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The Restructuring of Narrative and Empathy in Section 1983 Cases (symposium)

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INTRODUCTION

Suppose a police officer conducts a warrantless search of a person's home during which the officer causes the person harm. By virtue of 42 U.S.C. § 1983,[1] the injured person may have a federal cause of action against the police officer personally[2] for damages resulting from the alleged violation of the plaintiff's Fourth (and Fourteenth[3]) Amendment rights. From a corrective justice perspective,[4] the police

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1. Section 1983, which in effect creates a Fourteenth Amendment action for damages, reads as follows:

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C.S. § 1983 (1996).

Section 1983 is the subject of my two-volume treatise, with annual cumulative supplement. *See* SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 (3d ed. 1991 & Supp. 1996) [hereinafter CIVIL RIGHTS AND CIVIL LIBERTIES]. *See also* SHELDON NAHMOD, MICHAEL WELLS & THOMAS EATON, CONSTITUTIONAL TORTS (1995).

2. The potential damages liability of an individual defendant personally may be quite extensive. It can include not only significant compensatory damages but, where the defendant acts with reckless disregard of constitutional rights, she can be liable for punitive damages as well. *See* CIVIL RIGHTS AND CIVIL LIBERTIES, *supra* note 1, §§ 4.01-4.15. In contrast, while local governments can be liable for compensatory damages under § 1983, they are absolutely immune from punitive damages. *See id.* §§ 6.01-6.24.

The seriousness of the potential individual damages liability of § 1983 defendants is directly relevant to the extent to which empathy and mercy for such defendants may be present. *See discussion infra* pp. 823-29.

3. The Fourteenth Amendment incorporates most of the Bill of Rights, including the Fourth Amendment, and applies them to the states. *See* CIVIL RIGHTS AND CIVIL LIBERTIES, *supra* note 1, § 2.03. The relevant Fourth Amendment cases are *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Wolf v. Colorado*, 338 U.S. 25 (1949).

4. Corrective justice has both Aristotelian and Kantian elements. *See* Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997, 1001 (1990) (discussing Aristotelian elements); Ernest J. Weinrib, Essay: *The Gains and Losses of Corrective Justice*, 44 DUKE L.J. 277, 289-93 (1994) (discussing the connection between Kantianism and corrective justice).

officer must compensate the plaintiff because the officer's normatively improper conduct violated the applicable Fourth Amendment standard and caused the plaintiff harm.

But there is considerably more to this § 1983 story. Even if the police officer in fact violated the plaintiff's Fourth Amendment rights, she may not be liable for damages due to the affirmative defense of qualified immunity.[5] Under current standards, if the officer can show that a *reasonable* police officer under the same circumstances *could have believed* that the warrantless search did not violate the Fourth Amendment *at the time* of the search,[6] then she avoids damages liability.

One can explain this objective reasonableness qualified immunity test either in corrective justice terms or in utilitarian terms.[7] A corrective justice explanation is that although the police officer violated the Fourth Amendment, she acted reasonably, and thus her fault, as a normative matter, did not warrant the imposition of damages. A utilitarian explanation is that although the police officer was indeed at fault for violating a constitutional norm, society needs to promote independent decision-making by providing a margin for error for government officials and employees. Thus, the plaintiff bears his own loss for the greater benefit of the public.[8]

Whatever the explanation, in the real world of § 1983 litigation qualified immunity has become a remarkably potent defense for defendants. This is not only the result of pro-defendant doctrinal changes in the elements of the qualified immunity test, but also because the procedural ground rules have been changed for the benefit

5. *See* CIVIL RIGHTS AND CIVIL LIBERTIES, *supra* note 1, §§ 8.01-8.21, for an extensive discussion. Relevant aspects of qualified immunity are addressed in this Essay.

6. This temporal emphasis is important. Whether the Fourth Amendment was violated is determined using current Fourth Amendment standards, even if the challenged conduct occurred in the past, and even if the case is one of first impression. In contrast, whether the qualified immunity objective reasonableness test was passed is determined using then-current Fourth Amendment standards. For example, assume in the hypothetical that the challenged conduct occurred in January 1992. When the court decides in 1995 whether the challenged conduct violated the Fourth Amendment, it uses 1995 Fourth Amendment standards. In contrast, when it determines whether the defendant police officer acted in an objectively reasonable manner for qualified immunity purposes, it uses January 1992 Fourth Amendment standards.

7. *Compare* John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461, 1468-70 (1989) (arguing for the corrective justice explanation of qualified immunity), *with* Nahmod, *supra* note 4, at 1002-06, 1019 (arguing for the utilitarian explanation of qualified immunity).

