University of Miami Law Review

Volume 65
Number 4 *Volume 65 Number 4 (Summer 2011) Eleventh Circuit Issue*

Article 7

7-1-2011

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Tal J. Lifshitz, *"Arguable Probable Cause": An Unwarranted Approach To Qualified Immunity*, 65 U. Miami L. Rev. 1159 (2011)
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NOTES

"Arguable Probable Cause": An Unwarranted Approach to Qualified Immunity

TAL J. LIFSHITZ*

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I. INTRODUCTION

Late one mid-July night in 1983, a New Hampshire State Trooper spotted a 1975 Chevrolet station wagon cruising through the rural town of Moultonboro with a broken left headlight. Behind the wheel of the Chevy sat a man named Barry Floyd.

The events that followed what initially seemed like an innocuous traffic stop ultimately resulted in the First Circuit Court of Appeals finding trooper Richard Farrell immune from civil liability arising out of his arrest of Barry Floyd.[1] But it is not the result or the facts of *Floyd v. Farrell*[2] that make it significant nearly thirty years later. Rather, it is the

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1. Floyd v. Farrell, 765 F.2d 1, 6 (1st Cir. 1985).

2. *Id.* at 1.

First Circuit's misinterpretation of an already difficult-to-administer analysis that has pushed this decision to the forefront of qualified immunity jurisprudence for over half of the federal circuits.[3]

This Article argues that the "arguable probable cause" standard created by *Floyd* is an unnecessary and confusing evolution of the qualified immunity inquiry. Essentially, the standard posits that even if an officer effects a search or arrest without probable cause, the officer is nevertheless immune if he can show either that it was objectively reasonable for him to believe he had probable cause, or, that officers of reasonable competence could disagree whether probable cause existed.[4]

"Arguable probable cause" imposes a "reasonableness" analysis onto defendant law enforcement officers' conduct despite well-established evaluations of reasonableness inherent in probable cause determinations.[5] The standard thus allows defendant officers who have unquestionably acted in violation of the Fourth Amendment, i.e., unreasonably, to nevertheless avoid liability because their conduct is found to be "objectively reasonable" for purposes of qualified immunity. These officers are granted immunity because they acted "reasonably unreasonable." While the Supreme Court has endorsed this linguistic awkwardness in certain situations,[6] "arguable probable cause" was not what the Court had in mind. In effect, the standard has erected a hurdle in the way of § 1983 plaintiffs because it has awarded immunity to officers who are found to have violated clearly established constitutional rights.[7] These grants of immunity are contrary to Supreme Court precedent because no violation of clearly established rights can be objectively reasonable.

The following pages will examine the history and evolution of "arguable probable cause" and how the standard has shaped the qualified immunity jurisprudence of over half of the federal circuit courts of appeals. Part II discusses the genesis of the standard. Part III traces the origins of § 1983 and continues through the Supreme Court's consequent development of qualified immunity. Part IV describes the growth of "arguable probable cause" among the circuits and the further adoption of such standards as "arguable reasonable suspicion," which the Eleventh Circuit claims nearly to itself. Part V describes the results that

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3. *See* discussion *infra* Part IV.B.

4. *See* Grider v. City of Auburn, 618 F.3d 1240, 1257 & n.25 (11th Cir. 2010); Oliveira v. Mayer, 23 F.3d 642, 649 (2d Cir. 1994).

5. *See* discussion *infra* Part VI.

6. *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 640–44 (1987) (holding that an officer can act in an objectively reasonable manner even though in violation of the Fourth Amendment).

7. *See, e.g.*, Gold v. City of Miami, 121 F.3d 1442, 1446 (11th Cir. 1997) ("It is clear . . . that the officers did not have actual probable cause to arrest [the plaintiff] . . . . That said, the officers nonetheless are entitled to qualified immunity.").

accompany use of the "arguable probable cause" standard. And Part VI concludes by explaining why the recommitment to an objective standard of reasonableness eliminates the complexity of "arguable probable cause," providing a functional approach to qualified immunity consistent with Supreme Court directives.

II. ORIGIN OF "ARGUABLE PROBABLE CAUSE"

When he was pulled over, Barry Floyd—a convicted felon—was driving a stolen car with an expired driver's license and a broken left headlight.[8] There was also an arrest warrant out for his father, whom Floyd had just dropped off at the bus station, in connection with the theft of the car.[9] Given these facts, the First Circuit concluded that the officer had good reason to believe that Floyd knew he was driving a stolen car and that he could consequently arrest Floyd.[10] This was not, however, because probable cause existed—although it may have. The court did not undertake to determine whether the officer in fact had probable cause. Rather, it asked whether the officer's belief that he had probable cause—regardless of whether he in fact did—was reasonable. If the existence of probable cause was a close call or a difficult call, the officer would be immune from suit.

This "arguable probable cause" test has its roots in a retaliatory discharge suit filed by an Air Force management analyst who was fired by the Nixon administration after critical testimony before a congressional committee.[11] In *Harlow v. Fitzgerald*, the Supreme Court held that an executive official could only be liable for damages if he violated "clearly established" rights of the plaintiff: "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."[12]

Applying this standard to routine encounters between police and citizens, the First Circuit held that a police officer was liable for an arrest effected under a warrant only "where the officer should have known that the facts recited in the affidavit did not constitute probable cause."[13] In *Briggs v. Malley*, the court rejected the contention that the judicially approved warrant was an absolute bar to liability, holding that

8. Floyd v. Farrell, 765 F.2d 1, 5–6 (1st Cir. 1985).

9. *Id.* at 5–6.

10. *Id.*

11. *See* Nixon v. Fitzgerald, 457 U.S. 731, 733–34 (1982); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 802–03 (1982).

12. *Harlow*, 457 U.S. at 818.

13. Briggs v. Malley, 748 F.2d 715, 721 (1st Cir. 1984).

the officer might still be liable if the officer should have known that the underlying affidavit was in some way defective.[14] *Floyd* extended this reasoning to warrantless arrests and applied it at a higher level of generality. The court broke from *Briggs* by treating the existence of probable cause as itself a technical legal issue, positing that officers had no ability to know whether probable cause obtains in any given situation unless a court has previously expressly said so:

> Despite a finding of no probable cause at a later hearing, a police officer should not be found liable under § 1983 for a warrantless arrest because the presence of probable cause was merely questionable at the time of the arrest. His qualified immunity is pierced only if there clearly was no probable cause at the time the arrest was made.[15]

By assuming that police officers were incapable of assessing probable cause without judicial assistance, *Floyd* misinterpreted the rationale of *Briggs* while pretending to follow that case. In fact, *Briggs* was predicated on the notion that police officers could never be absolved of the responsibility for knowing when probable cause exists:

> We recognize . . . that police officers cannot be held to the standards of lawyers or judges. It cannot be considered negligence, therefore, for a police officer to seek an arrest or search warrant in a merely questionable situation. In such a case, the determination by the magistrate that a warrant should issue will insulate the officer from a negligence claim. There is a clear difference, however, between a situation in which there might be probable cause and a situation in which there is *no* probable cause.[16]

Floyd disregarded the distinction between an officer who relies on a judicial warrant in a doubtful case and an officer who takes the risk of acting on his own. Rather than holding that officer responsible if he failed to exercise good judgment, *Floyd* absolves him unless the plaintiff can prove that "there clearly was no probable cause at the time the arrest was made"—even in a situation "in which there is *no* probable cause."

One year after *Floyd*, the Supreme Court cemented the First Circuit's *Briggs* rationale by affirming the decision,[17] promoting an objective standard of reasonableness[18] for testing police behavior. Noting that

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14. *Id.*

15. Floyd v. Farrell, 765 F.2d 1, 5 (1st Cir. 1985) (internal citations omitted).

16. *Briggs*, 748 F.2d at 719–20 (emphasis in original).

17. Malley v. Briggs, 475 U.S. 335, 344–45 (1986); *accord Harlow*, 457 U.S. at 800.

18. The concept of "objective reasonableness" is firmly embedded in the Supreme Court's Fourth Amendment jurisprudence, particularly in the context of what the Court has labeled the "good-faith exception" to the exclusionary rule. *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.3(e), at 71–72 (4th ed. 2004) (analyzing the impact of United States v. Leon, 468 U.S. 897 (1984), and the Supreme Court's adoption of a purely objective test in the context of law enforcement officers' reliance on magistrates' probable cause

objective reasonableness was the measure for police conduct in a suppression hearing, the Court reasoned that it would be "incongruous" to exempt the same police conduct from scrutiny in a § 1983 damages action:[19] Unlike the exclusionary rule, which excludes unlawfully obtained evidence even if probative of guilt, "[A] damages remedy for an arrest following an objectively unreasonable request for a warrant imposes a cost directly on the officer responsible for the unreasonable request, without the side effect of hampering criminal prosecution."[20] But the inherent circumstances of a § 1983 action provide even further justification for *not* exempting such unreasonable police behavior from civil liability. In such actions, "[T]he likelihood is obviously greater than at the suppression hearing that the remedy is benefiting the victim of police misconduct one would think most deserving of a remedy—the person who in fact has done no wrong, and has been arrested for no reason, or a bad reason."[21]

At bottom, *Briggs* could not be promoting consistent law enforcement accountability while simultaneously adopting a reduced threshold for law enforcement officers seeking immunity—as *Floyd* and its "arguable probable cause" progeny would suggest. And though the *Floyd* court may not have intended to reduce § 1983 to its presently hollow form, its words have echoed among the circuits: "arguable probable cause" is here.

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determinations: "Citing to [Harlow v. Fitzgerald, 457 U.S. 800 (1982)], where the same result was reached as to the qualified immunity of public officials in suits seeking damages for alleged deprivations of constitutional rights, the Court declared that 'our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization'.") (citations omitted).

19. As one district court noted, "[Q]ualified immunity in the civil case context is the mirror image of the good faith exception [to the exclusionary rule] in the criminal context which will preclude suppression of evidence even if there was insufficient probable cause." Chism v. Washington, 683 F. Supp. 2d 1145, 1152 (E.D. Wash. 2010) (citing *Leon*, 468 U.S. at 897). Coincidentally, the good-faith exception arguably also was borne from circumstances similar to those of "arguable probable cause," i.e., a court misapplying the law to straight-forward facts resulting in heightened impunity for law enforcement officers. *Leon*, 468 U.S. at 962–63 (Stevens, J., concurring) ("It is, of course, disturbing that the Court chooses one case in which there was no violation of the Fourth Amendment, and another in which there is grave doubt on the question, in order to promulgate a "good faith" exception to the Fourth Amendment's exclusionary rule. . . . The Court seems determined to decide these cases on the broadest possible grounds; such determination is utterly at odds with the Court's traditional practice as well as any principled notion of judicial restraint. Decisions made in this manner are unlikely to withstand the test of time.").

