The Misapplication of Qualified Immunity: Unfair Procedural Burdens for Constitutional Damage Claims Requiring Proof of the Defendant's Intent

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INTRODUCTION

In the fall of 1988, Brett C. Kimberlin, a prisoner in an Oklahoma federal correctional institution, announced to the news media that he had previously sold marijuana to Dan Quayle, who then was the Republican nominee for Vice President of the United States. Following Kimberlin's initial contacts with the press, prison officials placed him in administrative detention three separate times, both before and after the November election. In response, Kimberlin brought a damages suit against the responsible officials for violating his First Amendment rights. He alleged that the first two detentions were intended to prevent him from talking to the press, and that the third was in retaliation for his having initially publicized his story.

Several pieces of circumstantial evidence supported Kimberlin's assertion that the defendants' actions were meant to prevent further contacts between him and the media. Despite this evidentiary showing, however, the Court of Appeals for the District of Columbia Circuit dismissed his case after the defendants moved for summary judgment. Because the defendants were government officials and thus were protected by qualified immunity, the D.C. Circuit said that Kimberlin had to satisfy a

2. See id. at 792-93.
3. See id. at 790. While Kimberlin had initially alleged violations of other constitutional and federal statutory provisions, only the First Amendment charge was at issue before the D.C. Circuit. See id.
4. See id. at 793.
5. Kimberlin offered evidence indicating the unusual involvement of high-ranking personnel in his detentions, as well as contacts between those high-ranking officials and members of the Bush-Quayle campaign committee. See id. at 801-02. Although the defendants asserted that Kimberlin's detentions were alternatively meant to protect his safety or to punish him for making third-party phone calls from within the prison, Kimberlin was nonetheless able to highlight contradictions between the stories of the individual defendants. See id.
6. See id. at 798.
7. Both federal and state courts generally provide immunity for discretionary, but not ministerial, governmental duties. See Davis v. Scherer, 468 U.S. 183, 196 n.14 (1984); Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982); Susan L. Abbott, Note, Liability of the State and its Employees for the Negligent Investigation of Child Abuse Reports, 10 Alaska L. Rev. 401, 414 (1993). This immunity serves two distinct purposes: first, it preserves the separation of powers by preventing courts from interfering with executive and legislative decisions through the imposition of tort liability; second, it ensures that private citizens cannot use the courts to intimidate government officials from making necessary policy decisions. See Abbot, supra, at 414; Kelly M. Tullier, Note, Government-
"heightened pleading" standard, under which a plaintiff can avoid dismissal only by offering direct evidence of the defendants' unlawful intent. Because Kimberlin was able to offer only circumstantial evidence of the defendants' intent, the court dismissed his claim.

The D.C. Circuit derived its heightened pleading standard from Harlow v. Fitzgerald, in which the Supreme Court established an objective standard for granting qualified immunity to government officials. Before Harlow, plaintiffs bringing constitutional damage claims could defeat a defendant's claim of immunity by alleging that the official knew his actions were unconstitutional, thus disputing any contention by the defendant that he acted in good faith. Issues of fact regarding whether the defendant knew his actions to be unconstitutional would often prevent dismissal of such cases at the summary judgment stage. As a result, the plaintiff could subject the defendant to the burdens of discovery and trial even if the plaintiff's claim of "malice" proved to be unsubstantiated.

The Harlow court eliminated these subjective inquiries and instructed lower courts considering qualified immunity claims to dismiss the plaintiff's case unless he alleges a violation of a clearly defined constitutional right of which a reasonable person would have known. By limiting the relevant analysis to an exclusively objective inquiry, the Court transformed qualified immunity into an issue of law that courts could determine at the summary judgment stage. In order to spare government defendants the burden of unnecessary discovery, the Court stated that discovery should not be allowed until after resolution of the qualified immunity issue.

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8. See Tullier, supra note 7, at 793-94.
9. See id. at 798.
11. See id. at 817-18.
12. See id. at 815-16.
13. See id.
14. See id.
17. See id.
Unfortunately, Harlow's prohibition against subjective inquiries has proven to be problematic when lower courts, such as the D.C. Circuit in Kimberlin, are confronted with constitutional claims requiring proof of the defendant's unlawful intent. While the Harlow Court intended only to foreclose inquiries into the defendant's knowledge of the law, some lower courts have misinterpreted Harlow's restriction on "bare allegations of malice" to limit inquiries into the motivations underlying the defendant's actions where such motivations are an element of the plaintiff's substantive claim. Based on this misperceived conflict between Harlow and claims requiring proof of the defendant's intent, courts have forced plaintiffs bringing this type of claim to offer a higher level of proof of the defendant's intent than is normally required once a defendant moves for dismissal or for summary judgment. Often, courts will demand that the plaintiff satisfy these increased procedural burdens before allowing the plaintiff to conduct discovery into the defendant's motives.

Both courts and critics have attacked this application of Harlow, arguing that Harlow should not restrict a plaintiff's ability to prove the defendant's unlawful intent as part of his substantive constitutional claim. Courts have reasoned that because the issue of the defendant's unlawful motive is an issue of fact distinct from issues relating to qualified immunity, the plaintiff should be held to normal procedural standards when establishing the defendant's motives. The Supreme Court recently fortified this argument in Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, in which it flatly rejected a pleading standard imposed by the Fifth Circuit which exceeded the general standard of notice pleading set up under the Federal Rules of Civil Procedure. In light of Leatherman, it seems clear that courts are not entitled to impose increased procedural burdens on plaintiffs bringing intent-
This Note argues that courts should not raise procedural burdens for plaintiffs bringing constitutional damage claims based on the defendant’s unlawful intent. Part I discusses constitutional damage claims requiring proof of intent, as well as the Supreme Court’s attempt in *Harlow v. Fitzgerald* to design a qualified immunity standard that would balance the plaintiff’s interest in vindicating his constitutional rights with the defendant’s need for immunity from meritless suits. Part II begins with an examination of how the lower courts have understood *Harlow* to relate to inquiries into the defendant’s allegedly unlawful intent, looking at arguments advanced for both expansive and narrow readings of *Harlow*’s scope. Part II then discusses the different procedural standards courts have imposed on claims requiring proof of intent based on their understanding of *Harlow*’s holding and purpose. Part III discusses what implications *Leatherman* poses for lower courts departing from the procedural standards provided for in the Federal Rules. Part IV argues that, in light of both *Harlow* and *Leatherman*, courts are not justified in increasing procedural burdens beyond the levels normally required under the Federal Rules. Part IV then describes how courts can effectively deal with potentially frivolous intent-based claims by applying conventional procedural mechanisms. Finally, this Note concludes that despite the perceived need to offer an increased level of protection to government defendants, the standards provided for in the Federal Rules constitute the best instruments for shielding defendants while still allowing plaintiffs to bring claims requiring proof of intent.

**I. CONSTITUTIONAL CLAIMS AND QUALIFIED IMMUNITY**

Since the 1960s, the Supreme Court has provided a federal damages remedy for individuals suffering violations of their constitutional rights by government officials. While access to federal court has increased for such plaintiffs over the past three decades, the Supreme Court has tempered this increased access by imposing specific limitations on plaintiffs bringing constitutional damage claims. First, in some instances, the plaintiff must prove that the defendant’s actions were motivated by an unconstitutional intent before a constitutional violation is established.

