QUALIFIED IMMUNITY NOT ACCIDENT-PROOF, OFFICIAL DISCRETION ADVISED: THE NEED TO CLEARLY ESTABLISH THE RIGHT TO RAISE QUALIFIED IMMUNITY IN CIVIL RIGHTS CLAIMS UNDER 42 U.S.C. § 1983

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I. INTRODUCTION

Consider the following hypothetical: Calitucky is the fifty-first state to become a member of the United States of America. Like most states, Calitucky's jails are overcrowded, mostly with men and women who have been picked up for minor drug charges. In hopes of better dealing with this overpopulation, Calitucky recently changed its laws with regard to possession of marijuana. As of 2013, it is no longer an arrestable offense in Calitucky to carry less than twenty-five grams of marijuana. Instead, these offenders will be issued a citation accompanied by a $200 fine and a court date. All squad cars are now equipped with measuring scales, specifically for the purpose of weighing marijuana.

Officer Michael Jones is a twenty-two-year-old patrol officer employed by the State of Calitucky. He is fresh out of the academy, having graduated first in his class, and looks to have a promising future with the Calitucky State Police. On March 4, 2013, Officer Jones was working the night shift. After having been on duty for only a few hours, Officer Jones decided to park near a popular interstate to run his radar gun to check for people who were speeding. A few minutes after midnight, he pulled over a civilian, Eric Southwood. As Officer Jones walked up to the vehicle, he saw Mr. Southwood scrambling to hide several bags of marijuana under his passenger seat. Officer Jones then legally searched the vehicle and found six individually-wrapped bags of marijuana.

Aware of the new drug laws in Calitucky, Officer Jones took the bags back to his squad car to calculate how many grams of marijuana Mr. Southwood was carrying. Each of the two bigger bags weighed 10 grams, with the remaining smaller bags weighing 2.3, 0.9, 0.8, and 0.2 grams, respectively. Although the numbers added up to only 24.2 grams (a non-arrestable offense), Officer Jones accidentally calculated that Mr. Southwood was carrying 25.2 grams of marijuana (an arrestable offense) and placed him under arrest. Mr. Southwood could not afford to pay his

bail and, consequently, his employer fired him for missing the next several days of work.

No one discovered Officer Jones's calculation error until the morning of March 28, 2013. Later that day, the police released Mr. Southwood from custody, and he immediately filed an action against Officer Jones in his individual capacity under 42 U.S.C. § 1983.[1] In his complaint, Mr. Southwood alleged that Officer Jones violated his Fourth Amendment right to be free from false arrest by miscalculating the amount of marijuana in his possession. Mr. Southwood sought money damages in excess of $100,000 for the loss of his liberty and various other expenses associated with the loss of his livelihood.

At the trial court level, Officer Jones sought summary judgment. In his motion, Officer Jones asserted that because he was on duty for the Calitucky State Police at the time of the alleged constitutional violation, he should be shielded from any potential liability arising from his actions by the doctrine of qualified immunity.[2] Mr. Southwood's attorney in turn argued that Officer Jones was not entitled to assert the defense of qualified immunity because his act of weighing the marijuana was not a *discretionary* task. The attorney reasoned that because Officer Jones was not using his independent judgment when he calculated the total amount of marijuana, Officer Jones was not deserving of qualified immunity protection.

Upon reviewing the motion for summary judgment, the trial judge noted that qualified immunity was an issue of first impression for the district. Not knowing how to rule on the matter, she decided to do some research to see how the U.S. Supreme Court, federal appellate courts, and other federal districts had handled similar matters.

This Comment will argue that a government official's use of discretion is not, and should not be, a threshold condition to qualified immunity analysis. Section II of this Comment will examine the historical context of official immunity and will explain how early U.S. Supreme Court precedent shaped discretion's role in modern qualified immunity analysis. Section III will discuss how qualified immunity analysis has evolved over the past thirty years. The section will first analyze recent U.S.

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1. 42 U.S.C. § 1983 is the codified version of a civil action for the deprivation of federally guaranteed constitutional rights, privileges, and immunities. *See* 42 U.S.C. § 1983 (2012).

2. Qualified immunity is a federal, judicially created doctrine that arises in cases brought against government officials under 42 U.S.C. § 1983. Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187, 188 (1993). When applicable, qualified immunity shields a public official from liability for otherwise actionable constitutional deprivation claims. *Id.*

Supreme Court case law and will then explain the differing approaches lower circuits have taken with regard to discretion as a possible prerequisite to qualified immunity.

Section IV of this Comment will compare the differing interpretations of discretion's role in qualified immunity by using the scenario presented by the hypothetical case of *Southwood v. Jones* and will show why the best approach to qualified immunity claims is one in which discretionary action in not required. Section V will propose a resolution for the U.S. Supreme Court (and lower courts) to take with respect to future qualified immunity claims that best furthers the policy underlying immunity while also providing protection for police officers such as Officer Jones.

