RUNNING IN PLACE: THE PARADOX OF EXPANDING RIGHTS AND RESTRICTED REMEDIES†

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In the spring 2004 David C. Baum Memorial Lecture, David Rudovsky argued that although constitutional and statutory rights have generally been expanding since the historic Brown v. Board of Education*, federal remedies have not kept pace. Contrary to views expressed by Chief Justice John Marshall, there now exists a paradox of legal rights without remedy. Although major remedial decisions of the Warren Court, such as* Mapp v. Ohio *and* Monroe v. Pape*, have not been expressly overruled, the Supreme Court has in later decisions significantly limited their impact. The Court has increasingly turned to prospective rulings, but while these provide some guidelines to future actors, they deprive the harmed individual recompense for the violations of her rights. Extensions of the doctrine of qualified immunity and the Eleventh Amendment's sovereign immunity, as well as congressional legislation limiting litigation by prisoners and access to habeas corpus, have created a system where only egregious violations of rights may be subject to remedial judicial action.*

I. INTRODUCTION

The fiftieth anniversary of *Brown v. Board of Education*,[1] which marked the start of the modern civil rights era, provides an appropriate historical point to evaluate the current status of civil rights law and remedies. In this period, the combination of social and advocacy movements (led by the Black Civil Rights Movement), the development of constitutional doctrine by the Supreme Court, and the congressional en-

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1. 347 U.S. 483 (1954).

actment of civil rights laws broadly expanded rights and liberties.[2] The judicial and legislative developments have touched virtually all groups in our society and have impacted a broad range of political and social issues. Racial and ethnic minorities, women, the disabled, juveniles, the elderly, gays and lesbians, prisoners, and the criminally accused have experienced significant changes in their legal status. In addition, the content of basic constitutional guarantees—equal protection, due process of law, religious and speech freedoms, privacy and autonomy—has been profoundly redefined by court decisions and legislative action.[3]

Each area of change has generated widespread scholarly and public debate and commentary on the scope and limitations of the substantive rights at stake. Quite obviously, the degree to which civil rights and civil liberties are established as a matter of constitutional law is largely a function of this substantive constitutional adjudicative process.[4] Supreme Court decisions that define the scope of rights are the necessary starting point for assessing the overall status of rights and liberties,[5] but as we know from history and experience, rights may exist on paper as a matter of court decision or legislation, but their viability, indeed their very essence, depends in large part on the effectiveness of remedial and enforcement measures.

In this article, I will address the other side of the constitutional rights coin—the remedial framework for vindicating and enforcing civil rights. Over the past three decades, the Supreme Court (and in recent years, the Congress) has restricted civil rights remedies through a series of complex and controversial measures, including expanded immunities from suit, narrower standards for standing and for private enforcement of civil rights legislation, exceptions to the exclusionary rule, limitations on remedies in criminal cases and federal habeas corpus, and direct federal court door-closing legislation. As a result, the normal remedies for constitutional and statutory violations—compensation, equitable relief, and criminal procedural sanctions—are denied in many cases. More dis-

2. *See* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63 (1988); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002).

3. *See generally* THEODORE EISENBERG, CIVIL RIGHTS LEGISLATION: CASES AND MATERIALS (5th ed. 2004); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (1988).

4. Civil rights and civil liberties are normally viewed as common and mutually enforcing concepts. For a discussion of the sometimes antagonistic relationship of rights and liberties, see Richard Delgado, *About Your Masthead: A Preliminary Inquiry into the Compatibility of Civil Rights and Civil Liberties*, 39 HARV. C.R.-C.L. L. REV. 1, 5–15 (2004).

5. In the past 25 years, state constitutional law has played an increasingly significant role in the overall structure of rights and liberties. *See, e.g.*, JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW (1995); THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES (Gormley et al. eds., 2004); ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS 179–87 (3d ed. 1999); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548–52 (1986). In many respects, however, the extension of state constitutional rights has been limited by the same forces I discuss with respect to federally protected rights.

turbing, by excusing "reasonable" constitutional violations and remedying only the most egregious official misconduct, the Court has in effect ruled that officials who violate constitutional rights may do so in some instances without fear of sanctions. Officials may well conform their conduct to the sub-constitutional norms for remedies as opposed to substantive constitutional principles and thereby erode both the structure of rights and governmental accountability.

II. THE RELATIONSHIP OF RIGHTS TO REMEDIES

The integral relationship of rights to remedies was recognized early in our constitutional history when Chief Justice John Marshall asserted in *Marbury v. Madison*:[6]

> The very essence of civil liberty certainly consists of the right of every individual to claim protection of the laws, wherever he receives an injury, one of the first duties of government is to afford that protection. . . .
>
> [I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded . . . . [E]very right, when withheld, must have a remedy, and every injury its proper redress.
>
> The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[7]

In a more modern exposition, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court held that there is an implied constitutional cause of action for damages for a fourth amendment violation against federal officials, since "where legal rights have been invaded . . . federal courts may use any available remedy to make good the wrong done."[8]

Even if we allow for some poetic (or judicial) license, and recognize that a "right-remedy gap" may be inevitable,[9] the John Marshall commandment provides a useful standard against which to gauge the nation's

6. 5 U.S. 137 (1803).

7. *Id.* at 163; *see also* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897) (stating that "legal duty" is a function of remedy). State Constitutions of the original thirteen states recognized the right to a remedy. *See* John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1902–14 (1983).

8. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971) (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)); *see also Bivens*, 403 U.S. at 410 (Harlan, J., concurring) ("For people in Bivens' shoes, it is damages or nothing.").

9. John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 113 (1999) ("To say that there are gaps between right and remedy is really only to acknowledge that the law of remedies, as a body of doctrine not generalizable across all enforcement mechanisms, exists.") [hereinafter Jeffries, *The Right-Remedy Gap*]; *see also* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 587 (1983) (calling law of remedies a "jurisprudence of deficiency, of what is lost between declaring a right and implementing a remedy").

commitment to the protection of rights and liberties.[10] Redress for constitutionally based deprivations is of substantial importance if we expect that government will act within the bounds of the Constitution. Whether the concepts of rights and remedies are properly analyzed as separate legal concepts or are more properly understood as being "inextricably intertwined" and part of a "symbiotic relationship,"[11] a debate that has divided constitutional scholars along theoretical lines, the discourse helps to illuminate the critical significance of the remedial framework. Professor Levinson has characterized the opposing theories as "rights essentialism" and "remedial equilibration."[12] Rights essentialism, a theory he associates with the views of Professors Sager, Dworkin, and Fiss,[13] assumes a process of constitutional adjudication that begins with judicial identification of a pure constitutional value, without regard to remedies or enforcement. This "pure value" is then subject to limitations by a remedial apparatus that translates the right into a weaker operational rule when applied to the facts of the real world.[14] Under this view, rights and remedies are separate concepts and are largely "incommensurable entities."[15]

10. For further commentary on the relationship of rights to remedies, see generally RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS (1983) [hereinafter SCHUCK, SUING GOVERNMENT]; Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733 (1991); Owen M. Fiss, Foreword, *The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Gewirtz, *supra* note 9; John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47 (1998) [hereinafter Jeffries, *Eleventh Amendment*]; Jeffries, *The Right-Remedy Gap*, *supra* note 9; Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1 (2002); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 (2003); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247 (1988); Henry P. Monaghan, *Foreword*, *Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004); Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

11. Levinson, *supra* note 10, at 858, 914; Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d 941, 943 (2d Cir. 1930) (Hand, J.) ("[A] right without any remedy is a meaningless scholasticism . . . ."); *see* Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1293 (2000) ("Substantive rights . . . are worth no more than the procedural mechanisms available for their realization and protection."); Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 TEX. L. REV. 1401, 1413 (1983) (expressing doubt that "the central problems for constitutional law . . . are issues of the definition of rights rather than the creation of a machinery of jurisdiction and remedies that can transform rights proclaimed on paper into practical protections").

12. Levinson, *supra* note 10, at 858. Several scholars have approached the issue of rights and remedies from a wider institutional framework and have emphasized the need for building coalitions and institutions to make civil rights remedies more effective. *See, e.g.*, James Liebman & Brandon Garrett, *Experimentalist Equal Protection*, 104 COLUM. L. REV. 837 (2004).

13. *Id.* at 861–72.

14. *Id.* at 858.

15. *Id.* at 914.

By contrast, the theory of "remedial equilibration" views rights and remedies as "inextricably intertwined."[16] "Rights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence."[17] For Levinson, the notion of a "pure right" is a fiction,[18] as remedies ultimately control the value of any constitutional right.[19] Under this view, when the Court articulates the scope of a constitutional right, it does so against the backdrop of the remedial field, and the constitutional definition is directly affected by the range of possible remedies.[20]

This debate—and the perceived dichotomy—is useful in focusing on the processes that the Court has employed in defining rights, but neither polar view successfully captures the universe of rights-remedies relationships. For example, certain remedial limitations operate independent of the substantive rights. Thus, Eleventh Amendment and absolute prosecutorial and judicial immunity do not redefine or abrogate the right asserted; rather, they operate to immunize from damage claims the unconstitutional or otherwise unlawful conduct of specific classes of officials.[21] It may well be that these immunities were recognized by the Supreme Court to limit the reach of certain substantive rights, but in operation they function in an independent manner.

Other remedial doctrines, such as the defense of qualified immunity, which precludes damages relief against governmental officers who violate rights that were not "clearly established" at the time,[22] can operate both separately and apart from the constitutional right involved and as "rights defining" doctrine. The Supreme Court has imposed a formal

16. *Id.* at 858.

17. *Id.*

18. *Id.* at 924.

19. *Id.* at 914.

20. The debate over the relationship of rights and remedies in the fields of constitutional law and civil rights reflects a similar dialogue regarding the role and scope of remedies in private law. There, too, the question of how a legal right should be protected and remedied has divided the commentators. Scholars and the courts have recognized the availability of property rules (requiring consent of owner before transfer of entitlements is allowed) and liability rules (that would compensate in damages for entitlements taken). *See generally* Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1 (2002); Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case for Mass Detentions*, 56 STAN. L. REV. 755 (2004). Under the prevailing property and liability rules, injunctive relief would be the presumptive remedy for violations or threatened violations of rights, while damages would be a default remedy when restoration of the entitlement is not feasible. As I discuss below, this paradigm does not fit well in the civil rights field where much of what is litigated presents issues of damages only. *See* Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 WM. & MARY BILL RTS. J. 427, 467 nn.105–07 (1997). And, as will be shown, the remedial framework in civil rights litigation not infrequently denies both forms of relief.

21. *See, e.g.*, Burns v. Reed, 500 U.S. 478, 486 (1991) (holding that prosecutors enjoyed absolute immunity from suit for constitutional violation committed in bringing charges and in pursuing a criminal case); Stump v. Sparkman, 435 U.S. 349, 356–57 (1978) (citing Bradley v. Fisher, 80 U.S. 335, 351 (1872), which required a "clear absence of all jurisdiction to permit suit against judge").

22. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

separation in rights and remedies by requiring a court first to determine if a constitutional violation has occurred and, if so, then to decide whether the right was clearly established.[23] However, this methodology does not fully uncouple right and remedy. As I will discuss, in protecting governmental defendants in cases in which they acted reasonably, albeit in violation of the Constitution, the doctrine carries with it a strong potential for the erosion of substantive rights by individual and institutional adoption of sub-constitutional standards.

Brown v. Board of Education provides a revealing case history of the complex interplay of constitutional doctrine and remedies. The decision in *Brown* was almost immediately transformed into a battle over remedies. The famous—or infamous—"with all deliberate speed" injunction by the Supreme Court,[24] was an enforcement compromise and, in the face of "massive resistance"[25] by the southern political and social systems, a decade passed before the Court finally ordered previously segregated school systems to eliminate "all vestiges of prior segregation."[26]

Desegregation efforts were successful for some period of time, but a combination of factors, including white flight from southern school districts and the de facto segregated status of northern school districts, forced the Court to reconsider both the substantive scope of its equal protection doctrine and the remedial powers of federal courts in enforcing the desegregation mandate. As the *Brown* era unfolded, the Court was faced with competing visions of equality: was the right to racial equality limited to the prohibition of de jure segregation or was it a right to an integrated education based on a broader claim of a right to be free from racial subordination?[27] Ultimately, the Court answered these questions by refusing to broaden the substantive scope of equal protection principles beyond a prohibition against de jure or intentional discrimination and by limiting the remedies available in federal courts. By very close margins, the Court ruled that de facto segregation could not be

23. *See* Groh v. Ramirez, 540 U.S. 551, 563–64 (2004) (holding that the facial invalidity of a warrant which failed to specify which items were to be seized precluded a claim of qualified immunity, even though a magistrate had issued the warrant); Hope v. Pelzer, 536 U.S. 730, 745–46 (2002) (ruling that the "obvious cruelty" of tying a prisoner to a hitching post for hours provided sufficient notice of the wrongfulness of the practice, precluding the claim that a lack of case law relating to similar fact patterns allowed a claim of qualified immunity).

24. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) [hereinafter *Brown II*].

25. Griffin v. County Sch. Bd., 377 U.S. 218, 221 (1964).

26. *Id.* at 234 ("The time for mere 'deliberate speed' has run out . . . ."); *see also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) ("The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."); Green v. County Sch. Bd., 391 U.S. 430, 437–38 (1968) (holding that *Brown II* "charged [schools] with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch").

27. *See* CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* (2004); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470 (2004); Kathleen Sullivan, *What Happened to* Brown*?*, N.Y. REV. BOOKS, Sept. 23, 2004 at 47.

remedied,[28] that interdistrict transfers of students were not permissible absent a showing of past discriminatory practices,[29] that there was no duty for a state to provide a funding system that would ensure equality in funding of local education,[30] and that lower courts could not continue to enforce desegregation programs that were not believed to be narrowly tailored to meet the original segregation patterns.[31] It is difficult to separate the substantive and remedial threads of these decisions, but the end result is an equal protection doctrine that prohibits only de jure or intentional segregation.[32]

The centrality of the remedial issues was apparent in the Court's first opinions regarding the government's war on terrorism.[33] Not surprisingly, much of the Court's discussion of these significant constitutional challenges was centered on threshold remedial and jurisdictional issues of access to the courts, separation of powers, and judicial authority in times of war.[34] The Court refused to close the courthouse doors to persons held as unlawful combatants and, as a result, the substantive content of the due process rights will be developed in light of the general principles regarding the right to a "meaningful opportunity" to contest the grounds for detention that were articulated by the Court.[35] Thus, the issue of terrorism and civil liberties, like many others, will find its resolution at the intersection of substantive constitutional rights, access to the courts, and remedies.

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28. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 120–22 (1995).

29. Milliken v. Bradley, 418 U.S. 717, 746 (1974) (holding that *Brown* stood only for the right of a child to attend a desegregated school within that school district); *id.* at 806–07 (Marshall, J. dissenting, joined by Douglas, Brennan, & White JJ.) ("The nature of a violation determines the scope of the remedy simply because the function of any remedy is to cure the violation to which it is addressed . . . . [A] remedy which effectively cures the violation is what is required. No more is necessary, but we can tolerate no less." (citations omitted)).

30. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973) (holding that, in terms of funding, the Equal Protection Clause does not require "absolute equality").

31. *See, e.g.*, *Jenkins*, 515 U.S. at 137. For discussions of the Court's role, see ERWIN CHEMERINSKY, THE SEGREGATION AND RESEGREGATION OF AMERICAN PUBLIC EDUCATION: THE COURTS' ROLE, CIVIL RIGHTS LITIGATION AND ATTORNEYS FEES HANDBOOK (2003); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); Michael J. Klarman, Brown*, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 75–85 (1994).

32. Indeed, the decision in *Rodriguez*, finding no equal protection violation in unequal funding of local school districts, while framed in substantive equal protection jurisprudence, has been viewed as an example of an "under-enforced" constitutional doctrine, heavily influenced by matters of federalism, judicial competence, and separation of powers. Sager, *supra* note 10.

33. Rasul v. Bush, 124 S. Ct. 2686, 2698–99 (2004) (holding that United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad and held at Guantanamo Bay); Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2650 (2004) (holding that American citizen held as unlawful combatant has a due process right to challenge the factual basis for his detention); Rumsfeld v. Padilla, 124 S. Ct. 2711, 2721–22 (2004) (holding that habeas challenge must be made in state of actual detention).

34. *See Rasul*, 124 S. Ct. at 2698–99; *Padilla*, 124 S. Ct. at 2721–22.

35. *See Hamdi*, 124 S. Ct. at 2649 (holding that Due Process requires that citizen held as an enemy combatant have a meaningful opportunity to contest grounds for detention); *Rasul*, 124 S. Ct. at 2698–99 (holding that courts have jurisdiction to hear habeas challenges by enemy combatants at Guantanamo Bay).

III. LIMITATIONS ON RIGHTS BY REMEDIAL RESTRICTIONS

The growth of constitutional and statutory civil rights in the modern civil rights era (1954–2004) has been an ebb and flow process. While expansion of rights characterizes this half-century,[36] the trend has been qualified by Court decisions limiting new doctrine.[37] However, a full substantive constitutional counter-revolution has not materialized, even in areas in which the current Court would be unlikely to recognize the rights established by earlier decisions. Thus, cases like *Miranda v. Arizona* and *Mapp v. Ohio* have been doctrinally redefined, and limited in application, but have not been expressly overruled.[38] In certain areas, for example with respect to First Amendment speech and associational rights, the Court, reflecting a broad ideological consensus on free speech issues, has regularly broadened these rights.[39] At the same time, the gap

36. *See generally* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988).

37. In the Fourth Amendment area, the Court has limited the scope of individual privacy recognized in *Katz v. United States*, 389 U.S. 347, 350–51 (1967). *See, e.g.*, California v. Greenwood, 486 U.S. 35, 41–43 (1988) (ruling that citizens have no expectation of privacy in trash left for public collection); Oliver v. United States, 466 U.S. 170, 179 (1984) (deciding that no expectation of privacy pertained to privately held land, posted with no trespassing signs); Smith v. Maryland, 442 U.S. 735, 745–46 (1979) (holding that no privacy pertains to phone numbers dialed on home phone); United States v. White, 401 U.S. 745, 752 (1971) (no privacy in government recorded conversations with friend, turned informant).

Similarly, the Court has limited the Fifth Amendment rights in the *Miranda* context. *See* Yarborough v. Alvarado, 124 S. Ct. 2140, 2152 (2004) (holding that a state court need not consider a defendant's age and inexperience in determining whether the defendant was "in custody" for *Miranda* purposes); Chavez v. Martinez, 538 U.S. 760, 769–70 (2003) (stating that coercive interrogation after defendant was shot by police, which did not lead to prosecution, did not violate self-incrimination clause); Illinois v. Perkins, 496 U.S. 292, 300 (1990) (holding that undercover jailhouse interrogation did not require *Miranda* warnings, as the defendant was not in "custody" for *Miranda* purposes); Colorado v. Connelly, 479 U.S. 157 (1986) (ruling that no violation of self-incrimination clause occurred where mentally ill defendant rendered confession, because no police coercion occurred); New York v. Quarles, 467 U.S. 649, 655–56 (1984) (holding that statements adduced in the interest of public safety were still admissible at trial, even where defendant had not been given *Miranda* warnings).

The Court has imposed similar limitations on the right to counsel. *See* Texas v. Cobb, 532 U.S. 162, 171–72 (2001) (stating that the Sixth Amendment right to counsel is charge-specific, and that a confession obtained in violation of right to counsel on one charge can be used to prove another crime which the defendant has not been charged with at the time of interrogation); McNeil v. Wisconsin, 501 U.S. 171, 180–81 (1991) (holding asserting that right to counsel under the Sixth Amendment does not necessarily assert right to counsel under the Fifth Amendment); United States v. Ash, 413 U.S. 300, 321 (1973) (holding that no right to counsel attached to the showing of a photo array to a witness for identification purposes); Kirby v. Illinois, 406 U.S. 682, 690 (1972) (stating that preindictment identification did not invoke Sixth Amendment protections) .

38. *See supra* note 37; *see also* United States v. Leon, 468 U.S. 897, 913 (1984) (establishing the good faith exception to exclusionary rule for search warrants); United States v. Calandra, 414 U.S. 338, 354 (1974) (holding that the exclusionary rule is not applicable to grand jury proceedings).

39. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 347–48 (2003) (cross burning); Reno v. ACLU, 521 U.S. 844, 885 (1997) (internet pornography); Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 559–61 (1995) (gays in St. Patrick's Day parade); R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992) (hate speech); Texas v. Johnson, 491 U.S. 397, 399 (1989) (flag burning); Larry D. Kramer, Foreword, *We the Court*, 115 HARV. L. REV. 4, 130–33 (2001).

between rights and remedies has grown more pronounced, a process described as one of "remedial abridgment."[40]

The current constitutional remedial framework has its genesis in a pair of cases decided by the Supreme Court in 1961, *Mapp v. Ohio*[41] and *Monroe v. Pape*.[42] *Mapp* extended the exclusionary rule for Fourth Amendment violations previously imposed in federal prosecutions to all state prosecutions. The remedy was viewed as "part and parcel"[43] of the Fourth Amendment and as necessary to protect privacy interests, deter misconduct, and preserve judicial integrity.[44] The Court would soon develop similar remedial mechanisms for the enforcement of other constitutional rights of suspects and criminal defendants.[45]

Monroe v. Pape resurrected § 1983,[46] the post–Civil War federal civil rights act, the statute that would quickly become the fulcrum of constitutional tort litigation. It is difficult to overstate the significance of this case. Without statutory authorization, constitutional damage claims against state and local officials would be problematic, and a restrictive interpretation of § 1983 would place substantial barriers to constitutional litigation. In *Monroe*, the police officer defendants argued that the "under color of state law" provision of § 1983 limited liability to cases in which positive state law authorized acts that violated the Constitution.[47] Under this view, officers who acted in an unconstitutional manner, and in violation of state law, would not be liable under § 1983. The Court re-

40. Karlan, *supra* note 10, at 185. The Supreme Court has imposed heightened culpability standards to limit the scope of constitutional protections in both its substantive and remedial jurisprudence. On the substantive side of the ledger, these take the form of mental state elements for constitutional torts. Thus, the finding of a constitutional violation frequently requires a particular mental state of the defendant government official. *See* County of Sacramento v. Lewis, 523 U.S. 833, 855 (1998) (requiring for substantive due process claims a showing of conduct that is so deliberately indifferent as to "shock the conscience," such that a high speed chase claim can only succeed if the officer intended harm to result); Farmer v. Brennan, 511 U.S. 825, 834 (1994) (requiring proof of deliberate indifference of prison officials to state a due process claim for failure to protect from injury or assault); Hudson v. McMillian, 503 U.S. 1, 9 (1992) (requiring showing of malicious or sadistic use of force in Eighth Amendment claims by prisoners for excessive force); Daniels v. Williams, 474 U.S. 327, 332–33 (1986) (holding that negligence is insufficient to state a due process constitutional violation); Washington v. Davis, 426 U.S. 229, 239–40 (1976) (holding that race discrimination claims under Equal Protection Clause must be based on showing of intentional discrimination). On the remedial side, the culpability standards are incorporated in immunity and governmental liability doctrine. *See infra* Part IV.A.1., IV.A.4.

41. 367 U.S. 643 (1961).

42. 365 U.S. 167 (1961).

43. *Mapp*, 367 U.S. at 651.

44. *Id.* at 660 ("[T]he right to privacy . . . is . . . constitutional in origin . . . [and] is enforceable in the same manner . . . as other basic rights secured by the Due Process Clause . . . .").

45. *See, e.g.*, United States v. Wade, 388 U.S. 218, 236–38 (1967); Miranda v. Arizona, 384 U.S. 436, 467–73 (1966); Brady v. Maryland, 373 U.S. 83 (1963).

46. 42 U.S.C. § 1983 (2000) provides:

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

47. *Monroe*, 365 U.S. at 172.

jected this interpretation and found an independent basis for remedies for acts, authorized or not by state law, that were violative of the Constitution or federal law.[48]

To get a sense of the different world that existed at the time *Mapp* and *Monroe* were decided, consider the following:

- There were few of the landmark decisions establishing the constitutional rights that we today take for granted. Decisions that would protect the rights of dissidents,[49] extend guarantees of counsel and fairness to criminal suspects,[50] broaden religious freedoms,[51] and protect racial minorities,[52] women,[53] gays and lesbians,[54] the disabled,[55] and the elderly[56] from discrimination were still to be handed down.
- While the Supreme Court had recognized a constitutionally based equitable cause of action against state officials (*Ex parte Young*[57]) there was no damages remedy for many constitutional violations.
- The civil rights acts that would protect voting,[58] employment,[59] and other social rights[60] were yet to be enacted by Congress.
- There were few advocacy or litigation-oriented organizations that promoted civil liberties or litigated these issues in the courts; moreover, pre–*Gideon v. Wainwright*, defender offices and civil legal services were almost nonexistent.[61]
- There was virtually no civil rights litigation. In 1961, a grand total of 150 nonprisoner civil rights suits were filed for the entire nation.[62] By contrast, in 1998, 42,354 of such suits were filed.[63]

48. *Id.* at 192.
49. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969).
50. *See, e.g.*, Gideon v. Washington, 372 U.S. 335 (1963).
51. *See, e.g.*, Engle v. Vitale, 370 U.S. 421 (1962).
52. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79 (1986).
53. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973).
54. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003).
55. *See, e.g.*, PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001).
56. *See, e.g.*, Reeves v. Sanderson Plumbing Prods., 530 U.S. 133 (2000).
57. 209 U.S. 123, 168 (1908).
58. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 (2004).
59. Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e–e-17 (2004)).
60. *See, e.g.*, Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 83 (1968) (codified as amended at 42 U.S.C. § 3605 (2004)); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. § 12101 (2004)).
61. *See* ANTHONY LEWIS, GIDEON'S TRUMPET (1964); Stephen B. Bright, Gideon*'s Reality: After Four Decades, Where Are We?*, CRIM. JUST., Summer 2003, at 5.
62. *See* Louise Weinberg, *The* Monroe *Mystery Solved: Beyond the "Unhappy History" Theory of Civil Rights Litigation*, 1991 BYU L. REV. 737, 738 n.9.
63. EISENBERG, *supra* note 3, at 170.

From a civil rights standpoint, the landscape was quite barren, but the seeds of change in the *Mapp* and *Monroe* decisions would soon take root.[64] Over the next two decades, the Court made available the remedies under § 1983 against state actors to federal agents by recognizing an implied constitutional cause of action,[65] interpreting the standing doctrine to provide broad access to federal courts to those injured by an unconstitutional law or practice,[66] authorizing broad forms of equitable relief[67] and class actions[68] and permitting civil rights organizations to seek out clients and to promote litigation.[69]

Immunity defenses were not as expansive as they are today.[70] Governmental entities became subject to liability under certain circumstances under the Federal Tort Claims Act,[71] the doctrine of municipal liability,[72] and under certain federal civil rights statutes. The Court also made clear that § 1983 had broad compensatory and deterrent purposes.[73]

Congress extended rights and remedies to large classes of persons with claims of discrimination based on race, sex, age, alienage and dis-

64. The pre-*Mapp*/*Monroe* remedial jurisprudence was not entirely lacking in enforcement provisions. Federal courts had exercised general federal jurisdictional powers to enforce rights under the doctrine from *Ex parte Young*, 209 U.S. 123 (1908), permitting injunctive suits against state officials notwithstanding the Eleventh Amendment, and state courts were required to provide some relief on certain constitutional claims. *See* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77 (1997). However, prior to the modern era, these cases involved primarily tax and property claims, and prior to *Brown v. Board of Education*, there were only isolated cases protecting liberty interests in the context of affirmative civil litigation. First Amendment jurisprudence was developed in large part in criminal proceedings. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); Yates v. United States, 354 U.S. 298 (1957); Herndon v. Lowry, 301 U.S. 242 (1937).

65. *See, e.g.*, Carlson v. Green, 446 U.S. 14, 18–19 (1980); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

66. Sierra Club v. Morton, 405 U.S. 727, 737–38 (1972); Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 156–57 (1970); Flast v. Cohen, 392 U.S. 83, 105–06 (1968).

67. *See* Gerstein v. Pugh, 420 U.S. 103, 108 n.9 (1975); Allee v. Medrano, 416 U.S. 802, 821 (1974); Frank Askin, *Two Visions of Justice: Federal Courts at a Crossroads*, 11 ST. JOHN'S J. LEGAL COMMENT. 63 (1995). At the same time, the Court restricted access to federal courts under the abstention doctrine. *See, e.g.*, Trainor v. Hernandez, 431 U.S. 434, 447–48 (1977); Younger v. Harris, 401 U.S. 37, 43–44 (1971).

68. County of Riverside v. McLaughlin, 500 U.S. 44, 58–59 (1991); Franks v. Bowman Transp. Co., 424 U.S. 747, 779–80 (1976); Sosna v. Iowa, 419 U.S. 393, 410 (1975); LaDuke v. Nelson, 762 F.2d 1318, 1326 (9th Cir. 1985).

69. *In re* Primus, 436 U.S. 412, 431–32 (1978); Bhd. of R.R. Trainmen v. Virginia, 377 U.S. 1, 8 (1964); NAACP v. Button, 371 U.S. 415, 444–45 (1963).

70. *See, e.g.*, Carlson v. Green, 446 U.S. 14, 20–23 (1980) (extending *Bivens* to Eighth Amendment claims, notwithstanding right to recovery under Federal Tort Claims Act); Wood v. Strickland, 420 U.S. 308, 318 (1975) (holding that an officer is entitled to qualified immunity where she acts in good faith and where the law is not clearly established); Pierson v. Ray, 386 U.S. 547, 555, 557 (1967) (requiring officer to show good faith and probable cause for qualified immunity).

71. 28 U.S.C. §§ 2671–2680 (2000). Under § 2680(h), the United States is liable for the intentional torts of assault, false imprisonment, false arrest and malicious prosecution committed by federal law enforcement officials.

72. *See* City of Canton v. Harris, 489 U.S. 378, 382–83 (1989); Owen v. City of Independence, 445 U.S. 622, 657 (1980); Monell v. Dep't of Social Servs., 436 U.S. 658, 700–01 (1978).

73. *Owen*, 445 U.S. at 650–52 (1980).

abilities.[74] Early decisions provided individuals with implied causes of action to sue to enforce these acts and related administrative regulations.[75]

There were important developments as well on the issue of access to the courts. The Civil Rights Attorney's Fees Awards Act of 1976[76] provided indispensable support for civil rights litigation and, with the expansion of legal services, defender, public interest and advocacy organizations, individuals had far broader access to the courts. Moreover, as defender and legal services lawyers migrated to the private sector, some brought with them the tools and motivation to litigate civil rights cases. Government agencies could also seek to protect rights by enforcement actions, internal disciplinary proceedings and, in serious cases, by prosecution of offending officials under criminal civil rights statutes.[77] In too many instances, however, these measures were more theoretical than real.

The Court also expanded appellate and habeas corpus rights of defendants to provide multilayered review and relief from unconstitutional convictions and illegal enforcement practices,[78] and adopted remedies for violations of a variety of constitutional rights in the criminal prosecution context.[79]

These developments led to a significant surge in civil rights litigation.[80] However, as the numbers of cases and expertise of lawyers increased, the Court (and later, Congress) reacted by limiting access to the courts and abridging remedies in a number of critical areas. Civil rights litigation appeared to be robust, but beneath the surface a strong crosscurrent of retrenchment was developing. Today, in many cases there is

74. *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2000) (age discrimination); Voting Rights Act of 1965, 42 U.S.C. § 1973 (2000); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000) (employment discrimination); Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601–3631 (2000) (housing discrimination); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000) (discrimination against people with disabilities).

75. Cannon v. Univ. of Chicago, 441 U.S. 667, 709 (1979) (inferring cause of action under Title IX); J.I. Case Co. v. Borak, 377 U.S. 426, 430–31 (1964) (inferring private cause of action under Securities Exchange Act of 1934).

76. 42 U.S.C. § 1988 (2000).

77. *See* 18 U.S.C. §§ 241–242 (2000).

78. Evitts v. Lucey, 469 U.S. 387, 399–400 (1985); Fay v. Noia, 372 U.S. 391, 440–41 (1963).

79. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 686 (1984) (ineffective assistance of counsel); Barker v. Wingo, 407 U.S. 514, 515 (1972) (speedy trial); Miranda v. Arizona, 384 U.S. 436 (1966) (right to counsel); Brady v. Maryland, 373 U.S. 83, 87–88 (1963) (prosecution's duty to disclose exculpatory evidence).

80. *See* EISENBERG, *supra* note 3, at 170 (comparing 287 civil rights suits filed in 1960 in federal district court with 42,354 nonprisoner civil rights suits in 1998). These numbers have provoked a debate as to whether there has been a "flood" of constitutional tort cases. *See, e.g.*, Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 2–3 (1985); Mark R. Brown, *The Failure of Fault Under § 1983: Municipal Liability for State Law Enforcement*, 84 CORNELL L. REV. 1503, 1519–20 (1999); Michael G. Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1493–97 (1989); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 642–45 (1987); Woolhandler, *supra* note 64, at 79–81.

either no available remedy or partial remedies that are so encumbered by procedural barriers as to amount to no actual remedy. Even more disquieting is the fact that in an increasing number of cases the availability of remedies is now tied to standards of proof that are extra-constitutional in nature. *Monroe* rejected the argument that § 1983 requires a showing of intentional misconduct,[81] but immunity and municipal liability doctrines have been formulated to create a heightened mens rea for constitutional claims.[82] I discuss below the troubling ramifications of a system where remedies are dependent upon a showing of both a constitutional violation and an additional level of culpable conduct by the governmental actor or entity.[83]

IV. THE LIMITATIONS ON REMEDIES

The courts, legislators, and commentators are in substantial disagreement on the necessary elements of a fair and effective remedial scheme. In making judgments in this area, one must differentiate among different types of civil rights claims to understand the interplay of criminal and civil remedies and to focus on the interests affected by various remedial measures. The possibility of money damages and equitable remedies, individual and governmental liability, civil and criminal proceedings, individual and class actions, state and federal forums, and internal or administrative sanctions presents a complex matrix of remedial measures.

In my view, a fair remedial structure should provide (1) effective deterrence of governmental misconduct, (2) compensation to individuals for violations of their constitutional or statutory rights, and (3) enforcement mechanisms that ensure compliance with constitutional and statutory norms.[84] Of course, these broadly stated normative standards do not answer the difficult questions of how to select and choose among remedies, how best to structure a system that provides access to courts and counsel consistent with constitutional and prudential limitations on "cases and controversies," and how to protect against possible overdeter-

81. 365 U.S. 167, 187 (1961); *cf.* Daniels v. Williams, 474 U.S. 327, 335–36 (1986) (holding that merely negligent acts by prison officials do not implicate the Due Process Clause).

82. *See* Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 125–35 (1999); Susanah M. Mead, *42 U.S.C. § 1983 Municipal Liability: The* Monell *Sketch Becomes a Distorted Picture*, 65 N.C. L. REV. 517, 523–32 (1987).

83. *See infra* Part IV.

84. Adjudication of rights also serves expressive process interests. *Cf.* Fallon & Meltzer, *supra* note 10, at 1736:

> We argue that two principles, each capable of accommodating competing values in its own way, underlie the law of constitutional remedies. The first principle, which is strong but not always unyielding, calls for effective redress to individual victims of constitutional violations. The second, more absolute principle demands a general structure of constitutional remedies adequate to keep government within the bounds of law. Under these two principles, the Constitution typically allows the substitution of one remedy for another, and sometimes tolerates situations in which individual victims receive no effective redress.

rence or other negative effects on governmental functions.[85] However, if we start with the premise of "for every right a remedy," there should be a strong presumption in favor of historically recognized forms of remedies—damages, equitable relief, and governmental administrative enforcement of statutory rights.

The erosion of remedial measures over the past twenty-five years reflects hostility to substantive constitutional and statutory rights and creates very different worlds of rights in theory and in practice. By the steady adoption of remedial limitations, the Court and Congress have effected a significant cutback in civil rights at the operational level while avoiding the controversy that would be provoked by the direct abrogation of constitutional and statutory rights.

Not every remedy must be available in each case to achieve these goals, but the absence of *any* remedy for unconstitutional conduct in a significant numbers of cases will operate to deprive individuals of redress for injuries suffered, and, more significantly, will signal a tolerance of unconstitutional practices that will erode the structure of governmental accountability and respect for civil rights and civil liberties. Even more troublesome, if remedies are denied on the theory that officials who violate rights have acted reasonably, in some circumstances officials may conform their conduct to the sub-constitutional norms reflected in the reasonable, but illegal conduct that the courts have immunized.[86]

Commentators consistently promote a system of "substitutability" of remedies,[87] and the Court regularly invokes the alternative remedy rationale when it refuses requested remedial measures.[88] Over the years, however, as the full scope of remedial limitations has unfolded, the notion of alternatives or substitutes that can effectively serve the purpose of the principal remedy that has been foreclosed, has the appearance of a "shell game." Alternatives are promised, but they are often denied, unavailable in practice, or riddled with exceptions that seriously undermine

85. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366–67 (1953) (stating that Congress has the power to choose among a range of remedies); *see also* Amar, *supra* note 10, at 1491 n.262:

> Unlike other legal rights created and subject to qualification, modification, and limitation by government, constitutional rights derive from a higher source than government itself. Their very purpose is to keep government honest. Thus, absent a clear statement by the People in the Constitution itself, the document should not be read to create gaps between right and remedy manipulable by government.

86. *See infra* notes 148–50 and accompanying text.

87. *See, e.g.*, Fallon & Meltzer, *supra* note 10, at 1787; Jeffries, *Eleventh Amendment*, *supra* note 10, at 71–82.

88. *See, e.g.*, Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 306, 376 (2001) (Kennedy, J., concurring) (observing that states, even though not subject to a suit brought by an individual, may be subject to a suit brought by the federal government); Alden v. Maine, 527 U.S. 706, 755 (1999) (same); City of Los Angeles v. Lyons, 461 U.S. 95, 111–13 (1983) (denying injunctive relief, but asserting that plaintiff can sue for damages); Butz v. Economou, 438 U.S. 478, 512 (1978) ("[S]afeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct."); Imbler v. Pachtman, 424 U.S. 409, 428–29 (1976) (absolute prosecutorial immunity leaves open professional sanctions, criminal prosecution, and criminal procedural remedies).

their effectiveness. There are significant categories of deprivations that are fully insulated from judicial relief, and which create large holes in the protective constitutional fabric.

The Court is inclined to provide some form of relief for egregious and intentional violations of rights, but less serious violations are likely to be immunized, not subject to equitable remedies, or swept into the expanding universe of exceptions to criminal procedural remedies. Further, the Court seems content to restrain government in the future: denial of individual redress is frequently justified in civil and criminal cases on the assumption that a court's declaration of controlling constitutional principles in cases where no relief is provided will be a sufficient guidepost to future governmental actors. While this theory of "wealth transfer" to future generations works with respect to declarations of certain rights,[89] this process does not assure protection of all rights, even in the future.

A. Damages

Money damages for losses incurred by wrongful conduct is a well-established remedy. Violations of constitutional rights can result in significant losses and damages provide both compensation and a means of deterrence. Moreover, in most cases it will be, as it was in *Bivens*, "damages or nothing,"[90] since the wrongful conduct provides no predicate for equitable remedies, criminal sanctions, administrative enforcement measures, or criminal procedural remedies. In theory, *Monroe* and *Bivens* make monetary damages available for all constitutional violations (as well as many statutory infringements). In practice, however, the Court has constructed a set of remedial limitations grounded in an expansive view of immunities and a "rebalancing" of the constitutional calculus that impose high—and in many cases insurmountable—barriers to recovery.

1. Absolute Immunity from Suit for Judges and Prosecutors

Judicial immunity is very broad in scope, protecting a judge from suit for damages for judicial acts unless she acted with a complete lack of jurisdiction.[91] Prosecutorial immunity extends to all actions taken by a prosecutor within his prosecutorial discretion.[92] Accordingly, a broad

89. *See* Jeffries, *The Right-Remedy Gap*, *supra* note 9, at 107–10.

