evidentiary burdens even when the facts are not in dispute to conform to the structure of summary judgment. Arguably, this jimmying of law-based qualified immunity disputes to fit into a summary judgment mold indicates that summary judgment is not the best tool to resolve this type of qualified immunity dispute. For the aforementioned reasons, summary judgment, either before or after discovery, is a poor tool to resolve "law-based" qualified immunity disputes.[167] It is, however, well suited for resolution of "fact-dependent" qualified immunity claims.

> SCENARIO 2: THE FACT-DEPENDENT QUALIFIED IMMUNITY ARGUMENT
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> The plaintiff alleges that the defendant violated the Fourth Amendment by unreasonably arresting him instead of his brother. The plaintiff alleges that he is 5'3", has brown eyes and black hair, and weighs approximately 135 pounds. He claims that, in contrast, his fraternal twin brother is 6'3", has blue eyes, bleach blonde hair, and weighs approximately 200 pounds. In short, the plaintiff claims that he and his brother do not resemble one another and, accordingly, it was unreasonable for the defendant to mistake him for his brother. The defendant, however, claims that he is entitled to qualified immunity because he reasonably mistook the plaintiff for his brother, who was wanted in Florida. More specifically, the defendant claims that, due to a clerical mix up, the plaintiff's picture was attached to the suspect's file and he reasonably believed the person pictured, the plaintiff, was the suspect he sought to arrest. (For the purposes

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particularized sense' constitute a violation of a constitutional right." (quoting Brosseau v. Haugen, 543 U.S. 194, 198-99 (2004))).

166. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986):

> Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Id.

167. Should courts insist on resolving law-based qualified immunity disputes as summary judgment they should structure the proceedings as they would if they were resolving a qualified immunity dispute pursuant to Rule 12(b)(6) or Rule 12(c) of the Federal Rules of Civil Procedure.

of this scenario, assume that the plaintiff admits that he was not ordered from the house and that he left voluntarily).[168]

The second broad category of qualified immunity arguments depend, in large part, upon the factual information the defendant alleges to have had at the time of the incident. As discussed in greater detail in Part II of this Article, fact-dependent qualified immunity arguments are particularly thorny when the plaintiff alleges a violation of a Fourth Amendment right.[169] The Court's holdings in both *Anderson* and *Saucier*, nevertheless, seem to suggest that a search or seizure may be unreasonable under the Fourth Amendment standard but reasonable under the qualified immunity standard.[170] So, for the academic purpose of this Article, we will assume the plaintiff has established the underlying Fourth Amendment violation and concentrate solely on the qualified immunity dispute.

Where, as here, the court's determination will depend upon the defendant's allegations, it would be inappropriate for the court to grant the defendant's motion to dismiss on the basis of a qualified immunity defense.[171] It is also unlikely that a judgment on the pleadings will be appro-

168. If the plaintiff voluntarily left the house, the primary issues in determining whether the seizure violated the Fourth Amendment is whether it was reasonable for Officer Brown to believe that Tim Smith was his fraternal twin brother Jim Smith.

169. The fact-dependent qualified immunity argument is often more complicated than the law-dependent argument for two reasons. First, the relevant factual allegations will be contained in the defendant's pleadings, not the plaintiff's complaint. This means that the court cannot simply accept the plaintiff's allegations as true and base its qualified immunity determination on those "facts." The second related difficulty is that the court is now faced with two factual scenarios, which may lead to a factual dispute (a problem averted in the law-based qualified immunity argument outlined in Scenario 1). Furthermore, because the defendant's entitlement to a qualified immunity claim may depend upon the veracity of his or her allegations as compared to plaintiff's allegations, resolution of the qualified immunity may require trial, or at a minimum, discovery. In short, when confronted with fact-dependent qualified immunity arguments, courts may not simply "link" the plaintiff's allegations to the legal rule to determine whether the defendant is entitled to qualified immunity, as it could in a law-based argument. Instead, the court may have to make factual determinations before it can reach the law application step.

170. *See* Saucier v. Katz, 533 U.S. 194, 203 (2001) (citing Anderson v. Creighton, 483 U.S. 632, 641 (1987)) ("In *Anderson*, a warrantless search case, we rejected the argument that there is no distinction between the reasonableness standard for warrantless searches and the qualified immunity inquiry.").

171. Trial courts should only grant a defendant's 12(b)(6) motion to dismiss when it is clear from the plaintiff's complaint (and attached documents) that the plaintiff has failed to state a claim upon which relief can be granted. For a discussion of when it is appropriate for a 12(b)(6) motion to be granted, see *supra* notes 109-24.

priate.[172] Summary judgment is the next available pre-trial disposition option.[173]

As discussed in Part C of Scenario 1, summary judgment differs from motions to dismiss and motions on the pleadings in both its purpose and structure. Summary judgment is structured around the evidentiary burdens the parties will bear at trial.[174] Although the use of summary judgment for the resolution of "law-based" qualified immunity claims is suspect, where, as here, the outcome is dependent upon the veracity of the defendant's allegations, summary judgment is a more preferable form of pre-trial resolution than both Rule 12(b)(6) or 12(c). The court will, however, need to assign evidentiary burdens. This leads to the third goal of this Article: determining what party courts should assign evidentiary burdens in fact-dependent qualified immunity disputes.