II. BACKGROUND

A. Qualified Immunity Origins

The history of qualified immunity for police officers dates back to the common law "good faith" defense.[3] During the 1960s and 1970s, claims against government officials skyrocketed due to the expansion of civil rights litigation under 42 U.S.C. § 1983.[4] During this time, there was great concern that this increase in litigation would soon surpass the management capabilities of courts, thus hindering the effectiveness of the government.[5] As a response to this increase in litigation, the U.S. Supreme Court, in *Pierson v. Ray*, extended the common law good faith defense to police officers sued under 42 U.S.C. § 1983 in the form of a "qualified" immunity.[6]

This newly crafted qualified immunity defense subsequently evolved into a two-part objective/subjective test where a government official would receive protection only if his actions demonstrated both objective reasonableness and subjective good faith.[7] Under this approach, courts generally held that qualified immunity could be overcome if the official

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3. Pierson v. Ray, 386 U.S. 547, 555-57 (1967). Under the common law, an official could raise the defense of "good faith" and would not be held accountable if he could show that he had sincere motives in the performance of his duties. *See* RESTATEMENT (SECOND) OF TORTS §§ 10, 121 (1965).
4. Edmund L. Carey, Jr., *Quick Termination of Insubstantial Civil Rights Claims: Qualified Immunity and Procedural Fairness*, 38 VAND. L. REV. 1543, 1544 n.3 (1985) (stating that the number of claims between 1961 and 1983 increased from about 500 to about 27,000).
5. Harry T. Edwards, *The Rising Workload and Perceived 'Bureaucracy' of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 903-06 (1983).
6. 386 U.S. at 565.
7. Wood v. Strickland, 420 U.S. 308, 322 (1975) (identifying the objective element as involving a presumptive knowledge of and respect for "basic unquestioned constitutional rights" and the subjective element as referring to "permissible intentions").

"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 the *malicious intention* to cause a deprivation of constitutional rights or other injury . . . ."[8]

The subjective prong of the analysis—the prong concerning malicious intent—turned out to be heavily fact-based and did little to further the government's goal of dispensing with excessive litigation at the summary judgment phase.[9] With this subjective prong in place, the courts were finding that qualified immunity claims were still resulting in both trials and extensive discovery proceedings before the merits of the cases were being reached.[10] Some courts went as far as to question whether subjective good faith could ever be determined without a jury, as it is inherently a question of fact.[11]

B. Modern Qualified Immunity (*Harlow v. Fitzgerald*)

As a result of the problems that had arisen with regard to the subjective prong of qualified immunity, the U.S. Supreme Court took the analysis in a different direction with the landmark 1982 case of *Harlow v. Fitzgerald*.[12] In *Harlow*, the petitioner, a presidential aide in charge of congressional relations, asserted that his role within the government entitled him to absolute immunity.[13]

Although the Court has consistently held that government officials are entitled to some form of immunity from damage suits, absolute immunity protects only the highest-ranking government officials—those whose jobs are most vulnerable to interference by way of litigation—such as legislators in their legislative roles, judges in their judicial roles, and prosecutors in their advocacy roles.[14]

Most public officials, however, are entitled only to qualified immunity.[15] In denying these officials absolute immunity, the Court has recognized the need to protect lower-ranking government officials, but also

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8. *Id.* (emphasis added).
9. Harlow v. Fitzgerald, 457 U.S. 800, 815-17 (1982) (stating that "Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment"); *see also* Butz v. Economou, 438 U.S. 478, 507 (1978) (emphasizing that insubstantial claims should not proceed to trial).
10. *Id.*
11. *See, e.g.*, Landrum v. Moats, 576 F.2d 1320, 1329 (8th Cir. 1978); Duchesne v. Sugarman, 566 F.2d 817, 832-33 (2d Cir. 1977).
12. Carey, *supra* note 4, at 1544-45.
13. *Harlow*, 457 U.S. at 810. The aide made the argument that because he was delegated several of the President's essential duties, recognition of his own absolute immunity was supported by all of the factors that mandated absolute immunity for the President himself. *Id*.
14. *See id.* at 807.
15. *Id.* at 814.

that in most situations where such officials have abused their power, the only realistic avenue for vindication of constitutional guarantees is a civil suit for damages.[16] Thus, providing a qualified form of immunity successfully balances the vindication of individual rights and the social costs that will inevitably arise when public officials have exercised their power responsibly.[17]

However, in arguing against qualified immunity, the petitioner in *Harlow* asserted that the dismissal of insubstantial lawsuits without a trial (a key factor in the balancing of competing interests) was hindered by the Court's prior case law dealing with "good faith" immunity.[18] The Supreme Court agreed.[19] Following this argument, the Supreme Court went on to completely eliminate the subjective "good faith" prong of the qualified immunity analysis in favor of a solely objective determination of whether there was law clearly establishing the complained-of conduct as unconstitutional.[20] The Court determined that focusing on factors that were plainly objective effectuated a better method of resolving qualified immunity claims at the summary judgment phase.[21] The Court stated, "On summary judgment, the judge appropriately may determine, not only the currently applicable law, but [also] whether that law was clearly established at the time an action occurred."[22] Thus, modern qualified immunity analysis looks only to the objective reasonableness of an official's conduct as measured by reference to clearly established law.[23]

With its decision, the *Harlow* Court paved the road for modern qualified immunity analysis. However, in doing so, it also cleared a path for discussion of the role that "discretion" should play within that analysis. The rule most courts have taken from the *Harlow* decision is as follows: "[G]overnment officials performing *discretionary functions* generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[24]

Though this "discretionary function" language was not the basis of the actual holding in *Harlow*, the Court clarified, in dicta, that individual judgments associated with discretionary action are often influenced by the decisionmaker's experiences, values, and emotions.[25] The Court went on to

16. *Id*.
17. *Id.*
18. *See supra* text accompanying notes 9-11.
19. *Harlow*, 457 U.S. at 814-15.
20. *Id.* at 818.
21. *Id.*
22. *Id.*
23. *Id*.
24. *Id.* (emphasis added).
25. *Id*. at 816.

distinguish discretionary actions from "ministerial" tasks, yet did not clarify whether government officials performing such ministerial tasks could ever assert qualified immunity.[26] Having not clarified whether discretionary action should be considered a threshold condition to qualified immunity, the Court left the question open to further analysis, confusion, and disagreement.