90. 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

91. Stump v. Sparkman, 435 U.S. 349, 355–57 (1978).

92. Buckley v. Fitzsimmons, 509 U.S. 259, 273–76 (1993); Imbler v. Pachtman, 424 U.S. 409, 428–31 (1976); *see* Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 668 (1972). This immunity is limited specifically to the prosecutorial actions taken in an advocate's capacity. *See* Kalina v. Fletcher, 522 U.S. 118, 125–27 (1997) (reiterating that absolute immunity only attaches to advocacy, not to investigation or administration); Genzler v. Longanbach, 384 F.3d 1092, 1104–05 (9th Cir. 2004) (denying summary judgment on absolute immunity grounds be-

spectrum of unconstitutional conduct by judges and prosecutors, which can have severe consequences for persons charged with a crime, is immune from damages lawsuits, and is rarely subject to equitable relief, administrative sanctions, or criminal prosecution.

The justifications for absolute immunity are premised on the role of judges and prosecutors in the criminal process. These include the fear of groundless and potentially harassing suits by criminal defendants, the availability of other remedies, including reversal of convictions tainted by misconduct, and the concern that officials' exposure to damages would make it less likely that a court would find a constitutional violation.[93] With respect to prosecutorial immunity, the Court has stated:

> This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242, the criminal analog of § 1983. The prosecutor would fare no better for his willful acts. Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.[94]

Justice White would have rejected absolute immunity for failure to disclose exculpatory evidence.[95] He believed that immunity would "discourage precisely the disclosure of evidence sought to be encouraged by the rule granting prosecutors immunity from defamation suits."[96] Experience over the past thirty years has validated these concerns. Repeated instances of serious prosecutorial misconduct demonstrate that the "alternative remedies" have not been effective, and there has been little in the way of professional or other sanctions.[97] For obvious reasons,

cause manufacture and suppression of evidence took place so early in the process that it was investigation rather than advocacy).

93. *Imbler*, 424 U.S. at 426–29.

94. *Id.* at 429 (citations and footnotes omitted).

95. *See id.* at 438.

96. *Id.* at 443.

97. An Innocence Project study found that in exonerations involving prosecutorial misconduct, thirty-seven percent of the cases concerned suppression of exculpatory evidence. *See* Innocence Project, Police Misconduct, *available at* http://www.innocenceproject.org/causes/policemisconduct.php; *see also* Andrea Elliott & Benjamin Weiser, *When Prosecutors Err, Others Pay the Price*, N. Y. TIMES, Mar. 21, 2004, at 125. Recent studies involving DNA exoneration and systemic faults in the criminal justice system have reported numerous and serious cases of prosecutorial misconduct. *See, e.g.*, JIM DWYER ET AL., ACTUAL INNOCENCE 246 (2000); OFFICE OF THE GOVERNOR OF ILLINOIS, REPORT OF COMMISSION ON CAPITAL PUNISHMENT (2002), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/; Steve Weinberg, *Breaking the Rules* (June 26, 2003), *available at* http://www.publicintegrity.org/pm/default.aspx?sid=main (charges dismissed or convictions reversed in over 2,000 cases from 1970–2003 for prosecutorial misconduct).

criminal prosecutions of prosecutors are almost never undertaken.[98] Disciplinary sanctions are just as rarely imposed. As Professor Richard Rosen concluded in a study of this process:

> The results of this research demonstrate that despite the universal adoption by the states of Disciplinary Rules prohibiting prosecutorial suppression of exculpatory evidence and falsification of evidence, and despite numerous reported cases showing violations of these rules, disciplinary charges have been brought infrequently and meaningful sanctions rarely applied. The result is a disciplinary system that, on its face, appears to be a deterrent to prosecutorial misconduct, but which has had its salutary impact seriously weakened by a failure of enforcement.[99]

It is true that constitutional violations that prejudice a defendant's right to a fair trial are grounds for reversal of convictions. However, the combination of the prejudice element for many constitutional violations,[100] the expansive application of the harmless error doctrine,[101] and the limits on federal habeas relief[102] have insulated many convictions against reversal, even where prosecutors have committed intentional violations.[103]

98. *See* Kamin, *supra* note 10, at 81–82 n.291 (noting that only two prosecutors have been prosecuted for failing to disclose exculpatory evidence (both dismissed pretrial) and in entire 20th century only six prosecutors convicted for courtroom misconduct).

99. Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987). Similar findings are reported by BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT §§ 14-9 to 14-10, 14-12 to 14-20 (2d ed. 2004) (noting that contempt citations, frequently used against defense counsel, "[are] rarely used to punish prosecutors"; naming a prosecutor in appellate opinions reversing a conviction based on prosecutorial misconduct is the clear exception; and, sanctions by disciplinary committees are "infrequent." In *Miller v. Pate*, 386 U.S. 1 (1967), the Court reversed a conviction where the prosecutor had led a jury to believe that the defendant's clothing was smeared with blood, that he knew to be red paint, but the Illinois Bar Association grievance committee refused to recommend discipline. Alschuler, *Courtroom Misconduct*, *supra* note 92, at 671–72; *see also* Kamin, *supra* note 10, at 82 n.291 (citing Maurice Possley & Ken Armstrong, *Prosecution on Trial in DuPage*, CHI. TRIB., Jan. 12, 1999, at 1) (noting that of 381 cases in the previous thirty-six years in which a case was reversed because a prosecutor withheld or falsified evidence, only two had led to criminal prosecutions of the district attorneys and in both cases, the charges were dismissed prior to trial, and concluding that only six prosecutors had been convicted in the twentieth century for their courtroom misconduct). The Hyde Amendment, 18 U.S.C. § 3006A (2000), permits a court to order the government to pay a defendant's counsel fees for "vexatious, frivolous, or bad faith" prosecutions. *See, e.g.*, United States v. Aisenberg, 358 F.3d 1327, 1335 (11th Cir. 2004), *cert denied*, No. 04-2, 2004 U.S. LEXIS 6553 (Oct. 4, 2004).

100. *See infra* note 347 and accompanying text.

101. *See infra* notes 342–54 and accompanying text.

102. *See infra* notes 325–41 and accompanying text.

103. Criminal prosecutions of governmental officials are not a realistic alternative. *See* PAUL CHERIGNY, EDGE OF THE KNIFE, 101 (1995):

> Criminal prosecution is the most cumbersome tool for the accountability of officials. As an instrument for policy, it presents the difficulties with disciplinary proceedings writ large: the charges are made after the fact; it is a matter of hazard which cases can be proved and which cannot; and because the burden of proof is extremely high, the likelihood of success is small. Prosecutions are brought in the few cases where the evidence happens to be available, and the results thus create a patchy deterrent; they may have no effect on police policy at all if police executives do not agree with the decision to prosecute. Furthermore, the standards of the criminal law usually cannot delineate what is good police work that will minimize the unnecessary use of force—that must be shaped by police regulations, training, and practice.

Moreover, developments in constitutional litigation since *Imbler v. Pachtman*[104] provide adequate protections for prosecutors without the need for absolute immunity. First, as discussed below, the qualified immunity doctrine protects from liability any act that a reasonable officer could believe to be lawful. Under this doctrine, where the law or facts were not previously sufficiently developed to make clear to an official that her acts would be unlawful, there is immunity from damage claims.[105] Second, the Supreme Court has foreclosed most suits by criminal defendants alleging violations in their prosecutions unless they first are successful in obtaining a dismissal or acquittal on the criminal charges.[106]

In its early decisions on prosecutorial immunity, the Court assumed that alternative restraints on prosecutors would provide sufficient deterrence.[107] There is now good reason to believe that remedies other than reversal of convictions are illusory and that prosecutors are not subject to any meaningful external restraints on their vast discretionary powers.[108] Moreover, because more than ninety percent of all sentences spring from plea bargains at the federal level,[109] rather than trials, prosecutorial conduct is subject to little judicial oversight in the great majority of cases. Even if civil remedies or disciplinary proceedings were available, prosecutorial misconduct in the context of plea bargaining would be extremely difficult to prove due to lack of an official record. Moreover, the most common form of prosecutorial misconduct—failure to produce exculpatory evidence—is often an undocumented event.[110] Only if the evidence

104. 424 U.S. 409 (1976).

105. *See infra* note 111 and accompanying text.

106. Heck v. Humphrey, 512 U.S. 477, 486–87 (1994).

107. *Imbler*, 424 U.S. at 428–29 ("We emphasize that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs.").

108. As originally defined, the doctrine of absolute judicial immunity did not foreclose suits against judges for injunctive or declaratory relief. In such actions, an award of attorney's fees could be made against judicial defendants. Pulliam v. Allen, 466 U.S. 522, 543–44 (1984). However, 42 U.S.C. § 1983 and § 1988(b), now prohibit an award of injunctive relief "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity . . . unless a declaratory decree was violated or declaratory relief was unavailable" and preclude an award of attorney's fees for "any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity . . . unless such action was clearly in excess of such officer's jurisdiction."

109. *See, e.g.*, Ellen Yaroshefsky, *Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275 (2004).

110. Bennett Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 313 n.14 (Winter 2001) (listing sources showing the frequency of suppression of evidence by prosecutors and its role in wrongful convictions). According to the Innocence Project, suppression or destruction of evidence is the most common form of prosecutorial misconduct leading to wrongful convictions. *See* http://www.innocenceproject.org/causes/policemisconduct.php. Systemic review of all death penalty cases reversed upon appeal revealed that suppression of evidence by prosecutorial misconduct was the second most common cause of reversal, comprising 16–19% of all causes for reversal. *See* James S. Liebman & Jeffrey Fagan, *A Broken System: Error Rates in Capital Cases, 1973–1995*, at 5 (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman. A similar study revealed that out of 350 wrongful convictions for capital-grade crimes, 50 stemmed from prosecutorial misconduct, 35 of which included suppression of exculpatory evidence. Hugo Adam Bedeau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 173–79 tbl.6 (1987).

is discovered by other means can its suppression be challenged. The net effect of absolute immunity and lack of oversight is to create an environment of impunity.

2. Qualified Immunity

This defense has become a primary means of denying damages to individuals who have suffered a violation of their constitutional rights. Under a test that protects governmental officers if the law was not "clearly established" at the time of the violation, the court must determine whether in light of the facts of the case, the contours of the right were clearly enough established so that a reasonable officer would know that his conduct was violative of the Constitution.[111]

On one level, the doctrine is not controversial: where a wholly novel right is recognized or where doctrinal development was not foreseeable, it would be unfair to hold an individual officer liable in damages. Early immunity decisions made this point and provided protection in such situations.[112] But the Court has extended the doctrine to immunize conduct that violates plainly foreseeable decisions,[113] and has ruled that qualified immunity protects all but the "plainly incompetent" or those who intentionally violate rights.[114] And while the Court has modified its approach at times, holding that prior case law that gives "fair notice" of a right is sufficient to defeat qualified immunity,[115] the doctrine often denies damages for serious violations.[116]

Qualified immunity jurisprudence is highly result-oriented and prone to judicial manipulation. It is impossible to reconcile the hundreds of appellate opinions, and even within judicial circuits the results are often inconsistent.[117] Recent case law from the Fourth Circuit provides

111. Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982); Brown, *supra* note 80, at 1507.

112. Pierson v. Ray, 386 U.S 547, 555 (1967).

113. *See* Saucier v. Katz, 533 U.S. 194, 207–08 (2001); Anderson v. Creighton, 483 U.S. 635, 639 (1987).

114. Malley v. Briggs, 475 U.S. 335, 341 (1986). To the degree that qualified immunity limits liability to "intentional" deprivations, the doctrine provides an end-run around *Monroe v. Pape* which had held that § 1983 has no state of mind component. 365 U.S. 167, 187 (1961) ("We construed that word in its setting to mean the doing of an act with 'a specific intent to deprive a person of a federal right.' We do not think that gloss should be placed on [§ 1983] which we have here." (citation omitted)).

115. Hope v. Pelzer, 536 U.S. 730, 746 (2002).

116. *See* Mark R. Brown, *The Demise of Constitutional Prospectivity: New Life for Owen*, 79 IOWA L. REV. 273, 286 (1994); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 54–55 (1989). Some courts have found that qualified immunity protects even malicious or intentional misconduct. *See, e.g.*, Estate of Ford v. Ramirez-Palmer, 301 F.3d 1043, 1053 (9th Cir. 2002) (qualified immunity granted to prison officer whose malicious use of force violated Eighth Amendment's prohibition on cruel and unusual punishment).

117. The conflict in the lower courts is traceable in part to the differing standards articulated by the United States Supreme Court. In some cases, the Court has ruled that qualified immunity is almost the norm, stating that it is available to all but the "incompetent" officer and to those who intentionally violate rights. *Saucier*, 533 U.S. at 202; *Anderson*, 483 U.S. at 640; *Malley*, 475 U.S. at 341. In

some insight into the increasingly bizarre and irreconcilable results.[118] In *Robles v. Prince George's County*, police officers holding an arrestee wanted in another county, but not willing to wait for officers to pick him up, handcuffed the detainee to a pole in the middle of a deserted shopping center parking lot at 3 a.m. and then notified the other jurisdiction where he could be located.[119] The court had little difficulty determining that this action had no valid law enforcement purpose and thus was violative of the Constitution, but quite inexplicably ruled that the officers were entitled to qualified immunity since no court had previously proscribed this kind of misconduct.[120] It is difficult to believe that the Court did not understand that the lack of a controlling precedent was a function of the truly unprecedented illegality.

Similarly, in *Parrish v. Cleveland*,[121] the Fourth Circuit granted qualified immunity, notwithstanding established law that prohibited the conduct in question. There, the defendant transported a highly intoxicated individual, who had already suffered bouts of vomiting, and who was left unattended and not observable in the back of a police wagon with his head covered by a "spit-mask" *designed* to trap fluids from the mouth and nose.[122] The court of appeals ruled that the officers had qualified immunity from suit, where the plaintiff's death from suffocation resulted from the forcible application of this mask.[123] Questionable decisions abound in this area.[124]

Wilson v. Layne, 526 U.S. 603 (1999), the Court ruled that the Fourth Amendment prohibited police from inviting the media to "ride along" and be present at the execution of search warrants, but further held that qualified immunity protected the officers from liability even though the Court was unanimous on the Fourth Amendment issue and there was no judicial support for such conduct. *Id.* at 614–15. According to the Court, a reasonable officer would not know that the conduct was illegal in the absence of specific judicial rulings on the issue. *Id.* at 617–18. In other cases, the Court has ruled that the lack of precedent is not always a basis for qualified immunity. In *Hope v. Pelzer*, 536 U.S. 730 (2002), the Court rejected qualified immunity for prison officials who had restrained a prisoner to a "hitching post" as a disciplinary punishment, and denied him water and bathroom access. The lack of precedent did not mandate immunity:

> Our opinion in *Lanier* thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in *Lanier*, we expressly rejected a requirement that previous cases be "fundamentally similar." Although earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with "materially similar" facts. Accordingly, pursuant to *Lanier*, the salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional.

Id. at 741.

118. Parrish v. Cleveland, 372 F.3d 294 (4th Cir. 2004) (Luttig, J., dissenting); Robles v. Prince George's County, 302 F.3d 262 (4th Cir. 2002).

119. *Robles* 302 F.3d at 266–67.

120. *Id.* at 271.

121. *Parrish*, 372 F.3d at 309–10.

122. *Id.* at 297–300.

123. *Id.* at 309–10. In his dissent from denial of rehearing en banc in *Robles*, 308 F.3d at 446, Judge Luttig pointed to "clearly established law" in the state that would reject qualified immunity. In *Bailey v. Kennedy*, 349 F. 3d 731, 741–42 (4th Cir. 2003), the court held, contrary to *Robles*, that officers should have known they were violating the constitutional rights of an allegedly suicidal person by taking him involuntarily into custody for psychological evaluation. *See also* Odom v. S.C. Dep't of

Defenders of the doctrine of qualified immunity recognize its broad reach and, in the words of one commentator, the "huge" right-remedy gap that is created along with the "societal loss in under enforced constitutional norms."[125] Still, they find that the doctrine is necessary (1) to protect officers who have to make "difficult" legal judgments, (2) to prevent overdeterrence by avoiding strict liability, and (3) to encourage courts to announce new constitutional principles they might otherwise reject.[126]

The rationales for the doctrine are seriously overstated. First, there is no strict liability in constitutional tort litigation. Strict liability would permit damages based on a showing of injury and causation,[127] but all constitutional claims require a showing of culpable conduct. For example, a search is not illegal simply because it turns up no contraband; rather, the officer seeking a warrant need only have a "fair probability" of finding contraband.[128] Nor would an innocent person convicted of a crime have a civil remedy following her exoneration unless she could

Corr., 349 F. 3d 765 (4th Cir. 2003) (vacating an order of qualifying immunity and remanding a case in which corrections officers deliberately ignored an inmates plea for protection against assault by another inmate).

124. *See* Thomas v. Roberts, 323 F.3d 950, 955 (11th Cir. 2003) (strip search of students violates Fourth Amendment, but not sufficiently "egregious" to defeat qualified immunity); Cruz v. Kauai County, 279 F.3d 1064, 1069 (9th Cir. 2002) ("The right violated here . . . was the Fourth Amendment right not to have a prosecutor, in order to obtain a bail revocation, personally attest to a false statement of a biased source with no investigation of the statement's truth or falsity. Unfortunately for [the plaintiff], he has not cited any case that establishes such a right, nor is it self-evident."); Butera v. District of Columbia, 235 F.3d 637, 652 (D.C. Cir. 2001) (confidential informant's constitutional right to protection by the District of Columbia from third-party violence was not clearly established); Trulock v. Freeh, 275 F.3d 391, 403–04 (4th Cir. 2001) (granting qualified immunity to officers who searched plaintiff's password-protected computer files without a warrant, concluding that, "[a]lthough cases involving computers are not *sui generis*, the law of computers is fast evolving, and we are reluctant to recognize a retroactive right based on cases involving footlockers and other dissimilar objects"); Brown v. Nationsbank Corp., 188 F.3d 579, 592 (5th Cir. 1999) (innocent third parties injured by law enforcement sting operations "run amok" not entitled to compensation); Jones v. Cannon, 174 F.3d 1271, 1286 (11th Cir. 1999) (ruling no clearly established duty of police officer to intervene to prevent fellow officer from fabricating a confession); Petta v. Rivera, 143 F.3d 895, 899 (5th Cir. 1998) ("[O]ur review of the record shows that Rivera is entitled to the defense of qualified immunity based on the undisputed fact that the Petta children alleged purely psychological harm as a result of Rivera's actions. At the time of these events, it was not 'clearly established' in our law that such nonphysical harm gave rise to a constitutional tort."); White v. Bd. of Trustees of Univ. of Ala., 31 F. Supp. 2d 953, 954 (N.D. Ala. 1999) ("The Eleventh Circuit leads the parade when it comes to the recognition of 'qualified immunity' as virtually perfect insulation for individuals from § 1983 liability."); *cf.* O'Rourke v. Hayes, 378 F.3d 1201, 1210 (11th Cir. 2004) (denying qualified immunity to officers who acted with the "unbridled arrogance of those who believe they will never be held accountable for their behavior").

125. Jeffries, *The Right-Remedy Gap*, *supra* note 9, at 89–90; *see also* Jeffries, *Eleventh Amendment*, *supra* note 10, at 75–76. Professor Jeffries has presented thoughtful arguments in favor of certain limitations on remedies, but he has been careful to note that current restrictions on damages are "extravagant" and that the Court has been "requiring *too much* fault as a condition of constitutional tort liability." Jeffries, *The Right-Remedy Gap*, *supra* note 9, at 91.

126. Jeffries, *The Right-Remedy Gap*, *supra* note 9, at 113; *see also* SCHUCK, SUING GOVERNMENT, *supra* note 10, at 59–81 (setting forth damages of "over-deterrence" of governmental officers).