When confronted with a "fact-dependent" qualified immunity argument at the summary judgment stage (both before and after discovery has taken place), the circuits are divided regarding which party bears the evidentiary burden. For example, in *Michalik v. Hermann*,[175] the defendant's qualified immunity claim was based upon facts not contained in the plaintiff's pleadings (the plaintiff also disputed the defendant's factual allegations).[176] Nevertheless, the court agreed that the " usual summary

172. *See generally* 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1368, at 253-54 (4th ed. 2004) (outlining practice under Rule 12(c)). A material issue of fact that will prevent a motion under Rule 12(c) from being successful may be framed by an express conflict on a particular point between the parties' respective pleadings. *Id.* It also may result from the defendant pleading a new matter and affirmative defenses in his or her answer. *Id.* Judgment pursuant to Rule 12(c) of the Federal Rules of Civil Procedure is only an appropriate form of resolution when the parties agree upon the material facts. *Id.* Where, as here, the defendant seeks to introduce facts in addition to those contained in the plaintiff's complaint it will be unlikely (or at a minimum unwise) for the plaintiff to agree with the defendant's version of the facts. *Id.* To survive a motion for judgment on the pleadings when the defendant makes a "fact-dependent" qualified immunity claim, the plaintiff only needs to dispute the defendant's version of the facts—the plaintiff does not even need to offer evidence which contradicts the defendant's allegations. *Id.*

173. *See* Crawford-El v. Britton, 523 U.S. 574, 600 (1998) (claiming that summary judgment is "ultimate screen to weed out truly insubstantial lawsuits prior to trial"). This is likely to be a post-discovery motion for summary judgment. *Id.* at 598. The court noted that "[i]f the plaintiff's action survives [a motion to dismiss] . . . the plaintiff ordinarily will be entitled to some discovery." *Id.*

174. *See, e.g.*, Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (explaining importance of evidentiary burdens borne by parties at trial). In *Celotex*, the Court explained:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Id.

175. 422 F.3d 252 (5th Cir. 2005).

176. *See id.* at 254-57.

judgment burden of proof is altered in the case of a qualified immunity defense. An officer need only plead his good faith, which then shifts the burden to the plaintiff, who must rebut the defense by establishing that the officer's allegedly wrongful conduct violated clearly established law."[177] In contrast, the Tenth Circuit has described the evidentiary burdens of qualified immunity as follows:

> When a defendant raises a claim of qualified immunity, the burden shifts to the plaintiff to show that the defendant is not entitled to immunity. To overcome a qualified immunity defense, a plaintiff must first assert a violation of a constitutional or statutory right and then show that the right was clearly established . . . . Once the plaintiff satisfies this initial two-part burden, the burden shifts to the defendant to show that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law.[178]

If courts are to resolve fact-dependent qualified immunity disputes at the summary judgment stage, they must first determine which party will bear the burden of proof and production at trial.[179] As a general rule, the burden of proof "follows" the burden of pleading.[180] Accordingly, the

177. *Id.* at 262 (citation omitted).

178. Robbins v. Wilkie, 433 F.3d 755, 764 (10th Cir. 2006) (citations omitted).

179. *See* Christopher David Lee, Note, *Summary Judgment in New Mexico following* Bartlett v. Mirabel, 33 N.M. L. REV. 503, 510 (2003) (citing *Celotex*, 477 U.S. at 331 (Brennan, J., dissenting)) ("A threshold question in the summary judgment process regards whether the party seeking summary judgment will bear the burden of persuasion at trial.").

180. *See* MCCORMICK, EVIDENCE § 337 (2d ed. 1972) (discussing relationship between burden of proof and burden of pleading). Closely related to this rule is the premise that the burden of proof depends upon "whether a particular material element is part of plaintiff's prima facie case or a defense." Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 8 (1959). As Cleary explained:

> [T]he responsibility for dealing with every element is not placed on the plaintiff. Instead we settle for a 'prima facie case' or 'cause of action,' consisting of certain selected elements which are regarded as sufficient to entitle plaintiff to recover, if he proves them and unless defendant in turn establishes other elements that would offset them.

Id. at 7.

Herein lies at least part of the difficulty with the affirmative defense of qualified immunity. The Court has held that a § 1983 plaintiff's prima facie case consists of just two elements: (1) deprivation of a federally protected right (2) deprivation of that right must be by a person acting under color of state law. *See* Gomez v. Toledo, 446 U.S. 635, 640 (1980). Proof that a reasonable officer would have recognized the illegality of the conduct in question is not a part of a plaintiff's case-in-chief. *Id.* Therefore, under this method of determination, it seems inappropriate to require the plaintiff to prove that a reasonable officer would have realized that the arrest was unreasonable. *See* Chen, *supra* note 5, at 96-97 ("[A]ssignment of the burden of persuasion to the plaintiff would have serious legal ramifications. It is at least clear that assigning the burden to the plaintiff would mean that she must prove more than she would in order to prevail on the

party who bears the burden of pleading a particular issue traditionally bears the burden of proving that issue. This is a fairly straightforward method so long as there is precedent determining which party bears the burden of pleading. There are, however, exceptions to this general rule.[181]

Given Justice Rehnquist's concurring opinion in *Gomez* and the Supreme Court's discussions of qualified immunity, qualified immunity may be one such exception. In *Gomez*, the Supreme Court held that because qualified immunity is an affirmative defense, the defendant bears the burden of pleading.[182] When Justice Rehnquist joined the Court's opinion, however, he specifically noted that, as he read it, the majority opinion only addressed the burden of pleading and "[left] open the issue of the burden of persuasion."[183]

Although the Court has referenced *Gomez* since *Harlow*,[184] the language the Court uses in several qualified immunity cases suggests that the plaintiff, not the defendant, bears the evidentiary burdens.[185] For exam-

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merits."). Equally problematic, the Court has indicated that qualified immunity is more than a defense. *See* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (discussing potential uses of qualified immunity). Combined, these holdings suggest that qualified immunity is not easily classified as part of a plaintiff's case-in-chief or as an affirmative defense. *Id.* Accordingly, this method does not unequivocally resolve which party should bear the burden of proof on this issue.