III. RECENT DEVELOPMENTS

Over the past thirty years, the Court's use of the phrase "discretionary function" has steadily declined.[27] In fact, in the past ten years, the words have completely left the Court's vocabulary in favor of solidifying the objective approach to handling qualified immunity decisions.[28] As a result, lower courts are conflicted as to whether discretion should even play a role with regard to qualified immunity.[29] Furthermore, those courts that have recognized discretion as a mandatory condition have come up with differing ways of determining when an official action will be considered "discretionary" for purposes of the analysis.[30] Part A of this section will address how three key Supreme Court cases have shaped modern qualified immunity analysis. Part B will address recent Supreme Court decisions in which discretion has not been mentioned, and Part C will address the differing roles discretion has played within the federal circuit courts.

A. The U.S. Supreme Court's Advancement of Qualified Immunity

Three key Supreme Court cases have shaped how claims of qualified immunity are handled post *Harlow v. Fitzgerald*.[31] The first, *Davis v. Scherer*, has narrowed the scope of a ministerial distinction—if there ever was such a distinction to begin with.[32] The second two cases, *Saucier v. Katz* and *Pearson v. Callahan*, demonstrate that the Court has focused mainly on two key factors throughout the evolution of qualified immunity:

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26. *Id*. The *Harlow* court did not define the word "ministerial." However, *Black's Law Dictionary* defines ministerial as "[o]f or relating to an act that involves obedience to instructions or laws instead of discretion, judgment, or skill." BLACK'S LAW DICTIONARY (9th ed. 2009).
27. *See, e.g.*, Reichle v. Howards, 132 S. Ct. 2088, 2093 (2012); Pearson v. Callahan, 555 U.S. 223, 231 (2009); Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (all shaping modern qualified immunity analysis without so much as mentioning discretion).
28. *Id.*
29. *See* Karen M. Blum, *Qualified Immunity: Discretionary Function, Extraordinary Circumstances, and Other Nuances*, 23 TOURO L. REV. 57, 58 (2007).
30. *Id.*
31. Davis v. Scherer, 468 U.S. 183 (1984); Saucier v. Katz, 533 U.S. 194 (2001); *Pearson*, 555 U.S. 223.
32. 468 U.S. 183.

ensuring that there is a determination of clearly established law and ensuring that these claims are handled in the most efficient way possible.[33]

1. Davis v. Scherer

In 1984, the Supreme Court reaffirmed *Harlow* when it held that a plaintiff who seeks damages for a violation of constitutional or statutory rights may overcome a defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue.[34] However, the plaintiff in *Davis* attempted to argue that the defendants had breached a "ministerial" duty because they had violated a regulation setting out procedures that needed to be followed before they were allowed to terminate the plaintiff's employment, and as a result, the defendants were not entitled to the qualified immunity analysis that had been laid out in *Harlow*.[35]

The Court barely considered this alternative argument, only addressing it in a footnote, where it explained that the plaintiff had misunderstood the ministerial duty exception to qualified immunity in two respects.[36] First, the Court reiterated that the only relevant inquiry was that of clearly established law when it stated that "breach of a legal duty created by the personnel regulation would forfeit official immunity only if that breach itself gave rise to the appellee's cause of action for damages."[37] Most notably, the Court went on to state that this principle applied regardless of whether the official was performing discretionary or ministerial duties.[38]

The plaintiff's second misunderstanding of the "ministerial duty" exception was that he failed to completely understand what activities actually constituted a ministerial duty.[39] In *Davis*, the rules that purportedly established the defendants' "ministerial" duties still left them a substantial measure of discretion in the performance of their jobs.[40] The Court further narrowed the ministerial exception when it elaborated that "a law that fails to specify the precise action that the official must take in each instance

33. *See Saucier*, 533 U.S. 194; *Pearson*, 555 U.S. 223.
34. *Davis*, 468 U.S. at 197.
35. *Id*. at 196 n.14.
36. *Id.*
37. *See id.*
38. *Id.* Put a different way, whether the official's actions were discretionary or ministerial will have no impact on the outcome of a qualified immunity decision as long as the complained-of conduct is what gives rise to a constitutional violation.
39. *See id.* Also, note that "ministerial" is still not defined by the Court.
40. *See id.* (explaining that, despite the ministerial procedures of termination, the defendants in that case were still required to determine what constituted a complete investigation sufficient to justify termination of the plaintiff's employment in the first place).

creates only discretionary authority; and that authority remains discretionary however egregiously it is abused."[41]

2. Saucier v. Katz *and* Pearson v. Callahan

In *Saucier v. Katz*, the Supreme Court made no mention of discretion when it laid out a mandatory two-step process for handling qualified immunity claims.[42] The first step in the analysis was to determine whether a constitutional right had been violated.[43] The second step in the analysis, as emphasized in *Harlow*, was to determine whether there was law clearly establishing that the conduct at issue had violated a constitutional right.[44]

