ARTICLES

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

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The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment, and to ensure the victim adequate compensation.1

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INTRODUCTION

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

However, this position is undercut by the inability of many victims to obtain redress when government actors in the United States violate constitutional rights. Unfortunately, although U.S. substantive law does provide strong civil rights standards that match those found in international human rights law, the U.S. legal system simultaneously includes impediments to rights protection. One of the most serious impediments to the enforcement of human rights in the United States is the broad application of sovereign immunity to prevent liability or even suit against federal, state, and local governments and their officials. United States sovereign immunity rules, which include sovereign immunity for the government as well as qualified immunity for individual officials, protect government actors from suit in a broad swath of cases. As a result, victims of constitutional violations are often left without an opportunity to obtain compensation for the harm they have suffered, and civil rights protections are inadequately enforced.

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2. See discussion infra Part I.B.
3. I use the label of sovereign immunity to refer to the sovereign immunity structure that encompasses both sovereign immunity for governments and qualified immunity for government officials. Scholarly discussions often treat sovereign immunity for the federal government, sovereign immunity for states based loosely on the Eleventh Amendment to the Constitution, and qualified immunity for federal, state, and local officials as distinct subjects. For purposes of this Article, they are treated as different components of an overall sovereign immunity system. As will be discussed further below, they all derive from the same baseline theory that the government, the “sovereign,” should enjoy special protections against liability, and they work together to form a patchwork of barriers to suit ensuring that the limitations on government liability are real and vigorous. These immunities that fall under the umbrella of “sovereign immunity” differ from other immunities in that they broadly and generally wrap almost all government activity in protection on the mere basis that it is governmental, without regard to the specific type of activity or actor involved. They thus differ from the immunity provided to discrete categories of government officials based on their specific roles or functions (such as absolute presidential, judicial, and prosecutorial immunities). It would arguably be possible to shift the conceptual focus of this Article and instead refer to the government’s liability structure or remedial scheme, which is essentially the flip side to the immunity structure. This Article, though, trains its analysis on sovereign immunity and the unique effect of that doctrine on government liability for constitutional violations, regardless of the substantive merits of a claim.
The contours of sovereign immunity will be discussed in detail below, but the case of *Petta v. Rivera*\(^4\) provides an example of the breadth of the protection provided to government actors. In *Petta*, the Fifth Circuit denied compensation to two children victimized by a law enforcement official.\(^5\) Melinda Petta was driving on a rural road with her daughter, age seven, and son, age three, when she was stopped for speeding by a Texas Department of Public Safety highway patrolman. Rather than issuing a ticket, the officer ordered Petta to step out of the vehicle, but she refused. The officer reacted by screaming and cursing and attempting to smash the driver’s side window with a nightstick.\(^6\) When the officer pulled out his .357 Magnum and waved it menacingly at the family, Petta drove away in fear. The officer shot at her as she pulled out and then engaged in a high-speed pursuit during which he shot at the car again.\(^7\)

Petta brought suit on her children’s behalf against the Texas Public Department of Public Safety and the officer in both his official and individual capacities, alleging constitutional violations under section 1983 of the Civil Rights Act of 1871 (section 1983),\(^8\) which is the main vehicle for litigating constitutional claims against state and local government actors. All claims against the government and against the officer in his official capacity were dismissed because of the broad sovereign immunity available to the state, completely precluding any possibility to pursue damages directly against the government.\(^9\) The claims against the officer in his individual capacity then came before the Fifth Circuit, which decided that qualified immunity foreclosed those claims.\(^10\) The Fifth Circuit found that the officer’s actions were “grossly disproportionate to the need for action” and concluded that the officer’s actions violated the due process rights of the children under the Fourteenth Amendment to the U.S. Constitution.\(^11\) The court nonetheless held that the officer was entitled to qualified immunity because, at the time of the incident, the law in the Fifth Circuit did not make clear that an officer could be liable for a Fourteenth Amendment violation when the victim of abuse suffered only psychological injury.\(^12\) Thus, despite the egregious nature of the officer’s behavior, his two young victims were denied any right to compensation for the constitutional harm they suffered.\(^13\)

