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Qualified Immunity and Unqualified Assumptions

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QUALIFIED IMMUNITY AND UNQUALIFIED ASSUMPTIONS

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INTRODUCTION

A lot of smart people question the wisdom of qualified immunity. Lower court judges called on the Supreme Court to overhaul the defense.¹ The House passed a bill that would eliminate qualified immunity in certain actions.² Several states passed legislation curtailing it.³ Scholars from across

¹ See James A. Wynn Jr., Opinion, *As a Judge, I Have to Follow the Supreme Court. It Should Fix This Mistake*. WASH. POST (June 12, 2020), <https://www.washingtonpost.com/opinions/2020/06/12/judge-i-have-follow-supreme-court-it-should-fix-this-mistake> [https://perma.cc/7T4H-V9MQ] (James A. Wynn Jr. is a judge on the U.S. Court of Appeals for the 4th Circuit); see also Jamison v. McClendon, 476 F. Supp. 3d 386, 419 (S.D. Miss. 2020) (Reeves, J.) (describing qualified immunity as a manufactured doctrine needing to stop).

² H.R. 1280, 117th Cong. § 102 (2021).

³ COLO. REV. STAT. ANN. § 13-21-131 (West, Westlaw through 2021 1st Reg. Sess.) (implementing measures to enhance law enforcement practices and eliminating qualified immunity for state court claims); An Act Concerning Police Accountability, Pub. Act No. 20-1, 2020 Conn. Acts 143 (Spec. Sess.) (eliminating qualified immunity for state court claims in an omnibus police bill); New Mexico Civil Rights Act, ch. 119, 2021 N.M. Laws 1312 (permitting an individual to bring a claim against a public body or person acting on behalf of or under the authority of a public body for a violation of the individual's rights, privileges or immunities and eliminating the qualified immunity defense); An Act Relating to Permissible Uses of Force by Law Enforcement and Correctional Officers, ch. 324, 2021 Wash. Sess. Laws 2745 (requiring law enforcement and community corrections officers to use the least amount of physical force necessary); N.Y.C., N.Y., ADMIN. CODE tit 8, ch. 8 (2021), available at <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYAdmin/0-0-0-5270> [https://perma.cc/Y5X3-TFA6] (creating a right of security against unreasonable search and seizure, and against excessive force regardless of whether such force is used in connection with a search or seizure, that is enforceable by civil action); S.B. 1991, 2021 Leg., 244th Sess. (N.Y. 2021) (eliminating qualified immunity for state claims); S.B. 2, 2021 Leg., Reg. Sess. (Cal. 2021) (eliminating certain immunity provisions for peace officers and implementing certification procedures for peace officers); H.B. 609, 2021 Leg., Reg. Sess. (La. 2021) (prohibiting qualified immunity for officers as a defense in state court claims). *But see* FLA. STAT. ANN. § 166.241 (West, Westlaw through 2021 1st Reg. Sess.) (limiting local municipalities' ability to reduce funding for law enforcement agencies); S.B. 479, 88th Gen. Assemb., Reg. Sess. (Iowa 2021) (denying state funds to local entities if the local entity reduces the budget of their law enforcement agency).

the political spectrum have panned qualified immunity.⁴ Even Supreme Court Justices criticize the doctrine.⁵

And there is little wonder why so many people are skeptical of qualified immunity. Under this doctrine, a government official may violate the United States Constitution and avoid liability so long as the constitutional right at issue was not “clearly established.”⁶ The Court, at least initially, saw qualified immunity as a compromise because it preserved the damages remedy that 42 U.S.C. § 1983 promises while simultaneously protecting reasonable government officials.⁷

⁴ John C. Jeffries, *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010) (“Determining whether an officer violated ‘clearly established’ law has proved to be a mare’s nest of complexity and confusion. The circuits vary widely in approach, which is not surprising given the conflicting signals from the Supreme Court.”); William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 87 (2018) (arguing that the qualified immunity doctrine is unlawful and inconsistent with conventional principles of statutory interpretation); David G. Savage, *Supreme Court Shields a Police Officer from Being Sued for Shooting a Woman in Her Front Yard*, L.A. TIMES (Apr. 2, 2018, 1:40 PM), <https://www.latimes.com/politics/la-na-pol-supreme-court-police-shooting-20180402-story.html> [https://perma.cc/3UH3-2UGH] (illustrating several legal scholars criticizing the Supreme Court’s approach to police shootings).

⁵ *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) (stating “qualified immunity for public officials” had “diverged to a substantial degree from the historical standards”); *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) (admitting that the Supreme Court has not even “purported to be faithful to the common-law immunities that existed when § 1983 was enacted”); *Baxter v. Bracey*, 140 S. Ct. 1862, 1864 (Thomas, J., dissenting) (noting that there is “no basis” for the “clearly established law” analysis); *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (saying the doctrine tells “officers that they can shoot first and think later,” and it tells the public that palpably unreasonable conduct will go unpunished).

⁶ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (noting that qualified immunity is more than a defense; it shields defendants from trial and “the other burdens of litigation” when the law is not “clearly established”). As the Court in *Harlow* made clear, judges should resolve qualified immunity disputes as early in the litigation as possible, often before the parties have even engaged in the discovery process. *Id.* at 816 (stating that “[i]t now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.”).

⁷ 42 U.S.C. § 1983 provides a victim of constitutional violations with a federal civil remedy. It reads in pertinent part:

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

Nevertheless, more and more people have come to view qualified immunity as a failure.⁸ Qualified immunity protects government officials when they do something everyone knows is wrong, like stealing, simply because a court has never held it to be *constitutionally* wrong.⁹ As the Supreme Court made clear in *Davis v. Scherer*, the violation of a clear state statute or department regulation by a government official does not necessarily mean the offending official will be denied qualified immunity.¹⁰ The relevant question in qualified immunity disputes is not whether they violated a clearly established state law or department regulation. Rather, the relevant question is whether the defendant deprived the plaintiff of a clearly established *constitutional* right.¹¹

As the Supreme Court explained in *Mitchum v. Foster*, 407 U.S. 225, 242 (1972), “The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law.” Ten years later, in *Harlow*, the Court noted the “social costs” of civil rights litigation. *Harlow*, 457 U.S. at 814 (listing the “social costs” of § 1983 litigation as “the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.”). Nevertheless, the Court held that an objective qualified immunity standard would “balance competing values,” specifically “the importance of a damages remedy to protect the rights of citizens,” “the need to protect officials” and “the related public interest in encouraging the vigorous exercise of official authority.” *Id.* at 807 (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)).

⁸ See, e.g., *Kisela v. Hughes*, 138 S. Ct. 1148, 1155 (2018) (Sotomayor, J., dissenting) (criticizing the Court for “treating qualified immunity as an absolute shield”); Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INST. (Sept. 14, 2020), <https://www.cato.org/publications/policy-analysis/qualified-immunity-legal-practical-moral-failure> [https://perma.cc/F2BE-LLU2] (criticizing the doctrine as incapable of consistent, predictable application, confusing and dividing lower courts tasked with applying it, and regularly permitting “egregious unconstitutional misconduct to go unaddressed, exacerbating an ongoing crisis of accountability in law enforcement”); Joanna Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1799–1800 (2018) (“Qualified immunity does not shield individual officers from financial liability. It almost never shields government officials from the costs and burdens associated with discovery and trial in filed cases. And it appears unnecessary to encourage vigorous enforcement of the law.”).

⁹ See, e.g., *Jessop v. City of Fresno*, 936 F.3d 937, 941 (9th Cir. 2019) (acknowledging that “virtually every human society teaches that theft generally is morally wrong” but granting police officials who stole \$250,000 during a search were entitled to qualified immunity because “[w]e have never addressed whether the theft of property covered by the terms of a search warrant, and seized pursuant to that warrant, violates the Fourth Amendment”).

¹⁰ *Davis v. Scherer*, 468 U.S. 183, 194 (1984); see, e.g., *Mullenix v. Luna*, 577 U.S. 7, 19 (2015) (finding that a police official who violated a direct order to “stand by” when he shot a fleeing motorist was entitled to qualified immunity because he did not violate a clearly established constitutional right).

¹¹ *Id.*; see also *Jessop*, 936 F.3d at 941.

Yet, *Harlow v. Fitzgerald*, the seminal case on qualified immunity, hinges on what would seem to be an uncontroversial premise: “a reasonably competent public official should know the law governing his conduct.”¹² Although this seems self-evident, this Article begins with the following question in mind: “Should a reasonably competent public official know the law governing his conduct?”

In her recent article, *Qualified Immunity’s Boldest Lie*, Professor Joanna Schwartz proves that police officials, in fact, are not regularly informed of court decisions interpreting Fourth Amendment use of force decisions.¹³ From Professor Schwartz’s work, one might conclude that reasonable officials should *not* know the law governing their conduct because they are not trained to do so.¹⁴ This Article agrees with Professor Schwartz’s findings and builds upon her work. In fact, our own study of twenty United States police departments confirms her conclusion that officers often are not informed of recent binding federal opinions. Notwithstanding Schwartz’s findings, this Article asserts that these findings do not necessarily resolve whether government officials should be aware of the law governing their conduct. Rather, this inquiry warrants a nuanced interpretation of *Harlow*.

This Article argues that *Harlow v. Fitzgerald* is best understood as setting forth both positive and normative notions. Although it is improbable that government officials know the law governing their conduct, they nevertheless are obligated to do so. Through careful grammatical analysis, Part I carefully dissects the Court’s standard in *Harlow*. This Article argues that because the Court heavily relies on the modal verbs “should” and “would,” *Harlow* is subject to multiple interpretations. Part I concludes “should,” in the phrase “a reasonable competent public official should know the law governing his conduct,” is intended to reflect an obligation, or a normative standard. In contrast, the Court’s use of the modal verb “would”—when it defines clearly established law—is intended to denote probability or a more positive notion.

Part II then uses empirical data to better understand whether officials actually know the law. This Part details the results of surveys sent to twenty United States police departments to determine if and how officers were informed of federal judicial decisions regarding the Fourth and/or Fourteenth Amendments of the United States Constitution.

¹² *Harlow*, 457 U.S. at 819.

¹³ Joanna C. Schwartz, *Qualified Immunity’s Boldest Lie*, 88 U. CHI. L. REV. 605, 610 (2021).

¹⁴ *Id.* at 683-84 (concluding that officers are seldom informed of appellate and district court opinions and the qualified immunity standard should be abolished or reformed).