28. See infra notes 178-82 and accompanying text.
29. See infra notes 41-52 and accompanying text.
31. See infra notes 53-80 and accompanying text.
32. See infra notes 93-125 and accompanying text.
33. See infra notes 126-60 and accompanying text.
34. See infra notes 161-82 and accompanying text.
35. See infra notes 183-88 and accompanying text.
36. See infra notes 189-93 and accompanying text.
37. See infra notes 41-42 and accompanying text.
38. See infra note 42.
39. See infra notes 41-52 and accompanying text.
Second, in order to ensure that government officials are not unduly burdened with defending potentially frivolous claims, the Supreme Court has held that government officials are immune from suit when their alleged actions are objectively reasonable in light of clearly established law.40

A. Constitutional Damage Claims Requiring Proof of the Defendant’s Intent

Under the Supreme Court’s decision in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,41 an individual may recover damages in federal court against federal officials who violate that individual’s constitutional rights.42 Title 42 U.S.C. § 1983 provides an individual with this same federal damages remedy for constitutional violations by state officials.43 For immunity purposes, the Supreme Court has held that defendants being sued for constitutional violations under Bivens or


41. 403 U.S. 388 (1971).

42. See id. at 395. In Bivens, the plaintiff sued federal narcotics agents who had conducted a warrantless search of his apartment and who had arrested the plaintiff on narcotics charges, all allegedly without probable cause. See id. at 389. Rejecting the defendant’s arguments that plaintiff was limited to a state law remedy, the Supreme Court held that a federal cause of action for damages exists for plaintiffs whose Fourth Amendment rights have been violated by federal officials. See id. at 395. In finding federal jurisdiction over the plaintiff’s claim, the Court noted that since the Fourth Amendment was meant to counteract the enhanced “capacity for harm” possessed by agents acting under federal authority, it was reasonable for a federal court to provide a remedy where the plaintiff’s constitutional rights had been violated. See id. at 392. The Supreme Court has extended the Bivens analysis to claims based on violations of the First, Fifth, and Eighth Amendments. See generally Carlson v. Green, 446 U.S. 14, 17-18 (1980) (Eighth Amendment); David v. Passman, 442 U.S. 228, 248-49 (1979) (Fifth Amendment); Dellums v. Powell, 566 F.2d 167, 194-96 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978) (First Amendment).

43. The statute 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.

42 U.S.C. § 1983 (1988). Originally enacted in 1871 to enforce the Fourteenth Amendment’s anti-discrimination provisions, the statute was used infrequently during its first ninety years. See Daan Braveman, Protecting Constitutional Freedoms: A Role for Federal Courts 46 (1989); see also Peter H. Schuck, Suing Government: Citizen Remedies for Official Wrongs 47-48 (1983) (noting that the statute’s major turning point occurred ninety years after its enactment). In Monroe v. Pape, 365 U.S. 167 (1961), however, the Supreme Court substantially expanded the statute’s availability when it held that plaintiffs suffering constitutional harms at the hands of state officials could make use of § 1983 even when the defendants’ conduct was committed in violation of state law. See id. at 172-87. Since Monroe, the number of civil rights actions being filed against state officials in the federal judiciary has vastly increased. See Schuck, supra, at 48-51 (discussing marked increase in cases filed under 42 U.S.C. § 1983 since Monroe and subsequent Supreme Court decisions).
§ 1983 must be afforded the same levels of protection. Accordingly, lower federal courts have widely enforced this principle of equal treatment for federal and state defendants.

Certain constitutional claims brought under either Bivens or § 1983 require proof of the defendant's unlawful intent. This is most notably the case in Equal Protection claims. Under the Supreme Court's decision in Washington v. Davis, a plaintiff must prove a defendant's discriminatory intent in order to obtain a remedy under the Equal Protection Clause of the Fourteenth Amendment. Thus, a plaintiff claiming to be the victim of a discriminatory act must prove not merely that the act of the defendant adversely affected him, but also that such potentially adverse effects motivated the defendant's actions.

The plaintiff bears a similar burden when his claim alleges that certain acts were done in order to prevent or punish the exercise of constitutional rights. For example, if a plaintiff claims that he was fired for speech protected by the First Amendment, he must demonstrate that there were retaliatory motives underlying his termination. Likewise, if the plaintiff claims that the defendant took some action to inhibit the plaintiff from exercising his First Amendment rights, he must show that the defendant's actions were deliberately directed at suppressing the plaintiff's protected speech.

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44. See Butz v. Economou, 438 U.S. 478, 500-01 (1978) (holding that it would be nonsensical to draw a distinction for purposes of immunity between federal officials sued under Bivens and state officials being sued under § 1983).

45. See, e.g., F.E. Trotter, Inc. v. Watkins, 869 F.2d 1312, 1318 (9th Cir. 1989) (noting that the immunities recognized under Bivens are the same as for § 1983 cases); Chin v. Bowen, 833 F.2d 21, 24 (2d Cir. 1987) (holding that same immunity standards apply in § 1983 and Bivens cases); Reuber v. United States, 750 F.2d 1039, 1055 n.20 (D.C. Cir. 1985) (discussing how Bivens and § 1983 are coextensive with regard to both liability and immunity).


47. 426 U.S. 229 (1976).

48. See id. at 239-42.

49. See Personnel Adm'rr v. Feeney, 442 U.S. 256, 279 (1979) (requiring plaintiffs to prove that the defendants "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

50. See Kirkpatrick, supra note 46, at 53.


52. See Pueblo Neighborhood Health Ctr. v. Losavio, 847 F.2d 642, 647 (10th Cir. 1988) (stating that proof of intent is the critical element in establishing that state officials' contested search was designed to interfere with the plaintiffs' First Amendment speech and associational rights).
B. Qualified Immunity: Finding the Appropriate Level of Protection for Government Officials

By creating an exclusively objective standard of qualified immunity in *Harlow v. Fitzgerald,* the Supreme Court attempted to provide an increased level of protection for government officials facing constitutional damage claims. In its initial qualified immunity decisions, the Court granted immunity to government officials either because the official acted in “good faith,” or because the official’s actions appeared “reasonable” under the prevailing circumstances. When lower courts became confused as to whether qualified immunity involved a subjective or objective inquiry, the Court explained in *Wood v. Strickland* that the qualified immunity analysis necessarily contains both objective and subjective elements. The analysis is subjective in that the defendant official, to receive protection, must have acted “with a belief that he [was] doing right.” The analysis is objective, however, in that officials could not receive pro-

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54. The good faith approach to qualified immunity originated in *Pierson v. Ray,* 386 U.S. 547 (1967). In *Pierson,* the plaintiffs sued three policemen for arresting them under an allegedly unconstitutional Mississippi statute that barred the interracial use of segregated public facilities. See id. at 548-50. The Fifth Circuit rejected the police officers’ claim of good faith immunity and held that common law immunities did not exist for law enforcement officials sued under § 1983. See *Pierson v. Ray,* 352 F.2d 213, 218 (5th Cir. 1965), rev’d, 386 U.S. 547 (1967). The Supreme Court reversed the Fifth Circuit’s decision, holding it fundamentally unfair to impose liability where a police officer acts under a statute that he believed to be valid but which is later held unconstitutional. See id. at 555.

55. The Court first articulated an objective analysis for qualified immunity in *Scheuer v. Rhodes,* 416 U.S. 232 (1974). In *Scheuer,* the Court considered how the good faith defense previously applied to law enforcement officers should apply in the case of high ranking executive officials. The defendants in *Scheuer* were Ohio officials responsible for sending the National Guard to quell the infamous student uprising at Kent State University. See id. at 234. Noting that the range of policy decisions faced by such officials is both varied and complex, see id. at 246, the Court held that the range of discretion afforded them should be broad enough to ensure prompt and effective action when crises arise. See id. at 247. Declining to articulate any bright line test, the Court instead stated that the scope of the immunity should be determined according to the discretion and responsibilities of the officeholder in conjunction with the surrounding circumstances as they reasonably appeared at the time of the action. See id. at 248 (citing Moyer v. Peabody, 212 U.S. 78, 85 (1909)).


