QUALIFIED IMMUNITY, MISTAKEN SHOOTINGS, AND THE PERSISTENT IMPORTANCE OF PERSPECTIVE: *HENRY V. PURNELL*, 652 F.3D 524 (4TH CIR. 2011) (EN BANC)

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Last year, in *Henry v. Purnell*,[1] the United States Court of Appeals for the Fourth Circuit, sitting en banc, held that a police officer who mistakenly drew his service pistol instead of his taser and shot a fleeing suspect was not entitled to qualified immunity.[2] The court therefore denied the officer's motion for summary judgment.[3] In so ruling, the court provided that a jury would decide whether the officer's use of force violated the suspect's constitutional rights.[4] Judge Roger L. Gregory wrote the majority opinion,[5] and Judge Dennis W. Shedd[6] and Judge Paul V. Niemeyer filed vigorous dissents.[7]

The case is important for two reasons. First, through this case, the Fourth Circuit addressed how it would treat mistaken uses of force for purposes of the all-important inquiry of qualified immunity. Second, and more generally, the Fourth Circuit's reasoning highlights the fact that, in the analysis of qualified immunity, one's perspective often determines the outcome; that is, to borrow a phrase from Justice Frankfurter: "On the question you ask depends the answer you get."[8]

I. THE LAW OF QUALIFIED IMMUNITY: "FAIR NOTICE" OF CONSTITUTIONAL VIOLATIONS

It is difficult to overstate the importance of civil rights actions under 42 U.S.C. § 1983, on the one hand, and the doctrine of qualified immunity, on the other. Section 1983 provides a cause of action for an individual whose federal constitutional or statutory rights were violated by a state official.[9] By some

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1. 652 F.3d 524 (4th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 781 (2011).
2. *Id.* at 528, 536–37.
3. *Id.* at 536–37.
4. *Id.* at 530, 535–36.
5. *Id.* at 524.
6. *Id.* at 542–53 (Shedd, J., dissenting).
7. *Id.* at 533–57 (Niemeyer, J., dissenting).
8. Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 484 (1948) (Frankfurter, J., dissenting).
9. *See* 42 U.S.C. § 1983 (2006).

estimates, civil rights actions under § 1983 number between 40,000 and 50,000 per year.[10] Nevertheless, the doctrine of qualified immunity provides broad protection to officials who are sued under § 1983.[11] The avowed purpose of qualified immunity is to protect public officials not only from liability, but also from "unwarranted demands customarily imposed upon those defending a long drawn out lawsuit."[12] The doctrine is well structured to serve these goals.

Under the doctrine of qualified immunity, an officer is only subject to suit if he was on "fair notice" that his conduct would violate the subject's constitutional or statutory rights.[13] An official is not on such fair notice if "a reasonable officer could have believed that [his conduct] was lawful, in light of clearly established law and the information [the officer] possessed."[14] In determining whether an officer is entitled to qualified immunity, the court employs a two-step process: first, the court determines whether the plaintiff has "alleged . . . the violation of a constitutional right," and second, "the court must decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct."[15] Qualified immunity protects the officers unless the court determines both that the plaintiff has alleged a violation of a constitutional right and that the right was clearly established.[16] And, because the purpose of qualified immunity is to resolve litigation relatively quickly, the court focuses only on objective facts, and not on the subjective intentions of the officer, which would "inherently requir[e] resolution by a jury."[17]

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10. 1 MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES, § 1.01[B], at 1-5 (4th ed. Supp. 2011-1).

11. *See, e.g.*, Malley v. Briggs, 475 U.S. 335, 341 (1986) ("As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.").

12. Siegert v. Gilley, 500 U.S. 226, 232 (1991); *see also* Pearson v. Callahan, 555 U.S. 223, 232, 237 (2009) (noting that the Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation," thus, attempting to avoid "forc[ing] the parties to endure additional burdens of suit . . . when the suit otherwise could be disposed of more readily" (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam); Brief for National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Respondent at 30 *Pearson*, 555 U.S. 223 (2009) (No. 07-751), 2008 WL 3831556, at *30) (internal quotation marks omitted)).

13. *See* Hope v. Pelzer, 536 U.S. 730, 739 (2002) (quoting Saucier v. Katz, 533 U.S. 194, 206 (2001)).