20. *Malley*, 475 U.S. at 344.

21. *Id.* (citing Owen v. City of Independence, 445 U.S. 622, 653 (1980)).

III. The Citizens' Remedy

A. *§ 1983*

Section 1983 is used now more than ever as a way for citizens to seek redress for constitutional violations. And with deep historic roots, it was not always kept in check by qualified immunity and "arguable probable cause."

Following the Civil War and the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments, Congress enacted a series of statutes engineered to afford citizens a vehicle to sue for enforcement of federal rights, with particular attention being paid to the role of the Ku Klux Klan in endemic violence against blacks throughout the South.[22] In response to a 600-page Senate report detailing the unwillingness of Southern states to control the activities of the Klan,[23] Congress enacted the Civil Rights Act of 1871, Section 1 of which is now embodied in Section 1983 of Title 42 of the United States Code.[24] This section creates an action for damages against individuals who deprive a plaintiff of rights, privileges, or immunities "secured by the Constitution and laws."[25] It provides, in pertinent part,

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[26]

Since its inception, § 1983 has experienced a dramatic increase in legal impact.[27] Studies have shown that, for the first sixty-five years of its existence, only approximately twenty reported cases construed or

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22. *See generally* RICHARD D. FREER & MARTIN H. REDISH, FEDERAL COURTS 303 (3d ed. 2004); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.2 (5th ed. 2007) (providing a historical background of § 1983 and focusing particularly on its legislative history).

23. S. REP. NO. 1-42., 1st Sess. (1871).

24. 42 U.S.C. § 1983 (2006).

25. *Id.*; *see also* 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 2:1 (4th ed. 2008).

26. 42 U.S.C. § 1983.

27. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1081–83 (5th ed. 2003) (providing further discussion of the growth in § 1983 litigation); CHEMERINSKY, *supra* note 22, at § 8.2 (discussing the sparing use of § 1983 before 1961 and the subsequent growth in § 1983 litigation); *see also* 1 NAHMOD, *supra* note 25, at § 2:2 (listing numerous reasons for the dormancy of § 1983 from the time of its enactment to the year 1961, largely because of the broad scope given § 1983 by the Supreme Court in Monroe v. Pape, 365 U.S. 167 (1961)); *see generally* 1 NAHMOD, *supra* note 25, at §§ 1:5–1:9 (providing a brief overview of the policy considerations of § 1983 litigation, including judicial concerns with federalism, overdeterrence, and overburdened courts).

applied the statute.[28] Justice Oliver Wendell Holmes at one point remarked, mid-opinion, that he assumed Congress had not repealed the statute.[29] To be sure, many factors influenced the statute's insignificant presence. Namely, the end of Reconstruction brought an end to Northern attempts to protect the rights of Blacks in the South, and Southern federal judges were just as reluctant as state judges to stop racism and discrimination.[30]

Yet § 1983 is now responsible for a striking percentage of civil litigation, with over 55,000 civil rights cases being filed in 2000—nearly twenty-one percent of the civil cases filed that year.[31] Even by the end of the 1960s, commentators sought ways of limiting § 1983's impact.[32] And as recently as 2007, § 1983 actions were said to comprise over ten percent of the federal court docket,[33] prompting noted scholars to proclaim that "[n]o statute is more important in contemporary America."[34]

But to what can this increased use of § 1983 be attributed? While the precise catalyst is debated,[35] the statute's sudden rise in utility can be traced in no small part to a case decided in 1961.[36]

Monroe v. Pape[37] involved an action brought under § 1983 alleging Fourth Amendment violations by officers of the Chicago Police Department. The plaintiffs alleged that thirteen Chicago police officers broke into their home, routed them from bed, made them stand naked in the

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28. *See* Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1486 n.4 (1969) ("*United States Code Annotated* notes only 19 decisions under [§ 1983] in its first 65 years on the statute books.") (citing 42 U.S.C.A. § 1983 (1964)); CHEMERINSKY, *supra* note 22, at 487 (between 1871 and 1920, only twenty-one cases were decided under § 1983); *see also* Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951); FREER & REDISH, *supra* note 22, at 306–07.

29. Giles v. Harris, 189 U.S. 475, 485 (1903).

30. CHEMERINSKY, *supra* note 22, at 487.

31. FREER & REDISH, *supra* note 22, at 307. *But cf.* FALLON, JR. ET AL., *supra* note 27, at 1081–83 (suggesting that the actual growth of § 1983 litigation may be exaggerated due to a substantial increase in non-§ 1983-related civil rights claims); *see also* Louise Weinberg, *The Monroe Mystery Solved: Beyond the "Unhappy History" Theory of Civil Rights Litigation*, 1991 BYU L. REV. 737, 757 (1991) (attributing the increase in civil rights cases after *Monroe* to the Warren Court's expansion of protections afforded by the Bill of Rights rather than *Monroe*'s holding).

32. *See* Note, *supra* note 28, at 1486–1511.

33. CHEMERINSKY, *supra* note 22, at 483; *see also* George C. Pratt, *Foreword* to MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES, at xviii (4th ed. 2003).

34. CHEMERINSKY, *supra* note 22, at 483; MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES 2 (3d ed. 1997).

35. *See supra* notes 27 and 31 and accompanying text.

36. CHEMERINSKY, *supra* note 22, at 484 ("the landmark decision in *Monroe v. Pape* . . . dramatically expanded the definition of [the phrase "under color of state law"] and hence is largely responsible for the explosion of § 1983 litigation.").

37. Monroe v. Pape, 365 U.S. 167 (1961), *overruled by* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658 (1978).

living room, and ransacked every room in the house, emptying drawers and ripping mattress covers.[38] They further alleged that the officers subsequently took Mr. Monroe to the police station, detained him for ten hours on "open" charges while he was interrogated about a two-day-old murder, refused to take him before a readily accessible magistrate, did not permit him to call his family or attorney, and ultimately released him.[39] Finally, the plaintiffs alleged that the officers had no search warrant and no arrest warrant, and that they acted "under color of the statutes, ordinances, regulations, customs and usages" of Illinois and of the City of Chicago, i.e., they acted under color of state law.[40]

In upholding Monroe's right to sue under § 1983, the Supreme Court established two points critically responsible for the statute's surge: First, § 1983 creates a federal remedy that is cognizable in federal court against state officials for violations of federal rights, and a plaintiff does not have to exhaust state remedies before filing such an action;[41] and second, police officers' actions may be under color of state law, as required by § 1983, even though their actions may be wholly unauthorized under that same law.[42] In other words, the "under color" requirement of § 1983 analyzes whether the defendant officer had "some badge of authority" to enforce state law, not necessarily whether the officer's actions were sanctioned.[43]

Particularly because of *Monroe*'s "dramatically expansive" definition of the phrase "under color of state law,"[44] § 1983 litigation has skyrocketed to combat numerous constitutional violations[45]—with the Fourth Amendment's prohibition against unreasonable searches and seizures being a popular vehicle for such claims.[46] Following this

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38. *Id.* at 169.

39. *Id.*

40. *Id.*

41. *Id.* at 171–72; *see also* David Achtenberg, *A "Milder Measure of Villainy": The Unknown History of 42 U.S.C. § 1983 and the Meaning of "Under Color of" Law*, 1999 UTAH L. REV. 5–6, 46–61 (1999) (thoroughly discussing the legislative history of § 1983 and concluding that "this history should dispel the remarkably persistent myth that the Forty-second Congress never intended the provision to cover constitutional wrongs unless those wrongs were actually authorized by state law."); CHEMERINSKY, *supra* note 22, at § 8.4 (analyzing how exhaustion of state remedies is not required for § 1983 litigation).

42. *Monroe*, 365 U.S. at 183.

43. FREER & REDISH, *supra* note 22, at 308; *see also* FALLON, JR. ET AL., *supra* note 27, at 1079.

44. *See* 1 LAFAVE, *supra* note 18, at § 1.10(a).

45. *See generally* Sheldon H. Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 7–13 (1974) (discussing the broad scope of § 1983); Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape, *and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 300–03, 321 (1965–66) (same).

46. *See* Shapo, *supra* note 45, at 323; 1 LAFAVE, *supra* note 18, at § 1.10(a) & nn.12–16 (providing examples of § 1983 claims alleging Fourth Amendment violations).

increase in litigation, it was inevitable that the citizens' newfound remedy would be constrained.[47]

B. *Qualified Immunity: The Remedy Restricted*

Assuming that the § 1983 cause of action is established and that absolute immunity is inapposite,[48] the relevant inquiry in a § 1983 plaintiff's claim has become whether a defendant is nevertheless entitled to "qualified," or "good faith,"[49] immunity from suit.[50] Noticeably, § 1983 itself lacks any provision for such immunities.[51] Yet the Supreme Court has held that the tradition of immunity is so firmly entrenched in the common law and is supported by such strong policy considerations[52] that "Congress would have specifically so provided had it wished to abolish the doctrine."[53]

To be sure, a doctrine such as qualified immunity serves important policy ends. Given that governmental entities are frequently shielded from liability[54] and that § 1983 provides a vehicle for relief against indi-

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47. While the primary focus of this Article is on § 1983's remedy for police misconduct, see generally 1 LAFAVE, *supra* note 18, at § 1.10 & nn.1–3, for a brief discussion of the other remedies for police misconduct that involve proceeding directly against the offending officers, such as criminal prosecution and disciplinary action.

48. "Absolute" immunity protects defendants from suit without exception. While beyond the scope of this Article, it is sufficient to say that only certain officers, e.g., judges, jurors, witnesses, prosecutors, and legislators, are entitled to absolute immunity from suit, and only while performing certain types of tasks. Most § 1983 cases are brought against state or local officials, such as police officers, who do not enjoy absolute immunity. *See* Shapo, *supra* note 45, at 321–23; *see also* 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 3.1(k) & n.257 (3d ed. 2007) ("Virtually all § 1983 actions involving a Fourth Amendment claim are brought against police officers . . . ."). For more discussion on absolute immunity, see generally CHEMERINSKY, *supra* note 22, at § 8.6.2.

