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ARTICLES

THE LIABILITY RULE FOR CONSTITUTIONAL TORTS

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INTRODUCTION

THERE is no liability rule for constitutional torts. There are, rather, several different liability rules, ranging from absolute immunity at one extreme to absolute liability at the other. The choice among them does not depend, as the proverbial Martian might expect, on the role of money damages in enforcing particular rights. The right being enforced

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is irrelevant to constitutional tort doctrine. What matters instead is the identity of the defendant or the act she performs. States and state agencies are absolutely immune from damages liability for violations of constitutional rights, no matter how egregious their conduct may be. The same is true for those who perform legislative, judicial, and certain prosecutorial actions. In contrast, local governments are strictly liable for constitutional violations committed pursuant to official policy or custom, even if the right found to have been violated was first recognized after the conduct triggering liability. Most defendants—including federal, state, and local officers—are neither absolutely immune nor strictly liable. Instead, they are protected by qualified immunity, a fault-based standard approximating negligence as to illegality.

This fracturing of constitutional torts into disparate liability rules does not reflect any plausible conception of policy. Although the Court occasionally makes functional arguments about one or another corner of this landscape, it has never attempted to justify the overall structure in those terms. Nor could it. The proliferation of inconsistent policies and arbitrary distinctions renders constitutional tort law functionally unintelligible. Blame may be cast on the shadow (though certainly not the terms) of the Eleventh Amendment, on the incorporation into constitutional tort doctrine of bits and pieces of the common law, and on accidents of timing and personnel: when and under what circumstances did particular issues come to the Court? However sympathetic one may be to the disruptive effect of such fortuities or to the more general difficulty of devising a rational system through episodic pronouncements on constituent issues, the fact remains that constitutional tort doctrine is incoherent. It is so shot through with inconsistency and contradiction as to obscure almost beyond recognition the underlying stratum of good sense.

Academic commentary largely tracks the agenda of cases. Scholars do not always (or often) approve of the Court's decisions, but they generally follow the Court in addressing themselves to questions defined by current doctrine. Thus, there are excellent articles on the several categories of absolute immunity, on the meaning and administration of qualified immunity, and on the official-policy-or-custom requirement that opens the door to strict liability of local governments. The literature on these questions is impressive. But there are relatively few sustained efforts to understand the relations among these issues or to justify particular doctrines in terms applicable to all.

This Article attempts a unified theory of constitutional torts. Less grandly, it offers a comprehensive normative guide to the award of damages for violation of constitutional rights. It seeks generally to align the damages remedy on *one* liability rule, a modified form of qualified immunity with limited deviations justified on functional grounds and constrained by the reach of those functional justifications. As this analysis is explicitly normative, it will not be persuasive to all. That is especially true, given that the analysis is normative in a lawyerly way. It does not assume a blank slate in the law of constitutional remedies, but takes existing doctrine as the place to start and seeks to propose changes to the landscape that we know rather than to substitute a world we can only imagine.

For that reason, the analysis leads with the negative. Critiques of existing doctrine provide the basis for proposed changes. The analysis begins with absolute immunity, then proceeds to absolute liability, and concludes with extended consideration of qualified immunity. I call for curtailment of the first two categories and reform of the third. Overall, these changes would shift the law toward greater damages liability for constitutional liability, but not across the board. Liberalization of recovery would be the net effect of reforms that cut in both directions. The overall goals are preservation of money damages as a means of enforcing constitutional rights; protection against the downside of unconstrained damages awards and their effect on the functioning of government and the development of constitutional law; and rationalization of the law through simplification of existing doctrine. In my judgment, the best balance of those conflicting goals lies in adopting some version of a fault-based standard as the general liability rule for constitutional torts and in adhering closely to that standard in almost all situations. The case for requiring fault, beyond the fact of a constitutional violation, for the award of money damages—which is to say, the case for continuing some version of qualified immunity—is stated in Part III. Much of the groundwork for that argument is laid in Parts I and II, where we begin.

I. ABSOLUTE IMMUNITY

On its face, absolute immunity seems nonsensical. To say that money damages are an appropriate remedy for constitutional violations but that the defendant is absolutely immune from having to pay them reduces constitutional tort to a nullity. Yet surprisingly large areas of current law embrace this contradiction. The President is absolutely immune for any-

thing within the "outer perimeter" of his or her official duties.[1] That may well be justified by the President's role as lightning-rod-in-chief, but absolute immunity also protects many thousands of lesser officials for legislative, judicial, and certain prosecutorial acts that violate constitutional rights. These categories are far more important than presidential immunity and deserve close attention.

A. Legislative and Judicial Immunity

Legislative immunity is said to rest on history. For federal legislators, it is supported by the Speech or Debate Clause,[2] which, though read far too broadly,[3] does at least speak to the issue. For state and local officers, legislative immunity has no hint of textual support. The Court has nevertheless invoked the historical concern for legislative independence and concluded that the enactors of the Civil Rights Act of 1871 (predecessor of 42 U.S.C. Section 1983) must have meant to embrace absolute legislative immunity by passing a statute saying nothing about it.[4] Though the frailty of that assumption seems evident, it is understandable that damages liability for legislators' misconduct would be approached gingerly. The prospect of coercive process and personal judgment against elected representatives for unsound legislative acts (as distinct from bribery and the like) justifies judicial caution. At the very least, such

[1] Nixon v. Fitzgerald, 457 U.S. 731, 755 (1982); cf. Clinton v. Jones, 520 U.S. 681, 693 (1997) (finding no immunity for acts unrelated to the office).

[2] U.S. Const. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.").

[3] The Supreme Court has been quiet about Speech or Debate issues in recent years, but the lower courts have given the clause very broad readings. See, e.g., United States v. Rayburn House Office Bldg., Room 2113, 497 F.3d 654, 666 (D.C. Cir. 2007) (allowing members of Congress to shield bribery, fraud, and corruption by housing incriminating documents in their legislative offices, where search warrants do not reach); James W. McPhillips, Note, "Saturday Night's Alright for Fighting": Congressman William Jefferson, The Saturday Night Raid, and the Speech or Debate Clause, 42 Ga. L. Rev. 1085, 1109 (2008) (noting the "dangerous incentives" of the *Rayburn* decision).

[4] Tenney v. Brandhove, 341 U.S. 367, 376 (1951) ("The limits of [§ 1983] were not spelled out in debate. We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us."). This inference may be sound, but it cannot be confirmed in the legislative history. See David Achtenberg, Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will, 86 Nw. U. L. Rev. 497, 502–11 (1992) (showing that immunity doctrine crafted within the boundaries of the legislative history of the 1871 Act would be much narrower than current law).

proceedings would bring the courts into open conflict with the political process.

Whether avoidance of such confrontations justifies total abrogation of damages for injured parties may be a difficult question, but fortunately it is not often faced. In most circumstances, absolute legislative immunity does not categorically preclude money damages; it merely redirects the litigation. In most cases, an injured party barred from suing the legislator who voted for an unconstitutional statute can sue the executive officer who enforces it. As nearly all legislative acts require executive implementation, there is almost always an executive officer to be sued. And the fact that the enforcing officer acted with legislative authorization is, in itself, no defense.[5] Generally speaking, therefore, absolute legislative immunity is more nominal than substantive. Functionally, it is justified not only—and perhaps not even chiefly—by an overriding need for absolute immunity but also—and crucially—by the generally low cost of making that accommodation.

Judicial immunity is similar. The Court explains it in the familiar terms of a historical pedigree so well established that Congress must have meant to maintain it. As the Court said in *Pierson v. Ray*:

> The legislative record [of Section 1983] gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held . . . that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.[6]

This presumption from silence is the same as that for absolute legislative immunity, though the history is more muddled,[7] but functionally the

[5] Conceivably, the existence of a statute might help support a defendant's claim that "a reasonable officer could have believed" enforcing it to be lawful, Hunter v. Bryan, 502 U.S. 224, 228 (1991) (per curiam), but the "objective legal reasonableness" of the officer's conduct is analytically independent of legislative authorization, Anderson v. Creighton, 483 U.S. 635, 639 (1987) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982)).

[6] 386 U.S. 547, 554–55 (1967).

[7] Compare Douglas K. Barth, Immunity of Federal and State Judges from Civil Suit—Time for a Qualified Immunity?, 27 Case W. Res. L. Rev. 727, 732 n.29 (1977) (stating that in the nineteenth century, judges of inferior courts could be held liable for malicious acts), and Note, Liability of Judicial Officers Under § 1983, 79 Yale L.J. 322, 325 n.25 (1969) (same), with J. Randolph Block, *Stump v. Sparkman* and the History of Judicial Immunity,

cases are distinct. Absolute legislative immunity benefits from the existence of an alternative damages remedy. An injured party barred from seeking damages from a legislator for acts of general applicability may sue the officer who enforces the law against that individual. Because judicial actions are individuated, enforcement is more or less automatic, and there is typically no executive defendant available. Of course, there are the officers who carry out court orders, but in almost all circumstances, it would be objectively reasonable for them to think judicial instructions lawful.[8] As a practical matter, therefore, absolute judicial immunity is in fact absolute; it completely precludes damages liability for judicial violations of constitutional rights.

Yet in a broader sense, absolute judicial immunity, like absolute legislative immunity, is justified by the existence of an alternative remedy. That remedy is appeal. Appellate review does not provide any prospect of compensation—and is in that way inferior to the remedial alternatives for legislative immunity—but it does offer an avenue of redress. And although appeal takes time and money, in most situations it provides a reasonable prospect of correction for judicial error. Superimposing an additional remedial structure for awarding money damages would increase enforcement of rights but at considerable cost in disruption of the

1980 Duke L.J. 879, 887–91 (finding that such liability extended only to administrative duties).

There is an additional complication drawn from the legislative history of § 2 of the 1866 Civil Rights Act, a criminal provision that originated the "under color of" language on which § 1 of the 1871 Act seems to have been based. See George Rutherglen, Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983, 89 Va. L. Rev. 925, 942 (2003). Rutherglen cites a statement by Senator Trumbull, Cong. Globe, 39th Cong., 1st Sess. 1758 (1866), to the effect that the 1866 Act might not shield public officials from criminal punishment for civil rights violations. Rutherglen, supra, at 942. This interpretation provoked opposition in the 1866 debates. See Cong. Globe, 39th Cong., 1st Sess. 500 (1866) (statement of Sen. Cowan). The expression of doubt about extending criminal liability to judicial officers in 1866 may be taken to support *Pierson*'s assumption that the 1871 legislation meant to incorporate common-law judicial immunities, though the inference is obviously not conclusive.

[8] Moreover, there are precedents sustaining a kind of derivative absolute immunity for non-judicial officers acting pursuant to judicial authorization. See, e.g., Davis v. Bayless, 70 F.3d 367, 374 (5th Cir. 1995) (holding a receiver appointed to recover assets of a judgment-debtor and the receiver's attorney absolutely immune for wrongful seizure of property of the judgment-debtor's girlfriend); Murray v. Gilmore, 231 F. Supp. 2d 82, 88–89 (D.D.C. 2002) (holding a receiver appointed to reform the D.C. Department of Public and Assisted Housing absolutely immune against an employee's claim of race and sex discrimination, even though the appointing judge would not have enjoyed absolute immunity for similar conduct), rev'd in part on other grounds, 406 F.3d 708 (D.C. Cir. 2005).

judicial process and the expense of litigation. One need only contemplate damages actions as a routine sequel to appellate reversal to see that the question is difficult. If absolute immunity were withdrawn, most judges, like most executive officers, could successfully invoke qualified immunity. Indeed, qualified immunity would likely be even more protective of judges than of executive officers, given that judges are professionally trained in law, that they act at leisure and with research support, and that they usually have the benefit of argument by counsel. Decisions rendered in such conditions would rarely violate "clearly established" constitutional rights, at least in the grounded and particularized sense required by the Supreme Court. Nonetheless, there are cases of "clear" judicial error, and the question whether persons injured thereby should be able to recover damages is a close call. Sophisticated analysis would have to balance the incremental gain in enforcing constitutional rights against the costs of entertaining damages claims for judicial decisions.

If the merits of that inquiry are debatable, the political infeasibility of suing judges for damages is not. Nearly thirty years ago, the Supreme Court construed Section 1983 to allow suit against a judge, not for damages but for injunctive relief only, and then only in highly unusual circumstances that allowed no alternative remedy.[9] Nonetheless, the outrage of the nation's judges proved so effective that the statute was promptly amended to extend absolute judicial immunity to injunctive relief.[10] It is hard to imagine that the judiciary's reaction would be less effective if the Court were to allow damage actions against judges.

This high-speed tour of legislative and judicial immunity is designed to set up a simple, indeed obvious, proposition: absolute legislative and judicial immunity are deviations from the norm; they should be con-

[9] Pulliam v. Allen, 466 U.S. 522, 542 (1984). Gladys Pulliam, a state-court magistrate, made a practice of requiring bail for non-jailable offenses and incarcerating those who could not pay. The defendants were always released after a few days and thus had no opportunity to appeal. The result was a system of short-term incarceration for offenses for which incarceration was not authorized. This practice was found unconstitutional, and Magistrate Pulliam was enjoined from continuing it, a judgment that triggered an award of attorney's fees under 42 U.S.C. § 1988. Id. at 524–26, 542.

[10] 42 U.S.C. § 1983, Pub. L. No. 104-317, § 309(c) (1996). The amended statute provides a remedy against officers acting in their official capacity, "except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." Id. Interestingly, the amendment does not seem to have cured the only practical consequence of the injunction against Magistrate Pulliam, which was the award of attorney's fees.

strued grudgingly, in close adherence to the rationales that are thought to justify total abrogation of the constitutional tort remedy. For legislators (putting aside any special protections compelled for federal legislators by the Speech or Debate Clause), this means that absolute immunity should be confined to decisions of general applicability that must be enforced by executive officers, who can themselves be sued for violating constitutional rights. In other words, absolute legislative immunity should be reserved for situations where it avoids *unnecessary* conflict with the legislative process. It should not be allowed to bar all prospect of constitutional enforcement when no alternative defendant is available. For judicial immunity, the rationale and its limitation are similar. Absolute immunity for judicial decisions is justified by the general availability of the alternative remedy of appeal. It follows that judicial decisions so far removed from that corrective process as to render it irrelevant should not be absolutely beyond the pale of constitutional tort actions.

The cases do not track these limitations. Take, for example, the Supreme Court's latest pronouncement on legislative immunity. In *Bogan v. Scott-Harris*, the plaintiff alleged and a jury found that the defendants had proposed and supported a municipal ordinance eliminating her employment, not for any legitimate reason of economy or reorganization, but as retaliation for her complaints about racist vituperation by another, well-connected employee.[11] If the plaintiff had been fired for this reason, she would have been entitled to damages from the officer who fired her (and, indirectly, from the government employing that officer).[12] But because the plaintiff worked for a very small city, the defendants did not need to remove her from the job; they simply eliminated the department of which she was the sole employee. Because this was done by munici-

[11] 523 U.S. 44, 47–48 (1998).

[12] For obvious practical reasons, governments routinely defend their employees against constitutional tort claims and indemnify them against any adverse judgments, even where they have no legal obligation to do so. See David F. Hamilton, The Importance and Overuse of Policy and Custom Claims: A View from One Trench, 48 DePaul L. Rev. 723, 730 (1999) (acknowledging that "[e]ven where indemnification [of officers] is not required as a matter of law . . . there may be powerful reasons for the local governments to provide it"); John C. Jeffries, Jr., In Praise of the Eleventh Amendment and Section 1983, 84 Va. L. Rev. 47, 50 (1998) [hereinafter Eleventh Amendment] (asserting that, "[s]o far as can be assessed, this is true not occasionally and haphazardly but pervasively and dependably"); see also George A. Bermann, Integrating Governmental and Officer Tort Liability, 77 Colum. L. Rev. 1175, 1189 (1977) (examining state statutes requiring state governments to pay judgments against officials, entitling officials to free legal defense, authorizing reimbursement of officer litigation expenses, and defining rights of indemnification for states and their employees).

pal ordinance, the defendants claimed absolute legislative immunity, and the Supreme Court unanimously agreed.[13]

Given that the jury found this act unconstitutionally retaliatory, why the availability of money damages should turn on the particular mechanism of retaliation is not at all clear. Justice Thomas's opinion for the Court was mainly concerned to establish that legislative immunity applies to localities, as well as to federal, state, and regional governments. This much is unsurprising.[14] It is also not surprising—though it is in my view regrettable—that the Court took an essentialist view of the scope of legislative immunity. One defendant was vice president of the city council, and the Court found that her vote to eliminate the plaintiff's position was "quintessentially legislative."[15] As a purely formal matter, that was true, but another way to view that action was readily at hand. The United States Court of Appeals for the First Circuit had ruled that the scope of absolute immunity should be "drawn along a functional axis that distinguishes legislative and administrative acts."[16] On that view, "the position-elimination ordinance (which, after all, constituted no more in this case than the means employed by Scott-Harris' antagonists to fire her) constituted an administrative rather than a legislative act."[17] The virtue of the First Circuit's approach is not just that it confines rather than extends absolute immunity—though that may be thought virtue enough—but that it confines legislative immunity in a sensible way. Requiring some generality of application screens out ostensibly "legislative" actions targeted at specific individuals, who likely have no other redress, and leaves in genuinely "legislative" actions that must be applied against individuals by executive officers. If rights are violated by such officers, constitutional tort actions will lie, and the threat of such actions will inhibit enforcement of unconstitutional laws. The First Circuit's approach thus aligns the scope of absolute legislative immunity with the rationale

[13] *Bogan*, 523 U.S. at 56.

[14] The question was reserved in *Lake Country Estates v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 404 n.26 (1979), but the answer seemed plain, and the lower courts had no difficulty in anticipating the Court's conclusion, see, e.g., Acevedo-Cordero v. Cordero-Santiago, 958 F.2d 20, 22–23 (1st Cir. 1992); Aitchison v. Raffiana, 708 F.2d 96, 98–100 (3d Cir. 1983); Reed v. Vill. of Shorewood, 704 F.2d 943, 952–53 (7th Cir. 1983); Bruce v. Riddle, 631 F.2d 272, 277–79 (4th Cir. 1980).