14. Wilson v. Layne, 526 U.S. 603, 615 (1999).

15. *Pearson*, 555 U.S. at 232 (citing *Katz*, 533 U.S. at 201). In a 2007 case, *Henry v. Purnell*, 501 F.3d 374 (4th Cir. 2007), the Fourth Circuit clarified the parties' burdens on these prongs. The Fourth Circuit held that the *plaintiff* bears the burden of proof on the question of whether the conduct violated a constitutional right, whereas the *defendant* bears the burden on the issue of whether the right was clearly established and, therefore, whether the defendant is entitled to immunity. *See id.* at 377–78 (citing Wilson v. Kittoe, 337 F.3d 392, 397 (4th Cir. 2003); Bryant v. Muth, 994 F.2d 1082, 1086 (4th Cir. 1993)).

16. *Pearson*, 555 U.S. at 232 (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

17. Harlow v. Fitzgerald, 457 U.S. 800, 814, 816–18 (1982) (citing Butz v. Economou, 438 U.S. 478, 507 (1978)).

Nevertheless, within this established analytical framework remains some ambiguity. The United States Supreme Court has offered little guidance on the proper level of generality—or, as Professor John C. Jeffries, Jr. put it, the proper "altitude"—at which the right in question should be defined.[18] On the one hand, the Court has admonished lower courts in general, and the Ninth Circuit in particular, "not to define clearly established law at a high level of generality."[19] And, on the other hand, the Court has rejected attempts by the Eleventh Circuit to require that conduct is clearly established as violative of a federal right only if that conduct is "materially similar" to the facts of a prior case in which a court ruled that the conduct was improper.[20] Yet, in those cases, instead of offering further guidance on the relevant level of abstraction, the Court has merely reasoned that "the salient question . . . is whether the state of the law . . . gave respondents fair warning that their [conduct] was unconstitutional."[21]

This lack of guidance from the Supreme Court as to the proper level of generality grants lower courts great discretion over the applicability of qualified immunity. The very question of whether an officer's conduct violates clearly established law depends on the level of generality at which the court defines clearly established law, relative to the officer's conduct. For example, if one defines the right in question generally, as "the right to be free in one's home from unreasonable searches and arrests,"[22] then any officer certainly has fair notice that a broad class of conduct would be subject to liability. Conversely, if the court defines the right in question narrowly, as the right to be free from specific conduct that is materially similar to conduct that the court has already held improper, then almost every officer would find himself in a novel factual situation in which he would not be on fair notice of the potential impropriety of his conduct.[23]

Thus, and as *Henry v. Purnell* again makes clear, the way in which the court frames the right in question often determines the answer, and therefore, the level of generality at which a court views a particular right is "crucially important."[24]

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18. *See* John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 854 (2010). Professor Jeffries frames the issue of "altitude" in terms of the clearly established law, whereas I would argue that the key inquiry is actually the level at which a given right is defined. Professor Jeffries notes, "The problem of generality—or, if you prefer, altitude—concerns the level of abstraction at which 'clearly established' is assessed. . . . Lofty abstractions [of constitutional rights] . . . are long-standing and completely familiar. If that is all it takes to make a right clearly established, virtually everything is." *Id.* at 854, 856.

19. Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2084 (2011).

20. Hope v. Pelzer, 536 U.S. 730, 735, 741 (2002).

21. *Id.* at 741.

22. *See* Pearson v. Callahan, 555 U.S. 223, 230 (2009) (quoting Callahan v. Millard Cnty., 494 F.3d 891, 898 (10th Cir. 2007), *rev'd*, *Pearson*, 555 U.S. 223 (2009)) (internal quotation marks omitted).

23. Hope v. Pelzer, 240 F.3d 975, 981–82 (11th Cir. 2001) (citing Suissa v. Fulton Cnty., 74 F.3d 266, 269–70 (11th Cir. 1996)), *rev'd*, 536 U.S. 730 (2002).

24. Jeffries, *supra* note 18, at 855.

II. BACKGROUND, PROCEDURAL HISTORY, AND PANEL OPINION

The facts of *Henry v. Purnell* are relatively straightforward, but the case has undergone a long and tortured procedural history. The case arose in 2003, after Officer Robert Purnell attempted to serve an arrest warrant on Frederick Henry in southern Maryland.[25] Henry had failed to pay his child support and when he did not comply with the court's order, a warrant was issued for his arrest.[26] Officer Purnell attempted to find Henry at his last known address and last known employer, but Henry evaded arrest.[27] On October 23, 2003, Officer Purnell encountered Henry and other passengers in a truck outside of Henry's home.[28] Henry exited the vehicle, and then ran towards his house.[29] Officer Purnell took chase.[30]

