QUALIFIED IMMUNITY & SUBJECTIVE KNOWLEDGE

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There is something weird going on within the doctrine of qualified immunity. The Supreme Court and lower courts routinely claim that officers who "knowingly violate the law" are not entitled to qualified immunity, but then—in almost the same breath—assert that an officer's knowledge of the law is irrelevant to the qualified immunity analysis. What is even more strange is that these two opposing views can apparently be traced to the foundational case in the field: Harlow v. Fitzgerald.

This Article explores and proposes a resolution to this apparent contradiction. Beginning with Harlow *itself, the Article explores the case using the detailed personal papers of Justice Lewis Powell, the author of the majority opinion in* Harlow. *These papers show that, although* Harlow *is generally understood to have rejected any inquiry into subjective knowledge, the opinion is far more nuanced and ambiguous than generally appreciated.*

After showing that Harlow *may not have definitively rejected subjective knowledge, the Article then turns to a normative defense of subjective knowledge. In particular, it argues that relying on subjective knowledge ought to be relevant to qualified immunity determinations because (1) it furthers the underlying purposes of the defense, (2) subjective knowledge already matters in many qualified immunity cases, and (3) subjective knowledge is used in contexts that the Supreme Court deems analogous to qualified immunity.*

After presenting this normative case, the Article then explores how plaintiffs might prove subjective knowledge. Addressing an issue that has currently split courts, the Article first explains that actual knowledge may be proven by reference to the content of departmental policies or trainings. Additionally, subjective knowledge may be proven—rather unexpectedly—through an admission of the defendant. While

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officers may not always admit such knowledge, they are far more likely to do so in cases in which liability is based chiefly on a mistake of fact rather than mistake of law.

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INTRODUCTION

What is the difference, legally speaking, between these two sentences?

[Q]ualified immunity shields officials . . . so long as their conduct does not violate . . . rights of which a reasonable person would have known.[1]	Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law.[2]

Both sentences are from recent Supreme Court opinions addressing qualified immunity: a sometimes-controversial defense regularly raised by defendants in constitutional tort actions. Yet, both sentences define the defense in fundamentally different ways. The sentence on the left describes the defense as "wholly objective."[3] That is, it posits that an officer's immunity turns on whether a hypothetical reasonable officer would have understood his actions to be unconstitutional, and is completely unconcerned with whether the particular officer being sued *actually knew* his actions were unconstitutional.[4] In contrast, the sentence on the right is not wholly objective. It has an objective component—whether the officer behaved "incompetent[ly]"—but also has a subjective component—namely, whether the officer being sued "knowingly violate[d] the law."[5]

So, which sentence is correct? One might think that the answer could be found in *Harlow v. Fitzgerald*,[6] the foundational case of modern qualified immunity doctrine. *Harlow* is widely understood, as Part II of this Article explains, to have purged subjectivity from qualified immunity doctrine.[7] As one court described, "under *Harlow*, an officer's 'subjective beliefs about [whether his conduct was lawful] are irrelevant.'"[8] Yet, if *Harlow* is so clear, then why does the Supreme Court repeatedly state that "those who knowingly violate the law" are not immune?[9]

Perhaps *Harlow* is not as clear as it seems—or so this Article argues. Relying on internal memoranda and detailed notes

1. Mullenix v. Luna, 577 U.S. 7, 11 (2015) (internal quotation marks omitted).
2. Ziglar v. Abbasi, 137 S. Ct. 1843, 1867 (2017) (internal quotation marks omitted).
3. Davis v. Scherer, 468 U.S. 183, 191 (1984).
4. *See id.*
5. *See Ziglar*, 137 S. Ct at 1867.
6. 457 U.S. 800 (1982).
7. *See infra* Part II.
8. Frasier v. Evans, 992 F.3d 1003, 1016 (10th Cir. 2021) (quoting Anderson v. Creighton, 483 U.S. 635, 641 (1987)).
9. *See Ziglar*, 137 S. Ct. at 1867.

maintained by Justice Lewis Powell—the author of the majority opinion in *Harlow*—this Article explains in Part III that the Court may have intended to retain, rather than purge, subjective knowledge from the qualified immunity test.[10] The evidence ranges from a "compromise" ostensibly reached on Monday, June 7, 1982, in a meeting between Justices Powell, White and Brennan, to potential misunderstandings of the term "malice," to odd and contradictory statements later made by Justices Powell and White.[11] To be sure, the evidence is not conclusive, but it does merit hesitation in firmly declaring that *Harlow* purged subjective knowledge from the qualified immunity test.

Even if *Harlow* did not purge subjective knowledge, one would hardly expect that the courts would instantly reverse course. The Supreme Court is free to simply overturn any such holding or implication in *Harlow*, and lower courts, having declared over and over again that subjective knowledge is irrelevant, are unlikely to change direction without a strong normative case for change. Addressing that concern, this Article takes up a normative defense of subjective knowledge in Part IV. It argues that relying on subjective knowledge ought to be relevant to qualified immunity determinations because: (1) it furthers the underlying purposes of the defense; (2) subjective knowledge already matters in many qualified immunity cases; and (3) subjective knowledge is used in contexts that the Supreme Court deems analogous to qualified immunity.

Part V then shifts to how subjective knowledge might be proven. It first explains that subjective knowledge may be proven with evidence of departmental policies or training. Scholars have advocated for this result, but have thus far overlooked the possibility that incorporating subjective knowledge into the qualified immunity test would open the door to such proof.[12] Part V then turns to a second way to demonstrate subjective knowledge: by obtaining an admission from the defendant. This unexpected approach relies on the fact that a significant proportion of constitutional tort actions turn on pure mistakes of fact. Where the core issue is a mistake of fact, many officers may willingly—though admittedly, not certainly—concede to knowing the relevant legal standard, which will in turn take the qualified immunity defense off the table.

A short conclusion follows. The conclusion reiterates that long-held assumptions about the place of subjective knowledge in qualified immunity doctrine deserve re-examination. Not only do those assumptions depend on a version of *Harlow* that might not be true, but they also ignore the normative case in favor of relying on subjective knowledge. Based on this normative case, plaintiffs have

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10. *See infra* Part III.
11. *See infra* notes 79–80 and accompanying text.
12. *See infra* Part V.

concrete options for proving actual knowledge and overcoming the qualified immunity defense.

I. THE PROBLEM OF SUBJECTIVE KNOWLEDGE

If an officer actually knows that her actions are unconstitutional, may she nonetheless claim immunity from liability? At present, the answer is unclear. This Part explains key precedent from the Supreme Court, surveys lower court cases, and summarizes scholarly treatment on the issue. Before addressing those matters, however, this Part begins with a short primer on qualified immunity and its conception of reasonableness.

A. Qualified Immunity and Reasonableness

When a plaintiff sues a government officer for damages arising from a federal constitutional violation, the officer may usually raise the defense of qualified immunity. Such immunity is "qualified" in the sense that it applies in some circumstances, but not others.[13] Speaking very generally, the doctrine endeavors to protect officers who made "bad guesses in gray areas."[14] Constitutional law, the argument goes, is full of subtlety and nuance and officers ought not to be liable unless they "transgress[] bright lines."[15]

Of course, much depends on how one defines "gray areas" and "bright lines." At present, courts draw these boundaries by focusing on whether "existing precedent . . . placed the statutory or constitutional question beyond debate."[16] If such precedent, often termed "clearly established law," did not exist when the officer acted, she could not have been expected to know that her actions were unlawful.[17] In contrast, if such precedent did exist, the officer's actions can be deemed unreasonable.[18] In this way, qualified immunity protects reasonable officers but exposes unreasonable officers to liability.

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13. In contrast, "absolute immunity" applies to *every* act of a particular official, provided the official acts in the capacity triggering such immunity. Public officials engaged in legislative, judicial, and prosecutorial acts enjoy absolute immunity for those acts. *See, e.g.*, Bogan v. Scott-Harris, 523 U.S. 44, 46 (1998) (absolute legislative immunity); Stump v. Sparkman, 435 U.S. 349, 355–56 (1978) (absolute judicial immunity); Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (absolute prosecutorial immunity).

14. Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992).

15. *Id.*

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

17. *See id.*

18. *See id.*

Or so the argument goes. There is a vast literature critiquing qualified immunity, including its legal validity,[19] internal logic[20] and policy justifications.[21] And, of course, there is some literature that is less critical.[22] This subset of literature will become relevant later, but for the moment, our focus is on qualified immunity's conception of "the reasonable officer."

In law, the concept of "reasonableness" is usually considered quintessentially *objective*. A person's actions are "reasonable" if they are of the sort that "average" and "ordinary" persons would take. In this sense, an evaluation of reasonableness is fully external to the person and her mental state. It is unnecessary to know what she was *actually thinking* at the time of her actions to discern whether she acted reasonably. If the qualified immunity inquiry is objective in this sense, then an officer's internal mental state is completely

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19. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018) (arguing that qualified immunity lacks a legitimate legal basis that justifies its application in constitutional tort actions); Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CALIF. L. REV. 201 (2023) (arguing that § 1983, as originally enacted, barred the application of immunity).

20. *See, e.g.*, Nathan S. Chapman, *Fair Notice, The Rule of Law, and Reforming Qualified Immunity*, 75 FLA. L. REV. 1 (2023) (arguing that the fair notice principle does not justify qualified immunity as the defense is currently constructed); John F. Preis, *Qualified Immunity and Fault*, 93 NOTRE DAME L. REV. 1969 (2018) (criticizing qualified immunity's incongruence with the principle of fault); Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605 (2021) (criticizing qualified immunity's reliance on "clearly established law" because officers receive no training in such law); John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851 (2010).

21. *See, e.g.*, Joanna Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017) [hereinafter Schwartz, *How Qualified Immunity Fails*] (demonstrating that qualified immunity rarely shields defendants from discovery, a purported justification for the defense); Joanna Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018) [hereinafter Schwartz, *The Case Against Qualified Immunity*] (gathering evidence impeaching the claimed purposes of the qualified immunity defense).

22. *See, e.g.*, Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853 (2018) (arguing that qualified immunity is not perfect but a necessary doctrine); Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229, 235 (2020); Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. REV. 547 (2020); Chapman, *supra* note 20, at 46–47 (arguing that immunity will sometimes be justified on fair notice grounds); Scott Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337 (2021) (arguing that qualified immunity is rooted in the common law and thus may legitimately be applied in constitutional tort actions); Hillel Y. Levin & Michael L. Wells, *Qualified Immunity and Statutory Interpretation: A Response to William Baude*, 9 CALIF. L. REV. ONLINE 40 (2018) (arguing that § 1983 is a "common law statute" that permits courts to craft rules of decision, including immunities, that implement the statute).

irrelevant.[23] Perhaps the officer meant good or perhaps she meant ill, but if her actions were consistent with "clearly established law," then she acted *reasonably* and is entitled to immunity.[24]

Yet, as any student of torts knows, the "reasonable person" standard applicable in negligence actions is not fully blind to personal characteristics. Put differently, the reasonable person standard is not *purely* objective; it accounts for some subjective factors. For example, if the putative tortfeasor is a nine-year-old child, her actions are measured against children of a similar age, experience and intellect, *not* against the general population at large (nor even the population of children).[25] So too for persons with a physical disability. A deaf person is not deemed careless simply because she failed to heed the train's whistle, even though most others would have done so.[26]

Just as the reasonable person standard accounts for physical or mental limitations, it also accounts for superior physical or mental abilities. Consider a passenger on a plane who happens to be trained as a pilot. If the passenger is summoned to the cockpit when the pilot takes ill, and thereafter crashes the plane, the passenger-made-pilot's actions will be measured against a person with training as a pilot, not against the generic reasonable person.[27] Or, consider a person who walks on a floor that she knows is slippery, even though its slipperiness would not be apparent to an average person. If the person slips and falls, her actions will be assessed against persons with knowledge of the condition of the floor, not against the general public.[28]

The logic behind this rule is that a "reasonable person will act in the light of . . . information, knowledge and skill that he himself

23. Frasier v. Evans, 992 F.3d 1003, 1016 (10th Cir. 2021).

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

25. *See, e.g.*, Hudson-Connor v. Putney, 86 P.3d 106, 109 (Or. 2004); *see also* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, HORNBOOK ON TORTS § 10.14 at 233 (2d ed. 2016) ("With some exceptions, children are not subjected to the reasonable person standard but are instead held to a standard that is largely subjective. . . . The minor is instead required to conduct himself only with the care of a minor of his own age, intelligence, and experience in similar circumstances.").

26. DOBBS, HAYDEN & BUBLICK, *supra* note 25, § 10.9 at 223 ("The reasonable person standard becomes partly subjective when it comes to physical attributes of the defendant. . . . [O]ne with physical illness or other physical disability is held to the standard of a reasonable person having such a disability, not to a standard of some ideal or average physical capacity."); *see also* RESTATEMENT (SECOND) OF TORTS § 283C (AM. L. INST. 1965); RESTATEMENT (THIRD) OF TORTS § 11(a) (AM. L. INST. 2010).

27. *See* Jackson v. Axelrad, 221 S.W.3d 650, 655–58 (Tex. 2007) (patient who brought medical malpractice action against physician, but who trained as a physician himself, was required to use his knowledge as a physician to assist with his treatment).

28. *See* Krombein v. Gali Serv. Indus., 317 F. Supp. 2d 14, 21 (D.D.C. 2004).

has."[29] If this rule makes sense in the realm of tort law, should it also apply in the context of qualified immunity? Put more succinctly, should the "reasonableness" of an officer's actions be measured solely by reference to the hypothetical average officer, or should it also account for the officer's subjective knowledge that her actions were unconstitutional? At present, and as explained below, the case law does not provide a clear answer to this question.

B. Subjective Knowledge in the Supreme Court

The role of subjective knowledge in the modern qualified immunity defense begins with *Harlow v. Fitzgerald*.[30] *Harlow* is addressed in far more detail in Part III, but for the moment, it is worth noting that the majority opinion strongly criticizes reliance on subjective knowledge. The problem for the Court was that an "inquiry into subjective motivation" may be "peculiarly disruptive of effective government."[31] The disruption flows mainly from "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service."[32] To protect government from such disruptions, therefore, an inquiry into an officer's "subjective motivations" should be avoided. *Harlow* may not have completely shut the door, but it certainly heavily criticizes any inquiry into subjective knowledge.

In the years after *Harlow*, the Court repeatedly characterized the case as "eliminating the subjective component of the standard."[33] For example, in 1984—two years after *Harlow*—the Court explained in one case that "*Harlow v. Fitzgerald* rejected the inquiry into state of mind in favor of a wholly objective standard,"[34] and explained in another case that "[i]n *Harlow*, we eliminated the subjective component of the qualified immunity [defense]."[35] Then, in a 1985 case, the Court noted that, in *Harlow*, it had "purged qualified immunity doctrine of its subjective components."[36] The Court made

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29. DOBBS, HAYDEN & BUBLICK, *supra* note 25, § 10.12 at 230; *see also* RESTATEMENT (SECOND) OF TORTS § 289 (AM. L. INST. 1965); RESTATEMENT (THIRD) OF TORTS § 12 (AM. L. INST. 2010).

30. 457 U.S. 800 (1982).

31. *Id.* at 817.

32. *Id.* at 816.

33. Illinois v. Gates, 462 U.S. 213, 266 (1983) (White, J., concurring).

34. Davis v. Scherer, 468 U.S. 183, 191 (1984) (citation omitted).

35. United States v. Leon, 468 U.S. 897, 922 n.23 (1984).

36. Mitchell v. Forsyth, 472 U.S. 511, 517 (1985).

similar statements in 1987,[37] 1992,[38] 1996,[39] and 1998,[40] all of which would seem to cement the view that an officer's actual knowledge is irrelevant to the qualified immunity analysis.

Yet, there are some complications to this view—two of them, in fact. The first concerns the 1984 case of *Malley v. Briggs*.[41] There, the Court stated that the "qualified immunity defense . . . provides ample protection to all but the plainly incompetent or *those who knowingly violate the law*."[42] Thus, under *Malley*, subjective knowledge is plainly relevant.[43] This is notable because *Malley* came *after* cases stating that *Harlow* "rejected the inquiry into state of mind"[44] and was then *followed* by still more cases stating that an officer's "subjective beliefs . . . are irrelevant."[45] Complicating the issue further, the Court has repeated this line from *Malley* over and over (including as recently as 2021[46]) while also reiterating that qualified immunity is an "objective" inquiry.[47]

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37. Anderson v. Creighton, 483 U.S. 635, 641 (1987) (stating that, under *Harlow*, the "relevant question . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed" that his search was lawful, and that the officer's "subjective beliefs about the search are irrelevant").