57. 420 U.S. 308 (1975). In *Wood,* the Court resolved a dispute between the trial and appellate courts regarding whether the qualified immunity analysis was subjective or objective. See id. at 321. At trial, the district court instructed the jury that liability could be imposed only if the defendants had acted with “malice” or “ill will” towards the plaintiffs. See id. at 313-14. The Court of Appeals for the Eighth Circuit, rejecting the district court’s analysis, held that specific intent was not a prerequisite to liability, and that the standard was essentially objective. See Strickland v. Inlow, 485 F.2d 186, 191 (8th Cir. 1973), vacated sub nom. Wood v. Strickland, 420 U.S. 308 (1975).

tection where they ignorantly believed their actions to be appropriate when in fact their actions violated "settled" and "indisputable" law. Based on these subjective and objective elements, the Court held that a government official is not immune from liability if he knew, or reasonably should have known, that the action he took would violate the rights of the individual affected, or if he acted with the malicious intention to cause a deprivation of a constitutional right.

Eventually, it became clear that litigating issues regarding defendants' knowledge of the law imposed too great a burden on government officials. Because lower courts construed issues regarding defendants' knowledge of the law as questions of fact, it was extremely difficult for defendants to have frivolous cases dismissed at the summary judgment stage. As a result, officials were exposed to trial as well as to broad ranging discovery, both of which the Harlow Court regarded as "peculiarly disruptive to effective government."

In order to remove these burdens from government defendants, the Harlow Court eliminated the subjective prong of the qualified immunity analysis previously identified in Wood v. Strickland. After Harlow, judges considering a claim of qualified immunity need only determine whether the defendant's alleged conduct violated a clearly defined constitutional right of which a reasonable official would have known. By limiting qualified immunity analysis to a consideration of exclusively objective factors, the Court transformed qualified immunity into an issue of law that could easily be resolved on a motion for summary judgment. Thus, if the law was not clearly established at the time of the alleged violation, an official could not reasonably be expected to have known that it forbade the conduct in question, and the case may therefore be dismissed. To reduce the burdens imposed on defendant officials during pre-trial proceedings, the Court held that discovery should not be proceed until the qualified immunity issue is resolved.

By shifting the inquiry from whether the official acted in good faith to whether the official's alleged actions were objectively reasonable, the Court ensured that bare allegations of "malice" would no longer be sufficient to subject government officials to the burdens of discovery and

59. See id. Thus, qualified immunity's objective element holds the defendant official to a reasonable knowledge of the law involved in the exercise of his duties. See id. at 322 ("[A] school board member . . . must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges.").
60. See id. at 322.
62. See id. at 815-16.
63. Id. at 817.
64. See id. at 817-18.
65. See id. at 818.
66. See id. at 818-19.
67. See id. at 818.
68. See id.
This increased level of protection for defendants did not, however, eliminate the plaintiffs' right to a remedy. Indeed, the Court emphasized that by defining qualified immunity in essentially objective terms, it was striking a balance between the plaintiff's right to a damages remedy for violations of his constitutional rights and the defendant's ability to perform necessary government functions free from the specter of potential litigation.

Decisions following Harlow primarily addressed the issue of when a government official acted reasonably in light of established law. In Anderson v. Creighton, the Court set down specific criteria to be used in determining whether a right is "clearly established." In Anderson, the plaintiffs claimed their Fourth Amendment rights had been violated when the defendant officials conducted a warrantless search of their home under the mistaken belief that the plaintiffs were harboring a bank robbery suspect. The Eighth Circuit denied the defendant's immunity defense and held that the plaintiff's claim satisfied Harlow's objective test because a home owner's right to be free from unreasonable searches and seizures was clearly established at the time of the violation.

The Supreme Court rejected the Eighth Circuit's analysis as an overly broad articulation of the right in question. The Court stated that the right allegedly violated must be defined in a particularized way. Specifically, the "contours" of the right allegedly violated must be sufficiently clear so that a reasonable official would understand that his conduct violates that right. Otherwise, plaintiffs could circumvent Harlow's guarantee of immunity by alleging the violation of a constitutional right so abstract that no one could reasonably dispute its being clearly established.

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69. See id. at 817-18.
70. See id. at 819.
71. See id. ("Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967))).
72. See, e.g., Malley v. Briggs, 475 U.S. 335, 345 (1986) (rejecting defendant police officer's argument that submission of baseless warrant application was reasonable per se where the officer believes the alleged facts to be true); Davis v. Scherer, 468 U.S. 183, 192-93 (1984) (holding state employer's discharge of plaintiff to be reasonable under the Due Process Clause where the plaintiff is informed as to the reason for his discharge and where state law provided a for full evidentiary hearing after termination).
74. See id. at 640.
75. See id. at 637.
76. See id. at 638.
77. See id. at 639-40.
78. See id. at 640.
79. See id.
80. See id. at 639.
II. THE LOWER COURTS' APPLICATION OF QUALIFIED IMMUNITY TO CLAIMS REQUIRING PROOF OF THE DEFENDANT'S INTENT

Despite the fact that Harlow foreclosed only those subjective inquiries that relate to the qualified immunity analysis, some lower courts have read Harlow to restrict all types of subjective inquiries, even when they are necessary to establish the plaintiff's substantive claim. While some courts restrict such inquiries based on a misinterpretation of Harlow's holding, others do so based on Harlow's stated policy goals. Under either rationale, courts have used Harlow to justify imposing procedural burdens which exceed those provided for in the Federal Rules.

A. The Proper Scope of Qualified Immunity

Based upon Harlow and the Supreme Court's most recent decisions regarding qualified immunity, courts facing Bivens or § 1983 claims must determine only whether the defendant's alleged conduct violates a clearly defined right under the Constitution. Because the analysis is wholly objective, a plaintiff cannot defeat immunity merely by alleging that the defendant knew his conduct was unconstitutional. Rather, the plaintiff must prove that the right was sufficiently clear for a reasonable government official to know that his conduct would violate that right.

If the plaintiff's substantive claim requires proof of the defendant's intent, the scope of the qualified immunity analysis should not change. A court need only consider whether the claim as alleged is based on a clearly defined right. If, for example, a plaintiff claims that he was fired by a government employer because he is an African-American, it is clear that the defendant cannot claim qualified immunity, since the right to be free from racial discrimination is clearly established under the Fourteenth Amendment. Indeed, one could not reasonably dispute that the "contours" of the right not to be fired because of one's race are clearly

81. See infra notes 86-91 and accompanying text.
82. See infra notes 93-106, 119-25 and accompanying text.
83. See infra notes 93-106 and accompanying text.
84. See infra notes 119-25 and accompanying text.
85. See infra notes 130-44, 148-51 and accompanying text.
87. See Harlow, 457 U.S. at 817-18 (holding that "bare allegations of malice" not enough to force defendants into discovery or trial); see also supra notes 61-68 and accompanying text.
89. See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273-74 (1986) (holding that governmental employment decisions based on racial factors violate the Fourteenth Amendment except where such decisions are narrowly tailored to serve a compelling governmental interest).
defined under the Constitution. Harlow's bar on discovery pending resolution of the qualified immunity analysis makes sense in this context, because no discovery is required for a court to determine whether the rights allegedly violated were clearly defined under the Constitution.

