Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation

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In *Harlow v. Fitzgerald*,¹ the Supreme Court fundamentally altered the qualified immunity defense available to a government official charged with a constitutional violation in a civil rights action for damages. Under *Harlow*, an official is entitled to immunity unless his conduct violates a "clearly established" constitutional right.² This purely objective standard of qualified immunity is a radical departure from prior law, which permitted a plaintiff to rebut an official's immunity defense by introducing facts to show that the official had acted with malicious intent to cause a constitutional deprivation or other injury.³ The *Harlow* Court believed that such a drastic revision was necessary to shield officials from the burden of defending against insubstantial lawsuits based solely on conclusory allegations of malice.⁴ By focusing exclusively on the "clearly established" requirement and foreclosing factual inquiry into an official's state of mind, *Harlow* transformed the issue of qualified immunity from a mixed question of fact and law into a pure question of law to be resolved by the court on a motion for summary judgment.⁵

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

2. *Id.* at 818.

3. See *infra* text accompanying notes 21-29.

4. 457 U.S. at 816-18.

5. A number of case notes have commented upon *Harlow* and its reformulation of the qualified immunity test. 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) [hereinafter cited as Comment, *The Lower Courts Implement*] (analyzing how court should determine whether controlling law was clearly established); Comment, *Rejecting Absolute Immunity for Federal Officials*, 71 CALIF. L. REV. 1707 (1983) (advocating expanded regime of governmental liability coupled with amendment to Federal Torts Claims Act codifying *Harlow* test); Note, *An Examination of Immunity for Federal Executive Officials*, 28 VILL. L. REV. 956 (1983) (advocating extension of *Harlow* qualified immunity standard to all government officials, including legislative aides, to promote uniformity in treatment); *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 226-36 (1982) (arguing that *Harlow* will leave many plaintiffs without redress in ambiguous or uncharted areas of law); Comment, *Entity and Official Immunities Under 42 U.S.C. Section 1983: The Supreme Court Adopts a Solely Objective Test*, 28 S.D.L. REV. 337 (1983) (noting that *Harlow* fundamentally altered nature of qualified immunity defense); Comment, *Immunity: Eliminating the Subjective Element from the Qualified Immunity Standard in Actions Brought Against Government Officials*, 22 WASHBURN L.J. 577 (1983).

Qualified Immunity

In reformulating the qualified immunity defense, however, the Supreme Court failed to distinguish between “malice” as an element necessary to rebut an official’s qualified immunity defense and “state of mind” as an element of the plaintiff’s substantive claim. It is unlikely that the Court meant for *Harlow* to prevent a plaintiff from inquiring into the reasons behind an official’s conduct when the substantive law controlling the plaintiff’s claim makes the official’s state of mind a necessary component of the constitutional violation. Applied literally, however, *Harlow*’s wholly objective immunity standard threatens to eviscerate the civil rights remedy in just such cases. Moreover, because these suits often involve the intentional abuse of government power, the *Harlow* standard would deny redress to victims of precisely the kind of official misconduct that the civil rights remedy was primarily intended to address.

This Note argues that the qualified immunity inquiry must be restructured to force the lower courts to resolve the purely legal question of an official’s qualified immunity independently of any factual inquiry into an official’s state of mind. Although inquiry into an official’s state of mind is inappropriate for purposes of the qualified immunity determination, *Harlow* should not be construed to prohibit such inquiry whenever it is essential to establishing a valid substantive claim. The restructuring proposed by this Note is imperative if the *Harlow* standard is to strike a satisfactory balance between the conflicting interests of plaintiffs and government officials in civil rights actions.

I. THE LAW OF QUALIFIED IMMUNITY

The ability of a plaintiff in a civil rights suit⁶ to recover damages from a government official is severely restricted by the law of qualified immu-

(same).

6. Civil rights actions against state officials in their individual capacities are permitted under 42 U.S.C. § 1983 (1982). Section 1983 provides in pertinent part:

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

Section 1983 creates no substantive rights; it only provides a right of action to vindicate those rights already guaranteed by the Constitution or federal statute. *See, e.g., Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979) (Section 1983 is “not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes.”).

Section 1983 was originally enacted as part of the Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13. Although originally designed to enforce the provisions of the Fourteenth Amendment and to protect the constitutional rights of black citizens in the South during Reconstruction, the remedial function of § 1983 has been interpreted broadly by the federal courts to extend beyond the context of racial discrimination to violations of any substantive right secured by the Constitution or federal law. *See Monroe v. Pape*, 365 U.S. 167, 172–87 (1961) (recognizing right of action under § 1983 for

nity,⁷ which protects officials from liability for constitutional violations in all but the most egregious cases.⁸ The law of qualified immunity is an imperfect attempt by the federal courts to accommodate three competing goals: (1) providing effective redress to persons whose constitutional rights have been violated by government officials, (2) deterring officials from abusing their power in derogation of the Constitution, and (3) protecting officials from being unduly burdened by the threat of potential liability in the discharge of their discretionary duties.⁹

Fourth Amendment violation even though challenged conduct violated state law because official was vested with authority of state law); *see also* P. SCHUCK, *SUING GOVERNMENT* 47-51 (1983) (discussing historical evolution of § 1983).

Suits against federal officials for constitutional violations have been permitted only since 1971 by virtue of the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing implied cause of action for damages against federal official in individual capacity for constitutional violation). The Supreme Court has limited this cause of action, however, to situations in which "Congress has [not] provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (emphasis in original).

For a concise discussion of official liability and immunity doctrines in the federal courts, *see* P. SCHUCK, *supra*, at 203-05.

7. Some government officials have been permitted to claim absolute immunity from damages actions for constitutional violations. *See* *Tenney v. Brandhove*, 341 U.S. 367 (1951) (legislators, for acts in their legislative capacity); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutors, for their prosecutorial acts); *Stump v. Sparkman*, 435 U.S. 349 (1978) (judges, for their judicial acts); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (President of United States). These officials remain subject to the criminal law for willful deprivations of constitutional rights. 18 U.S.C. § 242 (1982) (criminal analog of § 1983). *See Imbler*, 424 U.S. at 429; *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974).

Executive officials have generally been limited to a qualified immunity defense unless they perform special prosecutorial or adjudicative functions which require a broad exemption from liability. *See Butz v. Economou*, 438 U.S. 478, 508-17 (1978).

8. Although § 1983 and the *Bivens* doctrine authorize civil rights actions for injunctive and declaratory relief, this Note is concerned solely with actions seeking compensatory damages. Because injunctive and declaratory actions do not carry the threat of personal liability, the Supreme Court has ruled that the law of qualified immunity does not bar injunctive and declaratory suits against government officials. *See Harlow*, 457 U.S. at 819 n.34; *see also Pulliam v. Allen*, 104 S. Ct. 1970 (1984) (judicial immunity no bar to prospective injunctive relief against judicial officer acting in judicial capacity).

Furthermore, while § 1983 has been interpreted to encompass claims based on violations of federal statutes, *see Maine v. Thiboutot*, 448 U.S. 1, 4 (1980), this Note will address only constitutionally-based claims.

9. *See Scheuer v. Rhodes*, 416 U.S. 232, 239-42, 245-48 (1974) (emphasizing injustice of subjecting to liability officials who are required to exercise discretion, and societal interest in encouraging vigorous exercise of official authority); *Butz v. Economou*, 438 U.S. 478, 504-07 (1978) (public policy considerations support limited immunity for federal executive officials despite importance of providing redress to injured citizens and deterring officials from committing constitutional wrongs); and *Harlow*, 457 U.S. at 813-15 (resolution of immunity question requires balance between vindication of constitutional guarantees and social costs of suits against public officials). *See also* Comment, *The Lower Courts Implement*, *supra* note 5, at 913-15 (discussing interaction between three goals of compensation, deterrence, and protection of public officials in development of qualified immunity defense in civil rights litigation).

No clear consensus exists as to the relative weight that should be given to each of these goals. Compare P. SCHUCK, *supra* note 6, at 59-121 (arguing that official liability for damages creates perverse incentives for official behavior and advocating expanded regime of governmental liability) and Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110 (1981) (qualified immunity seriously inhibits officials' discretionary conduct while only rarely permitting damage awards to

Qualified Immunity

In analyzing the scope of the immunity defense accorded government officials charged with constitutional violations, it is important to note that the law of qualified immunity is entirely a creation of the courts, without textual basis in either the Constitution or statute.¹⁰ In an effort to mitigate the social costs that attend the litigation of suits against officials,¹¹ the federal courts have consistently drawn on common law doctrines of official immunity¹² to fashion a defense for officials in the constitutional

plaintiffs) with Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482 (1982) (Supreme Court should not have interposed common law immunity doctrines into § 1983 litigation to bar recovery by plaintiffs whose constitutional rights have been violated) and Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 NW. U.L. REV. 526 (1977) (qualified immunity standard emphasizing "settled" law rather than reasonableness effectively eliminates official liability and leaves injured plaintiffs without a remedy).