49. Since *Harlow*'s adoption of a strictly objective standard of reasonableness for determining whether a government official is entitled to qualified immunity, see discussion *infra* Part III.C., a defendant's subjective state of mind is no longer relevant. *See* 2 LAFAVE ET AL., *supra* note 48, at § 3.1(k) & n.260. "Good faith" immunity is therefore not a particularly apt description, so the remainder of this Article will refer to the standard as "qualified" immunity.

50. *See* 2 NAHMOD, *supra* note 25, at § 8:1; *see also* FREER & REDISH, *supra* note 22, at 323; 2 LAFAVE ET AL., *supra* note 48, at § 3.1(k) & nn.259–60.

51. *See* FREER & REDISH, *supra* note 22, at 320; CHEMERINSKY, *supra* note 22, at § 8.6.1 ("Section 1983 is written in absolute terms . . . . No exceptions are mentioned in the statute.").

52. *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 638 (1987) ("[P]ermitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.") (internal citation omitted).

53. Wyatt v. Cole, 504 U.S. 158, 163–64 (1992) (quoting Pierson v. Ray, 386 U.S. 547, 555 (1967)); *see also* Tenney v. Brandhove, 341 U.S. 367, 372–74 (1951); *see generally* CHEMERINSKY, *supra* note 22, at § 8.6.1. ("[T]he Supreme Court consistently has held that all officers possess some degree of immunity from liability.").

54. *See* CHEMERINSKY, *supra* note 22, at § 8.6.1 (discussing immunity for State and municipal governments and the corollary importance of relief being available against individual officers).

vidual officers,[55] there must be some form of counterbalance protecting officers who reasonably act within the confines of the law, even if damage or harm results. Qualified immunity seeks to supply this equilibrium, threatening sufficient liability to ensure compensation and deterrence while simultaneously encouraging government employees to perform their duties with the knowledge that adequate immunity exists. The Supreme Court has commented that doctrines like qualified immunity reflect both "the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required by the legal obligations of his position, to exercise discretion" and "the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good."[56]

Thus, qualified immunity originated as a basic proposition: defendant officials should not be held liable for harm caused in good faith because the threat of such liability might deter officials from effectively carrying out their duties.[57] The problem with such a standard, of course, concerned defining what such "good faith" meant.[58]

The Supreme Court attempted to characterize the state of mind necessary for qualified immunity in *Scheuer v. Rhodes*,[59] where the Court 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 . . . ."[60] This combination of a reasonableness requirement along with the evaluation of an official's belief established a qualified immunity test with both an objective and a subjective component.

One year later, the Court elaborated on its *Scheuer* definition of good faith. In *Wood v. Strickland*,[61] the Court affirmed the dual-component nature and proclaimed that an official would not be immune from liability under § 1983 if "he knew or reasonably should have known that the action he took . . . would violate . . . constitutional rights . . ., or if he took the action with the malicious intention to cause a deprivation of

55. *See supra* Part III.A.

56. Scheuer v. Rhodes, 416 U.S. 232, 240 (1974), *abrogated by* Harlow v. Fitzgerald, 457 U.S. 800 (1982); *see also* Hunter v. Bryant, 502 U.S. 224, at 229 (1991) (quoting Davis v. Scherer, 468 U.S. 183, 196 (1984)) (internal quotation marks omitted); CHEMERINSKY, *supra* note 22, at § 8.6.3.

57. *See Harlow*, 457 U.S. at 807.

58. *See* Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 460 (1978) ("The good faith defense was imported into section 1983 rather casually from the common law, has been extended uncritically, and operates in practice at best to create confusion and at worst to defeat legitimate claims.").

59. 416 U.S. at 232.

60. *Id.* at 247–48.

61. 420 U.S. 308 (1975).

constitutional rights or other injury . . . ."[62]

Interestingly, given subsequent developments in the law and its infatuation with multiple levels of objective reasonableness,[63] a vehement dissent in *Wood* criticized the *objective* component of the majority's test noting the difficulty of defining the law that an officer should be expected to know.[64] And former Chief Judge Jon O. Newman of the Second Circuit Court of Appeals levied further criticism on incorporating an objective component into the analysis. Expounding on the *Wood* dissent, Judge Newman stated that while objective reasonableness was "undoubtedly" added to ensure that an officer could not obtain immunity solely based on good-faith belief, that same reasonableness involved "nearly circular reasoning that promotes confusion and defeats meritorious claims."[65]

Using the example of a victim's claim of an arrest without probable cause, the judge noted that to make out a valid § 1983 cause of action, a plaintiff would necessarily have to establish that a constitutional right was violated, i.e., that he was arrested *without* probable cause.[66] In response, the officer could nevertheless invoke immunity if he acted in good faith and *reasonably* believed that he did have probable cause.[67] But if the plaintiff is initially required to demonstrate that the arrest was *not* reasonably based on probable cause—making the arrest unlawful—how can the officer reasonably believe that there was probable cause for an unlawful arrest?[68] Especially when an unlawful arrest is, by definition, "an arrest for which a prudent police officer could not reasonably believe there was probable cause."[69]

Notwithstanding the warnings of Justice Powell and Judge Newman, the Supreme Court has not only included an objective component for assessing officials' conduct for qualified immunity, but also stripped the analysis of its good-faith component, leaving nothing but objective reasonableness as the test.[70] Decided in 1982, *Harlow v. Fitzgerald*[71] was the landmark decision responsible.

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62. *Id.* at 322.
63. *See* discussion *infra* Parts III.C–D, IV.B–C.
64. *Wood*, 420 U.S. at 327–31 (Powell, J., concurring in part and dissenting in part).
65. *See* Newman, *supra* note 58, at 460.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *See generally* CHEMERINSKY, *supra* note 22, at § 8.6.3 (questioning whether a completely objective standard that allows "an unscrupulous official to engage in malicious misuse of public authority whenever the relevant legal standards are objectively unclear" is desirable).
71. 457 U.S. 800 (1982).

C. *How "Clearly Established" Becomes Unclear*

In *Harlow*, the Court explicitly rejected the subjective component endorsed by *Scheuer* and *Wood* and held that malice was no longer relevant in claims of immunity.[72] The Court reasoned that allowing recovery upon proof of malice, i.e., retaining the subjective element for qualified immunity, was exceedingly disruptive of government operations: "[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."[73] Thus, a new test for qualified immunity was born, shielding "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[74]

Per *Harlow*'s instructions, the evaluation of whether an officer is protected by qualified immunity now rests on a two-step analysis: 1) Has a constitutional right been violated?[75] And, if so, 2) has that right been clearly established such that a reasonable officer should know about it?[76] The Supreme Court reinforced this sequence in *Wilson v. Layne*,[77] a case involving a civil suit against federal officers for bringing media representatives with them during the execution of arrest warrants in a private home.[78] While holding that such a "media ride-along" was violative of the Fourth Amendment, the Court nevertheless granted immunity to the officers because "the state of the law was not *clearly established* at the time the search . . . took place . . . ."[79]

Harlow's two-step analysis was further affirmed in *Saucier v. Katz*,[80] where the Court unanimously ruled against a § 1983 plaintiff and found that the use of excessive force by police does not preclude a determination that officers are protected by qualified immunity.[81] In other words, *Saucier* held that an officer's use of force could be excessive yet remain objectively reasonable if the officer had reason to be ignorant of clearly established law.[82]

Consistent with *Wilson* and *Saucier*, the *Harlow* test thus pros-

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72. *Id.* at 817–18.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. 526 U.S. 603 (1999).
78. *Id.* at 605.
79. *Id.* at 605–06.
80. 533 U.S. 194 (2001), *receded from by* Pearson v. Callahan, 555 U.S. 223 (2009).
81. *Saucier*, 533 U.S. at 208–09.
82. *Id.*

cribes that where there is no clearly settled law at the time a defendant official acted, the defendant escapes § 1983 liability. The obvious consequence of such a standard, then, is to incentivize plaintiffs to argue that the "clearly established" inquiry should occur at a general level, while defendants are advantaged by arguing that the inquiry requires more factually similar circumstances to establish the law.[83]

In 1987, however, the Supreme Court would be faced with a case in which the governing principles of law were clear, but the application of the law to the facts was in dispute. The Eighth Circuit's decision in *Creighton v. City of St. Paul*[84] laid the foundation by ruling that if a warrantless search of a home was unlawful, the officer could not obtain qualified immunity because clearly established law prohibited entry of a dwelling absent probable cause and exigent circumstances.[85] Upon granting certiorari, Justice Scalia penned the majority opinion for a divided Supreme Court and reversed, holding that the Fourth Amendment did not foreclose the notion that an officer can act in an objectively reasonable manner even though in violation of the Fourth Amendment—thus reaching the rather confusing conclusion that an officer can reasonably act unreasonably.[86]

Justice Scalia reasoned that the Eighth Circuit had misapplied the *Harlow* standard by identifying the legal rule that was allegedly violated at too high a level of generality.[87] "[T]he 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."[88] The Court's opinion in *Anderson v. Creighton* has consequently been interpreted as requiring a two-step qualified immunity analysis differing slightly from *Harlow*'s: 1) Has a

83. *See* 2 NAHMOD, *supra* note 25, at § 8.1.

84. 766 F.2d 1269 (8th Cir. 1985), *rev'd sub nom.* Anderson v. Creighton, 483 U.S. 635 (1987).

85. *Creighton*, 766 F.2d at 1277; *see also* FALLON, JR. ET AL., *supra* note 27, at 1129.

86. *Anderson*, 483 U.S. at 640–44 (rejecting the argument that it is impossible for an officer to "reasonably" act unreasonably for two reasons: First, the argument is foreclosed by previous extensions of qualified immunity to officials who were alleged to have violated the Fourth Amendment; and second, the incompatible logic of "reasonably" acting unreasonably can be attributed to the historical accident of expressing the Fourth Amendment's guarantees in terms of "unreasonable" searches and seizures. "Had an equally serviceable term, such as 'undue' searches and seizures been employed, what might be termed the 'reasonably unreasonable' argument against application of *Harlow* to the Fourth Amendment would not be available . . . ."); *see also* FALLON, JR. ET AL., *supra* note 27, at 1129–31. *But cf.* Oliveira v. Mayer, 23 F.3d 642, 649 n.2 (2d Cir. 1994) (emphatically rejecting the Court's explanation for distinguishing between reasonableness for Fourth Amendment lawfulness and reasonableness for qualified immunity).

87. *Anderson*, 483 U.S. at 639–40; *see also* FALLON, JR. ET AL., *supra* note 27, at 1129.

