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PUBLIC OFFICIALS' QUALIFIED IMMUNITY IN SECTION 1983 ACTIONS UNDER *HARLOW v. FITZGERALD* AND ITS PROGENY: A CRITICAL ANALYSIS

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Forty-two U.S.C. section 1983[1] (section 1983), enacted in 1871 as part of the Ku Klux Klan Act,[2] provides individuals with a federal cause of action for violations of their constitutional and other federal statutory[3] rights by persons acting under color of state law. In 1961, the Supreme Court in *Monroe v. Pape*[4] held that a plaintiff could recover damages from a government official who violated the plaintiff's constitutional rights by actions that were not "authorized" by state law.[5] The Court, however, insulated from suit the municipal corporations that employed such officials, holding that Congress did not intend to include municipal corporations within the ambit of section 1983.[6] This part of

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1. 42 U.S.C. § 1983 (1982). Section 1983 provides:

> 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. Ku Klux Klan Act, ch. 22, § 1, 17 Stat. 13 (1871).
3. *See, e.g.*, Maine v. Thiboutot, 448 U.S. 1 (1980).
4. 365 U.S. 167 (1961).
5. The Court reversed a line of cases that held that state action did not include behavior by a state official that was illegal under state law. *See* Note, *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1156-61 (1977). The Court in *Monroe* broadened the "under color of [state] law" requirement to include not only situations where the constitutional deprivation was authorized by state law, but also situations involving "[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." 365 U.S. at 184 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).
6. The Court interpreted the defeat of the Sherman Amendment, which would have made cities and counties liable for certain acts of violence which occurred within their borders, as a rejection of any and all municipal liability under § 1983. "The response of the Congress to the proposal to make municipalities liable for certain actions being

the opinion was reversed seventeen years later in *Monell v. Department of Social Services*,[7] where the Court held that local governing bodies could be sued directly under section 1983.[8] Municipal corporations would not be responsible on a *respondeat superior* basis for all constitutional violations committed by their employees, but only those violations in which execution of a government policy or custom caused the injury.[9]

The decision in *Monell* caused two types of section 1983 damage suits to arise. The first type arises when government policy or a government official following government policy directly causes injury. In such a case, the injured party may sue the government directly.[10] In the second scenario, a government employee who is not acting pursuant to official policy causes the

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brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them." *Id.* at 191.

7. 436 U.S. 658 (1978).

8. The Court held that it had misinterpreted the rejection of the Sherman Amendment. That amendment would have held counties responsible "for private lawlessness" over which they might not have had control. Rejection of this principle, which was viewed as unfair and possibly unconstitutional, did not imply a rejection of municipal liability for constitutional violations committed by the municipality itself. "From the foregoing discussion, it is readily apparent that nothing said in debate on the Sherman Amendment would have prevented holding a municipality liable under § 1 of the Civil Rights Act for its own violations of the Fourteenth Amendment." *Id.* at 683.

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> We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Id. at 694. The Court relied both on the "shall subject or cause to be subjected" language of the statute and again on the rejection of the vicarious liability of the Sherman Amendment to reach this conclusion. *Id.* at 691-94. For an explanation and criticism of this reasoning, see Mead, *42 U.S.C. § 1983 Municipal Liability: The* Monell *Sketch Becomes A Distorted Picture*, 65 N.C.L. REV. 517 (1987), and *infra* note 168.

Because the violation in *Monell* had clearly been caused by official government policy, the Court's statement was actually dictum. Yet the Court has applied this standard consistently since *Monell*. *See, e.g.*, City of St. Louis v. Praprotnik, 108 S. Ct. 915, 922-27 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469, 477-85 (1986); City of Oklahoma City v. Tuttle, 471 U.S. 808, 816-24 (1985).

10. Such suits are sometimes brought against the individual defendant in her "official capacity." The suits are treated as if they were brought against the governmental entity.

> It is *not* a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

Kentucky v. Graham, 473 U.S. 159, 166 (1985); *see also* Brandon v. Holt, 469 U.S. 464 (1985).

harm. In this situation, the injured party may bring suit against the employee in his personal capacity.[11] Proof of a constitutional violation alone does not render a government official liable, however. Starting with *Pierson v. Ray*,[12] the Supreme Court has created a number of immunities, holding that Congress, in enacting section 1983, did not intend to abolish all common-law immunities.[13] Judges[14] and prosecutors,[15] or those acting in a judicial or prosecutorial capacity,[16] are afforded absolute immunity from damages. Most other government employees, including law enforcement personnel, are accorded qualified, or "good faith" immunity.[17]

The main reason that the Court gives for granting qualified immunity to law enforcement personnel is that immunity allows them to exercise their duties in good faith without fear of having to pay damage awards.[18] Absolute immunity grants to a small class of defendants the additional protection of freedom from damages even when it is alleged that they have acted "maliciously or corruptly."[19] There is, however, a significant extra cost to absolute immunity. In order to protect some "innocent" officials from the threat of litigation, clearly culpable conduct of

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11. *Graham*, 473 U.S. at 165-67.

12. 386 U.S. 547 (1967). *See infra* notes 36-41 and accompanying text for further discussion of this case.

13. *See infra* notes 114-20 and accompanying text for further explanation.

14. Pierson v. Ray, 386 U.S. 547, 553-54 (1967); *see also* Stump v. Sparkman, 435 U.S. 349 (1978).

15. Imbler v. Pachtman, 424 U.S. 409 (1976).

16. Butz v. Economou, 438 U.S. 478 (1978). The Court in *Butz* developed a functional approach to immunities, holding that a person's immunity depended not upon one's title, but rather upon one's responsibilities: "Judges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities." *Id.* at 511.

17. *E.g.*, Procunier v. Navarette, 434 U.S. 555 (1978) (granting qualified immunity to prison officials); O'Connor v. Donaldson, 422 U.S. 563 (1975) (granting qualified immunity to mental hospital administrators); Wood v. Strickland, 420 U.S. 308 (1975) (granting qualified immunity to school officials); Scheuer v. Rhodes, 416 U.S. 232 (1974) (granting qualified immunity to officers of the executive branch of a state government); Pierson v. Ray, 386 U.S. 547 (1967) (granting qualified immunity to police officers).

18. In *Scheuer v. Rhodes*, the Court stated:

> Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.

416 U.S. 232, 242 (1974); *see also* Pierson v. Ray, 386 U.S. 547, 555 (1967) ("A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.").

19. Stump v. Sparkman, 435 U.S. 349, 356 (1978) (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1871)).

others must go unremedied.[20] Recently, the Supreme Court has significantly expanded the scope of qualified immunity, so that it more resembles absolute immunity. Recognizing that any inquiry into the subjective good faith of an official usually involves an issue of fact to be resolved at trial, the Court has adopted a purely objective standard. The new standard, established in *Harlow v. Fitzgerald*,[21] protects officials from damage liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[22]

Although this standard serves the Court's purposes of avoiding trial and discovery in many cases, there are several problems with this approach, especially with how it has been refined by more recent cases.[23] To the extent that the standard protects an official who acted maliciously or in bad faith, it grants more protection than is warranted, and more protection than was accorded at common law. Since the Court has already determined that Congress's intent was to preserve common law immunities,[24] any attempt to extend them for the purpose of cutting down on section 1983 litigation is a usurpation by the Court of Congress's legislative authority.[25] Moreover, the Court, in responding to what it considers an explosion of civil rights suits, may be trying to deal with a problem that is either non-existent or not nearly as significant as the Court believes.[26] The new standard also makes it much more difficult to use section 1983 for establishing new constitutional rights or defining the outer edges of existing constitutional rights, because the standard permits only preexisting rights to be remedied.[27] If the purpose of qualified immunity is to protect officials acting reasonably and in good faith, while holding liable those acting unreasonably or in bad faith, then there may be no fair alternative to factfinding preceded by discovery. This alternative might subject some officials to litigation who might not ultimately be liable for dam-

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20. In Stump v. Sparkman, 435 U.S. 349 (1978), the Court upheld the use of absolute immunity by judges, "[d]espite the unfairness to litigants that sometimes results." *Id.* at 363.

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

22. *Id.* at 818. See *infra* notes 59-72 and accompanying text for a further discussion of the *Harlow* case.