[15] *Bogan*, 523 U.S. at 55.

[16] Scott-Harris v. Fall River, 134 F.3d 427, 440 (1st Cir. 1997), rev'd sub nom. Bogan v. Scott-Harris, 523 U.S. 44 (1998).

[17] Id. at 441.

for tolerating it. The Supreme Court's approach, in contrast, expands the scope of absolute legislative immunity beyond the realm where it merely determines the choice of defendants to cases where it does real and irreparable damage to the enforcement of constitutional rights.

What is most surprising—and most regrettable—about *Bogan* was the Court's treatment of another defendant, the mayor, who proposed elimination of Scott-Harris's position in retaliation for her exercise of First Amendment rights. The mayor was not a member of the city council and had no vote in that body, but because he introduced the budget and subsequently signed the ordinance into law, the Court found that he enjoyed absolute legislative immunity for his actions. On an essentialist view of the legislative function, this result may be intelligible,[18] though one must marvel at a rigorously formalist interpretation of a wholly non-textual limitation on statutorily imposed liability. In any other terms, the extension of absolute immunity to executive officers is unsound. It converts legislative immunity from a relatively costless means of avoiding unnecessary confrontation with the legislative branch into a categorical bar to legal accountability for constitutional violations by *executive* officers.

The cases on absolute judicial immunity are similar. Problems began with the Supreme Court's first extended consideration of the issue. *Stump v. Sparkman* involved a judge sued for action he took as a judge and only because he was a judge.[19] For the Court, this was enough to trigger absolute judicial immunity. In an oft-cited line, the Court said that a judge could be held civilly liable only if he acted in the "clear absence of all jurisdiction."[20] Under that standard, the judge's conduct, no matter how highhanded and irregular, was absolutely protected. But on another view, Judge Stump's conduct was so far removed from the procedural protections of the courtroom and so well insulated from any hope of appellate review that it should have been treated differently. He ordered the sterilization of a sexually active teenager on the ex parte petition of her mother without a hearing or even a day's delay, without appointing a guardian ad litem, and without informing the girl herself what was to be done to her. His conduct ensured that there "was and could be

[18] The Court reasoned that the mayor's actions in introducing a budget to the city council and signing its enactments into law "were legislative because they were integral steps in the legislative process." *Bogan*, 523 U.S. at 55.

[19] 435 U.S. 349, 356 (1978).

[20] Id. at 357 (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1872)).

no appeal."[21] If the question of absolute immunity turns on an essentialist view of what is a judicial act, perhaps *Stump* would be defensible. But if absolute immunity depends in any degree on having a functioning system for the enforcement of constitutional rights, *Stump* was grievously wrong. As was explained in Justice Powell's dissent, underlying absolute judicial immunity

> is the notion that private rights can be sacrificed in some degree to the achievement of the greater public good deriving from a completely independent judiciary, because there exist alternative forums and methods for vindicating those rights.
>
> But where a judicial officer acts in a manner that precludes all resort to appellate or other judicial remedies that otherwise would be available, the underlying assumption of the [immunity] doctrine is inoperative.[22]

It is hard to think that the *Stump* majority would have disagreed with that assessment had they thought such considerations relevant. The fundamental error in *Stump*, as in *Bogan*, lies in treating the problem as essentialist and definitional. Though the Supreme Court says that it follows a "'functional' approach" in construing immunities,[23] that term is misleading. The Court looks to the nature of an act rather than the office held by the actor and in that sense looks to the "function" being performed. The Court, however, pays no attention to the functional rationale for according such actors absolute immunity. The problem is partly one of vocabulary, as the word "functional" might refer to the nature of the act, as in the Court's usage, or it might refer to a purposive inquiry into whether the immunity serves the reasons behind it. To minimize confusion, I sometimes refer to the focus on the essential nature of an act as "essentialist" or "definitional," terms designed to signal the lack of concern with rationale. My sense of a "functional" analysis is one that relates the scope of absolute immunity to the rationale for allowing it.

In this terminology, both *Bogan* and *Stump* are definitional or essentialist rather than functional. Both rely on the character of an action rather than on the most important policy consideration, which is the availability of alternate remedies. The failure to adhere closely to a functional

[21] Id. at 369 (Stewart, J., dissenting).
[22] Id. at 370 (Powell, J., dissenting) (footnote omitted).
[23] See, e.g., Forrester v. White, 484 U.S. 219, 224 (1988).

rationale for legislative and judicial immunity leads to an unjustifiably broad sweep for doctrines that should be viewed as exceptional and construed narrowly.

Perhaps the only good thing about *Stump v. Sparkman* was its implication that absolute judicial immunity might be confined to formally judicial acts. But this limitation proved illusory. Of course, it has long been understood that not everything done by a judge triggers absolute immunity. Thus, for example, a judge sued for unconstitutional discharge of a court employee is entitled only to qualified immunity, as such action is administrative rather than judicial.[24] In recent years, however, this sensible *limitation* on absolute immunity for judges has led to a surprising *expansion* of absolute immunity for non-judges.[25] The objects of this solicitude are often court adjuncts and appointees. Thus, medical experts appointed in child abuse and custody proceedings or in criminal competency hearings have been afforded absolute immunity.[26] When such experts testify in open court, they are entitled to the absolute immunity typically afforded witnesses,[27] but in-court immunity would not reach the prior acts of medical investigation and examination or

[24] Id. at 299; cf. Supreme Court of Va. v. Consumers Union, Inc., 446 U.S. 719, 723–24, 731, 736 (1980) (explaining that the Supreme Court of Virginia acted in a legislative capacity in promulgating the Virginia Code of Professional Responsibility, in an enforcement capacity in initiating actions against suspected violators, and in a judicial capacity in adjudicating such disputes once brought).

[25] These developments are well described and documented in Margaret Z. Johns, A Black Robe Is Not a Big Tent: The Improper Expansion of Absolute Judicial Immunity to Non-Judges in Civil Rights Cases, 59 SMU L. Rev. 265 (2006) [hereinafter Judicial Immunity], to which the discussion in text is indebted.

[26] Id. at 277–79 (citing cases).

[27] The immunity of witnesses for statements made in court is afforded all participants in judicial proceedings, including lawyers, judges, and jurors, on the rationale that fearlessness in that context will promote the public good. See Rehberg v. Paulk, 132 S. Ct. 1497, 1505 (2012) (applying absolute immunity to testimony before a grand jury); Briscoe v. LaHue, 460 U.S. 325, 334 (1983) (establishing absolute immunity for witnesses, as "the common law's protection for witnesses is 'a tradition so well grounded in history and reason' that we cannot believe that Congress impinged on it 'by covert inclusion in the general language before us'"). Witness immunity may be conceptualized as part of a broader immunity against liability for defamation for in-court statements, whether by witnesses, lawyers, judges, or jurors. Burns v. Reed, 500 U.S. 478, 501 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part) ("At common law, all statements made in the course of a court proceeding were absolutely privileged against suits for defamation . . . . This immunity did not turn upon the claimant's status as a public or judicial officer, for it protected private parties who served as witnesses, and even as prosecuting witnesses.").

preparation of reports.[28] Nevertheless, many courts hold that judicial appointment is sufficient to clothe out-of-court conduct by medical experts with absolute judicial immunity.[29] Similarly, guardians ad litem receive absolute judicial immunity for acts within the scope of their appointments, no matter how egregious.[30] And social workers in child abuse and custody cases typically receive absolute immunity for unconstitutional misconduct,[31] and the same is true for mediators[32] and, more controversially, for receivers.[33]

Just how far some courts have drifted from any defensible rationale for judicial immunity is revealed by *Davis v. Bayless*.[34] Bayless was the lawyer for judgment-creditors in a medical malpractice action. When the doctor refused to pay up, the court appointed a receiver to recover his non-exempt assets. By this time, the doctor had left his wife and moved in with his girlfriend, Lana Davis. Acting pursuant to a court order specifically authorizing search of storage facilities held by Davis and her children, the receiver and attorney Bayless searched the facility of Davis's adult daughter and seized $5600 in cash, items of jewelry, and an oil painting. The Davises were not parties to the receivership proceeding and received no notice that their facility would be searched or their property taken. Not unreasonably (it seems to me), they sued the receiver, claiming deprivation of property without due process of law, but the Fifth Circuit held the receiver entitled to "derivative judicial immunity" and therefore beyond the reach of Section 1983.[35]

Now, if the scope of immunity is purely definitional—that is, whether the defendant's actions were in some sense "judicial"—an argument could be made for the court's result, as the receiver acted with judicial authorization. But if the question turns on the availability of a judicial

[28] But see Kurzawa v. Mueller, 732 F.2d 1456, 1458 (6th Cir. 1984) (holding that court-appointed mental health professionals who were charged with reporting to the court were performing the function of witnesses and therefore were entitled to absolute immunity analogous to witnesses).

[29] See Johns, Judicial Immunity, supra note 25, at 277–79.

[30] Id. at 283–84 (citing precedent to this effect from the First, Third, Fourth, Sixth, Seventh, and Ninth Circuits).

[31] Id. at 286–87 (citing cases). The courts are split on whether absolute immunity for social workers is better conceived as judicial or prosecutorial. Id.

[32] Id. at 292–93 (citing cases and including references to the surprisingly rich literature on this question).

[33] Id. at 290–91 (citing cases).

[34] 70 F.3d 367 (5th Cir. 1995).

[35] Id. at 371–72, 376.

remedy, the opposite result would follow. Lana Davis and her daughter were not parties to a court proceeding, had no opportunity to participate in it, were not notified that it affected them, and certainly had no right to appeal. All that they could have done was to initiate legal proceedings after the fact to seek redress for unlawful invasion of their interests. This opportunity, of course, exists for *all* constitutional tort plaintiffs. If the alternative remedy of a state tort action were sufficient to preclude the federal cause of action under Section 1983, then Section 1983 would be virtually nonexistent. The extension of absolute judicial immunity to circumstances where there is no notice, no proceeding, and no possibility of appeal robs the doctrine of any functional support.

In this connection, it is worth remembering that—at least under current doctrine—the choice for Mayor Bogan and Judge Stump is not between absolute immunity and automatic liability, but between absolute immunity and qualified immunity. If the defendants in *Bogan*, *Stump*, and *Davis* had not been granted legislative or judicial immunity, they still would have been protected against liability for any reasonable error. Only if a reasonable officer in the defendant's situation could not have believed his or her actions lawful would these defendants (and the governments that employed them) have had to pay damages.[36] Absolute immunity extends protection to those who could *not* reasonably have thought their actions lawful. This, as the Court has said, is "strong medicine,"[37] and should be applied sparingly. The cases, however, do not follow that prescription. They unnecessarily and unwisely extend absolute immunity to cases in which the remedial alternatives that make that regime tolerable do not exist.

B. Prosecutorial Immunity

The problems with legislative and judicial immunity pale in comparison to those of absolute prosecutorial immunity. Here there is no support from history. However ready one may be to assume that the Civil Rights Act of 1871 silently incorporated common-law immunities, absolute prosecutorial immunity cannot rest on that basis. The first American

[36] See, e.g., Anderson v. Creighton, 483 U.S. 635, 641 (1987) (barring liability if "a reasonable officer could have believed" his or her actions lawful "in light of clearly established law").

[37] Forrester v. White, 484 U.S. 219, 230 (1988) (quoting Forrester v. White, 792 F.2d 647, 660 (7th Cir. 1986) (Posner, J., dissenting)).

case to embrace that doctrine was decided in 1896, a full generation after passage of what was to become Section 1983.[38] Moreover, there is earlier authority approving civil liability for prosecutorial misconduct.[39] The historical state of affairs has been summarized by Margaret Johns:

> [A] hypothetical legislator in 1871 conscientiously researching the common law on the eve of the passage of § 1983 would have found the well-established tort of malicious prosecution, which had been upheld in an action against a public prosecutor for eliciting and using false testimony. Additionally, he would have found no immunity defense to insulate the prosecutor from liability if the elements of the cause of action were proven, for there was *not a single decision* affording prosecutors any kind of immunity defense from liability for malicious prosecution.[40]

Obviously, absolute prosecutorial immunity should rest—as all immunities should rest—on a functional justification. That justification cannot be, as the Court once unwisely suggested, that prosecutors are somehow so vulnerable to unwarranted civil liability that they require greater solicitude and protection than, for example, the police.[41] The true justification is that much of what prosecutors do occurs in court, where they may legitimately rely on monitoring by opposing counsel and supervision by a judge. For misconduct in that arena—including inflammatory remarks in summation, or improper comment on the defendant's silence, or introduction of hearsay evidence, or even eliciting false testimony[42]—correction in the courtroom seems the obvious remedy. For

[38] Griffith v. Slinkard, 44 N.E. 1001, 1002 (Ind. 1896). This case was identified as the "first American case" to address the question raised in *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976).

[39] Margaret Z. Johns, Reconsidering Absolute Prosecutorial Immunity, 2005 BYU L. Rev. 53, 111–14 (citing cases) [hereinafter Prosecutorial Immunity]. While most of these decisions concerned private prosecutors (lawyers privately retained to prosecute criminal offenses), there was at least one 1854 decision holding that public prosecutors could be held liable for malicious prosecution. See Parker v. Huntington, 68 Mass. (2 Gray) 124, 128 (1854).

[40] Johns, Prosecutorial Immunity, supra note 39, at 114 (footnotes omitted).

[41] See *Imbler*, 424 U.S. at 425 ("It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials.").

[42] See id. at 443 (White, J., concurring in the judgment) (referring to "improper summations, introduction of hearsay evidence in violation of the Confrontation Clause, [and] knowing presentation of false testimony" as "truly an 'integral part of the judicial process'").

such violations, the costs of providing an additional remedial opportunity to sue for money damages may very well outweigh the benefits.

Prosecutors, however, perform many actions that are not subject to direct monitoring and supervision. This is true not only for administrative decisions, such as hiring and firing, but also, and more importantly, for advice and assistance to the police. From the outset, the Court recognized, therefore, that a prosecutor cast "in the role of an administrative *or* investigative officer" should receive only qualified immunity.[43] The pressure to deny absolute immunity for investigative acts is especially great when police and prosecutors perform the same functions. In that circumstance, extending absolute immunity only to prosecutors would look too much like class-based adjudication, or, in Justice Rehnquist's gentler phrasing, an especially keen judicial sensitivity to the difficulties faced by lawyers and judges.[44]

The pull between absolute prosecutorial immunity and the need to treat prosecutors and police alike when they perform similar functions has led to some exceedingly fine distinctions. For example, a prosecutor has only qualified immunity for advising the police on probable cause but absolute immunity for assertions to a court about probable cause.[45] More precisely, a prosecutor has absolute immunity for *unsworn* assertions to a court about probable cause; the prosecutor who submits her own sworn application for an arrest warrant has only qualified immunity for the statements contained therein, on the ground that factual testimony is separate from prosecutorial function.[46] In reaching this conclusion,

[43] Id. at 430–31 (emphasis added) (approving by implication Ninth Circuit decisions allowing only qualified immunity for investigative activities and limiting the embrace of absolute immunity accordingly). This implication was expressly approved in *Burns v. Reed*, 500 U.S. 478, 494–96 (1993) (holding that a prosecutor's administrative and investigative functions trigger only qualified immunity).

[44] Butz v. Economou, 438 U.S. 478, 528 n.* (1978) (Rehnquist, J., concurring in the judgment in part and dissenting in part) ("If one were to hazard an informed guess as to why such a distinction in treatment between judges and prosecutors, on the one hand, and other public officials on the other, obtains, mine would be that those who decide the common law know through personal experience the sort of pressures that might exist for such decisionmakers in the absence of absolute immunity, but may not know or may have forgotten that similar pressures exist in the case of nonjudicial public officials to whom difficult decisions are committed.").

[45] *Burns*, 500 U.S. at 487–88, 492 (holding the prosecutor absolutely immune for false statements made in probable cause hearing); id. at 496 (allowing only qualified immunity for erroneous advice to the police on the existence of probable cause).

[46] Kalina v. Fletcher, 522 U.S. 118, 130 (1997) ("Testifying about facts is the function of the witness, not of the lawyer.").

the Court doubtless was influenced by the fact that police officers had already been held to enjoy only qualified immunity for their sworn statements.[47] And while presenting or eliciting false evidence in court triggers absolute immunity, the prior act of concocting such evidence during a criminal investigation does not.[48]

Monitoring such niceties has inevitably spawned confusion. For example, *Buckley v. Fitzsimmons* ruled that prosecutorial conduct occurring before there is probable cause to arrest is necessarily investigative and therefore not entitled to absolute immunity.[49] This seems sensible, but it has led to difficult litigation over whether the existence of probable cause may rest on the prosecutor's evaluation of the case or whether it requires validation by some third party.[50] And there is also litigation about what happens once probable cause has been—by whatever standard—established. Absolute immunity then becomes the norm, but there can still be post-probable cause activities that are deemed investigative and therefore trigger only qualified immunity.[51] And there are also knotty disputes about the level of immunity applicable to the coercion of witnesses and fabrication of evidence.[52]

[47] See Malley v. Briggs, 475 U.S. 335, 343 (1986) (stating that "the judicial process will on the whole benefit" if police officers have only qualified immunity for sworn statements made in support of warrant applications).

[48] Compare *Imbler*, 424 U.S. at 427 (granting absolute immunity for presenting false evidence at trial), with Buckley v. Fitzsimmons, 509 U.S. 259, 274–76 (1993) (holding absolute immunity inapplicable to a charge of pre-indictment fabrication of evidence). For another fine distinction, see *Van de Kamp v. Goldstein*, 555 U.S. 335, 343–44 (2009) (holding that while administrative functions ordinarily trigger only qualified immunity, administrative functions closely related to trials may receive absolute immunity).

[49] 509 U.S. at 274, 276 ("A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested," and thus "may not shield his investigative work with the aegis of absolute immunity.").