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

constitutional violation occurred because of the officer's unreasonable behavior? And, if so, 2) was it reasonable for the officer to have been unaware of the legal significance of his conduct?[89]

As Professor Chemerinsky points out, the *Anderson* decision is troubling in a few respects;[90] but perhaps most troubling is that the facts of *Anderson* presented no issue as to whether the law was clearly established: officers are *clearly* not allowed to conduct warrantless searches unless there is probable cause and exigent circumstances. Consistent with *Harlow*, the immunity defense should be defeated upon such a finding of a clearly established constitutional right being violated. Nevertheless, the Court's majority ruled that qualified immunity is not lost when an officer violates the Fourth Amendment unless a reasonable officer would know that the *specific* conduct was prohibited:

> The principles of qualified immunity that we reaffirm today require that Anderson be permitted to argue that he is entitled to summary judgment on the ground that, in light of the clearly established principles governing warrantless searches, he could, as a matter of law, reasonably have believed that the search of the Creightons' home was lawful.[91]

Thus, although the distinction in *Anderson* is conceptually subtle, government officials have reaped the benefits where they have violated clearly established constitutional rights, but the "contours" of those rights under particular factual circumstances may not be so clear.

Yet while *Anderson* may have stood for the proposition that an award of qualified immunity required materially similar facts between existing precedent and the present litigation, the Supreme Court's 2002 opinion in *Hope v. Pelzer*[92] attempted to control the effect of such an interpretation. In the aptly named *Hope* decision, Justice Stevens stated that any such "materially similar" requirement being read into the *Harlow* test was a "rigid gloss" on the qualified immunity standard that was inconsistent with Supreme Court precedent.[93] Quoting both *Saucier* and *Anderson*, Justice Stevens recognized that qualified immunity operates to ensure that "officers are on notice their conduct is unlawful"

89. *See Anderson*, 483 U.S. at 640; *accord* Saucier v. Katz, 533 U.S. 194, 201, 205 (2001) (applying the two-step process to the immunity defense in the context of a complaint of excessive force in making an arrest), *receded from by* Pearson v. Callahan, 555 U.S. 223 (2009); FALLON, JR. ET AL., *supra* note 27, at 1130 n.10. *But see Pearson*, 129 S. Ct. at 818 (2009) ("On reconsidering the [two-step protocol] required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory.").

90. CHEMERINSKY, *supra* note 22, at § 8.6.3.

91. Anderson v. Creighton, 483 U.S. 635, 641 (1987).

92. 536 U.S. 730 (2002).

93. *Id.* at 739.

before they are subjected to suit;[94] and to meet the "clearly established" requirement of *Harlow*, a constitutional right's contours must be clear enough that a reasonable official would understand that what he is doing violates that right. Justice Stevens further instructed, however, that while *Anderson* undoubtedly required the unlawfulness of conduct to be apparent in light of pre-existing law, this did not mean that official action would be protected by qualified immunity unless "the very act in question ha[d] previously been held unlawful."[95]

In 2004, Justice Stevens provided additional support for his interpretation of the *Harlow* standard in *Groh v. Ramirez*,[96] a *Bivens* action[97] alleging a violation of the Fourth Amendment where a federal agent obtained a facially-deficient search warrant, albeit on the basis of an admittedly proper application.[98] Writing for the majority, Justice Stevens concluded that the defendant officer should not have been awarded immunity because the failure of the warrant to describe the items to be seized violated the Fourth Amendment, and no reasonable officer could believe that a warrant that did not comply with the Fourth Amendment's particularity requirement was valid.[99]

In sum, Justice Stevens' decisions in *Hope* and *Groh* display the Court's recognition of the Pandora's Box opened by *Anderson.* Unlike those circuits that employ "arguable probable cause," Justice Stevens recognized that granting defendant officials immunity in situations where they have violated clearly established law could not have been the *Anderson* Court's intention. But under the guise of following Supreme Court precedent, these "arguable probable cause" jurisdictions reach such results, in opposition to *Harlow*'s test and subsequent Supreme Court guidelines.

D. *A New Approach*

After *Anderson*, and despite Justice Stevens's efforts, the "clearly established" inquiry must be approached at a fairly fact-specific level. Consistent with the purpose of qualified immunity—notice to officials who should not be held responsible for predicting development in con-

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94. *Id.* (quoting *Saucier*, 533 U.S. at 206).

95. *Id.*

96. 540 U.S. 551 (2004).

97. Though § 1983 is not applicable to federal officials, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 391–92, 397 (1971), filled this gap with respect to Fourth Amendment violations, holding that a complaint alleging a violation of the Fourth Amendment by a federal agent entitles a petitioner to recover money damages for resulting injuries. *See* LAFAVE, *supra* note 18, at § 1.10(b); *see also* Nahmod, *supra* note 45, at 11–13.

98. *Groh*, 540 U.S. at 554–56.

99. *Id.* at 557–60.

stitutional law—courts have looked to similar or analogous fact patterns when determining the extent to which any relevant constitutional doctrine is developed.[100] As may be expected, and particularly in the context of alleged Fourth Amendment violations requiring determinations of probable cause, circuits have developed various ways of deciding the issue.

The Fourth Amendment of course provides that

> [t]he 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.[101]

This "right to be let alone—the most comprehensive of rights and the right most valued by civilized men"—is centrally protected by the concept of probable cause.[102] And it is by now fundamental that probable cause means "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense."[103] As Justice Rutledge noted in *Brinegar v. United States*,[104] the name "probable cause" itself implies that the standard deals in probabilities rather than technicalities; and these probabilities are "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[105]

Accordingly, before the *Anderson* decision—and consistent with Justice Stevens's decisions in *Hope* and *Groh*—plaintiffs could reasonably argue that where an officer had conducted a search or effected an arrest under circumstances not providing probable cause, the officer could not subsequently invoke immunity based solely on a belief that

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100. *See, e.g.*, Denver Justice & Peace Comm., Inc. v. City of Golden, 405 F.3d 923, 929–33 (10th Cir. 2005); Devereaux v. Perez, 218 F.3d 1045, 1055 (9th Cir. 2000).

101. U.S. CONST. amend. IV.

102. *See* 2 LAFAVE, *supra* note 18, at § 3.1 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967)). For a thorough discussion of the deep roots of probable cause in United States history, see Jack K. Weber, *The Birth of Probable Cause*, 11 ANGLO-AM. L. REV. 155, 155–66 (1982).

103. Michigan v. DeFillippo, 443 U.S. 31, 37 (1979); Gerstein v. Pugh, 420 U.S. 103, 111–12 (1975); Adams v. Williams, 407 U.S. 143, 148 (1972); Beck v. Ohio, 379 U.S. 89, 91 (1964); Draper v. United States, 358 U.S. 307, 313 (1959); Brinegar v. United States, 338 U.S. 160, 175–76 (1949); Carroll v. United States, 267 U.S. 132, 161–62 (1925).

104. 338 U.S. at 160.

105. *Id.* at 175.

probable cause existed.[106] Such a stance on immunity made sense because the Fourth Amendment itself was said to strike an appropriate balance between protecting citizens' privacy and allowing law enforcement officers to effectively carry out their duties.[107] Through defining probable cause in objective terms, the elements of reasonableness inherent in the "probable cause" standard afforded such protection, e.g., by affording protection to an officer who acts with probable cause even if his suspect is innocent.[108]

Consistent with *Harlow*, then, it is clear that an arrest or search made *with* probable cause will not subject a defendant officer to liability under § 1983 because such a search or arrest does not violate a constitutional right. It is the situations in which probable cause is lacking, however, that have caused division among the circuits. For example, some courts have logically reasoned that where the unlawfulness of searches and arrests not based on probable cause is clearly established in a particularized sense, immunity cannot result.[109] This conclusion is sound because such an absence of probable cause would negate any possibility that an officer could be reasonably unaware of the law. It is already fundamental that a search or arrest can be made only upon probable cause,[110] so a search or arrest without probable cause in the *particularized sense* required by *Anderson* would necessarily constitute a violation of a clearly established constitutional right. Thus, given the broad latitude provided by the probable cause standard—e.g., asking whether an officer had sufficient basis for making a practical, common-sense decision that a fair probability of crime existed[111]—courts using the "proba-

106. MICHAEL AVERY ET AL., POLICE MISCONDUCT: LAW AND LITIGATION § 3:13 (3d ed. 1996).

107. *Id.*

108. *Id.*

109. *See generally* Wilson v. Attaway, 757 F.2d 1227, 1247 (11th Cir. 1985) (holding that defendant sheriff was not entitled to qualified immunity because he arrested plaintiffs without probable cause); Broadway v. City of New York, 601 F. Supp. 624, 626–27 (S.D.N.Y. 1985) (finding that arrest made without probable cause required summary judgment in favor of plaintiffs even though no fact in the record established anything more than that police officers erred in good faith in violating plaintiffs' constitutional rights: "To hold otherwise would be to conclude that every police officer making a warrantless arrest without probable cause could be held liable only if malice were demonstrated. *Harlow* and good faith do not extend that far."); Sewell v. Dever, 581 F. Supp. 556, 560 (W.D. Pa. 1984) ("[T]he requirement of probable cause for a warrantless arrest is clearly established and . . . a police officer should be aware of that requirement") (citing Harlow v. Fitzgerald, 457 U.S. 800 (1982)).

110. *See* Lee v. Sandberg, 136 F.3d 94, 102 (2d Cir. 1997) ("The right not to be arrested without probable cause is a clearly established right.") (internal citation omitted); Cook v. Sheldon, 41 F.3d 73, 78 (2d Cir. 1994) ("It is now far too late in our constitutional history to deny that a person has a clearly established right not to be arrested without probable cause.") (internal citations omitted).

111. Illinois v. Gates, 462 U.S. 213, 238–39 (1983).

ble cause" approach have struck a functional and workable balance between imposing liability and awarding immunity.[112]

Other courts, in contrast, have complicated the issue. These courts bifurcate the application of qualified immunity to probable cause determinations by addressing two levels of objective-reasonableness analysis—one for Fourth Amendment purposes and one for qualified immunity purposes. And they conclude by asking whether a reasonable officer would have known that the conduct in question was unlawful.[113] To avoid the resultant "linguistic awkwardness" of finding an officer's conduct reasonably unreasonable[114] under this approach—unreasonable under the Fourth Amendment, yet reasonable for qualified immunity purposes—courts have settled on the ostensibly less offensive term "arguable probable cause" when granting immunity to an official who violated clearly established constitutional rights. This mutated standard protects officers who, although acting without probable cause, nevertheless are found to have made a "reasonable" mistake. As Professor Martin A. Schwartz points out, it is therefore not surprising that in the jurisdictions employing "arguable probable cause," a great majority of arrest and search cases result in the defendant officer being protected from liability by qualified immunity.[115]

IV. DIVERGING THEORIES IN A MUDDLED ANALYSIS

A. *Probable Cause*

For a few fortunate plaintiffs, *actual* probable cause is still the governing standard when evaluating claims of qualified immunity in a minority of the circuits, including the Third,[116] Fourth,[117] Sixth,[118]

112. *See* AVERY ET AL., *supra* note 106, at § 3:13.