181. *See* Mitchell Green, Note, *Qualified Immunity for Public Officials Under Section 1983 in the Fifth Circuit*, 60 TEX. L. REV. 127, 133 (1981) ("The burden of proof may diverge from the burden of pleading for such reasons as judicial convenience, general considerations of fairness, or public policy.").

182. *See Gomez*, 446 U.S. at 640 (1980).

183. *Id.* at 642.

184. *See, e.g.*, Bloom v. Town of New Windsor Police Dep't, No. 00-7430, 2000 WL 1654752, at *1 (2d Cir. Nov. 3, 2000) (referencing *Gomez* for proposition that plaintiff must prove right was violated by person acting under color of state or territorial law); Finley v. Giacobbe, 79 F.3d 1285, 1296 (2d Cir. 1996) (citing *Gomez* for requirement that plaintiff show right violated by government entity); Walentas v. Lipper, 862 F.2d 414, 418 (2d Cir. 1988) (explaining that plaintiff must allege that individual acting under state or territorial law violated right that is secured by Constitution or laws of United States). Some scholars argue that *Gomez*'s reasoning is no longer applicable because *Gomez* was decided before the Court revamped the qualified immunity test in *Harlow*. *See, e.g.*, 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE § 19.30 (3d ed. 1999). The authors offer the following observations and arguments regarding the "burden of proof" in § 1983 qualified immunity cases:

> *Gomez* relied on the rationale that qualified immunity was based on subjective factors which a plaintiff cannot reasonably be expected to know. This rationale is no longer applicable since *Harlow v. Fitzgerald*, which focused only on objective factors. However, *Harlow* reaffirmed, without discussion, the *Gomez* rule that the burden of pleading qualified immunity is on the defendant.

Id.

185. *See, e.g.*, Davis v. Scherer, 468 U.S. 183, 197 (1984) ("A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue.").

ple, in *Davis v. Scherer*,[186] the Court noted that "[a] plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue."[187] Although the Court explained in *Elder* that *Davis* does not require the plaintiff to identify relevant case law to "defeat" a defendant's qualified immunity claim, Supreme Court cases do not explicitly state which party bears the burden.[188] In fact, cases decided after *Elder* continue to suggest that the plaintiff bears the burden of proof in qualified immunity disputes.[189] Thus, the "proof follows pleading" rule seems to be an unreliable method for determining evidentiary burdens in fact-dependent qualified immunity disputes.[190]

When courts choose to deviate from the general rule that proof follows pleading, they often cite policy, probability and fairness considerations as justifications for their decision.[191] Nevertheless, even *when* one considers these three factors, it still seems more appropriate that the defendant bear the evidentiary burdens in qualified immunity disputes.

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186. 468 U.S. 183 (1984).

187. *Id.*

188. Elder v. Holloway, 510 U.S. 510, 515 (1994) (explaining that Ninth Circuit misconstrued *Davis*).

189. *See* NAHMOD, *supra* note 57, § 8.19 (discussing burden of proof).

190. *But see* Richard A. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556, 573 (1973) (analyzing "proof follows pleading" presumption). Legal scholars and courts have also employed the "affirmative form method" to decide which party should carry the evidentiary burden. *Id.* Under this method, "the party with the affirmative side of an issue [is] required to plead [and prove] it." *Id.* This method, however, has been criticized as "no more than a play on words." *See* Cleary, *supra* note 180, at 11 (criticizing affirmative form method). The qualified immunity doctrine tends to verify this criticism. *Id.* Depending upon the level of specificity at which a court identifies the qualified immunity issue, courts can properly frame the issue of qualified immunity in any of the following ways: (1) The defendant must prove entitlement to qualified immunity; (2) The plaintiff must prove that the law was clearly established; (3) The defendant must prove that a reasonable official could believe the defendant's actions were lawful. *Id.* Each of these statements is an accurate description of qualified immunity and each is in the affirmative form. *Id.* Accordingly, if one were to apply the "affirmative form method," assignment of the evidentiary burden would vary depending on how one frames the inquiry. In the end, this method provides little in the way of guidance as to which party should bear the burden of production and persuasion. Even Epstein, one of the leading proponents of the affirmative form method, admits that there are "some cases that create difficulties for this formal test." *See* Epstein, *supra*, at 576 (admitting potential difficulties in using affirmative form method).

191. *See* Cleary, *supra* note 180, at 11 (noting that court considers factors such as policy, fairness and probability when assigning burden); Green, *supra* note 181, at 133 (discussing shift of burden of proof and how courts can diverge from proof follows pleading rule); *see also* 2 MCCORMICK, EVIDENCE § 337, at 415 (John W. Strong ed., 5th ed. 1999) ("[T]here is no key principle governing the apportionment of the burdens of proof. Their allocation, either initially or ultimately, will depend upon the weight that is given to any one or more of several factors . . . .").