38. Wyatt v. Cole, 504 U.S. 158, 165–66 (1992) (noting that *Harlow* "altered the standard of qualified immunity" by forbidding "judicial inquiry into subjective motivation").

39. Behrens v. Pelletier, 516 U.S. 299, 306 (1996) (stating *Harlow* "adopted [a] criterion of 'objective legal reasonableness,' rather than good faith" (quoting *Harlow*, 457 U.S. at 819)).

40. Crawford-El v. Britton, 523 U.S. 574, 587–88, (1998) (noting that *Harlow* adopted "a single objective standard" and that the "defendant's subjective intent is simply irrelevant").

41. 475 U.S. 335 (1986).

42. *Id.* at 341 (emphasis added).

43. *See id.*

44. Davis v. Scherer, 468 U.S. 183, 191 (1984).

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

46. *See, e.g.*, City of Tahlequah v. Bond, 142 S. Ct. 9, 11 (2021); Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018); District of Columbia v. Wesby, 138 S. Ct. 577, 585 (2018); Ziglar v. Abbasi, 137 S. Ct. 1843, 1867 (2017); White v. Pauly, 137 S. Ct. 548, 551 (2017); Mullenix v. Luna, 577 U.S. 7, 12 (2015); Taylor v. Barkes, 575 U.S. 822, 825 (2015); City & County of San Francisco v. Sheehan, 575 U.S. 600, 611 (2015); Carroll v. Carman, 574 U.S. 13, 17 (2014); Stanton v. Sims, 571 U.S. 3, 6 (2013). For a case in which the Court declared that subjective knowledge is relevant, but without citing the axiom from *Malley*, see *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 167–68 (2016) ("Qualified immunity may be overcome . . . if the defendant knew or should have known that his conduct violated a right 'clearly established' at the time of the episode in suit." (quoting Filarsky v. Delia, 566 U.S. 377, 394 (2012) (Ginsburg, J., concurring))).

47. *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1866 (2017) ("Whether qualified immunity can be invoked turns on the 'objective legal reasonableness' of the official's acts." (quoting Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982))); Messerschmidt v. Millender, 565 U.S. 535, 546 (2012) ("[W]hether an official protected by qualified immunity may be held personally liable for an allegedly

A second complication comes from the 2017 case of *Ziglar v. Abbasi*.[48] In *Ziglar*, the Court repeated its familiar line from *Malley*: "the Court has held that qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'"[49] Instead of simply moving on to the substance of its qualified immunity analysis, however, the Court described the *Malley* standard in a bit more detail:

> To determine whether a given officer falls into either of those two categories, a court must ask whether it would have been clear to a reasonable officer that the alleged conduct "was unlawful in the situation he confronted." If so, then the defendant officer must have been either incompetent or else a knowing violator of the law, and thus not entitled to qualified immunity. If not, however—*i.e.,* if a reasonable officer might not have known for certain that the conduct was unlawful—then the officer is immune from liability.[50]

This statement appears to excise any inquiry into subjective knowledge. To determine whether an officer is "plainly incompetent" or has "knowingly violated the law," *Ziglar* instructs courts to "ask whether it would have been clear to a reasonable officer that the alleged conduct was unlawful in the situation he confronted."[51] If a reasonable officer would have known that her actions were unconstitutional, then a court may—or perhaps *must*—conclude that the officer who actually took those actions *knew* that they were unconstitutional.[52]

Ziglar's assertion that objective unreasonableness is evidence that an officer subjectively knew that his actions were unlawful appears to conflate objective and subjective knowledge—a view that is plainly out of step with common understandings of subjective knowledge.[53] Given this, it appears that the Court was attempting to walk back its apparent embrace of subjectivity in *Malley* and other cases, without explicitly disclaiming those assertions.

So where does this leave us? The answer is unclear. On one hand, the Court has often stated that *Harlow* "eliminated the subjective component of the qualified immunity [defense]" and has never disowned this claim.[54] On the other hand, the Court has frequently

unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." (quoting *Anderson*, 483 U.S. at 639)).

48. 137 S. Ct. 1843 (2017).

49. *Id.* at 1867 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

50. *Id.* (citation omitted) (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)).

51. *Id.* (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)).

52. *See id.*

53. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 842 (1994) (holding that evidence of unreasonableness is not sufficient to prove actual knowledge).

54. United States v. Leon, 468 U.S. 897, 922 n.23 (1984).

observed that "those who knowingly violate the law" are not protected by qualified immunity.[55] And most recently, the Court has oddly asserted that proof of objective unreasonableness indicates subjective knowledge.[56] Given all of this, Supreme Court precedent certainly leans towards objectivity, but fails to clearly preclude subjectivity.

C. *Subjective Knowledge in the Lower Courts*

In contrast to the Supreme Court, the lower federal courts appear to have firmly embraced the view that "an officer's subjective belief is 'irrelevant' for qualified immunity purposes."[57] To be sure, lower courts frequently trot out *Malley*'s axiom that qualified immunity does not protect those who "knowingly violate the law."[58]

Yet, this phrase appears to be little more than an unthinking recitation of boilerplate, rather than an assertion of positive law. Indeed, courts seem to be so oblivious to the inconsistency between these two conceptions of qualified immunity that they will sometimes

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

56. *See Ziglar*, 137 S. Ct. at 1867.

57. Bustillos v. City of Artesia, 98 F.4th 1022, 1030 (10th Cir. 2024); *see also* Davis v. Owens, 973 F.2d 574, 576 (7th Cir. 1992) ("Because the inquiry is purely an objective one, an officer's subjective intent and beliefs are irrelevant."); Delacueva v. Tex. Alcoholic Beverage Comm'n, 182 F.3d 913, 1999 WL 422947, at *1 (5th Cir. 1999) ("[B]ecause the test is one of objective reasonableness, the agents' motivations and subjective beliefs as to the lawfulness of their conduct are irrelevant."); Duamutef v. Hollins, 297 F.3d 108, 113 (2d Cir. 2002) ("It has long been established that the qualified immunity standard of Harlow and its progeny is an objective one. An official's subjective intent, motivation or belief is generally irrelevant." (citation omitted)); Lassiter v. Ala. Agric. & Mech. Univ. Bd. of Trs., 28 F.3d 1146, 1150 (11th Cir. 1994) ("The subjective intent of government actor defendants plays no part in qualified immunity analysis."); Henry v. Purnell, 652 F.3d 524, 535 (4th Cir. 2011) (stating that "objectivity has been the touchstone of qualified immunity law for nearly thirty years," and under *Anderson v. Creighton*, "an officer's subjective belief about the nature of his conduct is 'irrelevant' for qualified immunity purposes"); Grant v. City of Pittsburgh, 98 F.3d 116, 123 (3d Cir. 1996) ("*Harlow* teaches that whether the [defendants] in fact knew that they were violating plaintiffs' constitutional rights is simply irrelevant . . . ."); Halperin v. Kissinger, 807 F.2d 180, 186 (D.C. Cir. 1986) ("It is clear from the Court's [*Harlow*] opinion that the qualified immunity defense is not to be denied because the defendant official in fact knew (even though most people would not) that his action was categorically unlawful . . . .").

58. *See, e.g.*, Liu v. Phillips, 234 F.3d 55, 57 (1st Cir. 2000); Dancy v. McGinley, 843 F.3d 93, 106 (2d Cir. 2016); Bryan v. United States, 913 F.3d 356, 362 (3d Cir. 2019); Caraway v. City of Pineville, 111 F.4th 369, 381 (4th Cir. 2024); Sauceda v. Lopez, 125 F.4th 634, 638 (5th Cir. 2025); Jackson-Gibson v. Beasley, 118 F.4th 848, 853 (6th Cir. 2024); McGee v. Parsano, 55 F.4th 563, 570 (7th Cir. 2022); Martin v. Turner, 73 F.4th 1007, 1010 (8th Cir. 2023); Perez v. City of Fresno, 98 F.4th 919, 924 (9th Cir. 2024); Apodaca v. Raemisch, 864 F.3d 1071, 1076 (10th Cir. 2017); Jordan v. Mosley, 487 F.3d 1350, 1354 (11th Cir. 2007).

recite them one after the other. For example, a recent Eleventh Circuit opinion explained that the qualified immunity standard was "wholly objective" and then stated, inexplicably: "[t]his 'standard of objective reasonableness' provides protection to 'all but the plainly incompetent or those who knowingly violate the law.'"[59] Similar examples are easy to find.[60]

Although most courts ignore the inconsistency, a few confront it head on. The most recent and deepest analysis can be found in *Frasier v. Evans*.[61] In *Frasier*, police officers briefly detained a man whom they believed had videotaped their use of force against another person.[62] The man filed suit, asserting that the detention violated his First Amendment right to record police activity in a public place.[63] Claiming qualified immunity, the officers argued that, because neither the Supreme Court nor the Tenth Circuit had ever declared such behavior to be unconstitutional, they did not violate any "clearly established law."[64] Responding to this argument, the plaintiff pointed out that, because these officers had recently been informed by their department that the public had a constitutional right to record police activity, these officers *knew* their conduct was unconstitutional.[65]

The facts of *Frasier* thus teed up a contest between the two versions of qualified immunity. If the defense is "wholly objective," then the officers would be immune, despite the fact that they actually knew that their actions were unconstitutional.[66] In contrast, if the defense does not protect those who "knowingly violate the law," then the officers would be liable.[67] In an extensive opinion, the Tenth

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59. King v. Pridmore, 961 F.3d 1135, 1145 (11th Cir. 2020) (quoting Priester v. City of Riviera Beach, 208 F.3d 919, 925 (11th Cir. 2000)).

60. *See, e.g.*, Putman v. Harris, 66 F.4th 181, 186 (4th Cir. 2023) ("[Q]ualified immunity . . . 'protects all but the plainly incompetent or those who knowingly violate the law.' [The defendant] is thus immune from suit if his 'conduct [was] objectively reasonable under the circumstances.'" (citation omitted) (first quoting Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011); and then quoting Raub v. Campbell, 785 F.3d 876, 881 (4th Cir. 2015))); Berg v. County of Allegheny, 219 F.3d 261, 272 (3d Cir. 2000) (declaring in the same paragraph that that an officer's "subjective beliefs . . . are not relevant" to the qualified immunity defense, which does not protect those who "knowingly violate the law"); New v. Denver, 787 F.3d 895, 900 (8th Cir. 2015) ("[T]he *existence* of probable cause turned on Denver's belief that the leaves were marijuana. Qualified immunity does not protect 'the plainly incompetent or those who knowingly violate the law.' Thus, whether the arrest was objectively reasonable for qualified immunity purposes requires an evaluation of the objective credibility of Sgt. Denver's conclusion . . . .").

61. 992 F.3d 1003 (10th Cir. 2021).

62. *See id.* at 1010–11.

63. *See id.* at 1011.

64. *Id.* at 1011–15.

65. *See id.* at 1012.

66. *See id.* at 1015.

67. *Id.* at 1016 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

Circuit sided with the "wholly objective" view.[68] According to the court, the Supreme Court in *Harlow* "adopted an objective test"[69] and had affirmed that test repeatedly.[70] But what of the Supreme Court's repeated assertion that those who "knowingly violate the law" may not claim qualified immunity? The court traced that view of the law to Justice Brennan's concurrence in *Harlow* which was not binding on the court and, in any event, was "not a persuasive reading of the scope of *Harlow*'s holding."[71] As to the many other times the Supreme Court and lower courts have used the phrase "knowingly violated the law," the court held that each of those statements was "dictum."[72]

In sum, lower courts have almost uniformly held that an officer's subjective beliefs are irrelevant to the qualified immunity defense, although they continue to claim that officers who "knowingly violate the law" are not entitled to immunity. Further, this view is based on a reading of *Harlow*—a reading that, as explained in Part III, is subject to some doubt.

D. Subjective Knowledge in Scholarship

Within the legal academy, there is wide acceptance that qualified immunity is a purely objective inquiry that the Supreme Court adopted in *Harlow*. This is evident not just in journal articles,[73] but

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68. *See id.* at 1015.

69. *See id.* (quoting Pueblo Neighborhood Health Ctrs., Inc. v. Losavio, 847 F.2d 642, 645 (10th Cir. 1988)).

70. *See id.* at 1015–16.

71. *Id.* at 1017.

72. *Id.*

73. *See, e.g.*, Baude, *supra* note 19, at 60 ("[I]nstead of the subjective inquiry into intent or motive that marked the good-faith inquiry, qualified immunity has become an objective standard based on case law."); Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 21 (1997) (stating that, in *Harlow*, the Court "move[d] from a dual subjective/objective test to a purely objective test"); Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1414 (2019) (stating that *Harlow*'s "'objective' inquiry . . . did not require subjective good faith on the part of defendants"); Edward C. Dawson, *Qualified Immunity for Officers' Reasonable Reliance on Lawyers' Advice*, 110 NW. U. L. REV. 525, 569 (2016); Gary S. Gildin, *Immunizing Intentional Violations of Constitutional Rights Through Judicial Legislation: The Extension of* Harlow v. Fitzgerald *to Section 1983 Actions*, 38 EMORY L.J. 369, 387 (1989) ("Under *Harlow* . . . intent is irrelevant to the immunity analysis."); Jeffries, *supra* note 20, at 852 ("[In *Harlow*,] the Supreme Court lopped off the subjective branch, leaving only the requirement of 'objective reasonableness of an official's conduct, as measured by reference to clearly established law.'" (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)); Nielson & Walker, *A Qualified Defense of Qualified Immunity*, *supra* note 22, at 1859 ("The *Harlow* Court reversed course and said the standard is objective."); Schwartz, T*he Case Against Qualified Immunity*, *supra* note 21, at 1802 ("[T]he Supreme Court, in *Harlow v. Fitzgerald*,

also in leading textbooks and treatises as well.[74] In the few years after *Harlow* was decided, a couple scholars considered the possibility that an officer's subjective beliefs remained relevant.[75] The same scholars generally concluded, however, that the defense was fully objective.[76]

Although there is wide agreement that qualified immunity is purely objective, some scholars have argued that the defense should be reformed to include subjective knowledge.[77] These arguments, however, are not based on a re-interpretation of *Harlow*, but on the underlying logic of qualified immunity itself. If qualified immunity is needed to protect officers who make "bad guesses in gray areas,"[78] it should not extend to officers who know that their actions are unlawful. Such officers are not making "bad guesses"; they are deliberately choosing unconstitutionality.

In sum, courts and scholars seem to be in wide agreement that, in *Harlow v. Fitzgerald*, the Supreme Court adopted a purely objective approach to qualified immunity. While courts frequently recite dicta stating that "those who knowingly violate the law" may not claim immunity, there are few (if any) modern cases applying that rule. With this point established, the Article turns to an evaluation of *Harlow* itself.

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eliminated consideration of officers' subjective intent and focused instead on whether officers' conduct was objectively unreasonable.").

74. *See, e.g.*, SHELDON H. NAHMOD, 2 CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 8:4 (2024) ("The Court's decision in *Harlow v. Fitzgerald* substantially changed [the] qualified immunity test[s] by largely eliminating the subjective part . . . ." (footnote omitted)); ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.6 at 601 (8th ed. 2021) ("The Court expressly discarded the subjective component [in *Harlow*].").

75. *See, e.g.*, Stephanie E. Balcerzak, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 YALE L.J. 126, 134 n.35 (1985) ("The validity of the concurrence's interpretation of the qualified immunity defense advanced in *Harlow* is highly questionable."); Lisa R. Eskow & Kevin W. Cole, *The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the Specter of Subjective Intent That Haunts Objective Legal Reasonableness*, 50 BAYLOR L. REV. 869, 888 (1998) (stating that "there now exists considerable consensus that *Harlow* precludes any inquiry into a defendant's actual, subjective knowledge of the law").

