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Questioning the U.S. Supreme Court's Legalistic Qualified Immunity Approach and Suggestions for a Better Approach Essay

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**QUESTIONING THE U.S. SUPREME COURT’S LEGALISTIC QUALIFIED
IMMUNITY APPROACH AND SUGGESTIONS FOR A BETTER APPROACH**

Robert Weems*

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I. INTRODUCTION

In the May 2014 decision of *Plumhoff v. Rickard*,¹ the U.S. Supreme Court squarely endorsed its 2004 decision in *Brosseau v. Haugen*,² which epitomizes the more legalistic line of the Court’s qualified immunity jurisprudence. Under the *Brosseau-Plumhoff* approach, the U.S. Supreme Court evaluated the liability of low-level officers in Section 1983 cases based upon an analysis of whether or not a particular defendant’s alleged conduct was previously held to be unlawful by relevant federal appellate court authority.³ Notably absent in both *Brosseau* and *Plumhoff* was any discussion of whether the appellate court authority in question would have been known to a reasonable officer in the defendant’s position, and this Article contends that it clearly would not have been.

This Article argues that the *Brosseau-Plumhoff* approach is not equal to the task of evaluating the liability of individual Section 1983 defendants, many of whom are low-level state and local governmental officers who almost certainly do not read federal appellate court decisions. This is significant because in establishing the basic qualified immunity standard in the 1982 decision of

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1. 134 S. Ct. 2012 (2014).

2. 543 U.S. 194 (2004) (per curiam); see also *Plumhoff*, 134 S. Ct. at 2023 (stating that *Brosseau* “squarely demonstrates that no clearly established law precluded petitioners’ conduct at the time in question”).

3. See *Plumhoff*, 134 S. Ct. at 2023 (citing *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080, 2083–84 (2011)); *Brosseau*, 543 U.S. at 198 (citing *Saucier v. Katz*, 533 U.S. 194, 206 (2001)).

Harlow v. Fitzgerald,⁴ the Supreme Court stressed that qualified immunity should apply unless the defendant violated “clearly established statutory or constitutional rights of which a reasonable person would have known.”⁵ More importantly, the Supreme Court in *Harlow* established an “extraordinary circumstances” defense, discussed in depth below, which allows a defendant to claim immunity in cases where the defendant neither knew, nor should have known, of the authority in question.⁶

The existence of the extraordinary circumstances defense, as well as the context and the plain language of the *Harlow* decision, make it clear that the Supreme Court did not intend for that decision’s legalistic analysis of precedent to form the governing qualified immunity standard in cases involving low-level officers. This Article contends that by assessing the liability of low-level officers based upon appellate court precedent of which they are almost certainly unaware, the *Brosseau-Plumhoff* approach moves the qualified immunity analysis away from factors which are actually relevant to officers on the job and into a legalistic after the fact debate among lawyers and judges, which provides a poor basis for evaluating the liability of many Section 1983 defendants.

Brosseau and *Plumhoff* each involved shootings by police officers of criminal suspects who were attempting to evade arrest in vehicles.⁷ Qualified immunity existed in both cases, based upon the Supreme Court’s conclusion that relevant federal appellate court precedent had not clearly established shootings under similar circumstances to be unlawful.⁸ This Article acknowledges that the results in *Brosseau* and *Plumhoff* were reasonable, and it may be that the cases involved a sufficiently distinct and common factual scenario that a legalistic standard was adequate. It is this writer’s experience, however, that many other Section 1983 cases involve less distinct factual scenarios, where a legalistic analysis of precedent fails to provide workable standards for determining the liability of individual defendants.

Section 1983 cases frequently arise out of simple acts such as a police officer’s physical restraint of a suspect in the course of making an arrest.⁹ In such cases, the plaintiff generally contends that the defendant officer used an amount of force that was objectively unreasonable under the Fourth Amendment, and that the plaintiff suffered significant physical injuries as a result.¹⁰ While the legal inquiry in this context may seem simple enough, the actual result may depend upon a host of factors. These factors may include, but are certainly not

4. 457 U.S. 800 (1982).

5. *Id.* at 819.

6. *Id.* (establishing a specific defense which could be raised by defendants when they were able to demonstrate that they “neither knew nor should have known of the relevant legal standard”).

7. See *Plumhoff*, 134 S. Ct. at 2017–18 (citations omitted); *Brosseau*, 543 U.S. at 195–97.

8. See *Plumhoff*, 134 S. Ct. at 2023–24 (citations omitted); *Brosseau*, 543 U.S. at 199–201 (citations omitted).

9. See, e.g., *Graham v. Connor*, 490 U.S. 386, 388–90 (1989) (recounting injuries sustained by plaintiff in the course of detention by police).

10. See *id.* at 395.

limited to, the precise nature of the force employed by the officer—as to which subtle differences may be crucial, the extent to which the suspect was known to have a history of violence, whether the suspect was under the influence of drugs or alcohol, whether the suspect was reasonably believed to be in close proximity to a deadly weapon, and whether there were innocent bystanders in close proximity to the altercation who were threatened by it.¹¹

The list of factors that may affect the objective reasonableness of an officer's actions in the typical Section 1983 excessive force case is quite lengthy, and this writer can state from experience that attempting to judge the actions of an officer in a particular case on the basis of federal appellate court precedent frequently seems like an exercise in futility. First of all, poring through the vast number of Fourth Amendment cases to find ones that are relevant is a daunting task, and many lawyers—particularly plaintiffs' lawyers—will lack the resources to do a truly thorough job in this regard. Even if research reveals cases which are at least somewhat similar, there are almost always significant distinguishing factors from one case to another, and the law is quite unclear regarding how closely on point precedent needs to be in order to be deemed relevant.

It should also be noted that technologies and procedures used by police officers and other public employees are constantly evolving and, as such, they may get well ahead of the legal precedent on a particular issue. For example, this Article raises a hypothetical involving the repeated tasing of a suspect by police officers. At one time, tasers were a new technology and there were, of course, no federal appellate court decisions dealing with them. This raises the risk that, under the *Brosseau-Plumhoff* approach, defendants may enjoy a certain degree of legal impunity when dealing with new technologies and procedures, which have not yet been addressed by precedent. Indeed, this risk is present, in varying degrees, for virtually any novel fact pattern, which has not yet been addressed by federal appellate courts.

Although informed by the writer's experiences as a career federal district law clerk, this Article will attempt to make its case largely through the words of Supreme Court Justices whose views are, obviously, entitled to far more deference. The Article will discuss how, in the 1975 decision of *Wood v. Strickland*,¹² four Supreme Court Justices objected to considering the analysis of federal appellate precedent that now forms the sole inquiry under the *Brosseau-Plumhoff* approach.¹³ At the time *Wood* was decided, the qualified immunity

11. See *id.* at 396 (holding that to decide the Fourth Amendment reasonableness of use of force, "the proper application requires careful attention to the facts and circumstances of each particular case including the severity of the crime at issue, whether the subject poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight"); see also *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985) (holding that when deciding Fourth Amendment reasonableness, "the question was whether the totality of the circumstances justified a particular sort of search or seizure").

12. 420 U.S. 308 (1975).

13. *Id.* at 329 (Powell, J., concurring in part and dissenting in part). This Article will discuss how certain other Supreme Court decisions—most notably *Hope v. Pelzer*, 536 U.S. 730, 738

standard was largely based upon a subjective inquiry into whether the defendant “took the action with the malicious intention to cause a deprivation of constitutional rights or other injury,”¹⁴ and, at the time, not a single Justice objected to this inquiry.¹⁵ It is therefore striking that the Supreme Court overruled this subjective portion of the qualified immunity inquiry a mere seven years later in *Harlow*, and adopted as its sole standard the objective analysis of precedent which four Justices recently found to be objectionable.¹⁶

Harlow dealt with qualified immunity in the context of claims of political retaliation on the part of aides to President Nixon,¹⁷ and this Article will seek to demonstrate that the Supreme Court’s rejection of the subjective inquiry in that case was largely and expressly based upon considerations, including separation of powers concerns, which are unique to claims against high executive officials. This Article will contend that, while the Supreme Court’s analysis in *Harlow* was plainly tailored to claims against such high-level officials, the Court erred in not more narrowly tailoring its actual holding to that context. While *Harlow* can thus be faulted for making an overbroad holding, the decision did contain an escape valve of sorts, in the form of the aforementioned extraordinary circumstances defense,¹⁸ which was essentially ignored in both *Brosseau* and *Plumhoff*.

It must be emphasized that this Article is not calling for the application of *Harlow*’s extraordinary circumstances defense to cases involving low-level officers such as those in *Brosseau* and *Plumhoff*. To the contrary, and as discussed in greater detail below, such a literal application of *Harlow*’s holding would seemingly grant blanket immunity to low-level officers in a wide variety of contexts because they will generally be unaware of the state of federal appellate court precedent on a given issue. Rather, this Article contends that the very existence of the extraordinary circumstances defense should make undeniable what already seems clear enough from *Harlow*’s context and language: that its legalistic analysis of precedent was not intended to form the governing qualified immunity standard in cases involving low-level officers.

This Article contends that the Supreme Court should first recognize that *Harlow*’s analysis was not intended to apply to low-level officers, and thereupon set about defining a qualified immunity standard that does make sense in this

(2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958))—have employed a far less legalistic approach.

14. *Wood*, 420 U.S. at 322.

15. See *id.* at 330 (Powell, J., concurring in part and dissenting in part) (approving the subjective element of qualified immunity while dissenting on other grounds).

16. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

17. See *id.* at 802.

18. See *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023–24 (2014) (citations omitted) (finding qualified immunity applied because there were no clear cases showing that conduct was unconstitutional); *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (per curiam) (finding qualified immunity where there was not a clear set of cases establishing that the conduct violated the Fourth Amendment).

context. This Article suggests that a good starting point for such a standard lies in language from one post-*Harlow* Supreme Court decision, which has been repeatedly quoted by lower federal courts in the qualified immunity context. In the 1986 decision of *Malley v. Briggs*,¹⁹ the Supreme Court wrote that qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.”²⁰

The *Malley* language has been so well received by federal judges because it captures the essence of the proper qualified immunity inquiry, at least as many judges would like it to be captured.²¹ Unfortunately, the *Malley* language makes reference to the subjective state of mind of the defendant, and generally bears little resemblance to the Supreme Court’s actual qualified immunity standard.²² In this sense, the *Malley* language has served as an “off the menu special” of sorts, which seems to give federal judges license to consider the sort of factors which they are naturally predisposed to consider in qualified immunity cases. The fact remains that the language in *Malley* is merely dicta, which is in evident conflict with the Supreme Court’s actual qualified immunity standard, at least as applied in *Brosseau* and *Plumhoff*.²³

This Article contends that one of the fundamental defects in the *Brosseau-Plumhoff* approach is that it reflects an appellate bias which vastly overestimates the extent to which federal appellate courts may “clearly establish” law regarding the myriad factual scenarios which district judges encounter in Section 1983 cases.²⁴ The typical Fourth Amendment excessive force case, for example, may involve an almost infinite number of actions by the suspect and counteractions by police, and the results in such cases often depend upon subtle factual distinctions which it is unrealistic to expect federal appellate court precedent to clearly address. *Brosseau* and *Plumhoff* instruct that, when a review of federal appellate court precedent fails to provide clarity, then that in and of itself resolves the qualified immunity issue with no further inquiry into the merits of the case required.²⁵

As will be seen, the Supreme Court’s recent qualified immunity approach has resulted in the application of the exact same analysis to calculated decisions of the U.S. Attorney General,²⁶ as it has to decisions made by low-level police officers in emergency situations. In both contexts, the Supreme Court has essentially instructed federal judges to crack open their federal and Supreme

19. 475 U.S. 335 (1986).

20. *Id.* at 341.

21. See, e.g., *Ireland v. Tunis*, 113 F.3d 1435, 1448, 1450 (6th Cir. 1997) (providing multiple citations to *Malley*, and finding qualified immunity applied); *Robison v. Via*, 821 F.2d 913, 921 (2d Cir. 1987) (also citing *Malley* at length and finding that qualified immunity applied).

22. See *Plumhoff*, 134 S. Ct. at 2023 (citations omitted); *Brosseau*, 543 U.S. at 201.

23. See *Plumhoff*, 134 S. Ct. at 2023 (citations omitted); *Brosseau*, 543 U.S. at 201.

24. See *Plumhoff*, 134 S. Ct. at 2023 (citations omitted); *Brosseau*, 543 U.S. at 201.

25. See *Plumhoff*, 134 S. Ct. at 2023 (citations omitted); *Brosseau*, 543 U.S. at 198–201 (citations omitted); *al-Kidd*, 131 S. Ct. at 2083–85 (citations omitted).

26. See *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083–85 (2011) (citations omitted).

Court reporters and evaluate the liability of individual defendants based upon the legal precedents contained therein.²⁷ This approach might be appropriate for evaluating the Attorney General's calculated decisions, but it seems quite inadequate for assessing the liability of low-level police officers in emergency situations.

Both *Brosseau* and *Plumhoff* garnered large majorities among Supreme Court Justices,²⁸ and it is not clear that the Court is even aware of the concerns regarding the basic relevance of its analysis to the low-level officers who form the bulk of individual defendants in Section 1983 cases.²⁹ As discussed below, this appears to result partly from the fact that, factually speaking, neither *Brosseau* nor *Plumhoff* were particularly close cases, and qualified immunity would likely have been found to exist under any standard. It is submitted that clear cases, such as *Brosseau* and *Plumhoff*, are ones in which bad law frequently gets written. In such cases the result seems clear enough, and it is easy to overlook concerns about whether the Court's analysis will serve courts well in future cases. Bringing attention to these concerns is the purpose of this Article.

Qualified immunity is, from a practical perspective, one of the doctrines in federal civil litigation that matters the most. Federal constitutional claims are generally litigated through 42 U.S.C. § 1983,³⁰ and plaintiffs are, in many cases, forced to proceed solely against individual defendants.³¹ This is because U.S. Supreme Court precedent provides that municipalities are only liable for their own unlawful conduct, and may not be held vicariously liable in Section 1983 cases.³² Additionally, recovery against states is a nonstarter based on both Eleventh Amendment immunity,³³ as well as decisions holding that a state is not a "person" within the meaning of Section 1983.³⁴ However, to obtain recovery against an individual defendant, the plaintiff must first get past the qualified

27. See *Plumhoff*, 134 S. Ct. at 2023 (citations omitted); *Brosseau*, 543 U.S. at 198–201 (citations omitted); *al-Kidd*, 131 S. Ct. at 2083–85 (citations omitted).

28. See *Plumhoff*, 134 S. Ct. at 2016 (providing only one opinion of the Court with some difference of opinion, but no dissenting opinions); *Brosseau*, 543 U.S. at 194, 202 (providing a per curiam opinion with only Justice Stevens dissenting).

29. See *Plumhoff*, 134 S. Ct. at 2023 (citations omitted) (applying legal case-based analysis to qualified immunity of police officers); *Brosseau*, 543 U.S. at 198–201 (citations omitted) (also applying legal case-based analysis to qualified immunity of police officers).

30. See MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 1.02, at 1–10 (4th ed. Supp. 2007) (noting a growth in Section 1983 claims, which "often involve[] difficult questions of constitutional analysis").

31. See SCHWARTZ, *supra* note 30, § 1.04[A], at 1–17 (4th ed. Supp. 2011) (noting that, to assert a claim under Section 1983, "[f]irst, 'the plaintiff must allege that some person has deprived him of a federal right,' and second, 'he must allege that the person who has deprived him of that right acted under color of state or territorial law'" (quoting *Gomez v. Toledo*, 446 U.S. 635, 640 (1980))).

32. See *Monell v. Dep't of Soc. Servs. of the City of N.Y.*, 436 U.S. 658, 690–91 (1978).

33. See *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66–67 (1989); *Quern v. Jordan*, 440 U.S. 332, 345 (1979).

34. See *Will*, 491 U.S. at 68–69 (citing *Quern*, 440 U.S. at 343).

immunity defense that is almost always raised in cases where the defendant may not assert some form of absolute immunity.³⁵

This Article makes two primary contentions regarding the Supreme Court's qualified immunity jurisprudence. The first contention is that the Supreme Court in *Harlow* acted unwisely when it chose to completely discard the subjective inquiry in all qualified immunity cases, instead of merely those cases involving high-level executive officials.³⁶ The second contention is that, even considering *Harlow*'s inherent limitations, the *Brosseau-Plumhoff* approach misapplies its holding by assessing the liability of low-level officers on the basis of federal appellate court authority of which no reasonable officer would have known. The Article will discuss these contentions in turn.

II. THE SUPREME COURT MADE A POOR DECISION IN *HARLOW* WHEN IT COMPLETELY REMOVED THE SUBJECTIVE INQUIRY FROM THE QUALIFIED IMMUNITY ANALYSIS.

This Article will begin discussion of its first contention with a proposition which includes some degree of opinion, but which is believed to be correct. That proposition is as follows: in deciding whether to grant qualified immunity to an individual defendant in a Section 1983 case, one of the most important factors for the typical federal judge is a subjective one relating to the state of mind of the defendant, in particular, the defendant's intent. More particularly, many—if not most—federal judges, both trial and appellate, place great importance upon whether they have before them a defendant who subjectively was simply trying to perform his job duties as he understood them, or whether the defendant was motivated by a malicious intent to harm others or a reckless disregard for his actions.

A simple hypothetical involving a fact pattern quite typical for Section 1983 cases will hopefully illustrate this point. Assume a case in which a criminal suspect who is fleeing on foot is repeatedly tased by police officers, resulting in significant physical injuries. The plaintiff alleges, although the defendants dispute, that he was tased more often than was necessary to subdue him and that such action was objectively unreasonable under the Fourth Amendment. Now

35. In resolving questions of qualified immunity at summary judgment, part of the inquiry is whether the facts considered “in the light most favorable to the party asserting the injury . . . show the officer's conduct violated a constitutional right.” *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (overruled on other grounds). The Supreme Court has held that courts may grant qualified immunity on the ground that a purported right was not “clearly established” by prior case law, without resolving the often more difficult question of whether the purported right exists at all. *Pearson v. Callahan*, 555 U.S. 223, 236–37 (2009). Requiring that a plaintiff allege that a federal right was violated is noncontroversial, and such requirement is not the subject of this Article. Rather, this Article deals with what is often referred to as the second part of the qualified immunity standard, which itself includes two subparts which were set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 819 (1982).

36. See *Harlow*, 457 U.S. at 819.

take that same hypothetical and assume that there is additional proof from several witnesses that, while tasing the suspect, the officers were laughing, taunting, and clearly enjoying the suspect's suffering.

Both the Fourth Amendment standard and the qualified immunity standard are objective ones,³⁷ and, legally speaking, the subjective state of mind of the defendants should not matter. Yet, this Article will argue this fact does matter to most federal judges and that it should matter under basic considerations of fairness and justice. It is argued that an officer who is using his job as an outlet for his sadistic tendencies should not be treated the same as one who is simply trying to perform his work duties as he understands them. This Article contends that a qualified immunity standard which does not allow this distinction to matter should be reconsidered.

In *Harlow*, the Supreme Court held that the subjective state of mind of the defendant was no longer a relevant factor in the qualified immunity analysis, and that federal judges should instead consider only the objective portion of the court's preexisting qualified immunity standard.³⁸ Under *Harlow*'s objective analysis a plaintiff must establish, to reiterate, that the employee violated "clearly established statutory or constitutional rights of which a reasonable person would have known."³⁹

Harlow rejected and overruled the Supreme Court's preexisting qualified immunity standard, which included both objective and subjective components.⁴⁰ In the 1974 decision of *Scheuer v. Rhodes*,⁴¹ for example, the Supreme Court considered the personal liability of the governor of Ohio arising out of the killing of four Kent State University students by the Ohio National Guard.⁴² In establishing the standard for qualified immunity, the Supreme Court wrote that "[i]t is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."⁴³ Similarly, in its 1975 decision in *Wood*,⁴⁴ the Supreme Court held that in the context of a suit filed by students against school officials for allegedly unlawful expulsions that an official is not immune if "he knew or reasonably should have known that the action . . . would violate . . . constitutional rights . . . , or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury."⁴⁵

37. See *id.* at 817–18.

38. See *id.*

39. *Id.* at 818.

40. See *id.* at 815, 818.

41. 416 U.S. 232 (1974).