On his right leg, Officer Purnell had holstered both his service pistol, a Glock .40 calibur handgun, and a taser just underneath the pistol.[31] Officer Purnell attempted to subdue Henry with his taser, but mistakenly drew his firearm and aimed it at Henry for "three to five seconds."[32] Officer Purnell fired a single bullet, which struck Henry in the elbow.[33] Henry fell to the ground and Officer Purnell, realizing his mistake, then called an ambulance and assisted with attending to Henry's wound.[34]

In March 2004, Henry sued Officer Purnell under § 1983 in the United States District Court for the District of Maryland, alleging that Officer Purnell had "violated his Fourth Amendment right to be free from seizures effectuated by excessive force."[35] Importantly, over the long course of the lawsuit,[36] Henry stipulated that Officer Purnell did not intentionally shoot him, had meant to draw and fire his taser, and did not realize until after shooting Henry that he had fired his pistol.[37]

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25. Henry v. Purnell, 652 F.3d 524, 527 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 781 (2011).
26. *Id.*
27. *See id.*
28. *Id.*
29. *See id.* at 528.
30. *See id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *See id.*
35. *Id.* Henry also brought state law claims against Officer Purnell. *Id.* These state law claims are not directly relevant to the inquiry of qualified immunity, and therefore, they are not discussed here.
36. Two other rulings of the district court were appealed to the Fourth Circuit in 2005 and 2007. *See* Henry v. Purnell, 501 F.3d 374, 381–82 (4th Cir. 2007) (affirming district court's determination that the firing constituted a "seizure"); Henry v. Purnell, 119 F. App'x 441, 443 (4th Cir. 2005) (dismissing an appeal of the district court's denial of motion for summary judgment).
37. Henry v. Purnell, 619 F.3d 323, 328 (4th Cir. 2010), *rev'd en banc*, 652 F.3d 524 (4th Cir. 2011). This stipulation appears to have been a matter of compromise by Henry during a series of discovery disputes. *See id.* Ultimately, the Fourth Circuit found the sincerity of the officer's mistake to be irrelevant. *See infra* Part III.

In June 2008, the district court concluded that Officer Purnell was entitled to qualified immunity and granted Officer Purnell's motion for summary judgment.[38] A divided panel of the Fourth Circuit affirmed the district court's finding,[39] over a dissent by Judge Gregory.[40] Writing for the majority of the panel, Judge G. Steven Agee was joined by Judge Eugene E. Siler, Jr. of the Sixth Circuit, who was sitting by designation.[41]

In his panel opinion, Agee employed the standard two-step analysis of qualified immunity.[42] Under the first step, Agee concluded that a jury could find that Officer Purnell violated Henry's constitutional rights when he mistakenly fired his Glock, since a jury could determine that his mistake was unreasonable.[43] Agee noted that there remained unresolved issues of material fact regarding the reasonableness of the mistake, including whether a reasonable officer would have noticed the lack of a visible laser sight and thumb lock as he held a pistol instead of a taser.[44]

In the second step of the analysis, however, Agee determined that even if a jury found that Officer Purnell violated Henry's rights, that particular right was not clearly established at the time.[45] The panel therefore granted Officer Purnell qualified immunity.[46]

Agee reasoned that, under step two, the issue was whether an officer in this "'specific context' would know that an act of weapon confusion of the firearm for the taser was 'clearly established' as an excessive use of force under the Fourth Amendment."[47] Importantly, Agee found no case that would give Officer Purnell notice that confusing his firearm for his taser would have violated Henry's constitutional rights.[48] To the contrary, Agee noted a similar decision from the United States District Court for the Eastern District of California, *Torres v. City of Madera* (discussed below), which held that an officer was not on notice that her mistaken use of her service pistol would violate the suspect's rights.[49] Thus, concluded Agee, at the time of Officer Purnell's firing of his pistol, no case law gave him guidance on what would make his mistake

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38. *See Henry*, 652 F.3d at 530 (citing Henry v. Purnell, 559 F.Supp. 2d 648 (D.Md. 2008), *aff'd in part*, *rev'd in part*, 619 F.3d 323 (4th Cir. 2010), *rev'd en banc*, 652 F.3d 524 (4th Cir. 2011)).

39. *Henry*, 619 F.3d at 342.

40. *Id.* at 342 (Gregory, J., dissenting).

41. *Id.* at 326 (majority opinion).

42. *Id.* at 332–41.

43. *See id.* at 333–34.

44. *See id.* at 333.

45. *See id.* at 339.

46. *Id.* at 340.

47. *Id.* at 339.