10. In creating the *Bivens* remedy, the Supreme Court specifically reserved for future resolution the question of whether federal government officials are entitled to some form of immunity by virtue of their position and the nature of their duties. 403 U.S. at 397-98. However, other than the speech and debate clause in article 1, section 6, which provides that members of Congress may not be challenged with respect to their official legislative activities, there is nothing in the U.S. Constitution which expressly mandates such immunity.

Similarly, the plain text of 42 U.S.C. § 1983 creates no exceptions for special classes of persons, and a literal reading of the statute suggests that a government official, like any other person, is subject to § 1983 liability for a constitutional infringement. See Eisenberg, *supra* note 9, at 492-93.

11. The Supreme Court has cited three specific costs which attend the litigation of suits against government officials. First, litigation diverts official energy and resources from pressing public problems. Second, the threat of personal liability may discourage able persons from entering public office. Third, the fear of being sued may seriously deter an official from executing his office with the decisiveness and judgment required for the public good. See *Harlow*, 457 U.S. at 814; *Scheuer v. Rhodes*, 416 U.S. at 240.

Professor Schuck has elaborated on these costs and concluded that fear of litigation leads officials to engage in self-protection and risk-minimizing behavior to the detriment of the greater public interest. See P. SCHUCK, *supra* note 6, at 59-81. However, no empirical evidence has ever been amassed to support that view. Furthermore, the threat of litigation and personal liability is mitigated by the fact that the government will generally provide counsel or pay for private counsel to represent a defendant employee. Moreover, most state and local governmental units will either indemnify or insure the employee for any judgment entered against him arising out of the good-faith performance of his official duties. *Id.* at 83-88.

For the view that the threat of personal liability for state and local officials under § 1983 has not been so great as to interfere with the performance of government by inhibiting the conduct of officials, see Jaron, *The Threat of Personal Liability Under the Federal Civil Rights Act: Does It Interfere with the Performance of State and Local Government?*, 13 URB. LAW. 1 (1981). Jaron suggests that one positive benefit of § 1983 liability has been the increasing frequency with which state and local governments are adopting ongoing risk management programs "to identify potential exposures to loss and to reduce or control the possibility that the loss will occur through a number of identified approaches and techniques, such as training programs designed to improve the performance of public officials." *Id.* at 21 (footnote omitted). By increasing awareness of potential risks and by engendering respect for the basic constitutional rights protected by § 1983, Jaron argues, effective risk management can minimize hazards while also reducing the costs of government.

12. Government officials enjoyed absolute immunity from personal liability at common law as an extension of the doctrine of sovereign immunity. See, e.g., *Scheuer v. Rhodes*, 416 U.S. at 238-42 (discussing rationales behind common law immunity); see also P. SCHUCK, *supra* note 6, at 30-41 (discussing in detail English and American common law positions).

Federal officials continue to enjoy absolute immunity for violations of the common law. See *Barr v. Matteo*, 360 U.S. 564 (1959); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). *Harlow* did not alter the application of this doctrine in common law tort actions. See, e.g., *Oyler v. National Guard Ass'n of United States*, 743 F.2d 545, 551-53 (7th Cir. 1984); *McKinney v.*

realm.¹³ To appreciate the magnitude of the change worked by *Harlow* on the law of qualified immunity, and its ominous implications for civil rights litigation in general,¹⁴ it is first necessary to examine the development and refinement of the qualified immunity doctrine in the federal courts.

A. *The Origin of the Qualified Immunity Doctrine in Civil Rights Litigation*

In 1967 in *Pierson v. Ray*,¹⁵ the Supreme Court considered for the first time whether a government official sued under 42 U.S.C. § 1983 should be permitted to raise a qualified immunity defense.¹⁶ Concluding that Congress did not intend section 1983 to abrogate the common law immunities traditionally accorded government officials, the Court permitted a police officer to raise the specific common law defense of good faith and probable cause in a section 1983 action alleging unconstitutional arrest.¹⁷

Several years later in *Scheuer v. Rhodes*,¹⁸ the Supreme Court extended its holding in *Pierson* by recognizing a reasonable good-faith immunity defense to section 1983 liability for high-ranking state executives. While declining to define the full scope of the immunity available to executive officials, the Court did suggest that the defense was based on "the existence of reasonable grounds for the belief [that the official's actions were not constitutionally proscribed,] formed at the time and in light of all the circumstances, coupled with good-faith belief."¹⁹ The Court's language in-

Whitfield, 736 F.2d 766, 768 (D.C. Cir. 1984).

13. See *Dennis v. Sparks*, 449 U.S. 24, 29 (1980) ("The immunities of state officials that we have recognized for purposes of § 1983 are the equivalents of those that were recognized at common law . . ."). For a view critical of the federal courts' activity, see Eisenberg, *supra* note 9, at 494-96 (immunity doctrines formulated in common law tradition are inapplicable within context of federal system to civil rights actions alleging violations of federal Constitution).

14. Because the doctrine of sovereign immunity prohibits an action against the governmental entity itself in most cases, see P. SCHUCK, *supra* note 6, at 203-05, the ability of an injured plaintiff to bring a damages action against the government official in his individual capacity is essential. See *Bivens*, 403 U.S. at 410 (Harlan, J., concurring) ("For people in *Bivens*' shoes, it is damages or nothing."); *Harlow*, 457 U.S. at 814 ("In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees.").

15. 386 U.S. 547 (1967) (policemen charged with unconstitutional arrest of white and black clergymen attempting to use segregated facilities in interstate bus terminal).

16. Although the Supreme Court's early decisions regarding the law of qualified immunity involved state officials, *Butz v. Economou* confirmed the general belief that a *Bivens* action against a federal official should be governed by the same standard of qualified immunity as a § 1983 suit against a state official. 438 U.S. 478, 486 & n.9 (1978). The Court deemed it untenable "[t]o create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials." *Id.* at 504.

17. *Pierson*, 386 U.S. at 557.

18. 416 U.S. 232 (1974) (Governor of Ohio sued under § 1983 in connection with his decision to deploy Ohio National Guard on Kent State campus during May 1970 demonstrations against Vietnam War).

19. *Id.* at 247-48.

Qualified Immunity

dictated that both objective and subjective factors would be relevant to the immunity inquiry.

The qualified immunity defense articulated in *Scheuer*, however, proved too vague to guide the lower federal courts in deciding whether an official was actually entitled to immunity in a given case.²⁰ The Supreme Court therefore attempted in *Wood v. Strickland*²¹ to provide a precise standard against which an official's conduct could be more readily measured. The reformulated defense contained both an objective and a subjective component. An official would be stripped of his immunity if *either*: (1) he knew or reasonably should have known that the action he took within the sphere of his official responsibility would violate the plaintiff's clearly established constitutional rights, *or* (2) he acted with malicious intent to cause a deprivation of constitutional rights or other injury.²²

The objective prong of the *Wood* standard imputed to officials knowledge of "basic, unquestioned constitutional rights."²³ Conduct violative of these rights was deemed *per se* unreasonable and thus did not warrant the protection of the law of qualified immunity.

The subjective prong of the *Wood* standard focused on an official's subjective state of mind. It became operative only when the relevant constitutional right was not clearly established, but was instead located on the developing fringe of constitutional law. Because officials cannot be expected to anticipate future developments in constitutional law,²⁴ the reasonableness of conduct violating such a "fringe" right turned on a subjective factor—whether the official had acted with malicious intent.²⁵

The lower courts had little difficulty applying the objective prong of the

20. See Friedman, *The Good Faith Defense in Constitutional Litigation*, 5 HOFSTRA L. REV. 501, 511–12 (1977) (discussing questions left unanswered by *Scheuer*: "Did 'good faith' mean that the government officials acted without malice or an evil intent, that they affirmatively believed that they were acting within the law or the limits of their authority, or that they were following what they thought were lawful orders of their superiors?").

21. 420 U.S. 308 (1975). The respondents in *Wood* were high school students who had been expelled by the local school board for violating a school regulation. The school board members contended that they were entitled to immunity from respondents' § 1983 action which alleged due process violations. *Id.* at 309–11.