B. The Confusion over Harlow's Relationship to Claims Requiring Proof of the Defendant's Intent

Despite the narrow and relatively straightforward inquiry required to evaluate a qualified immunity defense, courts have differed widely in their interpretations of how Harlow's language applies to claims that require inquiry into the defendant's motives. Because Harlow flatly prohibits bare allegations of "malice," courts have questioned whether Harlow's holding bans not only inquiries into the defendant's knowledge of the law, but also inquiries into what motivated the defendant's actions.

In Halperin v. Kissinger, Justice Scalia offered an elaborate defense of interpreting Harlow to bar inquiries into the defendant's motives, even where the plaintiff is required to prove the defendant's motives as part of his claim. In Halperin, a former staff member of the National Security Council brought a claim for damages against ten federal officials, alleging that their warrantless wiretapping of the plaintiff's home telephone violated his Fourth Amendment rights. In considering whether Harlow barred inquiry into the actual motives behind the defendant's actions, Justice Scalia observed that a "respectable" argument could be made for such an interpretation. He reasoned that no other hypothesis achieves the true "objectification" of the qualified immunity defense, which was

90. Cf. Anderson, 483 U.S. at 640 (holding that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right").
91. See Stephanie E. Balcerzak, Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation, 95 Yale L.J. 126, 142 (1985) ("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.").
92. The Harlow court's prohibition against subjective inquiries did not expressly distinguish between those inquiries that relate to qualified immunity and those that relate to the plaintiff's substantive claim, thus leaving lower federal court's in a quandry over how to deal with motive-based claims. See id. at 127; John D. Kirby, Note, Qualified Immunity for Civil Rights Standards: Refining the Standard, 75 Cornell L. Rev. 462, 482-83 n.155 (1990) (discussing the difficulty experienced by lower federal courts in applying Harlow to motive-related claims); see also Note, Qualified Immunity: Interpreting Harlow and its Progeny, 56 Geo. Wash. L. Rev. 1047, 1052 (1988) ("Harlow might have only proscribed inquiry into the official's knowledge of the law, or alternatively, it might have proscribed inquiry into both the official's knowledge of the law and the 'intent' of the official if intent is an element of the claim.").
93. 807 F.2d 180 (D.C. Cir. 1986).
94. Justice Scalia was a Circuit Judge when the case was briefed and argued, and was a designated Circuit Justice on the date of the decision. See id. at 180.
95. See id. at 182-83. The plaintiff also alleged that the wiretap violated Title III of the Omnibus Crime Control and Safe Street Act of 1968. See id.
96. See id. at 186.
Harlow's announced purpose.97 Furthermore, according to Justice Scalia, objections that such an interpretation would unfairly leave the plaintiff without a civil remedy are undercut by the fact that even under the narrowest interpretation of Harlow, defendants who knowingly violate the law are still immune if the reasonable official would consider the conduct in question "arguably proper."98 Although the Halperin court ultimately decided that an exclusively objective inquiry into whether the defendant's actions could have had a reasonable basis was appropriate, it expressly limited its holding to situations where the defendant claims his actions were motivated by a national security interest.99

Few courts have reached Halperin's result and interpreted Harlow to bar inquiry into the defendant's actual motivations once the defendant can offer a reasonable justification for his actions.100 Nevertheless, some courts still characterize Harlow's language as conflicting with claims based on the defendant's motives.101 For example, in Elliott v. Thomas,102 the Seventh Circuit considered whether the plaintiff should be allowed discovery into whether the defendants discharged her from her university position in retaliation for her protected speech.103 After briefly considering whether the plaintiff's complaint alleged a violation of clearly established law,104 the court looked to Harlow to determine under

97. See id.

98. See id. This argument is problematic in light of the Supreme Court's assertion in Harlow that where a right has not been clearly defined, a defendant could not reasonably be said to know that his actions violated that right. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

99. See Halperin, 807 F.2d at 188. After the court considered whether Harlow could bar inquiry into defendant's motivations in general, the court discussed reasons why such a result was especially warranted in situations where a national security interest is involved. See id. at 187-88.

100. See, e.g., Floyd v. Farrel, 765 F.2d 1, 6 (1st Cir. 1985) (holding that "actual motives for conduct" are not to be considered once defendant has made a qualified immunity defense). The court in Halperin noted that they had encountered no court that was willing to extend "Harlow's proscription of subjective inquiry beyond the issue of . . . intent related to knowledge of the law." Halperin, 807 F.2d at 186.

101. See, e.g., Branch v. Tunnell, 937 F.2d 1382, 1385 (9th Cir. 1991) (noting the existence of a "tension . . . between Harlow's emphasis on 'objective reasonableness' and cases in which the 'clearly established law' at issue contains a subjective element, such as motive or intent"); Elliott v. Thomas, 937 F.2d 338, 344 (7th Cir. 1991) (discussing the difficulty of allowing the plaintiff's request for discovery into the actual purposes behind defendant's actions in light of Harlow's ban on subjective inquiries), cert. denied, 112 S. Ct. 973 (1992).


103. See id. at 341, 344.

104. The plaintiff's claim in Elliott rested on the Supreme Court's decision in Pickering v. Board of Educ., 391 U.S. 563, 572-73 (1968), which held that a constitutional violation exists when a public employee is forced to relinquish First Amendment rights where such rights outweigh state employer's interest in promoting efficiency of public services. Although the Elliott court implicitly acknowledged that the plaintiff's claim could potentially give rise to liability under the Pickering standard, see 937 F.2d at 343, it ultimately focused its qualified immunity analysis on the resolution of factual disputes between the parties. See id. at 343-44.
what circumstances the plaintiff's requested discovery was permissible. Since the plaintiff's discovery was aimed at establishing the intent element of her substantive claim, one may infer from such reasoning that the court viewed *Harlow* as applying not only to inquiries into the defendants' knowledge of the law, but also to inquiries into the defendants' motives.

In contrast to *Halperin* and *Elliott*, many courts have expressly rejected arguments that *Harlow* forecloses inquiries into the motives behind the defendant's actions when the defendant's intent is an element of the underlying claim. Such courts have asserted that the issue of the defendant's motives is an issue of fact that is analytically distinct from questions regarding the defendant's knowledge of the law. Under this analysis, a defendant's challenge to the plaintiff's allegations regarding the defendant's underlying motives simply creates a factual dispute. Where a genuine factual dispute exists, the defendant cannot prevent inquiry into his underlying motives merely by offering up a permissible excuse for his conduct.

Several considerations support the conclusion that *Harlow* does not bar inquiries into the defendant's motives. To begin with, inquiries into the defendant's motives were simply not at issue in the cases leading up to *Harlow*. In initially establishing a "subjective" inquiry as part of the qualified immunity analysis, the Court focused on the need to insulate officials who reasonably believed their actions to be legal. In *Wood v.*

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105. See id. at 344-45.
107. See, e.g., Feliciano-Angulo v. Rivera-Cruz, 858 F.2d 40, 45 (1st Cir. 1988) ("[Harlow] does not rule out the need to inquire into the actual reasons behind an official's conduct when the official's state of mind is a necessary component of the constitutional violation . . ."); Musso v. Hourigan, 836 F.2d 736, 743 (2d Cir. 1988) (holding that inquiry into a defendant's motives is appropriate since "Harlow precludes inquiry into the defendant's state of mind only with respect to the state of the law"); Kenyatta v. Moore, 744 F.2d 1179, 1185 (5th Cir. 1984) (asserting that *Harlow* did not eliminate subjective inquiry from qualified immunity where the constitutionality of an action turns on whether the defendant's purposes were permissible), cert. denied, 471 U.S. 1066 (1985).
108. See, e.g., Feliciano, 858 F.2d at 45 (distinguishing the issue of the defendant official's experience in the law from the issue of whether the defendant fired the plaintiff for a discriminatory reason); Losch v. Borough of Parkesburg, 736 F.2d 903, 910 (3d Cir. 1984) (holding that a defendant's assertion that his actions were founded on permissible motives relates directly to the merits of the case, not to qualified immunity); see also Sanchez v. Sanchez, 777 F. Supp. 906, 916 (D.N.M. 1991) (criticizing courts that conflate the issue of defendant's liability under the substantive law with the issue of the defendant's entitlement to qualified immunity).
109. See *Feliciano*, 858 F.2d at 45.
110. See *id.* at 45-46.
111. See *Wood v. Strickland*, 420 U.S. 308, 321 (1975) (stating that the proper immunity standard should allow public school officials to understand that actions taken in
Strickland," the Court expressly stated that the subjective element of the analysis defeated immunity where the defendant knew his actions to be unconstitutional. Because Wood so clearly indicates that the "subjective prong" of the qualified immunity analysis involves only inquiries into the defendant's knowledge of the law, it makes little sense to interpret Harlow's elimination of the subjective prong to foreclose anything other than those same inquiries.

