Balance, Band-Aid, or Tourniquet: The Illusion Of Qualified Immunity for Federal Officials

H. Allen Black

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NOTES

BALANCE, BAND-AID, OR TOURNIQUET: THE ILLUSION OF QUALIFIED IMMUNITY FOR FEDERAL OFFICIALS

Every day, thousands of federal officers from the Federal Bureau of Investigation, the Coast Guard, the Customs Service, the Drug Enforcement Agency, and a host of other agencies carry out their duties enforcing the Nation's laws.1 Their work is often difficult and dangerous. Few of these officers may realize, however, that the armed criminal is not the only danger they face. State and local officials have faced the possibility of personal liability for alleged violations of constitutional rights under 42 U.S.C. § 19832 for some time. That threat did not extend to federal officers, however, until 1971, when the Supreme Court created a cause of action for violations of constitutional rights committed by federal officers—the "Bivens suit."3 Now, federal officers who rigorously execute their duties court the threat of civil lawsuits from angry citizens who believe that their rights have been infringed.

The Court did not create the Bivens suit in a vacuum, however. Our legal system has long recognized a zone of "qualified immunity" for public officials acting within the scope of their duties.4 The two judicially created doctrines are thus at odds with each other: one exposes officials to lawsuits; the other provides shelter from such suits. Although the Bivens suit reflects the evolution of this country's appreciation of constitutional rights, the development of qualified immunity has not maintained the balance. Qualified immunity exists now as a judicial band-aid solution to a complex problem, subject to practical, procedural, and jurisprudential weaknesses.5

2. See infra note 17 and accompanying text.
4. See infra note 38.

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The doctrine is an ephemeral shield against well-pleaded complaints and an indiscriminate sword against many well-founded claims.

The Court refined the qualified immunity doctrine most recently in Anderson v. Creighton,6 declaring that this doctrine protects all but the "plainly incompetent or those who knowingly violate the law."7 Yet, an officer who relies upon the protection of qualified immunity would be like the fairytale emperor who paraded before his subjects in a suit made of cloth, which he was told would be invisible to those "unfit for office or unforgivably stupid."8 Regardless of professionalism and good intentions, any officer may in fact be exposed to the burdens and stress of defending a lawsuit.9

Plaintiffs with well-founded complaints of constitutional violations also are sacrificed to the doctrine of qualified immunity. Even though a citizen may have suffered a constitutional injury, the qualified immunity doctrine often serves as an indiscriminate tourniquet, cutting off any hope of moral vindication, as well as damages, for victims who have not been criminally charged.10

Further, the qualified immunity doctrine prevents the full development of constitutional law. Because courts may grant immunity when the law "is not clearly established,"11 the law will never

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7. Id. at 638 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).
9. An officer has little refuge against the annoyance of a litigious plaintiff. For example, in James v. United States, 709 F. Supp. 257 (D.D.C. 1989), a Nigerian resident alien brought suit pro se against the United States and a District of Columbia policeman, alleging common law and constitutional torts. Id. at 258. The plaintiff complained that in November 1986, the officer had, inter alia, used excessive force in arresting him for driving without a license. Id. at 258-59. After limited discovery, the district court dismissed the case on a variety of grounds. Id. at 261.

Shortly after the dismissal, the plaintiff brought another pro se suit alleging common law and constitutional torts, this time against the United States Customs Service and an unknown United States Customs officer. James v. United States Customs Serv., No. 89-733 (D.C. Feb. 26, 1990) (LEXIS, Genfed library, Dist file). James alleged that the officers violated his rights in the course of searching him upon his arrival at Baltimore-Washington International Airport on a flight from Amsterdam, the Netherlands. Id. at *1. The district court dismissed that case for failure to state a claim, but the litigation still subjected the defendants to the stress and expense of limited discovery. Id. at *3.

10. See, e.g., Anderson, 483 U.S. 635, In Anderson, officials subjected the plaintiffs to a warrantless, nighttime search, during which an official punched one of the plaintiffs in the mouth. Creighton v. Anderson, 724 F. Supp. 654, 657 (D. Minn. 1989). The court never permitted the parties to fully develop or challenge the questionable "exigent circumstances." Anderson, 483 U.S. at 641, 657-58 (Stevens, J., dissenting). Had Creighton, the plaintiff, been charged with a crime, a court would have had an opportunity to determine whether the officials' actions that night were justified as a matter of law, and, if not, a court would have excluded at trial any evidence obtained by the illegal search.

become clearly established except in criminal trials in which the Supreme Court hears suppression appeals.12

In the wake of the Court's decision in Westfall v. Erwin,13 which restricted immunity for common law torts, Congress created protection for all federal officials against suit for common law torts by making the Federal Tort Claims Act (FTCA)14 the exclusive remedy for such actions. Yet, Congress specifically withheld that protection from federal officials charged with constitutional torts.15

This Note argues that Congress should amend the FTCA to include constitutional torts. First, the Note reviews the origins of the constitutional tort and the development of the qualified immunity doctrine. Next, the Note examines the shortfalls of the qualified immunity doctrine and discusses how the doctrine has failed government officials, rightful plaintiffs, and the judicial system that created it. The Note then outlines how Congress has attempted to insulate federal officers from personal liability through the FTCA—protection that is often illusory because of the large loophole resulting from Congress' failure to include constitutional torts within the coverage of the FTCA. The Note concludes that Congress should amend the FTCA to include constitutional torts as well as common law torts.

By making the FTCA the exclusive remedy for all alleged torts committed by government employees acting within the scope of their employment, Congress will provide far more substantial coverage to federal officers than the illusory protections of the qualified immunity doctrine. At the same time, Congress will empower citizens to seek just vindication of their rights and will enable the courts to decide sincere constitutional questions and thus guide future law enforcement actions.16

12. In the context of the current "war on drugs," the qualified immunity doctrine poses a particularly grave danger to constitutional rights. Civil libertarians have complained recently that the greatest victim of the drug war may be the constitutional rights of citizens. See Lacayo, A Threat to Freedom?, TIME, Sept. 18, 1989, at 28. Even legal experts have noted an emerging "drug exception" to the Constitution. Id.
15. Id. § 2679(b)(2).
16. The qualified immunity doctrine developed by the Court is unified for both 42 U.S.C. § 1983 civil rights actions (involving state and local officials) and Bivens suits (involving federal officials). It would be "unteachable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." Butz v. Economou, 438 U.S. 478, 504 (1978). The problems experienced with the doctrine in the federal context are therefore the same ones experienced at the local level, and the reasoning that supports the federal government's
HISTORY OF THE CONSTITUTIONAL TORT

The Origin of the Constitutional Tort: Section 1983

In 1871, the forty-second Congress first recognized the constitutional tort as a cause of action. Congress enacted a "Civil Action for Deprivation of Rights," which provided that "any person who, under color of any law . . . of any State," deprived another of the rights secured by the Constitution or other law would be liable in an action at law or equity. Congress first drafted the law not to

waiver of sovereign immunity would therefore support such a waiver by state and local governments as well, in the abstract.

Amenability of a municipality to suit carries important consequences. In appropriate cases, it focuses the litigation on the party directly responsible for the constitutional violation and thereby may provide a surer means of deterrence. Municipal liability also provides greater assurance that compensation in fact will be accomplished by placing the risk of loss on the population at large. This liability may also bring political pressures on the governing unit to change its unconstitutional policies or practices.

Rudovsky, supra note 5, at 30-31.

On a more concrete level, however, § 1833 actions involve a number of additional complex federalism and constitutional issues beyond the scope of this Note. Such issues include sovereign immunity, application of the eleventh amendment, and the definition of a "person" under 42 U.S.C. § 1983. See Owen v. City of Independence, 445 U.S. 622 (1980); Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978); Monroe v. Pape, 365 U.S. 167 (1961), overruled in part, Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 663 (1978) (overruling the proposition that local governments are wholly immune from § 1983 suits); Hans v. Louisiana, 134 U.S. 1 (1890). Although these issues may inhibit the remedying of qualified immunity in § 1833 situations, the federal government is free of such concerns and has the power to take broad, effective action. Congress should take the first step in this area by discarding the judicial band-aid of qualified immunity.


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

Id. Post-Civil War unrest in the southern states originally motivated Congress to enact this law:

A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is
create a new type of relief for injured parties, but to provide a federal forum for constitutional complaints when the state forum was inadequate.18 Section 1983 has become a fertile source of litigation, spawning thousands of cases alleging deprivation of rights.19

By its terms, section 1983 applies only to those officials acting under state law; courts have held that federal officials acting under federal law are beyond the reach of section 1983.20 Although Congress enacted a number of laws providing criminal sanctions or civil remedies for specific types of official misconduct,21 it failed to provide a federal version of section 1983 to cover complaints of constitutional violations by federal officials.

The Federal Cause of Action: The Bivens Suit

In 1971, the Supreme Court found a compelling case in which to create a cause of action for constitutional torts committed by federal officials. In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,22 the plaintiff alleged that agents of the Federal Bureau of Narcotics, acting without a warrant, entered his apart-

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18. See Monroe, 365 U.S. at 173-74 (quoting President Grant's Message to Congress (Mar. 23, 1871), reprinted in CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871)).

19. A search via computerized legal research on January 29, 1990, revealed that courts had issued opinions in 15,569 § 1983 cases since 1945. Section 1983 actions have included allegations of police misconduct, see Graham v. City of Charlotte, 644 F. Supp. 246 (W.D.N.C. 1986), aff'd, 827 F.2d 945 (4th Cir. 1987), vacated and remanded, 490 U.S. 386 (1989); claims of denial of due process made by government employees, see Giacalone v. Abrams, 850 F.2d 79 (2d Cir. 1988); prisoners, see Unwin v. Campbell, 863 F.2d 124 (1st Cir. 1988); mental hospital patients, see Waldrop v. Evans, 871 F.2d 1030 (11th Cir. 1989); and high school students, see Strickland v. Inlow, 348 F. Supp. 244 (W.D. Ark. 1972), rev'd, 485 F.2d 186 (8th Cir. 1973), vacated sub nom. Wood v. Strickland, 420 U.S. 308 (1975).


21. See, e.g., 18 U.S.C. § 2234 (1988) (making it a crime to obtain a warrant maliciously); id. § 2225 (providing criminal sanctions for searching an occupied building without a warrant under certain circumstances); 28 U.S.C. § 1346(b) (the FTCA) (providing that the government is liable for the negligent or wrongful acts of employees who were acting within the scope of their employment under circumstances in which a private person would be liable to the victim); 18 U.S.C. § 2520 (the Wiretapping Act) (providing sanctions for unauthorized police wiretapping).

ment and arrested him for alleged narcotics violations. The agents manacled him in front of his wife and children and threatened to arrest the whole family before searching the apartment from "stem to stern."

The agents took Bivens to the federal courthouse in Brooklyn, where he was interrogated, booked, and strip-searched, but the Bureau later dropped the charges against him.