[50] Compare Broam v. Brogan, 320 F.3d 1023, 1033 (9th Cir. 2003) (relying on the prosecutor's subjective evaluation of the existence of probable cause), with Hill v. City of New York, 45 F.3d 653, 661 (2d Cir. 1995) (requiring an objective assessment of whether there was probable cause). See generally Johns, Prosecutorial Immunity, supra note 39, at 97–103 (describing and discussing lower court decisions).

[51] *Buckley*, 509 U.S. at 274 n.5 ("Of course, a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards. Even after that determination . . . a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity."). See generally Johns, Prosecutorial Immunity, supra note 39, at 103–05 (describing and discussing lower court decisions on this point).

[52] On witness coercion, see Johns, Prosecutorial Immunity, supra note 39, at 89–96 (recounting that the Third and Seventh Circuits have concluded that an accused has no right to sue for violation of a witness's rights, while the Second Circuit has held that coercing witnesses can violate the rights of the accused). On fabrication of evidence, compare Buckley v.

Some idea of the doctrinal imbroglio to which these distinctions lead may be gleaned from *KRL v. Moore*.[53] Local prosecutors got three successive search warrants against persons involved in the KRL Partnership. The investigation started with the suspicion that the defendants had removed an underground gasoline storage tank in an environmentally unsafe way. The first search led to a twenty-one-count indictment (though all charges were later dropped) for actions related to the storage tank removal. The prosecutors then obtained a second search warrant to find more evidence of those wrongs and also to uncover evidence of additional wrongs that they had begun to suspect (unreported income, unpaid taxes, questionable property transfers, and the like). A third warrant extended the search still further.[54] In a faithful attempt to apply Supreme Court precedent, the Ninth Circuit held that, even under a single warrant (the second), absolute immunity covered some but not all of the prosecutors' acts. Specifically, absolute immunity applied to the effort to find additional evidence of the crimes for which the defendants had already been indicted but not to the attempt under the same search warrant to find evidence of additional crimes.[55] As if that were not slicing the salami thin enough, the court noted that its finding of qualified immunity for assertions in that part of the warrant addressing new crimes "would not necessarily be the same had the prosecutors reviewed an arrest warrant, rather than a search warrant."[56] The reason is apparently that obtaining a pre-indictment search warrant is investigative (and therefore not absolutely immune) but determining whether probable cause exists to order an arrest is initiating the legal process and therefore judicial.[57] Examples

Fitzsimmons, 20 F.3d 789, 795 (7th Cir. 1994) (allowing absolute immunity for fabricating evidence because it occurred during the advocacy phase of the trial), and Michaels v. New Jersey, 222 F.3d 118, 123 (3d Cir. 2000) (same), with Zahrey v. Coffey, 221 F.3d 342, 356 (2d Cir. 2000) (treating fabrication of evidence as investigative misconduct triggering only qualified immunity), and Milstein v. Cooley, 257 F.3d 1004, 1011 (9th Cir. 2001) (same).

[53] 384 F.3d 1105 (9th Cir. 2004).

[54] Id. at 1108–09.

[55] Compare id. at 1112 ("We conclude that, to the extent the second search warrant sought evidence to prosecute the crimes charged in the indictment, [the prosecutors'] review of the warrant prior to submission was intimately associated with the judicial process."), with id. at 1113 ("Like advising officers about the existence of probable cause during the pretrial investigation, approving a search warrant to assist with a collateral investigation into new crimes is an investigative function that is not entitled to absolute immunity." (citation omitted)).

[56] Id. at 1114.

[57] Id. ("[T]he Court has stated that a prosecutor does not serve as an advocate before probable cause to arrest anyone has been established [citing *Buckley*, 509 U.S. at 274], but that

of such overly fine distinctions could be multiplied indefinitely,[58] but to little purpose. Not only does the litigation of such questions consume effort, time, and money; it does so without any obvious payoff for the functional integrity of constitutional tort law.

The problem is not just the inevitable difficulty of drawing lines; the problem is that the line is drawn in the wrong place. When the Court first recognized absolute prosecutorial immunity in *Imbler v. Pachtman*, it explicitly approved that doctrine for "initiating a prosecution" and "presenting the State's case."[59] Absolute immunity for "presenting the State's case" can readily be defended. That phrase describes the context in which prosecutorial misconduct most reliably can be detected and corrected on the spot. Damages actions would likely not add much. An attenuated version of the same rationale might be advanced for "initiating a prosecution." Such decisions are subject either to a requirement of prior approval by a grand jury or to the immediate post-audit of a preliminary hearing. Conceivably, such procedures might be thought to provide adequate protection against prosecutorial misconduct in charging decisions, though that requires a rather idealized view of how the system works.[60] Grand jury recalcitrance or judicial supervision may suffice to counter wholly bogus charges, but that is not the heart of the charging problem. Most criminal defendants are guilty of something, and a prosecutor's decision to initiate proceedings would—and should—be upheld so long as there is basis for it. The greater problem is not the wholly unjustified charge, but the proliferation of justified—or at least plausible—charges to the point of overwhelming legitimate efforts in defense. The essential problem, especially at the federal level, is that the redundancy of criminal offenses, the extravagance of authorized penal-

the determination of whether probable cause exists to file charging documents is the function of an advocate [citing Kalina v. Fletcher, 522 U.S. 118, 129–30 (1997)].").

[58] For example, there is uncertainty about whether prosecutors are entitled to absolute immunity when involving themselves in warrant applications. Compare Mink v. Suthers, 482 F.3d 1244, 1262 (10th Cir. 2007) (holding a prosecutor not entitled to absolute immunity for approving an application for a search warrant prior to a judicial proceeding), with Schrob v. Catterson, 948 F.2d 1402, 1411, 1413 (3d Cir. 1991) (reaching the opposite conclusion).

[59] 424 U.S. 409, 427, 431 (1976).

[60] See, for example, *Rehberg v. Paulk*, 132 S. Ct. 1497, 1501 (2012), where the chief investigator of a district attorney's office made three appearances before grand juries, allegedly to retaliate against the critic of a local hospital. The grand jury returned successive indictments for everything ranging from assault to making harassing phone calls. All charges were ultimately dismissed, but the participation of the grand jury seems to have posed no obstacle at all to official harassment and malicious prosecution.

ties, and the curtailment of judicial discretion in sentencing leave the prosecutor altogether too much in control of who is imprisoned and for how long.[61] For all but the simplest crimes, prosecutors can pile up charges to the point where the incentive to plea bargain becomes overwhelming. The resulting imbalance of power between prosecution and defense may be—as I think it is—a grave problem, but it is not one that constitutional tort actions can realistically redress. The defect lies in the substantive law, not in a prosecutor's overly enthusiastic use of the powers that the law affords. So long as charging decisions can be made almost without limit, the prospect of constitutional tort litigation for improper charges will be largely irrelevant. Against this backdrop of substantive non-constraint, the choice of the liability rule for constitutional tort actions is almost beside the point.

Unfortunately, the *Imbler* Court did not confine itself to approving absolute immunity for "initiating a prosecution" and "presenting the State's case." It also described the doctrine's scope more generally, saying that absolute prosecutorial immunity was "quasi-judicial,"[62] that it applied to activities that formed an "integral part of the judicial process,"[63] and, in the most-quoted phrase, that it covered acts "intimately associated with the judicial phase of the criminal process."[64] The difference between these broad formulations and a narrow focus on in-court supervision is crucially important. The former includes, while the latter would exclude, violations of *Brady v. Maryland*.[65] *Brady* requires that

[61] See Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 Stan. L. Rev. 869, 874–87 (2009) (describing the prosecutor as a "leviathan" of "unchecked power"); John C. Jeffries, Jr. & John Gleeson, The Federalization of Organized Crime: Advantages of Federal Prosecution, 46 Hastings L.J. 1095, 1117–25 (1995) (detailing the procedural powers of federal prosecutors). See generally Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor (2007) (analyzing prosecutorial powers and the potential for abuse).

[62] *Imbler*, 424 U.S. at 420 (referring to "'quasi-judicial' immunity" conferred by lower courts).

[63] Id. at 430 (quoting the decision of the court below).

[64] Id. ("We agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force.").

[65] 373 U.S. 83 (1963). That the *Imbler* Court intended this result is made plain in a footnote rebutting the separate opinion of Justices White, Brennan, and Marshall. Justice White agreed with absolute immunity "for presentation of testimony later determined to have been false, where the presentation of such testimony is alleged to have been unconstitutional solely because the prosecutor did not believe it or should not have believed it to be true," but argued that it should not extend to "claims of unconstitutional suppression of evidence." See

the prosecution disclose, upon request, evidence favorable to the accused.[66] Of course, it is possible to imagine an adversarial system in which the defense is required to do all of its own work. But given the imbalance between prosecutorial resources and the starvation diet of appointed counsel,[67] the results would be appalling. *Brady* attempted to ameliorate that imbalance and to bolster both the accuracy and the fairness of criminal trials by requiring that prosecutors disclose material exculpatory information to the defense. There is ample evidence that the constitutional obligation announced in *Brady* is under-enforced. Studies, reports, and commissions have found striking evidence of widespread noncompliance.[68] Indeed, *Brady* has been described by one knowledgeable observer as "an illusory protection that is easily evaded and virtually unenforceable."[69]

Imbler, 424 U.S. at 432–33 (White, J., concurring). The majority, speaking through Justice Powell, answered in a long footnote rejecting that distinction and extending absolute immunity claims based on the deliberate withholding of exculpatory information. See id. at 432 n.34 (majority opinion).

[66] 373 U.S. at 87 ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

[67] See Robert P. Mosteller, Failures of the American Adversarial System to Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative Fairness, 36 N.C. J. Int'l L. & Com. Reg. 319, 363 (2011) (discussing prosecutorial powers and the resource disparities between prosecution and defense).

[68] For a sampling of the empirical research on *Brady* violations, see Cal. Comm'n on the Fair Admin. of Justice, Report and Recommendations on Reporting Misconduct 3 (2007) (finding that 443 of the 2130 cases examined—or twenty-one percent—involved prosecutorial misconduct, which was often a *Brady* violation); James S. Liebman, Jeffrey Fagan & Valerie West, A Broken System: Error Rates in Capital Cases, 1973–1995, at 5 (2000) (reporting a 2000 Columbia Law School study finding that sixteen to nineteen percent of reversible errors in capital cases were due to improperly withheld evidence); Ken Armstrong & Maurice Possley, The Verdict: Dishonor, Chi. Trib., Jan. 10, 1999, at 3 (finding that 381 of 11,000 homicide convictions were reversed for *Brady* violations); Bill Moushey, Hiding the Facts, Pittsburg Post-Gazette, Nov. 24, 1998, at A-12 (reporting frequency of *Brady* violations in examined cases); Steve Weinberg, Breaking the Rules: Who Suffers When a Prosecutor Is Cited for Misconduct?, Ctr. for Pub. Integrity (June 26, 2003, 12:00 AM), http://www.publicintegrity.org/2003/06/26/5517/breaking-rules (finding reversible prosecutorial misconduct in 2012 of 11,452 cases examined—or seventeen percent—a majority of which involved *Brady* violations). Given the difficulty of uncovering *Brady* violations, it is likely that reports of the frequency with which they occur understate the problem.

For an excellent summary of these materials and their findings, see Bennett L. Gershman, Bad Faith Exception to Prosecutorial Immunity for *Brady* Violations, Amicus: Harv. C.R.-C.L. L. Rev.'s Online Companion 1, 13–14 (Aug. 10, 2010), http://harvardcrcl.org/wp-content/uploads/2010/08/Gershman_Publish.pdf.

[69] Gershman, supra note 68, at 6.

It is easy to see why. At a minimum, *Brady* casts prosecutors in what Justice Marshall called an "unharmonious role."[70] Of course, they are officers of the court, but they are also hard-charging, competitive lawyers whose reputations and satisfactions depend on obtaining convictions. To that end, they construct a narrative of the case that aligns the evidence with a verdict of guilty. *Brady* requires not only that zealous prosecutors help the opposition, but that they do so by crediting a version of the evidence at odds with their understanding. Both common sense and cognitive psychology confirm the difficulty of that task. Whether described as "tunnel vision,"[71] or with more sophisticated references to "confirmation bias,"[72] "selective information processing,"[73] "belief perseverance,"[74]

[70] United States v. Bagley, 473 U.S. 667, 697 (1985) (Marshall, J., dissenting).

[71] See, e.g., Susan Bandes, Loyalty to One's Convictions: The Prosecutor and Tunnel Vision, 49 How. L.J. 475, 493 (2006) (suggesting that the loyalty prosecutors may develop to their narrative of the case can blind them to the significance of contrary facts); Keith A. Findley & Michael S. Scott, The Multiple Dimensions of Tunnel Vision in Criminal Cases, 2006 Wis. L. Rev. 291, 296–307 (describing case studies suggesting that prosecutors overlook inconsistencies and inadequacies that threaten to undermine their theory of the case).

[72] See Alafair S. Burke, Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science, 47 Wm. & Mary L. Rev. 1587, 1593–94 (2006) (describing "confirmation bias" as the tendency to focus on evidence favoring one's theory of the case and to slight evidence that undermines it). The general phenomenon of confirmation bias seems reasonably well understood. See P.C. Wason & P.N. Johnson-Laird, Psychology of Reasoning: Structure and Content 210–17 (1972) (affirming existence of confirmation bias, which leads people to give more credit to confirming, rather than disconfirming, evidence); Carole Hill, Amina Memon & Peter McGeorge, The Role of Confirmation Bias in Suspect Interviews: A Systematic Evaluation, 13 Legal & Criminological Psychol. 357, 368–70 (2008) (presenting experimental results indicating that preexisting expectations bias evaluation of evidence); Dan Simon, A Third View of the Black Box: Cognitive Coherence in Legal Decision Making, 71 U. Chi. L. Rev. 511, 513 (2004) (arguing that cognitive bias leads to systemic issues in legal decision making); Mary Snyder & William B. Swann, Jr., Hypothesis-Testing Processes in Social Interaction, 36 J. Personality & Soc. Psychol. 1202, 1211–12 (1978) (demonstrating the power of confirmation bias on social inferences).

[73] Burke, supra note 72, at 1596–99 (describing "selective information processing" as an inability to evaluate the strength of new evidence independent of prior beliefs). See generally Charles G. Lord, Lee Ross & Mark R. Lepper, Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence, 37 J. Personality & Soc. Psychol. 2098, 2099 (1979) (describing how people tend to align ambiguous information with their preexisting values).

[74] Burke, supra note 72, at 1599–1601 (describing "belief perseverance" as a cognitive failure to discard strongly held beliefs in the face of contrary evidence). See generally Craig A. Anderson, Mark R. Lepper & Lee Ross, Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information, 39 J. Personality & Soc. Psychol. 1037, 1045 (1980) (presenting evidence suggesting that self-generated theories persist in the face of conflicting objective evidence); Lee Ross, Mark. R. Lepper & Michael Hubbard, Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the

and avoiding "cognitive dissonance,"[75] the all-too-human tendency to dismiss or discredit conflicting evidence is easily understood.[76] In light of these findings and the teachings of experience, it does not disparage prosecutors, either as professionals or as individuals, to think that many sometimes lack the intellectual discipline, imaginative agility, and moral punctiliousness required to implement *Brady* properly.[77]

The slippage in administering *Brady* is aggravated by its limitation to *material* exculpatory evidence.[78] An ardent prosecutor, believing in the defendant's guilt and committing to proving it in court, can all too readily discount non-conforming evidence as not sufficiently important or probative to be considered material. For that reason, the Advisory Committee for the Federal Rules of Criminal Procedure considered eliminating "material" from the implementation of *Brady* in Federal Rule of Criminal Procedure 16, only to be stymied by opposition from

Debriefing Paradigm, 32 J. Personality & Soc. Psychol. 880, 888 (1975) (showing that self-evaluations are difficult to change even in the face of contrary data).

[75] Burke, supra note 72, at 1601–02 (describing the avoidance of "cognitive dissonance" as the tendency to adjust internal beliefs to fit external behavior, regardless of the accuracy of those beliefs). For a classic example of a study on cognitive dissonance, see Leon Festinger & James M. Carlsmith, Cognitive Consequences of Forced Compliance, 58 J. Abnormal & Soc. Psychol. 203, 209–10 (1959).

[76] For general sources on scholarly uncertainty about the ability of individuals to weigh evidence and make accurate assessments, see John G. Benjafield, Cognition 287–313 (3d ed. 2007) (examining mental models and deductive reasoning); Craig M. McKenzie, Judgment and Decision Making, *in* The Handbook of Cognition 321 (Koen Lamberts & Robert L. Goldstone eds., 2005) (canvassing the past forty years of research on inference and uncertainty and assessing the predictive power of normative models regarding the accuracy of decision making under uncertainty).

[77] Many scholars have expressed concern about *Brady*. See, e.g., Rachel E. Barkow, Organizational Guidelines for the Prosecutor's Office, 31 Cardozo L. Rev. 2089, 2106 (2010) (suggesting monitoring and reporting of *Brady* violations in order to help prevent them); Gershman, supra note 68, at 3 (arguing for a bad faith exception to prosecutorial immunity for *Brady* violations); Johns, Prosecutorial Immunity, supra note 39, at 54 (criticizing absolute prosecutorial immunity); Daniel S. Medwed, *Brady*'s Bunch of Flaws, 67 Wash. & Lee L. Rev. 1533, 1557–66 (2010) (calling for open-file policies and harsher disciplinary sanctions for nondisclosure); Richard A. Rosen, Disciplinary Sanctions Against Prosecutors for *Brady* Violations: A Paper Tiger, 65 N.C. L. Rev. 693, 697 (1987) (arguing that disciplinary sanctions are grossly ineffective and need to be strengthened); Joseph R. Weeks, No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence, 22 Okla. City U. L. Rev. 833, 933–34 (1997) (suggesting that *Brady*'s materiality standard be abandoned and absolute immunity curtailed).

[78] *Brady*, 373 U.S. at 87 (holding that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is *material either to guilt or to punishment*, irrespective of the good faith or bad faith of the prosecution" (emphasis added)).

the Department of Justice.[79] The slackness introduced by the requirement of materiality is compounded by the showing that the victim of a *Brady* violation must make to get relief. The ordinary rule that constitutional violations require reversal unless they are harmless beyond a reasonable doubt[80] does not apply. Instead, the convicted defendant must prove that, but for the prosecutor's suppression of exculpatory evidence, there was a "reasonable probability" that the result would have been different.[81] Prosecutors facing this forgiving regime may be expected to skimp on *Brady*, and by all accounts they do.