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4. 143 F.3d 895 (5th Cir. 1998).
5. *See id.* at 914.
6. *See id.* at 897.
7. *See id.* at 898.
10. *See id.* at 914.
11. *Id.* at 902–03 (citing Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981)).
12. *See id.* at 914.
13. *See id.* at 898, 914. A case involving the same actions by a federal official would likely have resulted in the same outcome. As will be discussed in detail below, the federal government itself would be held to enjoy governmental immunity from suits based on constitutional violations, and the individual officer would be entitled to the same qualified immunity applicable to state actors. In theory,
Although a number of scholars have criticized sovereign immunity as a problematic anomaly in the U.S. constitutional system, the application of this doctrine as an impediment to human rights protection in the United States has not been analyzed. This Article asserts that because the operation of sovereign immunity leaves many victims of constitutional violations unprotected, U.S. civil rights law cannot be said to stand in for human rights protections. International human rights law seeks to protect individuals against abuses by governments. The U.S. system, through the operation of broad sovereign immunity doctrines, instead protects the government against individuals who lay claim to redress for abuses they have suffered.

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

Part II describes the application of sovereign immunity in U.S. law. This Part looks at both governmental sovereign immunity from suit generally afforded to the federal government and the states as well as the qualified immunity enjoyed by government officials. This Part explains that, although it is theoretically possible to overcome government immunity in many cases by suing individual officials, qualified immunity also constitutes a major impediment for victims.

14. See, e.g., Akhil Reed Amar, Of Sovereignty and Federalism, 96 YALE L.J. 1425, 1427, 1489–90 (1987) (arguing that government immunity from liability “conflicts with the Constitution’s structural principle of full remedies for violations of legal rights against government” and insisting that sovereign immunity “is simply not part of our Constitution’s structure”); Erwin Chemerinsky, Against Sovereign Immunity, 53 STAN. L. REV. 1201, 1201 (2001) (suggesting that “[s]overeign immunity is an anachronistic relic [that] should be eliminated from American law” and that the doctrine “is inconsistent with the United States Constitution”); Vicki C. Jackson, Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence, 35 GEO. WASH. INT’L L. REV. 521, 521–23, 541 (2003) (arguing that “more restrictive understandings” of sovereign immunity are desirable given “the adverse effects of sovereign immunity on courts’ capacities to provide individual justice” and the doctrine’s likely incompatibility with the Bill of Rights, and also noting that federal sovereign immunity is “nowhere explicitly set forth in the Constitution”); Carlos Manuel Vázquez, Eleventh Amendment Schizophrenia, 75 NOTRE DAME L. REV. 859, 863, 917–18 (2000) (suggesting that state sovereign immunity is likely to conflict with the Constitution’s Supremacy Clause to the extent that the Supreme Court maintains or accelerates its trend in the direction of eliminating alternative judicial means for enforcing the federal obligations of the states).
seeking to obtain remedies for violations of their rights. The gap between right and remedy is real and serious.

Part III then analyzes the U.S. system for civil rights protection, which includes the application of sovereign immunity, from an international human rights law perspective. The Part sets forth the basic goal of international human rights law as protecting individuals from abuse by government. It then lays out the requirement that an effective human rights system must provide for a remedy, including compensation, when the government commits abuses. More specifically, governmental immunities from liability are unacceptable limitations on human rights. When measured against these standards for an effective human rights system, the U.S. civil rights system fails to pass muster.

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

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

The focus of this Article is on the ability of individuals to access U.S. courts when they suffer abuses at the hands of the government that can be characterized as civil rights violations under U.S. domestic law. It does not address the desirability of making claims available to litigants based directly on international human rights law. Instead, the Article takes on its face the argument supporting the adequacy of the civil rights system as a substitute for human rights protections and proceeds on those terms to demonstrate shortcomings in the U.S. civil rights legal regime.

Nor does this Article seek to analyze any of the issues surrounding litigation in U.S. courts against non-U.S. government actors for human rights abuses. It looks only at the possibilities for addressing abuses committed by U.S. government actors (federal, state, and local) in U.S. courts. As a result, it does not include any discussion of the doctrines of sovereign immunity that apply in cases involving suits against foreign government actors in the tribunals of another country, including, for example, act of state immunity doctrines and the immunities available to foreign governments under the Foreign Sovereign

Immunities Act.16 Those doctrines are separate and distinct from the sovereign immunity doctrines that U.S. government actors have claimed for themselves in their home courts and involve foreign policy justifications not applicable in the context of domestic sovereign immunity in the United States.