22. *Id.* at 322. Although the *Wood* holding was limited explicitly to school board members sued under § 1983, *id.*, the Supreme Court quoted the *Wood* formulation in subsequent cases as the general standard of qualified immunity. See, e.g., *Baker v. McCollan*, 443 U.S. 137, 139 (1979); *Procunier v. Navarette*, 434 U.S. 555, 562–63, 565–66 (1978).

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

24. See *Pierson v. Ray*, 386 U.S. 547, 557 (1967) (government official cannot be "charged with predicting the future course of constitutional law").

25. A showing of malicious intent, however, did not relieve the plaintiff of the burden of establishing a valid constitutional claim in the first place. Where the substantive law underlying the plaintiff's claim made the official's state of mind an essential element of the constitutional violation, the plaintiff was still required to demonstrate that the official had acted with a purpose or intent deemed unconstitutional regardless of whether the official had also acted with malice. See *infra* text accompanying notes 44–50.

Wood test. Whether an official's conduct had violated a constitutional right was a question of law, which could be resolved by the court on a motion for summary judgment.²⁶ The subjective prong, however, proved far more problematic. Whether an official had acted with the requisite malicious intent was a question of fact, which normally could be resolved only after a full trial.²⁷ Yet, requiring an official to go through a full-scale trial before judging the validity of his immunity defense defeated one of the principal purposes of the qualified immunity doctrine—to shield officials from the costs attending litigation. More importantly, because even conclusory allegations of malicious intent would force an official into court to defend against an otherwise frivolous lawsuit,²⁸ the subjective prong of the test was open to abuse by plaintiffs seeking to harass government officials.²⁹

B. *The Harlow Standard of Qualified Immunity*

Responding to the problems created by the subjective component of the *Wood* standard, the Supreme Court set out in *Harlow v. Fitzgerald*³⁰ to increase the protection afforded government officials by the qualified immunity defense.³¹ After explaining why the *Wood* standard tended to per-

26. The objective prong of the *Wood* test has been criticized, however, on the ground that by limiting an official's liability to violations of clearly established rights, officials are in effect allowed one free violation of any constitutional right not previously recognized by the courts, and are rewarded for devising new and ingenious ways of infringing upon constitutional guarantees. *See, e.g.*, Freed, *supra* note 9, at 558-62.

27. FED. R. CIV. P. 56 provides that a motion for summary judgment may be granted only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." As a result, the federal courts have generally held that summary judgment is inappropriate to resolve claims in which factual issues of intent, good faith, and other subjective attitudes play a dominant role. *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); *cf.* Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979) (suggesting that question of "actual malice" in libel suit against public figure cannot properly be resolved on summary judgment because it presents issue of fact).

28. Judge Gerhard Gesell observed:

It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient [to force a full trial on the merits].

Halperin v. Kissinger, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring), *aff'd in part by an equally divided Court, cert. dismissed in part*, 452 U.S. 713 (1981).

29. In *Butz v. Economou*, 438 U.S. 478 (1978), the Supreme Court recognized that a serious consequence of subjecting executive officials to private lawsuits was the danger that they would be harassed by frivolous litigation. To minimize this threat, *Butz* admonished the lower courts to dispose of insubstantial suits whenever possible by granting summary judgment for the official based on the qualified immunity defense. *Id.* at 507-08. The subjective component of the *Wood* standard, however, often prevented the trial courts from complying with this instruction.

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

31. *Harlow* involved a *Bivens* action brought by A. Ernest Fitzgerald, an Air Force management analyst, alleging that Bryce Harlow and Alexander Butterfield, senior White House aides to President

Qualified Immunity

mit insubstantial lawsuits to proceed to trial, the Court concluded that in cases alleging the violation of a "fringe" right, the costs of litigating whether an official had acted with malicious intent were unacceptably high.³² Accordingly, the *Harlow* Court ruled that a plaintiff could no longer allege malicious intent to defeat an official's qualified immunity defense in a civil rights action.³³ It then set forth a reformulated standard³⁴ whereby a government official performing discretionary functions is entitled to immunity from civil damages "insofar as [his] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."³⁵ The *Harlow* Court provided lit-

Nixon, had conspired with the President to have Fitzgerald dismissed in retaliation for his congressional testimony concerning cost overruns in defense contracts and the Defense Department's questionable purchasing practices. 457 U.S. at 802-06. Fitzgerald's claim was based primarily on First Amendment violations.

In addition to raising the qualified immunity defense, Harlow and Butterfield argued that as Presidential aides they were entitled to absolute immunity derived from the absolute immunity of the President himself. By their analysis, derivative absolute immunity was essential given that "the President must delegate a large measure of authority to execute the duties of his office." *Id.* at 810. The Court rejected this argument and held that Presidential aides were limited to a qualified immunity defense. *Id.* at 809.

Nixon was the named defendant in a companion case, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). In *Nixon*, the Supreme Court held that the President was entitled to absolute immunity from civil liability.

32. The *Harlow* Court noted that, given the difficulty of defining the relevant evidence, judicial inquiry into an official's subjective motivation often entailed broad-ranging discovery, including numerous depositions of the official and his professional colleagues, and full-scale trials, all of which were extremely disruptive of effective government. 457 U.S. at 817. To minimize the social costs associated with permitting suits against government officials, the Court believed that it was necessary to limit official liability to those cases in which the reasonableness of the official's conduct could be measured objectively. *Id.* at 817-18.

33. 457 U.S. at 817-18. Seven Justices joined Justice Powell's majority opinion in *Harlow*. Chief Justice Burger dissented on the ground that the defendants were entitled to absolute immunity derived from the President's immunity. *Id.* at 822-29. There were three concurrences. The first concurrence, written by Justice Brennan, and joined by Justices Marshall and Blackmun, set forth a different interpretation of the reformulated qualified immunity test, which is discussed *infra* note 35. *Id.* at 820-21. A second concurrence, written again by Justice Brennan, and joined by Justices White, Marshall, and Blackmun, stressed that by joining the majority opinion in *Harlow*, they did not mean to imply any approval of the holding in *Nixon v. Fitzgerald* that the President was absolutely immune from civil damages for constitutional violations. *Harlow*, 457 U.S. at 821-22. In a third concurrence, Justice Rehnquist joined the majority opinion, but noted that the holding in *Butz v. Economou*, that federal executive officials are entitled to qualified, rather than absolute, immunity, should be re-examined. *Harlow*, 457 U.S. at 822.

34. Although *Harlow* involved a *Bivens* suit against federal officials, the Court indicated that its decision in *Butz v. Economou*, discussed *supra* note 16, dictated that the standard of qualified immunity announced in *Harlow* apply with equal force to § 1983 actions against state officials. *Harlow*, 457 U.S. at 818 n.30.

35. *Id.* at 818. The *Harlow* Court, however, did create an exception that would preclude a trial court from granting summary judgment "if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard." 457 U.S. at 819. The Court emphasized, however, that even if an official advanced such extraordinary circumstances, the immunity defense would still turn "primarily on objective factors." *Id.*

In a concurring opinion, 457 U.S. at 820-21, Justice Brennan, joined by Justices Marshall and Blackmun, seized on the extraordinary circumstances exception to reformulate the qualified immunity standard articulated by the majority in such a way as to retain a role for subjective inquiry. The concurrence suggested that liability should be imposed whenever an official knew or should have

the instruction as to how a district court should actually conduct the modified immunity inquiry,³⁶ but it did specify that the issue of qualified immunity should be treated as a threshold question to be resolved by the trial court as a matter of law on summary judgment before any discovery is allowed.³⁷

The Supreme Court reaffirmed the objective nature of the *Harlow* standard in its recent decision in *Davis v. Scherer*.³⁸ The Court explained that *Harlow* had rejected any inquiry into an official's subjective state of mind in favor of a wholly objective standard. Consequently, in determining whether an official may prevail on his qualified immunity defense, a trial court may look only to whether the official's conduct violated clearly established law. The *Davis* Court emphasized that under *Harlow* "no other 'circumstances' are relevant to the issue of qualified immunity."³⁹

II. THE *Harlow* STANDARD AND ITS RELATIONSHIP TO THE PLAINTIFF'S SUBSTANTIVE CLAIM

In adopting a purely objective standard of qualified immunity, the Supreme Court in *Harlow* failed to consider the overlap between the law of qualified immunity as formulated in *Wood v. Strickland* and the constitutional law underlying a plaintiff's substantive claim. By eliminating malicious intent from the law of qualified immunity, the *Harlow* Court surely

known of the constitutionally violative effect of his actions. *Id.* Under the concurrence's formulation of the standard, an official who actually knew that he was violating the plaintiff's constitutional rights would be held liable for his actions even though the rights were not clearly established and he could not reasonably have been expected to know that he was violating the Constitution. Accordingly, the concurrence would allow some measure of discovery to determine exactly what an official did know at the time he acted. *Id.* at 821.