Bivens brought suit against the agents in the District Court for the Eastern District of New York, claiming damages as a result of an unconstitutional search and seizure. The court was unsympathetic to Bivens' desire for federal court adjudication, holding that section 1983 clearly did not apply to federal officials. The United States Court of Appeals for the Second Circuit affirmed, noting that the plaintiff should have brought his claim in a state court: "'In the scheme of the Constitution [the state courts] . . . are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones.'"

In a landmark decision authored by Justice Brennan, the Supreme Court reversed, creating a federal cause of action for constitutional violations committed by federal officials. The Court based its decision upon both a federal supremacy theory and a civil rights vindication theory, noting that when plaintiffs brought

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23. Id. at 389.
24. Id.
27. Bivens, 276 F. Supp. at 13-14. The court quoted with approval Judge Learned Hand's opinion in Gregoire v. Biddle: "Section 43 [the precursor of section 1983] is so plainly limited to acts done under color of some state or territorial law or ordinance that no discussion can make it clearer than appears from its reading." Id. at 14 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)). The court went on to hold that the complaint failed to state any cause of action under federal law; therefore, no jurisdiction existed under 28 U.S.C. § 1331. Id. at 14-15. The court quoted extensively from Bell v. Hood to support its holding:

Whenever a federal officer or agent exceeds his authority, in so doing he no longer represents the Government and hence loses the protection of sovereign immunity from suit. . . . Plaintiffs are unable to point to any constitutional provision or federal statute giving one who has suffered an unreasonable search and seizure or false imprisonment by federal officers any federal right or cause of action to recover damages from those officers as individuals.

Id. at 15 (quoting Bell v. Hood, 71 F. Supp. 813, 817 (S.D. Cal. 1949)).
29. Id. at 721 (quoting H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 339 (1st ed. 1953)).
suits against federal officials in state courts, the Department of Justice removed all such suits to federal courts as a matter of policy. As a result, federal courts evaluated the conduct of federal officials, arguably in the pursuit of their official duties, according to state law. The Court refused to accept that situation.

Brennan then explored the unsuitability of applying state tort remedies to allegations of constitutional violations by federal officials. He noted that the relationship between a citizen and an official is not amenable to treatment under common law tort principles because an agent acting under color of federal authority possesses a greater capacity for harm than does a private individual. Brennan emphasized that “power, once granted, does not disappear like a magic gift when it is wrongfully used.” He went on to point out that a state remedy against private citizens would not deal with the same concerns as the Constitution: “[O]ur cases make clear [that] the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen.”

Having based its decision upon these practical foundations, the Court concluded by articulating its guiding philosophy. Quoting from *Marbury v. Madison*, it noted that “the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”

**DEVELOPMENT OF THE QUALIFIED IMMUNITY DOCTRINE**

*Origins of the Qualified Immunity Rationale: Undampened Ardor*

The Supreme Court created the *Bivens* cause of action in a system that had a long tradition of recognizing areas of absolute and qualified immunity for public officials, at a time when that tradition was entering an era of rich development.

31. *Id.* at 391.
32. *Id.* at 392-95.
33. *Id.* at 394-95.
34. *Id.* at 392.
35. *Id.*
36. 5 U.S. (1 Cranch) 137 (1803).
38. The concept of granting immunity to public officials originated in England at least as early as 1608. See *Barr v. Matteo*, 360 U.S. 564, 579-80 (1959) (Warren, C.J., dissenting). The doctrine made its way to this country, receiving recognition in the United States Constitution with respect to any speech, debate, vote, report, or other legislative activity...
Then-Judge Learned Hand set out the underlying rationale behind the immunity doctrine in *Gregoire v. Biddle*:

"If it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."

The Court cited Hand’s opinion in *Gregoire* with approval when it considered the question of immunity for lesser executive branch officials in *Barr v. Matteo*. In *Barr*, the plaintiffs alleged that the Acting Director of the Office of Rent Stabilization issued a defamatory press release announcing his intention to suspend the plaintiffs because of their involvement in a plan to use agency funds for settlement of terminal leave. Holding that executive officers performing official acts are absolutely immune from civil defamation suits, the Court reasoned that "[i]t has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties." The decision focused upon whether the official’s actions were within the scope of his official duties.
duty or authority, approving Hand’s assertion that “[t]he decisions have, indeed, always imposed as a limitation upon the immunity that the official’s act must have been within the scope of his powers.” The Court concluded that “[t]he fact that the action here taken was within the outer perimeter of petitioner’s line of duty is enough to render the privilege applicable.”

**Extension and Evolution of Good Faith: From Subjective to Objective**

The Court expanded and developed the qualified immunity doctrine in subsequent decisions. It extended the protection to police officers and created a “good faith” standard for immunity. This good faith standard contained both objective and subjective elements. Objectively, the Court required that officials be aware of “clearly established constitutional rights.” Subjectively, the Court called on trial judges to determine whether

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45. Id. at 574-75.
46. Id. at 572 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)).
47. Id. at 575.
48. See Pierson v. Ray, 386 U.S. 547 (1967). In Pierson, the plaintiffs were members of a group of white and African-American ministers who were arrested when they attempted to use a segregated interstate bus terminal waiting room in Jackson, Mississippi. Id. at 548-49. The state subsequently charged the plaintiffs with breaching the peace under a state statute which the Court later declared unconstitutional. Id. at 548-50 & n.4 (citing Thomas v. Mississippi, 380 U.S. 524 (1965)). The Court held that the police officers could assert the defense of good faith and probable cause and remanded the case for a new trial. Id. at 557-58.
49. Id. at 577.
50. Wood v. Strickland, 420 U.S. 308 (1975). In Wood, a school board suspended three high school girls for a period of three months for their part in “spiking” punch with malt liquor at a school event. Id. at 311-12. The Court determined the good faith of a school board member by reference to whether the member “knew, or reasonably should have known[,] that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.” Id. at 322.
51. Id. The Court noted that if a school board member acted in apparent disregard of the student’s “clearly established constitutional rights,” then “his action cannot reasonably be characterized as being in good faith.” Id.

In his dissent in Wood, Justice Powell complained that the standard of requiring officials to know “what is characterized as ‘settled, indisputable law,’ leaves little substance to the doctrine of qualified immunity.” Id. at 329 (Powell, J., dissenting). Powell continued: The Court’s decision appears to rest on an unwarranted assumption as to what lay school officials know or can know about the law and constitutional rights. These officials will now act at the peril of some judge or jury subsequently finding that a good-faith belief as to the applicable law was mistaken and hence actionable.

Id.
the defendant acted with "malicious intent" to deprive the plaintiff of constitutional rights. During the same period, the Court held that the extent of an official's qualified immunity depends upon "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." The subjective questions of "good faith" and "malicious intent" did not survive for long. In 1982, the Court substantially revised the qualified immunity doctrine in Harlow v. Fitzgerald, holding that henceforth the test would be purely objective. Justice Powell began the qualified immunity analysis by noting that in cases of official misconduct, "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." He continued, however, by noting that "claims frequently run against the innocent as well as the guilty; at a cost not only to the defendant officials, but to society as a whole."
The Court found the subjective test incompatible with the principal goal of official immunity, namely that "insubstantial claims should not proceed to trial." In addition to the great financial and social costs of suits against officials, the subjective test involved excessive inquiry into officials' intent. Powell concluded that the most effective way to preclude undue litigation against public officials exercising discretionary functions would be to provide a strictly objective standard for determining qualified immunity:

[B]are 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.

The Court's goal in providing the "objective reasonableness" standard was to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." Therefore, a judge could determine the "threshold immunity question"—whether a clearly established legal rule existed at the time of the alleged violation—before trial. In areas in which a clearly established legal rule did not exist, "the public interest may be better served by action taken 'with independence and without fear of consequences.'"

Changing the Question from Fact to Law

In *Mitchell v. Forsyth*, the Court set out the elements of the qualified immunity defense. The Court stressed that the qualified immunity entitlement "is an immunity from suit rather than a

58. *Id.* at 815-16.
59. *Id.* at 816-17.
60. *Id.* at 817-18.
61. *Id.* at 818.
62. *Id.*
63. *Id.*
64. *Id.* (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)).
mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."66 The issues involved in the qualified immunity decision under Harlow were thus "conceptually distinct" from the merits of the case.67 The qualified immunity question was to be strictly a question of law: "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or . . . whether the law clearly proscribed the actions the defendant claims he took."68

In 1986, the Court extended the Harlow standard of objective reasonableness, with its potential for use at summary judgment, to police officers in Malley v. Briggs.69 Under the objective reasonableness test, judges should deny claims for immunity only if "it is obvious that no reasonably competent officer would have concluded" that the action was lawful; however, "if officers of reasonable competence could disagree on this issue, immunity should be recognized."70 The Court concluded that such a test for qualified immunity would protect "all but the plainly incompetent or those who knowingly violate the law."71

66. Id. at 526.
67. Id. at 527-28.
68. Id. at 528.
69. 475 U.S. 335 (1986). Malley was a Rhode Island state trooper who obtained arrest warrants for the Briggses, based upon intercepted telephone conversations that led him to believe they were in possession of marijuana. Id. at 337-38. When the grand jury did not return an indictment, the Briggses sued, alleging violations of their fourth and fourteenth amendment rights. Id. at 338.

Although the district court granted a directed verdict for Malley on the premise that the judge's act in granting the warrant had broken the causal link between Malley's act and the Briggs' arrest, the United States Court of Appeals for the First Circuit reversed, holding that the officer was not entitled to immunity unless he had an objectively reasonable basis for believing that the facts alleged in his affidavit were sufficient to form probable cause. Briggs v. Malley, 748 F.2d 715 (1st Cir. 1984), aff'd, 475 U.S. 335 (1986).

The Supreme Court affirmed, rejecting Malley's argument for absolute immunity. Malley, 475 U.S. at 339. Ironically, the Court restricted the police officer's immunity by applying the same test of objective reasonableness that it used to create a good faith exception to the exclusionary rule in United States v. Leon, 468 U.S. 897 (1984). Malley, 475 U.S. at 344. Leon, like Malley, involved objective reasonableness in obtaining a search warrant. See Leon, 468 U.S. at 918-25. The Court stated in Malley that "it would be incongruous to test police behavior by the 'objective reasonableness' standard in a suppression hearing while exempting police conduct in applying for an arrest or search warrant from any scrutiny whatsoever in a § 1983 damages action." Malley, 475 U.S. at 344 (citation omitted). The Court justified the symmetry by noting that the exclusionary rule, though necessary, carried with it great social costs, whereas a § 1983 action imposed the costs directly upon the officer responsible for the unreasonable request "without the side effect of hampering a criminal prosecution." Id.

70. Malley, 475 U.S. at 341.
71. Id.
The Justices believed that the Malley-Harlow standard of qualified immunity for police officers struck a fair balance. The standard would provide a cause of action against officers who acted unreasonably and would stimulate officers to "exercis[e] reasonable professional judgment," while at the same time permitting officers to defeat frivolous claims through summary judgment before trial. Further, the Court did not believe that a qualified immunity standard would seriously impede law enforcement.