However, in 2009, the Court overruled the mandatory two-step approach of *Saucier*, thus giving courts the option to consider only the second step, that of clearly established law.[45] The Court noted the value of the two-step approach to the development of constitutional precedent, but realized that its rigidness also came with a price.[46] The main concern was that such a procedure would sometimes result in a "substantial expenditure of scarce judicial resources on difficult questions that had no effect on the outcome of the case."[47]

Putting this cost into perspective, there are many cases in which it will be clear that a constitutional right is not clearly established (step two) while it will be far from obvious whether or not that right actually exists (step one).[48] In such cases, it makes no sense to burden already overworked courts with the task of completing step one when step two obviously settles the issue.[49] As the *Pearson* court pointed out, such unnecessary litigation of constitutional issues wastes valuable resources, thus disserving the purpose of qualified immunity: protecting government officials from having to defend lawsuits past the summary judgment phase of litigation.[50]

B. The U.S. Supreme Court and the Disappearance of Discretion

Since the *Pearson v. Callahan* decision, courts have settled into a routine for how they approach claims of qualified immunity.[51] While

41. *Id.*
42. 533 U.S. 194 (2001).
43. *Id.* at 201.
44. *Id.*
45. Pearson v. Callahan, 555 U.S. 223 (2009).
46. *Id.* at 236.
47. *Id.* at 236-37.
48. *Id.* at 237.
49. *Id.*
50. *See id.*
51. *Pearson* remains good law and is frequently cited. *See, e.g.*, Reichle v. Howards, 132 S. Ct. 2088, 2093 (2012).

looking solely to whether there was law clearly establishing the complained of conduct as unconstitutional, the Court has completely disregarded the "discretionary function" language used in *Harlow* and has yet to mention footnote fourteen of *Davis*.[52] The following cases further demonstrate that discretion was not a primary concern of the Court when it revamped qualified immunity by eliminating the subjective prong of the analysis in *Harlow* in 1982.

1. Hope v. Pelzer

In 2002, the Supreme Court considered *Hope v. Pelzer*, a case in which a prison inmate filed suit against Alabama prison guards, alleging that the guards had violated his Eighth and Fourteenth Amendment rights when they handcuffed him to a hitching post on two separate occasions.[53] The prison guards in the case claimed qualified immunity, despite the fact that, at the times the prison guards had handcuffed Hope to the hitching post, the Eleventh Circuit had unequivocally condemned the use of hitching posts.[54] Additionally, an Alabama Department of Corrections regulation prohibited their use.[55] Most persuasively, the Department of Justice had issued a report that found Alabama's use of the hitching post to be "improper corporal punishment."[56]

The Department of Justice report, the Department of Corrections regulation, and the Eleventh Circuit precedent all prohibited the use of the hitching post (seemingly removing the officials' discretion to use one), yet the Supreme Court did not engage in any threshold discretionary analysis to determine whether the prison guards' actions deserved protection under qualified immunity.[57] Instead, the Court applied the traditional *Saucier* two-step analysis and ultimately came to the conclusion that the three laws, taken together, clearly established the prison guards' conduct as unconstitutional.[58]

52. *See, e.g.*, *Reichle*, 132 S. Ct. 2088; Hope v. Pelzer, 536 U.S. 730 (2002); Filarsky v. Delia, 132 S. Ct. 1657 (2012).
53. *Hope*, 536 U.S. at 733-36.
54. *Id*. at 736-37; *see* Gates v. Collier, 501 F.2d 1291, 1306 (5th Cir. 1974) ("We have no difficulty in reaching the conclusion that these forms of corporal punishment run afoul of the Eighth Amendment, offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess.").
55. *Hope*, 536 U.S. at 737.
56. *Id.*
57. *See id.*
58. *Id.* at 744.

2. Filarsky v. Delia

Most notably, in 2012, the Supreme Court considered *Filarsky v. Delia*, a case in which a private attorney hired by the City of Rialto, California, to assist in internal affairs investigations, asserted qualified immunity as a defense to a firefighter's § 1983 claims.[59] In *Filarsky*, the court of appeals granted qualified immunity protection for three of the four defendants, but denied it to Filarsky (the private attorney) because he was a private individual, as opposed to a public official.[60]

On review, the Supreme Court made clear that qualified immunity applied even to private contractors, as long as they were performing governmental functions.[61] In focusing the bulk of the analysis on the traditional nature of what were and were not governmental functions and the people who performed them, the Court cited its own decision in *Wyatt v. Cole*.[62] In *Wyatt*, the Court explained that qualified immunity had always been in place to "protect[] *government's* ability to perform its traditional functions."[63] Immunity protected those functions by "preventing the harmful distractions from carrying out the work of government that can often accompany damage suits" and by "ensuring that talented candidates are not deterred from public service."[64] The entire *Filarsky* opinion barely mentioned the word "discretion" and instead focused on the rationale behind protecting the efficiency of the government and its employees.[65]

C. Lack of Discretionary Clarity: Lower Courts Forced to Make Their Own Judgment Calls With Regard to Immunity

Both the common law and the U.S. Supreme Court have recognized the difficulty of making the distinction between discretionary and ministerial functions.[66] Because the Supreme Court has only spoken of discretionary functions in dicta and has yet to actually rule on the matter, lower courts have taken it upon themselves to figure out how to apply the *Harlow* ruling.[67] It logically follows that lower courts that have attempted

