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Article

QUALIFIED IMMUNITY FOR OFFICERS' REASONABLE RELIANCE ON LAWYERS' ADVICE

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ABSTRACT—An officer is entitled to qualified immunity when a reasonable officer would not have known that her conduct violated clearly established law. Courts disagree over whether and how an officer's receipt of legal advice before acting supports the qualified immunity defense by showing that, based on the advice, a reasonable officer would have thought that her conduct would not violate clearly established law. This Article argues that legal advice should support the qualified immunity defense. It argues that when an officer asserts reliance on legal advice as supporting qualified immunity, a court should consider whether in the circumstances the officer was reasonable to rely on that legal advice, rather than analyzing the issue under a narrow "extraordinary circumstances" exception. It further proposes a detailed framework for assessing reasonableness, based on a synthesis of various circuits' divergent approaches to this specific question, the Supreme Court's evolving approach to qualified immunity, and the policies that drive the qualified immunity doctrine. This detailed framework for a searching reasonableness analysis is the best way to balance the imposition of liability for officers who violate clear law against the recognition that often the best course for a reasonable officer will be to seek and rely on a legal opinion about a difficult legal question.

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Do you think it is at all pertinent . . . that the officers submitted the affidavit to support the warrant to Deputy District Attorney Jane Wilson, who reviewed it and signed off on it? . . . Is it relevant in any way?

—Chief Justice John Roberts[†]

INTRODUCTION

A sheriff in North Dakota fires one of his deputies for opposing his reelection, but only after seeking advice from the county attorney and being told the termination would be legal.[1] The fired deputy then sues the sheriff

[†] Transcript of Oral Argument at 41, Messerschmidt v. Millender, 132 S. Ct. 1235 (2012) (No. 10-704) [hereinafter *Messerschmidt* Transcript].

[1] Nord v. Walsh County, 757 F.3d 734, 737–38 (8th Cir. 2014).

under 42 U.S.C. § 1983 for violating his First and Fourteenth Amendment rights, and the sheriff asserts the defense of qualified immunity.[2] At summary judgment, the court must decide whether the sheriff violated clearly established law based on a complex analysis of the interaction between state employment law and the Supreme Court's *Pickering*[3]–*Connick*[4] balancing test for the protection of public employee speech. In performing this analysis, the court must also consider whether and how the sheriff's qualified immunity defense is supported by the county attorney's legal advice.[5]

During a traffic stop in Carlisle, Pennsylvania, a police officer notices the car's passenger is videotaping him.[6] Believing that the taping violates the state's Wiretap Act[7] because the passenger was recording surreptitiously, the officer takes the passenger's camera back to his unit and calls an assistant district attorney, who reviews the statute and tells the officer that the state Wiretap Act does prohibit the passenger's conduct.[8] The officer then arrests the passenger; the charges are eventually dropped, but the prosecutor writes a memo stating the officer had probable cause for the seizure and arrest.[9] The passenger then sues the officer under 42 U.S.C. § 1983 for violating his First and Fourth Amendment rights. At summary judgment, the court must decide not only whether the officer's conduct violated clearly established constitutional law, but also whether and how the assistant district attorney's legal advice supports the police officer's qualified immunity defense.[10]

In these cases, and most close cases under § 1983, whether the government officer[11] will be liable depends on whether a court accepts the officer's qualified immunity defense. Qualified immunity immunizes an officer from liability and suit unless the officer's conduct violated clearly

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[2] *Id.*

[3] Pickering v. Bd. of Educ., 391 U.S. 563, 569–73 (1968).

[4] Connick v. Myers, 461 U.S. 138, 142 (1983).

[5] *See Nord*, 757 F.3d at 743 (citing Stanton v. Sims, 134 S.Ct. 3, 5 (2011) ("[Because of] the advice given by the Walsh County attorney . . ., Sheriff Wild could have logically and rationally believed that his decision to terminate Nord was well within the breathing room accorded him as a public official in making a reasonable, even if mistaken, judgment under the circumstances.").

[6] Kelly v. Borough of Carlisle (*Kelly I*), 622 F.3d 248, 251 (3d Cir. 2010). [Editor's Note: The *Kelly* cases cited in this Article have been numbered according to the Third Circuit's designations for ease of reference.]

[7] Pennsylvania Wiretapping and Electronic Surveillance Control Act (Wiretap Act), 18 PA. CONS. STAT. §§ 5701–82 (2014).

[8] *Kelly I*, 622 F.3d at 251–52.

[9] *Id.* at 252.

[10] *See id.* at 254–55.

[11] This Article uses "officer" to refer to any state or local government official or employee.

established law of which an objectively reasonable officer would have known.[12] The question presented by these two example cases, and scores of other cases litigated in the federal courts, is whether and when an officer can support her qualified immunity defense by arguing that she reasonably relied on legal advice that her planned conduct would be lawful.

This Article argues that legal advice should support an officer's qualified immunity defense when the officer can show that an objectively reasonable officer would have relied on the lawyer's advice to conclude that her intended conduct would not violate clearly established constitutional law, and thus trigger § 1983.[13] This Article also proposes a specific framework for evaluating when an officer reasonably relied on legal advice, such that qualified immunity should follow.

Part I gives general background on § 1983 litigation and more detailed background on qualified immunity doctrine, examining the evolution of qualified immunity doctrine and the circuits' divergence and confusion about how the doctrine applies. Against this background and in the context of the circuits' broader difficulties in applying qualified immunity, Part II examines courts' and scholars' division over the lawyers' advice issue. The federal circuits are split over whether and how to weigh lawyers' advice in qualified immunity analysis.[14] Most circuits consider legal advice relevant, but a few suggest it is not.[15] Courts that do consider legal advice relevant weigh it along a spectrum. Some consider it relevant to the basic qualified immunity inquiry into whether a reasonable officer in the circumstances would have known her conduct would violate clearly established law.[16] Others, however, consider legal advice only as a potential "extraordinary circumstance," an exception that can establish immunity only in rare cases.[17] Finally, courts who consider legal advice assign it varying weight in the analysis: some give it very little weight, some consider it a factor in a

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[12] Pearson v. Callahan, 555 U.S. 223, 231 (2009).

[13] *See, e.g.*, Cox v. Hainey, 391 F.3d 25, 35 (1st Cir. 2004).

[14] Research for this Article has identified at least sixty published circuit court opinions considering the question in some way (data on file with the *Northwestern University Law Review*). *See infra* Section II.B. and Table 1; *see also* MICHAEL AVERY ET AL., POLICE MISCONDUCT: LAW AND LITIGATION § 3:9, at 331 n.8 (3d ed. 2014) ("The courts are divided on the question of whether and under what circumstances the advice of counsel can establish extraordinary circumstances."); MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION CLAIMS AND DEFENSES § 9A.05[C] (2015), Westlaw SNETLCD (cataloging some circuit cases and their distinct approaches).

[15] *See, e.g.*, *In re* County of Erie, 546 F.3d 222, 229 (2d Cir. 2008) ("[R]eliance upon advice of counsel . . . cannot be used to support the defense of qualified immunity.").

[16] *See, e.g.*, *Cox*, 391 F.3d at 35.

[17] *See, e.g.*, V–1 Oil Co. v. Wyo., Dep't of Envtl. Quality, 902 F.2d 1482, 1488 (10th Cir. 1990); Watertown Equip. Co. v. Norwest Bank Watertown, 830 F.2d 1487, 1495 (8th Cir. 1987).

"totality of the circumstances" approach,[18] others say it "goes far to establish immunity,"[19] and one court concludes that lawyers' advice presumptively entitles the officer to immunity.[20]

As also discussed in Part II, the Supreme Court has not yet specified how to figure legal advice into qualified immunity analysis, but it has suggested that it is "pertinent."[21] In *Messerschmidt v. Millender*,[22] in 2012, the Court held that in the Fourth Amendment warrant search context, an attorney's approval "provides further support" for the officer's qualified immunity defense.[23] The Court did not address, however, where legal advice fits into the doctrinal framework, how much weight it should carry, or how to analyze when reliance on legal advice is reasonable. Finally, while scholars have identified the disagreement over how lawyers' advice affects qualified immunity analysis, there has not yet been a proposal for a comprehensive solution. Further, those solutions that have been offered have assumed (contrary to the arguments in this Article) that lawyers' advice must be analyzed under *Harlow*'s "extraordinary circumstances"[24] exception. This Article proposes a systematic, detailed approach for analyzing this issue based on an analysis of all the circuit cases, consideration of how the issue fits within the Supreme Court's modern qualified immunity test, and the guidance of *Messerschmidt*.

In Part III, the Article argues that legal advice should be relevant to the qualified immunity defense, and that when an officer invokes legal advice to support her qualified immunity defense, a court should consider whether in the circumstances the officer was reasonable to rely on that legal advice, rather than analyzing the issue under an extraordinary circumstances exception. This approach is most consistent with the Court's modern qualified immunity doctrine because the Court has discarded the extraordinary circumstances approach, and instead has focused qualified immunity analysis on the reasonableness of the officer's conduct in light of established law and the circumstances of the particular case. This approach

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[18] *See, e.g.*, *Cox*, 391 F.3d at 35.

[19] *See, e.g.*, Fleming v. Livingston County, 674 F.3d 874, 881 (7th Cir. 2012) (quoting Kijonka v. Seitzinger, 363 F.3d 645, 648 (7th Cir. 2004)); Ewing v. City of Stockton, 588 F.3d 1218, 1231 (9th Cir. 2009) (same); Frye v. Kan. City Mo. Police Dep't, 375 F.3d 786, 792 (8th Cir. 2004) (same).

[20] *Kelly I*, 622 F.3d 248, 255–56 (3d Cir. 2010).

[21] Messerschmidt v. Millender, 132 S. Ct. 1235, 1250 (2012).

[22] *Id.*

[23] *Id.* at 1249. Justices Kagan, Sotomayor, and Ginsburg all disagreed with this part of the Court's decision. *See id.* at 1252 (Kagan, J., concurring in part and dissenting in part); *id.* at 1259–60 (Sotomayor, J., dissenting). Justice Breyer expressed no view on it. *See id.* at 1251 (Breyer, J., concurring).

[24] Harlow v. Fitzgerald, 457 U.S 800, 819 (1982).

also better balances the policy of deterring official misconduct against that of preventing overdeterrence and unfairness to officers. It strikes a middle ground between an extraordinary circumstances approach, which ignores that often officers will be reasonable to trust a legal expert's opinion over their own, and a presumption of immunity approach, which could give officers bad incentives to misuse lawyers' advice as a shield to push the boundaries of the law.[25] This reasonableness approach thus incentivizes officers to seek balanced legal advice on difficult problems[26] by offering protection if they seek advice—but only when the officers are forthright, the circumstances make it reasonable to rely, and the officer actually follows the advice.

To effect this desired balance between overdeterrence or unfairness and appropriate deterrence of misconduct, in Part IV the Article proposes a specific framework for evaluating reasonableness based on a synthesis of the circuits' divergent approaches. Under this framework, a court should first determine whether the officer gave the attorney all the relevant facts, whether the attorney actually advised the officer that the conduct would be constitutional, and whether the officer actually followed the lawyer's advice. If not, the legal advice should not support immunity. Further, the officer should bear the burden of proof on these questions. If these threshold requirements are met, the court should then balance several factors to decide whether an objectively reasonable officer would have relied on the lawyer's advice. These include (1) whether the advice was specific and detailed, (2) whether the lawyer had authority and expertise to give the advice, (3) the extent to which the lawyer was independent from the officer, (4) whether the issue presented would be difficult or novel for an officer in the defendant's position, and (5) the closeness of the underlying question of whether the law was clearly established.

This proposed framework of threshold questions and balancing factors is designed to identify cases in which reliance on legal advice would have been reasonable, based on factors already recognized as relevant in the decisions of circuit courts. In addition, the proposed approach is also broadly consistent with common law on the advice-of-counsel defense, which coheres with the Supreme Court's general approach of consulting

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[25] *See, e.g.*, *Messerschmidt*, 132 S. Ct. at 1252 (Kagan, J., concurring in part and dissenting in part) ("To make their views relevant is to enable those teammates [prosecutors and police officers] (whether acting in good or bad faith) to confer immunity on each other for unreasonable conduct . . . .").

[26] *See, e.g.*, *Kelly I*, 622 F.3d at 255 (noting the desirability of a rule that encourages officers to seek advice on difficult questions); *Messerschmidt* Transcript *supra* note †, at 43 (Chief Justice Roberts asking whether the rule should encourage officers to seek legal advice).

(but not mimicking) common law rules in crafting qualified immunity doctrine under § 1983.[27]

The Conclusion summarizes the Article's main argument, and also argues that if the Court takes up the question of how to figure lawyers' advice into qualified immunity analysis, it should clarify the doctrine by dispensing with the vestigial extraordinary circumstances exception and explaining the proper interaction of reasonableness and circumstance in the qualified immunity analysis.

I. SECTION 1983 AND THE QUALIFIED IMMUNITY DEFENSE

Section 1983 allows a private individual to sue state and local government officials, as well as local governments, for officials' violations of the plaintiff's federal constitutional rights under color of state law.[28] Section 1983 suits are, and for decades have been, the primary vehicle for private enforcement of federal constitutional rights against state and local officials and governments.[29] Qualified immunity is a defense available to individual government officers sued under 42 U.S.C. § 1983.[30] This Part reviews the § 1983 doctrine generally, and then explains in detail the origins, current doctrine, and policy underpinnings of qualified immunity.

A. Section 1983 Liability and Defenses

Section 1983 was originally enacted after the Civil War as part of the Civil Rights Act of 1871.[31] It imposes civil liability on "person[s]" who deprive others of constitutional or statutory rights "under color of" law.[32]

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[27] *See, e.g.*, Filarsky v. Delia, 132 S. Ct. 1657, 1665 (2012) (noting that the Court has interpreted § 1983 in light of common law tort principles of defenses and immunities).

[28] 42 U.S.C. § 1983 (2012). The statute also allows some suits for violations of plaintiffs' federal statutory rights. *E.g.*, Maine v. Thiboutot, 448 U.S. 1, 4 (1980). This Article focuses on constitutional violations as "the most frequently litigated claims" under § 1983. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 728 (1999) (Scalia, J., concurring in part and concurring in the judgment).

[29] Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing* Bivens *After* Minneci, 90 WASH. U. L. REV. 1473, 1502 (2013) (referring to § 1983 as "the principal means of enforcing constitutional rights").

[30] *See, e.g.*, Pierson v. Ray, 386 U.S. 547, 557 (1967) (recognizing for the first time the qualified immunity defense to § 1983 lawsuits).

[31] Enforcement Act of 1871, Pub. L. No. 42-22, 17 Stat. 13 (1871). The law was also known as the Ku Klux Klan Act because its goal was to stop racial terrorism in the South.

[32] 42 U.S.C. § 1983.

For nearly 100 years after its enactment, the statute lay dormant,[33] until in *Monroe v. Pape*[34] the Supreme Court revived it as a meaningful constraint on state and local government officials by holding that § 1983 could be used to sue officials for actions taken under the authority of their office, even when those actions were not required or authorized by state or local law.[35] This holding created modern § 1983 litigation[36] and led to the Court's development of a complex doctrine to govern liability and defenses under the statute.[37]

Monroe, together with the Warren Court's expansion of substantive constitutional rights,[38] led to a proliferation of civil rights suits against state and local officials.[39] Among the many contexts in which § 1983 is used to vindicate civil rights, two in particular are worth mentioning as instances in which the lawyers' advice issue most often arises. Plaintiffs often use the statute to sue for damages arising out of allegedly unconstitutional searches or seizures in violation of the Fourth Amendment.[40] And government employee plaintiffs often use § 1983 to challenge their firings as a violation of their due process rights under the Fourteenth Amendment,[41] their free speech rights under the First Amendment,[42] or both.[43]

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[33] Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 10–17 (1985) (describing the post-Reconstruction disuse and retraction of civil rights laws).

[34] 365 U.S. 167 (1961).

[35] *Id.* at 187 (holding that government officers could be held liable under § 1983 for official conduct even when that conduct was not directed or authorized by state law).

[36] *See* Randolph J. Haines, Note, *Reputation, Stigma and Section 1983: The Lessons of* Paul v. Davis, 30 STAN. L. REV. 191, 191 (1977) (explaining that the "landmark" decision in *Monroe* increased the number of § 1983 suits).

[37] *See* Howard M. Wasserman, *Civil Rights Plaintiffs and John Doe Defendants: A Study in Section 1983 Procedure*, 25 CARDOZO L. REV. 793, 823 (2003) (noting § 1983's "uniquely complicated (one might say Byzantine) liability scheme" (footnote omitted)).

[38] *See* Louise Weinberg, *The* Monroe *Mystery Solved: Beyond the "Unhappy History" Theory of Civil Rights Litigation*, 1991 BYU L. REV. 737, 757.

[39] *See* Wells v. Ward, 470 F.2d 1185, 1189 (10th Cir. 1972) (noting "[t]he proliferation of litigation resulting from the expanded use of § 1983" (quoting Freeman v. Flake, 448 F.2d 258, 261 (10th Cir. 1971))); Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1003 (2002) ("The explosion in litigation under § 1983 is often traced to the Supreme Court's 1961 decision in *Monroe v. Pape* . . . ."); Paul Howard Morris, Note, *The Impact of Constitutional Liability on the Privatization Movement After* Richardson v. McKnight, 52 VAND. L. REV. 489, 499–500 (1999) ("In contrast to the small number of § 1983 cases brought before *Monroe*, by 1977 over 20,000 § 1983 suits were filed per year.").

[40] *E.g.*, Messerschmidt v. Millender, 132 S. Ct. 1235, 1241 (2012) (involving suit against officers for allegedly unlawful search).

[41] *E.g.*, Gilbert v. Homar, 520 U.S. 924, 926 (1997) (involving suspension of a university police officer without a hearing).

[42] *E.g.*, Lane v. Franks, 134 S. Ct. 2369, 2376 (2014) (involving termination of a youth program director for truthful testimony at public corruption trial).

Section 1983 exposes defendant officers to money damages imposed personally against them.[44] Concerns about imposing personal liability on government officers and changes in the Court's composition led the Court to develop immunity doctrines to protect officers.[45] In developing these doctrines, the Court sought to balance the statutory purpose of remedying and deterring constitutional wrongs against the desire not to impede or overdeter officers' performance of their duties through unfair imposition of liability.[46]

The Court has developed two main categories of official immunity—absolute and qualified. Absolute immunity provides total immunity from suit under § 1983 to government officers performing legislative,[47] judicial,[48] and prosecutorial[49] functions, no matter how blatantly unconstitutional their actions.[50] In reading absolute immunity into the statute, as in other aspects of interpreting § 1983, the Court has looked to common law, both as it stood in 1871[51] and as it developed since.[52] Under the Court's functional approach to absolute immunity, immunity depends on the nature of the action, not the officer's job title.[53] Under this "functional approach," for example, prosecutors have absolute immunity for actions taken "in their role as advocates,"[54] but are entitled only to qualified immunity when

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[43] *E.g.*, Melton v. City of Okla. City, 879 F.2d 706, 712 (10th Cir. 1989) (involving due process and free speech claims arising out of the discharge of a police officer for testimony and conduct related to judicial corruption trial).

[44] *See, e.g.*, Carey v. Piphus, 435 U.S. 247, 258 (1978). In most cases, however, government employers indemnify officers for that liability. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 911–13 (2014) (describing an empirical study concluding that essentially all § 1983 judgments and settlements are paid by governments, not officers).

[45] *Cf.* Christopher E. Smith, *The Impact of New Justices: The U.S. Supreme Court and Criminal Justice Policy*, 30 AKRON L. REV. 55, 65 (1996) (tracing how changes in the Court's composition drove changes in jurisprudence).

[46] *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 231 (2009) ("Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.").

[47] Tenney v. Brandhove, 341 U.S. 367, 379 (1951).

[48] Pierson v. Ray, 386 U.S. 547, 554 (1967).

[49] Imbler v. Pachtman, 424 U.S. 409, 427 (1976).

[50] *See, e.g.*, Stump v. Sparkman, 435 U.S. 349, 364 (1978) (holding that a judge was entitled to absolute immunity even though the judge ordered unconsented sterilization of a minor).

[51] Filarsky v. Delia, 132 S. Ct. 1657, 1662 (2012) (stating that the Court begins by looking to "the common law as it existed when Congress passed § 1983 in 1871" (citing Tower v. Glover, 467 U.S. 914, 920 (1984)).

[52] *See, e.g.*, Rehberg v. Paulk, 132 S. Ct. 1497, 1502 (2012); Kalina v. Fletcher, 522 U.S. 118, 123 (1997); Owen v. City of Independence, 445 U.S. 622, 637 (1980).

[53] *See, e.g.*, *Rehberg*, 132 S. Ct. at 1503; Forrester v. White, 484 U.S. 219, 224 (1988).

[54] *Rehberg*, 132 S. Ct. at 1503.

performing nonprosecutorial functions,[55] such as giving officers legal advice about the legality of a planned search.[56]

The other sort of officer immunity, qualified immunity, is more limited and applies to protect the officer only when the officer acts reasonably.[57] Though qualified immunity is less than absolute, it is still quite robust, protecting "all but the plainly incompetent or those who knowingly violate the law,"[58] and the trend over time has been towards making it stronger.[59] Most of this Article is about qualified immunity, but before focusing on qualified immunity doctrine, it is helpful to briefly note two other points that support this Article's arguments for considering lawyers' advice as relevant to qualified immunity analysis.