_Dangerous Definition: The Objective Reasonableness Standard Under Anderson v. Creighton_

What the Court in Malley failed to provide, however, was any guidance for determining what "reasonably competent" police officers would know or agree upon. Such a determination appears to be a question of fact, which requires a trial and therefore defeats the goal of dismissing unwarranted claims at summary judgment. Malley's fatal flaw of requiring judicial definition of the "reasonable officer" continued to haunt the Court's decisions on qualified immunity.

In a purported clarification of the Harlow objective reasonableness standard, the Court in fact created a significantly different standard of situational objectivity for the defense of qualified immunity in Anderson v. Creighton. Rendering the opinion of

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72. Id. at 346.
73. Id. at 341.
74. The Court noted in Malley:
In the case of the officer applying for a warrant, it is our judgment that the judicial process will on the whole benefit from a rule of qualified rather than absolute immunity. We do not believe that the Harlow standard, which gives ample room for mistaken judgments, will frequently deter an officer from submitting an affidavit when probable cause to make an arrest is present.
Malley, 475 U.S. at 343.
75. See infra text accompanying notes 157-85.
the Court, Justice Scalia sought to define “the level of generality at which the relevant ‘legal rule’”—which the Court in *Harlow* said must be “clearly established”77—“is to be identified.”78 The Court held that “the right the official is alleged to have violated must have been ‘clearly established’ in a more particularized, and hence more relevant, sense.”79 The decision continued beyond that legal standard to add the “fact-specific”80 question of whether “[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.”81

The test resulting from *Anderson* requires a two-part analysis. First, the judge must make a factual determination of the circumstances in which the official acted.82 Second, the judge must make a legal determination of whether the rights that the officer allegedly violated were so clearly established for that particular situation that an objectively reasonable officer would have known that the alleged actions were unlawful.83

In *Anderson*, the plaintiffs brought a *Bivens* civil rights suit against a Federal Bureau of Investigation (FBI) agent who conducted a warrantless search of their house while looking for a robbery suspect.84 Suspecting that the robber was Mrs. Creighton’s brother, a convicted felon, the defendant FBI agent and other officers entered the Creightons’ home without their consent, while uniformed and plainclothes officers surrounded the house.85 In response to Creighton’s request for a warrant, a police sergeant stated, “We don’t have a search warrant. I don’t need a search warrant. You watch too much T.V.”86 During the extensive search of the house and property, an officer punched Robert Creighton in the mouth.87

78. *Anderson*, 483 U.S. at 639.
79. Id. at 640.
80. Id. at 641.
81. Id. at 640.
82. Id. at 646 n.6.
83. Id. at 640.
84. Id. at 637.
85. See Creighton v. Anderson, 724 F. Supp. 654, 656-57 (D. Minn. 1989) (on remand from the Supreme Court), aff’d, 922 F.2d 443 (8th Cir. 1990). The district court memorandum opinion set out the facts with particularity and found that the defendant was entitled to qualified immunity. Id. at 661. Both parties supplied affidavits that formed the factual basis of the court’s opinion; the court viewed disputed facts in the plaintiffs’ favor. Id. at 655-56.
86. Id. at 657.
87. Id.
The Court noted that "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable."\(^88\) Scalia was unimpressed with the Creightons' argument that qualified immunity should not apply to officials alleged to have violated the fourth amendment: "It is not possible . . . to say that one 'reasonably' acted unreasonably."\(^89\) In rebutting the argument, Scalia distinguished the fourth amendment standard of reasonableness from the \textit{Harlow-Anderson} standard of objective reasonableness.\(^90\) He then revealed the policy underlying the decision: "Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law."\(^91\)

Although Scalia and the Court may have intended to broaden the protection available to government officials under the qualified immunity defense,\(^92\) the decision ultimately may have had the opposite effect by undercutting \textit{Harlow}'s goal of allowing innocent officials to defeat claims at summary judgment. Scalia asserted that the analysis in \textit{Anderson} "does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent that \textit{Harlow} sought to minimize."\(^93\) He went on to note, however, that "[t]he relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed."\(^94\) The Court acknowledged that

\(^{88}\text{Anderson, 483 U.S. at 641.}\)
\(^{89}\text{Id. at 643.}\)
\(^{90}\text{Id. Scalia noted as a "short answer" that "we have previously extended qualified immunity to officials who were alleged to have violated the Fourth Amendment." Id. He went on to dismiss the argument as one of semantics. Id.; see infra text accompanying note 200.}\)
\(^{91}\text{Anderson, 483 U.S. at 644.}\)
\(^{92}\text{For an illustration of this interpretation, see id. at 641:}\)
\(^{93}\text{Id. (citing Harlow v. Fitzgerald, 457 U.S. 800, 815-20 (1982)).}\)
\(^{94}\text{Id.}\)
balancing the Harlow goal of early case resolution with the necessary factfinding under Anderson could be "complicated."95 The Court's solution was an admonition to resolve qualified immunity questions at the earliest possible stage of litigation.96

The Band-Aid Solution: A Summary of Current Qualified Immunity Doctrine

A clear picture has emerged from the Court's qualified immunity decisions with regard to the justifications for and purposes of the doctrine. In general, the doctrine seeks to balance the legitimate concerns of persons whose rights federal officials allegedly violated with the need to insulate government officials from harassment through frivolous lawsuits.97 The Court has noted that "the Fourth Amendment operates as a limitation upon the exercise of federal power."98 It has further recognized that an action for damages may well be essential for the protection of constitutional guarantees.99 In addition, the Court in Harlow noted the public interest in the "deterrence of unlawful conduct and in compensation of victims."100

Despite its concern with protecting the constitutional rights of citizens, the Court also has been well aware of the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; [and] the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.101

Further, the Court pointed out in Harlow that "claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole."102 These

95. Id. at 646 n.6.
96. Id.
99. See Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982); see also Bivens, 403 U.S. at 397 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, wherever he receives an injury.").
100. Harlow, 457 U.S. at 819.
costs include the expenses of litigation, the diversion of official energy from pressing public issues, the deterrence of able citizens from acceptance of public office, and the cooling of ardor in the discharge of official duties.103

The Court thus has engaged in a judicial balancing act, providing some cause of action against wrongdoing officials but limiting relief to those cases alleging misconduct by officials who either are "plainly incompetent or . . . knowingly violate the law."104 To be effective, the Court has noted, the qualified immunity defense should be available early in the litigation process to "protect public officials from the 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government.' "105 In the context of civil litigation against individual officials, the goals of protecting citizens from abuses of power while simultaneously insulating government officials from liability are simply not compatible. In its attempt to provide an adjustable tourniquet to regulate the expenses of lawsuits against public officials, the Court has been able to apply only an ill-fitting band-aid.

SHORTFALLS OF THE QUALIFIED IMMUNITY DOCTRINE

Practical Problems

Anderson v. Creighton106 remains the Supreme Court's definitive pronouncement on qualified immunity, yet the doctrine is rife with practical, procedural, and jurisprudential infirmities. On a practical level, the qualified immunity doctrine fails to satisfy the concerns of either plaintiffs or defendants and falls far short of achieving the purposes that the Court set out for it. Although it may be true that "[i]t is a very hard undertaking to seek to please everybody,"107 the qualified immunity doctrine is a failure even by its own standards.

The ultimate resolution of Anderson108 illustrates the problems with the current doctrine. The Supreme Court provided the lower
court with explicit directions on how to proceed on remand.\textsuperscript{109} In accordance with these directions, the district court first established the facts involved in the incident by referring to affidavits provided by witnesses and both parties, to exhibits attached to the affidavits, and to Anderson's deposition. Viewing disputed material facts in the plaintiffs' favor,\textsuperscript{110} the court then analyzed whether any reasonable officer in Anderson's situation could have believed that the actions he took that night were reasonable.\textsuperscript{111} Determining that a reasonable officer could so conclude, the court granted Anderson's motion for summary judgment based upon his qualified immunity defense.\textsuperscript{112} When the district court issued its final order, though, neither Creighton, Anderson, nor the judicial system had benefitted from the Supreme Court's qualified immunity doctrine.

\textbf{The Plaintiffs' Perspective: Rights Denied}

From the plaintiffs' perspective, the application of the doctrine failed to acknowledge that the Creightons had two significant concerns implicit in their lawsuit. Although they indeed sought monetary damages for the alleged violation of their rights, they also sought to establish and vindicate those rights. In what may be a sad commentary on the state of American social development, the qualified immunity doctrine focuses exclusively on the question of damages.\textsuperscript{113}

In addition to denying the Creightons' monetary damages, the judge denied them the opportunity to establish in court that the officers' actions violated their right to "be secure in [their] per-

\textsuperscript{109} [O]n remand, it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful. If they are, then Anderson is entitled to dismissal prior to discovery. If they are not, and if the actions Anderson claims he took are different from those the Creightons allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved. \textit{Anderson}, 483 U.S. at 646-47 n.6 (citation omitted).

\textsuperscript{110} \textit{Anderson}, 724 F. Supp. at 655-56.

\textsuperscript{111} \textit{Id.} at 658-60.

\textsuperscript{112} \textit{Id.} at 661.

\textsuperscript{113} \textit{See} Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) ("In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees."); \textit{see also} Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 408 U.S. 388, 410 (1971) (Harlan, J., concurring) ("For people in Bivens' shoes, it is damages or nothing.").
sons, houses, papers, and effects, against unreasonable searches and seizures.” The district court misstated the result of the case when it said, “Based upon those facts and accepting plaintiffs' version of the disputed facts as true, defendant's search of the Creighton house was objectively reasonable.” The court could not know that the search was objectively reasonable because it did not inquire into whether any “exigent circumstances” did, in fact, justify the warrantless search that Anderson conducted. The court asked only whether “[a]n officer knowing what Anderson did could reasonably have concluded that there was probable cause that [the suspect] was at the Creighton home on November 11, 1983 and that exigent circumstances existed to search the home that night.” As a result, the court misapplied the determination of what a reasonable officer could have believed to be exigent circumstances as establishing the fourth amendment standard of an objectively reasonable search in fact. The ultimate question Anderson poses—whether the circumstances involved actually did constitute exigent circumstances—therefore remains unanswered.

The Defendant's Perspective: Scant Protection

Even though Anderson ultimately won summary judgment in the case against him, the qualified immunity doctrine failed him. In addition to the three years during which the constitutional questions on qualified immunity percolated to the Supreme Court, the Creightons' civil rights suit tied up Anderson for two years following the Court's remand. During that time, Anderson underwent pretrial maneuvering on the scope of discovery, and the plaintiffs ultimately deposed him. The full impact on any defendant in Anderson's shoes of simply being involved in a suit

114. U.S. CONST. amend. IV.
116. See id. at 658-60.
117. Id. at 661.
118. See Graham v. Connor, 490 U.S. 386, 396-99 (1989); see also id. at 399 n.12 (noting the qualified immunity standard of "objective good faith" as distinguished from the fourth amendment standard explained in the text of the decision).
119. For a discussion concerning the inhibition of constitutional development, see infra text accompanying notes 214-24.
can be "devastating." Such involvement may hamper defendants' efforts to obtain loans, keep defendants from disposing of certain real property, subject defendants to great personal and professional stress, and force defendants to lose countless hours defending the suit.

