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TEACHING CIVIL RIGHTS WITH AN EYE ON PRACTICE: THE PROBLEM OF MAINTAINING MORALE

HAROLD S. LEWIS, JR.*

INTRODUCTION

This paper asks two questions: Is a paramount pedagogical concern with the actual practice of civil rights law legitimate; and, if so, how can the morale of teachers and students convinced of the importance of civil rights litigation be sustained in the face of a decades-long judicial assault on, and Congressional indifference to, the claims asserting those rights? As background, let us survey the demise of civil rights doctrine and practice over the past twenty-seven years.

I. HISTORICAL ANALYSIS

A. *The Sedulous Erosion of Civil Rights Doctrine*

I have not taught Civil Rights this century, having done so for about ten years previously. Initially, I greatly enjoyed offering the course. But the truth is, recent absence from the field as a teacher has brought more relief than regret. I attribute this to my inability to be content simply to recite and celebrate the now historic victories of the mid-twentieth century's civil rights movement and the distance achieved from slavery and Jim Crow. Perhaps because I have recurrently served as a lawyer in the field, my course always stressed contemporary developments in civil rights doctrine and practice. I also explicitly tried to address student interest in civil rights careers. Those points of emphasis, in turn, inevitably raised increasing doubts with each passing year about the fit between the doctrinal developments of the past quarter-century and the historic purposes of civil rights law. Here's why.

Real-life civil rights practice has not, to put it mildly, proved inspirational for quite some time. Since roughly 1982, the advent of the Supreme Court's policy-driven expansion of common law qualified immunity from damages for

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individual officer defendants,¹ the federal courts, with virtually unrelenting consistency, have delivered a series of body blows to the typical, and by far the most numerous kinds of putative civil rights claims—those by criminal suspects or arrestees and prisoners against individual government officers.²

1. Justice Scalia has been particularly forthright in acknowledging that section 1983 qualified immunity doctrine, as reformulated by the Court, differs strikingly from its common law version, and that the reformulation has been driven by policy. See *Crawford-El v. Britton*, 523 U.S. 574, 611–12 (1998) (Scalia, J., dissenting) (“[O]ur treatment of qualified immunity . . . [under section 1983] has not purported to be faithful to the common-law immunities that existed when §1983 was enacted We find ourselves engaged . . . in the essentially legislative activity of crafting a sensible scheme of qualified immunities” (citing *Burns v. Reed*, 500 U.S. 478, 498 n.1 (1991) (Scalia, J., concurring in judgment in part and dissenting in part))).

2. In reshaping the defense, the Court has had two principal goals. It has sought to reduce government officers’ timidity in discharging their duties by lessening the prospect that they will be mulcted in damages, and to abbreviate the time they must spend defending claims and hence shorten their diversion from those duties.

Substantively, that reformulation began with *Harlow v. Fitzgerald*, 457 U.S. 800, 801, 815 (1982), relieving defendants of making the common law’s dual objective and subjective showings required to claim immunity as a traditional affirmative defense and instead requiring plaintiffs to overcome a presumptive immunity by demonstrating that the defendant violated federal rights that were “clearly established” and of which defendant should have known. It intensified with *Anderson v. Creighton*, 483 U.S. 635, 658 (1987), clarifying that plaintiff must cite on-point case law showing that defendant violated clearly established law in the particular context, and that in any event defendant is immune if, despite violating plaintiff’s clearly established rights, a judge or jury concludes he could not, under the circumstances confronting him, have reasonably realized that his contemplated act or omission would violate those rights. See also *Crawford-El*, 523 U.S. at 588 (1998) (clarifying that even affirmative evidence of an individual defendant’s unconstitutional or malicious motive does not divest that defendant of qualified immunity). The current Court continues to facilitate the immunity. See *Pearson v. Callahan*, 555 U.S. ___, 129 S. Ct. 808, 815–17 (2009) (permitting district courts to grant qualified immunity dismissal motions simply upon determining that the violation in question was not clearly established by, or *a fortiori* was absolved by, authoritative case law extant when the defendant officer acted, without first determining whether the officer’s conduct constituted a current, cognizable constitutional violation that might be relied on in the future to “clearly establish” the violation). Procedurally, the Court has protected individual officer defendants from prolonged suit with special pleading, discovery, and summary judgment rules at trial. See *Crawford-El*, 523 U.S. at 574, 592–93, 597–601. Even if, as is increasingly unlikely after *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009), a federal trial court denies an officer defendant’s motion to dismiss on the pleadings; indeed even before *Ashcroft v. Iqbal* there was some evidence that the lower federal courts were applying the Supreme Court’s new, tighter pleading standards, declared in an antitrust case, more vigorously to civil rights than to other claims. Kendall W. Hannon, Comment, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1815 (2008). And then the Court also denies the officer defendant’s summary judgment motion based on qualified immunity. See *Saucier v. Katz*, 533 U.S. 194, 209–10 (2001) (Ginsburg, J., concurring) (extending a “double reasonableness” version of qualified immunity to officers accused of excessive force). The Court has afforded the officer at least one, *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985), and frequently two, *Behrens v. Pelletier*, 516 U.S. 299, 310–11 (1996), interlocutory appeals. Not only do these appeals greatly enhance