8. "[W]here 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.'" Harlow v. Fitzgerald, 457 U.S. 800, 821 (1982) (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)).

of § 1983 defendants. However, I want to argue that much more has changed than the applicable doctrines themselves: the shift is deeper than that. As a structural matter, these changes in the substantive and procedural doctrines privilege the § 1983 defendant's narrative and marginalize the counter-narrative of the plaintiff, thereby directing the qualified immunity decision-maker—the judge—to empathize[9] more with the defendant than with the injured plaintiff. This empathy may in turn tend to encourage the judge, at least in close cases, to act mercifully and alleviate the defendant's potential damages liability to the plaintiff.[10]

This Essay describes and analyzes structurally each of the relevant substantive and procedural changes, showing how each promotes a pro-defendant posture of empathy and mercy. If I am correct, this posture is ironic in several respects. First, the U.S. Supreme Court has frequently warned in other contexts that emotions such as mercy, compassion, and pity are inappropriate grounds for decision.[11] Second, this posture turns on its head the current academic insistence on hearing the "outsider's" narrative: it focuses instead on the "insider's"

9. By empathy I mean "understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other . . . ." Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579 (1987). Compare Lauren Wispe's psychotherapeutic definition: "'Empathy' refers to the attempt by one self-aware self to comprehend unjudgmentally the positive and negative experiences of another self. . . . Empathy depends upon the use of imaginal and mimitic [sic] capabilities and it is most often an effortful process." Nancy Eisenberg & Janey Strayer, *Critical Issues in the Study of Empathy*, *in* EMPATHY AND ITS DEVELOPMENT 4 (Nancy Eisenberg & Janey Strayer eds., 1987).

As this Essay makes clear, I agree with Susan Bandes when she writes: "Empathy, by itself, is merely an instrumental concept. It is not an emotion, benign or otherwise, but rather a capacity, a tool used to achieve a variety of ends." Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 379 (1996). In the present § 1983 context, the Supreme Court has structured empathy in such a way that it favors the defendant and thereby promotes the Court's substantive goals.

10. The desire of the judge to alleviate the § 1983 defendant's potential liability can be characterized as merciful if the defendant is considered to have acted wrongfully in violating the constitutional norm. Note that there is a thin line between compassion and mercy regarding blame and punishment. *See* Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 83, 109 n.50 (1993).

11. For example, the Court characterized compassion as irrelevant to the due process merits in DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989). In *Deshaney*, the Court ruled against a child who sued social service officials for damages under § 1983, because they returned him to the custody of his natural father, despite clear prior indications of serious child abuse, who subsequently beat him into a vegetative state. *See id.;* Benjamin Zipursky, Note, DeShaney *and the Jurisprudence of Compassion*, 65 N.Y.U. L. REV. 1101 (1990) (criticizing *DeShaney*). And in *Saffle v. Parks*, 494 U.S. 484, 486 (1990), the Court held that an anti-sympathy instruction in the penalty phase of a criminal defendant's trial did not violate the Eighth Amendment. *But cf.* Payne v. Tennessee, 501 U.S. 808, 811, 830 (1991) (upholding the admissibility at sentencing of victim impact statements). *See* Bandes, *supra* note 9, at 396, 402-10 (criticizing *Payne*).

narrative, namely that of the government official.[12] And finally, *one* government official's qualified immunity determination—the judge—is now so structured that in close cases qualified immunity promotes a posture of empathy and mercy for *another* government official, the § 1983 defendant. Indeed, § 1983 immunity doctrine as a whole appears to be grounded, at least in part, on the empathy that judges feel for governmental employees who may be inconvenienced and stigmatized by discovery or trial.[13]

This Essay builds on the work of others regarding narrative and empathy, and is grounded on the well-established "evaluative" conception of the emotions rather than the now largely discredited "mechanistic" conception.[14] However, it applies notions of narrative and empathy to § 1983, an area far-removed from the criminal law setting where so much of this kind of analysis occurs.

THE PRIOR TWO-PART QUALIFIED IMMUNITY TEST AND NARRATIVE/EMPATHY PARITY

A short time ago, the qualified immunity test was not exclusively objective, but had a subjective component as well. In *Pierson v. Ray*,[15] decided in 1967, the U.S. Supreme Court held that police officers have an affirmative defense of good faith and probable cause to claims of unconstitutional arrests. The plaintiffs there, peaceful sit-in demonstrators, asserted that they had been arrested, first, under a breach of the peace statute subsequently held unconstitutional and, second, under circumstances clearly indicating the absence of any factual basis for their arrest.