The validity of the concurrence's interpretation of the qualified immunity defense advanced in *Harlow* is highly questionable. The process of determining whether an official knew that he was violating the plaintiff's constitutional rights would presumably suffer from the same defects as the process of determining whether an official acted with malicious intent—precisely what the Court was attempting to remedy in *Harlow*.

36. The *Harlow* Court refused to rule on the defendant officials' motion for summary judgment on appeal and instead remanded the case for further factual findings concerning whether the plaintiff had been dismissed for a constitutionally proscribed reason. 457 U.S. at 819-20. As a consequence, the Court did not have the opportunity to apply its standard to an actual case, and the lower courts were left without explicit instruction as to how that standard should operate in practice, particularly in cases such as *Harlow* where the controlling constitutional law itself contains a subjective component. See *infra* note 40. *Harlow* was eventually settled without further court proceedings.

37. 457 U.S. at 818-19.

38. 104 S. Ct. 3012 (1984) (state officials entitled to qualified immunity because Fourteenth Amendment due process violation not clearly established even though officials violated state statute and administrative regulations).

39. *Id.* at 3018. The Supreme Court had a further opportunity to consider the nature of the qualified immunity inquiry post-*Harlow* in *Mitchell v. Forsyth*, 105 S. Ct. 2806 (1985), in which the Court held that a pretrial order denying qualified immunity is immediately appealable under the "collateral order" doctrine. Again the Court emphasized that the immunity question is a purely legal one: "Whether the facts alleged . . . support a claim of violation of clearly established law." *Id.* at 2816 n.9.

Qualified Immunity

did not mean to insulate officials from liability in all cases in which the controlling substantive law makes the official's state of mind an essential component of the alleged constitutional violation.⁴⁰ Unfortunately, it articulated an immunity standard which, if applied literally, would do just that.

Had the *Harlow* Court actually intended to restrict a plaintiff's ability to recover to those actions in which the controlling substantive law contains no subjective elements, it would have granted the defendant officials' motion for summary judgment on appeal instead of remanding the case for further factual findings concerning the purpose behind plaintiff Fitzgerald's termination.⁴¹ Fitzgerald had alleged that he was dismissed in retaliation for his exercise of his First Amendment rights.⁴² Under the controlling legal doctrine, Fitzgerald was required to establish that his constitutionally protected speech was a substantial or motivating factor in his dismissal.⁴³ If the Court had in fact wanted to eliminate this sort of purpose inquiry, it could easily have done so in *Harlow*.

A. *Subjective Elements in Substantive Constitutional Law*

The drastic implications of the *Harlow* standard for civil rights litigation are evidenced by the wide range of constitutional claims for which the controlling substantive law contains some type of subjective element.⁴⁴ Subjective issues in substantive constitutional doctrine have arisen in two contexts. Certain constitutional guarantees have been interpreted to require a showing of specific intent to establish a violation. For example, a purposeful discriminatory intent is required to establish an equal protec-

40. The elimination of the subjective component from the qualified immunity standard had been neither briefed nor carefully considered at oral argument. See Transcript of Oral Argument at 21-22, *Nixon* (No. 79-1738) and *Harlow* (No. 80-945). To minimize the burden on government officials of defending against insubstantial lawsuits grounded in conclusory allegations of malicious intent, the petitioners *Harlow* and *Butterfield* had merely suggested that the Court adopt a legal standard of sufficiency of evidence that inquired into "whether the credible evidence . . . adds up to a substantial showing that the defendants were implicated." Brief for Petitioners *Harlow* & *Butterfield* at 18-19, *Harlow* (No. 80-945) (petition for certiorari). It is thus doubtful that the Supreme Court gave much consideration to how its reformulated standard of immunity would actually be applied by the lower courts.

41. *Harlow*, 457 U.S. at 819-20.

42. *Id.* at 802-06.

43. See *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

44. Section 1983 itself contains no state-of-mind requirement. See *supra* note 6. It simply authorizes a cause of action against an official based on a constitutional violation. Many constitutional guarantees, however, have been interpreted to contain state-of-mind requirements that must be satisfied for a violation to have occurred. See Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State-of-Mind Requirement*, 46 U. CIN. L. REV. 45 (1977).

As necessary elements of the plaintiff's constitutional claim, these state-of-mind requirements are distinct from the malicious intent component of the *Wood* standard in that they refer to an official's acting for a purpose or with a specific intent deemed unconstitutional regardless of whether or not the official acted with malice. See *supra* note 25.

tion violation.⁴⁵ Similarly, a violation of the Eighth Amendment's prohibition against cruel and unusual punishment requires a showing of "deliberate indifference."⁴⁶ Hence, a prison official who negligently fails to protect an inmate from attack by another inmate has not violated the Eighth Amendment, but a prison official who knows of such an attack and does nothing to prevent the inmate from being injured will have committed a constitutional violation.⁴⁷

The violation of other constitutional rights, primarily those guaranteed by the First and Fourth Amendments, often depends upon the purpose underlying the allegedly wrongful conduct. Conduct which appears legally valid on its face will constitute a violation if undertaken for a constitutionally impermissible purpose.⁴⁸ For instance, it is perfectly legal for a government official to fire a subordinate if he fails to come to work regularly, but the First Amendment prohibits him from firing the subordinate because of his political affiliation.⁴⁹ Similarly, a prison official may conduct a warrantless search of an inmate's cell when prison security is threatened, but the Fourth Amendment prohibits him from conducting such a search to further a prosecutorial investigation.⁵⁰

45. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (purposeful discriminatory intent necessary to establish equal protection violation for racial discrimination in employment); *Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (same for racial discrimination in voting); *Personnel Adm'r v. Feeney*, 442 U.S. 256, 274 (1979) (same for gender discrimination).

46. See *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976).

47. See, e.g., *Branchcomb v. Brewer*, 669 F.2d 1297, 1298 (8th Cir. 1982); *Gullatte v. Potts*, 654 F.2d 1007, 1012 (5th Cir. 1981).

48. Federal District Court Judge Warriner has described a number of situations in which a defendant's purpose or intent is crucial to determining whether a constitutional violation has occurred:

[A] police officer does not violate a citizen's constitutional rights for accidentally running into him on the street . . . unless that police officer was trying to prevent the citizen from arriving at the polls to vote. If the officer was trying to hinder the person in voting, his mere verbal intimidation of the citizen might well state a constitutional claim. If the officer accidentally ran into a march of peaceful protesters, mangling and killing several, his careless driving alone would amount to no more than a State tort If, however, he swerved to frighten the protestors, of whom he disapproved, his accidental bruising of even one makes out a First Amendment violation under § 1983, being the natural result of an unconstitutional intent. Defamation of a citizen under color of State law likewise would not state a constitutional claim unless that defamation was, say, intended as coercion of the citizen's exercise of a specific constitutional right.

Danbridge v. Police Dept. of Richmond, 566 F. Supp. 152, 160-61 (E.D. Va. 1983) (citations omitted).

49. See *Branti v. Finkel*, 445 U.S. 507, 513-17 (1980); see also *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. at 287 (requiring evidence that protected conduct was substantial factor in alleged retaliatory dismissal to establish violation of First Amendment).

50. See, e.g., *United States v. Vallez*, 653 F.2d 403, 406 (9th Cir.), *cert. denied*, 454 U.S. 904 (1981); *United States v. Savage*, 482 F.2d 1371, 1373 (9th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974).

Qualified Immunity

B. *Harlow and the Problem of Unconstitutional Purpose*

The *Harlow* standard of qualified immunity has generated much confusion in the lower federal courts with respect to how an objective standard should operate in cases in which the substantive law controlling the plaintiff's claim makes state of mind an essential element of the constitutional violation. The confusion is largely the result of the fact that these cases usually involve disputed factual questions concerning the official's purpose or intent in acting.⁵¹ The resulting misconstruction of the law of qualified immunity has taken two forms. The first occurs when the factual validity of the plaintiff's substantive claim is determined by the court on a motion for summary judgment. The second occurs when the legal validity of the official's qualified immunity defense is determined by the trier of fact at trial.