After the suit was over, Anderson and his fellow officers were no better off for having gone through the process. The summary judgment resolution prevented a clear ruling as to whether the officers' actions were in fact lawful. The suit left law enforcement officers to wonder whether similar actions in the future will be good police work or instead will expose them to the same legal jeopardy that Anderson faced.

The System's Perspective: Much Cost at Little Benefit

The qualified immunity doctrine has failed even the judicial system that created it. At the birth of our Nation, James Madison declared that "[j]ustice is the end of government. It is the end of civil society." The doctrine of qualified immunity can be directly counterproductive to that moral ambition. In his dissent to the grant of immunity in *Barr v. Matteo,* Justice Brennan asserted that "the way to minimizing the burdens of litigation does not generally lie through the abolition of a right of redress.

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122. Id.
123. For a discussion of the impact of qualified immunity on the development of constitutional law, see infra text accompanying notes 214-24.
124. Charles H. Whitebread, a law professor and instructor at the FBI National Academy, noted the problem of leaving unclear rules to guide police officers:
For over twelve years, I have taught at the F.B.I. National Academy in Quantico, Virginia. I teach 300 state and local police officers each quarter. From that experience, I feel quite fervently the imperative of rule-oriented decision-making in police related cases. It is a major jurisprudential error for any appellate court to leave the police uncertain as to what they may lawfully do, until a series of subsequent court decisions have supplied the nice factual distinctions necessary to establish the line between permissible and impermissible conduct. Without clear rules, the police will have no reliable idea of what they may do, many mistakes will be made and, if we use exclusion, guilty people will go unpunished because of police mistakes that might not have occurred had the Court stated an understandable rule to govern police conduct.
for an admitted wrong. The method has too much of the flavor of throwing out the baby with the bath." Perfect justice is to ensure not only that no innocent person is found guilty; it is to ensure also that no guilty person goes free. Yet, not only will wrongdoers go free under the Harlow-Anderson doctrine of qualified immunity, their transgressions will go unremedied as well.

The Supreme Court formulated the Harlow standard with a view towards dispensing with frivolous lawsuits as early as possible, yet federal courts remain overwhelmed by a massive volume of civil rights litigation. Unless this country is facing a crisis of contempt for the Constitution, the only possible conclusions from that fact are that the doctrine is not working to exclude frivolous suits, that it is not understood by the parties and legal community, or that it has provided a shield for public officials behind which they have felt free to trample the rights of their fellow citizens.

Procedural Problems: The Summary Judgment Question

Procedurally, the post-Anderson state of the qualified immunity doctrine remains confusing to courts and lawyers. If in Anderson the Court sought to clarify qualified immunity questions, it failed miserably. To date, the issue of qualified immunity under Anderson has been litigated over four hundred times in federal courts alone. The bulk of this confusion results from the application of the principal benefit of qualified immunity: the decision at summary judgment.

The purpose of the summary judgment procedure is "to determine whether an issue set forth in the pleadings is in fact in dispute, and, if not, to eliminate any portion of the case for which trial is not required." Although courts generally have applied the correct standard for summary judgment—that no genuine

127. Id. at 589 (Brennan, J., dissenting).
128. Speech by Judge W. Cox, United States Court of Military Appeals, Norfolk Naval Station, Virginia (June 1989) (paraphrasing).
130. See supra note 19.
131. For an exploration of this idea in greater depth, see infra notes 162-63 and accompanying text.
132. The basis of this assertion is computerized legal research conducted on January 29, 1990, encompassing all reported federal cases citing Anderson in the digest or synopsis of the case.
133. See, e.g., Harlow, 457 U.S. at 817-18.
issue of material fact exists and that the movant is entitled to judgment as a matter of law—the qualified immunity process alters the determination of what constitutes a material fact. The issue is often not what the officer actually did, but how clearly established the law was for the situation at issue and whether a reasonable officer should have known that the actions he allegedly took were illegal. The judge's role in making the summary judgment determination therefore hinges largely upon how the judge decides the three interrelated issues involved in the qualified immunity/summary judgment question:

1. What was the factual situation at the time of the alleged constitutional tort?
2. What constitutes the "reasonable officer?"
3. How clearly established was the law applicable to the situation?

Fulfillment of the "clearly established" standard depends greatly upon the facts of the situation and on how specifically the court defines the situation. The Supreme Court addressed the problem in Anderson, but provided no clear guidance. The determination of the law is clearly a judicial function, but the court must evaluate the "clearly established" question with regard to the framework of the "reasonable officer," not that of the judge.

Finding the Facts: Judge or Jury

The right to a jury trial is embedded in our legal tradition and guaranteed by the seventh amendment. Nonetheless, the

135. FED. R. CIV. P. 56(c). Summary judgment "shall be rendered . . . 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." Id.

136. The court may not focus upon what the officer actually did because courts, in evaluating motions for summary judgment, must view the facts in the light most favorable to the nonmoving party. If the defendant officer is the moving party, the court therefore will view the facts in the light most favorable to the plaintiff. See J. FRIEDENTHAL, M. KANE, & A. MILLER, supra note 134, § 9.3, at 439-40.


138. See infra notes 143-56 and accompanying text.

139. See infra notes 157-85 and accompanying text.

140. See infra notes 186-96 and accompanying text.


142. Id. at 640. According to the Court, "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . [T]he unlawfulness must be apparent." Id.

143. U.S. CONST. amend. VII.
function of the jury is to serve only as a finder of fact, whereas the function of the judge is to decide questions of law. This fact/law division of duty is firmly grounded in the Anglo-American conception of ordered liberty. It arises from the same principles that underlie our form of republican government and provides a balance between freedom and excessive self-interest.

Courts have had little difficulty respecting the boundary between judge and jury in qualified immunity cases in which the facts are not in dispute or the court can readily resolve the questions in the plaintiff's favor. In many cases, however, key facts concerning information known by the official are beyond the plaintiff's knowledge. Without the opportunity to probe an official's credibility, courts must rely on the facts as presented by affidavits or discovery. As the Supreme Court noted in Illinois v. Gates, fourth amendment questions turn on "particular factual contexts," and in Anderson, "The relevant question ... is the objective (albeit fact-specific) question." In granting summary judgment based upon qualified immunity, courts often must usurp the jury's factfinding role.

145. Blackstone noted the democratic value of balancing the magistracy with a jury: The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely intrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity; it is not to be expected from human nature, that the few should be always attentive to the interests and good of the many. On the other hand, if the power of judicature were placed at random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts. It is wisely therefore ordered, that the principles and axioms of law, which are general propositions, flowing from abstracted reason, and not accommodated to times or to men, should be deposited in the breasts of the judges, to be occasionally applied to such facts as come properly ascertained before them. For here partiality can have little scope: the law is well known, and is the same for all ranks and degrees; it follows as a regular conclusion from the premises of fact pre-established.
3 W. BLACKSTONE, COMMENTARIES *379-80.
146. E.g., Anderson v. Creighton, 724 F. Supp. 654, 655-56, 661 (D. Minn. 1989). In Anderson, the only source of information about the basis of Anderson's probable cause to believe that Dixon was in the Creighton house was Anderson himself; yet the plaintiff could not challenge Anderson's credibility in the context of the motion for summary judgment. Cf. id. at 656 (the court accepted Anderson's affidavit and deposition as factually correct without evaluating his credibility).
148. Id. at 232.
Federal circuit courts generally have been willing to allow federal district courts to decide dispositive factual questions in determining matters of intent in qualified immunity cases. Their reliance on judicial factfinding of intent may be misguided, however—at least according to Justice Scalia, the author of the Anderson decision. In Halperin v. Kissinger, then-Judge Scalia stated that “it is impossible to place reliance on the objective reasonableness of an official’s conduct, as measured by reference to clearly established law,” when clearly established law makes the conduct legal or illegal depending upon the intent with which it is performed. Despite that admonition, courts have not hesitated either to decide questions of intent as matters of law or to hold intent irrelevant in the qualified immunity context.

An example of the courts’ tendency to cling tenaciously to the “objective” language of Harlow-Anderson is Walnut Properties, Inc. v. City of Whittier, in which the central issue involved the City Council’s intent in reenacting an ordinance against adult businesses that a federal district court previously had held unconstitutional. The United States Court of Appeals for the Ninth Circuit granted summary judgment based upon qualified immunity, asserting that “[t]he test is wholly objective, and we do not inquire into the actual subjective intent of the official.”

Finding the “Reasonable Officer”

The summary judgment process breaks down even further when the crucial question of fact becomes one of “reasonableness.” As Justice Oliver Wendell Holmes noted, “The distinction between the functions of court and jury does not come in question

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150. See, e.g., Yalkut v. Gemignani, 873 F.2d 31, 35 (2d Cir. 1989) (whether Internal Revenue Service agents acted beyond their authority in levying on attorney’s bank account); Walnut Properties, Inc. v. City of Whittier, 861 F.2d 1102, 1111 (9th Cir. 1988) (whether reenactment of ordinance previously held unconstitutional was done with wrongful intent), cert. denied, 490 U.S. 1006 (1989); Poe v. Haydon, 853 F.2d 418, 432 (6th Cir. 1988) (whether supervisors acted with discriminatory intent), cert. denied, 488 U.S. 1007 (1989); Rakovich v. Wade, 850 F.2d 1180, 1204 (7th Cir.) (en banc) (whether plaintiff’s dismissal from police department was based upon improper intent), cert. denied, 488 U.S. 968 (1988).
151. 807 F.2d 180 (D.C. Cir. 1986).
152. Id. at 184 (citation omitted).
153. See supra note 150. Indeed, “whether conduct violates constitutional rights often depends upon the intent that characterizes the conduct.” Rudovsky, supra note 5, at 62.
154. 861 F.2d 1102.
155. Id. at 1110.
156. Id. at 1111 (citing Davis v. Scherer, 468 U.S. 183, 191 (1984)).
The problem is that because so many factors are involved in determining what is or is not reasonable, "[a] standard which requires only conduct proportionate to the circumstances and the risk seldom, if ever, can be made a matter of absolute rule." 157

Whether a judge may determine "reasonable man" questions as a matter of law has divided judges since the Holmes-Cardozo railroad crossing cases. 159 Although current federal practice has the jury decide reasonable person questions, 160 the Supreme Court in Harlow and Anderson encouraged the lower courts to dispose of seemingly frivolous cases as early as possible through summary judgment. 161

The wide variety of ways in which federal circuit courts have resolved qualified immunity questions amply demonstrates the confusion surrounding the doctrine. 162 Although all of the circuits