Absolute immunity for such actions is profoundly unwise. In discharging their obligations under *Brady*, prosecutors act ex parte and without judicial supervision, usually without correction from opposing counsel, and under professional and psychological circumstances that vitiate the incentives to comply. Other remedies are inadequate. And qualified immunity, as applied to a standard of *material* exculpatory evidence, would protect prosecutors against liability (or trial) in all but the most egregious cases. Indeed, the most serious objection to replacing absolute with qualified immunity is that it might not matter much. The dif-

[79] Several judges made statements to the Advisory Committee supporting changes in the rule. Judge Emmet G. Sullivan stressed that "it is uncontroverted that *Brady* violations . . . occur" and suggested that a tougher federal rule would "protect prosecutors from inadvertent failures to disclose exculpatory information" and "ensure that the defense receives in a timely manner all exculpatory information in the government's possession." Letter from Emmet G. Sullivan, U.S. Dist. Judge, to Richard C. Tallman, Chair, Judicial Conference Advisory Comm. (Apr. 28, 2009), available at http://legaltimes.typepad.com/files/sullivan_letter.pdf. Similarly, Judge Mark L. Wolf said that "amending Rule 16 would be in the Department's own best interest because an amendment would clarify a prosecutor's discovery obligations and make it easier to satisfy those obligations." See Advisory Comm. on Criminal Rules, Minutes of September 27–28, at 8–9 (2010), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CR09-2010-min.pdf. Judge Harvey Bartle III concurred, saying that "[h]aving an effective, objective prophylactic rule would be in everyone's long-term best interest, including the Justice Department's." Id. at 7. Despite these efforts to cast strengthening the disclosure requirement as a benefit to federal prosecutors, the Department of Justice resisted any change, with Assistant Attorney General Lanny Breuer warning of "great" dangers in amending Rule 16 to broaden disclosure. Id. at 8.

[80] See Chapman v. California, 386 U.S. 18, 24 (1967) ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.").

[81] United States v. Bagley, 473 U.S. 667, 682 (1985) ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."). Under *Strickland v. Washington*, 466 U.S. 668, 694 (1984), a "reasonable probability" is a "probability sufficient to undermine confidence in the outcome."

ficulty of uncovering *Brady* violations and the lax standards by which such questions are judged suggest that, so long as the substantive dimensions of the right remain the same, constitutional tort actions could provide only a gentle constraint. Nevertheless, something is better than nothing. There is real value in providing redress for egregious *Brady* violations, of which there seems to be no shortage,[82] even if more marginal violations go unremedied. And if, as the *Imbler* majority seems to have feared,[83] even the remote prospect of civil liability would induce prosecutors to release more evidence than a strict interpretation of *Brady* might require, that is all to the good. The sense of absolute power engendered by absolute immunity is exactly the problem, and should be constrained wherever possible.

[82] A 525-page report by special counsel asked to investigate *Brady* violations in the prosecution of Senator Ted Stevens began with the following sentence: "The investigation and prosecution of U.S. Senator Ted Stevens were permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated Senator Stevens's defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness." Henry F. Schuelke III, Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, Dated April 7, 2009, at 1 (2011). Judge Sullivan had previously commented that, "[i]n nearly 25 years on the bench, I've never seen anything approaching the mishandling and misconduct that I've seen in this case." Transcript of Motion Hearing at 3, United States v. Stevens, No. 08-231, 2009 WL 6525926 (D.D.C. Apr. 7, 2009). For other high-profile judicial complaints, see *United States v. Jones*, 620 F. Supp. 2d 163, 167 (D. Mass. 2009) (opinion of Wolf, J.) (chiding the prosecutor for "a fundamentally flawed understanding of her obligations, or a reckless disregard of them"); *United States v. Shaygan*, 661 F. Supp. 2d 1289, 1292 (S.D. Fla. 2009) (opinion of Gold, J.) (questioning the "integrity of those who wield enormous power over the people they prosecute" in light of a *Brady* violation).

There are many other instances in which courts have described *Brady* violations in similarly scathing terms. See, e.g., United States v. Mauskar, 557 F.3d 219, 232 n.3 (5th Cir. 2009) (describing prosecutor's actions as "beneath a member of the Bar representing the United States before this court"); United States v. Chapman, 524 F.3d 1073, 1080, 1085 (9th Cir. 2008) (describing a *Brady* violation as "flagrant" and citing the court below as saying it was "unconscionable"); United States v. Rittweger, 534 F.3d 171, 180, 183 (2d Cir. 2008) (saying that the court was "troubled" and "disappointed" by the prosecutor); United States v. Chases, 230 F. App'x 761, 762 (9th Cir. 2007) (calling a *Brady* violation evidence of "shocking sloppiness"); Ferrara v. United States, 456 F.3d 278, 293 (1st Cir. 2006) (calling a *Brady* violation "blatant" and "outrageous").

[83] *Imbler*, 424 U.S. at 432 n.34 ("We further think Mr. Justice White's suggestion . . . that absolute immunity should be accorded only when the prosecutor makes a 'full disclosure' of all facts casting doubt upon the State's testimony, would place upon the prosecutor a duty exceeding the disclosure requirements of *Brady* and its progeny.").

II. ABSOLUTE LIABILITY

At the opposite extreme from absolute immunity is absolute liability. As surprising as it may seem, some victims of constitutional torts are categorically barred from damages, no matter how malevolent and egregious the constitutional violation, while others are assured of recovery even if the government's action was entirely reasonable and done in complete good faith.

Under current law, strict liability is reserved for municipalities and other local governments that cause constitutional violations through official policy or custom. The story begins with *Monell v. Department of Social Services*,[84] which overruled *Monroe v. Pape*[85] to hold that a city was a "person" within the meaning of Section 1983 and therefore a proper party defendant.[86] Actually, *Monell* overruled *Monroe* twice: first in ruling that localities could be sued, and second in adopting for that class of defendants the standard rejected by *Monroe* for Section 1983 generally—namely, that constitutional violations be actionable only if formally or informally authorized by law.[87]

By itself, *Monell* might not have mattered all that much. It is true that the addition of a governmental defendant (in addition to the officer who accomplished the violation) might change the atmospherics of the litigation. The jury (for those cases that get to the jury) might be more willing to impose liability on a government than on an individual, or to increase the damages when liability is found. Although difficult to verify, these intuitions seem plausible. Even so, *Monell* did not itself portend a radical transformation in constitutional tort law. That came in *Owen v. City of Independence*, which held that when localities can be held liable, they are *strictly* liable, without benefit of the qualified (or absolute) immunity available to all other defendants under Section 1983.[88] This conclusion

[84] 436 U.S. 658 (1978).

[85] 365 U.S. 167, 187 (1961) (holding that "Congress did not undertake to bring municipal corporations within the ambit of [§ 1983]").

[86] *Monell*, 436 U.S. at 657–58.

[87] Id. at 694 (holding that local governments can be held liable only when a constitutional violation results from the "execution of a government's policy or custom"). This is essentially the same standard for which Justice Frankfurter argued, for himself alone, in his *Monroe* dissent. See *Monroe*, 365 U.S. at 236 (Frankfurter, J., dissenting) (construing § 1983 to reach only acts which were explicitly authorized by state law or which "came through acceptance by law-administering officers to constitute 'custom, or usage' having the cast of law").

[88] 445 U.S. 622, 638 (1980) ("We hold, therefore, that the municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983.").

rested on the traditional foundation of history—but with a bizarre twist. Because nineteenth-century municipal corporations mostly enjoyed absolute but not qualified immunity, said the Court, and since absolute immunity was inappropriate, they were therefore entitled to no immunity at all.[89] *Owen* also advanced inconsistent assumptions of probable effect, asserting both that municipal liability would deter employees from constitutional violations but that it would not inhibit them from the vigorous exercise of government powers.[90] Whatever the basis for these conflicting intuitions, *Owen* established that, alone among Section 1983 defendants, local governments have no immunity against the award of damages.[91]

After *Owen*, the official-policy-or-custom requirement of *Monell* became paramount. It no longer determined merely whether another defendant, whose presence might or might not matter, could be added to a constitutional tort case. It now controlled access to strict liability. When qualified immunity precludes liability of officer defendants, official policy or custom is the ball game. It is the gateway to the only liability rule under which many plaintiffs can recover. Naturally, this creates powerful litigation incentives: plaintiffs try to establish official policy or custom; defendants resist that conclusion. But this is true only for acts by employees of *local* governments. States and state agencies remain absolutely immune, whether an employee's unconstitutional conduct is authorized or not.[92]

[89] See id. at 644–48 (holding that municipalities enjoyed absolute immunity when acting as "a [governmental] arm of the State" and when engaged in "'discretionary' or 'legislative' activities"); id. at 647–51 (denying qualified immunity).

[90] Compare id. at 651–52 ("The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights."), with id. at 656 ("[I]t is questionable whether the hazard of municipal loss will deter a public officer from the conscientious exercise of his duties . . . .").

[91] The internal contradictions multiplied some years later, when the Court ruled that local governments, again alone among § 1983 defendants, though absolutely liable in compensatory damages for constitutional violations, were absolutely immune from the award of punitive damages. City of Newport v. Fact Concerts, 453 U.S. 247 (1981) (arguing, in direct contradiction to the reasoning of *Owen*, that "it is far from clear that municipal officials . . . would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality").

[92] This conclusion is expressed in terms of incapacity to be sued rather than "absolute immunity," but they amount to the same thing. See Will v. Mich. Dep't of State Police, 491

This complicated landscape leads to three propositions. The first two are—or should be—noncontroversial. The third—which is considered at length in Part III—raises the foundational issue of the appropriate liability rule in constitutional tort law, an issue that persistently divides the Court from its critics and that underlies many disputes about specific doctrines.

The first proposition is the most obvious. Litigating official policy or custom is wasteful. Logically, "policy" and "custom" suggest generality of application. Either the action was taken pursuant to a general rule or a persistent practice, or the decision to act was reached under procedures of such formality and deliberation as to signal a protocol for future cases.[93] So construed, the requirement of official policy or custom might have had something close to a plain meaning. But the Court ruled otherwise. It held that official policy or custom can be found in isolated, ad hoc decisions, unsupported by any explicit rule or persistent practice and reached without procedural elaboration or formality.[94] That conclusion robs "official policy or custom" of any intrinsic meaning. The most obvious alternative is to say that "policy" is simply any act by a policy maker. If the identity of the government actor is the key, one might sort government employees by level of responsibility and treat any act by a high-level employee (judged by whatever standard) as official policy and any act by a low-level employee as something else. This is a looser response to the policy-or-custom language, but it too has a certain internal integrity. It too has been rejected.[95] The Court insists that isolated, ad hoc decisions count as official policy only if the decision maker had the

U.S. 58, 71 (1989) ("[N]either a State nor its officials acting in their official capacities are 'persons' under § 1983.").

[93] Similar observations have been made on the Court, albeit in dissent. See Pembaur v. City of Cincinnati, 475 U.S. 469, 499–500 (1986) (Powell, J., dissenting).

[94] See id. at 485 (majority opinion) (holding that a county prosecutor who answered a deputy sheriff's question by phone established official policy).

[95] City of St. Louis v. Praprotnik, 485 U.S. 112, 125 n.2 (1988) (opinion of O'Connor, J.) (rejecting Justice Stevens's attempt to distinguish between "high" and "low" officials as the test of government liability). Justice Stevens had argued that:

> [e]very act of a high official constitutes a kind of 'statement' about how similar decisions will be carried out; the assumption is that the same decision would have been made, and would again be made, across a class of cases. Lower officials do not control others in the same way.

Id. at 171 (Stevens, J., dissenting).

authority to make *final* policy in that area,[96] which is apparently not the same as asking whether the actor had the authority to act in that area, or even to command others to do so. The existence of final policy-making authority is said to be "not a question of federal law, and . . . not a question of fact in the usual sense,"[97] though analytically it would seem to be precisely a question of the application of (federal) law to fact. We are told, however, that final policy-making authority is a question of state law.[98] Of course, state law ordinarily would have no occasion or ability to declare that a particular official is or is not a "final policy maker" under Section 1983. If a state used such labels only to affect federal liability, state law would have no effect. Ordinarily, state law does not have an entirely free hand in characterizing state issues on which federal rights depend.[99] Presumably, an attempt by state law to dictate municipal liability under Section 1983 by declaring officials not "final policy makers" would meet the same fate as Virginia's effort to specify an unusually short statute of limitations for Section 1983,[100] Wisconsin's attempt to impose a special notice-of-claim requirement for such cases,[101] or New York's law requiring that damages actions against corrections officers be maintained as actions against the state in the New York Court of Claims.[102] All were struck down as attempts to manipulate state law to evade or defeat federal rights. Any state law that targets enforcement of federal rights would be similarly ignored.

[96] Id. at 127 (opinion of O'Connor, J.) ("[T]he authority to make municipal policy is necessarily the authority to make *final* policy.").

[97] Id. at 124.

[98] Id. ("[W]hether an official had final policymaking authority is a question of state law." (quoting *Pembaur*, 475 U.S. at 483 (plurality opinion))). Elsewhere the view has been expressed that the question is not merely whether the official had final policy-making authority, but whether he or she actually exercised it. See *Pembaur*, 475 U.S. at 498 (Powell, J., dissenting) ("The question here is not '*could* the county prosecutor make policy?' but rather, '*did* he make policy?'").

[99] See, e.g., Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100, 108–09 (1938) (rejecting the Indiana Supreme Court's conclusion that state law created no contract between the state and an employee on the ground that the construction was inconsistent with prior state cases and that it would preclude enforcement of the federal guarantee against impairing the obligation of contract).

[100] Johnson v. Davis, 582 F.2d 1316, 1317 (4th Cir. 1978) (refusing to apply a special one-year statute of limitations adoption targeted at § 1983 actions because it evidenced hostility to and discrimination against federal rights).

[101] Felder v. Casey, 487 U.S. 131, 134 (1988) (refusing to apply a state statute requiring written notice to a locality within 120 days of the events giving rise to the suit).

[102] Haywood v. Drown, 556 U.S. 729, 740–42 (2009).

In summary, therefore, the cases teach that official policy or custom requires neither a general rule nor a persistent practice nor a decision reached with any particular formality; that it can be based on an isolated, ad hoc decision by someone with final "policy-making" authority; and that the existence of such authority is a question of state law, unless state law attempts directly to control federal liability, in which case it is not given effect. These criteria identify a legal standard that is crucially important but radically indeterminate. Given that the choice of liability rule is often decisive, litigants have every incentive to pour time and money into contesting official policy or custom. And given that the standard for determining policy or custom is, in the words of Justice Breyer, "neither readily understandable nor easy to apply,"[103] the cost in time and money is likely to be great. The expenditure of resources might be justifiable if it were necessary to address a central issue, but to my mind, there is no obvious reason why official policy or custom should control the liability rule for constitutional torts. Extended litigation over that question is not only costly but wasteful, and it is perhaps for that reason that several Justices have signaled a willingness to throw in the towel and start over.[104]

The second proposition is more far-reaching than the first. Whatever the appropriate liability rule, states and cities should be treated the same. Current law defies common sense. Under the fairly narrow circumstances described above, local governments are strictly liable for constitutional violations by their employees, no matter how reasonable the actions may have been when committed. They may even be required to pay for violation of rights that did not exist (save in some Blackstonian ether) at the time of the action taken.[105] States and state agencies, in contrast, are absolutely immune. They face no possibility of direct governmental liability, even for an egregious constitutional violation explicitly commanded by the highest authority. To my knowledge, no one has ever attempted a functional defense of this disparity, and none comes to mind. Indeed, to the extent that there is any reason to treat states differently

[103] Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 433 (1997) (Breyer, J., dissenting).

[104] See id. at 437 (Breyer, Stevens & Ginsburg, JJ., dissenting) (asking for further argument on the requirement of policy or custom); id. at 430 (Souter, J., dissenting) (suggesting reexamination of *Monell*).

[105] See, e.g., *Owen*, 445 U.S. at 634–38 (imposing liability for failing to provide a "name-clearing hearing" of the sort first required in *Board of Regents v. Roth*, 408 U.S. 564, 569–70 (1972), which was decided after the events in question).

from localities, the distinction would cut the other way. On average, states are bigger than localities and have more capacity to absorb large damages judgments. This would be a very slender reed on which to base an argument that states should be held to a *more* demanding standard than localities, but it is stronger than any conceivable justification for the opposite regime of current law.

Of course, the Court's insistence on absolute state immunity and absolute municipal liability has nothing to do with functional concerns. It is rather a reflection of the fact that state immunity and municipal liability are the law of the Eleventh Amendment.[106] Perhaps that would be explanation enough if the Eleventh Amendment were coercive and clear, but it is neither. Eleventh Amendment doctrine is opaque, confused, and contradictory, and virtually every aspect of its meaning is contested and debated, both on and off the Court. Read over its long history, the Eleventh Amendment is as much an opportunity for judicial creativity as an inhibition thereof. Yet even if one takes as given the main outlines of current doctrine, there is ample room to bring states and localities into alignment for purposes of Section 1983.

Either side of the current disparity between states and cities could be altered without any change in constitutional doctrine. Under settled (indeed, unanimous) law, Congress can override state sovereign immunity in the exercise of its enforcement powers under the Civil War Amendments.[107] The Civil Rights Act of 1871 was enacted pursuant to those powers. Therefore, Section 1983 could be construed to abrogate any sovereign or Eleventh Amendment immunity that states would otherwise enjoy. That the statute currently does not have that effect is owing to statutory construction of the word "person" to exclude states,[108] a construction that could be undone with no more embarrassment than overruling any other decision that has come to be seen as error.[109]

[106] Compare Hans v. Louisiana, 134 U.S. 1, 20–21 (1890) (barring monetary recovery from a state), with Lincoln Cnty. v. Luning, 133 U.S. 529, 530 (1890) (allowing monetary recovery from a locality), another case decided the same day.

