Calling the United States' Bluff: How Sovereign Immunity Undermines the United States' Claim to an Effective Domestic Human Rights System

Denise Gilman

> The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.
> Int.-Am. Ct. Hum. Rts., Velasquez Rodriguez Case, Judgment of July 29, 1988, par. 174.

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INTRODUCTION

United States government policy and rhetoric assert that the United States need not ratify additional international human rights instruments, accept the jurisdiction of international human rights oversight bodies or directly enforce international human rights standards, because the domestic legal system in this country adequately protects against abuses without recourse to external legal standards or pressure. The claim is that the United States Constitution prohibits violations of all of those rights which are treated as central in the various international human rights instruments. Because domestic law provides all the protection that is needed, the argument goes, the United States need not take on international human rights obligations.

However, this position is severely undercut by the inability of many victims to obtain redress when governmental actors in the United States violate constitutional rights. Unfortunately, while United States substantive law does include strong civil rights standards that match those found in international human rights law, the United States legal system simultaneously includes grave impediments to rights protection. One of the most serious impediments to the enforcement of human rights in the United States is the broad application of

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sovereign immunity to prevent liability or even suit against federal, state and local governments and their officials. United States sovereign immunity rules, which include absolute sovereign immunity for the government as well as qualified immunity for individual officials, protect governmental actors from suit in a broad swath of cases.[2] As a result, victims of constitutional violations are often left without an opportunity to obtain compensation for the harm they have suffered and civil rights protections are inadequately enforced.

The contours of sovereign immunity will be discussed in detail below, but the case of Petta v. Rivera[3] provides an example of the breadth of the protection provided to governmental actors. Petta denied compensation to two children victimized by a law enforcement official. Melinda Petta was driving on a rural road with her daughter, age 7, and son, age 3, when she was stopped for speeding by a Texas Department of Public Safety highway patrolman. Rather than issuing a ticket, the officer ordered Petta to step out of the vehicle. Nervous, she refused. The officer reacted by screaming and cursing and attempting to smash the driver's side window with a nightstick. When the officer pulled out his .357 Magnum and waved it menacingly at the family, Petta drove away in fear. The officer shot at her as she pulled out and then engaged in a high-speed pursuit during which he shot at the car again.

Petta brought suit on her children's behalf against the Texas Public Department of Public Safety and the officer, alleging constitutional violations under Section 1983 of the Civil Rights

[2] I use the label of sovereign immunity to reference the sovereign immunity structure that encompasses both sovereign immunity for governments and qualified immunity for government officials. Scholarly discussions often treat sovereign immunity for the federal government, state sovereign immunity based loosely on the Eleventh Amendment to the Constitution, and qualified immunity for federal, state and local officials as distinct subjects. For purposes of this article, they are treated as different components of an overall sovereign immunity system. As will be discussed further below, they all derive from the same baseline theory that the government, the "sovereign," should enjoy special protections against liability, and they work together to form a patchwork of barriers to suit ensuring that the limitations on governmental liability are real and vigorous. These immunities that fall under the umbrella of "sovereign immunity" differ from other immunities in that they broadly and generally wrap almost all governmental activity in protection on the mere basis that it is governmental, without regard to the specific type of activity or actor involved. They thus differ from the immunity provided to discrete categories of government officials based on their specific roles or functions (e.g. absolute presidential, judicial and prosecutorial immunities).

[3] 143 F.3d 895 (5th Cir. 1998).

Act of 1871 ("Section 1983"), which is the main vehicle for litigating constitutional claims against state and local governmental actors. All claims against the government were dismissed because of the broad sovereign immunity available to the state, completely precluding any possibility to pursue damages directly against the government. The claims against the individual officer then came before the United States Court of Appeals for the Fifth Circuit, which decided that qualified immunity foreclosed those claims. The Fifth Circuit found that the officer's actions could be considered grossly disproportionate to the need for action and concluded that the officer's actions violated the due process rights of the children under the Fourteenth Amendment to the United States Constitution. The court nonetheless concluded that the officer was entitled to qualified immunity, because at the time of the incident, the law in the Fifth Circuit did not make clear that an officer could be liable for a Fourteenth Amendment violation where the victim of abuse suffered only psychological injury. Despite the egregiousness nature of the officer's behavior, his two young victims were denied any right to compensation for the constitutional harm they suffered.[4]

While a number of scholars have criticized sovereign immunity as a problematic anomaly in the United States constitutional system,[5] the application of this doctrine as an impediment to human rights protection in the United States has not been analyzed. This Article asserts that, because the operation of sovereign immunity leaves many victims of constitutional violations unprotected, United States civil rights law cannot be said to stand in for human rights

[4] Id. at 270-71. A case involving the same actions by a federal official would likely have resulted in the same outcome. As will be discussed in detail below, the federal government itself would be held to enjoy absolute governmental immunity from suits based on constitutional violations, and the individual officer would be entitled to the same qualified immunity applicable to state actors. In theory, a claim could be brought against the United States under the Federal Tort Claims Act ("FTCA"), but that suit might well be dismissed on the basis of the discretionary function exception or because the facts of the case do not neatly fit into any state law tort category.

[5] See, e.g., Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425 (1987); Erwin Chemerinsky, Against Sovereign Immunity, 53 Stan. L. Rev. 1201 (2001); Carlos Manuel Vazquez, Eleventh Amendment Schizophrenia, 75 Notre Dame L. Rev. 859 (2000).

protections. International human rights law seeks to protect individuals against abuses by governments. The United States system, through the operation of broad sovereign immunity doctrines, instead protects the government against individuals who lay claim to redress for abuses they have suffered.

Section I of this article sets forth the claim that the United States civil rights norms, embodied principally in the Constitution, largely parallel the central human rights standards embodied in international law. It is therefore appropriate to analyze the United States civil rights system to determine whether it provides sufficient protections so as to make it unnecessary for the United States to take on additional international human rights commitments. If it is to be treated as an adequate human rights protection system, the civil rights regime in the United States must ensure that the rights set forth in the United States Constitution have meaning and that violations of those rights are promptly and appropriately addressed. The current reality is that sovereign immunity severely restricts human rights protection in this country.

Section II describes the application of sovereign immunity in United States law. The Section looks at both absolute sovereign immunity from suit generally afforded to the federal government and the states as well as the qualified immunity enjoyed by governmental officials. This Section explains that, while it is theoretically possible to overcome governmental immunity in many cases by suing individual officials, qualified immunity also constitutes a major impediment for victims seeking to obtain a remedy for violations of their rights. The gap between right and remedy is real and severe.

Section III then analyzes the United States system for civil rights protection, which includes the application of sovereign immunity, from an international human rights law perspective. The Section sets forth the basic goal of international human rights law as protecting

individuals from abuse by government. It then lays out the requirement that an effective human rights system must provide for a remedy, including compensation, where the government commits abuses. More specifically, governmental immunities from liability are unacceptable limitations on human rights. When measured against these tests for an effective human rights system, the United States civil rights system fails miserably.

In Section IV, this Article provides a basis for comparison of the governmental liability regime in the United States with legal systems elsewhere. The comparison demonstrates that some national legal systems have eschewed grants of sovereign immunity. These countries have provided greater human rights protections without any serious negative consequences for their legal systems. The comparative law exercise suggests that the United States could and should take a path away from sovereign immunity in cases involving human rights claims.

Section V recommends specifically that the United States not apply sovereign immunity rules, including both governmental immunity and qualified immunity for its officials, to constitutional tort claims. Only in this manner will the United States provide an effective human rights protection system.

The focus of this Article is on the ability of individuals to access United States courts when they suffer abuses at the hands of the government that can be characterized as civil rights violations under United States domestic law. It does not address the desirability of making available to litigants claims based directly on international human rights law.[6] Instead, the Articles takes on its face the argument supporting the adequacy of the civil rights system as a

[6] Scholars have carefully analyzed elsewhere the issues raised by adjudication of international human rights law claims in United States courts. See Beth Stephens, Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations, 27 Yale J. Int'l L. 1, n. 3 (2002) (noting that a Westlaw search conducted in August 2001 for "Filartiga," the key case establishing the ability to litigate human rights claims in United States courts, found 900 references in the law review database).

substitute for human rights protections and proceeds on those terms to demonstrate the shortcomings in the United States civil rights legal regime.

Nor does the Article seek to analyze any of the issues surrounding litigation in United States courts against non-United States government actors for human rights abuses. It looks only at the possibilities for addressing abuses committed by United States governmental actors (federal, state and local) in United States courts. As a result, it does not include any discussion of the doctrines of sovereign immunity that apply in cases involving suits against foreign governmental actors in the tribunals of another country, including for example act of state immunity doctrines and the immunities available to foreign governments under the Foreign Sovereign Immunities Act. Those doctrines are separate and distinct from the sovereign immunity doctrines that United States governmental actors have claimed for themselves in their home courts and involve foreign policy justifications not applicable in the context of domestic sovereign immunity in the United States.

I. The United States' Claim to an Effective Domestic Human Rights System

The United States[7] argues that modern international human rights conceptions developed out of and as a result of the Bill of Rights protections first developed in the Constitution of this country. The United States asserts that its historic human rights standards are the best and need not be supplemented by the newer worldwide human rights structure.[8]

[7] This Article references the United States' position on human rights without making distinctions, except as necessary, regarding the specific branches of government that have acted or made pronouncements establishing this position. For the purpose of a human rights discussion, the State as such is the relevant actor. While the various branches speak with different voices, they all represent the State. Of course, the most relevant branches of the United States government on international issues, including human rights, are the executive and legislative.

[8] See, e.g., U.N. H. R. Committee, Summary Record of the 1405th Meeting: United States of America, U.N. Doc. CCPR/C/SR.1405 (Mar. 31, 1995) (reflecting statement by John Shattuck, then U.S. Assistant Secretary of State, that the United States' deep commitment to civil liberties was demonstrated by its "long and often painful struggle fully to achieve them" and that the United States system of laws and practices allowed "greater freedom than required by the International Covenant on Civil and Political Rights [("ICCPR")]"); Letter from the Head of the Delegation of the United States of America to the 54th Session of the Commission on Human Rights, U.N. Doc.

A. United States Civil Rights are Human Rights

In the United States, the protections against abuses contained in the Constitution are known as civil rights rather than human rights. Lawyers and non-lawyers alike cling to this distinction in terms. In fact, civil rights lawyers working within the United States legal system and human rights lawyers working in international fora may be the most adamant about refusing to use the two terms interchangeably and to see the commonalities in civil rights and human rights work.[9]

However, civil rights are, in fact, human rights. If the semantic difference is overcome, it becomes clear that domestic civil rights and international human rights standards largely overlap.[10] It is true that the United States conceived of and codified human rights before many

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E/CN.4/1998/174 (Apr. 23, 1998) [hereinafter U.S. Delegation Letter] (arguing in rejection of a critical report by a United Nations Special Rapporteur that "the basic rights and fundamental freedoms guaranteed by the ICCPR . . . have long been protected as a matter of federal constitutional and statutory law" in the United States and further asserting that the United States criminal justice system is among the "fairest in the world"); 146 Cong. Rec., S1276 (Mar. 8, 2000) (statement of Sen. Helms, Chairman, Sen. For. Rel. Comm.) (opposing ratification of the United Nations Convention on the Elimination of All Forms of Discrimination against Women on the grounds that "the United States has led the world in advancing opportunities for women"); Louis Henkin, The Age of Rights 77 (1990) (explaining United States opposition to greater international human rights involvement as deriving from a belief that "[h]uman rights in the United States . . . are alive and well."); Paul L. Hoffman & Nadine Strossen, Enforcing International Human Rights Law in the United States, *in* Human Rights: An Agenda for the Next Century 491 (Louis Henkin & John Lawrence Hargrove, eds.) (1994) (citing the widespread "attitude that U.S. civil rights and civil liberties law is more protective of individual rights than the laws of any other country, so Americans do not need these international protections").

[9] See Martha Minow, Lawyering at the Margins: Lawyering for Human Dignity, 11 Am. U.J. Gender Soc. Pol'y & L. 143, 165-66 (2003) (recalling a student's comments that human rights and civil rights groups seem to have nothing to do with one another and even appear to use different language and conceptions); Martha F. Davis, International Human Rights and United States Law: Predictions of a Courtwatcher, 64 Alb. L. Rev. 417, 417-18 (2000) (noting that civil rights lawyers in the United States have resisted framing their demands in international human rights terms). The sharp divide in the use of the terms civil rights and human rights did not always exist. References to civil rights protections made in times closer to the adoption of the United States Constitution as well as in the latter half of the 19th century use the terminology of human rights. See Ex Parte Milligan, 71 U.S. 2, 119 (1866) (noting that "human rights" are secured by enforcement of the Constitution and the laws authorized by it); 2 J.Elliot's Debates 446-448 (2d ed. 1876) (Patrick Henry advocating for adoption of the Bill of Rights as a means of protecting "human rights"); 42nd Congress, 1st Sess., App. at 67 (the legislation that became Section 1983 was referred to by its author as aiding in "the preservation of human liberty and human rights"); see generally, Jordan J. Paust, On Human Rights: The Use of Human Rights Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts, 10 Mich. J. Int'l L. 543 (1989).

[10] See, e.g., Restatement Third of the Foreign Relations Law of the United States § 701, rep. note 8 (1987) [hereinafter Restatement Third] (many provisions in the ICCPR parallel provisions in the United States Constitution). The overlap between international and domestic standards is recognized broadly both by those who press the United States to take on more direct and substantial international human rights obligations and by those

other countries accepted that such rights existed and before the modern human rights movement took form. The United States Constitution has provided an important model and guide for the development of human rights standards in international law and in the domestic law of many countries worldwide.[11] As a result, international human rights standards do mirror the United States Constitution in important respects.[12] Stated conversely, the substantive civil rights found in the United States Constitution, particularly in the original Bill of Rights and in the Fourteenth Amendment, match many of the human rights protected in international law.

For example, the Fourth Amendment to the United States Constitution prohibits "unreasonable searches and seizures."[13] Parallel language is found in Articles 9 and 17 of the International Covenant on Civil and Political Rights ("ICCPR"),[14] which prohibits "arbitrary arrest" and "arbitrary or unlawful interference with . . . privacy, family, home or correspondence." Articles IX, X and XXV of the American Declaration of the Rights and Duties of Man ("American Declaration") also establish the rights to "inviolability" of the home and of correspondence and the right to protection from "arbitrary arrest."[15]

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who urge that it is unnecessary or even unwise for the United States to do so. See, e.g., John M. Rogers, International Human Rights Law and U.S. Law *in* World Justice: U.S. Courts and International Human Rights 107, 110, 118-19 (Mark Gibney, ed. 1991) [hereinafter World Justice] (arguing against direct application of international human rights law in United States courts and asserting that the provisions of the United States Constitution largely match international human rights standards); M. Cherif Bassiouni, Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate, 42 DePaul L. Rev. 1169, 1169 (1993) (noting the overlap between the terminology utilized in the United States Constitution and the ICCPR and the International Covenant on Economic, Social and Cultural Rights while criticizing the conditions imposed by the United States on the ratification of the ICCPR).

[11] See Henkin, supra note 8, at 1, 66, 126; Louis Henkin, Rights: American and Human, 79 Colum. L. Rev. 405, 415 (1979); Bassiouni, supra note 10, at 1169.

[12] Henkin, supra note 8, at 126, 149 ("most of the provisions of the Universal Declaration of Human Rights, and later of the International Covenant on Civil and Political Rights, are in their essence American constitutional rights projected around the world").

[13] U.S. Const., amend. IV.

[14] International Covenant on Civil and Political Rights, arts. 9, 17, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. The ICCPR is binding on the United States. It was ratified by the United States on June 8, 1992 and entered into force for the United States on September 8, 1992.