Finally, Part III discusses, more generally, normative and positive notions and applies these concepts to *Harlow*.¹⁵ Part III concludes that although *Harlow* sets forth a normative notion by holding that reasonable officials *should* know the law, its aims are undermined by the positive statement that police officials are unaware of many of the specific cases that govern their conduct. The result is a qualified immunity standard that distorts both positive and normative notions of the reasonable official. This creates a conflict between the fundamental assumptions of qualified immunity for reasonable officials—courts assume reasonable police know the law governing their conduct but that these same officials are incapable of understanding whether their conduct is legal.

I. *HARLOW V. FITZGERALD*: THE MAKING OF AMORPHOUS LAW

Harlow v. Fitzgerald is the seminal case on qualified immunity.¹⁶ There, the Court lays out qualified immunity analysis as follows:¹⁷

[G]overnment officials performing discretionary functions generally 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 If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to “know” that the law forbade conduct not previously identified as unlawful If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.¹⁸

Harlow, essentially, lays out a three-part test: (1) whether the defendant was performing discretionary functions; (2) if so, whether the law was clearly established; and (3) if so, whether there were extraordinary standards that

¹⁵ As detailed in Part III, a positive statement reflects what is and a normative statement reflects what ought to be. *See infra* Part III.

¹⁶ *See* Alexander A. Reinert, *Qualified Immunity at Trial*, 93 Notre Dame L. Rev. 2069–70 (2018) (describing *Harlow* as a seminal decision).

¹⁷ The Court announced the “good faith qualified immunity defense” in *Pierson v. Ray*, 386 U.S. 547, 557 (1967) (“[T]he defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983”). However, *Harlow* eliminated the subjective “good faith” aspect of the “good faith qualified immunity defense.” *Harlow*, 457 U.S. at 817–18.

¹⁸ *Harlow*, 457 U.S. at 818–19.

excuse the officials' ignorance of the law.¹⁹ Although the inquiries build upon one another, courts seldom give much consideration to either the first or third points.²⁰ Part I considers each of these prongs.

A. "DISCRETIONARY FUNCTIONS"

Under *Harlow*, the Court holds that qualified immunity is only available to government officials who are performing a discretionary function. Although this reads as a threshold inquiry, courts seldom address this point. Nevertheless, it continues as an articulated aspect of the qualified immunity analysis.²¹

At common law, when an executive official claimed immunity for his (in)action, the distinction between ministerial and discretionary duties was integral to the court's determination.²² A government official was liable to the party injured when he failed to perform "mandatory ministerial duties."²³ On the other hand, an official would be immune from liability for harms he caused while reasonably executing a discretionary function.²⁴ One treatise rationalized official immunity for discretionary duties as follows:

When the law, in words or by implication, commits any officer the duty of looking into facts, and acting upon them, not in a way it specifically directs, but after a discretion in its nature judicial, the function is termed *quasi-judicial*; and he is responsible to one injured by his wrongdoing only if it is negligent, or malicious, or both.²⁵

The treatise then explains that the immunity is inherently linked to the discretionary function and offers the following rationale: the law requires officials to use discretion; humans may err; therefore, the law which requires

¹⁹ *Id.*

²⁰ See *infra* Sections I.A and I.C.

²¹ See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) ("Government officials are entitled to qualified immunity with respect to 'discretionary functions' performed in their official capacities") (emphasis added) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)).

²² JOEL PRENTISS BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW AND ESPECIALLY AS TO COMMON AFFAIRS NOT OF CONTRACT OF THE EVERY-DAY RIGHTS AND TORTS § 784–85 (1889).

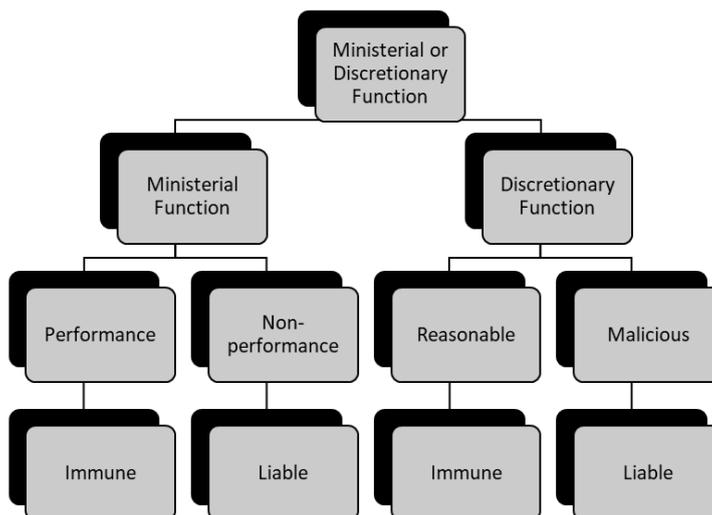
²³ *Id.* at § 796.

²⁴ See Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stan. L. Rev. 1337, 1348–49 (2021) (citing *Amy v. Supervisors*, 78 U.S. (11 Wall.) 136, 138 (1871)); BISHOP, *supra* note 22, at § 786 (explaining that officials are "responsible to the persons injured" for the "wrongful exercise" of their "ministerial duties"). Bishop defined discretionary duties as "quasi-judicial functions" lying "midway between the judicial and ministerial" functions. *Id.* at § 785. Although government officials were liable for non-performance of a ministerial duty, they were protected from liability at common law when they were performing ministerial functions. *Id.* at § 791.

²⁵ BISHOP, *supra* note 22, at § 785–86.

him to exercise “his own judgment” should also protect him from liability if he acted honestly and carefully.²⁶

Thus, under common law, governmental immunity depended on several factors. First, whether the relevant act was ministerial or discretionary. If the act was ministerial, then whether the injury was a consequence of performance or non-performance. If the act was discretionary, then whether the official acted reasonably. Accordingly, one might depict the common law analysis for quasi-judicial immunity inquiries as follows:



Under the common law, government authority clearly did not give officials an absolute shield.²⁷ There were two routes to liability and two corresponding routes to immunity. Whether the defendant was immune depended, in part, upon whether he performed a ministerial or discretionary function.²⁸ The challenge, of course, is how to distinguish discretionary functions from mandatory (or ministerial) functions.²⁹

Although the discretionary prong was well understood at common law, the Court has done little to develop this aspect of the qualified immunity

²⁶ *Id.* at § 787.

²⁷ *Id.* at § 798 (stating that one “invested with official power is not therefore licensed to become a lawbreaker”).

²⁸ *Id.* at § 788.

²⁹ *Id.* (offering the following examples of discretionary functions: “an assessor of taxes in making a valuation” and “a school board, in expelling a scholar”).

doctrine.³⁰ In *Harlow*, the Court briefly touched upon the idea of discretionary functions.³¹ The Court stated, “judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker’s experiences, values, and emotions.”³² However, the Court has only addressed the issue once since then, leaving lower courts to extrapolate from *Harlow*.³³ As detailed herein, following the Supreme Court’s example, lower courts largely have avoided the question of discretionary functions in qualified immunity analysis.³⁴ Not surprisingly, those courts that have addressed the issue have failed to agree what, if any, functions should be classified as ministerial functions.³⁵

The Sixth Circuit addressed the distinction between discretionary and ministerial functions in the greatest detail.³⁶ In *Hedgepath v. Pelphrey*, the plaintiff filed a § 1983 claim against jail employees after her son died of a drug overdose while in police custody.³⁷ The district court denied several of

³⁰ See *Horta v. Sullivan*, 4 F.3d 2, 11 (1st Cir. 1993) (“[I]n spite of the reference to discretionary functions, it has never since been clear exactly what role, if any, this concept is supposed to play in applying qualified immunity.”).

³¹ *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982) (recognizing the only other time the Supreme Court has discussed ministerial versus discretionary functions in the context of § 1983 liability was in *Owen v. City of Independence*, 445 U.S. 622, 648 (1980), and there it was in the context of municipal liability. *Owen* noted that at common law, municipal liability turned, in part, on whether the claim stemmed from the municipality’s discretionary power. *Owen*, 445 U.S. at 648.).

³² *Harlow*, 457 U.S. at 816.

³³ *Davis v. Scherer*, 468 U.S. 183, 196 n.14 (1984) (rejecting plaintiff’s argument that defendants were performing a ministerial duty and therefore, should be denied qualified immunity).

³⁴ See *infra* footnotes 36–59 and accompanying text.

³⁵ Compare *Hedgepath v. Pelphrey*, 520 F. App’x 385, 389 (6th Cir. 2013) (recognizing ministerial functions), with *Gagne v. City of Galveston*, 805 F.2d 558, 560 (5th Cir. 1986) (suggesting that a function is discretionary whenever officials exercise some degree of judgment).

³⁶ See *Hedgepath*, 520 F. App’x at 385 (denying qualified immunity and making a distinction between a discretionary duty to anticipate prospective harm and the ministerial duty to follow instructions); *Finn v. Warren Cnty.*, 768 F.3d 441, 449 (6th Cir. 2014) (stating that under Kentucky law, the supervision of employees is a ministerial act for which the supervisor is not entitled to qualified immunity in a civil rights suit, where that supervision merely involves enforcing known policies); *Wegener v. City of Covington*, 933 F.2d 390, 392 (6th Cir. 1991) (holding that once the officer has shown that the act was performed within the scope of discretionary authority, the burden shifts to the plaintiff to establish by direct or circumstantial evidence that the discretionary act was not performed in good faith).

³⁷ *Hedgepath*, 520 F. App’x at 385 (alleging officials deprived decedent of his Eighth, Tenth, and Fourteenth Amendment rights by failing to regularly check on him). The deputy

the defendants' qualified immunity defenses "because their duties were ministerial under Kentucky law."³⁸ The defendants appealed the trial court's qualified immunity determination, arguing that the alleged actions involved discretionary duties.³⁹ Noting that qualified immunity only protects defendants when they are performing discretionary functions, the Sixth Circuit considered whether the defendants were performing ministerial or discretionary duties.⁴⁰ In so doing, the court noted, "[i]n reality, few acts are ever purely discretionary or purely ministerial."⁴¹ Nevertheless, the court distinguished between those cases where officials have "the discretionary duty to anticipate prospective harm" and cases in which the defendants simply had "the ministerial duty to follow instructions."⁴²

Ultimately, the court concluded that jail employees who were tasked with checking on a detainee every twenty minutes to ensure they were conscious were performing a ministerial duty because the execution of this duty did not require "personal deliberation, decision, and judgement."⁴³ Similarly, the Sixth Circuit held that a prison nurse was not entitled to qualified immunity when she allegedly denied an inmate medical treatment prescribed by a doctor.⁴⁴ The court held that the nurse's compliance with the prescription or treatment plan was ministerial function, not a discretionary one.⁴⁵

The Ninth Circuit addressed the distinction between discretionary and ministerial functions in *Grotten v. California*. In *Grotten*, a real estate agent

jailers were required to ensure the safety of intoxicated detainees by checking on them every twenty minutes to make sure they were conscious. *Id.* at 391–92.