1. *Questions of Fact Resolved by the Court*

If *Harlow* is construed to prohibit factual inquiry into state of mind in cases in which the purpose or intent underlying an official's conduct is dispositive of its legality, then an official can shield himself from the legal consequences of his unconstitutional conduct by disingenuously declaring that his purpose or intent was perfectly legitimate, that his conduct therefore did not violate clearly established law, and that he is accordingly entitled to qualified immunity.⁵² For instance, the government official charged with violating the First Amendment by firing a public employee who revealed inefficient departmental practices to the press can assert that the employee was actually terminated because his work was of poor quality.⁵³

51. The lower courts have also had some difficulty in determining how they should measure whether a given constitutional right was clearly established. The Supreme Court in *Harlow* failed to indicate whether the opinions of the Supreme Court, the Courts of Appeals, the District Courts, the state courts, or all of the foregoing should serve as the reference point. The Court also failed to specify how closely the facts of a precedential case must correspond to an official's challenged conduct before it can be said that the official violated clearly established law. Naturally, the greater the degree of correspondence required, the easier it will be for an official to claim successfully that he is entitled to immunity. See Nahmod, *Constitutional Wrongs Without Remedies: Executive Official Immunity*, 62 WASH. U.L.Q. 221, 250-58 (1984); Comment, *The Lower Courts Implement*, *supra* note 5, at 918-20.

52. This type of error has occurred primarily in cases involving alleged violations of the First or Fourth Amendment. For cases involving First Amendment violations, see *infra* note 53. For cases involving Fourth Amendment violations, see *infra* note 56.

53. See, e.g., *Egger v. Phillips*, 710 F.2d 292, 314-15 (7th Cir.) (en banc) (suggesting that *Harlow* prevents court from inquiring into reasons behind a transfer allegedly ordered in retaliation for plaintiff's exercise of First Amendment freedoms), *cert. denied*, 104 S. Ct. 284 (1983); *Tubbesing v. Arnold*, 742 F.2d 401 (8th Cir. 1984) (official granted summary judgment on immunity defense despite plaintiff's allegation that she was dismissed for political reasons in violation of First Amendment); *Gilles v. Alley*, 591 F. Supp. 181 (M.D. Ala. 1984) (official granted summary judgment on immunity defense despite plaintiff's allegation that he was transferred in retaliation for exercise of First Amendment freedoms).

In *Egger v. Phillips*, plaintiff, a former FBI agent, claimed that his First Amendment rights had

Similarly, the official charged with an equal protection violation can claim that the purpose motivating the allegedly discriminatory conduct was benign. Unable to challenge the factual validity of the official's pretextual assertions regarding his state of mind, the victim whose rights have been violated will find himself out of court without a remedy.⁵⁴ A literal application of *Harlow* thus permits an official to be granted qualified immunity as a matter of law even though the principal disputed question of fact in the case—the true purpose or intent motivating the official's conduct—remains unresolved. More accurately, the principal disputed question of fact, which forms the basis of the substantive claim, is subsumed by the legal immunity inquiry and implicitly resolved by the court against the plaintiff when it concludes, on the basis of nothing more than the official's pretextual assertions, that the allegedly unconstitutional conduct contravened no clearly established law.⁵⁵

This type of error is well illustrated by the lower courts' treatment of a series of Fourth Amendment challenges to warrantless electronic surveillances authorized by federal officials in the Nixon Administration.⁵⁶ The

been violated when he was transferred to a remote duty station after reporting that a fellow agent was engaged in illegal activities. The defendant official asserted that the transfer was motivated by strained personal relations between plaintiff and other agents in the office. The Seventh Circuit affirmed the entry of summary judgment for the official in part on the qualified immunity defense, on the ground that although the plaintiff might have had a clearly established right not to be discharged on the basis of speech, the same protection did not extend to a transfer necessary to relieve severe disharmony in the office. Concluding that under *Harlow* the official's "subjective motivation is not relevant to the qualified immunity question," the court refused to inquire into the reasons behind the transfer to determine whether they were in fact lawful. *Id.* at 314-15. Relying on defendant's asserted explanation of the challenged transfer, the court held that strained personal relations between an employee and his co-workers were a permissible basis for a transfer "*notwithstanding the root cause of the strained relations.*" *Id.* at 315 (emphasis added).

Following the analysis in *Egger*, the district court in *Gilles v. Alley* similarly refused to inquire into the motives behind a plaintiff employee's transfer after he had reported that the state veterinary service failed to follow federal guidelines. "Under *Harlow*, defendant's subjective intent is no longer relevant." *Id.* at 188. Accepting as true defendant's proffered reason that the transfer was necessitated by strained office relations and a desire to ease disruption, the court held that the official had violated no clearly established law and was accordingly entitled to qualified immunity.

54. The plaintiff is rendered powerless by the fact that *Harlow* prohibits discovery until the threshold immunity inquiry has been resolved. 457 U.S. at 818. Hence, he cannot begin to gather evidence to counter the official's assertions until after the official has been granted immunity, at which point it is simply too late.

55. In a Title VII case, a plaintiff attempting to prove employment discrimination at trial must be given an opportunity to demonstrate that the apparently legitimate, nondiscriminatory reasons offered by the defendant for rejecting the plaintiff are pretextual and without factual basis. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 256 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973). Because this pretext inquiry takes place during the course of trial on the merits, the Title VII analogy is not entirely apposite to the plight of a civil rights plaintiff who must survive a threshold determination of the qualified immunity issue. The analogy does, however, illustrate the error of dismissing an action on nothing more than the defendant's assertion that he acted with a lawful purpose.

56. See, e.g., *Zweibon v. Mitchell*, 720 F.2d 162 (D.C. Cir. 1983), cert. denied, 105 S. Ct. 244 (1984); *Burkhart v. Saxbe*, 596 F. Supp. 96 (E.D. Pa. 1984); *Smith v. Nixon*, 582 F. Supp. 709 (D.D.C. 1984); *Halperin v. Kissinger*, 578 F. Supp. 231 (D.D.C. 1984); *Ellsberg v. Mitchell*, No.

Qualified Immunity

clearly established constitutional and statutory law governing the plaintiffs' claims required that all wiretaps conform to certain warrant and reasonableness requirements unless conducted for national security reasons.⁵⁷ As a result, the principal issue of fact in these cases concerned the purpose behind the challenged wiretaps.

The plaintiffs' substantive claims alleged that the warrantless surveillances were motivated by partisan political strategy and hence were constitutionally invalid. In response, the defendant officials asserted that because the wiretaps had been undertaken for national security purposes, their conduct violated no clearly established law, thus entitling them to summary judgment based on the qualified immunity defense. They further contended that *Harlow* foreclosed factual inquiry into an official's state of mind in resolving the immunity issue and consequently prevented the plaintiffs from challenging the national security characterization of the wiretaps. Mistakenly equating the charge of impermissible purpose, a component of the substantive claims, with a charge of subjective malice, a component of the immunity defense clearly inappropriate after *Harlow*,⁵⁸ the trial courts unquestioningly accepted the officials' explanation of the purpose underlying the challenged taps and ruled that the *Harlow* standard had been satisfied.⁵⁹ If the officials could present any evidence reflecting a national security concern, the courts interpreted *Harlow* to preclude inquiry into the motives behind the warrantless electronic surveillances.⁶⁰

1879-72 (D.D.C. June 20, 1984); *Ellsberg v. Mitchell*, No. 1879-72 (D.D.C. July 22, 1983).

57. The plaintiffs' claims were predicated on alleged violations of the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, 82 Stat. 197, 211-225 (prior to 1978 amendment). At the time the challenged wiretaps were authorized and conducted, taps initiated for national security purposes were not subject to the clearly established warrant and reasonableness requirements that were imposed by the Fourth Amendment and Title III on wiretaps undertaken for all other purposes. Hence, whether there had been a constitutional or statutory violation depended upon whether the wiretaps had been conducted for valid national security reasons. *See Smith v. Nixon*, 582 F. Supp. at 713.

58. *See Harlow*, 457 U.S. at 817-18.

59. *See, e.g., Zweibon v. Mitchell*, 720 F.2d 162, 173 n.18 (1983) ("[A]llegations of prosecutorial purpose raise no genuine issues relevant to the defense of qualified immunity."), *cert. denied*, 105 S. Ct. 244 (1984); *Burkhart v. Saxbe*, 596 F. Supp. 96, 100 (E.D. Pa. 1984) ("The subjective state of mind of the Attorney General in authorizing the wiretap should not be investigated under *Harlow*. . . . *Harlow* requires a determination of the facts without inquiry into the subjective state of mind of the official."); *Ellsberg v. Mitchell*, No. 1879-72, slip op. at 3, 4 (D.D.C. July 22, 1983) ("[W]e are convinced that the Supreme Court's purpose in formulating a new qualified immunity test was to prevent the sort of investigation into motives which plaintiff seeks to undertake. . . . The objective record . . . establishes a valid rationale for the surveillance. *Harlow* precludes us from continuing further and asking if national security was the actual or only reason for defendant's conduct.") (footnote omitted). The objective record referred to by the court in *Ellsberg* contained only defendants' assertions that the wiretaps had been initiated to investigate leaks of national security information and that plaintiffs had had access to classified information, refuted by plaintiffs' evidence that they had never had access to the information that had actually been leaked.