Harlow's own procedural history provides further indication that the Court did not intend the qualified immunity analysis to foreclose claims requiring inquiry into the defendant's motives. In Harlow, the plaintiff alleged that he was fired for exercising his First Amendment rights. If the Harlow court had truly intended to bar inquiries into the purposes underlying the defendants' actions and thereby achieve an exclusively objective analysis, it could easily have granted the defendants' motion for summary judgment based on the fact that plaintiff's claim required inquiry into what motivated the defendants' actions. Instead, the Court remanded the case for further factual findings. Since the Harlow court remanded the case for further discovery instead of granting the defendant's summary judgment motion, it seems difficult to argue that Harlow bars claims requiring motive-related inquiries.

Finally, a narrow reading of Harlow seems appropriate when one considers the preclusive effect that the alternative interpretation would have on civil rights claims. If Harlow prohibits inquiry into the defendant's motives where such motives form the basis of the plaintiff's claim, it effectively eliminates any civil rights action where the plaintiff must prove motive. Since a court would be obliged to grant a motion to dismiss whenever the defendant's actions appear facially neutral, a plaintiff's claim would be dismissed whenever the defendant can offer up some permissible reason for his or her actions. As a result, plaintiffs bringing claims based on a defendant's discriminatory intent, for example, would...
be unable to prove the central issue of their claim. Even Justice Scalia acknowledged that a great number of civil rights claims would not survive *Harlow* if that case mandates dismissal of a claim whenever the defendant can proffer a reasonable pretext for his challenged conduct.\textsuperscript{118}

Although a significant number of courts interpret *Harlow* as dealing only with the defendant's knowledge of the law, many have still imposed procedural restraints on plaintiffs bringing state of mind claims.\textsuperscript{119} Such courts have justified these restraints not on *Harlow*'s holding, but rather on *Harlow*'s stated goal of protecting defendants from the burdens of trial and broad discovery.\textsuperscript{120} The D.C. Circuit best articulated this argument in *Hobson v. Wilson*.\textsuperscript{121} In *Hobson*, the plaintiffs sued several law enforcement officials, claiming that their constitutional rights had been violated by an elaborate government conspiracy directed at disrupting the plaintiffs' political protests.\textsuperscript{122} In considering defendants' qualified immunity defense, the court held that the plaintiffs had definitely alleged a violation of a clearly established right.\textsuperscript{123} The court also stated, however, that some procedural restrictions are justified for intent-based claims in light of the special danger that such claims pose for government officials. Specifically,

plaintiffs might allege facts demonstrating that defendants have acted lawfully, append a claim that they did so with an unconstitutional motive, and as a consequence usher defendants into discovery, and perhaps trial, with no hope of success on the merits. The result would be precisely the burden *Harlow* sought to prevent.\textsuperscript{124}

Based on this perceived threat to *Harlow*'s stated policy goals, the court went on to increase the procedural burdens the plaintiffs had to meet to avoid dismissal of their case.\textsuperscript{125}

\section*{C. Increasing Procedural Burdens for Plaintiffs Bringing Intent-Based Claims}

Whether it is based on the misconception that *Harlow*'s holding reaches inquiries into the defendant's motivations, or based upon a per-
ceived need to promote the policy goals that drive Harlow, many courts have chosen to raise procedural burdens for plaintiffs bringing constitutional claims based on the defendant’s state of mind. These courts have required the plaintiff to offer an increased level of proof regarding the defendant’s allegedly unconstitutional motives before the case may proceed to trial. Some courts require this evidence to be pleaded in the complaint under what has been termed a “heightened pleading standard.” Other courts, instead of requiring such evidence at the pleading stage, have demanded that the plaintiff offer this additional evidence when the defendant moves for summary judgment based on qualified immunity. Some courts, determined to minimize the costs of pre-trial proceedings for the defendant, require that such increased evidentiary standards be met without the benefit of discovery.

1. Increased Proof of Intent

Under the heightened pleading standard, complaints alleging claims that require proof of the defendant’s motives must include specific non-conclusory evidence of the defendant’s unlawful intent, or face dismissal. This approach, first imposed by the D.C. Circuit in Hobson v. Wilson, represents a significant departure from conventional pleading standards. Under the Federal Rules of Civil Procedure, courts considering the adequacy of the plaintiff’s complaint normally hold the plaintiff to a standard of “notice pleading.” As the Supreme Court explained in Conley v. Gibson, notice pleading requires only that the plaintiff provide the defendant with a short, plain statement of the facts that will give the defendant fair notice of the plaintiff’s claim and the grounds upon which it rests. The plaintiff is not required to set out a detailed version

126. See infra notes 130-44 and accompanying text.
127. See infra notes 130-39 and accompanying text.
128. Courts following this approach effectively raise the burden of production the plaintiff must meet lest their case be dismissed before trial. See infra notes 140-144 and accompanying text.
129. See infra notes 148-151 and accompanying text.
131. See 737 F.2d 1, 29-30 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985); see also supra notes 119-25 and accompanying text (discussing how the Hobson court justified its procedural holding on Harlow’s policy goals).
132. See generally 2A James W. Moore et al., Moore’s Federal Practice § 8.13 (2d ed. 1994) (discussing Fed. R. Civ. P. 8(a)’s requirement that complaints provide only a plain statement of the facts that furnishes defendants with adequate notice of the claim against them).
133. 355 U.S. 41 (1957).
134. See id. at 47.
of the facts upon which his claim is based.\(^{135}\) Hence, by requiring that specific evidence be pled in the complaint, the heightened pleading standard demands a substantially greater degree of specificity at the outset of the plaintiff's case than is normally required for other civil claims.

Courts imposing the heightened pleading standard have differed as to how specific the plaintiff's evidence must be. Since the late 1980s, the D.C. Circuit has substantially raised the heightened pleading standard by imposing a direct evidence rule,\(^{136}\) under which a plaintiff must offer direct, as opposed to circumstantial, evidence of the defendant's unconstitutional motives.\(^{137}\) As one judge criticizing the direct evidence rule has pointed out, such a requirement allows plaintiffs to survive the heightened pleading standard only in the unlikely situation that the defendant has openly confessed his unconstitutional motives.\(^{138}\) Certain courts outside the D.C. Circuit that have adopted a heightened pleading standard have nonetheless declined to adopt the direct evidence rule, requiring only that the plaintiff offer circumstantial evidence of the defendant's unlawful intent.\(^{139}\)

Instead of requiring the plaintiff to include specific evidence of defendant's intent in the complaint, some courts have required that this evidence be offered once the defendant moves for summary judgment.\(^{140}\) Although courts considering summary judgment motions normally consider the relevant evidence in the light most favorable to the non-moving party,\(^{141}\) courts considering motions based on qualified immunity have shifted the burden of production onto the plaintiff.\(^{142}\) Upon dismissing

\(^{135}\) See id.