59. 132 S. Ct. 1657 (2012).
60. Delia v. City of Rialto, 621 F.3d 1069 (9th Cir. 2010), *rev'd sub nom. Filarsky*, 132 S. Ct. 1657.
61. *Filarsky*, 132 S. Ct. at 1667.
62. *Id.* at 1665.
63. Wyatt v. Cole, 504 U.S. 158, 167 (1992) (emphasis added).
64. *Filarsky*, 132 S. Ct. at 1665 (citing Richardson v. McKnight, 521 U.S. 399, 409 (1997)).
65. *See id.* at 1658.
66. Owen v. City of Independence, 445 U.S. 622, 648 n.31 (1980) (stating that at common law a clear line between discretionary and ministerial functions was often hard to discern); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 132, at 1062 (5th ed. 1984) (stating that the distinction between discretionary and ministerial acts is not one "that judicial academic or practicing lawyers have been able to define").
67. Blum, *supra* note 29, at 59-60.

to make the difficult distinction between discretionary and ministerial functions have come up with some very differing results.[68]

Some circuits have taken the discretion versus ministerial distinction literally and have denied qualified immunity to the latter group of actions.[69] Other circuits have taken an alternative approach to defining discretionary functions and have asked not whether the acts in question were ministerial, but whether the acts fell within the scope of the public official's authority.[70] Finally, some circuits have completely disregarded the supposed "discretion" requirement entirely, allowing all government officials to at least *assert* qualified immunity, resting the ultimate decision on an analysis of clearly established law.[71]

1. Discretionary vs. Ministerial Functions

In some cases, qualified immunity has been denied solely because the official did not perform a discretionary function.[72] For example, the Ninth Circuit, in *Groten v. California*, denied qualified immunity to a defendant who failed to hand out the proper application materials with respect to a real estate license.[73] The court reasoned that the defendant was required to hand out the materials, and his refusal to do so constituted a purely ministerial function, thus denying him the benefit of qualified immunity analysis.[74]

Furthermore, the Fifth Circuit, in *Brooks v. George County*, utilized the ministerial function distinction when it found that Mississippi law imposed a ministerial function on a sheriff to keep work records and to provide those records to board supervisors so that detainees could be paid.[75] The *Brooks* court denied the sheriff's qualified immunity defense because the statute in question specifically required the sheriff to keep records for the purpose of paying inmates who worked for the county while they awaited trial.[76] The court reasoned that because the statute removed individual judgment and decision making (i.e., discretion), the sheriff's actions were purely ministerial and not entitled to qualified immunity.[77]

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68. *Compare* Groten v. California, 251 F.3d 844 (9th Cir. 2001), *with* Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1265 (11th Cir. 2004).
69. *See, e.g.*, *Groten*, 251 F.3d 844; Brooks v. George County, 84 F.3d 157 (5th Cir. 1996).
70. *See, e.g.*, Varrone v. Bilotti, 123 F.3d 75 (2d Cir. 1997); *Holloman*, 370 F.3d 1252.
71. *See* DeArmon v. Burgess, 388 F.3d 609, 613 (8th Cir. 2004).
72. *See, e.g.*, *Groten*, 251 F.3d 844.
73. *Id.* at 851.
74. *Id.*
75. 84 F.3d 157, 164 (5th Cir. 1996).
76. *Id*. at 165.
77. *Id.*

2. Scope-of-Authority Test

Alternatively, some circuits have defined discretion in terms of authority.[78] Those circuits doing so hold that qualified immunity is only available to government officials who are able to establish that they were acting within the scope of their "discretionary authority" when the alleged constitutional violation occurred.[79] While most circuits have not developed a bright line test to illustrate when an officer is acting within his scope of discretion, all of the circuits that apply the scope-of-discretion test require the officer to produce evidence of objective circumstances showing that the officer was pursuing his duties and that he was not acting outside the scope of his authority.[80]

One example of a circuit that abides by the scope-of-authority test is the Eleventh Circuit.[81] In *Holloman ex rel. Holloman v. Harland*, the court developed a two-prong approach to determine whether an official was acting within the scope of his authority.[82] The first prong in this scope of discretionary authority analysis asks "whether the government employee was . . . performing a legitimate job-related function—that is, pursuing a job-related goal."[83] The second prong of the test considers whether the official's actions were done "through means that were within his power to utilize."[84]

In *Holloman*, a teacher began class each morning by asking, "Does anyone have any prayer requests?"[85] A disgruntled student brought a claim alleging that the teacher violated his constitutional rights under the Establishment Clause for holding silent prayer in the classroom.[86] While the court found "fostering character development and teaching moral education" to be legitimate job-related functions, the court denied the teacher qualified immunity because she was not allowed to utilize prayer to achieve those goals.[87] In so holding, the court looked to objective evidence and reasoned that conducting classroom prayer was not a normal activity performed by high school teachers and was not commonly accepted as part of a teacher's official duties.[88]