³⁸ *Id.* at 388.

³⁹ *Id.* at 389.

⁴⁰ *Id.* Curiously, the court interpreted qualified immunity under Kentucky law rather than federal law. *Id.* ("Qualified immunity under Kentucky law shields public employees from tort liability so long as the employee was performing '(1) discretionary acts or functions . . . ; (2) in good faith; and (3) within the scope of the employee's authority'") (quoting Yanero v. Davis, 65 S.W.3d 510, 522 (Ky. 2001)).

⁴¹ *Hedgepath*, 520 F. App'x at 389 (quoting Haney v. Monsky, 311 S.W.3d 235, 240 (Ky. 2010)).

⁴² *Id.* at 390.

⁴³ *Id.* at 391 (quoting *Collins v. Ky. Nat. Res. & Env't Prot. Cabinet*, 10 S.W.3d 122, 126 (1999)). Similarly, in *Finn v. Warren County*, 768 F.3d 441, 450 (6th Cir. 2014), the Sixth Circuit denied a supervising jail official qualified immunity for failure to train his subordinates on written emergency medical services policy. The court held that once a policy is decided, training employees "to adhere to their duties . . . is a ministerial function." *Id.* at 449 (quoting *Hedgepath*, 520 F. App'x at 391).

⁴⁴ *Boretti v. Wiscomb*, 930 F.2d 1150, 1156 (6th Cir. 1991).

⁴⁵ *Id.*

attempted to apply for a temporary license to conduct real estate transactions in California.⁴⁶ The state employees in this case refused to give Groten the proper materials to apply for the license, resulting in a denial of his application.⁴⁷ The Ninth Circuit found that supplying a potential applicant with the proper materials is a ministerial task required by state law.⁴⁸ Because the employees were required to furnish these materials, they were not performing a discretionary function and, accordingly, they were not entitled to qualified immunity.⁴⁹

However, it is important to recognize the aforementioned cases are anomalies. Most courts that apply *Harlow*'s discretionary functions prong conclude that the defendant was performing a discretionary function.⁵⁰ In *Gagne v. City of Galveston*, an officer's failure to remove a belt from a person during the booking process resulted in the suicide of the prisoner, who hung himself with his belt.⁵¹ The prisoner's estate claimed that the officer was not engaged in a "discretionary act" because there was an unambiguous police department regulation stating that "[b]elts must be removed from prisoner's clothing and placed in the property bag."⁵² The Fifth Circuit, quoting *Davis v. Scherer*, held that the violation of "such a departmental regulation could not by itself deprive [the officer] of the protection of qualified immunity."⁵³ Specifically, the court noted that "if an official is required to exercise his

⁴⁶ Groten v. California, 251 F.3d 844, 847 (9th Cir. 2001).

⁴⁷ *Id.* at 846.

⁴⁸ *Id.* at 850.

⁴⁹ *Id.* at 851; *see also* Walz v. Town of Smithtown, 46 F.3d 162, 169 (2d Cir. 1995) (finding that a town superintendent of highways denying permits in order to extort land was not a discretionary function, but rather the superintendent's failure to perform a ministerial task).

⁵⁰ *See, e.g.,* Davis v. Williams, 451 F.3d 759, 762 (11th Cir. 2006) (concluding that where a statute does not mandate arrest, an officer who decides to arrest someone is performing a discretionary act); *Gagne v. City of Galveston*, 805 F.2d 558, 560 (5th Cir. 1986) (stating that an official is required to exercise judgement for the discretionary functions prong, but that judgment could be used "rarely or to a small degree"); *McSpadden v. Wolfe*, 325 F. App'x 134, 139 (3d Cir. 2009) (finding that even though computation of a sentence for incarceration is a ministerial task, complex case law and sentencing guidelines created a discretionary function).

⁵¹ *Gagne*, 805 F.2d at 559.

⁵² *Id.*

⁵³ *Id.* ("Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." (quoting *Davis v. Scherer*, 468 U.S. 183, 194 (1984))).

judgment, even if rarely or to a small degree, the Court would apparently not find the official's duty to be ministerial in nature."⁵⁴

Furthermore, several circuits have outright declined to engage in the discretionary versus ministerial analysis.⁵⁵ For example, in *Sellers ex rel. Sellers v. Baer*, the Eighth Circuit rejected the plaintiff's argument that the defendants were exercising a ministerial function by noting its "belief that the ministerial-duty exception to the qualified immunity defense is dead letter."⁵⁶ The Eleventh Circuit went as far as to hold that the term "discretionary authority" includes actions that do not necessarily involve an element of choice.⁵⁷ Additionally, the Seventh Circuit declined to consider arguments that the defendant was acting in a ministerial capacity and instead questioned the value of the discretionary functions prong.⁵⁸

⁵⁴ *Gagne*, 805 F.2d at 559 (holding that officials do not lose qualified immunity merely because their conduct violates an unambiguous statutory or administrative provision).

⁵⁵ See, e.g., *McIntosh v. Weinberger*, 810 F.2d 1411, 1432 (8th Cir. 1987) ("[W]e can find no recent case other than that before us in which a court has rejected qualified immunity simply because the official in question was performing a ministerial duty."); *Coleman v. Frantz*, 754 F.2d 719, 727 (7th Cir. 1985) ("[I]t would be unwise to engage in a case by case determination of Section 1983 immunity based upon the ministerial versus discretionary nature of the particular official act challenged."); *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1315 (9th Cir. 1989) ("Few official actions consist entirely of the unfettered exercise of discretion; most have some ministerial element."); *Horta v. Sullivan*, 4 F.3d 2, 12 (1st Cir. 1993) (questioning whether the discretionary function prong "is relevant at all in the immunity sphere . . .").

⁵⁶ *Sellers ex rel. Sellers v. Baer*, 28 F.3d 895, 902 (8th Cir. 1994). In *Sellers*, park rangers removed an intoxicated individual from a state fair and turned the individual over to police, who then placed the individual in a city police vehicle, drove ten blocks away and released the intoxicated individual in a parking lot where he was later struck by a motorist and killed. *Id.* at 897–98. Qualified immunity was granted to both police officers and park rangers, concluding that the "ministerial-duty exception" to qualified immunity was a "dead letter" law and even if it was not, the ministerial exception did not apply. *Id.* at 902. See also *Withers v. Levine*, 615 F.2d 158, 163 (4th Cir. 1980) (finding the distinction between discretionary and ministerial action irrelevant to the determination of a public official's qualified immunity from § 1983 liability).

⁵⁷ *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1265 (11th Cir. 2004) (interpreting "'discretionary authority' to include actions that do not necessarily include an element of choice," and that even purely ministerial activities can be considered a discretionary function (citation omitted)).

⁵⁸ In *Coleman v. Frantz*, the court offered the following observation:

[A]s a matter of public policy, it would be unwise to engage in a case by case determination of Section 1983 immunity based upon the ministerial versus discretionary nature of the particular official act challenged. Not only would such an analysis require repeated judicial applications of the unclear ministerial-discretionary distinction, but more importantly it would do little to forward the purposes of the immunity.

Coleman, 754 F.2d at 727–28. The court suggested that instead of showing they were performing a discretionary function, street level officials should be required to "demonstrate

Thus, in the context of discretionary functions, qualified immunity cases may be divided into three categories: those that recognize the distinction between discretionary and ministerial functions and deny defendants qualified immunity on this basis (this is a minute number of cases); those that recognize the distinction, but still refuse to deny defendants qualified immunity on this basis; and cases that reject (either implicitly or explicitly) the distinction between ministerial and discretionary functions. The vast majority of cases fall into this third category.

On a doctrinal level, it is problematic for courts to reject the distinction between ministerial and discretionary functions because it elevates *Harlow*'s policy concerns—quick disposal of civil rights claims—over *Harlow*'s clear doctrinal directive.⁵⁹ On a practical level, this rejection means that almost all qualified immunity disputes turn on the question of clearly established law.⁶⁰

B. CLEARLY ESTABLISHED LAW

1. “A Reasonably Competent Public Official Should Know the Law Governing His Conduct”

Most qualified immunity determinations turn on *Harlow*'s second prong: whether the law was clearly established. As the Court explains in *Harlow*, “If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.”⁶¹ This phrase, which initially seems relatively straightforward, is fairly opaque from a grammatical perspective. This is

that, based on objective circumstances at the time he acted, his actions were undertaken pursuant to the performance of his duties and within the scope of his authority.” *Id.* at 728. The Seventh Circuit reasoned that the discretionary functions prong should be ignored because it was convoluted; one of the primary purposes of *Harlow* was to simplify qualified immunity analysis. *Id.*; see also *Sweatt v. Bailey*, 876 F. Supp. 1571, 1576 (M.D. Ala. 1995) (noting that the Eleventh Circuit has found “that basing a decision on whether an act is ministerial or discretionary too narrowly interprets the first part of the qualified immunity test”).

⁵⁹ *F.E. Trotter, Inc.*, 869 F.2d at 1315 (“Parsing discretionary acts into their discretionary and ministerial components and protecting only the former would sharply curtail the protection for discretionary duties that qualified immunity is meant to furnish”); *Ricci v. Key Bancshares of Maine, Inc.*, 768 F.2d 456, 464 (1st Cir. 1985) (“[B]reaking down discretionary acts . . . into discretionary and ministerial components would seem to vitiate much of the protection of discretionary action which absolute immunity was designed to provide.”). As one might sense, the courts’ reasonings in these cases seem circular.

⁶⁰ See *infra* Part III (discussing courts’ limited discussion of *Harlow*'s “extraordinary circumstances” prong).