\(^{137}\) See Siegert, 895 F.2d at 802.


\(^{139}\) See, e.g., Branch v. Tunnell, 937 F.2d 1382, 1386 (9th Cir. 1991) (refusing to require that the plaintiff offer direct, as opposed to circumstantial, evidence of the defendant's unlawful intent). The Ninth Circuit's based its position mainly on Supreme Court language criticizing the D.C. Circuit's direct evidence rule. See id. at 1386 (discussing Siegert v. Gilley, 111 S. Ct. 1789, 1795, 1800-01 (1991) (concurring and dissenting opinions)). Although the appropriateness of the D.C. Circuit's application of the heightened pleading standard was the original grounds for the plaintiff's appeal in Siegert, this subject was not addressed by the majority opinion. Justice Kennedy (concurring) and Justice Marshall's (dissenting) discussion of the heightened pleading standard is addressed more fully below. See infra notes 170-173 and accompanying text.

\(^{140}\) See Poe v. Haydon, 853 F.2d 418, 432 (6th Cir. 1988), cert. denied, 488 U.S. 1007 (1989); Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 649 (10th Cir. 1988); see also Collinson v. Gott 895 F.2d 994, 1002 (4th Cir. 1990) (Phillips, J., concurring) (endorsing the approach of courts requiring a higher evidentiary showing where the plaintiff's claim is based on a defendant's unlawful motives).


\(^{142}\) See, e.g., Martin v. D.C. Metro. Police Dep't, 812 F.2d 1425, 1435 (D.C. Cir.) (holding that the stated policy goals of the Supreme Court's decisions on qualified immunity "impels the application of a standard more demanding of plaintiffs when public of-
the plaintiff’s claim, these courts often state that although the plaintiff’s evidence would be sufficient to withstand the defendant’s motion under normal circumstances, the concerns raised by qualified immunity force them to hold the plaintiff to a higher standard.143 As with the heightened pleading standard, there is a dispute among courts raising the summary judgment burden as to whether the plaintiff must offer direct or circumstantial evidence of the defendant’s intent.144

The argument that Harlow justifies an increase of evidentiary standards seems doubtful when one considers that Harlow itself said nothing about raising procedural burdens for plaintiffs bringing intent-based claims. Indeed, Harlow’s prescription for limiting the liability of government officials focused not on procedure but on the substantive analysis of qualified immunity.145 Based on this fact, critics discussing the procedural implications of Harlow have concluded that Harlow should not be interpreted to change summary judgment analysis.146 Some courts, recognizing the distinction between qualified immunity analysis and substantive issues relating to the underlying claim, have refused to use Harlow as an excuse to raise the evidentiary burden the plaintiff must meet in his complaint or in response to a summary judgment motion.147

143. See, e.g., Pueblo, 847 F.2d at 649 (“Even if [plaintiff’s evidence] could be construed to allow a plaintiff to remain in court in an ordinary case, they will not be adequate in a case of this type.”).

144. Compare Poe v. Haydon, 853 F.2d 418, 432 (6th Cir. 1988) (holding that the plaintiff must present direct evidence that the officials’ actions were improperly motivated in order to defeat summary judgment motion), cert. denied, 488 U.S. 1007 (1989), with Elliott v. Thomas, 937 F.2d 338, 345 (7th Cir. 1991) (requiring that the plaintiff put forward only circumstantial evidence of the defendant’s intent), cert. denied, 112 S. Ct. 973 (1992).

145. See supra notes 64-67 and accompanying text.

146. See, e.g., Henk J. Brands, Note, Qualified Immunity and the Allocation of Decision-Making Functions Between Judge and Jury, 90 Colum. L. Rev. 1045, 1057 (1990) (arguing that since Harlow did not change the summary judgment standard, a jury should still hear the case when the plaintiff’s version of the facts would not give rise to qualified immunity but the defendant’s version would); Balcerzak, supra note 91, at 140 (arguing that since Harlow did not purport to alter the summary judgment standard, a court should only determine whether disputed questions of fact exist and avoid adjudicating such questions before trial); see also, Edmund L. Carey, Jr., Note, Quick Termination of Insubstantial Civil Rights Claims: Qualified Immunity and Procedural Fairness, 38 Vand. L. Rev. 1543, 1558-59 (1985) (noting that the Harlow Court gave no indication that it intended to alter the summary judgment analysis).

147. See, e.g., Feliciano-Angulo v. Rivera-Cruz, 858 F.2d 40, 47 (1st Cir. 1988) (rejecting defendant’s request to hold plaintiff to a more demanding standard of proof in light of persisting factual disputes); Sanchez v. Sanchez, 777 F. Supp. 906, 916 (D.N.M. 1991) (arguing that the issue of motive is a question of fact distinct from the qualified immunity analysis, and that summary judgment will work to dismiss a plaintiff’s claim where the defendant offers insufficient evidence).
2. Restrictions on Discovery

In order to further insulate government officials from potentially frivolous suits, many courts imposing increased evidentiary standards bar discovery until the plaintiff offers what the court construes to be sufficient evidence of the defendant’s unlawful intent. The apparent origin of this approach was the D.C. Circuit’s decision in *Hobson v. Wilson*,\(^\text{148}\) where the court held that discovery should not be allowed before satisfaction of the heightened pleading standard.\(^\text{149}\) Several courts have followed *Hobson*’s lead, refusing to allow discovery before the plaintiff has met either the heightened pleading standard or the increased burden of persuasion imposed under a motion for summary judgment.\(^\text{150}\) Under this approach, once the defendant moves for dismissal or summary judgment, all discovery is halted until the plaintiff can show specific, and in some instances direct, evidence of the defendant’s intent.\(^\text{151}\)

It is not difficult to see how a ban on discovery can put the plaintiff in an altogether untenable position. When combined with increased evidentiary standards (especially the direct evidence standard), such a restriction can effectively quash the plaintiff’s ability to bring his claim.\(^\text{152}\) Under this approach, courts not only demand the plaintiff to show more proof than is normally required to reach trial, but also cut off the plaintiff’s access to the one mechanism by which they can obtain the necessary evidence.\(^\text{153}\) Realizing these effects, many courts have simply rejected a


\(^\text{149}\) The court acknowledged, however, that the evidence plaintiffs would be able to offer pending discovery would in all likelihood be “broad and speculative,” and thus that the rule should not be enforced with too much rigidity. *See id.* at 30-31.

\(^\text{150}\) *See*, e.g., *Elliott v. Thomas*, 937 F.2d 338, 344-45 (7th Cir. 1991) (holding that discovery may not be allowed until the plaintiff has produced specific, non-conclusory evidence of the defendant’s intent), *cert. denied*, 112 S. Ct. 973 (1992); *Siegert v. Gilley*, 895 F.2d 797, 804 (D.C. Cir. 1990) (refusing to allow even limited discovery into the defendant’s intent where the plaintiff has failed to allege direct evidence of defendant’s motives), *aff’d on other grounds*, 111 S. Ct. 1789 (1991); *see also Lewis v. City of Ft. Collins*, 903 F.2d 752, 758 (10th Cir. 1990) (arguing that a trial court should not allow further discovery after the defendant moves for summary judgment based on qualified immunity even when the plaintiff claims such discovery is necessary to obtain evidence of the defendant’s unlawful intent).

