Spring 1989

Immunizing Intentional Violations of Constitutional Rights Through Judicial Legislation: The Extension of Harlow v. Fitzgerald to Section 1983 Actions

Gary S. Gildin
gsg2@psu.edu

Recommended Citation

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 (1989).

IMMUNIZING INTENTIONAL VIOLATIONS OF CONSTITUTIONAL RIGHTS THROUGH JUDICIAL LEGISLATION: THE EXTENSION OF *HARLOW V. FITZGERALD* TO SECTION 1983 ACTIONS

by
Gary S. Gildin*

I. INTRODUCTION

In *Harlow v. Fitzgerald*,[1] the United States Supreme Court expanded the qualified immunity available to federal officials sued in *Bivens*[2] actions for violations of constitutional rights. In the six years since the *Harlow* decision, the Supreme Court and the federal courts of appeals have uniformly extended the new immunity rule to civil actions brought under 42 U.S.C. § 1983[3] seeking redress for constitutional violations caused by state governmental officials. It is the thesis of this Article that, despite an unwavering line of authority to the contrary, the *Harlow* immunity does not shield state officials sued under section 1983.

To understand why *Harlow* cannot govern section 1983 actions, it is necessary to identify the source of state government officials' immunity under the statute. On its face, section 1983 does not explicitly establish an immunity defense. Rather, the statute provides, in pertinent part, that "[*e*]*very* person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured . . . ."[4] Even though the statute does not expressly set forth any immunity, the Supreme Court has reasoned that Congress, using general language in section 1983, could not have meant to abolish all common law

---

* Professor, The Dickinson School of Law; B.A. 1973, University of Wisconsin; J.D. 1976, Stanford Law School.

[1] 457 U.S. 800 (1982).

[2] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (holding that a federal cause of action for which damages are recoverable exists against federal agents who cause injury while engaging in a violation of consititutional rights).

[3] (1982).

[4] 42 U.S.C. § 1983 (1982) (emphasis added).

immunities.[5] Instead, the Court has presumed that Congress intended to incorporate the common law immunities when it enacted section 1983 since it failed to abrogate them specifically.[6]

If the Court's interpretation of the intent of the legislature is accepted,[7] then until Congress amends the statute, the qualified immunity of state officials under section 1983 must parallel the common law immunity standard. As shall be discussed, the qualified immunity defense crafted by the Court in *Harlow* admittedly departs from the common law to afford significantly broader protection from liability to government officials who violate the Constitution. Consequently, application of the *Harlow* immunity

---

[5] Tenney v. Brandhove, 341 U.S. 367, 376 (1951) ("We cannot believe that Congress . . . would impinge on a tradition so well grounded in history and reason by covert inclusion in the language before us.").

[6] Pierson v. Ray, 386 U.S. 547, 554-55 (1967) ("The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities.").

[7] The Court's supposition that Congress intended to adopt common law immunities arguably is inconsistent with the very purpose of § 1983. The legislature created a federal remedy because state law often failed to afford redress for violations of constitutional rights. Monroe v. Pape, 365 U.S. 167, 174-75 (1961). Congress did not simply intend to federalize state tort law; instead, § 1983 is founded on the assumption "that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." *Id.* at 196 (Harlan, J., concurring). *But see Monroe*, 365 U.S. at 187 (Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."). Interestingly, in common law actions alleging violations of the Constitution, government officials were held strictly liable for their transgressions. Butz v. Economou, 438 U.S. 478, 490-91, 507 n.34 (1978) (constitutional violations by federal officials are, by definition, not the valid exercise of federal authority and are not entitled to immunity).

The presumed inclusion of common law defenses further contradicts the legislature's instruction that the statute should be liberally construed to afford a remedy for invasions of constitutional rights. Monell v. Dep't of Social Services, 436 U.S. 658, 684-85 (1978) ("In both Houses, statements of the supporters of § 1 corroborated that Congress, in enacting § 1, intended to give a broad remedy for violations of federally protected civil rights."). *See* Briscoe v. Lahue, 460 U.S. 325, 348 (1983) (Marshall, J., dissenting) ("Members of the 42d Congress explicitly stated that § 1983 should be read so as to further its broad remedial goals."); Pierson v. Ray, 386 U.S. 547, 561-64 (1967) (Douglas, J,. dissenting) ("The section's purpose was to provide redress for the deprivation of civil rights.").

Finally, the Supreme Court's reliance on the common law to afford an immunity that the language of § 1983 does not explicitly confer is at odds with the Court's refusal to borrow common law concepts in interpreting the cause of action created by § 1983. In Martinez v. California, 444 U.S. 277, 285 (1980), the Court declined to import state common law duties into § 1983. In *Monell*, the Court held that municipalities and other local governmental entities cannot be held liable on a respondeat superior theory, even though such entities were vicariously liable under tort law at the time § 1983 was enacted. *Monell*, 436 U.S. at 690-91. *See* Owen v. City of Independence, 445 U.S. 622, 640 (1980) ("As a general rule, it was understood that a municipality's tort liability in damages was identical to that of private corporations and individuals . . . .").

to section 1983 actions would both contravene congressional intent to import common law immunities and undermine the legislature's goal of affording redress for deprivations of constitutional rights.

II. THE QUALIFIED IMMUNITY STANDARD UNDER SECTION 1983 PRIOR TO *HARLOW*

The United States Supreme Court first recognized the qualified immunity defense in *Pierson v. Ray*,[8] a section 1983 action alleging that municipal police officers had unconstitutionally arrested a group of black and white clergymen who attempted to use segregated facilities at a Jackson, Mississippi bus terminal. The court of appeals had ruled that the police officers could not assert any immunity. Finding that "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common law immunities,"[9] the Court reversed, holding that the immunity defense applicable to a common law action for false arrest and imprisonment was likewise available in a section 1983 action.

While acknowledging qualified immunity for section 1983 actions, the Court in *Pierson* was ambiguous in its articulation of the standard for the immunity. The Court stated that a police officer would be excused from liability "for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional," for actions taken in "good faith and with probable cause," and for "reasonably believ[ing] in good faith that the arrest was constitutional."[10] The Court did not unequivocally indicate whether the immunity test was subjective or objective; nor did it issue guidance on how to apply the immunity to circumstances beyond section 1983 claims that aver police officers executed an unconstitutional arrest.