The Court noted as to the first claim:

> Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved. 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. Although the matter is not entirely free from doubt, the same consideration would

12. As noted later, though, the counter-narrative of the plaintiff—often an outsider—is marginalized.

13. This applies not just to qualified immunity but particularly to the absolute immunity from damages liability of judges themselves. *See infra* note 29.

14. *See* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 301 (1996). *See also* Bandes, *supra* note 9, at 366 ("[T]here is broad agreement on one crucial point—that emotions have a cognitive aspect—and its corollary—that reasoning has an emotive aspect.").

15. 386 U.S. 547 (1967).

> seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied.[16]

The Court then applied *Monroe v. Pape's*[17] "background of tort liability" approach, described as including the defense of good faith and probable cause, to the police officers and concluded: "We agree that a police officer is not charged with predicting the future course of constitutional law."[18] The Court thus suggested that if the reasonableness of the defendants' conduct in connection with the legal status of the statute had been the only issue before it, it would have ruled as a matter of law that the defendants acted reasonably.

However, the Court held as to the second claim that it was for the jury to determine whether the police officers "reasonably believed in good faith that the arrest was constitutional. . . ."[19] If the jury believed the officers' testimony, then the officers would prevail; if it believed the testimony of the plaintiffs and other witnesses, the plaintiffs would prevail.[20]

In discussing the defense of good faith and probable cause, the Court in *Pierson* clearly indicated that police officers have the burden of proving this reasonable grounds/good faith defense.[21] Further, while *Pierson* may be criticized for its rather conclusory assertion that such a common law tort defense ought to be fully applicable to police officers in § 1983 cases, *Pierson* reflects the Court's concern that a margin for error be given to police officers to allow them to perform effectively.[22]

Observe that under the two-part *Pierson* test, the police officer in the initial hypothetical loses and thus is liable in damages unless she prevails on *both* parts. Even if she acted reasonably, she is still liable if she *subjectively* knew that the warrantless search was unconstitutional when it took place, admittedly not a very likely scenario,

16. *Id.* at 555 (citations omitted).

17. 365 U.S. 167, 187 (1961), *overruled in part by* Monell v. Department of Soc. Servs., 436 U.S. 658 (1978) (overruling *Monroe's* holding that cities were not persons subject to § 1983 liability).

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

19. *Id.*

20. *See id.*

21. I later refer to this defense of reasonable grounds and good cause as the "Pierson two-part test." For further discussion of who should have this burden see CIVIL RIGHTS AND CIVIL LIBERTIES, *supra* note 1, § 8.19.

22. Consider also the fact that the police officer's employer, a city or county, is not vicariously liable for damages under § 1983. *See* CIVIL RIGHTS AND CIVIL LIBERTIES, *supra* note 1, §§ 6.01-6.24 (on local government liability). Furthermore, the judge who may be involved is absolutely immune. *See id.* §§ 7.01-7.16. Thus, the police officer is frequently the sole target.

although a possible one. Conversely, an honest but *unreasonable* belief in constitutionality similarly would not avoid damages liability. But if she had both an honest *and* a reasonable belief in the constitutionality of her conduct at the time it took place, then she would escape damages liability altogether even though she may have violated the plaintiff's Fourth Amendment rights.

It is significant that under this two-part test there was typically a *parity of narrative*, or a kind of symmetry, for both the plaintiff and defendant. Each had the chance to tell his or her story in full to the decision-maker and to present both a narrative and counter-narrative, without being treated as faceless. That is, each party had a meaningful opportunity through narrative to have the decision-maker put itself into that party's place, to "'judge with' the agent who has done the alleged wrong"[23] as well as the person who was harmed. Thus, the decision-maker could empathize with, and possibly have mercy for, the defendant,[24] and empathize with, and perhaps pity, the innocent plaintiff. This parity of narrative functioned in a very real sense to promote Aristotelian "equity" because it focused on the particularities of the case itself in all of its aspects, including the actual state of mind of the constitutional tort defendant and the circumstances of both of the parties.[25]

Equally significant, in most cases—as in *Pierson* itself—the ultimate decision-maker was the jury because of the existence of the subjective part of qualified immunity. It worked this way: where the § 1983 defendant moved for summary judgment based on qualified

23. Nussbaum, *supra* note 10, at 94.

24. The connection among narrative, empathy, and mercy is a deep one.

> The person who "reads" a complex case in the manner of the reader of a narrative or the spectator at a drama is put in contact—by the structure of the forms themselves as they solicit the reader's or spectator's attention—with two features of the equitable: its attentiveness to particularity and its capacity for sympathetic understanding. This means that the spectator or reader, if he or she reads well, is already prepared for equity and, in turn, for mercy.