127. Jeffries, *Eleventh Amendment*, *supra* note 10, at 71.

128. Illinois v. Gates, 462 U.S. 213, 246 (1983).

prove culpable conduct of a state official.[129] Constitutional law is no more indeterminate than other legal rules and standards and, as noted below, early immunity doctrine protected officers where legal standards changed after the officers acted.[130]

Second, the argument that qualified immunity is needed to permit the development of constitutional law, while of some surface appeal, is ultimately unpersuasive. Professor Jeffries argues that without the protections afforded by qualified immunity, the Court would be hesitant to recognize new constitutional principles or to expand existing rights.[131] In support of this theory, he claims that decisions like *Brown*,[132] *Mapp*,[133] *Miranda*,[134] and *United States v. Wade*,[135] would not have been possible if money damages were available or if the new constitutional rules were to be applied retroactively. Further, he claims that cases like *Paul v. Davis,*[136] resulted in a "cramped, illiberal view of protected 'liberty,'"[137] because of the Court's concerns about officer liability and the possibility that the Fourteenth Amendment would become a "font of tort law."[138]

Nonretroactivity of "new" constitutional decisions, like *Mapp* and *Miranda*, where thousands of convictions would otherwise have been reversed, is essential to the growth of constitutional law. But that proposition is not equally applicable to civil litigation. Early qualified immunity doctrine provided protection from liability where a court decision amounted to "new" constitutional law.[139] And, settled retroactivity law for civil claims provides a fair level of protection to defendants from unforeseeable legal developments.[140] There is a critical difference between protecting officers from liability under new or otherwise unforeseeable decisions and protecting them from liability on a standard that requires the plaintiff to show that the constitutional right was already "clearly established."[141] Further, the retroactivity of decisions is limited by statutes

129. 42 U.S.C. § 1983 permits liability against municipalities in cases where a right is first recognized, but even in that context, the plaintiff must prove culpable conduct of the individual officer or the municipality. *See* Owen v. City of Independence, 445 U.S. 622, 635–36 (1980).

130. *See* Pierson v. Ray, 386 U.S. 547, 557 (1967).

131. Jeffries, *Eleventh Amendment*, *supra* note 10, at 78; Jeffries, *The Right-Remedy Gap*, *supra* note 9, at 95–102.

132. 347 U.S. 483 (1954).

133. 367 U.S. 643 (1961).

134. 384 U.S. 436 (1966).

135. 388 U.S. 218 (1967).

136. 424 U.S. 693, 701 (1976) (holding that defamation of citizen by police chief not actionable as a due process violation without a showing of tangible loss).

137. Jeffries, *Eleventh Amendment*, *supra* note 10, at 78.

138. *Paul*, 424 U.S. at 701.

139. Pierson v. Ray, 386 U.S. 547, 557–58 (1967).

140. *See* Chevron Oil v. Huson, 404 U.S. 97, 105–08 (1971) ("the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed" (citation omitted)).

141. With respect to the school desegregation litigation, damages would have been precluded under even limited qualified immunity principles given that previous precedent was directly overruled in *Brown*. However, it may well be that a potential damages remedy for the thousands of students de-

of limitations, the *Heck v. Humphrey* doctrine requiring a convicted defendant to secure reversal of his conviction prior to filing a civil rights suit where the claim would "necessarily imply the invalidity of [the] conviction or sentence,"[142] the practical realities regarding access to counsel, knowledge of claims, and access to the courts,[143] and the fact that the current Supreme Court is not in the business of recognizing many new constitutional rights.

Professor Jeffries's assertion that it is "almost inconceivable that *Paul* would have come out the same way had injunctive relief been the only remedy,"[144] does not account for the fact that *Paul* is consistent with the Rehnquist Court's limited view of liberty and privacy interests.[145] Indeed, even with the expansive qualified immunity doctrine, the Court continues to reject plausible constitutional claims.[146] The Court's immunity law is but one facet of a constitutional jurisprudence which is marked by limits on damage remedies, equitable relief, and substantive rights. And, if the Court is not willing to recognize rights where an officer would be left holding the "tab," the easy resolution would be to permit recovery against the municipal employer on a respondeat superior basis.[147] This would place the burden of payment on the government and, in turn, act as an incentive to implement measures aimed at reducing future violations.

Third, and most important, this doctrine does more than deprive victims of compensation for proven constitutional violations. It operates as well to establish a sub-constitutional standard for future government conduct. In *Anderson v. Creighton* the Court ruled that language in the Fourth Amendment proscribing unreasonable searches and seizures did not preclude the possibility that an officer can act in an objectively rea-

nied access to desegregated schools in the years following *Brown* would have been a useful tool in combating the "massive resistance" tactics of recalcitrant school officials.

142. Heck v. Humphrey, 512 U.S. 477, 487 (1994).

143. Notwithstanding the growth of civil rights organizations, a more rigorous civil rights bar, and a broader societal understanding of constitutional protections, access to courts for civil rights claimants is limited by the relatively small number of lawyers with the experience and resources to litigate these cases, racial and class characteristics that tend to prejudice juries against the plaintiffs, and the restrictions on damages that make the cases unattractive to counsel. *See generally* Anthony G. Amsterdam, *The Supreme Court and Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 787–90 (1970).

144. Jeffries, *Eleventh Amendment*, *supra* note 10, at 79.

145. *See, e.g.*, Siegert v. Gilley, 500 U.S. 226, 234 (1991) (holding that the Constitution does not protect a "liberty" interest in reputation); Meachum v. Fano, 427 U.S. 215 (1976) (holding that transfer between prisons does not implicate a validly convicted prisoner's liberty interests); Laird v. Tatum, 408 U.S. 1, 9–10 (1972) (holding that petitioner did not have standing to challenge certain government surveillance programs).

146. *See, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833, 854–55 (1998) (declining to impose liability for high speed police pursuits unless officer acted with conscience shocking culpability amounting to an intent to harm); DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 199–200 (1989) (holding that county and state owe no affirmative duty to protect persons from even foreseeable harm unless they are in custody or subjected to restraints on liberty).

147. *See* Bd. of County Comm'rs v. Brown, 520 U.S. 397, 430–31 (1997) (Breyer, J., dissenting) (suggesting respondeat superior liability for municipalities).

sonable fashion even though in violation of the Fourth Amendment.[148] The Court noted that determinations of probable cause are often quite difficult and that officials should be held liable in damages only where their conduct was clearly proscribed.[149] But, as Chief Judge Newman has noted:

> It is not readily apparent how a police officer could have an objectively reasonable belief that conduct was lawful when the unlawfulness of that conduct rests on a determination that an objectively reasonable police officer would not have acted. And the situation is especially perplexing [where] . . . it has been determined, correctly in our view, that no reasonable juror could fail to find that the officer's conduct was unlawful.[150]

In the wake of *Anderson*, a number of circuits have routinely employed the concept of "arguable probable cause" in Fourth Amendment qualified immunity analysis.[151] Given the fact that probable cause can be established on facts that show only a "fair probability" of criminal conduct (a "practical, nontechnical conception"),[152] to permit "arguable" probable cause to justify a search is to degrade the Fourth Amendment's protections to a very low level.

The Court has provided officers with a similarly broad immunity from damages where they use unreasonable force. In *Graham v. Connor*, the Court ruled that excessive force claims arising out of arrests, investigatory stops, or other seizures of "free citizens" are properly analyzed under the Fourth Amendment's "objective reasonableness" standard.[153] Reasonableness is to be determined by the "facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[154] Under the objective nature of the test, "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's

148. 483 U.S. 635, 640–41 (1987).

149. *Id.*

150. Oliveira v. Mayer, 23 F.3d 642, 648 (2d Cir. 1994). *But see* Karnes v. Skrutski, 62 F.3d 485, 492 n.3 (3d Cir. 1995) ("There is no conflict in saying a police officer who acted unreasonably nevertheless reasonably (but mistakenly) believed his conduct was reasonable.").

151. *See, e.g.*, Mendenhall v. Riser, 213 F.3d 226, 231 (5th Cir. 2000) ("[S]ubjective intent, motive, or even outright animus are irrelevant in a determination of qualified immunity based on arguable probable cause to arrest, just as an officer's good intent is irrelevant when he contravenes settled law."); Wollin v. Gondert, 192 F.3d 616, 621 (7th Cir. 1999) (discussing "arguable probable cause" in the context of a qualified immunity defense); Lee v. Sandberg, 136 F.3d 94, 103 (2d Cir. 1997) ("A review of the circumstances of this case reveals that . . . the State Troopers . . . had 'arguable' probable cause).

152. Illinois v. Gates, 462 U.S. 213, 231 (1983).

153. Graham v. Connor, 490 U.S. 386, 391 (1989).

154. *Id.* at 396.

good intentions make an objectively unreasonable use of force constitutional."[155]

However, in *Saucier v. Katz* the Supreme Court determined that "[t]he inquiries for qualified immunity and excessive force remain distinct."[156] *Graham* protects an officer who reasonably, but mistakenly, believed the circumstances justified using more force than in fact was needed. The Court failed to explain how an officer could act in an objectively unreasonable manner for Fourth Amendment purposes, but could still have reasonably believed that his conduct was lawful. Given the inherent contradictions in the standards articulated by the Court, it is not surprising that lower courts have struggled in their application of qualified immunity in the use of force context.[157]

Under this qualified immunity regime, we can fully expect officers to apply the lesser Fourth Amendment protection of the immunity doctrine in their street-level decisions to arrest, search, investigate, and use force. After all, if a court will demand only "arguable probable cause" for a search or arrest or will permit "reasonable" unreasonable force, officers will often face no sanctions for applying these sub-constitutional standards. Use of force is not subject to the exclusionary rule and many searches, arrests, or investigative detentions yield no physical evidence.

In theory, qualified immunity should protect officers from liability for a specific type of unconstitutional conduct only once: with the right defined, an officer can no longer claim that it was not clearly established. But that is true only for the establishment of categorical rights. Thus, police now know that they may not bring media along on the execution of search warrants.[158] However, by extending the doctrine to protect officers who claim not that the legal standard was not clearly established—e.g., probable cause to arrest or search—but that their specific conduct in the case in question was not clearly proscribed by previous decisions, the

155. *Id.* at 397.

156. 533 U.S. 194, 204 (2001).

157. *See, e.g.*, McCormick v. City of Fort Lauderdale, 333 F.3d 1234, 1245 n.16 (11th Cir. 2003) (per curiam) (ruling that law was not clearly established that surprise use of pepper spray on a violent felony suspect violated Constitution); Curley v. Klem, 298 F.3d 271, 282 (3d Cir. 2002) (stating that historical facts had to be resolved by jury before determination of objective reasonableness could be made as to officer's shooting of a black officer mistaken for suspect); Ewolski v. City of Brunswick, 287 F.3d 492, 505 (6th Cir. 2002) ("Even if genuine issues of material fact did exist as to whether a reasonable officer would have perceived an immediate threat . . . we would still find summary judgment to be appropriate on the basis of the 'clearly established' prong of the qualified immunity test."); Robinson v. Solano County, 278 F.3d 1007, 1015 (9th Cir. 2002) (en banc) ("The development of the law with respect to arrests and detentions now allows us to recognize as a general principle that pointing a gun to the head of an apparently unarmed suspect during an investigation can be a violation of the Fourth Amendment, especially where the individual poses no particular danger . . . . The contours of that right were not at all clear in 1995, however." (citation omitted)); Holland v. Harrington, 268 F.3d 1179, 1197 (10th Cir. 2001) ("We can find no substantial grounds for a reasonable officer to conclude that there was legitimate justification for continuing to hold the young people outside the residence directly at gunpoint after they had completely submitted to the SWAT deputies' initial show of force, or for training a firearm directly upon a four-year old child at any time during the operation.").

158. Wilson v. Layne, 526 U.S. 603, 617–18 (1999).

constitutional rule for that case will not control other factually distinct arrests or searches. In these circumstances, deviance is defined downward and officers may well continue to operate on this sub-constitutional level. Professor Levinson states:

> [O]ne might doubt the extent to which governmental officials whose behavior is governed by constitutional law care much about constitutional rights except as predictors of legal risk, which is a function of remedies—especially in the context of criminal justice where there are strong normative reasons for pushing against constitutional limits.[159]

The claim is also made that qualified immunity is necessary to prevent overdeterrence of public officials who, faced with the exposure to civil liability for constitutional violations, might steer clear of the constitutional line and fail to fully enforce the law.[160] Yet, from an opposite direction, we are told that damage awards fail to achieve any meaningful deterrence of governmental misconduct.[161] There is good reason to be skeptical of the claim that officers will not engage in appropriate law enforcement if the qualified immunity doctrine is limited to protection against unforeseeable constitutional developments. Not only does current doctrine in the highly litigated Fourth Amendment areas of law enforcement provide substantial room for error, but to the degree that government agencies believe that further protection against damages is warranted, it can be provided by means of indemnification by the governmental employer.[162]

Damages can play a vital role in deterring both individual and governmental misconduct, but only if the damages assessment reflects the seriousness of the proven misconduct and the injuries that are suffered, government officials take necessary steps to reform practices and proce-

159. Levinson, *supra* note 10, at 911. The risk of encouraging unconstitutional conduct is enhanced as well by application of the objectively reasonable officer standard for the good faith exception to the exclusionary rule and for habeas corpus review.

160. *See* SCHUCK, SUING GOVERNMENT, *supra* note 10, at 180; Jeffries, *The Right Remedy Gap*, *supra* note 9, at 113. In *Owen v. City of Independence*, 445 U.S. 622, 655–56 (1980), the Court stated that at the "heart of [the] justification for a qualified immunity . . . is the concern that the threat of *personal* monetary liability will introduce an unwarranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy."

161. *See, e.g.*, Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903, 903 (2001) (asserting that principles of justice support damage claims in these cases); Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 600 (2000) (arguing that indemnification and insurance aspects of civil rights litigation substantially decreases any possible deterrent effect on officer conduct); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 415–20 (2000) (asserting that government entities, unlike private defendants, will not normally be deterred by money damages, and that compensatory aspects of constitutional tort litigation may not be supported by various justice theories) [hereinafter Levinson, *Making Government Pay*].

162. As noted, if protection of the officer from unwarranted imposition of damages was the real concern, that goal could be achieved along with compensation for wrongs committed by permitting respondeat superior liability against the municipality. *See supra* note 147 and accompanying text.

dures that cause constitutional violations, and individual officers are properly disciplined, retrained and supervised as a result of findings of misconduct. Some jurisdictions view money damages simply as a cost of doing business and, as long as the amounts that are awarded or paid by way of settlement do not exceed budgetary limits, the "benefits" achieved by aggressive policing or other governmental operations that result in constitutional violations are seen as worth the price.[163] But this fact does not prove that damages cannot deter. There are situations in which governmental units have changed practices and policies in the wake of large damage awards.[164] Further, the fact that some damage awards have not had a deterrent effect may well be a function of the limitations that courts and legislatures have imposed on damages in civil rights cases.[165] Thus, if damages were permitted on the basis of the inherent value of rights (without a showing of injury or other losses) and punitive damages were recoverable from municipalities, it would be more difficult for government to consider damages simply as a cost of doing business. Surely, at some level, the cost of doing business will be simply too great for the municipal budget and practices will change.[166]

Equally important, it is a mistake to view the issue of deterrence solely through the prism of damages. Economic sanctions may not always create the incentives for reform or respect for individual rights, but damages in combination with other measures, for example, court-mandated injunctive relief, judicial or legislative limitations on indemnification,[167] and mandatory internal sanctions against officials who intentionally violate rights, have the capability of deterring future misconduct.

There is a related point. In the continuing debate over the role of constitutional tort remedies and criminal procedural limitations on law

163. *See, e.g.*, Levinson, *Making Government Pay*, *supra* note 161, at 369.

164. As one example, in Philadelphia in 1996, in the wake of a police abuse scandal and the payment of several million dollars in settlements to persons who were wrongfully arrested and prosecuted on false narcotics charges, the City agreed to a Settlement Agreement in a federal lawsuit that mandated extensive changes in the operation, policies and practices of the police department (including computerization of almost all records and data in the department, extensive use of force reporting, changes in internal affairs investigative procedures, heightened supervision of narcotics law enforcement, new policies to address racial profiling and unjustified stops of cars and pedestrians, and new hiring procedures). *See* Settlement Agreement, NAACP v. City of Philadelphia, C.A. No. 96-6045 (E.D. Pa.) (on file with author). No single reason motivated the City to agree to this settlement, but the payment of significant damages and the prospect of further corruption and exposure to verdicts were part of the mix.

165. *See* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986); Carey v. Piphus, 435 U.S. 247, 254–55 (1978).

166. For commentary on the "cost of policing" approach to damage awards, see Susan Bandes, *Patterns of Injustice: Policy Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1337–38 (noting that New York City paid over $31 million in settlements and judgments in 1998, but failed to take action against officers responsible for the misconduct); Levinson, *Making Government Pay*, *supra* note 161, at 412–14; *see also L.A. police corruption settlements estimated to reach $70 million*, Associated Press, Mar. 31, 2005, *available at* 3/31/05 APDATASTREAM 17:09:47 (Westlaw).

167. *See* Emery & Maazel, *supra* note 161, at 596–600 (advocating process by which the court apportions damages according to relative culpability of official and the municipality and takes into consideration ability of official to pay the judgment).

enforcement and other government agencies and officials, courts frequently assert that limitations on a particular remedy are justified on the grounds that alternative remedies exist for both deterrence and compensation. Thus, limitations on the exclusionary rule are justified by arguments that other remedies are available or can be created to fill whatever remedial void is created.[168] Similarly, advocates of limitations on damages suggest that deterrence can be accomplished by the exclusionary rule or injunctive relief.[169] But, the process has not been one of substitution; to the contrary, each of the remedial mechanisms has been limited. Thus, as I discuss below, the exclusionary rule has been substantially reduced in scope, the structural injunction remedy is available only under very limited circumstances, and damages are often precluded by immunity doctrine.[170]

These developments reflect a remedial "shell game" where, as discrete remedies are reduced or limited, we are told that equally effective alternatives exist; nevertheless, when implementation of those remedies is at issue, the same justifications are provided for limiting those remedial measures. It is not difficult to present cogent arguments as to the discrete inefficiencies and adverse effects flowing from the broad application of any specific remedial measure. But when all remedies are restricted, the right is reduced to a dead letter.

3. Related Doctrinal Limitations on Damages

a. Class Action Limitations

Litigation of class action damage claims in civil rights and other tort contexts has become more difficult in the federal courts.[171] Where plain-

168. *See, e.g.*, United States v. Leon, 468 U.S. 897, 917 n.18 (1984) (creating good faith exception to exclusionary rule where search warrant is found defective does not leave magistrates who serve as "rubber stamps" in approving warrants free from other sanctions, including removal from office). An early advocate of the abolition of the exclusionary rule, Chief Justice Burger stated that the abolition should be contingent upon an "administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated." Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 422 (1971) (Burger, C.J., dissenting); *see also* Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 2–4 (2001) (suppression orders should be made contingent on failure to pay fair damages to the defendant).

169. *See* Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982); Butz v. Economou, 438 U.S. 478, 512 (1978); *cf.* Chappell v. Wallace, 462 U.S. 296, 305 n.2 (1983). Professor Jeffries argues that limitations on damages "facilitates constitutional change by reducing the costs of innovation." Jeffries, *The Right-Remedy Gap*, *supra* note 9, at 90. But this theory depends on the availability of alternative remedies such as a viable exclusionary rule and injunctions, and a qualified immunity regime that gives the government only one "free bite" at a constitutional violation. *See also* Fallon & Meltzer, *supra* note 10, at 1788 n.312; Levinson, *Making Government Pay*, *supra* note 161, at 416–19.

170. *See infra* Part VI.

171. The injunctive class provisions of Rule 23(b) were "designed specifically for civil rights cases seeking broad declaratory or injunctive relief." Baby Neal v. Casey, 43 F.3d 48, 59 (3d Cir. 1994); *see also* Stewart v. Abraham, 275 F.3d 220, 228 (3d Cir. 2001) (approving certification of class of arrestees in challenge to preliminary hearing procedures).

tiffs seek class certification of the damages claims under Rule 23(b)(3),[172] the questions of whether common issues predominate over differences in damages for individual class members and whether class certification is a superior means of handling the litigation have divided the courts. In a number of cases, class certification has been denied on the theory that even where a common question exists as to liability, the assessment of damages for constitutional or other torts is so individualized that separate proceedings are necessary for the damages phase.[173] Some courts have found the class action to be a superior means of a fair and effective adjudication of damages claims and have adopted various procedures for assessing damages on a class or sub-class basis.[174] In cases involving large numbers of potential plaintiffs, for example in the racial profiling context, where individual damages tend to be modest, the refusal of courts to certify the damages class will render almost all claims moot, since there will not be the lawyers or resources sufficient to litigate the great majority of the individual claims.

b. Exhaustion of Remedies

While the general rule is that a § 1983 plaintiff need not exhaust administrative or state law remedies, there are significant exceptions. In *Heck v. Humphrey*, the Court ruled:

> [W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated [e.g., "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus."][175]

Many civil rights claims presented by persons subject to state criminal prosecutions are barred under *Heck*'s rationale, absent an acquittal

172. FED. R. CIV. P. 23b(3).

173. *See, e.g.*, Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 192 (3d Cir. 2001) (denying class certification in securities litigation); Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1240 (11th Cir. 2000) (denying class certification in case alleging discrimination in car rental practices); Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1004–05 (11th Cir. 1997) (denying class certification on claims of racial discrimination); White v. Williams, 179 F. Supp. 2d 405, 421 (D.N.J. 2002) (denying class certification on claim of racial profiling on New Jersey Turnpike).