⁶¹ *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)

largely because of the Court's use of "should." "Should" is a modal verb.⁶² Like most modal verbs, *should* is subject to multiple interpretations, which renders the qualified immunity standard ambiguous at best.⁶³

Merriam Webster Collegiate Dictionary provides the following ways in which "should" might be employed:

1. Used in auxiliary function to express condition: "If he *should* leave his father, his father would die."
2. Used in auxiliary function to express obligation, propriety, or expediency: "You *should* brush your teeth after each meal."
3. Used in auxiliary function to express futurity from a point of view in the past: "She realized that she *should* have to do most of her farm work before sunrise."
4. Used in auxiliary function to express what is probable or expected: "With an early start, they *should* be here by noon."
5. Used in auxiliary function to express a request in a polite manner or to soften direct statement: "I *should* suggest that a guide . . . is the first essential."⁶⁴

In short, "should" has at least five different interpretations and, arguably, to discern the user's intended meaning, the interpreter ought to consider the larger context.

Harlow's clearly established prong begins with the clause, "If the law was clearly established, the immunity defense ordinarily *should* fail."⁶⁵ Because *should* is modified by "ordinarily," the Court seems to use it in the auxiliary function to express what is probable or expected—if the law is clearly established then the defense usually will fail.

This interpretation makes sense when viewed within the context of the entire paragraph. The Court goes on to explain that even if the law is clearly

⁶² Generally speaking, a modal verb is "an auxiliary verb that expresses necessity or possibility. English modal verbs include *must, shall, will, should, would, can, could, may, and might.*" *Modal Verb*, OXFORD U.S. ENG. DICTIONARY, https://www.lexico.com/en/definition/modal_verb [<https://perma.cc/UT3P-W8JV>].

⁶³ The fact that the Court sprinkles "should" throughout *Harlow's* qualified immunity standard only compounds the problem:

If the law was clearly established, the immunity defense ordinarily *should* fail, since a reasonably competent public official *should* know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor *should* have known of the relevant legal standard, the defense *should* be sustained.

Harlow, 457 U.S. at 818–19 (emphasis added).

⁶⁴ *Should*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://merriam-webstercollegiate.com/dictionary/should> [<https://perma.cc/AGM4-GVWD>].

⁶⁵ *Harlow*, 457 U.S. at 818–19 (emphasis added).

established, § 1983 defendants may still escape liability if they plead and prove “extraordinary circumstances.”⁶⁶ Read together, one can understand the standard as follows: When the law is clearly established, defendants will usually be denied qualified immunity; however, in the rare circumstances where they are able to prove that extraordinary circumstances justified their ignorance of the clearly established rule, a court will grant them qualified immunity. Thus, in the first instance, the Court uses “should” to convey likelihood or probability.⁶⁷

The Court then goes on to justify its conclusion: the defense should fail because “a reasonably competent public official *should* know the law governing his conduct.”⁶⁸ The Court’s use of “should” in this second instance is more ambiguous. One might read it, again, as an expression of what is probable or expected—a reasonable official probably knows the law governing his conduct. Alternatively, one might interpret it as an expression of obligation or aspiration—a reasonable official ought to know the law governing his conduct. The first interpretation focuses on a reasonable official’s understanding of the law, while the latter focuses on the nature of the law itself. Yet, against *Harlow*’s broader context, the obligatory or aspirational interpretation seems more logical.

Immunities, by their very nature, shield the defendant from liability and, necessarily, deny the plaintiff a remedy.⁶⁹ In *Harlow*, the Justices granted certiorari to consider whether presidential aides were entitled to absolute immunity for their official actions.⁷⁰ Recognizing that “an action for damages may offer the only realistic avenue for vindication of constitutional guarantees,” the Court refused to extend the absolute immunity doctrine to executive officials besides the President, instead offering them qualified immunity as a shield.⁷¹ The Court further explained that “[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.”⁷² *Harlow*’s

⁶⁶ *Id.* at 819.

⁶⁷ This interpretation also makes sense when read against *Harlow*’s earlier statement that defendants “*generally* 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.” *Id.* at 818 (emphasis added).

⁶⁸ *Id.* at 818–19.

⁶⁹ See *Qualified Immunity*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/qualified_immunity [<https://perma.cc/SS3Z-YQG6>].

⁷⁰ *Harlow*, 457 U.S. at 802–03.

⁷¹ *Id.* at 814.

⁷² *Id.* at 819.

objective qualified immunity standard was intended to “balance competing values” to protect officials from insubstantial suits and simultaneously to insure that “lawless conduct” does not go unchecked.⁷³

Qualified immunity is able to balance these interests, at least theoretically, because of its underlying belief that reasonable officials ought to know the law governing their conduct when the law is clearly established; this is what justifies making them liable. Thus, courts should interpret *Harlow*’s phrase “a reasonably competent public official *should* know the law governing his conduct” as an expression of obligation.⁷⁴

2. “*Constitutional Rights of Which a Reasonable Person Would Have Known*”

If one accepts that the qualified standard obligates government officials to know the law—that reasonable officials *should* know the law governing their conduct—this hardly resolves the qualified immunity inquiry. Qualified immunity shields government officials from liability in the absence of a clearly established right. Furthermore, the law is clearly established when the rule at issue is one “which a reasonable person *would* have known.”⁷⁵

The distinction between *should* and *would* is noteworthy. Like *should*, *would* is a modal verb and, as such, has multiple meanings.⁷⁶ In *Harlow*, however, the Court seems to use “*would*” “to express probability or presumption in past or present time.” In other words, the law is clearly established when it is likely that a reasonable official knows the rule. The Court connects these two key phrases in *Harlow* as follows: The law is clearly established when a reasonable person *would* have known the rule. If the law is clearly established, the defendant will be liable because a reasonable official *should* know the law governing his conduct.⁷⁷ Accordingly, whether a defendant is entitled to qualified immunity largely will depend upon whether the law is clearly established.

Over the years since *Harlow*, the Court has articulated the clearly established standard in increasingly stringent terms.⁷⁸ Consider how the Court’s language evolved:

⁷³ *Id.* at 807.

⁷⁴ *Id.* at 819 (emphasis added).

⁷⁵ *Id.* at 818 (emphasis added).

⁷⁶ *Would*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/would> [<https://perma.cc/A5GY-EBE7>].

⁷⁷ *See Harlow*, 457 U.S. at 818.

⁷⁸ *Compare id.* (defining clearly established using the reasonable person standard in 1982), with *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (citing *Anderson v. Creighton*, 483

- 1982. “[G]overnment officials performing discretionary functions generally 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.”⁷⁹
- 1987. “The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”⁸⁰
- 1999: “[C]learly established’ for purposes of qualified immunity means that ‘[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.’”⁸¹
- 2011. “A Government official’s conduct violates clearly established law when, at the time of the challenged conduct, ‘[t]he contours of [a] right [are] sufficiently clear’ that every ‘reasonable official would [have understood] that what he is doing violates that right.’⁸²

Now, the law is only clearly established if *every* reasonable official would have recognized the illegality of the defendant’s conduct.⁸³ The Court, in effect, heightened the evidentiary standard for judges to deny government

U.S. 635, 640 (1987)) (defining clearly established as whether every reasonable official would understand that their actions violate a right).

⁷⁹ *Harlow*, 457 U.S. at 818.

⁸⁰ *Anderson*, 483 U.S. at 640.

⁸¹ *Wilson v. Layne*, 526 U.S. 603, 614–15 (1999) (quoting *Anderson*, 483 U.S. at 640).

⁸² *al-Kidd*, 563 U.S. at 741 (quoting *Anderson*, 483 U.S. at 640); *see also* *Plumhoff v. Rickard*, 572 U.S. 765, 778–79 (2014) (noting that an official “cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in the defendant’s shoes would have understood that he was violating it”).

⁸³ *See* *Schwartz*, *supra* note 14, at 615 (“The Court has also gotten stricter about how factually analogous prior precedent must be in order to clearly establish the law.”). Applying this standard, some lower courts have held that government officials are entitled to qualified immunity if a reasonable official *could* have believed the alleged conduct was lawful. *See, e.g., Roy v. Correct Care Sols., LLC*, 914 F.3d 52, 72 (1st Cir. 2019) (“Qualified immunity protects [defendants] from suit because reasonable officials could have believed . . . that no equal protection or First Amendment violation occurred.”); *Turner v. Lieutenant Driver*, 848 F.3d 678, 687 (5th Cir. 2017) (stating that to deny qualified immunity, the law must be so established that there is no ambiguity and there must be controlling authority); *Harte v. Bd. of Comm’rs*, 864 F.3d 1154, 1194 (10th Cir. 2017) (stating that even though one officer might know that having seven fully armed officers execute a search warrant against a small-time marijuana grow is excessive force, not every other officer would believe the same way).

officials qualified immunity.⁸⁴ Under *Harlow*'s original standard, one might frame the issue as follows: the court should deny the defendant qualified immunity if it is more likely than not that a reasonable official would know the conduct was unconstitutional. Under the Court's current standard, a court should only deny a defendant qualified immunity if every government official in the defendant's position would know the conduct was illegal. To state this in numerical terms, under *Harlow*, a court had to conclude there was a 50.1% chance a reasonable official would know the conduct was unconstitutional. Theoretically, after *Ashcroft v. al-Kidd* a court must find there was a 50.1% chance that 99% of government officials would know the conduct is illegal.⁸⁵ If the question is ambiguous, then the defendant is entitled to qualified immunity.⁸⁶

As the qualified immunity standard has evolved, it has become increasingly difficult for courts to conclude that the law is clearly established.⁸⁷ This is especially true in the context of Fourth Amendment litigation. When it comes to excessive force cases, the Court has noted that "'the result depends very much on the facts of each case,' and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue."⁸⁸ This is equally true with qualified immunity disputes regarding probable cause. The Court explains the tension between probable cause and qualified immunity as follows:

⁸⁴ Compare *Harlow*, 457 U.S. at 818, with *al-Kidd*, 563 U.S. at 741.

⁸⁵ *al-Kidd*, 563 U.S. at 741. If that sounds nonsensical, it aligns with so much else that is wrong with the qualified immunity standard. See Teresa E. Ravenell, *Law Enforcement Officials, Qualified Immunity and the Absolute Immunity of Anonymity*, AM. CONST. SOC'Y (Aug. 3, 2020), <https://www.acslaw.org/expertforum/law-enforcement-officials-qualified-immunity-and-the-absolute-immunity-of-anonymity> [<https://perma.cc/7K2Y-L9QF>] (noting "[t]here is so much wrong with the qualified immunity defense" and providing a summary of problems).

⁸⁶ *al-Kidd*, 563 U.S. at 741 ("[E]xisting precedent must have placed the statutory or constitutional question beyond debate").