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78. *See, e.g.*, Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1263-64 (11th Cir. 2004).
79. *Id.*
80. *See, e.g.*, Shechter v. Comptroller of New York, 79 F.3d 265, 270 (2d Cir. 1996); *In re* Allen, 106 F.3d 582, 593 (4th Cir. 1997); Barker v. Norman, 651 F.2d 1107, 1121 (5th Cir. 1981); Mackey v. Dyke, 29 F.3d 1086, 1095 (6th Cir. 1994); Coleman v. Frantz, 754 F.2d 719, 728 (7th Cir. 1985).
81. *See Holloman*, 370 F.3d 1252.
82. *Id.*
83. *Id.* at 1265.
84. *Id.*
85. *Id.* at 1261.
86. *Id.* at 1259-60.
87. *Id.* at 1283.
88. *Id.*

The court further explained that even though the teacher was serving a job-related function, her means to serve that function were limited in that she was not allowed to "educate students at all costs."[89] More importantly, "[e]mployment by a local, county, state, or federal government is not a [blank check] invitation to push the envelope and tackle matters far beyond one's job description or achieve one's official goals through unauthorized means."[90]

An example of a court that has applied a less stringent form of the scope-of-authority test for discretion is the Fourth Circuit.[91] In *In re Allen*, the Fourth Circuit held that the overriding issue with regard to discretion was whether a reasonable official in the defendant's position would have known that his conduct was beyond the scope of his official duties.[92] In that case, the attorney general performed an act that was clearly beyond the scope of his discretionary authority when he established a government agency in the form of a corporation.[93]

However, other courts have used the scope-of-authority language without performing any sort of test to determine whether the official acted beyond the limits of his official duties.[94] In *Cottone v. Jenne*, an inmate with severe mental illness strangled another inmate with his shoelaces while two guards failed to watch the surveillance cameras that were pointed toward the area where the incident occurred.[95] The amended complaint stated that not only did those guards fail to watch the monitors, but also that at the time of the incident, the guards were instead playing computer games on the main computer in the control room where they were stationed.[96]

The *Cottone* court recognized that to receive qualified immunity, the government officials (the prison guards) would first have to prove that they were "acting within [their] discretionary authority."[97] However, without engaging in any analysis, the court stated, "In this case, it is clear—and undisputed—that [the defendants] were acting within their discretionary authority."[98] Under the logic of *Cottone*, a prison guard is acting within the scope of his authority and entitled to at least assert qualified immunity as long as his alleged wrongful actions occurred while he was on duty as a government official.[99]

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89. *Id.*
90. *Id.* at 1267.
91. *See In re* Allen, 106 F.3d 582 (4th Cir. 1997).
92. *Id.* at 595.
93. *Id.*
94. *See, e.g.*, Cottone v. Jenne, 326 F.3d 1352 (11th Cir. 2003).
95. *Id.* at 1356.
96. *Id.*
97. *Id.* at 1357.
98. *Id.* at 1358.
99. *Id.*

3. Discretion is a "Dead Letter"

Following *Davis v. Scherer*'s ruling that "a law that fails to specify the precise action that the official must take in each instance creates only discretionary authority," some circuits have gone as far as to call the discretionary function requirement a "dead letter."[100] The Eighth Circuit, for example, has held that "even assuming that the [defendants] violated purely ministerial [acts, the defendants were] entitled to qualified immunity."[101] In *DeArmon v. Burgess*, the Eighth Circuit held that because the defendants raised constitutional claims, not state law claims, the only relevant inquiry was whether there were "clearly established constitutional rights."[102] In making this ruling, the court was following its own decision in *Sellers v. Baer.*[103]

In *Sellers*, two National Park Rangers arrested an intoxicated man that had been harassing women at a local fairground.[104] After driving the man to the nearest police station, they made the man promise not to go back to the fairground and released him.[105] A little over an hour later, still intoxicated, the man was struck and killed by a passing motorist.[106] The man's minor daughter claimed that the officers who arrested her father were not entitled to qualified immunity because a department regulation required that police officers take intoxicated individuals either to a police station or a detoxification center.[107] This regulation, she contended, created a "ministerial" duty on the part of the officers to ensure her father's safety.[108] The court rejected the daughter's argument and held that a duty is "ministerial" only when the statute (or regulation) at issue leaves no room for discretion.[109] The court went on to state that "in light of the limitations placed on the exception by *Davis*, we are unable to imagine the case in which the ministerial-duty exception ever could apply."[110]

4. Discretion is Irrelevant

The Fifth Circuit has questioned the continued validity of the ministerial-discretionary function distinction, and the Second Circuit has

100. Sellers v. Baer, 28 F.3d 895, 902 (8th Cir.1994) (quoting Davis v. Scherer, 468 U.S. 183 (1984)) (holding that the ministerial exception to qualified immunity is "quite narrow").
101. DeArmon v. Burgess, 388 F.3d 609, 613 (8th Cir. 2004) (quoting *Sellers*, 28 F.3d at 902).
102. *Id.*
103. *Id.*
104. *Sellers*, 28 F.3d at 897.
105. *Id.* at 898.
106. *Id.*
107. *Id*. at 901.
108. *See id.*
109. *Id.* at 902.
110. *Id*.

gone as far as to rule that discretionary functions are not required at all for an official to be protected by qualified immunity.[111] The Fifth Circuit, in *Gagne v. City of Galveston*, reiterated that the ministerial duty exception to qualified immunity is "extremely narrow."[112] In *Gagne*, the court held that police officers were not responsible for an inmate's suicide-by-belt despite the fact that department policy specifically required officers to remove all inmates' belts before booking them into a holding cell.[113] In essentially ruling that police officers are entitled to assert qualified immunity for *all* actions performed in the course of their official duties, the court interpreted *Davis* to suggest that "if an official is required to exercise his judgment, even if rarely or to a small degree, the [Supreme Court] would apparently not find the official's duty to be ministerial in nature."[114]