[15] American Declaration of the Rights and Duties of Man, arts. IX, X and XXV, Mar. 30-May 2, 1948, O.A.S. Off. Rec. OEA/Ser.L/V/I.4 Rev. (1965) [hereinafter American Declaration]. The United States is considered to be bound

The Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution protect the right of the people "to be secure in their persons" and prohibit the deprivation of life or liberty without due process of law and the infliction of "cruel and unusual" punishments.[16] This language is matched by Article 9 of the ICCPR[17] and Article I of the American Declaration,[18] both of which protect the right to liberty and security of the person. Article 7 of the ICCPR also explicitly prohibits torture or cruel, inhuman or degrading treatment or punishment.[19]

Many other parallels are found between the language in the Bill of Rights and the Fourteenth Amendment to the United States Constitution and international standards. For example, the First Amendment guarantees freedom of thought, religion, expression and assembly.[20] The ICCPR protects these same freedoms in Articles 18 through 22[21] and the American Declaration covers these freedoms in Articles III and IV and XXI and XXII.[22] Similarly, the Fourteenth Amendment provides for "equal protection of the laws"[23] while Article 26 of the ICCPR[24] establishes the right to "equal protection of the law," and Article II of the American Declaration establishes the right to "equality before law."[25]

Of course, there are a number of areas in which international human rights standards arguably provide greater protections than the United States Constitution.[26] International human rights instruments also include treaties that cover broader social, economic and cultural rights not

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by the provisions of the American Declaration, through its membership in the Organization of American States and its obligations under the Charter of that inter-governmental body. See infra note 138 and accompanying text.
[16] U.S. Const., amends. IV, V, VIII.
[17] ICCPR, art. 9.
[18] American Declaration, art. I.
[19] ICCPR, art. 7.
[20] U.S. Const., amend. I.
[21] ICCPR, arts. 18-22.
[22] American Declaration, arts. III, IV, XXI, XXII.
[23] U.S. Const., amend. XIV.
[24] ICCPR, art. 26.
[25] American Declaration, art. II.
[26] See Restatement Third, supra note 10, § 701, rep. note 8 (1987); Henkin, supra note 8, at 150, 154.

set forth in the United States Constitution.[27] Still, the core human rights protected under international law have counterparts in United States civil rights law.

B. The United States' Assertions that it Provides International Human Rights Protections through its Domestic Human Rights System

It is therefore appropriate to assess the adequacy of the United States civil rights system as a substitute for more active involvement by the United States in the international human rights system. When studied closely, the argument of the United States is essentially that the civil rights protections in the United States constitute an effective domestic human rights system.[28]

Thus, when the United States ratified the ICCPR in 1992, the report of the Senate Committee on Foreign Relations stated its position that U.S. civil rights protections were sufficiently extensive such that ratification of the ICCPR did not entail or require acceptance of any additional obligations.[29] The Committee explicitly noted that implementing legislation was not necessary given the general compatibility of domestic law with the ICCPR.[30] Finally, the Committee made its approval of ratification contingent on the inclusion of language making the ICCPR non-self-executing.[31] The terms of the ratification thus made clear that the obligations accepted upon ratification of the ICCPR would be met only through existing United States law.

In subsequent reports to the United Nations regarding the ICCPR, the United States emphasized its position that its human rights obligations were fulfilled through the functioning of

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[27] See, e.g., International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, O.A.S. T.S. No. 69.

[28] A number of scholars urge this point as well in defense of the failure of the United States to become more involved in international human rights regimes. See Curtis A. Bradley & Jack L. Goldsmith, Pinochet and International Human Rights Litigation, 97 Mich. L. Rev. 2129, 2173 (1999); Rogers, supra note 10, at 107, 110, 118-19.

[29] See U.S. Senate Executive Report, 102d Cong., 2d Sess., 102-23, reproduced in 31 I.L.M. 645, 649 (1992) [hereinafter Senate Comm. Report on the ICCPR].

[30] Id. at 649.

[31] Id. at 658. A treaty that is not self-executing does not have immediate direct applicability in domestic law but rather requires legislation to incorporate its provisions into United States law. Restatement Third, supra note 10, § 111(3), comm. h.

the United States domestic civil rights system. In 1994, the first report of the United States to the Human Rights Committee, the United Nations body that supervises implementation of the ICCPR,[32] asserted that the United States Constitution, particularly the Bill of Rights, contains protections of the "most important rights and freedoms."[33] In explaining the decision of the United States to declare the provisions of the ICCPR non-self-executing, the report goes on to say that the "fundamental rights and freedoms protected by the Covenant are already guaranteed as a matter of U.S. law . . . and can be effectively asserted and enforced by individuals in the judicial system on those bases."[34]

In 1995, the United States echoed the same theme when its representatives appeared before the Human Rights Committee. United States representatives from the Department of State told the Human Rights Committee that no special or implementing legislation was needed after ratification of the ICCPR, because the treaty "essentially embodied the individual rights and freedoms enjoyed by Americans under their Constitution and Bill of Rights."[35] The representatives went on to say that the non-self-executing nature of the ICCPR did not present any problem, because "United States domestic law establishe[s] numerous mechanisms by which the Covenant rights it guarantee[s] could be protected and asserted."[36]

In 1998, several years after ratification of the ICCPR, the United States made similar assertions before the United Nations Human Rights Commission, the political human rights body

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[32] See ICCPR, arts. 28-45.
[33] Initial Report of the United States to the U.N. Human Rights Committee, CCPR/C/81/Add.4, par. 8 (Aug. 24 1994) [hereinafter Initial ICCPR Report].
[34] Id. at par. 8. (emphasis added).
[35] U.N. H.R. Committee, Summary Record of the 1401st Meeting: United States of America, CCPR/C/SR.1401 (Apr. 17, 1995) (statement by State Department Legal Adviser Conrad Harper).
[36] Id; see also U.N. H.R. Committee, Summary Record of the 1405th Meeting: United States of America, CCPR/C/SR.1405 (Mar. 31, 1995) (reflecting statement of Conrad Harper, State Department Legal Adviser, that the ICCPR did not provide a direct cause of action in United States courts but that the rights in the ICCPR would be guaranteed and effective recourse and remedies in case of violation made available, through the United States domestic system).

of the United Nations. In a heated response to the report of a United Nations Special Rapporteur who visited the United States to analyze issues of police brutality and the application of the death penalty, the official United States delegation to the Human Rights Commission stated that the Rapporteur should devote most of his time to countries with "serious problems" rather than reporting on the United States. In this context, the United States again noted that its domestic law was so protective that it had not been necessary to adopt implementing legislation to give effect to the ICCPR's provisions in domestic law. The letter stated that, "the basic rights and fundamental freedoms guaranteed by the [ICCPR] have long been protected as a matter of federal constitutional and statutory law."[37]

Even more recently, in submissions made in 2006 to the United Nations Committee Against Torture, which oversees implementation of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture"),[38] the United States again emphasized the strength of domestic human rights protections as a reason not to become further involved with the United Nations system for the protection of human rights. The Committee Against Torture queried whether the United States would consider allowing the Committee to receive and adjudicate complaints by individuals claiming to have suffered human rights violations committed by the United States. The United States responded negatively and stated:

> [T]he United States legal system affords numerous opportunities for individuals to complain of abuse, and to seek remedies for such alleged violations. Accordingly, the United States will continue to direct its resources to addressing and dealing with violations of the Convention pursuant to the operation of its own domestic legal system.[39]

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[37] U.S. Delegation Letter, supra note 7.
[38] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85. The United States signed this treaty on April 18, 1988 and ratified on October 2, 1994.
[39] U.N. Comm. Against Torture, Second Periodic Reports of States Parties: United States of America, CAT/C/48/Add.3/Rev.1, par. 163 (Jan. 13, 2006) [hereinafter Second Report to Committee Against Torture].

The United States provided the same response when the Committee asked whether the United States would consider ratification of an optional protocol to the Convention Against Torture that would allow for liberal inspections of detention centers.[40]

C. The Challenge to the United States' Claim to an Effective Domestic Human Rights System

This Article challenges the United States' blithe assertions that it protects human rights through its domestic civil rights system. The Article recognizes that the argument of the United States has common-sense appeal and is also, in principle, a legitimate position to take pursuant to international law. International human rights law condones protection of human rights through domestic legal systems, including through application by the States' judiciaries of constitutional provisions in internal law that are comparable to international norms.[41]

However, this Article explains why United States civil right protections do not, in reality, create an adequate system for the protection of human rights. It is not sufficient for the United States to simply point to the similarity between the substantive rights codified internationally and domestically. To assert that it provides effective human rights protections, the United States must have a comprehensive structure and system for guaranteeing that the rights set forth actually have meaning. A crucial component of such a system is a mechanism for responding to human rights violations and providing redress, including compensation.

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[40] Response of the United States of America to the Committee Against Torture's List of issues to be considered during the examination of the second periodic report of the United States of America, available at http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/listUSA36_En.pdf [hereinafter Response to Committee Against Torture].

[41] See U.N. H.R. Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, par. 15, CCPR/C/21/Rev.1/Add. 13 (May 26, 2004) [hereinafter General Comment No. 31] (the International Covenant on Civil and Political Rights "does not require . . . incorporation . . . into national law" and states may effectively assure the rights guaranteed in that treaty in a number of ways including through "application of comparable constitutional or other provisions of law"); see also Henkin, supra note 8, at 17.

The requirement of a mechanism for redress is central, because violations of human rights do occur regardless of the substantive protections included in the United States constitutional regime. Some notorious abuses come readily to mind. For example, after September 11, 2001, law enforcement officials rounded up some 750 non-citizens and held many without charge for extended periods of time. Many of these detainees were held at the Metropolitan Detention Center in Brooklyn, New York, where officers slammed them against walls, twisted fingers and wrists, and rained racist language upon them.[42]

Other violations of individuals' rights that do not reach the same level of notoriety occur all too often. Police officers and prison officials use excessive force and engage in abuse and even torture. They conduct unfounded and unlawful searches and seizures and coerce confessions.[43] And, corrections officials around the United States continue to sexually abuse women in jails and prisons.[44] The United States government has not denied that law enforcement authorities in the United States sometimes violate the civil rights protections found in the United States Constitution.[45]

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[42] See U.S. Department of Justice, Office of the Inspector General, Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn (Dec. 2003). Constitutional suits based on these cases are currently working their way through the judicial system. Some claims have already been dismissed on immunity and other grounds. See Turkmen v. Ashcroft, 2006 U.S. Dist. LEXIS 39170 (E.D.N.Y. June 14, 2006); cf. Elmaghraby v. Ashcroft, 2005 U.S. Dist. LEXIS 21434 (E.D.N.Y. Sept. 27, 2005).

[43] See U.N. Comm. Against Torture, Consideration of Reports submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations: United States of America, CAT/C/USA/CO/2 (May 18, 2006) [hereinafter Committee Against Torture Conclusions] (expressing concern about reports of brutality and excessive force by law enforcement personnel); U.N. H.R. Committee, Consideration of Reports submitted by States Parties under Article 40 of the Covenant, Concluding Observations: United States of America, par. 30 (July 2006) (same).

[44] See Martin A. Geer, Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law – A Case Study of Women in United States Prisons, 13 Harv. Hum. Rts. J. 71 (2000); Response to Committee Against Torture, supra note 40 (recognizing that in 2004, eleven allegations of sexual misconduct by Bureau of Prisons personnel were substantiated but that no compensation was paid to any of the victims).

[45] Second Report to Committee Against Torture, supra note 39, at pars. 89, 148; U.N. H.R. Committee, Third Periodic reports of States Parties: United States of America, CCPR/C/USA/3, pars. 131, 174, 187 (Nov. 28, 2005) [hereinafter Third ICCPR Report].

Unfortunately, the United States civil rights regime fails in the essential task of addressing these violations and providing reparations to their victims. The sovereign immunity rules preventing suit against governmental actors constitute a grave limitation on the ability of victims to obtain redress for human rights violations.[46] Those rules lay bare the disingenuousness of the United States' claim to vigilant domestic human rights protection.

In challenging the effectiveness of the United States system, this Article places special, although not exclusive, emphasis on the rights to be free from unwarranted searches and detention and from excessive police force, protected in the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution. These are among those most easily understood as human rights, and impunity in cases where they are violated creates obvious human rights protection concerns. However, the civil rights protections found in the United States Constitution and human rights under international law are both actually much broader. They involve due process, equal protection and freedom of speech and association rights, for example, which can come into play in reference to a wide range of governmental action. Just as with civil rights law, international human rights law is invoked whenever the government violates rights enumerated in the relevant law, and the rights protected are extensive.[47] A remedy must be made available whenever the government is responsible for a human rights violation.

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[46] Other significant limitations on the effectiveness of the United States system as a human rights protection regime exist. For example, the insistence that the United States Constitution and Bill of Rights do not apply extraterritorially, political question and foreign affairs doctrines as well as absolute immunities for certain categories of actors and actions create problems for human rights protection by limiting the faculty of the courts to ensure human rights accountability. See Henkin, supra note 8, at 105. This Article focuses only on sovereign immunity limitations on suits for compensation, however.

[47] International human rights law potentially categorizes a significantly greater range of harm suffered by individuals as human rights violations in comparison to United States civil rights law, because international human rights law makes a government responsible for omissions and failures to act where United States law generally does not. See Int.-Am. Ct. Hum. Rts., Velasquez Rodriguez Case, Judgment of July 29, 1988, par. 174; DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989).

II. How Sovereign Immunity Severely Restricts Redress for Civil Rights Violations

One of the most important, if not the most important, means of responding to civil rights violations that take place is by providing compensation for the harm suffered as a result of the violation. Other means of addressing civil rights violations, such as injunctions or declaratory relief or even criminal proceedings against violators, serve important functions and may be appropriate and even necessary responses to violations. However, they do not replace the crucial role of compensation for harms suffered.

A. The Importance of Compensation for Civil Rights Violations

The victim of a civil rights violation that cannot be fully undone can be made whole only if compensation is available.[48] It is also fundamentally unfair to require innocent victims of wrongdoing at the hands of government officials, who are empowered by the public for the public good, to bear the costs of the harm they suffer on their own rather than to spread those costs among the population.[49] By preventing such unfairness, a system that provides compensation for violations serves the important purpose of affirming the vitality of the rule of law and the legitimacy of the government and the courts.[50] Monetary liability also provides an important sanction and deterrent against further abusive acts and is sometimes the only meaningful deterrent available.[51]

In the United States, the possibility of addressing civil rights violations through the payment of compensation to victims is severely restricted. While a constitutional tort structure

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[48] See Amar, supra note 5, at 1427; Chemerinsky, supra note 5, at 1215.
[49] See Peter H. Schuck, Suing Government: Citizen Remedies for Official Wrongs 23 (1983); Owen v. City of Independence, 445 U.S. 622, 651, 654(1980) ("it is fairer to allocate . . . financial loss to the . . . costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights . . . have been violated").
[50] See Schuck, supra note 49, at 23; Vicki C. Jackson, Suing the Federal Government: Sovereignty, Immunity and Judicial Independence, 35 Geo. Wash. Int'l L. Rev. 521, 607-09 (2003).
[51] Schuck, supra note 49, at 16 (noting that actions not likely to be repeated and decisions below the policy level can often only be reached through tort liability); Richard H. Fallon, Jr. & Daniel J. Meltzer, 104 Harv. L. Rev. 1733 (1991); Ronald A. Cass, Damage Suits against Public Officers, 129 U. Pa. L. Rev. 1110 (1981).

exists, allowing victims to seek government liability and payment of compensation through suit, the United States legal system currently does not allow governmental liability and full compensation for many constitutional violations. The doctrine of sovereign immunity severely limits the ability of victims of civil rights/human rights abuses by the United States government from seeking redress and accountability in the form of suits seeking compensation.