76. *See* Balcerzak, *supra* note 75, at 134; Eskow & Cole, *supra* note 75, at 888.

77. Chapman, *supra* note 20, at 47–50; Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1941–51 (2018); Gary S. Gilden, *The Neuroscience of Qualified Immunity*, 126 PENN. ST. L. REV. 769, 813 (2022); Carly LaForge, Note, *Qualified Knowledge: The Case for Considering Actual Knowledge in Qualified Immunity Jurisprudence as It Relates to the First Amendment Right to Record*, 64 WM. & MARY L. REV. 851, 875 (2023); Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 22, at 236.

78. Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992).

II. *HARLOW* AND SUBJECTIVE KNOWLEDGE

If *Harlow* supposedly adopted a purely objective approach to qualified immunity, it is worth looking deeply at the case itself. In this regard, there is a valuable resource that scholars have thus far left untapped: the papers of Justice Lewis Powell.[79] Powell, the author of *Harlow*, maintained detailed records of his chambers' work on every case, including draft opinions, internal memoranda, and communications with other justices.[80]

Relying heavily on the "Powell Papers," this Part recounts the decision in *Harlow*. It begins by explaining the challenge that Powell faced: how to secure at least five votes for a "wholly objective" approach to qualified immunity, while several members of the Court (led by Justice Brennan) preferred an approach that was both objective and subjective. The Part then explains how this conflict informed the final opinion and examines the degree to which *Harlow* adopts a wholly objective approach. It concludes that, while *Harlow*'s rhetoric heavily favors an objective approach, there are reasons both internal and external to the opinion that suggest a different reading. The Part finishes by summarizing the lessons of *Harlow* and briefly noting the role of "judicial history" in discerning the meaning of legal precedent.

A. Building a "Bare Majority"

The story of *Harlow* is dependent in part on the story of its companion case, *Nixon v. Fitzgerald*.[81] The two cases arose from the same nucleus of facts in the Nixon White House, were argued together on November 20, 1981, and were both resolved with opinions on June 24, 1982.[82] Most importantly for our purposes, Justice Lewis Powell was tasked with writing the majority opinion in both cases.[83]

Powell focused on the *Nixon* opinion first. Depending on how the case was framed, which was a major point of contention among the justices, several different issues were at play. One issue was whether the plaintiff, Arthur Fitzgerald, could sue former President Nixon under the newly-developed *Bivens* doctrine,[84] and another issue was whether a President should be entitled to absolute immunity from

79. Justice Powell's papers are physically maintained at Washington & Lee University School of Law, but portions of his papers have been digitized and are available online. *See Lewis F. Powell Jr. Papers*, WASH. & LEE SCH. OF L. SCHOLARLY COMMONS (2025), https://perma.cc/K372-NNMH.

80. *See Lewis F. Powell Jr. Papers: Supreme Court Case Files*, WASH. & LEE SCH. OF L. SCHOLARLY COMMONS (2025), https://perma.cc/G7CN-LZ75.

81. 457 U.S. 731 (1982).

82. Harlow v. Fitzgerald, 457 U.S. 800 (1982); *Nixon*, 457 U.S. at 731.

83. *Harlow*, 457 U.S. at 802; *Nixon*, 457 U.S. at 733.

84. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971).

civil liability.[85] Within weeks of oral argument, it became clear that the justices were split three ways. Some justices preferred to rule in favor of Nixon on *Bivens* grounds; some justices preferred to rule in favor of Nixon on immunity grounds; and some justices preferred to dismiss the case as improvidently granted.[86] The result was a three-way split which would, at best, produce a plurality opinion.[87]

Justice Powell's own preference was to rule in favor of Nixon via *Bivens*, a preference also shared by Justice Stevens.[88] Yet, Powell recognized that resolving such an important and politically charged case via a plurality opinion was particularly undesirable.[89] Thus, he dropped the *Bivens* approach and instead opted for absolute immunity.[90] Stevens followed suit and, together with the original proponents of absolute immunity (Chief Justice Burger and Justices Rehnquist and O'Connor), a five-vote majority formed.[91]

The members of the five-vote majority in *Nixon* impacted Powell's approach to *Harlow*. In *Harlow*, Powell's preferred view was that presidential aides should only be entitled to qualified immunity, but he also knew that at least some of those in the *Nixon* majority (in particular, Burger and Rehnquist) favored absolute immunity in this case as well.[92] Therefore, Powell could not carry his *Nixon* majority over to *Harlow*. Instead, he was forced to look to the *Nixon* dissenters for support. Of the dissenters—Justices White, Brennan, Marshall and Blackmun—Justice White was a natural partner.

White had a keen interest in the qualified immunity doctrine and had previously attempted to re-cast the test as purely objective.[93] Powell had come to share that view and, regardless, Powell knew that

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85. *See* Justice Lewis F. Powell, Jr., Letter to Chief Justice Warren E. Burger, Nixon v. Fitzgerald, No. 79-1738 (Dec. 17, 1981) (on file with Wash. & Lee Univ. Sch. Of L., Lewis F. Powell, Jr. Papers, Box 81, at 128), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1134&context=casefiles [hereinafter POWELL PAPERS: *Nixon*].

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *See* Justice Lewis F. Powell, Jr., Memorandum to Dick Fallon, Law Clerk, U.S. Sup. Ct., Harlow v. Fitzgerald, No. 80-945 (Mar. 1, 1982) (on file with Wash. & Lee Univ. Sch. Of L., Lewis F. Powell, Jr. Papers, Box 84, at 3–4) https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1139&context=casefiles [hereinafter POWELL PAPERS: *Harlow*].

93. *See* Wood v. Strickland, 420 U.S. 308, 309, 321 (1975); *see also* Justice Byron White, Memorandum of Justice White, Kissinger v. Halperin (Apr. 9, 1981), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 67–69 (criticizing the use of subjective knowledge in assessing qualified immunity).

he needed at least White's vote.[94] Moreover, White had suggested to him that adopting a purely objective approach might be enough to secure the votes of "the Chief and possibly even Rehnquist."[95] The alternative—retaining the subjective element—would not only alienate White but also produce a "badly fractured Court."[96] Having jumped through hoops to avoid a plurality opinion in *Nixon*, Powell was eager to avoid the same result in *Harlow*.

Accordingly, when Powell circulated his first draft opinion to the Court on March 17, 1982, he was aiming for a compromise. Justices on the right—mainly Burger and Rehnquist—might prefer absolute immunity, but could perhaps be persuaded to settle for a purely objective version of qualified immunity. Justices on the left—Brennan, Blackmun and Marshall—preferred qualified immunity to absolute immunity, but could perhaps be persuaded to accept a fully objective approach, especially if their fellow dissenter in *Nixon* (White) favored that approach.[97]

The March 17 draft contains much of the logic and language found in the final opinion issued on June 24, 1982.[98] As with the final opinion, the March 17 draft posits that inquiring into "an official's subjective good faith" creates "[l]itigation burdens" that "distract officials from the performance of their duties."[99] The burdens arise from the wide-ranging discovery that plaintiffs pursue in an effort to establish bad faith, and from the fact that evidence of bad faith creates "a question of fact" that prevents summary judgment.[100] Given these problems with the objective prong of qualified immunity, the draft opinion "defin[ed] the limits on a high official's qualified immunity solely in 'objective' terms."[101] Under this objective test, "executive officials are shielded from liability for civil damages insofar

94. Justice Lewis F. Powell, Jr., Memorandum to Dick Fallon, Law Clerk, U.S. Sup. Ct. (Mar. 1, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 3; *see also* Justice Lewis F. Powell Jr., Letter to Justice John Paul Stevens, Jr. (Mar. 15, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 13 (noting that, even if White joined Powell's majority opinion in Harlow, "one of our Brothers who were with Byron last Term" would still be needed to make a majority).

95. Justice Lewis F. Powell, Jr., Memorandum to Dick Fallon, Law Clerk, U.S. Sup. Ct. (Mar. 1, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 3–4.

96. *Id.*

97. *See* Nixon v. Fitzgerald, 457 U.S. 731, 764–65 (1982) (White, J., dissenting).

98. *Compare* Justice Lewis F. Powell, Jr., Draft Opinion, Harlow v. Fitzgerald (Mar. 17, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 140, *with* Harlow v. Fitzgerald 457 U.S. 800, 816 (1982).

99. Justice Lewis F. Powell, Jr., Draft Opinion, Harlow v. Fitzgerald (Mar. 17, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 139–40.

100. *Id.*

101. *Id.* at 143.

as their conduct does not violate 'settled, indisputable' legal rights of which they reasonably should have known."[102]

Within a couple weeks of circulating his draft opinion, Powell had his majority. As expected, White joined, as did Justice Stevens.[103] Then, on April 1, Rehnquist and O'Connor both signaled their willingness to join—provided some small changes could be made.[104] Rehnquist proposed some language to further emphasize the objective nature of the inquiry,[105] and O'Connor sought the deletion of two sentences that seemed to define "settled, indisputable" law in a way that was too favorable to government officials.[106] Powell was happy to accommodate these changes and, by April 5, Rehnquist and O'Connor formally joined his opinion.[107]

By early April, Powell also knew that he had lost at least one of the holdouts: Burger, Brennan, Blackmun and Marshall.[108] On March 18, Chief Justice Burger wrote a letter to Powell sharply criticizing the draft opinion's application of qualified immunity—as compared to absolute immunity—to high-ranking federal officials.[109] Then, on March 30, Burger circulated a draft dissent arguing that high-ranking officials should be entitled to absolute immunity.[110] Losing Burger was not ideal, but given that O'Connor and Rehnquist had agreed to join Powell's majority opinion *after* Burger had circulated his dissent, this bode well for Powell retaining a five-vote majority.[111]

Of course, Powell wished to do more than retain a five-vote majority. Ideally, he would prefer to have eight votes. Securing three additional votes, however, would prove somewhat complicated.

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102. *Id.* at 142 (quoting Wood v. Strickland, 420 U.S. 308, 321 (1975)).

103. *See* Justice Lewis F. Powell, Jr., Chart Recording Votes by Supreme Court Justices in Harlow v. Fitzgerald, *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 124.

104. *See* Justice Sandra Day O'Connor, Letter to Justice Lewis F. Powell, Jr. (Apr. 1, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 29; Letter from Justice William H. Rehnquist to Justice Lewis F. Powell, Jr. (Apr. 1, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 27–28.

105. Justice William H. Rehnquist, Letter to Justice Lewis F. Powell, Jr. (Apr. 1, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 27–28.

106. Justice Sandra Day O'Connor, Letter to Justice Lewis F. Powell, Jr. (Apr. 1, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 29.

107. Justice Lewis F. Powell, Jr., Chart Recording Votes by Supreme Court Justices in Harlow v. Fitzgerald, *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 124.

108. *See* Chief Justice Warren E. Burger, Draft Dissent, Harlow v. Fitzgerald, *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 19.

109. *See* Chief Justice Warren E. Burger, Letter to Justice Lewis F. Powell, Jr. (Mar. 18, 1982), *in* POWELL PAPERS: *Nixon*, *supra* note 85, at 140.

110. Chief Justice Warren E. Burger, Draft Dissent, Harlow v. Fitzgerald, *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 19.

111. *See id.*; Justice Lewis F. Powell, Jr., Chart Recording Votes by Supreme Court Justices in Harlow v. Fitzgerald, *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 124.

B. *Brennan's Confusion*

The first sign of trouble came on May 19, 1982.[112] On that day, Justice Brennan sent a memo to Powell that should have set off alarm bells—but apparently did not.[113] In the memo, Brennan expressed general agreement with Powell's overall approach, but objected to the term "indisputable legal rights": a precursor to the now ubiquitous "clearly established rights."[114] In the scheme of things, this was a small issue—one that Powell was happy to, and did in fact, address to Brennan's satisfaction.[115] Yet, a much bigger issue lurked in Brennan's memo.

In expressing his general agreement with the qualified immunity test in Powell's opinion, Brennan laid out his understanding of the test.[116] As he put it: "You have defined the new substantive standard of liability to be objective in the sense that an official's 'qualified immunity would be defeated if [he] "knew or reasonably should have known that the action he took"'" was unconstitutional.[117] Brennan thought this formulation was appropriate, continuing: "[t]o my mind, the relevant intent inquiry should focus on the official's attentiveness to ascertainable law, on what the official 'knew or should have known.'"[118] These passages reveal that Brennan was under the impression that Powell's opinion *retained* subjective knowledge as part of the qualified immunity test.

It is hard to know what to make of Brennan's reading of the draft opinion. The draft repeatedly criticizes the subjective prong and then concludes by stating that qualified immunity should therefore be "defin[ed] . . . solely in 'objective' terms."[119] Thus, it is hard to see how Brennan could draw from the opinion that an officer's subjective knowledge remained relevant.[120]

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112. *See* Justice William J. Brennan, Jr., Letter to Justice Lewis F. Powell, Jr. (May 19, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 74–76.

113. *See id.*

114. *Id.*

115. Justice Lewis F. Powell, Jr., Letter to Justice William J. Brennan, Jr. (May 26, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 88.

116. *See* Justice William J. Brennan, Jr., Letter to Justice Lewis F. Powell, Jr. (May 19, 1982) *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 74–76.

117. *Id.* (quoting Justice Lewis F. Powell, Jr., Draft Opinion, Harlow v. Fitzgerald (Mar. 17, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 138 (alteration in original) (emphasis omitted)).

118. *Id.*

119. Justice Lewis F. Powell, Jr., Draft Opinion, Harlow v. Fitzgerald (Mar. 17, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 143.

120. A memo from Justice Blackmun's clerk to Blackmun suggests that Brennan may have taken some interpretive liberties in his reading of the majority opinion. Memorandum from Harold Koh, Law Clerk, Sup. Ct., to Justice Harry A. Blackmun (n.d.) (on file with author). The memo states that Brennan's "brief concurring opinion . . . endorses LP's [Justice Powell's] standard, but cleverly emphasizes a different part of LP's opinion. Rather than citing the

There is an aspect of the March 17 draft that supported Brennan's view, however. The March 17 draft and several later drafts contained a sentence on page 18 that described the test in subjective terms: "Where an official knows that his conduct will violate constitutional rights, he should be made to hesitate."[121] Indeed, a week after Brennan's memo, Justice O'Connor called Powell's attention to the problematic sentence in a memo of her own. She wrote:

> As you know, I have previously joined this opinion and I am still with you. I write this only to seek clarification of the last full sentence on page 18. It states that knowledge by an official that his conduct will violate statutory or constitutional rights is sufficient for liability. However, on the preceding pages, and at page 17, I understood the draft to indicate that the subjective element is being discarded and that liability will be imposed only when the official conduct violates clearly established rights of which a reasonable person would have known. Does this sentence on page 18 reintroduce a subjective test?[122]

Therefore, Brennan's view that an officer's actual knowledge remained relevant was not wildly out of step with the draft opinion. His reading was not the only reasonable reading, but a close reading of the opinion reveals it to be more ambiguous than at first glance.

Whether Brennan's view of the draft opinion was justified is ultimately unimportant given the fact that, eight days later on May 27, Brennan circulated a draft concurrence that repeated his view that Powell's opinion had adopted a "knew or should have known" standard.[123] The concurrence opened as follows: "I agree with the substantive standard announced by the Court today, imposing liability when a public-official defendant 'knew or should have known' of the constitutionally violative effect of his actions . . . ."[124] Given this, Brennan continued, "it seems inescapable . . . that some measure of discovery may sometimes be required to determine exactly what a public official did 'know' at the time of his actions."[125]

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standard stated on p. 17 of LP's Draft, WJB [Justice Brennan] now cites the 'knew or should have known' language employed on pp. 15 and 18. WJB's emphasis effectively saves the important aspect of the 'subjective good faith' prong of the *Wood v. Strickland* test." *See id.* at 3 ("The net result of all this seems to be that *Harlow* has not really altered the law very much.").

121. Justice Lewis F. Powell, Jr., Draft Opinion, Harlow v. Fitzgerald (Mar. 17, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 143–44.

122. Justice Sandra Day O'Connor, Letter to Justice Lewis F. Powell, Jr. (May 26, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 91.

123. Justice William J. Brennan, Jr., Draft Concurring Opinion (May. 27, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 94.