60. Although the federal courts traditionally defer to the executive branch in the area of national security, the courts in the wiretapping cases made clear that it was the Supreme Court's decision in

By merging the principal disputed question of fact—whether the wiretaps were based on a valid national security concern—into the purely legal immunity inquiry, and implicitly resolving that question in favor of the officials, the trial courts exceeded their function on summary judgment. *Harlow* did not purport to alter the requirements of Federal Rule of Civil Procedure 56 authorizing summary judgment.⁶¹ Hence, when considering a summary judgment motion, a trial court may only determine whether disputed questions of fact exist; it may not adjudicate them. As long as the trial courts persist in determining the factual validity of constitutional claims, the availability of remedies for civil rights violations will be seriously restricted.⁶²

This result is especially offensive because of the abuse of government power that occurs when the otherwise legal act of an official is colored by an unconstitutional purpose or when an official co-opts legal instrumen-

Harlow, not the national security rationale, that prevented them from inquiring into the purpose behind the challenged surveillances. "Courts have long inquired into the 'reasons' for or 'purposes' of a challenged surveillance, and the Court of Appeals has warned that 'courts must be alert to the possible *pretextuality*' of a 'national security' claim." *Smith v. Nixon*, 582 F. Supp. 709, 713 (D.D.C. 1982) (citations omitted) (emphasis in original). While recognizing the "doctrinal necessity of determining whether the tap[s] [were] based on a valid 'national security rationale,'" these courts have nevertheless concluded that "*Harlow* renders certain facts no longer 'material' within the meaning of Rule 56: 'subjective motivation' and 'intention' are of no legal significance after *Harlow* and may not be the subject of inquiry." *Id.* at 714.

Even if national security is a particularly sensitive area of the law, an official should not be able to rely on a national security rationale for a challenged wiretap when such an objective is without basis in fact. For example, in *Halperin v. Kissinger*, 578 F. Supp. 231 (D.D.C. 1984), *Halperin* had never even had access to the classified information which he had supposedly leaked, and the information from the tap that was reported to the FBI concerned *Halperin's* political activities rather than any national security investigation. See *Halperin v. Kissinger*, 606 F.2d 1192, 1197-99, 1204-05 (D.C. Cir. 1979), *aff'd in part by an equally divided Court, cert. dismissed in part*, 452 U.S. 713 (1981).

61. See *McSurely v. McClellan*, 697 F.2d 309, 321 n.20 (D.C. Cir. 1982) (*Harlow* did not change the operation of Rule 56 in immunity cases); *Briggs v. Goodwin*, 698 F.2d 486, 489 n.2, *vacated on other grounds*, 712 F.2d 1444 (D.C. Cir. 1983) ("[T]he rules governing summary judgment in cases involving officials claiming a qualified immunity do not differ from those applicable in other contexts."). For a discussion of Rule 56, see *supra* note 27.

Moreover, in determining whether summary judgment is appropriate, the court must view the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party. *E.g.*, *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962).

62. The D.C. Circuit in *Hobson v. Wilson*, 737 F.2d 1, 24-31 (1984), *cert. denied*, 105 S. Ct. 1843 (1985), recognized the apparent difficulty that the *Harlow* standard poses for constitutional claims where the underlying substantive law requires a showing of specific intent or impermissible purpose to establish a violation, and suggested a solution which mirrors the approach taken by the concurring Justices in *Harlow*. See *supra* note 35. The D.C. Circuit argued that an exception to the *Harlow* standard should be created to permit plaintiffs to plead "unconstitutional motive" and survive summary judgment on the immunity issue. 737 F.2d at 29-31.

However, like the Supreme Court in *Harlow*, the D.C. Circuit failed to consider the interaction between the law of qualified immunity and substantive constitutional doctrine in civil rights litigation. As the court readily acknowledged, the exception would permit plaintiffs to allege that any act was performed with an unconstitutional motive, not simply those for which the underlying substantive law makes purpose or intent an essential component of the constitutional violation. As a result, this solution would leave officials in essentially the same position that they were in prior to *Harlow* when plaintiffs could plead subjective malice.

Qualified Immunity

talities to achieve an illegitimate end. It is this type of flagrantly abusive conduct on the part of officials charged with upholding the public trust that the civil rights remedies were principally designed to deter.⁶³ It would be most ironic if *Harlow* were to preclude effective redress for those constitutional violations for which victims are most in need of compensation and for which officials are least deserving of immunity.

When an official is charged with a constitutional violation entailing gross abuse of his power and position, society has no interest in seeing that the burden of litigation is eased so that it does not interfere with the discharge of his duties. To the contrary, it is in society's interest to ensure that such conduct is unequivocally deterred. Consequently, in civil rights actions involving abuse of government power, the balance struck by the law of qualified immunity should shift in favor of compensating injured victims and deterring future misconduct.

2. *Questions of Law Resolved by the Trier of Fact*

When confronted with cases involving controverted questions of fact concerning an official's intent, some courts have erred in precisely the opposite manner from the courts in the wiretapping cases. These courts have refused to apply the objective immunity standard on a motion for summary judgment and have instead left the qualified immunity inquiry for the jury to decide after a trial on the merits. These courts have acted largely on the basis of an incorrect belief that it is impossible to determine as a matter of law whether the official's *alleged* conduct impaired a clearly established right if there is a factual dispute as to the official's *actual* conduct.⁶⁴ In effect, they have confused the legal validity of the

63. See *Monroe v. Pape*, 365 U.S. 167, 172 (1961) (Section 1983 designed "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position"); *United States v. Classic*, 313 U.S. 299, 326 (1941) (Section 1983 aimed at redressing "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law"); *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971) ("An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own").

64. See, e.g., *Acoff v. Abston*, 762 F.2d 1543, 1550 (11th Cir. 1985) (factual questions bearing on legal question of qualified immunity must be resolved before any determination as to immunity can be made); *Kenyatta v. Moore*, 744 F.2d 1179, 1184 (5th Cir. 1984) ("Qualified immunity cannot be decided without a complete determination of the nature of both the wrongful act and the law applicable at the time it was committed . . ."); *McLaurin v. Fischer*, 595 F. Supp. 318, 323 (S.D. Ohio 1983) (summary judgment precluded because immunity question turns on factual determinations); *Dowd v. Calabrese*, 589 F. Supp. 1206, 1222 (D.D.C. 1984) (immunity issues intertwined with factual disputes making resolution of immunity question as matter of law improper); *Tunnell v. Office of Public Defender*, 583 F. Supp. 762, 768–69 (E.D. Pa. 1984) (immunity determination requires fully developed record); *Taylor v. Mayone*, 574 F. Supp. 609, 613 (S.D.N.Y. 1983) (fact issues material to determination of whether official is entitled to qualified immunity); *Muzychka v. Tyler*, 563 F. Supp. 1061, 1065–66 (E.D. Pa. 1983) (summary judgment on immunity question inappropriate if there are conflicting versions of what official actually did).

official's qualified immunity defense, a question for the court, with the factual validity of the plaintiff's substantive constitutional claim, a question for the trier of fact. No factual discovery is needed for a court to determine whether the plaintiff's *allegations* with respect to the nature of the official's conduct make out a violation of clearly established law. Whether the plaintiff can later substantiate those allegations at trial is a matter of the sufficiency of the evidence supporting the plaintiff's claim, a matter entirely unrelated to the official's immunity defense.⁶⁵

The practice of allocating to the jury legal questions concerning an official's qualified immunity defense can seriously impair the interest of a plaintiff in a civil rights action. As difficult as it is for a judge to ascertain whether a constitutional right is "clearly established,"⁶⁶ it is practically impossible for a jury to make such a determination. If a jury were forced to grapple with the question of law posed by the *Harlow* immunity inquiry, a trial within a trial would be required, "with the jury hearing 'evidence' of the state of law, trends in the law, and clarity of the law."⁶⁷ However, because evaluating the relative strength of competing legal positions is both a difficult and technical task, even a properly instructed jury would be decidedly ill-equipped to determine, for instance, whether the use of tear gas on an inmate confined to his prison cell constitutes a form of corporal punishment that clearly violates the Eighth Amendment.⁶⁸

In light of the technical complexity inherent in the *Harlow* immunity inquiry, there is a great risk that a jury instructed to resolve the immunity issue will misunderstand the distinction between the plaintiff's substantive claim and the official's immunity defense and will consequently resort to traditional tort notions of reasonableness to evaluate the legal validity of the official's defense.⁶⁹ Did the official act reasonably under the circumstances? Did the official have a reasonable belief in the lawfulness of his

65. If at trial the plaintiff is unable to advance sufficient evidence to support his claim, the official is entitled to judgment on the merits, not on the immunity defense.