The Supreme Court next addressed the qualified immunity defense in *Scheuer v. Rhodes*,[11] a section 1983 action arising out of the fatal shooting of three students at Kent State University during an anti-war demonstration. Defendants included the Governor and the Adjutant General of Ohio, various members of the Ohio National Guard and the University

---

[8] 386 U.S. 547 (1967).
[9] *Id.* at 554.
[10] *Id.* at 555, 557.
[11] 416 U.S. 232 (1974).

President. The court of appeals had affirmed the district court's dismissal of the complaint, holding that the executive officials are entitled to absolute immunity for all actions performed within the scope of official duty.[12] The Supreme Court reversed, stating that the executive officials could avail themselves of a qualified, but not an absolute, immunity to section 1983 liability.[13] Because of the procedural posture of the case, the Court did not attempt to define the contours of the qualified immunity of state executive officials.[14] The Court did note, however, that evaluating immunity for high level executive officials is more complex than asssessing immunity for line police officers because of the broader range of duties and authority accorded the former.[15] The Court then posited the following general qualified immunity standard for executive officials:

> [In varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.[16]

Although *Scheuer* strongly suggested that a state official was required to meet both subjective and objective criteria to be immune, the lower federal courts continued to apply divergent standards. In *Wood v. Strickland*,[17] the Court granted certiorari to determine whether the qualified immunity test for school board members was purely subjective, as the district court contended, or objective, as the court of appeals decided.[18] In keeping with the origin of the section 1983 immunity defense, the Court examined the common law immunity of public school officials. It concluded that while formulations of the immunity varied, "state courts have generally recognized that such officers should be protected from tort liabil-

---

[12] *Id.* at 234-35.
[13] *Id.* at 247-48.
[14] *Id.* at 249.
[15] *Id.* at 245-47.
[16] *Id.* at 247-48.
[17] 420 U.S. 308 (1975).
[18] *Id.* at 313-14.

ity under state law for all good-faith, nonmalicious action taken to fulfill their official duties."[19] Relying on the common law, as well as its own immunity precedents, the Court held that a school board official must satisfy both objective and subjective tests to be immune from liability under section 1983:

> The disagreement between the Court of Appeals and the District Court over the immunity standard in this case has been put in terms of an "objective" versus a "subjective" test of good faith. As we see it, the appropriate standard necessarily contains elements of both. . . . [W]e hold that a school board member is not immune from liability for damages under section 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.[20]

In the years between its *Wood* decision and *Harlow v. Fitzgerald*,[21] the Court faithfully hewed to the rule that a state official must satisfy both the objective and subjective tiers of the qualified immunity to avoid section 1983 liability for constitutional violations.[22]

---

[19] *Id.* at 318.

[20] *Id.* at 321-22. The Court also observed that the qualified "immunity from damages does not ordinarily bar equitable relief as well." *Id.* at 314 n.6.

[21] 457 U.S. 800 (1982).

[22] Procunier v. Navarette, 434 U.S. 555 (1978) (applying the rule to prison officials); O'Connor v. Donaldson, 422 U.S. 563 (1975) (applying the rule to the superintendent of a state mental hospital).

In *Procunier* and *O'Connor*, the Court ignored the source of the qualified immunity defense by applying the *Wood* standard without making any inquiry into what immunity was afforded the specific officials at common law. *Procunier*, 434 U.S. at 568 (Stevens, J., dissenting). Furthermore, without purporting to overrule or modify *Wood*, *Procunier* radically enlarged the circumstances under which an official would be deemed to satisfy the objective test of the qualified immunity. The expansion of the objective tier is addressed in detail in S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION §§ 8.04, 8.09 (1986).

III. EXPANSION OF THE QUALIFIED IMMUNITY IN *HARLOW V. FITZGERALD*

In *Harlow v. Fitzgerald*,[23] the Supreme Court broadened the protection afforded by the qualified immunity in actions against federal officials alleged to have infringed constitutionally protected interests. In order to comprehend *Harlow* and to assess whether its holding can be applicable to state officials sued under section 1983, it is necessary to identify the source of the civil immunity of federal officials accused of violating constitutional rights.

A. *Source of the Immunity of Federal Officials*

Section 1983 provides a civil cause of action against state, but not federal, officials who violate federal constitutional rights.[24] Congress never enacted a counterpart to section 1983 to implement a general civil damage remedy for the constitutional wrongs of persons acting under color of federal law. Faced with the prospect of leaving victims of federal misconduct remediless, the Supreme Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[25] implied from the Constitution a civil cause of action for damages against federal officials who trammel fourth amendment rights.[26] The cause of action introduced in *Bivens* was not a

---

[23] 457 U.S. 800 (1982).

[24] Daly-Murphy v. Winston, 837 F.2d 348, 355 (9th Cir. 1987). Federal officers may be sued under § 1983 when the constitutional violation is the result of a conspiracy between federal and state actors. Kletschka v. Driver, 411 F.2d 436, 448 (2d Cir. 1969); *see also* Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970) (private persons who conspire with state officials act "under color of law" within the meaning of § 1983).

[25] 403 U.S. 388 (1971). *Bivens* involved a civil rights suit against agents of the Federal Bureau of Narcotics for violations of the fourth amendment. The agents had forced their way into Webster Bivens' apartment, conducted a warrantless search, and manacled and arrested him in front of his family for alleged narcotics violations. *Id.* at 389. A United States commissioner eventually dismissed the criminal complaint against Bivens.

[26] The reasoning of *Bivens* was subsequently adopted and applied by the Court to allow a cause of action against federal officers for violations of other constitutional rights. Carlson v. Green, 446 U.S. 14 (1980) (eighth amendment); Davis v. Passman, 442 U.S. 228 (1979) (fifth amendment).

A *Bivens* action may be precluded when "Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Carlson*, 446 U.S. at 18. Similarly, a *Bivens* action may be defeated by "special factors counselling hesitation in the absence of affirmative action[s] by Congress." *Bivens*, 403 U.S. at 396. *See* United States v. Stanley, 107 S. Ct. 3054, 3063 (1987) (*Bivens* remedy unavailable for injuries that "arise out of or are in the course of activity incident to [military] service."); Bush v.

product of legislation. To the contrary, Congress's failure to supply a remedy for the constitutional trespasses of federal officials induced the Court to establish the cause of action.