23. Anderson v. Creighton, 107 S. Ct 3034 (1987) (*see infra* text accompanying notes 80-86); Davis v. Scherer, 468 U.S. 183 (1984) (*see infra* text accompanying notes 73-79).

24. Pierson v. Ray, 386 U.S. 547, 554-55 (1967); *see infra* notes 36-41 and accompanying text.

25. *See infra* notes 113-26 and accompanying text.

26. *See infra* notes 127-32 and accompanying text.

27. *See infra* notes 107-09 and accompanying text.

ages. Because the determination of whether there has been a constitutional violation can usually be made on motion for summary judgment, however, only those who have committed constitutional violations would be forced to litigate the issue of whether they acted in good faith. Forcing officials who had committed constitutional violations to litigate whether they were entitled to immunity in spite of the violations does not seem unfair, especially when compared to the alternative of leaving remediless a plaintiff whose constitutional rights have been violated in bad faith.

Another way to solve this problem would be for the Court or Congress to reverse the decision in *Monell* holding government employers harmless for the constitutional violations of their employees, except when caused by government policy.[28] This would remove the burden of litigation from the employee and place it on the government, where the Court in similar circumstances has held that it more rightly belongs.[29]

Part I of this Article discusses the development of immunities in section 1983 actions. Part II examines the application of *Harlow* and its progeny to a variety of situations. This discussion shows that broadened qualified immunity produces anomalous results under some circumstances by granting immunity to officials who have acted in a clearly culpable manner. Part III discusses the appropriateness of the *Harlow* standard and determines that it is neither supported by the legislative history of section 1983 nor by legitimate policy concerns. Finally, Part IV proposes several solutions that would protect deserving public officials from personal damage liability without unnecessarily depriving plaintiffs of their right to recover.

I. OFFICIAL IMMUNITIES UNDER SECTION 1983

As a consequence of the decision in *Monell v. Department of Social Services*,[30] a potential plaintiff must look to the source of the violation to determine the proper entity against which to bring suit. Although section 1983 plaintiffs might want to sue the governmental employer directly,[31] they can do so only if the

28. *See infra* notes 165-77 and accompanying text.

29. Owen v. City of Independence, 445 U.S. 622 (1980). *See infra* notes 173-77 and accompanying text.

30. 436 U.S. 658 (1978).

31. There are a number of reasons why a plaintiff might want to sue the governmental employer rather than the individual defendant. First, as a practical matter, the gov-

constitutional violation was caused by a government policy or custom.[32] If a non-policymaking, lower-level employee violates section 1983, then the only remedy is a suit against the responsible individual.[33] Thus, in the typical police misconduct case, the plaintiff must sue the individual officers involved, to redress an illegal search and seizure or illegal arrest or excessive use of force, unless a municipal policy directly led to the violation.[34]

These individual defendants are not liable for damages merely upon a finding of a constitutional violation. The Supreme Court has developed a system of immunities to shield officials from damages in certain cases. The kind of immunity received is based on the function the official was exercising at the time of the violation. Those exercising judicial or prosecutorial functions are given absolute immunity from damages. Those exercising executive functions, such as police officers, are given qualified, or good faith immunity.[35]

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ernment is more likely to have the assets to satisfy any judgment against it. *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, 24 (1981). Second, unlike an individual defendant, a municipal defendant will not be able to assert a qualified immunity to damages. Owen v. City of Independence, 445 U.S. 622 (1980). *See* Mead, *Evolution of the "Species of Tort Liability" Created by 42 U.S.C. § 1983: Can Constitutional Tort Be Saved From Extinction?*, 55 FORDHAM L. REV. 1, 6 n.29 (1986).

32. Monell v. Department of Social Servs., 436 U.S. 658, 694 (1978); *see supra* note 8 and accompanying text.

33. City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985) (finding city not liable for excessive use of force by police officer). Actions taken by upper level officials with policymaking authority, however, will make the municipality liable, even if such actions were taken on a one-time basis and were not intended to establish standards for future conduct. Pembaur v. City of Cincinnati, 475 U.S. 469 (1986). In such a case, however, the official must have "final policymaking authority," not subject to review by a superior. City of St. Louis v. Praprotnik, 108 S. Ct. 915 (1988).

34. Plaintiffs have tried to establish that excessive use of force or other violations by police officers have been caused by a policy of inadequate or improper training. The Court, in City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985), reversed a judgment against a municipality based on inadequate training. The Court held that a policy of inadequate training could not be inferred from a single incident of misconduct. *Id.* at 823-24. The Court expressed no opinion "whether a policy that itself is not unconstitutional, such as the general 'inadequate training' alleged here, can ever meet the 'policy' requirement of *Monell*." *Id.* at 824 n.7. The Court answered that question in the affirmative in *City of Canton, Ohio v. Harris*, 57 USLW 4263 (Feb. 28, 1989). It held that inadequacy of police training may serve as the basis for municipal liability under § 1983. In order to prevail, however, plaintiffs must not only show that the city's training program was inadequate. They must also show that "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.* at 4273. Additionally, plaintiffs must show that the "deficiency in a city's training program is closely related to the ultimate injury." *Id.* at 4274. Therefore, although the Court in *City of Canton* theoretically allowed "inadequate training" suits, it established a very difficult evidenciary burden on plaintiffs.

35. *See supra* notes 12-17 and accompanying text.

The seminal case for both absolute and qualified immunity from section 1983 damage actions is *Pierson v. Ray*.[36] Pierson was a section 1983 lawsuit against local police officers and judges to redress plaintiffs' unconstitutional arrests and convictions during a civil rights march. Looking at the legislative history of section 1983, the Court held that "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common law immunities."[37] Therefore, the Court looked to the common law to determine what kind of immunities existed for governmental officials at the time section 1983 was passed. The Court held that at common law judges were absolutely immune from damages for acts committed within their judicial discretion.[38]

> This immunity applies even when the judge is accused of acting maliciously and corruptly, and it is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.[39]

As to police officers, the Court held: "The common law has never granted police officers an absolute and unqualified immunity."[40] Instead they were granted immunity if they acted in good faith under a statute they believed to be valid, even if the arrest later turned out to be unconstitutional.[41] The Court remanded the case to the trial court to determine whether "the officers reasonably believed in good faith that the arrest was constitutional."[42]

The Court further defined qualified immunity under section 1983 in *Scheuer v. Rhodes*.[43] *Scheuer* was an action brought against the governor and other Ohio officials growing out of the

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36. 386 U.S. 547 (1967). Actually, *Pierson* was preceded by Tenney v. Brandhove, 341 U.S. 367 (1951), a pre-*Monell* case holding members of state legislatures absolutely immune from suit under § 1983 for actions taken in their legislative capacities.

37. *Pierson*, 386 U.S. at 554.

38. "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in Bradley v. Fisher, 13 Wall. 335 (1871)." *Id.* at 553-54.

39. *Id.* at 554 (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, note at 349-50 (1871) (quoting Scott v. Stansfield, 3 L.R.-Ex. 220, 223 (1868)).

40. *Id.* at 555.

41. *Id.*

42. *Id.* at 557.

43. 416 U.S. 232 (1974).

shootings at Kent State University. After first deciding that the governor and other executive officers were entitled to qualified immunity,[44] the Court defined what appeared to be a subjective test for the immunity, based on the good faith belief of the officer involved.[45] The Court recognized in *Scheuer* that application of this standard would require an inquiry into the facts.[46]

One year later, in *Wood v. Strickland*,[47] the Court, by a five to four vote, increased the burden of those employing the qualified immunity defense. In addition to proving "subjective" good faith, which the Court defined as "acting sincerely and with a belief that he is doing right,"[48] the official must also show "objective" good faith. This standard is "based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges."[49] Under the new standard, the official would lose his qualified immunity from damages "if he knew or reasonably should have known that the action he took . . . 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."[50]

Four justices, in dissent, argued against including the objective standard as part of the test. They feared that it would be too difficult to determine what are "unquestioned constitutional rights."[51] They argued for use of only the subjective standard as laid out in *Scheuer*: "whether in light of the discretion and re-

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44. The Court of Appeals had held that the officials were entitled to absolute immunity. *Id.* at 242. The Supreme Court reversed, holding that they were entitled only to qualified immunity. These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government; the variation depends upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action. *Id.* at 247.