48. *See id.*

49. *See id.* (quoting Torres v. City of Madera, 655 F. Supp. 2d 1109, 1125 (E.D.Cal. 2009), *rev'd*, 648 F.3d 1119 (9th Cir. 2011), *cert. denied*, No. 11-567, 2012 WL 33348 (U.S. Jan. 9, 2012)).

unreasonable.[50] Accordingly, Agee concluded that "we can say that Purnell lacked 'fair notice' regarding the potential unlawfulness of his actions," and therefore, he was entitled to qualified immunity.[51]

Agee's analysis depended on the level at which he defined the right in question. Agee posited the specific context of the case as "where a police officer, who would have acted reasonably in using the taser to apprehend Henry, draws his firearm by mistake and unintentionally shoots Henry instead."[52] In other words, Agee's inquiry was whether an officer in that situation would know that making a mistake over which weapon he was using, no matter whether it was reasonable or not, would violate the suspect's constitutional rights. Because no previous case had held that an officer's weapon confusion would violate the Fourth Amendment, the officer was not on notice of the potential for a constitutional violation in that specific context, so the officer was entitled to qualified immunity. In Agee's words: "Put simply, context matters."[53]

Judge Gregory wrote a spirited dissent in which he argued that the majority had impermissibly analyzed the propriety of the officer's *mistake*, instead of focusing on the propriety of the officer's objective conduct.[54]

III. EN BANC OPINION: THE IMPORTANCE OF ONE'S PERSPECTIVE ON THE FACTS AND ON THE LAW

Judge Gregory eventually carried the day. The Fourth Circuit granted a rehearing en banc, and when it reversed the panel's decision and denied qualified immunity to Officer Purnell, Judge Gregory penned the new majority opinion.[55] The reasoning of Gregory's majority opinion mirrored the reasoning of his panel dissent. Judge Shedd wrote a dissenting opinion, which was joined by Judge Niemeyer and also by Judge Agee[56]—although Shedd's dissent took a markedly different approach than did Judge Agee's initial panel opinion. Judge Niemeyer also authored a separate dissent.[57]

Gregory's majority opinion in *Henry* is notable for its specific holding and for its approach to the factual and legal issues of qualified immunity. In one respect, Gregory's opinion was driven by his view of the facts and his emphasis on the particular facts of the situation known to Officer Purnell. Gregory focused on the objective circumstances and emphasized that "an officer's subjective intent or beliefs play no role."[58] Gregory also emphasized that, under

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50. *See id.*
51. *See id.* at 340 (quoting Hope v. Pelzer, 536 U.S. 730, 739 (2002)).
52. *Id.* at 338.
53. *Id.* at 337.
54. *See id.* at 342 (Gregory, J., dissenting).
55. *See* Henry v. Purnell, 652 F.3d 524 (4th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 781 (2011).
56. *Id.* at 542 (Shedd, J., dissenting).
57. *Id.* at 553 (Niemeyer, J., dissenting).
58. *Id.* at 535 (majority opinion).

all of the background information known to Officer Purnell, Purnell "had no reason to believe [that Henry] was a threat."[59] Gregory argued that under the objective facts, viewed in the light most favorable to Henry, Officer Purnell was merely serving an 11-day-old warrant for misdemeanor failure to pay child support, he knew the location of Henry's residence and wife, and he had no basis to believe that Henry might be armed.[60] Shooting a suspect under such circumstances, Gregory reasoned, is unreasonable and violated Henry's constitutional rights.[61]

Moreover, the fact that Officer Purnell made a sincere mistake did not change Gregory's analysis because Gregory reasoned that Henry could prove that Officer Purnell's mistake was unreasonable.[62] Gregory concluded that a reasonable officer would have noticed the heavier weight of the firearm and the absence of a thumb safety.[63] Gregory again focused on what a reasonable officer would have perceived, rather than dwelling on the particular experience of Henry.[64]

Or, at the very least, reasoned Gregory, a reasonable officer, knowing all of the background facts, would have concluded that he had the time to check his weapon choice: "There was no evidence indicating that Purnell did not have the split-second he would have needed to at least glance at the weapon he was holding to verify that it was indeed his Taser and not his Glock."[65] Notably, in dismissing Officer Purnell's mistake as unreasonable, Gregory implied that Officer Purnell's subjective intentions are relevant, at least to the extent that they suggest that he made a mistake, and that a *reasonable* mistake in using the firearm would not violate Henry's rights in the first place.[66]

But in another respect, Gregory's opinion was driven not merely by his view of the facts, but also by his preliminary definition of the right in question. Whereas Agee had defined the issue as the *mistake* of using a firearm instead of a taser,[67] Gregory defined the issue as the *shooting* of a "fleeing, nonthreatening,

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59. *Id.* at 532.