One is that the Court has held that § 1983 allows suits against local and municipal government entities, as well as individual officers.[60] Local governments are liable, however, only when plaintiffs can show that a policy, custom, or action of the municipal or local government caused the constitutional violation committed by the individual officer.[61] Under this approach, a municipal or local government may be liable when its express policy or informal custom causes officers to violate the constitution,[62] or when an official with policymaking authority for the municipality caused the constitutional violation.[63] Further, when a municipality is responsible for a violation under these doctrines, it has no qualified immunity defense.[64] In the lawyers' advice scenario, this means that local government could be liable if (1) it had a policy or custom of having its lawyers give blanket

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[55] *E.g.*, Buckley v. Fitzsimmons, 509 U.S. 259, 276–77 (1993) (holding that there is no absolute immunity for a prosecutor's statements at a press conference).

[56] Burns v. Reed, 500 U.S. 478, 495 (1991) (stating that prosecutors are not entitled to absolute immunity for legal advice to police); *see also* Kijonka v. Seitzinger, 363 F.3d 645, 648 (7th Cir. 2004) (holding that a lawyer is not immune for incorrect advice to an officer about probable cause for arrest).

[57] Anderson v. Creighton, 483 U.S. 635, 638–39 (1987).

[58] Malley v. Briggs, 475 U.S. 335, 341 (1986).

[59] *See* Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 273–75 (2006) (arguing that Rehnquist and Roberts Courts are shifting qualified immunity towards absolute immunity).

[60] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978). States, however, are immune from § 1983 suits because they are not § 1983 "persons." Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989).

[61] *Monell*, 436 U.S. at 694 (rejecting respondeat superior liability for local governments).

[62] *Id.*

[63] Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986) (holding that a city may be held liable for a decision made by an official with authority to make policy for the city).

[64] Owen v. City of Independence, 445 U.S. 622, 638 (1980). Justices and scholars have criticized the confusing patchwork of municipal liability rules. *See, e.g.*, Bd. of the Cty. Comm'rs v. Brown, 520 U.S. 397, 431 (1997) (Breyer, J., dissenting) (criticizing municipal liability law under § 1983); Wasserman, *supra* note 37, at 823–26 (noting the difficulties caused by the complex interaction between officer liability and municipal liability doctrines).

sanction to officers without regard to the true state of the law to bolster those officers' qualified immunity defenses, which caused officers to violate rights; or if (2) the lawyer giving the advice was sufficiently high ranking to be a policymaker for the local government, so that the lawyer's approval amounted to municipal policy authorizing the violation.[65]

The second point is that the Court's interpretation of § 1983, and particularly its qualified immunity doctrine, is largely judge-made,[66] and has frequently been revised and reversed by the Court since 1961.[67] The rules and their changes are generally driven not by the text of the statute,[68] which is relatively brief, but by reliance on a shifting mix of legislative history,[69] common law analogs,[70] and policy considerations.[71] The result has been that § 1983 doctrine, and in particular, qualified immunity doctrine, is widely considered to be complex, confusing, and sometimes

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[65] *See infra* Section IV.B.1 (arguing that legal advice from a high-ranking official is a factor supporting an officer's claim that it was reasonable to rely on the advice).

[66] *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1536–37 (1987) (noting "statutory common law" development of § 1983 doctrine).

[67] Since the birth of modern § 1983 in *Monroe v. Pape*, the Court has reversed its position on a number of fundamental doctrinal points. These include reversing its position to allow liability for municipal and local governments under § 1983, *Monell*, 436 U.S. at 690 (overruling Monroe v. Pape, 365 U.S. 167 (1961)); changing from a subjective to an objective approach to qualified immunity, Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982) (dispensing with the subjective qualified immunity inquiry developed in *Pierson v. Ray*, 386 U.S. 547, 557 (1967), and used through *Wood v. Strickland*, 420 U.S. 308, 321 (1975)); and switching the qualified immunity analysis from a "rigid order of battle" to a discretionary approach that allows courts to consider whether law was "clearly established" before deciding whether the Constitution was violated, Pearson v. Callahan, 555 U.S. 223, 235–36 (2009) (reversing Saucier v. Katz, 533 U.S. 194 (2001)).

[68] Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 54–57 (1989) (noting the limits of the text in resolving interpretive questions about the § 1983 cause of action).

[69] *See, e.g.*, *Monroe*, 365 U.S. at 176–86, 224–29 (debate between majority and Justice Frankfurter in dissent over interpretation of § 1983 based on legislative history).

[70] *See, e.g.*, Rehberg v. Paulk, 132 S. Ct. 1497, 1502–03 (2012) (describing the Court's approach of consulting common law to shape contours of immunity under § 1983); Anderson v. Creighton, 483 U.S. 635, 644–45 (1987) ("[W]e have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law."); *see also* Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157 (1998) (noting inconsistencies in Court's use of and deviation from common law principles).

[71] *See, e.g.*, Smith v. Wade, 461 U.S. 30, 93 (1983) (O'Connor, J., dissenting) ("Once it is established that the common law of 1871 provides us with no real guidance on this question, we should turn to the policies underlying § 1983 to determine which rule best accords with those policies."); *see also* Jack M. Beermann, *Common Law Elements of the Section 1983 Action*, 72 CHI.-KENT L. REV. 695, 698 (1997) ("Overall, the Court's methodology . . . has been highly oriented toward legislative intent and policy, with the common law playing an important role."); Beermann, *supra* note 68, at 54 (noting that the author and other commentators see the Court's methods as "ad hoc, designed to allow the Court to rationalize any outcome in any case"); John M. Greabe, *A Better Path for Constitutional Tort Law*, 25 CONST. COMMENT. 189, 205 (2008) ("[T]he Supreme Court has openly acknowledged its willingness to rewrite the text of section 1983 to create a regime that 'better' balances competing policy considerations than does the actual law that Congress passed.").

contradictory.[72] The Court's demonstrated willingness to change the doctrine supports this Article's argument that adoption of the proposed test is feasible; the consensus that the doctrine is complex and confusing supports this Article's argument that the proposed test is better because it is simpler.

B. The Qualified Immunity Doctrine—Origins, Evolution, and Policies

Qualified immunity protects an officer from suit[73] and liability for violating the law when the officer mistakenly but reasonably believed that his conduct was legal.[74] It only applies to officers performing discretionary government functions,[75] and the officer must raise qualified immunity as an affirmative defense.[76] Once the defense is raised, however, most circuits hold that the plaintiff has the burden to show that the official's conduct violated clearly established constitutional law.[77] A vast literature on

[72] *E.g.*, Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000) ("Wading through the doctrine of qualified immunity is one of the most morally and conceptually challenging tasks federal appellate court judges routinely face.").

[73] Saucier v. Katz, 533 U.S. 194, 200–01 (2001) (emphasizing that the immunity is from suit, not just from liability).

[74] *See* Stanton v. Sims, 134 S. Ct. 3, 5 (2013) (per curiam) ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments . . . ." (quoting Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2085 (2011))).

[75] Holloman v. Harland, 370 F.3d 1252, 1263–67 (11th Cir. 2004) (emphasizing the discretionary function requirement). This Article addresses only situations in which the discretionary function requirement is met.

[76] Gomez v. Toledo, 446 U.S. 635, 639–41 (1980).

[77] *E.g.*, Walter v. Morton, 33 F.3d 1240, 1242 (10th Cir. 1994) (noting plaintiff's burden); *see also* Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 91–92 (1997) (analyzing the circuits' approaches to burden of persuasion on qualified immunity at the summary judgment stage); Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. ILL. U. L.J. 135, 143–45 (2012) (summarizing the circuits' approaches to the burden of proof question).

qualified immunity has comprehensively summarized,[78] critiqued,[79] and even sometimes defended the doctrine.[80]

The Court's development of qualified immunity doctrine has aimed to balance the policy of redressing and deterring constitutional wrongs against the policy of not unduly deterring government officials from the zealous performance of their duties.[81] The trend in the cases over the past several decades has been towards favoring the latter policy by making qualified immunity harder to overcome.[82] Relatedly, the Court has also refined the rules so that it is easier for courts to resolve the defense at summary judgment[83]—a change driven by the Court's emphasis that the defense is a defense from suit and that exposure to extended litigation disserves the policy of avoiding undue deterrence of officials.[84]

The Supreme Court recognized the qualified immunity defense fairly soon after the birth of modern § 1983 litigation in *Monroe v. Pape*. The Court drew the defense from common law principles of official immunity,[85] and has continued to consult common law in defining and refining qualified

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[78] *E.g.*, Karen Blum, Erwin Chemerinsky & Martin Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633 (2013).

[79] *E.g.*, Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 590–91 (1998) (critiquing qualified immunity doctrine by comparison with criminal law concepts of fair notice); Beermann, *supra* note 71, at 698 (criticizing the Court's reliance on common law concepts); Wells, *supra* note 70, at 159–60 (same); Chen, *supra* note 59, at 270 (criticizing the doctrine's approach to resolving factual issues); John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 247–64 (2013) (arguing for a reconstruction of qualified immunity doctrine); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 77 (1989) (arguing that the Rehnquist Court's approach misbalances constitutional protections and government efficiency).

[80] *E.g.*, Michael T. Kirkpatrick & Joshua Matz, *Avoiding Permanent Limbo: Qualified Immunity and the Elaboration of Constitutional Rights from* Saucier *to* Camreta *(and Beyond)*, 80 FORDHAM L. REV. 643, 643 (2011) (defending current doctrine as generally a "well-functioning procedural framework"); Charles T. Putnam & Charles T. Ferris, *Defending a Maligned Defense: The Policy Bases of the Qualified Immunity Defense in Actions Under 42 U.S.C. § 1983*, 12 BRIDGEPORT L. REV. 665, 667–68 (1992) (arguing that current qualified immunity doctrine generally is well designed).

[81] *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 231 (2009); Richardson v. McKnight, 521 U.S. 399, 408 (1997); Anderson v. Creighton, 483 U.S. 635, 638 (1987).

[82] *See* Blum, Chemerinsky & Schwartz, *supra* note 78, at 657 ("[T]he Roberts Court is strongly pro-immunity."); Chen, *supra* note 59, at 273–75 (arguing that the Rehnquist and Roberts Courts are transforming qualified immunity into absolute immunity).

[83] *See, e.g.*, Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) (allowing interlocutory appeal from denial of summary judgment on qualified immunity); Harlow v. Fitzgerald, 457 U.S 800, 815–16 (1982) (shifting to an objective standard to make the qualified immunity issue easier to resolve on summary judgment).

[84] *See* Saucier v. Katz, 533 U.S. 194, 200–01 (2001); Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam).

[85] *See* Pierson v. Ray, 386 U.S. 547, 556–57 (1967) (recognizing qualified immunity by analogy to common law defenses of good faith and probable cause).

immunity's scope and application.[86] The Court has also, however, deviated from common law principles in significant ways, for example, by changing the qualified immunity analysis to an objective analysis so that the defense could be more easily and frequently resolved at summary judgment.[87]

Early qualified immunity doctrine, drawing on the common law "good faith" defense, incorporated both objective and subjective components—qualified immunity could be overcome either if the officer "knew or reasonably should have known" his actions would violate the plaintiff's constitutional rights, or if he acted with malicious intent to deprive the plaintiff of constitutional rights.[88] The Court changed approaches, however, in *Harlow v. Fitzgerald*, holding that the qualified immunity test should be purely (or almost purely) objective.[89] The Court's main rationale was to make it easier to resolve the qualified immunity defense at summary judgment—the subjective prong generated too many fact questions that would allow a case to proceed to trial.[90]

Harlow therefore held that "officials performing discretionary functions . . . are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[91] *Harlow* thus fundamentally changed qualified immunity by making the analysis primarily objective. Its most important holding was that qualified immunity should be determined by examining whether a reasonable officer would have known that their conduct would violate clearly established rights.[92] It also suggested a presumption that a "reasonably competent" official should know clearly established law.[93] Finally, the Court suggested, in dicta, an extraordinary circumstances exception to this presumption: "[I]f the official pleading the defense claims extraordinary circumstances and can prove that

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[86] *See, e.g.*, Filarsky v. Delia, 132 S. Ct. 1657, 1662 (2012) (noting that the Court consults the "'general principles of tort immunities and defenses' applicable at common law" (quoting Imbler v. Pachtman, 424 U.S. 409, 418 (1976))); *see also* Beermann, *supra* note 71, at 698 (critiquing the Court's approach to using common law); Wells, *supra* note 70, at 160 (same).

[87] *Harlow*, 457 U.S at 815–16 (shifting from common law's subjective approach to a purely objective approach); *see also* Anderson v. Creighton, 483 U.S. 635, 644–45 (1987) ("[W]e have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law.").

[88] Wood v. Strickland, 420 U.S. 308, 322 (1975); *see also Pierson*, 386 U.S. at 557 (focusing on defendant officers' subjective belief that their actions were constitutional).

[89] 457 U.S. at 816.

[90] *Id.* at 815–16 ("The subjective element of the good-faith defense frequently has proved incompatible with our admonition . . . that insubstantial claims should not proceed to trial.").

[91] *Id.* at 818.

[92] *See id.*

[93] *Id.* at 818–19.

he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors."[94]

The Court's statement about extraordinary circumstances is confusing because it simultaneously suggests that the inquiry should be subjective ("he neither knew") and objective ("would turn primarily on objective factors").[95] Further, the Court has never clarified its dicta about extraordinary circumstances, or for that matter, mentioned it again in a majority opinion.[96] Some circuits have developed extraordinary circumstances case law, including in cases involving lawyers' advice,[97] but the Court itself has never referred back to the concept.

Instead, since *Harlow*, the Court has progressed steadily towards analyzing qualified immunity by examining whether the officer's conduct was reasonable in the particular circumstances the officer faced.[98] In *Anderson v. Creighton*, the Court emphasized that claims an officer's conduct violated clearly established law—of which a reasonable officer would have known—must be evaluated at the appropriate "level of generality."[99] Cases since *Anderson* have repeated this theme.[100] Thus, for a constitutional violation to be clearly established, prior precedents must have been sufficiently similar such that they clearly established the "contours of the right"[101] in such a way that a reasonable officer would have known their conduct in the circumstances would conflict with those precedents.[102] So it is not enough, for example, to say that any search that a court concludes violated the Fourth Amendment also violates clearly established law because the Fourth Amendment clearly requires probable

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[94] *Id.* at 819.

[95] *See id.*

[96] John M. Greabe, *Objecting at the Altar: Why the* Herring *Good Faith Principle and the* Harlow *Qualified Immunity Doctrine Should Not Be Married*, 112 COLUM. L. REV. SIDEBAR 1, 11 (2012) (noting that "*Harlow*'s mysterious 'extraordinary circumstances' dictum" has never been cited by a subsequent majority opinion of the Court, and instead immediately disappeared from the Court's articulation of the test).

[97] *See infra* Part II.

[98] *See* Pearson v. Callahan, 555 U.S. 223, 244 (2009) ("The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law."); Greabe, *supra* note 96, at 11 (noting the Court's "many subsequent indications that the qualified immunity analysis is wholly objective").

[99] 483 U.S. 635, 639 (1987).

[100] *See, e.g.*, Carroll v. Carman, 135 S. Ct. 348, 350 (2014) (per curiam) (citing *Anderson*'s reasoning); Reichle v. Howards, 132 S. Ct. 2088, 2093–94 (2012) (same); Brosseau v. Haugen, 543 U.S. 194, 198–99 (2004) (per curiam) (same); Wilson v. Layne, 526 U.S. 603, 614–15 (1999) (same).

[101] *Anderson*, 483 U.S. at 640.

[102] *See, e.g.*, Lane v. Franks, 134 S. Ct. 2369, 2381 (2014); *Brosseau*, 543 U.S. at 198–99.

cause; instead a court must inquire whether it would have been clear at the time that probable cause was lacking in the context of that particular case.[103] On the other hand, precedents need not be factually identical to clearly establish the law; it is enough that the body of precedents at the time of the conduct should have made the officer aware that the conduct would be illegal.[104]

Thus, the analysis seeks sufficiently similar precedent to give an officer "fair warning"[105] or "fair notice"[106] that their conduct would be illegal, and generally presumes that if such precedent exists, a reasonable officer should know it.[107] The Court has also prescribed rules on what level and weight of decisional law can "clearly establish" law to provide fair notice. Supreme Court decisions are clearly sufficient.[108] Decisions of the officer's "home circuit" are thought sufficient by the circuits themselves,[109] and assumed sufficient by the Supreme Court.[110] A consensus of persuasive circuit authority may also suffice if there is no controlling authority.[111] District court decisions are insufficient.[112]

The Court has also provided alternative phrases to capture the essence of the test and how it protects officers. The Court has said "the focus is on whether the officer had fair notice that her conduct was unlawful,"[113] or whether the officer had "fair warning" that he could be held liable for his actions.[114] Similarly, the Court said that qualified immunity "gives government officials breathing room to make reasonable but mistaken

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[103] *See Anderson*, 483 U.S. at 640–41.

[104] *See, e.g.*, Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011) (noting that the test does not require a case "directly on point," but that "existing precedent must have placed the . . . question beyond debate"); Hope v. Pelzer, 536 U.S. 730, 740–41 (2002) (rejecting qualified immunity despite lack of factually identical case).

[105] *Hope*, 536 U.S. at 739–40.

[106] *Brosseau*, 543 U.S. at 205 (Stevens, J., dissenting).

[107] Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982).

[108] *See, e.g.*, Wood v. Moss, 134 S. Ct. 2056, 2061 (2014) (looking to decisions "of this Court" to determine whether right was clearly established); Ryburn v. Huff, 132 S. Ct. 987, 990 (2012) (per curiam) (same).

[109] *See, e.g.*, Vincent v. Yelich, 718 F.3d 157, 167–68 (2d Cir. 2013) (looking to circuit decisions in determining whether law was clearly established); Gardenhire v. Schubert, 205 F.3d 303, 311 (6th Cir. 2000) (same); Foote v. Spiegel, 118 F.3d 1416, 1425 (10th Cir. 1997) (same).

[110] *See, e.g.*, Lane v. Franks, 134 S. Ct. 2369, 2381–83 (2014) (analyzing Eleventh Circuit precedents to determine whether an Alabama official's conduct violated clearly established law). *But see* Carroll v. Carman, 135 S. Ct. 348, 350 (2014) (per curiam) (merely "[a]ssuming for the sake of argument that a controlling circuit precedent could constitute clearly established federal law").

[111] *See* Wilson v. Layne, 526 U.S. 603, 617 (1999).

[112] Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2084 (2011) ("[A] district judge's ipse dixit of a holding . . . falls far short of what is necessary absent controlling authority.").

[113] Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam).

[114] Hope v. Pelzer, 536 U.S. 730, 739–40 (2002).

judgments,"[115] and protects "all but the plainly incompetent or those who knowingly violate the law."[116] Across these various verbal formulations, the trend has been for the Court to drive the analysis towards an assessment of reasonableness under the circumstances by comparison with extant clearly established law.[117] The Court emphasizes that the touchstone of the analysis is objective reasonableness,[118] and rejects attempts to inject subjectivity into the defense.[119]

In addition to shifting the substantive focus of the analysis, the Court has also shaped qualified immunity doctrine to resolve the issue at summary judgment when possible and streamline adjudication of the defense.[120] Furthermore, in making the inquiry purely objective to facilitate resolution on summary judgment,[121] the Court has made summary judgment denials of qualified immunity interlocutorily reviewable as collateral orders, again to ensure that an officer may vindicate his immunity defense before trial.[122] Finally, the Court has recently shifted away from requiring lower courts to always decide the constitutional merits question first in a rigid "order of battle,"[123] to allowing courts to skip to the "clearly established" question.[124] The Court made this change to allow lower courts to avoid unnecessary work, and the decision of difficult constitutional questions, when a case is more easily resolved under the "clearly established" prong.[125]

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[115] *al-Kidd*, 131 S. Ct. at 2085.

[116] Malley v. Briggs, 475 U.S. 335, 341 (1986).

[117] *See* Anderson v. Creighton, 483 U.S. 635, 639 (1987). The inquiry focuses on the state of the law as it existed at the time of the officer's actions. Wilson v. Layne, 526 U.S. 603, 609 (1999).

[118] *See, e.g.*, Messerschmidt v. Millender, 132 S. Ct. 1235, 1245 (2012) (noting that qualified immunity analysis "generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken" (quoting *Anderson*, 483 U.S. at 639)).

[119] *See* Greabe, *supra* note 96, at 11 (noting that the Court has consistently maintained that the test is objective rather than subjective).

[120] *See* Pearson v. Callahan, 555 U.S. 223, 231 (2009) ("[W]e have made clear that the 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that '"insubstantial claims' against government officials [will] be resolved prior to discovery." (second alteration in original) (quoting *Anderson*, 483 U.S. at 640 n.2)).

[121] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[122] Mitchell v. Forsyth, 472 U.S. 511, 527–30 (1985).

[123] *See* Saucier v. Katz, 533 U.S. 194, 201 (2001).

[124] *See Pearson*, 555 U.S. at 236.

[125] *Id.* at 236–38. The *Saucier* to *Pearson* shift was important for the application of qualified immunity doctrine, and has been extensively analyzed and criticized. *See, e.g.*, John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 120 (arguing in favor of the merits-first approach); James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1617 (2011) (arguing that *Pearson* leaves rights undefined and encourages courts to "validate constitutionally dubious official

In sum, under current law, the Supreme Court, and most circuits, analyze qualified immunity using a two-step test outlined in *Pearson*:

> First, a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right. Second, if the plaintiff has satisfied the first step, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct.[126]

After *Pearson*, courts may skip to the second step when doing so will allow the court to quickly dispose of the plaintiff's claims. A few circuits also add a third step: "[W]hether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights."[127] These courts note that the third step does not substantively change the test,[128] but their articulation of the third step does clarify that the present test focuses on the objective legal reasonableness of the official's actions in light of what the evidence shows about the particular circumstances of the case.