45. *Id.* at 247-48. "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." *Id.*

46. *Id.* at 242-43. "If the immunity is qualified, not absolute, the scope of that immunity will necessarily be related to facts as yet not established either by affidavits, admissions, or a trial record." *Id.*

47. 420 U.S. 308 (1975). *Wood* was a suit brought by public high school students against members of the school board, who had allegedly expelled them from school without affording them a proper hearing. *Id.* at 309-10.

48. *Id.* at 321.

49. *Id.* at 322.

50. *Id.*

51. *Id.* at 329 (Powell, J., dissenting). "One need only look to the decisions of this Court—to our reversals, our recognition of evolving concepts, and our five-to-four splits—to recognize the hazard of even informed prophecy as to what are 'unquestioned constitutional rights.'" *Id.*

sponsibilities of his office, and under all of the circumstances as they appeared at the time, the officer acted reasonably and in good faith."[52]

In *Wood v. Strickland* all nine justices favored using the subjective test for sovereign immunity.[53] The only disagreement between the majority and the dissent was whether to include an objective test in addition to the subjective test.[54] Given this, it is quite astonishing that in *Harlow v. Fitzgerald*[55] the Court completely abandoned the subjective test in favor of a purely objective one.

Harlow was a suit for damages for constitutional violations brought against several senior aides and advisors to the President of the United States. Because section 1983 does not apply to federal officials,[56] *Harlow* was not actually a section 1983 case. The Supreme Court has held, however, that a private right of action for damages arises from certain constitutional provisions.[57] Therefore, damage actions may be brought against federal officials for constitutional violations even though section 1983 does not apply.[58] Such suits are known as "*Bivens* actions," named for the case that first established them. *Harlow* was such a *Bivens* action. The Court first determined that the aides would receive qualified immunity if they could not establish that their

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52. *Id.* at 330 (Powell, J., dissenting).

53. *Id.* at 321-22 and 327-28 (Powell, J., dissenting).

54. *Id.*

55. 457 U.S. 800 (1982).

56. Most federal officials are not proper defendants in a § 1983 action because they are not acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." 42 U.S.C. § 1983 (1982); *see* District of Columbia v. Carter, 409 U.S. 218 (1973). Congress amended § 1983 in 1979 to include defendants acting under color of the local laws of the District of Columbia, Pub. L. No. 96-170, 93 Stat. 1284 (1979), but most federal government employees are still not covered by § 1983.

57. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (involving a fourth amendment violation); *see also*, Carlson v. Green, 446 U.S. 14 (1980) (involving an eighth amendment violation); Davis v. Passman, 442 U.S. 228 (1979) (involving a fifth amendment equal protection violation).

58. *See* Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987), distinguishing between "civil rights litigation" generally and "constitutional tort litigation":

> Civil rights litigation encompasses litigation under many federal statutes, including nineteenth- and twentieth-century antidiscrimination provisions. Constitutional tort litigation refers to a subset of civil rights litigation. The term encompasses both action brought against state and local authorities under 42 U.S.C. § 1983 and similar actions brought against federal officials based on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.*

Id. at 643 (footnotes omitted); *see also* Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980); Comment, *Respondeat Superior Liability of Municipalities for Constitutional Torts After* Monell: *New Remedies to Pursue?*, 44 MO. L. REV. 514 (1979).

functions required absolute immunity.[59] The Court recognized that the subjective part of the qualified immunity test often involved issues of fact that needed to be resolved by the factfinder and thus precluded summary judgment.[60] The Court noted that an inquiry into the facts was inconsistent with an earlier admonition that "insubstantial lawsuits be quickly terminated,"[61] and that "insubstantial claims should not proceed to trial."[62]

The Court recognized that most officials were given qualified, rather than absolute, immunity because a damage action might be the "only realistic avenue for vindication of constitutional guarantees."[63] If absolute immunity were applied in such cases, the plaintiff might lose her only avenue of redress. Because "claims run against the innocent as well as the guilty,"[64] however, the Court recognized that such litigation involved costs not only to the defendants, "but to society as a whole."[65] The Court recognized four societal costs: the expenses of litigation; the diversion of energy from pressing public issues; the deterrence of able citizens from accepting public employment; and fear that the threat of lawsuits would "dampen the ardor of public officials in discharging their duties."[66]

The Court also mentioned the special costs involved in litigation concerning the subjective state of mind of officials performing discretionary functions. Allowing discovery to determine an official's state of mind could be "peculiarly disruptive of effective government,"[67] because "judicial inquiry into subjective motivation . . . may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues."[68] The Court, therefore, held 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."[69] The new standard for qualified immunity would involve

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59. Harlow v. Fitzgerald, 457 U.S. 800, 813 (1982). In the companion case Nixon v. Fitzgerald, 457 U.S. 731, 751 (1982), the Court held that the President of the United States would receive absolute immunity from civil damages for his actions as President.

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

61. *Id.* at 814 (quoting Butz v. Economou, 438 U.S. 478, 507-08 (1978)).

62. *Id.* at 816.

63. *Id.* at 814.

64. *Id.*

65. *Id.*

66. *Id.* (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)).

67. *Id.* at 817.

68. *Id.* The Court recognized that discovery of this kind against a President's closest aides "could implicate separation-of-powers concerns." *Id.* at 817 n.28.

69. *Id.* at 817-18.

only the objective component. Officials would be shielded from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[70] This standard, the Court opined, could usually be decided by motion for summary judgment, because the judge, as a matter of law, could decide not only the currently applicable law, "but whether that law was clearly established at the time an action occurred."[71] Moreover, the Court determined that the threshold immunity question could and should be resolved before allowing any discovery.[72]

The Supreme Court has decided several cases since *Harlow* that have refined the standard established in that case. In *Davis v. Scherer*,[73] a state employee sued under section 1983 because he had been terminated from his position without being afforded procedural due process. The District Court held that the procedures used to fire the plaintiff were inadequate under the Fourteenth Amendment,[74] but held that the due process rights claimed by the plaintiff had not been clearly established in that circuit when he was fired.[75] The court looked to the "totality of the circumstances"[76] and held that the defendants had forfeited their qualified immunity because they violated the agency's "explicit regulations, which have the force of state law," and therefore that their conduct was inherently unreasonable.[77]

The Supreme Court reversed, holding that the *Harlow* standard was the only permissible way to overcome qualified immunity, and that no other standards were relevant to the issue of qualified immunity.[78] Whether the official's conduct violated state law was not relevant. "Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision."[79]

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70. *Id.* at 818 (citing Procunier v. Navarette, 434 U.S. 555, 565 (1978); Wood v. Strickland, 420 U.S. 308, 322 (1975)). Even if the Court found that the right in question had been clearly established, the official might still avoid liability if he or she "claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard." *Id.* at 819.

71. *Id.* at 818.

72. *Id.*

73. 468 U.S. 183 (1984).

74. *Id.* at 187 (citing Scherer v. Davis, 543 F. Supp. 4, 14 (N.D. Fla. 1981)).

75. *Id.* at 188.

76. *Id.* (quoting Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974)).

77. *Id.* (quoting Scherer v. Davis, 543 F. Supp. 4, 20 (N.D. Fla. 1981)).

78. *Id.* at 191.

79. *Id.* at 194.

In *Anderson v. Creighton*,[80] the Court refined the *Harlow* standard and gave instructions regarding how it should be applied in a fact-specific situation. A *Bivens* action was brought against an FBI agent who had conducted a warrantless search for a fugitive he believed was hiding in plaintiff's home. The District Court granted summary judgment for defendant on the ground that the search was lawful, holding that the undisputed facts revealed that the defendant had probable cause to search the plaintiff's home and that his failure to obtain a warrant was justified by exigent circumstances.[81] The Court of Appeals reversed, holding that unresolved factual disputes made it impossible to determine as a matter of law whether probable cause and exigent circumstances had been present.[82] The court further held that the defendant was not entitled to summary judgment on qualified immunity grounds because the right he was alleged to have violated—the right to be free from warrantless searches of one's home without probable cause and exigent circumstances—had been clearly established.[83] The Supreme Court reversed. Although the Court agreed that the right in question had been clearly established, it held that the clearly-established-law test could not be applied at this level of generality and must be applied in a more particularized sense.[84] Although the right to be free from warrantless searches and seizure without probable cause and exigent circumstances had been clearly established, the Court of Appeals should have considered the argument that it had not been clearly established that the particular circumstances with which the defendant was confronted did not constitute probable cause and exigent circumstances.[85] The Court held that the relevant question was "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."[86]

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80. 107 S. Ct. 3034 (1987).