[107] Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); accord United States v. Georgia, 546 U.S. 151, 158 (2006) (stating that "no one doubts" Congress's power to abrogate state sovereign immunity and impose damages liability for Fourteenth Amendment violations).

[108] Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989).

[109] Cf. *Monell*, 436 U.S. at 695–701 (defending the decision to overrule *Monroe v. Pape*'s interpretation of § 1983).

Alternatively, the Court could overrule *Monell*'s decision that "person" does include municipalities,[110] especially since the underlying constitutional interpretation that set the pattern for that conclusion has become so transparently fictitious. *Lincoln County v. Luning*[111] held that counties were not protected by the Eleventh Amendment, a conclusion subsequently extended to other forms of local government.[112] The rationale for these decisions seems to have been that nineteenth-century localities were not really governments at all but were more closely analogized to private corporations.[113] However plausible this may have been in 1871, it is manifestly untrue today. Local governments are governments. They derive their powers entirely from the states that created them and have no powers other than those delegated by the states.[114] They act in ways authorized or commanded by the states that gave them birth. Legally, local governments are units of state government and should be entitled to as much or as little immunity as other units of state government. The fact that Section 1983 has been construed differently reflects the inertial force of a decision based on outdated facts. In my view, it could be updated to fit current reality with no more difficulty than deciding that Article I, Section 8, which speaks only of the Army and the Navy, also empowers Congress to create the Air Force.

My purpose here is not to offer yet another reconstruction of the law of state sovereign immunity, but only to show that there is no constitutional obstacle to making sense of Section 1983. Current doctrine fails that test. It imposes diametrically opposite liability rules on governmental defendants that are functionally indistinguishable. And in doing so, it introduces bizarre and counterproductive litigation incentives that needlessly drive up the cost of constitutional tort cases. Given the prospect of

[110] Id. at 688–91.

[111] 133 U.S. 529, 530 (1890).

[112] See, e.g., Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280–81 (1977) (school boards); Workman v. New York, 179 U.S. 552, 565, 570 (1900) (cities).

[113] See *Lincoln Cnty.*, 133 U.S. at 530 (stating that a county is "a corporation created by and with such powers as are given to it by the State" and thus is "part of the State only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the State").

[114] This view was famously expressed by Chief Judge Dillon in *City of Clinton v. Cedar Rapids and Missouri River Railroad Co.*, 24 Iowa 455, 475 (1868) ("Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control."). These remarks were quoted approvingly in *Atkin v. Kansas*, 191 U.S. 207, 221 (1903), and are widely accepted today.

strict liability, plaintiffs have powerful incentives to depict their wrongs as products of official policy or custom by a local government. For the same reason, defendants have equally strong incentives to contest policy and custom, and to argue that if any government is involved, it is an arm of the state.

The full flower of wastefulness to which this regime leads can be seen in *McMillian v. Monroe County*, where the issue was whether the sheriff of Monroe County, Alabama, was a county policy maker, in which case the county could be held liable for his suppression of exculpatory evidence without regard to the qualified immunity that the sheriff himself would have enjoyed.[115] The Supreme Court examined the matter and concluded that Alabama county sheriffs were actually officers of the state, which could not be sued at all. This conclusion rested on the Alabama Constitution of 1901, which included sheriffs in the "executive department" of the state in order to shift the power to remove them from the county courts (where the sheriffs had influence) to the state supreme court (which was expected to be less tolerant of official complicity in lynchings).[116] This analysis faithfully followed the trail of existing doctrine. It investigated an unusual state-law structure and appears to have done so correctly.[117] The only trouble is that the issue on which the litigants and the courts spent so much time and trouble has no conceivable relation to the merits of the plaintiff's constitutional tort claim or to the arguments for granting or withholding monetary relief. There is simply no connection between the controlling legal doctrine and the reason for the litigation.

The third proposition to which the discussion of municipal liability leads is the most difficult. It raises the issue of the role of fault in constitutional tort law. To say that states and cities should be treated the same is not to say how either should be treated. Two alternatives present themselves. On the one hand, the pocket of strict enterprise liability created by *Monell* and *Owen* could be generalized to include all acts by local government employees (not just acts done pursuant to official policy

[115] 520 U.S. 781, 783 (1997).

[116] Id. at 787–88.

[117] Though the point is surely debatable, as the Court split 5-4. See id. at 797–801 (Ginsburg, Stevens, Souter & Breyer, JJ., dissenting) (arguing that Alabama sheriffs should be treated as county officials).

or custom) and all acts by state government employees.[118] Strict enterprise liability would then be the rule.[119] On the other hand, the zone of strict liability defined by *Monell* and *Owen* could be eliminated in favor of governmental immunity from direct liability, absent federal legislative intervention. A construction of "person" in Section 1983 to *exclude* both states and cities would channel all constitutional tort litigation, as most of it currently is channeled, into officer suits. And though it is not analytically inevitable that officer defendants would continue to enjoy some form of qualified immunity, such immunity would seem to be the strongest reason for relying on officer suits to enforce constitutional rights.

These alternatives are starkly different. Across-the-board strict liability would make damages for constitutional violations routine and would thereby heighten the disincentives for governments to engage in conduct that might result in constitutional violations. An across-the-board requirement of officer fault, in contrast, would constrain damages liability and thus preserve at least some of the protection that government now enjoys against liability for reasonable mistakes.[120] Doctrinally, the ques-

[118] It is difficult to imagine judicial action that would create a comparable regime for the federal government, since no plausible interpretation of § 1983 would bring the federal government within the statute's reach. To achieve anything like strict enterprise liability for constitutional violations by federal officers, legislation would be required.

[119] Strict liability and enterprise liability are not analytically inseparable, but they are a natural pairing. It would be more than a little awkward to hold officers personally liable for constitutional violations without proof of fault. If it were thought wise to move to a regime that compensates *all* violations of constitutional rights regardless of individual fault or the lack thereof, that responsibility should rest directly on government.

[120] Professor Daryl Levinson has expressed radical skepticism about the impact of money damages on the conduct of government officers. See Daryl J. Levinson, Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs, 67 U. Chi. L. Rev. 345, 347 (2008) ("Because government actors respond to political, not market, incentives, we should not assume that government will internalize social costs just because it is forced to make a budgetary outlay."). This argument has achieved great prominence and prompted much debate. See, e.g., Myriam E. Gilles, In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies, 35 Ga. L. Rev. 845, 861 (2001) (arguing that, considering adverse publicity and the burdens of litigation, "constitutional damage remedies, although denominated in dollars, clearly translate into the political currency that moves political actors"). Levinson is surely right in drawing attention to the effects of institutional design and structure and the individual incentives they produce and in cautioning against overconfidence in relying on classic deterrence theory. Of course, much the same could be said of any argument drawn from microeconomic theory. My own view is that the deterrent effect of money damages plus attorney's fees is sufficiently plausible to warrant reliance on such analysis until disproved.

tion is whether constitutional tort law should retain some form of the defense of qualified immunity. It is to that question that we now turn.

III. QUALIFIED IMMUNITY

The choice between strict liability for constitutional violations and a fault-based approach to officer suits is the critical issue in constitutional torts. On balance, academic opinion favors the former alternative,[121] while a majority of the Justices support the latter.[122] The issue is certainly not, as is often said, "outside the scope of this Article," but it is a matter of depth and complexity. A fully developed argument would likely test the reader's patience. Moreover, to an extent it would recapitulate arguments made in earlier articles advocating fault-based liability for constitutional torts.[123] I offer here a restatement of the case for requiring fault, with an invitation to interested readers to refer to the earlier articles for further explication.

In following this argument, it is essential to distinguish the case for retaining *some version* of qualified immunity from the details of existing

[121] See, e.g., Peter H. Schuck, Suing Government: Citizen Remedies for Official Wrongs 100–21 (1983) (advocating enterprise liability); Mark R. Brown, The Demise of Constitutional Prospectivity: New Life for *Owen*?, 79 Iowa L. Rev. 273, 312 (1994) (disparaging any protection against damages liability even for newly created constitutional rights); Harold S. Lewis, Jr. & Theodore Y. Blumoff, Reshaping Section 1983's Asymmetry, 140 U. Pa. L. Rev. 755, 761–62 (1992) (arguing that entity liability "would work its own indirect but powerful deterrence of individual misbehavior"); Cornelia T.L. Pillard, Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under *Bivens*, 88 Geo. L.J. 65, 66–68 (1999) (criticizing reliance on officer suits).

[122] Perhaps the strongest indications of the Court's fidelity to fault-based constitutional tort liability, despite the contrary pronouncement in *Owen v. City of Independence*, 445 U.S. 622, 638 (1980), are cases in which the Court has reintroduced fault into doctrine that had seemed to dispense with that requirement. See, e.g., Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 405 (1997) (interpreting prior governmental liability decisions, including *Owen*, as implicitly requiring "fault and causation"); id. at 411 (limiting liability for inadequate screening of local government employees to cases where the resulting unconstitutional conduct was a "plainly obvious consequence" of the hiring decision); City of Canton v. Harris, 489 U.S. 378, 388 (1989) (imposing municipal liability for failure to train only where it reflects "deliberate indifference" to constitutional rights).

[123] The two most relevant to this discussion are Eleventh Amendment, supra note 12, and The Right-Remedy Gap in Constitutional Law, 109 Yale L.J. 87 (1999) [hereinafter Right-Remedy Gap]. See also Disaggregating Constitutional Torts, 110 Yale L.J. 259 (2000); Compensation for Constitutional Torts: Reflections on the Significance of Fault, 88 Mich. L. Rev. 82 (1989) [hereinafter Compensation for Constitutional Torts]; Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts, 75 Va. L. Rev. 1461 (1989).

doctrine. In my view, the former is desirable, while the latter is not. The general issue is addressed immediately below. The details of existing doctrine are considered thereafter.

A. The Case for Requiring Fault

The place to begin is with the simple recognition that money damages are ordinarily not a constitutionally required remedy for constitutional violations. This fact is abundantly clear from the cases, which routinely preclude damages on all sorts of less-than-compelling grounds,[124] but I think it is also clear in principle. Aside from the Takings Clause, money damages are not an inevitable means of enforcing constitutional rights. The basic and essential remedy for most constitutional rights is the opportunity to assert them defensively against government coercion.[125] *Ex parte Young*[126] added the opportunity to enjoin threatened violations. To what extent *Ex parte Young* changed prior law is hard to say, but it has come to stand for the proposition that injunctive relief against an appropriate state officer is more or less routinely available, despite the traditional requirement that there be no adequate remedy at law.[127] Damages

[124] In addition to the many instances of absolute immunity discussed above, see supra Part II, note also the Court's increasing unwillingness to allow damage actions against federal officers under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 389 (1971). See, e.g., Wilkie v. Robbins, 551 U.S. 537, 562 (2007) (holding *Bivens* precluded for a campaign of harassment and persecution of a Wyoming landowner by federal officers who wanted an easement over his land, on the ground that allowing such an action might lead to difficult questions of official motivation); Schweiker v. Chilicky, 487 U.S. 412, 414 (1988) (holding *Bivens* precluded by emergency legislation designed to deal with wrongful denial of disability benefits even though that scheme did not allow any recovery for consequential damages); United States v. Stanley, 483 U.S. 669, 683–84 (1987) (holding *Bivens* precluded for involuntary administration of LSD to U.S. Army personnel on the grounds of special solicitude for the United States military).

[125] See John C. Jeffries, Jr. & George A. Rutherglen, Structural Reform Revisited, 95 Calif. L. Rev. 1387, 1391–95 (2007) (discussing the defensive assertion of rights as the "basic and essential" remedy).

[126] 209 U.S. 123, 167 (1908).

[127] See Jeffries & Rutherglen, supra note 125, at 1395 (describing *Ex parte Young* as the "case that shunted aside the traditional presumption against equitable relief"). There are rare circumstances where injunctive relief is not available, but they do not cohere. See, e.g., Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 287–88 (1997) (precluding injunctive relief, apparently as a result of ad hoc balancing, when sought in conjunction with a quiet title action to settle ownership of the submerged beds of Lake Coeur d'Alene and its water system); Seminole Tribe v. Florida, 517 U.S. 44, 73–74 (1996) (finding that Congress's attempt to force states to negotiate with Indian tribes on tribal gaming activities actually embodied a congressional intent to preclude accomplishing that objective by resort to *Ex parte Young*);

came much later. Federal damages actions for constitutional violations—as distinct from the ordinary tort actions that might be made out on the same facts—first became clearly available with the rediscovery of Section 1983 in 1961[128] and the creation of an analogous remedy against federal officers ten years later.[129] From the beginning therefore, the award of money damages to redress constitutional violations has been treated as sub-constitutional law, requiring (or at least allowing) judicial creativity, and reflecting, implicitly or explicitly, the weighing of costs and benefits. It is in that framework that the issue of fault in constitutional tort law should be addressed.[130]

The costs and benefits of requiring fault are easy to identify but impossible to quantify. Obviously, allowing officers and the governments that employ them to escape liability for constitutional violations when their acts are reasonable reduces whatever incentives damages can provide to enforce compliance with the Constitution. Although economists tell us that an ideally administered negligence standard—so well crafted as to be completely predictable—would be as effective as strict liability

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984) (holding federal injunctive relief against state officers not available when sought to prevent violations of *state* law).

[128] Monroe v. Pape, 365 U.S. 167, 168–69 (1961).

[129] *Bivens*, 403 U.S. at 397. Before *Monroe* and *Bivens*, damage actions for violations of constitutional rights were not explicitly authorized, but there were antecedents of such actions in diversity cases. See Ann Woolhandler & Michael G. Collins, Federal Question Jurisdiction and Justice Holmes, 84 Notre Dame L. Rev. 2151, 2168 (2009) (documenting that diversity jurisdiction "may have been intended as, and was in fact, a vehicle for federal question cases. Both before and after 1875, the Court saw diversity as appropriately employed to raise federal questions, and often gave an expansive interpretation of the diversity jurisdiction to accommodate federal questions.").

[130] For me it follows that, so far as any non-instrumental concept of compensation is concerned, persons injured by the unconstitutional acts of government have no necessary priority over those injured by legitimate acts of government or perhaps over those who simply have injuries and unmet needs. To put the point more precisely, the non-instrumental case for compensation is compelling only when the fact of injury is accompanied by proof of fault. See Jeffries, Compensation for Constitutional Torts, supra note 123, at 99–102.

Consider, for example, the case of a person who is arrested, prosecuted, convicted, and sentenced in strict compliance with the Constitution, but whose guilt is later disproved by new evidence. Is the person thus mistakenly imprisoned necessarily less deserving of financial relief than the person whose rights are violated by an inadvertently illegal search? Or the person whose property is devalued by government regulation? I know of no categorical answer to such questions. They depend, it seems to me, on considerations of policy and judgments of degree.

in inducing caution,[131] that is not remotely true of constitutional law, which has few rules and many standards. Even if strict liability were not more effective in inducing compliance with the Constitution (which almost certainly it is), one might prefer strict liability because it forces government to "internalize" the costs of constitutional violations, including those that would not be prevented by reasonable care, and spreads the losses across the citizenry at large rather than letting them lie where they fall.[132]

Against these arguments, the Supreme Court has posited overdeterrence—more accurately, unintended deterrence—of socially desirable conduct as the countervailing concern. As the Court said in *Scheuer v. Rhodes*, the danger of a no-excuses policy regarding government unconstitutionality is "that the threat of such liability would deter [an official's] willingness to execute his office with the decisiveness and the judgment required by the public good."[133] The argument is essentially the same as that in First Amendment overbreadth cases—that the prospect of civil liability will induce timidity and caution in the exercise of government powers that generally operate to the public good. This argument depends on indeterminacy in the legal standards. If the criteria of constitutionality were crisp and unambiguous—for example, that no car can be searched without a warrant, or any vehicle can be searched at any time—the problem of unintended deterrence of legitimate activity would go away. It is only because constitutional law is full of open-ended criteria of illegality that unintended deterrence of socially desirable conduct looms so large.

The problem of overdeterrence is exacerbated by several characteristics of government employment. First, interactions between government officials and individual citizens are usually nonconsensual, often coercive, and therefore productive of conflict. Moreover, the incentives facing government officers are skewed by a cause-of-action problem.[134] An

[131] See, e.g., Kenneth S. Abraham, The Forms and Functions of Tort Law 167 (3d ed. 2007) ("[A]t least in theory the threat of liability for negligence deters all the accidents worth deterring—those whose costs outweigh the costs of avoiding them—because liability for negligence is imposed when accident costs outweigh avoidance costs, and is not imposed when accident costs do not outweigh avoidance costs."); Steven Shavell, Strict Liability v. Negligence, 9 J. Legal Stud. 1, 6–9 (1980).

[132] See Jeffries, Eleventh Amendment, supra note 12, at 72–73.

[133] 416 U.S. 232, 240 (1974).

[134] See Jerry L. Mashaw, Civil Liability of Government Officers: Property Rights and Official Accountability, 42 Law & Contemp. Probs. 8, 29 (1978).

individual hurt by government conduct usually knows exactly whom to blame. The causal connection between the plaintiff's injury and the defendant's conduct is typically clear, and the victim has no trouble stating a cause of action. A person injured by official *in*action—by the officer who foregoes an arrest or the school principal who tolerates a troublemaker—often has difficulty identifying any officer responsible for subsequent injury and proving a causal connection. As a result, the risk of being sued for erroneous *action* is much higher than the risk of being sued for erroneous *inaction*, though the two may be equally costly. This disparity increases the incentive to protect oneself by doing less.[135]

Even aside from the cause-of-action problem, the incentive structure of government officials encourages inaction. The idea is most plausible for civil servants, who face punishment or loss for demonstrable *mis*conduct but who are rarely able to capture the gains of effective action. For high-level officials, where the coin of the realm is political reputation (and future earning power), Professor Daryl Levinson's skepticism about the immediate impact of financial incentives may be well founded.[136] But for run-of-the-mill civil servants, the prospect of discipline and loss from erroneous action seems likely to loom especially large. As I have argued elsewhere, the structure of civil service employment makes it likely that government workers might "rationally be more concerned with avoiding mistakes than with maximizing social benefits."[137] And if that characteristic of government employment is widely understood by prospective employees, timidity and caution may be powerfully reinforced by self-selection. Risk-takers may gravitate toward the private sector, while the risk-averse are drawn to government work. To the extent that is true, the skewed incentives facing hypothetically rational civil service employees may simply exploit a psychological predisposition to avoid risk.