174. *See, e.g.*, Tardiff v. Knox County, 365 F.3d 1, 7 (1st Cir. 2004) (sustaining district court certification of damages class in case alleging unconstitutional strip searches at jails and prisons); Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 162–63 (2d Cir. 2001) (permitting damages class to proceed in racial discrimination case, and suggesting procedures for assessing damages); Ingram v. Coca-Cola Co., 200 F.R.D. 685, 700–01 (N.D. Ga. 2001) (approving settlement of racial discrimination class action); Warnell v. Ford Motor Co., 189 F.R.D. 383, 387–88 (N.D. Ill. 1999) (certifying damages class in case alleging system wide sex discrimination).

175. 512 U.S. 477, 486–87 (1994).

or dismissal of the state charges.[176] This is true even though the state court might have determined that a violation of rights had occurred, but denied relief on harmless error grounds, or where a state court erroneously determined that there was no constitutional violation of the defendant's rights, and under waiver, procedural default or deferential habeas corpus review, appellate and federal courts refused to vacate the conviction.[177]

4. Governmental Liability

a. State Government

The Eleventh Amendment insulates states and state agencies from suit for damages or equitable relief.[178] The complexity, incoherency, and manipulability of Eleventh Amendment jurisprudence has been the subject of extensive commentary and debate,[179] and for the most part is beyond the scope of this article. What is relevant is the effect of this sovereign immunity doctrine on the availability of remedies for constitutional violations by state officers and the consequential impact on the enforcement of constitutional norms.

The potentially broad disabling effects of Eleventh Amendment immunity have been substantially minimized by the doctrine of *Ex parte Young*, which permits suit against state officials for unconstitutional conduct.[180] However, it is not the case that "[t]he Eleventh Amendment al-

176. *See* Harvey v. Waldron, 210 F.3d 1008, 1015 (9th Cir. 2000) (discussing whether a Fourth Amendment claim is barred by *Heck*); Hainze v. Richards, 207 F.3d 795, 798–99 (5th Cir. 2000) (holding that where plaintiff had been convicted of aggravated assault under Texas law, the "force used by the deputies . . . up to and including deadly force, cannot be deemed excessive."); Covington v. City of New York, 171 F.3d 117, 123 (2d Cir. 1999) ("[I]n a case where the *only* evidence for conviction was obtained pursuant to an arrest, recovery in a civil case based on false arrest would necessarily impugn any conviction resulting from the use of the evidence."); Washington v. Summerville, 127 F.3d 552, 556 (7th Cir. 1997) (success on either unlawful arrest or excessive force claim would not have necessarily implied the invalidity of a potential conviction on murder charge); Brooks v. City of Winston-Salem, 85 F.3d 178, 182 (4th Cir. 1996) ("[A] charge that probable cause for a warrantless arrest was lacking, and thus that the seizure was unconstitutional, would not necessarily implicate the validity of a subsequently obtained conviction—at least in the usual case.").

177. Exhaustion of remedies is also required in prisoner litigation. *See* 42 U.S.C. § 1997e(a) (2003).

178. The Federal Tort Claims Act waives the sovereign immunity of the United States and permits suits for damages for certain acts or omissions by government employees, but limits liability to negligent, nondiscretionary conduct and to the intentional torts of assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution when these are committed by federal investigative or law enforcement officers. Gasho v. United States, 39 F.3d 1420 (9th Cir. 1994). Thus, a wide range of constitutional violations including first amendment, due process, and equal protection claims cannot be remedied under the Act. The tort which forms the basis of the suit must be recognized by the law of the state in which it occurred; accordingly, a constitutional violation must constitute a separate tort under state law to be actionable. Washington v. DEA, 183 F.3d 868, 873 (8th Cir. 1999); Rhoden v. United States, 55 F.3d 428, 431 (9th Cir. 1995). The Act provides no right to a jury trial and prohibits an award of punitive damages.

179. Amar, *supra* note 10, at 1479; Jeffries, *Eleventh Amendment*, *supra* note 10, at 49.

180. 209 U.S. 123 (1908).

most never matters."[181] First, *Ex parte Young* does not apply to permit retroactive payments from the state treasury.[182] Thus, systematic violations of the rights of a class of persons pursuant to state law that would otherwise be remedied by payments directed by the state are retrospectively immune.[183] Second, while states may indemnify the individual official, indemnification by the state is not a universal practice.[184] Indeed, in cases in which the official's conduct was particularly egregious, the state will often refuse indemnification, thus creating the anomalous situation of denying compensation in the most serious cases.

Third, there are cases in which the officials are not identifiable or where their conduct was the product of state law or policies. In the first situation, the indemnification question becomes moot and there is no legal recourse. In the second, the official is likely to be protected by qualified immunity and the state will be protected by the Eleventh Amendment.[185] Thus, the Eleventh Amendment plays a role in the right-remedy gap.[186] Congress has power under section 5 of the Fourteenth Amendment to override Eleventh Amendment immunity.[187] However, the Court has placed substantial limits on Congressional powers under section 5, ruling that where Congress goes beyond the prohibition of constitutionally forbidden conduct (e.g., intentional discrimination), it must demonstrate both that the legislation is necessary to provide prophylactic measures to carry out the objectives of the constitutional guarantee and that the law is a limited response to a pattern of unlawful conduct.[188]

The Court's restrictive standard was initially applied in *City of Boerne v. Flores*, where it held unconstitutional the Religious Freedom Restoration Act, a statute providing broader free exercise rights than recognized by Supreme Court precedent, on the ground that section 5 does not authorize Congress to "enforce a constitutional right by changing what the right is."[189] According to the Court, Congress could only remedy or prevent constitutional violations by legislation that was "congruent" and "proportional" to the "injury to be prevented or reme-

181. Jeffries, *Eleventh Amendment*, *supra* note 10, at 49.

182. *See* Edelman v. Jordan, 415 U.S. 651 (1974) (bringing challenge to administration of federal-state programs of Aid to Aged, Blind and Disabled).

183. *See* Papasan v. Allain, 478 U.S. 265 (1986).

184. This observation is based on my own litigation and consultation with other civil rights lawyers.

185. *See* Brown, *supra* note 80, at 1533–34.

186. It should also be noted that states may not be sued in state court under § 1983, as the Court has ruled that "states" are not "persons" as that term is defined in the statute, Will v. Mich. Dep't. of State Police, 491 U.S. 58, 65 (1989), and that the Eleventh Amendment bars a federal court from awarding injunctive relief against a state official on the basis of state law. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101 (1984).

187. *See* Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999).

188. *See* Brown, *supra* note 80, at 2165.

189. 521 U.S. 507, 519 (1997).

died."[190] In quick succession, the Court applied this standard to strike down federal laws authorizing suits against states for patent infringement,[191] age discrimination in employment,[192] gender-motivated violence,[193] and discrimination against disabled persons.[194]

Board of Trustees of University of Alabama v. Garrett was a particularly telling rejection of Congressional power to enforce civil rights laws against the states. Patricia Garrett, a Director of Nursing at a state hospital, suffered from breast cancer and as a result was given a lower paying job.[195] The Court assumed that the conduct violated the ADA, but it ruled that Congress lacked the power to authorize such suits against the state.[196] Disparate treatment of the disabled was subject to a "rational basis" test, and even though Congress had built a record demonstrating that many state laws were inadequate in dealing with discrimination against the disabled, the Court found insufficient evidence of "unconstitutional *employment* discrimination by the States against the disabled."[197] While the Court did not go so far as to condemn any legislation that went beyond what the Court might find unconstitutional, it severely restricted Congressional power to prevent or remedy this type of discriminatory conduct by measures that prohibited more than the core constitutional misconduct.[198]

The balance the Court has drawn between respect for states and protection of constitutional rights is revealing. In *Alden v. Maine*, responding to an argument that suits against states are essential for the supremacy of federal law, Justice Kennedy stated: "We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an

190. *Id.* at 520.

191. *Coll. Sav. Bank*, 527 U.S. at 672–73 (state remedies for violations may have been insufficient in some cases, but legislation was not an "appropriate" response).

192. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82–83 (2000) (age discrimination is subject to rational basis standard and ADEA lacks congruence and proportionality because it would prohibit conduct that was not in itself unconstitutional).

193. United States v. Morrison, 529 U.S. 598, 627 (2000) (holding that remedies of Violence Against Women Act cannot be applied against states, notwithstanding extensive fact findings of state failure to provide effective remedies for gender related violence as not every state failed to provide remedies; Act also lacked congruence and proportionality).

194. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 372 (2001).

195. *Id.* at 363.

196. *Id.* at 374.

197. *Id.* at 368 (emphasis added). Justice Breyer, in dissent, argued that the Court had unfairly picked apart "a vast legislative record documenting" discrimination. *Id*. at 377.

198. For critical commentary on the section 5 cases, see generally Susan Bandes, *Fear and Degradation in Alabama: The Emotional Subtext of* University of Alabama v. Garrett, 5 U. PA. J. CONST. L. 520 (2003); Karlan, *supra* note 10; Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367 (2002); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441 (2000).

important assurance that [the Constitution and laws will be supreme]."[199] As Professor Chemerinsky has written:

> Is it possible to imagine that 30 or 40 years ago, at the height of the civil rights movement, the Supreme Court would have issued such a statement that state governments simply could be trusted to voluntarily comply with federal law? James Madison said that if people were angels there would be no need for a Constitution, but there would be no need for a government, either. The reality is that state governments, intentionally or unintentionally, at times will violate federal law. To rely on trust in the good faith of state governments is no assurance of compliance with federal law at all.[200]

Recent cases may mark the limits of the Court's resistance to Congressional power,[201] but it is apparent that the current standards for assessing federal legislative authority to override the Eleventh Amendment will continue to limit Congressional response to state sovereign immunity.

b. Municipal Liability

Local governmental units do not qualify for Eleventh Amendment immunity,[202] but the Court has erected culpability and causation requirements that make it quite difficult to establish local government liability. The jurisprudence of municipal liability reflects a deep divide between legal theory and institutional reality. The Court has failed to appreciate the significance of the organizational culture and hierarchical structure of law enforcement agencies and, consequently, has bypassed remedies for practices and policies that cause many constitutional violations.[203]

Studies and investigations of law enforcement practices and organizational structures by government agencies, independent auditors, and litigants in court proceedings have documented the "us vs. them" atti-

199. Alden v. Maine, 527 U.S. 706, 755 (1999); *see also Garrett*, 531 U.S. at 375 (Kennedy, J., concurring) ("It is a most serious charge to say a State has engaged in a pattern or practice designed to deny its citizens the equal protection of the laws . . ."). It should be noted that the Court has not been hesitant to employ federal preemption doctrine to override state laws that provide more protection to state residents than federal law. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 571 (2001).

200. Erwin Chemerinsky, *Closing the Courthouse Doors to Civil Rights Litigants*, 5 U. PA. J. CONST. L. 537, 541 (2003) (footnote omitted).

201. *See* Tennessee v. Lane, 124 S. Ct. 1978, 1986, 1994 (2004) (holding that Congress authorized to enact Title II of ADA to make state liable for failure to make courthouse accessible to people with disabilities; Congress may "enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent"); Frew v. Hawkins, 540 U.S. 431, 439 (2004) (holding that Eleventh Amendment does not bar federal court enforcement of consent decree); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728, 734 (2003) (upholding Family Medical Leave Act against the states as a proper exercise of Congressional power to enforce "the right to be free from gender-based discrimination in the workplace").

202. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 n.54 (1978).

203. *See* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 525–45 (2004).

tudes of law enforcement officers, the pervasiveness of the code of silence in many departments, the unwritten policies and practices of using extra-legal measures to increase crime control and order maintenance, and the lack of management controls and accountability for abusive conduct.[204] Yet, officials continue to explain serious misconduct in terms of "bad apples" or "rogue cops" and ignore the direct relationship between organizational culture and patterns of misconduct.[205]

Governmental commission reports and scholarly studies have made clear that systemic misconduct is often the result of police training, supervision, and disciplinary practices and policies.[206] Consistently, these Commission reports and more recent consent decrees and settlement agreements have focused on the need for comprehensive computerized data necessary for internal management and external monitoring of abuse and corruption, supervision and audits of narcotics squads on issues of search warrants and informants, full reporting on use of force, pedestrian and vehicular stops (including data on racial patterns of these stops), independence and integrity of internal affairs investigation, and in-service training on use of force and integrity issues.[207] As Professor Armacost has commented:

> [A] law enforcement organization that tolerates repeated, notorious instances of the worst kinds of brutality—even by a minority of police officers—effectively signals to its employees that a certain level of violence is acceptable despite formal policies to the contrary. . . . Moreover, empirical research suggests that departments with high levels of *excessive or unlawful* uses of force also tend to have high incidence of *all* uses of force by its officers. This correlation strongly suggests that the so-called rogue cops are only a small part of a broader, more systemic phenomenon.[208]

204. *See, e.g.,* Commission to Investigate Allegations of Police Corruption (1994) (Mollen Commission Report); L.A. County Sheriff's Dep't., A Report by Special Counsel James G. Kolt (1992) (Kolt Report); Report of the Boston Police Dep't. Management Review Committee (1992) (St. Clair Commission Report); REPORT OF THE INDEP. COMM'N ON THE L.A. POLICE DEP'T (1991) (Christopher Commission); *see also* HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES (1998); JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 193–216 (1993); JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES (1968); Bandes, *supra* note 166; David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 480–88 (1992).

205. *See* Armacost, *supra* note 203, at 457–59, 521–22.

206. *See* sources cited *supra* note 204; s*ee also* Fallon & Meltzer, *supra* note 10, at 1822.

207. *See, e.g.*, sources cited *supra* note 204. It is not surprising that the abuse of prisoners by the U.S. military in Iraq and other locations has resulted from the same management deficiencies and organizational culture. *See* Report of James R. Schlesinger (August, 2004); Report of Lt. General Paul T. Mikolashek (July, 2004); Report of Maj. General George R. Fay and Lt. Gen. Anthony R. Jones (August, 2004); *see also* Dahlia Lithwick, *No Smoking Gun*, N.Y. TIMES, Aug. 26, 2004, at A27.

208. Armacost, *supra* note 203, at 506 (emphasis in original; footnotes omitted). On the issue of the "code of silence," see Brandon v. Holt, 469 U.S. 464, 467 n.6 (1985) (code of silence is "induced by peer pressure"); Jeffes v. Barnes, 208 F.3d 49, 62–64 (2d Cir. 2000); Blair v. City of Pomona, 223 F.3d 1074, 1080–81 (9th Cir. 2000); Thomas v. City of New Orleans, 687 F.2d 80, 82–83 (5th Cir. 1982); SKOLNICK & FYFE, *supra* note 204, at 13; Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence"*

In this context, the legal standards for assessing municipal liability are of critical importance. If police and other law enforcement agencies cannot be held accountable for practices and procedures that cause constitutional violations, the remedial gap will be very difficult to fill with alternative remedies. Moreover, if this lack of accountability results from a lack of judicial understanding of the significance of the practices and policies of these agencies, the disconnect between fundamental causative factors and constitutional injury will remain.

In *Monell v. Department of Social Services*, the Court construed section 1983 to permit actions against municipalities where a policy of the governmental entity caused the constitutional violation.[209] Initially, the Court expected that the threat of damages would encourage policy makers "to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights."[210] Over the years, however, it has insisted that liability be imposed only upon a high level of proof of culpability. Thus, a plaintiff can prove municipal liability by showing that the governmental unit did not properly train, supervise, or discipline police officers, but only where

> in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.[211]

Moreover, the Court has ruled that a plaintiff seeking to prove liability where the municipality has not "directly inflicted an injury . . . rigorous standards of culpability and causation must be applied. . . . "[212] The Court has also determined that municipal liability can be based on the actions of policymakers whose "edicts or acts may fairly be said to represent official policy,"[213] but few policymakers fall within this narrow definition.[214] Under this standard, municipalities may defend suits on the basis of general, formal policies consistent with the Constitution even where officials in fact are exercising their discretion in a manner that violates constitutional rights, and relatively few cases have found final actions by policymakers violative.[215]

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as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury, 59 U. PITT. L. REV. 233, 250–56 (1998).

209. 436 U.S. 658, 690 (1978).

210. Owen v. City of Independence, 445 U.S. 622, 652 (1980).

211. *See* City of Canton v. Harris, 489 U.S. 378, 390 (1989).

212. Bd. of County Comm'rs v. Brown, 520 U.S. 397, 405 (1997) (rejecting claim based on negligent hiring theory). The lower courts have rejected claims absent strong proof of municipal dereliction. *See, e.g.*, Riddick v. School Bd., 238 F.3d 518, 525–26 (4th Cir. 2000); Barney v. Pulsipher, 143 F.3d 1299, 1308 (10th Cir. 1998) (requiring plaintiff to show that officer was "highly likely to inflict the *particular* injury suffered").

213. *Monell*, 436 U.S. at 694.

214. St. Louis v. Praprotnik, 485 U.S. 112, 124–27 (1988).

215. *See* Thomas *ex rel.* Thomas v. Roberts, 261 F.3d 1160, 1172–73 (11th Cir. 2001) ("Although Roberts was provided with the discretion to order searches within the school, she had no authority to

Even where a final policymaker is responsible for the constitutional violation, Eleventh Amendment immunity will preclude recovery of damages against the governmental unit if it is determined that the policymaker was acting as a state official.[216] The issue of whether an official acts for the state can be quite complex as officials may act in different capacities depending upon the functions involved. For example, chief prosecutors and sheriffs are generally elected or appointed on a county level, are often paid by county funds, but perform both local and state functions in their law enforcement responsibilities.[217] Moreover, some courts have absolved local officials of liability where they act pursuant to state statutes.[218]

The Court's insistence on proof of a high level of culpability by individual officers could be viewed as a proper means of protecting them from damages awards where they acted reasonably, but in light of the Court's rulings that governmental entities must also be shown to have acted with heightened culpability before they can be held liable in damages, it is apparent that immunity doctrines for individual defendants are less about protecting them from damages than they are about reducing remedies and narrowing constitutional protections.[219] I do not mean to suggest that municipal liability claims are so difficult to prove as to render this remedy entirely ineffective as a means of compensation or deterrence. Even under the Court's restrictive standards, governmental enti-

alter the District's explicit policy that searches could not be conducted absent reasonable suspicion . . . . [I]t is irrelevant that Roberts's decision was not subject to review because it was contrary to the District's official written policy."), *opinion reinstated and supplemented*, 323 F.3d 950 (11th Cir. 2003); Greensboro Prof'l Fire Fighters Ass'n v. City of Greensboro, 64 F.3d 962, 965–66 (4th Cir. 1995) (noting that fire chief's power to "appoint and to establish procedures for making appointments was always subject to the parameters established by the City"); Auriemma v. Rice, 957 F.2d 397, 400 (7th Cir. 1992) (to hold municipality liable, agent's action must "implement rather than frustrate the government's policy"). *But see* Bennett v. Pippin, 74 F.3d 578, 586 (5th Cir. 1996) ("In this case, the Sheriff's actions were those of the County because his relationship with [plaintiff] grew out of the attempted murder investigation and because . . . he used his authority over the investigation to coerce sex with her.").

216. *See* Manders v. Lee, 338 F.3d 1304, 1308 (11th Cir. 2003) (en banc) (holding that Georgia sheriff, in his official capacity, was an arm of the state, not county, in establishing use-of-force police at jail and in training and disciplining deputies in that regard).