81. *Id.* at 3037-38.

82. *Id.* at 3038 (citing Creighton v. St. Paul, 766 F.2d 1269, 1272-76 (8th Cir. 1985)).

83. *Id.*

84. *Id.* at 3038-39.

85. *Id.* at 3039.

86. *Id.* at 3040.

II. APPLICATION OF *Harlow, Davis,* AND *Anderson*

By removing the subjective good faith element from the qualified immunity test, the Supreme Court clearly made it more difficult for plaintiffs to overcome defendants' claims of qualified immunity.[87] The Court stated that the reason for this change was to protect public officials from the expense of defending lawsuits, some of which might turn out to be insubstantial.[88] The Court failed to consider that by so doing, a deserving plaintiff whose constitutional rights had been violated might be left without a remedy. When, in 1967, the Court created absolute immunity for judges, they recognized this possibility.[89] They did not seem to recognize, however, that they were creating the same sort of problem by removing the requirement of subjective good faith from the qualified immunity standard.

A recent Supreme Court case demonstrates the problem. In *Tennessee v. Garner*,[90] plaintiff's son, an unarmed burglary suspect, had been shot and killed while fleeing a Memphis police officer. Both Tennessee law and Memphis police policy authorized the use of deadly force to stop a fleeing felon.[91] The District Court had denied liability against both the city and the officer on the ground that it was not unconstitutional to use deadly force against a fleeing felon.[92] The Supreme Court held that use of deadly force to prevent the escape of a fleeing felon violates the fourth amendment unless "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."[93]

The Supreme Court decided only the substantive constitutional issue and not the issue of liability for damages.[94] It is clear, however, that under *Harlow* the officer would be entitled to immunity because he was relying in good faith on a state statute and department regulation which had not yet been held unconstitutional. Given the facts, this result seems reasonable and fair. The plaintiff most likely would be able to recover from the

87. *See* S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION 462 (2d ed. 1986); Comment, Harlow v. Fitzgerald: *The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983*, 132 U. PA. L. REV. 901, 905 (1984).

88. *See supra* notes 61-62 and accompanying text.

89. Pierson v. Ray, 386 U.S. 547, 554 (1967).

90. 471 U.S. 1 (1985).

91. *Id.* at 4-5 (quoting Tenn. Code Ann. § 40-7-108 (1982)).

92. *Id.* at 5-6.

93. *Id.* at 11.

94. The Court remanded for a determination of whether the police department and the City of Memphis would be liable under the *Monell* standard. *Id.* at 22.

City of Memphis because the department regulation, which would be considered city policy, was unconstitutional and caused the violation of decedent's rights.[95]

Let us now assume, however, that neither the state nor the department had any explicit policy dealing with the use of deadly force on a fleeing suspect. If the police officer, mistakenly believing that it was proper to shoot a fleeing burglary suspect, shot and killed the decedent, he would be immune from damages. At the time he took his action, such acts had not been ruled unconstitutional. He would be protected under either the *Harlow* standard or the earlier subjective good faith standard. Nor could the plaintiff recover from the city, because city policy did not prompt the action which led to the violation.[96] The plaintiff in this scenario would be left remediless. Unfortunately, this cost must be borne by some members of society if public officers are to be encouraged to perform their jobs to the best of their abilities without worrying that later second-guessing by the courts will result in their personal liability for actions which at the time were not unconstitutional.[97]

If we assume this time that the police department did have a regulation specifically prohibiting use of deadly force except when the suspect poses a danger to the officers or others, then we would have a *Davis v. Scherer*[98] situation. In *Davis*, the Court held that the violation of a state statutory or administrative provision was simply not relevant to the issue of whether the defendant would receive qualified immunity. The result would be the same even where, as in this case, the statute or regulation "advanced important interests or was designed to protect constitutional rights."[99] This position does not strike a proper balance between protecting plaintiffs' constitutional rights and protecting officials' ability to perform their duties without fear of liability for actions they had no reason to believe were improper. In such a case officials have been found to have violated plaintiffs' constitutional rights. They have also been found to have violated state and local regulations designed to protect those rights. Officials are not being held liable *because*

95. Monell v. Department of Social Servs., 436 U.S. 658 (1978).

96. City of Oklahoma City v. Tuttle, 471 U.S. 808, 824 (1985).

97. Plaintiffs in such a situation could be provided with a remedy without imposing personal liability on the official involved if the Court were willing to reverse its holding in *Monell* that municipal defendants will not be liable on a *respondeat superior* basis. *See infra* notes 166-72 and accompanying text.

98. 468 U.S. 183 (1984).

99. *Id.* at 195.

they violated state regulations. Existence of those regulations, however, should deprive them of the claim that they had no reason to believe that their actions were improper. Where a defendants' actions are clearly improper under state law and violate plaintiff's constitutional rights, then liability should attach.

The Court in *Davis* gave only two reasons for not taking this position, which it admitted was "not without some force."[100] The Court indicated that officials in such situations would not be able to "anticipate when their conduct may give rise to liability for damages."[101] This is true, because even if officials knew they were violating state regulations, they would only be held liable if the state regulation violation turned out to be a constitutional violation, which would not have been settled at the time of the actions. This seems to be the wrong standard. Officials should be held liable for their constitutional violations not only if they had reason to know that they might be liable, but also if they had reason to know that their conduct was unlawful or improper. The Court also stated that its goal that "unjustified lawsuits are quickly terminated" might be jeopardized if qualified immunity depended on the meaning or purpose of a state administrative regulation, because federal judges might not be able to determine such questions on motions for summary judgment.[102] However, the Court gave no reasons why federal judges, who daily make such determinations of state law, could not do so in this case.[103]

The Court seemed concerned that officials are subject to a plethora of rules with which they cannot always comply.[104] If they are required to determine whether their actions comply with all applicable rules, interference with the swift and firm ex-

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100. *Id.* at 194.

101. *Id.* at 195.

102. *Id.*

103. Pursuant to 42 U.S.C. § 1988 (1982), Congress has directed the federal courts to adopt and use state law in civil rights cases if there is no existing federal rule on point. *See, e.g.*, Wilson v. Garcia, 471 U.S. 261 (1985) (holding that federal court must choose most appropriate state statute of limitations for § 1983 actions).

Recently, in City of St. Louis v. Praprotnik, 108 S. Ct. 915 (1988), the Court, in a § 1983 case, held that federal courts are perfectly capable of interpreting state law to determine if a state official has policymaking authority: "We are not, of course, predicting that state law will always speak with perfect clarity. We have no reason to suppose, however, that federal courts will face greater difficulties here than those that they routinely address in other contexts." *Id.* at 925.

104. Davis v. Scherer, 468 U.S. 183, 196 (1984) (quoting P. SCHUCK, SUING GOVERNMENT 66 (1983) ("These officials are subject to a plethora of rules, 'often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively.' ")).

ercise of their duties may result.[105] But one must only take our hypothetical one step further to see that even if a state regulation were specifically called to the attention of the official, he would still be immune under *Davis*. Even if we assume that at morning roll call on the day of the shooting the officers were informed of the department policy about use of deadly force and specifically admonished to follow it, the officer would still not be liable. The Court in *Davis* held that "no other 'circumstances' " except whether the defendant's conduct had violated clearly established constitutional law were relevant to the issue of qualified immunity.[106] Thus, plaintiff would not be given the opportunity to show that defendant had specific knowledge that his conduct was unlawful.

One can see how absurd the rule is when the standard is applied to the extreme case. Suppose that just as an officer is about to shoot the fleeing suspect, his partner shouts for him to stop, that regulations prohibit the shooting. Even if the officer turns and says, "I don't care, I feel like shooting someone today," he would still not be liable under the *Harlow* standard. It is clear that any "qualified" immunity that would protect a defendant in such a case is for all practical purposes an absolute immunity.