42. *Id.* at 234.

43. *Id.* at 247–48.

44. *Wood v. Strickland*, 420 U.S. 308 (1975).

45. *Id.* at 322.

Considering *Harlow*'s eventual holding it seems remarkable that, in *Wood*, four Supreme Court Justices objected to including an objective legal analysis in the qualified immunity standard.⁴⁶ At the time, it was taken for granted that the subjective state of mind of the defendant should be considered, and four dissenting Justices argued that it made little sense to augment that subjective test with an objective inquiry into legal decisions which the defendant in question almost certainly did not read.⁴⁷ Specifically, Justice Powell, joined by Justices Burger, Blackmun, and Rehnquist, wrote as follows:

The holding of the Court on the immunity issue is set forth in the margin. It would impose personal liability on a school official who acted sincerely and in the utmost good faith, but who was found—after the fact—to have acted in ‘ignorance . . . of settled, indisputable law.’ Or, as the Court also puts it, the school official must be held to a standard of conduct based not only on good faith ‘but also on knowledge of the basic, unquestioned constitutional rights of his charges.’ Moreover, ignorance of the law is explicitly equated with ‘actual malice.’ This harsh standard, requiring knowledge of what is characterized as ‘settled, indisputable law,’ leaves little substance to the doctrine of qualified immunity. The Court's decision appears to rest on an unwarranted assumption as to what lay school officials know or can know about the law and constitutional rights. These officials will now act at the peril of some judge or jury subsequently finding that a good-faith belief as to the applicable law was mistaken and hence actionable.⁴⁸

The reader is urged to consider the words of these four Supreme Court Justices carefully. In his dissent in *Wood*, Justice Powell objected to federal courts considering at all what is, under *Harlow*, the sole inquiry in the present qualified immunity analysis.⁴⁹ Justice Powell and three other Justices felt that the hallmark of the qualified immunity analysis was a more subjective inquiry into whether a defendant “acted sincerely and in the utmost good faith,”⁵⁰ and this writer submits that, notwithstanding *Harlow*, this remains true for many federal judges today.

In *Wood*, the four dissenting Justices professed great skepticism that a legalistic analysis of settled precedent could reasonably be applied to Section

46. See *id.* at 327–31 (Powell, J., concurring in part and dissenting in part) (citations omitted).

47. See *id.* at 331 (Powell, J., concurring in part and dissenting in part).

48. *Id.* at 327–29 (Powell, J., concurring in part and dissenting in part) (internal citations omitted).

49. See *id.* at 330 (Powell, J., concurring in part and dissenting in part).

50. *Id.* at 328 (Powell, J., concurring in part and dissenting in part).

1983 defendants, who generally lack extensive legal training.⁵¹ In words that seem quite prescient in light of *Brosseau* and *Plumhoff*, the dissent asserted that:

The Court states the standard of required knowledge in two cryptic phrases: ‘settled, indisputable law’ and ‘unquestioned constitutional rights.’ Presumably these are intended to mean the same thing, although the meaning of neither phrase is likely to be self-evident to constitutional law scholars—much less the average school board member.⁵²

It is thus remarkable that a mere seven years later, Justice Powell himself wrote the court’s opinion in *Harlow*, which reached essentially the opposite result from what he had advocated in his dissent in *Wood*.⁵³ It is certainly true that Supreme Court Justices are at liberty to change their minds, and one could argue that perhaps Justice Powell simply reconsidered his earlier views regarding the validity of an objective inquiry into legal precedent and the relevance of subjective factors in deciding qualified immunity issues.

This Article does not suggest that an analysis of legal precedent has no place in the qualified immunity analysis, although it clearly seems more relevant in some contexts than in others. The Article does argue, however, that the Supreme Court made a poor decision in *Harlow* when it elected to simply discard, in all cases, the subjective inquiry that four Justices had recently deemed to be the very heart of the qualified immunity analysis, and which the entire Court had endorsed as being a proper part of that analysis.

In so arguing, the writer emphasizes that the Supreme Court in *Harlow* never rejected the subjective inquiry on its merits.⁵⁴ Rather, the Court was very upfront that it was discarding the subjective portion of the standard largely because it was resulting in too many Section 1983 cases surviving summary judgment and going to trial.⁵⁵ Specifically, the Supreme Court wrote in *Harlow* as follows:

The subjective element of the good-faith defense frequently has proved incompatible with our admonition . . . that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided

51. See *id.* at 331 (Powell, J., concurring in part and dissenting in part).

52. *Id.* at 329 (Powell, J., concurring in part and dissenting in part).

53. See *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982).

54. It can be argued that the Supreme Court’s concerns in *Harlow* regarding separation of powers issues, discussed below, constituted a rejection of the subjective inquiry, at least partially, on its merits. If so, then it should be apparent that these concerns are simply irrelevant in the vast majority of Section 1983 cases.

55. See *Harlow*, 457 U.S. at 815–16 (“The subjective element of the good-faith defense has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial.”).

on motions for summary judgment. And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.

In the context of *Butz's* [sic] attempted balancing of competing values, it 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.⁵⁶

Based upon these factors, the Court in *Harlow* wrote that:

[W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government 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.⁵⁷

In adopting this standard, the Supreme Court reiterated that its goal was to “avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.”⁵⁸ In this sense, *Harlow* can be analogized to a chef throwing out half the ingredients in one of his most important recipes simply because he concluded that it took too long to cook. While cutting the ingredients in half will no doubt expedite the cooking process, one must wonder whether the resulting dish will be quite as appetizing. So it is with the Supreme Court's post-*Harlow* qualified immunity jurisprudence.

It is abundantly clear that *Harlow's* decision to discard subjective factors in qualified immunity cases was based largely upon concerns which are far less applicable in cases involving low-level officers. *Harlow* involved allegations of unconstitutional conduct by aides to President Nixon, specifically, that they had participated in a conspiracy led by the President to fire the plaintiff for providing politically damaging testimony before Congress.⁵⁹ It is apparent that *Harlow's* rejection of a subjective inquiry arose partly from a desire by the Supreme Court to avoid entangling federal courts in divisive political disputes, where allegations of subjective malice against political opponents are easy to allege and difficult to

56. *Id.* at 815–16.

57. *Id.* at 817–18.

58. *Id.* at 818.

59. *See Nixon v. Fitzgerald*, 457 U.S. 731, 736 (1982).

prove.⁶⁰ Indeed, in the context of high-level politics, the basic issue of what constitutes malice is often difficult to extricate from political questions that federal courts have long sought to avoid.⁶¹

In this vein, the Supreme Court noted in *Harlow* that separation of powers concerns partly motivated its decision, writing that:

In suits against a President's closest aides, discovery of this kind frequently could implicate separation-of-powers concerns. As the Court recognized in *United States v. Nixon* . . .

A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.⁶²

Earlier in the decision, the Supreme Court had observed that:

For executive officials in general, however, our cases make plain that qualified immunity represents the norm. In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), we acknowledged that high officials require greater protection than those with less complex discretionary responsibilities. . . . In *Butz v. Economou*, *supra*, we extended the approach of *Scheuer* to high federal officials of the Executive Branch. Discussing in detail the considerations that also had underlain our decision in *Scheuer*, we explained that the recognition of a qualified immunity defense for high executives reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens . . . but also ‘the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.’⁶³

Thus, the Supreme Court in *Harlow* was clearly concerned with the application of subjective factors in the context of discretionary functions by

60. See *Harlow*, 457 U.S. at 817 (citing *U.S. v. Nixon*, 418 U.S. 683, 708 (1974); *Halperin v. Kissinger*, 606 F.2d 1192, 1214 (1979), *aff’d*, 452 U.S. 713 (1981)).

61. See *Butz v. Economou*, 438 U.S. 478, 506 (1978) (recognizing “the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority”).

62. *Harlow*, 457 U.S. at 817 n.28 (quoting *Nixon*, 418 U.S. at 708).

63. *Id.* at 807 (citing *Butz*, 438 U.S. at 504–06; *Scheuer v. Rhodes*, 416 U.S. 232, 247–48 (1974)).

high-level executive officers, a context that bears little resemblance to the typical Section 1983 case that district courts face.⁶⁴ In expressing these concerns, the Court approvingly quoted a federal appellate decision for the proposition that:

We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels.⁶⁵

It is submitted that this quote, as well as numerous other references in *Harlow* to “high government officials,”⁶⁶ leaves little doubt that the Supreme Court was motivated largely by factors specific to cases involving such defendants, and that the decision has been improperly extended to low-level officers.⁶⁷

The contention that *Harlow* was misapplied in *Brosseau* and *Plumhoff* is the subject of the second part of this Article, and a more extensive discussion of the strongest proof of such appears below. Briefly, however, the writer reiterates that the Supreme Court in *Harlow* provided for an actual defense in cases where the “official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard.”⁶⁸ This is highly significant because however strongly the above language suggests that the Supreme Court in *Harlow* was concerned with immunity, in the context of high-level officials, that language constitutes mere dicta.⁶⁹ The extraordinary circumstances defense is clearly more than dicta,⁷⁰ however, and it strongly suggests that *Harlow* was not intended to apply to low-level officers, particularly those facing emergency situations—as in *Brosseau* and *Plumhoff*. Indeed, it can scarcely be characterized as extraordinary that a reasonable police officer would be unaware of the federal appellate court

64. See *id.* at 807 (citing *Scheuer*, 416 U.S. at 247).

65. *Id.* at 817 n.29 (quoting *Halperin*, 606 F.2d at 1214).

66. See *Butz*, 438 U.S. at 506; *Nixon*, 418 U.S. at 708; *Scheuer*, 416 U.S. at 247–48; *Halperin*, 606 F.2d at 1214.

67. See, e.g., *Butz*, 438 U.S. 478 (1978) (involving a proceeding by the Department of Agriculture); *Nixon*, 418 U.S. at 683 & n.3 (involving indictment of White House staff and presidential aides); *Scheuer*, 416 U.S. at 234 (involving the governor of Ohio and various officers of the Ohio National Guard); *Halperin*, 606 F.2d at 1195 & n.1 (involving ten federal officials, including former President Richard Nixon and former Attorney General John N. Mitchell).

68. *Harlow*, 457 U.S. at 819.

69. See *id.*

70. See *id.*

precedent discussed in *Brosseau* and *Plumhoff*; it would be extraordinary if an officer were aware of such authority.