Neither policy nor probability seems to suggest that one party is better suited to shoulder the burden of proof. "Policy" refers to any special considerations indicating which party should bear the evidentiary burden.[192] With regard to qualified immunity, it is difficult to determine whether policy considerations would favor placing evidentiary burdens on the plaintiff or the defendant. The Court in *Harlow* stated:

> The recognition of a qualified immunity defense for high executives reflect[s] an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[193]

Because qualified immunity is intended to balance multiple interests, it seems a bit glib to suggest that policy considerations favor assigning one party evidentiary burdens as opposed to the other.[194]

Similarly, attempting to decide which party should bear the burden of proof by applying the "probability factor" is an exercise in futility. The probability factor is "a judicial, i.e., wholly non-statistical, estimate of the probabilities of the situation, with the burden being put on the party who will be benefited by a departure from the supposed norm."[195] Stated a bit more simply, when assigning evidentiary burdens on the basis of "probability," "judges will often assign the burden of proof to the party seeking to establish the least-likely scenario."[196] Accordingly, if one believes that government officials did not knowingly violate the law, then the burden should be on the plaintiff.[197] If, however, one believes that reasonably competent public officials will know the law and recognize when their behavior violates constitutionally permissible standards, then the burden of proof should be on the defendant.[198]

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192. *See* MCCORMICK, *supra* note 191, at 415 (allocating burdens of proof).

193. Harlow v. Fitzgerald, 457 U.S. 800, 800 (1982) (quoting Scheuer v. Rhodes, 416 U.S. 232 (1974)).

194. *But see* Carey, *supra* note 32, at 1570. Carey notes:

> [T]he policy rationale strongly supports placing the burden of proof on the plaintiff. The *Harlow* Court's concern that 'insubstantial lawsuits undermine the effectiveness of government as contemplated by our constitutional structure,' coupled with the Court's hope that the lower courts could resolve many of these claims on summary judgment, places a civil rights plaintiff in the position of advancing a 'disfavored contention.'

Id.

195. Cleary, *supra* note 180, at 12-13.

196. Marshall S. Sprung, Note, *Taking Sides: The Burden of Proof Switch in* Dolan v. City of Tigard, 71 N.Y.U. L. REV. 1301, 1308 (1996) (analyzing burden of proof switch in *Dolan*).

197. *See, e.g.*, Malley v. Briggs, 475 U.S. 335, 341 (1986) (presenting question of degree of immunity granted to defendant police officer).

198. *See* Carey, *supra* note 32, at 1569 ("[T]he probability rationale . . . would presume that public officials know their constitutional duties and are responsible for constitutional violations occurring as a result of their actions."). "Once a pub-

Thus, the only remaining factor to be considered is fairness, which tends to indicate that the defendant should bear the evidentiary burdens on this particular issue.[199] Fairness reflects the idea that the party with superior access to the evidence should be assigned the burden of proof.[200] Given the nature of the argument in Scenario 2, requiring the defendant to bear the evidentiary burden completely comports with fairness.[201] Fact-dependent qualified immunity claims hinge upon the defendant's understanding of the facts at the time of the alleged deprivation. Between plaintiffs and defendants, defendants are surely in a better position to offer evidence of the facts upon which they relied when assessing the legality of their conduct.[202] Thus, fairness (and in this respect,

lic official has shown that he was acting within the scope of his duties, the public official also should bear the onus of proving the exception to the rule." *Id.*

199. *See* Dale A. Nance, *Civility and the Burden of Proof*, 17 HARV. J.L. & PUB. POL'Y 647, 662 (1994) ("[T]he focus on disturbance of the status quo may help explain many burdens placed upon plaintiffs (and counter-claimants), but it leaves affirmative defenses wholly untouched."). Courts may also allocate burdens based upon which party is attempting to alter the status quo—with the burden being assigned to the party seeking change. *Id.* This consideration, however, is inapplicable here.

200. *See* Cleary, *supra* note 180, at 12.

201. *See* Gomez v. Toledo, 446 U.S. 635, 640-41 (1980) (holding that defendant, not plaintiff, has distinct ability to know facts which determine whether immunity has been established). *But see* Carey, *supra* note 32, at 1569 (examining how assigning burden to plaintiff comports with fairness). Carey asserts the following: "The fairness rationale supports placing the burden on the plaintiffs. Because *Harlow* generally has stripped away subjective considerations from the *Wood v. Strickland* test for qualified immunity, any special access a defendant official might have to subjective evidence concerning his state of mind ought to have less relevance." *Id.* This argument suffers from the same mistakes that are so common within this doctrine. First, this view does not distinguish between the two types of arguments that a defendant may advance when asserting qualified immunity—the law-based qualified immunity claim and the fact-based qualified immunity argument. But, this deficiency may be attributed to the Note's publication date—the Court did not decide *Anderson v. Creighton* until 1987, two years after the note was published. The position fails because it does not recognize that the specific issue it is addressing—whether the law was "clearly established"—does not depend on truth of the matter asserted and, accordingly, it is inappropriate to assign either party the burdens of production or persuasion. There are no facts to be determined.

202. *See Gomez*, 446 U.S. at 640-41 (comparing ability of plaintiff and defendant to offer evidence that they relied in assessing legality of their conduct). Explaining the Court's decision in *Gomez*, Justice Marshall writes:

> Our conclusion as to the allocation of the burden of pleading is supported by the nature of the qualified immunity defense. As our decisions make clear, whether such immunity has been established depends on facts peculiarly within the knowledge and control of the defendant. Thus we have stated that "[i]t is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." The applicable test focuses not only on whether the official has an objectively reasonable basis for that belief, but also on whether "[t]he official himself [is] acting sincerely and with a belief that he is doing right." There may

> be no way for a plaintiff to know in advance whether the official has such a belief or, indeed, whether he will even claim that he does. The existence of a subjective belief will frequently turn on factors which a plaintiff cannot reasonably be expected to know. For example, the official's belief may be based on state or local law, advice of counsel, administrative practice, or some other factor of which the official alone is aware. To impose the pleading burden on the plaintiff would ignore this elementary fact and be contrary to the established practice in analogous areas of the law.