B. The General Contours of Sovereign Immunity

The concept of sovereign immunity has a history in the United States as long as the history of civil rights protections.[52] The doctrine is not explicitly set forth in the United States Constitution.[53] Rather, it was transposed onto the United States system from English law, which at the time of the adoption of the Constitution still assumed that "the King can do no wrong."[54] Sovereign immunity has always been closely tied to another British conception intended to limit governmental liability—the rule making respondeat superior or enterprise responsibility, applicable in tort actions involving private citizens, inapplicable to the government.[55]

In varying forms, sovereign immunity protects federal, state and local governments and their components against suits by individuals for compensation alleging constitutional violations. The doctrine also severely limits the extent to which individual agents of the federal, state or local government may be sued for damages in civil rights cases. The exact contours of the sovereign immunity protection have changed over time, but the doctrine still bars courts completely from adjudicating a broad range of individual claims of unlawful conduct by

[52] The first explicit references to sovereign immunity came in the 1790s and 1800s. See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821); United States v. McLemore, 45 U.S. 286 (1846) (government cannot be sued "except with its own consent."); Reeside v. Walker, 52 U.S. 272, 290 (1851) (no action can be sustained against the government unless by its own consent).
[53] See Jackson, supra note 50, at 523; Vazquez, supra note 5, at 859 n.1, 900.
[54] See Feres v. United States, 340 U.S. 135 (1950); Chemerinsky, supra note 5, at 1201.
[55] Schuck, supra note 49, at 29-39.

governmental actors.[56] Sovereign immunity is not a liability standard imposing a different or higher burden of proof in cases against the government but instead is a bar to suit, which applies to protect governmental entities without regard to the nature, merits or strength of the constitutional claim at issue. The doctrine thus severely limits the possibility, even for victims of established constitutional violations, to obtain redress for the harm they have suffered.

The remainder of this Section outlines the contours of sovereign immunity as it affects civil rights claims. Only in reviewing the interaction of the various forms that the doctrine takes can its broad blackout effect on litigation of constitutional violations be appreciated.

C. Sovereign Immunity Protections for the Federal Government

The United States government is completely immune from suits for damages except where it consents to be sued.[57] The United States has not waived immunity from suit for constitutional violations. As a result, a victim simply cannot sue the federal government for damages directly under the United States Constitution.[58]

The United States did consent to certain limited types of suits when it passed the Federal Tort Claims Act ("FTCA") in 1946. The FTCA waives immunity for certain tort claims against the United States. The FTCA relaxed the immunity of the United States to suits for damages based on "run-of-the-mine" accidents and torts committed by the United States government and

[56] See Jackson, supra note 50, at 527 (2003).
[57] Alden v. Maine, 527 U.S. 704, 749 (1999) ("It is unquestioned that the Federal Government retains its own immunity from suit not only in state tribunals but also in its own courts."); Ickes v. Fox, 300 U.S. 82, 96 (1937) ("no rule is better settled than that the United States cannot be sued except when Congress has so provided").
[58] The general immunity of the United States is so well established that few civil rights victims, other than the occasional pro se litigant, attempt to bring claims against the federal government under the United States Constitution. See Settles v. U.S. Parole Comm'n., 429 F.3d 1098, 1105-06 (D.C. Cir. 2005) (dismissing constitutional claims against United States Parole Commission because it is "axiomatic" that the United States may not be sued without consent). Almost no case law is available on this point other than the general assertions in cases like Alden v. Maine, which reference federal government immunity as a principle that must be accepted without explanation or citation. See 527 U.S. 704; Ickes, 300 U.S. 82.

its officials.[59] However, it did not open the door in a meaningful way to litigants seeking redress for constitutional violations.

The FTCA allows suits against the federal government only "under circumstances where the United States, if a private person, would be liable" under the local law where the act or omission occurred.[60] In order to bring a suit under the FTCA, then, a victim of constitutional rights must shoehorn the claimed violation into a common tort claim.[61] This is not always possible.[62] The FTCA undesirably subjects determinations about compensation for violations of federal constitutional rights to the vagaries of state tort law.

In essence, the FTCA serves, in certain circumscribed circumstances, to place the United States in the same position as a private actor for purposes of tort liability. Of course, the government is not simply a private actor but rather has unique power and authority. Yet, the FTCA vehicle provides no room for asserting or recognizing the special harm caused when the government violates rights set forth in the United States Constitution specifically to protect the individual against abuse by an overbearing government.[63]

The FTCA includes additional limits that prevent it from providing a meaningful remedy for victims of constitutional violations. The waiver of immunity contains numerous broad exceptions. For example, claims based on intentional torts, such as assault and battery or intentional infliction of emotional distress, are excluded from the coverage of the FTCA except

[59] See Dalehite v. United States, 346 U.S. 15, 28 (1953).
[60] 28 U.S.C. S 1346(b).
[61] For example, an unlawful search and seizure might be brought as a trespass or false imprisonment claim and would be required to meet the applicable standards under state tort law. The use of excessive force by a law enforcement officer might be litigated as an assault claim.
[62] See Schuck, supra note 49, at 114-15. For example, it is difficult to imagine which torts might be invoked in cases involving unlawful surveillance or procedural due process.
[63] See Cornelia T.L. Pillard, Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability under Bivens, 88 Geo. L.J. 65, 71-72 (1999) (quoting the opinion of Justice Brennan in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971)); Una A. Kim, Government Corruption and the Right of Access to Courts, 103 Mich. L. Rev. 554 (2004).

when committed by law enforcement officials.[64] Thus, some serious constitutional violations cannot be claimed against the United States through the FTCA.

The greatest limitation on the effectiveness of the FTCA as a means of redressing constitutional violations is its discretionary function exception to the waiver of sovereign immunity. That provision disallows claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused."[65] This exception has been interpreted broadly to protect numerous government activities.[66] In theory, a constitutional violation should not fall within the discretionary function exception, because federal officials do not possess discretion to violate constitutional rights.[67] In practice, the discretionary function exception operates much like qualified immunity, discussed further below, to grant the benefit of the doubt to governmental actors and to disallow actions against the government in many cases.[68]

Sovereign immunity thus prevents suits against the United States government for violations of constitutional rights in all but a narrow category of cases that can be brought effectively under the FTCA. Victims of civil rights violations by federal officials or agents often cannot seek redress, in the form of compensation, by suing the federal government.

D. Sovereign Immunity and Related Protections for State and Local Governments

Victims of constitutional violations are not more successful with suits for damages against state and local governments. The sovereign immunity doctrine grants states broad

[64] 28 U.S.C. S 2680(h).
[65] 28 U.S.C. S 2680(a).
[66] See Dalehite, 346 U.S. 15.
[67] See, e.g., Medina v. United States, 259 F.3d 220, 225 (4th Cir. 2001).
[68] See, e.g., Lawrence v. United States, 340 F.3d 952 (9th Cir. 2003) (FTCA suit barred because supervision of convicted felon by federal parole officers is discretionary function); Adras v. Nelson, 917 F.2d 1552 (11th Cir. 1990) (FTCA suit barred because decision to parole/release inmates is discretionary function); Pooler v. United States, 787 F.2d 868 (3rd Cir. 1986), cert. denied 479 U.S. 849 (FTCA suit barred because conduct of criminal investigation, even where unlawful arrest and prosecution are alleged, is discretionary function).

immunity from claims by private individuals seeking damages in federal court for constitutional violations. Localities enjoy a related form of protection.

1. State Sovereign Immunity

The Supreme Court has repeatedly held that sovereign immunity prevents individuals from bringing constitutional claims against states in federal court.[69] The only determination to be made is whether the suit is against the state; if so, it must be dismissed on immunity grounds even if the constitutional violation is established and egregious.[70]

2. Protections for Local Government

Local government entities –such as counties, municipalities, districts—do not enjoy the same blanket sovereign immunity applicable to states. To the extent that the ability to sue local government in federal court provides a narrow window of liability for constitutional violations, it is problematic that the ability of a victim to receive compensation for constitutional harm should depend on the fact that a local rather than a state official committed the civil rights violation.[71]

In any case, victims of constitutional violations at the hands of local government also face significant difficulties in obtaining compensation. The most important barrier to recovery

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[69] See Quern v. Jordan, 440 US 332 (1979) (deciding that Section 1983 does not override states' sovereign immunity and therefore disallowing constitutional actions against the state in federal court under Section 1983); see also Seminole Tribe v. Florida, 517 U.S. 44 (1996); Alden v. Maine, 527 U.S. 704. Statutory civil rights claims may be brought against states in the discrete set of cases – for example housing and employment discrimination matters -- where Congress has successfully abrogated the states' immunity pursuant to the enforcement provisions of the Fourteenth Amendment to the United States Constitution and provided a statutory cause of action. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (permitting abrogation of state immunity pursuant to Section 5 of the Fourteenth Amendment); see also Fair Housing Act, 42 U.S.C. §§ 3601-3631;Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

[70] Given this rule, few victims of violations attempt to bring constitutional claims against the states. Occasionally, the federal courts have the opportunity to reaffirm the sovereign immunity of states in cases where they determine that a particular governmental actor, sued as a local entity, is instead properly characterized as a state actor. See, e.g., Lawrence v. Chabot, 2006 U.S. App. LEXIS 12191 (6th Cir. May 16, 2006).

[71] Many governmental actors that operate on the local level are nonetheless characterized as state government entities entitled to sovereign immunity. See, e.g., Bockes v. Fields, 999 F.2d 788 (4th Cir. 1993) (social services agency is state entity entitled to governmental sovereign immunity); Lewis v. Board of Educ., 262 F.Supp.2d 608 (D.Md. 2003) (school board is state entity entitled to governmental sovereign immunity). Even some law enforcement entities – for example state troopers and state park police -- are properly designated as state actors. See South Carolina Troopers Federation Local 13 v. South Carolina Dept. of Public Safety, 2004 U.S. App. LEXIS 17064 (4th Cir. Aug. 17, 2004); Giancola v. West Virginia Dep't of Public Safety, 830 F.2d 547 (4th Cir. 1987).

against local governments is the requirement of direct unconstitutional action by the government itself. In Monell v. Dep't. of Soc. Servs., the Supreme Court ruled that local governments may not be held responsible for constitutional violations on a respondeat superior theory as a result of the unlawful actions of government employees, even though private employers are generally subject to liability on that basis.[72] Instead, victims of violations must show that the local government itself had a policy that directly led to constitutional violations.

In practice, victims of constitutional violations by local government officials have an extremely difficult time showing that those violations resulted from official government policy. The decision of the Fourth Circuit in Carter v. Morris[73] provides an example. The case involved the arrest, based on a false identification, of Pamela Carter, who was then mistreated and subjected to racial epithets while held by police officers from the Danville, Virginia police department. Carter sued the City of Danville. The Fourth Circuit recognized that Monell allowed local government responsibility for constitutional violations to be established, in the absence of an official written policy, through evidence of a custom allowing its agents to commit constitutional violations. However, to show such a custom, the court required proof of a permanent widespread practice of abuse.[74] The court refused to find a custom or policy and impose liability despite Carter's evidence of numerous prior incidents, spanning nearly two decades, in which officers from the police department beat handcuffed suspects, engaged in other shows of excessive force and then improperly handled complaints about those abuses. As is demonstrated by this case, the preclusion of respondeat superior liability makes it so difficult to

[72] 436 US 658, 691, 693 (1978). The Supreme Court has suggested that the unavailability of the respondeat superior theory of liability in cases against local governments derives from sovereign immunity-like concerns about federalism and separation of powers. See id. at 693, 701; see also Owen, 445 U.S. at 649, 655 n.39.
[73] 164 F.3d 215 (4th Cir. 1999).
[74] Id. at 218 (quoting Monell, 436 U.S. at 591).

sue local governments that it results in "something close to effective immunity."[75]

E. Individual Government Officers and Qualified Immunity

The Supreme Court has suggested that the broad sovereign immunity provided to governments is not problematic, because individual agents of the government can still be sued.[76] Victims of constitutional violations may bring suit for damages against federal agents pursuant to Bivens v. Six Unknown named Agents of the Federal Bureau of Narcotics[77] and against state[78] and local agents pursuant to Section 1983.[79]

The ability to sue an official does not compensate for the inability to sue the government itself. Even if successful in court, a human rights victim may be unable to recover compensation owed to her by an abusive official. Individual officials, without the financial backing of the government, are not typically in a financial position to pay a damages award.[80]

In some instances, the government itself does ensure payment of a final damage award against an employee, either directly or through a government-paid insurance regime, but this is not always the case. The federal government has a general rule against paying judgments assessed against its employees in Bivens actions.[81] Also, where an individual government agent is terminated from employment, sometimes as a result of the abuse committed, neither federal or

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[75] Michael Rowan, Leaving No Stone Unturned: Using RICO as a Remedy for Police Misconduct, 31 Fla. St. U.L. Rev. 231 (2003).
[76] See Alden v. Maine, 527 U.S. 704.
[77] 403 U.S. 388 (1971)
[78] Because of the broad sovereign immunity available to states, actions against state officials are examined to determine whether they are truly against the individual official or actually constitute disguised suits against the state. See Scheuer v. Rhodes, 416 U.S. 232, 237 (1974).
[79] 42 U.S.C. §1983.
[80] See Schuck, supra note 49, at 98.
[81] See United States Attorneys' Manual § 4-5.412(F) (May 1998) ("a federal employee [is] personally responsible for the satisfaction of a judgment entered solely against the employee; there is no right to compel indemnification from the United States or any agency thereof"); 28 CFR §50.15 (Department of Justice employees may request indemnification from the Department of Justice, and the Attorney General may determine that such indemnification is proper if it "is in the interest of the United State"); see also Telephone Interview with Alexander Reinert (July 10, 2006). Reinert regularly litigates Bivens and Section 1983 claims and is currently litigating claims against the federal government for the abuses committed against 9/11 detainees described above. See supra note 42.

local governments will generally assume responsibility for a judgment against the agent.[82] In addition, the litigation insurance protection provided by some governments to its agents does not cover acts of intentional or malicious misconduct.[83] Thus, governments are least likely to ensure that compensation is paid in those cases where their officials engage in the most serious human rights abuses, resulting in their termination or exclusion from insurance/indemnification coverage. The victims of the most egregious violations will therefore often go uncompensated.

In any case, many victims of civil rights violations will never obtain a favorable judgment or even an opportunity to have their claims fully aired in court. Any government agent or official sued under Bivens or Section 1983 is entitled to qualified immunity, which is a powerful protection against suit.[84]

Qualified immunity is another layer of sovereign immunity, providing protection against suit brought against government agents rather than the government itself. As the Supreme Court has made clear, qualified immunity "springs from the same root considerations that generated the doctrine of sovereign immunity" that bars suit against governments.[85]

Pursuant to the doctrine of qualified immunity, an official who violates the civil rights protections found in the United States Constitution may nonetheless be immune from suit for damages in court under Section 1983 or Bivens. The government official will be immune from liability so long as the conduct in question was "objectively reasonable."[86] A government agent

[82] E-mail exchange with Victor Glasberg (July 28, 2006). Victor Glasberg, an attorney in Alexandria, Virginia, regularly litigates Bivens and Section 1983 claims in federal court.
[83] See, e.g., Commonwealth of Virginia Risk Management Plan (2001), available at http://www.radford.edu/~fac-man/Safety/risk_man/risk_plan.htm (insuring government officials acting within the scope of employment except where conduct was "intentional, malicious or willful and wanton"); NY CLS Pub. O. § 17 (2006) (providing indemnification to employees for judgments against them except where the employee engaged in "intentional wrongdoing"); see also Schuck, supra note 49, at 87.
[84] Scheuer v. Rhodes, 416 U.S. 232; Butz v. Economou, 438 U.S. 478 (1978).
[85] Scheuer v. Rhodes, 416 U.S. at 239.
[86] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

may be stripped of immunity and held responsible only if he knew or should have known that he was violating a constitutional standard that was "clearly established at the time" of the action.[87]

As noted above, qualified immunity does not implicate a modification to substantive liability standards in order to accommodate the unique circumstances of action by government officials. The Supreme Court has held that there is no general constitutional liability standard that must be met to establish official responsibility for constitutional violations under Section 1983 or Bivens. Rather, the standards applicable to a constitutional claim for damages, under Section 1983 or Bivens, are determined by the relevant constitutional provisions and vary depending on the constitutional right invoked.[88] Qualified immunity does not change that structure but instead applies as a bar to suit against officials even when they have violated the relevant constitutional standard and would otherwise be liable for a constitutional violation.