⁸⁷ See Schwartz, *supra* note 14, at 617 ("[C]ircuit courts have granted officers qualified immunity even when prior precedent held that almost identical conduct was unconstitutional."). Some scholars, however, predict that the Court will reconfigure the qualified immunity doctrine in the near future. See Anya Bidwell & Patrick Jaicomo, *Lower Courts Take Notice: The Supreme Court is Rethinking Qualified Immunity*, USA TODAY (Mar. 2, 2021, 4:00 AM), <https://www.usatoday.com/story/opinion/2021/03/02/supreme-court-might-rethinking-qualified-immunity-column/4576549001> [<https://perma.cc/4JAT-PW3J>] (noting that although the Court virtually always grants government officials qualified immunity, recent cases demonstrate the Supreme Court is "reintroducing some common sense to the law," indicating it is rethinking qualified immunity).

⁸⁸ *Kisela v. Hughes*, 138 S. Ct. 1148, 1152–53 (2018) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (per curiam)).

Probable cause turns on the assessment of probabilities in particular factual contexts and cannot be reduced to a neat set of legal rules. It is incapable of precise definition or quantification into percentages. Given its imprecise nature, officers will often find it difficult to know how the general standard of probable cause applies in the precise situation encountered. Thus, we have stressed the need to identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment . . . [A] body of relevant case law is usually necessary to clearly establish the answer with respect to probable cause.⁸⁹

In short, there is no question that qualified immunity will turn on the legal rule in effect at the time the alleged conduct.

A more complicated question is to what, if any extent, the inquiry should turn on courts' understanding of the reasonable official. As previously indicated, *Harlow* relies on the normative principle that if the law is clearly established, a reasonable official should know the law governing his conduct. However, it does not necessarily follow that even reasonable government officials *actually* know the law.⁹⁰ Peter Schuck describes the problem of "comprehensive-based illegality" as follows:

The official to whom a legal directive is addressed cannot comply unless he understands what is expected of him, what the law requires . . . Like any impulses, however, bureaucratic messages tend to dissipate energy and strength as they pass through media. Journeying through layer after hierarchical layer, they generate friction, losing some of the power and immediacy that propelled them at their source . . . A sweeping mandate from the courthouse to protect suspects' rights enters the station house as just one more insertion in the patrolman's tattered operations manual.⁹¹

There is clear evidence that government officials, particularly police officials, are not necessarily aware of the law governing their conduct, even when there is clear precedent in their jurisdiction.⁹² The Court seems to make room for this type of "ignorance of the law" in *Harlow's* extraordinary prong.⁹³

⁸⁹ *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (internal citations omitted).

⁹⁰ See generally Schwartz, *supra* note 14, at 610 ("[O]fficers are not regularly or reliably informed about . . . the very types of decisions that are necessary to clearly establish the law about the constitutionality of uses of force.").

⁹¹ PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 4–5 (1983).

⁹² *Id.*; see, e.g., *Elder v. Holloway*, 510 U.S. 510, 513–14 (1994) (exemplifying how police officials may be unaware of controlling appellate decisions).

⁹³ *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

C. REASONABLE OFFICIALS, REASONABLE RELIANCE AND EXTRAORDINARY CIRCUMSTANCES.

In *Harlow*, the Court held “if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained.”⁹⁴ Like the “discretionary functions” prong of qualified immunity analysis, scholars pay scant attention to this prong.⁹⁵ Although the Supreme Court has not addressed this prong since *Harlow*, most appellate courts have discussed the issue.⁹⁶ Typically, when defendants claim “extraordinary circumstances” their argument centers on the factual claim that they relied upon the advice of counsel or some superior official.⁹⁷ And while defendants arguments are relatively uniform, courts’ treatment of these arguments are not. Some courts incorporate the defendants’ reliance arguments into the clearly established prong; others analyze these under the *Harlow*’s extraordinary circumstances prong. This Section discusses courts’ varied approaches.

⁹⁴ *Id.*

⁹⁵ *But see* Adam L. Littman, *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, 646 (2008) (arguing that “extraordinary circumstances” doctrine from multiple circuit courts clouds the doctrine, making it unclear on how to apply it); Robert Weems, *Questioning the U.S. Supreme Court’s Legalistic Qualified Immunity Approach and Suggestions for a Better Approach*, 66 S.C. L. REV. 543, 546 (2014) (arguing that qualified immunity (as a whole) was never intended to apply to low-level government officials and positing that if courts were to apply the extraordinary circumstances prong to low level government officials, they should almost always conclude these officials are entitled to qualified immunity because they do not read case law).

⁹⁶ *Fernandez v. Leonard*, 784 F.2d 1209, 1216 (1st Cir. 1986) (finding that extraordinary circumstances can only be found when there is an issue of mistake of law, not fact); *Taravella v. Town of Wolcott*, 599 F.3d 129, 147 (2d Cir. 2010) (declining to determine whether reliance on the advice of counsel is per se extraordinary); *Buonocore v. Harris*, 134 F.3d 245, 252 (4th Cir. 1998) (finding that legal advice is not per se extraordinary circumstances); *York v. Purkey*, 14 F. App’x 628, 633 (6th Cir. 2001) (holding that certain factors can create extraordinary circumstances when an official relies on the advice of counsel); *Moore v. Marketplace Rest., Inc.*, 754 F.2d 1336, 1348 (7th Cir. 1985) (finding that advice from a supervisor might rise to the level of extraordinary circumstances).

⁹⁷ *See, e.g.*, *Liu v. Phillips*, 234 F.3d 55, 56 (1st Cir. 2000) (claiming that relying on the incorrect information regarding failure to carry one’s green card entitled the official to extraordinary circumstances); *Buonocore*, 134 F.3d at 245 (claiming that reliance of counsel creates extraordinary circumstances); *York*, 14 F. App’x at 628 (claiming that reliance on counsel for employment decisions rises to the level of extraordinary circumstances); *Moore*, 754 F.2d at 1336 (claiming that advice from a supervisor rises to the level of extraordinary circumstances); *E-Z Mart Stores, Inc. v. Kirksey*, 885 F.2d 476, 478 (8th Cir. 1989) (claiming that reliance on the advice of counsel rises to the level of extraordinary circumstances).

1. *Extraordinary Circumstances*

As previously mentioned, when defendants plead “extraordinary circumstances” they almost always argue that they relied on the advice of another.⁹⁸ For example, in *York v. Purkey*, a county sheriff sought advice from the county attorney before terminating employees.⁹⁹ The counsel advised him that as long as the reason for termination did not violate the terminated employees’ civil rights, there should be no issue.¹⁰⁰ When the terminated employees sued the sheriff claiming they were fired because of their political beliefs, the sheriff argued he was entitled to qualified immunity based upon extraordinary circumstances because he relied on the advice of counsel when he fired the plaintiffs.¹⁰¹ When analyzing the sheriff’s arguments, the court considered whether the advice was unequivocal, the information provided to the attorney was complete, the recency of the advice, and the prominence of the attorney.¹⁰² Ultimately, the Sixth Circuit held that legal advice alone does not create extraordinary circumstances.¹⁰³ Nevertheless, the court recognized that under some circumstances reliance on the advice of counsel may satisfy *Harlow’s* extraordinary circumstances exception.¹⁰⁴

When analyzing the extraordinary circumstances prong of *Harlow*, other courts consider the following factors for reliance on legal advice:¹⁰⁵

- How frequently public officials seek legal advice¹⁰⁶

⁹⁸ See *supra* Section I.A and accompanying footnotes.

⁹⁹ *York*, 14 F. App’x at 630.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 631.

¹⁰² *Id.* at 634.

¹⁰³ *Id.* at 633.

¹⁰⁴ *Id.* at 633.

¹⁰⁵ *Id.* (creating the factors to determine how a defendant can establish extraordinary circumstances when relying on the advice of counsel); *Mineer v. Call*, No. 92–5368, 1993 WL 144536, at *6 (6th Cir. May 4, 1993) (utilizing the test created by *York* to find that the defendant’s reliance on advice of counsel did not rise to the level of extraordinary circumstances).

¹⁰⁶ *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.”). Interestingly, the Fourth Circuit concluded that seeking legal advice was entirely ordinary, yet nevertheless analyzed defendant’s claim under the extraordinary circumstances prong. *Id.* Specifically, the court noted, “reliance on legal advice *alone* does not, in and of itself, constitute an ‘extraordinary circumstance’ sufficient to prove entitlement to the exception to the general *Harlow* rule. *Id.* at 253 (citing *Hollingsworth v. Hill*, 110 F.3d 733, 741 (10th Cir. 1997)). Ultimately the court denied the defendant qualified immunity because he did not actually follow the advice of counsel. *Id.*

- Who provided the legal advice¹⁰⁷
- Whether the advisor was informed of all the relevant facts¹⁰⁸
- Whether the advice was tailored to the specific facts of the case¹⁰⁹
- Whether the advice was given before or after the alleged conduct¹¹⁰
- Whether the defendant followed the advice given¹¹¹

From these factors and *Harlow*'s directive, it is clear that courts' overall aim, even in the extraordinary circumstances prong, is to determine whether it was objectively reasonable for the defendant to violate the law under the circumstances.¹¹² The Court in *Harlow* emphasized that "the defense would turn primarily on objective factors."¹¹³ Given the continued focus on objective reasonableness, it is not entirely surprising that some judges have eschewed the extraordinary circumstances prong and instead incorporated defendants' reliance arguments into the clearly established prong.¹¹⁴

2. *The Reasonable Government Official*

Several courts treat "reliance on others" as one of the many factors to be considered in the "clearly established" inquiry.¹¹⁵ One of the complicating factors of a qualified immunity inquiry is that courts are often required to

¹⁰⁷ *Lawrence v. Reed*, 406 F.3d 1224, 1231 (10th Cir. 2005) (listing "the prominence and competence of the attorney(s)" as one of many factors for courts to consider when determining whether *Harlow*'s extraordinary circumstances prong is met).

¹⁰⁸ *York*, 14 F. App'x at 634 (finding that because the sheriff defendant did not inform counsel of the entirety of the information surrounding the issue such as the political leanings of the employees to be terminated, the sheriff's reliance on counsel was not an extraordinary circumstance).

¹⁰⁹ *Id.* (finding that because the sheriff did not give the exact and full information to counsel, the advice was not specifically tailored to the situation at hand).

¹¹⁰ *Id.* at 633 (stating that advice must be given before the alleged conduct to satisfy this factor to establish an extraordinary circumstance).

¹¹¹ *Id.*; *Buonocore*, 134 F.3d at 253 (finding defendants cannot claim that their reliance on counsel constitutes extraordinary circumstances if they fail to follow the exact advice of counsel).