Id. (internal citations omitted). The Court seems particularly concerned with the qualified immunity's subjective prong (which *Harlow* later eliminated). Yet, the Court's reasoning is equally applicable to fact-dependent qualified immunity claims. As the Court notes, "the official's belief may be based on state or local law, advice of counsel, administrative practice, or some other factor of which the official alone is aware." *Id.* Although *Harlow* eliminated the subjective prong of the good faith qualified immunity inquiry, *Anderson* makes clear that the inquiry is fact-specific. *See* Anderson v. Creighton, 483 U.S 635, 641 (1987). Accordingly, each of these examples would still be relevant under *Harlow*'s objective test and it continues to comport with ideas of fairness (and common sense) that the defendant should bear the burden of proof when the defense depends upon factual allegations to which the plaintiff is not privy (at least in the absence of discovery).

Harlow's extraordinary circumstances prong also tends to support the conclusion that the defendant should bear the burden of production and persuasion in fact-dependent qualified immunity disputes. *See* Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982). In *Harlow*, the Justices held that government officials are not liable for monetary damages when they are able to prove that, although the law was "clearly established," as a result of extraordinary circumstances, they neither knew nor should have known that their actions would deprive the plaintiff of a protected right. *Id.* at 818-19. Most judges and legal scholars who have considered the issue agree that the defendant should bear the burden of establishing extraordinary circumstances. *See, e.g.*, NAHMOD, *supra* note 57, § 8.19 ("There is one situation in which it is surely appropriate to speak about an evidentiary burden of proof to be imposed on the defendant: where there is clearly settled law and the defendant claims extraordinary circumstances justifying his or her failure to know and comply with it.").

The uniformity of opinion regarding evidentiary burdens when the defendant's qualified immunity claim is based upon extraordinary circumstances may be the result of *Harlow*'s language, policy considerations or some combination of the two. In *Harlow*, the Court explicitly states, "if [in] the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained." 457 U.S. at 819. The decision to assign the defendant the evidentiary burden in this circumstance may also be attributable to the nature of the evidence. *Id.* As discussed in the preceding pages, considerations of fairness (and probability and policy to the degree that they implicate fairness) suggest that the defendant should bear the evidentiary burden when raising a "fact-dependent" qualified immunity argument. Between the plaintiff and the defendant, the defendant is in a better position to know and prove "extraordinary circumstances." It is also in the defendant's best interests to do so.

Furthermore, requiring the defendant to bear the burden of proof when seeking qualified immunity on the basis of a mistake of fact is consistent with the language of *Anderson*. *See* 483 U.S. at 641 ("The principles of qualified immunity that we reaffirm today require that Anderson be permitted to argue that he is entitled to summary judgment . . . .").

policy)[203] indicates that defendants should bear the burden of proof on this particular claim.[204]

With that said, many scholars argue that the burden of proof is seldom important in civil cases.[205] The argument has been explained as follows:

> [T]he outcome of the litigation often depends less on the allocation of the burden of proof than on whether it is plaintiff or defendant who presents a stronger case on key issues. Regardless of whether plaintiff or defendant has the burden of proof on contributory negligence, for example, plaintiff will present evidence and attempt to convince the fact finder that she was not negligent, and defendant will present his proof in an attempt to convince the fact finder that plaintiff was negligent.[206]

This argument is logical. Take, for example, the case of *Smith v. Brown* as described in the second scenario. The plaintiff alleges in his complaint that it was unreasonable for Officer Brown to mistake him for his brother, who was wanted in Florida, because the two men have very different appearances. Officer Brown, however, claims that he is entitled

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203. There is often a great deal of overlap among policy, probability and fairness. *See* Cleary, *supra* note 180, at 11 ("Much overlap is apparent, as sound policy implies not too great a departure from fairness, and probability may constitute an aspect of both policy and fairness.").

204. *See* Chen, *supra* note 5, at 96-97 (addressing burdens of qualified immunity). Chen offers an additional compelling reason why courts should hesitate to assign plaintiffs the burdens of production and persuasion on issues of qualified immunity:

> Assignment of the burden of persuasion to the plaintiff would have serious legal ramifications. It is at least clear that assigning the burden to the plaintiff would mean that she must prove more than she would in order to prevail on the merits . . . . This covert transformation of substantive constitutional law would both be unfair and create substantial inequalities in constitutional law enforcement. Moreover, the alteration of substantive law in this manner would occur subversively because it would be achieved at a sub-doctrinal level. The subtle change occasioned by allocating the burden of persuasion to the plaintiff would not consciously be acknowledged in the substantive constitutional law. Furthermore, putting the persuasion burden on the plaintiff would make overcoming the immunity defense an element of plaintiff's case-in-chief, which arguably conflicts with the Court's holding in *Gomez v. Toledo* that qualified immunity is an affirmative defense.

Id.

205. *See, e.g.*, JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 493-95 (2d ed. 1987) ("[F]or the most part the burden of proof does not make much difference in the outcome of the case."); Edmund M. Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 911 (1931) ("The location of the burden of persuasion is important at only one stage of the trial, and then only in a situation which seldom occurs—namely, when at the close of evidence the mind of the trier of fact is in equilibrium upon the issue.").