113. 1A MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 9A.11 (4th ed. 2010); *see also* discussion *infra* Parts IV.B–C, VI.

114. *See* Anderson v. Creighton, 483 U.S. 635, 643–44 (1987).

115. 1A SCHWARTZ, *supra* note 113, at § 9A.11; *see also* AMERICAN BAR ASSOCIATION, SWORD AND SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION 49–50 (Mary Massaron Ross & Edwin P. Voss, Jr. eds., 2006).

116. *See, e.g.*, Ciardiello v. Sexton, 390 F. App'x 193, 199–200 (3d Cir. 2010); Reedy v. Evanson, 615 F.3d 197, 223–24 (3d Cir. 2010); Ruiz v. Lebanon Cnty., Pa., 325 F. App'x 92, 95–96 (3d Cir. 2009); Rogers v. Powell, 120 F.3d 446, 455–56 (3d Cir. 1997).

117. *See, e.g.*, Pena v. Porter, 316 F. App'x 303, 311–12 (4th Cir. 2009); Miller v. Prince George's Cnty., 475 F.3d 621, 631–33 (4th Cir. 2007); Bailey v. Kennedy, 349 F.3d 731, 741–42 (4th Cir. 2003); Wilson v. Kittoe, 337 F.3d 392, 397–403 (4th Cir. 2003).

118. *See, e.g.*, Adams v. Metiva, 31 F.3d 375, 387 (6th Cir. 1994) (rejecting defendant's claim of qualified immunity where defendant arrested plaintiff without probable cause because such action was "objectively unreasonable . . . in light of clearly established law.").

Ninth,[119] and D.C.[120] Circuit. Yet of these circuits, the Third stands alone as the only one in which "arguable probable cause" has been explicitly rejected as a logical progression or interpretation of Supreme Court precedent, with one District of New Jersey Court recently expressing the following view on the standard:

> Defendants employ the phrase "arguable probable cause" in support of their qualified immunity claim. This language has not been adopted by the Supreme Court or the Third Circuit. "Arguable probable cause" is a confusing construct, because it suggests that qualified immunity is available whenever fairminded officers may disagree on the presence of probable cause.[121]

Notwithstanding this court's view, "arguable probable cause" has managed to infiltrate the remainder of the "actual probable cause" circuits' district courts, with the Fourth,[122] Sixth,[123] and Ninth[124] Circuit never explicitly adopting the standard but with their district courts referencing it repeatedly.

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119. *See, e.g.*, Beier v. City of Lewiston, 354 F.3d 1058, 1068–69 (9th Cir. 2004) (refusing to extend qualified immunity to defendant officers because it was not objectively reasonable for the officers to believe that there was probable cause to arrest the suspect for violating a protection order whose contents the officers had not ascertained); Ganwich v. Knapp, 319 F.3d 1115, 1119–20 (9th Cir. 2003) (expressing that certain police conduct—such as making an arrest *without probable cause*—is per se unreasonable).

120. *See, e.g.*, Pitt v. District of Columbia, 491 F.3d 494, 509–10 (D.C. Cir. 2007); Barham v. Ramsey, 434 F.3d 565, 572 (D.C. Cir. 2006); Martin v. Malhoyt, 830 F.2d 237, 263 (D.C. Cir. 1987).

121. Peterson v. Bernardi, No. 07–2723, 2010 WL 2521392, at *7 n.9 (D.N.J. June 15, 2010).

122. *See, e.g.*, Plaster v. Boswell, No. 6:05cv00006, 2007 WL 3231533, at *6 (W.D. Va. Oct. 30, 2007) ("[L]aw enforcement officers are entitled to qualified immunity if they arrest a suspect under the mistaken belief that they have probable cause to do so—provided that the mistake is objectively reasonable. Stated otherwise, '[t]he issue for immunity purposes is not probable cause in fact but arguable probable cause.'") (quoting Kuehl v. Burtis, 173 F.3d 646, 649–650 (8th Cir. 1999)); Moore v. Cease, No. 703–cv–144 FL 1, 2005 WL 5322794, at *13 (E.D.N.C. July 5, 2005); Washington v. Buraker, 322 F. Supp. 2d 692, 698–99 (W.D. Va. 2004); Lea v. Kirby, 171 F. Supp. 2d 579, 583–584 (M.D.N.C. 2001).

123. *See, e.g.*, Moran v. Marker, 889 F. Supp. 284, 287 (E.D. Mich. 1995) ("Upon this basis and viewing the facts in a light most favorable to the non-movant, the court concludes that there was arguable probable cause. As a result, defendant is entitled to qualified immunity.").

124. *See, e.g.*, Goldyn v. Clark Cnty., No. 2:06–CV–0950–RCJ–RJJ, 2007 WL 2592797, at *10 (D. Nev. Aug. 31, 2007) ("[A]dding Detective Maddock to the case would be futile as he is protected by qualified immunity for his actions. The record reveals he acted in an objectively reasonable manner and with probable cause in conducting the investigation. As such, there was 'arguable probable cause' for his actions and he is immune from suit.") (citations omitted); *see also* Franklin v. Fox, 107 F. Supp. 2d 1154, 1160–61 (N.D. Cal. 2000). *But cf.* Stiffman v. City of Pullman Police Dep't, No. CV–04–0414–EFS, 2006 WL 2469124, at *3 (E.D. Wash. Aug. 24, 2006) (rejecting defendant officer's proffered "arguable probable cause" theory because no reasonable officer in his position would have reasonably, but mistakenly, concluded that probable cause existed to arrest plaintiff).

B. *"Arguable" Probable Cause*

A majority of the circuits[125] employ "arguable probable cause" in their Fourth Amendment qualified immunity analyses.[126] As discussed above, the standard owes its development to the First Circuit, which laid the foundation for "arguable probable cause" in 1985.[127] But the First Circuit's words have spread like wildfire, prompting commentators to recognize "arguable probable cause" as the majority view.[128]

Since the *Floyd* decision in 1985, the First,[129] Second,[130] Fifth,[131]

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125. *See* David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricting Remedies*, 2005 U. ILL. L. REV. 1199, 1222 n.151 (2005) (listing circuits that employ "arguable probable cause" in their qualified immunity analyses).

126. AVERY ET AL., *supra* note 106, at § 3:13.

127. Floyd v. Farrell, 765 F.2d 1, 5 (1st Cir. 1985).

128. Erwin Chemerinsky & Karen M. Blum, *Fourth Amendment Stops, Arrests and Searches in the Context of Qualified Immunity*, 25 TOURO L. REV. 781, 825 (2009) ("[A]nother concept . . . [is] the notion of arguable probable cause, which is evidently all you need to get qualified immunity in most circuits.").

129. *See, e.g.*, Cox v. Hainey, 391 F.3d 25, 31 (1st Cir. 2004); Fletcher v. Town of Clinton, 196 F.3d 41, 53 (1st Cir. 1999); Ricci v. Urso, 974 F.2d 5, 6–7 (1st Cir. 1992); Prokey v. Watkins, 942 F.2d 67, 72 (1st Cir. 1991); Santiago v. Fenton, 891 F.2d 373, 387 (1st Cir. 1989); *Floyd*, 765 F.2d at 5; Cox v. Me. State Police, 324 F. Supp. 2d 128, 130 (D. Me. 2004); Burbank v. Davis, 227 F. Supp. 176, 185 n.15 (D. Me. 2002); Burke v. City of Portland, No. 99-319-P-C, 2000 WL 761799, at *7 (D. Me. May 5, 2000).

130. *See, e.g.*, Amore v. Navarro, 624 F.3d 522, 536 (2d Cir. 2010); Finigan v. Marshall, 574 F.3d 57, 61 (2d Cir. 2009); Droz v. McCadden, 580 F.3d 106, 109 (2d Cir. 2009); Walczyk v. Rio, 496 F.3d 139, 163 (2d Cir. 2007); Jenkins v. City of New York, 478 F.3d 76, 87 (2d Cir. 2007); Zellner v. Summerlin, 494 F.3d 344, 369–70 (2d Cir. 2007); Escalera v. Lunn, 361 F.3d 737, 743 (2d Cir. 2004); Caldarola v. Calabrese, 298 F.3d 156, 162 (2d Cir. 2002); Cerrone v. Brown, 246 F.3d 194, 202–03 (2d Cir. 2001); Martinez v. Simonetti, 202 F.3d 625, 634 (2d Cir. 2000); Lee v. Sandberg, 136 F.3d 94, 102–03 (2d Cir. 1997); Robinson v. Via, 821 F.2d 913, 921 (2d Cir. 1987).

131. *See, e.g.*, Lockett v. New Orleans, 607 F.3d 992, 998–99 (5th Cir. 2010); Club Retro, L.L.C. v. Hilton, 568 F.3d 181, 206–07 (5th Cir. 2009); DeBlanc v. Zanotelli, No. 08-3440, 2009 WL 3068214, at *1 (E.D. La. Sept. 23, 2009); Ashford v. City of Lafayette, No. 07-0650, 2008 WL 5157900, at *7 n.4 (W.D. La. Dec. 9, 2008); Rakun v. Kendall Cnty., No. SA-06-CV-1044-XR, 2007 WL 2815571, at *16 n.21 (W.D. Tx. Sept. 24, 2007); Blackmon v. Carroll Cnty. Sherriff's Dep't, No. Civ.A. 3:05CV91LN, 2006 WL 286783, at *3 (S.D. Ms. Feb. 3, 2006); Mitchell v. City of Jackson, 481 F. Supp. 2d 586, 591 (S.D. Ms. 2006); Brown v. Lyford, 243 F.3d 185, 190 (5th Cir. 2001); Morris v. Dillard Dep't Stores, Inc., 277 F.3d 743, 753–54 (5th Cir. 2001); Mendenhall v. Riser, 213 F.3d 226, 231 (5th Cir. 2000).