124. *Id.*

125. *Id.*

Brennan's draft concurrence prompted a sharp memo from Dick Fallon, Justice Powell's clerk:

> I don't know what to make of this. WJB deliberately misreads the opinion as requiring an inquiry—at least in some cases—into what a particular official actually knew. This is "subjective" in the sense of requiring discovery into a particular official's knowledge of the law—possibly a different inquiry from what an official could reasonably have been expected to know. In so reading the opinion, WJB cites page 15—apparently the quotation from *Wood* concerning the present law, rather than the new standard created by the opinion. The quoted words do not appear on page 18, the other page that he cites. After Justice O'Connor's requested change is made, there will be no ambiguity on page 18.
>
> What to do? WJB has not joined the opinion. According to his clerks, he and several others are awaiting the lead of BRW. I think it probably is best for now to wait for White. Without strong pressure from BRW, I think it may ultimately be important even to point out that WJB is wrong—that the opinion does not contemplate the kind of inquiry to which he refers.[126]

Fallon's statement that "WJB has not joined the opinion" was correct when he wrote it, but not for long. The next day, Brennan confirmed that he joined in Powell's opinion.[127] A couple days later, Blackmun and Marshall also joined Powell's opinion.[128] This was a positive development, except that Blackmun and Marshall *also* joined Brennan's concurrence.[129]

Thus, at the end of May 1982, with the term set to close in a few weeks, Powell had secured eight votes for his majority opinion, but a concurring opinion with three votes announced a rule that appeared to be in significant tension with the majority opinion. By June 7, however, the matter would be resolved.[130]

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126. Dick Fallon, Law Clerk, U.S. Sup. Ct., Memorandum to Justice Lewis F. Powell, Jr. (May 27, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 96.

127. Justice William J. Brennan, Jr., Letter to Justice Lewis F. Powell, Jr. (May 28, 1982) *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 98.

128. Justice Lewis F. Powell, Jr., Chart Recording Votes by Supreme Court Justices in Harlow v. Fitzgerald, *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 124.

129. Justice Harry A. Blackmun, Letter to Justice William J. Brennan, Jr. (May 31, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 100; Justice Thurgood Marshall, Letter to Justice William J. Brennan, Jr. (June 2, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 101.

130. Justice Lewis F. Powell, Jr., Letter to File (June 7, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 113; Justice Sandra Day O'Connor, Letter to Justice Lewis F. Powell, Jr. (June 7, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 116.

C. Building a "[S]trong Court"

As Fallon recognized in his memo to Powell, Justice White was likely best positioned to address this problem.[131] White was a fellow dissenter with Brennan, Blackmun, and Marshall in *Nixon*, and thus shared some sensibilities with the three on the issue of official immunity.[132] White did not enter the picture right away, however.

On Thursday, June 3, 1982, Brennan wrote a letter to Powell (with copies to the entire Court) explaining his rationale.[133] Using a phrase that would later appear in his concurrence, Brennan argued that a fully objective approach would wrongfully allow "the clever and unusually well-informed violator of constitutional rights [to] evade just punishment for his crimes."[134] That same day, Powell drafted a response to Brennan but never sent it.[135] Instead, he shared it with White.[136]

Though Powell apparently never shared his letter with Brennan, the response is telling because it reveals Powell's surprising willingness to compromise. Instead of attempting to bring Brennan over to his view, Powell instead sought to "accommodate[]" Brennan's views by "returning to the word 'knows' on page 18," provided that the plaintiff makes an "objective showing" of knowledge rather than a "bare averment."[137]

Powell's inclination to compromise here is especially surprising given that he already had five votes for his majority opinion. What was apparently on Powell's mind was the unwelcome prospect that *Harlow* might turn out as *Nixon* already had: with a 5-4 split on a politically charged issue.[138] In asking for Brennan's vote (which presumably came with Blackmun's and Marshall's votes as well), Powell wrote "[t]hough not necessary, I think also it would be beneficial if there could be a strong Court rather than a bare margin of five votes."[139]

When he received Powell's draft letter to Brennan, White went to work developing some new language to appease Brennan. On Saturday, June 5, White sent Powell some proposed language.[140]

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131. Dick Fallon, Law Clerk, U.S. Sup. Ct., Memorandum to Justice Lewis F. Powell, Jr. (May 27, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 96–97.

132. Nixon v. Fitzgerald, 457 U.S. 731, 733 (1982).

133. Justice William J. Brennan, Jr., Letter to Justice Lewis F. Powell, Jr. (June 3, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 104–05.

134. *Id.* at 105.

135. Justice Lewis F. Powell, Jr., Letter to Justice William J. Brennan, Jr. (June 3, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 102–03.

136. *Id.* at 102.

137. *Id.*

138. *Id.* at 103.

139. *Id.*

140. Justice Byron White, Letter to Justice Lewis F. Powell, Jr., (June 5, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 106.

Fallon reviewed it, proposed some edits[141] and, by Monday, June 7, Powell and White were ready to take the new language to Brennan.[142] They met with Brennan together that same day and Brennan agreed to it—a fact that Powell marked in his notes with the word "Cheers!"[143]

D. Harlow *Reconsidered*

"Cheers" for what? Presumably, Powell was cheered by the fact that, with the Court's term set to close in a few weeks, he was able to resolve a dispute with three potential dissenters in a major case. But what exactly did the resolution entail? Did Brennan secure sweeping changes to the opinion that favored his preferred view, or did Brennan capitulate to Powell's view?

The answer is uncertain. First, there are the changes to the opinion itself. These changes fall far short of embracing subjective knowledge, but they do suggest that subjective knowledge could be relevant. This makes sense given that the changes were meant to appease Brennan who, incidentally, edited his concurrence after the June 7 meeting to more strongly declare that subjective knowledge was relevant.[144] Second, and more supportive of the view that *Harlow* did not fully banish inquiries into "subjective knowledge," there is evidence that *Harlow* was chiefly concerned with allegations of "malice"—an allegation that was considered by some to be distinct from subjective knowledge.[145] Third and finally, Justices Powell and White both conspicuously described qualified immunity as containing a "know or should have known" standard in the years after *Harlow*.[146]

1. Changes to the Opinions

When Justices Powell and White met with Brennan on the morning of June 7, they presented him with proposed edits to the latest draft

141. Dick Fallon, Law Clerk, U.S. Sup. Ct., Memorandum to Justice Lewis F. Powell, Jr. (June 6, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 111–12.

142. Justice Lewis F. Powell, Jr., Letter to File (June 7, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 113.

143. *Id.* In addition to reaching a compromise with Brennan on Monday, June 7, Powell apparently also informed Justice O'Connor of the changes to the opinion. That same day, Justice O'Connor wrote to Powell: "I have no objection to the proposed change. It is still primarily an objective test." Justice Sandra Day O'Connor, Letter to Justice Lewis F. Powell, Jr. (June 7, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 116.

144. Justice Lewis F. Powell, Jr., Letter to File (June 7, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 113–14.

145. Justice Lewis F. Powell, Jr., Memorandum to Dick Fallon, Law Clerk, U.S. Sup. Ct. (Mar. 1, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 3.

146. *See infra* Section II.D.3.

opinion, which had been circulated four days prior on June 3.[147] Brennan ostensibly accepted these edits, which were then incorporated into next draft, which was circulated the following day on June 8 and became part of the final opinion.[148] The chart below compares the key portions of the two excerpts.

147. Justice Lewis F. Powell, Jr., Draft Opinion, Harlow v. Fitzgerald (June 3, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 113–14.
148. Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982).

Majority Opinion	
June 3 Draft	**June 8 Draft**
On summary judgment, the judge appropriately may determine what the law was at the time an action occurred and in most cases what a reasonable person could have been expected to know about it. Until this threshold immunity question is resolved, extensive discovery generally should not be allowed.[149]	On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was "clearly established" at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, however, the immunity defense ordinarily should fail since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.[150]

149. Justice Lewis F. Powell, Jr., Draft Opinion, Harlow v. Fitzgerald (June 3, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 223 (footnote omitted).

150. Justice Lewis F. Powell, Jr., Draft Opinion, Harlow v. Fitzgerald (June 8, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 243 (footnote omitted); *see also Harlow*, 457 U.S. at 818–19.

At first glance, the text of the June 8 draft seems to offer Brennan little. The replacement language repeatedly points to the primacy of "clearly established" law—which is the core of the objective approach.[151] Moreover, to the extent that an officer's mental state is relevant, it is to protect the officer from liability, not to establish it.

At the same time, a different reading of the changes is at least plausible. Consider the new language from the perspective of a district court judge looking to *Harlow* for guidance in resolving a defendant's motion for summary judgment. The opinion directs the judge to "determine . . . whether [the] law was clearly established at the time an action occurred" and, if not, then to grant immunity because the official could not "fairly be said to 'know' that [his conduct was unlawful]."[152] This instruction focuses on clearly established law, but also makes clear that the *purpose* of inquiring into clearly established law is to discern an officer's presumptive knowledge. If that knowledge can be separately proven, then it only makes sense that the qualified immunity analysis follow this proof rather than rely on the proxy of clearly established law.

Several other points are worth noting. First, it cannot be forgotten that the changes were apparently intended to offer Brennan *something* of value. Perhaps Powell and White simply persuaded Brennan to abandon his position, or that Brennan was somehow hoodwinked. These scenarios seem unlikely, however.[153] Indeed, the day after three Justices agreed on the "compromise" language, Brennan circulated a more emphatic concurrence.[154] While his earlier concurrence simply stated that officers should be held liable if they "'knew or should have known' of the constitutionally violative effect of [their] actions,"[155] the new concurrence went into more detail:

> This standard would not allow the official who *actually knows* that he was violating the law to escape liability for his actions, even if he could not "reasonably have been expected" to know what he actually did know. Thus the clever and unusually well-

151. *Harlow*, 457 U.S. at 818–19.

152. *Id.* at 818.

153. Justice Brennan's papers, which are held at the Library of Congress, do not contain any reference to his June 7 meeting with Justices Powell and White. Nor do the Papers contain any reference to the new language added to the June 8 draft opinion. Similarly, Justice Blackmun's, Marshall's and White's papers, which are also held at the Library of Congress, do not contain any reference to these issues.

154. *See* Justice William J. Brennan, Jr., Draft Concurring Opinion, Harlow v. Fitzgerald, No. 80-945 (June 9, 1982) (on file with The Burger Ct. Opinion Writing Database, at 19), https://perma.cc/8P2E-T7FL [hereinafter BURGER CT. DATABASE: *Harlow*].

155. Justice William J. Brennan, Jr., Draft Concurring Opinion, Harlow v. Fitzgerald (May. 27, 1982), in POWELL PAPERS: *Harlow*, *supra* note 92, at 94.

> informed violator of constitutional rights will not evade just punishment for his crimes.[156]

Brennan's circulation of a more emphatic concurrence is particularly notable given that, when Brennan circulated the first draft of his concurrence, Powell's law clerk, Dick Fallon, specifically noted that "it may ultimately be important even to point out that WJB is wrong" in his characterization of the majority opinion.[157] The final opinion does not "point out" any problems with Brennan's concurrence, which could be read as an acceptance of the truth of Brennan's assertions.

Another notable point is a memo from Dick Fallon to Powell about White's proposed changes. Fallon wrote that he had "no difficulty with BRW's suggested 'compromise' language," which again, suggests that the new language was intended to yield some ground to Brennan.[158] Additionally, Fallon noted in his memo that Powell's central concern (*i.e.*, the issue on which Powell sought to "move the law in [his] preferred direction") pertained to officials being held liable when the law was ambiguous.[159] Brennan's preferred position, which was "to make sure that officials can be held liable whenever they personally know that their conduct is unlawful," did not implicate this central concern.[160] Fallon's view is confirmed by Powell's prior opinion in *Wood v. Strickland* in which he objected to any version of qualified immunity that failed to protect officials from ambiguity in the law.[161] If Powell's central concern in *Wood* remained his central concern in *Harlow* (which Fallon's memo suggests), then Powell presumably would have had no objection to holding liable the "clever and unusually well-informed violator of constitutional rights."[162]

In sum, although it seems apparent that Justices Powell and White sought to reach some sort of compromise with Brennan, the specific changes they proposed on June 7 do not appear to offer him much. Perhaps at least Powell and Brennan considered the changes meaningful, but the changes to the opinion do not seem to bear this

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156. *See* Justice William J. Brennan, Jr., Draft Concurring Opinion, Harlow v. Fitzgerald (June 9, 1982), *in* BURGER CT. DATABASE: *Harlow*, *supra* note 154, at 19 .

157. Dick Fallon, Law Clerk, U.S. Sup. Ct., Memorandum to Justice Lewis F. Powell, Jr. (May. 27, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 96.

158. Dick Fallon, Law Clerk, U.S. Sup. Ct., Memorandum to Justice Lewis F. Powell, Jr. (June 6, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 111.

159. *Id.* at 111–12.

160. *Id.* (emphasis omitted).

161. Wood v. Strickland, 420 U.S. 308, 329 (1975) ("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.") (Powell, J., concurring in part).

162. Harlow v. Fitzgerald, 457 U.S. 800, 821 (1982) (Brennan, J., concurring).

out. Nonetheless, there is the possibility that, as explained below, there was a belief that other portions of the opinion might be read to endorse Brennan's position.

2. Knowledge v. Malice

Another way in which Brennan's position might be justified is by distinguishing between malice and knowledge. At first glance, this distinction might seem untenable because, as a matter of general principles, one who acts with knowledge that her actions are unlawful may be deemed to have acted with an unlawful purpose, of which malice would seem to be an example.[163] Yet, although the two concepts are often treated as similar, *Harlow* seems to speak of malice as distinct from knowledge. Consider the following excerpt, which appeared in the early drafts and made it into the final opinion:

> Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with malicious intention to cause a deprivation of constitutional rights or other injury."[164]

The structure of this sentence suggests that the "objective" element of the qualified immunity test consisted of a "knew or should have known" inquiry, and the "subjective" element of the test consisted of a "malicious intention" inquiry. Thus, by abandoning the subjective element of the test, *Harlow* may be read as retaining the objective element—*i.e.*, the "knew or should have known" element.

Further evidence that at least some members of the Court considered knowledge and malice distinct concepts can be found in Justice Powell's files. In a letter to Powell, for example, Justice Brennan agreed that an inquiry into "malicious intention" had no place in the qualified immunity test and that the test should instead focus only on "the official's attentiveness to ascertainable law, on what the official 'knew or should have known.'"[165]

Similarly, in a memorandum to the Court during the prior term, Justice White—the most outspoken supporter of the purely objective approach—stated that, although "[t]he subjective element of the qualified immunity standard . . . was designed to bar an immunity defense to those who acted with 'malice,'" the standard should be reformed so that the defense is not "defeated by a defendant's ill

163. *See, e.g.*, MODEL PENAL CODE § 2.02(2)(a)–(c) (AM. L. INST. 1985).

164. Justice Lewis F. Powell, Jr., Draft Opinion, Harlow v. Fitzgerald (Mar. 17, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 138 (quoting *Wood*, 420 U.S. at 321–22); *see also Harlow*, 457 U.S. at 815.

165. Justice William J. Brennan, Jr., Letter to Justice Lewis F. Powell, Jr. (May 19, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 75.

will."[166] Further, looking to sources outside Powell's papers, Professor Kit Kinports has cataloged numerous examples from the early and mid-1980s in which the "knew or should have known" element of the qualified immunity test was "widely . . . referred to as the objective prong of the defense."[167]

Beyond this evidence, other parts of *Harlow* itself reveal a distinctive focus on malice. In announcing its holding, the opinion focuses solely on malice: "we conclude today that bare allegations of malice should not suffice to subject government officials to either the costs of trial or to the burdens of broad-reaching discovery."[168] Additionally, when critiquing subjectivity, the draft opinion focuses on factors that are consistent with the officer's subjective motivation, not his knowledge of unconstitutionality. Powell wrote in an early draft that discovery could become burdensome because it would inquire into officer's "loyalty, ideology, and emotion,"[169] a phrase that was changed to "experiences, values, and emotions" in the final opinion.[170] If the "objective element" of the test included evidence of an officer's knowledge of the law, "broad-reaching discovery" into factors like loyalty and emotions would not occur.