Application of the *Harlow* standard, especially as refined in *Anderson v. Creighton*,[107] not only restricts damage recoveries by individual plaintiffs, but inhibits the development of constitutional civil rights law generally. Constitutional tort cases have been one of the most constructive vehicles for defining and expanding citizens' civil rights. Before *Harlow*, a court could reach and decide the constitutional issue before considering the immunity issue. Under *Harlow*, the trial judge may dismiss the case on a summary judgment motion on the immunity issue without reaching the constitutional issue.

Assume, for example, that a plaintiff's complaint alleged the violation of a constitutional right in a factual situation which had not yet been ruled upon by the courts. The court could find that a newly recognized constitutional right of the plaintiff had been violated. The defendant might be held immune from damages if she could show, either at trial or before, that she acted in subjective good faith, and, therefore, the plaintiff might not recover damages. But the result of the lawsuit would still be to

105. *Id.*
106. *Id.* at 191.
107. 107 S. Ct. 3034 (1987).

establish that right for the future, so that the next time it was violated, damages would be awarded. The official would lose her immunity because after the first case she should have known of the existence of the constitutional right.

Under *Anderson,* this could no longer happen. Before the court would rule on whether the facts amounted to a constitutional violation, the judge would first have to determine whether the specific constitutional right had been previously "clearly established." If it had not, the case would be dismissed and the court would never rule on whether the right should be established or applied to those circumstances.[108] Constitutional civil rights would not be completely static because other avenues might be open for litigation of new or expanded rights,[109] but one of the best vehicles for doing so has been curtailed.

Anderson creates additional, sometimes insurmountable, problems for plaintiffs. Without explicitly doing so, the Court seems to have changed the burden of pleading on the qualified immunity issue. In *Gomez v. Toledo,*[110] the Court had held that the burden of pleading a qualified immunity defense rests with the defendant. Although *Anderson* does not purport to change that holding, it is clear from the holding that a plaintiff is required to plead facts that show that the constitutional right had been established in those particular circumstances. The Court stated: "Thus, on remand, it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful."[111]

This may be particularly difficult for plaintiffs to do without the benefit of discovery, when the standard established by the court takes into account the information possessed by the defendant. The actual standard established by the Court was "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.*"[112] Without the benefit of discovery, how can a section 1983 plain-

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108. *Id.* at 3042 n.6. One commentator has referred to this situation as a "Catch-22." McCann, *The Interrelationship of Immunity and the* Prima Facie *Case in Section 1983 and* Bivens *Actions,* 21 GONZ. L. REV. 117, 139-40 (1985-86).

109. New rights could be established in a number of ways, including § 1983 injunctive actions; actions against municipalities, which cannot claim immunity, Owen v. City of Independence, 445 U.S. 622 (1980); actions against private parties who have conspired with government officials, Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); and as defenses to criminal actions; *see* McCann, *supra* note 108.

110. 446 U.S. 635 (1980).

111. 107 S. Ct. 3034, 3042 n.6.

112. *Id.* at 3040 (emphasis added).

tiff hope to show that a defendant official possessed such information that made his actions unreasonable?

III. THE *Harlow* STANDARD IS NOT SUPPORTED BY LEGITIMATE PUBLIC POLICY CONSIDERATIONS.

A. The Application of Harlow to Section 1983 Cases Usurps Congressional Prerogative.

In holding certain officials immune from section 1983 damage claims, the Supreme Court did not rely on statutory language, nor, in the first instance, on policy considerations. The statute requires that "every person" who violates the constitutional rights of another "shall be liable."[113] Rather, the Court interpreted congressional intent to determine that Congress, in passing section 1983, did not intend to abolish those immunities that officials enjoyed to common law damage actions: "The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities."[114]

The process that the Court employed until *Harlow* in determining whether and what kind of immunity an official would receive involved looking to the immunity granted such an official at common law. Because legislators acting in their legislative role received absolute immunity for their actions, it was assumed that Congress would have expected them to enjoy this immunity to section 1983 suits.[115] Similarly, the Court held that judges were absolutely immune from damages for acts committed within their judicial discretion.[116]

The situation with police officers was different, however. "The common law has never granted police officers an absolute and unqualified immunity . . . ."[117] Police officers were generally entitled only to "good faith" immunity from damages in suits for false arrest and other common law actions.[118]

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113. 42 U.S.C. § 1983 (1982); see *supra* note 1 for the text of the statute.

114. Pierson v. Ray, 386 U.S. 547, 554 (1967).

115. Tenney v. Brandhove, 341 U.S. 367 (1951).

116. "The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine." Pierson v. Ray, 386 U.S. 547, 554-55 (1967); *see supra* notes 43-5 and accompanying text.

117. *Id.* at 555.

118. The Court held that a police officer would be immune "for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on

This is not to say that the Court ignored the policy reason behind granting such immunities. The Court has consistently recognized that immunity from damages plays an important role in allowing government officials to perform their jobs in a "principled and fearless" manner, without fear of personal consequences.[119] Yet it is clear that the Court did not purport to be exercising its own independent policy judgments in establishing the immunities, but rather was interpreting congressional intent in passage of the act. The Court indicated that Congress could have abolished the immunities, which are not constitutionally based, had it so desired.[120] Although they do not explicitly so state, the clear implication is that the Court would have respected such congressional intent, even had they disagreed with the policy implications.

The Court appeared to abandon the congressional intent inquiry when in *Harlow* the Court significantly expanded the qualified immunity of executive officials. *Harlow* rests solely on policy considerations.[121] This in itself was not illegitimate, because *Harlow* was a *Bivens* action against federal officials rather than a section 1983 suit against state officials. Because *Bivens* was a judicially rather than a congressionally created remedy, the Court was free to establish limits based on policy on the remedy that it had created. In fact, although the Court noted that the same immunities usually applied under section 1983 and *Bivens* actions, it explicitly noted that it was not deciding any immunity issues in section 1983 actions.[122] The real problem arose when the Court applied the *Harlow* standard, practically without comment, to a section 1983 suit in *Davis v. Scherer*.[123] In-

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its face or as applied." *Id.* The Court noted that Mississippi law granted such a "limited privilege" to police officers. *Id.*

119. *Id.* at 554.

120. *See supra* note 114 and accompanying text.

121. The Court hoped to avoid the costs and governmental disruption which it thought accompanied the factual determination required by the good-faith standard. The Court determined that replacing it with an objective legal standard would allow immunity claims to be decided by motion for summary judgment before discovery. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

122. The Court stated:

> This case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under 42 U.S.C. § 1983. 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."

Id. at 818 n.30 (quoting Butz v. Economou, 438 U.S. 478, 504 (1978)).

123. 468 U.S. 183 (1984). Although the *Davis* Court recognized that *Harlow* was a *Bivens* action and *Davis* was a § 1983 action, the opinion merely restated the proposi-

deed, the Court later recognized in *Anderson* that in *Harlow* it had "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."[124] By altering the standard, the Court disregarded its own statement that congressional intent should be examined to determine the breadth of the immunities at common law. The Court, as a result, should not have applied an immunity different from and broader than those known at common law. The language of section 1983 grants no immunities.

The Court defended its departure from the common law by stating that it had "never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law."[125] *Harlow*, however was not a minor adjustment[126] to some "arcane rule" relating to immunity. It was, as the Court admitted in *Anderson*, a complete departure from the whole concept of common law good faith immunity. Any change that completely removes the issue of an official's good faith from good faith immunity is in fact an entirely new kind of immunity, one that grants significantly more protection to defendants.

Not only was the Court in *Harlow* engaging in legislative activity reserved for Congress, but it may have been doing so based on false assumptions. Certain members of the Court have voiced their concern that a flood of constitutional tort cases, many of them meritless, have besieged the federal courts.[127] The chief evidence cited to support this proposition has been the Annual Report of the Director of the Administrative Office of the U.S. Courts, which lists the number of civil rights cases filed each year. For example, Justice Powell noted, in *Patsy v. Board of Regents*,[128] decided the same year as *Harlow*, that the number

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tion 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 v. Six Unknown Federal Narcotics Agents*." Davis v. Scherer, 468 U.S. 183, 194 n.12.