The fact that the Supreme Court in *Harlow* dealt with qualified immunity in the context of high-level federal officials does help to explain the Court's sudden about-face regarding the relative value of subjective and objective evidence in deciding qualified immunity issues. What is less clear is why the Supreme Court failed to recognize that a blanket approach to qualified immunity issues was unwise, and that the Court should narrowly tailor its actual holding to the analysis which it offered. It is submitted that, as the author of both the *Harlow* majority and the *Wood* dissenting opinions,⁷¹ Justice Powell should have recognized that his prior concerns that the "average school board member"⁷² would be unaware of the status of federal appellate court precedent were no less valid than they had been seven years earlier in *Wood*.⁷³ Justice Powell should also have recognized that, while the consideration of subjective proof may raise separation of powers concerns in cases against high-level executive officers, such concerns are simply not relevant in the typical Section 1983 case.

Harlow can thus be faulted for a myopic focus on the facts and policy concerns of the particular case before it, and a failure to recognize—at least in its actual holding—that qualified immunity raises different concerns in the context of claims against presidential aides than it does in the typical Section 1983 claim against a school board member or police officer. The Supreme Court's failure to narrowly tailor *Harlow*'s holding to a greater extent seems even less excusable in light of the fact that the decision was expressly based, at least in large part, upon a simple desire to expedite consideration of qualified immunity issues.⁷⁴ To the extent that the decision was based upon more substantive factors, such as separation of powers concerns, those factors are not relevant in most Section 1983 cases.

When one is confronted with an admittedly results-oriented decision such as *Harlow*, it seems legitimate to question whether the same results could have been obtained through less disruptive means.⁷⁵ It is submitted that they could have. First and foremost, the Supreme Court should have made a more limited

71. See *id.* at 802–20 (citations omitted); *Wood v. Strickland*, 420 U.S. 308, 327–31 (1975) (Powell, J., concurring in part and dissenting in part) (citations omitted).

72. *Wood*, 420 U.S. at 329 (Powell, J., concurring in part and dissenting in part).

73. See *id.* ("One need only look to the decisions of this Court—to our reversals, our recognition of evolving concepts, and our five-to-four splits—to recognize the hazard of even informed prophecy as to what are 'unquestioned constitutional rights.'").

74. See *Harlow*, 457 U.S. at 815–16 ("The subjective element of the good-faith defense frequently has proved incompatible with our admonition . . . that insubstantial claims should not proceed to trial.").

75. Indeed, Title VII claims based upon a disparate impact theory are analyzed under a similar inquiry. See *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009) (citing 42 U.S.C. §§ 2000e-2(k)(1)(A)(ii) & C (2012)) (noting that a plaintiff may prevail on a Title VII discrimination claim "by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs").

holding in *Harlow*, such that subjective factors should not be considered in deciding qualified immunity issues if consideration of such factors would result in interference with executive functions or otherwise raise separation of powers concerns. Alternatively, the Court could have expressly limited its holding to high-level executive officials, which would have prevented the standard's subsequent application to contexts where it makes far less sense. If the Supreme Court deemed the above measures insufficient to expedite the qualified immunity review process, then the Court could have still allowed consideration of subjective evidence in appropriate cases, but under tight procedural controls.

For example, instead of barring subjective evidence outright, the Supreme Court in *Harlow* could have adopted a pleading standard similar to that which it later adopted in *Iqbal*⁷⁶ and *Twombly*⁷⁷ requiring that federal judges closely analyze the plausibility of allegations of malice against individual officers in Section 1983 cases.⁷⁸ The Court could have further held that discovery regarding such subjective factors should only be allowed in cases where the plausible allegations and circumstances of the case suggest that the discovery would be likely to produce results. The Supreme Court could have additionally held that any such discovery that was allowed should be on an expedited basis. If the foregoing measures were deemed insufficient, then the Supreme Court could have required that subjective malice be proven by clear and convincing evidence and held that where the proof failed to establish fact issues in this regard, summary judgment should be granted.⁷⁹

The fact of the matter, however, is that the Supreme Court actually did none of these things in *Harlow*, instead expressing its holding in language which went much further than was supported by its own analysis. By simply declaring in *Harlow* that the subjective good faith of a defendant was henceforth off-limits,⁸⁰ the Supreme Court made an overbroad holding which, literally applied, seeks to restrict federal judges from considering what many of them regard as highly relevant evidence in deciding qualified immunity issues. Indeed, *Harlow*'s holding restricts federal judges from considering evidence which the Supreme Court justices themselves had unanimously regarded as being an integral part of the qualified immunity inquiry a mere seven years previously.⁸¹

76. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

77. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

78. *See id.* at 556.

79. In *Crawford-El v. Britton*, 523 U.S. 574, 594 (1988), the Supreme Court rejected in a 5-4 decision a general requirement that improper motive be proven by clear and convincing evidence in order to recover under Section 1983. However, it is submitted that the Court might reasonably reach a differing result as to proof of improper motive in the qualified immunity context, which is intended to be more deferential to the defendant.

80. *See Harlow v. Fitzgerald*, 457 U.S. 800, 815-18 (1982) (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1974)).

81. Compare *Harlow*, 457 U.S. at 815, 819 (finding that government officials are generally entitled to a qualified immunity standard based on "objective terms"), with *Wood*, 420 U.S. at 322

Unfortunately, federal district courts and litigants have had to live with the results of *Harlow*'s one size fits all approach to qualified immunity and, as will be seen, the *Brosseau-Plumhoff* approach exacerbates the situation by doubling down on the most legalistic aspects of the *Harlow* analysis.⁸² While the Supreme Court should have framed its holding in *Harlow* more narrowly, it seems clear enough from the context and language of the decision, as well as its extraordinary circumstances defense,⁸³ that the Court did not intend for its analysis to apply to low-level officers. The second part of this Article deals with the *Brosseau-Plumhoff* approach's failure to recognize this fact, and discusses how this failure has left federal district courts with a qualified immunity standard that is poorly suited for determining the liability of low-level officers in Section 1983 cases.

III. EVEN CONSIDERING THE LIMITATIONS OF THE *HARLOW* STANDARD, THE *BROSSEAU-PLUMHOFF* APPROACH MISAPPLIES IT.

Prior to addressing its contention that the *Brosseau* and *Plumhoff* decisions misapplied *Harlow*, this Article will contrast those decisions with a recent decision that employed the *Harlow* standard in the context in which it was actually intended to be applied. In the 2011 decision of *Ashcroft v. al-Kidd*,⁸⁴ the Supreme Court considered federal claims arising out of allegations that, in the aftermath of the September 11th terrorist attacks, Attorney General John Ashcroft had improperly authorized federal prosecutors and law enforcement officials to utilize the federal material witness statute on pretextual grounds to detain individuals with suspected ties to terrorist organizations.⁸⁵

The Supreme Court in *al-Kidd* held that qualified immunity existed, noting at the time, "not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional."⁸⁶ The aftermath of September 11th, 2001, was clearly an emergency situation, but there was presumably time for a defendant, with the resources of the Attorney General, to conduct a review of legal authority to determine the legality of his proposed actions.⁸⁷ In this sense, *Al-Kidd* is the exception which proves the rule because its facts highlight how *Harlow*'s analysis of legal precedent does yield a workable and appropriate standard in

(holding that officials are entitled to a qualified good faith immunity defense unless the defendant "knew or reasonably should have known" the action they took violated an individual's rights).

82. See *Brosseau v. Haugen*, 543 U.S. 194, 205 (2004) (per curiam) (quoting *Harlow*, 457 U.S. at 818).

83. *Harlow*, 457 U.S. at 819.

84. 131 S. Ct. 2074 (2011).

85. See *id.* at 2079 (citing 18 U.S.C. § 3144 (2012)).

86. *Id.* at 2083.

87. But see *id.* at 2086 (Kennedy, J., concurring) (stating that high-level national government officials such as the Attorney General should be given deference when their office must interpret conflicting law across multiple federal circuits).

cases involving high-level officials who are either attorneys or who have access to legal advice, and can reasonably be expected to have researched the legal standards governing their conduct prior to acting.⁸⁸

In stark contrast to *al-Kidd*, however, both *Brosseau* and *Plumhoff* involved low-level officers who were required to make split-second decisions regarding whether to fire their weapons at fleeing suspects.⁸⁹ As to these defendants, the Supreme Court assessed their liability based solely upon a review of federal appellate court precedent in a manner that was never intended in *Harlow*.⁹⁰

In *Brosseau*, the Supreme Court considered a police officer's shooting of a suspect as he attempted to flee in his vehicle.⁹¹ In concluding that qualified immunity applied, the Supreme Court in *Brosseau* initially rejected the notion that vague citations to the Fourth Amendment excessive force standard⁹² served to provide "fair warning" to the police officer that her actions were unlawful.⁹³ The Supreme Court observed that these cases were "cast at a high level of generality,"⁹⁴ and it reiterated its statement in the 1987 decision of *Anderson v. Creighton*⁹⁵ "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."⁹⁶

In evaluating the conduct of the defendant officer, the Supreme Court in *Brosseau* then proceeded to review three Court of Appeals decisions that allegedly dealt with the conduct in question. Given that this Article takes issue with *Brosseau*'s analysis, it will quote that decision's analysis of federal appellate precedent in full:

The parties point us to only a handful of cases relevant to the 'situation [Brosseau] confronted': whether to shoot a disturbed felon, set on

88. See *id.* at 2086 (Kennedy, J., concurring) (citing *Wilson*, 526 U.S. 603, 617; *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985); *Davis v. Scherer*, 468 U.S. 183, 195 (1984)) (pointing out the difficult legal analysis often required to interpret clearly established law by the Attorney General's Office).

89. See *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2017–18 (2014) (citations omitted) (showing that a police officer shot and killed plaintiff's father during a car chase); *Brosseau v. Haugen*, 543 U.S. 194, 194 (2004) (per curiam) (stating that a police officer shot the plaintiff in the back while he was fleeing the scene).

90. See *Plumhoff*, 134 S. Ct. at 2024 (noting the lack of federal appellate court precedent to distinguish the plaintiff's claim from the facts of *Brosseau*); *Brosseau v. Haugen*, 543 U.S. 194, 199–201 (2004) (citations omitted) (analyzing federal appellate court decisions to find no clearly established law).