Seventh,[132] Eighth,[133] Tenth,[134] and particularly the Eleventh[135] Circuit have embraced the "arguable" language in their qualified immunity analyses, persistently fueling the "arguable probable cause" fire. In the Second Circuit, for example, even if it is found that an officer arrests an individual without probable cause, the officer is nevertheless immune if he can show either that it was objectively reasonable for him to believe he had probable cause, or, that officers of reasonable competence could disagree as to whether probable cause existed.[136] In other words, qualified immunity is granted to defendant officers in the Second Circuit if they "reasonably believe[ ] that a reasonably prudent officer would have acted even though a reasonably prudent officer would not have acted."[137]

The Eighth Circuit[138] has likewise done its part to contribute to the flames, providing such language as, "[T]he governing standard for a

132. *See, e.g.*, Carmichael v. Vill. of Palatine, 605 F.3d 451, 459–60 (7th Cir. 2010); Aleman v. Vill. of Hanover Park, No. 07 C 5049, 2010 WL 3894193, at *8 (N.D. Ill. Sept. 29, 2010); Morfin v. City of East Chicago, 349 F.3d 989, 1000 n.13 (7th Cir. 2003); Braun v. Baldwin, 346 F.3d 761, 779–80 (7th Cir. 2003); Williams v. Jaglowski, 269 F.3d 778, 781–82 (7th Cir. 2001); Wollin v. Gondert, 192 F.3d 616, 621–23 (7th Cir. 1999); Humphrey v. Staszak, 148 F.3d 719, 725–26 (7th Cir. 1998).

133. *See, e.g.*, Copeland v. Locke, No. 09-2485, 2010 WL 2977399, at *3 (8th Cir. July 30, 2010); Walker v. City of Pine Bluff, 414 F.3d 989, 992 (8th Cir. 2005); Kuehl v. Burtis, 173 F.3d 646, 649–650 (8th Cir. 1999); Gorra v. Hanson, 880 F.2d 95, 97 (8th Cir. 1989); Myers v. Morris, 810 F.2d 1437, 1455 (8th Cir. 1987).

134. *See, e.g.*, Shroff v. Spellman, 604 F.3d 1179, 1190 (10th Cir. 2010); Koch v. City of Del City, No. CIV-07-371-D, 2010 WL 1329819, at *8 (W.D. Ok. Mar. 29, 2010); Harapat v. Vigil, 676 F. Supp. 2d 1250, 1263 (D.N.M. 2009); Poolaw v. White, No. CIV 06-923 BB/WDS, 2007 WL 6970817, at *5 (D.N.M. Sept. 26, 2007); Vondrak v. City of Las Cruces, No. CIV 05-0172 JBLFG, 2007 WL 2219449, at *7 (D.N.M. May 14, 2007), *aff'd in part, rev'd in part, dismissed in part*, 535 F.3d 1198, 1206–07 (10th Cir. 2008); Cortez v. McCauley, 478 F.3d 1108, 1120–21 & n.15 (10th Cir. 2007).

135. *See, e.g.*, Grider v. City of Auburn, 618 F.3d 1240, 1257 & n.25 (11th Cir. 2010); Brown v. City of Huntsville, 608 F.3d 724, 734–35 (11th Cir. 2010); Skop v. City of Atlanta, 485 F.3d 1130, 1137–38 (11th Cir. 2007); Kingsland v. City of Miami, 382 F.3d 1220, 1232 (11th Cir. 2004); Holmes v. Kucynda, 321 F.3d 1069, 1079 (11th Cir. 2003); Storck v. City of Coral Springs, 354 F.3d 1307, 1315 (11th Cir. 2003); Lee v. Ferraro, 284 F.3d 1188, 1195 (11th Cir. 2002); Jones v. Cannon, 174 F.3d 1271, 1283 & n.3 (11th Cir. 1999); Gold v. City of Miami, 121 F.3d 1442, 1445 (11th Cir. 1997); Montoute v. Carr, 114 F.3d 181, 184 (11th Cir. 1997); Williamson v. Mills, 65 F.3d 155, 158 (11th Cir. 1995); Eubanks v. Gerwen, 40 F.3d 1157, 1160 (11th Cir. 1994); Post v. City of Ft. Lauderdale, 7 F.3d 1552, 1558 (11th Cir. 1993); Moore v. Gwinnett Cnty., 967 F.2d 1495, 1497–98 & n.1 (11th Cir. 1992); Lindsey v. Storey, 936 F.2d 554, 562 (11th Cir. 1991); Von Stein v. Brescher, 904 F.2d 572, 579 (11th Cir. 1990); *see also* discussion *supra* Part IV.C.

136. Mozzochi v. Borden, 959 F.2d 1174 (2d Cir. 1992); Magnotti v. Kunz, 918 F.2d 364 (2d. Cir. 1990).

137. Oliveira v. Mayer, 23 F.3d 642, 649 (2d Cir. 1994); *see also* Lee v. Sandberg, 136 F.3d 94, 103 (2d. Cir. 1997) (noting that in the context of a qualified immunity defense to a false arrest, an officer need only show "arguable" probable cause); Robinson v. Via, 821 F.2d 913 (2d Cir. 1987) (same).

138. *See supra* note 133.

Fourth Amendment unlawful arrest claim is not probable cause in fact but arguable probable cause . . . that is, whether the officer should have known that the arrest violated plaintiff's clearly established right."[139] Despite the aforementioned circuits' best efforts, however, one circuit has pulled away from the "arguable" pack.

C. *The Eleventh Circuit*

In 1990, only five years after the *Floyd* decision,[140] the Eleventh Circuit adopted "arguable probable cause" as its qualified immunity standard in *Von Stein v. Brescher.*[141] The *Von Stein* case arose from a lessor's arrest for leasing commercial property used for prostitution.[142] The Sheriff of Broward County, Florida, at the time, George Brescher, made sure to publicize the event by letting the local media know that prostitution would no longer be tolerated and that those behind such conduct were law enforcement's new targets.[143] What the Sheriff did not disclose, however, was that the lessor was unaware of the property's intended use when he entered into the lease, that the lessor had learned of the prostitution prior to his arrest, and that the lessor actually took steps to evict the tenant upon learning such information. These steps included contacting the Sheriff's Department to see if it could help in getting rid of the tenant.[144]

Nevertheless, a detective investigating the property concluded that the lessor could be prosecuted because the relevant Florida statute was not limited to the inception of the lease and in fact could apply to an ongoing lease relationship.[145] When another Sheriff's Deputy called the lessor to request a get-together, the lessor unsuspectingly agreed to meet. And upon affirmatively answering whether the lease was still in effect, he was swiftly placed under arrest.[146]

The lessor subsequently brought suit against Sheriff Brescher and the three Sheriff's deputies present at his arrest alleging that he was illegally arrested and that his arrest was staged as a media event in order to create favorable publicity for the defendant sheriff—who was running for re-election.[147] The jury found at trial that the defendants had arrested

139. Copeland v. Locke, No. 09-2485, 2010 WL 2977399, at *3 (8th Cir. July 30, 2010) (quoting Walker v. City of Pine Bluff, 414 F.3d 989, 992 (8th Cir. 2005)).

140. Floyd v. Farrell, 765 F.2d 1 (1st Cir. 1985).

141. 904 F.2d 572, 579 (11th Cir. 1990).

142. *Id.* at 574.

143. *Id.*

144. *Id.* at 575.

145. *Id.* at 576.

146. *Id.*

147. *Id.* at 574.

the plaintiff without probable cause, and, more importantly, that their conduct in arresting him was not protected by qualified immunity.[148] Specifically, the district court found that probable cause was lacking because even though the defendants correctly anticipated the manner in which the statute would be interpreted, an "unsettled" area of law "does not necessarily mean that qualified immunity offers protection to all discretionary acts taken pursuant to it."[149]

Reasoning that the defendants' mistaken probable cause determination could not be attributed to the unsettled nature of the law,[150] the court concluded that "a reasonable officer would have known that there was no probable cause to arrest the [p]laintiff" given the information available to the defendants.[151] And the court further noted that the plaintiff's theory of a staged arrest for political impact was adequately supported by such evidence as the defendants' failure to obtain an arrest warrant, notification of the media, the defendant sheriff's media statement, and ultimate dismissal of the charges.[152]

Nevertheless, upon the defendants' subsequent appeal, the Eleventh Circuit turned to First and Eighth Circuit precedent to state that for qualified immunity determinations, "the issue is 'not probable cause in fact but "arguable" probable cause.' "[153] With such a standard in place, it was unsurprising when the court held that "[r]easonable law enforcement officers, possessing the same knowledge and in the same circumstances as [d]efendants, could have believed that 'arguable' probable cause existed for [p]laintiff's arrest."[154]

Since *Von Stein* and *Floyd*, a majority of the circuits employ the "arguable" standard when assessing qualified immunity.[155] And many of these circuits' decisions eerily resemble *Von Stein* in outcome. The Eleventh Circuit, however, has plainly staked its claim as master of the "arguable" language. It has even adopted the phrase "arguable reasonable suspicion,"[156] which, aside from fleeting references by other cir-

148. *Id.*

149. 696 F. Supp. 606, 612 (S.D. Fla. 1988), *rev'd*, Von Stein v. Brescher, 904 F.2d 572 (11th Cir. 1990).

150. *Von Stein*, 696 F. Supp. at 612.

151. *Id.*

152. *Von Stein*, 904 F.2d at 578 n.8.

153. *Id.* at 579 (internal citations omitted).

154. *Id.* at 580.

155. *See* discussion *supra* Part IV.B.

156. *See, e.g.*, Wilson v. Correa, 384 F. App'x 907, 907 (11th Cir. 2010); Whittier v. Kobayashi, 581 F.3d 1304, 1308–09 (11th Cir. 2009) ("In the context of qualified immunity, this Court has stated [that] the issue is not whether reasonable suspicion existed in fact, but whether the officer had *arguable reasonable suspicion*.") (emphasis added) (citation and internal quotation marks omitted); Kilpatrick v. United States, No. 3:06cv158/LAC, 2009 WL 5215585, at *4 (N.D. Fla. Dec. 29, 2009); Croom v. Balkwill, 672 F. Supp. 2d 1280, 1292 (M.D. Fla. 2009); Redding v.

cuits,[157] leaves the Eleventh Circuit as the only one to use the standard.[158]

Through the application of this language, defendant officials in the Eleventh Circuit, more so than any other, have reaped the benefits of the "arguable" shield for the last twenty years. "Arguable reasonable suspicion" merely demonstrates the circuit's devotion to the standards. Of course, while the Eleventh Circuit's defendant officers have been enjoying a relaxed immunity threshold during this period, plaintiffs have dealt with the consequences.