60. *See id.* at 532.

61. *See id.* at 531–32 (citing Tennessee v. Garner, 471 U.S. 1, 3 (1985)).

62. *See id.* at 532.

63. *Id.* at 533.

64. *See, e.g.*, *id.* at 533 n.10 ("Purnell claims that the firearm he previously carried . . . had a thumb safety. He claims that . . . with his Glock . . . he still made the same instinctive thumb motion that he used to make with his prior weapon. For that reason, he maintains that it was reasonable for him not to notice the lack of a thumb safety on his Glock. However, . . . a reasonable officer would have noticed that he was not pushing anything with his thumb when he made that motion.").

65. *Id.* at 533.

66. In his dissent, discussed below, Judge Shedd points out this contradiction in Gregory's reasoning. As one considers the reasonableness of Officer Purnell's mistake, one must consider his subjective intention, in that one must consider that Officer Purnell intended an outcome other than what occurred. *Id.* at 549 n.9 (Shedd, J., dissenting).

67. Henry v. Purnell, 619 F.3d 323, 338 (4th Cir. 2010), *rev'd en banc*, 652 F.3d 524 (4th Cir. 2011).

suspected misdemeanant."[68] And, Gregory's definition of the right in question determined his answer at step two of his qualified immunity analysis. At step two of the qualified immunity analysis, Gregory summarily concluded that "[u]nder prong two, it would have been clear to a reasonable officer that shooting a fleeing, nonthreatening misdemeanant with a firearm was unlawful. This basic legal principle had been established by the Supreme Court years earlier . . . ."[69]

Judge Shedd wrote a dissenting opinion, in which he argued that the officer should have been entitled to qualified immunity. But Shedd's reasoning departed from that of Agee's initial panel opinion. Whereas Agee had held under step one that Henry could establish a constitutional violation, but that such a violation was not clearly established under step two,[70] Shedd did not reach step two.[71] Instead, Shedd concluded under step one that Officer Purnell's conduct was entirely reasonable, and therefore, it did not violate a constitutional right under step one.[72] There was, therefore, no need to progress to step two.[73]

Shedd's opinion is also notable for its distinct approach to both the facts and the law. As for the facts, Shedd squarely joined issue with Gregory. Gregory had focused on the background facts, such as the nature of the warrant, which would have led a reasonable officer to conclude that the flight was not an exigent circumstance.[74] However, Shedd focused not on the general background information known by Purnell, but rather on the specific facts of the encounter itself, which he called "tense and potentially dangerous."[75] Rather than discuss the background, Shedd noted that Officer Purnell attempted to arrest Henry, which was a presumptively dangerous action, and that Henry then fled, running towards his house, with bystanders present, all before Officer Purnell had a chance to search him for weapons.[76] Shedd focused on the specific facts of the encounter itself and reasoned that the encounter was sufficiently dangerous that it was reasonable for Officer Purnell to focus on the suspect and not realize his mistake.[77]

Shedd was principally concerned that the majority set a dangerous precedent of "inappropriate second-guessing" of an officer's judgment during an arrest and flight from arrest.[78] For Shedd, such second-guessing puts officers and bystanders at risk:

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68. *Henry*, 652 F.3d at 534.
69. *Id.* at 534.
70. *Henry*, 619 F.3d at 333–34.
71. *See Henry*, 652 F.3d at 543 n.2 (Shedd, J., dissenting).
72. *Id.* at 543.
73. *See id.*
74. *See Henry*, 619 F.3d at 326–28.
75. *Henry*, 652 F.3d at 549 (Shedd, J., dissenting).
76. *See id.* at 544, 551, 553.
77. *See id.* at 549, 551.
78. *Id.* at 551.