217. *See, e.g.*, McMillian v. Monroe County, 520 U.S. 781, 793 (1997) (ruling that Alabama Sheriff is a state law enforcement officer even though he is elected and paid by county); *Manders*, 338 F.3d at 1328. *But see* Cozzo v. Tangipahoa Parish Council—President Gov't, 279 F.3d 273, 281–83 (5th Cir. 2002) (stating that sheriff in Louisiana is not an "arm of the state" and not entitled to Eleventh Amendment immunity); Weiner v. San Diego County, 210 F.3d 1025, 1031 (9th Cir. 2000) (holding that California district attorney is state officer when deciding whether to prosecute an individual, but county officer for some purposes).

218. *See, e.g.*, Bethesda Lutheran Homes and Servs., Inc. v. Leean, 154 F.3d 716, 718 (7th Cir. 1998) (addressing local enforcement of unconstitutional medicaid laws).

219. Deterrence policies are also compromised by the rule that municipalities are immune from punitive damages awards under § 1983. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981). In his concurring opinion in *Ciraolo v. City of New York*, 216 F.3d 236 (2d Cir. 2000), Judge Calabresi addressed violations of § 1983 where not all persons injured by an unconstitutional policy are able or willing to bring suit. In such circumstances, the municipality is not forced to bear the entire cost of its unconstitutional policy, and may not be sufficiently motivated to change its practices without a kind of "socially compensatory damages." *Id.* at 245 (concurring opinion).

ties have been subjected to damages and injunctive relief upon the requisite showing of deliberate indifference or policymaker causation.[220] Indeed, the *Monell—City of Canton v. Harris* standards have provided grounds for some institutional reform litigation.[221] Overall, the municipal liability jurisprudence reflects the partially open courthouse doors that characterize much of the civil rights litigation remedial framework.

B. Equitable Relief

Injunctive and declaratory relief are powerful tools in preventing future misconduct and in securing governmental compliance with constitutional norms. Indeed, in some cases, equitable relief may be the most appropriate approach to balancing the remedial factors. During the 1960s and 1970s, the "structural injunction" became a vital part of reform litigation that challenged conditions in a number of governmental institutions, including schools, prisons, mental hospitals, and police departments.[222] Over the past twenty-five years, the Supreme Court has limited the scope and reach of these injunctions, and in specific areas, Congress too, has limited federal judicial injunctive powers.[223] The judicial limitations are based on federalism, comity, and separation of powers principles, and the resulting framework has placed significant restraints on equitable remedies in civil rights cases. Thus, while the Court has not

220. *See, e.g.*, Brown v. Gray, 227 F.3d 1278, 1290 (10th Cir. 2000) (finding sufficient evidence from which jury could conclude that Denver policymakers were deliberately indifferent in failing to train officers in off-shift implementation of always armed/always on duty policy); Allen v. Muskogee, 119 F.3d 837, 844 (10th Cir. 1997) (the need for different training as to how to approach armed, suicidal, mentally disturbed persons was so obvious and the inadequacy so likely to result in violation of constitutional rights that the policymakers of the City could reasonably be said to have been deliberately indifferent to the need,"); Zuchel v. City of Denver, 997 F.2d 730, 740–41 (10th Cir. 1993) (jury could find failure to implement recommended periodic live "shoot–don't shoot" range training constituted deliberate indifference); Walker v. City of New York, 974 F.2d 293, 300 (2d Cir. 1992) (addressing failure to train assistant district attorneys on their obligations under *Brady v. Maryland*, 373 U.S. 83 (1963)); Hopkins v. Andaya, 958 F.2d 881, 888 (9th Cir. 1992) (failure to train officer adequately with result that he allowed his baton to be taken from him and then killed an unarmed civilian, purportedly to save his own life); Davis v. Mason County, 927 F.2d 1473, 1483 (9th Cir. 1991) (ruling that failure to train officers in the legal limits of use of force constituted "deliberate indifference" to safety of inhabitants as a matter of law).

221. *See* Shain v. Ellison, 273 F.3d 56 (2d Cir. 2001) (strip search policy in jail); Easyriders v. Hannigan, 92 F.3d 1486 (9th Cir. 1996); Church v. City of Huntsville, 30 F.3d 1332 (11th Cir. 1994); Thomas v. County of Los Angeles, 978 F.2d 504 (9th Cir. 1992); Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547 (9th Cir. 1986); Md. State Conference of NAACP Branches v. Md. State Police, 72 F. Supp. 2d 560 (D. Md. 1999).

222. *See* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW COURTS REFORMED AMERICA'S PRISONS (Alfred Blumstein & David Farrington eds., 1998); OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION (1978); Chayes, Foreword, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Chayes, *supra* note 10 (discussing the role of courts in issuing mandatory injunctions); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980). For a recent discussion of these issues, see Karlan, *supra* note 10.

223. *See discussion infra* at Part IV.C.

heeded calls to eliminate the structural injunction,[224] it has imposed procedural hurdles that substantially erode the availability of the equitable remedy.

To secure injunctive or declaratory relief, a civil rights plaintiff must satisfy a number of justiciability requirements, including standing, ripeness, and case or controversy.[225] Standing doctrine is comprised of both constitutional and prudential limitations on the exercise of federal court jurisdiction. For many years, standing to seek equitable remedies rested on the plaintiff's "personal stake" in the controversy.[226] However, in *City of Los Angeles v. Lyons*, the Court imposed a stricter test, demanding a strong likelihood of recurrence of unconstitutional conduct.[227] Lyons was stopped by Los Angeles police officers for a traffic violation; the officers drew their guns, ordered Lyons to place his hands behind his head and, without provocation, placed him in a chokehold.[228] He lost consciousness and suffered damage to his larynx.[229]

Notwithstanding evidence that the chokehold had led to the death of sixteen suspects in Los Angeles (twelve of whom were minorities),[230] the Supreme Court ruled that Lyons had not proved a sufficient likelihood that he would again be subject to a police chokehold to make out a case or controversy on his request for an injunction.[231] The Court stated:

> In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also make the incredible assertion either (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose

224. *See* Missouri v. Jenkins, 515 U.S. 70, 123, 131 (1995) (Thomas, J., concurring) ("A structural reform decree eviscerates a State's discretionary authority over its own programs and budgets . . . ."). Some commentators have also been critical of the reform injunctive process. *See* ROSENBERG, *supra* note 31; Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979) (questioning federal courts intervention into state and local governmental matters); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1738–44 (1996); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121 (1996).

225. Standing requires that the plaintiff state an actual case or controversy in which he has a "personal stake." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 213–14 (2000); Bennett v. Spear, 520 U.S. 154, 162 (1997). Ripeness requires that the case is applied to the plaintiff. *See* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997). Mootness occurs when the case or controversy is not alive and active when the lawsuit is brought. *See Friends of the Earth, Inc.*, 528 U.S. at 212–13; Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.22 (1997).

226. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 499 (1975); Allee v. Medrano, 416 U.S. 802, 828–29 (1974).

227. City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983).

228. *Id.* at 97–98.

229. *Id.* at 98.

230. *Id.* at 115–16 (Marshall, J., dissenting).

231. *Id.* at 112.

of arrest, issuing a citation or questioning, or (2) that the City ordered or authorized police officers to act in such manner.[232]

The adverse impact on civil rights injunctions of the additional element of the standing calculus—the likelihood of future harm—has been substantial, but not fatal. The plaintiff can show a "credible" or "realistic" threat of future harm by proof that the harm was the product of a policy or practice of a governmental unit,[233] that the harm was visited upon individuals engaged in protected activity,[234] or proof of conduct violative of environmental protection or anti-discrimination laws.[235]

In some cases, the Supreme Court has appeared to broaden standing, a development that raises the question (that pervades the Court's overall approach to civil rights and criminal procedural remedies) of whether the federalism, separation of powers, and judicial restraint rationales are invoked to protect against judicial overreaching or whether the restrictions on remedies are intended as "bulwarks against *liberal* activism."[236] Consider, for example, the Court's recent affirmative action ruling in *Gratz v. Bollinger*,[237] a challenge brought by white applicants to the University of Michigan who had enrolled at other schools at the time they filed their complaint. Neither of the plaintiffs had applied again to the University and they alleged only that they intended to seek admis-

232. *Id.* at 105–06; *see also* Lewis v. Casey, 518 U.S. 343 (1996); Rizzo v. Goode, 423 U.S. 362, 379–80 (1976); O'Shea v. Littleton, 414 U.S. 488, 502 (1974); Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1040 (9th Cir. 1999) (en banc).

233. *See, e.g.*, *Ex rel.* Deshawn E. v. Safir, 156 F.3d 340, 345 (2d Cir. 1998) (finding standing because "[i]n contrast [to Lyons], the challenged interrogation methods in this case are officially endorsed policies"); Church v. City of Huntsville, 30 F.3d 1332, 1339 (11th Cir. 1994) (plaintiffs alleged a "policy, practice and custom" of harassing homeless persons); Am. Postal Workers Union v. Frank, 968 F.2d 1373, 1377 (1st Cir. 1992) ("In none of the Supreme Court cases addressing the question of standing to obtain equitable relief was the challenged practice a routine, daily procedure implemented as a matter of policy by the defendants."); Thomas v. County of Los Angeles, 978 F.2d 504, 508–09 (9th Cir. 1992) (finding standing where plaintiff alleged that "misconduct was condoned and tacitly authorized by department policy makers" and that repeated violations had occurred).

234. *See Church*, 30 F.3d at 1339 (granting homeless plaintiffs standing, since due to the "allegedly involuntary nature of their condition, the plaintiffs cannot avoid future 'exposure to the challenged course of conduct' in which the City allegedly engages"; *Thomas*, 978 F.2d at 508 ("[M]any victims purportedly did nothing to warrant detention or apprehension prior to the mistreatment."); Hernandez v. Cremer, 913 F.2d 230, 234–35 (5th Cir. 1990) ("The injury . . . did not result from an individual's disobedience of official instructions and [the plaintiff] was not engaged in any form of misconduct"); Nat'l Cong. for Puerto Rican Rights v. City of New York, 75 F. Supp. 2d 154, 161 (S.D.N.Y. 1999) ("The fact that plaintiffs were stopped while engaging in everyday tasks further illustrates a realistic risk of future harm.").

235. In *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167 (2000), the Court granted standing to plaintiffs in an environmental lawsuit challenging the pollution of a river. The Court ruled that there was "nothing 'improbable' about the proposition that a company's continuous and pervasive discharge of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms." *Id.* at 184 (citation omitted); *see also* Honig v. Doe, 484 U.S. 305, 322 (1988); *Thomas*, 978 F.2d at 508 (practices aimed at minorities).

236. *See* Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It's Still Moving!*, 58 U. MIAMI L. REV. 143, 146 (2003).

237. Gratz v. Bollinger, 539 U.S. 244 (2003).

sion if successful in the lawsuit.[238] Chief Justice Rehnquist stated that the standing requirement was satisfied on the allegation of an "intent to apply again,"[239] an assertion that had been rejected in previous cases as too "conjectural or hypothetical."[240] Under this test, plaintiffs who simply allege that they intend to engage in activities that will subject them to unlawful practices would have standing. That may be the proper standard, but it is a sharp departure from the Court's previous cases,[241] and the Court's willingness to intervene on the merits may well have turned on the political dimension of the substantive rights at stake.[242]

The Court has also limited private enforcement of congressional legislation. Early cases had endorsed a liberal application of the private cause of action to enforce legislation by not demanding express congressional authorization.[243] In *Cannon v. University of Chicago*,[244] the Court had approved of lower court decisions holding that section 601 of Title VI of the Civil Rights Act of 1964, barring intentional discrimination by race or national origin by federally funded programs or activities, could be enforced by private plaintiffs. In *Alexander v. Sandoval*, however, the Court ruled that regulations adopted by a number of federal agencies

238. *Id.* at 260–64.

239. *Id.* at 261.

240. *Id.* at 285 (Stevens, J., dissenting) (citing O'Shea v. Littleton, 414 U.S. 488, 494 (1974)); *see also* Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1044 (9th Cir. 1999) (en banc) (rejecting standing on claim of highway racial profiling even though the plaintiff asserted an intent to use that highway in the future).

241. *Gratz*, 539 U.S. at 285; *see also* Shaw v. Reno, 509 U.S. 630, 643 (1993) (granting standing in racial gerrymandering case because classifications "threaten to stigmatize"). Commentators have asserted that traditional standing requirements were simply ignored in the voting cases. *See* John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576, 581 (1997); Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2285–86, 2286 n.48 (1998); Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 278 (describing the Court's "complete disregard for standing requirements" in voting rights cases).

242. Some doctrines appear to be driven not by concern for state and local government operations or by separation of powers concerns, but rather by the "liberal" or "conservative" results that will flow from the decisions. *See, e.g.*, Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 474 (2002) ("[The Court's] considerations of federalism are outweighed by interests in advancing a substantively conservative constitutional agenda."). For example, the Court has rejected habeas claims where the state court issued an ambiguous ruling as to whether it ruled on federal grounds, *e.g.*, Ylst v. Nunnemaker, 501 U.S. 797, 806 (1991), but was willing to hear state appeals from similarly ambiguous state court judgments under a presumption that the state court relied on federal grounds. Michigan v. Long, 463 U.S. 1032, 1041 (1983); *see* Amar, *supra* note 10, at 1473 n.201 (labeling as "doublespeak" the Court's exacting standards regarding waiver of Eleventh Amendment immunities and its permissive standards with respect to waiver of personal constitutional rights in the criminal procedural context); Chemerinsky, *supra* note 200, at 553 ("Rehnquist Court's use of federalism has been entirely about limiting Congress' powers, not about empowering state and local governments generally."); D. Karlan, *supra* note 10, at 186; Kramer, *supra* note 39, at 122 n.515; Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 229 (2003); *see also* Bush v. Gore, 531 U.S. 98, 103–04 (2000).

243. *See* J.I. Case, Co. v. Borak, 377 U.S. 426, 433 (1964) ("[U]nder the circumstances it is the duty of the courts . . . to provide such remedies as are necessary to make effective the congressional purpose.").

244. Cannon v. Univ. of Chi., 441 U.S. 677 (1979).

under section 602 of Title VI (authorizing federal agencies to "effectuate" the provisions of section 601) which prohibited both intentional discrimination and conduct that had a discriminatory impact, could not be enforced by a private cause of action.[245]

In *Gonzaga University v. Doe*, the Court went further and ruled that rights created by Congress pursuant to its spending powers in the Family Education Rights and Privacy Act were not enforceable by a private cause of action or directly under § 1983, absent unambiguous congressional authorization.[246] Inherent in this approach to enforcement of congressional legislation is a built-in gap between rights and remedies. The Court has followed a similar approach in narrowing the implied constitutional cause of action, first recognized in *Bivens*. In a series of cases, the Court has denied a private cause of action for constitutional violations by federal officials on the grounds that "special factors" counsel against such claims in the absence of Congressional grants of jurisdiction or because Congress has provided some other remedies for the violations.[247] Whatever the merits of the Court's current standards for congressional authorization of private causes of action, the result is to preclude private enforcement and to leave responsibility for enforcement in the hands of the federal government. Under this regime, even where the administration is sympathetic to the goals of the statutes, scarcity of enforcement resources will lead to underenforcement; where there is hostility to the statutes, enforcement can be almost nonexistent.[248]

Federalism principles have also been invoked to close federal courthouse doors to civil rights plaintiffs, pending state or administrative proceedings. In *Younger v. Harris*, the Court ruled that federal courts should abstain from hearing claims of unconstitutional state criminal prosecutions,[249] and has since extended the abstention doctrine to state-initiated civil enforcement proceedings,[250] state administrative proceedings,[251] and to suits between private parties where substantial state interests are involved.[252]

245. 532 U.S. 275, 286 (2001).

246. 536 U.S. 273, 280 (2003).

247. *See, e.g.,* United States v. Stanley, 483 U.S. 669, 678 (1987) (holding even in case of gross violations, to bar claims against government based on misconduct of military officials under FTCA because of evidence of Congressional intent); Chappell v. Wallace, 462 U.S. 296, 304 (1983) (finding no claim for racial discrimination in the Navy); Bush v. Lucas, 462 U.S. 367, 378 (1983) (no *Bivens* claim for whistle-blower in light of alternative employment remedies). See also Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2002), where the Court refused an implied cause of action by a federal prisoner against a private prison provider for failure to render necessary medical care.

248. *See* Three Rivers Ctr. For Indep. Living, Inc. v. Housing Auth. Pitts., 382 F.3d 412, 417 (3d Cir. 2004) (noting HUD's failure to enforce ADA provisions); *Enforcement of Civil Rights Law Declined Since '99, Study Finds*, N.Y. TIMES, Nov. 22, 2004, at A17; Karlan, *supra* note 10, at 195.

249. 401 U.S. 37, 53 (1971).

250. Huffman v. Pursue, Ltd., 420 U.S. 592, 607 (1975).

251. *E.g.*, Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 433 (1982) (stating that state bar disciplinary proceedings not subject to federal intervention).

252. *See, e.g.*, Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 14 n.12 (1987).

The Court has more recently emphasized that federal statutory jurisdiction should be presumed mandatory and that the abstention doctrine does not preclude suits for equitable relief even in the face of a state initiated declaratory judgment action,[253] but the abstention doctrine continues to limit access to the federal courts.

Finally, the Court has compromised civil rights injunctive litigation by its decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*.[254] The Civil Rights Attorney's Fees Awards Act of 1976[255] has been an indispensable tool in providing civil rights plaintiffs access to the federal courts. The Act encourages lawyers to litigate valid complaints, particularly with respect to injunctive actions.[256] Some civil rights organizations have succeeded in raising funds to support this type of litigation, but without the engagement of private lawyers, the pool of cases would shrink considerably.

The Act had been construed by the lower federal courts to authorize payment of fees to plaintiffs where the legal action was the "catalyst" for a "voluntary" change in practice or policy by the defendant.[257] However, in *Buckhannon*, the Court ruled that plaintiffs are not entitled to fees on a "catalyst theory" of recovery, and held that the term "prevailing party" requires a judgment, court-approved settlement, or some other court order that formally changes the legal relationship between the parties.[258] This ruling permits defendants to litigate equitable claims to the point of judgment, and then avoid fees by consenting to the relief requested. The Court's hostility to legislation that was intended to broaden access to the courts in civil rights cases is reflected in Justice Scalia's comments regarding the comparative interests at stake:

> It could be argued, perhaps, that insofar as abstract justice is concerned, there is little to choose between the dissent's outcome and the Court's: If the former sometimes rewards the plaintiff with a phony claim (there is no way of knowing), the latter sometimes denies fees to the plaintiff with a solid case whose adversary slinks away on the eve of judgment. But it seems to me the evil of the former far outweighs the evil of the latter. There is all the difference in the world between a rule that denies the *extraordinary boon*

253. New Orleans Public Serv., Inc. v. Council of New Orleans, 491 U.S. 350 (1989).

254. 532 U.S. 598 (2001).

255. 42 U.S.C. § 1988 (2000).

256. *See* Hernandez v. Kalinowski, 146 F.3d 196, 200 (1998).

257. *Buckhannon*, 532 U.S. at 627–28 (Ginsburg, J., dissenting).

258. *Id.* at 610; *see also* Richard S. v. Dep't of Developmental Servs. of Cal., 317 F.3d 1080, 1089 (9th Cir. 2003) (settlement agreement record reflected that parties intended the agreement to be enforceable, even without a consent decree or court judgment); Truesdell v. Phila. Hous. Auth., 290 F.3d 159, 165–66 (3d Cir. 2002) (settlement agreement, approved by court and titled "Order," that gave plaintiff right to judicial enforcement was sufficient to support award of fees); Smyth *ex rel.* Smyth v. Rivero, 282 F.3d 268, 273, 281–85 (4th Cir. 2002) (preliminary injunction and later administrative change of challenged policy that led to dismissal on mootness grounds not sufficient to support claim for fees; court suggests that incorporation of terms of agreement into dismissal order or judicial retention of jurisdiction to enforce settlement would be a basis for fee application).