Echoing the restrictions on claims against individual officers, and equally familiar to civil rights teachers, is the Court's exacting "policy" or "custom" requirement for a *prima facie* case of liability against local government entities.³ After its announcement in 1978, in extensive dictum designed to qualify a holding that, for the first time, made local governments potentially liable under section 1983,⁴ the concept was then applied so restrictively during the 1980s and 1990s⁵ that today, relatively few such actions are brought. That's certainly a counterintuitive result from the standpoint of litigation realities. Government entity defendants are the most reliably solvent (unless individual offices are indemnified or insured, they are likely to be judgment proof) and are far less likely than officer defendants to appeal to jury sympathies.

These barriers to liability have been backstopped by limitations on remedies. As Congress recognized in enacting the Civil Rights Attorney's Fees Awards Act of 1976,⁶ the prospect of an award of attorneys' fees in the event the plaintiff prevails is, in most cases, indispensable to enable a would-be plaintiff to attract competent counsel to join a cause that, as we have seen,

the likelihood of the defendant's early exit from the litigation; the extensive delay they entail is potentially ruinous to the economic viability of the plaintiff's case, because Section 1983 plaintiffs' lawyers are almost never paid currently by their clients, but must await a favorable judgment that triggers "prevailing party" attorney's fees awarded against the defendant. Plaintiffs and their counsel are accordingly softened up, by both the substance and the procedure of the reformulated qualified immunity doctrine, to accept substantially cheaper offers of settlement.

3. With remarkable legerdemain and an anachronistic use of statutory history, the Court held in *Will v. Mich. Dep't of State Police* that, unlike local government entities, a state *eo nomine* is not a "person" capable of being sued under section 1983—a statute that in its terms refers to constitutional violation under color of "state" law, and not at all to cities, counties, villages or other state government subunits. 491 U.S. 58, 64 (1989).

4. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694–95 (1978).

5. *See St. Louis v. Praprotnik*, 485 U.S. 112, 139–40 (1988) (holding, by plurality, that defendant local government was not liable for simply ratifying an unconstitutional decision of its agent, but only when defendant's "final policymaking official," as defined by state law, adopts both the agent's decision and the unconstitutional reason or motive underlying it); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 738 (1989) (*Praprotnik* requirement adopted by majority); *City of Canton v. Harris*, 489 U.S. 378, 390 (1989) (finding the entity can be liable for a failure to train only when the "need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent," and even then only when plaintiff proves that the training deficiency was the proximate cause of that indifference); *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 411 (1997) (holding the entity liable for an agent's failure to screen in connection with initial hire "[o]nly where adequate scrutiny . . . would lead a reasonable policymaker to conclude that the plainly obvious consequence" of hiring would be the particular constitutional deprivation ultimately sustained by the plaintiff).

6. 42 U.S.C. §1988 (2006).

faces formidable obstacles.⁷ Yet, in recent years the Supreme Court has declared a presumption that in cases where the plaintiff who has sought other relief recovers only nominal damages, “the only reasonable fee is usually no fee at all,” even though he has established liability and technically “prevailed.”⁸