See id. at 105. *See generally* Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Bandes, *supra* note 9; Robert Cover, Forward: *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

25. Also, where the particular constitutional standard itself was somewhat rigid, the two-part qualified immunity test alleviated some of its harshness and did "justice" when it was properly applied and "use[d] equity's flexible standard." Nussbaum, *supra* note 10, at 96. In the Fourth Amendment situation, the constitutional standard is objective in not taking account of the police officer's actual state of mind but it is particularistic in taking account of the actual circumstances. *See* Whren v. United States, 116 S. Ct. 1769, 1775 (1996). Other constitutional standards do both: for example, both the Eighth Amendment, which requires deliberate indifference, and the Equal Protection Clause, which requires purposeful discrimination, have state of mind requirements. *See* Farmer v. Brennan, 114 S. Ct. 1970 (1994) (deliberate indifference requirement); Washington v. Davis, 426 U.S. 229 (1976) (purposeful discrimination requirement).

immunity, that motion frequently would be denied because of the existence of a material issue of fact in dispute regarding the defendant's actual state of mind.[26] Consequently, it was the jury that would go on to hear the plaintiff's detailed version of what happened as well as the defendant's. The jury, considered to be the representative of the community, applied a "common-sense judgment" in contrast to "the more tutored . . . reaction of the single judge . . . ."[27] In effect, it was as if the community itself was evaluating the contrasting narratives of the parties. Such an evaluation of both narratives by the jury, following judicial instructions, would tend to be more evenhanded[28] than that of the judge. Alone, the judge, a government official like the defendant and therefore perhaps more sensitive to the need for independent official conduct, might be more inclined to empathize with the defendant.[29]

26. *See* FED. R. CIV. P. 56.

27. Duncan v. Louisiana, 391 U.S. 145, 156 (1968). *Duncan* was a criminal case in which the Court went on to say: "[T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."

More to the present point, see *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972), where the Court of Appeals upheld the trial court's rejection of a jury nullification instruction in a criminal trespass case involving a protest against Dow Chemical Company. In the course of its opinion, the court observed that the famous University of Chicago study of the American criminal jury system supported

> the conclusion that the jury is likely to call on its prerogative of lenity and equity, contrary to the judge's instruction, when the case is one where it can *empathize* with the [criminal] defendant, *feeling either that the jurors might well have been or come to be in the same position*, or that in the large the defendant's conduct is not so contrary to general conduct standards as to be condemned as criminally deviate conduct.

Id. at 1130-31 n.33 (emphasis added).

28. It might be thought that the jury would tend to be pro-plaintiff rather than evenhanded because it would empathize more with the injured plaintiff. This is because the plaintiff is usually an ordinary citizen like the jurors themselves. Still, at least until the Rodney King videotape and trials, the conventional wisdom among civil rights plaintiffs' attorneys was that juries all too often believed the narratives of § 1983 defendants as against those of plaintiffs because of the defendants' positions of authority and respectability. At the same time, especially in police brutality cases or warrantless search cases like the hypothetical, the plaintiffs tended to be minorities or other "unpopular" persons. These factors frequently made it difficult for plaintiffs to recover damages even under the prior two-part *Pierson* test.

29. It is surely no accident that the U.S. Supreme Court, itself a judicial body, held that state and local judges are absolutely, and not just qualifiedly, immune from damages liability. *See* CIVIL RIGHTS AND CIVIL LIBERTIES, *supra* note 1, §§ 7.01-7.16. Absolute immunity means that the defendant avoids not only potential liability but also the need to defend at all, and is based on the importance of independent judicial decision-making. Still, it was not difficult for the Court to put itself in the place of state and local government judges who would otherwise have faced the threat of § 1983 suits whenever litigants appearing before them lost.

OBJECTIVE REASONABLENESS: THE PRIORITY OF THE DEFENDANT'S NARRATIVE

Parity of narrative, or symmetry, disappeared suddenly in *Harlow v. Fitzgerald*.[30] *Harlow* substantially modified the two-part qualified immunity test by eliminating the subjective part, and by insisting that the objective part of the test—now the primary part—be applied by courts in a pro-defendant manner.[31] The Court's avowed purpose was to permit the defeat of insubstantial claims without resort to trial.[32]

Harlow involved actions for damages against White House aides to former President Nixon based in part on the First Amendment.[33] In the course of ruling that these aides were protected only by qualified (and not absolute) immunity, the Court went on to eliminate the subjective part of the test.[34] It first observed that an official's subjective good faith typically had been considered a disputed question of fact which should not be decided on motion for summary judgment.[35] As a result, "substantial costs attend the litigation of the subjective good faith of government officials . . . ," including extensive judicial inquiries into subjective motivation which can be "peculiarly disruptive of effective government."[36] It then declared:

> [W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. *We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.*[37]
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> * * *
>
> By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal rea-

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

31. *See id.* at 818-19. Also indicating that the objective part was to be applied in a pro-defendant manner were *Anderson v. Creighton*, 483 U.S. 635 (1987), discussed later, *Davis v. Scherer*, 468 U.S. 183 (1984), and *Procunier v. Navarette*, 434 U.S. 555 (1978). *See* CIVIL RIGHTS AND CIVIL LIBERTIES, *supra* note 1, at 104.

32. *Harlow*, 457 U.S. at 818-19.

33. Such a First Amendment action for damages is a constitutional tort action against *federal* officials based on the constitutional provision itself—a so-called *Bivens* action—without resort to a statute like § 1983 that applies by its terms only to state and local government officials, not federal officials. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

34. *See Harlow*, 457 U.S. at 818-19.

35. *See id.*

36. *Id.* at 816-17.

37. *Id.* at 817-18 (emphasis added).

> sonableness of an official's acts. 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."[38]

Harlow's elimination of the subjective part of the qualified immunity test was expressly designed to minimize, if not altogether bypass, the role of the jury in the qualified immunity determination. Henceforth, whether a defendant passed the qualified immunity test (and would thus not be subject to damages liability personally) would depend on whether she acted with an objectively reasonable belief in the constitutionality of her conduct and nothing more.

This reconstituted objective reasonableness qualified immunity test appears at first blush to raise a purely legal issue, and thus to be peculiarly appropriate for the judge and not the jury. Narrative may appear normatively inappropriate because empathy and mercy should not interfere with a purely legal determination. However, the objective reasonableness inquiry is *not* solely a legal one: it is a law application question, or a mixed question of law and fact.[39] This was made especially clear shortly after *Harlow* by *Anderson v. Creighton*.[40]

In *Anderson*, the defendant FBI officer and other law enforcement officers conducted a warrantless search of the plaintiffs' home because they erroneously believed that a suspected bank robber might be found there.[41] The Court of Appeals for the Eighth Circuit held that the defendant was not entitled to summary judgment on qualified immunity grounds because the constitutional right allegedly violated by the defendant—"the right of persons to be protected from warrantless searches of their home unless the searching officers have probable cause and there are exigent circumstances—was clearly established" at the time of the search.[42]

Reversing in an opinion by Justice Scalia, the U.S. Supreme Court observed that the Eighth Circuit inquired into the existence of clearly settled law at too high a level of generality.[43] Under the

38. *Id.* at 818-19 (citations omitted). The Court rather clearly indicated that its discussion of qualified immunity encompassed § 1983 actions. *See id.* n.30.

39. *See infra* note 48—discussing *Hunter v. Bryant*, 112 S. Ct. 534 (1991).

40. 483 U.S. 635 (1987).

41. *See id.* at 637.

42. *Id.* at 637-38.

43. *See id.* at 646.

Eighth Circuit's approach, the Court contended, qualified immunity could be converted into "a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."[44] Rather, the proper approach was to ask whether the right allegedly violated was clearly settled in a more particularized and fact-specific sense.[45] Thus, in the case before it, the relevant question was "the objective (albeit fact-specific) question whether a reasonable officer could have believed [defendant's] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. [Defendant's] subjective beliefs about the search are irrelevant."[46] This approach, the Court insisted, was not an expansion of the scope of *Harlow*.

The determination of whether the defendant violated clearly settled law in a particular case will therefore typically be a fact-specific one, a factor that enhances the force of the defendant's narrative. The fact-specific nature of this narrative introduces some complexity into *Harlow* summary judgment procedure and its relation to discovery. It suggests that limited discovery may occasionally be required prior to a ruling on summary judgment. Thus, in *Anderson*, the Court commented that, on remand, the district court should first decide whether the actions alleged by the defendants were actions

> that a reasonable officer could have believed lawful. If they are, then [defendant] is entitled to dismissal prior to discovery. If they are not, and if the actions [defendant] claims he took are different from those the [plaintiffs] allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before [defendant's] motion for summary judgment on qualified immunity grounds can be resolved. Of course, any such discovery should be tailored specifically to the question of [defendant's] qualified immunity.[47]

The *Harlow/Anderson* test thus expressly requires the judge to put himself or herself in the place of the § 1983 defendant before (or while) making this law-application objective reasonableness determination.[48] The judge does this by reading the defendant's particularized narrative and imagining what it was like when she acted as she did