\(^\text{151}\) *See* *Elliott*, 937 F.2d at 344; *Siegert*, 895 F.2d at 802.

\(^\text{152}\) *See* Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 Georgia L. Rev. 597, 647 (1989) (arguing that since the motive underlying a defendant’s actions is a fact solely within the knowledge of the defendant, a court cannot fairly grant the defendant’s motion for summary judgment before the plaintiff has been given an opportunity to conduct discovery into that issue); Rudovsky, *supra* note 15, at 63 (“Where the plaintiff must establish the [intent] element as part of the constitutional claim, denial of discovery on this issue would make it impossible to prove certain cases.”); *see also* David A. Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 Nw. U. L. Rev. 774, 785 (1983) (arguing that the plaintiff’s right to trial should not be denied before he has had the opportunity to complete discovery).

\(^\text{153}\) *See* *Siegert*, 895 F.2d at 805 (Wald, C.J., dissenting) (“This case brings into sharp focus a dilemma created by our circuit’s current jurisprudence on qualified immunity: plaintiffs are required to adhere to a ‘heightened pleading standard’ of non-conclusory
These courts have noted that it is unfair to deny the plaintiff the ability to establish the single most important element of his claim.\textsuperscript{155}

Barring discovery into the defendant's motives seems even more inappropriate when one closely scrutinizes \textit{Harlow} and the Supreme Court's subsequent decision in \textit{Mitchell v. Forsyth}.\textsuperscript{156} Although \textit{Harlow} banned all discovery pending resolution of the qualified immunity issue,\textsuperscript{157} it also limited the analysis required under qualified immunity to a consideration of whether the plaintiff's complaint alleged a violation of clearly established law.\textsuperscript{158} Given this limitation on the qualified immunity analysis, it follows that \textit{Harlow}'s ban on discovery should be lifted once it is established that the plaintiff has alleged a violation of a clearly defined right, thus allowing the plaintiff the discovery required to support his substantive claim. \textit{Mitchell v. Forsyth}\textsuperscript{159} further supports this interpretation. In \textit{Mitchell}, the Court stated that if "the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts."\textsuperscript{160} Such language clearly contemplates that plaintiffs will be afforded the discovery necessary to factually support their substantive claim. Thus, the relevant Supreme Court decisions as well as the inevitable result of a complete discovery ban favor allowing at least limited discovery into the defendant's motives where intent is an element of the plaintiff's claim.

III. \textit{LEATHERMAN v. TARRANT COUNTY NARCOTICS INTELLIGENCE \\ & \textit{COORDINATION UNIT}: A LITERAL READING OF THE FEDERAL RULES}

As previously discussed,\textsuperscript{161} courts that impose a heightened pleading facts that demonstrate a government official's unconstitutional motive, but they are entirely restricted from obtaining through discovery the information necessary to make that showing.")}, \textit{aff'd on other grounds}, 111 S. Ct. 1789 (1991).

\textsuperscript{154} See, e.g., Feliciano-Angulo v. Rivera-Cruz, 858 F.2d 40, 47 (1st Cir. 1988) (refusing to grant summary judgment before more discovery into the defendant's motives is conducted); Martin v. D.C. Metro. Police Dep't, 812 F.2d 1425, 1437 (D.C. Cir.) (allowing limited discovery into the defendant's motives where the defendant's intent an element of the plaintiff's substantive claim), \textit{reh'g granted, vacated in part}, 817 F.2d 144 (D.C. Cir.), \textit{reinstated on reconsideration sub nom.} Bartlett ex rel. Neuman v. Bowen, 824 F.2d 695 (D.C. Cir. 1987); Stone's Auto Mart, Inc. v. St. Paul, 721 F. Supp. 206, 211 (D. Minn. 1989) (refusing to grant the defendant's request for a ban on discovery based on qualified immunity).

\textsuperscript{155} See \textit{Martin}, 812 F.2d at 1437.
\textsuperscript{156} 472 U.S. 511 (1985).
\textsuperscript{158} See \textit{id.}
\textsuperscript{159} 472 U.S. 511 (1985).
\textsuperscript{160} See \textit{id.} at 526.
\textsuperscript{161} See \textit{supra} part II.B.
standard or that raise the level of proof necessary for plaintiffs to survive a motion for summary judgment depart from the normal procedural standards provided for in the Federal Rules. With regard to pleading, Rule 8 requires that complaints meet a standard of mere notice pleading under which plaintiffs are not required to present their evidence in any detail. Although Rule 9(b) specifies claims that must be pled with particularity, that rule does not mention civil rights claims. Thus, by requiring the complaint to incorporate an increased level of evidence regarding the defendant's unlawful motives, the heightened pleading standard exceeds the evidentiary requirements outlined in the Federal Rules.

Under Rule 56(c), a court must deny a summary judgment motion whenever the relevant evidence presents any material issue of fact. While the Supreme Court has emphasized that summary judgment should actively be used to dismiss complaints where the plaintiff fails to support an essential element of his claim, courts considering such motions are obliged to accept as true all the evidence presented by the non-movant and draw all justifiable inferences in the non-movant's favor. In light of this standard, courts that shift the evidentiary burden to the plaintiff when the defendant moving for summary judgment is protected by qualified immunity depart significantly from the standards provided for in the Federal Rules and in the relevant Supreme Court case law.

The Supreme Court has not yet ruled on whether these increased procedural burdens are an appropriate method of dealing with potentially frivolous constitutional damage claims that require proof of the defend-

162. See supra notes 130-35, 140-43 and accompanying text.
163. The individual Federal Rules of Civil Procedure will be refered to as "Rule — ."
164. Rule 8 provides in pertinent part that a pleading need only set forth only "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." See Fed. R. Civ. P. 8(a)(2); see also supra notes 130-35 and accompanying text (discussing how the heightened pleading standard departs from the usual notice pleading requirements).
165. Rule 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). It is interesting to note that Rule 9(b) permits malice, intent, and knowledge to be averred generally. See id. Thus, even if Rule 9(b) did require that civil rights claims be pleaded with particularity, this requirement would not apply to allegations regarding the defendant's unlawful motives.
166. Rule 56 provides in pertinent part:
The judgment sought 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).
The only Supreme Court language addressing procedural standards in intent-based claims can be found in *Siegert v. Gilley*, where the Court granted *certiorari* to consider the plaintiff's challenge to the D.C. Circuit's application of the heightened pleading standard. Although the *Siegert* Court ultimately affirmed the case on other grounds, both Justices Kennedy and Marshall briefly discussed the D.C. Circuit's pleading requirements. In his concurring opinion, Justice Kennedy endorsed the D.C. Circuit's heightened pleading standard, arguing that an increased standard was a justifiable way of discouraging meritless suits, although the direct evidence rule went too far in restricting the plaintiff's claim. In his dissenting opinion, Justice Marshall more vigorously objected to the D.C. Circuit's approach, but still implied that the plaintiff should be required to offer at least circumstantial proof at the pleading stage.

In stark contrast to the concurring and dissenting opinions in *Siegert* stands the Supreme Court's recent decision in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, in which the Court rejected pleading requirements that exceeded those provided for in the Federal Rules. In *Leatherman*, the Court reversed the Fifth Circuit's application of a heightened pleading standard to a plaintiff's § 1983 claim against a local municipality. In rejecting the lower court's use of the standard, the Court stated flatly that Rule 9(b) represented an exhaustive list of claims where particularity in pleading may be required. Since Rule 9(b) fails to mention civil rights claims, the Court found it impossible to reconcile the Fifth Circuit's departure from the notice pleading standard with the procedural framework created under the Federal Rules.