Further, the Court has denied prevailing party status, and hence attorneys’ fees, to plaintiffs whose Section 1983 action challenging an unconstitutional practice is shown to be the catalyst for the defendant’s “voluntary” mid-suit abandonment or modification of the practice. Rather, to achieve that status and become eligible for court-ordered fees, the plaintiff must be awarded declaratory or injunctive relief by an order or formal judgment⁹ or, in the view of some lower federal courts, a court-sanctioned (as opposed to stipulated) settlement agreement.¹⁰ *Buckhannon* thus permits a defendant facing only or primarily equitable relief to litigate on speculation and, if the handwriting on the wall is adverse, cave in by unilaterally modifying the practice before a court command can issue. By doing so, the defendant can insulate itself from liability for a plaintiff’s fees, commonly the largest single monetary component of a civil rights judgment.¹¹ This is especially threatening to the budgets of civil rights advocacy organizations, which frequently are alone in their willingness to undertake litigation that promises mainly injunctive relief and which are partially dependent on awards of court-ordered fees.¹²

As if stringent *prima facie* proof requirements, generous defenses, and restrictions on remedies were not enough, there is some evidence, confirmed by several researchers, that federal district courts, with the acquiescence of the Supreme Court, grant summary judgment motions submitted by civil rights (and employment discrimination) defendants with considerably greater

7. See, e.g., Harold S. Lewis, Jr. & Thomas A. Eaton, *The Contours of a New FRCP*, 68.1: *A Proposed Two-Way Offer of Settlement Provision for Federal Fee-Shifting Cases*, 252 F.R.D. 551, 553 (2008).

8. *Farrar v. Hobby*, 506 U.S. 103, 115 (1992). It should be said that several federal courts have mounted rear-guard resistance to this view, relying on Justice O’Connor’s concurring opinion in *Farrar* to create an “exceptional circumstances” exception that takes into account the difference between what plaintiff sought and the judgment obtained, the significance of the legal issue on which plaintiff prevailed, and the public purpose of the lawsuit. See, e.g., *Gray v. Bostic*, 570 F.3d 1321, 1326 (11th Cir. 2009). See also HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, *LITIGATING EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS CASES* 136 nn. 30–32 and accompanying text (Thomson-West 2d ed. 2005).

9. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 604 (2001).

10. See, e.g., *Truesdell v. Philadelphia Hous. Auth.*, 290 F.3d 159, 165 (3d Cir. 2002).

11. James K. Green & Barbara Kritchevsky, *Litigating Attorney’s Fees: Running the Gauntlet*, 37 URB. LAWYER 691, 713–14 (2005).

12. *Id.* at 693.

frequency than those made by civil defendants generally.¹³ Whether this is a consequence of federal judicial ideological or political hostility to civil rights claims,¹⁴ or of sub-par competence among plaintiffs' attorneys prosecuting those claims,¹⁵ or simply a desire to ease calendar congestion by shortening the duration of a principal component of the federal civil docket, it is at least apparent that the latitude federal courts once afforded civil rights plaintiffs¹⁶ is today in short supply. Congress has failed to intervene and overrule any of these substantive or procedural judicial restrictions on the use of Section 1983 to assert federal constitutional violations under color of state law.

A similar pattern emerges with Section 1983 claims for the "deprivation of any rights, privileges, or immunities secured by [federal] . . . laws," that is, statutes.¹⁷ Just one year after recognizing that Section 1983's language authorizing claims for the violation of federal statutory rights has "no modifiers,"¹⁸ the Court embarked on a campaign to restrict these "and laws" claims.¹⁹ It has accomplished this principally via the "individual enforceable private rights" requirement as applied most restrictively in *Gonzaga University v. Doe*.²⁰ This requirement imposes on the plaintiff the herculean burden of demonstrating, solely from "unambiguous" statutory text or structure (apparently with the aid of legislative history or context), that Congress intended her to have a private right of action for violations of particular statutory provisions as to which, by hypothesis, Congress did *not* use words affording such a claim expressly. The language must satisfy a federal court that Congress sought to create "rights" in individuals like the plaintiff—rather than merely to benefit the group of which she is a part, or to define violations

13. See, e.g., Harold S. Lewis, Jr. & Thomas A. Eaton, *Rule 68 Offers of Judgment: The Practices and Opinions of Experienced Civil Rights and Employment Discrimination Attorneys*, 241 F.R.D. 332, 354–55 nn.76–78 and accompanying text (2007) (citing studies reaching that conclusion).

14. See, e.g., Harold S. Lewis, Jr., *Walking the Walk of Plain Text: The Supreme Court's Markedly More Solicitous Treatment of Title VII Following the Civil Rights Act of 1991*, 49 ST. LOUIS U. L.J. 1081, 1082 n.10 (2005) (citing authority reporting that more than half the federal bench sitting in the 1990s had been appointed by Republican Presidents Ronald Reagan or George H. W. Bush).