¹¹² *See E-Z Mart Stores, Inc. v. Kirksey*, 885 F.2d 476, 478 (8th Cir. 1989) ("[F]ollowing such advice does not automatically cloak one with qualified immunity, but rather, is used to show the reasonableness of the action taken."); *see generally V-1 Oil Co. v. Wyo. Dep't of Env't Quality*, 902 F.2d 1482 (10th Cir. 1990) (establishing a test for a reasonable officer with similar factors to the extraordinary circumstances).

¹¹³ *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

¹¹⁴ *See supra* Section I.B.2.

¹¹⁵ *Id.*

consider the information possessed by the government official to determine whether the rule was clearly established.¹¹⁶ This is especially true when plaintiffs allege deprivation of a Fourth Amendment right. For example, in *Bilba v. McCleoud*, the defendants argued they were entitled to qualified immunity after officers seized the plaintiff's pet racoon without a warrant.¹¹⁷ The fact they were acting pursuant to a superior officer's directive was central to their qualified immunity argument.¹¹⁸ Interestingly, however, the First Circuit did not mention "extraordinary circumstances" once during the entire opinion.¹¹⁹ Rather, the court granted the defendant's qualified immunity because "[p]lausible instructions from a superior or fellow officer support qualified immunity where, viewed objectively in light of the surrounding circumstances, they could lead a reasonable officer to conclude that the necessary legal justification for his actions exists."¹²⁰

Like the First Circuit, several other circuits opted to treat a defendant's argument that they relied on the advice of another as one of many factors in the "clearly established" inquiry rather than as the basis for "extraordinary circumstances" argument.¹²¹ As noted in Section I.B, the law is clearly

¹¹⁶ *Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *James v. Tilghman*, 194 F.R.D. 408, 430 (D. Conn. 1999) (holding that courts "may consider the nature of the defendant's official duties, the character of his official position, the information which was known to the defendant or not known to him, and the events which confronted him at that time").

¹¹⁷ *Bilida v. McCleod*, 211 F.3d 166, 174 (1st Cir. 2000).

¹¹⁸ *Id.*

¹¹⁹ See generally *id.* (basing qualified immunity determination on the "clearly established law" part of the qualified immunity test).

¹²⁰ *Id.* at 174–75; see also *Liu v. Phillips*, 234 F.3d 55, 55 (1st Cir. 2000) (granting qualified immunity to a police official who relied on an immigration official's mistaken description of the relevant legal rule when he arrested a seventeen-year-old suspect for the violation of immigration law). A query that is beyond the scope of this Article is whether government officials who are simply following a directive should be denied qualified immunity because they are not exercising a "discretionary function." Courts have failed to give this aspect of qualified immunity sufficient consideration. See *supra* Section I.A.

¹²¹ See, e.g., *Cox v. Hainey*, 391 F.3d 25, 34 (1st Cir. 2004) ("[T]he fact of the consultation and the purport of the advice obtained should be factored into the totality of the circumstances and considered in determining the officer's entitlement to qualified immunity."); *Kijonka v. Seitzinger*, 363 F.3d 645, 648 (7th Cir. 2004) (noting that consulting a prosecutor prior to arresting a suspect "goes far to establish qualified immunity" in a § 1983 claim alleging a Fourth Amendment deprivation for false arrest); *Wentz v. Klecker*, 721 F.2d 244, 247 (8th Cir. 1983) (concluding that defendant who relied "on the advice of experienced counsel" had not "violated 'clearly established' rights of which 'a reasonable person would have known'"); *Lucero v. Hart*, 915 F.2d 1367, 1371 (9th Cir. 1990) (granting qualified immunity to defendant who relied on the advice of counsel under *Harlow's* "clearly established" right analysis); *Brock v. City of Zephyrhills*, 232 F. App'x 925, 928 (11th Cir. 2007) (analyzing the qualified immunity argument under the clearly established prong and concluding that defendant was

established when a reasonable official would know the conduct is illegal.¹²² Courts have incorporated reliance arguments into the clearly established inquiry by asking, in essence, whether a reasonable official who has been told X by Y would have believed that their conduct was unlawful.¹²³ So framed, the piece of advice becomes one additional piece of information possessed by the government official.¹²⁴

Furthermore, circuit courts are divided regarding how much weight to give these type of reliance arguments. Courts generally seem to agree that reliance should not result in *carte blanche* immunity.¹²⁵ The reliance must be reasonable.¹²⁶ Accordingly, when an officer knows or should have known that the advice or order that they are following is unlawful the court should deny them qualified immunity.¹²⁷ Nevertheless, the Third Circuit has held that, at least in the context of Fourth Amendment false arrest claims, “a police officer who relies in good faith on a prosecutor’s legal opinion that the arrest

“entitled to qualified immunity because it was objectively reasonable for him to conclude that the search was lawful based on his supervisor’s instruction”); *Dixon v. Wallowa Cnty.*, 336 F.3d 1013, 1019 (9th Cir. 2003) (considering whether defendant relied on the advice of counsel when determining “whether a reasonable officer could have believed that his conduct was lawful”). A different, but related issue is whether police officials are entitled to qualified immunity when they have relied on a fellow officer’s *factual* account (rather than legal assessment). Most courts have held that if the reliance is reasonable, this is a sound basis for qualified immunity. *See, e.g., Stearns v. Clarkson*, 615 F.3d 1278, 1286 (10th Cir. 2010).

¹²² *See supra* Section I.B.

¹²³ *See, e.g., Paff v. Kaltenbach*, 204 F.3d 425, 434 (3d Cir. 2000) (granting official qualified immunity “[b]ecause we believe a reasonable officer would, and in fact should, consider the views of the postmaster in this situation . . .”).

¹²⁴ *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (“The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson’s warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed.”).

¹²⁵ *See, e.g., Stearns*, 615 F.3d at 1284 (noting that “a prosecutor’s determination of probable cause prior to making an arrest is only one factor that is relevant to the qualified immunity analysis”); *Bunkley v. City of Detroit*, 902 F.3d 552, 563 (6th Cir. 2018) (rejecting the argument “arresting officers are entitled to qualified immunity because they were ‘simply following orders’” (quoting *Saad v. Keller*, 546 F. App’x 552, 559 (2013))); *Ramirez v. Butte-Silver Bow Cnty.*, 298 F.3d 1022, 1028 (9th Cir. 2002) (holding that reliance on a superior’s advice regarding a warrant was not reasonable because the officers should have checked the warrant themselves); *Wentz*, 721 F.2d at 247–48 (holding that reliance on advice is not sufficient to show that an official acted reasonably).

¹²⁶ *Sec. & L. Enf’t Emps. v. Carey*, 737 F.2d 187, 211 (2d Cir. 1984).

¹²⁷ *See id.*

is warranted under the law is presumptively entitled to qualified immunity”¹²⁸

Regardless of whether courts resolve § 1983 defendants’ reliance arguments under the clearly established prong or the extraordinary circumstances prong, the ultimate question is the same: whether it was reasonable for the defendants to believe their conduct was lawful. Furthermore, both approaches require courts to personalize the qualified immunity inquiry by considering the facts that are unique to the case at bar (i.e., that someone told them, explicitly or implicitly, that their conduct was lawful). The difference, in the end, is just a question of timing—some courts consider this as part of the clearly established inquiry, others treat it as a separate prong.

As noted at the beginning of Section I.C., overall, courts and scholars devote little time to qualified immunity based upon extraordinary circumstances or reasonable reliance.¹²⁹ Arguably, however, this idea of reasonable reliance is fundamental to our understanding of qualified immunity and, more generally, our expectations of government officials, particularly law enforcement officials. When courts conclude that it was unreasonable for a defendant to rely on another’s advice, they, in essence, have concluded that the defendant should have known the advisor was wrong. This conclusion seems to be based upon two assumptions. First, that the government official has (or should have) some independent knowledge of the applicable legal rules.¹³⁰ Second, that street level officials should, at least in some circumstances, disregard the legal assessments of others.¹³¹

¹²⁸ *Kelly v. Borough of Carlisle*, 622 F.3d 248, 255–56 (3d Cir. 2010). The plaintiff may “rebut this presumption” by showing that it was unreasonable for the officer to rely on the prosecutor’s assessment. *Id.* at 256.

¹²⁹ See *supra* note 95 and accompanying text.

¹³⁰ *Kelly*, 622 F.3d at 258 (“Police officers generally have a duty to know the basic elements of the laws they enforce.”).

¹³¹ See *Stearns v. Clarkson*, 615 F.3d 1278, 1284 (10th Cir. 2010). In *Stearns*, the Tenth Circuit noted that “[u]nder certain circumstances . . . an officer’s receipt of a prosecutor’s pre-arrest probable cause determination supports the officer’s qualified immunity defense.” *Id.* However, the court found that after the defendant learned the facts underlying the county attorney’s probable cause assessment, the defendant’s belief that an arrest was unconstitutional was “patently unreasonable.” *Id.* at 1285. Similarly, in *Kelly*, the Third Circuit concluded that “encouraging police to seek legal advice serves such a salutary purpose as to constitute a ‘thumb on the scale’ in favor of qualified immunity.” 622 F.3d at 255. Nevertheless, the court also noted that the “reliance must itself be objectively reasonable, however, because ‘a wave of the prosecutor’s wand cannot magically transform an unreasonable probable cause determination into a reasonable one.’” *Id.* at 256 (quoting *Cox v. Hainey*, 391 F.3d 25, 34 (1st Cir. 2004)).

Both assumptions are especially relevant to police officials, who regularly are required to make Fourth Amendment determinations. Part II examines the first assumption by considering how police officials are informed of new interpretations of constitutional law.

II. POLICE OFFICIALS' ACTUAL KNOWLEDGE

This Article's authors sent surveys to twenty police departments which were selected based upon two criteria.¹³² First, the authors sought departments located in cities with varied population counts: 1) less than 499 thousand; 2) 500 thousand – 999 thousand; and 3) more than one million.¹³³ Second, the authors selected police departments that made materials such as their police department manual public. Based on these criteria, the authors sent surveys to the municipalities:

Less than 499K	500-999K	More than 1 million
Aurora, CA	Austin, TX	Chicago, IL
Fayetteville, NC	Baltimore, MD	Houston, TX
Garden Grove, CA	Boston MA	Los Angeles, CA
Grand Rapids, MI	Memphis, TN	New York, NY
Honolulu, HI	Seattle, WA	Philadelphia, PA
New Orleans, LA	Tucson, AZ	Phoenix, AZ
Tulsa, OK	Washington, DC	

Of the twenty departments surveyed, responses were received from the following ten: Fayetteville, NC; Garden Grove, CA; Grand Rapids, MI; New Orleans, LA; Austin, TX; Tucson, AZ; Washington, DC; Houston, TX; Los Angeles, CA; and New York, NY.