Because the court of appeals had not addressed the issue, the Court in *Bivens* expressly refused to entertain the question of immunity.[27] It was not until 1978, in *Butz v. Economou*[28] that the Court first determined what immunities insulate federal officials from liability in a *Bivens* action.

Butz arose out of an action against the United States Secretary of Agriculture and other federal executive officials.[29] The complaint maintained that these officials had unconstitutionally prompted an investigation and administrative proceeding to revoke or suspend Economou's registration as a commodities futures commission merchant in retaliation for his criticism of the Department of Agriculture.[30] The district court dismissed the complaint on the ground that the defendants were absolutely immune for all discretionary actions within the scope of their authority.[31] The court of appeals reversed,[32] holding that the federal officials were entitled only to the same qualified immunity that governed state officials sued under section 1983.[33]

The Supreme Court rejected the federal officials' blanket claim to absolute immunity.[34] The Court began its analysis by examining the immunity of employees of the federal government at common law. While the common law extends absolute immunity to federal officers who act within

---

Lucas, 462 U.S. 367 (1983) (no *Bivens* action if Congress has enacted a comprehensive scheme that affords meaningful remedies); Chappell v. Wallace, 462 U.S. 296, 304 (1983) ("[T]he unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers.").

[27] *Bivens*, 403 U.S. at 397-98.

[28] 438 U.S. 478 (1978).

[29] Other individual defendants included the Assistant Secretary of Agriculture, the Judicial Officer and Chief Hearing Examiner, the Administrator of the Commodity Exchange Authority (the *CEA*), the Director of the CEA Compliance Division, the Deputy Director of the CEA Registration and Audit Division, the CEA Regional Administrator for the New York Region, the Agriculture Department attorney who prosecuted the enforcement proceeding, and several auditors who investigated or served as witnesses against Economou. *Id.* at 482.

[30] *Id.* at 480-82.

[31] *Id.* at 484.

[32] *Id.*

[33] *Id.* at 485.

[34] *Id.*

the outer limits of their authority, officers acting beyond their authority are held strictly liable.[35] Because a federal official is never authorized to transgress constitutional limits, the Court concluded that under common law there would be no immunity for unconstitutional actions.[36]

The Court also relied upon its section 1983 immunity decisions to reject across-the-board absolute immunity for federal executive officials. Noting that upper level state executive officers are permitted only a qualified immunity under section 1983, the Court refused to craft a more expansive immunity for federal executives:

> Accordingly, without congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials. The § 1983 action was provided to vindicate federal constitutional rights. That Congress decided, after the passage of the Fourteenth Amendment, to enact legislation specifically requiring state officials to respond in federal court for their failures to observe the constitutional limitations on their powers is hardly a reason for excusing their federal counterparts for the identical constitutional transgressions. To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head.[37]

Although unwilling to confer absolute immunity upon all members of the executive branch sued in *Bivens* actions,[38] the Court ruled as a matter of public policy that federal executive officials could invoke the same qualified immunity available to analogous state officers as defined in *Scheuer v. Rhodes*.[39] Thus, to be immune in a *Bivens* action, a federal executive

---

[35] *Id.* at 489-90.

[36] *Id.* at 490-91.

[37] *Id.* at 504.

[38] The Court did hold that absolute immunity would be available in "exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." *Id.* at 507. Although Secretary of Agriculture Butz was found entitled to only qualified immunity, the Court accorded absolute immunity to agency officials whose functions were analogous to those of a judge or a prosecutor. *Id.* at 514.

[39] 416 U.S. 232 (1974). The Court apparently did not consider the option of holding federal officials strictly liable for constitutional violations, even though it agreed that "traditional doctrine did not accord immunity to officials who transgressed constitutional limits." *Butz*, 438 U.S. at 507 n.34. For a discussion of Scheuer v. Rhodes, 416 U.S. 232 (1974), see *supra* text accompanying notes 11-

official must both act subjectively in good faith and satisfy the objective aspect of the defense.

B. Harlow v. Fitzgerald — Widening the Scope of Qualified Immunity in Bivens Actions

The zone of protection afforded federal officials who contravene the Constitution was broadened by the Court's reformulation of the qualified immunity standard in *Harlow v. Fitzgerald.*[40] Respondent A. Ernest Fitzgerald filed a *Bivens* action claiming that senior aides and advisers of the President of the United States conspired to violate his first amendment rights.[41] Seeking reversal of the lower federal courts' denial of their motion for summary judgment, petitioners claimed they were entitled to absolute immunity. Although the Court refused to find the federal officials absolutely immune on the existing record,[42] it agreed with their contention that public policy required adjustment of the qualified immunity to facilitate dismissal of meritless *Bivens* claims prior to trial.[43]

In *Harlow* the Court began its analysis by commenting that in adopting a qualified, rather than absolute, immunity in *Butz v. Economou*, the Court "relied on the assumption that this standard would permit '[i]nsubstantial lawsuits [to] be quickly terminated.' "[44] Under the prevailing qualified immunity standard, however, pre-trial dismissal of *Bivens* actions was impeded by the need to consider whether the official acted in good faith. Because some courts considered the issue of the official's intent to be a question of fact "inherently requiring resolution by a jury," the

---

16.

[40] 457 U.S. 800 (1982).

[41] Petitioner Bryce Harlow served both as the Presidential aide principally responsible for congressional relations and as Counselor to the President. Petitioner Alexander Butterfield was employed as Deputy Assistant to the President and Deputy Chief of Staff to H.R. Halderman. *Id.* at 802-04.

[42] The Court reasoned that the factors which mandated denial of blanket absolute immunity to high level executive officials in Butz v. Economou, 438 U.S 478 (1978), "apply with equal force to this case." *Harlow*, 457 U.S. at 809. However, the Court allowed that on remand, the White House aides could be absolutely immune if they proved that the acts in issue "embraced a function so sensitive as to require a total shield from liability." Id. at 813.