Qualified immunity analysis, at least in close cases, thus involves a careful and complex[129] comparison of official conduct in the case at hand to conduct held unconstitutional in precedents that are both sufficiently similar and of sufficient precedential weight.[130] Moreover, since the test presumes a reasonable officer knows clearly established law, and exposes an officer to liability if they violate clearly established law, the test also presumes that a hypothetical reasonable officer would evaluate their intended conduct in light of the decisional law of the Supreme Court, as well as probably their home circuit and the "consensus" of other circuits. This presumption is likely a fiction, at least to the extent it presumes that most government officials (e.g., police officers or school principals) are

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action"). The wisdom of that shift is not important to this Article, other than to show that the Court has modified qualified immunity doctrine to allow lower courts to more efficiently resolve qualified immunity cases.

[126] 555 U.S. at 232 (citations omitted). *Pearson* reversed *Saucier*'s holding that the steps had to be taken in order, but reaffirmed them as the basic components of the analysis. *Id.* at 240–42.

[127] Champion v. Outlook Nashville, Inc., 380 F.3d 893, 901 (6th Cir. 2004) (quoting Feathers v. Aey, 319 F.3d 843, 848 (6th Cir. 2003)); *see also* Sueiro Vázquez v. Torregrosa de la Rosa, 494 F.3d 227, 234 (1st Cir. 2007); Karen M. Blum, *The Qualified Immunity Defense: What's "Clearly Established" and What's Not*, 24 Touro L. Rev. 501, 510–12 (2008) (collecting and critiquing cases from "third step" courts).

[128] *See, e.g.*, *Sueiro Vázquez*, 494 F.3d at 234 (noting that the First Circuit's three-step test and other circuits' two-step test "address[] the same issues").

[129] *See* John C. Jeffries, Jr., Dunwody Distinguished Lecture in Law, *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 854 (2010) (describing the doctrine as a source of "much confusion and instability").

[130] *E.g.*, Lane v. Franks, 134 S. Ct. 2369, 2381–83 (2014); *Pearson*, 555 U.S. at 243–44; Nord v. Walsh County, 757 F.3d 734, 739–42 (8th Cir. 2014).

aware of the latest decisional developments in constitutional law.[131] However, the fiction creates incentives for officers to act in conformance with the law, and imposes a minimum standard of competence and legal compliance beyond which an officer will be punished and a plaintiff will be compensated.[132]

II. COURTS' DIVIDED APPROACHES TO LEGAL ADVICE IN QUALIFIED IMMUNITY ANALYSIS

A special scenario arises in qualified immunity cases when the officer argues that a lawyer's advice led the officer reasonably to believe her conduct would not violate clearly established law. This Part explains and gives examples of this scenario. It then examines and critiques the circuits' division over whether and how to give weight to lawyers' advice, and considers the Supreme Court's opinion in *Messerschmidt*, both for insight into the correct approach and to show the Court's interest in the question. Finally, it surveys scholars' and students' work to show that, while the division has been noted, a comprehensive analytical framework has not been proposed, and that most authors assume lawyers' advice must be analyzed under the extraordinary circumstances exception—a view this Article challenges.

A. The Lawyers' Advice Scenario

The specific scenario addressed by this Article arises when an officer acts in a way that violates or potentially violates the constitution[133] after being advised by a lawyer[134] that the conduct is constitutional. The situation presents a special dilemma because the qualified immunity test focuses on whether a reasonable officer would have known her conduct would violate clearly established law, and while it generally presumes that a reasonable officer should know clearly established law,[135] sometimes lawyers' advice

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[131] *See* Amore v. Novarro, 624 F.3d 522, 535 (2d Cir. 2010) ("[T]he statement in *Harlow* that reasonably competent public officials know clearly established law[] is a legal fiction." (quoting Lawrence v. Reed, 406 F.3d 1224, 1237 (10th Cir. 2005) (Hartz, J., dissenting) (second alteration in original))).

[132] *See* Malley v. Briggs, 475 U.S. 335, 341 (1986) (suggesting that the doctrine is intended to punish officers who are incompetent as well as those who knowingly violate the law).

[133] After *Pearson*, the situation can also arise if a court chooses to skip to analyzing the reasonableness/clearly established prong without deciding the constitutional merits question. *See Pearson*, 555 U.S. at 236.

[134] In most cases, the lawyer will also be a government employee, but in rare cases the lawyer may be a private lawyer or outside counsel. *See* Watertown Equip. Co. v. Norwest Bank Watertown, 830 F.2d 1487, 1489, 1495 (8th Cir. 1987).

[135] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

can create a situation in which an officer reasonably but mistakenly relies on the advice to believe that her conduct will comport with clearly established law.

The most common context where lawyers' advice has been invoked as a basis for qualified immunity is in Fourth Amendment search and seizure cases.[136] The issue often arises when a police officer consults a prosecutor or other attorney for advice about whether there is probable cause to search or arrest.[137] After being advised that the search or seizure is lawful, the officer takes the planned action, and then is sued by the plaintiff for a violation of the Fourth Amendment. The scenario can arise both when the officer seeks a warrant[138] and when the officer wants to conduct a warrantless search or seizure.[139] It can occur in civil as well as criminal contexts,[140] or may involve officers' involvement in private parties' property disputes.[141] Often, the Fourth Amendment claim may be combined with other constitutional claims.[142]

Another fairly common scenario presenting the lawyer's advice issue is termination of a government employee.[143] Superiors may wish to fire a government employee, sometimes based on the employee's speech or political affiliation.[144] Before firing the employee, the officer seeks legal

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[136] At least thirty cases consider the issue in this context. The citations below give examples, but a full list is omitted in the interest of space (data on file with the *Northwestern University Law Review*).

[137] *See, e.g.*, *Kelly I*, 622 F.3d 248, 255–56 (3d Cir. 2010).

[138] *See, e.g.*, Messerschmidt v. Millender, 132 S. Ct. 1235, 1249 (2012).

[139] *See, e.g.*, Forman v. Richmond Police Dep't, 104 F.3d 950, 960 (7th Cir. 1997).

[140] *See, e.g.*, Hollingsworth v. Hill, 110 F.3d 733, 737 (10th Cir. 1997) (child welfare dispute); V–1 Oil Co. v. Wyo., Dep't of Envtl. Quality, 902 F.2d 1482, 1488 (10th Cir. 1990) (environmental enforcement).

[141] *See, e.g.*, Cochran v. Gilliam, 656 F.3d 300, 302–03 (6th Cir. 2011) (involving officers assisting a landlord's seizure of property during the course of eviction); Stevens v. Rose, 298 F.3d 880, 881–82 (9th Cir. 2002) (involving arrest in civil dispute over car keys); Buonocore v. Harris, 134 F.3d 245, 246–47 (4th Cir. 1998) (deputy executing a warrant that allowed a private person to search a house).

[142] *See, e.g.*, Frye v. Kan. City Mo. Police Dep't, 375 F.3d 785, 788–89 (8th Cir. 2004) (First and Fourth Amendment claims arising out of arrests at an abortion protest); L.A. Police Protective League v. Gates, 907 F.2d 879, 883 (9th Cir. 1990) (First and Fourth Amendment claims arising out of a search of an officer's garage and his subsequent firing).

[143] *See, e.g.*, Nord v. Walsh County, 757 F.3d 734, 738 (8th Cir. 2014) (termination of deputy sheriff); Moss v. Martin, 614 F.3d 707, 708 (7th Cir. 2010) (termination of Illinois Department of Transportation employee); Taravella v. Town of Wolcott, 599 F.3d 129, 132 (2d Cir. 2010) (termination of senior-center director); Sueiro Vázquez v. Torregrosa de la Rosa, 494 F.3d 227, 229–30 (1st Cir. 2007) (political termination of opponents to new Puerto Rico administration); Gilbrook v. City of Westminster, 177 F.3d 839, 847 (9th Cir. 1999) (termination of firefighter); *L.A. Police Protective League*, 907 F.2d at 883 (termination of police officer); Melton v. City of Okla. City, 879 F.2d 706, 711 (10th Cir. 1989) (termination of police officer). This list is once again illustrative, not exhaustive—there are at least seventeen circuit cases involving lawyers' advice in the context of employee discipline or termination (data on file with the *Northwestern University Law Review*).

[144] *See, e.g.*, *Nord*, 757 F.3d at 738.

advice about whether the firing is allowed by law.[145] The lawyer advises the officer the firing is legal, the employee is fired, and then the employee sues under § 1983 raising claims of deprivation of Fourteenth Amendment procedural due process,[146] First Amendment violations,[147] or both.[148]

In each of these common scenarios, the underlying constitutional law is highly fact-sensitive in application[149]—perhaps explaining why these scenarios are the ones in which the lawyer's advice scenario most often arises. But the issue also arises in other less common situations, and has been litigated in dozens of reported circuit court opinions.[150] Moreover, theoretically, the problem could arise in most § 1983 lawsuits, except ones where the claim inherently arises in contexts where an officer has to make a split-second decision without time to seek legal advice—such as most excessive force cases.[151]

Two similar situations sometimes coincide with the lawyers' advice scenario,[152] but are analytically distinct. One is the "following orders" scenario, in which courts consider whether the officer's qualified immunity defense is supported by the fact that superiors ordered or approved the

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[145] *See, e.g.*, *Melton*, 879 F.2d at 730–31.

[146] *See, e.g.*, Gilbert v. Homar, 520 U.S. 924, 926 (1997) (involving a suspension without a hearing of a university police officer).

[147] *See, e.g.*, Lane v. Franks, 134 S. Ct. 2369, 2376 (2014) (involving the termination of a youth program director for truthful testimony at a public corruption trial).

[148] *See, e.g.*, *Melton*, 879 F.2d at 712 (involving due process and free speech claims arising out of the discharge of a police officer for testimony and conduct related to a judicial corruption trial).

[149] *See, e.g.*, Cox v. Hainey, 391 F.3d 25, 30–31 (1st Cir. 2004) (noting the special problems of applying the test in "settings that invite balancing tests" and are "fact-dependent"); *Melton*, 879 F.2d at 728–29 (noting "how difficult it is to apply *Harlow* in the setting of *Pickering* balancing" because of the "fact-specific nature" of the test).

[150] *See, e.g.*, Gomes v. Wood, 451 F.3d 1122, 1124 (10th Cir. 2006) (due process violations in child removal proceedings); Suboh v. Dist. Att'y's Office, 298 F.3d 81, 88–89 (1st Cir. 2002) (same); Vance v. Barrett, 345 F.3d 1083, 1086, 1091 (9th Cir. 2003) (prisoners' rights); Walters v. Grossheim, 990 F.2d 381, 383 (8th Cir. 1993) (same); Tanner v. Hardy, 764 F.2d 1024, 1027 (4th Cir. 1985) (same); Charfauros v. Bd. of Elections, 249 F.3d 941, 944 (9th Cir. 2001) (proper interpretation of territorial election law); Woodwind Estates, Ltd. v. Gretkowski, 205 F.3d 118, 120, 125 (3d Cir. 2000) (land development regulation); Swanson v. Powers, 937 F.2d 965, 966 (4th Cir. 1991) (unconstitutional tax collection).

[151] *See, e.g.*, Plumhoff v. Rickard, 134 S. Ct. 2012, 2020 (2014) (noting that officers must make split-second decisions in excessive force cases, and that courts should not evaluate these cases from the perspective of "the 20/20 vision of hindsight" (quoting Graham v. Connor, 490 U.S. 386, 396–97 (1989))). It is possible to imagine, however, that the issue could arise even in an excessive force case, if, for example, lawyers were consulted before the police determined to use force to end a hostage situation or siege.

[152] *See, e.g.*, Messerschmidt v. Millender, 132 S. Ct. 1235, 1249 (2012) (raising, in the same case, the lawyers' advice issue, the following orders issue, and the neutral magistrate issue).

officer's allegedly illegal actions.[153] This shares with the lawyers' advice scenario the aspect of external influence, but differs in that lawyers' advice, unlike superior orders, specifically concerns the legality of the officer's planned conduct and so bears more closely on whether a reasonable officer would have known that conduct would violate the law.

Another related but different scenario is the approval of a warrant by a neutral magistrate.[154] The Court has said that approval by a magistrate may suggest that an officer would be reasonable to believe there is probable cause for the search,[155] but has held that an officer still may be liable despite a magistrate's approval when it should have been obvious to a reasonable officer that there was no probable cause for the warrant.[156] The magistrate approval scenario sometimes coincides with the lawyers' advice scenario,[157] but there are many scenarios under the Fourth Amendment,[158] as well as almost all scenarios under other constitutional provisions,[159] where an officer may seek legal advice about their actions but does not seek a court order before undertaking them. Approval by a neutral magistrate is likely stronger evidence of the officer's reasonableness than lawyers' advice because a judge is neutral, while a lawyer consulted by an officer may have incentive to favor the officer in the analysis.[160]

B. The Circuits' Divided Approaches to Lawyers' Advice in Qualified Immunity Analysis

There is a deep and wide circuit split over how lawyers' advice fits into qualified immunity analysis, with three main bases of disagreement. The first is whether lawyers' advice is relevant to qualified immunity analysis at all. The second is whether lawyers' advice is relevant to deciding whether a reasonable officer would have known the conduct violated clearly established law,[161] or instead as an extraordinary

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[153] *See, e.g.*, Mark W.S. Hobel, Note, *"So Vast an Area of Legal Irresponsibility"? The Superior Orders Defense and Good Faith Reliance on Advice of Counsel*, 111 COLUM. L. REV. 574 (2011) (considering this issue in the context of international law and the "War on Terror").

[154] *See, e.g.*, Malley v. Briggs, 475 U.S. 335, 339 (1986).

[155] *E.g.*, *Messerschmidt*, 132 S. Ct. at 1249–50.

[156] *E.g.*, Groh v. Ramirez, 540 U.S. 551, 564 (2004); *Malley*, 475 U.S. at 341.

[157] *E.g.*, *Messerschmidt*, 132 S. Ct. at 1249.

[158] *E.g.*, *Kelly I*, 622 F.3d 248, 255–56 (3d Cir. 2010) (officer consulted attorney before making warrantless arrest).

[159] *E.g.*, Miller v. Admin. Office of the Courts, 448 F.3d 887, 896 (6th Cir. 2006) (termination of employee based on attorney advice).

[160] For example, in the warrant scenario, the prosecutor is part of the same "team" as the officer, while the judge is not. *E.g.*, *Messerschmidt*, 132 S. Ct. at 1249.

[161] This Article sometimes refers to this as the "basic" or "normal" qualified immunity test.

circumstance that may establish immunity even though the officer's conduct violated clearly established law.[162] The third is how much weight to give lawyers' advice in qualified immunity analysis, with answers ranging from "none" to "presumptive immunity."

First, the majority of circuits that have considered the issue have recognized lawyers' advice is at least potentially relevant to qualified immunity analysis.[163] But at least one circuit—the Second Circuit—has suggested that lawyers' advice is simply irrelevant to the analysis of qualified immunity,[164] and three dissenting Justices in *Messerschmidt* suggested the same.[165] The Second Circuit and the *Messerschmidt* dissenters raise the *Harlow* presumption that a reasonable officer ordinarily knows clearly established law[166] to the level of an absolute rule. Under this view, since qualified immunity analysis depends purely on whether the officer's conduct violated clearly established law as solidified by the decisions of relevant courts, the officer's receipt of legal advice is irrelevant.[167] The test of "objective legal reasonableness" means that either the conduct violated clearly established law, or it did not.[168]

Relatedly, the Ninth Circuit, at least in some cases, has said that lawyers' advice is not relevant to qualified immunity reasonableness analysis, but instead is only "evidence of [a] defendant's good faith."[169] In Fourth Amendment cases, this may mean that the court finds lawyers' advice relevant only to the merits question—whether there was a

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[162] *See* Harlow v. Fitzgerald, 457 U.S. 800, 815–19 (1982).

[163] *See, e.g.*, Taravella v. Town of Wolcott, 599 F.3d 129, 135 n.3 (2d Cir. 2010); *Kelly I*, 622 F.3d at 255–56; Ewing v. City of Stockton, 588 F.3d 1218, 1231 (9th Cir. 2009); Poulakis v. Rogers, 341 F. App'x 523, 533 (11th Cir. 2009); Gomes v. Wood, 451 F.3d 1122, 1134 (10th Cir. 2006); *Miller*, 448 F.3d at 896–97; Frye v. Kan. City Mo. Police Dep't, 375 F.3d 785, 792 (8th Cir. 2004); Cox v. Hainey, 391 F.3d 25, 35 (1st Cir. 2004); Kijonka v. Seitzinger, 363 F.3d 645, 648 (7th Cir. 2004); Swanson v. Powers, 937 F.2d 965, 972 (4th Cir. 1991); Jennings v. Joshua Indep. Sch. Dist., 877 F.2d 313, 318 (5th Cir. 1989); *see also Messerschmidt*, 132 S. Ct. at 1249 (the Supreme Court similarly taking into account lawyer's advice).

[164] *In re* County of Erie, 546 F.3d 222, 229 (2d Cir. 2008).

[165] *Messerschmidt*, 132 S. Ct. at 1252 (Kagan, J., concurring in part and dissenting in part); *id.* at 1260 (Sotomayor, J., dissenting) (joined by Justice Ginsburg).

[166] *Harlow*, 457 U.S. at 818–19.

[167] *See County of Erie*, 546 F.3d at 229 ("The question of whether a right is 'clearly established' is determined by reference to the case law extant at the time of the violation. This is an objective, not a subjective, test, and reliance upon advice of counsel therefore cannot be used to support the defense of qualified immunity." (citation omitted)).

[168] *See id.* The Second Circuit's statement, however, was made in an interlocutory appeal from a discovery dispute; the court was not actually analyzing a qualified immunity defense. *Id.* at 224. Moreover, in a case two years later, a different panel suggested that "at the very least the solicitation of legal advice informs the reasonableness inquiry." Taravella v. Town of Wolcott, 599 F.3d 129, 135 n.3 (2d Cir. 2010). So, even the Second Circuit has not firmly held that lawyers' advice is never relevant to qualified immunity analysis.

[169] Lucero v. Hart, 915 F.2d 1367, 1371 (9th Cir. 1990).

constitutional violation—because good faith is part of that test.[170] But the court has used the good faith formulation in several lawyers' advice cases outside the Fourth Amendment context.[171] It is also possible that the opinions are referring to the evidence of "'objective' good faith" described by *Harlow*,[172] though they do not all say so.[173] Some cases do use the same "good faith" phrase to suggest that lawyers' advice *is* relevant to qualified immunity reasonableness analysis,[174] while in others, the court has considered lawyers' advice as supporting immunity as part of an overall reasonableness analysis without mentioning "good faith."[175] Finally, in one recent case, the Ninth Circuit has indicated that the Supreme Court's decision in *Messerschmidt* may affect the court's approach.[176]

Thus, most circuits hold that lawyers' advice is relevant to qualified immunity analysis. Further, there are a few analytical points on which those circuits generally agree. These points form the basis for the threshold questions of this Article's proposed framework for evaluating the relevance of lawyers' advice to qualified immunity.[177] One is that lawyers' advice can only support qualified immunity when the officer gives the lawyer all relevant information, and neither withholds nor misrepresents relevant facts.[178] Another is that lawyers' advice can only support qualified immunity when the lawyer actually advises the officer that the officer's contemplated conduct is constitutional.[179] Finally, legal advice can only

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[170] *See, e.g.*, Ortiz v. Van Auken, 887 F.2d 1366, 1369–71 (9th Cir. 1989) (discussing and applying the "good faith" doctrine).

[171] *See, e.g.*, Vance v. Barrett, 345 F.3d 1083, 1088, 1094 n.14 (9th Cir. 2003) (prisoners' due process rights); Gilbrook v. City of Westminster, 177 F.3d 839, 847, 870 (9th Cir. 1999) (employee termination); *Lucero*, 915 F.2d at 1369, 1371 (same).

[172] 457 U.S. 800, 819 n.34 (1982); *see also* Messerschmidt v. Millender, 132 S. Ct. 1235, 1245 (2012) (noting that qualified immunity examines whether "the officers acted in an objectively reasonable manner, or as we have sometimes put it, in 'objective good faith'").

[173] If these opinions mean subjective good faith, this contradicts the Supreme Court's insistence that qualified immunity analysis does not consider subjective good faith. *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 641 (stating that, in qualified immunity analysis, "subjective beliefs about the [unconstitutional conduct] are irrelevant").

[174] *See, e.g.*, Ewing v. City of Stockton, 588 F.3d 1218, 1231 (9th Cir. 2009).

[175] *See, e.g.*, Charfauros v. Bd. of Elections, 249 F.3d 941, 954 (9th Cir. 2001) (considering whether reliance was reasonable); Nunez v. Davis, 169 F.3d 1222, 1230 (9th Cir. 1999) (concluding that "it was not reasonable" for the officer to rely on the lawyers' advice).

[176] Armstrong v. Asselin, 734 F.3d 984, 991 (9th Cir. 2013).

[177] *See infra* Section IV.A.

[178] *See, e.g.*, Belk v. City of Eldon, 228 F.3d 872, 882–83 (8th Cir. 2000); Burk v. Beene, 948 F.2d 489, 494 (8th Cir. 1991).