15. See, e.g., Lewis & Eaton, *supra* note 7, at 556 (speculating, and partially confirming, that a high percentage of the plaintiffs' attorneys in civil rights cases are "novices, either to law practice generally or to employment discrimination or civil rights cases. Many are tort, criminal or family lawyers who take a federal fee-shifting case as an outgrowth of their regular practices.").

16. See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1118 n.48 (1976).

17. 42 U.S.C. § 1983 (2006).

18. *Maine v. Thiboutot*, 448 U.S. 1, 12 (1980).

19. See *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 31 n.12 (1981) (Stevens J., dissenting).

20. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 274 (2002).

by the persons or businesses to be regulated, or to declare the duties of administrative agencies in the event of violations. Further, plaintiff must show that the individual rights conferred on her by the particular statutory provision in question are sufficiently specific to be susceptible of judicial enforcement.

Those few section 1983 claims that do meet these requirements may nonetheless fail to state a claim. According to *City of Rancho Palos Verdes v. Abrams*,²¹ a claim fails if a court deems the procedures or administrative or judicial remedies prescribed for a violation of the predicate statute “more restrictive” than those the plaintiff would be afforded by asserting the claim as an “and laws” violation of section 1983. This decision appears to relieve defendants of what had been their burden of persuasion before *Rancho Palos Verdes* to demonstrate the contrary, viz., that the procedures and remedies of the predicate statute are sufficiently reticulated to reflect a silent Congressional intent to preclude an express section 1983 “and laws” claim for relief based on the statute’s violation.²² As with section 1983 constitutional claims, Congress has also failed to intervene and overrule any of these restrictions on the express section 1983 claim for the violation of rights conferred by other federal statutes.

Another Reconstruction-era statute, 42 U.S.C. § 1985(3), traces its origin to violent coordinated action by members of the Ku Klux Klan and authorizes claims alleging the deprivation of constitutional rights by conspiracy.²³ The Supreme Court has drained this statute of practical application to an even greater degree than it has enfeebled section 1983, by limiting its scope mainly to race-based conspiracies committed by government, a kind of conspiracy almost unheard of in the past fifty years. Conspiracies by private defendants, the Court ruled, would be actionable only if aimed at depriving plaintiffs of the rare constitutional rights protected against private invasion, like the limited right of interstate travel or the right not to be subjected to involuntary servitude.²⁴ As with constitutional and statutory claims under section 1983, Congress has again failed to intervene and overrule these crippling restrictions on the express claim authorized by section 1985(3).

The few exceptions to the trend—the Supreme Court decisions awarding “victories” to civil rights plaintiffs—have generally been poorly reasoned²⁵ and largely symbolic, sometimes even pyrrhic. I refer primarily to the Supreme

21. *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005).

22. *Id.* at 130–31 (Stevens, J., concurring).

23. See, e.g., Catherine E. Smith, *The Group Dangers of Race-Based Conspiracies*, 59 RUTGERS L. REV. 55, 61 (2006).

24. See *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 832–33 (1983); *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 278 (1993).

25. See, e.g., LEWIS & NORMAN, *supra* note 8, at 252–53 nn.23–27 and accompanying text (criticizing *Felder v. Casey*, 487 U.S. 131 (1988) and *Johnson v. Fankell*, 520 U.S. 911 (1997)).

Court's decisions stoutly reaffirming the section 1983 plaintiff's right of access to a state court forum. The Court has held that the plaintiff who elects state court may do so free of state law procedural requirements, like a notice-of-claim rule.²⁶ More recently the Court has, in effect, accorded Section 1983 plaintiffs an exception from a state's statutes distributing subject matter jurisdiction among its different courts,²⁷ and it has done so even when these state law requirements are neutral and nondiscriminatory in the traditional sense necessary to avoid Supremacy Clause preemption, in that they operate facially and as applied to limit state and federal law claims alike.