> Purnell did not have the luxury of [the] knowledge [that Henry was unarmed] in the rapidly evolving situation, and he did what officers are trained to do: he focused on the fleeing suspect, who could have turned with a weapon at any moment, in order to protect himself and any innocent bystanders. The majority's belief that the deputy should have taken a "split-second" to focus his attention away from Henry might be fine in a perfect world, but in the real world it is those split-seconds during which law enforcement officers (and bystanders) are wounded or killed.[79]

Shedd was also deferential to Officer Purnell, as shown by his willingness to incorporate the individual beliefs and perceptions of Officer Purnell into his analysis of what a reasonable officer would have known at the time.[80] In the majority opinion, Gregory was adamant that the individual beliefs of Officer Purnell were irrelevant; what mattered were the objective facts as a reasonable officer would have perceived them.[81] Shedd similarly recognized that the key analysis focused on the objective facts, but he felt free to incorporate the individual perceptions of Officer Purnell regarding the potential dangerousness of Henry, at least to set the context for what an officer in Officer Purnell's position would have perceived.[82] Indeed, Shedd even quoted at some length the deposition testimony of Officer Purnell.[83] For Shedd, such a consideration is natural because qualified immunity cases require that the court "consider the facts and circumstances *as the officer perceived them* and then apply an objective standard over those facts to determine whether the officer's mistake was reasonable," while "avoid[ing] the temptation to second-guess the officer's actions."[84]

Shedd's dissent also differed from the majority opinion in its approach to the right in question. Whereas Gregory defined the right in terms of the objective circumstances of shooting a fleeing suspect,[85] Shedd framed the right in terms of Officer Purnell's mistake.[86] While Shedd did not find it necessary to formally address step two,[87] he nevertheless echoed Agee's panel opinion, reasoning that "this case is not about the reasonableness of Deputy Purnell's use of deadly force. It is about the reasonableness of his stipulated mistake in attempting to use what he believed to be a Taser."[88] Recall that Gregory defined the right in question as the constitutionality of *shooting* a fleeing, nonthreatening suspect,

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79. *Id.* at 551 (footnote omitted).
80. *See id.* at 544.
81. *See id.* at 534 (majority opinion) (citing Graham v. Connor, 490 U.S. 386, 397 (1989)).
82. *See id.* at 544 (Shedd, J., dissenting).
83. *See id.*
84. *Id.* at 547–48 (emphasis added).
85. *See supra* text accompanying note 68.
86. *See Henry*, 652 F.3d at 553 (Shedd, J., dissenting).
87. *Id.* at 543 n.2.
88. *Id.* at 549 n.10.

which made obvious the result that Officer Purnell was on notice that such conduct was improper. But for Shedd, like for Agee in the panel opinion, the right at issue was the constitutionality of an officer's *mistake* in that situation; defining the right as a mistake made it less likely that the court would find that such a right was clearly established.

In a separate and provocative dissent, Judge Niemeyer drew attention to the stipulated fact that Officer Purnell had made a sincere mistake and called into question the appropriateness of applying traditional qualified immunity analysis in the present case. Niemeyer noted that "qualified immunity analysis is meant to determine whether a reasonable officer in the defendant's shoes should have known that his conduct was unlawful."[89] But, under this standard, reasoned Niemeyer, "an officer who makes an honest [i.e.,—sincere—] mistake will always receive qualified immunity because he can never be on notice that his conduct is unlawful."[90] Niemeyer argued that the court's refusal to consider the stipulated mistake transformed the complex analysis under qualified immunity to a basic torts analysis in which an officer is liable for negligence.[91]

Niemeyer's dissent draws out the tension between qualified immunity analysis, which ignores subjective intent and focuses only on objective circumstances, and the fundamental inquiry of clearly established law under qualified immunity, which seeks to punish officers only for breaching some boundary that they knew about before they acted. As Niemeyer noted, "[i]nherently, a mistake is not known or understood beforehand so as to enable an officer to have the understanding or belief about whether it would violate clearly established law."[92]

While this tension certainly exists and may be worthy of note, settled law of qualified immunity does not address an officer's intentions,[93] and for good reason. Qualified immunity regularly addresses mistakes made by officers, and if a sincere mistake by an officer granted him immunity, then officers would have an ironic disincentive to pay attention, either during their training or in the field. Even Shedd refused to dwell on the sincerity of Officer Purnell's mistake; he instead focused only on the fact that, in his view, the mistake was "objectively reasonable" in light of the circumstances.[94]

Ultimately, Niemeyer's dissent does raise a challenging question about qualified immunity in the case of sincere mistakes, but it is not likely to affect the doctrine. Of more importance in this case are the shades of gray between the opinions of Gregory, Shedd, and Agee, who each approached the facts and the law from slightly different perspectives, and thus reached markedly different results.

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89. *Id.* at 555 (Niemeyer, J., dissenting).
90. *Id.*
91. *See id.* at 555–56.
92. *Id.* at 556.
93. *See supra* Part I.
94. *Henry*, 652 F.3d at 549 & n.9 (Shedd, J., dissenting).