[179] *See, e.g.*, Stearns v. Clarkson, 615 F.3d 1278, 1284 (10th Cir. 2010) (record did not show that an attorney actually advised an officer there was probable cause, but that the officer merely assumed that was the attorney's view); Lindsey v. City of Orrick, 491 F.3d 892, 901–02 (8th Cir. 2007) (rejecting reliance on attorney advice when the advice was on the interpretation of state law, not whether a firing would violate First Amendment).

support immunity when the officer actually follows the advice, which means both that the advice must precede the action and that the action may not differ from or exceed what the lawyer's advice endorsed.[180]

The second main point of the circuits' disagreement is over whether to consider lawyers' advice as part of the basic two-step (or in some circuits three-step)[181] qualified immunity analysis, or instead as an extraordinary circumstance that may confer immunity even if the plaintiff can show the officer's conduct did violate clearly established law.[182] Many courts consider lawyers' advice as relevant to analyzing whether the officer's conduct was reasonable in the circumstances.[183] Though these courts do not always expressly say so, they seem to be analyzing lawyers' advice at step two of the analysis, or in those circuits which use a third step, at step three.[184] These courts thus consider lawyers' advice as potentially showing that a reasonable officer could have relied on the advice and engaged in the challenged conduct without knowing that it violated clearly established law.[185]

Other circuits, in contrast, relegate consideration of lawyers' advice to the category of extraordinary circumstances.[186] For these courts, because the basic qualified immunity analysis is purely objective, it must turn only on a comparison of the officer's conduct[187] to clearly established decisional

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[180] *See, e.g.*, *Charfauros*, 249 F.3d at 954 (some actions preceded the advice, and the advice indicated that the actions were illegal); Womack v. City of Bellefontaine Neighbors, 193 F.3d 1028, 1031 (8th Cir. 1999) (the officers did not follow the advice).

[181] *See, e.g.*, Sueiro Vázquez v. Torregrosa de la Rosa, 494 F.3d 227, 234 (1st Cir. 2007).

[182] *Compare, e.g.*, Cox v. Hainey, 391 F.3d 25, 35 (1st Cir. 2004) (analyzing under reasonableness), *Kelly I*, 622 F.3d 248, 255–56 (3d Cir. 2010) (same), Taravella v. Town of Wolcott, 599 F.3d 129, 135 n.3 (2d Cir. 2010) (same), Armstrong v. City of Melvindale, 432 F.3d 695, 702 (6th Cir. 2006) (same), Kijonka v. Seitzinger, 363 F.3d 645, 648 (7th Cir. 2004) (same), *and* Jennings v. Joshua Indep. Sch. Dist., 877 F.2d 313, 318 (5th Cir. 1989) (same), *with, e.g.*, Buonocore v. Harris, 134 F.3d 245, 252 (4th Cir. 1998) (analyzing under extraordinary circumstances), Silberstein v. City of Dayton, 440 F.3d 306, 318 (6th Cir. 2006) (same), V–1 Oil Co. v. Wyo., Dep't of Envtl. Quality, 902 F.2d 1482, 1488 (10th Cir. 1990) (same), *and* Watertown Equip. Co. v. Norwest Bank Watertown, 830 F.2d 1487, 1495 (8th Cir. 1987) (same).

[183] *See, e.g.*, *Cox*, 391 F.3d at 35 ("In considering the relevance of an officer's pre-arrest consultation with a prosecutor, a reviewing court must determine whether the officer's reliance on the prosecutor's advice was objectively reasonable."); *see also* Nord v. Walsh County, 757 F.3d 734, 743 (8th Cir. 2014) (using reasonableness approach); Fleming v. Livingston County, 674 F.3d 874, 881 (7th Cir. 2012) (same); *Kelly I*, 622 F.3d at 255–56 (same); *Armstrong*, 432 F.3d at 702 (same); Forman v. Richmond Police Dep't, 104 F.3d 950, 960 (7th Cir. 1997) (same); E–Z Mart Stores, Inc. v. Kirksey, 885 F.2d 476, 478 (8th Cir. 1989) (same).

[184] *See, e.g.*, *Sueiro Vázquez*, 494 F.3d at 234.

[185] *See, e.g.*, *Cox*, 391 F.3d at 35.

[186] *See, e.g.*, Gomes v. Wood, 451 F.3d 1122, 1134 (10th Cir. 2006).

[187] At summary judgment, the factual record of the officer's conduct must be viewed in the light most favorable to the plaintiff. *See, e.g.*, Womack v. City of Bellefontaine Neighbors, 193 F.3d 1028, 1031 (8th Cir. 1999).

law, to which lawyers' advice is irrelevant.[188] These circuits base their approach on *Harlow*'s dicta suggesting that the presumption that a reasonable officer knows clearly established law can only be overcome in extraordinary circumstances when the officer can show that she neither knew nor should have known the clearly established legal standard.[189] Circuits that have analyzed lawyers' advice under extraordinary circumstances are a substantial minority.[190] Moreover, adding to the complexity, some circuits at times consider lawyers' advice as relevant only to extraordinary circumstances, while at other times consider it under basic qualified immunity reasonableness analysis.[191]

The circuits also disagree about how much weight to give to lawyers' advice in the qualified immunity analysis. Some circuits suggest that lawyers' advice has no weight in qualified immunity analysis.[192] Others have stated that while lawyers' advice might theoretically show extraordinary circumstances, as a practical matter the circumstances in which it can do so are vanishingly rare.[193] Less extreme are courts that relegate lawyers' advice to extraordinary circumstances, but have actually developed tests to evaluate extraordinary circumstances and sometimes found circumstances they deem sufficiently extraordinary.[194]

Towards the middle are courts that consider legal advice among the totality of circumstances, but hold that legal advice alone is not enough to

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[188] In considering "the officer's conduct," these courts seem to focus on the actual conduct that allegedly violated the plaintiff's rights; the officer's conduct in seeking legal advice is excluded from this part of the analysis.

[189] *See* 457 U.S. 800, 818–19 (1982).

[190] *See supra* note 182 (identifying four circuits that apply extraordinary circumstances some or all of the time).

[191] Circuits whose approach varies in this way include the Fourth Circuit, *compare* Buonocore v. Harris, 134 F.3d 245, 252 (4th Cir. 1998) (extraordinary circumstances), *with* Merchant v. Bauer, 677 F.3d 656, 664 (4th Cir. 2012) (reasonableness/totality of circumstances), the Sixth Circuit, *compare, e.g.*, Silberstein v. City of Dayton, 440 F.3d 306, 318 (6th Cir. 2006) (extraordinary circumstances), *with* Armstrong v. City of Melvindale, 432 F.3d 695, 702 (6th Cir. 2006) (reasonableness), and the Eighth Circuit, *compare, e.g.*, Putnam v. Keller, 332 F.3d 541, 545 n.3 (8th Cir. 2003) (extraordinary circumstances), *with* Nord v. Walsh County, 757 F.3d 734, 743 (8th Cir. 2014) (reasonableness). The Tenth Circuit seems to consistently apply extraordinary circumstances, while the First, Third, and Seventh Circuits seem to consistently evaluate reasonableness.

[192] *See, e.g.*, *In re* County of Erie, 546 F.3d 222, 229 (2d Cir. 2008).

[193] *See, e.g.*, *Silberstein*, 440 F.3d at 318 ("This circuit has determined that reliance on counsel's legal advice constitutes a qualified immunity defense only under 'extraordinary circumstances,' and has never found that those circumstances were met."). *But see Armstrong*, 432 F.3d at 702 (finding that prosecutor's advice supported qualified immunity defense).

[194] *See, e.g.*, Hollingsworth v. Hill, 110 F.3d 733, 740–42 (10th Cir. 1997) (upholding qualified immunity based on extraordinary circumstances); V–1 Oil Co. v. Wyo., Dep't of Envtl. Quality, 902 F.2d 1482, 1489 (10th Cir. 1990) (same); *see also* Lawrence v. Reed, 406 F.3d 1224, 1231 (10th Cir. 2005) (applying same test and rejecting extraordinary circumstances argument).

establish immunity.[195] For these courts, it is desirable both to avoid a presumption that a "wave of the prosecutor's wand" can automatically confer immunity, and to not "throw out the baby with the bath water" by adopting a rule making it difficult or impossible to rely on lawyers' advice to establish immunity.[196] Next are courts that give special weight to legal advice, saying it "goes far" to establish immunity (usually in the course of holding that the officer is entitled to immunity).[197]

Finally, at the most officer-protective end of the spectrum, is the Third Circuit, which has held that receipt of lawyers' advice creates a presumption of immunity.[198] For the Third Circuit, the desirability of incentivizing officers to seek counsel supported giving receipt of lawyers' advice the status of a presumptive qualified immunity defense.[199] All the courts, even the Third Circuit, seem to agree that legal advice does not per se entitle an officer to immunity.[200] Also, generally "extraordinary circumstances courts" give lawyers' advice less weight than "reasonableness courts," though the trend is not precise.

Table 1 outlines this line of cases among the various circuits, organized by increasing favorability for officers. However, there remains fact- and case-specific variation in how favorable the circuits have been in individual cases.

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[195] *See, e.g.*, Cox v. Hainey, 391 F.3d 25, 34 (1st Cir. 2004).

[196] *Id.*

[197] Kijonka v. Seitzinger, 363 F.3d 645, 648 (7th Cir. 2004) (first use of the "goes far" phrase); *see also* Fleming v. Livingston County, 674 F.3d 874, 881 (7th Cir. 2012) (referencing *Kijonka*'s "goes far" language); Ewing v. City of Stockton, 588 F.3d 1218, 1231 (9th Cir. 2009) (same); Poulakis v. Rogers, 341 F. App'x 523, 533 (11th Cir. 2009) (same); Frye v. Kan. City Mo. Police Dep't, 375 F.3d 785, 792 (8th Cir. 2004) (same).

[198] *Kelly I*, 622 F.3d 248, 255–56 (3d Cir. 2010); *see also* Fiore v. City of Bethlehem, 510 F. App'x 215, 220 (3d Cir. 2013) (applying the *Kelly I* presumption).

[199] *Kelly I*, 622 F.3d at 255.

[200] *See, e.g.*, *Ewing*, 588 F.3d at 1231 ("[C]onsultation with a prosecutor is not conclusive . . . ."); Sueiro Vázquez v. Torregrosa de la Rosa, 494 F.3d 227, 235 (1st Cir. 2007) ("[A]dvice of counsel alone does not per se provide defendants with the shield of immunity."); *Cox*, 391 F.3d at 35 ("[A] favorable pre-arrest opinion from a friendly prosecutor does not automatically guarantee that qualified immunity will follow."); Forman v. Richmond Police Dep't, 104 F.3d 950, 960 (7th Cir. 1997) ("[A]dvice . . . does not alone satisfy [the officer]'s burden of acting reasonably . . . .").

TABLE 1:

Effect on Qualified Immunity Analysis	Circuits[201]
Suggests lawyers' advice is irrelevant to qualified immunity analysis	Second Circuit[202]
Extraordinary circumstances test and/or reasonableness under *Harlow* presumption	Fourth Circuit[203] Sixth Circuit[204] Eighth Circuit[205]
Extraordinary circumstances test only	Tenth Circuit[206]
Reasonableness test only	First Circuit[207] Seventh Circuit[208]
Presumption of immunity	Third Circuit[209]

Independent of the analytical step at which courts consider legal advice or the rhetorical weight they attach to it, courts also vary as to whether they apply a specific test for evaluating its effect on qualified immunity. Some have no specific test, and simply mention advice as "part of the mix"[210] of reasonableness, which either supports the court's

[201] Ninth Circuit jurisprudence does not fall into a single category, and was thus excluded from Table 1. For a discussion of the varying decisions the Ninth Circuit has made, see *supra* notes 169–76 and accompanying text.

[202] *In re* County of Erie, 546 F.3d 222, 229 (2d Cir. 2008); *see also supra* note 168.

[203] *Compare* Buonocore v. Harris, 134 F.3d 245, 252 (4th Cir. 1998) (extraordinary circumstances), *with* Merchant v. Bauer, 677 F.3d 656, 664 (4th Cir. 2012) (reasonableness/totality of circumstances).

[204] *Compare* Silberstein v. City of Dayton, 440 F.3d 306, 318 (6th Cir. 2006) (extraordinary circumstances), *with* Armstrong v. City of Melvindale, 432 F.3d 695, 702 (6th Cir. 2006) (reasonableness).

[205] *Compare* Putnam v. Keller, 332 F.3d 541, 545 n.3 (8th Cir. 2003) (extraordinary circumstances), *with* Nord v. Walsh County, 757 F.3d 734, 743 (8th Cir. 2014) (reasonableness).

[206] *See, e.g.*, Hollingsworth v. Hill, 110 F.3d 733, 740–42 (10th Cir. 1997) (upholding qualified immunity based on extraordinary circumstances); V–1 Oil Co. v. Wyo., Dep't of Envtl. Quality, 902 F.2d 1482, 1489 (10th Cir. 1990) (same); *see also* Lawrence v. Reed, 406 F.3d 1224, 1231 (10th Cir. 2005) (applying same test and rejecting extraordinary circumstances argument).

[207] *See, e.g.*, Cox v. Hainey, 391 F.3d 25, 34 (1st Cir. 2004).

[208] Fleming v. Livingston County, 674 F.3d 874, 881 (7th Cir. 2012); Forman v. Richmond Police Dep't, 104 F.3d 950, 960 (7th Cir. 1997).

[209] *Kelly I*, 622 F.3d 248, 255–56 (3d Cir. 2010); *see also* Fiore v. City of Bethlehem, 510 F. App'x 215, 220 (3d Cir. 2013).

[210] *Poulakis*, 341 F. App'x 523, 534 (11th Cir. 2009).

conclusion that the officer is immune or does not disturb the court's conclusion that the officer's conduct was unreasonable.[211]

Other courts have specific frameworks for evaluating whether lawyers' advice supports an officer's qualified immunity defense. The Tenth Circuit, for example, has adopted this multistep test for determining when lawyers' advice establishes extraordinary circumstances: "(1) how unequivocal and specific the advice was; (2) how complete the information provided to the attorney giving the advice was; (3) the prominence and competence of the attorney; and (4) the time between the dispersal of the advice and the action taken."[212] The Ninth Circuit, while not applying extraordinary circumstances, also has sometimes used a multifactor test: (1) whether the attorney was independent, (2) whether the advice addressed the constitutionality of the proposed action, (3) whether the attorney had all the relevant facts, and (4) whether the advice was sought before or after the officer's action.[213] Other courts have identified similarly specific factors, without attempting to prescribe a comprehensive test.[214] This Article's proposed five-factor test for evaluating reasonableness draws on the factors used by the circuits.

C. Messerschmidt v. Millender*: The Supreme Court Considers Lawyers' Advice and Qualified Immunity*

The Supreme Court has not definitively resolved these questions that divide the circuits. But recently, in *Messerschmidt v. Millender*, the Court did raise the issue, suggesting strongly that lawyers' advice is relevant to qualified immunity analysis, conveying that the Justices are interested in the question of how to weigh lawyers' advice.[215]

Messerschmidt was a Fourth Amendment case involving a warrant search of the house of a suspected gang member.[216] Before submitting the

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[211] *See, e.g.*, Merchant v. Bauer, 677 F.3d 656, 664 (4th Cir. 2012); Cochran v. Gilliam, 656 F.3d 300, 309 (6th Cir. 2011); *Kelly I*, 622 F.3d at 255; Miller v. Admin. Office of the Courts, 448 F.3d 887, 896 (6th Cir. 2006); Kijonka v. Seitzinger, 363 F.3d 645, 648 (7th Cir. 2004).

[212] Roska *ex rel*. Roska v. Peterson, 328 F.3d 1230, 1253–54 (10th Cir. 2003); *see also* Davis v. Zirkelbach, 149 F.3d 614, 620 (7th Cir. 1998) (referencing the Tenth Circuit test); V–1 Oil Co. v. Wyo., Dep't of Envtl. Quality, 902 F.2d 1482, 1489 (10th Cir. 1990) (developing the test applied in *Roska*).

[213] Johnston v. Koppes, 850 F.2d 594, 596 (9th Cir. 1988); *see also* Dixon v. Wallowa County, 336 F.3d 1013, 1019 (9th Cir. 2003) (applying the *Johnston* factors).

[214] *See, e.g.*, Moss v. Martin, 614 F.3d 707, 712 (7th Cir. 2010) ("[T]he weight that we place on [defendant]'s reliance on advice of counsel depends on factors like how much information counsel had and how closely tailored the advice was to the position in question."); Cox v. Hainey, 391 F.3d 25, 35 (1st Cir. 2004) (mentioning as relevant the depth of the discussion between officer and prosecutor and whether the officer provided the lawyer with all the relevant facts).

[215] *See* 132 S. Ct. 1235, 1249 (2012).

[216] *Id.* at 1240–41.

warrant to a judge, the officer had sought and gotten the approval of his superior and a deputy district attorney.[217] The Court reversed the Ninth Circuit's conclusion that the searching officer was not entitled to qualified immunity, concluding the officer's judgment that the warrant was supported by probable cause "may have been mistaken, but it was not 'plainly incompetent.'"[218] The Court primarily held that the officer's probable cause determination was reasonable in light of the facts before the officer and the evidence he intended to search for.[219] But the Court then continued on to say that the approval of the warrant by a deputy district attorney further supported the reasonableness of the officer's belief.[220] Seeking these approvals, the Court reasoned, showed the officer had taken "every step that could reasonably be expected" of him and thus supported the reasonableness of this belief that there was probable cause.[221]

The Court then explained how attorney review is relevant. The Court first distinguished *Malley v. Briggs*,[222] which rejected immunity even though the warrant had been approved by a magistrate.[223] *Malley* means that review by superiors or by an attorney "cannot be regarded as dispositive" because they are "part of the prosecution team."[224] But, *Malley* did not suggest that "review by others is irrelevant to the objective reasonableness of the officers' determination."[225] To the contrary, the Court concluded, "[t]he fact that the officers secured these approvals is certainly pertinent."[226]

The majority's statements about the effect of counsel's approval are arguably dicta, since the opinion had already concluded that immunity should apply.[227] Further, the issue in *Messerschmidt* was complicated by the fact that the case involved counsel's advice, approval by a superior, and endorsement by a magistrate—and the Court did not analyze these separately.[228] However, at least five Justices endorsed the view that counsel's advice is "pertinent."[229] Further, the Court made no suggestion

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[217] *Id.* at 1243. The deputy district attorney reviewed the materials and approved the warrant for probable cause by initialing it. *Id.*

[218] *Id.* at 1249 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

[219] *Id.*

[220] *Id.*

[221] *Id.* (quoting Massachusetts v. Sheppard, 468 U.S. 981, 989 (1984)).

[222] *Id.* at 1249–50.

[223] *Malley*, 475 U.S. at 345.

[224] *Messerschmidt*, 132 S. Ct. at 1249.

[225] *Id.* at 1250.

[226] *Id.*

[227] *Id.* at 1249.

[228] *See id.*

[229] *Id.* at 1250.

that the advice should be considered under the heading of extraordinary circumstances; instead the Court clearly incorporated the lawyer's review into its overall analysis of whether the officer's conduct was reasonable in the circumstances.[230] Beyond this, the Court's opinion left open most of the questions on which the circuits are divided.[231] Nor did the Court note the circuit split over how to consider lawyers' advice, or consider that the lawyers' advice issue arises in contexts other than Fourth Amendment cases. However, the oral argument in the case did suggest that at least some of the Justices were interested in considering how much weight lawyers' advice should have.[232]

D. Commentators' Views

Scholars writing on qualified immunity have noted that the circuits are split over how to consider the receipt of legal advice as part of the analysis, and have cataloged the cases that raise this issue.[233] These taxonomic efforts have not been accompanied, however, by proposals for comprehensive solutions. Further, they tend to assume that the issue must be addressed under the heading of extraordinary circumstances,[234] even though many circuits have analyzed the issue (and the Supreme Court has suggested the issue should be analyzed) under basic qualified immunity reasonableness analysis. Other articles have considered related issues, like the following-orders scenario, but have not focused on the proper test for evaluating how

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[230] *See id.*

[231] *See supra* Section II.B.

[232] At oral argument, Chief Justice Roberts (who wrote the majority opinion) asked petitioner's counsel whether the Court had previously addressed the attorneys' advice issue, which suggested that he recognized the question was a new one for the Court. *See Messerschmidt* Transcript, *supra* note †, at 4. Further, the Chief Justice's colloquy with counsel about relevance of attorney advice and officer's incentives to seek advice indicates that he is interested in these questions. *See id.* at 41–43. Justice Scalia, though he joined the majority opinion in its entirety, at oral argument suggested that the advice of superiors and attorneys could only be relevant to subjective good faith, which is not a part of the qualified immunity test. *See id.* at 16. Justice Sotomayor, combining the receipt of legal advice with approval by superiors, dismissed the argument as a "Nuremburg defense" irrelevant to the qualified immunity analysis. *Id.* at 5. The oral argument suggests that the Court may be aware of and interested in the question, and might grant certiorari in a case that squarely presents the question and the opportunity to resolve the circuit split. *See* SUP. CT. R. 10(a); *supra* Section II.B (examining the circuit split). After *Messerschmidt*, then, the main questions about lawyers' advice remain open, but there is reason to think the Court might be interested in answering them.

[233] *See supra* note 14.