> *of attorney's fees* to some plaintiffs who are no less "deserving" of them than others who receive them, and a rule that causes the law to be the very instrument of wrong—exacting the payment of attorney's fees to the *extortionist*.[259]

There has been one significant counter-development with respect to equitable intervention. In 1994, in response to the Rodney King incident, Congress authorized the United States, through the Attorney General, to bring civil actions for declaratory or equitable relief against police departments engaged in a pattern or practice of deprivation of constitutional or statutory rights.[260] The statute provides potentially broad grounds for intervention and relief, but political realities have muted the law's potential reach.[261]

The Department of Justice and private litigators have crafted consent decrees and other settlement agreements that mandate systemic institutional reforms.[262] Police departments are required to collect and maintain in electronic form a wide range of information that is critical to the effective internal management of departments and to external monitoring of abuse and corruption issues. Decrees prohibit racial profiling and require the race of the suspect and the reasons for the police action to be recorded for all stops, searches, and arrests.[263] Further, police departments are required to computerize their record-keeping operations in a manner that creates accessible fields of relevant information and to initiate early warning systems to alert commanders and outside monitors of troublesome trends or performances.[264]

C. Congressional Door Closing Measures: The Prison Litigation Reform Act

While the Court has viewed with a jaundiced eye federal legislation pursuant to section 5 of the Fourteenth Amendment that is intended to broaden the scope of civil rights remedies, it has had few reservations with respect to legislation that closes the courthouse doors to highly dis-

259. 532 U.S. at 618 (concurring opinion) (emphasis added). Justice Scalia does not explain how the availability of catalyst fees make governmental defendants with meritorious defenses vulnerable to contrived demands, nor does he provide any examples of such cases. Moreover, because Congress intended to encourage civil rights litigation through the award of fees, a judicial rebalancing of the "evils" of fee shifting is highly questionable.

260. 42 U.S.C. § 14141 (2000). For a discussion of the implementation of the Act by the Department of Justice, see Armacost, *supra* note 203, at 525–31; Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1404–24 (2000); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815 (1999).

261. Livingston, *supra* note 260, at 841–50.

262. Consent Decree at 3–13, United States v. City of Pittsburgh, C.A. No. 97-354 (W.D. Pa. 1997) *available at* http://www.usdoj.gov/crt/Split/dowments/pitts.htm; Consent Decree at 9–30, United States v. State of New Jersey, C.A. No. 99-5970 (D.N.J. 1999), *available at* http://www.usdoj.gov/crt/split/documents/jerseysa.htm.

263. *See, e.g.*, Consent Decree at 6–29, State of New Jersey (No. 99-5970).

264. *See* Consent Decree at 8, City of Pittsburgh, (No. 97-354).

favored groups. Over the years, there have been congressional attempts to limit the jurisdiction and remedial powers of the federal courts with respect to cases involving school busing, abortion, and school prayer.[265] The question of whether Congress can selectively limit jurisdiction and remedial powers of the federal courts has been the subject of sharp debate,[266] but it has remained largely academic since Congress had failed to enact such legislation.

In the 1990s, Congress approached the issue from a slightly different perspective, but with far reaching consequences. Targeting groups without political power or support, Congress imposed wide-ranging limitations on access to the courts by prisoners seeking to litigate conditions of confinement cases,[267] inmates seeking to challenge convictions by means of federal habeas corpus,[268] and immigrants seeking to challenge government efforts at deportation and incarceration.[269] And, as part of an effort to deprive plaintiffs with disfavored claims, Congress also sought to limit the types of cases litigated and judicial relief requested by legal services lawyers.[270] There is a sad irony in the fact that Congress (and the courts which have sustained and implemented these restrictive conditions) have selectively limited rights for these "discrete and insular minorities."[271]

The Prison Litigation Reform Act (PLRA) limits the injunctive powers of federal courts in prisoner rights litigation;[272] requires prisoners, as opposed to all other civil rights plaintiffs, to exhaust administrative remedies;[273] reduces attorney's fees to prevailing plaintiffs;[274] creates a "three strike" provision disallowing in forma pauperis filings where courts have earlier dismissed actions by that inmate;[275] and precludes

265. *See, e.g.*, Mark Tushnet & Jennifer Jaff, *Why the Debate Over Congress' Power to Restrict the Jurisdiction of the Federal Courts Is Unending*, 72 GEO. L.J. 1311, 1319–20 nn.40–42 (1984) (citing numerous proposed federal laws aimed at restricting federal judicial review over cases involving school busing, abortion, and school prayer).

266. *See, e.g.*, Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Hart, *supra* note 85; Symposium, 86 GEO. L.J. 2445 (1998).

267. Prison Litigation Reform Act, 42 U.S.C. § 1997(e) (2004); 28 U.S.C.§ 1915 (2005); 18 U.S.C. § 3626 (2004).

268. *See* Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

269. *See id.*; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996). For commentary on this door closing legislation, see Symposium, 86 GEO. L.J. 2445 (1988); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L. J. 1 (1997).

270. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 548–49 (2001) (holding unconstitutional statute that prevented federally funded legal services lawyers from challenging welfare laws).

271. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

272. 18 U.S.C. § 3626(b); *see* Miller v. French, 530 U.S. 327 (2000) (ruling automatic stay provision of PLRA suspending prison conditions injunctions does not violate separation of powers principles).

273. Booth v. Churner, 532 U.S. 731 (2001). The exhaustion requirement has been interpreted as well to incorporate a procedural default provision which precludes any civil action for failure to timely exhaust prison grievance procedures. *See, e.g.*, Pozo v. McCaughtry, 286 F.3d 1022 (7th Cir. 2002).

274. 42 U.S.C. § 1997(d) (2003).

275. 28 U.S.C. § 1915 (1994).

compensatory damage awards for "mental or emotional injury" from proven constitutional violations where the inmate has not suffered "physical injury."[276]

The physical injury requirement provides a revealing example of the Act's limitations on recovery even for proven constitutional violations. In *Hudson v. McMillian*, the Court ruled that excessive force claims could be established without proof of serious bodily injury, noting that certain malicious conduct (for example, threatening to kill or torture an inmate) would otherwise not be actionable.[277] Of course, aside from claims of denial of medical care or excessive force, physical injury will be rare. Constitutional violations caused by censorship, punishment for protected expressions, or religious or racial discrimination will not normally result in "physical injury" and would normally be measured by emotional pain and suffering.[278] Yet, under the PLRA, even the most malicious or unjustified First Amendment or equal protection violations will be insulated from a damages remedy (and in most cases from any remedy of any kind).[279]

The limitations on attorney's fees are similarly structured to deter legitimate constitutional claims. The Civil Rights Attorney's Fees Awards Act entitles parties who prevail in civil rights actions to a reasonable attorney's fee.[280] The Act thus ensures that the injured party would be made whole, since the compensation for the transgression of constitutional rights would not be diminished by the cost of proving the wrong. The PLRA modifies the fee shifting provisions of § 1988 in three ways: by capping the hourly rate at 150% of the rates for compensation of attorneys appointed to represent defendants in criminal cases, by capping the amount of the award of attorney's fees at 150% of any money judgment, and by requiring that up to 25% of any money judgment obtained by a prisoner must be applied to offset the amount of attorney's fees awarded against the defendant.[281] The hourly rate and the propor-

276. 42 U.S.C. § 1997e(e) (2003). The Act has reduced prisoner litigation, see EISENBERG, *supra* note 3, at 539–47 (prisoner civil filings decreased from 40,000 in 1995 to 20,000 in 2001), but there is a debate over whether legitimate claims as well as frivolous suits have been eliminated. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1633–64 (2003).

277. 503 U.S. 1, 7–10 (1992).

278. *See* Carey v. Piphus, 435 U.S. 247 (1978).

279. *See, e.g.*, Royal v. Kautzky, 375 F.3d 720 (8th Cir. 2004); Allah v. Al-Hafeez, 226 F.3d 247 (3d Cir. 2000) (free exercise of religion claim). Indeed, one court applied this provision to a claim for unlawful arrest that was unrelated to the plaintiff's incarcerated status. Napier v. Preslicka, 314 F.3d 528, 532–34 (11th Cir. 2002), *rehearing denied*, 331 F.3d 1189 (11th Cir. 2003). *But see* Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998) (physical injury requirement does not apply to First Amendment claims).

280. 42 U.S.C. § 1988 (2000). By authorizing "fee shifting" in civil rights actions, Congress meant to stimulate the enforcement of the civil rights laws by giving the private bar a financial incentive to provide representation to those with meritorious claims and who would otherwise lack the means to vindicate their rights. Missouri v. Jenkins, 491 U.S. 274 (1989); City of Riverside v. Rivera, 477 U.S. 561 (1986); Hensley v. Eckerhart, 461 U.S. 424 (1983).

281. *See* 42 U.S.C. § 1997(e) (2003).

tionality caps drop the potential fees below the level of what is reasonable for private counsel.[282]

The only prisoners who are affected by the fee restrictions are those whose claims prove to be meritorious. By reducing the amount of attorney's fees that a prevailing prisoner can recover, Congress did nothing to deter frivolous lawsuits,[283] but the legislation has surely discouraged private lawyers from taking meritorious prisoner civil rights cases by eliminating the potential for a reasonable fee. Because of the inherent difficulties of prevailing before a jury on even well-founded prisoner claims, facially meritorious cases afford no assurance of a favorable verdict and even less assurance of a damage award commensurate with the gravity of the wrong or severity of the injury. By adding to the low probability of any fee award the prospect of a fee which is less than reasonable, the PLRA substantially reduces the already modest inducement to lawyers to represent prisoners with meritorious claims.[284]

The PLRA attorney's fees provision has been sustained by the courts of appeals as rationally related to the purpose of discouraging frivolous prisoner litigation and preserving limited state resources.[285] By contrast, as we have seen, Congressional efforts to expand remedies for civil rights violations are far more strictly scrutinized.[286]

V. REMEDIES IN THE CONTEXT OF CRIMINAL PROSECUTIONS

The network of remedies for constitutional violations committed by police, prosecutors, and judges in criminal prosecutions is an integral part of the remedial framework for constitutional infringements and must be considered in evaluating the overall effectiveness and fairness of the larger remedial framework. Criminal procedural remedies are grounded on personal right and deterrence rationales similar to the justifications for civil remedies, but the forms of the remedies—exclusion of evidence, dismissal of criminal charges, and the reversal of convictions—are quite distinct in form and application from their civil counterparts. The Court's constitutional criminal procedure remedial jurisprudence reflects many

282. At current CJA rates, the *maximum* hourly fee for prisoner litigation is $135/hour, an amount lower by several degrees than the standard hourly rates charged by even modestly experienced lawyers in the legal markets. *See, e.g.*, Smith v. Phil. Hous. Auth., 107 F.3d 223, 224–26 (3d Cir. 1997); Black Grievance Comm. v. Phil. Elec. Co., 802 F.2d 648, 652–53 (3d Cir. 1986).

283. Santana v. United States, 98 F.3d 752, 755 (3d Cir. 1996) ("Congress enacted the PLRA primarily to curtail [frivolous] claims brought by prisoners under 42 U.S.C. § 1983 and the Federal Tort Claims Act.").

284. *See* Tabron v. Grace, 6 F.3d 147, 157 n.6 (3d Cir. 1993) ("[T]here are few attorneys who are willing to provide free legal assistance to prisoners in civil rights cases. . . . The possibility of obtaining attorneys fees under 42 U.S.C. § 1988 is generally not a sufficient financial inducement, for fees thereunder depend upon success in the litigation, and the prospective amount of recovery in most prisoner civil rights cases is usually small." (citing Howard S. Eisenberg, *Rethinking Prisoner Civil Rights Cases*, 17 S. ILL. U. L.J. 417, 462–66, 477 (1992))).

285. *See, e.g.*, Johnson v. Daley, 339 F.3d 582, 583 (7th Cir. 2003) (en banc).

286. *See supra* notes 189–98 and accompanying text.

of the policy concerns that animate the debate over civil rights remedies, including cost-benefit analysis of sanctions against law enforcement officers, federalism, separation of powers, and due process versus crime control considerations.

In assessing the role and scope of criminal procedural remedies, some threshold observations are appropriate. First, the remedies that are available are limited to a specific class of persons—those accused of crime. Further, within that class, certain violations of rights will not be subject to any criminal procedural remedy or sanction. For example, Fourth Amendment violations that do not result in the seizure of evidence, instances of excessive or unreasonable force, and coercive interrogation techniques that run counter to Fifth Amendment protections (but do not result in statements that are introduced at trial), cannot be remedied in the criminal process. These claims are relegated to the civil law for remedies. At the same time, for many defendants within the criminal justice system, the criminal procedural remedies will be exclusive. Thus, for example, by reason of the doctrine of absolute judicial immunity, any remedy for judicial or prosecutorial misconduct will reside, if at all, in the criminal process.

Second, remedies for the criminal defendant are burdened by doctrines of standing,[287] prejudice,[288] harmless error,[289] and exceptions to the exclusionary rule[290]—all of which mitigate the "consequences to the government in criminal prosecutions of the unconstitutional behavior of law enforcement agents."[291] Moreover, as in the civil rights remedial framework, application of these doctrines has the distinct potential of leading prosecutors and police to tailor their actions to the sub-constitutional level in the real world of law enforcement and criminal trials.

A. Suppression of Evidence

The exclusionary rule applies to evidence seized in violation of the Fourth Amendment, including certain "fruits" of these violations,[292] to confessions obtained in violation of the Fifth Amendment right against

287. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 143 (1978) (requiring defendant to have reasonable expectation of privacy to have standing to object to illegal search or seizure).

288. *See, e.g.*, United States v. Bagley, 473 U.S. 667, 682–83 (1985) (limiting *Brady* doctrine requiring disclosure of exculpatory evidence to "material" evidence, that which would create a "reasonable probability" of a different result at trial).

289. *See* Kamin, *supra* note 10, at 85.

290. *See, e.g.*, United States v. Leon, 468 U.S. 897, 926 (1984) (announcing the good faith exception for searches conducted pursuant to a warrant).

291. Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2504 (1996).

292. Mapp v. Ohio, 367 U.S. 643, 658 (1961); Wong Sun v. United States, 371 U.S. 471, 484–85 (1963). Of course, this exclusionary rule has been applicable to federal prosecution ever since *Weeks v. United States*, 232 U.S. 383, 398 (1914).

self-incrimination or Sixth Amendment right to counsel,[293] and to identification evidence obtained in violation of the Sixth Amendment right to counsel or the due process right to be free from unnecessarily suggestive and unreliable identification procedures.[294] The broad pronouncements of the Supreme Court in the cases initially establishing these rights have been narrowed,[295] but for the most part, the Court has not abandoned the foundational principles of these decisions. Instead, the Court has reduced the application of these rights by restricting the exclusionary rule.

1. The Fourth Amendment Exclusionary Rule

The *Mapp* Court, in ruling that the exclusionary rule was applicable to state prosecutions and was of a constitutional dimension, determined that the rule protected a personal Fourth Amendment right of the defendant to suppress illegally obtained evidence.[296] The right to privacy is "constitutional in origin . . . [and] is enforceable in the same manner . . . as other basic rights secured by the Due Process Clause."[297] Soon, however, the Court rejected the notion that exclusion was a matter of constitutional right and determined that its purpose (and therefore its limits) would be defined primarily by the need for deterrence, an issue that has become a matter of cost-benefit analysis for the Court.[298] Thus, in several areas, including grand jury proceedings,[299] habeas corpus actions,[300] "good faith" applications for search warrants,[301] and deportation hearings,[302] the Court has refused to order suppression of evidence for constitutional violations on the theory that deterrence would not be served.

293. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 435 (2000); Edwards v. Arizona, 451 U.S. 477, 485 (1981).

294. Manson v. Braithwaite, 432 U.S. 98, 114 (1977); United States v. Wade, 388 U.S. 218, 235–37 (1967).

295. *See, e.g.*, California v. Hodari D., 499 U.S. 621, 623–24 (1991) (Fourth Amendment not applicable to police attempt to seize individual with no probable cause, where seizure is not effectuated); Oliver v. United States, 466 U.S. 170, 176 (1984) (no reasonable expectation of privacy in "open fields," even those marked with no trespassing signs); Smith v. Maryland, 442 U.S. 735, 741 (1979) (no reasonable expectation of privacy in the numbers one dials on their phone); United States v. Ash, 413 U.S. 300, 317 (1973) (restricting right to post-indictment identification procedures to physical line-ups, as opposed to photo-spreads); Kirby v. Illinois, 406 U.S. 682, 690 (1972) (restricting the right to counsel to post-indictment line-ups).

296. *Mapp*, 367 U.S. at 655–56.

297. *Id.* at 660. The Court pointed as well to considerations of deterrence and the protection of judicial integrity. *Id.* at 656.

298. *See, e.g.*, Dripps, *supra* note 168, at 7; Myron W. Orfield, *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 79 (1992); Christopher Slobogin, *Testifying: Police Perjury And What To Do About It*, 67 U. COLO. L. REV. 1037 (1996); Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1390 (1983).

299. United States v. Calandra, 414 U.S. 338, 351 (1974).

300. Stone v. Powell, 428 U.S. 465, 486–88 (1976).

301. United States v. Leon, 468 U.S. 897, 906–08 (1984).

302. INS v. Lopez-Mendoza, 468 U.S. 1032, 1042–43 (1984).

In *United States v. Leon*, the Court adopted a good faith exception to the exclusionary rule in search warrant cases.[303] Even where a search warrant fails to state probable cause, the Fourth Amendment does not require that the evidence be suppressed if the officer who secured the warrant believed in reasonable good faith that the facts asserted were sufficient to establish probable cause.[304] *Leon*'s good faith exception is functionally equivalent to the qualified immunity clearly established law standard, and brings with it the same risk that officers will conform their conduct to the remedial standard as opposed to the substantive requirements of probable cause. The Court has also created specific exceptions to the exclusion of evidence, including the doctrines of "inevitable discovery"[305] and "independent source"[306] and the use of improperly seized evidence to impeach a testifying defendant.[307]

Whether these exceptions are justified on the ground that suppression of relevant evidence cannot advance deterrence interests where police have acted in good faith, if the goal is to avoid suppressing relevant evidence at criminal trials, and at the same time to protect the values of the Fourth Amendment, one would expect that other remedies for constitutional violations would be strengthened to compensate for limitations on the exclusionary rule. To the contrary, as we have seen, the Court has significantly restricted civil remedies for constitutional violations.[308] Indeed, while the Court has stressed the deterrence rationale of the exclusionary rule, it has refused suppression of evidence where the rule would be most effective—when an official acts with the intent of violating the Fourth Amendment.[309]

2. The Fifth Amendment

The status of *Miranda* as a constitutionally based prophylactic rule makes it difficult to draw a precise line between substantive changes in doctrine and remedial limitations. Where *Miranda* has been held not to apply for lack of "custodial interrogation"[310] or ambiguous requests for

303. 468 U.S. at 922 (1984).

304. *Id.* at 919–20.

305. *See* Nix v. Williams, 467 U.S. 431 (1984).

306. Murray v. United States, 487 U.S. 533 (1988).

307. United States v. Havens, 446 U.S. 620 (1980).

308. Further, if we were able to perfectly calibrate nonsuppression deterrents to improper arrests, searches, and seizures, privacy would still trump "truth," which is exactly the consequence envisioned by the Fourth Amendment. *See* Yale Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66 (1978); Stewart, *supra* note 298, at 1389–96.

309. *See* Nix v. Wiliams, 467 U.S. 431, 444 (1984) (inevitable discovery doctrine permits admission of evidence even where officer deliberately violated defendant's rights); United States v. Payner, 447 U.S. 727, 731–32 (1980) (deliberate violation of rights of third party with intent to obtain evidence against defendant is not subject to suppression remedy even under federal court's supervisory powers).

310. *See, e.g.*, Rhode Island v. Innis, 446 U.S. 291, 302 (1980) (holding that suggestive conversation between officers in the presence of the detainee did not constitute questioning).

counsel,[311] or where "public safety" or other special law enforcement factors are present,[312] the decisions appear to be limitations on the substantive scope of the protections. Other restrictions are more clearly remedial in nature—for example, the refusal to apply the exclusionary rule to any evidence except the statements obtained in violation of *Miranda,*[313] and the broad exception to the exclusionary rule for *Miranda* violations where the evidence is used to impeach testifying defendants.[314]

However classified, these doctrinal limitations not only diminish the scope of *Miranda* protections, but provide interrogators with incentives to conduct questioning "outside Miranda."[315] Police detectives in some jurisdictions deliberately do not provide warnings to suspects or, where suspects invoke their rights, continue to interrogate them without counsel.[316] The first method provides a means of obtaining a statement (concededly inadmissible in court), after which the suspect is given the warnings, with the expectation that he will provide the same statement. This tactic was at issue last term in *Missouri v. Siebert*, and the Court ordered that all statements be excluded.[317] Justice Kennedy's concurring opinion emphasized the deliberate actions of the officer to avoid the very point of *Miranda* warnings.[318] However, the Court did not expressly rule out all such deceptive practices and we can expect that creative police officials and prosecutors will continue to attempt to find ways to avoid the *Miranda* ruling.[319]

In a related development, the Court has ruled that the Fifth Amendment provides no basis for a civil remedy for even a physically coerced confession unless the confession was actually used in a criminal

311. Davis v. United States, 512 U.S. 452, 455–59 (1994) (ruling that defendant who stated, "Maybe I should talk to a lawyer," did not speak with sufficient clarity to require that interrogation be halted).