IV. SUMMARY AND CONCLUSION

In conclusion, *Henry v. Purnell* is important for both its specific holding and for the implications of the reasoning by which its judges reached their various conclusions. Specifically, the Fourth Circuit has now held that an officer who unreasonably mistakes his firearm for his taser is on notice that such a mistake would violate the suspect's constitutional rights. Such a holding is especially important for purposes of qualified immunity in that following *Henry*, an officer would not automatically be entitled to qualified immunity in the face of such a mistake. Recall that in his panel opinion, Agee had reasoned that an officer would not be on notice that a mistake of a firearm for a taser would be unconstitutional;[95] following the en banc holding, no judge could maintain such a position.

Interestingly, while Agee followed the reasoning of the California district court in *Torres*, that case has since also been reversed on appeal.[96] In *Torres*, a suspect was handcuffed in the back of a police car and became violent, and an officer outside the police car decided to enter the car and use a taser to subdue him.[97] But the officer mistook her firearm for her taser, and when she entered the police car and approached the suspect, she shot the suspect at close range, fatally wounding him.[98] The district court granted the officer qualified immunity, reasoning, like Agee later did in *Henry*,[99] that the officer lacked fair warning of what circumstances would have made her mistake unreasonable.[100] But, following the en banc reversal in *Henry*, the Ninth Circuit reversed *Torres* and cited *Henry* as persuasive precedent.[101] And in reversing the district court, the Ninth Circuit in *Torres* mirrored Gregory's reasoning in *Henry*.[102] Under step two of the analysis of qualified immunity, the Ninth Circuit analyzed the right in question based on the actual conduct of the officer and whether an officer would know whether it was unconstitutional to *shoot* a handcuffed suspect in that situation, instead of analyzing whether an officer would know whether weapon confusion would be unconstitutional.[103]

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95. *See* Henry v. Purnell, 619 F.3d 323, 339 (4th Cir. 2010), *rev'd en banc*, 652 F.3d 524 (4th Cir. 2011).

96. *Supra* note 49.

97. Torres v. City of Madera, 648 F.3d 1119, 1121 (9th Cir. 2011), *cert. denied*, No. 11-567, 2012 WL 33348 (U.S. Jan. 9, 2012).

98. *Id.*

99. *See supra* text accompanying notes 47–53.

100. *Torres*, 648 F.3d at 1123.

101. *See id.* at 1120 (citing Henry v. Purnell, 652 F.3d 524 (4th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 781 (2011)) (noting that its holding is "[c]onsistent with" the en banc holding from *Henry v. Purnell*).

102. *See* Henry v. Purnell, 619 F.3d 323, 345 (4th Cir. 2010) (Gregory, J., dissenting), *rev'd en banc*, 652 F.3d 524 (4th Cir. 2011).

103. *See Torres*, 648 F.3d at 1124, 1127.

In an ironic twist, Judge Siler of the Sixth Circuit, who sat by designation on the Fourth Circuit panel in *Henry*, and who joined Agee's opinion *granting* Officer Purnell qualified immunity, was also sitting by designation on the Ninth Circuit panel that reversed *Torres* and *denied* that officer qualified immunity.[104] In a concurrence in the panel opinion in *Torres*, Siler explained his seemingly contradictory positions; not surprisingly, his explanation was based in part on the facts and in part on the law. As for the facts, reasoned Siler, Officer Purnell was in an exigent situation where his decision was forced and he made a reasonable mistake, whereas the officer in *Torres*, in his opinion, had no need to rush, and her mistake was unreasonable.[105] And, as for the law, Siler noted that, from his perspective, the Ninth Circuit had already held that an officer's mistaken use of force, in cases based on a mistake of identity, could be a violation of the Fourth Amendment, and that such cases put the officer on notice that her weapon confusion could violate the suspect's constitutional rights.[106]

Based on Gregory's analysis of Officer Purnell's conduct under step two, and viewed in light of the Ninth Circuit's similar analysis under step two, *Henry v. Purnell* lays the precedent for the Fourth Circuit's future treatment of such officers. In future cases of a mistaken use of force, the Fourth Circuit will analyze the officer's conduct at step two based on what actually occurred, with no consideration of the officer's mistake and intention.