[234] *See* AVERY ET AL., *supra* note 14, at § 3:9 n.8, at 331 (analyzing cases under the extraordinary circumstances exception); Schwartz, *supra* note 14, at § 9A.05[C] (same); Karen M. Blum, *Qualified Immunity: Discretionary Function, Extraordinary Circumstances, and Other Nuances*, 23 TOURO L. REV. 57, 65–68 (2007) (same).

lawyers' advice fits into qualified immunity analysis.[235] Several student pieces have also noted the issue in the context of critiquing a specific case[236] or examining broader issues.[237]

This Article analyzes in detail the variety of the circuits' approaches, considers lawyers' advice as a standalone question, and proposes a specific, comprehensive framework for how to treat lawyers' advice. In doing so, it examines the issue in light of the Supreme Court's opinion in *Messerschmidt* and considers the entire spectrum of circuit court approaches. The Article next explains why the right answer is to analyze lawyers' advice as part of basic reasonableness analysis rather than under the extraordinary circumstances exception, and proposes a specific framework of threshold questions and balancing factors for determining when reliance is reasonable.

III. WHY LAWYERS' ADVICE SHOULD BE CONSIDERED IN QUALIFIED IMMUNITY ANALYSIS

This Part explains why and how courts should consider lawyers' advice as relevant to the qualified immunity defense. A court considering lawyers' advice as part of the qualified immunity defense at the summary judgment stage[238] should consider it under the basic qualified immunity test, as relevant to the question of whether a reasonable officer in the circumstances would have known that his intended conduct would violate clearly established law.[239] It should not be considered under the heading of

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[235] *See, e.g.*, Daniel L. Pines, *Are Even Torturers Immune from Suit? How Attorney General Opinions Shield Government Employees from Civil Litigation and Criminal Prosecution*, 43 WAKE FOREST L. REV. 93, 123–26 (2008) (discussing circuit decisions on lawyers' advice in the context of arguing that federal Attorney General Opinions should immunize federal officers from civil and criminal liability for torture); Teressa E. Ravenell, *Blame It on the Man: Theorizing the Relationship Between § 1983 Municipal Liability and the Qualified Immunity Defense*, 41 SETON HALL L. REV. 153, 186 (2011) (examining the superior orders scenario).

[236] *See, e.g.*, Recent Case, Kelly v. Borough of Carlisle, *622 F.3d 248 (3d Cir. 2010)*, 124 HARV. L. REV. 2083 (2011) (criticizing the Third Circuit's decision to adopt a presumption of immunity in favor of officers who seek lawyers' advice).

[237] *See, e.g.*, Hobel, *supra* note 153, at 605 (considering advice of counsel in context of "torture memos" and the superior orders defense); Adam L. Littman, Note, *A Second Line of Defense for Public Officials Asserting Qualified Immunity: What "Extraordinary Circumstances" Prevent Officials from Knowing the Law Governing Their Conduct?*, 41 SUFFOLK U. L. REV. 645, 647 (2008) (considering the extraordinary circumstances defense and arguing for presumption of immunity for reliance on a statute, regulation, or ordinance).

[238] The Article focuses on summary judgment because that is when qualified immunity is usually resolved, and also when the Supreme Court has suggested it should be resolved whenever possible. *See* Saucier v. Katz, 533 U.S. 194, 200–01 (2001).

[239] *See* Suboh v. Dist. Att'y's Office, 298 F.3d 81, 90 (1st Cir. 2002) (describing the inquiry as "whether a reasonable officer, similarly situated, would understand that the challenged conduct violated th[e] established right").

extraordinary circumstances, which is outmoded both because it has never been invoked by the Supreme Court and because it is out of step with the Court's modern approach to qualified immunity.[240] Consistent with that approach, the focus of the inquiry should be on whether, under the circumstances, a reasonable officer would have relied on the lawyer's advice to conclude that the contemplated conduct would not violate clearly established law.[241] The court should approach the question neither with an extraordinary circumstances presumption against immunity,[242] nor a presumption in favor of immunity,[243] but instead should focus on a reasonableness analysis tailored to the facts of the specific case.[244]

Under this approach, a court should examine whether the officer reasonably relied on the lawyer's advice in engaging in the challenged action; if the reliance was reasonable, then the officer should be immune. In Part IV, the Article proposes a specific test for evaluating reasonableness—courts should consider three threshold questions to determine whether legal advice may be relied upon, then balance five factors to decide whether a reasonable officer would have relied on the advice.

A. Lawyers' Advice Should Support Qualified Immunity

Lawyers' advice to officers should be considered in qualified immunity analysis because doing so is consistent with qualified immunity doctrine, furthers the policies behind the doctrine, and is broadly consistent with common law.

1. Doctrinal Consistency.—First, allowing lawyers' advice to support the qualified immunity defense fits with the Supreme Court's development of qualified immunity doctrine. The overall goal of the qualified immunity defense is to make sure that an officer is only held liable when the officer has "fair notice" that the officer's conduct is illegal.[245] The current doctrine accomplishes this goal by evaluating whether the officer's conduct violated clearly established law of which a reasonable officer would have known.[246] As the Court has emphasized, the defense is robust and protects all but the "plainly incompetent or those who

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[240] *See infra* Section III.B.1.

[241] *See, e.g.*, Cox v. Hainey, 391 F.3d 25, 35 (1st Cir. 2004).

[242] *See, e.g.*, Silberstein v. City of Dayton, 440 F.3d 306, 318 (6th Cir. 2006).

[243] *See, e.g.*, *Kelly I*, 622 F.3d 248, 255–56 (3d Cir. 2010).

[244] *See, e.g.*, *Cox*, 391 F.3d at 35.

[245] Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam).

[246] *See* Harlow v. Fitzgerald, 457 U.S. 800, 815–19 (1982).

knowingly violate the law"[247] by giving officers "breathing room to make reasonable but mistaken judgments."[248]

In developing the doctrine, the Supreme Court has focused on examining whether a reasonable officer under the circumstances would have known that their contemplated conduct would violate clearly established law.[249] This attentiveness to circumstance requires allowing lawyers' advice to support immunity, in at least some cases, because the fact that a lawyer advised the officer that the conduct would be legal is a relevant circumstance which shows that a reasonable officer would not have known the conduct would violate clearly established law.[250] A reasonable officer who is not a legal expert, and is confronted with a difficult (to the officer) legal question about how to act, may reasonably be influenced by a lawyer's advice that his intended course of action is legal.[251] Thus, both the reasonableness courts and extraordinary circumstances courts agree that, at least in some cases, lawyers' advice can be a circumstance demonstrating that a reasonable officer would not have known they were about to violate the law.[252]

It is true that since *Harlow*, the qualified immunity test has generally presumed that a reasonable officer should know clearly established law, so that an officer may be liable whether or not the officer subjectively knew the legal rules.[253] But this presumption is based on a fiction—that officers are aware of ongoing developments in constitutional law.[254] The fiction serves important purposes—to give officers and local governments independent incentives to become aware of and abide by developments in substantive law, to remedy violations when the law is clear, and to punish

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[247] Malley v. Briggs, 475 U.S. 335, 341 (1986).

[248] Stanton v. Sims, 134 S. Ct. 3, 5 (2014) (per curiam) (quoting Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2085 (2011)).

[249] *See, e.g.*, Saucier v. Katz, 533 U.S. 194, 202 (2001) ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."); Anderson v. Creighton, 483 U.S. 635, 645 (1987) (noting the importance in qualified immunity analysis of considering the particular factual circumstances of the case).

[250] *See, e.g.*, Miller v. Admin. Office of the Courts, 448 F.3d 887, 896 (6th Cir. 2006).

[251] *See, e.g.*, Cox v. Hainey, 391 F.3d 25, 35 (1st Cir. 2004) (stating that considering legal advice in "the totality of the circumstances is consistent with an inquiry into the objective legal reasonableness of an officer's belief").

[252] *See, e.g.*, *id.*; V–1 Oil Co. v. Wyo., Dep't of Envtl. Quality, 902 F.2d 1482, 1488 (10th Cir. 1990). Where the courts disagree is whether such occasions are exceptional.

[253] Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982).

[254] *See, e.g.*, Amore v. Novarro, 624 F.3d 522, 535 (2d Cir. 2010) (noting this fiction); *see also* Kelly v. Borough of Carlisle (*Kelly III*), 544 F. App'x 129, 136–37 (3d Cir. 2013) ("[Q]ualified immunity may be granted when there is a breakdown in the legal fiction that reasonably competent police officers know every clearly established law." (citing *Amore*, 624 F.3d at 535)).

officers who act in willful or negligent ignorance about the state of the law.[255] When an officer seeks a lawyer's advice before acting, however, adhering to this fiction will sometimes not be sensible.[256] Since the "clearly established" rule is designed to give officers incentives to learn and abide by clear substantive law by punishing them if they fail to do so,[257] it does not make sense to hold an officer liable when he acts on that incentive by seeking legal advice, is told that the contemplated conduct is legal, and then reasonably relies on that legal advice.[258]

Moreover, the idea that after *Harlow*, law is simply clearly established or not—so that seeking a lawyer's advice can make no difference—ignores how the circuits and the Supreme Court actually perform qualified immunity analyses once an officer is sued. Qualified immunity analysis often proceeds through a close examination and comparison of a web of precedents with the case at issue, to see whether the precedents' holdings are sufficiently similar to "clearly establish" a violation.[259] To suppose that a reasonable officer in the line of duty can or does undertake a similar analysis before acting is, again, a fiction.[260] It is a valuable fiction, but it pushes the fiction too far to presume that a reasonable officer can gain nothing by consulting a lawyer—who should know the applicable law and be competent to actually perform the relevant analysis.[261]

Considering lawyers' advice as supporting qualified immunity is also consistent with the Court's varied formulations of the qualified immunity test. If the question is whether an officer had "fair notice" that he would be violating the law,[262] at least sometimes an officer would lack fair notice when he recognized he was unsure about what the law required, asked a designated legal expert for an opinion, was told that his contemplated

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[255] *See Kelly III*, 544 F. App'x at 136–37.

[256] *See, e.g.*, *id.*

[257] *See* Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115, 121 (1991) ("This objective standard will not overdeter public officials, but will instead give them an incentive to 'pause to consider whether a proposed course of action can be squared with the Constitution' . . . ." (quoting Mitchell v. Forsyth, 472 U.S. 511, 524 (1985))); Ravenell, *supra* note 235, at 199 ("Denying government officials qualified immunity when the applicable legal rule is unambiguous gives officials an incentive to know the law.").

[258] *See* Pearson v. Callahan, 555 U.S. 223, 244 (2009) ("The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law.").

[259] *See, e.g.*, Lane v. Franks, 134 S. Ct. 2369, 2381–83 (2014) (performing such an analysis); Nord v. Walsh County, 757 F.3d 734, 738–42 (8th Cir. 2014) (same).

[260] *See* Amore v. Novarro, 624 F.3d 522, 535 (2d Cir. 2010).

[261] *See* Kijonka v. Seitzinger, 363 F.3d 645, 648 (7th Cir. 2004) (contrasting the relative competency of the prosecutor and police officer to understand clearly established law).

[262] *See* Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam).

conduct would be legal, and reasonably believed the lawyer's advice.[263] Similarly, an officer who reasonably relies on legal advice that causes a constitutional violation acts within the "breathing room to make reasonable but mistaken judgments."[264] Finally, if the question is whether the officer was "plainly incompetent or . . . knowingly violate[d] the law,"[265] at least sometimes a competent officer may seek legal advice on a question about which the officer is uncertain, but receive the wrong advice.[266] In that circumstance, the officer is not willfully violating the law—instead, the officer is attempting to avoid violating the law. Nor is the officer incompetent—instead, the violation occurs because the officer was misinformed by someone the officer reasonably believed was better situated to know the relevant law.[267]

Indeed, consulting a lawyer is often the main or only way that a reasonable and competent officer who is unsure what the law requires can try to find an answer.[268] The constitutional law applicable in many areas of § 1983 litigation is complex, circumstance-specific, and evolves regularly.[269] Officers usually do not have the time or expertise to learn all of this law.[270] Certainly officers do have the duty and ability to know the broad legal standards that govern their conduct.[271] But if an officer knows (or fears) the law is complicated, confronts a difficult problem, wishes to avoid a mistake, and so seeks legal advice, that often will be the officer's best and most reasonable course of action.[272] This is especially true when the officer has good reasons for wanting to take some action rather than

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263 *See, e.g.*, V–1 Oil Co. v. Wyo., Dep't of Envtl. Quality, 902 F.2d 1482, 1489 (10th Cir. 1990).

264 Stanton v. Sims, 134 S. Ct. 3, 5 (2013) (per curiam) (quoting Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2085 (2011)).

265 Malley v. Briggs, 475 U.S. 335, 341 (1986).

266 *See, e.g.*, *Kijonka*, 363 F.3d at 648.

267 *See, e.g.*, *id.*

268 *See, e.g.*, Messerschmidt v. Millender, 132 S. Ct. 1235, 1249 (2012); Cox v. Hainey, 391 F.3d 25, 35 (1st Cir. 2004).

269 *See* Saucier v. Katz, 533 U.S. 194, 214 (2001) (Ginsburg, J., concurring in the judgment) ("Law in the area is constantly evolving and, correspondingly, variously interpreted.").

270 *Cf.* Amore v. Novarro, 624 F.3d 522, 535 (2d Cir. 2010). For example, there is little reason to think a sheriff in a small North Dakota county would know the intricacies of the *Pickering* balancing test, but it would be reasonable to rely on the county's chief legal officer—the county attorney—to know it, or be able to learn it. *See* Nord v. Walsh County, 757 F.3d 734, 740, 743 (8th Cir. 2014) (involving a county sheriff in a small department who asked the county attorney for advice before terminating a deputy sheriff); *see also, e.g.*, Lee v. Mihalich, 847 F.2d 66, 71 (3d Cir. 1988) (involving a lawyer who was asked for advice by an officer and had an intern prepare a research memo on the question).

271 *See* Harlow v. Fitzgerald, 457 U.S. 800, 815–19 (1982). This is also a reason for making the complexity of the legal question one of the balancing factors in deciding whether the officer's reliance on the lawyer's advice was reasonable. *See infra* Section IV.B.

272 *See, e.g.*, L.A. Police Protective League v. Gates, 907 F.2d 879, 883, 888 (9th Cir. 1990).

simply doing nothing.[273] Seeking advice if the officer is uncertain is what a competent officer *should* do—and qualified immunity doctrine should encourage the officer to do so.[274].

2. Sound Policy.—Incorporating lawyers' advice into qualified immunity analysis is also consistent with the balance of policy considerations driving the doctrine. The overall purpose of § 1983 is to remedy and deter abuses of power that violate constitutional rights.[275] Within that framework, qualified immunity doctrine balances "the need to hold public officials accountable when they exercise power irresponsibly [against] the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[276] Considering lawyers' advice in qualified immunity analysis serves all of these goals.

If lawyers' advice may support the qualified immunity defense, this will incentivize officers to seek advice before acting in uncertain situations.[277] Police officials are actually aware of the cases allowing reliance on lawyers' advice to support the immunity defense, and have advised officers to seek advice to take advantage of this rule.[278] If officers more frequently seek advice, this should actually reduce the instances of abusive violations of rights because generally officers may be more likely than lawyers to make legal mistakes.[279] Moreover, a rule that encourages advice-seeking may actually aid plaintiffs' ability to recover in cases when

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[273] *See* Filarsky v. Delia, 132 S. Ct. 1657, 1665 (2012) ("We have called the government interest in avoiding 'unwarranted timidity' on the part of those engaged in the public's business 'the most important special government immunity-producing concern.'" (quoting Richardson v. McKnight, 521 U.S. 399, 408 (1997))); *Richardson*, 521 U.S. at 408 (noting that qualified immunity doctrine "protect[s] the public from unwarranted timidity on the part of public officials").

[274] *See Kelly I*, 622 F.3d 248, 255–56 (3d Cir. 2010); Kijonka v. Seitzinger, 363 F.3d 645, 648 (7th Cir. 2004).

[275] City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 268 (1981) ("[T]he deterrence of future abuses of power by persons acting under color of state law is an important purpose of § 1983." (citing Owen v. City of Independence, 445 U.S. 622, 651 (1980))).

[276] Pearson v. Callahan, 555 U.S. 223, 231 (2009).

[277] *See Kelly I*, 622 F.3d at 255–56; *Messerschmidt* Transcript, *supra* note †, at 43 ("Do you want—do you want to encourage officers, when they're applying for search warrants, to have them reviewed by the deputy district attorney or not?" (question from Roberts, C.J.)).

[278] *See, e.g.*, Elliot B. Spector, *A Little Advice May Buy You Immunity*, POLICE CHIEF, May 2005, at 10 (article in magazine directed at police chiefs advising officers that consulting a lawyer may support a qualified immunity defense).

[279] *See* Poulakis v. Rogers, 341 F. App'x 523, 533 (11th Cir. 2009) ("[W]hen an officer is unsure of how to proceed, his ability to seek guidance from a prosecutor may protect an individual from wrongful arrest."); *Kijonka*, 363 F.3d at 648 (noting that having officers consult prosecutors is "a valuable screen against false arrest").

an officer seeks legal advice and then disregards it.[280] Thus, considering lawyers' advice should actually reduce abusive violations of rights, and may sometimes make it easier to punish such violations.

Further, a contrary rule would "create perverse incentives" for officers to not seek advice because "if they sought advice of counsel that turned out to be wrong, they would be liable, but if they maintained a deliberate ignorance, they might be able to get away with arguing that no reasonable officer would have known that the rule applied to their particular situation."[281] This disincentive to seek legal advice, in turn, increases officers' tendency to "exercise power irresponsibly."[282]

Considering lawyers' advice also, perhaps more obviously, serves the policy of shielding officials who perform their duties reasonably.[283] As noted, when an officer confronted with a difficult legal question seeks an answer from a lawyer, that officer is acting reasonably and desirably. It is therefore good policy for the qualified immunity doctrine to protect that officer when her reliance on the lawyer's opinion was reasonable. It would be unfair to punish officers who reasonably recognize they may not know the law and seek legal advice before acting, but then are misled by the lawyer's advice.[284]

3. Common Law Support.—Finally, incorporating lawyers' advice into the qualified immunity defense is also broadly consistent with common law. The Court has looked to common law for guidance in interpreting § 1983, and in particular, in crafting immunities under the statute.[285] In developing the doctrine of qualified immunity, the Court drew on the common law rule that good faith and probable cause were a defense to an action for false arrest, and then expanded that defense to apply to all § 1983 causes of action.[286] In modeling qualified immunity, the Court has looked both to common law in 1871 and to more modern developments,[287] and has followed common law rules flexibly, not "slavishly," to serve the

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[280] *See, e.g.*, Borges Colón v. Román-Abreu, 438 F.3d 1, 18–19 (1st Cir. 2006) (jury concluding that lawyers had actually suggested acts were not legal); Charfauros v. Bd. of Elections, 249 F.3d 941, 954 (9th Cir. 2001) (court concluding the same).

[281] Davis v. Zirkelbach, 149 F.3d 614, 620 (7th Cir. 1998).

[282] Pearson v. Callahan, 555 U.S. 223, 231 (2009).

[283] *See id.*

[284] *See, e.g.*, L.A. Police Protective League v. Gates, 907 F.2d 879, 888 (9th Cir. 1990) (arguing that it would be "counterproductive and even oppressive" to impose liability on officers faced with a "complex and uncertain" legal issue who sought and followed legal advice).

[285] *E.g.*, Filarsky v. Delia, 132 S. Ct. 1657, 1662–65 (2012); *see also supra* notes 51–52 and accompanying text.

[286] Pierson v. Ray, 386 U.S. 547, 557 (1967).

[287] *Filarsky*, 132 S. Ct. at 1662, 1665.

particular purposes of immunity under § 1983.[288] Scholars debate whether the Court's use of common law is consistent or productive,[289] but it is at least true that the Court considers common law analogs relevant to developing immunity rules under § 1983.

At common law, advice of counsel was "a good defense" to causes of action "where intent is requisite to the offense and such intent involves a conclusion as to a matter of law."[290] This description aligns fairly closely with the issue in a qualified immunity case—whether an officer should have known his conduct would violate clearly established law. More specifically, at common law in 1871, advice of counsel was a defense to a suit for malicious prosecution,[291] another cause of action that the Court has sometimes considered as a common law analog to the § 1983 suit.[292] This is still the modern rule.[293] The modern rule also considers advice of counsel relevant in other contexts to "the client's state of mind,"[294] which supports considering advice of counsel relevant to an officer's argument that his conduct was reasonable and in objective good faith. It is true that under the common law approach, advice of counsel is relevant to *subjective* state of mind.[295] But transmuting this into an objective intent inquiry is fully consistent with the Court's approach in qualified immunity cases. This is exactly what *Harlow* did when it transformed the subjective common law good faith defense into the "'objective' good faith" defense of qualified immunity.[296]

4. Responses to Counterarguments.—For these reasons, almost all the circuits, as well as the *Messerschmidt* majority, recognize that lawyers' advice should carry some weight in qualified immunity analysis.[297] While

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[288] Anderson v. Creighton, 483 U.S. 635, 644–45 (1987).

[289] *See supra* notes 70–71.

[290] Thomas L. Preston, *Advice of Counsel as a Defense*, 28 VA. L. REV. 26, 49 (1941) (summarizing advice of counsel defense across several different areas of law, and collecting cases before and after 1871).

[291] *Id.* at 35.

[292] *E.g.*, Heck v. Humphrey, 512 U.S. 477, 483–84 (1994) (analogizing between malicious prosecution claims and claims that call into question the lawfulness of confinement).

[293] *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 29 cmt. c (AM. LAW INST. 2000); RESTATEMENT (SECOND) OF TORTS § 666 (AM. LAW INST. 1977).

[294] RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 29 cmt. c.

[295] *Id.*

[296] 457 U.S. 800, 815–19 (1982); *see also* Anderson v. Creighton, 483 U.S. 635, 645 (1987) ("*Harlow* . . . completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action.").