91. See *Brosseau*, 543 U.S. at 194.

92. See *id.* at 199 (finding the facts of the present case to be far from the obvious use of excessive force found in two prior cases).

93. *Id.* at 199 (citing *Brosseau v. Haugen*, 339 F. 3d 857, 873–74 (9th Cir. 2003)).

94. *Id.* at 199.

95. 483 U.S. 635, 640 (1987).

96. *Brosseau*, 543 U.S. at 198 (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight. *Ibid.* Specifically, *Brosseau* points us to *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993), and *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992).

In these cases, the courts found no Fourth Amendment violation when an officer shot a fleeing suspect who presented a risk to others. *Cole v. Bone*, *supra*, at 1333 (holding the officer ‘had probable cause to believe that the truck posed an imminent threat of serious physical harm to innocent motorists as well as to the officers themselves’); *Smith v. Freland*, 954 F.2d, at 347 (noting ‘a car can be a deadly weapon’ and holding the officer’s decision to stop the car from possibly injuring others was reasonable). *Smith* is closer to this case. There, the officer and suspect engaged in a car chase, which appeared to be at an end when the officer cornered the suspect at the back of a dead-end residential street. The suspect, however, freed his car and began speeding down the street. At this point, the officer fired a shot, which killed the suspect. The court held the officer’s decision was reasonable and thus did not violate the Fourth Amendment. It noted that the suspect, like Haugen here, ‘had proven he would do almost anything to avoid capture’ and that he posed a major threat to, among others, the officers at the end of the street.

Haugen points us to *Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993), where the court found summary judgment inappropriate on a Fourth Amendment claim involving a fleeing suspect. There, the court concluded that the threat created by the fleeing suspect’s failure to brake when an officer suddenly stepped in front of his just-started car was not a sufficiently grave threat to justify the use of deadly force. *Id.* at 234.

These three cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case. None of them squarely governs the case here; they do suggest that *Brosseau*’s actions fell in the ‘hazy border between excessive and acceptable force.’ *Saucier v. Katz*, *supra*, at 206. The cases by no means ‘clearly establish’ that *Brosseau*’s conduct violated the Fourth Amendment.

The judgment of the United States Court of Appeals for the Ninth Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.⁹⁷

97. See *id.* at 200–01 (citing *Cole v. Bone*, 993 F. 2d 1328 (8th Cir. 1993); *Estates of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993); *Smith v. Freland*, 954 F. 2d 343 (6th Cir. 1992)).

Thus, the Supreme Court in *Brosseau* based its ruling entirely upon a review of appellate court precedent, which it found did not clearly establish that the defendant's conduct violated the Fourth Amendment.⁹⁸

It should be noted that the Supreme Court in *Brosseau* did not even limit its analysis to the precedent of the federal circuit in which the defendant officer served, instead reviewing cases from three different federal circuits.⁹⁹ Once again, the second part of the *Harlow* standard requires that the clearly settled precedent be law of which a "reasonable person would have known."¹⁰⁰ It seems doubtful that there is even a single police officer in the nation who religiously reads the decisions of federal appellate courts nationwide. Even assuming that such an officer exists, it seems highly doubtful that the officer would have the time or ability to review that authority in their mind when required to make a decision regarding whether to fire their weapon at a fleeing suspect.

It therefore seems beyond dispute that, even if the Supreme Court in *Brosseau* had found a federal court opinion directly on point which clearly prohibited an officer in Brosseau's position from discharging her weapon, a reasonable police officer would not have been aware of that authority. That being the case, what is the point of reviewing the authority at all? There is none that the writer can discern. The Supreme Court's analysis in *Brosseau*, thus, seems plainly insufficient, even though the actual result of the case was clear enough that only Justice Stevens dissented to it.¹⁰¹ This demonstrates that clear cases can sometimes make bad law, and such is the case with *Brosseau*.

Another troubling aspect of *Brosseau* is the manner in which the Supreme Court sought to distinguish one of its decisions, which had employed a far less legalistic approach to qualified immunity. In the 2002 decision of *Hope v. Pelzer*,¹⁰² the Supreme Court considered a case where prison guards handcuffed a prisoner to a hitching post on two occasions, one of which lasted for seven hours without regular water or bathroom breaks.¹⁰³ Among other facts, the Supreme Court noted that "[a]t one point, a guard taunted him about his thirst."¹⁰⁴

Faced with these facts, six Supreme Court Justices concluded that the Eleventh Circuit erred in concluding that the defense of qualified immunity was available to the defendants.¹⁰⁵ The Court held that "[a]s the facts are alleged by Hope, the Eighth Amendment violations [are] obvious."¹⁰⁶

98. *Id.* at 200–01 (citations omitted).

99. *Id.* at 201.

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

101. *See Brosseau*, 543 U.S. at 202–08 (Stevens, J., dissenting) (citations omitted).

102. 536 U.S. 730 (2002).

103. *Id.* at 738 (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

104. *Id.* at 735.

105. *See id.* at 745–46 (quoting *U.S. v. Lanier*, 520 U.S. 259, 271 (1997)).

106. *Id.* at 738.

The Supreme Court in *Hope* thus found that qualified immunity was not available to the defendants, even though there were no prior federal appellate court decisions which had found the specific conduct in question to be unlawful.¹⁰⁷

While the results in both *Brosseau* and *Hope* seem entirely defensible, the differences in the analysis which the Supreme Court employed to reach those results are striking. This fact has not gone unnoticed by legal scholars. In his treatise *Federal Jurisdiction*, Chemerinsky writes that:

There is an obvious tension between *Hope v. Pelzer*, declaring that there need not be a case on point to overcome qualified immunity, and *Brosseau v. Haugen* and *Ashcroft v. Al-Kidd*, finding qualified immunity based on the lack of a case on point. . . . Not surprisingly, there is great confusion in the lower courts as to whether and when cases on point are needed to overcome qualified immunity.¹⁰⁸

This writer can certainly confirm Chemerinsky's observation regarding the "great confusion"¹⁰⁹ at the trial court level regarding the applicable qualified immunity standard.

Unfortunately, the Supreme Court's attempt in *Brosseau* to explain its differing analysis in *Hope* did very little to provide clarity in this regard.¹¹⁰ The majority in *Brosseau* explained the Court's differing analysis two years earlier by writing that "in an obvious case, these standards can 'clearly establish' the answer, even without a body of relevant case law."¹¹¹ These do not appear to simply be throw away words; to the contrary, they seem to represent the Supreme Court's best explanation as to why it had required case law specifically on point in some qualified immunity cases but not in others.

Establishing an "obvious case" exception to the requirement of "relevant case law"¹¹² seems quite unsatisfying since, in many cases, reasonable minds will differ regarding whether the case is, in fact, obvious. The majority in *Brosseau* offered *Hope* as being an example of such an obvious case, but it should be noted that three of the Justices in the *Brosseau* majority dissented in *Hope*,¹¹³ and the Eleventh Circuit reached a different result in its consideration

107. *See id.* at 739.

108. ERWIN CHERINSKY, *FEDERAL JURISDICTION* § 8.6, at 580 (6th ed. 2012).

109. *Id.*

110. *See Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam).

111. *Id.*

112. *Id.*

113. *Compare id.* at 194 (showing a per curiam opinion with only Justice Stevens dissenting), with *Hope v. Pelzer*, 536 U.S. 730, 748–64 (2002) (Thomas, J., dissenting) (showing a dissenting opinion joined by Chief Justice Rehnquist and Justice Scalia).

of the case.¹¹⁴ This demonstrates that whether or not a case is obvious is often in the eyes of the beholder. Unfortunately, the Supreme Court in *Brosseau* provided no standards to assist courts in determining whether or not a case is obvious.

It is submitted that *Hope* would have been an obvious case under a qualified immunity standard which allowed the consideration of subjective factors as it did prior to *Harlow*. Given the actual qualified immunity standard that the Eleventh Circuit was required to apply, however, it is not difficult to discern why the Court ruled the way it did. The Supreme Court emphasized in *Anderson v. Creighton* that to defeat qualified immunity citations to broad prohibitions against excessive force and similar misconduct is insufficient, and that “the right the official is alleged to have violated must have been ‘clearly established’ in a more particularized . . . sense.”¹¹⁵ In light of these words, one can understand why the Eleventh Circuit would have felt that the plaintiff needed a “hitching post” case in order to defeat qualified immunity.¹¹⁶

In this sense, the Eleventh Circuit’s decision in *Hope* to award qualified immunity to guards who apparently took sadistic pleasure in tying a prisoner to a hitching post was an unfortunate, yet predictable, casualty of the Supreme Court’s legalistic qualified immunity approach. *Brosseau*’s obvious case exception seems unlikely to alleviate confusion among lower courts in this regard. It is submitted that the Supreme Court did not clarify the contradictions between *Hope* and *Brosseau* because there was no clarity that could be given. Indeed, there is no apparent way to resolve the fundamental contradictions in the Supreme Court’s qualified immunity jurisprudence, which has its origins in a determination to greatly limit the factors which may be considered in qualified immunity cases in the interest of deciding those issues more quickly.

Brosseau was merely one opinion of the Supreme Court, and it is frequently the case that the Court’s decisions are soon distinguished or limited to their facts. Such is not the case with *Brosseau*, however, as the Supreme Court appeared to firmly endorse its analysis in its May 2014 decision in *Plumhoff*.¹¹⁷ In *Plumhoff*, the Supreme Court unanimously reversed the Sixth Circuit’s ruling that the defendant police officers violated the Fourth Amendment in using deadly force,¹¹⁸ and it alternatively held that qualified immunity would still exist.¹¹⁹ The Supreme Court described the facts in *Plumhoff* as follows:

114. See *Hope v. Pelzer*, 240 F.3d 975, 977 (11th Cir. 2001), *rev’d*, 536 U.S. 730 (2002) (affirming the trial court’s ruling in favor of the defendant’s motion for summary judgment based on qualified immunity).

115. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

116. See *Hope*, 240 F.3d at 981 (finding a violation of a constitutional right but still allowing the guards qualified immunity).