The Court's concern for the Section 1983 plaintiff's voluntary choice of a state forum is somewhat bizarre as a matter of history. Motivated in part by distrust of the state courts, a primary purpose of the enacting Congress of 1871 "was to interpose the *federal* courts between the States and the people, as guardians of the people's federal rights"²⁸ As a practical matter, and far more important than preserving a Section 1983 plaintiff's arguably unfair choice²⁹ of a state forum shorn of standard jurisdictional or procedural features that might make her claim more difficult to prove, are the formidable barriers recently erected by Congress³⁰ and the Court itself³¹ to a prisoner's assertion of a Section 1983 claim in any court. In any event, the Section 1983 plaintiff's theoretical ability to invoke state court subject matter jurisdiction, so resoundingly reaffirmed by the Court on strained rationales, is automatically defeasible at the counter-tactical whim of the defendant, who can always unilaterally remove such claims to federal district court.³²

Still, the Court occasionally issues a meaningful decision reflecting its understanding that, to borrow from Justice Harlan's concurrence in *Monroe v. Pape*, "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state [or perhaps federal statutory] right and

26. *Felder v. Casey*, 487 U.S. 131, 156 (1988).

27. *Haywood v. Drown*, 556 U.S. ___, 129 S. Ct. 2108 (2009) (Thomas, J., dissenting).

28. *Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982) (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)) (emphasis added).

29. Why should a plaintiff, who (assuming some court is open to her) may always sue in a federal court, be permitted to invoke the tactical advantages of a particular state's court system without being subjected to its standard limitations?

30. *Crawford-El v. Britton*, 523 U.S. 574, 596–97 (1998) (listing the several significant impediments that the Prison Litigation Reform Act erects to court access by putative prisoner plaintiffs).

31. See *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994) (delaying and more likely, as a practical matter, permanently precluding any Section 1983 damages claim by a prisoner that, if successful, would taint the validity of his underlying conviction).

32. The removal jurisdiction of federal district courts over claims, like Section 1983 claims, that "arise under" federal law is authorized by 28 U.S.C. § 1441(a) and is not defeated, under § 1441(b), by the presence of a forum state citizen defendant.

therefore deserves a different remedy”³³ In *Fitzgerald v. Barnstable School Committee*,³⁴ the Court held that the availability of a judicially implied claim to enforce Title IX of the Education Amendments of 1972 does not preclude a claim under section 1983 alleging gender discrimination in violation of the Equal Protection Clause.³⁵ In part, the Court supported its ruling by observing that where the rights conferred by a statute, like Title IX, diverge significantly from claimed rights under the Constitution, “it is not likely that Congress intended to displace §1983 suits enforcing constitutional rights.”³⁶

Even then, however, the Court’s support for the Section 1983 claim was tepid and qualified. The Court observes that it had “never held that an *implied* right of action [like that under Title IX] had the effect of precluding suit under § 1983, likely because of the difficulty of discerning congressional intent in such a situation.”³⁷ There is an available negative effect here, namely that an *expressly* authorized contemporary statutory claim, if sufficiently detailed, might preclude the equally express, yet considerably more venerable, claim under Section 1983, even when the latter is based on an asserted violation of the Constitution. Further doubt is cast on the opinion’s recognition of the special status of constitutional claims by the way in which the Court distinguishes decisions that relied on the detailed procedural and remedial features of express statutory claims to preclude Section 1983 “and laws” claims. The Court distinguishes those cases not on the ground that the Section 1983 claim at issue in *Barnstable* was constitutional, but rather because the enforcement schemes prescribed by the express statutory claims in the precedent cases were “unusually elaborate” or “carefully tailored” and remedially “restrictive.”³⁸ The Court thus leaves us uncertain whether detailed procedural and remedial features of a statute affording an express claim for relief could in fact preclude a Section 1983 claim alleging a violation of the Constitution based on the same conduct.

Small wonder, then, when one reflects on this recent history that the occasional public excitement about civil rights tends to gravitate around long-delayed, only now-pending criminal prosecutions of alleged violations of civil rights in the Deep South that occurred during the civil rights protests of the 1960s, with the accompanying inevitable concerns about statutes of limitations

33. 365 U.S. 167, 196 (1961).

34. 555 U.S. ___, 129 S. Ct. 788 (2009).

35. Pub. L. No. 92-318, 86 Stat. 373 (1972); 20 U.S.C. § 1681(a) (2006).

36. *Fitzgerald*, 129 S. Ct. at 794.

37. *Id.* at 796 (emphasis added).

38. *Cf. Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 73–76 (1996) (holding that *Ex Parte Young* claims for injunctive relief against state officials to halt federal *statutory* violations prospectively were impliedly precluded when the statute allegedly violated more limited administrative remedies).

and stale evidence. Or, a recent NAACP advertising campaign protests, almost wistfully, that the organization is “still” making history.