[297] *See supra* Sections II.B–C.

there are some arguments that this view is misguided,[298] the benefits of this test outweigh any costs.

a. Barred by precedent.—One objection is that allowing reliance on lawyers' advice to support an officer's qualified immunity defense is inconsistent with the Court's own precedent. In *Malley v. Briggs*, the Court held that an officer's independent duty to act reasonably in light of clearly established law means that an officer is not per se immune simply because a judge approves a warrant for probable cause.[299] Further, reliance on lawyers' advice is an even weaker case for per se immunity than *Malley* since a lawyer, unlike a magistrate, usually will have some incentive to approve the officer's proposed course of action.[300] But, while the Court in *Malley* rejected a per se rule of immunity, it did not adopt a countervailing per se rule that external opinions about the legality of the conduct are irrelevant to the analysis. The Court in *Messerschmidt* so held when it rejected the argument that *Malley* creates a per se rule, and suggested that both approval of the warrant and the advice of the lawyer did support the officer's qualified immunity defense.[301]

It might also be argued that considering lawyers' advice is inconsistent with *Harlow*, which made qualified immunity an objective test that considers only the officer's conduct in light of clearly established law, and established a presumption that a reasonable officer generally knows that clearly established law.[302] But the Court has never held that the *Harlow* presumption is an absolute rule. To the contrary, in *Harlow* itself the Court made clear that the presumption was only that, and that there could be extraordinary circumstances in which it should not hold.[303] This Article proposes doing away with the extraordinary circumstances label, but clearly *Harlow* recognized that an officer should not always be presumed to know clearly established law. Therefore *Harlow* does not bar considering lawyers' advice in qualified immunity analysis, and indeed actually seems to allow it. Finally, even if either of these precedents were inconsistent with

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[298] *E.g.*, Messerschmidt v. Millender, 132 S. Ct. 1235, 1260 (2012) (Sotomayor, J., dissenting) (arguing that considering prosecutors' advice as relevant "would turn the Fourth Amendment on its head").

[299] 475 U.S. 335, 341 (1986); *see also* Groh v. Ramirez, 540 U.S. 551, 564 (2004) (similarly rejecting the qualified immunity defense because any reasonable officer would have known that the warrant was invalid).

[300] *See Messerschmidt*, 132 S. Ct. at 1249.

[301] *Id.* at 1249–50 (stating that *Malley* did not hold that "review by others is irrelevant to the objective reasonableness of the officers' determination").

[302] 457 U.S. 800, 815–19 (1982); *see also* Davis v. Scherer, 468 U.S. 183, 191 (1984) ("*Harlow* . . . rejected the inquiry into state of mind in favor of a wholly objective standard.").

[303] 457 U.S. at 819.

the proposed rule, the Court has proven more willing to reverse itself in qualified immunity cases than in most other statutory interpretation contexts, which suggests it might be more willing to revisit its precedents on this issue.[304]

b. No need for even greater margin of error.—Another, related concern is that considering lawyers' advice in qualified immunity analysis would wrongly expand the margin of error in a test that is already very officer friendly. The clearly established law test already accommodates uncertainties in the law and gives officers room for reasonable error. It does not require officers to know all legal developments, only ones clearly established by Supreme Court decisions, and those of the officer's home circuit.[305] This is more than enough margin of error to protect officers from liability, and indeed it is often argued that the doctrine is already too officer friendly.[306] But this argument disregards that an officer who is not a lawyer is unlikely to be familiar even with "clearly established" law as it develops in every area of law the officer may encounter.[307] When the officer actually is unsure about the law, at least sometimes it is reasonable for the officer to rely on a lawyer's advice to determine what that "clearly established" law requires, even though sometimes the lawyer will err.[308]

More importantly, considering lawyers' advice in the analysis does *not* simply give officers an even wider margin of error for officers to violate rights. Instead, it protects officers when they act reasonably in an attempt to *avoid* violating rights, and moreover, gives them an incentive to seek advice that, in most cases, will tend to reduce their error rate.[309] Since qualified immunity already makes it very difficult for plaintiffs to prevail even when their rights are violated, the marginal increase in officer protection conferred by considering lawyers' advice in the qualified immunity analysis is justified by the prospective decrease in overall violations that should follow from a rule that encourages officers to seek advice before acting.[310]

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[304] *See supra* notes 66–72 and accompanying text.

[305] *See, e.g.*, Carroll v. Carman, 135 S. Ct. 348, 350 (2014) (per curiam).

[306] *See, e.g.*, Blum, Chemerinsky & Schwartz, *supra* note 78.

[307] *See, e.g.*, Amore v. Novarro, 624 F.3d 522, 535 (2d Cir. 2010).

[308] *See, e.g.*, Kijonka v. Seitzinger, 363 F.3d 645, 648 (7th Cir. 2004) (holding that a prosecutor disregarded clearly established law, but the police officer was entitled to qualified immunity for reasonably relying on the prosecutor's advice).

[309] *See* Davis v. Zirkelbach, 149 F.3d 614, 620 (7th Cir. 1998).

[310] *See Kelly I*, 622 F.3d 248, 258 (3d Cir. 2010).

c. Transformation into a subjective inquiry.—Still others might claim that considering lawyers' advice in qualified immunity analysis would import a subjective inquiry that is inconsistent with the Court's emphasis on objective reasonableness.[311] If the officer is allowed to support his defense by arguing that the lawyer's advice would have led a reasonable officer to believe that he would not be violating the law, this is *really* an argument that the officer did not subjectively know the law. But this contradicts the Court's modern approach to qualified immunity since *Anderson v. Creighton*, which is to examine the reasonableness of the officer's actions in the circumstances of the particular case.[312] The Court emphasized in *Anderson* that this attention to circumstances does not transmute the inquiry into a subjective inquiry.[313] Circuit courts applying the reasonableness approach to lawyers' advice have been able to weigh lawyers' advice in the analysis without changing the analysis into a subjective one.[314] They can consider the lawyer's advice as it would have influenced the conduct of a reasonable officer in the circumstances, rather than asking whether this particular officer–defendant subjectively relied on the advice. Certainly the subjective/objective distinction in qualified immunity doctrine is subtle and sometimes confusing,[315] but extending the "reasonableness in the circumstances" rule to include the legal advice circumstance does not alter or overcomplicate the objective reasonableness approach.[316]

d. Practical concerns: incentives for collusion and empty-handed plaintiffs.—A final set of objections is that allowing lawyers' advice to support officers' qualified immunity will create undesirable incentives for misconduct and collusion, and leave plaintiffs

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[311] *See* Davis v. Scherer, 468 U.S. 183, 191 (1984); Harlow v. Fitzgerald, 457 U.S. 800, 815–19 (1982).

[312] *See* Saucier v. Katz, 533 U.S. 194, 201 (2001) ("This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition . . . .").

[313] 483 U.S. 635, 641 (1987) (noting that considering the factual circumstances of the case "does not reintroduce . . . the inquiry into officials' subjective intent that *Harlow* sought to minimize").

[314] *See, e.g.*, Cox v. Hainey, 391 F.3d 25, 35 (1st Cir. 2004).

[315] Lisa R. Eskow & Kevin W. Cole, *The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the Specter of Subjective Intent That Haunts Objective Legal Reasonableness*, 50 BAYLOR L. REV. 869, 888 (1998) (noting confusion about interaction between subjective and objective standards after *Harlow*).

[316] *See* Amore v. Navarro, 624 F.3d 522, 535 (2d Cir. 2010) (noting that qualified immunity analysis does not "consider an official's subjective intent," but does "consider 'the particular facts of the case,' including the objective information before the officer at the time of the arrest" (citation omitted) (quoting Robison v. Via, 821 F.2d 913, 921 (2d Cir. 1987))).

empty-handed in cases where an officer engaged in conduct that violated the law.[317]

First, considering lawyers' advice in qualified immunity analysis might give officers and attorneys negative incentives to collude to cross-immunize.[318] If officers know that "a little advice may buy you immunity,"[319] then they might simply have lawyers' rubber-stamp their proposed actions. As the *Messerschmidt* majority noted, since the lawyer and the officer often will be on the same "team,"[320] the lawyer may have natural incentives to unduly sanction the officer's intended course of action.[321] And if the rule were that advice presumptively provides immunity, officers could give the lawyer only barebones facts, which would then give the lawyer herself plausible deniability against liability. This would confer immunity on officers and lawyers who do not deserve it, and allow governments to push the envelope of conduct in ever more abusive ways.[322]

Despite this concern, it does not support an absolute rule against considering lawyers' advice in qualified immunity analysis. Instead, it supports a searching examination of the circumstances to decide whether the officer's reliance on the lawyer's advice was actually reasonable.[323] Under this Article's framework—outlined in Part IV—lawyers' advice will not support immunity under the proposed test if an officer leaves out important facts, or if the lawyer's "advice" is an unspecific "sure, sounds good."[324] There are also other constraints that will operate to inhibit lawyers from merely rubber-stamping officers' requests. One is that the lawyer

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[317] In *Messerschmidt*, Justice Sotomayor pithily invoked these criticisms by describing the majority's approach as "four wrongs apparently make a right." 132 S. Ct. 1235, 1260 (2012) (Sotomayor, J., dissenting).

[318] *See, e.g.*, Gilbrook v. City of Westminster, 177 F.3d 839, 847, 870 (9th Cir. 1999) (arguing, in a case of the firing of a firefighter, ruling "that reliance on the advice of counsel is sufficient to confer qualified immunity" would "provid[e] an incentive for lawyers to tell public-employer clients that they have immunity even when other factors suggest the absence of immunity").

[319] Spector, *supra* note 278, at 10.

[320] 132 S. Ct. at 1249.

[321] *See id.* at 1252 (Kagan, J., concurring in part and dissenting in part) ("To make their views relevant is to enable those teammates (whether acting in good or bad faith) to confer immunity on each other for unreasonable conduct . . . ."); Cox v. Hainey, 391 F.3d 25, 35 n.4 (1st Cir. 2004) ("[P]rosecutors work hand in glove with . . . officers . . . .").

[322] *See* Jeffries, *supra* note 125, at 120 ("[T]he repeated invocation of qualified immunity will reduce the meaning of the Constitution to the lowest plausible conception of its content."); Pfander, *supra* note 125, at 1617 ("[B]y authorizing courts to dodge the merits, the *Pearson* regime may . . . produce a kind of race to the bottom in which courts validate constitutionally dubious official action.").

[323] *See Cox*, 391 F.3d at 35 ("Although we acknowledge the possibility of collusion between police and prosecutors, we do not believe that possibility warrants a general rule foreclosing reliance on a prosecutor's advice.").

[324] *See infra* Section IV.A.

herself is potentially liable for endorsing actions that violate clearly established law.[325] Another is the independent ethical rules that govern government lawyers' conduct—for example, the rule that the lawyer's client is the government itself, not the official, which means that the lawyer has an ethical duty to prevent officers exposing the municipality to liability, not simply to aid the individual officer in any way possible.[326]

A related concern is that immunizing officers based on lawyers' advice will leave empty-handed plaintiffs whose rights have actually been violated. To some extent, this is simply inherent in the qualified immunity doctrine. The defense protects officers for "reasonable but mistaken judgments,"[327] which means that its core purpose is to sometimes prevent liability even though the plaintiff's rights were been violated. Also, even when lawyers' advice supports immunity for the officer who took the advice, the plaintiff will not always be without remedy. The plaintiff may be able to pursue the lawyer as a defendant,[328] and the standard of reasonableness is higher for a lawyer who is expected to know and be able to research the law.[329] If the lawyer gave incompetent legal advice on which the officer reasonably relied before committing the violation, the lawyer should be liable.[330] Further, the lawyer generally will not be able to claim absolute immunity. Even in Fourth Amendment cases, a prosecutor will generally not have absolute immunity for advising officers that probable cause exists to search, seize, or arrest.[331] And outside the Fourth Amendment context, cases in which the lawyer would be entitled to invoke absolute immunity for giving advice are rare.[332]

This benefit would be magnified when plaintiffs are eligible to sue the government itself. For example, if a county had a policy or custom under which its attorneys always gave officers legal "cover" for their actions,

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[325] *See, e.g.*, Kijonka v. Seitzinger, 363 F.3d 645, 648 (7th Cir. 2004).

[326] Brett Kandt, *Held to a Higher Standard: Ethical Considerations for Public Lawyers*, NEV. LAW., Dec. 2009, at 10, 12, 14 (noting special ethical constraints on government lawyers and that generally, the client is the government, not the individual government official); *see also* Owen v. City of Independence, 445 U.S. 622, 638 (1980) (holding that local governments do not have qualified immunity from liability under § 1983).

[327] Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2085 (2011).

[328] *See, e.g.*, *Kijonka*, 363 F.3d at 648 (including as a defendant the lawyer who gave the advice); Watertown Equip. Co. v. Norwest Bank Watertown, 830 F.2d 1487, 1495–96 (8th Cir. 1987) (same).

[329] *See, e.g.*, *Kijonka*, 363 F.3d at 648.

[330] *See, e.g.*, *id.* (holding that prosecutor was not entitled to qualified immunity for an erroneous interpretation of law, but police officer was entitled to qualified immunity for reasonably relying on prosecutor's advice).

[331] *See, e.g.*, Burns v. Reed, 500 U.S. 478, 495–96 (1991) (holding that prosecutors are not entitled to absolute immunity for legal advice to police).

[332] *But see, e.g.*, Lee v. Mihalich, 847 F.2d 66, 71–72 (3d Cir. 1988) (involving a lawyer's advice about whether a prosecution could be brought in light of the statute of limitations).

then the municipality itself could be held liable under the Court's *Monell* doctrine.[333] Moreover, under this Article's proposed framework in Part IV, some of the factors that tend to favor a conclusion that an officer's reliance on advice was reasonable are also factors that would tend to make local government liability more likely. For example, if the lawyer giving the advice was sufficiently high ranking, that might make it more reasonable for the officer to rely, but it would also give the plaintiff a stronger argument that the advice amounted to government policy, so that the government itself could be liable.[334]

B. Lawyers' Advice Should Be Analyzed for Reasonableness, Not Extraordinary Circumstances

If lawyers' advice is relevant to qualified immunity analysis, the next question is how to decide when the advice supports the qualified immunity defense. The two main approaches in the circuits are to analyze it under the normal qualified immunity reasonableness analysis, or under an extraordinary circumstances exception.[335] The better approach is to make it part of the basic qualified immunity reasonableness analysis.

1. Doctrinal Consistency.—First, the reasonableness approach better fits the Supreme Court's development of qualified immunity doctrine, which has focused on reasonableness in the circumstances and abandoned *Harlow*'s extraordinary circumstances dicta.[336] Since *Anderson v. Creighton*, and with increasing strength over time, the Court has emphasized that the key focus of the qualified immunity analysis is on objective reasonableness in the circumstances confronted by the officer.[337] Just as important, the Court has never alluded to, much less applied, *Harlow's* extraordinary circumstances dicta.[338] The Court's overall focus on objective reasonableness in the circumstances is inconsistent with an approach that creates a special, undefined exception for extraordinary circumstances that revives the mixed objective/subjective test of the pre-

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[333] *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978). If the officer was a state officer, however, the government would be wholly immune.

[334] *See* Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986) (holding that a city may be held liable for a decision made by an official with authority to make policy for the city); *see also, e.g.*, Sueiro Vázquez v. Torregrosa de la Rosa, 494 F.3d 227, 234–35 (1st Cir. 2007) (involving a high-ranking lawyer giving advice); V–1 Oil Co. v. Wyo., Dep't of Envtl. Quality, 902 F.2d 1482, 1489 (10th Cir. 1990) (same).

[335] *See supra* Section II.B (examining the circuit split).

[336] *See* 457 U.S. 800, 819 (1982).

[337] *See, e.g.*, Davis v. Scherer, 468 U.S. 183, 191 (1984) ("*Harlow* . . . rejected the inquiry into state of mind in favor of a wholly objective standard.").

[338] Greabe, *supra* note 96, at 11.

Harlow cases.[339] *Messerschmidt* confirms this trend: both the majority and the dissent considered the relevance of the lawyer's advice without any reference to potential extraordinary circumstances.[340] The doctrine has moved away from the idea of extraordinary circumstances towards a holistic consideration of reasonableness under all the circumstances, and this trend should extend to the special scenario of lawyers' advice.

2. Sound Policy.—Second, the reasonableness approach better fits the policies that support courts' consideration of lawyers' advice in qualified immunity analysis. Relegating lawyers' advice to an extraordinary circumstances exception suggests that seeking lawyers' advice should be helpful only in extraordinary cases.[341] But in fact, seeking lawyers' advice both is and should be ordinary. The extraordinary circumstances courts actually have noted the first point—that lawyers' advice is routine—but have used it to justify a rule that lawyers' advice can only rarely support immunity, since *Harlow* "requires" circumstances that are "extraordinary."[342] This reasoning has it backwards. Seeking advice is ordinary, and it should be encouraged, so the test for whether it supports qualified immunity should be whether the officer was reasonable in the circumstances to trust the lawyer's judgment over his own. Sometimes this test will be met, and others not, but relegating lawyers' advice to an extraordinary circumstances exception does not recognize the strong policy justifications for a rule that encourages and rewards officers who seek and reasonably rely on legal advice for difficult questions.[343]

3. Analytical Simplicity and Judicial Efficiency.—Third, the reasonableness approach simplifies in two ways a test that is widely recognized as confusing: it eliminates an extra step of analysis, and it prevents the injection of a subjective element into what is supposed to be an objective analysis. It is widely recognized that qualified immunity doctrine creates confusion among circuit courts,[344] and the discussion above has shown the uncertainty regarding how to analyze lawyers' advice in

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[339] *See, e.g.*, Watertown Equip. Co. v. Norwest Bank Watertown, 830 F.2d 1487, 1495 (8th Cir. 1987) (suggesting that the extraordinary circumstances exception is a subjective exception to the general objective rule); McKinley v. Trattles, 732 F.2d 1320, 1324 (7th Cir. 1984) (same).

[340] 132 S. Ct. 1235, 1249 (2012); *id.* at 1252 (Kagan, J., concurring in part and dissenting in part); *id.* at 1259–60 (Sotomayor, J., dissenting).

[341] *See, e.g.*, Silberstein v. City of Dayton, 440 F.3d 306, 318 (6th Cir. 2006).

[342] *See, e.g.*, Buonocore v. Harris, 134 F.3d 245, 252 (4th Cir. 1998) ("It is hardly unusual, let alone extraordinary, for public officers to seek legal advice."); V–1 Oil Co. v. Wyo., Dep't of Envtl. Quality, 902 F.2d 1482, 1488 (10th Cir. 1990) ("[F]ew things in government are more common than the receipt of legal advice.").

[343] *See supra* Section III.B.2.

[344] *See, e.g.*, Wilson, *supra* note 72, at 447; *see also* Jeffries, *supra* note 129, at 854.

particular.[345] Taking lawyers' advice out of the category of extraordinary circumstances and allowing it to be considered with other circumstances of the case will simplify the analysis by removing a special and complicated extra step. Moreover, the specific framework proposed in Part IV of this Article would further streamline and clarify how it is that lawyers' advice fits with qualified immunity.

Including lawyers' advice in the basic qualified immunity reasonableness analysis will also eliminate confusion by making clear that advice is relevant only to the officer's objective reasonableness, and not to the officer's subjective state of mind. *Harlow*'s own brief, cryptic discussion of extraordinary circumstances in dicta is at the root of this confusion.[346] In the same breath, the Court both said that the extraordinary circumstances exception requires an officer to show they neither "knew nor should have known of the relevant legal standard" (i.e., a subjective test), and that "again, the defense would turn primarily on objective factors."[347] The "mysterious" *Harlow* dicta[348] has produced confusion in the circuits, which sometimes seem to treat extraordinary circumstances as subjective, and sometimes as purely objective.[349] It is possible to read extraordinary circumstances as a purely objective test,[350] but the phrase and cases applying it demonstrate confusion about whether the exception is objective or subjective.[351] Analyzing lawyers' advice under the basic reasonableness test will eliminate this confusion.

Relatedly, this approach also will make it easier and more likely to resolve the defense on summary judgment. The Court has repeatedly emphasized that qualified immunity is an immunity from suit, so it is important for the qualified immunity test to allow cases to be resolved early in the litigation whenever possible.[352] But courts considering lawyers'

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345 *See supra* Section II.B.

346 Greabe, *supra* note 96, at 11.

347 Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982).

348 Greabe, *supra* note 96, at 11.

349 *See, e.g.*, Crawford-El v. Britton, 93 F.3d 813, 836 n.11 (D.C. Cir. 1996) (describing *Harlow*'s extraordinary circumstances dicta as "cryptic[]," but reading it to "allow[] the use of evidence concerning subjective motivation if it *benefits* the government"), *vacated*, 523 U.S. 574 (1998); Floyd v. Farrell, 765 F.2d 1, 4 n.1 (1st Cir. 1985) (stating that the extraordinary circumstances exception might mean "that the Court [in *Harlow*] did not mean to entirely eliminate from consideration actual 'subjective' knowledge of constitutional standards"); McKinley v. Trattles, 732 F.2d 1320, 1324 (7th Cir. 1984) (suggesting that the extraordinary circumstances exception left a limited role for subjective knowledge in qualified immunity analysis).

350 *See, e.g.*, Morris, *supra* note 39, at 519 ("*Harlow*'s qualified immunity involves only an objective component that can usually be resolved by summary judgment at the pleadings stage.").

351 *See* Greabe, *supra* note 96, at 11 (noting tension between generally objective qualified immunity test and seemingly subjective extraordinary circumstances exception).