206. Lee, *supra* note 91, at 11 (addressing overstated importance of burden of proof on actual outcome of given case).

to qualified immunity because, given the information in his possession at the time of plaintiff's arrest, it was reasonable for him to believe that the plaintiff was his brother.[207] Although it is clearly the defendant's burden to plead qualified immunity, at summary judgment and/or trial, the plaintiff will introduce evidence that it was unreasonable for Officer Brown to believe that he was wanted for arrest.[208] Meanwhile, the defendant will produce evidence to prove that a reasonable officer in his position would believe that the plaintiff was actually his brother.[209] In short, regardless of which party bears the burden of proof, both parties will introduce evidence to support their position. From this, many legal scholars have concluded that evidentiary burdens are only outcome determinative when neither party is able to produce evidence on a particular material issue or in "close cases."[210] This argument, however, focuses almost entirely on the burden of production.[211]

The burden of persuasion is equally, if not more important, than the burden of production, particularly in cases where the outcome requires resolution of a mixed question of law and fact. In most civil cases, the party bearing the burden of persuasion must prove its claim or defense by a preponderance of the evidence.[212] The preponderance of the evidence

207. *See* Saucier v. Katz, 533 U.S. 194, 203 (2001) (citing *Anderson*, 483 U.S at 643) (noting distinction between "the reasonableness standard for warrantless searches and the qualified immunity inquiry"). To establish a Fourth Amendment violation, a plaintiff must prove that the defendant's actions were objectively unreasonable. Arguably, the defendant's allegations, if true, would also prove that there was not a Fourth Amendment violation. Supreme Court precedent, however, indicates that a defendant may be entitled to qualified immunity even when the court finds that the defendant violated the Fourth Amendment.

208. *See* Gomez v. Toledo, 446 U.S. 635, 640 (1980) (asserting that reasonable officer would have recognized illegality of conduct in question and determined that it was not part of plaintiff's case-in-chief).

209. *See* BLACK'S LAW DICTIONARY 39 (Abridged 6th ed. 1991) (defining affirmative defense as "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true"). As is true with most affirmative defenses, the defendant does not necessarily dispute the plaintiff's factual allegations. Instead, the defendant wishes to introduce additional facts that prove that, under the circumstances, a reasonable official would believe the arrest was lawful.

210. *See, e.g.*, Morgan, *supra* note 205, at 911 (presenting situations where evidentiary burdens can become outcome determinative).

211. *See id.* (same).

212. *See generally* Ronald J. Allen & Robert A. Hillman, *Evidentiary Problems in—and Solutions for—the Uniform Commercial Code*, 1984 DUKE L.J. 92, 95 (1984) ("In civil litigation, [the standard of proof] is normally a preponderance of the evidence, but occasionally courts impose higher or lower standards."). Under a preponderance of the evidence standard, the party bearing the burden of proof must:

> prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with the evidence opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true.

standard applicable in most civil cases reflects traditional set point theory. Under this theory, " every variable x either has the property P or the property not P. . . [e]verything is either a member of the set of red things or it is not. Everything is either a member of the set of things divisible by two, or it is not."[213] Like set point theory, the preponderance of the evidence standard gives jurists two choices, "something is more likely so than not so."[214]

Determinations of historical facts will typically fit into the binary structure upon which set point theory and the preponderance of the evidence standard are based. For example, in *Smith v. Brown* the parties may dispute whether Officer Brown ordered the plaintiff to come out of the house or not. It is a yes or no question. Given their binary nature, disputes over historical facts are well suited for the preponderance of the evidence standard. Unfortunately, qualified immunity is not a question of just fact but a mixed question of law and fact (or an example of law application).

When determining the availability of qualified immunity by a preponderance of the evidence standard (or, more generally, set point theory), jurists must determine whether it is more likely than not that a reasonable official would (or could) know that the alleged conduct was illegal. This assumes that officials may be classified as reasonable or unreasonable.

Some conduct is clearly reasonable, while other conduct is clearly unreasonable.[215] Most conduct, however, falls somewhere in the middle of these two extremes. Accordingly, one might view reasonableness as a spec-

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KEVIN F. O'MALLEY ET AL., 3 FEDERAL JURY PRACTICE & INSTRUCTION § 104.01 (5th ed. 2000).

213. Charles M. Yablon, *On the Allocation of Burdens of Proof in Corporate Law: An Essay on Fairness and Fuzzy Sets*, 13 CARDOZO L. REV. 497, 510 (1991) (discussing applicable burdens of proof in corporate law).

214. *See* O'MALLEY ET AL., *supra* note 212, § 104.01 (identifying choices available to jurors under preponderance of evidence standard).

215. *See* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 590-91 (1998) (suggesting that entitlement to qualified immunity will depend upon nature of underlying constitutional violation). Armacost explains:

> Officials who make reasonable legal judgments that are later adjudicated unconstitutional may not be sufficiently blameworthy to warrant the imposition of constitutional damages liability. In such cases it is easy to see why a defense of qualified immunity—excusing a failure to know the law—would be available. The above-described rationale for qualified immunity only holds, however, when nothing else inherent in the defendant's conduct or circumstances makes her behavior wrongful apart from knowledge of illegality. This explains why qualified immunity often drops out of the analysis when the underlying claim requires a showing of bad intent, such as intentional racial discrimination or deliberate indifference to a prisoner's serious medical needs. The argument that qualified immunity is unnecessary in such cases, however, is not based solely on the intentionality of the official's conduct. It also rests on the notion that conduct such as invidious racial discrimination contains indicia of its own wrongfulness: Today, discrimination against someone because she is African-American or Hispanic is viewed as inherently and obviously "bad" be-

trum with obviously reasonable behavior on one end and obviously unreasonable behavior on the other. Like the colors in a color spectrum, unreasonable and reasonable may blend together. Set point theory and the preponderance of the evidence standard, however, recognize only two categories—red and not red, reasonable or unreasonable. Because there are only two choices, but a range of reasonable/unreasonable behavior, many reasonableness determinations are difficult to classify.[216] Stated differently, there is no bright line separating a reasonable official from an unreasonable official. As a result, even if it is true that evidentiary burdens are only outcome determinative in close cases, issues of law application, like reasonableness, are more likely to give rise to close cases than are determinations of historical fact. Accordingly, the burden of persuasion plays an active role in cases requiring law application. Even if one disputes this conclusion, it is impossible to ignore the integral role that evidentiary burdens play in summary judgment proceedings.