V. The Dangers of "Arguable Probable Cause"

With the knowledge that § 1983 was enacted to provide citizens a remedy for constitutional violations, it is unsettling to think that this check on governmental abuse can be discounted by the power of qualified immunity.[159] Recent case law shows the consequences of allowing law-enforcement officers to act with impunity under the veil of such immunity through "arguable probable cause."[160] Time and time again,

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Chesnut, No. 5:06-CV-321 (CDL), 2008 WL 4831741, at *4 (M.D. Ga. Nov. 3, 2008); McCray v. City of Dothan, 169 F. Supp. 2d 1260, 1281 (M.D. Ala. 2001), *aff'd in part, rev'd in part*, 67 F. App'x 582, 582 (11th Cir. 2003); Brent v. Ashley, 247 F.3d 1294, 1303–06 (11th Cir. 2001); Jackson v. Sauls, 206 F.3d 1156, 1166 (11th Cir. 2000).

157. *See, e.g.*, Vondrak v. City of Las Cruces, 535 F.3d 1198, 1206 (10th Cir. 2008); Cortez v. McCauley, 478 F.3d 1108, 1123 (10th Cir. 2007); Goldberg v. Town of Glastonbury, No. 3:07cv1733, 2010 WL 4681249, at *2 (D. Conn. Nov. 8, 2010); Bernardi v. Klein, 682 F. Supp. 2d 894, 903 (W.D. Wis. 2010); Gil v. Cnty. of Suffolk, 590 F. Supp. 2d 360, 370–71 (E.D.N.Y. 2008); Harris v. Wydra, 531 F. Supp. 2d 233, 242 (D. Conn. 2007); Gomez v. City of New York, No. 05 Civ 2147 (GBD) (JCF), 2007 WL 5210469, at *8 (S.D.N.Y. May 28, 2007); Garcia v. Jaramillo, No. CIV-05-1212 JB/RLP, 2006 WL 4079681, at *5 (D.N.M. Nov. 27, 2006); Cross v. City of Chicago, No. 03 C 4265, 2004 WL 2644405, at *4 (N.D. Ill. Nov. 19, 2004); Konop v. Nw. Sch. Dist., 26 F. Supp. 2d 1189, 1203–04 (D.S.D. 1998).

158. *Lindsey v. Story*, 936 F.2d 554 (11th Cir. 1991), provided the gateway for the Eleventh Circuit's transfer of "arguable" language to the reasonable suspicion required in *Terry*-type seizures. Noting that defendant officers are entitled to immunity when they reasonably but mistakenly conclude that probable cause is present, the Eleventh Circuit reasoned that the defendant officer in *Lindsey* must also be entitled to immunity unless "he *clearly* lacked the reasonable suspicion necessary to justify the search." *Id.* at 559. Thus, as with the majority of search and arrest cases litigated under the "arguable probable cause" standard, the seizures of cash found in a pat-down search and in the trunk of the plaintiff's car were found to be supported by enough evidence to establish "*arguable* reasonable suspicion." *Id.* at 559–60. The court never even addressed whether the facts were sufficient to establish *actual* reasonable suspicion—already a lesser requirement than probable cause—instead contenting itself with the knowledge that the facts did not support a finding that there was *clearly* no reasonable suspicion. *Id.* at 560.

159. *See* LaFave, *supra* note 18, at § 1.10(a) n.9 (listing sources that detail further obstacles to relief for § 1983 plaintiffs, such as biased, pro-officer juries and insufficient money damages to justify commencement of suit).

160. *See, e.g.*, Von Stein v. Brescher, 904 F.2d 572, 579 (11th Cir. 1990) (awarding immunity where unlawful arrest was clearly established violation of Fourth Amendment, but nevertheless finding that "reasonable officers in the same circumstances and possessing the same knowledge as the Defendants could have believed that probable cause existed to arrest Plaintiff."); Gold v. City

courts have found officers' conduct to be in violation of clearly established constitutional rights, e.g., searches and arrests unquestionably lacking probable cause. Yet these officers are awarded immunity because of the legal fiction that is necessary to overcome "arguable probable cause": a consensus among all hypothetical reasonable officers that the challenged conduct was unconstitutional.

Decisions from across the circuits illustrate the effects of "arguable probable cause." In the Second Circuit, for example, the court in *Walczyk v. Rio*[161] was faced with a plaintiff whose previous state court convictions had been reversed due to a lack of probable cause to support a search warrant. The plaintiff, along with his mother (whose house had been the target of the search), brought a § 1983 action against the individual officers. A review of the warrant affidavit revealed that the son "was licensed to possess various firearms and that he maintained *two* neighboring residences where such firearms would likely be found," with one of the residences belonging to his mother.[162] "What the affidavit omitted, however, was the apparently undisputed fact that [the plaintiff] had not resided at his mother's . . . residence for more than seven years."[163]

Although concluding that "nondisclosure of the staleness of the dual residency allegation was fatal to a demonstration of probable cause,"[164] the court nevertheless noted that "[d]espite our ruling that the search of [the mother's] home was *not supported by probable cause*, defendants might still be entitled to claim qualified immunity from liability for damages if the search was supported by 'arguable probable cause.'"[165] The *Walczyk* court ultimately affirmed both the district court's ruling that defendants did not yet establish their entitlement to qualified immunity and that the mother was not entitled to summary judgment on liability, stating that "[f]urther record development and factfinding [was] necessary to determine [the issue]."[166] But while Judge (and current Supreme Court Justice) Sotomayor joined the relevant por-

of Miami, 121 F.3d 1442, 1446 (11th Cir. 1997) ("It is clear from the facts viewed in the light most favorable to [plaintiff] that the officers did not have actual probable cause to arrest [plaintiff] for disorderly conduct. That said, the officers nonetheless are entitled to qualified immunity."); Post v. City of Ft. Lauderdale, 7 F.3d 1552, 1558 n.6 (11th Cir. 1993) (citing Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982)) (finding that whether defendant officer actually believed he had no probable cause has no effect on the qualified immunity analysis: "Qualified [i]mmunity invokes an objective standard; that is, if a reasonable person in the defendant's place could have acted the same way, the defendant's subjective intent is irrelevant.").

161. 496 F.3d 139 (2d Cir. 2007).

162. *Id.* at 161–62 (emphasis in original).

163. *Id.* at 162.

164. *Id.*

165. *Id.* at 163 (emphasis added).

166. *Id.*

tion of the majority opinion that precluded judicial resolution of a question of disputed fact,[167] she also expressed unease with her circuit's "collective failure to harmonize . . . qualified immunity analysis with the Supreme Court's directives" through use of the "arguable probable cause" standard.[168]

Walczyk was not the Second Circuit's first encounter with "arguable probable cause." In *Lee v. Sandberg*,[169] the court further demonstrated the effect of the standard when it reviewed the circumstances of a disorderly conduct arrest and concluded that the defendant officers "*did not in fact have probable cause* to arrest the plaintiff . . . ."[170] The court nevertheless proceeded to grant qualified immunity, however, because the officers "certainly had 'arguable' probable cause to arrest . . . and accordingly, it was objectively reasonable for [them] to believe that probable cause existed."[171]

The Eleventh Circuit has produced similar results through its application of the "arguable probable cause" standard. In *Gold v. City of Miami*,[172] for example, the court noted that "[i]t is *clear* . . . that *the officers did not have actual probable cause* to arrest [the plaintiff] for disorderly conduct."[173] In fact, the court even recognized that in the plaintiff's case against the City of Miami, a jury concluded that the officers did not have probable cause to arrest the plaintiff and awarded the plaintiff a substantial verdict.[174] But these findings were not enough to overcome "arguable probable cause," and the court ultimately granted immunity to the officers.[175]

Situations such as these, where probable cause is undisputedly lacking, should never result in an award of immunity to defendant officers.[176] And no plaintiff who has suffered such a constitutional violation should be foreclosed from potential relief based on such a forgiving standard as "arguable probable cause." Moreover, for those plaintiffs seeking relief through § 1983's protections, "arguable probable cause" is not the only obstacle to be hurdled.[177]

167. *Id.* at 165 & n.2 (Sotomayor, J., concurring).
168. *Id.* at 165; *see also* discussion *infra* Part VI.
169. 136 F.3d 94 (2d Cir. 1997).
170. *Id.* at 103 (emphasis added).
171. *Id.*
172. 121 F.3d 1442 (11th Cir. 1997).
173. *Id.* at 1446 (emphasis added).
174. *Id.* at 1446 n.6.
175. *Id.* at 1446.
176. *See* discussion *infra* Part VI.
177. *See* LaFave, *supra* note 18, at § 1.10(a) n.9 (listing sources that detail further obstacles to relief for § 1983 plaintiffs, such as biased, pro-officer juries and insufficient money damages to justify commencement of suit).

The concept of probable cause has been grounded in criminal law and procedure for over two centuries.[178] Ease of application and clarity, however, are not qualities with which the standard is endowed.[179] Probable cause is determined by a "totality of the circumstances" approach for purposes of suppressing evidence.[180] But instructions to examine the totality of any situation's circumstances do not offer much guidance. As the Supreme Court has noted, "Articulating precisely what 'probable case' mean[s] is not possible . . . [T]he standard[is] 'not readily, or even usefully, reduced to a neat set of legal rules.'"[181] Thus, rather than trusting the already broad latitude supplied by probable cause, "arguable probable cause" jurisdictions further complicate the matter.

In addition to probable cause's complexity, however, qualified immunity also requires a taxing assessment as to whether a constitutional violation is "clearly established." But any plaintiff seeking to prove a "clearly established" constitutional violation must proceed without the benefit of unpublished opinions—opinions that provide the support necessary to clearly establish the law.[182]

One commentator has expressed that "[d]enying precedential status to unpublished opinions muddles the already unclear law surrounding qualified immunity."[183] While the application of qualified immunity is challenging owing to the perpetually fluctuating level of factual similarity between precedent cases and the alleged violation necessary to clearly establish the law, "[A]n even more fundamental ambiguity exists that muddles the qualified immunity analysis."[184] In denying precedential status to unpublished opinions, courts alter the contours of a right and "the clarity with which an official would understand that the right has been violated" because these courts exclude opinions that clearly establish the law.[185] These opinions demonstrate "*exactly the state of the law*" that plaintiffs must prove in order to overcome a defendant officer's claim of qualified immunity.[186] Thus, such exclusion of unpublished opinions as a source of law for qualified immunity purposes

178. Locke v. United States, 7 Cranch 339, 341–42 (1813).

179. *See* 2 LAFAVE, *supra* note 18, at § 3.2; *see generally* SAM KAMIN & RICARDO J. BASCUAS, INVESTIGATIVE CRIMINAL PROCEDURE: A CONTEMPORARY APPROACH 127 (2010) ("[P]robable cause is a largely amorphous term that defies easy definition.").