159. Compare Baltimore & Ohio R.R. v. Goodman, 275 U.S. 66 (1927) with Pokora v. Wabash Ry., 292 U.S. 98 (1934). In Goodman, Holmes attempted to "[l]ay down a standard once for all," requiring an automobile driver approaching a railroad crossing with an obstructed view to stop, look, and listen, and if he could not be sure otherwise that no train was coming, to get out of the car. Goodman, 275 U.S. at 70. Justice Cardozo discarded that rule in Pokora, holding that the failure to get out of one's car at obstructed crossings was not necessarily unreasonable: "Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. . . . Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the common-place or normal." Pokora, 292 U.S. at 105-06.
160. C. Wright, A. Miller, & M. Kane, 10A Federal Practice and Procedure § 2729, at 194 (2d ed. 1983) ("Particular deference has been accorded the jury . . . in light of its supposedly unique competence in applying the reasonable man standard to a given fact situation.").
162. Compare Harrell v. United States, 875 F.2d 828 (11th Cir. 1989) (whether Coast Guard arrest, stripsearch, and detention were reasonable); Günter v. Stalcup, 869 F.2d 384 (8th Cir. 1989) (whether destruction of house by police gunfire and burning to apprehend murder suspect was reasonable); Henry v. Perry, 866 F.2d 657 (3d Cir. 1989) (whether use of deadly force against escaping prisoner was reasonable); Osabutey v. Welch, 857 F.2d 220 (4th Cir. 1989) (whether the search of a suspect and his automobile based upon an informant's tip was reasonable); Giacalone v. Abrams, 850 F.2d 79 (2d Cir. 1988) (whether defendant supervisors' belief that their interest in office efficiency outweighed the plaintiff's first amendment interests was reasonable) with Waldrop v. Evans, 871 F.2d 1039 (11th Cir. 1989) (whether medical treatment of prisoner was reasonable); Feagley v. Waddell, 868 F.2d 1437 (5th Cir. 1989) (whether conduct of officials at state school for mentally retarded was reasonable); Walters v. Western State Hosp., 864 F.2d 695 (10th Cir. 1988) (whether state hospital's treatment of patient with isolation and psychotropic drugs was reasonable); Unwin v. Campbell, 863 F.2d 124 (1st Cir. 1988) (whether prison guard's actions in subduing inmates were reasonable).
have applied the Harlow-Anderson standard, they have varied in their willingness to decide what is or is not reasonable conduct as a matter of law. In general, courts have been more willing to decide reasonableness as a matter of law in cases involving law enforcement officials as defendants than they have been in cases involving physicians.\textsuperscript{163}

The United States Court of Appeals for the Eleventh Circuit illustrated this difference in approach in two recent decisions. In \textit{Harrell v. United States},\textsuperscript{164} the court found that a reasonable Coast Guard officer in the defendant's position could have believed his actions were lawful.\textsuperscript{165} In \textit{Waldrop v. Evans},\textsuperscript{166} however, the court found that the interpretation of the quality of care provided by the defendant doctors was a question of material fact which precluded summary judgment.\textsuperscript{167} The court is certainly well suited to decide matters of law, but it is unlikely to have any more experience as to what a "reasonable Coast Guard officer" would believe than what a "reasonable doctor" would believe.\textsuperscript{168} Yet, although the court realized that it lacked the professional medical expertise to evaluate the actions of a physician, it did not similarly conclude that only a professional law enforcement officer could accurately evaluate the reactions of another officer.\textsuperscript{169}

Judges who nonetheless undertake to evaluate the reasonableness of an officer's conduct must determine how to assess actions taken under the stress of urgent law enforcement situations. Because cases involving questions of the reasonableness of police conduct present very fine shades of distinction between approved and disapproved police conduct,\textsuperscript{170} courts may be ill-suited to

\begin{footnotes}
\footnote{163. \textit{See supra} note 162.}
\footnote{164. 875 F.2d 828.}
\footnote{165. \textit{Id.} at 831.}
\footnote{166. 871 F.2d 1030.}
\footnote{167. \textit{Id.} at 1035-36.}
\footnote{168. \textit{See Schwartz, Stop and Frisk (A Case Study in Judicial Control of the Police)}, 58 J. \textit{Crim. L., Criminology \& Police Sci.} 433, 444-45 (1967). Schwartz notes that courts generally must follow police judgment, "for what else can the judge really do? . . . if the officer whos [sic] conduct is under review is an experienced patrolman, which the judge almost never is." \textit{Id.} at 445.}
\footnote{169. \textit{Harrell}, 875 F.2d at 831.}
\footnote{170. Compare \textit{United States v. Jennings}, 468 F.2d 111 (9th Cir. 1972) (holding unreasonable officer's detention of a suspect for 25 minutes because suspect cooperated fully and no additional suspicion developed) with \textit{United States v. Richards}, 500 F.2d 1025 (9th Cir. 1974) (holding reasonable officer's detention of a suspect for over one hour in case in which suspect gave implausible answers to questions). \textit{See generally} Y. \textit{Kamisar, W. Laffave, \& J. Israel, Basic Criminal Procedure} 285 (1990) (on distinguishing permissible from impermissible conduct).}
\end{footnotes}
evaluate "all of [the] subtle considerations to be balanced by the [officer] on the spot, in a matter of seconds or minutes."\textsuperscript{171}

The question of which standard judges—or juries, for that matter—should use to evaluate the reasonableness of an official's conduct or knowledge of the law further complicates the issue. Is the "reasonable officer" standard to be a national standard—similar to the general standard in medical malpractice cases—a local standard, or an agency standard?\textsuperscript{172} An additional question is the degree to which the standard either takes into account the official's training or, alternatively, makes him potentially liable for his agency's failure to disseminate legal information properly.\textsuperscript{173} What may be unreasonable to a college-educated FBI agent in Washington, D.C., may seem quite reasonable to a young Customs patrol officer in Beaufort, North Carolina. As Justice O'Connor noted in her dissenting opinion in \textit{Illinois v. Krull},\textsuperscript{174} "it is not apparent how much constitutional law the reasonable officer is expected to know."\textsuperscript{175}

Two recent section 1983 cases involving allegations of excessive police force provide a comparison of the disparate outcomes possible under the \textit{Harlow-Anderson} standard. In \textit{Thorsted v. Kelly},\textsuperscript{176} the plaintiff alleged that a Beverly Hills, California, police officer used excessive force by handcuffing her after she attacked him and grabbed his pistol in a scuffle.\textsuperscript{177} The United States Court of Appeals for the Ninth Circuit held that "the question of whether a reasonable officer placed in the circumstances faced by Kelly could reasonably believe that his conduct was legal is a fact-specific one, and was appropriately given to the jury."\textsuperscript{178}

\textsuperscript{171} Y. Kamisar, W. Lafave, & J. Israel, \textit{supra} note 170, at 448.

\textsuperscript{172} Under a local standard, judges determining reasonableness would consider the nature of the geographic area in which the defendant acted. \textit{See} Prosser \& Keeton, \textit{supra} note 158, \S 32, at 187-88. Reasonableness would thus mean very different things to officials in an undeveloped rural area such as the Texas border area than it would to officials in an urban area such as Boston, Massachusetts. Under an agency standard, the reasonableness of an official's action could depend upon the agency in which the defendant served. \textit{Cf. id.}

\textsuperscript{173} For example, Customs Service standards could find reasonable actions that Coast Guard standards would find unreasonable.

\textsuperscript{174} \textit{See generally} S. Wasby, \textit{Small Town Police and the Supreme Court} 217-23 (1976) (discussing the limited dissemination of new law to police officers).

\textsuperscript{175} 480 U.S. 340 (1987) (allowing the admission of evidence obtained during a search conducted pursuant to a statute that a federal district court found unconstitutional one day after the search).

\textsuperscript{176} Id. at 367 (O'Connor, J., dissenting).

\textsuperscript{177} 855 F.2d 571 (9th Cir. 1988).

\textsuperscript{178} Id. at 572.
In *Graham v. Connor*, a recent Supreme Court case, a police officer, unaware that Graham was a diabetic suffering from an insulin reaction, became suspicious after watching Graham dash into and then out of a store. The officer stopped Graham to investigate the matter, but ignored Graham's explanation of his situation and pleas for help and inflicted several serious injuries upon him. The district court granted a directed verdict for the officer on the question of the use of excessive force, and the United States Court of Appeals for the Fourth Circuit affirmed. Although the officer did not seek qualified immunity, the Supreme Court noted that "the officer's objective 'good faith'—that is, whether he could reasonably have believed that the force used did not violate the fourth amendment—may be relevant to the availability of the qualified immunity defense to monetary liability." The Court then remanded to the court of appeals "for reconsideration . . . under the proper Fourth Amendment standard." Given that both the district court and the Fourth Circuit concluded that the officer's actions were constitutional prior to the Supreme Court's hearing of the case, the officer probably will avoid liability on remand under a qualified immunity defense.

**Determining When Law is Clearly Established**

The judicial determination of whether the law that the official allegedly violated is "clearly established" hinges upon the resolution of the two foregoing questions: the factual situation in which the officer acted and the reasonableness of the officer's belief that the questioned acts were not unlawful in that context. In addition, although the Court in *Anderson* noted that "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense," its opinion did not provide any clear rule establishing how particularized the situation must be other than that "[t]he contours of the right must be sufficiently clear that a

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180. Id. at 389.
181. Id. at 389-90.
183. 827 F.2d 945 (4th Cir. 1987).
185. Id. at 399.
187. Id. at 640.
reasonable official would understand that what he is doing violates that right.”

The United States Court of Appeals for the Seventh Circuit demonstrated the potential for such a standard to become virtually meaningless in its decision in *Rakovich v. Wade.* The plaintiff in *Rakovich* alleged that officials charged him with crimes in retaliation for his criticisms of local police departments. Dismissing the claim, the court held that precedents must be very closely analogous for the law to be clearly established, noting that “the balancing of competing interests . . . is so fact dependent that the ‘law’ can rarely be considered ‘clearly established.’” Even though a number of precedents had held that retaliatory action based upon a person’s assertion of first amendment rights was improper, none had considered quite the same facts as those at issue in the case at bar. As a result, the court held, the law was not clearly established, and a directed verdict under qualified immunity was proper. Under such a standard, the doctrine of qualified immunity approaches the level of absolute immunity.

In deciding whether the law is clearly established, courts typically will look at the law from a lawyer’s, not a law enforcement officer’s, perspective. They also look to the constitutional, statutory, or case law in effect at the time of the alleged acts. For decisional law, courts consider Supreme Court decisions, decisions within their circuit, and cases from other circuits. Few courts, if any, consider the law from the viewpoint of the

188. *Id.*
189. 850 F.2d 1180 (7th Cir. 1988) (en banc) (court granted summary judgment based upon qualified immunity).
190. *Id.* at 1183-87.
191. *Id.* at 1213 (quoting Benson v. Allphin (Benson II), 786 F.2d 268, 276 & n.18 (7th Cir. 1986)): “There is one type of constitutional rule, namely that involving the balancing of competing interests, for which the standard may be clearly established, but its application is so fact dependent that the ‘law’ can rarely be considered ‘clearly established.’ . . . It would appear that whenever a balancing of interests is required, the facts of the existing caselaw must closely correspond to the contested action before the defendant official is subject to liability under *Harlow.* With *Harlow’s* [sic] elimination of the inquiry into actual motivations of the official, qualified immunity typically casts a wide net to protect government officials from damage liability whenever balancing is required. There may, of course, be a situation in which the defendant’s actions are so egregious that the result of the balancing test will be a foregone conclusion, even though prior caselaw may not address the specific facts at issue.
192. *Id.* at 1213-14.
194. *Id.*
officer, who is likely to have only the most basic knowledge of

the law. That knowledge is limited by the training provided by the officer's agency, which is almost certain to take months to disseminate new law.