312. *See* New York v. Quarles, 467 U.S. 649, 657 (1984).

313. United States v. Patane, 124 S. Ct. 2620, 2622 (2004); *see also* United States v. Ceccolini, 435 U.S. 268, 279–80 (1978) (placing restrictions on exclusionary rule with respect to witnesses secured as a result of Fourth Amendment violations).

314. Oregon v. Hass, 420 U.S. 714, 722–23 (1975); Harris v. New York, 401 U.S. 222, 225–26 (1971).

315. KAMISAR *ET AL.*, *Questioning "Outside* Miranda," MODERN CRIMINAL PROCEDURE 802 (10th ed.).

316. *See* Albert Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1442–43 (1987) (advice that could be provided to police by Holmesian "badman").

317. Missouri v. Seibert, 124 S. Ct. 2601, 2613 (2004).

318. *Id.* at 2614 (Kennedy, J., concurring).

319. *See, e.g.*, KAMISAR, ET AL., 2004 SUPPLEMENT TO MODERN CRIMINAL PROCEDURE 127 (10th ed.):

> Suppose, a week after *Seibert* was decided, a deputy district attorney told a group of officers attending a police training session the following: "don't write off the interrogation tactics used in Seibert. You can continue to use the same deliberate two-step questioning technique used in that case and still get the postwarning statements admitted into evidence. . . . (1) [C]all for a three or four-hour break between the first and second questioning session instead of the 20-minute break that took place in Seibert or (2) have a different police officer resume the questioning after the break instead of using the same officer who did the questioning in the prewarning session or (3) after resuming questioning, be careful not to confront the suspect with the same incriminating statement(s) she made at the first questioning session.

prosecution.[320] This ruling protects an official from civil sanctions for intentional misconduct unless the suspect can establish a substantive due process violation by showing conduct that "shocks the conscience," a standard that is the most demanding of all of the tests prescribed by the Court for constitutional culpability.[321]

Finally, there is good reason to be highly skeptical of the process by which the courts in criminal cases determine whether constitutional criminal procedural violations have occurred. There are a number of factors that can distort the adjudication of constitutional criminal procedural claims, including police perjury,[322] the police code of silence,[323] and the reality that the suppression of evidence may terminate or seriously undermine a prosecution of a guilty person for a serious crime. These factors can lead even the most conscientious and even-handed judges to make fact-findings that justify denial of a remedy where the issues of credibility seem to clearly favor the plaintiff.[324]

B. Limitations on Federal Habeas Corpus

Court decisions and Congressional reformulation of the federal habeas corpus statute have resulted in the imposition of a number of procedural and substantive limitations on federal habeas corpus remedies. The procedural minefield that a petitioner must navigate, with its complex barriers of time limitations, exhaustion of state remedies, procedural defaults, and harmless error analysis is daunting, and in many cases precludes a court from reaching the merits of the claim.[325] But for present purposes, I limit my comments to the remedial consequences of retroactivity doctrine and the limits on the scope of review of state court constitutional adjudications.

For many years, the Supreme Court struggled with the issue of retroactive application of new constitutional doctrine in the criminal procedure arena. In the period immediately following the Court's decisions in *Mapp*, *Miranda*, and *Gideon*, retroactive application was subject to a multipart test, which required an examination of the purposes of the rule, the degree to which law enforcement had relied on previous doctrine, and the overall effect on the administration of justice.[326] Having opened the door to nonretroactive application, the Court would soon be faced

320. Chavez v. Martinez, 538 U.S. 760, 767 (2003) (rejecting Fifth Amendment basis for damages claim where confession not used at trial).

321. *See, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833, 846–50 (1998).

322. *See, e.g.*, Slobogin, *supra* note 298.

323. *See, e.g.*, Thomas v. City of New Orleans, 687 F.2d 80, 82–83 (5th Cir.1982); SKOLNICK & FYFE, *supra* note 204, at 108–12; Chin & Wells, *supra* note 208, at 250–56.

324. *See, e.g.*, Slobogin, *supra* note 298.

325. *See, e.g.*, RANDY HERTZ & JAMES LIEBERMAN, FEDERAL HABEAS CORPUS, PRACTICE AND PROCEDURE 107–321 (3d ed. 1998).

326. *See* Stovall v. Denno, 388 U.S. 293, 297 (1967); Linkletter v. Walker, 381 U.S. 618, 636–38 (1965).

with a persistent challenge to its methodology by Justice Harlan who proposed an approach that would require retroactive application to all cases on direct appeal of a "new" constitutional rule, but would largely deny such application to cases at the stage of collateral attack.[327]

The Supreme Court took the first step to implement this view of retroactivity in 1987 when it decided that new rules would always be applicable to cases not yet final on direct appeal, stating that any other approach would violate "basic norms of constitutional adjudication."[328] Then, in *Teague v. Lane*, where a federal habeas petitioner sought to argue that the Sixth Amendment prohibited a prosecutor from exercising peremptory challenges to deny the defendant a fair cross-section of the community, the Court denied review on the ground that a decision in favor of the petitioner on the merits would apply a new constitutional rule in a collateral proceeding.[329] The Court did recognize two exceptions to this nonretroactivity principle, but they are exceedingly narrow in scope.[330] A plurality of the Court went even further in stating that it would bar any federal habeas petition that itself would result in a new constitutional rule, on the theory that because the petitioner could not benefit by the decision, any ruling would amount to an advisory opinion.[331]

The Court has interpreted the new rule element of *Teague* to bar any claim that was not "*dictated* by [Supreme Court] precedent existing at the time the defendant's conviction became final."[332] Under this formulation, even where the new rule was a likely result from precedent or even the most reasonable interpretation of prior law, there is no retroactivity unless no other interpretation was reasonable.[333] In applying this standard, the Court has made specific reference to the qualified immu-

327. *See* Mackey v. United States, 401 U.S. 667, 688–89 (1971) (Harlan, J., dissenting); Desist v. United States, 394 U.S. 244, 258–69 (1969) (Harlan, J., dissenting).

328. Griffith v. Kentucky, 479 U.S. 314, 322–23 (1987).

329. 489 U.S. 288, 299–316 (1989). The plurality opinion was ultimately adopted by the Court. *See* O'Dell v. Netherland, 521 U.S. 151, 156–68 (1997); Saffle v. Parks, 494 U.S. 484, 487–95 (1990).

330. First, a rule would be retroactive if it placed "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 307 (quoting Mackey v. United States, 401 U.S. 607, 692 (1971)). Second, certain "watershed rules," but only those which implicate the fundamental fairness of the criminal proceeding could be applied retroactively. *Id.* at 311. The Court has rarely invoked either prong. *See, e.g.*, Sawyer v. Smith, 497 U.S. 227, 233–45 (1996) (rejecting retroactivity of rule of *Caldwell v. Mississippi*, 472 U.S. 320 (1985)).

331. *See Teague* 489 U.S. at 316. The Court fully adopted this position in *Saffle v. Parks*, 494 U.S. at 487–95.

332. *Id.* at 301 (emphasis added).

333. *See* Beard v. Banks, 124 S. Ct. 2504, 2512–15 (2004) (finding that the rule of *Mills v. Maryland*, 486 U.S. 367 (1988), was not compelled by existing precedent); *O'Dell*, 521 U.S. at 164–66 (stating that even where Court stated that result was "compelled" by precedent, it is still a new rule if a "reasonable jurist . . . would not have felt *compelled* to adopt the rule"); Lambrix v. Singletary, 520 U.S. 518, 527–39 (1997); Butler v. McKellar, 494 U.S. 407, 414–15 (1990) (holding that a law is "new" under *Teague* even though the Court had declared that it was "controlled" by precedent as this is not conclusive for the "new rule" determination). The Court has found a rule to be retroactive only once since *Teague*. *See* Penry v. Lynaugh, 492 U.S. 302, 313–19, 329–30 (1989) (holding that requiring juries in the capital sentencing context to consider mitigating evidence did not create a "new rule").

nity doctrine, noting that just as a court considering immunity should not consider the legal issue at a high level of generality in determining whether law was clearly established, a habeas court must also refrain from finding that an outcome was dictated by prior precedent announcing general principles of law.[334]

The habeas law became even more restrictive with the adoption in 1996 of the Antiterrorism and Effective Death Penalty Act (AEDPA), which limits the scope or review of state criminal convictions by permitting relief only where the state court ruling was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[335] Under this provision, a state court ruling that erroneously determines that there has not been a constitutional violation cannot be the basis for habeas relief if the state court ruling was reasonable.[336] Relief is precluded unless the state court decision rejects a Supreme Court precedent or principle in a case involving "materially indistinguishable facts" or the decision "unreasonably applies that principle to the facts of the . . . case."[337] This provision bars federal relief for unconstitutional state court convictions beyond those already barred by *Teague*.[338]

The combination of *Teague* preclusion of claims and AEDPA deferential review of state court judgments recasts habeas law. Vindication of federal rights is no longer the premise; rather, the role of habeas is to deter state courts from committing constitutional error. Because most cases involve questions of law that are at least debatable on some theoretical point, this approach, which reflects the "good faith" tests of immunity and the exclusionary rule, and which disables federal judges from reviewing such decisions, may well signal to state court judges and law enforcement officials that they need not be concerned about fairly applying constitutional standards in their actions and judgments. A standard of review that permitted relief where the rule was "clearly foreshadowed"[339] or where a reasonable jurist would have good reason to believe that the rule would be announced, would protect against unforeseeable

334. Sawyer v. Smith, 497 U.S. at 236 (1990) (citing Anderson v. Creighton, 483 U.S. 635, 639 (1987)).

335. 28 U.S.C. § 2254(d)(1) (2000).

336. *See* 28 U.S.C. § 2254(d)(1).

337. Williams v. Taylor, 529 U.S. 362, 413 (2000); *see also* Lockyer v. Andrade, 538 U.S. 63 (2003) (holding that the state court determination that the three-strike provision was not in violation of Eighth Amendment was reasonable); Woodford v. Visciotti, 537 U.S. 19, 24–27 (2002) (holding that the state court determination regarding whether lawyer's actions prejudiced defendant was not unreasonable).

338. There is debate as to whether the habeas court should even address the merits of the claim. *See, e.g.*, Bell v. Jarvis, 236 F.3d 149, 157 (4th Cir. 2000) (en banc) (finding that the court need not determine whether there was a violation when the merits of the claim were adjudicated in state court). Of course, as in the *Teague* cases, if the court does not decide the issue, it remains unresolved and a later state court decision on similarly incorrect, but not unreasonable constitutional theory, will again be insulated from review on federal habeas.

339. *See* Fallon & Meltzer, *supra* note 10, at 1816–17.

new decisions, but still encourage state courts to consider the development of constitutional law.

We have seen similar deference to law enforcement in the formulation of qualified immunity doctrine, where the Court has denied damages to plaintiffs when the defendant official violated constitutional principles that were not clearly established and in the good faith exception to the exclusionary rule for searches conducted pursuant to a warrant.[340] While the qualified immunity defense and the good faith exception are not as broad as *Teague*'s nonretroactivity and AEDPA's deferential standard of review,[341] these doctrines operate in a mutually reinforcing manner and over a broad spectrum of cases to preclude relief for constitutional violations.

C. The Harmless Error Doctrine

The harmless error doctrine has evolved into a complex set of standards for review of criminal convictions that differ depending upon both the form of review (direct or collateral) and whether the error is of constitutional dimension.[342] In brief, constitutional errors that are subject to a harmless error standard are grounds for reversal on direct review unless the appellate court is convinced beyond a reasonable doubt that the error was harmless.[343] By contrast, on collateral review in federal habeas corpus, the standard is more deferential and the constitutional error is deemed harmless unless it "had substantial and injurious effect or influence in determining the jury's verdict."[344] By its very nature, the doctrine will preclude remedies in a significant number of cases of constitutional violations.[345] Even if it is legitimate to deny the remedy of a new trial where the violation can with confidence be said to have had no meaningful impact on the verdict, it must be recognized that the defendant is left without any cognizable remedies. Absolute immunity will

340. *See supra* notes 22, 303–07 and accompanying text.

341. *See* Hope v. Pelzer, 536 U.S. 730, 742 (2002) (no immunity even in the absence of direct precedent where no reasonable official could believe that the conduct was permissible); *cf.* Sawyer v. Smith, 497 U.S. 227, 236 (1990) (comparing qualified immunity and habeas review standards).

342. *See, e.g.,* Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 422 (1980); Kamin, *supra* note 10, at 8 n.18 (listing articles); Stacy & Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM L. REV. 79, 82–83 (1988).

343. Chapman v. California, 386 U.S. 18, 24 (1967). Almost all trial errors are subject to harmless error review. *See* Arizona v. Fuliminante, 499 U.S. 279, 282 (1991) (coerced confessions can be harmless error). Certain "structural" errors, such as denial of self-representation, McKaskle v. Wiggins, 465 U.S. 168, 177–78 n.8 (1984), and right to a public trial, Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984), are not subject to harmless error analysis.

344. Brecht v. Abrahamson, 507 U.S. 619, 623 (1993).

345. As Fallon & Meltzer have observed, *supra* note 10, at 1773 n.224, "[t]he harmless error doctrine is by no means a minor remedial detail. In Judge Posner's arresting phrase, '[t]he expansive code of constitutional criminal procedure that the Supreme Court has created in the name of the Constitution is like the grapes of Tantalus, since the equally expansive harmless error rule in most cases prevents a criminal defendant from obtaining any benefit from the code.' United States v. Pallais, 921 F.2d 684, 692 (7th Cir. 1990)."

protect judges and prosecutors; qualified immunity will protect police officers involved in the prosecution; exhaustion principles will preclude any civil suit that would "necessarily imply the invalidity of [the] conviction;"[346] and equitable relief will be barred by standing and related principles.

Moreover, in defining constitutional doctrine, the Court has often included as an element of a violation, a prejudice component that operates as a kind of internal harmless error doctrine.[347] Thus, a Sixth Amendment claim of ineffective counsel requires the defendant to show both that the lawyer's conduct fell below professional standards and that the defendant was prejudiced, that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[348] Similarly, where the defendant claims a violation of her due process right to disclosure of exculpatory evidence, she must show that the nondisclosure was "material," that is, there would be a reasonable probability of a different result had it been disclosed.[349] And, under the Court's test for determining whether police identification procedures were unnecessarily suggestive and therefore in violation of due process, a court must consider whether the resulting identification was sufficiently "reliable" to permit its use at trial.[350] These "prejudice" standards are often determinative of whether a violation is established, and whether the decision to deny relief is made as a matter of substantive law or by means of remedial limitations—the same unconstitutional conduct has been insulated from a remedy. Moreover, by denying relief for lack of prejudice, the substantive rule loses some of its deterrent force since a prosecutor can decide to withhold exculpatory evidence on the gamble that a court will later find the evidence not to be "material," and an officer can use suggestive identification procedures knowing that a court will likely find any resulting identification to be reliable.

There is yet another dimension to the harmless error doctrine. The operation of this rule has the "capacity to make the separation of rights from remedies permanent" since a determination of harmless error, even though it is usually accompanied by a determination that there was a constitutional violation, does nothing to prevent the same type of violation in future cases.[351] Indeed, even where a prosecutor deliberately vio-

346. Heck v. Humphrey, 512 U.S. 477, 487 (1994).

347. *See* Brandon L. Garrett, *Innocence, Harmless Error and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35.

348. Strickland v. Washington, 466 U.S. 668, 694 (1984).

349. United States v. Bagley, 473 U.S. 667, 699–700 (1985); United States v. Agurs, 427 U.S. 97, 112–13 (1976).

350. Manson v. Brathwaite, 432 U.S. 98, 110 (1977).

351. Kamin, *supra* note 10, at 6. In cases involving "internal" harmless error rules, for example, ineffectiveness of counsel or denial of exculpatory evidence, the Court has suggested that a reviewing court is free to jump immediately to the issue of prejudice and not decide the issue of the conduct of the lawyer or prosecutor. *Strickland*, 466 U.S. at 697; *see also* United States v. Leon, 468 U.S 897, 924–

lates the law, harmless error will continue to prevent reversals if the error was not sufficiently prejudicial:

> Thus, while both qualified immunity and nonretroactivity disenfranchise early claimants in favor of later ones, harmless error functions very differently. Like the other two doctrines, it lowers the cost of innovation, at least if merits may be decided before the question of entitlement to a remedy. Unlike these other doctrines, however, harmless error does not have the capacity to change behaviors over time, because it does not contain a temporal element. An error that is harmless in case one will likely be harmless in later cases; while both qualified immunity and nonretroactivity ratchet up the pressure on state officers, harmless error does not.[352]

Harmless error is an expansive constitutional "safe harbor."[353] As Professor Carol Steiker has demonstrated, the doctrine is part of the counter-revolution in criminal procedure that leaves the substantive framework of earlier cases, but without viable remedies—here, by an "inclusionary rule" on appeal.[354]

VI. CONCLUSION

Remedial measures for the protection and vindication of constitutional rights will be effective to the degree that they compensate for individual violations, deter misconduct, and create a system that conforms the conduct of governmental officials to constitutional norms. The baseline of remedies should include the traditional civil remedies of damages and equitable relief, and the constitutional criminal procedural remedies that have evolved to protect the rights of suspects and defendants in the criminal process. However, a remedial paradigm built on alternative remedies can achieve these goals, without affording each theoretically available remedy in all cases.

The current remedial framework promises compensation, deterrence, and accountability, but in practice there are large and troubling gaps in each of these areas. Remedies have been restricted on the theory that other remedies would be available, but in too many cases the Court has failed to adjust the remedial scheme to ensure the viability of this substitution process. The Court appears to be satisfied with a process

25 (1984) (holding that the issue of good faith can be decided in some cases without determining whether there was a Fourth Amendment violation).

352. Kamin, *supra* note 10, at 61 (footnotes omitted).

353. Susan R. Klein, *Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1032 (2001).

354. Steiker, *supra* note 291, at 2504. Limitations on criminal procedural remedies do not only affect remedial rights in the criminal case setting. As I have explained, as a result of exhaustion, estoppel and related theories, the failure of the criminal defendant to secure relief in the criminal case will often preclude any civil rights action for the constitutional violation. Thus, the broader the limits on relief in the criminal context, the broader the preclusive effect will be on possible alternative remedies. Increasingly, the web that insulates police, prosecutors, judges and other public officials from remedial sanctions is one that permits no escape.

that addresses the most egregious of constitutional violations, but which denies compensatory damages in a significant portion of cases. Deferring to reasonable unconstitutional conduct not only denies relief to individual victims of unconstitutional conduct, but also creates a system in which law enforcement officials, prosecutors, and judges risk little in acting in accordance with the sub-constitutional standards that are a by-product of remedial restrictions. While substantive constitutional law is not frozen under this process, and courts continue to articulate the governing substantive standards, the mutually reenforcing limitations on and exceptions to traditional remedies have in some respects turned the Constitution into an honor code of conduct.

The paradox of expanding rights and limited remedies has not closed the door to civil rights claims. Thousands of civil claims are filed each year, others are settled without litigation, and in the criminal process, courts continue to exclude evidence and reverse convictions for unconstitutional conduct. But the numbers mask a trend to eliminate or severely restrict remedies in a significant number of cases. The fact that in the modern era federal courts have broadened substantive rights makes even more poignant the reciprocal limitations on remedies. Continued articulation of the governing constitutional standards will not be sufficient to hold government officials in check where the restrictions on remedies are pervasive. Remedial gaps may be inevitable, but the systemic manner in which the Court and Congress have restricted remedies for constitutional violations leaves increasingly intolerable voids in the essential protective shield of the Constitution.