44. *Id.* at 639.
45. *See id.* at 640.
46. *Id.* at 641.
47. *Id.* at 646-47 n.6.
48. As further confirmation of the point that the *Harlow/Anderson* test calls for a law-application judgment by the judge and *not* the jury, consider *Hunter v. Bryant*, 502 U.S. 224 (1991), a per curiam opinion, where the Supreme Court, reversing the Court of Appeals for the Ninth Circuit, summarily held that Secret Service officers sued for damages in connection with a Fourth Amendment claim that they arrested the plaintiff without probable cause were protected

under the circumstances confronting her.[49] Such narratives, now mandated by *Harlow/Anderson* and the fact-specific gloss on the objective reasonableness qualified immunity test, encourage empathy and mercy for the § 1983 tort defendant in connection with the potential for significant personal damages liability.

By way of example, consider the likely effect of a defendant-empathic and fact-specific narrative in *Rich v. City of Mayfield Heights*.[50] Here the plaintiff arrestee asserted a due process violation in the failure of the defendant police officers to immediately take him down when they discovered him hanging in his cell.[51] Instead, they called paramedics, who took at least several minutes to arrive.[52] This failure allegedly caused the plaintiff permanent physical harm and institutionalization, although he did not die.[53] Ruling for the defendants, the Court of Appeals for the Sixth Circuit commented that it was clearly settled in May 1987 that an arrestee had a due process right to adequate medical care, even if his injuries were self-inflicted.[54] However, the inquiry here was more particularized and for that reason the defendants were entitled to qualified immunity: "No case has been brought to this Court's attention which recognizes a constitutional duty on the part of jail officials to immediately cut down a prisoner found hanging in his or her cell."[55] What was constitutionally required was the prompt summoning of medical care, and that was done.[56]

by qualified immunity. The plaintiff had been arrested for threatening the President in violation of federal law. *See id.*

The Court ruled that the court of appeals had used an incorrect qualified immunity standard when it stated that "whether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment . . . based on lack of probable cause is proper only if there is one reasonable conclusion a jury could reach." *Id.* at 228. This was erroneous because the qualified immunity question was not for the jury but should be decided by the court long before trial. *See id.* It was further incorrect because the proper qualified immunity question was whether the defendants acted reasonably under settled law under the circumstances, and *not* whether another reasonable interpretation of what happened could be developed long afterwards. *See id.* The Supreme Court then concluded that the defendants were entitled to qualified immunity because they had acted reasonably, even if mistakenly, under settled law. *See id.*

49. Compare the judicious spectator in ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (1976).

50. 955 F.2d 1092 (6th Cir. 1992).

51. *See id.* at 1094.

52. *See id.*

53. *See id.*

54. *See id.* at 1096.

55. *Id.* at 1097.

56. *See id.*

A second and perhaps more vivid example is *O'Brien v. City of Grand Rapids*.[57] Here is a factually accurate newspaper account of what happened in *O'Brien*:

> As Grand Rapids police with automatic rifles, tear-gas canisters and stun grenades surrounded Joseph O'Brien's home in October 1987, O'Brien smoked cigarettes and ate lunch. . . . O'Brien, 33, who was shot and partially paralyzed during the stand-off, is suing the city of Grand Rapids, Police Chief William Hegarty and two police officers for $5 million, claiming that they violated his constitutional rights. Attorney Fred Dilley, in his opening statement before a six-member jury, described his client as a "hermit" and paranoid schizophrenic who was oblivious to the commotion outside his home . . ., until officers started breaking his windows. Even then, O'Brien thought his "house was being invaded by intruders, . . . His mind was not capable of registering that these were police . . . ." O'Brien fired the first of his nine or 10 [sic] shots, none of which resulted in injuries, after the windows were broken. The nine-hour stand-off ended when officer Stanley Lis shot O'Brien in the neck [severing his spinal cord and rendering him a paraplegic]. The stand-off began when a court officer, accompanied by Grand Rapids police officer Dennis Johnson, tried to seize O'Brien's pickup truck to help satisfy a $35,000 legal [default] judgment.[58]

Nevertheless, the Court of Appeals for the Sixth Circuit in *O'Brien* reversed the district court on the Fourth Amendment qualified immunity issue and declared:

> We think it is clear that the officers were not, in law, excused on exigent circumstances grounds from obtaining a warrant before invading O'Brien's house. But we cannot say that no reasonable officer, objectively assessing the situation, could conclude that there were exigent circumstances excusing the requirement that a warrant be obtained. [Defendants] Hegarty and Ostapowicz are not held to the standards of a constitutional law scholar concerning the vagaries of the exigent circumstances exception to the warrant requirement of Fourth Amendment law. They were policemen, command officers to be sure, dealing with a potentially dangerous incident in the middle of a residential neighborhood, that might have exploded at any moment.[59]

Judge Keith soundly dissented in *O'Brien*, characterizing the defendants' conduct as "unacceptable and outrageous."[60] In Judge Keith's view, they should have recognized that, because the plaintiff presented no threat and there was "no probable cause to believe he

57. 23 F.3d 990 (6th Cir. 1994).