Further, the facts of *Harlow* itself appear to implicate malice, but not knowledge. Neither party in the case argued that the defendants actually knew (or did not know) that their actions were unconstitutional.[171] Rather, the key factual question was "whether the defendants were engaged in a conspiracy to dismiss Fitzgerald from his job in retaliation for his testimony before a congressional committee concerning cost overruns at the Pentagon."[172] This question rings in malice, not knowledge.

A final point in favor of the view that *Harlow* banished an inquiry into malice but not knowledge concerns the Supreme Court's formal disposition of the case. After holding that the trial court applied the wrong standard, the Court remanded the matter to that court because it was "more familiar with the record so far developed and also is

166. Justice Byron White, Memorandum of Justice White, Kissinger v. Halperin, *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 68.

167. Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 613 (1989); *see, e.g.*, Krohn v. United States, 742 F.2d 24, 31 (1st Cir. 1984) ("What *Harlow* eliminated altogether, as a matter of substance, was not knowledge, but subjective 'malice,' perhaps not spelling out malice sufficiently for those unfamiliar with the broad scope of the term, viz., a 'bad' state of mind not related to knowledge.").

168. Justice Lewis F. Powell, Jr., Draft Opinion, Harlow v. Fitzgerald (Mar. 17, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 142; *see also Harlow*, 457 U.S. at 817–18.

169. Justice Lewis F. Powell, Jr., Draft Opinion, Harlow v. Fitzgerald (Mar. 17, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 140.

170. *Harlow*, 457 U.S. at 816.

171. *See generally* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

172. Kinports, *supra* note 167, at 615.

better situated to make any such further findings as may be necessary."[173] If qualified immunity were a purely legal question—one that ignored the officer's mental state (including malice *and* knowledge)—the Supreme Court could have answered the question itself. The Court was less familiar than the lower court with the "record so far developed," but, if mental state is irrelevant, then familiarity with the record would have been unimportant.[174]

Of course, it is important to acknowledge that the evidence does not point in a single direction. That is, while several members of the Court may have deemed malice to be distinct from knowledge of unconstitutionality, not all of them likely did. Indeed, there is clear evidence from Powell's papers that Justice O'Connor did not. As noted already,[175] Justice O'Connor wrote Powell in May 1982 to "seek clarification" on a sentence that referred to an officer's actual knowledge rather than his presumed knowledge pursuant to clearly established law.[176] Powell shared O'Connor's observation with White, and quickly rewrote the sentence to refer to an officer's objective, rather than subjective, knowledge.[177] Thus, while there is significant evidence that several Justices desired to end inquiries into malice, and may have viewed malice as distinct from knowledge, there is also evidence that several Justices also disapproved of subjective knowledge more generally.

3. Extrinsic Evidence

Beyond the text of *Harlow* and Powell's records of the case, there are two other pieces of evidence that, while extrinsic, are relevant to an assessment of the case's holding. First and most revealing is Justice White's dissent in *Nixon*.[178] Recall that the Court decided *Harlow* and *Nixon* on the same day, and that the cases arose from the same underlying facts.[179] The majority in *Nixon* held that President Nixon was absolutely immune from civil liability: a holding from which Justice White dissented (joined by Justices Brennan, Marshall and Blackmun).[180] In defending his dissenting view that absolute immunity was inappropriate, White pointed out that, without absolute immunity, Nixon would still be entitled to *qualified* immunity.[181]

173. *Harlow*, 457 U.S. at 820.
174. Kinports, *supra* note 167, at 615.
175. *See id.*
176. *Id.*
177. *See* Justice Lewis F. Powell, Jr., Letter to Sandra Day O'Connor (May 26, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 86.
178. Nixon v. Fitzgerald, 457 U.S. 731, 764–97 (1982) (White, J., dissenting).
179. *See supra* notes 81–83 and accompanying text.
180. *Nixon*, 457 U.S. at 749.
181. *Id.* at 764 (White, J., dissenting).

Referring to *Harlow*, White wrote: "Today's decision in *Harlow v. Fitzgerald* makes clear that the President, were he subject to civil liability, could be held liable only for an action that he knew, or as an objective matter should have known, was illegal and a clear abuse of his authority and power."[182] This is a telling characterization of *Harlow*. Justice White, as just recounted above, was an integral part of the negotiations with Brennan over whether subjective knowledge should matter in *Harlow*. He and Powell personally met with Brennan to work out a compromise.[183] Although the compromise language in *Harlow* does not openly embrace subjective knowledge, it would be exceedingly odd for White to coax Brennan into agreeing to language in *Harlow* that rejected subjective knowledge, only to then cede with a clear statement in *Nixon* that subjective knowledge was relevant.

Second, and in a similar vein, White and Powell both summarized qualified immunity as including actual knowledge in *Malley v. Briggs*—a case decided four years after *Harlow*, in 1986.[184] One issue in *Malley* was whether an officer was entitled to qualified immunity when he applied for and obtained an arrest warrant that was later determined to be lacking probable cause.[185] Justices White and Powell—both key players in *Harlow*—wrote the two opinions in the case.[186] Writing for the majority, Justice White described the qualified immunity standard: "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law."[187] White's description of the defense, while at odds with a "wholly objective" approach, was fully consistent with his dissent in *Nixon*.

In partial dissent, Justice Powell wrote that he "agree[d] with [the majority's] characterizations of the applicable standard."[188] Powell further explained that, in *Harlow*, the Court "stated that a claim for qualified immunity 'would be defeated [only] if an official "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff]."'"[189] Powell then added that "[a]t one point in the Court's opinion today, it correctly recognizes that as the 'qualified

182. *Id.* at 782 (White, J., dissenting) (citation omitted).

183. *See* Dick Fallon, Law Clerk, U.S. Sup. Ct., Letter to Justice Lewis F. Powell, Jr. (June 6, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 111–12; *see also* Justice Byron White, Letter to Justice Lewis F. Powell, Jr. (June 7, 1982) *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 115.

184. *See* Malley v. Briggs, 475 U.S. 335, 340 (1986).

185. *Id.* at 338–39.

186. *Id.* at 336.

187. *Id.* at 341.

188. *Id.* at 349 (Powell, J., concurring in part and dissenting in part).

189. *Id.* (Powell, J., concurring in part and dissenting in part) (alterations in original) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982)).

immunity defense has evolved, it provides ample protection to all but the *plainly incompetent or those who knowingly violate the law*.'"[190]

White and Powell's assertions in *Malley* are powerful evidence that the Court in *Harlow* did not intend to banish inquiries into an officer's subjective knowledge. White and Powell, as we have seen, were both key players in crafting the majority opinion in *Harlow* and the June 7 "compromise" reached with Brennan.[191] Interestingly, White and Powell's opinions in *Malley* also support the view that the "knew or should have known" standard was understood as an "objective" standard and that the subjective standard consisted of malice. In White's majority opinion, just after stating that officers who "knowingly violate the law" may not claim immunity, he described the standard as "objective" and stated that "an allegation of malice is not sufficient to defeat immunity."[192] Like White, Powell also described qualified immunity as operating on a standard of "objective reasonableness"—albeit one that subjected officers to liability if they "knew or should have known" of the unconstitutionality of their actions.[193]

E. A Summary and Note on "Judicial History"

So where does this leave us? Looking at the *legal principles* at work in *Harlow*, there is ample basis to incorporate subjective knowledge into the qualified immunity test. If qualified immunity is aimed at ensuring officers have fair notice of the law before being held liable, then it would make logical sense to reject the defense in cases of actual knowledge. Of course, invasive and burdensome discovery is a concern, but discovery into an officer's actual knowledge of the law would presumably prove far less invasive and burdensome than discovery into their motivations and emotions.[194] Further, such a result would fit with the opinion's focus on malice as a mental state distinct from subjective knowledge of the law, as well as with Justice Powell's and White's declarations that subjective knowledge remained part of the qualified test.

The main problem with the above explanation is that it is not borne out by the text of *Harlow* itself. Focusing on the specific language in *Harlow*, rather than the broader legal principles that the Court invoked, the support for evaluating subjective knowledge becomes weaker. The opinion repeatedly refers to "clearly established

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190. *Id.* (Powell, J., concurring in part and dissenting in part) (quoting *id.* at 341 (majority opinion).

191. *See* Dick Fallon, Law Clerk, U.S. Sup. Ct., Letter to Justice Lewis F. Powell, Jr. (June 6, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 111–12; *see also* Justice Byron White, Letter to Justice Lewis F. Powell, Jr. (June 7, 1982), *in* POWELL PAPERS: *Harlow*, *supra* note 92, at 115.

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

193. *Id.* at 349 (Powell, J., concurring in part and dissenting in part).

194. *See* Kinports, *supra* note 167, at 616–18.

law" and cites the cost of "subjective" inquiries.[195] Remaining is the possibility that, while the five or more justices who decided *Harlow* (in the majority, Powell and White; in concurrence, Brennan, Marshall and Blackmun) may have personally *supported* and *believed* that the opinion permitted an inquiry into subjective knowledge, these beliefs are not borne out in an ordinary reading of the opinion itself.[196]

When faced with ambiguity in the context of statutory interpretation, it is not at all uncommon for courts to refer to the beliefs of legislators regarding the content of the legislation.[197] The use of such "legislative history" is neither universally accepted, nor universally rejected.[198] This naturally raises the question of whether, in the context of interpreting a judicial opinion, background information about the beliefs of the judges who signed onto the opinion deserve any weight. This leads to a larger question of whether judges interpreting *Harlow*—or any other case—should rely on "judicial history" when deciding the precedential authority of a case.

As a descriptive matter, the use of "judicial history" is rare, if not non-existent; though it may depend on how one defines "judicial history." In his own study of the topic, Adrian Vermeule put the point bluntly: "Federal courts do not consider the judiciary's internal records as interpretive sources bearing on the meaning of published opinions . . . ."[199] If "judicial history" is expanded to include the briefs and oral arguments in a case, however, reference to those materials seems to be common.[200] As a normative matter, there is little support that the type of materials discussed above, such as Justice Powell's

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

196. As noted above, Justice Blackmun's clerk believed that Brennan's concurrence blunted the emphasis on objectivity in the majority opinion. *See* Memorandum from Harold Koh, *supra* note 120. In the clerk's opinion, "[t]he net result [is] that *Harlow* has not really altered the law very much." *Id.*

197. *See, e.g.*, Delaware v. Pennsylvania, 143 S. Ct. 696, 711–12 (2023).

198. *Compare* Frank H. Easterbrook, *The Role of Original Intent in Statutory Interpretation*, 11 HARV. J.L. & PUB. POL'Y 59 (1988) (arguing that legislators' "intent," to the extent it can even be discerned, should be ignored in statutory interpretation), *with* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) (arguing that legislative history is a permissible source of information, among many other permissible sources, that can shed light on the meaning of a statute).

199. Adrian Vermeule, *Judicial History*, 108 YALE L.J. 1311, 1313 (1999).

200. *See generally* Richard J. Lazarus, *Advocacy History in the Supreme Court*, 2020 SUP. CT. REV. 423 (documenting widespread use of arguments presented in a particular case to determine the holding of that case). For an insightful article considering a related issue, see Charles L. Barzun, *Impeaching Precedent*, 80 U. CHI. L. REV. 1625 (2013) (arguing that historical evidence demonstrating that a judicial decision may have been based on a judge's improper motivation should be relevant, among other factors, to a determination of the precedential authority of that decision).

personal notes and memoranda, should be consulted, though the rarity of their use by judges (as opposed to academics) is a good indication that the practice lacks normative appeal.

Even if the above account of *Harlow* is irrelevant to judges discerning *Harlow*'s holding, it can still be relevant to the collective legal community's assessment of qualified immunity. Modern qualified immunity doctrine was founded in *Harlow* and the case thus is imbued with a particular type of authority, much in the way that "the Founders" are often deemed authoritative on matters of constitutional law. The above account of *Harlow* suggests that qualified immunity's "founding"—much like the founding of the United States—was more complex and nuanced than often appreciated. Attention to this complexity and nuance, in turn, opens the door to critical re-examination, and even rejuvenation, of long-forgotten ways of understanding law, including qualified immunity.

IV. Defending Subjective Knowledge

The previous Part argued that *Harlow* may not have barred subjective knowledge from the qualified immunity test. If that reading of *Harlow* is plausible, then it allows lower courts—perhaps with some creative license—to take account of a defendant's subjective knowledge of unconstitutionality in qualified immunity cases.

The force of precedent only goes so far, however. Obviously, *Harlow*'s holding does not bind the Supreme Court. Thus, even if the Supreme Court concluded that *Harlow* did not discard subjective knowledge, it could simply clarify that, henceforth, subjective knowledge would be irrelevant in the realm of qualified immunity. Further, even if *Harlow* does not clearly prohibit lower courts from considering subjective knowledge, those courts will naturally be reluctant to embrace subjective knowledge unless it is supported by an adequate normative basis. Put differently, even if *Harlow* left open the possibility that subjective knowledge could be relevant, it also expresses a great deal of skepticism towards subjective knowledge—skepticism that has some persuasive value and that might motivate lower courts to stick with their current approach of ignoring subjective knowledge. What response can be made to this skepticism?

This Part offers a normative justification for relying on subjective knowledge in qualified immunity determinations. The defense is three-fold. First, subjective knowledge ought to be relevant to qualified immunity determinations because it furthers the underlying purposes of the defense. Second, despite the court's frequent statements that subjective knowledge is irrelevant to qualified immunity questions, such knowledge actually matters in several categories of cases. Third and finally, in contexts that the Supreme Court has treated as analogous to qualified immunity (including criminal prosecutions under 18 U.S.C. § 242 and

enforcement of the exclusionary rule), subjective knowledge is relevant.

A. *The Purported Justifications for Qualified Immunity*

In *Harlow* itself and in later cases, the Supreme Court has offered two justifications for qualified immunity.[201] First, the defense ensures that officers have "fair notice" that their actions are unlawful before being held liable.[202] Second, the defense prevents officers from being "overdeterred"—*i.e.*, from underenforcing the law out of fear of liability.[203] Scholars have criticized these purported justifications,[204] but even if the defense does in fact further these goals, accounting for subjective knowledge will not defeat them. As explained below, officers who actually know of the unconstitutionality of their actions have sufficient fair notice and are not at risk of being overdeterred.

1. *Providing Fair Notice*

According to the Supreme Court, "[q]ualified immunity operates . . . to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful."[205] This, of course, is a principle that reaches far beyond constitutional litigation,[206] but it is thought to be especially relevant in this area given the indeterminacy of significant portions of constitutional law.[207] The indeterminacy arises not just from constitutional text itself, but also from the fact judges employ different interpretive methodologies and rely on different moral commitments in deciding cases.[208] Further, even where a significant body of precedent appears to clarify a particular rule of law, the implementation of that rule in a given case is subject

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201. Chapman, *supra* note 20, at 6 ("From its initial articulation of the doctrine, the Court said qualified immunity was supported by two policy concerns: the risk of over-deterring law enforcement and the unfairness to officers who lacked notice of liability.").

202. *Id.*

203. *Id.* at 6–7.

204. *See, e.g.*, Schwartz, *How Qualified Immunity Fails*, *supra* note 21, at 62–63 (critiquing the overdeterrence justification for qualified immunity); Chapman, *supra* note 20, at 46 (arguing that qualified immunity, as currently applied, cannot be fully justified by the fair notice rationale).

205. Saucier v. Katz, 533 U.S. 194, 206 (2001).

206. *See* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) ("[A] statute . . . so vague that men of common intelligence must guess at its meaning . . . violates the first essential of due process of law.").

207. *See* Baude, *supra* note 19, at 70 (noting in in the context of qualified immunity's fair notice rationale that "simply reading the Constitution does not always tell an official much about what conduct the law forbids").