In *Varrone v. Bilotti*, the Second Circuit was faced with determining whether two subordinate officers were entitled to qualified immunity when they followed the strict direction of their supervisors in strip searching a visitor to a department of corrections facility.[115] The district court held that these officers were not entitled to qualified immunity because their actions were ministerial and did not involve any exercise of discretion.[116]

However, the Second Circuit reversed this ruling, holding that "even if [the] two subordinate officers performed solely a ministerial function in conducting the strip search, they still have qualified immunity for carrying out the order, not facially invalid, issued by a superior officer who is protected by qualified immunity."[117] The court felt that the reasons for granting qualified immunity to superior officers are equally applicable to subordinate officers who were merely following directions and had no choice but to carry out their orders.[118]

IV. ANALYSIS

After seeing the different approaches courts have taken with respect to qualified immunity, some questions remain: What did the Supreme Court mean in *Harlow* when it stated that qualified immunity was available to those performing discretionary functions? Did it mean discretionary functions to the exclusion of ministerial functions?[119] Did it mean that an

111. *See* Gagne v. City of Galveston, 805 F.2d 558, 559-60 (5th Cir. 1986); Varrone v. Bilotti, 123 F.3d 75, 82 (2d Cir. 1997).
112. 805 F.2d at 560.
113. *Id.* at 559.
114. *Id.* at 560.
115. 123 F.3d at 81.
116. *Id.* at 82.
117. *Id.*
118. *Id.*
119. *See* discussion *supra* Part III.C.1.

official must be acting within the scope of his discretionary authority at the time of the conduct at issue?[120] Or, was the Court simply defining discretion to show that efficiency concerns require the protection of those officials who perform discretionary functions?[121] Because the Supreme Court has left the door open to many possible interpretations, that is exactly what has happened over the past thirty years: many interpretations. Depending upon the circuit in which an alleged constitutional violation occurs, government officials essentially play the lottery with their right to be protected for actions and circumstances that are beyond their control.

Again, consider the hypothetical situation in *Southwood v. Jones*. If Officer Jones had improperly weighed the marijuana in a circuit that recognizes the discretionary versus ministerial distinction, it is likely that Officer Jones would not be entitled to assert qualified immunity and would potentially be liable for an amount up to $100,000.[122] Recall, ministerial tasks are those involving no judgment, emotion, or decision-making ability.[123] In this hypothetical situation, the Calitucky statute specifically required Officer Jones to weigh the marijuana, and he could arrest Mr. Southwood only if the total weight was above twenty-five grams.

Officer Jones was not guided by his emotions, nor did he make a judgment call about how much the marijuana weighed. He merely followed protocol by weighing the individual bags and, unfortunately, made a calculation error that led to Mr. Southwood's arrest. Supreme Court precedent suggests that the only relevant inquiry in this situation should be whether a reasonable person in Officer Jones's position would have known that his actions violated Mr. Southwood's constitutional rights.[124] Yet, in a jurisdiction that recognizes discretion as a precursor to qualified immunity, Officer Jones is not even entitled to that analysis. In such a jurisdiction, Officer Jones would be held fully liable in this situation regardless of whether there was clearly established law of which he should have been aware. This result, on its face, does not seem correct and does little to further the purpose of protecting government officials who perform their duties responsibly.[125]

Next, consider if the conduct occurred in a jurisdiction that recognizes some form of the scope-of-authority test.[126] Generally, Officer Jones seems to be able to at least assert qualified immunity in such a jurisdiction because his actions were taken within the scope of his duties as a police officer. He

120. *See* discussion *supra* Part III.C.2.
121. *See supra* text accompanying notes 17, 65.
122. *See* discussion *supra* Part III.C.1.
123. Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982).
124. *Id*. at 818.
125. *See supra* text accompanying note 17.
126. *See* discussion *supra* Part III.C.2.

was running his radar gun during the night shift and pulled over Mr. Southwood for speeding. He followed procedure and procured an arrest. Although his measurements were inaccurate, Mr. Southwood was acting in his role as a state police officer and has a good argument for meeting the discretionary authority requirement.

However, now hypothesize that Officer Jones pulled over Mr. Southwood in the Eleventh Circuit, where *Holloman ex rel. Holloman v. Harland* was decided. Following the two-prong approach in its scope of authority test, Officer Jones is likely once again out of luck. The second prong of the test states that the official must have been pursuing a job-related goal "through means that were within his power to utilize."[127] Though Officer Jones was pursuing a job-related goal in arresting a drug offender, he did not have the power to utilize the means of arrest to achieve that job-related goal in this case because Mr. Southwood had less than twenty-five grams of marijuana in his possession. So it seems that even under some variation of the scope of authority test, Officer Jones is prohibited from raising the defense of qualified immunity.