Jurisprudential Problems

Duplication of the Probable Cause Standard

In Llaguno v. Mingey, Judge Posner of the Seventh Circuit biting criticized the Harlow standard of qualified immunity, which distinguished between the fourth amendment standard of reasonableness and the qualified immunity standard of reasonableness. Giving defendants two opportunities to establish "reasonableness," remarked Posner, was like giving "two bites at the apple."

Justice Scalia attempted to rebut that criticism in Anderson by stating that conduct that would be unreasonable within the meaning of the fourth amendment might still be "objectively

195. See generally H. Uviller, Tempered Zeal 98-101 (1988) (describing the "confident misunderstandings" of police in the field). Uviller, a law professor who spent a year working with New York City patrol officers, noted that although many officers were sensitive to legal constraints on their actions, they tended to adopt a ritualistic understanding of how those rules actually operate. Id.

196. See S. Washy, supra note 173, at 217-23. See generally R. Harris, The Police Academy: An Inside View 98-107 (1973) (describing the lack of effectiveness of police training on constitutional issues); H. Uviller, supra note 195 (providing a lawyer's view of how police go about their day-to-day business).

In Brower v. County of Inyo, 489 U.S. 593 (1989), the Court ruled that stopping a suspect with a police roadblock constituted a seizure, which could be either reasonable or unreasonable depending upon the circumstances involved. Id. at 598-600. On remand from the Court, the Ninth Circuit held that the roadblock at which the plaintiff's decedent died could be unreasonable if it was set up as alleged. 884 F.2d 1316, 1318 (9th Cir. 1989). After Brower, any officer who successfully sets up a roadblock to stop a fleeing felon may be subject to damages for a constitutional tort alleging an unreasonable seizure. Even if the officer is aware of this recent statement of the constitutional status of roadblocks, however, the Court has provided scant guidance on what constitutes a "reasonable" roadblock.

197. 763 F.2d 1560 (7th Cir. 1985) (en banc).

198. Id. at 1569. In explaining his position, Posner wrote:

The question whether they had probable cause depends on what they reasonably believed with reference to the facts that confronted them, as the judge instructed in the passage we quoted earlier. To go on and instruct the jury further that even if the police acted without probable cause they should be exonerated if they reasonably (though erroneously) believed that they were acting reasonably is to confuse the jury and give the defendants two bites at the apple.

Id.
legally reasonable” for the purpose of qualified immunity. He described the problem as one of semantics only, asserting that the “reasonably unreasonable” argument would not be available if “an equally serviceable term, such as ‘undue’ searches and seizures [had] been employed.” Scalia noted that “regardless of the terminology used,” the boundaries of constitutionality represent a reasonable “accommodation between governmental need and individual freedom.”

The Court failed to realize that the justification for creating a distinction between reasonableness for qualified immunity purposes and reasonableness for fourth amendment purposes implied an anomaly which could threaten its recent probable cause jurisprudence. In its decision in Anderson, the Court declared that “[w]e have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment.” The Court’s cases on point, however, demonstrate a contrary proposition—that the fourth amendment standard is a “common-sense, practical question” based upon “the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” In Illinois v. Gates, decided in 1983, and more recently in Graham v. Connor, decided in 1989, the Court affirmed a “totality of the circumstances” test as a practical standard for determining fourth amendment questions. The objectively reasonable standard for

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200. Id. at 643.
201. Id. at 643-44.
202. Id. at 644 (citing Malley v. Briggs, 475 U.S. 335, 341 (1986)). The passage in Malley that the Court cited, however, noted only that qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” Malley, 475 U.S. at 341. The Court in Anderson apparently attempted to make the point that only the “incompetent” would be unreasonably unreasonable. Anderson, 483 U.S. at 644.
204. Id. at 231 (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).
206. See id. at 396-97 (holding that the totality of the circumstances determines reasonableness of force); Gates, 462 U.S. at 238 (holding that the totality of the circumstances forms the basis for probable cause for search warrants); see also United States v. Sokolow, 490 U.S. 1 (1989) (holding that the use of “drug courier profiles” is constitutional); New Jersey v. T.L.O., 469 U.S. 325 (1985) (holding that the totality of circumstances determines the constitutionality of the school officials’ searches of students); United States v. Leon, 468 U.S. 897 (1984) (holding that the good faith exception to the exclusionary rule applies to reasonable reliance on a defective search warrant).
qualified immunity that the Court set out in *Anderson*\(^{208}\) thus appears indistinguishable from the objectively reasonable standard for the fourth amendment that it set out in *Graham*.\(^ {209}\)

The use of the objectively reasonable standard for both the qualified immunity and the constitutionality questions poses procedural as well as substantive hazards. When a court decides the qualified immunity issue, it may be deciding the merits of the plaintiff's claim as well.\(^ {210}\) In the context of criminal trials, in which judges must pass on suppression motions, Oliver Wendell Holmes may have been accurate in noting that "to this day the question of probable cause is always passed on by the court."\(^ {211}\) In the context of civil trials, however, whether an officer had probable cause is more properly a question for the jury, and the court should grant summary judgment only if no reasonable jury could find that probable cause existed.\(^ {212}\)

By saying that probable cause did not exist, a court in effect says that a reasonable officer would not believe that he was justified in taking the action involved. In other words, the actions are objectively unreasonable. The *Anderson* question of whether the law was clearly established at the time the officer acted should be considered more properly as a single factual element of the constitutional question, rather than as a separate test for immunity. A judicial decision on the constitutionality of certain actions reflects societal concerns, balancing of competing policies, and jurisprudence, as well as reasonableness. Thus, an officer could view clearly established law as objectively unreasonable in some situations, just as he could view some actions as unreasonable even in the absence of clearly established law.\(^ {213}\)


\(^{209}\) *Graham*, 490 U.S. at 396-97. Similarly, the Court held that the objectively reasonable standard it applied in *Malley* was the same standard it applied in *Leon*. *Malley* v. Briggs, 475 U.S. 335, 344 (1986) (citing *Leon*, 468 U.S. 897).


\(^{211}\) O.W. Holmes, *supra* note 157, at 115.

\(^{212}\) See *White* v. Pierce County, 797 F.2d 812, 815 (9th Cir. 1986).

\(^{213}\) See *R. Harris*, *supra* note 196, at 102-03, for a discussion of police instructors' feelings about constitutional law. According to Harris, many police instructors have told their recruits that *Miranda* warnings are unnecessary and adverse to law enforcement. *Id.* Compare the reasonableness of the law enforcement officers' actions in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (in which officers entered plaintiff's home and arrested him without a warrant), with those at issue in *Graham v. Connor*, 490 U.S. 386 (in which officer inflicted injuries upon diabetic who was suffering from an insulin reaction).
Inhibition of Constitutional Development

The qualified immunity doctrine also does not give full consideration to the societal and citizen interests implicated in a constitutional tort lawsuit. The plaintiff bringing a suit alleging a constitutional tort has two interests at stake: compensation for the constitutional injury and establishment or vindication of a constitutional right. Cases dismissed under the qualified immunity doctrine fail to determine whether officials in fact violated plaintiffs' rights. As a result, the constitutional boundaries of official action remain unclear and undeveloped.

A number of court decisions upholding grants of qualified immunity explicitly declined to determine the fundamental question of whether the acts complained of were in fact lawful. The unspoken assertion in such cases was that the courts themselves did not know what the law was in the situation at bar and would not go to the trouble of determining the law because a motion for summary judgment did not require such a determination.

The qualified immunity doctrine in effect represents a policy decision that, for cases falling within gray areas, the need for vigorous action by public officials outweighs a plaintiff's desire for compensation. The doctrine does not take into account the societal interest in clarifying and protecting constitutional rights.

214. See Harrell v. United States, 875 F.2d 828, 831 (11th Cir. 1989). In Harrell, the plaintiff asked the United States Court of Appeals for the Eleventh Circuit to consider the constitutionality of the reboarding of a vessel and the arrest, search, and detention of its crew by Coast Guard boarding officers. Id. at 830-81. Rather than answer the question, the court stated:

Lt. Atkin appears not to have violated the constitution at all; but, if he did, we have no reluctance to say that a reasonable officer in Lt. Atkin's position would have believed his actions were lawful. This is sufficient for immunity, and we find Lt. Atkin entitled to qualified immunity as to the constitutional torts.

Id. at 831; see also Osabutey v. Welch, 857 F.2d 220 (4th Cir. 1988). In Osabutey, the plaintiffs brought a § 1983 action alleging that the defendant officers conducted an unconstitutional search and seizure when they detained and searched the plaintiffs and their car based upon an informant's tip. Id. at 221-23. Instructing the district court to grant summary judgment for the police defendants, the United States Court of Appeals for the Fourth Circuit asserted:

Exigent circumstances vary from case to case, and a determination of the issue is of necessity fact-specific. Although it is tempting, we need not, and do not, decide whether the search of plaintiffs was constitutional. Rather, our inquiry is limited to whether the officers could reasonably believe that their action was permissible within the limits of clearly established constitutional principles.

Id. at 224 (citing United States v. Turner, 650 F.2d 526, 528 (4th Cir. 1981)).

In the criminal justice context, by contrast, clarifying and protecting constitutional rights is paramount; courts refuse to admit evidence obtained in violation of the Constitution, even when such a refusal requires courts to set free dangerous criminals.\(^{216}\) In creating the exclusionary rule, the Supreme Court concluded,

> The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.\(^{217}\)

As the Court noted when it extended the exclusionary rule to the states in *Mapp v. Ohio*,\(^ {218}\) "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."\(^ {219}\)

In the context of a civil suit, however, the qualified immunity doctrine sets up a Catch-22 situation. The law is not clearly established, so qualified immunity protects the official's actions. The law remains unclear because the case is resolved through the immunity defense and the courts never determine the law. The immunity doctrine thus freezes constitutional law in the civil context, leaving its clarification almost exclusively to the criminal context.\(^ {220}\) The resulting chilling effect on constitutional law is

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218. 367 U.S. 643.

219. Id. at 659.

220. See *Terry v. Ohio*, 392 U.S. 1, 13-14 (1968). As the Court explained in *Terry*:

   [I]n our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents . . . [but] the exclusionary rule . . . is powerless to deter invasions of constitution-
clearly contrary to the wisdom Thomas Jefferson expressed when he wrote that "[n]o society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation."221

The qualified immunity doctrine thus poses an added danger in that it may greatly restrict the protection of constitutional rights.222 Anderson v. Creighton223 provides a vivid example of how the doctrine freezes constitutional law and exposes citizens to greater police latitude. Because the Court resolved Anderson by summary judgment without reaching the principal issue of whether exigent circumstances justified the search of the Creighton residence, the Court did not clearly establish the constitutional law with regard to exigent circumstances in similar situations. The qualified immunity standard thus denied not only satisfaction of the Creightons' rights, but also clear guidance to well-meaning law enforcement officers who may find themselves in the same situation as Anderson. Dissenting in Anderson, Justice Stevens wrote, "I see no reason why the family's interest in the security of its own home should be accorded a lesser weight than the Government's interest in carrying out an invasion that was unlawful."224

STATUTORY PROTECTION UNDER THE FTCA: FIGHT THAT CLAIM ALONE?