66. See *supra* note 51.

67. *Skevoifilax v. Quigley*, 586 F. Supp. 532, 539 (D.N.J. 1984).

68. Court of Appeals judges often disagree about such complicated constitutional questions. For an example of such disagreement, see the majority and dissenting opinions in *Bailey v. Turner*, 736 F.2d 963 (4th Cir. 1984) (discussing whether constitutional parameters controlling use of tear gas on prison inmates were clearly established at time of alleged violation). In fact, even Supreme Court Justices can sharply disagree about whether the controlling constitutional law in a particular area was clearly established. For an example, see the majority and dissenting opinions in *Davis v. Scherer*, 104 S. Ct. 3012 (1984) (discussing whether failure to afford civil service employee meaningful pretermination notice and hearing violated clearly established due process right).

69. This result should not be surprising because the reasonableness standard in tort law, like the *Harlow* standard, is an objective one. An individual's conduct is judged by reference to what a reasonable person would have done under the circumstances, not by his own subjective capacity to exercise care. See F. HARPER & F. JAMES, *THE LAW OF TORTS* 903 (1956) ("On the whole, the law has chosen an objective standard . . ."); O.W. HOLMES, JR., *THE COMMON LAW* 108-10 (1881) (courts generally apply an external standard rather than taking tortfeasor's "personal equation" into account).

Qualified Immunity

actions? Answering these questions may lead a jury to grant an official qualified immunity even if he violated a clearly established constitutional right as long as he acted with a good-faith belief that the purpose or intent underlying his conduct was not constitutionally proscribed.⁷⁰

This result, however, is exactly the opposite of what the *Harlow* standard requires. If the official acted with an unconstitutional purpose, thereby violating a clearly established constitutional right, he is liable in damages under *Harlow* regardless of whether he had a reasonable basis for believing that his actions were lawful. *Harlow* makes the violation of a clearly established constitutional right unlawful per se.

The interests of defendant officials may also be impaired if *Harlow* is construed to permit the jury to decide the legal immunity question. Submitting the legal issue of an official's qualified immunity to the jury directly contradicts *Harlow's* mandate to minimize the substantial costs that attend the trial of nonmeritorious claims against government officials because it postpones resolution of the immunity question until after a full-scale trial has been conducted. Given that a plaintiff's allegations, even if proven, may not constitute a violation of a clearly established constitutional right, it is critical that the legal determination regarding an official's immunity be made at the threshold of the proceedings so that an official will not be forced unnecessarily to incur the costs of discovery and trial.⁷¹

70. See, e.g., *Llaguno v. Mingey*, 763 F.2d 1560 (7th Cir. 1985) (reversing jury finding that police officers were entitled to qualified immunity because they acted in good-faith belief that their actions were lawful when in fact officers violated Fourth Amendment as a matter of law when they arrested and detained plaintiff for 42 hours without probable cause); *Vizbaras v. Prieber*, 761 F.2d 1013 (4th Cir. 1985) (affirming jury finding that police officers were entitled to qualified immunity because they had acted in good faith even though they had used excessive force, resulting in death, in arresting plaintiff's son); *Bates v. Jean*, 745 F.2d 1146 (7th Cir. 1984) (reversing jury finding that prison officials were entitled to qualified immunity because they had acted in good faith, even though they had violated plaintiff's clearly established Fifth and Eighth Amendment rights by brutally beating him); *Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir. 1984) (reversing jury finding that school officials were entitled to immunity because they sincerely believed they were acting lawfully when they violated basic Fourth Amendment rights in searching students for drugs); *Bailey v. Turner*, 736 F.2d 963 (4th Cir. 1984) (affirming jury finding that prison official who maced plaintiff in his cell violated plaintiff's Eighth Amendment rights but was entitled to immunity because he acted in good faith and with reasonable belief in lawfulness of his actions).

71. Confusion as to how the *Harlow* standard operates in civil rights actions involving unconstitutional purpose or intent also led several circuits to hold that pretrial orders denying qualified immunity are not immediately appealable under the collateral order doctrine. These courts contended that the immunity issue was intimately and inseparably intertwined with the merits of a plaintiff's action, and thus turned on disputed questions of fact. See *Powers v. Lightner*, 752 F.2d 1251, 1257 (7th Cir. 1985); *Kenyatta v. Moore*, 744 F.2d 1179, 1184 (5th Cir. 1984); *Forsyth v. Kleindienst*, 729 F.2d 267, 273-74 (3d Cir. 1984), *aff'd in part, rev'd in part sub nom.* *Mitchell v. Forsyth*, 105 S. Ct. 2806 (1985); *Bever v. Gilbertson*, 724 F.2d 1083, 1088-89 (4th Cir.), *cert. denied*, 105 S. Ct. 349 (1984); *Evans v. Dillahunt*, 711 F.2d 828, 830 (8th Cir. 1983). But see *McSurely v. McClellan*, 697 F.2d 309, 316 (D.C. Cir. 1982) ("[W]e believe that appellate review of a denial of a motion for summary disposition must be available to ensure that government officials are fully protected against unnecessary trials under qualified immunity on the same basis as for absolute immunity.") (footnote

III. RESTRUCTURING THE QUALIFIED IMMUNITY INQUIRY AFTER *Harlow*

The difficulty that the lower courts have had in applying the *Harlow* standard stems from a basic misunderstanding of the nature of the qualified immunity defense and its relationship to the plaintiff's cause of action. The fact that the law of qualified immunity prevents a plaintiff from alleging malicious intent for purposes of defeating an official's immunity defense should not operate to foreclose factual inquiry into the official's state of mind for purposes of establishing a valid substantive claim. If the *Harlow* standard is to permit effective redress for constitutional violations, the qualified immunity inquiry must be restructured in such a way as to force the lower courts to differentiate between the legal validity of the official's immunity defense and the factual validity of the plaintiff's substantive claim. The following two-stage inquiry would create just such a distinction.

A. *The Validity of the Official's Qualified Immunity Defense: A Question of Law*

In a civil rights action against a government official, the first inquiry should focus entirely on the question of law articulated in *Harlow*: Did the official's *alleged* conduct violate a clearly established constitutional right? To resolve this question at the threshold, the court must assume that the plaintiff can substantiate the allegations of fact in his complaint, particularly those charging that the official acted with an unconstitutional purpose or intent whenever the substantive law so demands.⁷² Based on

omitted).

The Supreme Court resolved this inter-circuit dispute in *Mitchell v. Forsyth*, 105 S. Ct. 2806 (1985), holding that orders denying qualified immunity are immediately appealable. The Court indicated that an official's qualified immunity defense is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated. Because the legal question posed by the immunity inquiry is whether the facts *alleged* by the plaintiff state a claim of violation of clearly established law, the Court noted that an appellate court can review an order denying qualified immunity without considering whether the plaintiff's allegations are in fact true. *Id.* at 2816.

72. Some of the confusion surrounding application of the *Harlow* standard can be attributed to the peculiar fact that the Supreme Court specified that the qualified immunity inquiry take the form of a motion for summary judgment but prohibited any discovery until the immunity question has been resolved. *Harlow*, 457 U.S. at 818-19. Because the threshold inquiry presupposes no discovery or factual development of the claim, the procedural mechanism through which the *Harlow* test is applied more properly resembles a motion to dismiss for failure to state a claim upon which relief can be granted under FED. R. CIV. P. 12(b)(6) than a motion for summary judgment under FED. R. CIV. P. 56. In ruling on a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court may not consider matters outside the pleadings. If it does, Rule 12(c) provides that the motion to dismiss must be treated as a motion for summary judgment under Rule 56.