The third and final approach, that discretion is not actually a prerequisite for the assertion of qualified immunity (or that if it ever was, it is now a "dead letter"),[128] provides the best result. Such an approach takes into account the possibility that the *Harlow* court was simply referring to the fact that government officials' (mainly police officers') jobs are inherently discretionary, which is the reason why government officials are entitled to assert qualified immunity.[129] There is support for this assertion.[130] In *F.E. Trotter v. Watkins*, the Ninth Circuit pointed out that separating an official's job that requires a substantial amount of independent judgment into "discretionary" and "ministerial" components does little to further the protection afforded government officials, especially when, as pointed out in *Owen v. City of Independence*, such a fine line is often hard to discern.[131]

Additionally, this assertion is in line with footnote fourteen of *Davis v. Scherer*. The *Davis* decision stands for the proposition that there may be the rare occasion where a government official's job is purely ministerial.[132] Such an example would be the officers in *Groten v. California* that were required to distribute licensing materials when asked.[133] In contrast, police officers, whose jobs are inherently discretionary, are the type of

127. Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1265 (11th Cir. 2004).
128. *See* discussion *supra* Parts III.C.3-4.
129. *See* Town of Castle Rock v. Gonzales, 545 U.S. 648 (2008) (holding that a tradition of police discretion has long co-existed with allegedly mandatory enforcement statutes).
130. *See, e.g.*, F.E. Trotter v. Watkins, 869 F.2d 1312, 1315 (9th Cir. 1989).
131. *Id.*; Owen v. City of Independence, 445 U.S. 622, 748 n.31 (1980).
132. Davis v. Scherer, 468 U.S. 183, 196 n.14 (1984).
133. 251 F.3d 844, 849 (9th Cir. 2001).

government officials who should be entitled to assert qualified immunity in any instance.

An approach that disregards discretion is also supported by the Court's reluctance to expend a substantial amount of judicial resources on difficult questions that will have virtually no effect on the outcome of the case.[134] Consider the case of *Cottone v. Jenne*, mentioned earlier, where the prison guards were able to assert qualified immunity despite the fact that they had been playing video games at the time of the inmate's murder.[135] At the outset, this result does not seem right. Yet the court eventually concluded that those guards had a duty to monitor and supervise known violent inmates who posed a substantial risk of serious harm to others.[136] As such, the guards were found to have been deliberately indifferent to the deceased inmate's Fourteenth Amendment rights and were thus not entitled to the benefit of qualified immunity on clearly established law grounds.[137]

The Supreme Court has stated on numerous occasions that the only inquiry relevant to qualified immunity is that of clearly established law.[138] In determining that clearly established law was the right question, the Court noted that an objective standard best dispensed of insubstantial claims at the summary judgment phase of litigation.[139] Any approach that invites an analysis of discretion also invites the ever-changing question, "Was this officer's act discretionary?" This approach would likely lead courts backwards toward the fact-intensive situations that the Court sought to get rid of when it eliminated the subjective "good faith" prong of qualified immunity.[140]

Alternatively, an approach that allows an official to assert qualified immunity regardless of discretion will save the courts from future unnecessary litigation with virtually the same result. Such an approach also makes sense from the perspective of a reasonable person in Officer Jones's position. If there is no law clearly establishing the government official's conduct as unconstitutional, the official's actions should be protected by qualified immunity regardless of whether those actions are discretionary, ministerial, or otherwise.

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134. *See* Pearson v. Callahan, 555 U.S. 223, 236-37 (2009).
135. *See supra* text accompanying notes 96-100.
136. Cottone v. Jenne, 326 F.3d 1352, 1360 (11th Cir. 2003).
137. *Id.*
138. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818-820 (1982); Davis v. Scherer, 468 U.S. 183, 183 (1984).
139. *See Harlow*, 457 U.S. at 818-820.
140. *See supra* text accompanying notes 18-23.

V. PROPOSED RESOLUTION

In light of the conflicting views surrounding discretion's role within qualified immunity analysis, the Supreme Court should, at the very least, take the opportunity to clarify the phrase "discretionary functions" as used in *Harlow v. Fitzgerald*. Upon taking the opportunity, the solution could be as simple as one sentence, such as: "The qualified immunity defense may be asserted by any government official, regardless of whether that official is performing discretionary or ministerial functions and regardless of whether the official's action may arguably have been outside the scope of the official's authority."

Such an approach would eliminate the differing results within the circuit courts with respect to the doctrine and would provide guidance to future courts, such as the district court in the hypothetical case of *Southwood v. Jones*. Such a simple solution would not only ensure that the policies underlying qualified immunity hold true in all situations, but also that able individuals will continue to step up to take positions within the government and will continue to exercise their duties without fear of constitutional liability or unwarranted litigation.

VI. CONCLUSION

In conclusion, discretion is not, and should not be, considered as a threshold inquiry to qualified immunity analysis. Supreme Court precedent shows that qualified immunity was designed to be resolved quickly without resort to trial, and the use of the word discretion, though present in the 1980s, has steadily declined with the adoption of a "clearly established law" standard. However, because of the Court's use of the discretionary language in *Harlow*, lower courts are split with regard to the proper place and application of such an analysis. Some courts have taken the ministerial function distinction so far as to deny officers qualified immunity, while others have completely ignored the language as pure dicta. The best approach to take in future qualified immunity situations is an approach that affords all government officials the right to assert qualified immunity. The defense should rest entirely, as stated in *Harlow*, on an analysis of clearly established law. Such a standard is all that is required in order to ensure that insubstantial claims are resolved in an efficient manner and will successfully balance the vindication of individual rights with the social costs that will inevitably arise when public officials have exercised their power responsibly.