The substantive standards that must be met to establish constitutional violations reflect the special nature of government action, are stringent and often require highly intentional action by government officials. For example, to establish a violation of the Eighth Amendment for failure to provide medical attention to a prisoner, the complainant must show that government officials acted with "deliberate indifference to a prisoner's serious illness or injury."[89] To establish a violation of the Fourth Amendment, a search or seizure must be "unreasonable" or without "probable cause."[90] To make out a claim of excessive force under the substantive due

[87] Id. at 818-19. Pursuant to this standard, the central inquiry in most qualified immunity cases is whether the law establishing a violation was clear at the time the action took place. See, e.g., Hope v. Pelzer, 536 U.S. 730 (2002). However, the objective reasonableness standard also still sometimes requires an inquiry as to whether the individual government official knew or should have known about the law or expressed disregard for the law's requirements. Id. at 819. For example, a police officer who seeks or executes an arrest warrant without probable cause may still enjoy qualified immunity if reasonably competent officers would have disagreed as to whether probable cause existed. See Malley v. Briggs, 475 U.S. 335, 341 (1986); Michalik v. Hermann, 422 F.3d 252, 259 (5th Cir. 2005).
[88] See Baker v. McCollan, 443 U.S. 137, 139-40 (1979); Parratt v. Taylor, 451 U.S. 527, 547-48 (1981) (Powell, J. concurring); Graham v. Connor, 490 U.S. 386 (1989).
[89] Estelle v. Gamble, 429 U.S. 97, 105 (1976).
[90] Graham v. Connor, 490 U.S. 386 (1989).

process protections of the Fifth or Fourteenth Amendments, a plaintiff may be required to show that law enforcement actions were "grossly disproportionate to the need for action" and "inspired by malice."[91] Nonetheless, even where a constitutional violation can be made out based on these stringent standards, qualified immunity wraps another "protective layer" around the conduct of government officials and requires an additional analysis of reasonability.[92]

The Supreme Court has made this point even more clear by establishing that, when litigation is filed against an individual officer, courts must first determine whether the allegations raised would establish a constitutional violation if proven.[93] Then, and only then, the court must proceed to analyze whether the responsible official should enjoy immunity. By creating this two-step process, the Supreme Court has left no doubt that the qualified immunity analysis is in addition to the inquiry into constitutionality and bars suit even for constitutional violations if the victim cannot also show that the abusive official knew or should have known that he was violating a clearly established constitutional right.

The Supreme Court has also held that qualified immunity is "an immunity from suit rather than a mere defence to liability."[94] If the officer is entitled to immunity, the suit should be dismissed at a preliminary stage. Specifically, the Supreme Court requires that the determination regarding qualified immunity and dismissal generally be made before discovery begins.[95] The Supreme Court has insisted that such an early dismissal is possible, because the applicability of

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[91] Petta v. Rivera, 143 F.3d at 902; see United States v. Cobb, 905 F.2d 784, 789 (4th Cir. 1990); King v. Blankenship, 636 F.2d 70, 73 (4th Cir. 1980).
[92] Michael Avery, et al., Police Misconduct: Law and Litigation 230 (3rd ed. 2005).
[93] Hope v. Pelzer, 536 U.S. at 736.
[94] Mitchell v. Forsyth, 472 US 511, 526 (1985).
[95] Harlow v. Fitzgerald, 457 U.S. at 818; Jordan v. Bryant, 502 U.S. 224 (1991). While the focus is on an early adjudication of immunity, the facts sometimes must be known before the applicability of qualified immunity can be decided. See, e.g., Anderson v. Creighton, 483 U.S. 635, 646 (1987) (allowing limited discovery on issues relevant to qualified immunity); Taylor v. Vermont Dep't of Educ., 313 F.3d 768, 793 (2d Cir. 2002) (ruling on qualified immunity premature at motion to dismiss stage where issue turns on factual questions). Qualified immunity is sometimes raised early and, if not granted, raised and decided again during successive stages of litigation.

qualified immunity is generally an objective and categorical determination not requiring a fact-specific analysis.[96] Thus, the victim of an unconstitutional action by a government official may be deprived of the right even to have a court begin to uncover the merits of the claim.

The qualified immunity standard is interpreted in a manner that is highly protective of government officials involved in constitutional wrongdoing and grants officials significant deference.[97] As the Supreme Court has emphasized, the standard amply protects officials who make "mistaken judgments" and violate the constitutional rights of victims.[98] The immunity protects "all but the plainly incompetent or those who knowingly violate the law."[99]

Because of its broad reach, qualified immunity prevents redress for victims of a broad range of constitutional violations committed by government officials.[100] As one scholar has noted, while qualified immunity may seem to have more modest effect than full sovereign immunity, in reality it "has operated as a virtually complete bar to recovery."[101] Qualified immunity has been identified as the main reason for the "remarkably low success rates" in Bivens actions.[102] Some estimate that, in 30 or more years of litigation under Bivens, tens of thousands of federal employees have been subjected to suit but only about 100 of these suits have resulted in final judgments providing relief in the form of damages to plaintiffs alleging constitutional violations.[103]

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[96] Harlow v. Fitzgerald, 457 U.S. at 818-19.
[97] See Avery, et al., supra note 92, at 230 (noting that the qualified immunity defense provides "the utmost deference for law enforcement officials").
[98] Malley v. Briggs, 475 U.S. at 341.
[99] Id.
[100] See John C. Jeffries, Jr., The Right-Remedy Gap in Constitutional Law, 109 Yale L.J. 87, 89-90 (1999); Vazquez, supra note 5, at 876-77; Jackson, supra note 50, at 565-66.
[101] Pillard, supra note 63, at 94.
[102] Id.
[103] Helene M. Goldberg, Tort Liability for Federal Government Actions in the US, *in* Tort Liability of Public Authorities in Comparative Perspective 531 (2002) (Duncan Fairgrieve, et al., eds.) [Comparative Tort Liability]. Obviously, it cannot be assumed that all of the claims filed were meritorious. It is likely, though, that many more might have reached a favorable result if it were not for the operation of qualified immunity.

Wilson v. Layne, decided by the Supreme Court in 1999,[104] demonstrates the difficulty of overcoming the qualified immunity bar to suit in Bivens cases. That case involved the actions of officials who brought members of the press into the home of a suspect's parents when executing an arrest warrant. The suspect was not present, but reporters photographed the father in underpants and the mother in her nightgown. The suspect's parents brought suit against the involved officers, which proceeded as a Bivens claim.[105] The Supreme Court unanimously held that the officers' action violated the Fourth Amendment to the United States Constitution. However, the Court nonetheless held that the officers must be granted immunity pursuant to a qualified immunity analysis and upheld dismissal of the suit against the officers.

Qualified immunity has similarly served as a substantial barrier to success on Section 1983 actions. The Fourth Circuit's decision in Robles v. Prince George's County[106] is a case in point. In Robles, the victim brought suit under Section 1983 against police officers who tied him to a metal pole in a deserted parking lot and abandoned him there after arresting him on a traffic warrant at about 3:30 am. The court found that the officers' behavior was unrelated to any legitimate law enforcement purpose and held that their actions violated the Due Process Clause of the Fourteenth Amendment. The court affirmed the decision of the district court granting summary judgment, though, on qualified immunity grounds. The court held that the officers should have known that their "Keystone Kop" conduct was wrongful but did not have sufficient notice from the case law that their conduct constituted a constitutional violation.[107]

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[104] 526 U.S. 603 (1999).
[105] The suit was originally brought as both a Bivens and Section 1983 claim, but the United States District Court of Maryland converted all claims against the individual officers into Bivens claims. The District Court also converted several claims into FTCA actions against the United States. The FTCA claims were resolved out of court, although it is not clear whether compensation was provided. See Docket Sheet for Case 8:94-cv-01718-PJ, available on Pacer.
[106] 302 F.3d 262 (4th Cir. 2002), cert. denied 2003 U.S. LEXIS 2533 (Mar. 31, 2003).
[107] Id. at 271.

An empirical review demonstrates that more than half of those cases that reach the Federal Circuit Courts to be decided on a qualified immunity defense result in a dismissal or denial of relief on qualified immunity grounds. The author's analysis of all cases, brought under Bivens or Section 1983, in which the Circuit Courts of Appeals took up a qualified immunity defense during the first six months of 2006, shows that the courts ruled on the qualified immunity defense in 133 cases. The courts barred suit on qualified immunity grounds in 71 of those 133 cases. The Courts of Appeals held, in another 12 cases, that qualified immunity provided an alternative ground for their decision dismissing suit or denying relief.[108]

H. The Inadequacy of State Court and State Law Alternatives to Federal Court Adjudication of Constitutional Claims

The possibility of asserting constitutional claims against state and local governments and officials in state courts does not provide an acceptable alternative to litigating claims under the United States Constitution in federal court. The option of recurring to state courts thus does not ameliorate the negative effect of the sovereign immunity doctrines applied by the federal courts.

The Supreme Court has made constitutional litigation against state governments in state courts extremely unlikely. The Court has held that Section 1983 does not allow suit against states even in their own courts.[109] The Court reached this conclusion as a matter of statutory interpretation of the coverage of Section 1983, but that interpretation was explicitly informed by sovereign immunity considerations.[110] Constitutional claims may be brought against localities in

[108] The citations to these cases are on file with the author. These cases involve a grant of qualified immunity on at least one claim as to at least one defendant. In some cases, the courts granted qualified immunity as to some defendants or some claims but denied qualified immunity or failed to rule on qualified immunity as to other defendants or claims. In 58 cases, the Courts of Appeals denied qualified immunity at the procedural juncture at issue in the decision reviewed (usually at the motion to dismiss or summary judgment stage). However, qualified immunity could still be granted at a later stage. Those 58 cases included eight in which qualified immunity was granted as to some claims or defendants but denied as to others.

[109] See Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989)

[110] See id. at 66-67.

state courts under Section 1983[111] but are subject to the same Monell requirement of direct unconstitutional action that has proved to be such a stringent limitation in federal court. Individual officials are similarly entitled to the same problematic qualified immunity protections described above.

The only remaining avenue -- litigation of federal constitutional grievances against state and local governments and officials as state law claims -- is also an unacceptable alternative to federal court litigation of claims under the United States Constitution. A number of state and local government entities enjoy state-law sovereign immunity in their own courts that completely precludes this alternative.[112] In addition, as with FTCA claims, litigation of federal constitutional violations as state law claims requires victims to frame their claims according to the different state law standards applicable in each state and makes recovery for a federal violation dependent on state law. Such litigation fails to recognize the unique nature of constitutional claims and makes it very unlikely that appropriate compensation will be awarded.

An example of the inadequacy of state law claims as a substitute for federal constitutional claims is provided by the case of Hill v. McKinley.[113] Robin Hill suffered serious abuse when she was jailed after an arrest for public intoxication. After they had forced her to undress, Hill's jailers decided to transfer her to a restraining board for "her security." Although Hill weighed only 110 pounds, six officers, including males, participated in the transfer of Hill down the hall to a room containing the restraining board. The officers strapped Hill to the board face-down, naked, and in a spread-eagle position. They kept her there for three hours.

[111] See Howlett v. Rose, 496 U.S. 356 (1990).
[112] See Niese v. City of Alexandria, 264 Va. 230 (2002) (invoking Virginia-law sovereign immunity to dismiss tort claims based on police officer's repeated rapes of the victim while on police duty and in police uniform).
[113] 311 F.3d 899 (8th Cir. 2002).

Hill brought constitutional claims against the officers under Section 1983 as the most meaningful avenue for seeking redress given the difficulty of suing the government directly. The Eighth Circuit found that the officers had violated Hill's Fourth Amendment rights but concluded that the officers were entitled to qualified immunity, because the Fourth Amendment did not clearly establish that Hill could not constitutionally be restrained naked.[114] Hill was thus denied any opportunity to bring a claim for damages under the United States Constitution.

Hill was left with a state law claim, which cabined her constitutional harm into the Iowa tort of invasion of privacy. The state law privacy claim was successful at trial, and the Eighth Circuit upheld the favorable verdict. Yet, Hill was awarded only $2,500 in damages.[115]

I. The Effect of Sovereign Immunity Doctrines

The preceding description demonstrates how the layers of sovereign immunity interact to preclude many suits for damages against governmental actors that commit constitutional violations.[116] Distilling these layers of sovereign immunity down to reveal which constitutional claims for damages survive is a difficult task. In summary, though, no suit for compensation

[114] Id. at 904-05.
[115] See id. at 901, 906-07.
[116] For additional troubling cases, see Owens v. Lott, 372 F.3d 267 (4th Cir. 2004) (strip search of all persons on the premises of a home where drugs might be found was unreasonable and violated the Fourth Amendment but qualified immunity was appropriate), cert. denied, Donaldson v. Lott, 2005 U.S. LEXIS 464 (June 10, 2005); Gomes v. Wood, 2006 U.S. App. LEXIS 16104 (10th Cir. June 27, 2006) (placement of child into protective custody without notice and a hearing based on report by doctor who identified injury but stated that he felt comfortable leaving the child in her mother's care violated family's due process rights, but qualified immunity was appropriate because reasonable officials might disagree about reasonableness of the conduct); Maldonado v. City of Altus, 433 F.3d 1294 (10th Cir. 2006) (the imposition by the City of a policy requiring employees to speak only English violated the equal protection rights of Hispanic workers under the Fourteenth Amendment, but qualified immunity was appropriate because the right to speak a foreign language in the workplace was not clearly established); Rasul v. Rumsfeld, 414 F.Supp. 2d 26, 41-45 (D.D.C. 2006) (allegations by detainees at Guantanamo regarding extended deprivation of liberty without counsel or a hearing, frequent beatings, insufficient shelter and food and other humiliating treatment dismissed on qualified immunity grounds, because law not clearly established as to whether constitutional rights extend to aliens held at territory under the complete jurisdiction and control of the United States but over which the United States does not have sovereignty). Many other suits are never brought in the first place because the chances of successfully obtaining redress are so slim. See U.S. Department of Justice, Bureau of Justice Statistics, Contacts between Police and the Public: Findings from the 2002 National Survey v (April 2005) (less than 20% of persons who believed police had improperly engaged in the use of force or threat of force against them filed a complaint or lawsuit against the authorities); E-mail exchange with Victor Glasberg (July 28, 2006).

alleging violations under the United States Constitution may proceed against the states of the United States. Nor can any such suit be pursued against the federal government unless the constitutional harms can effectively be brought under the FTCA as tort claims recognized under state law and also be framed to avoid the broad exceptions to government liability under the FTCA, including the discretionary function exception. Claims for compensation may be brought against local governments but face the difficult hurdle of establishing direct government responsibility for constitutional violations under Monell. Constitutional claims may be brought against individual federal, state or local government officials, who may not have the resources to pay those claims even if successful, but qualified immunity leads to dismissal, often early in the litigation, of an important number of those claims.

As one scholar has noted, "the promise of monetary compensation for constitutional violations has not been fulfilled."[117] The result is that "many victims of constitutional violations get nothing, and many others get redress that is less than complete."[118] The system leaves victims of recognized constitutional violations without an opportunity to obtain compensation for the harm they have suffered, leaving a serious right-remedy gap that is even acknowledged, to some degree, by the United States government.[119]

III. The Failure of the United States Civil Rights System to Measure Up as an Effective Human Rights System under International Law

There can be little doubt that, given the limitations imposed by sovereign immunity, the United States civil rights system fails to measure up as a domestic human rights system. This

[117] Jeffries, supra note 100, at 89.
[118] Id.
[119] See Initial ICCPR Report, supra note 33, par. 98 (recognizing qualified immunity limitations on suits for damages under Section 1983 and the discretionary function and intentional tort exceptions to the government's waiver of immunity under the FTCA); Jeffries, supra note 100, at 89-90.; Chemerinsky, supra note 5, at 1202; Vazquez, supra note 5, at 877; Jackson, supra note 50, at 527, 566; Amar, supra note 5, at 1487; Memorandum of U.S. Civil Society Organizations and Advocates to the Members of the United Nations Human Rights Committee, List of concerns for the review of the U.S. Second and Third Periodic Report 5-6 (Jan. 9, 2006) (on file with the author).

Section lays out the reasons why the United States civil rights regime is inadequate for the protection of human rights under international human rights law standards.

It is appropriate to turn to international law to gauge the adequacy of the United States system. To assess the claim that the United States has an effective domestic human rights system, it must be possible to judge the system by some standard. It would be circular to analyze the system as to its adequacy under the United States Constitution and interpretations of that document. The question here is whether the United States constitutional system adequately steps in to protect human rights as effectively as would the international human rights system. And, after all, the United States has invoked its domestic civil rights system as a defense against further international involvement. It only makes sense, then, to judge the United States system by international human rights standards to determine whether the system, in fact, provides an adequate substitute for greater international commitments or whether international human rights law would require more or different protections.