124. Anderson v. Creighton, 107 S. Ct. at 3041-42 (1987).

125. *Id.* at 3041.

126. The Court in *Harlow* did refer to the change as "an adjustment" of the good faith standard. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).

127. *See* Eisenberg and Schwab, *supra* note 58, at 646; Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. Rev. 1, 1-3 (1985).

128. 457 U.S. 496 (1982).

of civil rights filings had increased from 270 in 1961, the year *Monroe v. Pape* was decided, to more than 30,000 in 1981.[129]

Recent empirical research has shown, however, that these statistics are grossly misleading, and that constitutional tort cases do not represent such a large number or a large percentage of the federal caseload. Professors Eisenberg and Schwab performed a more careful analysis of this data, showing that constitutional tort cases filed by non-incarcerated persons actually increased at a much more moderate rate. This rate was in fact much lower than the rate of increase for all federal litigation generally.[130] The problem with the Court's use of the Administrative office data is that these figures lumped all civil rights cases together. This group includes a very large number of prisoner habeas corpus cases, private employment discrimination claims brought under Title VII, and claims under other civil rights statutes, all of which are unrelated to section 1983 or constitutional tort cases.[131] In fact, by combining their study of the national data with a very detailed study of every civil rights case filed in the Central District of California for 1980-81, Eisenberg and Schwab estimated that constitutional tort cases make up approximately four percent of the caseload of the federal courts, not the twenty percent that Justice Powell's figure represents.[132]

B. The Harlow Standard is Not Appropriate for Non- Policymaking Officers.

The concern in *Harlow* that high-level policy-making would be disrupted is not present in the typical section 1983 case. The defendants in *Harlow* were close aides to the president, upper-level policy-making officials of the federal government. The Court was appropriately concerned that a judicial inquiry into the subjective motivation of such high-level officials would disrupt government operations.[133] Because of the different rules for

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129. *Id.* at 533 (Powell, J., dissenting).

130. Eisenberg and Schwab, *supra* note 58, at 662-68.

131. *Id.*

132. *Id.* at 693.

133. The Court was concerned that an inquiry into subjective motivation might "entail broad ranging discovery and the deposing of numerous persons, including an official's professional colleagues." *Harlow*, 457 U.S. at 817. The Court speculated that this might hamper the policymaking process:

> A president and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations jus-

section 1983 and *Bivens* actions, this problem would not exist if the alleged unconstitutional actions had been taken by upper-level policy-making officials of a municipal, rather than the federal government.

In *Pembaur v. City of Cincinnati*[134] the Supreme Court held that all actions taken by officials of local governments making final policy decisions would be considered government policy.[135] In such instances the local governing body would be liable for damages under *Monell*. The issue of qualified immunity would not arise in such a case because local governments cannot assert the qualified immunity of their officials.[136] The typical section 1983 case in which qualified immunity would be raised is much more likely to involve a lower-level official such as a police officer. While there may be governmental costs associated with determining the subjective good faith of such officials, they are certainly much less than with that of the president's closest aides or upper-level municipal policy-making officials.

Such differences should, at least, have led the Court to reevaluate the *Harlow* standard before applying it to section 1983 actions in *Davis* and law enforcement officers in *Anderson*. As discussed earlier, however, the Court summarily dismissed the issue without serious deliberation.[137] This action was contrary to earlier Court opinions which indicated that a different standard might be appropriate for police officers than for upper-level executive officials.[138] Thus, in its desire to have a single

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tifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

Id. at 817 n.28.

134. 475 U.S. 469 (1986).

135. "We hold that municipal liability under § 1983 attaches where . . . a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.* at 483-84.

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

137. Anderson v. Creighton, 107 S. Ct. 3034 (1987).

138.

When a court evaluates police conduct relating to an arrest its guideline is "good faith and probable cause." In the case of higher officers of the executive branch, however, the inquiry is far more complex since the range of decisions and choices — whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions—is virtually infinite . . . . In short, since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad . . . .

These considerations suggest that, 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

standard for all defendants, the Court may be applying a standard that is inappropriate for the majority of section 1983 cases which are brought against individual officers.

C. The Harlow Standard is Not Necessary or Appropriate to Eliminate Insubstantial Claims.

The Supreme Court's stated purpose in imposing the *Harlow* standard was to allow "the dismissal of insubstantial lawsuits without trial."[139] Again, in *Davis v. Scherer,* the Court mentioned terminating "frivolous suits without protracted litigation."[140] It is clear that the *Harlow* standard, especially as applied in *Davis* and *Anderson,* will result in the dismissal of more section 1983 lawsuits without trial, or even discovery. Admittedly, a certain percentage of all lawsuits, including civil rights suits, are insubstantial or frivolous; so the standard will, in a certain sense, accomplish its goal of early termination of some civil rights suits. As shown above, however, *Harlow* will also result in the dismissal of some deserving claims.[141] Unless the standard can distinguish between substantial and insubstantial claims, its imposition is not worth its price.

What the Court meant by "insubstantial" or "frivolous" suits must first be determined. If the Court meant that the plaintiff had pleaded a claim that was not or should not be considered a constitutional violation, then the *Harlow* standard is clearly unnecessary in these situations. Even before *Harlow,* the court in a section 1983 case would not even reach the immunity question until it first determined, as a matter of law, whether the plaintiff had pleaded a violation of a constitutional right. If the plaintiff had not alleged a violation of a constitutional right, then the case would be dismissed and no immunity would be necessary to protect the defendant.

The Supreme Court has been troubled by what it perceives as a flood of section 1983 litigation,[142] particulary cases that it felt involved the constitutionalization of claims which were in reality

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the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.

Scheuer v. Rhodes, 416 U.S. 232, 245-47 (1974) (citation omitted).

139. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

140. 468 U.S. 183, 196 (1984).

141. *See supra* notes 96-106 and accompanying text.

142. *See supra* notes 127-129 and accompanying text.

state tort claims.[143] Especially troubling have been due process claims brought to redress deprivation of property caused by the negligent actions of state officers[144] and suits brought by state prisoners to redress violations committed against them.[145] The Court has already dealt with this perceived problem in a more appropriate manner by limiting the scope of substantive rights deemed deserving of constitutional protection. For example, in *Paul v. Davis,* the Court held that a person's reputation is not an interest protected by the fourteenth amendment.[146] In *Parratt v. Taylor,* the Court held that an adequate state remedy precluded a finding of most due process violations.[147] *Daniels v. Williams* precluded due process violations founded only upon negligence.[148] *Hudson v. Palmer* restricted the fourth amendment rights of prisoners.[149] Certainly the substantive restrictions in these cases should be adequate to eliminate trivial or insubstantial lawsuits from the federal courts.

The Court also could have meant, by frivolous or insubstantial lawsuits, cases where plaintiff had pleaded a constitutional violation, but in fact, the violation had not taken place. The Court seemed to be referring to these situations in *Harlow* when it remarked "that claims frequently run against the innocent as well as the guilty."[150] Yet the *Harlow* standard will not eliminate these kinds of factually insubstantial claims, because the Court

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143. In Paul v. Davis, 424 U.S. 693 (1976), a suit brought to redress damage to plaintiff's reputation when he was mistakenly identified as a shoplifter by police, the Court stated: "Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment." *Id.* at 699. In Parratt v. Taylor, 451 U.S. 527 (1981), a suit by a state prisoner to redress the negligent loss of a hobby kit valued at $23.50, the Court stated:

> Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."

Id. at 544 (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)).

144. Parratt v. Taylor, 451 U.S. 527 (1981); Paul v. Davis, 424 U.S. 693 (1976).

145. *See, e.g.,* Daniels v. Williams, 474 U.S. 327 (1986) (involving prisoner injured when he slipped on a pillow negligently left on staircase by prison guard); Davidson v. Cannon 474 U.S. 344 (1986)(involving prisoner injured by failure of guards to protect him from another inmate); Hudson v. Palmer, 468 U.S. 517 (1984)(involving a prisoner complaint of unreasonable shakedown search of cell).

146. 424 U.S. 693, 712 (1976); *see supra* note 143.