The Imperfect Protection of the FTCA

The Supreme Court is not to blame for the problems arising under the qualified immunity doctrine, however. The problem is that the doctrine represents a patchwork judicial solution to an


222. For a discussion of this danger, see The Supreme Court, supra note 73, at 220: [In Anderson], [t]he Court also made clear that Harlow will now protect not only high-level officials of the executive branch but also officers in the field. Taken together, the Court's rulings extend to law enforcement officers a new layer of protection that threatens to increase the number of unremedied violations of the fourth amendment.


224. Id. at 666 (Stevens, J., dissenting).
inherently legislative problem. Immunizing public officials implicates important policy decisions regarding the social value of protecting officials from lawsuits arising from the performance of their duties. As the Court noted in *Harlow v. Fitzgerald*,\(^2\) costs "of this immunization include the expenses of litigation, the diversion of official energy from pressing public issues, the deterrence of able citizens from acceptance of public office," and the cooling of officials' ardor in the discharge of their offices.\(^2\)\(^6\) Although Congress has acted to immunize federal officials from common law torts,\(^2\)\(^7\) it has expressly declined to do so for constitutional torts.\(^2\)\(^8\)

In the *FTCA*, Congress provided that the government would be liable for the negligent or wrongful acts of its employees "acting within the scope of [their] . . . employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."\(^2\)\(^9\) The original act, however, expressly excluded claims arising out of law enforcement activities.\(^2\)\(^3\)

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\(^2\)\(^2\) 457 U.S. 800 (1982).

\(^2\)\(^6\) Id. at 814.

\(^2\)\(^7\) See 28 U.S.C. § 2679(b)(1) (1988), which provides:

The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

\(^2\)\(^8\) See id. § 2679(b)(2), which provides:

Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

See also 134 CONG. REC. S15,600 (daily ed. Oct. 12, 1988) (discussing 1988 amendments to the *FTCA* as a response to "an immediate crisis of personal liability for the entire Federal workforce" for common law torts while leaving unaffected the right to *Bivens* actions or constitutional tort claims).

\(^2\)\(^9\) 28 U.S.C. § 1346(b).

\(^2\)\(^3\) See id. § 2680(h) (proviso inserted by 1974 amendments) (see infra note 241). The original act included the following exceptions:

The provisions of this chapter and section 1346(b) of this title shall not apply
In 1972, frustrated with congressional inaction, the Supreme Court created a cause of action for constitutional torts allegedly committed by federal officers in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.* As Chief Justice Burger conceded in his remarkable dissent, "[A]n unlawful act against a totally innocent person—such as petitioner claims to be—has been left without an effective remedy."232

Burger did not dispute the compelling nature of Bivens' complaint, but noted that "[t]his case has significance far beyond its facts and its holding."233 The Chief Justice took issue with the majority's judicial creation of a damage remedy in violation of the separation of powers doctrine: "Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not."234

After a few introductory paragraphs, Burger dedicated the remainder of his dissent to exploring the weaknesses of a previously created judicial remedy for violation of constitutional rights—the exclusionary rule. The Chief Justice concluded that "Congress should develop an administrative or quasi-judicial remedy against the Government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated. The venerable doctrine of *respondeat superior* in our tort law provides an entirely appropriate conceptual basis for this remedy."235

The Chief Justice gave as an example the hypothetical situation of a security guard who assaults a customer.236 Under tort law, Burger noted, the customer would have a cause of action against

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(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

...  

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. ...  

*Id.*
231. 403 U.S. 388, 397 (1971).
232. *Id.* at 415 (Burger, C.J., dissenting).
233. *Id.* at 412 (Burger, C.J., dissenting).
234. *Id.*
235. *Id.* at 422 (Burger, C.J., dissenting).
236. *Id.*
the employer.237 "Such a statutory scheme would have the added advantage of providing some remedy to the completely innocent persons who are sometimes the victims of illegal police conduct—something that the [exclusionary rule], of course, can never accomplish."238 In addition, Burger noted that damage verdicts for the acts of employees have often been big enough "to provide an effective deterrent and stimulate employers to corrective action."239 The Chief Justice actually went so far as to spell out recommended provisions for a statute dealing with allegations of the commission of constitutional torts by federal officials.240

In 1974, Congress responded to the Bivens decision by extending the FTCA to claims arising out of the acts or omissions of law enforcement officers of the United States, including claims of assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution.241 Nonetheless, Congress did

237. Id. (citing W. Prosser, THE LAW OF TORTS § 68, at 470-80 (3d ed. 1964)).
238. Id.
239. Id. at 421 n.5 (Burger, C.J., dissenting).
240. Burger recommended the following provisions:
   (a) a waiver of sovereign immunity as to the illegal acts of law enforcement officials committed in the performance of assigned duties;
   (b) the creation of a cause of action for damages sustained by any person aggrieved by conduct of governmental agents in violation of the Fourth Amendment or statutes regulating official conduct;
   (c) the creation of a tribunal, quasi-judicial in nature or perhaps patterned after the United States Court of Claims, to adjudicate all claims under the statute;
   (d) a provision that this statutory remedy is in lieu of the exclusion of evidence secured for use in criminal cases in violation of the Fourth Amendment; and
   (e) a provision directing that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of violation of the Fourth Amendment.

241. See 28 U.S.C. § 2680 (1988), which lists the following exceptions:
   The provisions of this chapter and section 1346(b) of this title shall not apply to—
   
   (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.
not extinguish the *Bivens* action, as the Court noted in *Carlson v. Green*. In *Carlson*, the Court held that Congress intended the FTCA and *Bivens* to provide "parallel, complementary causes of action."\(^\text{243}\)

**Opportunity Avoided: The 1988 Amendments to the FTCA**

In 1988, the Supreme Court dealt a heavy blow to federal employees' immunity from suit in *Westfall v. Erwin*.\(^\text{244}\) The Court held that government employees would be immune only for acts that were both discretionary, rather than ministerial, and within the scope of the employees' duties.\(^\text{245}\) Reacting to *Westfall*, Congress moved quickly to plug the new "discretionary gap" in official immunity.\(^\text{246}\) By November 18, 1988, Congress had amended the FTCA to make it the exclusive cause of action for common law torts arising from the acts or omissions of government employees acting within the scope of their duties.\(^\text{247}\) Congress failed to include *Bivens* suits in the exclusivity provisions, however, expressly exempting constitutional torts from FTCA coverage.\(^\text{248}\) The report of the Subcommittee on Administrative Law

\(^{242}\) 446 U.S. 14 (1980).

\(^{243}\) Id. at 20. The Court quoted congressional comments that accompanied the 1974 FTCA amendments:

> [A]fter the date of enactment of this measure, innocent individuals who are subjected to raids [like that in *Bivens*] will have a cause of action against the individual Federal agents and the Federal Government. Furthermore, this provision should be viewed as a counterpart to the *Bivens* case and its progeny [sic], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved).

Id. (quoting S. REP. No. 588, 93d Cong., 2d Sess. 3 (1973), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 2799, 2791 (emphasis added by the Court)).

\(^{244}\) 484 U.S. 292 (1988).

\(^{245}\) Id. at 297-98.

\(^{246}\) See generally H.R. REP. No. 700, 100th Cong., 2d Sess., reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 5945 (report of the Subcommittee on Administrative Law and Governmental Relations, Committee of the Judiciary, recommending legislative action to negate the impact of the *Westfall* decision).


and Governmental Relations, Committee of the Judiciary, explained the exclusion by noting that "this type of tort [is] a more serious intrusion of the rights of an individual that merits special attention. Consequently, [the amendments] would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights."\(^249\)

The executive branch, through the Attorney General's office, strongly supported the amendments, noting the importance of respondeat superior protection for governmental employees.\(^250\) The Attorney General's office, however, disagreed with the exclusion of constitutional torts from FTCA protection,\(^251\) but did not belabor the point. The office stated:

> We recognize, however, that such legislation always has been somewhat controversial because of its constitutional rights dimension. And while our position on the propriety of a *Bivens* bill remains the same, litigating *Bivens* cases will not much change as a result of *Westfall*, which changed the law only as it concerns common law torts.\(^252\)

Mark Roth, General Counsel for the American Federation of Government Employees (AFL-CIO), also recommended the removal of the exclusion to the Subcommittee, noting that section 2676 of the FTCA provides that a judgment under the FTCA is a bar to any other actions.\(^253\) Roth contended that "clarity would

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Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.


\(^{250}\) *Hearings, supra* note 121, at 71-80 (statement of Robert L. Willmore, Deputy Assist. Att'y Gen., Civil Div., Dep't of Justice).

\(^{251}\) See *id.* at 78 for the opinion of Robert L. Willmore, Deputy Assistant Attorney General, Civil Division, Department of Justice:

> There is no change, however, in our long-standing belief that persons whose constitutional rights have been violated by scope-of-employment federal conduct should also be required to sue the United States, not the employee. As this Subcommittee is aware, since *Bivens* was decided in 1971, the Department of Justice, under both Democratic and Republican Administrations, consistently has pursued legislation which would make a suit under the FTCA the exclusive remedy for persons injured by conduct alleged to violate constitutional rights.

\(^{252}\) *Id.*

\(^{253}\) *Hearings, supra* note 121, at 173 (statement of Mark D. Roth, Gen. Counsel, Am. Fed'n of Gov't Employees (AFL-CIO)).
be achieved and possible protracted litigation avoided if the amendment proposed . . . clearly stated that any settlement of, or judgment entered [under the FTCA] . . . shall be an absolute bar against any other civil actions or proceedings arising out of or relating to the same subject matter."

Despite these concerns, Congress was interested primarily in "remedying" the liability threats that the Westfall decision posed and it enacted the FTCA amendments with the exception for constitutional torts intact. In speeches accompanying adoption of the bill, Congress noted merely that the exclusivity provisions did not encompass Bivens actions, apparently believing that such tortious conduct was inherently outside the scope of federal officials' employment. Thus, despite the amendments to the FTCA to protect federal officials from common law liability, officials remain exposed to suit for actions that allegedly violate constitutional rights.