In a companion case, the Court held the President of the United States absolutely immune from liability for damages for all actions "within the 'outer perimeter' of his official responsibility." Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982).

[43] *Harlow*, 457 U.S. at 815.

[44] *Id.* at 814 (quoting *Butz*, 438 U.S. at 507-08).

immunity defense often could not be successfully invoked on a motion for summary judgment.[45] Consequently, innocent federal officials, and the government in general, were burdened with what the Court assumed were substantial social costs of litigating the state-of-mind issue, namely, "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service."[46]

In order to remove the perceived barrier to dismissal of *Bivens* actions prior to trial, the Court modified the qualified immunity standard by eliminating the condition that the official must act in subjective good faith to be immune:[47]

> Consistently with the balance at which we aimed in *Butz*, we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[48]

---

[45] *Id.* at 816.

[46] *Id.* at 816. The Court asserted that determining the official's intent was especially disruptive because "there often is no clear end to the relevant evidence," and resolution of the issue frequently necessitated "broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues." *Id.* at 817.

[47] The Court also reiterated the pro-defendant application of the objective tier of the qualified immunity which it had adopted in Procunier v. Navarette, 434 U.S. 555 (1978). If the right was not clearly established at the time of the violation, the official is automatically immune. *Harlow*, 457 U.S. at 818. On the other hand, if the right infringed was clearly established, the official may still successfully plead the immunity defense if he "claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standards." *Id.* at 819.

[48] *Harlow*, 457 U.S. at 817-18. In addition to abrogating the subjective aspect of the qualified immunity, the Court altered the ordinary application of the Federal Rules of Civil Procedure for *Bivens* actions. Most courts have interpreted FED. R. CIV. P. 56 to preclude an award of summary judgment until the party opposing the entry of judgment has had a full and fair opportunity to conduct discovery. *See* 6 J. MOORE & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 56.15(5) (2d ed. 1988) ("The party opposing summary judgment must be given a reasonable opportunity to gain access to proof, particularly where the facts are largely within the knowledge or control of the moving party."). The Court in *Harlow*, however, admonished that discovery "should not be allowed" until the court determines on a motion for summary judgment whether it was clearly established at the time of the alleged violation that the Constitution proscribed the official's conduct. *Harlow*, 457 U.S. at 818. *See* Dale v. Bartels, 552 F. Supp. 1253, 1266 n.1 (S.D.N.Y. 1982), *aff'd in part and rev'd in part*, 732 F.2d 278 (2d Cir. 1984) ("[R]easonableness of challenged intentional conduct is not the sort of issue which can be resolved by affidavit, especially in suits in which there has been no pre-trial

After *Harlow*, even if a federal officer intended to harm the plaintiff, he is immune if the constitutional interest in issue was not clearly established at the time of the violation.[49]

IV. THE EXTENSION OF *HARLOW* TO SECTION 1983 ACTIONS

A. *Post-Harlow Decisions*

The Court acknowledged that because *Harlow* arose out of the activities of federal officials, the "case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under 42 U.S.C. § 1983."[50] Although the question has never been formally posed, the Supreme Court repeatedly has presumed that the expanded *Harlow* immunity applies to section 1983 actions. The Court's extension of *Harlow* to section 1983 is founded in footnote thirty of the *Harlow* opinion. At the same time that it admitted that the *Harlow* case does not concern the immunity defense of state officials sued under section 1983, the Court volunteered: "We have found previously, however, that it would be 'untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.' "[51]

Four days after its *Harlow* opinion, the Supreme Court again suggested that it considered the broadened immunity of federal officials equally applicable to actions against state officials under section 1983. The Court vacated and remanded the decision of the Sixth Circuit in *Wolfel v. Sanborn* in which two state parole officers who had been sued under sec-

---

discovery. In suggesting that such a finding may be made at an early stage in the typical *Bivens* case, the *Harlow* opinion flies in the face of longstanding authority to the contrary . . . .").

[49] The subjective intent of the defendant may remain relevant to the immunity analysis when the constitutionality of the defendant's conduct depends on the purpose for which the actions were taken. Gutierrez v. Mun. Ct., 838 F.2d 1031, 1051 (9th Cir. 1988) ("[I]n deciding whether a defendant is entitled to qualified immunity, in cases in which unlawful motive is a critical element, the court must consider the actor's intent . . . ."); Hobson v. Wilson, 737 F.2d 1, 26-29 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985).

Justice Brennan's concurring opinion suggested that the official who knows that he was violating the Constitution would be liable "even if he could not 'reasonably have been expected' to know what he actually did know." *Harlow*, 457 U.S. at 821. Under Justice Brennan's standard, "some measure of discovery may sometimes be required to determine exactly what a public official defendant did 'know' at the time of his actions." *Id.*

[50] *Harlow*, 457 U.S. at 818 n.30.

[51] *Id.* (quoting Butz v. Economou, 438 U.S. 478, 504 (1978)).

tion 1983 unsuccessfully asserted a qualified immunity defense.[52] In its order remanding the case "for further consideration in light of *Harlow*," the Court cited *Butz* as deeming untenable "a distinction for purposes of immunity law between suits brought against state officials under Sec. 1983 and suits brought directly under the Consitution against federal officials."[53]

Predictably, the court of appeals, relying solely on footnote thirty of *Harlow*, construed the remand order to mean that the expanded *Harlow* qualified immunity applied to suits under section 1983.[54]

The first section 1983 qualified immunity case to reach the Supreme Court after *Harlow* was *Davis v. Scherer*.[55] In *Davis*, the Court was asked to decide whether state administrative regulations could be considered in evaluating whether a state official had violated clearly established federal constitutional rights. While the issue in *Davis* concerned only the objective aspect of the qualified immunity, the plaintiff did not question that the *Harlow* standard controlled his section 1983 action.[56] The Supreme Court reiterated that "our cases have recognized that the same qualified immunity rules apply in suits against state officers under § 1983 and in suits against federal officers under *Bivens* . . . ."[57]

In *Malley v. Briggs*,[58] the Supreme Court echoed its belief that section 1983 actions are governed by the *Harlow* immunity. The Court was confronted with the immunity plea of a state police officer defending a section 1983 suit. The plaintiffs averred that the officer caused their unconstitutional arrest by presenting the judge with a complaint and a supporting affidavit that failed to establish probable cause. Rejecting the police officer's claim to absolute immunity, the Court, citing *Harlow*, stated that under its own precedents, "qualified immunity represents the norm."[59] In a footnote to its citation of *Harlow*, the Court repeated the familiar foot-

---

[52] 666 F.2d 1005 (6th Cir. 1981), *vacated and remanded*, 458 U.S. 1102 (1982).