147. 451 U.S. 527, 543 (1981); *see supra* note 143.

148. 474 U.S. 327 (1986).

149. 468 U.S. 517, 525-26 (1984) (holding that the fourth amendment does not apply within the confines of a prison cell).

150. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

may look only to the plaintiff's pleading. As long as a plaintiff pleads a violation of an established constitutional right, *Harlow* will not bar the suit. Any plaintiff willing to fabricate a constitutional violation would be willing to fabricate a clearly established one to avoid *Harlow*. It is unclear exactly how much of a problem is posed by fabricated section 1983 claims, but summary judgment motions based on failure by plaintiff to provide substantial evidence of a violation would seem much more suited to eliminating such claims.

There is another possible meaning for the insubstantial or frivolous lawsuits referred to by the courts. Under the pre-*Harlow* standard, there were cases in which a plaintiff had truthfully and accurately alleged a constitutional violation, but the defendant had claimed a good faith immunity. The Supreme Court in *Harlow* correctly noted that the issue of good faith, involving factual issues, could often not be decided until trial.[151] There would have been cases, therefore, where the jury found that a constitutional violation had been committed, but also found the defendant immune from damages because he had acted in good faith. Many of these cases will no longer go to trial, as the defendant's actual good faith is no longer at issue. Nevertheless, to describe these cases as insubstantial or frivolous seems a misnomer.

To be sure, cases have gone to trial in which the defendant has eventually been found not liable. It is hard to see how such cases can be called insubstantial, however, because there is necessarily a finding that the defendant has, in fact, violated the plaintiff's constitutional rights. Certainly it is not a case of a claim against an "innocent" defendant proceeding to trial, about which the court was most concerned in *Harlow*. By providing a qualified immunity for public officials found to have violated the constitutional rights of another, the Court has not determined that such officials are innocent, or that such claims are insubstantial. It has merely concluded that the societal costs of punishing such defendants are too high.

If these claims are viewed not as frivolous, but as claims where a constitutional violation has occurred but the defendant is spared liability, then the equation changes. Clearly, the *Harlow* standard has the cost of throwing out claims for which the defendant should be held liable. This cost might be acceptable if it were necessary to weed out frivolous claims. But the *Harlow* standard is best not at weeding out frivolous claims in the sense

151. *Id.* at 816.

that no constitutional violation has occurred, but at terminating claims where the plaintiff has been injured by defendant's constitutional violation, albeit committed in good faith.

The *Harlow* defense has the unwanted side effect of protecting some undeserving defendants from liability. Its major positive effect, however, is not in protecting any additional deserving defendants from ultimate liability. Rather, it spares some defendants who had committed constitutional violations, but in good faith, from the expenses and hardships of trial, at the cost of protecting other defendants, who acted with malice. If indeed the Court is concerned about protecting defendants who had acted in good faith from the costs of trial, there are other ways of accomplishing this same result without depriving plaintiffs of a remedy against those who acted with malice.

IV. ALTERNATIVES TO THE *Harlow* STANDARD

The purpose of this Article has been to show that the modified qualified immunity standard applied to presidential aides in *Harlow v. Fitzgerald*[152] should not have been extended to section 1983 cases in *Davis v. Scherer*,[153] nor to police officers in a fact-specific manner in *Anderson v. Creighton*.[154] There are three possible courses of action which could eliminate the unfairness of these cases, while to varying degrees addressing the concerns expressed by the Supreme Court in *Harlow*. Given the Court's recent opinions, however, it is unlikely that the Court would be willing to take any of these steps. Therefore, congressional action may be necessary.

The first solution would be to reserve the *Harlow* standard for *Bivens* actions, while returning to a subjective good faith test for section 1983 actions against lower-level executive officials. Although the Supreme Court may have accomplished its goal in *Harlow* of allowing courts to decide claims of qualified immunity without significant litigation costs, this was done only at the expense of depriving some deserving civil rights plaintiffs of their only viable remedy. Because the Court was without authority to make this "exception" to a clear Congressional statute, it would be appropriate for Congress to reinstate the subjective good

152. 457 U.S. 800 (1982); *see supra* notes 55-72 and accompanying text.
153. 468 U.S. 183 (1984); *see supra* notes 123-25 and accompanying text.
154. 107 S. Ct. 3034 (1987); *see supra* notes 124-26 and accompanying text.

faith standard of *Scheuer v. Rhodes*,[155] at least in section 1983 cases involving non-policymaking government officials.

The second solution would be to return to a subjective test for section 1983 cases, but to shift the burden of proof on the issue of immunity to plaintiffs. In developing the *Harlow* standard, the Court was most concerned that in constitutional tort cases "insubstantial claims should not proceed to trial."[156] The normal mechanism in the federal courts for achieving this is the motion for summary judgment.[157] The *Harlow* Court was concerned, however, that "an official's subjective good faith" was an issue of fact that "some courts have regarded as inherently requiring resolution by a jury."[158] Yet Rule 56 requires a denial of a motion for summary judgment only when there is a "disputed" issue of material fact.

The most typical situations involving the grant of a motion for summary judgment occur when the nonmoving party has the burden of proof on an issue.[159] In those cases, unless the nonmoving parties can come up with some evidence on the issue, summary judgment will be granted. They cannot, in that case, rely on the allegations in their complaint. Moreover, it is considerably more difficult for the party with the burden of proof on an issue to be granted summary judgment. In that case the nonmoving party can avoid the motion not only by providing his own evidence on the issue, but by challenging the sufficiency or credibility of the movant's evidence.[160]

Although the Supreme Court has never ruled on who has the burden of proof on a qualified immunity claim, it has held that

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155. 416 U.S. 232 (1974).

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

157. FED. R. CIV. P. 56. The Rule provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c).

158. *Harlow*, 457 U.S. at 816 (citing Landrum v. Moats, 576 F.2d 1320, 1329 (8th Cir.), *cert. denied*, 439 U.S. 912 (1978); and Duchesne v. Sugarman, 566 F.2d 817, 832-33 (2d Cir. 1977)).

159. J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 441 (1985).

160. *Id.*; *see also* Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 747 (1974). Louis argues:

> If the movant bears the burden of proof—either because he is the plaintiff or because he is asserting an affirmative defense—then he must establish all essential elements of the claim or defense. If the movant does not bear the burden of proof, then he can obtain summary judgment simply by showing the nonexistence of any essential element of the opposing party's claim or affirmative defense.

Id. (footnote omitted).

the burden of pleading is on the defendant.[161] Most circuits have held that the defendant also has the burden of proof on a qualified immunity claim.[162] A much less drastic step that the Court could have taken, which might have accomplished much of what it sought in *Harlow*, would have been to put the burden of proving lack of good faith squarely on the plaintiff. Plaintiffs could not merely rely on allegations of bad faith but would have to come up with some real evidence of defendant's malice. As any plaintiff in a public figure libel case will tell you, that is no easy task.[163] Therefore, if Congress chose to reinstate the subjective good faith standard, but was concerned that plaintiff could bring a case to trial based on unsupported allegations of malice, Congress could make clear that the burden of showing bad faith was on the plaintiff.[164]

The last, best, and most far-reaching solution that would undo the unfairness of *Harlow* would be a reversal of the Supreme Court's holding in *Monell* that municipalities are not liable on a respondeat superior basis for the constitutional torts of their employees. It is this holding that forces plaintiffs to sue individual defendants personally and creates the need for qualified immunity in the first place. Under *Monell*, plaintiffs can recover from the government only "when execution of a government's policy or custom . . . inflicts the injury."[165]

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161. Gomez v. Toledo, 446 U.S. 635 (1980).

162. Davidson v. Scully, 694 F.2d 50 (2d Cir. 1982); Reese v. Nelson, 598 F.2d 822 (3d Cir.), *cert. denied*, 444 U.S. 970 (1979); Landrum v. Moats, 576 F.2d 1320 (8th Cir. 1978); Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977) *cert. denied*, 438 U.S. 916 (1978); Skehan v. Board of Trustees, 538 F.2d 53 (3d Cir.), *cert. denied*, 429 U.S. 979 (1976); Glasson v. City of Louisville, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975). *But see* Hander v. San Jacinto Junior College, 519 F.2d 273 (5th Cir. 1975). See further discussion of this issue in Gilden, *The Standard of Culpability in Section 1983 and* Bivens *Actions: The Prima Facie Case, Qualified Immunity and the Constitution*, 11 HOFSTRA L. REV. 557, 594-98 (1983); S. NAHMOD, *supra* note 87 at 509-12.