208. Chapman, *supra* note 20, at 32–34 (noting indeterminacy caused by interpretive pluralism).

to numerous other variables, including procedural and remedial doctrine—some of which is itself inherently discretionary.[209]

Whatever the merits of using qualified immunity to ensure fair notice, there can be little doubt that, where an officer actually knows that his actions are unconstitutional, there can be no worry that subjecting him to liability will unfairly surprise him. As the Supreme Court has observed, "[w]hile there is obvious unfairness in imposing liability . . . for engaging in conduct that was objectively reasonable when it occurred, no such unfairness can be attributed to holding one accountable for actions that *he or she knew*, or should have known, violated the constitutional rights of the plaintiff."[210] Indeed, to ignore such knowledge casts doubt on qualified immunity's purported concern with fair notice. If officers who knowingly violate the law are entitled to immunity, the doctrine cannot be reasonably justified on fair notice grounds and must instead be justified on some other basis. Yet, the Supreme Court has made clear that fairness is an essential component of the defense.[211]

In sum, to the extent that fair notice is a principle animating qualified immunity, accounting for an officer's subjective knowledge is not only consistent with this principle, but in fact furthers it.

2. Limiting Overdeterrence

A second purported justification for qualified immunity is that, if government officials are too-easily subject to suit for constitutional violations, they will hesitate to take necessary action for fear of being sued.[212] Under this theory, a rational officer will find it preferable to underenforce the law, rather than enforce it to its fullest extent and thereby risk personal liability if he crosses the line.[213] Even if the officer ultimately escapes personal liability,[214] there may still be substantial costs associated with being sued, including the cost of

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209. *See id.*

210. Crawford-El v. Britton, 523 U.S. 574, 591 (1998) (emphasis added); *see also* Butz v. Economou, 438 U.S. 478, 506 (1978) ("[I]t is not unfair to hold liable the official who knows or should know he is acting outside the law . . . ."); Chapman, *supra* note 20, at 48 ("[A]n official who intends to violate the law, or who acts with 'reckless indifference to the rights of an individual citizen,' should be able to predict morally censorious liability. It is not unfair to hold him liable for actually violating the law.").

211. *Crawford-El*, 523 U.S. at 590 n.13.

212. Though different scholars have made this argument, it is usually associated with Peter Schuck. *See* PETER H. SCHUCK, SUING THE GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 60–76 (1983).

213. *See id.*

214. As Professor Joanna Schwartz has shown, the vast majority of defendants in § 1983 actions are not personally responsible for the damages assessed against them. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 936–37 (2014).

participating in the litigation as well as reputational costs.[215] The result is systematic underenforcement of public law—a problem purportedly solved by providing officers some "breathing room" to cross the line on occasion.[216]

This justification falls flat when it comes to officers who actually know that their actions are unconstitutional. Officers who actually know the "line" between constitutional and unconstitutional actions, and then willingly cross that line, are not at risk of underenforcing the law for fear of liability. They have proven themselves to be *under*deterred.[217] Indeed, the Supreme Court recognized as much in *Harlow*, stating that the "fear of being sued will 'dampen the ardor of all but the most resolute, *or the most irresponsible [public officials]*, in the unflinching discharge of their duties.'"[218]

Although denying qualified immunity to *knowing* violators does not risk overdeterrence, there is an important counterargument to consider here. The argument is based on the claim in *Harlow* that "claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole."[219] If this is true—*i.e.*, that a plaintiff can easily plead actual knowledge and proceed to trial—then a qualified immunity test that considers actual knowledge will open the door to additional litigation which will, in theory at least, lead to overdeterrence.[220]

There are three responses to this argument. First, the merits of the argument depend on the view that bare allegations of subjective knowledge are sufficient to survive a motion to dismiss and motion for summary judgment. Even if that was true when *Harlow* was decided, it is certainly not true today. Beginning with motions to dismiss, *Harlow* was decided in an era of "notice pleading"—an era in which a plaintiff, to survive a motion to dismiss and gain the entry into the discovery phase of litigation, needed only plead facts providing the defendant with "notice" of the claims against him.[221] Under a notice-pleading regime, bare allegations of knowledge would normally suffice to overcome a motion to dismiss for failure to state a claim.[222] Yet, notice pleading no longer rules. Since 2007, plaintiffs must do far more than allege facts providing the defendant with

215. Chapman, *supra* note 20, at 49.

216. Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011).

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

218. *Id.* (alteration in original) (emphasis added) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

219. *Id.*

220. *See* Chapman, *supra* note 20, at 48 ("A fact-sensitive inquiry into the defendant's state of mind especially hands settlement leverage to plaintiffs. This can be unfair to officials who acted in good faith and did not violate a clearly established right.").

221. Conley v. Gibson, 355 U.S. 41, 47–48 (1957).

222. *See id.*

notice.[223] They must instead allege "enough facts to state a claim to relief that is plausible on its face."[224] This requirement is particularly onerous when it comes to alleging knowledge. As Professor Ben Spencer has demonstrated, courts now demand that plaintiffs "offer specific facts plausibly showing an alleged condition of the mind."[225] Citing numerous cases, Spencer continued: "[m]any examples of this practice abound both at the circuit and district court levels"—examples that are "too numerous to list in full."[226]

Not only have pleading rules increased the burden on plaintiffs since *Harlow*, but summary judgment practice has similarly tilted in favor of defendants. Four years after *Harlow* was decided in 1982, the Supreme Court issued its famous "summary judgment trilogy": three decisions[227] that, together, "made it easier [for defendants] to make the motion, and . . . increased the chances that it will be granted."[228] Indeed, Justice Kennedy recognized this point in 1992, stating that

> *Harlow* was decided at a time when the standards applicable to summary judgment made it difficult for a defendant to secure summary judgment regarding a factual question such as subjective intent, even when the plaintiff bore the burden of proof on the question . . . . However, subsequent clarifications to summary-judgment law have alleviated that problem . . . . Under the principles set forth in *Celotex* and related cases, the strength of factual allegations such as subjective bad faith can be tested at the summary-judgment stage.[229]

Thus, even if it was true in 1982 that plaintiffs alleging subjective knowledge could easily overcome motions to dismiss and motions for summary judgment, subsequent changes to the law have significantly altered that reality.

Second, the claim that allowing plaintiffs to plead subjective knowledge will lead to baseless litigation that will overdeter officers is belied by the fact that the Court has frequently adopted subjective knowledge requirements in other contexts. Consider, for example, *Farmer v. Brennan*.[230]

223. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

224. *Id.*

225. A. Benjamin Spencer, *Pleading Conditions of the Mind Under Rule 9(b): Repairing the Damage Wrought by* Iqbal, 41 CARDOZO L. REV. 1015, 1021 (2020).

226. *Id.* at 1021–22 (footnotes omitted).

227. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

228. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1041 (2003).

229. Wyatt v. Cole, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring).

230. 511 U.S. 825 (1994).

There, the Court was faced with a choice between two different versions of "deliberate indifference": one based on an officer's *constructive* knowledge that a prisoner faced a risk of harm, and one based on *actual* knowledge that a prisoner faced a risk of harm.[231] The Court sided with the "actual knowledge" version of deliberate indifference.[232] Nowhere did the Court suggest, or even consider, that this test would open the door to baseless litigation and result in overdeterrence. Indeed, the near-universal reaction to the Court's decision was that the actual knowledge requirement would make it *harder*, not easier, for plaintiffs to successfully take their case to a jury.[233]

Farmer is not *sui generis*. In numerous other contexts, the Supreme Court has adopted a test in which plaintiffs must prove actual knowledge to make out a constitutional violation. This includes equal protection claims alleging racial[234] or gender discrimination,[235] as well as "class of one" equal protection claims.[236] Proof of an officer's subjective mental state is also required in both substantive due process[237] and procedural due process cases.[238] So too with claims that officers failed to turn over exculpatory evidence,[239] deliberately misrepresented facts in a warrant application,[240] or fabricated evidence.[241] Beyond these cases, subjective knowledge is also required to make out a retaliation claim,[242] as well as an excessive force claim under the Eighth Amendment.[243] In short, proof of subjective

231. *Id.* at 835.

232. *Id.* at 837.

233. *The Supreme Court, 1993 Term—Leading Cases*, 108 HARV. L. REV. 231, 235 (1994) ("Although the Court has long indicated that the state has a duty to protect prisoners from inhumane conditions, *Farmer*'s subjective standard seriously erodes this constitutional duty. Further, *Farmer* makes it virtually impossible for an inmate to prove a breach of the remnants of this duty."); Melvin Gutterman, *The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement*, 48 SMU L. REV. 374, 396 (1995) (criticizing *Farmer* for "excus[ing] continuous inhumane treatment" due to a "myopic focus on the intentions of prison officials" (quoting *Farmer*, 511 U.S. at 855 (Blackmun, J., concurring))); Heather M. Kinney, *The "Deliberate Indifference" Test Defined: Mere Lip Service to the Protection of Prisoners' Civil Rights*, 5 TEMPLE POL. & C.R. L. REV. 121, 133 (1995) (criticizing *Farmer* for "impos[ing] a virtually impossible burden on prisoners" to prove subjective knowledge).

234. Washington v. Davis, 426 U.S. 229, 229 (1976).

235. Pers. Admin. of Mass. v. Feeney, 442 U.S. 256, 256 (1979).

236. Village of Willowbrook v. Olech, 528 U.S. 562, 562 (2000).

237. Cnty. of Sacramento v. Lewis, 523 U.S. 833, 833 (1998).

238. Daniels v. Williams, 474 U.S. 327, 327 (1986).

239. Jean v. Collins, 221 F.3d 656, 658 (4th Cir. 2000).

240. Franks v. Delaware, 438 U.S. 154, 154 (1978).

241. Barnes v. City of New York, 68 F.4th 123,123 (2d Cir. 2023).

242. Branti v. Finkel, 445 U.S. 507, 507 (1980); Pickering v. Bd. of Educ., 391 U.S. 563, 563 (1968).

243. Whitley v. Albers, 475 U.S. 312, 312 (1986).

knowledge is required in a wide variety of claims. If an officer's mental state were so easy to allege that plaintiffs could coast not only past motions to dismiss but also past summary judgment motions, one would certainly have expected the Court to have hesitated in embracing subjectivity in such cases. One would also have expected the plaintiffs' bar to welcome such decisions: a result that never occurred.

Third, qualified immunity as it is currently designed fails to weed out "insubstantial"[244] suits prior to discovery.[245] As Professor Joanna Schwartz has shown in a study of 979 cases in which the qualified immunity defense could have been raised, the defense only resulted in the dismissal of 3.9 percent of the cases.[246] Professor Schwartz postulated that plaintiffs can often allege facts that state a violation of clearly established law and, on summary judgment, proffer evidence creating a dispute of fact.[247] Moreover, plaintiffs almost always bring state law claims, which are often not subject to a qualified immunity defense.[248] These findings demonstrate that, even if discovery and other "burdens of litigation" lead to some degree of overdeterrence, qualified immunity does not play a causal role in this result.

In sum, accounting for an officer's subjective knowledge in evaluating qualified immunity will not contravene the stated purposes of the defense. Officers with actual knowledge of the unconstitutionality of their actions will not be deprived of "fair notice" that litigation and liability may follow. Nor will such officers be overdeterred; instead, the appropriate level of deterrence will be improved. This is true even for officers who did not have actual knowledge but might worry about allegations to the contrary. Bare allegations of knowledge are not normally sufficient to overcome current pleading rules; but even if they were, there is strong evidence that qualified immunity does not commonly result in dismissal on motions to dismiss or for summary judgment.

B. Subjective Knowledge's Current Role

Another argument in favor of using subjective knowledge in qualified immunity decisions is that, in many circumstances, it is *already* being used. Two circumstances in particular stand out: (1) courts' reliance on the "information possessed" by an official and (2) courts' reliance on subjective knowledge when it is an element of the underlying claim.

244. Harlow v. Fitzgerald, 457 U.S. 800, 815–17 (1982).

245. *See* Schwartz, *How Qualified Immunity Fails*, *supra* note 21, at 15.

246. *Id.* at 10.

247. *Id.* at 53–58.

248. *Id.* at 42, 55.

1. The "Information Possessed" by the Officer

To the degree that *Harlow* adopted a purely objective approach, it tied immunity to the content of "clearly established law."[249] What *Harlow* did not do, however, is explain how to discern the existence of clearly established law. If a plaintiff claims a violation of her Fourth Amendment rights, for example, is it not fair to conclude that the Fourth Amendment, having existed since the Founding, is "clearly established"? If so, then *every* Fourth Amendment claim can overcome the defense of qualified immunity, thus rendering qualified immunity categorically inapplicable to Fourth Amendment claims (not to mention many other constitutional claims). Under this conception of "clearly established law" the defense would be toothless.

To give the defense some teeth, the Supreme Court has required courts to look for clearly established law at a more fact-specific level.[250] The question is not whether there is clear law prohibiting officers from arresting persons without probable cause, for example, but instead whether there is clear law prohibiting officers from arresting persons in the *particular context* in which the officer acted.[251]

This focus on particularity is what opens the door to consideration of an officer's subjective knowledge. Consider *Anderson v. Creighton*.[252] In that case, officers entered a residence believing that a bank robber was hiding out there, though he was not.[253] In an ensuing constitutional tort action, the officers claimed that they did not violate the Fourth Amendment because their search was supported by probable cause and fell within the exigent circumstances exception to the warrant requirement.[254] Even if these arguments failed, however, officers additionally asserted qualified immunity.[255] On review, the Supreme Court explained that the "clearly established law" inquiry must occur in a "particularized" manner: a manner that is attentive to the specific facts underlying the claim.[256] This particularized approach, the Court continued, "will often require examination of the information possessed by the

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

250. White v. Pauly, 580 U.S. 73, 79 (2017).

251. *Id.* ("[C]learly established law must be 'particularized' to the facts of the case."(quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987))); Mullenix v. Luna, 577 U.S. 7, 12 (2015) ("[S]pecificity is especially important in the Fourth Amendment context."); Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011) ("We have repeatedly told courts . . . not to define clearly established law at a high level of generality." (citation omitted)).

252. 483 U.S. 635 (1987).

253. *Id.* at 637.

254. *Id.*

255. *Id.* at 638.

256. *Id.* at 640.

searching officials."[257] An evaluation of whether an officer had probable cause to make an arrest, for example, might turn on the fact that the arresting officer had been informed that the suspect was wearing a red coat. Such information, when possessed by the officer, would be relevant to whether the officer violated clearly established law in a "particularized" sense.

However, an "examination of the information possessed" by defendant-officers appears to contradict *Harlow*'s supposed injunction on inquiring into an officer's subjective knowledge. Not so, explained the Court. This sort of inquiry "does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent that *Harlow* sought to minimize."[258] Playing somewhat loose with the definition of "objective," the Court continued: "The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the defendant-officer's] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. [The defendant-officer's] subjective beliefs about the search are irrelevant."[259]

However one defines the terms "objective" and "subjective," *Anderson* makes clear that an officer's actual knowledge is relevant to qualified immunity determinations.[260] As the Fourth Circuit has explained, "uncontroverted facts known to . . . an officer . . . . are certainly relevant in the qualified immunity context, which requires courts to ascertain whether a 'reasonable officer' could have believed a search was lawful 'in light of clearly established law and the information the searching officers possessed.'"[261] Other courts widely agree.[262] Therefore, a categorical rejection of looking to an officer's subjective knowledge of the law is hard to sustain. Subjective

257. *Id.* at 641.