117. See *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014) (citing *Brosseau*, 543 U.S. at 197).

118. See *id.* at 2024.

119. See *id.*

Donald Rickard led police officers on a high-speed car chase that came to a temporary halt when Rickard spun out into a parking lot. Rickard resumed maneuvering his car, and as he continued to use the accelerator even though his bumper was flush against a patrol car, an officer fired three shots into Rickard's car. Rickard managed to drive away, almost hitting an officer in the process. Officers fired 12 more shots as Rickard sped away, striking him and his passenger, both of whom died from some combination of gunshot wounds and injuries suffered when the car eventually crashed.

Respondent, Rickard's minor daughter, filed a 42 U.S.C. § 1983 action, alleging that the officers used excessive force in violation of the Fourth and Fourteenth Amendments.¹²⁰

As this Article did with *Brosseau*, it will quote *Plumhoff*'s qualified immunity analysis at length:

An official sued under § 1983 is entitled to qualified immunity unless it is shown that the official violated a statutory or constitutional right that was 'clearly established' at the time of the challenged conduct. And a defendant 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. In other words, 'existing precedent must have placed the statutory or constitutional question' confronted by the official 'beyond debate.' In addition, '[w]e have repeatedly told courts . . . not to define clearly established law at a high level of generality,' since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced. We think our decision in *Brosseau v. Haugen* squarely demonstrates that no clearly established law precluded petitioners' conduct at the time in question. In *Brosseau*, we held that a police officer did not violate clearly established law when she fired at a fleeing vehicle to prevent possible harm to 'other officers on foot who [she] believed were in the immediate area, . . . occupied vehicles in [the driver's] path[,] and . . . any other citizens who might be in the area . . . After surveying lower court decisions regarding the reasonableness of lethal force as a response to vehicular flight, we observed that this is an area 'in which the result depends very much on the facts of each case' and that the cases 'by no means "clearly establish[ed]" that [the officer's] conduct violated the Fourth Amendment.' In reaching that conclusion, we held that *Garner* and

120. *Id.* at 2014–15.

Graham, which are ‘cast at a high level of generality,’ did not clearly establish that the officer’s decision was unreasonable.

Brosseau makes plain that as of February 21, 1999—the date of the events at issue in that case—it was not clearly established that it was unconstitutional to shoot a fleeing driver to protect those whom his flight might endanger. We did not consider later decided cases because they ‘could not have given fair notice to [the officer].’ To defeat immunity here, then, respondent must show at a minimum either (1) that the officers’ conduct in this case was materially different from the conduct in *Brosseau* or (2) that between February 21, 1999, and July 18, 2004, there emerged either ‘controlling authority’ or a ‘robust “consensus of cases of persuasive authority,”’ that would alter our analysis of the qualified immunity question. Respondent has made neither showing.¹²¹

The Supreme Court in *Plumhoff* then proceeded to analyze the facts of the case and concluded that they were not materially distinguishable from *Brosseau*, and that, indeed, they appeared more favorable for the defendants than in that case.¹²²

The facts of *Brosseau* and *Plumhoff* are quite similar,¹²³ and it is understandable that the Supreme Court would have relied upon the former decision in the latter case. Given that twelve years had passed between the two decisions, however, it is disappointing that the Supreme Court did not even hint in *Plumhoff* that the *Brosseau* analysis might be wanting. Even more concerning is the fact that, once again, the Supreme Court in *Plumhoff* did not even mention the second part of the *Harlow* standard in its analysis or question whether the standard made sense in the context of claims against low-level officers.¹²⁴ It should be noted that, aside from *Brosseau*, the only other qualified immunity case which the Court relied upon in *Plumhoff* was *al-Kidd*,¹²⁵ and the Supreme Court gave no indication that there might be fundamental differences between the facts of *al-Kidd* and those in *Brosseau* and *Plumhoff* which called for a different standard to be employed.

Brosseau and *Plumhoff* were either 8-1 or unanimous decisions,¹²⁶ and it should be apparent that, factually speaking, the cases were not particularly close ones. This raises the question of how the Court would apply the *Harlow*

121. *Id.* at 2023 (citations omitted).

122. *See id.* at 2023–24 (quoting *Brosseau*, 543 U.S. at 206 n.4 (Stevens, J., dissenting)).

123. *See id.* at 2023–24 (comparing the facts in that case to those in *Brosseau*).

124. *See id.* at 2022–24 (citations omitted) (analyzing officer’s qualified immunity using rules from the *al-Kidd* and *Brosseau* cases rather than the standard set forth in *Harlow*).

125. *See id.* at 2023 (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080, 2083–84 (2011)).

126. *See id.* at 2016; *Brosseau*, 543 U.S. at 202 (Stevens, J., dissenting) (showing that Justice Stevens was the only Justice who did not join the per curiam opinion, creating an 8-1 split).

standard in a closer case. One such case was *Anderson v. Creighton*, in which an FBI agent performed a warrantless search of a house based upon an incorrect suspicion that a bank robber was hiding there.¹²⁷ It is submitted that, as a policy matter, *Anderson* was a genuinely close case because while the agent's actions did appear to be contrary to clearly established Fourth Amendment precedent, there was a reasonable argument that he was simply performing his job duties as he understood them and was not knowingly violating the law.¹²⁸ Moreover, there was no proof of the sort of sadistic behavior that was present in *Hope*.¹²⁹ It is submitted that reasonable arguments can be made both ways as to whether, under circumstances such as these, the law should force the agent to personally bear the burdens of litigation.

The Eighth Circuit in *Anderson* concluded that the law should do so, holding that it was clearly established at the time that the Fourth Amendment prohibited warrantless searches, absent probable cause and exigent circumstances, and that qualified immunity accordingly did not apply.¹³⁰ Three dissenting Supreme Court Justices in *Anderson* agreed with the Eighth Circuit that qualified immunity did not apply.¹³¹ For its part, the majority in *Anderson* appeared to agree with the Eighth Circuit's evaluation of the law as a broad proposition, but it concluded that the appellate court did not frame the legal issue correctly in the qualified immunity context.¹³² The majority wrote that in the qualified immunity context, the right allegedly violated "'must have been clearly established' in a more particularized, and hence more relevant, sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."¹³³

Perhaps tellingly, the majority in *Anderson* supported this proposition with a rather extensive analysis, but seemed highly reluctant to actually apply its standard to the facts of the case, instead remanding the district court to do so.¹³⁴ One wonders whether the six Justice majority in *Anderson* could survive the actual application of its "'clearly established' in a more particularized, and hence

127. See *Anderson v. Creighton*, 483 U.S. 635, 637 (1987).

128. See MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 9A.03(A), at 9A-19 (4th ed. Supp. 2012) (quoting *Downs v. Sawtelle*, 574 F.2d 1, 15 (1st Cir. 1978)).

129. Compare *Anderson*, 483 U.S. at 637 (recounting that the agent-defendant "conducted a warrantless search" of the plaintiffs' home under the mistaken belief that "a man suspected of a bank robbery committed earlier that day, might be found there."), with *Hope v. Pelzer*, 536 U.S. 730, 733-35 (2002) (stating that the plaintiff "was subjected to cruel and unusual punishment" when guards handcuffed him to a post twice, once for two hours and another time for seven hours).

130. See *Creighton v. City of St. Paul*, 766 F.2d 1269, 1277 (8th Cir. 1985), *vacated*, 483 U.S. 635, 649 (1987).

131. See *Anderson*, 483 U.S. at 649 (Stevens, J., dissenting).

132. See *id.* at 640-41.

133. *Id.* at 640.

134. See *id.* at 640-41, 646 (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)).

more relevant, sense”¹³⁵ standard to the facts of a genuinely close case. The *Anderson* standard is a quite vague one, and it is submitted that what exactly the Court meant by the previously quoted words could only be seen through their application. It does not lend itself to confidence in the standard that the Supreme Court did not even attempt to do so. It is submitted that *Anderson*’s requirement that the law be clearly established in a particularized sense sounds much better in theory than it actually works in practice.¹³⁶ This is partly because appellate courts do a much better job of clearly establishing general principles of law than they do in clearly establishing particularized ones, which may vary depending upon the proof of each case.¹³⁷

In *Brosseau* and *Plumhoff*, the Supreme Court seemed even more reluctant to address another issue: that “of which a reasonable person would have known” language used in *Harlow*.¹³⁸ It is not difficult to understand why. Under ordinary English usage, the “of which” language in the *Harlow* standard clearly suggests that the specific law which the Court finds to be clearly established would have been known to a reasonable person in the defendant’s position. As previously mentioned, however, this standard simply breaks down as a relevant factor when applied to the typical low-level officer, such as the police officers in *Brosseau* and *Plumhoff*.¹³⁹

The Supreme Court in *Brosseau* spent a few paragraphs discussing the state of circuit court precedent,¹⁴⁰ but it did not even mention the fact which seems obvious that, regardless of the state of the precedent, a reasonable police officer would not have been aware of it. Presumably, the Supreme Court recognized that it would have made a poor impression to simply hold that “whatever the circuit courts have held on this issue, a reasonable officer would not have been aware of it, and qualified immunity therefore applies.”¹⁴¹ Such a holding could have been made in a single sentence, and would have saved the Supreme Court and the reader considerable time. The holding would have been intellectually

135. *Id.* at 640.

136. *Id.*

137. *Id.*

138. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083–84 (2011)); *Brosseau v. Haugen*, 543 U.S. 194, 200 n.4 (2004)) (examining the limited analysis from *Brosseau* and its application to the facts of this case).

139. *See Plumhoff*, 134 S. Ct. at 2023–24 (quoting *Brosseau*, 543 U.S. at 206 n.4 (Stevens, J., dissenting); *Vaughan v. Cox*, 343 F.3d 1323, 1331 (11th Cir. 2003)) (applying the reasonableness standard to the facts by stating that the facts are indistinguishable from those in *Brosseau* and using the *Brosseau* Court’s analysis); *Brosseau*, 543 U.S. at 199 (stating the “case is far from obvious” in regards to the standard of what a reasonable officer would have known).

140. *Brosseau*, 543 U.S. at 199–201 (citations omitted).

141. This would likely have been the holding had the Supreme Court not addressed the Circuit Court precedent.

honest, but it would have made the deficiencies in the applicable legal standard clearer than they already are.