In invoking international human rights standards, this Article does not suggest that these norms are directly applicable in the United States. Nor does the Article urge a determination by international bodies that the United States is in violation of international law.[120] Such direct applicability and oversight of international human rights compliance is exactly what the United States has refused to accept. Instead, this Article challenges the rationale offered by the United States to explain the limitations that it has placed on its involvement with international human rights. International human rights law is utilized to identify what is required of an effective human rights system and to measure the United States system against those requirements.

[120] Of course, some of the norms cited are binding on the United States under international law. The failure of the United States to meet those international standards does entail a violation of the State's international obligations even if there is little, if any, ability to obtain a ruling from a United States court or international body to that effect.

A. Structural Incompatibility of the United States System with International Human Rights Protection

The doctrine of sovereign immunity places governmental actors in a privileged position vis-à-vis the people of the United States. Whereas individuals can sue private actors and obtain compensation for a wide range of conduct,[121] as described above, individuals are greatly restricted in their ability to sue the government and its officials for compensation.

This structure, which provides special protections for government actions even where they violate civil/human rights, is diametrically opposed to the central purpose and rationale of human rights protection pursuant to international law. The primary purpose of international human rights law is "the safeguard of the individual in the face of the arbitrary exercise of the powers of the State."[122]

International human rights law recognizes that the State and its agents are in the strongest position to protect human rights or to harm them. The citizens cede great power to the State, and the State is expected to use that power to protect the citizenry.[123] When the State instead abuses the rights of its citizens, it can cause great harm because of its strength. It also breaches the trust that the citizens place in it to provide proper protection. International human rights law

[121] See, e.g., Richardson v. Knight, 521 U.S. 399, 401 (1997) (denying qualified immunity to employees of a private prison management firm sued under Section 1983 despite the government-like functions they fulfilled).
[122] Int.-Am. Ct. H.R., Constitutional Court Case, Judgment of Jan. 31, 2001, par. 89; see also Int.-Am. Ct. H.R., Velasquez Rodriguez, Judgment of July 29, 1988, par. 165 (noting that human rights impose limits on government because they derive "from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State"); Int.-Am. Ct. H.R., The Gomez Paquiyauri Brothers, Judgment of July 8 2004, par. 73 (affirming that human rights law is established to provide the individual with means to protect internationally recognized human rights as against the state); see also Nigel S. Rodley, Can Armed Opposition Groups Violate Human Rights? *in* Human Rights in the Twenty-first Century 299 (K.E. Mahoney & P. Mahoney, eds.) (1993) (tracing the development of human rights as a response to the rise of the modern nation state with its increased power and authority).
[123] See American Declaration, pmbl. (recognizing that "juridical and political institutions, which regulate life in human society, have as their principal aim the protection of the essential rights of man.").

acknowledges that violations of rights committed by the State are qualitatively worse than harms caused by private individuals.[124]

International human rights law thus imposes the greatest, not the least, burdens of human rights protection on the State. It focuses on the responsibility of States in relation to human rights rather than on private entities or individuals and generally provides a means of redress only for victims of the actions and omissions of States.[125] Private actors may do damage to the rights of others, but they will generally not be liable for human rights violations.[126]

Through its adherence to sovereign immunity protections for governmental actors, the United States system turns human rights protection on its head. The United States system protects the government against the citizenry rather than the reverse.

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[124] Dinah Shelton, Remedies in International Human Rights Law 50 (1999); see Rodley, supra note 122, at 302 n.10 ("May it not follow . . . that torment is particularly aggravated when the agents of the pain or suffering are precisely those who are supposed to protect against or at least potentially provide relief from the acts causing the suffering?"); Int.-Am. Ct. H.R., Loayza Tomaya v. Peru, Reparations Judgment of November 27, 1998, par. 150 (noting the harm caused by "a breach of the trust that the person had in government organs duty-bound to protect him and to provide him with the security needed to exercise his rights and to satisfy his legitimate interests"). To be sure, the theory of civil rights in the United States also emphasizes the power of the government and the corresponding duty to protect rather than violate rights. See Ogden v. Saunders, 25 U.S. (Wheat.) 213, 346-47 (1827) (Marshall, J. declaring that the right of coercion is surrendered by citizens to the government and imposes on government the duty of protecting rights and furnishing a remedy where they are violated). However, United States doctrine has not addressed the contradiction between these principles and the role that sovereign immunity plays in impeding accountability and redress for civil rights violations.

[125] See ICCPR, art. 2 (establishing that each State party to the ICCPR undertakes to respect and to ensure the rights recognized in that treaty); General Comment No. 31, supra note 41, at pars. 6, 8 (obligations are binding on States); Rodley, supra note 122, at 300, 318; Richard B. Bilder, An Overview of International Human Rights Law, *in* Guide to International Human Rights Practice 9 (Hurst Hannum, ed. 1994) [hereinafter Human Rights Practice]; Int.-Am. Comm. H.R., Third Report on the Situation of Human Rights in Colombia, ch. IV, par. 3 (1999) ("Under the individual petition procedure set forth in its Statute and the American Convention on Human Rights, the Commission's jurisdiction extends only to situations where the international responsibility of a member State is at issue.").

[126] The government may, in some cases, be liable for violations of human rights through its failure to control or sanction private actors. But, private actors themselves do not violate human rights. See General Comment No. 31, supra note 41, at 8 (noting that the obligations of the ICCPR are binding on States and do not "have direct horizontal effect" so as to bind private persons or entities); Rodley, supra note 122, at 309.

B. The Failure of the United States to Meet its obligation under International Human Rights Law to Provide Reparations/Compensation

International human rights law firmly establishes the right to an effective remedy for human rights violations, including pecuniary compensation for the victim. The right to a remedy, including compensation, is a necessary corollary to the human rights obligations imposed on the State.

1. The International Human Rights Law Requirement of Compensation

Almost all international human rights declarations and treaties, including those that are binding on the United States, impose an obligation on the State to provide compensation for violations of rights that do occur.[127] This obligation is found in specific articles of the international instruments that provide for a right to an effective remedy as well as in the general obligation imposed on States by international norms to "respect" and to "ensure" human rights.

The ICCPR, which is binding on the United States, provides in its Article 2, paragraph 3, that States Parties to the treaty must "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy." [128] The United Nations Human Rights Committee, in overseeing and interpreting the ICCPR, has established that an effective remedy includes compensation. In its General Comment analyzing the legal obligations imposed by the ICCPR, the Human Rights Committee specified that the provision requiring an effective remedy can only be fulfilled if "appropriate compensation" is made available to victims of human rights violations.[129] In its General Comment addressing torture, the Human Rights Committee stated

[127] Restatement Third, supra note 10, at § 703, comm. c (noting that international human rights agreements generally require a state party to provide remedies internally for violations of human rights and that a failure to provide such remedies constitutes an additional human rights violation).
[128] No reservation or declaration made by the United States upon ratification of the ICCPR affects the application of Article 2 other than the general declaration that the provisions of the ICCPR are not self-executing, which is irrelevant to this analysis.
[129] See General Comment No. 31, supra note 41, at par. 16.

unequivocally that, "States may not deprive individuals of the right to an effective remedy, including compensation."[130]

The Human Rights Committee has specifically emphasized the requirement of compensation in its interactions with the United States. After reviewing the United States' first report to the Human Rights Committee, that body urged the United States to ensure that "victims be compensated" in cases of excessive use of force by the police.[131]

The Convention Against Torture, also binding on the United States, provides explicitly for the obligation to provide compensation in its Article 14.[132] That provision establishes that the victim of an act of torture, or the family of that victim if death results, should be guaranteed the "right to fair and adequate compensation." The Committee against Torture has also emphasized this right to compensation in its dealings with the United States. In the conclusions and recommendations that it issued to the United States in 2006, the Committee against Torture expressed concern that some victims of abuses by United States government officials have faced difficulties obtaining redress and adequate compensation. The Committee then specifically urged the United States to ensure that "mechanisms to obtain full redress, compensation and rehabilitation are accessible to all victims of . . . abuse . . . perpetrated by its officials."[133]

The American Convention on Human Rights (the "American Convention"), which is the regional treaty governing human rights in the Americas, also establishes in its Article 25 the right

[130] See U.N. H.R. Committee, General Comment No. 20 concerning Prohibition of Torture or Cruel Treatment or Punishment, par. 15 (Oct. 3, 1992) [hereinafter General Comment No. 20].
[131] Concluding Observations of the Human Rights Committee: United States of America, CCPR/C/79/Add. 50, par. 297 (Mar. 10, 1995).
[132] The Convention against Torture was ratified by the United States on October 2, 1994 and entered into force for the United States on November 20, 1994. Interestingly, the only limitation imposed by the United States on Article 14, other than the general provision regarding non-self-execution, is an understanding that a private right of action for damages need only be available for torture committed in territory under the jurisdiction of the United States.
[133] Committee Against Torture Conclusions, supra note 43, at par. 28.

of individuals to judicial protection and a remedy for human rights violations.[134] In addition, Article 1 of the American Convention requires States Parties to "ensure" to all persons the free and full exercise of the rights and freedoms protected therein.[135] While the United States has not ratified this treaty, it nonetheless provides important guidance regarding the international human rights law standards that have been adopted and accepted by the States of the Americas.[136] The treaty and its interpretations have additional persuasive weight, because the United States is considered to be bound by the American Declaration of the Rights and Duties of Man, through its membership in the Organization of American States and its obligations under the Charter of that inter-governmental body.[137] The American Convention builds upon and develops the standards found in the American Declaration.[138]

The Inter-American Court of Human Rights (the "Inter-American Court"), which serves as the final authoritative body interpreting the American Declaration and the American Convention, has emphatically established the duty of States to provide compensation to human rights victims. The Inter-American Court first expounded upon the obligation to provide compensation for human rights violations in 1988 in its seminal decision in the Velasquez Rodriguez Case.[139] The case was brought against the government of Honduras alleging charging members of the Honduran military and intelligence services had abducted Manfredo Velasquez Rodriguez, a university student. The security forces took Velasquez in an unmarked car,

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[134] American Convention on Human Rights, art. 25, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention].
[135] Id., art. 1.
[136] The United States signed the treaty, on June 1, 1977, but has not yet ratified the instrument. As a result, the United States is bound not to take actions that would defeat the object and purpose of the treaty. Vienna Convention on the Law of Treaties, April 24, 1970, 1155 U.N.T.S. 331, art. 18.
[137] See, e.g., Int.-Am. Comm. H.R., Case 10.675 (United States), par. 149 (Oct. 17, 1996); Int.-Am. Comm. H.R., Case 10.951 (United States), par. 36 (Sept. 29, 1999).
[138] See American Convention, pmbl. par. 3; Int.-Am. Ct. H.R., Advisory Opinion OC-10, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights (July 14, 1989); Dinah L. Shelton, The Inter-American Human Rights System, *in* Human Rights Practice, supra note 125, at 120.
[139] Int.-Am. Ct. H.R., Velasquez Rodriguez Case, Judgment of July 29, 1988.

constituting an arrest without warrant, held him and interrogated and tortured him. Because the police and security forces refused to acknowledge his arrest and detention, the Inter-American Court considered that Velasquez had been "disappeared." After finding a number of violations of the American Convention on Human Rights, the Inter-American Court noted that Article 25 of the Convention requires an effective remedy where human rights are violated. The Court expounded on the type of remedy required when it analyzed the State's duty under Article 1 of the Convention to "ensure" the rights and freedoms delineated in the treaty. The Court held that, in addition to the obligation to investigate violations that take place and to sanction those responsible, States must provide compensation "for damages resulting from the violation."[140] Since that time, the Inter-American Court has repeatedly reaffirmed the obligation of States to provide reparations, including monetary compensation, for human rights violations.[141]

2. The Incompatibility with International Human Rights Law of Limitations on Compensation in the United States

Because of the application of sovereign immunity described above, the United States civil rights system fails to meet the central human rights protection obligation of providing compensation when violations occur. International human rights law does not impose specific requirements regarding the manner in which compensation be provided. However, it does require that victims of human rights violations be provided with a meaningful route for obtaining redress.[142] The United States has not provided such a mechanism. As discussed above, the

[140] Id., par. 166.
[141] See, e.g., Int.-Am. Ct. H.R., Ituango Massacres Case, Judgment of July 1, 2006, pars. 340-43 (finding a domestic procedure for providing compensation insufficient where strict statutes of limitations and other barriers prevented full access to the procedure); Int.-Am. Ct. H.R., Las Palmeras Case, Judgment of December 6, 2001 (right to compensation for extrajudicial execution of individuals falsely alleged to have been involved in guerrilla activities); Int.-Am. Ct. H.R., Case of Moiwana Village, Judgment of June 15, 2005, par. 166 (right to compensation for denial of justice and continuing displacement resulting from massacre of villagers); Int.-Am. Ct. H.R., Cantos Case, Judgment of Nov. 28, 2002, par. 66 (right to compensation for denial of access to courts to seek indemnification for expropriated property).
[142] See Int.-Am. Ct. H.R., Velasquez Rodriguez Case, Judgment of July 29, 1988, par. 66.

United States system precludes suit against the government, and suits against individual officials do not reliably result in compensation, because officers are often unable to pay if a judgment is rendered against them and because qualified immunity frequently protects them from such a judgment in the first place.

The Inter-American Court and the Inter-American Commission on Human Rights, the entity responsible for interpreting the American Declaration and American Convention in the first instance and for applying the American Declaration in cases against the United States, have both made clear that the State does not comply with its responsibility to provide compensation where it leaves payment to victims in the hands of individual officials who may not have the ability to pay a judgment. In the case of the Gomez Paquiyauri Brothers, [143] involving the kidnapping and killing by the Peruvian government of two young brothers unjustly accused of involvement in guerrilla activities, the courts of Peru entered a judgment against several low-level Peruvian government officials ordering the payment of compensation. The family was nonetheless unable to recover any monies. In its submissions to the Inter-American Court, the Inter-American Commission took the position that Peru had failed in its obligation to provide compensation, because it had ordered the payment of compensation by officials without resources and had not taken actions to ensure that payment was made.[144] The Inter-American Court of Human Rights agreed that the provisions of domestic law must be structured in such a way as to ensure that compensation would actually be paid.[145]

Nor does international human rights law permit a rule under which compensation will be forthcoming only in those limited cases where qualified immunity protections for government officials, like those established in United States law, are overcome. Put in other terms, the

[143] Int.-Am. Ct. H.R., Gomez Paquiyauri Brothers Case, Judgment of July 8, 2004.
[144] Id. at par. 184.
[145] Id. at par. 189.

international human rights law requirement of compensation does not apply only in those cases where a government official commits a human rights violation and also acts in a manner that is objectively unreasonable in doing so.

As with civil rights law in the United States, international human rights law does not preclude any consideration of reasonableness. The substantive requirements of international human rights law must be met before it can be said that a violation has taken place, and many of the provisions of human rights law include significant flexibility. Thus, for example, a detention or search must be "arbitrary" before it constitutes a violation of human rights protected in the ICCPR. Use of force does not lead to a human rights violation under the ICCPR unless it rises to the level of torture or cruel, inhuman or degrading punishment. Almost all of the international human rights instruments also allow derogations of certain rights under specific public emergency conditions.[146] However, once government actors commit a violation, as determined under the relevant standards, the right to redress, including compensation, attaches immediately.

In the United States, qualified immunity permits recovery for rights violations against individual officials only where an additional showing of individual culpability or fault in relation to the lawfulness of the action leading to a human rights violation can be made.[147] It essentially requires a victim to establish that the official in question knew or should have known that he was engaged in a violation of human rights.