**JUSTICE FOR ALL: BRINGING CONSTITUTIONAL TORTS WITHIN THE FTCA**

In the nine years since Chief Justice Burger urged Congress to take responsibility for all damages resulting from the wrongs of its servants in his dissent in Bivens, both the Court and Congress have expended significant effort in balancing the vindication of constitutional torts against the protection of innocent officials. These efforts have failed because a fair compromise between these interests cannot be struck. Both concerns can be met fully only if the federal government shields its employees and takes responsibility for the wrongs committed in its name. The reasoning that accounts for the waiver of sovereign immunity for common law torts applies with equal force to claims of constitutional torts. Further, including constitutional torts within the ambit of the FTCA would serve the interests of the govern-
ment as well as federal officials, injured citizens, and society as a whole.260

Serving Governmental Interests

From the government's point of view, perhaps the most compelling reason for waiving sovereign immunity for constitutional torts is that doing so would likely save federal expenses in the long run. Government reports noted an expectation that the common law tort exclusivity provisions in the 1988 amendments to the FTCA would result in ultimate cost savings.261 Although the amendments might encourage plaintiffs to bring more suits against the United States,

FTCA defenses usually cost less than personal liability defenses, and FTCA cases are almost always easier to settle than personal liability cases. Also, in the absence of [exclusivity], federal agencies may feel compelled to indemnify federal workers for judgments against them, which could result in greater costs to the federal government than would result from FTCA judgments.262

The Department of Justice currently defends federal employees against lawsuits for actions that reasonably appear to have been performed within the scope of employment.263 In many cases, that

260. See Owen v. City of Independence, 445 U.S. 622 (1980). In holding that § 1983 did not entitle municipalities to immunity, the Court stated in Owen that making governments liable for committing constitutional wrongs accomplishes three major objectives: it compensates the victim for the injury received; it immunizes the public official who acts in good faith from damages "more appropriately chargeable to the populace as a whole;" and it makes the public liable through the government only when the injury was "inflicted by the 'execution of government's policy.'" Id. at 657 (quoting Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 694 (1978)). In addition, the Court noted earlier in its decision that the threat of damages would "encourage [government decisionmakers] to institute internal rules and programs designed to minimize the likelihood [sic] of unintentional infringements on constitutional rights." Id. at 652.


262. Id.

263. 28 C.F.R. § 50.15(a) (1990) provides the following:

Under the procedures set forth below, a federal employee (hereby defined to include present and former Federal officials and employees) may be provided representation in civil, criminal, and Congressional proceedings in which he is sued, subpoenaed, or charged in his individual capacity . . . when the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and . . . representation would otherwise be in the interest of the United States.
representation is in addition to that of the United States as a defendant for common law torts under the FTCA, because "common law tort and constitutional tort claims may be complementary causes of action."264 As a result, the failure to include constitutional torts in the exclusivity provisions of the FTCA provides a loophole for litigious plaintiffs, who could sue both the government on a common law claim and the federal employee on a constitutional claim based on the same incident, such as an automobile accident.265 With constitutional torts excluded from coverage under the FTCA, the government could thus end up defending two cases arising out of the same circumstances. Further, because the Department of Justice may indemnify federal employees for damages arising out of official conduct within the scope of employment,266 the government could even end up paying damages from two suits arising out of the same circumstances.

A waiver of sovereign immunity also would encourage agencies to provide administrative remedies for constitutional wrongs, which would result in further savings. The FTCA requires that plaintiffs present claims to the agency responsible for the conduct complained of.267 Agencies have wide discretion to resolve claims administratively and thus avoid the need to take many cases to trial.268

Protecting Federal Officials

Including constitutional torts under FTCA coverage would effectuate Congress' intent to protect federal employees fully and

264. Hearings, supra note 121, at 174 (statement of Mark D. Roth, Gen. Counsel, Am. Fed'n of Gov't Employees (AFL-CIO)).
265. Id. at 173.

The Plaintiff [could seek] judgment for his injury alleging not only the common-law tort but also a constitutional deprivation of life and limb without due process. Once judgment is entered under the [FTCA] for damages due to the injury, the plaintiff continues to pursue actions because of the constitutional allegation.

266. See 28 C.F.R. § 50.15(12)(c)(1), which provides that:

The Department of Justice may indemnify the defendant Department of Justice employee for any verdict, judgment, or other monetary award which is rendered against such employee, provided that the conduct giving rise to the verdict, judgment, or award was taken within the scope of employment and that such indemnification is in the interest of the United States, as determined by the Attorney General or his designee.

Section (12)(c)(3) provides, however, that the Department will not agree to indemnify or settle the case before entry of an adverse judgment except in extraordinary circumstances. Section (12)(2)(5) makes indemnification contingent on the availability of appropriated funds.

268. See id. § 2672.
fairly\textsuperscript{269} by including all lawsuits that could arise out of the performance of their duties. By definition, an official acting within the scope of his duties acts for the benefit of the government. In \textit{Harlow v. Fitzgerald},\textsuperscript{270} the Court noted that exposing an official to the potential hazards of civil litigation over the performance of public duties carries extensive social costs by deterring vigorous public action.\textsuperscript{271} Statutory protection against those social costs therefore would be in the interests of both the government and public officials. In \textit{Owen v. City of Independence},\textsuperscript{272} the Court denied immunity to local governments for section 1983 actions, noting that it would be "fairer" for the costs of such constitutional violations to be "borne by all the taxpayers."\textsuperscript{273}

Providing statutory protection against suits alleging constitutional torts also would recognize that a significant, if not determinative, factor in the extent of constitutional violations by public officials may be the quality of training provided to the officials.\textsuperscript{274} Exposing a government employee to suit, damages, and calumny due in any part to the government's failure to provide adequate training is unjust.

Disposing of civil damages separately would allow the government to evaluate and deter wrongful conduct by officials through administrative or criminal sanctions without interference in or from an ongoing civil suit. The agency involved often will be in a better position to render a more honest and fair evaluation of the official's conduct because it will be able to determine what the reasonable officer standard is for that agency.

If the acts complained of are egregious, the official could be tried under criminal law.\textsuperscript{275} Although some theorists may view


\textsuperscript{270} 457 U.S. 800 (1982).

\textsuperscript{271} Id. at 814.

\textsuperscript{272} 445 U.S. 622 (1980).

\textsuperscript{273} Id. at 655.

\textsuperscript{274} See supra text accompanying notes 157-85 for a discussion of the reasonable officer.

\textsuperscript{275} Several federal laws prohibit wrongful actions by federal officers. For example, 18 U.S.C. § 2236 (1988) prescribes warrantless searches:

Whoever, being an officer, agent, or employee of the United States or any department or agency thereof, engaged in the enforcement of any law of the United States, searches any private dwelling used and occupied as such dwelling without a warrant directing such search, or maliciously and without reasonable cause searches any other building or property without a search warrant, shall be fined for a first offense not more than $1,000; and, for a
criminal penalties as harsher than civil damages, treating wrong-
ful conduct under criminal law principles would provide additional
protection to the innocent official. To convict, the prosecutor
would have to prove guilt beyond a reasonable doubt, rather
than by a preponderance of evidence, the standard used in civil
trials. Further, the trial could address squarely the central ques-
tion of the accused official's mental state, rather than attempting
to resolve the issue through the circuitous route used in qualified
immunity cases. Thus, if the plaintiff could show that the official
acted with wrongful intent, the court could punish the official
for the wrong done to society as a whole, and the government
would compensate the victim for the wrong inflicted by its
servant, regardless of the jury verdict.

Guarding Individuals' Rights

Including constitutional torts within the FTCA would ensure
that those "more serious intrusion[s] of the rights of an individual
that merit[] special attention" are not denied meaningful re-
dress at law. In a suit against an individual officer, the officer's
financial resources may render a finding for the plaintiff econom-
ically meaningless. From the plaintiff's perspective, the usually
limited resources of the individual officer should not restrict
recovery for constitutional violations. As in the general tort
down doctrine of respondeat superior, the employer should pay for the
foreseeable wrongs of those who act on his behalf. Although

subsequent offense, shall be fined not more than $1,000 or imprisoned not
more than one year, or both.

See also id. § 2235, which specifies punishments for the malicious procurement of a search
warrant: "Whoever maliciously and without probable cause procures a search warrant to
be issued and executed, shall be fined not more than $1,000 or imprisoned not more than
one year." See also id. § 872, which proscribes extortion

In addition, federal officials may be tried under the full panoply of laws of the state in
which the plaintiff alleges the offense occurred. Defendants may remove such cases to
federal court under 28 U.S.C. § 1442(a), which provides that civil and criminal actions
"commenced in a State court against [federal officials] may be removed by them to the
district court of the United States for the district and division embracing the place wherein
it is pending."

276. See generally Harlow v. Fitzgerald, 457 U.S. 800, 815-17 (1982) (discussing the difficulty
of establishing subjective intent at summary judgment as a justification for an objective
reasonableness standard).

277. H.R. REP. No. 700, 100th Cong., 2d Sess. 6, reprinted in 1988 U.S. CODE CONG. &
ADMIN. NEWS 5945, 5950.


279. PROSSER & KEETON, supra note 158, §§ 69-71, at 499-516.
many reasons support the theory of respondeat superior.\textsuperscript{280} The underlying premise is that an enterprise should bear its own losses.\textsuperscript{281} In many cases, only the governmental agency will be able to determine whether the alleged wrongs were authorized; the victim of the official misconduct may have no way of knowing at the time of the incident. As the Court noted in \textit{Bivens}, \textquote{\textquotedblleft Power, once granted, does not disappear like a magic gift when it is wrongfully used.\textquotedblright}\textsuperscript{282}

Perhaps most importantly, including constitutional torts within the FTCA could greatly reduce the number of cases federal district courts summarily dismiss before reaching the merits of the constitutional claim. This reduction would enable citizens to vindicate their constitutional rights by seeking unilateral administrative action from the agency involved or through a trial against the United States on the merits of the claim.\textsuperscript{283} Further, a comparison of the benefits of marginally lawful action with the costs of paying for the damages incurred may encourage the government to avoid testing the limits of constitutionally permissible behavior.\textsuperscript{284}

\textbf{CONCLUSION}

Throughout its development, the doctrine of qualified immunity has represented an uneasy balance between the desire to afford a remedy to a wronged citizen and the need to allow public officials to pursue their duties without fear of frivolous lawsuits. Despite the Supreme Court's best efforts, it has been unable to strike that balance. Cases following the Court's most recent pronouncement on qualified immunity in \textit{Anderson v. Creighton}\textsuperscript{285} have illustrated the practical, procedural, and jurisprudential limitations to the doctrine. The problem is a legislative one. As Chief Justice Burger noted none-too-subtly in \textit{Bivens}, the respon-

\begin{itemize}
\item \textsuperscript{280} \textit{Id.} \textsection 69, at 500. The reasons Prosser gives for vicarious liability of the master include the following: the master exercises "'control' over the behavior of the servant; he has 'set the whole thing in motion,' . . . he has selected the servant and trusted him"; and he has enjoyed the fruits of the servant's labor and so should bear the costs. \textit{Id.}
\item \textsuperscript{281} \textit{Id.}
\item \textsuperscript{283} See \textit{supra} text accompanying notes 214-24 for a discussion of the qualified immunity doctrine's impact on the development of constitutional law.
\item \textsuperscript{284} See \textit{supra} note 260.
\item \textsuperscript{285} 483 U.S. 635 (1987).
\end{itemize}
sibility for balancing the competing policy concerns must rest with Congress:

"And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation. For that course—the true course of judicial duty always—will powerfully help to bring the people and their representatives to a sense of their own responsibility."\(^{286}\)

H. Allen Black

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