258. *Id.*

259. *Id.*

260. *Id.*

261. United States v. McKenzie-Gude, 671 F.3d 452, 461 (4th Cir. 2011) (quoting *Anderson*, 483 U.S. at 641).

262. Floyd v. Farrell, 765 F.2d 1, 6 (1st Cir. 1985) ("The *Harlow* standard requires that we make an objective analysis of the reasonableness of conduct in light of the facts actually known to the officer and not consider the individual officer's subjective assessment of those facts."); Moore v. Vega, 371 F.3d 110, 117 (2d Cir. 2004) (taking account of officer's beliefs); Franz v. Lytle, 997 F.2d 784, 787 (10th Cir. 1993) ("Synthesizing *Harlow* and *Anderson*, we must then decide to sustain a claim of the lawful exercise of authority based on qualified immunity if, upon examining the information defendant possessed, we can conclude a reasonable officer . . . [could have] believed he was acting in accord with those principles."); Hall v. Shipley, 932 F.2d 1147, 1153 (6th Cir. 1991) ("In light of our authority and the information the searching officers possessed, an objectively reasonable officer confronted with these circumstances could have believed that [he was acting constitutionally].").

knowledge is not only routinely considered but, importantly, this sort of fact-specific analysis is crucial to making qualified immunity work. The Court rejected a generalized, non-fact-specific version of "clearly established law" in *Anderson*, and the price of that decision is that an officer's subjective knowledge will sometimes play an important role in immunity decisions.[263]

2. *Subjective Knowledge as an Element of the Claim*

Another situation in which qualified immunity currently turns on the subjective knowledge of the defendant is where subjective knowledge is an element of the underlying constitutional violation. Consider, for example, excessive force claims under the Eighth Amendment. To state a claim for relief, a plaintiff must show that the correctional officer used force against him "maliciously and sadistically to cause harm."[264] Thus, uses of force aimed at discipline or maintaining order are not sufficient to state a claim.[265]

If an officer shoots a man during a prison riot, the officer is not liable as long as the shooting was a reasonable effort to restore order.[266] If the shooting is not needed to restore discipline, and the officer used the force simply because he wanted to harm the victim, then the officer's actions are deemed "malicious[] and sadistic[]" and violative of the Eighth Amendment.[267]

Where a plaintiff has proven an excessive force violation, the plaintiff has also, in effect, overcome qualified immunity. This is because *every* malicious use of force violates the Eighth Amendment. The "fair notice" to which officers are entitled is supplied by the single Supreme Court case adopting the malice standard in 1986.[268] As an illustration, consider a Fourth Circuit case in which correctional officers subjected a detainee to a "rough ride," *i.e.*, drove a van erratically while the detainee was unrestrained in the back of the van, thus causing him injury.[269] On the underlying constitutional violation, the court held that the officers acted maliciously because there was no plausible penological purpose for their actions.[270] When it came to qualified immunity, the court rejected the defense.[271] Importantly, the court did not point to a prior Fourth Circuit case involving a "rough ride" or similar type of mistreatment; indeed, no such case existed. Although such cases would have provided the officers with "fair notice," the court did not think they were necessary

263. *Anderson*, 483 U.S. at 635.
264. Hudson v. McMillian, 503 U.S. 1, 7 (1992).
265. *Id.* at 6.
266. Whitley v. Albers, 475 U.S. 312, 321 (1986).
267. *Hudson*, 503 U.S. at 6–7.
268. *Whitley*, 475 U.S. at 313.
269. Thompson v. Virginia, 878 F.3d 89, 94–95 (4th Cir. 2017).
270. *Id.* at 99–102.
271. *Id.* at 106.

to do so. The fact that malice is an element of the claim was itself sufficient to put the officers on notice that what they were doing was wrongful. As the court stated, "[s]imply put, there are many ways of physically and maliciously assaulting a helpless prisoner, and all of them violate the Eighth Amendment."[272]

The Fourth Circuit's approach to qualified immunity in cases involving malice is standard throughout the country.[273] The fundamental logic behind these cases is that, because an "officer necessarily will be familiar with his own mental state," the officer has fair notice that his actions are unlawful.[274] These cases establish that, despite the lower-court rhetoric to the contrary, an officer's mental state is *already* relevant to the qualified immunity inquiry in many cases. Further, the logic justifying this result fully supports the denial of qualified immunity in any case involving actual knowledge of unconstitutionality, regardless of whether the underlying constitutional violation requires a showing of the officer's mental state. Just as an officer who acts with malice cannot reasonably claim ignorance of the wrongfulness of his actions, an officer who actually knows that his actions are unlawful also cannot reasonably claim such ignorance.

As a final point, it is important to address *Crawford-El v. Britton*.[275] In that case, the Court considered the challenge presented by cases in which the underlying constitutional claim required a showing of intent and the officer claimed qualified immunity.[276] In such a case, lower courts were conflicted on the role that allegations (or proof) of intent should play in the qualified immunity inquiry. The Supreme Court declared that, in cases where subjective intent was relevant to the underlying claim, courts should consider evidence of subjective intent in that context, but should not consider that

272. *Id.* at 103.

273. Monteiro v. City of Elizabeth, 436 F.3d 397, 404 (3d Cir. 2006) ("In cases in which a constitutional violation depends on evidence of a specific intent, 'it can never be objectively reasonable for a government official to act with the intent that is prohibited by law.'" (quoting Locurto v. Safir, 264 F.3d 154, 169 (2d Cir. 2001))); Skrtich v. Thornton, 280 F.3d 1295, 1301 (11th Cir. 2002) (holding that qualified immunity was not available for Eighth Amendment excessive force cases "because the use of force 'maliciously and sadistically to cause harm' is clearly established to be a violation of the Constitution by the Supreme Court decisions in *Hudson* and *Whitley*"); Scott v. Becher, 736 Fed. App'x 130, 133 (6th Cir. 2018) (holding that qualified immunity does not protect "malicious behavior that violates constitutional rights in a manner the precise likes of which have not yet been the basis of a lawsuit" because that would "encourage bad actors to invent creative and novel means of using unjustified force on prisoners" (quoting *Thompson*, 878 F.3d at 103)).

274. Dean v. Jones, 984 F.3d 295, 310 (4th Cir. 2021).

275. 523 U.S. 574 (1998).

276. *Id.* at 585.

evidence in relation to qualified immunity.[277] As the Court put it, "[e]vidence concerning the defendant's subjective intent is simply irrelevant to [the qualified immunity] defense."[278]

Are courts that categorically reject qualified immunity for intent-based claims acting in violation of *Crawford-El*? The answer is no. When a court holds that an officer's malicious and sadistic use of force in prison is not entitled to qualified immunity, they are merely applying the *clearly established law* of excessive force under the Eighth Amendment.[279] That law makes clear that *every* malicious and sadistic act violates the Eighth Amendment.[280]

C. Subjective Knowledge in Analogous Contexts

Looking beyond constitutional tort actions, an inquiry into subjective knowledge is also justified given the relevance of subjective knowledge to criminal prosecutions under 18 U.S.C. § 242 and the structure of the exclusionary rule applied in criminal cases.

1. 18 U.S.C. § 242

Section 242 of Title 18 is, in effect, the criminal counterpart to 42 U.S.C. § 1983.[281] Just as § 1983 authorizes the imposition of *civil* liability against state officers who commit federal constitutional violations, § 242 authorizes the imposition of *criminal* liability.[282] There is one crucial difference between § 1983 and § 242, however: while civil liability under § 1983 follows from the mere fact of a constitutional violation, criminal liability under § 242 follows only upon proof that the constitutional violation was "willful[]."[283]

The Supreme Court has never defined "willful" in the context of § 242, and lower courts have yet to converge on a common

277. *Id.* at 588.

278. *Id.*

279. *Cf.* Thompson v. Virginia, 878 F.3d 89, 106 (4th Cir. 2017) ("*Crawford-El*'s holding is . . . limited and is not itself a decision on qualified immunity. Read in context, the Court was merely referring to and reiterating *Harlow*'s holding that 'bare allegations of malice' cannot overcome the qualified immunity defense." (citation omitted)).

280. *Id.* at 103 ("Simply put, there are many ways of physically and maliciously assaulting a helpless prisoner, and all of them violate the Eighth Amendment.").

281. 18 U.S.C. § 242.

282. *Id.*

283. *Id.* (stating "[w]hoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States [shall be guilty of a crime]").

approach.[284] Some courts hold that a willful constitutional violation requires a showing that the officer acted "voluntarily and intentionally and with the specific intent to do something the law forbids."[285] Other courts follow a rule that is friendlier to prosecutors: one that allows a conviction if an officer "recklessly disregard[ed] the risk" that his actions were unconstitutional.[286] Despite the variation within the lower courts, there is universal agreement that evidence that the defendant *knew* that her actions were unconstitutional is sufficient to prove willfulness.

The fact that actual knowledge is sufficient to prove willfulness for the purpose of § 242 prosecutions augers in favor of relying on actual knowledge in the qualified immunity context. Crucially, this conclusion flows not just from the mere fact that actual knowledge is relevant in both contexts, but from the fact that the Supreme Court has specifically equated its approach in these contexts to qualified immunity. The Court has made it abundantly clear that the degree of "fair notice" required in the § 242 context is "the same" as required in the § 1983 context.[287] Moreover, it would be untenable to hold that an officer was culpable enough to be held criminally liable and made to spend years in prison, but not culpable enough to be held civilly liable. Criminal liability, of course, is generally reserved for the most serious wrongs: wrongs that are more serious than those triggering only civil liability.

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284. *See* Daniel W. Xu, *Narrowing the Police Accountability Gap in Civil Rights Prosecutions*, 73 EMORY L.J. 961, 973–78 (2024) (reviewing split among circuit courts).

285. United States v. McRae, 795 F.3d 471, 479 (5th Cir. 2015) (quoting United States v. Sipe, 388 F.3d 471, 479 (5th Cir. 2004)) (defining willfulness as conduct done with knowledge that it is forbidden by law); United States v. Dise, 763 F.2d 586, 591 (3d Cir. 1985) (holding that, to prove willfulness, prosecutors must prove that the officer "knew he was using excessive, unreasonable and unnecessary force beyond that which was permitted to him under the law of the State of Pennsylvania").

286. United States v. Cowden, 882 F.3d 464, 474 (4th Cir. 2018) (alteration in original) (quoting United States v. Mohr, 318 F.3d 613, 619 (4th Cir. 2003)). *See also* United States v. House, 684 F.3d 1173, 1199–1200 (11th Cir. 2012) (adopting similar definition). For another definition, see *United States v. Reese*, 2 F.3d 870, 885 (9th Cir. 1993), which states that "the requisite specific intent is the intent to use more force than is necessary under the circumstances."

287. *See* United States v. Lanier, 520 U.S. 259, 270–71 (1997) ("[I]n effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials . . . the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes."); *see also* Hope v. Pelzer, 536 U.S. 730, 739 (2002) ("Officers sued in a civil action for damages under 42 U.S.C. § 1983 have the same right to fair notice as do defendants charged with the criminal offense defined in 18 U.S.C. § 242.").

2. *The Exclusionary Rule*

Next, consider the exclusionary rule: a rule that prohibits the use of evidence in a criminal prosecution if the evidence was obtained in violation of the Fourth Amendment. In *Leon v. United States*,[288] the Court adopted the general rule that "good faith" violations—violations arising from an "honest mistake"—were not subject to the exclusionary rule.[289] In two later cases, the Court clarified that, if the violation was "flagrant"[290] or "deliberate, reckless, or grossly negligent,"[291] exclusion would *not* be justified. Courts and commentators have read these statements as indicating that, when a criminal defendant can show that an officer has actual knowledge of the unlawfulness of her actions, exclusion will not be warranted.[292]

Not only is actual knowledge relevant in the exclusionary rule context, but the Court's rationale for its exclusionary rule jurisprudence is drawn directly from its qualified immunity jurisprudence. Thus, the "good faith" standard adopted in *Leon* was modeled on *Harlow*'s formulation of clearly established law.[293] In a later case, the Court would describe the two standards as "the same,"[294] leading one commentator to state "[t]he good faith exception and the good faith defense had, according to the Court, become functionally indistinguishable; two had become one."[295]

Thus, just as subjective knowledge is relevant in the context of § 242 and exclusionary rule jurisprudence—which have long been modeled on qualified immunity—subjective knowledge can and should play a role in qualified immunity itself.

In sum, regardless of whether *Harlow* itself permits an inquiry into the defendant's subjective knowledge, there is good reason to adopt that approach. Inquiring into subjective knowledge does not contravene any of the purported justifications for the exclusionary rule, is consistent with the fact that courts already inquire into subjective knowledge in many qualified immunity cases, and is further supported by the fact that, in circumstances deemed by the Court to be analogous to qualified immunity, subjective knowledge is treated as relevant.

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288. 468 U.S. 897 (1984).

289. *See id.* at 923–26.

290. Utah v. Strieff, 579 U.S. 232, 241 (2016).

291. Herring v. United States, 555 U.S. 135, 144 (2009).

292. *See* Orin S. Kerr, *The Questionable Objectivity of Fourth Amendment Law*, 99 TEX. L. REV. 447, 463 (2021); Kit Kinports, *Questions for "The Questionable Objectivity of Fourth Amendment Law,"* 99 TEX. L. REV. ONLINE, 142, 146–47 (2021); Rebecca Laitman, *Fourth Amendment Flagrancy: What It Is and What It Is Not*, 45 FORDHAM URB. L.J. 799, 819–30 (2018).

293. United States v. Leon, 468 U.S. 897, 922 n.23 (1984).

294. Malley v. Briggs, 475 U.S. 335, 344 (1986).

295. Jennifer Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 711 (2011).

V. PROVING SUBJECTIVE KNOWLEDGE

Having defended the view that an officer's subjective knowledge of unconstitutionality ought to preclude qualified immunity, this Article now turns to how subjective knowledge may be proved. At first glance, one might think that successful showings of actual knowledge would be difficult and rare. Not only is it difficult to prove what someone was actually thinking at a given point in time, but the vast majority of executive officers will presumably have little knowledge of constitutional law.[296]

This view ignores two important avenues for proving subjective knowledge. Below, Section A explains how plaintiffs can use departmental policies and training to prove subjective knowledge and thus overcome qualified immunity. This approach to policy and training is important because courts have split on how to approach the issue. Section B then explains that many constitutional violations—particularly in the realm of Fourth Amendment law—are based on a mistake of fact, not a mistake of law. In such situations, officers may readily admit to legal knowledge sufficient to pierce any claim to immunity.

A. Policy or Training

An issue that is currently unsettled in the circuit courts is whether a department's internal policies or trainings are relevant to qualified immunity. *Frasier v. Evans*,[297] discussed above in Part II,[298] is instructive. In that case, a plaintiff sued several police officers for prohibiting him from videoing them while they used force on another man.[299] To overcome the officers' qualified immunity defense, the plaintiff argued that a departmental training had previously informed the officers that such actions were unconstitutional.[300] Before the court, therefore, was the issue of whether departmental training is relevant to qualified immunity. The court rejected the relevance of the training, holding that "whatever training the officers received concerning . . . [the] First Amendment . . . was irrelevant to the clearly-established-law inquiry."[301]

Scholars have criticized *Frasier* and other cases declaring policies and trainings irrelevant to the qualified immunity analysis, as highlighted by the Supreme Court and lower courts' rejection of policies and training materials.[302] In the view of many, policies should

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296. *See* Schwartz, *supra* note 20, at 635–63.
297. 992 F.3d 1003 (10th Cir. 2021).
298. *See supra* notes 57–72 and accompanying text.
299. *Frasier*, 992 F.3d at 1010–11.
300. *Id.* at 1012.
301. *Id.* at 1015.
302. Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1829 (2016) (arguing that "[a]n officer who violates police

count as "clearly established law" in the same way that published judicial opinions count as "clearly established law."[303] Although there is some support for these arguments,[304] there is a problem as well: the Supreme Court's decision in *City and County of San Francisco v. Sheehan*.[305]

In *Sheehan*, the plaintiff argued that officers who shot her while she was suffering from schizoaffective disorder lacked immunity because they disobeyed departmental instructions with regard to handling mentally ill persons.[306] Instructional materials explained that officers should "ensure that sufficient resources are brought to the scene," "contain the subject" and "respect the suspect's 'comfort zone," "use time to their advantage," and "employ non-threatening verbal communication and open-ended questions to facilitate the subject's participation in communication."[307] Even if the officers disobeyed these instructions, however, the Court rejected this argument.[308] The Court put its conclusion bluntly: it does not "matter for purposes of qualified immunity that . . . the officers did not follow their training."[309]

Sheehan appears to close the door on treating departmental policies as clearly established law. Yet, relying on actual knowledge

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department policy . . . should not be permitted to claim that she lacked notice entitling her to qualified immunity"); Darcy R. Samuelsohn, Comment, *Educate, Don't Escalate: Reforming the Qualified Immunity Standard for Those with Mental Illnesses to Incentivize Effective Police Training*, 95 TUL. L. REV. 741, 771 (2021) (proposing that "the Supreme Court hold that evidence an officer did not adhere to the widely accepted training practices on how to handle encounters with those living with mental illnesses will sufficiently rebut an asserted qualified immunity defense"); LaForge, *supra* note 77, at 875 (arguing that "courts should consider . . . training materials objectively as a secondary source when deciding whether a reasonable officer would have known about the right based on the current status of the law in his jurisdiction"); Eliana Fleischer, Comment, *Stating the Obvious: Departmental Policies As Clearly Established Law*, 90 U. CHI. L. REV. 1435, 1439 (2023) (arguing that courts should consider departmental policies and training materials "as clearly established law for the purpose of qualified immunity").