352 *E.g.*, Saucier v. Katz, 533 U.S. 194, 200 (2001).

advice under extraordinary circumstances, perhaps because they take the test to be subjective, sometimes conclude that invoking lawyers' advice as a basis for the defense creates fact issues that cannot be resolved at summary judgment.[353] Clarifying that the test for evaluating lawyers' advice is the same basic reasonableness test as under normal qualified immunity analysis will signal to courts that the issue can be resolved at summary judgment.[354]

4. Responses to Counterarguments.—The two main arguments against the reasonableness approach and in favor of extraordinary circumstances are that *Harlow* itself requires the extraordinary circumstances approach, and that the extraordinary circumstances approach is required to preserve the valuable *Harlow* presumption that a reasonable officer should know clearly established law. With regard to the first point, *Harlow*'s discussion of the extraordinary circumstances exception is purely dicta, and the Court has never applied or elaborated on it.[355] It is understandable why some circuits have built an extraordinary circumstances doctrine on that dicta,[356] but the fact that the Court has not used the exception in any of its long line of qualified immunity cases since *Harlow* strongly suggests that *Harlow*'s extraordinary circumstances approach is outmoded and perhaps even disapproved.[357]

The second, more compelling objection is that *Harlow*'s extraordinary circumstances exception is required to preserve the *Harlow* presumption that a reasonable officer should know clearly established law because the Court established both in the same paragraph of discussion.[358] Under this view, if the extraordinary circumstances exception is discarded, so too will be the valuable general rule that a reasonable officer knows clearly established law. But in fact, the extraordinary circumstances label for lawyers' advice cases is not needed to preserve that fiction in the mine-run of cases.[359] Instead, this Article's proposed threshold questions can ensure that lawyers' advice only factors into reasonableness analysis in cases that meet the necessary preconditions that could allow a court to conclude that

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353 *See, e.g.*, Watertown Equip. Co. v. Norwest Bank Watertown, 830 F.2d 1487, 1495 (8th Cir. 1987).

354 This is not to say that it *always* will be resolved at summary judgment—sometimes there will be fact questions about whether the officer is entitled to rely on the advice. *See, e.g.*, Slone v. Herman, 983 F.2d 107, 111 (8th Cir. 1993) (rejecting reliance on counsel because "[t]he record is not clear . . . as to exactly what counsel's advice was and when it was given").

355 *See* 457 U.S. 800, 819 (1982); Greabe, *supra* note 96, at 11.

356 *See, e.g.*, Roska *ex rel.* Roska v. Peterson, 328 F.3d 1230, 1247 (10th Cir. 2003).

357 *See, e.g.*, Messerschmidt v. Millender, 132 S. Ct. 1235, 1249 (2012).

358 457 U.S. at 818–19.

359 *See, e.g.*, Cox v. Hainey, 391 F.3d 25, 35 (1st Cir. 2004).

lawyers' advice alters the normal presumption.[360] Further, they do so without the rhetorical baggage of a phrase that leads courts to think that reliance on lawyers' advice can only support immunity in the rare or extraordinary case.[361]

C. The Test Should Be Neutral, Not Presumptive

1. Neutral, Not Presumptive.—The test for weighing lawyers' advice in qualified immunity analysis should be neutral, neither presuming immunity for reliance on legal advice[362] nor presuming that immunity is "extraordinary."[363] The relevance of lawyers' advice should be evaluated under a neutral reasonableness test like the one proposed in Part IV of this Article, but only after the officer meets the screening burden of the threshold questions.

Sometimes an officer will be reasonable under the circumstances to rely on lawyers' advice.[364] But presumptively granting immunity simply for speaking to a lawyer goes too far by creating bad incentives for officers to seek "legal advice" based on limited or incomplete facts, and by incentivizing collusion among lawyers and officers to push the envelope of legal conduct.[365] If merely seeking lawyers' advice presumptively confers immunity, then a lawyer can simply tell the officer, "looks good," presumptively immunizing the officer. The officer could then evade responsibility by relying on the advice, while the lawyer could evade responsibility by claiming she did not know all the relevant facts.[366] Further, a presumption could wrongly sweep into the immunity basket cases in which the officer was not at all justified in relying on the advice—cases designed to be screened out by the threshold questions in this Article's proposed framework.[367]

Neither should there be a presumption that lawyers' advice will only rarely support the defense in extraordinary circumstances.[368] While an officer should be required to demonstrate certain preconditions for relying on the advice, once he does so, the better approach is to neutrally analyze whether the officer was reasonable in relying on the advice. A searching

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360 *See infra* Section IV.A.

361 *See, e.g.*, Silberstein v. City of Dayton, 440 F.3d 306, 318 (6th Cir. 2006).

362 *E.g.*, *Kelly I*, 622 F.3d 248, 255–56 (3d Cir. 2010).

363 *E.g.*, *Silberstein*, 440 F.3d at 318.

364 *See supra* Section III.B; *infra* Part IV.

365 *See supra* Section III.A.4.d.

366 *See* Recent Case, *supra* note 236, at 2086–87 (criticizing the *Kelly I* presumption).

367 *See infra* Section IV.A.

368 *E.g.*, *Silberstein*, 440 F.3d at 318.

reasonableness analysis will better ensure that officers seek legal advice in the right way, and that they only rely on it when it is reasonable in the circumstances, without imposing a rule that makes it mostly fruitless to seek advice because of a thumb on the scale presuming that reliance on legal advice can support the defense only in rare extraordinary circumstances.[369]

More broadly, it is unhelpful (though tempting) to overgeneralize by saying that lawyers' advice has a tendency to strongly or weakly support qualified immunity.[370] The better approach is to disregard generalizations, and evaluate the relevance of lawyers' advice with careful attention to whether reliance on that advice was reasonable in the circumstances of the particular case.[371] This is more consistent with the Court's repeated instruction that the qualified immunity reasonableness analysis must focus on the circumstances of each individual case.[372] Nor does taking a neutral approach mean that officers can escape the *Harlow* presumption merely by mentioning legal advice. The *Harlow* presumption generally makes sense—a reasonable officer should be presumed to know clearly established law.[373] But the proposed threshold questions, on which the officer would have the burden, adequately screen for cases in which a court should neutrally consider lawyers' advice as part of the reasonableness analysis. The proposed approach avoids the downsides of a presumption for or against immunity, while still requiring the officer to carry the burden of overcoming the *Harlow* presumption that a reasonable officer knows clearly established law.

IV. PROPOSED TEST FOR EVALUATING THE REASONABLENESS OF OFFICERS' RELIANCE ON LAWYERS' ADVICE

This Part proposes a specific test for courts to use in evaluating whether an officer's reliance on lawyers' advice was reasonable, and justifies the test as most consistent with modern qualified immunity doctrine, the circuits' approaches, and the policy concerns which qualified immunity doctrine seeks to balance. Through a framework of threshold questions and balancing factors, the proposed test applies a searching reasonableness analysis to identify those cases in which an officer's

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[369] *E.g.*, Cochran v. Gilliam, 656 F.3d 300, 309 (6th Cir. 2011).

[370] *See supra* notes 192–200 and accompanying text.

[371] *See* Cox v. Hainey, 391 F.3d 25, 35 (1st Cir. 2004).

[372] *E.g.*, Scott v. Harris, 550 U.S. 372, 383 (2007) ("[I]n the end we must still slosh our way through the factbound morass of 'reasonableness.'").

[373] *See Kelly I*, 622 F.3d 248, 258 (3d Cir. 2010) ("Police officers generally have a duty to know the basic elements of the laws they enforce.").

reliance on lawyers' advice should support her qualified immunity defense. This Part sets out threshold questions and balancing factors, and explains how they work together to screen out cases where lawyers' advice should have no weight at all, and then identify cases in which an officer's reliance on advice was reasonable.

Before examining the framework in detail, it is worth explaining briefly why a specific framework is preferable to merely considering legal advice as "part of the mix" of qualified immunity analysis.[374] As noted, some circuits use a multifactor approach to assess whether lawyers' advice supports qualified immunity, while others take a looser approach that considers the advice in the general mix of the court's reasonableness analysis.[375] This Article proposes a specific, detailed framework because a specific test will improve judicial consistency, increase predictability for officers, and assist litigation strategy for plaintiffs. In addition, since both the threshold questions and the balancing factors are drawn from factors actually considered in decisions of the circuit courts,[376] there is doctrinal support for synthesizing them into a comprehensive test.

First, applying a specific framework will improve consistency across the large set of cases raising the lawyers'-advice question. As noted, the circuits' approaches to this issue are in disarray, not only between the circuits but also between panels of the same circuit.[377] Adopting a specific test will help to achieve more consistent results as the courts apply it in a series of cases.

Second, applying a specific framework will also increase predictability for officers, who will better know what they need to do to secure a legal opinion that will favor immunity.[378] For example, if it is emphasized that legal advice is irrelevant when secured after acting,[379] officers will know to seek advice in advance (when it may help to prevent a potential violation of someone's rights).[380] And, if it is clear that the opinion must be based on all the relevant facts, and will more likely support immunity if it is specific and detailed, officers will know to seek considered legal opinions rather than simply seeking "cover" through a lawyer's blessing.

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374 *See* Poulakis v. Rogers, 341 F. App'x 523, 533 (11th Cir. 2009).

375 *See supra* notes 210–14 and accompanying text.

376 *See infra* Sections IV.A.1, IV.B.1.

377 *See supra* Section II.B.

378 *See* Spector, *supra* note 278, at 10, 12 (examining specific qualified immunity decisions on lawyer's advice for guidance on how officer's should go about seeking advice).

379 *See, e.g.*, Johnston v. Koppes, 850 F.2d 594, 596 (9th Cir. 1988).

380 *See, e.g.*, Kijonka v. Seitzinger, 363 F.3d 645, 648 (7th Cir. 2004).

Finally, applying a specific framework will help plaintiffs shape their discovery to challenge the officer's reliance on counsel.[381] Current qualified immunity doctrine is generally and correctly regarded as quite officer friendly.[382] This Article has argued that, in the case of reliance of legal advice, there are actually good reasons for allowing it to support the officer's defense when the officer's reliance is reasonable.[383] But a specific framework for analyzing the issue will help plaintiffs test through discovery whether the officer's reliance was actually reasonable, and serve as a check on circuit courts simply using legal advice as yet another tool to throw out plaintiffs' cases on qualified immunity grounds.

A. Threshold Questions

1. The Three Threshold Questions.—In considering whether receipt of lawyers' advice supports an officer's qualified immunity defense, the court should begin by analyzing three threshold questions.[384] The first question is whether the officer accurately and completely described the relevant facts to the lawyer.[385] The second is whether the lawyer actually advised the officer that the officer's contemplated conduct was constitutional.[386] The third is whether the officer actually followed, and did not exceed, the lawyer's advice—which also requires a showing that the advice was given *before* the challenged conduct.[387] If the answer to any of these questions is "no," then the receipt of legal advice should do nothing to support the officer's qualified immunity defense. Further, the defendant officer should have the burden of persuasion on these questions.[388] This means that if, as in most cases, the qualified immunity defense is raised on

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[381] *See Messerschmidt* Transcript, *supra* note †, at 41 (respondent's counsel noting that the record did not show "what transpired in these conversations with the deputy district attorney").

[382] *See, e.g.*, Blum, Chemerinsky & Schwartz, *supra* note 78.

[383] *See supra* Sections III.A–B.

[384] This Article assumes that if an officer raises lawyers' advice as a defense, attorney–client privilege either would not apply or would be waived. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 29 cmt. c (AM. LAW INST. 2000) ("If the client asserts the lawyer's advice as a defense, however, it waives the privilege." (citation omitted)). Whether and when privilege would apply, or could be pierced, is beyond this Article's scope. However, if an officer invokes lawyers' advice, but for some reason privilege is upheld as to what the lawyer advised, the court should ignore the advice in the qualified immunity analysis. *Cf. In re* County of Erie, 546 F.3d 222, 229 (2d Cir. 2008) (holding that attorney–client privilege was not waived because lawyers' advice was irrelevant to the qualified immunity analysis).

[385] *See, e.g.*, Belk v. City of Eldon, 228 F.3d 872, 882–83 (8th Cir. 2000).

[386] *See, e.g.*, Lawrence v. Reed, 406 F.3d 1224, 1231 (10th Cir. 2005).

[387] *See, e.g.*, Kinkade v. City of Blue Springs, 64 F.3d 389, 399 (8th Cir. 1995).

[388] *See generally* Duvall, *supra* note 77 (discussing burdens of proof and persuasion in qualified immunity analysis).

summary judgment,[389] immunity should be denied if there is an absence of evidence or a material fact question about the answer to any of these threshold questions.[390] This also means that, if the officer wishes to rely on lawyers' advice as a summary judgment defense, the judge should allow discovery into the content and circumstances surrounding the legal advice.

First, the officer must give the lawyer all relevant facts—and must not misrepresent those facts—to be able to rely on the lawyer's advice to support a qualified immunity defense.[391] As courts have noted, "[a] reasonable officer would not rely on a district attorney's assent, when he knew the district attorney had not been given the material information."[392] Whether the officer fully advised the lawyer will be a context-specific inquiry that depends on the particular legal standard at issue and the facts in the summary judgment record.[393] But this threshold would not be met if, for example, officers seeking advice for probable cause to arrest fail to tell the lawyer that an eyewitness description did not match the suspect's appearance,[394] if an officer seeking advice on whether he may fire an employee fails to tell the attorney about the content of the employee's speech,[395] or if an officer simply provides the lawyer with false information.[396]

Second, the lawyer must actually advise the officer that the contemplated action is constitutional, or at least that it is not clearly unconstitutional.[397] In some circumstances, this threshold question will be trivial because the advice sought by the officer basically *is* the answer to the constitutional question—e.g., whether there is probable cause to

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[389] Whisman v. Rinehart, 119 F.3d 1303, 1309 (8th Cir. 1997) (noting that qualified immunity is usually raised at summary judgment after limited discovery); *see also* Sornberger v. City of Knoxville, 434 F.3d 1006, 1014 (7th Cir. 2006) (noting that qualified immunity is usually resolved before trial).

[390] *See, e.g.*, *Kinkade*, 64 F.3d at 399 (concluding that attorney's advice could not support summary judgment on qualified immunity when "a factual dispute remains about whether counsel's advice was given before or after [defendant] voted to terminate [plaintiff]").

[391] *See, e.g.*, *Sornberger*, 434 F.3d at 1015 (rejecting qualified immunity based on advice of counsel where officer either failed to give lawyer all relevant facts or misrepresented facts); Suboh v. Dist. Att'y's Office, 298 F.3d 81, 88 (1st Cir. 2002) (same); Belk v. City of Eldon, 228 F.3d 872, 882–83 (8th Cir. 2000) (same); Burk v. Beene, 948 F.2d 489, 495 (8th Cir. 1991) (same); *see also* Messerschmidt v. Millender, 132 S. Ct. 1235, 1249 (2012) (upholding immunity when "[t]he only facts omitted . . . would only have strengthened the warrant").

[392] *Suboh*, 298 F.3d at 97.

[393] *See, e.g.*, *Messerschmidt*, 132 S. Ct. at 1249 (noting that the only omitted facts were ones that would have actually strengthened probable cause).

[394] *Sornberger*, 434 F.3d at 1015 (describing facts given lawyer as "incomplete and one-sided").

[395] *Belk*, 228 F.3d at 882–83.

[396] *Burk*, 948 F.2d at 495; *see also* Watertown Equip. Co. v. Norwest Bank Watertown, 830 F.2d 1487, 1496 (8th Cir. 1987) (lawyer's advice was "somewhat equivocal").

[397] *See, e.g.*, Johnston v. Koppes, 850 F.2d 594, 596 (9th Cir. 1988).

arrest.[398] In other circumstances, however, this threshold question will be important. For example, if in an employee-termination scenario the lawyer advises a supervisory officer that the supervisor has contractual power to fire an employee, but says nothing about whether the firing would violate the employee's First or Fourteenth Amendment rights, then the lawyer would not have actually advised the supervisor that his conduct is constitutional.[399] Or, if the lawyer merely chats with the officer about the situation generally, but does not tell the officer that the proposed conduct is legal, then the lawyer's advice should drop out of the analysis.[400] Finally, if the official simply lies about the lawyer having approved the actions, the defense should fail.[401] On the other hand, it is possible that the lawyer might specifically advise the officer that the law is unsettled, and that the case at hand could be a good "test case" about the content of the law.[402] In that case, so long as the lawyer actually provided specific advice about the constitutional question, the threshold question would be met—since an officer could reasonably believe the law was not clearly established if a lawyer specifically advised her so.

Third, the officer must actually follow the lawyer's advice. If the lawyer advises one way but the officer acts another, the fact that the officer spoke to the lawyer cannot support the officer's qualified immunity defense.[403] Indeed, in some circumstances, if the lawyer correctly advised that the proposed conduct violated clearly established law, the advice could *defeat* the officer's defense by showing that a reasonable officer could not have believed the conduct would be legal.[404] Relatedly, the officer must also "follow" the advice in the sense that the advice must have been given *before* the officer engaged in the conduct. A lawyer's "blessing" of conduct after the fact should be irrelevant to whether a reasonable officer at the time

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398 *See, e.g.*, *Messerschmidt*, 132 S. Ct. at 1250.

399 *See Johnston*, 850 F.2d at 596.

400 *See, e.g.*, Lawrence v. Reed, 406 F.3d 1224, 1231 (10th Cir. 2005) (rejecting a lawyers' advice defense when the attorney told the officer seizure was statutorily authorized, but "never once discussed the applicable constitutional law" requiring a warrant or notice and hearing).

401 *See, e.g.*, Borges Colón v. Román-Abreu, 438 F.3d 1, 18–19 (1st Cir. 2006).

402 Thanks to Brian Scott for relating a real-world experience with this scenario.

403 Buonocore v. Harris, 134 F.3d 245, 253 (4th Cir. 1998) ("A public official who fails to follow legal advice obviously cannot rely on that advice to establish entitlement to qualified immunity." (emphasis removed)).

404 *E.g.*, Charfauros v. Bd. of Elections, 249 F.3d 941, 954 (9th Cir. 2001) (rejecting reliance on advice when the record suggested that counsel's advice to defendant was "that its actions to that point had not been legally acceptable"); *see also* Sornberger v. City of Knoxville, 434 F.3d 1006, 1015 (7th Cir. 2006) (noting that before officers approached a state's attorney, FBI officials were told by a United States Attorney that there was no probable cause to arrest).

of the conduct would have thought the conduct did not violate clearly established law.[405]

2. Justifications for the Threshold Questions.—The threshold questions of the proposed test are designed to eliminate cases in which the officer's reliance on legal advice should carry no weight towards supporting the officer's qualified immunity defense. Each of them is intended to eliminate cases in which an officer's reliance on legal advice categorically should be unreasonable. Further, each of them, like the overall principle of considering lawyers' advice, draws support from common law.

First, if the officer misleads the lawyer or omits crucial facts, then a court cannot conclude that an objectively reasonable officer could have reasonably relied on the lawyer's advice, and the lawyer's advice should be given no weight.[406] It is unreasonable for an officer to rely on the lawyer's opinion when the officer knows important facts relevant to the legal question the officer is asking about that the lawyer does not.[407] This threshold bar is also justified by good policy—given the incentives for officers to provide incomplete information to get the "right" answer, a strong rule is needed that simply cuts the legal advice out of the case if the officer was not forthright about the material facts.[408]

Second, if the lawyer does not specifically advise the officer that the conduct is constitutional, then that advice cannot establish that a reasonable officer under the circumstances would have relied on the advice. As discussed, officers are generally presumed to know the contents of clearly established law, and while this may be a fiction, it is generally a valuable fiction.[409] It should be able to be overcome by the officer's reliance on legal advice only when the legal advice specifically instructs the officer that the intended conduct is constitutional, or that the constitutional question is open.[410] If the lawyer's advice is not directed to the constitutional issue, then it is irrelevant to the key question of whether a reasonable officer

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[405] So, for example, in *Kelly v. Borough of Carlisle*, the lawyer's advice over the phone to the officer should weigh in the qualified immunity analysis, but the post-arrest memo concluding there had been probable cause for the arrest should not. 622 F.3d 248, 251–52 (3d Cir. 2010); *see also* Lindsey v. City of Orrick, 491 F.3d 892, 901–02 (8th Cir. 2007) (rejecting reliance on lawyer's advice that was sought after the challenged action had already been taken); *Charfauros*, 249 F.3d at 954 (same); Johnston v. Koppes, 850 F.2d 594, 596 (9th Cir. 1988) (same).

[406] *See, e.g.*, *Sornberger*, 434 F.3d at 1015; *see also supra* notes 391–96 and accompanying text.

[407] *See, e.g.*, Burk v. Beene, 948 F.2d 489, 495 (8th Cir. 1991).

[408] *See Sornberger*, 434 F.3d at 1015–16.

[409] *See Kelly III*, 544 F. App'x 129, 134 (3d Cir. 2013).