Finally, it may also be true that government decision makers give greater weight to costs that must be accounted for on-budget and that they tend to discount costs, such as tax-code complexity or regulatory delay, that fall elsewhere.[138] Civil-rights judgments and the accompanying awards of attorney's fees are on-budget costs. At least for states and

[135] Jeffries, Eleventh Amendment, supra note 12, at 75; Mashaw, supra note 134, at 31.

[136] See Levinson, supra note 120, at 345 ("Government actors respond to political incentives, not financial ones—to votes, not dollars.").

[137] Jeffries, Eleventh Amendment, supra note 12, at 76.

[138] See id. at 76–77.

localities, which do not have central-bank capabilities, increased on-budget costs mean higher taxes or cuts in other expenditures. The political penalties for either choice can be severe. There is this additional reason to think, therefore, that while erroneous government action and erroneous government inaction may be equally costly to society as a whole, the former is more likely to trigger on-budget liability and thus to affect and distort government behavior.

Arguments of this general variety have long been made by the Supreme Court. They are inevitably speculative, though not more so than most constitutional arguments, and to me they seem plausible. I am more persuaded, however, by a very different line of argument, one that relates the requirement of fault in damages actions to the content of constitutional law. Given the immunities available to defendants under current law, many violations of constitutional rights cannot be redressed by damages. That leaves a gap between the rights guaranteed by the Constitution and the availability of the damages remedy to enforce them. The size of the gap depends chiefly on the defense of qualified immunity. If qualified immunity is read broadly to protect a wide range of constitutional error, as is currently true, the gap is large. If qualified immunity were construed more narrowly, as I think it should be, the gap would be reduced. If strict liability were adopted as the general liability rule for constitutional torts, the gap would be eliminated entirely. In my view, some gap between constitutional rights and the damages remedy is a good thing. It is not a problem to be solved, but an asset to be preserved. Eliminating that gap entirely would have a baleful effect on the content and development of constitutional law.[139]

I start from the proposition that the specific content of constitutional rights—as distinct from the values that underlie them or the methodologies used to define them—does and should change. The descriptive part of that statement is unarguable. The normative part may not be quite so obvious, though I think it should be. Despite the allure (for some) of originalism as a methodology, it is hard to think that the Constitution as we know it would have endured if doctrine had remained forever static. It may be ironic but it is nonetheless true that "the reason that we still have some version of the original Constitution and that we can refer (more or less meaningfully) to the intent of the Framers is the docu-

[139] This argument was broached in Jeffries, Eleventh Amendment, supra note 12, at 78–81, and expanded in Jeffries, Right-Remedy Gap, supra note 123, at 90–91.

ment's capacity for internal growth."[140] Does anyone really think that the law of free speech, which is almost entirely a product of the twentieth century, should *for that reason* be dismantled? Or that the application of Fourth Amendment principles to new technologies is root and branch illegitimate? Or that the scope of federal power under the Commerce Clause should be determined wholly without regard to modern economic realities? To me, the answers to these questions seem obvious. Even for those who distrust judicial revolution, of whom I am one, the capacity of constitutional law to change is an important, and necessary, strength.

Limitations on money damages facilitate constitutional evolution and growth by reducing the cost of innovation. Judges contemplating an affirmation of constitutional rights need not worry about the financial fallout. The curtailment of such consequences is in a sense liberating. This is true not only for the abrupt shift in direction, which may or may not come to be considered heroic,[141] but also, and more importantly, for the small, incremental, evolutionary steps that are the lifeblood of constitutional law. Think, for example, of desegregation. The progression ranges from the sea-change of *Brown*;[142] to the desegregate "*now*" mandate of *Green*;[143] to the approval of busing in *Swann*;[144] to the many decisions finding northern and western communities guilty of de jure segregation despite the absence of formal apartheid;[145] to fact-specific decisions, in school districts throughout the country, rejecting existing desegregation

[140] Jeffries, Right-Remedy Gap, supra note 123, at 97.

[141] E.g., Roe v. Wade, 410 U.S. 113, 163–64 (1973); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954). Different trajectories in the eyes of subsequent generations obscure the commonality of these decisions at the time. Both were deeply divisive, at once marshaling massive support for new propositions of constitutional law and provoking outrage and determined resistance. *Brown* has since become universally celebrated, while *Roe* remains durably controversial.

[142] *Brown*, 347 U.S. at 495.

[143] Green v. Cnty. Sch. Bd., 391 U.S. 430, 439 (1968) ("The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.").

[144] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 30 (1971).

[145] See, e.g., Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 456, 468 (1979) (imposing desegregation remedies based on "cognitive acts or omissions" before 1954 resulting in an enclave of black schools in part of Columbus); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 541 (1979) (ordering system-wide remedy to redress intentional acts of segregation committed some two decades previously); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 213–14 (1973) (finding de jure segregation in Denver and approving a district-wide remedy to redress intentional segregation in only one part thereof).

plans and requiring something more and better.[146] At each and every stage, from wholesale innovation to minor adjustment, these decisions found unconstitutional acts that previously could have been thought lawful. All these acts had victims, and all the victims had injuries.[147] If awarding damages had been a necessary corollary of finding violations, the potential impact would have been staggering. One has only to imagine what a competent class action lawyer could have proved by way of damages for school segregation and the educational deprivation to which it led. As it happened (largely for non-doctrinal reasons), this history unfolded without regard to potential damages liability and was therefore unconstrained by that concern. If, however, a regime of strict enterprise liability for constitutional violations had been in place and lawyers had been alert to that possibility, judicial decision makers at every stage would have known that imposing additional requirements on segregated school districts would trigger massive financial liability. Every step taken would have had a larger remedial footprint, with the probable consequence of fewer steps taken.

The question posed by qualified immunity, not for desegregation specifically but for constitutional law generally, is whether a lockstep between constitutional violations and damages liability is desirable. In my view, it is not. Under current law, the prospect of awarding money damages does not constrain the definition of constitutional rights. For most defendants, the fact that the conduct now being prohibited could have been thought lawful precludes damages liability. If qualified immunity were removed, every extension of constitutional rights, whether revolutionary or evolutionary, would trigger money damages. In some circumstances, that prospect might not matter. In others, it surely would.

The impact of inhibiting constitutional innovation in this way is impossible to quantify, but I think it would prove deleterious. And it would be completely asymmetrical. Over the long history of American constitutional law, growth in judicially protected civil liberties has predominated, but only in a global sense. Along the way there have been both

[146] For a wonderful comparative history of two school districts, see James E. Ryan, Five Miles Away, A World Apart: One City, Two Schools, and the State of Educational Opportunity in Modern America (2010).

[147] See Jeffries, Right-Remedy Gap, supra note 123, at 100–03 (discussing desegregation in greater detail).

additions and subtractions from constitutional rights.[148] The former would be discouraged by strict liability for constitutional violations, while the latter would not. The effect would be not simply to encourage stasis, but to discourage only those interpretations that extend, enlarge, or clarify the applicability of constitutional guarantees. Interpretations that restrict, reduce, or confine the applicability of constitutional guarantees would be unaffected. It is hard to believe that would be a good thing.

This judgment is powerfully reinforced by the distributive effects of qualified immunity. Limiting money damages biases constitutional law in favor of the future. It builds into the structure of constitutional remedies a perpetual preference for the younger generation: "Older claimants are disadvantaged by doctrines that deny full individual remediation for past injuries; younger ones are advantaged by the continuing evolution of constitutional law to meet new challenges."[149] In a world of finite resources, choices must be made. The choice reflected in the defense of qualified immunity is that it is more important to secure the benefits of constitutional innovation for the future than to provide compensation for the past. This runs counter to the absolutist rhetoric of constitutional law, which implies total commitment to anything labeled a constitutional right. Such rhetoric obscures the inevitable weighing of costs and benefits, which is often buried in interpretive decisions about the scope of constitutional guarantees and in the various tests that describe the required strength of countervailing interests. Constitutional decision makers, no less than the rest of us, live in a world of limited resources and competing demands. It is to that world that the law of qualified immunity speaks. As constitutional rights evolve and change, qualified immunity subordinates past claimants to future beneficiaries and thereby effects a forward-looking and ultimately desirable redistribution of constitutional wealth.

For these reasons, my judgment is that *some version of* qualified immunity should be the liability rule for constitutional torts. Absolute immunity should be severely restricted, as described above, and the small pocket of strict liability created by *Monell* and *Owen* should be eliminated. Under this conception of constitutional tort law, even more than un-

[148] Indeed, if one ignores the additions and considers only the subtractions, it is possible to see the Constitution in collapse. See Erwin Chemerinsky, Foreword: The Vanishing Constitution, 103 Harv. L. Rev. 43, 96–97 (1989).

[149] Jeffries, Right-Remedy Gap, supra note 123, at 105.

der current doctrine, qualified immunity would be the rule. It is to the critically important definition of that standard that we now turn.

B. Evolution of Qualified Immunity

The existing law of qualified immunity is complicated, unstable, and overprotective of government officers.[150] The problem is not merely that the defense is too generous, though at least in some circuits that is clearly true.[151] The problem is rather that the defense has evolved in the wrong direction. The best way to see where the law got off track is to retrace recent history.

At one time the defense of qualified immunity had both objective and subjective components. The defendant had to show both a reasonable belief that his or her actions were lawful and an absence of ill will or malicious intention.[152] Dissenters feared that the requiring knowledge of constitutional law would be burdensome,[153] but the subjective branch proved more vexing. The trouble was that the requirement that the defendant "must be acting sincerely and with a belief that he is doing right"[154] invited wide-ranging discovery into any aspect of the officer's past that might suggest improper motive, even if unconnected to the particular case. That risk was particularly acute for high-ranking officials whose background and beliefs are politically salient. The Court respond-

[150] See generally John C. Jeffries, Jr., What's Wrong with Qualified Immunity?, 62 Fla. L. Rev. 851 (2010) [hereinafter Qualified Immunity]; Chaim Saiman, Interpreting Immunity, 7 U. Pa. J. Const. L. 1115, 1115 (2005) (describing an instability so persistent as to suggest "a perpetual state of crisis").

[151] There is considerable variation among the circuits. The Ninth Circuit often construes qualified immunity to favor plaintiffs and is often reversed for that reason. See, e.g., Brosseau v. Haugen, 543 U.S. 194, 199, 201 (2004) (per curiam). The Eleventh Circuit leans so far in the other direction that it has been called the land of "*un*qualified immunity." Elizabeth J. Normal & Jacob E. Daly, Statutory Civil Rights, 53 Mercer L. Rev. 1499, 1556 (2002) (quoting Karen M. Blum, Too Clearly Cruel & Unusual; Supreme Court Can Right Eighth Amendment Wrong, Fulton County Daily Rep., Mar. 5, 2002, at 7).

[152] See, e.g., Wood v. Strickland, 420 U.S. 308, 322 (1975) (holding that immunity would be lost if the defendant "knew or reasonably should have known" that his action would violate constitutional rights or "if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury").

[153] Id. at 329 (Powell, J., dissenting) ("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.").

[154] Id. at 321 (majority opinion).

ed in *Harlow v. Fitzgerald*,[155] which curtailed the subjective inquiry, focusing instead on whether the defendant violated "clearly established" law.[156] *Harlow* itself did not make clear just how far the Justices wanted to go in shutting down the subjective inquiry,[157] but they later decided that, except where the underlying right requires improper motive, evidence of the defendant's subjective motivation is "simply irrelevant."[158]

As thus interpreted, *Harlow* announced a change in substantive law, but it aimed at a change in procedure. It sought to accelerate the dismissal of insubstantial suits and thus to protect government officers not only from liability but also from the burdens of discovery and trial.[159] Implicitly, *Harlow* changed civil practice for constitutional tort actions. It encouraged judges to decide cases before discovery and to be far more forward in resolving the factual predicate for legal conclusions than is customary in American civil litigation. The problem is that while the Supreme Court can define qualified immunity, manipulation of the mechanics of civil practice is a bit messier. Judgment on the pleadings is controlled by Federal Rule of Civil Procedure 12, and the standard for summary judgment is set by Federal Rule of Civil Procedure 56, which provides that summary judgment should be granted "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as matter of law."[160] The Supreme Court can approve or disapprove amendments to the rules, but the Court acts on the recommendation of advisory committees. Proposed changes are sent to Congress and take effect only if Congress does not disapprove them within six months.[161] No proposal for exceptional treatment of constitutional tort cases has emerged from the rulemaking process, yet the ad-

[155] 457 U.S. 800 (1982).

[156] Id. at 817–18 ("[W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

[157] Id. The disapproval of "bare allegations of malice" left open the possibility that something more might suffice.

[158] Crawford-El v. Britton, 523 U.S. 574, 588 (1998).

[159] See Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (saying in the context of approving interlocutory appeal from denial of qualified immunity that the "entitlement is an *immunity from suit* rather than a mere defense to liability").

[160] Fed. R. Civ. P. 56(a).

[161] See 28 U.S.C. §§ 2073–2074 (2006).

ministration of *Harlow* immunity plainly contemplates that federal judges should be more energetic in resolving cases on the pleadings than anything contemplated by Rule 56. And to the extent that *Harlow* immunity invades areas traditionally reserved for the jury, the Seventh Amendment may be implicated.[162]

Perhaps for these reasons, the Supreme Court has never described *Harlow* as a change in summary judgment practice. Rather, it has treated the change in summary judgment practice as flowing naturally from the change in substantive law. As currently stated, qualified immunity turns on "objective legal reasonableness"[163] and applies if a reasonable officer could have believed his or her actions to be lawful in light of "clearly established" law.[164] Obviously, all constitutional rights are "clearly established" in the abstract, but the Court has required that the right be clearly established in "a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[165] Requiring that the right be "clearly established" on particular facts raises issues that traditionally would be viewed as "mixed questions of law and fact" or questions of the "application of law to fact," questions of the sort ordinarily reserved for the jury.[166] Yet describing such issues as questions of clearly established *law* provides plausible cover for pre-trial judicial resolution.[167] That is not a by-product of the Court's reformulation of qualified immunity; it is the point. When the Ninth Circuit was slow to get the point, the Court made it

[162] U.S. Const. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .").

[163] Anderson v. Creighton, 483 U.S. 635, 639 (1987).

[164] Id.; *Harlow*, 457 U.S. at 818 ("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.").

[165] *Anderson*, 483 U.S. at 640.

[166] See Alan K. Chen, The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law, 47 Am. U. L. Rev. 1, 7 (1997) (stating that qualified immunity raises a "mixed question of law and fact"); Sheldon Nahmod, The Restructuring of Narrative and Empathy in Section 1983 Cases, 72 Chi.-Kent L. Rev. 819, 827 (1997) (same); Teressa E. Ravenell, Hammering in Screws: Why the Court Should Look Beyond Summary Judgment When Resolving § 1983 Qualified Immunity Disputes, 52 Vill. L. Rev. 135, 150–52 (2007) (discussing qualified immunity as raising questions of "law application" or "mixed questions of law and fact").

[167] The Court's effort to treat qualified immunity as ordinarily raising only questions of law is trenchantly criticized in Alan K. Chen, The Facts About Qualified Immunity, 55 Emory L.J. 229, 230–33 (2006).

explicit: "[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation. . . . Immunity ordinarily should be decided by the court long before trial."[168]

Although there are legitimate concerns about the administration of *Harlow* immunity, it is certainly not the first or last time that the Court has tinkered with procedure to meet substantive concerns.[169] To my mind, the policy of constraining discovery and encouraging pre-trial resolution makes sense, if not pushed too far, but the Court has complicated matters by not pursuing that policy openly and directly. By couching qualified immunity as a purely legal issue (and thus implicitly justifying judicial control), the Court has introduced dysfunctionalities that threaten to overwhelm the good sense at the heart of the doctrine. As currently formulated, the law of qualified immunity asks the wrong question.

The distortion that now attends qualified immunity can be seen in many lower court decisions. In searching for clearly established *law*, courts seek precedents similar on the *facts*. The more nearly the facts before the court are required to replicate those of some prior case, the less likely the law is to be "clearly established" and the more protective the qualified immunity defense becomes. In many cases, the search for factual specificity in clearly established law has pushed qualified immunity far beyond the reach of any functional justification for that protection.

Examples are not hard to find.[170] Consider *Fields v. Prater*.[171] Tammy Fields worked for a county department of social services in western Vir-

[168] Hunter v. Bryant, 502 U.S. 224, 227–28 (1991); see also Chen, supra note 167, at 270 ("It is quite clear that the Court's qualified immunity decisions concerning whether an issue is legal or factual are based exclusively on this allocative function [between judge and jury].").

[169] A recent example is *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), which imposes pleading requirements that go beyond the "notice pleading" of the Federal Rules, see Fed. R. Civ. P. 8(a)(2) (requiring only "a short and plain statement of the claim showing that the pleader is entitled to relief"). The difficulty of reconciling *Iqbal* with the Federal Rules is shown in John M. Greabe, *Iqbal*, *al-Kidd* and Pleading Past Qualified Immunity: What the Cases Mean and How They Demonstrate a Need to Eliminate the Immunity Doctrines from Constitutional Tort Law, 20 Wm. & Mary Bill Rts. J. 1, 7–12 (2011). Cf. Anderson v. Liberty Lobby, 477 U.S. 242, 244 (1986) (endorsing summary judgment for defendant in a defamation case based on the requirement of clear and convincing evidence).

[170] For articles discussing such cases, see, for example, Mark R. Brown, The Fall and Rise of Qualified Immunity: From *Hope* to *Harris*, 9 Nev. L.J. 185, 197–202 (2008); Michael S. Catlett, Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine, 47 Ariz. L. Rev. 1031, 1044–50 (2005); Saiman, supra note 150, at 1186–90.