Human rights law, on the other hand, considers all violations of the substantive human rights norms, which are attributable to State actors operating within the scope of their

[146] See ICCPR, art. 4; American Convention, art. 27.
[147] See Jeffries, supra note 100, at 89 (interpreting qualified immunity as requiring proof of fault, essentially of "negligence with respect to illegality.").

employment, to result in a requirement of redress, including compensation.[148] No consideration is given to the individual culpability of the actor committing the violation.[149]

The requirement of specific culpability under the qualified immunity standard in the United States is a by-product of the immunity rules that force suits to be directed against individual officials rather than against the government.[150] But, the ultimate obligation under international human rights law to provide redress for violations committed by governmental actors remains at all times with the State.[151] The United States may not avoid its responsibility as a State to ensure that compensation is paid for human rights violations by requiring victims to proceed against individual officials and then protecting those officials with qualified immunity.

The United States has argued that various domestic means of enforcing rights, other than through individual suits for compensation, provide an adequate remedy for human rights violations. Specifically, the United States has identified criminal proceedings against violators, pattern and practice suits brought by the federal government and habeas corpus petitions as avenues providing adequate enforcement of human rights.[152] None of these other mechanisms allows human rights victims to initiate proceedings that have the possibility of resulting in redress in the form of the compensation. Because international human rights law makes an

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[148] Int.-Am. Ct. H.R., Velasquez Rodriguez Case, Judgment of July 29, 1988, pars. 170-73 ("any violation of rights . . . carried out by an act of public authority or by persons who use their position of authority is imputable to the State"); Int.-Am. Ct. H.R., Bamaca Velasquez Case, Judgment of November 25, 2000, par. 210 ("according to the rules of international human rights law, the act or omission of any public authority constitutes an action that may be attributed to the State and involve its responsibility").

[149] See Int.-Am. Ct. H.R., Velasquez Rodriguez Case, Judgment of July 29, 1988, pars. 172-73 (human rights violations do not depend upon determinations of "psychological factors" that establish "individual culpability;" "the intent or motivation of the agent who has violated . . . rights . . . is irrelevant"); Int.-Am. Ct. H.R., Paniagua Morales Case, Judgment of March 8, 1998, par. 91.

[150] See Pillard, supra note 63, at 79-80.

[151] See Int.-Am. Ct. H.R., Ituango Massacres Case, Judgment of July 1, 2006, par. 340 (the obligation to provide reparations belongs to the State); Int.-Am. Comm. H.R., Report 8/05, Admissibility (Ecuador), par. 33 (Feb. 23, 2005) ("the obligation to remedy human rights violations committed by its agents directly corresponds to [the] State, and not to its agents").

[152] See Third ICCPR Report, supra note 45, pars. 131-37; Initial ICCPR Report, supra note 33, par. 98.

award of compensation indispensable, U.S. human rights obligations cannot be satisfied exclusively by any of these other remedies.

The United States may have the authority, and even the duty, to employ methods of human rights protection other than compensation. Compensation alone may not be adequate in some cases. For example, international human rights law generally requires States to pursue sanctions against those committing serious human rights violations.[153]

However, even where the provision of compensation is not the only response to human rights violations that is required, it is nonetheless a required response. Other means of enforcement cannot replace its crucial role under international human rights law.[154]

C. The Impermissibility under International Human Rights Law of the Sovereign Immunity Doctrines Applied in the United States

In addition to its general requirement of compensation, international human rights law specifically prohibits immunities of the type granted to governmental actors in the United States. Almost every major human rights body has issued interpretations establishing the incompatibility of immunities with international human rights law.

The United Nations Human Rights Committee has found that immunity provisions are incompatible with the ICCPR. In its General Comments interpreting the obligations of States

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[153] See General Comment No. 31, supra note 41, par. 15; United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 60/147, pars. 4, 22(f) (Mar. 21, 2006) (noting duty of States to submit to prosecution individuals responsible for violations human rights and humanitarian law constituting crimes under international law); Int.-Am. Ct. H.R., Velasquez Rodriguez Case, Judgment of July 29, 1988, par. 174; Int.-Am. Comm. H.R., Report No. 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311 (Argentina) (1992) (noting that compensation was required but not sufficient in decision invalidating laws precluding criminal responsibility); Eur. Ct. H.R., Ergi v. Turkey (July 28, 1998) (an effective remedy entails, in addition to the payment of compensation, "a thorough and effective investigation capable of leading to the identification and punishment of those responsible.").

[154] The international community reaffirmed the importance of compensation even in cases pursued as criminal matter when it adopted the Rome Statute establishing the International Criminal Court (the "ICC"). The statute requires the ICC to provide for reparations, including monetary compensation, to the victims of violations that result in proceedings before that tribunal. See Rome Statute of the International Criminal Court, July 17, 1998, art. 75, 2187 U.N.T.S. 3. The order of compensation is to be made against the person convicted by the ICC and is to be enforced by the States parties to the statute. Id.

under the ICCPR, the Human Rights Committee has held that States do not respect their ICCPR obligations when they apply "amnesties," "immunities and indemnities."[155] The Human Rights Committee's conclusions are based, in part, on the requirement that States must provide compensation for violations and must not "deprive individuals of the right to an effective remedy."[156] The Human Rights Committee has also specifically noted that official status cannot justify immunity from legal responsibility.[157] In another pronouncement, the Human Rights Committee specifically stated that a grant of immunity to officials is incompatible with Article 2 of the ICCPR, which enshrines the right to an effective remedy.[158]

The Inter-American Court of Human Rights has similarly held that immunity provisions are incompatible with the American Convention. In its decision in the Barrios Altos Case, the Inter-American Court had occasion to address amnesty provisions adopted by the Peruvian government to protect government officials from all legal responsibility for human rights violations. The Court held that the provisions were impermissible under the Convention, because they obstructed access to justice and prevented human rights victims from "knowing the truth and receiving the corresponding reparation."[159]

Both the Human Rights Committee and the Inter-American Court have thus far addressed the question of immunities largely in the context of amnesties from criminal prosecution. However, nothing in their pronouncements suggests that immunities from suit for compensation would be any less problematic under international human rights law. In fact, their interpretations highlight the impact that any immunity provisions have on the right to an effective remedy and the right to reparations. The central concern of these bodies is that the application of immunities

[155] See General Comment No. 31, supra note 41, at par. 18; See General Comment No. 20, supra note 130, par. 15.
[156] See General Comment No. 20, supra note 130, par. 15.
[157] See General Comment No. 31, supra note 41, par. 18.
[158] U.N. H.R. Committee, Concluding observations: Gambia, CCPR/CO/75/GMB (Dec. 8, 2004).
[159] Int.-Am. Ct. H.R., Barrios Altos Case, Judgment of March 14, 2001, par. 43.

makes it impossible for States to comply with their obligations in responding to human rights violations that occur, including the obligation to provide compensation.

The Inter-American Commission on Human Rights did have an opportunity to address provisions explicitly providing immunity from civil suit for governmental actors. In its 1994 report on the human rights situation in El Salvador, the Inter-American Commission analyzed the amnesty law adopted in El Salvador in 1993.[160] That amnesty extinguished all civil liability for individuals who committed acts of violence during El Salvador's civil war, including those identified as having committed human rights violations by the report of the United Nations Truth Commission for El Salvador. The Inter-American Commission expressed special concern that the amnesty precluded civil liability and therefore directly affected the rights of human rights victims. The Commission concluded that the amnesty violated the American Convention, because it precluded criminal prosecution of actors involved in serious human rights violations but also because it "eliminate[d] any possibility of obtaining adequate pecuniary compensation . . . for victims."[161]

The European Court of Human Rights (the "European Court"), interpreting the European Convention on Human Rights ("European Convention"), has had greater occasion to analyze in depth the issue of immunities in the context of civil litigation for compensation. That Court has determined that the grant to governmental actors of immunities from suit necessarily leads to a breach of the obligations of the State under international human rights law. The European Convention is obviously not binding on the United States. However, the decisions of the European Court provide useful guidance in understanding the contours of the general right to compensation for violations under international human rights law and the permissibility of

[160] Int.-Am. Comm. H.R., Report on the Situation of Human Rights in El Salvador, ch. II (Feb. 11, 1994).
[161] Id. at 6.

limitations on that right imposed through immunities. The interpretations of the European Court are particularly helpful, because the European Convention establishes the right to access a court to seek redress for violations of human rights and the right to obtain a remedy in terms similar to those included in the ICCPR, the Convention against Torture and the American Declaration.[162]

For more than a decade now, the European Court has alerted the countries of Europe that immunities violate the terms of the European Convention. As early as 1994, the European Court held that it would be inconsistent with "the rule of law in a democratic society" if a State could "remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons.[163]

In 1998, in the case of Osman v. United Kingdom, the European Court issued a decision that left little room for doubt on the illegitimacy of immunities under the international human rights law norms included in the European Convention. The decision addressed standards applied by the United Kingdom in civil suits against the police, which, in the view of the European Court, provided "immunity on the police" for acts and omissions related to their law-enforcement activities.[164]

The case involved allegations that the police had failed to protect the Osman family from a gunman. The police had been advised that the gunman was hostile toward one member of the family. However, the police did not prevent the gunman from attacking the family in a shooting that resulted in the death of one member of the family and serious injury to another. The family brought a negligence suit against the police in the British courts. The British appellate court

[162] European Convention on Human Rights, arts. 6, 13, Nov. 4, 1950, 213 U.N.T.S. 221 (requiring a "fair and public hearing" for determinations of civil rights and establishing the right to an "effective remedy" for violations of rights); see also ICCPR, arts. 2, 14 (requiring States parties to "ensure" rights and requiring a "fair and public hearing" for determinations of rights and obligations); American Convention, arts. 1, 25 (requiring States parties to "ensure" rights and establishing the right to "effective recourse" for violations of rights).
[163] Eur. Ct. H.R., Fayed v. United Kingdom (1994).
[164] Eur. Ct. H.R., Osman v. United Kingdom, par. 151 (1998).

dismissed the Osman family's suit against the police on the grounds that public policy precluded an action against the police in negligence in the investigation and suppression of crime.

The European Court then analyzed the dismissal by the British courts of the case against the police as one of denial of access to a court under Article 6 of the European Convention. The European Court held that the immunity provided to the police in the domestic proceedings amounted "to an unjustifiable restriction on an applicant's right to have a determination on the merits of his or her claim against the police."[165] The European Court held that the British courts were required to examine the claims made against the police on the merits in an adversarial proceeding that would require the police to "account for their actions and omissions," rather than to dismiss those claims on immunity grounds.[166]

The Osman case established the impermissibility under European human rights law of immunities that allow for categorical dismissals of suits against the government through the application of objective or bright-line tests rather than requiring litigation of the individual facts of each case and an analysis of the specific acts or omissions in question. The sovereign immunities applicable in the United States, which prohibit altogether suits against the government and which require dismissal of suits against individual officers whenever the objective determination is made that their actions did not violate "clearly established" law, would clearly not pass the European test.

In the subsequent 2001 case of Z v. United Kingdom, the European Court changed its interpretation of British law but did not alter in any way its holding that immunities are incompatible with the European Convention.[167] In Z, the Court made clear that formal immunities, in the form of procedural bars applied in specified categories of cases, as well as

[165] Id. at 151.
[166] Id. at 153.
[167] Eur. Ct. H.R., Z v. United Kingdom (2001).

overly restrictive interpretations of substantive law resulting in a denial of relief to victims of human rights violations both violate international human rights law.

Z involved a claim that local authorities in the United Kingdom had failed to take adequate measures to protect four children who were severely abused and neglected by their parents. Suit was filed on the children's behalf against the local authority, claiming damages for negligence and failure to comply with a statutory duty. The British courts dismissed the claim, and that dismissal was appealed and eventually affirmed by the British House of Lords.

In analyzing the case, the European Court held that the United Kingdom, by omission, had violated Article 3 of the European Convention, which protects the right to be free from inhuman or degrading treatment.[168] The Court then analyzed the claim that the United Kingdom had denied access to the courts and a remedy to the victims through the grant of an impermissible immunity to the local government.

The European Court held that the decisions of the British courts dismissing the children's claim could not be "characterized as either an exclusionary rule or an immunity."[169] The European Court found instead that the British courts had analyzed the law of negligence actions and determined that British law did not allow for establishment of a duty of care – a required element for a negligence action —in this context of administering a welfare program. The European Court concluded that the inability of the children to sue the local authorities "flowed not from an immunity but from the applicable principles governing the substantive rights of action in domestic law."[170] As a result, in dismissing the children's action, the United Kingdom did not violate Article 6 of the European Convention guaranteeing access to the courts.

[168] Id., pars. 74-75.
[169] Id., par. 96.
[170] Id., par. 100.

However, the European Court concluded, the United Kingdom was responsible for a violation of Article 13, guaranteeing a remedy for rights violations, because the domestic court system had not provided a remedy for the violation of Article 3 of the Convention. In reaching this conclusion, the European Court emphasized the importance of the State's obligation to provide a remedy for human rights violations, including compensation for damages at a minimum.[171] The European Court found that any impediment – in this case the substantive limits on negligence actions -- preventing the possibility to seek and obtain "an enforceable award of compensation" violated the European Convention's requirements. The European Court therefore ordered Great Britain to pay damages for the violations of Articles 3 and 13 of the European Convention.[172]

The change in the European Court's characterization of the bases for dismissal of negligence actions in the United Kingdom appears to be justified. It seems to reflect a new understanding of British negligence law available to the European Court for the first time in Z rather than an acceptance of a British tactic to avoid international liability by labeling immunity as substance or a dilution of the court's standards regarding immunities. In Z, the lawyers for the United Kingdom made a particular effort, based on the scholarly work that had been conducted internally in Britain after Osman, to better explain British standards for dismissing negligence claims.[173] In addition, the law in the United Kingdom changed modestly after Osman and before Z. British legal standards incorporated greater individualized determinations in negligence cases in order to move further away from any appearance of immunity.[174]

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[171] Id., pars. 109, 111.
[172] Id., pars. 127, 131, 135.
[173] Id., par. 100 (the reasoning in Osman was reviewed in light of clarifications subsequently made by the domestic courts).
[174] See id., par. 100 (noting with approval recent developments regarding the law of negligence in the domestic courts that allow a more balanced individualized inquiry and thus eliminate the possibilities for an effective immunity); Jane Wright, The Retreat from Osman, *in* Comparative Tort Liability, supra note 103, at 60-61 (after

The European Court's interpretation of the dismissal in the Z case as constituting an application of substantive law also seems correct. The case involved claims that, due to government negligence, the victims suffered harm at the hands of non-governmental third parties. It is not altogether surprising that such a claim would be dismissed by the British courts as a question of substantive law without the necessity of applying immunity. In fact, the case is strikingly similar to a case in which the United States Supreme Court affirmed dismissal on substantive rather than sovereign immunity grounds. In DeShaney v. Winnebago County Dept. of Social Services, the Supreme Court analyzed a claim brought under Section 1983 alleging that a local governmental social services agency had engaged in a substantive due process constitutional violation by failing to prevent serious physical abuse of a young boy by the boy's father.[175] The Supreme Court held that "a State's failure to protect an individual against private violence" did not constitute a constitutional violation.[176] Given its decision on the merits of the substantive constitutional claim, the Supreme Court expressly declined to consider whether an immunity defense might be available.[177]

Nowhere in Z does the European Court qualify its holding in Osman that categorical immunities, which bar human rights claims, are impermissible. In fact, the European Court references the rule against immunities while deciding that the case before it does not present an immunity question.[178] The European Court's decision in Z must therefore be seen as a reaffirmation that immunities impermissibly restrict the ability of victims of human rights violations to obtain redress and simultaneously as a warning that limitations on substantive

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Osman, British courts started making decisions based on individualized justice rather than attempting to constrain demands on the public purse through immunities from suit); J.A. Weir, Human Rights and Damages, 40 Washburn L.J. 413 (2001) (the practice in the United Kingdom changed after the opinion in Osman and now cases generally proceed to trial rather than being struck out on the pleadings).

[175] 489 U.S. 189.

[176] Id. at 197.

[177] Id. at 202 n.10.

[178] Eur. Ct. H.R., Z v. United Kingdom, pars. 96, 98.

domestic law may also lead to breaches of State human rights obligations, although the two situations may be addressed under different provisions of the European Convention.

The United States' civil rights regime is fatally flawed under the international human rights law standards that prohibit immunities for government abuses. There can be no argument that the United States immunity system is really just a system for eliminating claims on substantive grounds and thus resembles the system at issue in the Z case. The sovereign immunity name given the doctrine in the United States is too apt. As described above, the doctrine provides immunity even in those cases where substantive law leads to a finding of a constitutional violation.