A. THE FINDINGS¹³⁴

All ten departments reported that their department stayed “up to date on federal judicial decisions regarding the Fourth and/or Fourteenth Amendments of the United States Constitution” and made efforts to convey recent federal judicial decisions regarding the Fourth and/or Fourteenth

¹³² Teri Ravenell, *Police Law Survey*, <https://app.smartsheet.com/b/form/fe56c5ff65854afebfb4c938efab890> [<https://perma.cc/2A9H-ZPLC>].

¹³³ The population of each city was based on data from the 2010 census.

¹³⁴ The Grand Rapids Police Department (PD) submitted two surveys; one was submitted by the Deputy Chief and one by the Public Information Officer. While most of the answers given on the two surveys were identical, some differed and the authors highlight where the answers differ.

Amendments to their police officers. Next, the authors asked the departments who received the recent federal judicial decisions: High Ranking police officials (for example, Chiefs, Commanders and Captains); Supervisory police officials (for example, Lieutenants and Sergeants); Street Level police officials (for example, Detectives and Officers); or Other. In responding, nine of the ten departments said all three groups, High Ranking, Supervisory, and Street Level police officials, receive recent federal judicial decisions. The remaining department, Tucson Police Department, responded that “[d]ecisions that represent a change in law will be conveyed to all commissioned officers and incorporated into academy training.” Notably, all ten departments required Street Level police officials to receive the recent federal judicial decisions. The frequency with which the information was relayed ranged from Every Day (two departments) to Every Week (one department) to Every Month (three departments) to Once per Year (two departments).¹³⁵

When asked *who* conveyed the recent federal decisions to the officials, most departments had more than one type of official convey the information. These officials ranged from High Ranking officials (four departments) to Supervisory officials (seven departments) to Prosecutors (three departments) to City or County Attorneys (seven departments) to Law Professors/Academics (one department) to Training Unit (one department) to Continuing Education Officers (one department).¹³⁶ The recent federal decisions were conveyed to Street Level officials in various ways, including Stand Alone Training (four departments); As Part of a Training Class Discussing Other Subjects (six departments); Through Written Materials (seven departments); During Daily Briefings such as “Roll Call” (six departments); and Online Class (two departments).¹³⁷

The departments were next asked to list by case name all federal judicial decisions regarding the Fourth and/or Fourteenth Amendments that have been conveyed to their police officials in the past twelve months. Each of the departments responded to this question, except for the Tucson Police Department. Of the nine responding departments, only three departments

¹³⁵ Two departments (Tucson PD and Austin PD) did not answer the frequency in which the information was relayed and Los Angeles PD explained that the frequency depended on the information that needed to be relayed. Also, the answers of the two Grand Rapids surveys differed. The Deputy Chief stated that the information is relayed to officials every day and the Public Information Officer stated that the information is relayed once a year.

¹³⁶ The departments were allowed to select more than one answer and/or identify a source not provided. Additionally, Tucson PD did not respond to this question.

¹³⁷ The departments were allowed to select more than one answer and/or identify a source not provided. Additionally, two departments (Tucson PD and Austin PD) did not respond to this question.

provided federal decisions occurring in 2020 or 2021: Fayetteville Police Department provided two cases; Grand Rapids Police Department provided two cases; and Austin Police Department provided four cases. Notably, of these six cases, three were rendered by the U.S. Supreme Court, two by the Fourth Circuit, and one by the Fifth Circuit. The remaining responding departments reported federal decisions that were rendered in years ranging from 1936-2017, with only one department, the New York Police Department, providing the names of decisions rendered within the last ten years.¹³⁸ Lastly, almost all of the decisions reported were from United States Circuit Courts or from the United States Supreme Court.

The three municipalities reporting that they inform street level officials of recent judicial decisions vary in their timing and method. The Fayetteville Police Department stated that City or County Attorneys inform street level officials of the federal decisions through written materials every month. As reported above, the Grand Rapids Police Department submitted two survey responses from two different officials. The Public Information Officer reported that federal judicial decisions were conveyed to officials once a year, while the Deputy Chief reported that decisions were conveyed every day. Additionally, the responders reported that the Supervisory Police Officials, City or County Attorneys, Prosecutors and Training Units were responsible for conveying the decisions to police officials. The Austin Police Department did not indicate how often federal judicial decisions were conveyed to their officials. However, it was reported that High Ranking police officials, City and County Attorneys, and Continuing Education officers were the officials that conveyed the federal judicial decisions to police officials.

Aggregated, the surveys evidence that among the responding municipalities there is not one clear standard or means for informing street level officials of judicial opinions. Importantly, of the nine departments that reported that federal judicial decisions were provided to their police officials in the past twelve months, only four departments named decisions rendered within the last ten years. This finding undermines *Harlow's* notion that reasonable officials know the law governing their conduct. It also calls into question the general structure of qualified immunity determinations. The Court has held that the law is only clearly established when “every reasonable official would have understood that what he is doing violates that right.”¹³⁹

¹³⁸ Houston PD did not provide a list of cases but instead reported that it was identifying “those 4th Amendment judicial decision that have been broadcasted via circulars and HPD’s intranet.” As of the date of publication, a case list was not provided.

¹³⁹ *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (internal citations omitted).

Yet, based upon the responding surveys, it seems unlikely that reasonable officials are aware of recent binding cases.

III. POSITIVE AND NORMATIVE NOTIONS OF THE REASONABLE OFFICIAL

The reasonable official is at the heart of qualified immunity determinations. *Harlow* depends on one very basic principle: “a reasonably competent public official should know the law governing his conduct.”¹⁴⁰ This seemingly simple principle, however, is actually very complex because it requires a factfinder to conceptualize the “reasonable official.”¹⁴¹ As other scholars note, the most fundamental inquiry regarding the “reasonable person” is whether they should be imbued with normative or positive content.¹⁴² Part III posits that this same debate underlies the qualified immunity standard and, consequently, the court’s understanding of the reasonable official seems to vacillate between normative and positive notions. A reasonable official should know the law. Yet, the law is only clearly established when a reasonable official would understand that their conduct violates the law. Section II.A briefly describes positive notions and applies these principles to the qualified immunity standard. Section II.B considers qualified immunity from a normative perspective.

A. QUALIFIED IMMUNITY: A POSITIVE NOTION

In their article *The Reasonable Person*, Miller and Perry summarize a positive approach to the reasonable person standard as follows:

¹⁴⁰ *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

¹⁴¹ Legal analysis is a two-step process. First one must identify the relevant legal rule, then they must compare the current situation to the relevant legal rule to determine the legality of their conduct. The “reasonable official” factors into qualified immunity analysis at both levels of this analysis. Judges impute knowledge of the relevant legal rule onto the defendant. Furthermore, when determining whether the law is “clearly established,” the court frames the issue as whether a “reasonable official would understand that what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

¹⁴² Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. Rev. 323, 324, 327 (2012) (questioning whether, in the context of tort law, “reasonableness be a normative or a positive notion” and noting “the prevalence of the concept of reasonableness in most areas of American law”).

[P]ositive definitions posit the existence of a reasonable person who is not a real entity but a hypothetical construct against which the alleged tortfeasor's behavior can be evaluated. Second, the nature of this hypothetical reasonable person can be approximated using empirically observable data. In other words, we can learn about the reasonable person by looking at the society. This implies that the reasonable person is in some sense a derivative of the society.¹⁴³

In short, a positive definition describes what is.¹⁴⁴ Perhaps the clearest example of this in tort law is when courts rely on industry custom or usage to define reasonableness.¹⁴⁵ Accordingly, a positive standard should begin with an empirical assessment of current practice. Nevertheless, as Miller and Perry point out, these assessments may be informal, amounting to an “empirical estimation” of the reasonable person.”¹⁴⁶

When discussing the reasonable police official, courts seem to base their assessment on officers' expertise and experiences.¹⁴⁷ Professor Lovsky argued that, “[s]tarting in the 1950s, judges came to rely on the promise of police expertise — the notion that trained, experienced officers develop

¹⁴³ *Id.* at 371. In contrast, “Positive law typically consists of enacted law — the codes, statutes, and regulations that are applied and enforced in the courts.” *Positive Law*, BLACK'S LAW DICTIONARY (11th ed. 2019).

¹⁴⁴ *Positive*, BALLENTINE'S LAW DICTIONARY (3d ed. 2010).

¹⁴⁵ Restatement (Second) of Torts § 295A cmt. a (AM. L. INST. 1965) (“A custom or usage . . . may consist of and be limited to the common practices of a relatively small group of persons who engage in particular activities, as in the case of the methods followed in maritime navigation.”); *see, e.g.*, *Baker v. Pidgeon Thomas Co.*, 422 F.2d 744, 747 n.5 (6th Cir. 1970) (“Professionals, including contractors, are generally held to the standard of care which a reasonable man, with his special knowledge, would observe, and industry custom is competent evidence of such a standard”); *McKee v. Cutter Lab'ys, Inc.*, 866 F.2d 219, 224 (6th Cir. 1989) (“Under Kentucky law, compliance with industry custom is evidence of non-negligence.”); *Dakota, Minn. & E. R.R. Corp. v. Ingram Barge Co.*, 429 F. Supp. 3d 615, 628 (N.D. Iowa 2019) (“Industry customs and practices are relevant to the reasonableness of a party's conduct, but they are not necessarily dispositive.”). *But see* *Tex. & Pac. Ry. Co. v. Behymer*, 189 U.S. 468, 470 (1903) (Holmes, J.) (“What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not”).

¹⁴⁶ *Miller & Perry*, *supra* note 142, at 371.