B. Why a Focus on Practice?

Twenty-first century academics characteristically venture their concerns with practice apologetically. An interest in practice bespeaks to some in the professoriate an unfamiliarity with, inability to conduct, or disdain for the “higher” branches of research: interdisciplinary, purely theoretical, or empirical. I shall proceed, however, on premises prevalent throughout most of the second half of the twentieth century: that law school is education for a profession;³⁹ most of its consumers seek training that will equip them to practice that profession; and teaching and legal scholarship geared to that practice are most likely to assist and be taken seriously by students, lawyers, and judges.

While a practice orientation no doubt serves careerist values, it serves many more as well. It cements a legal realism perspective on doctrine. A practical approach helps students distinguish between largely symbolic (for example, proclamations by the U.S. Civil Rights Commission) or ineffective (for example, most rulings under Executive Order 11246 respecting government contracts) enforcement efforts; the sometimes significant, but today rather rare, “effects” or “impact” suits; structural reform suits seeking principally injunctive relief, and accordingly, advanced almost always not by individuals with private counsel but by advocacy organizations or public employee unions;⁴⁰ and the most significant potential enforcement arena composed of the tens of thousands of Section 1983 actions brought on behalf of individual victims of police misconduct, convicted prisoners, street people, aliens, or wards of the state. Even so, a huge percentage of those actions is doomed to failure by restrictive substantive doctrine and procedural rules

39. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 7–12 (2007).

40. Private lawyers for the most part don’t prosecute “effects” cases under Title VII of the 1964 Civil Rights Act, because of the overwhelming expense and difficulties of proving the case. *Cf. Ricci v. DeStefano*, 557 U.S. 1, 2, 26 (2009). The defenses to a prima facie showing of disproportionate adverse impact against a group under Title VII of the 1964 Civil Rights Act, as amended, are still readily enough established, even after the 1991 Civil Rights Act amendments, that an employer may not justify disparate treatment of another group out of fear of liability for disproportionate adverse impact unless it has a “strong basis in evidence” to believe those defenses would fail. *Id.*; *see also Lanning v. SEPTA*, 308 F.3d 286 (3d Cir. 2002). Further, in the unlikely event disparate impact or “effects” liability is found, the available remedies remain weak because the 1991 Amendments made compensatory and punitive damages available only for successful disparate treatment claims. Effects-type discrimination is rare under Section 1983 because only intentional discrimination violates the Equal Protection Clause. *See Washington v. Davis*, 426 U.S. 229, 240 (1976); *Personnel Adm’r v. Feeney*, 442 U.S. 256, 277 (1979).

devised and applied by a generally hostile, indifferent, or overburdened federal judiciary that, if taken at face value, is principally concerned with calendar congestion.⁴¹

Above all, a focus on practice strikingly illustrates how, as is common throughout American law, dramatic Supreme Court pronouncements on substantive doctrine, the usual locus of student interest, are in the end made meaningful or hollow by the more mundane intricacies of procedure and remedies.

C. *Bolstering Morale in the Face of a Focus on Recent Practice*

The reader who has made it this far will hardly be surprised that I've sometimes not been able to sustain my own pedagogical enthusiasm for civil rights practice in the face of the federal judiciary's carving up of civil rights claims for twenty-seven years, followed by Congress' studied indifference. Here is my best shot at making the case for civil rights practice.

I have suggested elsewhere that the persistence of the judicial hostility toward civil rights cases is ultimately a function of civil rights advocates' inability to marshal sufficient Congressional support to overrule the Court's restrictive precedents.⁴² The criminal suspects, defendants, prisoners, street people, hospitalized, and aliens who collectively compose the great bulk of potential civil rights plaintiffs—even those eligible to vote—are unlikely to vote at the same rate as other citizens, if only for want of similar stakes in the form of property or employment. For the most part they are, quite literally, dispossessed. In any event, they have not formed an effective constituency in Congress. To the contrary, Congress, far from overruling the Supreme Court's corpus of antagonistic civil rights decisions, has created additional procedural obstacles to, and remedial limits on, suits alleging unconstitutional prison conditions.⁴³

The notably contrasting example that inspires at least a little hope is the recent colloquy between federal courts and Congress that has elaborated the federal employment discrimination statutes. Persons who are or recently were employed have enjoyed partial yet substantial success in overruling the Court's restrictive Title VII decisions with passage of the Civil Rights Act of 1991.⁴⁴