[53] Sanborn v. Wolfel, 458 U.S. 1102 (1982) (mem.) (citation omitted) (quoting Butz v. Economou, 438 U.S. 478, 504 (1978)).

[54] Wolfel v. Sanborn, 691 F.2d 270 (6th Cir. 1982), *cert. denied*, 459 U.S. 1115 (1983).

[55] 468 U.S. 183 (1984).

[56] *Id.* at 193. *See* Brief for Appellee at 21, 27-33, *Davis*, 468 U.S. 183 (1984) (No. 83-490).

[57] *Id.* at 194 n.12.

[58] 475 U.S. 335 (1986). As in *Davis*, plaintiff conceded that the *Harlow* immunity standard governed § 1983 actions. Brief for Respondent at 27-31, *Malley*, 475 U.S. 335 (1986) (No. 84-1586).

[59] *Malley*, 475 U.S. at 340 (quoting *Harlow*, 457 U.S. at 807).

note thirty: "*Harlow* was a suit against federal, not state, officials, but as we stated in deciding the case, it is 'untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.' "[60]

The Court further evidenced its acceptance of a purely objective immunity test for section 1983 suits when it repudiated the police officer's contention that policy considerations mandated that the officer receive absolute immunity:

> As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law. . . . The *Harlow* standard is specifically designed to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment," and we believe it sufficiently serves this goal. Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized.[61]

Thus, the Court in *Malley* clearly expressed its understanding that the objective *Harlow* immunity applies equally to section 1983 actions.[62]

Relying on footnote thirty of the *Harlow* opinion, the Supreme Court, without hesitation, has accepted that the *Harlow* immunity standard governs section 1983 suits against state officials.[63] Examination of the ration-

---

[60] *Id.* at 340 n.2 (quoting the portion of *Harlow*, 457 U.S. at 818 n.30, that quotes Butz v. Economou 438 U.S. 478, 504 (1978)).

[61] *Id.* at 341.

[62] In Anderson v. Creighton, 107 S. Ct. 3034, 3038-41 (1987), the Court repeatedly referred to *Malley* in defining the immunity applicable to *Bivens* actions, further manifesting its assumption that the immunity of state and federal officials is identical in the aftermath of *Harlow*. *See* Oklahoma City v. Tuttle, 471 U.S. 808, 812 n.1 (1985).

[63] Similarly, the federal appeals courts uniformly have held *Harlow* applicable to § 1983 actions. Brown v. Ponte, 842 F.2d 16, 18 (1st Cir. 1988); Krause v. Penny, 837 F.2d 595, 597 (2d Cir. 1988); Bennis v. Gable, 823 F.2d 723, 732-33 (3d Cir. 1987); L.J. *ex rel.* Darr v. Massinga, 838 F.2d 118, 124 (4th Cir. 1988); Page v. DeLaune, 837 F.2d 233, 239 (5th Cir. 1988); Stern v. Shouldice, 706 F.2d 742, 749 (6th Cir.), *cert. denied*, 464 U.S. 993 (1983); Greenberg v. Kmetko, 840 F.2d 467, 472 (7th Cir. 1988); Buller v. Buechler, 706 F.2d 844, 850 (8th Cir. 1983); Schlegel v. Bebout, 841 F.2d 937, 944 (9th Cir. 1988); Griess v. Colorado, 841 F.2d 1042, 1047 (10th Cir. 1988); Clark v. Evans, 840 F.2d 876, 879-80 (11th Cir. 1988).

ale underlying footnote thirty, however, reveals that it does not support extension of *Harlow* to section 1983.

B. Footnote Thirty of the Harlow Opinion Does Not Support Extension of the Expanded Immunity to Section 1983

Footnote thirty of *Harlow* improperly premises extension of the expanded immunity to section 1983 actions upon the following syllogism:

> 1. In *Butz v. Economou*, the Court reasoned that the immunity of federal officials from constitutional damage claims should be coextensive with the immunity of state officials.
>
> 2. *Harlow* established that to be immune, federal officials must fulfill an objective test, but need not establish subjective good faith.
>
> 3. Therefore, to have the same immunity as federal officials, state officials need only satisfy the objective *Harlow* test.

The reasoning is facially unassailable, which no doubt accounts for its universal acceptance by the Supreme Court and lower federal courts. However, in refashioning the qualified immunity for federal officials in *Harlow*, the Court violated the syllogism upon which it now relies to confer the *Harlow* immunity upon state officials.

At the time *Harlow* was decided, it was settled that state officials must satisfy both an objective and subjective test to escape liability under section 1983.[64] To be faithful to the proposition that federal and state officials must share an identical immunity, the Court could not have adopted a purely objective test for federal officials. When it made the policy judgment to abrogate the subjective tier of the immunity in *Harlow*, the Court abandoned the leading premise of its syllogism — that the immunity of federal officials must be no greater than the immunity of state officers. Thus it cannot justify extending the new immunity to section 1983 actions simply by resurrecting the syllogism it disregarded in *Harlow*.

---

[64] *See supra* Part II.

C. The Qualified Immunity, as Modified in Harlow, Departs from the Common Law Standard

Apart from the flawed logic that underlies the Court's application of *Harlow* to section 1983, extension of the new immunity contravenes the Court's settled holdings that immunity under section 1983 is founded in the common law.

As discussed earlier, the qualified immunity defense to section 1983 liability originated in the Supreme Court's presumption that, by failing to manifest an affirmative intent to abrogate common law immunities, Congress incorporated these immunities when it enacted section 1983.[65]

Prior to *Harlow*, the Court insisted that the common law required an official to satisfy both a subjective and objective test to merit immunity. When *Harlow* abolished the subjective prong of the test, it departed from the common law immunity standard. Consequently, application of *Harlow* to section 1983 actions would be contrary to congressional intent to merge common law immunities into the statute.