¹⁴⁷ *See, e.g.*, *United States v. Richmond*, 924 F.3d 404, 411 (7th Cir. 2019) (concluding that officers had reasonable articulable suspicion to stop suspect based in part on “the officers' over 25 combined years' of police training and experiences, a protrusion like this was more often than not a gun”); *United States v. Arvizu*, 534 U.S. 266, 277 (2002) (concluding that the officer had a reasonable suspicion to stop suspect based on the totality of the circumstances and the officer's knowledge and inferences from the scene); *United States v. Cortez*, 101 S. Ct. 690, 696 (1981) (concluding that border patrol officers, based on their training and expertise, had a particularized and objective basis for suspecting the stopped vehicle was engaged in criminal activity).

rarefied and reliable insight into crime.”¹⁴⁸ Lovsky’s article, *The Judicial Presumption of Police Expertise*, tracks courts’ deference to police officials.¹⁴⁹ Lovsky observes that “the judicial embrace of police judgment has not necessarily reflected judges’ reasoned deliberation about police competence” and warns that these judicial biases “likely pushed judges to systemically overvalue police knowledge.”¹⁵⁰ By relying on police expertise, courts, in essence, adopted a positive standard. Yet, courts do not carefully analyze police conduct against police expertise.¹⁵¹ Instead, courts impute expertise to almost every police official.¹⁵² Accordingly, their “analysis” largely concludes that if a police official did it, it must be reasonable.

The Supreme Court’s clearly established standard in qualified immunity jurisprudence reflects a similar sort of deference to police officials. In *Malley v. Briggs* the Court noted, “[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”¹⁵³ As noted in Section I.B., the Court held that law is clearly established when a reasonable official would know the conduct was unlawful. Theoretically, this might entail some sort of empirical analysis of officials’ understanding of the relevant legal rules. In practice, however, courts simply engage in a rough estimate of officials’ understanding of the law—the law is only clearly established if *every* reasonable official would have recognized the illegality of the defendant’s conduct.¹⁵⁴

This qualified immunity standard puts trial courts in a curious position. At least one official, the defendant, allegedly has engaged in unconstitutional conduct. If the defendant is reasonable, then the defendant should be granted qualified immunity because at least one reasonable government official failed to recognize the conduct was unlawful. If, however, the court finds the defendant was unreasonable (or should be ignored), the defendant should only be granted qualified immunity if the court finds that every reasonable

¹⁴⁸ Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 1998–99 (2017).

¹⁴⁹ *Id.* at 2002.

¹⁵⁰ *Id.*

¹⁵¹ See Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 Va. L. Rev. 211, 217 (2017) (arguing that, following *Tennessee v. Garner*, 105 S. Ct. 1694 (1985), “the Court’s subsequent Fourth Amendment jurisprudence is increasingly divorced from the tactical training that police receive to protect their own lives and those of citizens”).

¹⁵² See Lvovsky, *supra* note 148, at 2002 (noting the “natural tendency of courts to aggregate their discrete encounters with police officers into broad, often-distorted presumptions about police competence”).

¹⁵³ *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

¹⁵⁴ *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

official, excluding the defendant, would recognize the illegality of the defendant's conduct.

To determine whether conduct is constitutional, one must first know the relevant legal rule. Arguably, a true positive standard would assess whether a reasonable official would know the law governing his conduct. And while the courts making qualified immunity standards may make a rough estimate, empirical evidence indicates there is a clear disconnect between how courts envision officials' legal knowledge and officials' actual knowledge of the law. Indeed, our survey of police departments revealed that while all ten of the responding departments reported that they informed their street level police officers about recent federal judicial decisions, only six departments provided the names of cases that they had incorporated into their training (with some cases dating back to 1936). Furthermore, of these six departments, only three listed cases that were decided in 2020 or 2021 and only one additional department listed cases decided since 2011. If these results are indicative of larger trends, this suggests that most street level officials are not aware of federal judicial decisions within one to ten years of the decisions being published.

In short, the Supreme Court's clearly established standard—whether every reasonable official would know the defendant's conduct was unconstitutional—seems like a feigned positive standard. Courts impute legal knowledge to the defendant that the defendant, in fact, very well may not have. As Section II.B argues, this likely is a consequence of the normative aspect of the qualified immunity analysis.

B. QUALIFIED IMMUNITY: A NORMATIVE STANDARD

Normative notions offer one way to reconcile this apparent disconnect between a reality where government officials are not necessarily informed of specific judicial determinations and a qualified immunity standard that imputes this knowledge upon them. A norm is “[a] model or standard accepted (voluntarily or involuntarily) by society or other large group, against which society judges someone or something.”¹⁵⁵ Unlike positive standards, normative standards tend to reject the aggregation of society into a single ‘average person’, and instead focus on whether the defendant met

¹⁵⁵ *Norm*, BLACK'S LAW DICTIONARY (11th ed. 2019). In *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947), Judge Learned Hand outlined a formula for determining duty. The Hand Formula is the quintessential example of a normative standard. *See id.* (stating that “the owner's duty . . . is a function of three variables: (1) The probability that [the ship] will break away; (2) the gravity of the resulting injury, if she does; [and] (3) the burden of adequate precautions” therefore the equation for duty would be “whether $B < PL$ ”).

the underlying reasons and ideals of a given doctrine.¹⁵⁶ A normative definition of duty looks not at what society does, but rather at what it should do.¹⁵⁷

Harlow's statement that "a reasonably competent public official *should* know the law governing his conduct" is best understood as a normative statement.¹⁵⁸ It does not describe what is, but rather describes what should be. Normative standards push officials to evolve beyond the status quo.¹⁵⁹ Government officials—especially police officials—occupy an exalted position in United States society.¹⁶⁰ As public officers they swore to uphold the laws, including the United States Constitution.¹⁶¹

¹⁵⁶ Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward A Normative Conception of Reasonableness*, 81 Minn. L. Rev. 367, 495–96 (1996).

¹⁵⁷ Miller & Perry, *supra* note 142, at 323. Under a normative regime, even if defendants' conduct is consistent with a standard level of care, a fact-finder will still deem it unreasonable if it does not meet the normative standard, which requires the defendant to adhere to an established ideal. *See, e.g., Carroll Towing*, 159 F.2d at 173 (concluding that, despite conforming with industry custom, defendant owed a duty of care under a normative standard).

¹⁵⁸ *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

¹⁵⁹ *See Lee, supra* note 156, at 495 ("At one time, most Americans believed there was nothing wrong with slavery. The fact that slavery was not only accepted but approved of by most people did not mean that such a belief was reasonable. Reliance on a conception of reasonableness that focuses on what the average American thinks may be problematic . . .").

¹⁶⁰ *See, e.g., Jones v. Franklin Cnty. Sheriff*, 555 N.E.2d 940, 944 (1990) ("Law enforcement officials carry upon their shoulders the cloak of authority of the state. For them to command the respect of the public, it is necessary then for these officers even when off duty to comport themselves in a manner that brings credit, not disrespect, upon their department."); *Friedrick v. Dep't of Just.*, 52 M.S.P.R. 126, 135 (1991) (noting that the law enforcement official "occupied a position of trust and responsibility and was obligated to conform to a higher standard of conduct than other employees are"); *Vickers v. Powell*, No. Civ.A. 03-174(CKK), 2005 WL 3207775, at *20 (D.D.C. Nov. 21, 2005), *aff'd in part, rev'd in part*, 493 F.3d 186 (D.C. Cir. 2007) (noting that law enforcement officers are generally held to higher standards of conduct than other employees due to the great trust and confidence placed in them).

¹⁶¹ The U.S. Code requires every federal government official to swear the following oath "I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." 5 U.S.C. § 3331. Each state has state and county officials swear to oaths of office which generally require officials to swear to uphold the Constitution of the United States as well as the constitutions and laws of the individual state. *See, e.g., N.Y. CIV. SERV. LAW* § 62 (McKinney 2021). Each police department also has their own set of oaths that officers must take which usually include a provision for following and upholding the laws of their city, county, and state. *See, e.g., PITT. BUREAU OF POLICE, ORDER* 1203, OATH OF OFFICE (2015) (outlining the oath that states "I do solemnly swear that I will

Nevertheless, *Harlow's* positive notions continue to undermine its normative aims. Even though courts implicitly impute knowledge of the relevant legal rule onto police officials, the Court adopts an errant version of the reasonable official when it comes to an integral step of legal analysis, applying the law to the facts confronting them. In the context of qualified immunity determinations, it posits that a reasonable official is incapable of understanding whether their conduct is legal. Accordingly, courts grant officials qualified immunity even in cases of egregious misconduct.¹⁶²

CONCLUSION

Qualified immunity determinations turn almost entirely on the reasonable official's understanding of constitutional law. Unfortunately, *Harlow* complicates qualified immunity analysis because it simultaneously stands for what is and what ought to be. The Court seems to imbue the reasonable official with both positive and normative content. Recent Supreme Court opinions adopt a positive approach; they provide a rough estimation of what officials would understand. However, courts' assessments are not based on actual data. As discussed in Part II, street level police officials often are not informed of recent binding federal opinions. Yet, courts rarely consider officials' actual knowledge. Instead they impute knowledge of the relevant legal rule onto the defendant. This may be understood as a consequence of *Harlow's* basic normative principle that reasonably competent officials *should* know the law governing their conduct. Nevertheless, the Court undermined this basic principle of *Harlow* that a reasonable government official ought to know the law by changing the standard from "a reasonable official" to "every reasonable official" and

support the Constitution of the United States, the Constitution and laws of the Commonwealth of Pennsylvania, the laws and ordinances of the City of Pittsburgh, and obey all orders issued by my superior officers and all the rules and regulations pertaining to and governing the Department of Public Safety, Bureau of Police, and that I will well and faithfully discharge the duties of the office of Police Officer, with fidelity, according to the best of my knowledge and ability").

¹⁶² See Teresa E. Ravenell, *The Law Governing their Conduct*, 64 Howard L. J. 349, 351-52 (2021). Professor Ravenell offers the following observation:

In practice, § 1983 plaintiffs will only prevail if (1) they are able to identify a case with almost identical facts as their own case, (2) the prior case was decided by the Supreme Court or the appellate court where they filed their case, and (3) there is no conflicting authority outside of the circuit. In short, discovering "clearly established law" seems like an impossible task.

requiring a near perfect alignment between a prior judicial decision and the case at bar.

Today, the qualified immunity standard distorts both positive and normative notions of the reasonable official. It is not a positive standard because it is divorced from reality; it is not a normative standard because it is so far removed from any real ideal—“[a]s the qualified immunity defense has evolved, it . . . protect[s] all but the plainly incompetent [and] those who knowingly violate the law.”¹⁶³ *Harlow* intended qualified immunity to balance competing interests.¹⁶⁴ Today, the qualified immunity defense teeters between a false reality and a poorly articulated norm. The result is an illogical and largely unworkable doctrine. A lot of smart people are questioning the wisdom of qualified immunity. It is time the Supreme Court did the same.

¹⁶³ *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

¹⁶⁴ *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).