41. See, e.g., *Bivens v. Six Unknown Named Fed. Narcotics Agents*, 403 U.S. 388, 428, 430 (1971). The influential dissents of Justices Black and Blackmun which relied, respectively, on the fear of a "growing number of frivolous lawsuits" and "another avalanche of new federal cases" as a principal policy reason for resisting judicial implication of a claim for relief to seek compensation for federal constitutional violations committed under color of federal law. *Id.*

42. Lewis, *supra* note 14, at 1093-94.

43. See *Crawford-El v. Britton*, 523 U.S. 477, 596-97 (1998) (explaining the Prison Litigation Reform Act).

44. This constituency enjoyed greater success in restoring the ability to prove and receive remedies for intentional or "disparate treatment" discrimination than for neutral practice or

And political theorists may take heart that the Court, true to its recently dominant “plain text” interpretive approach, has usually been chastened by the Congressional overruling and brought to heel.⁴⁵ Just last year, another restrictive Supreme Court Title VII decision⁴⁶ was overruled by the Lilly Ledbetter Fair Pay Act of 2009.⁴⁷

Yet it is interesting that another group disadvantaged by restrictive Supreme Court doctrine, persons over 40—a group no longer plausibly characterized as “dispossessed”—has, like potential civil rights plaintiffs, also failed to muster a Congressional majority to check the incursions of the Court. The 1991 Act, while overruling a number of adverse Title VII decisions limiting claims of discrimination based on race, sex, national origin, religion and color, amended only Title VII, not the Age Discrimination in Employment Act of 1967 (ADEA).⁴⁸ As a result, and despite their influence, the class of potential federal age discrimination plaintiffs—large, politically active, relatively well paid, and affluent—was nevertheless a legislative loser.

The ensuing results are also consistent with what political theory, specifically separation of powers doctrine, would predict. In contrast to its approach under Title VII, the Court continues to adhere to restrictive pre-1991 Act precedents in ADEA decisions, consistently denying ADEA plaintiffs the benefits of the 1991 Amendments, because in relevant respects, those Amendments referred only to Title VII.⁴⁹ To me, this affords the comfort, however small, that the federal judiciary has been, in one sense, evenhanded. Left to their own devices, federal courts have restricted Congress’ initial

“disparate impact” discrimination. The details are sketched out in Lewis, *supra* note 14, at 1082–90.

45. *Id.*

46. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

47. 42 U.S.C.A. § 2000e-5(e)(3)(A) (West 2009).

48. 29 U.S.C. §§ 621–34 (2006).

49. With regard to intentional or “disparate treatment” discrimination, the Court continues to require ADEA plaintiffs to bear the burden of persuading that the employer’s reliance on plaintiff’s age was the “determinative” or “but-for” cause of an adverse employment decision, rather than merely a “motivating” factor, as the 1991 Act describes plaintiff’s initial burden under the amended Title VII. *Ky. Ret. Sys. v. EEOC*, 554 U.S. ___, 128 S. Ct. 2361, 2367–70 (2008). Accordingly, the burden of persuasion never shifts to an ADEA defendant to show whether it would be logically impossible to show if the plaintiff has demonstrated that age was determinative, *viz.*, that the employer would have taken the same adverse action for reasons other than age. *Gross v. FBL Fin. Servs.*, 557 U.S. ___, 129 S. Ct. 2343, 2355 (2009).

With regard to neutral practice or “disparate impact” discrimination, the Court continues to apply to ADEA cases its rulings under Title VII, antedating the 1991 amendments, that had afforded ADEA defendants a lax, easily established affirmative defense—even though the 1991 Amendments have imposed on Title VII defendants a somewhat more stringent version of that defense. *See Meacham v. Knolls Atomic Power Lab.*, 554 U.S. ___, 128 S. Ct. 2395 (2008); *Smith v. Jackson*, 544 U.S. 228, 240 (2005).

drafting efforts on behalf of all civil rights and employment discrimination plaintiffs regardless of race, sex, religion, national origin, age, or constitutional injury. But then the judiciary has reversed course appropriately when, but only when, advocates can summon an effective Congressional majority to overturn the restrictive decisions.