The *Harlow* opinion did not pretend to tie its widening of the qualified immunity to a parallel expansion of the common law defense for government officials,[66] but instead rested entirely on the Court's perception of the demands of public policy. In fact, in *Malley v. Briggs* the Court admitted that the *Harlow* immunity diverges from the common law:

> At common law, in cases where probable cause to arrest was lacking, a complaining witness's immunity turned on the issue of malice, which was a jury question. Under the *Harlow* standard, on the other hand, an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner.[67]

In *Anderson v. Creighton*,[68] the Court issued an even more resounding concession that the *Harlow* immunity is not anchored in a common law analog. *Anderson* was a *Bivens* action stemming from a warrantless search by FBI agents hunting for a fugitive. Rejecting as procrustean the

---

[65] *See supra* notes 4-7 and accompanying text.

[66] The Court has divided over whether it may, when interpreting the statute, utilize developments in the common law which followed enactment of § 1983. Smith v. Wade, 461 U.S. 30 (1983).

[67] 475 U.S. 335, 341 (1986) (footnote omitted).

[68] 107 S. Ct. 3034 (1987).

plaintiffs' assertion that the FBI agents could not advance a qualified immunity defense because officers conducting comparable fugitive searches were strictly liable at common law, Justice Scalia reasoned:

> [W]e have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law. That notion is plainly contradicted by *Harlow*, where the Court completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action.[69]

The Court may be at liberty to ignore the common law in crafting the qualified immunity for *Bivens* actions, which are not derived from an act of Congress. On the other hand, the Court is not free to supplant the legislature's intent to incorporate common law immunities into section 1983 merely because the Court believes public policy demands more generous protection of government officials.[70]

Indeed, the Court itself has confessed that it is powerless to substitute its policy judgment for the will of Congress in determining immunities under section 1983. In *Tower v. Glover*,[71] the Court held that a public defender sued under section 1983 could not assert any immunity because the defense was not available at common law for the actions in question. The Court rejected the defendant's contention that the Court should recognize an immunity for policy reasons notwithstanding the absence of a common law analog:

> Finally, petitioners contend that public defenders have responsibilities similar to those of a judge or prosecutor, and therefore should enjoy similar immunities. The threat of § 1983 actions based on alleged conspiracies among defense counsel and other state officials may deter counsel from engaging in activities that require some degree of cooperation with prosecutors — negotiating pleas, expediting

---

[69] *Id.* at 3041-42.

[70] *See* Briscoe v. Lahue, 460 U.S. 325, 364 n.33 (Marshall, J., dissenting) ("[W]e should be even more reluctant to import absolute immunity into § 1983 suits than into *Bivens* actions. . . . [W]ith § 1983, we deal with explicit statutory language indicating the broad scope of the action, whereas *Bivens* actions have been implied by the federal courts.").

[71] 467 U.S. 914 (1984).

> trials and appeals, and so on. Ultimately, petitioners argue, the State's attempt to meet its constitutional obligation to furnish criminal defendants with effective counsel will be impaired. At the same time, the federal courts may be inundated with frivolous lawsuits.
>
> Petitioners' concerns may be well founded, but the remedy petitioners urge is not for us to adopt. *We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy. It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate.*[72]

Ironically, at the same time that the Court assumed that *Harlow* would apply to section 1983, in *Malley v. Briggs*,[73] it emphasized that interpretation of the statute was constrained by Congress's intent to incorporate common law immunities. Dismissing the police officer's claim to absolute immunity, the Court stated:

> We reemphasize that our role is to interpret the intent of Congress in enacting § 1983, not to make a free-wheeling policy choice, and that we are guided in interpreting Congress' intent by the common-law tradition. In *Imbler* we concluded that at common law "[t]he general rule was, and is, that a prosecutor is absolutely immune from suit for malicious prosecution." We do not find a comparable tradition of absolute immunity for one whose complaint causes a warrant to issue. While this observation may seem unresponsive to petitioner's policy argument, it is, we believe, an important guide to interpreting § 1983. Since the statute on its face does not provide for *any* immunities, we would be going far to read into it an absolute immunity for conduct which was only accorded qualified immunity in 1871.[74]

The Supreme Court's section 1983 precedents expressly disavow any

---

[72] *Id.* at 922-23 (emphasis added). *See also* Pulliam v. Allen, 466 U.S. 522, 539-40 (1984) ("Absent some basis for determining that such a result [absolute judicial immunity in actions for equitable relief] is compelled, either by the principles of judicial immunity, derived from the common law and not explicitly abrogated by Congress, or by Congress' own intent to limit the relief available under § 1983, we are unwilling to impose those limits ourselves on the remedy Congress provided.").

[73] 475 U.S. 335 (1986).

[74] *Id.* at 342 (citations omitted) (quoting Imbler v. Pachtman, 424 U.S. 409, 457 (1976)).

power to expand the qualified immunity beyond the common law standards intended by Congress. Extension of *Harlow* to section 1983 would impermissibly substitute the Court's policy evaluation for the Court's own understanding of the will of Congress. Such judicial legislation is particularly egregious because, as shall next be discussed, the policy judgment of the Court is at odds with the purpose and general rule of construction of section 1983.

V. APPLICATION OF THE *HARLOW* IMMUNITY TO SECTION 1983 SUITS IS CONTRARY TO THE PURPOSE AND PROPER CONSTRUCTION OF THE STATUTE

Section 1983 was designed both to deter violations of the Constitution and to afford compensation to individuals who suffer invasions of constitutional rights.[75] As the Supreme Court has acknowledged, members of the enacting Congress expressly prescribed that the statute should be liberally construed to afford relief for constitutional wrongs.[76] The Court did not augment the relief available to victims of constitutional deprivations when it rewrote the qualified immunity standard in *Harlow*; instead, the Court enlarged the circumstances under which government officials may evade liability for the harm caused by their unconstitutional conduct. Consequently, applying the expanded immunity countenanced by *Harlow* to suits under section 1983 would contravene the purpose and proper construction of the statute.[77]

By abolishing the subjective portion of the immunity inquiry, *Harlow* exonerates officials who otherwise would be liable for intentional infliction of constitutional harm.[78] Under the subjective prong, immunity is denied

---

[75] Owen v. City of Independence, 445 U.S. 622, 650-52 (1980).