180. Illinois v. Gates, 462 U.S. 213, 230–31 (1983).

181. Ornelas v. United States, 517 U.S. 690, 695–96 (1996) (quoting *Gates*, 462 U.S. at 232).

182. *See* David R. Cleveland, *Clear as Mud: How the Uncertain Precedential Status of Unpublished Opinions Muddles Qualified Immunity Determinations*, 65 U. MIAMI L. REV. 45, 56–63 (2010).

183. *Id.* at 45.

184. *Id.* at 49–50.

185. *Id.*

186. *Id.* at 50 (emphasis added).

"injects unnecessary uncertainty into an already complicated legal analysis"[187] to the further detriment of plaintiffs seeking relief.

VI. Conclusion: Support for a Uniform, Practical Approach to the Qualified Immunity Analysis

"Arguable probable cause" jurisdictions split the single question of whether a right is "clearly established" into two distinct steps while simultaneously demanding "a consensus among all hypothetical reasonable officers that . . . challenged conduct was unconstitutional":[188]

> [The "arguable probable cause" approach to qualified immunity] does not simply divide into two steps what the Supreme Court treats singly, asking first, whether the right is clearly established *as a general proposition*, and second, whether the application of the general right *to the facts of this case* is something a reasonable officer could be expected to anticipate. Instead, ["arguable probable cause"] permits courts to decide that official conduct was "reasonable" even after finding that it violated clearly established law in the particularized sense. By introducing reasonableness as a separate step, [courts that employ "arguable probable cause"] give defendants a second bite at the immunity apple, thereby thwarting a careful balance that the supreme court has struck between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties.[189]

But Supreme Court precedent holds that "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."[190] In other words, "whether a right is clearly established is *the same question* as whether a reasonable officer would have known that the conduct in question was unlawful."[191] "Arguable probable cause" jurisdictions bifurcate the "clearly established" second step, however, by "splitting the 'relevant, dispositive inquiry' in two," thereby erecting "an additional hurdle to civil rights claims against public officials that has no basis in Supreme Court

187. *Id.*

188. Walczyk v. Rio, 496 F.3d 139, 166 (2d Cir. 2007) (Sotomayor, J., concurring).

189. *Id.* at 168–69 (emphasis in original) (quoting Anderson v. Creighton, 483 U.S. 635, 639 (1987), and Davis v. Scherer, 468 U.S. 183, 195 (1984)).

190. *Id.* (alterations in original) (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)); *see also id.* at 167 (referencing *Wilson v. Layne*, 526 U.S. 603, 615–17 (1999)) ("[W]hether an officer's conduct was objectively reasonable is part and parcel of the inquiry into whether the law was clearly established at the time of the challenged conduct and for the particular context in which it occurred.").

191. *Id.* at 166 (emphasis in original).

precedent."[192]

To be sure, the Court instructed in *Anderson v. Creighton*[193] that the contours of a right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right for it to be clearly established.[194] Contrary to "arguable probable cause" precedent, however, the Supreme Court does not follow the "clearly established" inquiry with "a second, *ad hoc* inquiry" into the reasonableness of an official's conduct.[195] Assessing whether an officer's violation of a clearly established constitutional right is objectively reasonable after finding that the right was clearly established in a particularized sense finds no justification in any Supreme Court discussion of qualified immunity.[196] If a violated right is found to be clearly established, the qualified immunity analysis should be complete.[197]

The natural counter to this view, of course, is that the Supreme Court has repeatedly instructed that law enforcement officers are not expected to be aware of every recent development in the law.[198] But the bifurcated approach of "arguable probable cause" overstates this principle through

> divorcing the reasonableness inquiry from the state of the law at the time of the conduct in question. The inquiry described by the Supreme Court already incorporates a recognition that police officers should not be expected to anticipate every application of legal principles because it requires that *the right be clearly established with particularity* for the conduct at issue.[199]

Asking whether law enforcement officials have "arguable probable cause," i.e., asking whether their conduct was reasonable, when assessing whether they are entitled to qualified immunity for reasonable but mistaken determinations that probable cause existed is a consideration "that properly fall[s] *within* the clearly established inquiry as the Supreme Court has described it."[200]

Significantly, the Supreme Court has never even referenced an "arguable probable cause" standard.[201] On the contrary, the Court has

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192. *Id.*

193. 483 U.S. 635 (1987); *see also* discussion *supra* Part III.C.

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

195. *Walczyk*, 496 F.3d at 166–67 (Sotomayor, J., concurring).

196. *Id.* at 167; *see also* Brosseau v. Haugen, 543 U.S. 194, 199–200 (2004); Groh v. Ramirez, 540 U.S. 551, 563 (2004); Hope v. Pelzer, 536 U.S. 730, 739–46 (2002).

197. *Walczyk*, 496 F.3d at 167 (Sotomayor, J., concurring).

198. *See* Saucier v. Katz, 533 U.S. 194, 205 (2001), *receded from by* Pearson v. Callahan, 555 U.S. 223 (2009); Graham v. Connor, 490 U.S. 386, 396–97 (1989).

199. *Walczyk*, 496 F.3d at 167 (Sotomayor, J., concurring) (emphasis added).

200. *Id.* at 168 (emphasis in original).

201. *Id.* ("It is not surprising, then, that 'arguable probable cause' finds no mention in any

repeatedly instructed lower courts to employ an objective standard of reasonableness when assessing qualified immunity. Such a standard of objective reasonableness—without "arguable probable cause's" superfluous reasonableness requirement—provides a functional approach to qualified immunity because the particularity required for any law to be clearly established must impute such knowledge to law enforcement. Moreover, courts have been making these determinations of objective reasonableness since the inception of qualified immunity. Abandoning the "arguable probable cause" standard will simply allow courts to analyze the state of the law for what it is without having to further struggle with assessing the reasonableness of officers' conduct. Thus, given the inherent protection afforded to law enforcement officers in the Fourth Amendment combined with the particularity required to clearly establish the law, Supreme Court guidelines have already provided the necessary balance between vindicating citizens' constitutional rights and allowing public officials to effectively perform their duties.

To still allow defendant officers to escape liability where they have violated law that is already found to be clearly established in a *particularized sense* presents an unwarranted obstacle for any § 1983 plaintiff. Nevertheless, beginning with the First Circuit's opinion in *Floyd* and subsequently snowballing into its present, sweeping form, "arguable probable cause" has reduced the threshold for officers to acquire immunity in precisely this manner, opposing Supreme Court guidelines.

Violations of clearly established law should never leave those that have been wronged with no remedy.[202] An objective standard of reasonableness accomplishes this goal because no violation of a clearly established Fourth Amendment right should ever be objectively reasonable. Thus, "arguable probable cause" crumbles on top of its own weak foundation as it purports to afford officers immunity in an impossible situation: where officers of reasonable competence could disagree on the legality of the action at issue in its particular factual context. Officers of reasonable competence should never disagree on the legality of the action at issue in its particular factual context if *the law is clearly established.* Reasonably competent officers are aware of clearly established

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Supreme Court opinion; the need for a separate term to describe this concept arises only once we have improperly splintered the 'clearly established' inquiry. Because I believe 'arguable probable cause' is both imprecise and an outgrowth of the first flaw in our qualified immunity analysis, I do not agree with the majority's use of the term.").

202. Per Judge Tashima of the Ninth Circuit: "Although the Supreme Court has held that some governmental intrusions may be so minor as not to violate the Fourth Amendment at all, it has never held that actions that do violate the Fourth Amendment may result in such little harm that § 1983 is not an available remedy." Bingham v. City of Manhattan Beach, 329 F.3d 723, 730 (9th Cir. 2003).

law because knowing the law is their job—that is what makes them "reasonably competent."[203] The text of *Harlow* supports such a view because *Harlow* explicitly states that where "law was clearly established, the immunity defense . . . should fail [barring extraordinary circumstances], since a reasonably competent public official should know the law governing his conduct."[204]

Demanding "a consensus among all hypothetical reasonable officers that . . . challenged conduct was unconstitutional" is superfluous and unnecessary.

> While it is unfair to expect officials to anticipate changes in the law with a prescience that escapes even the most able scholars, lawyers, and judges, our precedents recognize that qualified immunity is entirely consistent with the requirement that federal officials act in a way that is consistent with an awareness of the fundamental constitutional rights enumerated in the Bill of Rights of the Constitution.[205]

The right to be free from search and arrests that lack probable cause is a "fundemental constitutional right." Awarding officers immunity based on a finding that "all reasonable officers" may not agree on what constitutes such unconstitutional conduct is, at best, irrational, and, at worst, unconscionable.

Courts that employ the "arguable probable cause" standard[206] have lost sight of the balance necessary for a functional qualified immunity analysis, consequently tipping the scales in favor of enabling public officials to act in the fearless manner that § 1983 is designed to prevent.[207] "Arguable probable cause" must therefore give way to a single objective standard of reasonableness consistent not only with Supreme Court directives, but also with fundamental concepts of justice.

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203. *See* Briggs v. Malley, 748 F.2d 715, 719–20 (1st Cir. 1984) ("[U]nder our system of government the police have a duty to fight crime *without violating constitutional rights*. . . . We should expect police officers to have a basic understanding of the limits of their power and we must hold them liable when, *negligently or intentionally*, they overstep these bounds."), *aff'd*, 475 U.S. 335 (1986) (emphasis added).

204. Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982).

205. Anderson v. Creighton, 483 U.S. 635, 649 n.2 (1987) (Stevens, J., dissenting).

206. *See* discussion *supra* Parts III.D, IV.B, V.

207. *See* Rudovsky, *supra* note 125, at 1217–26 (internal citations and quotation marks omitted) (giving a broad overview of qualified immunity and its limiting impact on the availability of civilian remedies for constitutional violations: "Given the fact that probable cause can be established on facts that show only a fair probability of criminal conduct . . ., to permit 'arguable' probable cause to justify a search is to degrade the Fourth Amendment's protections to a very low level.").