IV. The International Trend Away from Sovereign Immunity

While the United States clings to sovereign immunity, much of the rest of the world is abandoning any vestiges of sovereign immunity doctrines still found in their legal systems. There is no indication that other States have suffered serious negative consequences by foregoing sovereign immunity, and there is every reason to believe that the move away from sovereign immunity has improved the ability of these States to protect human rights.

Comparative studies of governmental liability regimes have identified the trend toward the abolition of sovereign immunity. Fifteen years ago, a study published by the United Kingdom National Committee of Comparative Law and the British Institute of International and Comparative Law found that, through a combination of developments, legal systems had "gradually but dramatically" altered their prior position of insistence on sovereign immunity.[179] The study noted that none of the legal systems included therein, including England and Wales, Scotland, New Zealand, Australia, Belgium, France, Ireland, Italy, Germany and the European

[179] Anthony W. Bradley & John Bell, Governmental Liability: A Preliminary Assessment, *in* Governmental Liability: A Comparative Study 5 (John Bell & Anthony W. Bradley, eds. 1991).

Community, continued to apply a full-fledged sovereign immunity doctrine.[180] The authors of the study concluded even more broadly that the general picture, which emerged from their comparative analysis, was one of a "widening of governmental liability."[181] They found that immunities were declining and the grounds for obtaining compensation were expanding.[182] More recently, authors in the United States have also noted the trend in Europe toward setting aside rules of sovereign immunity and allowing for greater government liability.[183]

The reasons and methods for the changes in domestic law that eliminate or severely restrict sovereign immunity vary from country to country. Some countries have determined that sovereign immunity no longer fits well with the overarching structure of their legal system and have made changes through legislation or constitutional changes.[184] In other countries, changes have been motivated by newer interpretations of existing constitutional schemes and have been wrought by the judiciary.[185] Supra-national structures and laws, including human rights as well as other treaties establishing additional individual rights, have also motivated the movement away from immunity in some domestic legal systems.[186]

The remainder of this Section describes briefly the manner in which the legal systems of the United Kingdom, France and Argentina provide human rights protections by allowing suits

[180] Id. The study specifically noted, in contrast, that the doctrine of sovereign immunity had not "received its quietus" in the United States.
[181] Id. at 15.
[182] Id.
[183] See James E. Pfander, Government Accountability in Europe: A Comparative Assessment, 35 Geo. Wash. Int'l L. Rev. 611 (2003). Commentators in other parts of the world take the trend toward elimination of sovereign immunities for granted and, in fact, treat it as completed. See, e.g., Guido Santiago Tawil, La Responsabilidad del Estado y de los Magistrados y Funcionarios Judiciales por el Mal Funcionamiento de la Administración de Justicia 13-17 (1993) (equating the disappearance of sovereign immunity with the expansion of the rule of law in countries around the world).
[184] Bradley & Bell, supra note 179, at 5.
[185] Id. at 5, 15.
[186] Id.; Pfander, supra note 183, at 635-49.

for compensation against the government without the barrier of sovereign immunity.[187] The legal systems in these three States handle human rights claims largely through regular non-contractual (common tort or tort-like civil liability) schemes.[188] In each country, these schemes have explicitly developed as human rights protection systems,[189] where constitutional and other rights claims can be heard, without the application of sovereign immunity.[190]

A comparison of these other systems with the civil rights regime in the United States is instructive. The experience in these three countries suggests that the United States could choose a path away from sovereign immunity without harm to its legal system. In doing so, the United States would bring its protections for human rights more closely into line with international standards, would close a widening gap between it and other countries boasting well-developed legal systems and would vindicate the United States' own constitutionally-guaranteed rights.

A. England

The development of the law in England, resulting in the abolition of sovereign immunity more than fifty years ago, is illuminating, since the sovereign immunity doctrines applicable in the United States originally derived from British law. The last remnants of sovereign immunity available in the United Kingdom in relation to suits for damages against the government were

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[187] By describing the legal systems of these three countries and urging comparison with the United States system, I do not suggest that these countries have perfect human rights records or even that their records are better than that of the United States. It is nonetheless useful to study the manner in which these legal regimes have balanced competing concerns to provide redress for victims when human rights violations do take place.

[188] England has recently provided, through adoption of the Human Rights Act of 1998, a means of bringing suit against the government that looks similar to a constitutional tort system. The substantive rights protected under the Human Rights Act are those in the European Convention. See infra notes 203-04 and accompanying text.

[189] See Hickman, supra note 193, at 25 (English courts and commentators have long recognized the centrality of tort law's role in vindicating individual rights); Marie-Aimee de Latournerie, The Law of France, *in* Governmental Liability: A Comparative Study, supra note 179, at 221 (noting that violations of individual rights are given higher status by the courts in the hierarchy of treatment of liability claims); Maria Graciela Reiriz, Responsabilidad del Estado (1969) (explaining that the system of State responsibility in Argentina not only protects the rights set forth in the Constitution but is based on and required by the constitutional mandate of rights protection).

[190] As discussed above, the United States system allows certain civil rights claims to proceed as tort claims through operation of the Federal Tort Claims Act ("FTCA"). See supra notes 59-68 and accompanying text. However, the FTCA is a system of such a limited nature that it does not compare to these tort-based protection systems operating in other countries. Nor was it intended to serve as a means for protecting civil rights/human rights.

eliminated in 1947 with the passage of the Crown Proceedings Act. That legislation made the central government (the "Crown") liable to suit.[191] Local governments had already been liable.[192] With the abolition of sovereign immunity at all levels came the applicability of the doctrine of respondeat superior. Thus, under English law, governmental entities are vicariously liable to third parties where an employee official acts unlawfully in the course of his or her employment.[193] The effect is that governmental institutions and their employee officials are jointly liable for wrongful acts, and suits for compensation can be brought against either with the government paying any damages awarded in either case.[194] Recovery of compensation from governmental actors for human rights abuses is now available in a wide range of cases in the United Kingdom.[195]

Victims of abuses generally bring actions against governmental actors in the form of tort claims, and substantive tort law in England has persisted in considering certain special factors that may limit liability of governmental actors. Thus, a public official may in some limited circumstances avoid responsibility by alleging that he/she acted in good faith or acted within a statutory authorization.[196]

However, these substantive law protections for government should not be considered a de facto revival of sovereign immunity that defeats human rights protections. As described above,

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[191] Crown Proceedings Act 1947, Ch. 44 (July 31, 1947); Pfander, supra note 183, at 616; John Bell, The Law of England and Wales, *in* Governmental Liability: A Comparative Study, supra note 179, at 18-20.
[192] Spyridon Flogaitis, State Extra-Contractual Liability, *in* Comparative Tort Liability, supra note 103, at 444; Weir, supra note 174, at 425.
[193] Bradley & Bell, supra note 179, at 19-20; TR Hickman, Tort Law, Public Authorities, and the Human Rights Act 1998, *in* Comparative Tort Liability, supra note 103, at 31; Weir, supra note 174, at 425.
[194] Flogaitis, supra note 192, at 447; Bradley & Bell, supra note 179, at 19-20; Hickman, supra note 193, at 31. In some cases, the government may seek to recoup any compensation that it pays from the individual official committing the violations. Bradley & Bell, supra note 179, at 19-20.
[195] Telephone Interview with Richard Hermer, Doughty Street Chambers (July 14, 2006) (stating that very few legal doctrines limit the government's liability in the United Kingdom and suits involving a broad range of governmental conduct and seeking damages are frequently successful). Richard Hermer regularly litigates government abuse cases in the United Kingdom under the tort system and under the Human Rights Act.
[196] See Bradley & Bell, supra note 179, at 19-20; Pfander, supra note 183, at 616.

as a result of the decisions of the European Court of Human Rights in the Osman and Z cases, the British courts have more carefully delineated and delimited the special considerations granted to the government.[197] These special considerations are therefore on the decline.

In any case, the substantive law limitations on suit have been almost completely limited to the context of negligence tort claims alleging governmental failures to protect against harm by third party non-governmental actors.[198] These cases have received much attention, in part because of their treatment by the European Court of Human Rights, but they do not accurately portray the extent to which government liability is available in most cases. Cases alleging intentional and affirmative governmental wrongdoing are regularly allowed.[199] Actions against the police for assault or false imprisonment are common for example.[200]

For example, in 2003, a British court awarded almost $500,000 in damages to a black delivery driver, who was detained when he made a delivery to a company that was in the process of being searched by police and was then subjected to racial epithets and brought up on false charges.[201] In 2005, the British House of Lords reaffirmed the ability of individuals eventually acquitted after criminal proceedings to bring claims against the police for malicious prosecution and misfeasance in public office. In the case of O'Brien v. Chief Constable of Wales, O'Brien claimed that his conviction and imprisonment for 11 years was the result of an improper investigation conducted by police officials. The British courts not only allowed the claim to

[197] See supra notes 173-74 and accompanying text.
[198] See Pfander, supra note 183, at 616; Duncan Fairgrieve, The Human Rights Act 1998, Damages and English Tort Law *in* Comparative Tort Liability, supra note 103, at 81; Telephone Interview with Richard Hermer, Doughty Street Chambers (July 14, 2006).
[199] See Fairgrieve, supra note 198, at 81.
[200] See id.; Thompson v. Commissioner of Police of the Metropolis (1998) QB 498 (Court of Appeal) (successful action against the local police for assault and battery, false imprisonment and malicious prosecution resulting in the award of ordinary, aggravated and exemplary damages).
[201] Farquharson v. Commissioner of the Metropolitan Police (2003) 31 January, Central London County Court.

proceed but allowed O'Brien to present evidence suggesting misconduct in earlier investigations conducted by the same officers in support of his claim.[202]

In addition, the United Kingdom has now enacted legislation, the Human Rights Act of 1998, which allows victims to sue governmental authorities for violations of the rights protected in the European Convention.[203] Because this Act bases its substantive law on the terms of the European Convention, the British courts may not apply, in cases brought under this legislation, substantive law restrictions on governmental responsibility not considered in the human rights treaty. The enactment of the Human Rights Act also dispels any lingering doubts about the adequacy of using the tort system alone for addressing governmental human rights abuses in the United Kingdom. Victims may base their claims directly on specific human rights violations. Victims are now regularly bringing claims both under the Human Rights Act and on a tort theory with significant success.[204]

B. France

As with England, France has eliminated any lingering traces of sovereign immunity. The elimination of immunity in France provides a useful perspective, because substantive liability in France is expansive.[205] Despite this broad exposure of the government to liability, France has not deemed it necessary to provide protection from suit through sovereign immunity.

In France, local public bodies enjoy no immunity and can be sued for damages.[206] The central government (or national government) has also lost any immunity from suits for

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[202] O'Brien v. Chief Constable of South Wales (2003) Civ 1085, upheld by the House of Lords (2005) UKHL 26.
[203] Human Rights Act 1998, 1998 Chapter 42, sec. 7 (Nov. 9, 1998). One drawback to the Human Rights Act is that its language regarding compensation when human rights violations are found is permissive rather than mandatory. See id., sec. 8. In practice, though, the British courts are regularly awarding compensation under the Human Rights Act. See Telephone Interview with Richard Hermer, Doughty Street Chambers (July 14, 2006).
[204] Telephone Interview with Richard Hermer, Doughty Street Chambers (July 14, 2006).
[205] See Pfander, supra note 183, at 623.
[206] Latournerie, supra note 189, at 217.

compensation it once claimed except in a narrow category of cases involving "acts of state" in the conduct of foreign affairs.[207]

Victims of governmental abuses may then bring a range of claims against governmental actors in France.[208] The government accepts respondeat superior liability and pays for claims involving actions or omissions by its employees in the course of employment from public funds.[209] While the majority of claims against the government are heard in administrative courts, cases involving claims against public authorities that would constitute serious human rights abuses are handled by regular courts.[210] The French legal system deems these cases too consequential to be heard in administrative tribunals and thus places them under the jurisdiction of courts with higher status in the legal hierarchy.[211] Actions heard exclusively in regular court include those claims against public authorities arising from interference with personal liberty, including arbitrary arrest, unlawful use of force and invasion of the privacy of the home.

French law generally requires a claim for damages to be based on a showing of wrongdoing or "illegality."[212] However, French courts do not engage in any additional "public law immunity" analysis considering whether the officials in questions were involved in discretionary functions or otherwise entitled to protection due to their status as public officials.[213]

In fact, in some cases, the French courts will award compensation to individuals who have suffered harm at the hands of the government even if no government official or entity is at

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[207] Id. at 217-19.
[208] Id. at 219.
[209] Pfander, supra note 183, at 623. The government may seek to recoup any compensation that it pays from the individual official committing the violations. Flogaitis, supra note 192, at 442.
[210] Delatournerie, supra note 189, at 221; Pfander, supra note 183, at 620.
[211] Delatournerie, supra note 189, at 221-22.
[212] Roberto Caranta, Public Law Illegality and Governmental Liability, *in* Comparative Tort Liability, supra note 103, at 273; Pfander, supra note 183, at 623-24.
[213] Caranta, supra note 212, at 344. Interestingly, the 1905 decision that rejected the possibility of special treatment for officials involved in discretionary governmental functions involved police operations. See Conseil d'Etat, Tommaso Grecco Case, D 1906, III, 81 (1905) (no immunity for police operations in relation to claim that police had caused harm by firing a bullet into a home while trying to kill a rampaging bull).

fault at all, even through negligence.[214] The French system considers that, where the government engages in conduct that creates a risk of injury and harm takes place, the public as a whole should pay the cost. The rationale is that no individual should bear the burden of harm caused when the government acts to the benefit of society as a whole.[215] As an example, French law will award damages to an individual harmed when the police use weapons issued by the State in an operation to maintain public order, without any regard to the fault of the officers involved.[216]

The French liability regime explicitly recognizes the special and extensive powers given to the government and imposes corresponding special duties on governmental actors not applicable to individuals.[217] The result is broad liability without immunity.

C. Argentina

The legal system in Argentina provides a particularly interesting point of comparison for the United States system. Argentina's relevance as a country within the Americas with a well-developed legal system and significant commercial ties to the United States is augmented by the fact that the Argentine Constitution was modeled very closely on the United States Constitution.[218]

Since the end of the 19th century, Argentine law has offered the ability to sue individual officials for harm that they cause in the course of their governmental functions.[219] Although no immunity is available to these officials, the remedy is obviously limited, because individual officials are often unable to pay.

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[214] Pfander, supra note 183, at 624; Caranta, supra note 212, at 276.
[215] DeLatournerie, supra note 189, at 209.
[216] Conseil d'Etat, Lecomte, S. 1949.3.61 (1949).
[217] Caranta, supra note 212, at 333.
[218] Hector A. Mairal, Control Judicial de la Administracion Publica 96 (1984).
[219] Reiriz, supra note 189, at 13.

Originally, victims of abuses had no recourse against the government directly. The Supreme Court of Argentina, explicitly citing the jurisprudence of the United States courts, adopted a strict sovereign immunity doctrine in 1864, completely precluding suit against the government.[220]

Since that time, however, Argentine law has parted ways with the United States on the issue of sovereign immunity. In 1933, the Supreme Court of Argentina decided the Devoto case, which held that the government could be sued for the actions of its officials, including negligent actions.[221] The Court thus eliminated sovereign immunity and a previously-existing ban on respondeat superior liability in one decision. Sovereign immunity has now ceased to be an impediment to suits for damages against governmental actors.