[76] Monell v. Dep't of Social Services, 436 U.S. 658, 685-86 (1978).

[77] The Supreme Court has noted that even if the common law afforded immunity, "the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." Tower v. Glover, 467 U.S. 914, 920 (1984). *See Owen*, 445 U.S. at 650-52 (1980).

[78] *See* S. NAHMOD, *supra* note 22, § 8.04 at 460 (footnotes omitted):

> Because the two-part test had an additional hurdle, it would seem to follow that defendants were more often held liable under the two-part test than they will be under the modified objective test. Consequently, there will be more situations under the modified test than there were under the prior two-part test in which defendants violate constitutional rights with no remedy for plaintiffs. These unremedied violations impose costs on society which have not been, and perhaps cannot be, measured satisfactorily. Such costs include disrespect

to any official who acted "with the malicious intention to cause a deprivation of constitutional rights or other injury."[79] Under *Harlow*, however, intent is irrelevant to the immunity analysis. Even if the officer meant to harm the plaintiff, he is immune if the constitutional right violated was not "clearly established" at the time of his actions.[80]

The likelihood that a governmental official will be immunized for intentional wrongs simply because the right infringed was not clearly established has been markedly expanded by the post-*Harlow* decisions of the Supreme Court. In *Davis v. Scherer*,[81] the Court held that if the federal constitutional right violated was not clearly established, the official is immune even when state statutes and regulations unambiguously prohibit his actions.[82] Most recently, in *Anderson v. Creighton*,[83] the Court held that a right does not become clearly established solely by virtue of general declarations or definitions of the right. Instead, immunity is denied only if the right was clearly established in circumstances similar to the particular facts of the case in issue:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in light of preexisting law the unlawfulness must be apparent. . . . The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed.[84]

---

for authority, disrespect for the Constitution and laws generally, the erosion of Fourteenth Amendment values, and the prospect that some executives might be undeterred in connection with Fourteenth Amendment compliance. There are also, of course, costs to the individual, such as the actual harm caused and the feeling of being victimized.

[79] Wood v. Strickland, 420 U.S. 308, 322 (1974).

[80] *Harlow*, 457 U.S. at 818.

[81] 468 U.S. 183 (1984).

[82] *Davis* does not conform to the objective aspect of the immunity as originally defined in Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974), in which the Court stated, "[i]t is the existence of reasonable grounds for the belief formed at the time *and in light of all the circumstances* coupled with good-faith belief, that affords a basis for qualified immunity . . . ." (emphasis added).

[83] 107 S. Ct. 3034 (1987).

[84] *Id.* at 3039-40 (citations omitted). *See also* Mitchell v. Forsyth, 472 U.S. 511, 535 n.12 (1985) ("We do not intend to suggest that an official is always immune from liability or suit for a warrantless

It is unclear how proximate the facts of the relevant precedent cases must be to the case in question before a court will find that the constitutional right was clearly established.[85] In *Davis v. Scherer*,[86] the Court held that the failure to afford any hearing prior to termination of a state employee did not violate clearly established law. Even though the decisions of the Supreme Court had required some kind of hearing, the Court had not specified "any minimally acceptable procedures for termination of employment."[87] If *Davis* foretells the Court's disposition to demand a high degree of factual correlation to precedent cases before a right is deemed clearly established, the instances of government officials escaping liability for intentional harm under the *Harlow* standard will greatly increase. By expanding the immunity in a manner that shields what is arguably the most egregious official misconduct, *Harlow* defeats the purpose of section 1983.[88]

---

search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances. But in cases where there is a legitimate question whether an exception to the warrant requirement exists, it cannot be said that a warrantless search violates clearly established law.").

[85] *Compare* Muhammad v. Wainwright, 839 F.2d 1422, 1424 (11th Cir. 1987) (finding right not to be clearly established because general standard had not been applied to analogous concrete facts) *with* Savidge v. Fincannon, 836 F.2d 898, 908-09 (5th Cir. 1988) ("We reject any approach to immunity doctrine that requires us to imagine the defendants saying to themselves, 'We can safely give Jonathan Savidge inadequate treatment; he was not committed to the FWSS through formal judicial proceedings and so the rationale in *Wyatt* may not apply to him.' We simply do not envision reasonable doctors and administrators calibrating their responsibility to each child on the basis of such narrow distinctions." (footnotes omitted)).

Commentators have suggested that this particular area remains a thorny one for the courts. *See* Comment, *Harlow v. Fitzgerald: The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983*, 132 U. PA. L. REV. 901 (1984). *See also* Note, *Quick Termination of Insubstantial Civil Rights Claims: Qualified Immunity and Procedural Fairness*, 38 VAND. L. REV. 1543, 1553 n.44 (1985). "Commentators have suggested three general approaches: (1) to require strict factual correspondence between the precedent case and the instant case; (2) to require that officials apply general legal principles in analogous factual situations; or (3) to require that officials anticipate discernible trends in the law." *Id.*

[86] 468 U.S. 183 (1984).

[87] *Id.* at 192 n.10.