[410] *See, e.g.*, Lawrence v. Reed, 406 F.3d 1224, 1231 (10th Cir. 2005) (rejecting a lawyers' advice defense when the attorney "never once discussed the applicable constitutional law").

could have believed that her conduct would not violate clearly established law.[411] This may mean that the lawyer's advice is relevant to the defense on some claims, but not others. For example, in *Kelly v. Borough of Carlisle*, the lawyer advised the police officer that there was probable cause to arrest under Pennsylvania's Wiretap Act (i.e., that it would not violate the Fourth Amendment to arrest Kelly), but did not advise the officer as to whether the Wiretap Act violated clearly established First Amendment law.[412] Thus, the lawyer's advice could be considered relevant to qualified immunity only as to the Fourth Amendment claim, but not the First Amendment claim.[413]

Third, to rely on lawyers' advice in establishing qualified immunity, the officer must follow the advice, both in the sense that the officer's conduct must align with the advice, and that the conduct must chronologically follow the advice.[414] If the officer acts in a way that goes beyond or differs from what the lawyer advised the law would allow, then a reasonable officer could not have believed that the lawyer's advice supported her belief that her conduct would not have violated clearly established law.[415] And, if the advice was received only after the officer took the challenged action, it can have no relevance to whether a reasonable officer would have thought, at the time she acted, that her conduct would not violate clearly established law.[416]

In addition to the logical reasons for requiring these threshold questions be met before an officer can argue that a lawyer's advice supports her qualified immunity defense, the threshold questions are supported by common law.[417] At common law, just as under the proposed framework, the advice-of-counsel defense generally requires that (1) the client provided the lawyer with all the relevant facts, (2) the advice actually authorized the conduct, and (3) the client actually followed the advice.[418]

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411 *See* Harlow v. Fitzgerald, 457 U.S. 800, 815–19 (1982).

412 622 F.3d 248, 252 (3d Cir. 2010).

413 *See id.* at 262 (analyzing the First Amendment claim without reference to prosecutor's advice).

414 *See supra* notes 403–05 and accompanying text.

415 *See, e.g.*, Buonocore v. Harris, 134 F.3d 245, 253 (4th Cir. 1998).

416 *See, e.g.*, Lindsey v. City of Orrick, 491 F.3d 892, 901–02 (8th Cir. 2007).

417 *See supra* Section III.A.3 (justifying reliance on lawyers' advice by common law analogs).

418 *E.g.*, United States v. Cheek, 3 F.3d 1057, 1061 (7th Cir. 1993) ("In order to establish an advice of counsel defense, a defendant must establish that: '(1) before taking action, (2) he in good faith sought the advice of an attorney whom he considered competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, (5) and acted strictly in accordance with the advice of his attorney who had been given a full report.'" (quoting Liss v. United States, 915 F.2d 287, 291 (7th Cir. 1990))); C.E. Carlson, Inc. v. SEC, 859 F.2d 1429, 1436 (10th Cir. 1988) ("The elements of [the advice-of-counsel] defense require a showing of 1) a request for advice of counsel on the legality of a proposed action, 2) full disclosure of the relevant facts to counsel, 3) receipt of advice from counsel that the action to be taken will be legal, and 4) reliance in good faith on counsel's advice.").

Finally, both by illustration of how the test would work and to address possible concerns about the threshold questions imposing too high a burden on plaintiffs, it is important to note that under the proposed test, at summary judgment (the context in which qualified immunity is usually litigated)[419] all a plaintiff need do is show that there is a fact question about whether the officer meets the criteria. For example, if the record demonstrates a genuine, material fact question about whether the officer gave the lawyer all the relevant facts,[420] then the officer should not be entitled to qualified immunity on the basis of being advised by the lawyer that the conduct is constitutional. The same is true of the other threshold questions.

B. Proposed Framework: Five Balancing Factors

If the officer clears the threshold questions, then the court should weigh five factors to decide whether a reasonable officer could have concluded, based on the lawyer's advice, that her contemplated conduct would not violate clearly established law. These factors include (1) the specificity and detail of the advice, (2) the expertise and authority of the lawyer to give the advice, (3) whether the legal issue would have been novel or unusual to an officer in the defendant's position, (4) the extent to which the lawyer was independent from the defendant, and (5) the complexity and difficulty of the legal question in light of the law at the time. If examination of these factors demonstrates that it was reasonable for the officer to rely on the lawyer's advice that the contemplated conduct was not illegal, then the officer should be entitled to qualified immunity. No special burden would apply to the evaluation of these factors; they would be considered as part of the court's overall analysis of whether a reasonable officer would not have known their conduct would violate clearly established law.[421]

1. The Five Balancing Factors.—The first factor weighs the specificity and detail of the advice given. The more specific and detailed the attorney's advice, the more likely that an officer will be reasonable in

[419] Whisman v. Rinehart, 119 F.3d 1303, 1309 (8th Cir. 1997) (noting that qualified immunity is usually raised at summary judgment after limited discovery).

[420] *See, e.g.*, Sornberger v. City of Knoxville, 434 F.3d 1006, 1016 (7th Cir. 2006) (rejecting summary judgment on immunity when "the record is susceptible to the view that the officers themselves realized the weakness of their case, and therefore manipulated the available evidence to mislead the state prosecutor into authorizing [plaintiff]'s arrest").

[421] *See* Cox v. Hainey, 391 F.3d 25, 35 (1st Cir. 2004).

relying on it.[422] So, for example, if an attorney simply initials a warrant application to indicate approval,[423] that would carry less weight than if the record shows that the lawyer discussed the case with the officer in detail, and explained the legal issues before advising the officer that the proposed conduct would be legal.[424] Similarly, if the attorney produced a written memo endorsing the legality of the actions before the officer actually acted, that would bolster the officer's argument that she was reasonable to rely on the lawyer's advice.[425] The evaluation of whether the advice was "specific and detailed" will turn on the specific factual record assembled to show what the attorney actually advised.[426] If the record shows nothing specific about the lawyer's advice, this factor will weigh against immunity.[427]

Similarly, an officer will be more reasonable to rely on the lawyer's advice when the lawyer has expertise and authority to answer the legal question presented. So, for example, if the lawyer consulted by the officer is a prosecutor assigned to the narcotics division specifically to give advice about searches,[428] then that fact will tend to indicate the officer is reasonable to rely on the lawyer's opinion that a proposed search will be legal. Also, if the lawyer giving advice is high up in the legal hierarchy of the government entity, the officer's argument that it was reasonable to rely will be stronger.[429] If, on the other hand, a government official trying to decide whether to fire an employee consults an outside lawyer with no special expertise in that area of law or authority to provide opinions for the government, that would carry less weight towards showing that the officer was reasonable to rely on the lawyer's advice.[430]

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[422] *See, e.g.*, Davis v. Zirkelbach, 149 F.3d 614, 620 (7th Cir. 1998) (advice supporting immunity when a lawyer gave officers precise advice about use of tape that accounted for circumstances in which it was made and in which police had received it).

[423] Messerschmidt v. Millender, 132 S. Ct. 1235, 1243 (2012).

[424] *See, e.g.*, *Davis*, 149 F.3d at 620 (focusing on the fact that the lawyer's advice was specific and detailed); Hollingsworth v. Hill, 110 F.3d 733, 741 (10th Cir. 1997) (same).

[425] *See, e.g.*, Lee v. Mihalich, 847 F.2d 66, 71 (3d Cir. 1988) (officers requested memo from the Medicaid Fraud Unit on the statute of limitations before executing search warrants and initiating prosecution).

[426] *See, e.g.*, Tanner v. Hardy, 764 F.2d 1024, 1027 (4th Cir. 1985) ("[T]here should be detailed information as to whether and when such advice was given and the degree of mature consideration accorded the matter by the Assistant Attorney General . . . who gave the advice.").

[427] *See, e.g.*, Slone v. Herman, 983 F.2d 107, 111 (8th Cir. 1993) (rejecting reliance on counsel because "[t]he record is not clear . . . as to exactly what counsel's advice was and when it was given").

[428] *Davis*, 149 F.3d at 620.

[429] *See, e.g.*, Sueiro Vázquez v. Torregrosa de la Rosa, 494 F.3d 227, 236 (1st Cir. 2007) (involving advice from "Puerto Rico's chief legal officer"); V–1 Oil Co. v. Wyo., Dep't of Envtl. Quality, 902 F.2d 1482, 1489 (10th Cir. 1990) (involving advice from "high-ranking government attorneys").

[430] *See, e.g.*, Watertown Equip. Co. v. Norwest Bank Watertown, 830 F.2d 1487, 1495 (8th Cir. 1987) (involving a lawyer who was defendant's private attorney with no special expertise on constitutionality of attachment statutes).

Third, a court should consider whether the legal issue confronted by the officer was within the core or at the periphery of the duties of similarly situated officers. So, for example, a gang crimes detective, with over a decade of experience and specialized training in investigating gang-related crimes[431] should be less able to claim reasonable reliance on a lawyer's opinion about probable cause to search a suspected gang member's house than an environmental regulator who is not accustomed to searching and seizing property and seeks a lawyer's advice before going onto private property to test for contamination.[432] This factor recognizes that it will be more reasonable for an officer to rely on legal advice—that is, to trust the lawyer's opinion over her own—when the legal question is beyond the normal scope of the officer's duties.

Also relevant is the degree to which the lawyer is independent from the officer,[433] which has two aspects. One is whether the lawyer, like the officer, has a shared interest in taking the debatable action. For example if the lawyer is on the same prosecution "team" as the officer, it will be less reasonable for the officer to simply rely on the lawyer's legal advice, since the lawyer and the officer share closely an interest in pushing the law to make arrests and secure convictions.[434] On the other hand, the more the lawyer's role is to provide neutral legal advice, the more likely the officer will be reasonable to rely on it. It is true that almost always the attorney will have some degree of shared interest with the officer—either because both are government employees or because the officer is a private lawyer's client, retaining the lawyer to give legal advice. But cases can be placed on a spectrum in terms of the alignment of the officer's and the lawyer's incentives to approve the contemplated action. Relatedly, if the lawyer is actually subordinate to the government officer who seeks the advice, the lawyer will have a very obvious interest in approving the proposed action, which will make it presumptively less reasonable for the officer to rely on the lawyer's legal advice.[435]

Finally, reliance on lawyers' advice will be more reasonable if the legal question is complex or the clearly established analysis is close: "[W]here the application of the law to the facts falls on the hazy border

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[431] Messerschmidt v. Millender, 132 S. Ct. 1235, 1242 (2012); *see also* Friedman v. Boucher, 580 F.3d 847, 859 (9th Cir. 2009) ("[W]here a police officer is acquainted with the controlling law and does not need the advice of counsel to assess the legality of his actions, statements made by a prosecutor will not shield the officer from liability if he then violates the law.").

[432] *See V–1 Oil Co.*, 902 F.2d at 1484.

[433] *See* Johnston v. Koppes, 850 F.2d 594, 596 (9th Cir. 1988).

[434] *See Messerschmidt*, 132 S. Ct. at 1249.

[435] *See Johnston*, 850 F.2d at 596.

between clear and ambiguous, the officer's consultation with an attorney prior to making the arrest may become relevant to the [reasonableness] calculus."[436] Under this factor, a court may and should consider lawyers' advice together with its examination of the state of the law when evaluating whether the officer's actions were reasonable.[437] So, for example, if the relevant legal analysis requires applying a complicated balancing test such as the *Pickering* test,[438] or if determining what law is "clearly established" requires close reading of divergent circuit precedents,[439] it is more likely that an officer's reliance on a lawyer's conclusion about the issue will be reasonable. Also, if the applicability of constitutional protection itself turns on a complicated legal issue—such as whether an employee is tenured—it will be more likely reasonable for the officer to rely on a lawyer's answer to that question.[440] However, if the officer's planned course of action is unquestionably beyond the pale of what the law allows, the lawyer's advice will not magically render the officer's action reasonable.[441]

Under this test, then, lawyers' advice may act as a balance-tipping factor in the reasonableness analysis when the court believes there is a close question as to whether the officer's conduct violated clearly established law.[442] If the court itself believes the question whether the action was prohibited by clearly established law is close, then it should conclude that the officer's decision to seek legal advice tips the scale towards an overall conclusion that a reasonable officer would not have known that her conduct would violate clearly established law.

In weighing these factors, there should neither be a presumption that lawyers' advice entitles the officer to immunity,[443] nor a thumb on the scale

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[436] Poulakis v. Rogers, 341 F. App'x 523, 533 (11th Cir. 2009).

[437] *See, e.g.*, Revis v. Meldrum, 489 F.3d 273, 286 (6th Cir. 2007) (holding that county attorney's advice, together with new procedural rules and lack of clear federal case law on postjudgment deprivation of real property, supported conclusion that a reasonable officer would not have understood the conduct at issue would violate plaintiff's rights); L.A. Police Protective League v. Gates, 907 F.2d 879, 888 (9th Cir. 1990) (finding that legal advice together with "a complex and uncertain legal issue" supported immunity).

[438] *See, e.g.*, Nord v. Walsh County, 757 F.3d 734, 739–43 (8th Cir. 2014).

[439] *See, e.g.*, Lane v. Franks, 134 S. Ct. 2369, 2381–83 (2014).

[440] *See, e.g.*, Miller v. Admin. Office of the Courts, 448 F.3d 887, 896 (6th Cir. 2006) (involving a difficult legal question about an employee's legal status under state law); Tubbesing v. Arnold, 742 F.2d 401, 406–07 (8th Cir. 1984) (same); Wentz v. Klecker, 721 F.2d 244, 247 (8th Cir. 1983) (same).

[441] *See, e.g.*, Cochran v. Gilliam, 656 F.3d 300, 309 (6th Cir. 2011); *see also* Cox v. Hainey, 391 F.3d 25, 34 (1st Cir. 2004) (stating that "a wave of the prosecutor's wand cannot magically" confer immunity).

[442] *See, e.g.*, Poulakis v. Rogers, 341 F. App'x 523, 533 (11th Cir. 2009); *Revis*, 489 F.3d at 286; *L.A. Police Protective League*, 907 F.2d at 888.

[443] *E.g.*, *Kelly I*, 622 F.3d 248, 255–56 (3d Cir. 2010).

against immunity on the grounds that lawyers' advice can only support the officer's reasonableness argument in a rare or "extraordinary" case.[444] Instead, the court should simply analyze, using the framework above, the question whether a reasonable officer would have relied on the lawyer's advice in concluding that her intended conduct was legal. This analysis should be mostly independent from analyzing whether the officer's conduct would have violated clearly established law in the absence of the legal advice, except that if that analysis is close, the fifth factor will favor the conclusion that the officer is protected by reliance on legal advice.[445]

As an illustration of how the proposed test should work, applying the test to *Messerschmidt* suggests that, though the Court likely would have reached the same holding,[446] the advice of the deputy district attorney should not have done very much to support the officer's qualified immunity defense. The officer did not discuss the issue in detail with the lawyer; the lawyer merely initialed the warrant application and later testified that this indicated agreement that there was probable cause.[447] The legal question in the case was not particularly thorny; instead, most of the dispute centered on the facts supporting the warrant and whether they were sufficient to support probable cause under applicable law.[448] The lawyer and officer were part of the same prosecution "team."[449] The officer himself was an experienced detective with a long track record of investigating gang crimes, suggesting that an officer in his position would be well-positioned to know the applicable law,[450] and nothing in the opinion indicated that the attorney had special expertise or authority to address the issue. The only factor that arguably would cut in the officer's favor was the fifth factor, but even there it seemed the majority's view was simply that the officer's view was reasonable on the facts,[451] not that the relevant law was "on the hazy border between clear and ambiguous."[452]

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444 *See, e.g.*, Silberstein v. City of Dayton, 440 F.3d 306, 318 (6th Cir. 2006).

445 *See, e.g.*, *Poulakis*, 341 F. App'x at 533 ("[Lawyer's advice] may be an important factor for a court to consider when the outcome in the qualified immunity case would otherwise be unclear.").

446 The Court independently concluded the officer's probable cause determination was reasonable; moreover, it relied on the approval of the magistrate and the officer's superiors as supporting immunity. Messerschmidt v. Millender, 132 S. Ct. 1235, 1249–50 (2012).

447 *Id.* at 1243.

448 *See id.* at 1246–49.

449 *Id.* at 1249.

450 *Id.* at 1255 (Sotomayor, J., dissenting).

451 *See id.* at 1247 (majority opinion).

452 Poulakis v. Rogers, 341 F. App'x 523, 533 (11th Cir. 2009).

2. Justifications for the Five Balancing Factors.—The balancing factors are designed to assess whether the officer's reliance on the lawyer's advice was reasonable. Each identifies a circumstance that makes it more reasonable for an officer to trust the lawyer's legal opinion.

First, the specificity and detail of the advice supports a finding of reasonableness if it shows a reasonable officer would have believed that the lawyer's advice was based on an in-depth consideration of the issues at hand in the particular case. More specific and detailed advice suggests that the lawyer has given the problem "mature consideration"[453] and is providing advice specifically directed to the legality of the proposed conduct.[454]

Second, both the expertise and the authority of the advising lawyer affect how reasonable it is for the officer to trust the lawyer's opinion. The greater the lawyer's expertise in that area of the law, the more reasonable it will be for the officer to believe the lawyer's advice is correct.[455] As to authority, if the lawyer is authorized to give such advice, a reasonable officer would have more reason to believe the lawyer knows that area of law. Further, if the lawyer is high-ranking, it will be more reasonable for the officer to rely on the advice because the lawyer is competent to interpret law and make legal decisions for the government entity, and because the officer is not in a position to second-guess that lawyer's advice.[456]

Third, the independence of the lawyer from the officer supports reasonableness because it gives an indication that the officer could reasonably trust the lawyer's judgment on the issue. If the lawyer and officer are working "hand in glove" to pursue the same goal,[457] then the officer will be less reasonable to trust the lawyer's opinion because the officer and the lawyer have similar incentives to push the law to achieve the desired result.[458] Similarly, if the lawyer is actually the officer's subordinate, a reasonable officer would recognize that this dynamic gives the lawyer a natural incentive to provide the answer that the officer would

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[453] Tanner v. Hardy, 764 F.2d 1024, 1027 (4th Cir. 1985).

[454] *E.g.*, Davis v. Zirkelbach, 149 F.3d 614, 620 (7th Cir. 1998).

[455] *E.g.*, *id.* (involving advice from a lawyer specially detailed to the narcotics division).

[456] *See, e.g.*, Sueiro Vázquez v. Torregrosa de la Rosa, 494 F.3d 227, 234–35 (1st Cir. 2007) (involving advice given by the chief legal officer of Puerto Rico); V–1 Oil Co. v. Wyo., Dep't of Envtl. Quality, 902 F.2d 1482, 1488 (10th Cir. 1990) (involving advice given a by "high-ranking" lawyer).

[457] Cox v. Hainey, 391 F.3d 25, 35 n.4 (1st Cir. 2004).

[458] *See, e.g.*, Messerschmidt v. Millender, 132 S. Ct. 1235, 1249 (2012).

like to hear.[459] On the other hand, if the lawyer is independent from the officer, or outranks her, then the officer will be more reasonable to trust the lawyer's judgment about the difficult legal question.[460]

Fourth, a court should consider whether the legal issue would have been novel or difficult to an officer in the defendant's position. If the issue is one that an officer in the defendant's position would encounter routinely, then it will be less reasonable for the officer to abdicate to a lawyer their duty of making an independent judgment.[461] But if the legal issue is one which an officer in the defendant's position would be unlikely to regularly encounter, it will be more reasonable for the officer to seek and trust a lawyer's opinion about what clearly established law allows.[462]

Finally, whether the officer is reasonable to rely on the lawyer's judgment will and should turn in part on whether the underlying legal question is complex, difficult, or close. If the law is plain, *Harlow* directs that a reasonable officer should know it, and a defendant officer should be held liable for violating it.[463] If the law on the underlying legal question is indisputably *not* clearly established, then the officer should be immune regardless of having received legal advice.[464] If, however, the legal question is close, a court should be more likely to conclude that the officer was reasonable based on seeking and following legal advice. When the court itself thinks the "clearly established" question was close, it should recognize that it was reasonable for an officer to be uncertain and therefore to seek and rely on legal advice. This fifth factor may be particularly important in post-*Pearson* cases, when the district courts decide to resolve the "clearly established" question without deciding whether there was a constitutional violation.[465]

CONCLUSION

The best solution to the lawyers' advice question dividing the circuits is to analyze whether a reasonable officer would have relied on the

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[459] *See, e.g.*, Johnston v. Koppes, 850 F.2d 594, 596 (9th Cir. 1988).

[460] *See, e.g.*, *V–1 Oil Co.*, 902 F.2d at 1489.

[461] *See, e.g.*, *Messerschmidt*, 132 S. Ct. at 1242 (involving an officer who was a gang detective with years of experience serving gang warrants); Walters v. Grossheim, 990 F.2d 381, 384 (8th Cir. 1993) (rejecting a reliance-on-counsel argument because defendants were "not unsophisticated litigants, and . . . they reasonably should have known" the applicable law).

[462] *See, e.g.*, Nord v. Walsh County, 757 F.3d 734, 737–38 (8th Cir. 2014); *V–1 Oil Co.*, 902 F.2d at 1484.

[463] *See Kelly I*, 622 F.3d 248, 258 (3d Cir. 2010) ("Police officers generally have a duty to know the basic elements of the laws they enforce.").

[464] Pearson v. Callahan, 555 U.S. 223, 245 (2009).

[465] *See id.* at 236.

lawyer's advice to conclude that her conduct would not violate clearly established law. This approach is most consistent with qualified immunity doctrine and policy because it balances the need to punish unreasonable violations of constitutional rights against the recognition that sometimes a reasonable officer's best course of action will be to seek advice from a knowledgeable lawyer—and that encouraging officers to seek advice will help reduce violations across the spectrum of cases. The specific framework of threshold questions and balancing factors is designed to implement these policies by encouraging courts to screen out cases in which an officer could not have relied on the advice, and then perform a searching reasonableness analysis to determine whether the officer's reliance on legal advice was actually reasonable. The Supreme Court should also put to rest *Harlow*'s extraordinary circumstances dicta, which has misled the circuits and needlessly confused qualified immunity analysis.