A final example suggests another glimmer of hope for civil rights. A civil rights statute that the 1991 Amendments did amend to overrule hostile Supreme Court precedent was the Civil Rights Act of 1866, now known as Section 1981.⁵⁰ Some of the newly added subsections were well-crafted to overturn the Court's restrictions. When the Court deemed "plain" the language chosen by Congress to overrule one of its Section 1981 precedents,⁵¹ the Court not only acquiesced but even enlarged the scope of the overruling.⁵² In contrast, when Congress used substantially more ambiguous language in a different new subsection, apparently to address another restrictive Section 1981 precedent of the Court,⁵³ the federal circuit courts have chosen instead to adhere to the Court's restrictive, pre-1991 decision.⁵⁴ The lessons here for the civil rights community are, to be frank, not more than marginally promising. On the technical level of draftsmanship, proponents of legislation designed to overrule the Court's large body of obstructive precedent of the past quarter century are unlikely to be successful unless they can summon Congressional majorities not only to amend Sections 1983 and 1985(3), but to do so virtually without ambiguity.

More fundamentally, does the partially effective legislative overruling of Section 1981 in the 1991 Amendments suggest that the new Democratic Party majorities in Congress might follow suit by overruling other of the Court's many decisions of the past twenty-seven years that have severely limited of Sections 1983 or 1985(3)? Not necessarily, perhaps not even likely. Section 1981, unlike Sections 1983 and 1985(3), has regularly been used as a supplementary or stand-alone claim that provides generous remedies for intentional race or ancestry discrimination respecting private employment contracts.⁵⁵ Amendments to Section 1981 would, therefore, naturally enjoy support from the same employed or recently employed constituency that spurred the 1991 amendments to Title VII. While Section 1983 can reach discrimination in public employment that rises to the level of a constitutional

50. 42 U.S.C. § 1981 (2006).

51. *Patterson v. McClean Credit Union*, 491 U.S. 164, 183 (1989).

52. See Lewis, *supra* note 14, at 1092 n.83 and accompanying text.

53. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 703 (1989) (holding Section 1981 affords no distinct claim for relief against government defendants).

54. See circuit decisions collected at Lewis, *supra* note 14, at 1092–93 nn.82, 86. For a consistent, additional, recent circuit decision, see *McGovern v. Philadelphia*, 554 F.3d 114, 118 (2009).

55. *Patterson*, 491 U.S. at 176–78.

violation, either as a stand-alone claim⁵⁶ or in conjunction with a claim under Title VII, it is far more commonly used outside of employment, often by those who are not employed. The unemployed without assets—who compose a significant percentage of potential civil rights but not employment discrimination plaintiffs—cannot financially support Democrats any more than Republicans. “There is in our world almost no voice for the poor, which is perhaps a third of our nation.”⁵⁷ One can therefore be skeptical that the current Congress is any more likely than its recent predecessors to reverse the Court’s long-standing tendency to halt “pure” or “classic” civil rights litigation.

CONCLUSION

This leaves the Civil Rights teacher to seek solace, or at least explanation, from the subject matter of a different course, Federal Courts. Justice Harlan, concurring in the judgment in *Bivens v. Six Unknown Named Federal Narcotics Agents*, wrote that “the [federal] judiciary has a particular responsibility to assure the vindication of constitutional interests” and “the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities”⁵⁸ He concluded that the federal judiciary could devise traditional judicial relief—an implied cause of action for damages—to protect Fourth Amendment rights violated by *federal* agents, even if Congress had long declined to create that claim and even rejected bills to do so.⁵⁹

Congress, since 1871, *has* expressly created and maintained a Section 1983 claim to provide relief for federal constitutional and statutory violations committed under color of *state* law. So the more particular separation-of-powers question respecting Section 1983, which undoubtedly affords a claim, is what happens to precious individual rights if, for a considerable period of time, the federal judiciary construes them narrowly, stiffens the requirements for proving a *prima facie* case, enlarges defenses, and restricts remedies, all with the acquiescence of Congress? Consistent with traditional separation-of-powers theory, those rights wither on the vine. They await an effective legislative majority that is as concerned with the nation’s most defenseless (including its least appealing) citizens as it is with those most likely to make political contributions or to vote. And that’s the irreducible core of the morale problem confronted by today’s teachers of Civil Rights.

56. See, e.g., *Thigpen v. Bibb County, Ga. Sheriff’s Dep’t*, 223 F.3d 1231 (11th Cir. 2000) (the author was co-counsel for the plaintiffs in *Thigpen*).

57. James Boyd White, *Law, Economics & Torture*, in *LAW AND DEMOCRACY IN THE EMPIRE OF FORCE* 265, 270 (H. Jefferson Powell & James Boyd White eds., 2009).

58. 403 U.S. 388, 407 (1971).

59. *Id.*