58. Ken Kolker, THE GRAND RAPIDS PRESS, *O'Brien Home 'Invaded' by Police, Defense Claims,* January 24, 1992. The facts set out in this newspaper account were, so far as I can discern, not disputed at trial.

59. *O'Brien*, 23 F.3d at 1000.

60. *See id.* at 1005-06.

had committed any crime," it was objectively unreasonable to surround plaintiff's home, break its windows and harass and persecute him.[61] "[Their] refusal to obtain a warrant from a neutral and detached magistrate, despite the passing of several hours, resembles the self-righteous arrogance of a lynch mob. Unfortunately . . . [defendants'] aggressive conduct incited a scenario which left [plaintiff] paralyzed."[62]

OBJECTIVE REASONABLENESS: THE MARGINALIZATION OF THE PLAINTIFF'S COUNTER-NARRATIVE OR, "WHEN IS IT MY TURN?"

It is not simply that the defendant in the hypothetical, like § 1983 defendants generally, is allowed a particularized narrative with the consequent judicial empathy and mercy for her: the plaintiff is simultaneously denied his narrative. The parity of narrative present under the prior two-part qualified immunity test is gone. This is the result of the Court's instruction to trial courts in *Harlow/Anderson* that, to the extent possible, they decide qualified immunity *before* the merits of the § 1983 claims of plaintiffs are addressed. This is accomplished procedurally through the device of a judge's assuming arguendo that the defendant did indeed violate the plaintiff's constitutional rights and then going on to address the qualified immunity question of objective reasonableness. The Court's approach permits a judge to rule for a § 1983 defendant without ever reaching the merits of the plaintiff's claim. All that the judge does is assume a constitutional violation. Where the trial court has so ruled in favor of the defendant, the perverse result is that a determination of clearly settled law has been deferred.[63]

As a practical matter, then, the plaintiff's story is typically narrated in a barebones fashion, especially since federal courts, where most (although not all) constitutional tort actions are filed, are notice pleading, not fact pleading, jurisdictions.[64] And it is this barely told

61. *Id.* at 1006.

62. *Id.*

63. However, there may be times when the judge rules for the defendant on qualified immunity grounds because the judge determines that the plaintiff has not even stated a constitutional tort action at all. *See, e.g.*, Siegert v. Gilley, 500 U.S. 226, 233 (1991).

64. See Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763 (1995), who argues that civil rights complaints all too often contain impoverished language that does not begin to do justice to plaintiffs' narratives. He then goes on to suggest ways in which lawyers can and should draft civil rights complaints more "thickly" and the benefits of so doing.

story, not fleshed out, that competes with the defendant's more elaborate and evidentiary narrative articulated in the qualified immunity setting. Indeed, the plaintiff is not even permitted to make his story richer and more detailed through discovery. As noted earlier, the Supreme Court in *Anderson* emphasized that before a defendant's qualified immunity motion for summary judgment is decided, no discovery is permitted except insofar as it is related to the defendant's entitlement to qualified immunity.[65] This effectively prevents the plaintiff from obtaining discovery with regard to his entire case as well as presenting his narrative to the judge. At most the plaintiff can attempt to rebut the defendant's qualified immunity narrative.

INTERLOCUTORY REVIEW

Under the prior two-part qualified immunity test, and in virtually all federal trial settings, after a defendant who has moved for summary judgment loses that motion, the plaintiff's case proceeds to trial. The defendant then has the opportunity to rebut the plaintiff's case and to submit whatever affirmative defenses she wishes. Thus, *both* parties in this situation will, at this point, have parity of narrative, that is, the same chance to address the decision-maker, often the jury, and to present their own narratives and counter-narratives. The case then goes to the jury with the appropriate jury instructions, and it is only after the jury reaches a verdict (and after post-trial motions are dealt with) that the losing party has the opportunity to appeal. This is the final judgment rule, which requires a final judgment at the trial level before an appeal is permitted.