163. Under the standard of New York Times v. Sullivan, 376 U.S. 254 (1964), public figure plaintiffs in libel cases must plead and prove defendant's actual malice. Even though plaintiffs are granted discovery on this point, Herbert v. Lando, 441 U.S. 153 (1979), they often have trouble obtaining enough evidence to survive a motion for summary judgment. *See* Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1, 10-11 (1983): "The *Times* decision, if administered with rigorous summary judgment procedures, ensures that only the most egregious cases will reach the jury."

164. This would accomplish the Supreme Court's goal in *Harlow* of avoiding trials in unwarranted cases, but would not avoid discovery. In the libel area, however, the Court was not willing to take away plaintiff's right to discovery, even though the Court realized that there were some costs to first amendment rights by allowing discovery. Herbert v. Lando, 441 U.S. 153 176-77 (1979). As noted above, it is grossly unfair to make qualified immunity fact-dependent and then deny plaintiff discovery to establish the necessary facts. *See supra* notes 113-15 and accompanying text.

165. Monell v. Department of Social Servs., 436 U.S. 658, 694 (1978).

The *Monell* Court based its holding both on the statutory language[166] and legislative history[167] of section 1983. However, both of these bases for the opinion have been severely criticized elsewhere.[168] In *Monell*, unlike in the cases establishing and expanding personal immunities, the Court did not look at the policy implications of its decision. Had the Court done so, it would have followed the universal common-law rule of holding employers liable for the torts of their employees.[169] This would have advanced the Court's often-stated goals for section 1983: com-

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166. The Court held that the "shall subject, or cause to be subjected," language of § 1983 "cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Id.* at 691-92. "[T]he fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent." *Id.* at 692 (citation omitted).

167. The Court noted that Congress had rejected the Sherman Amendment, which was "the only form of vicarious liability presented to it." *Id.* at 693 n.57. "Equally important, creation of a federal law of *respondeat superior* would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose . . . ." *Id.* at 693.

168. *See* Mead, *supra* note 9. As to the statutory language argument, Professor Mead argues:

> A construction of the causation language that rejects *respondeat superior* is erroneous for several reasons. First, the language "subject or cause to be subjected" suggests that Congress envisioned at least two scenarios. One situation would be a section 1983 "person" acting to subject another to a constitutional harm. In such a case the defendant actively causes the harm. The language "cause to be subjected," however, suggests a very different situation. The use of passive voice indicates that Congress also intended to impose liability for constitutional harm on those who have not themselves done the "subjecting," but rather are responsible for those who have. In such cases the defendant need not have actively caused the harm to fall within the causation language. Thus, Congress took into account that responsibility for constitutional harm exists in the absence of actual participation in the events giving rise to the constitutional deprivation.

Id. at 532-33. Professor Mead criticizes the statutory history argument as follows:

> To infer from Congress' rejection of the vicarious liability in the Sherman Amendment an intent to reject *respondeat superior* in section 1983 overlooks the very distinction between the Sherman Amendment and section 1983 that the Court had specifically recognized in the first part of its opinion. The vicarious liability proposed in the Sherman Amendment would have made municipalities liable for actions of *private citizens* over which the municipality had no control . . . . Thus, it is unlikely that Congress' rejection of a broad form of vicarious liability was also a rejection of *respondeat superior*, which is a narrow type of vicarious liability for tortious acts of employees.

Id. at 535-36 (footnotes omitted).

169. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS § 69 at 499-500 (5th ed. 1984).

pensation to injured victims, prevention of future violations, and the vindication of constitutional rights.[170]

Holding municipalities liable for the violations of their employees would also have avoided the problems associated with personal liability that the Court was so concerned with and that led the Court to expand individual immunity in *Harlow*. The government, rather than the individual official, would be responsible for the costs of litigation and any judgment. Individuals would not be deterred by the threat of lawsuits from accepting public employment, nor would public officials be afraid to act because of the fear of personal liability. The Court in *Anderson* recognized that some state governments had voluntarily instituted programs to "reimburse officials for expenses and liability incurred in suits challenging actions they have taken in their official capacities."[171] The Court found, however, that such programs were not "sufficiently certain and generally available" to justify a reconsideration of *Harlow*.[172]

The Court has held, in *Owen v. City of Independence*,[173] that when, under *Monell*, a city may be sued directly for the violations of its policymaking officials, the city may not claim the qualified immunity that the officials could have exerted personally.[174] The Court held that the two main reasons for granting good faith immunities to the individual defendants[175] were not applicable to suits against the government itself.[176] The Court

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170. *See* Mead, *supra* note 9 at 539: "Compensation and deterrence considerations would be advanced consistently if *respondeat superior* were the basis of section 1983 municipal liability."

171. *Anderson*, 107 S. Ct. at 3040 n.3.

172. *Id.*

173. 445 U.S. 622 (1980).

174. *Id.* at 638.

175. The two main reasons asserted were:

> (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

Id. at 654 (quoting Scheuer v. Rhodes, 416 U.S. 232, 240 (1974)).

176. *Id.* at 654-56.

> The first consideration is simply not implicated when the damages award comes not from the official's pocket, but from the public treasury. It hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby . . . .
>
> . . . .
>
> The second rationale mentioned in *Scheuer* also loses its force when it is the municipality, in contrast to the official, whose liability is at issue. At the heart of this justification for a qualified immunity for the individual official is the concern that the threat of *personal* monetary liability will introduce an unwar-

held, moreover, that both the compensatory and deterrent functions of section 1983 would be served by denying governments good faith immunity.[177]

Reversing *Monell* would render cities liable for all constitutional violations of their employees, and it would slightly increase the total liability for such violations. The increased liability would arise, however, in those cases where deserving plaintiffs are now being denied liability. Under present law, plaintiffs will be denied compensation for their injuries caused by constitutional violations of government employees when they cannot show either that the right was "clearly established" or that the violation was caused by government policy. Plaintiffs' recovery should not be denied in such cases, absent some good reason. Although there may be good reason to deny personal liability in such cases, *Owen* makes clear that there is no good policy reason to deny governmental liability. Moreover, holding the government responsible for such violations would have the added benefit of eliminating litigation concerning qualified immunity and whether the violation was caused by city policy. The Supreme Court may have been correct in trying to eliminate unnecessary litigation from section 1983 cases. The Court adopted a solution, however, that deprives deserving plaintiffs of a remedy without considering solutions that would have served the same purpose while compensating these victims.

V. CONCLUSION

In 1982 the Supreme Court significantly expanded the scope of qualified immunity of executive officials from constitutional tort claims. *Harlow v. Fitzgerald* removed the requirement that an official act in subjective good faith in order to claim the immunity, in favor of an objective test. After *Harlow,* officials are shielded from damages unless they violate a citizen's clearly-settled constitutional rights.

The purpose of the new standard, which was developed in a *Bivens*-type suit against the President's aides, was intended to protect officials from the expenses and intrusion of discovery

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ranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy. The inhibiting effect is significantly reduced, if not eliminated, however, when the threat of personal liability is removed.

Id. (emphasis in original)(footnotes omitted).

177. *Id.* at 650-53.

and trial necessary to a determination of subjective good faith. It should not have been extended to section 1983 cases against non-policymaking municipal officials. It overextends the protection to officials who are not deserving of the immunity, in violation of congressional intent in passing section 1983.

There is a better solution, which would protect deserving officials from litigation expenses and fear of liability for damages without depriving deserving plaintiffs of recovery. The Court or Congress should overturn the holding of *Monell v. Department of Social Services* and impose liability on municipalities for the consitutional violations of their officials, whether caused by municipal policy or not. This would eliminate litigation regarding the officials' state of mind and whether the violation was caused by official policy, without greatly increasing the total amount of damages awarded. And unlike the current standard, the proposed overruling would provide a remedy to all plaintiffs who have been harmed by the constitutional violations of government officials, as Congress intended when it enacted section 1983.