[171] 566 F.3d 381 (4th Cir. 2009), *discussed in* Jeffries, Qualified Immunity, supra note 150, at 856–58. The facts recounted above were plaintiff's allegations, which were taken as true for purposes of this decision.

ginia. She applied for the position of director of that agency and was ranked first among seven candidates interviewed by a selection board. The county board of supervisors then dissolved the selection board and chose the candidate ranked dead last. Fields was a long-time Republican, and the successful candidate was the only one with an active history as a Democrat. Fields sued on the very plausible theory that the county board of supervisors, which was dominated by Democrats, had denied her the job on grounds of political affiliation. The unconstitutionality of doing so had long been clear.[172] The only conceivable question was whether the job Fields sought was a "policymaking" position for which the "hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the office involved."[173] That the job Fields sought was *not* such a position was as clear as Virginia law could contrive to make it. State law created these county-level positions and subjected them to state regulation and control.[174] The regulations adopted by the state explicitly stated that political affiliation could not be considered for this position,[175] and that point was reiterated in a handbook provided to all county board members.[176] Finally, the job application form filled out by Tammy Fields and the other candidates restated once again that the appointment was to be made without regard to political affiliation or party.[177] Thus, the Fourth Circuit had before it a crystal clear constitutional prohibition against taking party affiliation into account for nonpartisan positions and a crystal clear specification of this position as nonpartisan.[178] Nonetheless, the court found the law not

[172] See Elrod v. Burns, 427 U.S. 347, 373 (1976).

[173] Branti v. Finkel, 445 U.S. 507, 518 (1980).

[174] *Fields*, 566 F.3d at 387 (discussing state law, including Va. Code Ann. § 63.2-217 (2011) (giving State Board of Social Services authority to adopt regulations that local directors must observe); id. § 63.2-327 (providing for removal of local directors by the state); id. § 63.2-333 (providing that local directors serve as agents of the state)).

[175] *Fields*, 566 F.3d at 388.

[176] Id. (citing Commonwealth of Va., Dep't of Soc. Servs., Local Board Member Handbook 63–67 (2007)).

[177] Id. (citing Commonwealth of Va., Application for Employment DHRM Form 10-012 (2009)).

[178] The Fourth Circuit said that state law was not "dispositive," but merely "relevant" and entitled to "consideration" in determining whether partisan considerations would be allowed. Id. This is sound as a general statement of the relation between state and federal law, but it has no application to this case. It is inconceivable that a position created by state law and explicitly and repeatedly designated by the state as not appropriate for partisan concerns would nevertheless be found as a matter of federal law to be a position for which the state

sufficiently clear to deny qualified immunity. "All that was lacking was a prior Fourth Circuit decision saying that two plus two equals four."[179]

Or consider *Robles v. Prince George's County*, which also involved the Fourth Circuit.[180] Police in Prince George's County, Maryland, arrested Robles on an outstanding traffic warrant from neighboring Montgomery County. Finding a formal custody transfer difficult to arrange in the middle of the night, they drove across the county line to a deserted parking lot, tied Robles to a metal pole, and left a note saying that there was an outstanding warrant against him. They then anonymously called the Montgomery Police Department to report his presence. The Fourth Circuit had no trouble finding a constitutional violation.[181] And it had no trouble concluding that the officers did not reasonably believe their actions proper.[182] Nevertheless, it found that the right not to be handcuffed to a pole in a parking lot and left there in the middle of the night was not so "clearly established" as to defeat qualified immunity. As one scholar put it, the *Robles* defendants "escaped liability, not because there was some reasonable basis or legitimate (if misguided) governmental purpose in their actions, but because they were lucky enough to find that there were no cases on the books in which the right kind of pole was used for the right amount of time."[183]

Both *Fields* and *Robles* were unanimous decisions by panels of distinguished judges faithfully applying controlling precedent. The problem lies not in these particular adjudications but in the hyper-legalism of qualified immunity. By casting that defense in a way that sends judges in search of factually similar precedent to show clearly established law, the Supreme Court has excluded from civil liability conduct that fully merits that liability. As I have argued, there may be good reasons to preclude money damages in cases of *reasonable* constitutional error. And reasonable error is most likely to occur when the underlying constitu-

"demonstrate[d] that party affiliation is an appropriate requirement for . . . effective performance." *Branti*, 445 U.S. at 518.

[179] Jeffries, Qualified Immunity, supra note 150, at 858.

[180] 302 F.3d 262 (4th Cir. 2002).

[181] Id. at 267–70. Because Robles had already been arrested and thus had the status of a pre-trial detainee, the Fourth Amendment was not applicable, but the Court found a violation of due process because the "police behavior here was not reasonably related—indeed it was entirely unrelated—to any legitimate law enforcement purpose." Id. at 269.

[182] Id. at 271 ("The officers should have known, and indeed did know, that they were acting inappropriately.").

[183] Saiman, supra note 150, at 1188.

tional standard is unclear, unresolved, or in flux. It makes sense, therefore, to assess the reasonableness of constitutional error *in light of* clearly established law. But it does not make sense to bar liability for conduct that is both unconstitutional *and* unreasonable, simply because it has not specifically been declared so in a prior decision. As applied, the search for factually similar precedent extends qualified immunity beyond any defensible rationale. It is as if the one-bite rule for bad dogs started over with every change in weather conditions.

The Court itself recognized this problem and tried to put a brake on the quest for factually similar antecedents, but that effort was isolated and ineffective. The case was *Hope v. Pelzer*, where the Court denied qualified immunity to Alabama prison guards who punished disruptive inmates by handcuffing them to hitching posts for hours at a time, with little water and no bathroom breaks.[184] Those precise facts had not previously been litigated. The Supreme Court rejected the Eleventh Circuit's requirement that clearly established law "'must be preexisting, obvious and mandatory,' and established, not by 'abstractions,' but by cases that are '*materially similar*' to the facts in the case in front of us."[185] Requiring "materially similar" facts went too far. And the Court put some weight on the common-sense notion that the "obvious cruelty" of their actions put the officers on notice that their conduct was illegal.[186] Thus *Hope* held out hope that qualified immunity would shift from a preoccupation with the specific facts of previously decided cases to a more balanced inquiry into whether the defendant's conduct was reasonable in light of clearly established law.

Several circumstances, however, combined to constrain this prospect. First, the very extremity of the misconduct in *Hope*—the Court called it "antithetical to human dignity"[187]—distanced that decision from application to less flamboyant misbehavior. Second, there were in fact prior decisions very nearly on point, including one that outlawed handcuffing inmates to fences and bars for long periods.[188] Thus, even under a demanding standard of factual similarity, the conduct in *Hope* stood con-

[184] 536 U.S. 730, 746 (2002).

[185] Id. at 736 (quoting Hope v. Pelzer, 240 F.3d 975, 981 (11th Cir. 2001)) (emphasis added) (some internal quotation marks omitted).

[186] Id. at 745.

[187] Id.

[188] Gates v. Collier, 501 F.2d 1291, 1305–06 (5th Cir. 1974) (binding in the Eleventh Circuit which was subsequently created from the Fifth).

demned. Finally, the Court's subsequent decisions veered back toward requiring precedential specificity. A good example is *Brosseau v. Haugen*, where the Court summarily reversed the Ninth Circuit's denial of qualified immunity to a police officer who shot a fleeing unarmed suspect on the grounds that prior decisions "[depend] very much on the facts of each case" and therefore that none of them "squarely governs."[189] Such decisions suggested that *Hope* had imposed only a gentle limitation for extreme cases, and this certainly was the understanding of the lower courts. When three Eleventh Circuit decisions taking a very narrow view of "clearly established" law were vacated and remanded for reconsideration in light of *Hope*, the court reaffirmed qualified immunity in all three.[190]

The upshot of all this is that the degree of precedential specificity required for clearly established law is hard to state precisely. Partly, that is because the question is intrinsically one of degree. Partly, it is because of variation among the circuits.[191] And partly, it is because the Supreme Court has not stepped in with the level of supervision required to resolve the inconsistencies.[192] Still, this much is plain: as currently defined, qualified immunity focuses on precedent to determine when a constitutional violation can be redressed by money damages, and it requires that the precedent be "clear" at a fairly concrete level of specificity. When the underlying constitutional right is defined in broad and general terms, the requisite clarity can only be achieved by factual similarity between this case and a prior decision. The absence of such a precedent extends qualified immunity to conduct that is both unconstitutional and unreasona-

[189] 543 U.S. 194, 201 (2004) (per curiam).

[190] See Thomas v. Roberts, 261 F.3d 1160, 1170–72 (11th Cir. 2001), vacated, 536 U.S. 953 (2002), aff'd on remand, 323 F.3d 950, 952 (11th Cir. 2003) (addressing the strip search of school children to recover stolen money without particularized suspicion); Vaughan v. Cox, 264 F.3d 1027, 1035–37 (11th Cir. 2001), vacated, 536 U.S. 953 (2002), aff'd on remand, 316 F.3d 1210, 1212 (11th Cir. 2003) (addressing police shooting into a truck and wounding the passenger when the driver failed to pull over); Willingham v. Loughnan, 261 F.3d 1178, 1183–88 (11th Cir. 2001), vacated, 537 U.S. 801 (2002), aff'd on remand, 321 F.3d 1299, 1300 (11th Cir. 2003) (addressing the use of deadly force against unarmed woman who had just thrown a knife). These cases are discussed in Brown, supra note 170, at 213–15.

Note also that *Fields v. Prater*, discussed previously, was decided long after *Hope* and was not thought inconsistent with that decision.

[191] See Catlett, supra note 170 (surveying "clearly established" law in the Third, Sixth, Ninth, and Eleventh Circuits).

[192] Id. at 1041–44 (describing the Court's "hands-off" approach); id. at 1050–55 (detailing the costs of circuit inconsistency).

ble. Not only is subjective good faith eliminated as something the defendant must prove,[193] but the protection of qualified immunity is extended to acts that could not possibly have been done in good faith.[194] In short, qualified immunity as currently defined and administered goes well beyond shielding reasonable error. The resulting liability rule has been described as "recklessness" or "gross negligence."[195] "Recklessness" probably goes too far, as the Court has not required, although it has sometimes tolerated, the subjective awareness of wrongdoing associated with that term,[196] but "gross negligence" may be close to the mark. The standard cannot be captured in any precise concept, because while mere negligence suffices to negate qualified immunity when there is a factually similar precedent on point, something more is required when there is not. Whatever the label, qualified immunity has evolved toward an overly legalistic and therefore overly protective shield against liability for constitutional torts.

C. Reformulation of Qualified Immunity

Qualified immunity should be narrowed to adhere more closely to the rationales for limiting liability in the first place. I start from the premise that damages are an appropriate remedy for constitutional violations. That would be a wholly unnecessary statement were it not for the tendency in recent cases to regard damage awards against federal officers as deeply suspect.[197] Despite this increasing negativity, I am persuaded

[193] That is the effect of *Harlow*, 457 U.S. at 817–18, as interpreted in *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998).

[194] Both *Fields* (as alleged) and *Robles* (as proved) illustrate that statement.

[195] See Jennifer E. Laurin, Trawling for *Herring*: Lessons in Doctrinal Borrowing and Convergence, 111 Colum. L. Rev. 670, 726 (2011) (describing a "highly particularized conception of 'notice' of illegality as the touchstone of official liability, which approached a standard sounding more in gross negligence or recklessness").

[196] Compare id. at 728 (discussing elements of subjective awareness in the law of qualified immunity), with John M. Greabe, Objecting at the Altar: Why the *Herring* Good Faith Principle and the *Harlow* Qualified Immunity Doctrine Should Not Be Married, 112 Colum. L. Rev. Sidebar 1 (2012) (disputing Laurin's characterization of qualified immunity).

[197] See, e.g., Minneci v. Pollard, 132 S. Ct. 617, 623 (2012) (refusing to allow a *Bivens* action against employees of a privately operated federal prison); Wilkie v. Robbins, 551 U.S. 537, 541 (2007) (declining to allow a *Bivens* action for a sustained campaign of intimidation, harassment, and abuse of power by Bureau of Land Management officials). The most categorical opposition to *Bivens* comes from Justices Scalia and Thomas, who have stated that prior decisions allowing damages actions against federal officers should be limited to "the precise circumstances they involved." *Minneci*, 132 S. Ct. at 626 (Scalia & Thomas, JJ., concurring).

by the opinions in *Bivens* itself that damages are appropriate to the vindication of constitutional rights, absent countervailing concerns,[198] of which the most important and obvious would be superseding remedial legislation.[199] And of course the separation-of-powers concerns that allegedly motivate the restrictions on *Bivens* have no direct application to Section 1983. I therefore stand on the unexceptional proposition that constitutional tort actions are presumptively appropriate. They can and should be limited by countervailing considerations, but only to the extent of those considerations. It is the wide gap between existing doctrinal curtailments of constitutional tort actions and the rationales for those curtailments that needs to be changed.

If, for example, the justification for qualified immunity is, as the Court has suggested, the need to provide notice of illegality to avoid unfairly imposing liability for conduct the officer could reasonably have thought lawful,[200] then qualified immunity should hew closely to notice as a proxy for fault.[201] It may be in some sense unfair to impose liability for conduct that an officer could reasonably have thought lawful, but it is certainly not unfair to impose liability for conduct that the officer knew or should have known was wrong. Notice as a proxy for fault does not require a precedent precisely on point. A specific prior decision may be *sufficient* to give notice of illegality—though even that may be

[198] *Bivens*, 403 U.S. at 396–97 (noting that, as the "present case involves no special factors counseling hesitation," the question is "merely whether [a claimant who] can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts"); id. at 408 (Harlan, J., concurring in the judgment) (analyzing the question as whether damages are "'necessary' or 'appropriate'" to remedy constitutional violations, not whether they are "essential" and therefore constitutionally compelled). Additionally, there is a respectable argument that, whatever the foundation of *Bivens* actions as originally recognized, they have since been accepted and approved by act of Congress. See James E. Pfander & David Baltmanis, Rethinking *Bivens*: Legitimacy and Constitutional Adjudication, 98 Geo. L.J. 117, 121–23 (2009) (focusing on the Westfall Act of 1988, which amended the Federal Tort Claims Act in ways that may be taken to imply legislative acceptance of *Bivens*).

[199] See, e.g., Bush v. Lucas, 462 U.S. 367, 374–80, 390 (1983) (refusing to allow *Bivens* actions to supplement detailed civil service remedies authorized by act of Congress).

[200] See, e.g., Scheuer v. Rhodes, 416 U.S. 232, 240 (1974) (identifying as one rationale for qualified immunity "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").

[201] See Barbara E. Armacost, Qualified Immunity: Ignorance Excused, 51 Vand. L. Rev. 583, 617–24 (1998) (analyzing qualified immunity in these terms).

doubted[202]—but it is surely not *necessary*. Notice can be found as well in what Holmes called "common social duty."[203] The officers in *Robles* did not need a prior decision of the Fourth Circuit to tell them that leaving a suspect handcuffed to a pole in a parking lot was improper. And the county commissioners in *Fields v. Prater*, subjected as they were to repeated notification that the position they were filling was nonpartisan, did not require a prior court decision to lead them to that conclusion. Notice is, or should be, a broader and more practical concept than the search for a factually similar precedent.

The same analysis applies if one thinks of qualified immunity as a buffer against unwanted deterrence of the legitimate activities of government. As the Court originally put the point, qualified immunity mitigates "the danger that the threat of [damages] liability would deter [an official's] willingness to execute his office with the decisiveness and judgment required by the public good."[204] For this rationale to hold, there must be some genuine difficulty in distinguishing, ex ante, desirable from undesirable behavior. That may be true, for example, in a borderline case of obscenity enforcement or a close call on exigent circumstances for a warrantless search. Sometimes protection for reasonable error is built into the definition of the constitutional violation (more on this later), but when it is not, qualified immunity serves the purpose. The problem with current law is its implicit equation of reasonable error with the space between decided cases. An act violative of the Constitution is not made reasonable simply by the absence of a prior adjudication on similar facts in the same jurisdiction. Something more is required. Reasonable error must be reasonable, and not merely not yet specifically pronounced. No extended litigation before the Supreme Court should be required to decide (by a 6-3 vote, no less) that handcuffing a prisoner to a hitching post for hours on end, without protection from the sun or access to a bathroom, and with very little water, is an unreasonable abuse

[202] In some circumstances, it might be reasonable for officers not to know of very recent decisions that have not yet made their way into educational channels. And it might be reasonable for officials with geographically broad responsibilities to ignore isolated statements in some jurisdictions. See, e.g., Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083–84 (2011) (responding with barely concealed contempt to the Ninth Circuit's determination that a statement in a footnote in an opinion by the United States District Court for the Southern District of New York gave Attorney General John Ashcroft adequate notice of the illegality of his conduct in Idaho and Washington, D.C.).

[203] Nash v. United States, 229 U.S. 373, 377 (1913).

[204] *Scheuer*, 416 U.S. at 240.

of power by prison guards.[205] And that conclusion should not depend, as it may well have, on the happenstance that very similar misconduct had previously been identified and condemned. Qualified immunity as currently administered protects much error that is plainly *un*reasonable, simply because of the vagaries of prior adjudication. The consequence is to send exactly the wrong deterrent message: not only that officers should not be inhibited by the threat of liability for reasonable error, but that officers should not be inhibited at all, absent specific prior adjudication.

Much the same analysis applies if one conceives of qualified immunity primarily as a structural support for the integrity and development of constitutional law. This rationale for qualified immunity is perhaps most closely linked to the requirement of "clearly established law." Obviously, it calls for denial of money damages whenever the underlying constitutional rule is evolving or unclear. This justification is not limited to those rare instances of bold innovation that might once have triggered the non-retroactivity doctrine in criminal procedure.[206] It applies more pervasively and more importantly to the small, incremental, and evolutionary changes without which constitutional law would descend into ossified irrelevancy.[207] It follows that qualified immunity should apply when there is appreciable innovation in the constitutional ruling, even if the innovation consists of crystallizing that which was previously inchoate. But it does not follow that qualified immunity should preclude damages liability in the absence of innovation merely because there is no factually similar precedent in that jurisdiction. When the decision does no more than apply settled law to particular facts, qualified immunity should not apply. The difference between a constitutional ruling that embraces some degree of innovation and one that merely applies settled law to particular facts is not the difference between night and day. It is a judgment call and, like all judgment calls, will occasionally be close. Nonetheless, it is important to ask the right question—not whether the decision was anticipated by a factually similar decision in the same jurisdiction, but whether the decision followed from the principles of prior decisions as any reasonable person would have understood them. Focusing too closely on the specifics of prior decisions secures a desirable

[205] See *Hope*, 536 U.S. at 733–38.