A human rights victim may sue both the government and any individual officials responsible for rights violations. Where the court awards damages against a government official, the government is jointly liable.[222]

Argentine law generally requires a victim to establish some level of wrongdoing on the part of government officials in order to establish governmental liability. The requirement can be met in a number of ways – by establishing culpable or negligent actions of the officials or by demonstrating that they carried out their official functions in an "irregular" manner.[223] Responsibility of the government for the "irregular" conduct of its officials applies whenever the government has assumed responsibility for a function, such as public security or public services, and its officials cause harm or fail to prevent harm in the exercise of that function.[224] The

[220] Mairal, supra note 218, at 97.
[221] Reiriz, supra note 189, at 86.
[222] See Tarnopolsky v. the Nation, Supreme Court of Argentina (1999); Civil Code of the Republic of Argentina, art. 1113. The government may then seek to recuperate any damages paid to the victim from the official. See Civil Code of the Republic of Argentina, art. 1109.
[223] Reiriz, supra note 189, at 95-96; Civil Code of Argentina, arts. 1109, 1112.
[224] Reiriz, supra note 189, at 89.

liability is so broad as to encompass official acts committed in times of war when they fail to adhere strictly to the proper and limited nature of legitimate war powers.[225]

The Argentine system places emphasis on establishing the responsibility of individual officials and imputing that responsibility to the government. However, the law also recognizes that the central issue is the wrongful exercise of government authority. Thus, Argentine law does not necessarily require the victim of human rights abuses to identify the individual officers responsible for a violation or to describe with specificity their wrongdoing. Again, the fact that the abuses occurred in the context of governmental actions is usually sufficient.[226] For example, the Supreme Court has held the government responsible for a police seizure of property even where the victims could not identify the officers involved.[227]

The government may also be held directly responsible for certain executive and legislative acts.[228] In such cases, the victims of government action may simultaneously seek the invalidation of the action as well as damages.[229] In certain circumstances, as with the French system, the government may be required to pay damages for its harmful actions even if they are fully valid and lawful.[230]

The Argentine system has thus evolved to provide significant protection for victims of human rights abuses. Individuals must cloak their claims in the language of civil law violations (tort-like claims), such as abuse or usurpation of power or unlawful imprisonment, but they regularly and successfully invoke the rights protections in the Argentine Constitution and international human rights treaties to provide contour to those claims. In one such case decided

[225] Reiriz, supra note 189, at 94.
[226] Id. at 97.
[227] Id. at 97 (citing the decision of the Supreme Court of Argentina in the Lucena Case, decided in 1943).
[228] Id. at 91.
[229] Mairal, supra note 218, at 907, 915.
[230] Id. at 915; Reiriz, supra note 189, at 91.

in 1999, for example, Daniel Tarnopolsky brought a claim against the federal government and against an individual military official seeking compensation for the disappearance of several of his family members by the Argentine military during the dictatorship of the 1970s.[231] The Supreme Court of Argentina recognized the unique and tragic nature of disappearances and issued a decision affirming an award of almost $2 million dollars. Despite the broad liability that its legal system creates for governmental actors, Argentina has not deemed it necessary to revisit the elimination of sovereign immunity protections.

V. A Call for Change

If the United States wishes to hold itself forth as the international standard bearer for human rights, it must remove sovereign immunity, including both governmental sovereign immunity and qualified immunity, as a barrier to constitutional claims. Otherwise, the United States may not claim that it provides effective human rights protections within the United States and beam its model outward to the world as an example while limiting its own international involvement in human rights.

A. The Justifications Offered for Sovereign Immunity Should Fall

To convert the United States civil rights system into a human rights protection regime, the right to compensation must override the justifications offered in support of sovereign immunity. Sovereign immunity, including both governmental sovereign immunity and qualified immunity, is justified in jurisprudence and commentary in the United States as necessary to: 1) protect the public fisc and; 2) prevent the "over-deterrence" of official decision-making and action that might result from the risk of litigation and liability.[232]

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[231] See Tarnopolsky v. the Nation, Supreme Court of Argentina (1999).

[232] See Alden v. Maine, 527 U.S. 704 (the political process should determine the allocation of resources rather than the courts or private individuals); Jordan v. Bryant, 502 U.S. 224 (1991) (officials should not be put in a position of always erring on the side of caution for fear of being sued); Reeside v. Walker, 52 U.S. 272, 289-91 (1850) (the

The problem with these rationales for sovereign immunity is that they fail altogether to take into account the right of victims of abuses to obtain compensation for harm they suffer at the hands of the government. International human rights law, in no uncertain terms, requires redress, including compensation, to be provided to victims of governmental abuses.[233]

The justification based on the risk of over-deterrence has never been substantiated in any meaningful way and is inherently problematic. Presumably the Supreme Court wishes to avoid under-deterrence of constitutional violations, as well as over-deterrence, by establishing a system that provides the optimal level of deterrence. After all, an important goal of compensation for governmental abuses, beyond providing redress to individual victims, is to ensure governmental accountability and to deter future violations.[234]

Yet, the Supreme Court of the United States invokes the over-deterrence risk to justify the qualified immunity available to government officials without explaining or supporting its assertion that making government officials susceptible to suit would lead them to act with excessive caution. It is just as plausible to argue that immunity leads government officials to be unduly bold in their actions and thus causes under-deterrence of rights violations.[235] Nor has the Supreme Court ever addressed the possibility that a more appropriate level of deterrence could be provided by taking the focus away from suits against individual officials and making government itself liable. Scholars studying alternative liability systems for constitutional torts

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United States government may not be sued unless an act of Congress exists ordering the disbursement of funds); Erwin Chemersinky, supra note 5, at 1218 (immunity designed to protect government treasury); Vazquez, supra note 5, at 877 (qualified immunity designed to prevent over-deterrence).

[233] See supra notes 127-141 and accompanying text.

[234] Fallon & Meltzer, supra note 51, at 1736.

[235] Vazquez, supra note 5, at 878; Pillard, supra note 63, at 68, 92.

have suggested that government liability would provide the most effective level of deterrence.[236] The system may require adjustment if for no other reason than to ensure adequate deterrence.

Even more clearly, the hypothetical risk of over-deterrence cannot weigh more heavily than the right to redress of individual victims. Sovereign immunity prevents actual victims of government excess from suing for compensation on the theory that government officials, in some future instance, might otherwise refuse to take lawful action because of the specter of litigation. International human rights law squarely categorizes that unfair denial of compensation as an unacceptable State response to human rights violations.

The United States Supreme Court has also failed to explain why protection of the public fisc is of such importance as to justify sovereign immunity protections against suit. The Supreme Court has held that it is often desirable for the public at large, which benefits from the existence of government, to pay for any harm caused by the government's activities through the public budget rather than allow individual victims of rights violations to suffer the impact alone.[237] The Supreme Court has never explained why, in the sovereign immunity context, it has elected to put this distribution of cost theory aside in favor of protection of the public treasury.[238]

The preference for the treasury must give way in the face of the right to compensation afforded to individuals under international human rights law. While the government may properly be parsimonious with its funds elsewhere, it may not invoke sovereignty to refuse payment to a victim who has suffered rights violations at the government's own hands.[239]

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[236] Schuck, supra note 49, at 18, 98 (suggesting that the government is in the best and cheapest position to effect change to shape future government behavior); Cass, supra note 51, at 1178-79 (suggesting that the government itself could also be over deterred as a result of potential liability but nonetheless concluding that direct governmental liability would provide the optimal level of deterrence while also ensuring the award of damages in meritorious cases).

[237] Owen, 445 U.S. at 655.

[238] Chemerinsky, supra note 5, at 1216-17.

[239] As Justice Souter aptly stated in his dissent in Alden v. Maine, a civil rights victim seeking compensation "is not a dunning bill collector, but a citizen whose federal rights have been violated." 527 U.S. at 803.

B. Governmental Sovereign Immunity and Qualified Immunity for Officials Should be Eliminated in Relation to Constitutional Claims

In order to eliminate sovereign immunity protections in cases involving constitutional violations, the Supreme Court must act. Because the Supreme Court has held that sovereign immunity has constitutional underpinnings,[240] a legislative change would be ineffective in overcoming all aspects of sovereign immunity. The United States Congress could ameliorate the negative impact of sovereign immunity by taking steps such as amending the Federal Tort Claims Act to waive explicitly and fully the federal government's immunity from suit for constitutional torts or by limiting or eliminating qualified immunity. However, congressional action could only provide a piecemeal and partial solution in an area of the law already lacking in coherency and is therefore unsatisfactory. Of course, a clearly stated constitutional amendment could eliminate sovereign immunity, but the lengthy and uncertain amendment process does not provide an attractive resolution to the urgent problem presented by the inability of victims to obtain compensation for human rights violations. There is no doubt that the Supreme Court could eliminate sovereign immunity through a revised interpretation of the Constitution, since immunity is a judicially-created doctrine in the first place.[241] The Supreme Court should do so.

1. The Full Elimination of Governmental Sovereign Immunity and the Incorporation of Respondeat Superior Liability

Governmental sovereign immunity must be fully and completely eliminated in constitutional cases in order to provide for greater human rights protection in the United States legal system. Once governmental sovereign immunity is eliminated, most victims of civil rights violations will choose to sue the government rather than individual officials. Suit against the

[240] See Alden v. Maine, 527 U.S. at 728 (sovereign immunity derives from the structure of the Constitution itself).
[241] See Vazquez, supra note 5, at 886.

government will provide the most direct and effective means of obtaining compensation for harm caused by governmental actors.

To ensure that suit against the government is feasible, the elimination of sovereign immunity for constitutional tort claims should include the acceptance of respondeat superior liability.[242] The unavailability of a respondeat superior or vicarious liability theory to establish government liability has always been closely linked to sovereign immunity and has had the same effect of making it exceedingly difficult to secure government liability.[243] The incorporation of a ban on respondeat superior liability would thus defeat the purpose of eliminating sovereign immunity. For the same reason that sovereign immunity is rejected, the theory of respondeat superior liability should be available to individuals bringing civil rights tort claims against the government just as it is available to litigants in other tort contexts.

2. The Elimination of Qualified Immunity and Adoption of Joint Liability

The qualified immunity that protects government officials should also be eliminated. In some cases, victims of civil rights violations might still wish to bring suit against individual officials even after the elimination of governmental sovereign immunity. An individual government official may have acted in a particularly egregious or personal manner such that the victim wishes to identify the specific official as the perpetrator of a rights violation.[244] As shown above, qualified immunity makes it unacceptably difficult to secure the liability of a government official even where constitutional rights are involved.

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[242] And the current rule that disallows local government liability on a respondeat superior theory should be eliminated.

[243] Schuck, supra note 49, at 29-39.

[244] See Bradley & Bell, supra note 179, at 10 (suggesting that an individual should be permitted to choose whether to sue the government or an individual official); Schuck, supra note 49, at 110 (suggesting that victims' desire for personalized retribution is a legitimate interest not fulfilled by governmental liability).

The United States should adopt rules ensuring that the government will respond financially, through the development of a joint liability rule, in all cases when damages are imposed against individual officials who violate civil rights while acting within the scope of their employment. In result, suits against individual officials might be more symbolic than real, since payment would come from the government. However, that symbolism might be important for victims of rights violations in some cases.

In this way, victims of rights violations will be guaranteed recovery of any compensation to which they are entitled in suits against government officials. The system will appropriately recognize that, regardless of the entity or individual sued, the ultimate obligation to guarantee compensation remains with the government as is required under international human rights law. By eliminating qualified immunity and providing for joint liability, the system will more fairly and consistently recognize the reality that the government should and usually does respond for suits against officials involving actions taken within the scope of government employment.[245]

At the same time, individual officers would be protected from financial ruin resulting from liability for their official conduct.[246] Any remaining concern about over-deterrence should thus be resolved. If the government itself must pay for human rights violations even where the suit is brought against an individual official, the risk largely disappears.[247] The risk of under-

[245] See Pillard, supra note 63, at 67.

[246] Under this joint liability scheme, the government might in some cases require the individual official to pay some or all of the damages awarded or might seek indemnification from the individual official for amounts paid by the government. Such instances would likely be rare. See Schuck, supra note 49, at 111 n.*; Cass, supra note 51, at 1184. They would, however, provide a limited and appropriate means for ensuring that government officials be held financially responsible where they have acted particularly egregiously while still ensuring compensation for the victim of their abuse.

[247] See Owen, 445 U.S. at 653 n.37 (noting that suit against the government seeking compensation out of government funds did not imply the same risk of a chilling effect on the exercise of government decision-making as suits against officials in their personal capacity); Chemerinsky, supra note 5, at 1219; Cass, supra note 51, at 1178-79,1187-88.

deterrence might still exist, but at least any harm caused by constitutional violations that were not prevented will not be borne by the victim but rather by the society as a whole.

C. The Effect of the Elimination of Sovereign Immunity

Eliminating sovereign immunity does not mean that every use of force by the police, every law enforcement entry into a private home or every arrest that fails to lead to conviction will result in government liability in the United States courts. Every such act does not violate the United States Constitution and therefore cannot result in liability even if sovereign immunity does not apply.

1. The Elimination of Sovereign Immunity does not Expand Substantive Constitutional Rights

As discussed above, United States constitutional law imposes substantive standards that must be met before a constitutional violation is found at all. Substantive civil rights law, as well as substantive human rights law, recognizes the special nature of government and the activities it pursues. The proposal for change set forth in this Section does not argue for any modification of these substantive constitutional standards and does not therefore expand constitutional rights or restrict government's range of action. Instead, it seeks to ensure that current constitutional law norms are respected and enforced and that compensation is available when they are not. The elimination of sovereign immunity would simply allow governmental actors to be sued for compensation when the substantive law requirements are met establishing that a civil rights/human rights violation has taken place. In those cases, victims must be permitted to seek compensation or the United States fails to provide adequate human rights protections.

2. Punitive Damages are not Required under International Human Rights Law

The elimination of sovereign immunity to ensure greater human rights protection does not implicate any change in the rules on punitive damages applicable in the United States. International human rights law does not, as it has developed until now, require that punitive damages be awarded to victims of human rights violations.[248] Punitive damages are provided in addition to compensation for harm actually suffered, and international human rights law requires only that victims of violations be made whole for the damages they actually suffered. The ability of the United States system to provide human protections is therefore not undercut by continuing to preclude punitive damages in constitutional claims against governmental entities.[249] The very strict limitations on the availability of punitive damages in constitutional claims against individual officials may also be maintained.[250]

3. The Elimination of Sovereign Immunity Need Not Cause a Backlash against Rights

It is possible that the elimination of sovereign immunity might lead to a backlash of increased substantive protection for the government.[251] If sovereign immunity is not available to protect governmental actors from suit, the courts and/or Congress might restrict substantive rights so as to make claims for compensation less likely to succeed on the merits. To some degree, the United States may properly modify the contours of the rights it protects. There is a limit, however.[252] The United States cannot deprive constitutional rights of real meaning as a way of ensuring that victims will be unable to sue to obtain redress for governmental abuse even

[248] See Shelton, supra note 124, at 286 (noting that both the European and the Inter-American Court of Human Rights have thus far refused to award punitive damages).
[249] City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981)
[250] To obtain punitive damages against an official, a victim of a civil rights violation must show that the defendant not only engaged in intentional conduct but that he did so either with the intent to violate federal rights or with a reckless disregard for whether his conduct would violate such rights. See Avery et al., supra note 92, at 624.
[251] See Jeffries, supra note 100, at 90, 99-100 (arguing that the existence of sovereign immunity allows the law to evolve to include greater protections).
[252] See Eur. Ct. H.R., Z v. United Kingdom, supra notes 167-72 and accompanying text.

without sovereign immunity barriers. If the United States significantly diluted its rights protections, it would not be appropriate to operate from the premise that the substantive protections in domestic law closely match the protections provided for under international human rights law. The theoretical availability of suit against the government for damages would no longer make the United States civil rights system an effective human rights system if substantive human rights protections no longer existed in United States constitutional law. The United States can and should resist any temptation to dilute its substantive rights protections.

CONCLUSION

The United States must begin to accept that its domestic legal system is not perfect. While the United States fairly boasts that the United States Constitution enshrines most important human rights, the legal system does not provide adequate protections to ensure that those rights are respected and that their violation results in redress. International human rights law and comparative law provide an important perspective on the steps that the United States can and must take to provide for more effective human rights protection in this country. One step of vital and urgent importance is the elimination of all sovereign immunity doctrines from the United States legal system. More generally, the problems with sovereign immunity laid out in this Article demonstrate the fallacy of United States insistence that "everything is fine, thank you," in the United States. In general the United States should stop burrowing further into a hole of defensiveness about the brilliance of its rights protections. Instead, the United States should increase its receptiveness to the improvements that could be made by through active involvement in the international human rights community and the acceptance of additional human rights commitments. The United States will be better, not worse, for the change.