However, it is not certain that an officer's mistake will be of no consequence to step two of the analysis. The fact that the court concluded that Officer Purnell's mistake was unreasonable, as opposed to concluding that the mistake was irrelevant, leaves open the question of under what circumstances an officer's mistake would be unreasonable and, therefore, clearly established as unconstitutional. In other words, an officer in the future may not be on notice of the precise circumstances under which he is constitutionally required to take "the split-second . . . to at least glance at the weapon he was holding to verify that it was indeed his Taser."[107] If that question is unanswered, the court might still rule that, under different circumstances, an officer who makes an unreasonable mistake, as Officer Purnell did, might still not necessarily be on notice that such a mistake would have been unreasonable. Yet, it is in doubt whether such a concern will materialize; formally, that inquiry would come at step two, where the court in *Henry* seemed inclined only to focus on the objective effect of Officer Purnell's conduct and to give no thought to the fact of his mistake.[108]

More generally, *Henry* highlights the ways in which the perspective of the analysis makes all the difference. In evaluating what an officer would have

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104. *See id.* at 1120, 1129–30; *see id.* at 1130 (Siler, J., concurring).

105. *See id.* at 1130 (Siler, J., concurring).

106. *See id.* (citing Wilkins v. City of Oakland, 350 F.3d 949, 955 (9th Cir. 2003); Jensen v. City of Oxnard, 145 F.3d 1078, 1086 (9th Cir. 1998)).

107. *See* Henry v. Purnell, 652 F.3d 524, 533 (4th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 781 (2011).

108. *See id.* at 534.

perceived at the time, the court focused only on what a reasonable officer would have perceived and gave little or no consideration to Officer Purnell's perception.[109] Shedd's dissenting opinion, by contrast, openly considered those factors, and even quoted Officer Purnell's deposition transcript for support that he perceived the situation as dangerous.[110]

Further, the opinion in *Henry* suggests that the Fourth Circuit might be willing to second-guess an officer's decision in a tense situation. Shedd warned that the court's analysis engaged in "inappropriate second-guessing" of the officer's conduct, and that the court did a disservice to officers by looking over their shoulders in the "tense and potentially dangerous" context of an arrest and chase of a suspect who had not been searched.[111] To that extent, the court's opinion also suggests a move by the Fourth Circuit to give less weight to particular and specific facts of the encounter, such as the bare fact of an arrest and fleeing suspect. Shedd focused only on the facts of the encounter: he would likely have ruled that an arrest, and a subsequent flight from arrest, near a suspect's home and before the suspect had been searched, created a sufficiently tense and dangerous situation that would excuse an officer's mistake. But the court in *Henry* held that even in such a situation, the officer must also consider the background facts known to him, such as the nature of the warrant and whether the officer has any particular reason to believe that the suspect might be armed or might be looking for a weapon. The court concluded that an arrest of a suspect for a misdemeanor nonviolent crime would not give rise to any presumption of a dangerous encounter.[112]

And finally, *Henry v. Purnell* again demonstrates the central importance of the "altitude" at which a given right is defined for purposes of qualified immunity. In Agee's panel opinion, the right at issue was defined narrowly, as the constitutionality of an officer's mistaken use of a firearm instead of a taser.[113] Because Agee could find no cases that specifically held that such a mistake would violate the Constitution, he was obligated to grant qualified immunity for Officer Purnell.[114] But, Gregory's en banc opinion defined the right far more broadly, as the constitutionality of *shooting* a fleeing suspect who posed no threat.[115] From that perspective, Officer Purnell's conduct did violate clearly established law.[116]

Henry v. Purnell is thus a case study of the various issues at play in qualified immunity analysis. Specifically, this case determined that in the Fourth Circuit,

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109. *See id.*

110. *See id.* at 544 (Shedd, J., dissenting).

111. *Id.* at 549, 551.

112. *See id.* at 534 (majority opinion).

113. *See* Henry v. Purnell, 619 F.3d 323, 338–39 (4th Cir. 2010), *rev'd en banc*, 652 F.3d 524 (4th Cir. 2011).

114. *See id.* at 339.

115. *See Henry*, 652 F.3d at 533.

116. *Id.* at 536.

an officer is not entitled to qualified immunity for even a sincere mistake in use of force, although it left unanswered the issue of what makes an officer's mistake reasonable, and perhaps, whether such a consideration would even be relevant for purposes of qualified immunity in the future. But, more broadly, it demonstrated the importance of one's perspective on the particular facts and law in evaluating the officer's conduct. Moreover, and finally, it demonstrated that the definition of the right makes all the difference, and so long as courts are still left with wide discretion over the way in which that right is framed, the definition of that right can often dictate the result. To quote Judge Agee: "Put simply, context matters."[117]

117. *Henry*, 619 F.3d at 337.