Rule 56 authorizing summary judgment allows the parties to submit affidavits, depositions, answers to interrogatories, and admissions on file. In fact, Rule 56(e) often requires a party to submit such evidence:

When a motion for summary judgment is made and supported as provided in this rule, an

Qualified Immunity

the cause of action apparent from the face of the complaint, the court must determine both the applicable constitutional law and the settled nature of that law.⁷³

If the court concludes that the official's alleged conduct did not contravene clearly established law, even accepting as true the plaintiff's allegations concerning the official's unconstitutional purpose or intent, the official should be adjudged immune and all inquiry should cease. If, on the other hand, the court concludes that the official's alleged conduct did violate clearly established law, it must deny summary judgment on the ground that the official is not entitled to qualified immunity, and the case should proceed to discovery and trial.⁷⁴

adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Harlow did not alter the requirements of Rule 56, *see supra* note 61 and accompanying text. It therefore seems particularly incongruous for the Supreme Court to have required that the immunity question be resolved on summary judgment while, at the same time, limiting discovery.

To permit the qualified immunity inquiry to be conducted independently of the inquiry into the factual validity of the plaintiff's claim, a court must assume that the plaintiff can prove the facts that he has alleged in his complaint. This assumption is consistent with ordinary practice in ruling on either a motion to dismiss for failure to state a claim or a motion for summary judgment. An order dismissing a complaint for failure to state a claim necessarily takes the plaintiff's allegations as true in concluding that the substantive law does not afford a remedy based on the factual predicate set out in the complaint. The standard for appraising the legal sufficiency of a complaint which has been traditionally applied in the federal courts provides that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). A similar rule governs motions for summary judgment. *See supra* note 61.

73. Several commentators have suggested that the critical variable in applying the *Harlow* standard is the degree of factual correspondence required between a precedential case and the official's conduct that is being challenged as having violated a clearly established right. These commentators have argued that if a strict correspondence is required, it will be impossible to determine whether the facts surrounding the official's allegedly wrongful conduct are sufficiently close to those in the precedential case to warrant denying immunity until there has been at least some factual discovery into the nature of that conduct. *See supra* note 51 and authorities cited therein.

If specific pleading requirements are imposed on civil rights complaints, however, a court in most cases ought to be able to glean sufficient information from the complaint to ascertain the applicable law governing the official's conduct and to make a threshold determination as to whether that law was clearly established. Moreover, in the majority of civil rights actions alleging unconstitutional purpose or intent, where the distinction between the legal validity of the official's immunity defense and the factual validity of the plaintiff's claim is most critical, the controlling law will be clearly established. *See supra* text accompanying notes 44-50.

74. *Harlow* permits an official who has allegedly violated a clearly established right to claim that extraordinary circumstances prevented him from knowing of the relevant legal standard. Because the *Harlow* Court suggested that such extraordinary circumstances should ordinarily be evaluated on objective factors and resolved as a matter of law, the lower courts have primarily limited the "extraordinary circumstances" exception to situations involving very recent or extremely complex law. *See, e.g., Arebaugh v. Dalton*, 730 F.2d 970 (4th Cir. 1984) (remanding for consideration of extraordinary circumstances claim where violation had occurred twelve days after Supreme Court decision was handed down); *Skevofilax v. Quigley*, 586 F. Supp. 532, 541 n.8 (D.N.J. 1984) (discussing factors that bear on claim of "extraordinary circumstances").

As a result, an official whose qualified immunity defense has been rejected on the basis of the clearly established law standard is free to raise a second motion for summary judgment on the ex-

If this proposed restructuring of the immunity inquiry is to prove workable, the trial courts must be able to identify the essential elements of the plaintiff's constitutional claim upon a facial inspection of the complaint. Because it is unlikely that notice pleading under Federal Rule of Civil Procedure 8⁷⁵ will provide a court with sufficient information to ascertain the applicable law governing the official's conduct without engaging in supplemental discovery, the federal courts should adopt uniform specific pleading requirements for civil rights complaints.⁷⁶ These rules should require the plaintiff to support his allegations of unconstitutional purpose or intent in the complaint by specifying the factual predicate underlying the constitutional deprivation in sufficient detail to establish a *prima facie* case entitling him to relief.⁷⁷ Any complaint that fails to conform to this standard should be dismissed with leave for the plaintiff to amend the complaint to comply with the requirements.⁷⁸

traordinary circumstances exception before the plaintiff proceeds with discovery and trial. In the rare event that the exception presents a factual dispute requiring a jury determination, an official is not significantly disadvantaged by proceeding with a trial on the merits to resolve both the validity of the plaintiff's cause of action and the validity of the official's claim of extraordinary circumstances.

75. Notice pleading under the Federal Rules of Civil Procedure requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). See generally F. JAMES & G. HAZARD, CIVIL PROCEDURE § 3.11 (3d ed. 1985) (discussing federal pleading rule).

76. Every circuit currently requires that civil rights complaints be pleaded with "at least a minimum of specificity." *Hobson v. Wilson*, 737 F.2d 1, 30 (D.C. Cir. 1984) (discussing content of various pleading requirements), *cert. denied*, 105 S. Ct. 1843 (1985).

77. To comply with the specific pleading requirements, a plaintiff will have to set forth facts that are legally sufficient to justify judgment in his favor. In a First Amendment employment case, for example, a well-pleaded complaint should contain a recital of the events leading up to the allegedly unlawful discharge or transfer, illustrating that the official was motivated by an unconstitutional purpose.

Of course, in some instances, a government official may have exclusive control of crucial information with regard to the purpose or intent motivating his conduct without access to which a plaintiff will be unable to set out his cause of action in sufficient detail to comply with the requirements. Overly rigid application of specific pleading requirements could thus result in the dismissal of meritorious claims. Consequently, lower courts should be sensitive to the problems confronting a plaintiff who must plead unconstitutional purpose or intent as an element of his cause of action, and they should exercise careful discretion in dismissing inadequate complaints, liberally granting plaintiffs leave to amend the complaint to comply with the requirements.

FED. R. CIV. P. 56(f), which permits a party opposing a motion for summary judgment to petition the court to deny the motion if for stated reasons he is unable to produce facts essential to his opposition, may be a useful tool for a civil rights plaintiff who lacks access to information that is vital to his cause of action. If the plaintiff can convince the court of the importance of the unavailable information and that there is a reasonable probability that such information actually exists in the exclusive possession of a government official, then the court may order limited discovery to give the plaintiff an opportunity to demonstrate that he indeed has a constitutional claim that can withstand summary judgment on the official's qualified immunity defense.

78. To prevent plaintiffs from making unreasonable allegations in their complaints which they are incapable of supporting with evidence, the federal courts should strictly enforce FED. R. CIV. P. 11, which, as amended in 1983, permits a federal court to assess expenses, including attorney's fees, against an attorney or litigant who in bad faith has interposed a pleading that is either ungrounded in fact or unwarranted by law. See *Elliott v. Perez*, 751 F.2d 1472, 1480-82 (5th Cir. 1985) (discussing implications of amended Rule 11 for civil rights complaints containing loose and conclusory allegations).

Qualified Immunity

B. *The Validity of the Plaintiff's Constitutional Claim: A Question of Fact*

The second inquiry should focus entirely on questions of fact that impugn the validity of the plaintiff's substantive claim on the merits. Once the court has determined as a matter of law that the official is not entitled to qualified immunity, the plaintiff should be permitted to engage in discovery to inquire into the intent or purpose motivating the official's allegedly wrongful conduct. Although these questions of fact may be resolved on summary judgment if either party can show that there is no genuine dispute as to any material fact, a trial will normally be required to allow the plaintiff to prove his allegations. If the trier of fact ultimately finds that the official did indeed violate a constitutional right that the court in the first inquiry has already determined to have been clearly established, the plaintiff may recover compensatory damages. If, however, the trier of fact finds that there is insufficient evidence to support the plaintiff's claim, the official is entitled to judgment in his favor, but one entered on the merits, not on the qualified immunity defense.

CONCLUSION

In *Harlow v. Fitzgerald*, the Supreme Court made a technical adjustment to the law of qualified immunity in order to restrict the scope of constitutional violations for which a government official can be held liable in damages. In so doing, however, the Court ignored the overlap between the law of qualified immunity and substantive constitutional law in civil rights litigation, and thus inadvertently articulated an immunity standard that has the potential to eviscerate the civil rights remedy for all constitutional violations for which the official's state of mind is a necessary component. To prevent civil rights plaintiffs from being left without a remedy, the qualified immunity inquiry must be restructured to force the lower courts to recognize that an official's qualified immunity defense and a plaintiff's substantive claim raise analytically distinct questions—one of law and one of fact—which must be resolved independently.