[206] See Toby J. Heytens, The Framework(s) of Legal Change, 97 Cornell L. Rev. 595, 604–06 (2012).

[207] See Jeffries, Right-Remedy Gap, supra note 123, at 97–98.

leeway for constitutional innovation but at excessive cost. The vitiation of incentives to obey existing law, which is an inevitable feature of qualified immunity, should be no greater than is necessary. Under current doctrine, qualified immunity goes too far.

The standard statement of current law shields officers from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[208] This statement is not itself objectionable, but its administration has become hyper-technical and unbalanced. What is needed is a shift of emphasis from "clearly established" back to "reasonable." The particularity required of prior precedent needs to be scaled back in favor of a broader concept of notice derived from existing law. The Court actually put the point well in *Anderson v. Creighton* when it said that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[209] A balanced administration of that standard would not protect the defendants in *Fields* or *Robles* or in thousands of other cases where misconduct is plainly unreasonable "in the light of" clearly established law,[210] even though it has not yet been specifically litigated and condemned. A balanced administration of that standard would treat *Hope* as an easy case rather than a close call.[211] And a balanced administration of that standard would avoid the elaborate rules that have divided and bedeviled the lower courts over exactly which precedents count.[212] The Eleventh Circuit is probably the most demanding in limiting relevant precedent to decisions of the Supreme Court, the Eleventh Circuit itself, or the highest court of the state where the action took place.[213] Under this approach, a right would not become "clearly established" nationally until it had been litigated in every circuit or decided by the Supreme Court. Of course, divergences among the circuits are inevitable, but the question whether a

[208] *Harlow*, 457 U.S. at 818.

[209] 483 U.S. 635, 640 (1987).

[210] Id.

[211] 536 U.S. at 748 (Thomas, J., Rehnquist, C.J. & Scalia, J., dissenting). Note the split decision in that case.

[212] See Jeffries, Qualified Immunity, supra note 150, at 858–59.

[213] See Vinyard v. Wilson, 311 F.3d 1340, 1351 n.22 (11th Cir. 2002) ("'[W]hen case law is needed to "clearly establish" the law applicable to the pertinent circumstances, we look to decisions of the U.S. Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state.'" (quoting Marsh v. Butler Cnty., 268 F.3d 1014, 1032 n.10 (11th Cir. 2001))).

reasonable officer would have known his or her actions to be unlawful under national law should not become narrowly territorial. There is room for a broader and less technical conception of what a reasonable officer should have known, one that curtails the excesses of qualified immunity and restores constitutional tort actions to the realm of effective remedy.

One way to phrase the suggested change would be to shift the doctrinal focus from whether the defendant violated a "*clearly established*" right to whether the defendant's actions were "*clearly unconstitutional*."[214] Reformulating the standard in this way would be desirable both as a means of pointing courts in the right direction and as a way of leaving behind undesirable precedent. The goal would be to preserve the core of qualified immunity but prune its excesses. Liability would continue to be precluded when the law is changing or unsettled and in genuinely borderline cases where the application of a settled rule to particular facts is susceptible to good-faith error. In all these respects, asking whether the defendant's conduct was "clearly unconstitutional" would replicate existing law.

In other cases, however, the reformulation would curtail qualified immunity and shift constitutional tort law toward broader liability. The difference is one of weight and emphasis rather than concept. "Clearly unconstitutional" is designed to signal a less technical requirement, less tied to specific precedent, and more accommodating of notice through "common social duty."[215] That the defendant's conduct was outrageous should not be irrelevant. While it is true that outrageous misconduct is not necessarily unconstitutional, the fact that an officer's conduct was egregious should surely affect whether she could reasonably have thought it lawful. Conduct that is both outrageous and unconstitutional should not be immune from damages liability. In this respect, a "clearly unconstitutional" standard would change decisions that seem to regard extravagance of misconduct as essentially beside the point.[216] The courts

[214] This suggestion was first broached in Jeffries, Qualified Immunity, supra note 150, at 867–69.

[215] Nash v. United States, 229 U.S. 373, 377 (1913).

[216] See, e.g., Foster v. City of Lake Jackson, 28 F.3d 425, 430 (5th Cir. 1994) (noting that moral outrage or conduct shocking to the judicial conscience "does not mean necessarily that the officials should have realized that it violated a constitutional right"); Doe v. Louisiana, 2 F.3d 1412, 1421 (5th Cir. 1993) (King, J., concurring) (upholding qualified immunity of social workers for a "nightmarish" "witch hunt" of a father wrongly believed to have molested

that decided these cases are right to say that egregiousness does not in itself violate the Constitution, but they are wrong, it seems to me, to treat egregiousness as irrelevant to the scope of qualified immunity for conduct found to be unconstitutional. Shifting the focus from "clearly established" law to "clearly unconstitutional" conduct would likely change these cases. The qualified immunity cases discussed earlier in this Article are additional examples of cases that would come out differently. *Fields* and *Robles* would easily result in denial of qualified immunity if the court asked only whether the defendants' conduct was clearly unconstitutional.

Of course, no mere turn of phrase can avoid hard cases or ensure good decisions. Close calls are inevitable. But the first step toward getting the right answer is to ask the right question, and the inquiry into "clearly established" law has proved too technical, too fact-specific, and far too protective of official misconduct. Asking instead whether conduct was "clearly unconstitutional" would not resolve all difficulties at a stroke, but it would move in the right direction.

D. Qualified Immunity and Excessive Force

Finally, special mention must be made of the case of excessive force. The unconstitutional use of excessive force presents the most glaring case of the inadequacy of current law. To some extent, that reflects the intractability of the underlying problem of persuading officers who may be excited, adrenalin-rushed, and fearful to be more restrained in the use of force, especially deadly force. The intersection of qualified immunity and excessive force claims raises in a particularly troubling context an issue that can be put more generally: what role should qualified immunity play for rights defined in terms of reasonableness? The question was first raised by Justice Stevens in his dissent in *Anderson*,[217] where the majority applied qualified immunity to an unlawful search. Justice Stevens objected to what he called a "double standard of reasonableness."[218] Since the Fourth Amendment forbids only "unreasonable" searches and seizures, he argued, extending qualified immunity to invasions found to violate that standard introduced "two layers of insulation from liability"

his daughter, noting that the fact that the actions complained of were "egregious" did not mean they violated a federal right).

[217] 483 U.S. at 647 (Stevens, J., dissenting).

[218] Id. at 659.

and led to a logical contradiction: "I remain convinced that in a suit for damages as well as in a hearing on a motion to suppress evidence, 'an official search and seizure cannot be both "unreasonable" and "reasonable" at the same time.'"[219] Since allowance for reasonable error was already built into the definition of the constitutional right, Stevens argued, allowing the officers to claim qualified immunity unjustifiably gave them "two bites at the apple."[220] Writing for the majority, Justice Scalia rejected the "'reasonably unreasonable' argument" as little more than a play on words.[221] The fact that Fourth Amendment doctrine (including the warrant requirement and the specification of exigent circumstances) had developed under the rubric of "unreasonable searches and seizures" did not mean that one could not be reasonably mistaken about specific questions. Application of qualified immunity to Fourth Amendment protections was in principle no different from its application to any other constitutional guarantee.

Logically, Scalia is right. The phrasing of the Fourth Amendment does not preclude the possibility of reasonable mistake. On any of the component issues of Fourth Amendment doctrine (probable cause, exigent circumstances, and the like), an officer could be reasonably mistaken about whether his or her conduct violated clearly established law. Analytically, there is no conceptual contradiction in applying qualified immunity to the Fourth Amendment.

At a deeper level, however, Stevens has a point. That point arises not from the fact that the Fourth Amendment uses the term "unreasonable" but rather from the construction of a constitutional standard that seemingly encompasses within its terms all possibility of reasonable mistake. The archetype of such a standard, however, is not ordinary search and seizure but the constitutional prohibition against excessive force.

The Supreme Court has said in *Graham v. Connor* that claims of excessive force should be analyzed under the Fourth Amendment and that the test is one of "objective reasonableness."[222] This label might suggest

[219] Id. (quoting United States v. Leon, 468 U.S. 897, 960 (1984) (Stevens, J., dissenting)).

[220] Id. at 664 n.20 (quoting Llaguno v. Mingey, 763 F.2d 1560, 1569 (7th Cir. 1985)).

[221] Id. at 643 (majority opinion) ("[The argument's] surface appeal is attributable to the circumstance that the Fourth Amendment's guarantees have been expressed in terms of 'unreasonable' searches and seizures. Had an equally serviceable term, such as 'undue' searches and seizures been employed, what might be termed the 'reasonably unreasonable' argument against application of *Harlow* to the Fourth Amendment would not be available . . . .").

[222] 490 U.S. 386, 395 (1989) ("[*A*]*ll* claims that law enforcement officers have used excessive force . . . should be analyzed under the Fourth Amendment . . . ."); id. at 397 ("[T]he

a standard that is cut-and-dried, but in fact it is highly variable and particular. Factors such as the severity of the suspected crime and whether the suspect is actively resisting arrest are not to be assessed "with the 20/20 vision of hindsight" but from the perspective of the officer on the scene, with limited time and information and under conditions of emergency.[223] As the Court put it, "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[224] The result is a general concept, unmediated by specific implementing rules or doctrines, that takes all relevant circumstances into account. *All* the mistakes that an officer might make—such as misidentifying the suspect or erroneously thinking him armed or overestimating the risk of civil disorder if a loud-mouth is not subdued—are subsumed within the constitutional standard, *so long as those mistakes are reasonable*. To find a violation of the constitutional standard, the court or jury must conclude that, taking into account all the circumstances that might excuse misjudgment, the use of force was *un*reasonable. To then say that the unreasonable use of force might nevertheless be reasonable is indeed puzzling.

The Supreme Court (per Justice Kennedy) explained the matter as follows:

> It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the [qualified] immunity defense.[225]

This statement is confusing and has worked much mischief, but it is not analytically unsound. The confusion arises from trying to imagine how a

question is whether the officers' actions are 'objectively reasonable' . . . ."). The principal consequence of this doctrinal formulation was to avoid the inquiry into subjective malice or ill will that might be thought relevant to a substantive due process standard. In that respect, *Graham v. Connor* is analogous to, and aligned with, *Harlow v. Fitzgerald*'s reformulation of qualified immunity.

[223] Id. at 396.

[224] Id. at 396–97.

[225] Saucier v. Katz, 533 U.S. 194, 205 (2001).

reasonable officer could be mistaken about the "relevant legal doctrine" when it consists only of the injunction that the use of force be reasonable. Every officer would know that, and not knowing it would itself be unreasonable. It is nevertheless true that an officer on the scene and a subsequent trier of fact might evaluate the reasonable use of force (from the perspective of the officer on the scene, etc.) differently. In that case, one might say, with the Supreme Court, that the officer would have a "mistaken understanding as to whether a particular amount of force is legal" and that if the officer's misjudgment of that issue were very slight, it might be deemed reasonable.[226] By this reasoning, qualified immunity would still have some role to play in borderline applications of a constitutional standard based entirely on reasonableness.

An alternative understanding—which seems to me the better understanding—would treat the trier of fact's evaluation as conclusive of reasonableness, as is done for example in negligence cases. Conceptually, the difference between these approaches lies in whether one conceives of the officer as trying to anticipate the judgment of a trier of fact (in which case a borderline error might be deemed reasonable) or as trying to adhere to the underlying standard governing both officer and trier of fact (in which case the latter's determination would be conclusive). The latter characterization seems more appropriate in this context and is certainly more straightforward, but the former characterization is more consistent with the overall structure of qualified immunity, which traditionally focuses on mistake as to legality.

Whatever view one takes of this matter, it seems plain that qualified immunity would impart only a very slight addition to the protections built into the constitutional standard for excessive force. Given that reasonable mistakes and misjudgments preclude finding a constitutional violation in the first place, it is hard to see much room for the operation of qualified immunity. At most, it would add a very narrow zone of additional protection in truly borderline cases.

This is not, however, the lesson of the cases. Courts have been told that qualified immunity applies to claims of excessive force, that reasonable mistakes in light of "clearly established" law should trigger qualified immunity despite the "objective unreasonableness" of the actor's conduct, and that "clearly established" law depends on similar precedent. This cumulation of messages, powerfully reinforced by *Brosseau*

[226] Id.

v. Haugen,[227] has led many lower courts to reject civil liability for excessive force in circumstances where such liability seems fully justified. As usual, the culprit is the unlikelihood of finding another excessive-force case in that jurisdiction with sufficiently similar facts.

There are many examples of the debilitating search for specificity in excessive-force cases, but my favorite is *Willingham v. Loughnan*.[228] Betty Willingham witnessed a confrontation between two police officers and her brother on her front lawn. She stood at the doorway to her home; yelled at the police; called for help; and threw a glass, some bottles, and a kitchen knife at the officers and their dog. Both police officers then shot her twice.[229] These circumstances, even in this brief sketch, well illustrate the muddled situations in which snap judgments must be made. Properly instructed on those issues, a jury nevertheless found the officers' use of deadly force objectively unreasonable and awarded substantial damages.[230] To reach this verdict, the jury necessarily found that it was unreasonable for the officers to think (if in fact they did think) that she posed any current threat. Any reasonable mistake on that point would have precluded finding a constitutional violation. The Eleventh Circuit accepted this conclusion but reversed on qualified immunity. The revealing point is the remarkable specificity of the court's description of what was missing from the plaintiff's case:

> [W]hether Defendant Officers violated clearly established federal law in 1987, by shooting Plaintiff within a "split second" after she attacked two officers—having just tried to kill one of them [by throwing the kitchen knife]—while she, at the moment, was not in the physical control of the police and was standing unarmed but near the area from which she had already obtained four objects she had used as weapons, at least one of which was a potentially lethal weapon.[231]

The lack of clarity that precluded liability did not arise from the legal rule, which was simple, obvious, and easily stated. Nor did it arise from the facts, which a jury had properly found. It did not even arise from the

[227] 543 U.S at 201 (summarily reversing an opinion that strayed from these guideposts).

[228] 261 F.3d 1178, 1185–86 (11th Cir. 2001), vacated, 537 U.S. 801 (2002), aff'd on remand, 321 F.3d 1299, 1304 (11th Cir. 2003).

[229] Each officer fired two "double taps" of two bullets each, which may be considered two "shots" but discharged four bullets per officer. Id. at 1182 & n.6, 1183.

[230] Id. at 1180–81.

[231] Id. at 1186.

application of law to fact, which had been done by the jury after full trial and to which the appellate court had no objection. Rather, the uncertainty arose from the absence of any prior case (in Florida or the Eleventh Circuit) that looked like this one. Why that should preclude accountability on these facts has never been satisfactorily explained. Indeed, the unlikelihood of ever finding a factually similar case gives credence to the claim that qualified immunity has become very nearly absolute.[232]

As the excessive-force cases demonstrate, the administration of qualified immunity has unjustifiably expanded the area of protected misconduct and constrained the effectiveness of money damages as a remedy. The barriers raised by qualified immunity, as currently administered, far exceed the rationales that support limiting damages liability. The result is an inversion of sensible policy. Damages liability for constitutional torts should be the rule, from which exceptions are created only for good reasons, and only to the extent justified by those reasons. The reality today for excessive-force claims is the reverse. Immunity is the general policy, and liability the exception. This should change.

Of course, it is idle to pretend that expanding damages liability would solve the problem of excessive force. To the extent that the use of excessive force—especially deadly force—results from fear and panic, the prospect of civil sanctions is likely to prove ineffective. But to the extent that excessive force—again, especially deadly force—reflects an admixture of other motives, damages may help. It seems likely that many, perhaps most, excessive-force cases (in which by definition the use of force was not a reasonable response to fear for personal safety) involve elements of frustration, belligerence, and resentment at having to go to the trouble of chasing or subduing a recalcitrant suspect. The willingness to act on these motivations might well be influenced by the prospect of tort liability. Moreover, even if (as I doubt) damage awards did not strengthen deterrence of individual officer excesses, at least they would encourage government employers to cashier problem cases and weed out repeat offenders. The problem is by no means specific to individual officers; it is at least partly the culture in which those officers operate. And the culture of law enforcement can, I believe, be affected by the award of money damages in appropriate cases. Finally, at the very least, a judgment of

[232] Chen, supra note 167, at 262 (arguing that the Supreme Court has shifted decision making to judges from juries "in order to unqualify immunity subversively—to make it as much like absolute immunity as possible without formally abandoning the idea that civil rights claimants can still enforce the Constitution").

civil liability serves an admirable function in recognizing that wrong was done and providing some measure of compensation to victims and their families. Excessive force is not the only context to which these arguments apply, but it is the most vivid example of the inadequacy of current law and of the need to do better.

CONCLUSION

There is no liability rule for constitutional torts, but there should be. Constitutional tort law needs a spine, an organizing principle reflecting a considered judgment of the costs and benefits of damages liability, a principle from which deviations are allowed only where, and to the extent that, they are justified. In my view, the correct default rule for constitutional torts is a modified form of qualified immunity. I would therefore eliminate the pocket of strict liability that exists in current law, prune absolute immunity with an eye to the availability of alternative remedies, and reform the administration of qualified immunity to make immunity less robust and liability more routine. Others will disagree with those specific judgments and advance competing claims for other regimes. The one point on which all should be able to agree, however, is the incoherence of current law. Only in thinking about constitutional tort law systematically and comprehensively is the full scope of that incoherence visible, and only in thinking about constitutional tort law systematically and comprehensively is there hope of a better alternative.