303. *See* Fleischer, *supra* note 302, at 1439, 1451.

304. *See* Hope v. Pelzer, 536 U.S. 730, 741–42 (2002) (holding that report from United States Department of Justice to state agency was sufficient to put agency officials on notice of the unconstitutionality of their actions); Groh v. Ramirez, 540 U.S. 551, 564 (2004) (holding that "the guidelines of [the officer's] own department placed him on notice that he might be liable for executing a manifestly invalid warrant"); *see also* Wilson v. Layne, 526 U.S. 603, 617 (1999) (observing that, where the law is not clear, it "was not unreasonable for law enforcement officers to look and rely on their [agency's] policies").

305. 575 U.S. 600 (2015).

306. *Id.* at 603–06.

307. *Id.* at 616.

308. *Id.*

309. *Id.*

rather than clearly established law provides a workaround. An officer's actual knowledge in this context would arise from the reasonable inference that people who are exposed to information quite often absorb and retain that information. Students in math class, for example, generally learn math. Not always, of course, but often—so often that reasonable inferences can often be drawn. So too do officers who are trained in constitutional law learn the content of constitutional law.

This is not a hypothetical inference divorced from legal practice. In fact, the Supreme Court has specifically held that an officer's actual knowledge "is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence."[310] Thus, if a plaintiff can show that "the defendant-official being sued had been exposed to information" a court can infer that the official "'must have known' about it."[311]

Lest there be any doubt about this view, consider a common litigation strategy when prosecuting officers under 18 U.S.C. § 242. Recall that § 242 is a criminal law counterpart to § 1983; just as § 1983 renders officials civil liable for their constitutional violations, § 242 renders officers criminally liable for their constitutional violations—provided that the officers acted willfully—a standard that is met with evidence that the officer *knew* his actions were unconstitutional.[312] To demonstrate this knowledge, federal prosecutors routinely rely on departmental policies and trainings.

Consider, for example, *United States v. Proano*.[313] In that case, a police officer named Marco Proano encountered a car that began backing up during a traffic stop.[314] Although neither Proano nor any other person were in the path of the car, Proano nonetheless fired sixteen shots into the car, wounding two occupants.[315] A grand jury later indicted Proano for willfully using excessive force against the passengers, a violation of § 242.[316] At trial, prosecutors attempted to prove that Proano acted willfully by pointing to his training in the use of excessive force—training that instructed him *not* to use force in that context.[317] The jury convicted Proano and, on appeal, the officer

310. Farmer v. Brennan, 511 U.S. 825, 842 (1994).

311. *Id.*; *see also, e.g.*, LaMarca v. Turner, 995 F.2d 1526, 1536–37 (11th Cir. 1993) (given evidence including "incident reports, internal staff reports, and reports by external investigators" regarding uncontrolled violence in prison, a reasonable jury could draw "[a]n inference . . . from this evidence that [the prison officer being sued] did know" of dangerous violence).

312. *See supra* notes 281–87 and accompanying text.

313. 912 F.3d 431 (7th Cir. 2019).

314. *Id.* at 434.

315. *Id.* at 435.

316. *Id.*

317. *Id.* at 436.

argued that his prior training was incapable of proving that he knew he was violating the constitution at the time he acted.[318]

The Seventh Circuit disagreed. As the court put it:

> an officer's training can help inform his state of mind in certain circumstances. If, for example, an officer has been trained that officers should do certain things when confronted with tense situations, and he does those things, the fact that he acted in accordance with his training could make it less likely that he acted willfully. And vice versa: If, as here, an officer has been trained that officers should not do several things when confronted with tense situations, yet he does those things anyway, the fact that he broke from his training could make it more likely that he acted willfully.[319]

The result in *Proano* is standard across the circuits,[320] and lower courts follow the same approach.[321]

Given that courts regularly hold that an officer's violation of departmental policy or training is sufficient to establish that the officer actually knew that his actions were unconstitutional in the context of a criminal prosecution, there should be no impediment to using that same evidence to establish knowledge in a civil prosecution. As noted already, if the officer is culpable enough to serve time in prison, he is certainly culpable enough to be held civilly liable.[322]

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318. *Id.* at 437–38.

319. *Id.* at 439.

320. *See* United States v. Rodella, 804 F.3d 1317, 1338 (10th Cir. 2015); United States v. Brown, 654 F. App'x 896, 910 (10th Cir. 2016) ("Willfulness can be inferred from 'plainly' wrongful conduct, inconsistency between actions and training, and efforts to prevent detection of wrongful behavior." (citations omitted)); United States v. Dise, 763 F.2d 586, 588 (3d Cir. 1985); United States v. Brown, 934 F.3d 1278, 1296–97 (11th Cir. 2019) ("[W]here [the] officer's actions so obviously violate his training on the use of force, a jury may infer that the violation was willful."); United States v. Thao, 76 F.4th 773, 778 (8th Cir. 2023), *cert. denied*, 144 S. Ct. 610 (2024).

321. United States v. Roeder, No. 18-30003, 2019 WL 2524763, at *6 (D. Mass. June 19, 2019) ("The government presented evidence of the training Defendant received about when to use force and the types of force to use. . . . This evidence was sufficient for the jury to find Defendant willfully deprived Mr. Peters of his right to be free from the use of unreasonable force . . . ."); United States v. Bryant, 528 F. Supp. 3d 814, 818–19 (M.D. Tenn. 2021); United States v. Boruchowitz, No. 23-CR-00149, 2024 WL 4906104, at *2 (D. Nev. Nov. 27, 2024); United States v. Brown, No. 17-CR-80102, 2018 WL 582536, at *2 (S.D. Fla. Jan. 25, 2018), *aff'd*, 934 F.3d 1278 (11th Cir. 2019) ("[A] reasonable jury could conclude that the evidence that Officer Brown received training on his departmental policy regarding excessive force and that he violated that policy demonstrated willfulness.").

322. *See supra* note 287 and accompanying text.

In sum, if an officer's actual knowledge of wrongfulness is sufficient to overcome qualified immunity, then an officer's exposure to departmental policies or training materials may be used to demonstrate knowledge. Not every exposure will certainly demonstrate knowledge, and officers may freely rebut inferences of knowledge that may be drawn from such evidence. But that is a matter for a jury to resolve, not the court on a motion for summary judgment.

B. Mistakes of Fact

A second way to prove subjective knowledge arises from an underappreciated reality of constitutional tort litigation: an enormous number of cases turn on mistakes of fact. Where a case involves a mistake of fact, there is a realistic chance—though, admittedly, one that is not certain—that an officer will admit to his knowledge of constitutional law. In such a case, the officer is not admitting to knowledge that his actions were unconstitutional. After all, a mistake of fact prevented him from knowing the particular nature of his actions. Instead, he is admitting to knowledge of what the Constitution requires of him. This admission can then be paired with evidence that the mistake of fact was unreasonable to overcome qualified immunity.

As background, it is first important to emphasize how common mistakes of fact are in constitutional tort litigation. Officers routinely make mistakes—sometimes reasonable, sometimes unreasonable—that then lead to a civil rights claim. Officers often search the wrong house,[323] arrest the wrong person,[324] use the wrong weapon,[325] or shoot the wrong person.[326] They overlook risks to prisoners,[327] fail to consider risks to hostages,[328] and ignore risks to the general public.[329] In many (but not all) of these cases, the core issue in the case is the reasonableness of the officer's mistake about circumstances in the world, not what the law requires of the officer.

To illustrate, consider the case of *J.K.J. v. City of San Diego*,[330] which arose out of the death of Aleah Jenkins while in police

323. *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 637 (1987).
324. *See, e.g.*, Maryland v. Garrison, 480 U.S. 79, 80 (1987).
325. *See, e.g.*, Torres v. City of Madera, 648 F.3d 1119, 1120 (9th Cir. 2011).
326. *See, e.g.*, Milstead v. Kibler, 243 F.3d 157, 160 (4th Cir. 2001).
327. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 328 (1986).
328. *See, e.g.*, Childress v. City of Arapahoe, 210 F.3d 1154, 1155–56 (10th Cir. 2000).
329. *See, e.g.*, McKay v. City of Hayward, 949 F. Supp. 2d 971 (N.D. Cal. 2013).
330. 42 F.4th 990 (9th Cir. 2021). After issuing this opinion, the Ninth Circuit agreed to rehear the case *en banc*. *See J.K.J. v. City of San Diego*, 59 F.4th 1327 (9th Cir. 2023). Before the case was argued *en banc*, the case was dismissed at the request of the parties (presumably because the parties agreed to settle the matter). *J.K.J. v. City of San Diego*, 121 F.4th 1354 (2024).

custody.[331] The plaintiff (the decedent's minor son) alleged that Jenkins exhibited signs of medical distress while under arrest and being transported to the police station and that the officers ignored her needs.[332] For their part, the officers may have believed that Jenkins was "faking" her medical needs, perhaps as a ploy to avoid criminal charges.[333] Thus, Jenkins' death and the subsequent lawsuit turned centrally on an alleged mistake of fact: the officers' mistaken belief that Jenkins did not have serious medical needs.

The officers raised the defense of qualified immunity, which the plaintiff challenged by citing three cases holding that pre-trial detainees were entitled to adequate medical care.[334] The court, however, sided with the defendants because none of the cases arose in a "factual context[] akin to the context of this case."[335] Such cases are thus insufficient to put defendants on notice that their conduct in a *particular* context was unconstitutional.[336] Thus, even though the dispute in *J.K.J.* revolved around a mistake of fact—whether Jenkins' actions justified the officer's belief that did not need medical care—the result turned on the existence (or non-existence) of factually analogous case law.

Now consider how *J.K.J.* might have turned out differently in a world where actual knowledge was sufficient to defeat qualified immunity. For example, suppose that, during a deposition, an officer was asked the following question: "If you had believed Ms. Jenkins *actually* had serious medical needs, do you agree that you would have had a constitutional obligation to reasonably attend to those needs?" If the officer answered in the affirmative, then that admission would count as evidence of actual knowledge of what the Constitution requires. Importantly, this admission of actual knowledge would *not* pertain to a distinct factual context but would pertain to the *exact* context that the officer faced: Ms. Jenkins' need for medical care.

There are two concerns with the strategy just explained. The first is that the officer's admission was contingent on a fact that the officer did not think was true (Ms. Jenkins' medical need). Thus, the officer did *not* admit that, at the time he was caring for Ms. Jenkins, he actually knew that his actions were unconstitutional. This is true, but it ignores that qualified immunity provides protection against *legal* ambiguity, not *factual* ambiguity. As the Supreme Court has explained, qualified immunity protects officers from liability when "the *legal* constraints on particular . . . conduct" are unclear.[337] An officer's admission that, had he *actually* known that Ms. Jenkins

331. *Id.* at 995.
332. *Id.* at 995–96.
333. *Id.* at 1003 (Watford, J., dissenting).
334. *Id.* at 1000.
335. *Id.*
336. *Id.*; *see also* sources cited *supra* note 251.
337. Saucier v. Katz, 533 U.S. 194, 205 (2001).

needed medical care, he would have had a legal obligation to provide her with such care, is an admission that the officer understood the "legal constraints" on his conduct.

Another way to appreciate the distinction between fact and law in this context is to recognize that, while a plaintiff seeking to overcome qualified immunity must point to clearly established *law*, she need not point to clearly established *facts*. A dissenting judge in *J.K.J.* made this point, stating that "[o]ne will search the pages of the Federal Reporter in vain looking for guidance on whether a particular collection of facts shows that someone is suffering a real as opposed to a feigned medical emergency."[338] The "fair notice" that Ms. Jenkins had a serious medical need would have been provided to the officer through his daily experiences as a police officer and, more generally, as a human being. Daily experience with the world provides all of us, officers and non-officers alike, with information that allows us to interpret new information as it becomes available. Of course, many of us will make mistakes when interpreting new information. Some of these mistakes will be reasonable, and some of them will be unreasonable. But the reasonableness of the mistake can only be assessed against the knowledge that reasonable people (or reasonable police officers) possess. Case law will inform officers of the "legal constraints" applicable to particular sets of facts, but will not—and cannot—inform them of the reasonableness of their belief that certain facts in the world are true.

A second challenge to this proposal is that it depends on an officer's willingness to admit that he knew of the legal constraints on his conduct. Under this proposal, an officer may be incentivized to deny such knowledge, understanding that it could be used against him. However, there are two reasons to think that an admission can be obtained in many instances. First, officers (like most of us) are often eager to demonstrate their expertise on a particular matter. If the officer did know that the Constitution, as applied to a particular set of facts, required a particular result, the officer may well be inclined to admit to that knowledge. Second, there are potentially adverse consequences to denying such knowledge. Consider *J.K.J.* again. If the officer there denied any knowledge that the Constitution required him to provide medical care to persons in his custody having serious medical needs, this would be an astounding admission meriting further inquiry into departmental policies and training. If those materials demonstrated that that the officer had received training on those matters, then the plaintiff can rely on those materials to argue actual knowledge as explained in the previous Section. If those materials show that the officer was not trained on

338. *J.K.J.*, 42 F.4th at 1012 (Watford, J., dissenting).

these matters, then that could open the door to a "failure to train"[339] claim which, importantly, would not be subject to the defense of qualified immunity.[340]

In sum, if actual knowledge is relevant to the qualified immunity defense, there are potentially viable avenues for proving that knowledge. Just as federal prosecutors in § 242 cases routinely use departmental policies and trainings to demonstrate that an officer actually knew his conduct was unlawful, plaintiffs in § 1983 cases should be able to attain similar success by using such materials. Additionally, in cases where the dispute between the parties centers on a mistake of fact rather than a disagreement about the law, an officer may be inclined to freely admit that he knew of the "legal constraints" on his conduct when he acted.[341]

CONCLUSION

This Article has explored the past, present and potentially future role of subjective knowledge in the doctrine of qualified immunity. It began by showing that, while cases turning on an officer's subjective knowledge are rare, cases *claiming* that subjective knowledge is relevant are legion. In an effort to understand this strange phenomenon, the Article explored *Harlow v. Fitzgerald*, which has been cited as authority for both positions. Relying on Justice Powell's extensive personal papers, this Article has shown that, while the *text* of Harlow favors the no-subjective-knowledge approach, several Justices—perhaps as many as five—may have harbored a view that subjective knowledge was relevant.

In addition to this descriptive exploration of *Harlow*, the Article mounted a normative defense of relying on subjective knowledge. It explained that relying on such knowledge is consistent with the purported purposes of the qualified immunity inquiry, the use of subjective knowledge in certain qualified immunity cases, and the reliance on subjective knowledge in analogous contexts. With this normative defense made, the Article then turned to the practical issue of how knowledge might be proved. In this regard, the Article argued that subjective knowledge could be proven by proffering departmental policies or trainings as well as, perhaps unexpectedly, by obtaining an officer's admission of knowledge.

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339. *See, e.g.*, City of Canton v. Harris, 489 U.S. 378, 380 (1989). One potential challenge with a failure to train claim is that they normally require the plaintiff to demonstrate a prior pattern of misconduct, a pattern that would provide departmental supervisors with notice that training was needed. *See* Connick v. Thompson, 563 U.S. 51, 62 (2011). If the lack of training pertained to a basic aspect of policing that officers would almost certainly encounter—*e.g.*, providing medical care to detainees—then a failure-to-train claim is far more viable. *See Harris*, 489 U.S. at 390 n.10.

340. Owen v. City of Independence, 445 U.S. 622, 638 (1980).

341. *Saucier*, 533 U.S. at 205.

Reliance on subjective knowledge is not a cure-all for what ails qualified immunity, but cure-alls are hard to find, and even less likely to be adopted by the Supreme Court. A more modest change—one that would apply only to officers with culpable levels of knowledge—may be a change that yields some value but is also viable.