In this sense, the *Brosseau-Plumhoff* approach often seems to constitute so much sound and fury, signifying nothing. The standard kicks up a considerable amount of legal dust and makes it appear that a relevant legal analysis is taking place when, very frequently, it is not. It could be argued, since the Supreme Court in *Brosseau* and *Plumhoff* found there was no clearly established law prohibiting the defendants' actions,¹⁴² that it was unnecessary for the Court to even address the issue of whether a reasonable defendant would have known of the law. That argument might be valid if *Brosseau* and *Plumhoff* were district court opinions. However, *Brosseau* and *Plumhoff* are Supreme Court decisions to which federal courts nationwide will be looking for coherent standards to apply in numerous Section 1983 cases before them involving low-level officers. It is therefore quite concerning that, in both of those decisions, the Supreme Court offered up a highly legalistic version of the *Harlow* standard which is quite obviously not well suited for the inquiry at hand.¹⁴³

It may be true that, given the rather clear results in both *Brosseau* and *Plumhoff*, the Supreme Court could get away with the highly narrow analysis which it offered in those decisions and still be technically correct. However, the Supreme Court could only do so by ignoring the obvious issues, which will confront district courts in cases where the circuit court precedent does clearly establish a particular point of law and a low-level officer raises *Harlow*'s extraordinary circumstances defense, arguing that a reasonable officer in his position would have been unaware of that law. What then?

It appears that *Anderson* was a case where the law clearly prohibited the officer's conduct, but the majority in that case offered nothing more than legal generalities and refused to actually apply those generalities to the facts of the case.¹⁴⁴ Based on *Anderson* and *Brosseau-Plumhoff*, one wonders whether the Supreme Court has adopted a policy of deliberate ambiguity that seeks to avoid dealing with the logical inconsistencies in the qualified immunity standard it has adopted. Assuming this is the case, it is submitted that the Supreme Court will only be able to kick the can down the road for so long.

In so contending, this writer reiterates that *Harlow*'s "of which a reasonable person would have known" language was not mere dicta.¹⁴⁵ To the contrary, the Supreme Court wrote in *Harlow* that:

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

142. See *Plumhoff*, 134 S. Ct. at 2024; *Brosseau*, 543 U.S. at 201.

143. See *Plumhoff*, 134 S. Ct. at 2023 (citations omitted); *Brosseau*, 543 U.S. at 198–201 (citations omitted).

144. See *Anderson v. Creighton*, 483 U.S. 635, 638–41 (1986) (citations omitted).

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

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.¹⁴⁶ But again, the defense would turn primarily on objective factors.¹⁴⁶

Thus, the Supreme Court in *Harlow* was quite clear that it was not indulging in some legal fiction that a defendant was aware of the status of legal precedent. Rather, it specifically provided for an extraordinary circumstances defense in cases where the defendant could demonstrate that a reasonable official in his position would not have been aware of the authority in question. This language is central to this Article's contention that *Brosseau* and *Plumhoff* misapplied *Harlow*, since it is clearly more than dicta and cannot logically be reconciled with the *Brosseau-Plumhoff* approach. Indeed, the Supreme Court's assumption in *Harlow* that the ordinary public official would know of the relevant legal authority strongly suggests that it did not envision an inquiry similar to that in *Brosseau* and *Plumhoff*, whereby the conduct of low-level police officers is judged on the basis of federal appellate court case law.¹⁴⁷

The fundamental inconsistency between *Harlow* and the *Brosseau-Plumhoff* approach can be demonstrated through a hypothetical. Assume that the circuit court decisions analyzed by the Supreme Court in *Brosseau* found similar shootings to be unconstitutional. Presumably, the Supreme Court would have found the law to be clearly established that the shooting in *Brosseau* was in violation of the Fourth Amendment. If *Harlow*'s extraordinary circumstances defense means what it says, however, then what would have prevented the defendant officer in *Brosseau* from demonstrating, as she no doubt could have, that a reasonable officer would not have been aware of that authority? Perhaps she could have commissioned a reliable, independent poll of one hundred police officers, which would very likely have demonstrated that none of them had heard of any of the circuit court decisions. The plaintiff almost certainly could not have demonstrated otherwise. Faced with this proof, on what basis might a court have denied qualified immunity on the basis of the extraordinary circumstances defense? None as far as this writer can discern. Thus, taken to its logical conclusion, the *Brosseau-Plumhoff* approach of basing liability upon federal appellate court authority would seemingly provide for blanket immunity of low-level officers in a wide range of contexts because whatever the federal circuit

146. *Id.* at 818–19.

147. Compare *id.* at 819 (stating that “a reasonably competent public official should know the law governing his conduct”), with *Plumhoff*, 134 S. Ct. at 2023 (quoting *Brosseau*, 543 U.S. at 201) (adopting the *Brosseau* approach based on that court’s analysis of “lower court decisions regarding the reasonableness of lethal force as a response to vehicular flight”), and *Brosseau*, 543 U.S. at 200–01 (quoting *Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993); *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992)) (stating that immunity would not protect an officer’s use of deadly force if the officer “unreasonably created the encounter”).

courts might have held on the issue at hand, a reasonable officer would not be aware of it. The Supreme Court clearly did not intend such a result in *Harlow*, and the inconsistencies between that decision and the *Brosseau-Plumhoff* approach are thus evident.

In retrospect, one can identify the moment in which the Supreme Court, largely by accident it seems, extended the *Harlow* holding to low-level officers. In their dissent in *Anderson v. Creighton*, three Justices strongly objected to the “uncritical application of the precedents of qualified immunity that we have developed for a quite different group of high public office holders” to a comparatively low-level FBI agent.¹⁴⁸ These dissenting Justices argued, as this Article has argued, that “[t]he considerations underlying the formulation of the immunity rule in *Harlow* for Executive Branch officials . . . are quite distinct from those that led the Court to its prior recognition of immunity for federal law enforcement officials in suits against them founded on the Constitution.”¹⁴⁹

Plainly, the dissenting Justices in *Anderson* interpreted *Harlow* as merely dealing with qualified immunity in the context of high level-officials, and objected to what they regarded as its expansion to low-level officers.¹⁵⁰ In response, the majority in *Anderson* criticized what it characterized as:

the emptiness of the dissent's assertion that “[t]oday this Court makes the fundamental error of simply assuming that *Harlow* immunity is just as appropriate for federal law enforcement officers . . . as it is for high government officials.” *Post*, at 3046 (footnote omitted). Just last Term the Court unanimously held that state and federal law enforcement officers were protected by the qualified immunity described in *Harlow*. *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). We see no reason to overrule that holding.¹⁵¹

The dissenting Justices in *Anderson* issued a rebuttal to the majority's response, disagreeing that *Malley* had applied *Harlow* to low-level officers:

The Court asserts that this assumption merely reflects our holding last Term in *Malley v. Briggs*. The *Malley* case, however, rejected a police officer's claim that he was entitled to absolute immunity because he had acted pursuant to an arrest warrant issued by a magistrate. We

148. *Anderson*, 483 U.S. at 647 (Stevens, J., dissenting).

149. *Id.* at 651 (Stevens, J., dissenting).

150. *See id.* at 649 (Stevens, J., dissenting) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 524, 535 (1985); *Harlow*, 457 U.S. at 816–18 (1982)) (stating that immunity should not apply since the policy concerns of “allowing government officials to devote their time and energy to the press of public business without the burden and distractions . . . of a lawsuit,” and “the special unfairness associated with charging government officials with knowledge of a rule of law that had not yet been clearly recognized” laid out in the *Harlow* and *Mitchell* cases were not present in the present case).

151. *Anderson*, 483 U.S. at 642 n.4 (quoting *Anderson*, 483 U.S. at 654 (Stevens, J., dissenting); *Malley v. Briggs*, 475 U.S. 335, 344 (1986)).

specifically declined to accept the petitioner's invitation 'to expand what was a qualified immunity at common law into an absolute immunity.' We concluded that in 'the case of the officer applying for a warrant' a rule of qualified immunity based on the *Harlow* standard would give 'ample room for mistaken judgments.' Our opinion carefully avoided any comment on warrantless searches or the proper application of *Harlow* in cases in which the claim of 'qualified immunity' could not be evaluated in advance of discovery.¹⁵²

It appears to this writer that the truth lies somewhere in the middle.

It is argued that the majority in *Anderson* was correct that the Court had applied *Harlow* to a low-level officer in *Malley*, but it seems clear that it did so without considering whether the actual logic of the *Harlow* holding made sense in that context. Indeed, it is apparent from the *Anderson* dissent, written a mere year after *Malley*, that at least three—and likely more—of the Supreme Court Justices were completely unaware of the implications of applying *Harlow* to low-level officers. Moreover, the majority in *Anderson* never substantively responded to the dissent's belated objections in this regard, instead saying that the issue was now settled. This is hardly a ringing endorsement of the logic behind applying *Harlow*'s standard to low-level officers, and it does not seem a stretch to regard the Supreme Court's decision to do so in *Malley* as being an accidental holding of sorts which has never been justified on its merits.

At the same time, *Harlow* itself bears a considerable portion of the blame for its subsequent misapplication. The Supreme Court in *Harlow* should have recognized that its holding did not make sense as applied to low-level officers, and specifically limited it to high-level executive officials. The Court failed to do so, and it is therefore rather predictable that it would have simply applied the *Harlow* standard to a low-level officer when such a defendant came before it in *Malley*. It was not until *Anderson* that the dissenting Justices realized, to their alarm, the implications of extending *Harlow* to low-level officers. However, by then the majority could claim, in light of *Malley*, that the horse had left the barn. It is submitted that scenarios such as this are how bad law becomes worse law.

To use a rough analogy, *Harlow* can be compared to a box labeled "tools" which, upon being opened, is found to contain only wrenches. The Supreme Court in *Malley*, confronted with a rather basic job, appears to have opened the box and hammered a nail with a wrench without giving much thought to the matter. Faced with a more precise job in *Anderson*, the dissent wondered out loud why the Court was hammering nails with wrenches, to which the majority essentially responded that they settled that in *Malley* these are not wrenches, but rather are tools. Somewhat alarmingly, the Supreme Court in the *Brosseau* and *Plumhoff* decisions no longer appeared to notice that it was hammering nails with wrenches, nor did it appear to notice the damage that was being done to the

152. *Id.* at 654 n.8 (Stevens, J., dissenting) (quoting *Malley*, 475 U.S. at 340, 342–43).

boards in the process. It is submitted that no matter how many times the Supreme Court states that the *Harlow* box contains tools, the fact remains that, in reality, it contains only wrenches. Federal district courts need more varied tools to deal with the diverse qualified immunity issues they face.