D. *Summary Judgment and the Fact-Dependent Qualified Immunity Claim*

If I am correct, and the defendant does bear the burden of production and persuasion when raising a "fact-dependent" qualified immunity claim, courts are still faced with an additional problem when resolving qualified immunity disputes at the summary judgment stage: The Supreme Court has never explicitly stated how trial courts should structure summary judgment proceedings when the moving party bears the burden of proof on the dispositive issue. *Celotex*, the seminal case discussing the parties' burdens in summary judgment proceedings states:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and *on which that party will bear the burden of proof at trial.*[217]

As Justice Brennan points out in his dissenting opinion, the structure of summary judgment will differ if the party moving for summary judgment would bear the burden of proof on the dispositive element at trial.[218] Justice Brennan explains:

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havior, obviating the need for qualified immunity in a case alleging such discrimination.

Id.

216. Continuing the color analogy, it is like asking someone to decide if a shade of purple is red or blue.

217. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (emphasis added) (analyzing effect of Rule 56(c)'s language).

218. *See id.* at 330 (Brennan, J., dissenting) (explaining how burden assignment can be outcome determinative at trial). Justice Brennan's conclusion is logical. Simply imagine summary judgment proceedings if the non-moving party were required to demonstrate that there is "a genuine issue for trial," regardless of the

> If the moving party will bear the burden of persuasion at trial, that party must support its motion with credible evidence . . . that would entitle it to a directed verdict if not controverted at trial. Such an affirmative showing shifts the burden of production to the party opposing the motion and requires that party either to produce evidentiary materials that demonstrate the existence of a "genuine issue" for trial or to submit an affidavit requesting additional time for discovery.[219]

Both legal scholarship and appellate opinions seem to agree with Justice Brennan's assessment.[220] Accordingly, in *Smith v. Brown* the defendant would be required to produce evidence (e.g., an affidavit from Officer Brown) that, if proven, would demonstrate that a reasonable official in his position would (or could) believe the conduct was lawful. This would shift the burden to the plaintiff to produce evidence that there is a genuine dispute of fact. If the defendant filed the motion before discovery, then the plaintiff may request additional time in order to conduct discovery.[221] Conversely, in cases in which discovery has already taken place, the plaintiff must then produce evidence that shows there is a genuine dispute of material fact.[222]

The Court has defined a "genuine dispute of material fact" as a dispute dealing with "facts that might affect the outcome of the suit under the governing law . . . [where] the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[223] This standard raises a unique issue in fact-dependent summary judgment disputes. Traditionally, courts have considered reasonableness as a question for the jury. Qualified immunity's "reasonable official" standard seems reminiscent of the "reasonable man" standard employed in negligence law. Therefore, it

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evidentiary burdens the parties would bear at trial. If this were true, the parties' roles and evidentiary burdens at summary judgment would depend entirely upon which party filed the motion. The moving party could temporarily shift the evidentiary burdens that he or she would bear at trial to the non-moving party during the summary judgment proceeding by simply being the first to file the motion. Accordingly, it would be in every plaintiff's best interest to move for summary judgment before the defendant did so. This would mean that the parties' burdens at the summary judgment stage would reflect their burdens at trial.

219. *Id.* at 331 (addressing effect of assigning burden of persuasion to moving party).

220. *See* Torres Vargas v. Santiago Cummings, 149 F.3d 29, 35 (1st Cir. 1998) ("The party who has the burden of proof on a dispositive issue cannot attain summary judgment unless the evidence that he provides on that issue is conclusive."); Calderone v. United States, 799 F.2d 254, 259 (6th Cir. 1986) (explaining that if moving party has burden of proof in summary judgment proceeding, "his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party") (citation and emphasis omitted).

221. *See Celotex*, 477 U.S. at 330 (Brennan, J., dissenting) (detailing situation where additional discovery is permitted for plaintiff).

222. *See id.* (Brennan, J., dissenting) (same).

223. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

would seem that facts suggesting that a defendant acted reasonably or unreasonably would be considered material and could preclude summary judgment.[224] Nevertheless, the court has specifically held that qualified immunity is a question for the court. As a result, genuine disputes of material facts should only arise in qualified immunity proceedings when the parties offer contradictory evidence of a *specific* historical fact.

Returning to our fact pattern in *Smith v. Brown*, if the defendant moves for summary judgment after the completion of discovery and offers evidence that the plaintiff's picture was attached to the suspect's file, and, in response, the plaintiff offers evidence that he and his brother do not resemble each other, the court should still decide whether or not the defendant is entitled to qualified immunity at the summary judgment stage because there is no dispute of genuine fact. Instead, what the parties are disputing is whether a reasonable official would know the defendant's conduct was illegal. Because the Court has indicated that this is a question for the court, the trial judge should be able to determine the availability of qualified immunity and dispose of the case at the summary judgment stage if this is the only issue at bar.[225] While this may be considered a question for the jury (a.k.a. a question of fact) in some cases, for example tort cases, it is considered a question for the court in qualified immunity disputes.

If, however, the plaintiff produces evidence that directly contradicts this historical point (for example, an affidavit from the person in charge of the files), the court should deny summary judgment so that the jury may make a factual determination regarding whether the plaintiff's picture was attached to the file upon which the defendant relied. Accordingly, the parties will have to proceed to trial to resolve the case.[226]

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224. The jury would have to consider both sets of facts and decide whether the defendant's behavior was reasonable or unreasonable.