[88] *Harlow* and its progeny also increase the cost of pursuing relief for constitutional wrongs. In Mitchell v. Forsyth, 472 U.S. 511, 526 (1985), the Court interpreted *Harlow* to establish that the qualified immunity "*is an immunity from suit* rather than a mere defense to liability." Therefore, the Court held, denial of a pre-trial motion seeking dismissal of a lawsuit on the basis of the qualified immunity is an immediately appealable final decision within the meaning of 28 U.S.C. § 1291 (1982). *Mitchell*, 472 U.S. at 530. Consequently, a civil rights plaintiff can expect to endure the expense and delay of a motion to dismiss, as well as an immediate appeal should the motion be denied, even before commencing discovery. *See id.* at 556 (Brennan, J., dissenting in part) ("[T]oday's decision will give

The Court's reformulation of the qualified immunity in *Harlow* is based solely on the Court's appraisal of the social costs imposed on government by the litigation of federal civil rights actions. Interestingly, the Court cited no statistics regarding either the presumed inability of federal officials to secure dismissal of *Bivens* actions before trial or the extensive discovery which the Court assumed that determination of the subjective motivation of the government actor entails.[89] Nor did the Court in *Harlow* examine existing empirical data concerning the extent to which the then-

---

government officials a potent weapon to use against plaintiffs, delaying litigation endlessly with interlocutory appeals. The Court's decision today will result in denial of full and speedy justice to those plaintiffs with strong claims on the merits and a relentless and unnecessary increase in the caseload of the appellate courts." (footnote omitted)). At least one court has construed *Mitchell* to sanction two appeals before trial — one appeal from denial of a motion to dismiss on the pleadings prior to discovery and a second appeal from denial of a motion for summary judgment after discovery. Kennedy v. City of Cleveland, 797 F.2d 297, 299 (6th Cir. 1986), *cert. denied*, 479 U.S. 1 (1987). *Contra* Kaiter v. Town of Boxford, 836 F.2d 704, 707-08 (1st Cir. 1988).

[89] Most of the available statistics concerning the pre-*Harlow* period belie the Court's supposition that government officials were unable to avoid the costs of discovery and trial in civil rights litigation. A study of § 1983 cases filed in 1975 and 1976 in the Central District of California found that of 276 non-prisoner cases filed, depositions were conducted in 56 cases and only 17 cases went to trial. Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 550-53 (1982). Of the 212 prisoner § 1983 claims filed in the same period, depositions were conducted in 5 cases and 3 cases proceeded to trial. *Id.* at 554.

An empirical analysis of prisoner § 1983 suits in five federal districts in 1975-1977 concluded:

> Few prisoners attempted to conduct discovery, and still fewer successfully obtained any discovery. Hardly any of the cases went to trial. Only 18 of the 664 cases studied had either an evidentiary hearing or a trial. A grand total of forty-four court days over a two-and-one-half-year period were spent on the cases studied.

Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 624 (1979). The Court relied on this study in Cleavinger v. Saxner, 474 U.S. 193 (1985), in discrediting the claim that absolute immunity of members of a prison disciplinary committee is required to avoid procedural burdens and expense of litigation.

A third empirical study reviewed prisoner § 1983 cases filed in the Northern District of Illinois in 1971 and 1973. Bailey, *The Realities of Prisoners' Cases Under 42 U.S.C. § 1983: A Statistical Survey in the Northern District of Illinois*, 6 LOY. U. CHI. L.J. 527 (1975). Of 218 cases filed in 1971, all but 22 were summarily dismissed. Depositions were conducted in only nine cases and hearings were held in only seven. *Id.* at 551. Of the 173 cases filed in 1973, all but 36 were summarily dismissed. Depositions were taken in 7 cases and hearings were held in 22. *Id.* at 552.

The most recent evaluation of § 1983 and *Bivens* litigation in the Central District of California in 1980 and 1981 found that "discovery events occur somewhat more often in nonprisoner constitutional tort cases" and that "[j]udges are somewhat more likely to have a pretrial conference or conduct a trial in a constitutional tort case." Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 675 (1987). The authors cautioned, however, that their conclusions were limited to a single district and suggested "that decision makers demand evidence to support assertions about constitutional tort cases, and that they not act in the empirical void that has dominated discussion to date." *Id.* at 695.

prevailing qualified immunity standard foreclosed redress for injuries caused by unconstitutional conduct of government officials.[90] While adjustment of the qualified immunity standard facilitated the defendant's ability to procure dismissal of *Bivens* actions prior to discovery and trial, the Court's decision in *Harlow* erected a significant additional obstacle to bona fide victims seeking to remedy the violation of their constitutional rights. The Court's *ipse dixit* that "[t]he public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts,"[91] cannot erase the new barrier to relief imposed by the expanded immunity. As such, *Harlow* is inconsistent with the legislature's charge that section 1983 should be liberally construed to further its remedial purposes.

VII. CONCLUSION

The Supreme Court's public policy judgment in *Harlow* resulted in a new qualified immunity standard that deviates from the common law immunity of government officials and serves to make it more difficult to obtain redress for constitutional harms. Consequently, the *Harlow* rule, when applied to section 1983 actions, contradicts what the Court proclaimed to be Congress's intent to incorporate common law immunities into section 1983, as well as Congress's instruction to liberally construe

---

[90] A 1979 study of all reported *Bivens* cases found that plaintiffs had prevailed in only 5 of 136 cases in which judgment was entered. Note, *"Damages or Nothing" — The Efficacy of the Bivens-Type Remedy*, 64 CORNELL L. REV. 667, 694 (1979). In 51 of the 131 cases in which defendants prevailed, judgment was based upon an individual immunity. *Id.* at 695.

A project assessing the viability of § 1983 suits against police in Connecticut concluded "that suits in the sample brought under 42 U.S.C. § 1983 did not compensate plaintiffs for violations of their constitutional rights or deter police officers from engaging in proscribed behavior." Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 814 (1979). Among the solutions proposed by the authors was elimination of the qualified immunity defense. *Id.* at 815-16.

Other studies, while not isolating the qualified immunity defense, similarly found that plaintiffs fared poorly in § 1983 litigation. Eisenberg & Schwab, *supra* note 89, at 677 ("Constitutional tort plaintiffs do worse than non-civil rights litigants in every measurable way."); Eisenberg, *supra* note 89, at 527 ("The available information suggests that there is not a large-scale shift of public funds to § 1983 plaintiffs."); Turner, *supra* note 89, at 624 ("Permanent relief was practically never granted. In our 664-case sample, 3 injunctions were granted; minimal damages were awarded in 2 E.D. Va. cases but no others."); Bailey, *supra* note 89, at 531 (Prisoners obtained judicial relief in 4 out of 218 cases.).

[91] *Harlow*, 457 U.S. at 819.

the statute to afford a remedy for deprivation of constitutional rights caused by persons acting under color of state law. The Supreme Court has not and cannot explain how its assessment of public policy can supplant the expressed will of the legislature. Until Congress amends the statute, *Harlow* may not extend to suits under section 1983.