The fact that the majority in *Anderson* refused to engage with the dissent on the substance of its objections to applying *Harlow* to low-level officers, in the context of an opinion in which it refused to actually apply the vague standard it was adopting, heightens concerns that the Supreme Court may have adopted a policy of deliberate ambiguity which leaves it to district courts to sort out the clear contradictions in the Court's qualified immunity standards. These concerns are not assuaged by *Brosseau*'s announcement of an obvious case exception, which is a term that has no practical meaning that this writer can discern. Ultimately, it is immaterial when and how the *Harlow* standard was expanded to low-level officers since the actual words in the standard remain the same regardless. By its clear terms, the *Harlow* standard only applies to clearly established precedent "of which a reasonable person would have known."¹⁵³ Those words mean what they mean and that meaning will not change even if the Supreme Court continues to ignore them, as in *Brosseau* and *Plumhoff*, or seeks refuge in prior decisions, as in *Anderson*.

One treatise correctly notes that the Supreme Court in *Harlow* "failed to explain what might constitute 'extraordinary circumstances,' as have the numerous post-*Harlow* Supreme Court qualified immunity decisions."¹⁵⁴ The reader is urged to consider the implications of this statement. *Harlow* set forth its qualified immunity standard in 1982, and the Supreme Court has thus avoided explaining, for over thirty years, what an integral part of this standard actually means. It is difficult to discern how the Court's sustained failure to do so, despite many opportunities, could have been inadvertent. Qualified immunity is one of the most important doctrines in federal civil litigation, and the meaning of the governing standard in this context is far too important for the Court to keep hidden. The Supreme Court's narrow analysis in its 2014 *Plumhoff* decision suggests that it plans to continue, for the foreseeable future, a policy of deliberate ambiguity motivated by an apparent desire to avoid confronting the defects in the qualified immunity standard.

This Article was written partly to encourage the Supreme Court to address, and hopefully correct, the deficiencies in its qualified immunity standard rather than continue to ignore them. The writer emphasizes that while *Brosseau* and *Plumhoff* have been criticized for failing to recognize the actual intent behind the *Harlow* standard, this Article would not have been written if the writer felt that, on its merits, the *Brosseau-Plumhoff* approach was fundamentally a good one. Deviating from a prior decision is not necessarily a bad thing if the deviation takes the law in a positive direction. It is submitted that the *Brosseau-Plumhoff*

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

154. SCHWARTZ, *supra* note 30, at § 9A.04[B], at 9A-49 (4th ed. Supp. 2012).

approach does not. *Brosseau* and *Plumhoff* exist on a plane in which the answers to difficult and particularized legal questions lie in federal appellate court case law and, if that precedent fails to provide clarity, then that in and of itself resolves the qualified immunity issue. This approach reflects an appellate court bias, which fails to take account of the realities of Section 1983 litigation. It is submitted that the highly legalistic *Brosseau-Plumhoff* approach will often force federal judges to massage appellate court precedent to reach results that they deem fair based upon more practical considerations and, at other times, it will simply result in bad decisions and unfair results.

IV. CONCLUSION

The issues described in this Article involve one problem with two causes and, fortunately, one solution. The problem is that the Supreme Court has utilized *Harlow*'s qualified immunity standard well beyond the context of high-level executive officials to which it logically applies, and to which it was intended to apply. There are two causes for this problem, namely: (1) *Harlow*'s failure to more narrowly tailor its actual holding to its analysis, and (2) the Supreme Court's subsequent misapplication of the standard to contexts, in particular Section 1983 actions against low-level officers facing emergency situations, in which its analysis of legal precedent simply does not make sense and was not intended to apply.

The solution to this problem is a relatively simple one, which can be implemented consistently with principles of stare decisis. The solution is to limit the *Harlow* standard's inquiry to the context in which it was intended to apply, and to develop a different qualified immunity standard that makes sense as applied to low-level officers. It is submitted that *Malley*'s repeatedly quoted phrase that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"¹⁵⁵ captures the essence of the qualified immunity inquiry and could serve as a starting point for a qualified immunity standard for low-level officers.

Utilizing *Malley*'s language as the heart of any new qualified immunity standard would have the significant benefit of simply applying the Supreme Court's own words which have already been repeatedly cited by federal courts. Indeed, a Westlaw search of federal court opinions found a remarkable 4,557 opinions that quote this phrase. It is submitted that these words have found such a warm reception among federal judges because they give them license to consider the sort of factors that federal judges are naturally predisposed to consider in qualified immunity cases. The *Malley* standard could be supplemented with additional factors, including an analysis of federal appellate court authority when such is deemed relevant.

155. *Malley*, 475 U.S. at 341.

Utilizing the *Malley* standard would allow federal judges to make a commonsensical evaluation of the cases before them without going through the judicially inefficient and, even worse, frequently misleading process of incorporating authority from various circuits. It should be noncontroversial to state that federal appellate judges sometimes reach incorrect results and, even when they do not, there are usually important distinguishing factors between any two cases. Utilizing the *Malley* standard would allow district judges to focus their attention squarely on the cases before them, while still considering and applying the general principles of law established by federal appellate courts.

It is true that an application of the *Malley* standard would often require district judges to make gut decisions regarding whether a defendant's alleged actions were sufficiently incompetent or knowingly violative of the law to negate qualified immunity, but it is submitted that this is largely the nature of the qualified immunity beast. If one wishes for district judges to decide qualified immunity issues at an early stage of the proceedings, and the U.S. Supreme Court clearly does, then this will inevitably require district judges to make gut decisions under any standard. This Article contends that the law would best be served by a standard which focuses district judges' judgment upon the cases before them, rather than trying to shoehorn those cases into often distinguishable holdings from various circuits. If a litigant contends that a district judge made an erroneous decision in this regard, then that is why appellate courts exist.

The *Malley* standard may not be perfect, but it clearly provides a much better starting point for analyzing the conduct of low-level officers than the legalistic approach followed in *Brosseau* and *Plumhoff*. Indeed, it does not seem coincidental that the Supreme Court spoke these words in *Malley*, the same decision that applied *Harlow* to low-level officers in the first place. It is submitted, however, that the words represent the application of the qualified immunity doctrine to low-level officers as the Supreme Court wished it to be rather than what *Harlow* actually held. While not as legalistic a standard as *Brosseau* and *Plumhoff* would seem to indicate, the *Harlow* standard clearly does not allow federal judges to consider a number of factors which would otherwise be important to them in deciding qualified immunity issues.¹⁵⁶

It is further submitted that the Supreme Court should take the occasion of establishing separate qualified immunity standards for low-level officers as an opportunity to consider whether *Harlow*'s prohibition against considering subjective factors should apply in the low-level context. *Harlow* dealt with qualified immunity in a context where one man's loyal presidential aide, following the orders of President Nixon, was another man's willful constitutional violator who knowingly infringed upon citizens' due process rights.¹⁵⁷ It seems

156. See *Harlow*, 457 U.S. at 819 (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)) (stating that "[b]y defining the limits of qualified immunity essentially in objective terms," all policy and legal objectives of the standard are met).

157. See *id.* at 802, 804.

clear that *Harlow* was motivated largely by the Supreme Court's desire to wash its hands of such thorny issues, but that, in so doing, it threw out the baby with the bathwater. *Harlow* has conditioned federal judges to almost recoil from the word "subjective" in deciding qualified immunity issues, but this Article has demonstrated that the subjective inquiry was once universally accepted by Supreme Court Justices as being a valid part of the qualified immunity analysis and was never rejected on its merits.¹⁵⁸

In truth, subjective proof of malice is not nearly as thorny an issue in the typical Section 1983 case as it was in *Harlow*. In the typical case, it comes down to something as basic as whether an officer was trying, in good faith, to make an arrest to protect the public or whether he was using the occasion of an arrest as an outlet for his sadistic tendencies.¹⁵⁹ In cases where the proof clearly suggests that the latter is the case, what interest is served by instructing federal judges to simply ignore that proof? This writer submits that many federal judges are highly influenced by such proof today, even though the governing legal standards require them to hide it in their opinions. The Eleventh Circuit's opinion in *Hope* suggests that some federal judges are not in on the joke, and simply take the Supreme Court's qualified immunity jurisprudence at face value, often resulting in unfair results.¹⁶⁰

Federal judges badly need a qualified immunity standard that does not require them to play disingenuous games in their opinions, and which allows them to make a practical, rather than highly legalistic, evaluation of the issues before them. Moreover, regardless of its limitations, the *Harlow* standard was fashioned to deal with the liability of high-level officials and, properly applied, is largely self-limited to that context.¹⁶¹ The *Brosseau-Plumhoff* approach applies *Harlow* well beyond its proper limits and, in so doing, provides a poor basis for analyzing qualified immunity issues involving low-level officers. It is hoped that the Supreme Court will come to recognize the limitations in the *Brosseau-Plumhoff* approach and provide district courts with more workable and relevant qualified immunity standards in cases involving low-level officers.

158. See, e.g., *Wood v. Strickland*, 420 U.S. 308, 322 (1975) (adopting a subjective standard of whether or not the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights" of another to determine immunity).

159. Compare *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023, 2024 (holding that a police officer was entitled to immunity after using deadly force to apprehend a fleeing suspect after "a lengthy, high-speed pursuit that indisputably posed a danger both to the officers involved and to any civilians who happened to be nearby"), with *Hope v. Pelzer*, 536 U.S. 730, 733, 737 (2002) (holding that immunity did not apply to prison guards who subjected an inmate to cruel and unusual punishment by handcuffing him to a post twice as a punishment for disruptive conduct).

160. See *Hope v. Pelzer*, 240 F.3d 975, 981 (11th Cir. 2001), *rev'd*, 536 U.S. 730 (2002) (holding that "[d]espite the unconstitutionality of the . . . guards' actions, there was no clear, bright-line test established in 1995 that would survive our circuit's qualified immunity analysis").

161. See *Harlow*, 457 U.S. at 818–19 (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)) (discussing and applying the immunity standard in the limited context of high-level government officials).

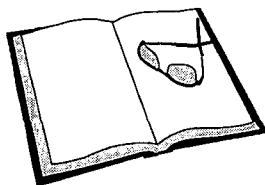
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