225. This is not to suggest that a court would necessarily *grant* the defendant summary judgment on the basis of qualified immunity, it simply means that the court can decide the qualified immunity issue at this stage. If the court denies the defendant's motion, a trial would be necessary to decide the underlying constitutional issue.

226. *See* NAHMOD, *supra* note 57, § 8.08 (noting that some trial courts use special interrogatories to resolve fact-dependent qualified immunity disputes that make it to trial). Appellate courts are divided with respect to the roles of the judge and the jury in qualified immunity disputes that reach trial. Professor Nahmod describes the division as follows:

> If there remain issues of fact in dispute relating to qualified immunity, there are two options. In at least one circuit, the trial court still decides whether the defendant violated clearly settled law. In other circuits, the trial court denies the motion for directed verdict and instructs the jury on qualified immunity in the alternative as follows: if the jury finds the facts one way, then it must find that the defendant violated clearly settled law; and if it finds the facts another way, then it must find that the defendant did not violate clearly settled law.

Id.; *see also* Stone v. Peacock, 968 F.2d 1163, 1166 (11th Cir. 1992) ("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.").

V. CONCLUSION

Qualified immunity, evidentiary burdens and federal civil procedures are complicated in and of themselves. When all three are combined, it is understandable how mistakes and confusion might arise. All the same, the Supreme Court has unnecessarily and erroneously complicated § 1983 litigation by characterizing qualified immunity as a question of law and suggesting, one might even say directing, lower courts to resolve qualified immunity at the summary judgment stage. Qualified immunity does not present a question of law, but rather an issue of law application. Furthermore, while courts may resolve some qualified immunity disputes without making a factual determination, others are "fact-dependent" mixed-questions of law and fact. On occasion, the Supreme Court has recognized this distinction.[227] Nevertheless, the Court's instructions regarding summary judgment as a procedural tool with which to resolve qualified immunity disputes is, in many cases, misguided.

While some legal scholars and judges may view pre-trial disposition motions as largely identical and evidentiary burdens as a technicality having little effect on the outcome, both of these views are mistaken.[228] As discussed previously, courts employ different standards of review when deciding a motion to dismiss or a motion on the judgment as compared to a motion for summary judgment. Accordingly, how the court categorizes the disposition will affect the plaintiff's ability to "survive" the motion. Furthermore, motions granted pursuant to Rule 12(c) and Rule 56 are viewed as a decision on the merits and are final. In contrast, courts do not "reach the merits" when ruling on motions to dismiss. As a result, the plaintiff may be able to file a new complaint based upon the same allegations when the claim is dismissed pursuant to Rule 12(b)(6).

One irony of the court's misdirection regarding summary judgment as a tool to resolve qualified immunity disputes is that, on several occasions, the Court has noted that a "'firm application of the Federal Rules of Civil Procedure' is fully warranted."[229] Nevertheless, several Supreme Court cases addressing pre-trial disposition of qualified immunity disputes

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227. *See generally* Johnson v. Jones, 515 U.S. 304, 305 (1995) (discussing availability of interlocutory appeal when qualified immunity dispute involves question of law as opposed to question of fact).

228. *See, e.g.*, CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 5C FEDERAL PRACTICE AND PROCEDURE § 1369 (4th ed. 2004). Wright and Miller explain:

> [T]here is probably little need for retaining the judgment on the pleading as a separate procedure for testing the sufficiency of the pleadings. Its essential function, that of permitting the summary disposition of cases that do not involve any substantive dispute that justifies a full trial can be handled more effectively under the summary judgment procedure or, on occasion, the Rule 12(b)(6) motion.

Id.

229. Crawford-El v. Britton, 523 U.S. 574, 597 (1998) (citing Harlow v. Fitzgerald, 457 U.S 800, 819-20 (1982)) (indicating that firm application of Federal Rules of Civil Procedure can be warranted).

contradict the structure and purpose of the pre-trial disposition procedures outlined in the Federal Rules of Civil Procedure.

As discussed in Part IV of this Article, summary judgment is often a poor tool with which to resolve law-based qualified immunity disputes. Summary judgment is intended to determine if there is sufficient evidence to warrant trial proceedings. Often, however, qualified immunity disputes will not require a factual determination. In those cases, Rules 12(b)(6) and Rule 12(c) of the Federal Rules of Civil Procedure are much better suited to resolve qualified immunity claims than is summary judgment. Furthermore, when qualified immunity does turn on a factual issue, it will often be inappropriate for courts to render judgment at the summary judgment stage; instead, courts will have to proceed to trial and allow a jury to render a factual determination.[230]

In order to fairly and accurately resolve qualified immunity disputes, courts must take care in selecting and employing the procedural tools available to them. As of the date of this Article, courts have done a poor job following the Federal Rules of Civil Procedure in § 1983 qualified immunity disputes. If courts are to resolve qualified immunity claims in accordance with the Federal Rules of Civil Procedure, they must first understand the nature of the claim facing them and then select the procedural tool best suited to resolve that claim. In short, they must look beyond summary judgment.

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230. *See* Gardenhire v. Schubert, 205 F.3d 303, 311 (6th Cir. 2000) (citing Poe v. Haydon, 853 F.2d 418, 425-26 (6th Cir. 1988)) ("[S]ummary judgment would not be appropriate if there is a factual dispute (*i.e.*, a genuine issue of material fact) involving an issue on which the question of immunity turns."); Sharrar v. Felsing, 128 F.3d 810, 828 (3d Cir. 1997) (asserting that issue only exists for jury where historical facts material to issues are in dispute).