Strikingly, in *Mitchell v. Forsyth*[66] the Court eliminated even this opportunity for a § 1983 plaintiff to narrate his story to the jury. Instead, it effectively provided the defendant with two chances while giving the plaintiff none. In *Mitchell*, a former United States attorney general was sued for damages for the warrantless and thus allegedly unconstitutional electronic surveillance of the plaintiff.[67] Upon the defendant's attempt to seek interlocutory review from the district court's denial of his claims of qualified immunity, the Court of Appeals for the Third Circuit ruled that the qualified immunity issue was not properly before it.[68] Even though *Harlow* eliminated the subjective part of the qualified immunity test so as to encourage "the sum-

65. *See* Anderson v. Creighton, 483 U.S. 635, 646-47 n.6 (1987).
66. 472 U.S. 511 (1985).
67. *See id.* at 513.
68. *See id.*

mary disposition of insubstantial claims brought against government officials," it did not "relax . . . the rule[ ] limiting interlocutory appeals."[69]

In an opinion by Justice White, the U.S. Supreme Court declared that the denial of a defense motion claiming *absolute* immunity was appealable before final judgment under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*,[70] because the claimant might be entitled not to stand trial at all. Similarly, a defendant claiming *qualified immunity* on clearly settled law grounds after *Harlow* was also possibly entitled not to stand trial. Thus, under the collateral order doctrine, a defendant claiming the absence of clearly settled law in a qualified immunity/summary judgment motion could, where the motion was denied, appeal the denial.[71]

After *Mitchell*, when a trial court denies a defendant's qualified immunity summary judgment motion the defendant can immediately present her narrative to, and secure a chance to be heard by, an appellate judicial decision-maker. And like the trial court, the appellate decision-maker is required to apply the objective reasonableness test empathically from the defendant's perspective.[72] Here, too, the defendant is the only party with a meaningful opportunity to narrate her story in any detail. In short, under *Harlow/Anderson* and *Mitchell*, the § 1983 defendant secures two chances at narration and empathy before the plaintiff gets even one.

69. 729 F.2d 267, 273 (1984).

70. *Mitchell*, 472 U.S. at 524-25 (citing Cohen v. Beneficial Indust. Loan Corp., 337 U.S. 541, 546 (1949)).

71. The Court in *Mitchell*, reaching the merits of the qualified immunity issue, ruled for the defendant on the ground that it was not clearly established in 1970, the time when the defendant approved the warrantless surveillance, that such surveillance was unconstitutional. *See id.* Only after the warrantless surveillance did the Court decide *United States v. United States District Court* (*Keith*), 407 U.S. 297 (1972), holding that the Fourth Amendment did not permit the use of warrantless wiretaps in cases involving domestic threats to the national security. Before that time, the question was explicitly described as "open" by the Court. The defendant's motion in *Mitchell* for summary judgment on qualified immunity grounds should have been granted inasmuch as the defendant did not violate clearly settled law. *Mitchell*, 472 U.S. at 530.

72. However, as the U.S. Supreme Court recently made clear, the role of the appellate court is not identical to, but is rather narrower than, that of a trial court confronted with a qualified immunity summary judgment motion. The Court unanimously held in *Johnson v. Jones*, 115 S. Ct. 2151 (1995), that where § 1983 defendants move for summary judgment on qualified immunity grounds, and the district court denies their motion because there are no material issues of fact in dispute, the defendants are not entitled to interlocutory review of this decision under *Mitchell v. Forsyth*. Specifically, the Court ruled that defendants cannot immediately appeal district court fact-related disputes about the pretrial record. *See id.*

CONCLUSION

When all of these substantive and procedural doctrinal changes are assessed from the perspective of narrative and empathy, it becomes clear that the U.S. Supreme Court has engineered a deep, albeit subtle, change in the § 1983 landscape. It has restructured narrative and empathy in a way that privileges the defendant's narrative and marginalizes that of the plaintiff. This effectively instructs the decision-maker, the judge (and *not* the jury), to empathize with the defendant, which in turn encourages the judge to be merciful to the defendant especially in close cases.

Whether this restructuring of narrative and empathy was deliberate is difficult to say. However, it complements parallel changes in the nature of the discourse used by the Court in § 1983 litigation, changes which have the effect of making it easier for courts to rule against § 1983 plaintiffs.[73] These changes are consistent with the U.S. Supreme Court's overt pro-defendant doctrinal moves in § 1983 litigation, which are designed to minimize the potential damages liability of government officials, thus forcing § 1983 plaintiffs to bear their own losses even when their constitutional rights are violated.

73. As I have previously argued. *See* Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719 (1989).

STUDENT NOTES AND COMMENTS