*Leatherman* strongly suggests that courts may not violate a plaintiff's procedural rights by forcing him to satisfy higher procedural burdens than are required under the Federal Rules. Even construed narrowly, *Leatherman* prevents courts from enforcing a heightened pleading standard since that approach requires a level of specificity beyond the maximum imposed under the notice pleading standard. Judge Edwards recognized this interpretation in his dissent to the D.C. Circuit's decision.

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171. In *Siegert*, the majority opinion ignored the plaintiff's challenge to the heightened pleading standard and affirmed the case based on the plaintiff's failure to allege a genuine cause of action under the Constitution. See *id.* at 1794. The Court maintained that the issue of whether the plaintiff has alleged a viable claim analytically precedes any consideration of the defendant's immunity. See *id.* at 1793.
172. See *id.* at 1795.
173. See *id.* at 1800-01.
175. See *id.* at 1161.
176. See *id.* at 1163.
177. See *id.*
in *Kimberlin v. Quinlan*,\(^\text{178}\) where he questioned whether the underlying rationale of the heightened pleading standard survived the Supreme Court's decision in *Leatherman*.\(^\text{179}\)

More significantly, *Leatherman* represents a broad rejection of procedural standards that are increased pursuant to perceived policy goals. Despite the elaborate policy justifications offered by the defendant to support the Fifth Circuit's pleading standard,\(^\text{180}\) the Court nonetheless measured the Fifth Circuit's approach against the applicable Federal Rules, and rejected it for exceeding the boundaries provided therein.\(^\text{181}\) Thus, courts that shift the summary judgment burden or that impose bans on discovery before that burden is met violate *Leatherman*'s holding since such procedural practices contradict the standards established by Congress.\(^\text{182}\)

IV. THE IMPLICATIONS OF *HARLOW* AND *LEATHERMAN*: A RETURN TO CONVENTIONAL PROCEDURAL MECHANISMS

After *Leatherman*, courts have no justification for raising procedural burdens for motive-based claims beyond the levels provided for in the Federal Rules of Civil Procedure.\(^\text{183}\) As discussed previously, to interpret *Harlow*'s holding as barring or even restricting inquiries into the defendant's motives effectively subsumes the factual issues of the defendant's purpose (which relates to the plaintiff's substantive claim) into the issue of the defendant's legal knowledge (which relates to qualified immunity).\(^\text{184}\) Based on the cases leading up to *Harlow* and on *Harlow*'s own procedural history, it is clear that the Court, in establishing a wholly objective standard for qualified immunity, meant only to foreclose inquiries into the defendant's knowledge of the law.\(^\text{185}\) This conclusion becomes even more obvious when one considers that claims such as those alleging discrimination under the Fourteenth Amendment would effectively be barred if plaintiffs are unable to prove intent when suing government officials protected by qualified immunity.\(^\text{186}\)

As for courts like that in *Hobson* that impose increased procedural burdens in order to achieve the policy goals discussed in *Harlow*, *Leatherman* indicates that such courts are not entitled to raise procedural burdens to the point where plaintiffs are denied the generally liberal standards provided for under the Federal Rules.\(^\text{187}\) One may view *Leatherman* as an implicit recognition that the Federal Rules are not

\(^{178}\) 6 F.3d 789 (D.C. Cir. 1993).

\(^{179}\) See id. 804-05.

\(^{180}\) See *Leatherman*, 113 S. Ct. at 1162.

\(^{181}\) See id. at 1162-63.

\(^{182}\) See supra notes 166-68 and accompanying text.

\(^{183}\) See supra notes 178-82 and accompanying text.

\(^{184}\) See supra notes 86-91, 107-18 and accompanying text.

\(^{185}\) See supra notes 111-16 and accompanying text.

\(^{186}\) See supra notes 116-18 and accompanying text.

\(^{187}\) See supra notes 178-82 and accompanying text.
mere options for courts to consider in designing procedural approaches to difficult issues, but are instead statutory boundaries imposed by Congress that often represent hard fought compromises between the interests of plaintiffs and defendants.  

Ultimately, concerns regarding unfounded allegations of unlawful intent can be adequately addressed through the application of procedural mechanisms already provided for under the Federal Rules. Although the policy of notice pleading prohibits a court from dismissing a complaint for lack of specific evidence of the defendant's intent, the defendant may still eventually have the claim dismissed if the plaintiff is incapable of alleging any evidence of the defendant's intent once discovery has occurred. Under the Federal Rules, parties are entitled to move for summary judgment at any time after the pleadings have been filed. Since the Federal Rules afford the trial judge significant control over the scope of discovery once a party moves for summary judgment, it is therefore unlikely that plaintiffs bringing unfounded claims will be able to subject the defendant to overly burdensome discovery. Where the plaintiff's claim appears conclusory, a court can direct limited and supervised discovery into the defendant's motives, thus sparing the defendant from broad ranging discovery while still allowing the plaintiff a fair opportunity to establish the required element of intent.

Although the application of conventional procedural standards will no doubt make it more difficult to dismiss claims that ultimately prove to be frivolous, that sacrifice seems justified when one considers the policy issues that are implicated by constitutional damage claims and qualified immunity. As the Harlow court acknowledged, a suit for monetary damages often represents the only way plaintiffs can effectively vindicate violations of their constitutional rights. If one accepts the premise that plaintiffs should be able to bring claims such as those based on discriminatory intent as easily as those based on non-subjective elements, it is imperative that courts allow such plaintiffs to make use of the pre-trial

188. See 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1201 (2d ed. 1990) (discussing past failed attempts to amend the Federal Rules so as to increase the requirements of pleading).
189. See supra notes 132-135 and accompanying text.
190. If the plaintiff cannot offer evidence to support his allegation that the defendant acted with an unconstitutional purpose, the plaintiff has failed to establish an essential element of the claim, thus allowing the court to grant summary judgment under the standard articulated in the Celotex case. See supra notes 166-168 and accompanying text.
191. Fed R. Civ. P. 56(b) provides that a defending party may move for summary judgment at any time, with or without supporting affidavits.
192. Fed. R. Civ. P. 56(f) provides that once the summary judgment motion has been made and the plaintiff cannot allege sufficient facts to defeat the motion, the court may permit "depositions to be taken or discovery to be had or may make such other order as is just."
193. See Carey, supra note 146, at 1563 (arguing that courts considering summary judgment motions should allow limited discovery into the defendant's motives when such motives are an element of the plaintiff's claim).
procedures that are afforded plaintiffs bringing other civil claims. While this more limited application of Harlow will not restrict claims based on motive, it still allows Harlow to perform its intended purpose of dismissing those claims which are not based on rights which have been clearly defined under the Constitution. In the end, this solution represents the only way to maintain the balance Harlow was intended to establish between the need to provide plaintiffs with an adequate remedy for violations of their constitutional rights and the need to insulate government officials from the burden of defending frivolous suits.

CONCLUSION

Despite the desire to protect government defendants from meritless claims, lower federal courts cannot use Harlow v. Fitzgerald\textsuperscript{195} to increase procedural burdens for claims requiring proof of the defendant's intent. Harlow's holding limits only those subjective inquiries that were formerly available to defeat claims of qualified immunity.\textsuperscript{196} Furthermore, Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit\textsuperscript{197} makes clear that courts cannot unduly raise procedural standards for plaintiffs based on perceived policy goals.\textsuperscript{198} Ultimately, applying the procedural standards provided for in the Federal Rules will strike the optimal balance between protecting government defendants and allowing plaintiffs to bring constitutional damage claims requiring proof of the defendant's intent.

196. See id. at 815-18.
197. 113 S. Ct. 1160 (1993).
198. See supra notes 178-182 and accompanying text.