I. THE UNITED STATES’ CLAIM TO AN EFFECTIVE DOMESTIC HUMAN RIGHTS SYSTEM

The United States17 argues that modern international human rights conceptions developed out of and as a result of the Bill of Rights protections first developed in the U.S. Constitution. The United States asserts that its historic human rights standards are the best and need not be supplemented by the newer worldwide human rights structure.18

A. U.S. CIVIL RIGHTS ARE HUMAN RIGHTS

In the United States, the protections against abuses contained in the Constitution are known as civil rights rather than human rights. Lawyers and nonlawyers alike cling to this distinction in terms. In fact, civil rights lawyers working within the U.S. legal system and human rights lawyers working in international fora may be the most adamant about refusing to use the two terms interchange-

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17. This Article refers to the U.S. position on human rights without making distinctions, except as necessary, regarding the specific branches of government that have acted or made pronouncements establishing this position. For the purpose of a human rights discussion, the State as such is the relevant actor. While the various branches speak with different voices, they all represent the State. Of course, the most relevant branches of the U.S. government on international issues, including human rights, are the Executive and Legislative.
ably and to see the commonalities in civil rights and human rights work.\textsuperscript{19}

However, civil rights are, in fact, human rights. If the semantic difference is overcome, it becomes clear that domestic civil rights and international human rights standards largely overlap.\textsuperscript{20} It is true that the United States conceived of and codified human rights before many other countries accepted that such rights existed and before the modern human rights movement took form. The U.S. Constitution has provided an important model and guide for the development of human rights standards in international law and in the domestic law of many countries worldwide.\textsuperscript{21} As a result, international human rights standards do mirror the U.S. Constitution in important respects.\textsuperscript{22} Stated conversely, the substantive civil rights found in the U.S. Constitution, particularly in the


\textsuperscript{21} See \textit{HENKIN}, supra note 18, at 1, 126 (tracing the idea of human rights to American political philosophers, the American Declaration of Independence, the U.S. Constitution and its Bill of Rights, and the French Declaration of the Rights of Man and of the Citizen); Bassiouni, \textit{supra} note 20, at 1169 (arguing that the United States has continuously been a “world leader” in the development of human rights, and the major international human rights instruments incorporate U.S. constitutional approaches and terminology).

\textsuperscript{22} See \textit{HENKIN}, \textit{supra} note 18, at 149 (“[M]ost of the provisions of the Universal Declaration of Human Rights, and later of the International Covenant on Civil and Political Rights, are in their essence American constitutional rights projected around the world.”).
original Bill of Rights and in the Fourteenth Amendment, match many of the human rights protected in international law.

For example, the Fourth Amendment to the U.S. Constitution prohibits “unreasonable searches and seizures.”23 Parallel language is found in Articles 9 and 17 of the International Covenant on Civil and Political Rights (ICCPR), which respectively prohibit “arbitrary arrest” and “arbitrary or unlawful interference with . . . privacy, family, home or correspondence.”24 Articles IX, X, and XXV of the American Declaration of the Rights and Duties of Man (American Declaration) also establish the rights to “inviolability” of the home and of correspondence and the right to protection from arbitrary arrest.25

The Fourth, Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution protect the right of the people “to be secure in their persons”26 and prohibit the deprivation of life or liberty without due process of law27 and the infliction of “cruel and unusual punishments.”28 Similar language appears in Article 9 of the ICCPR and Article I of the American Declaration, both of which protect the right to liberty and security of the person.29 Article 7 of the ICCPR also explicitly prohibits torture and cruel, inhuman, or degrading treatment or punishment.30

Many other parallels are found between the language in the Bill of Rights and the Fourteenth Amendment to the U.S. Constitution and international standards. For example, the First Amendment guarantees freedom of thought, religion, expression, and assembly.31 The ICCPR protects these same freedoms in Articles 18 through 22, and the American Declaration covers these freedoms in Articles III, IV, XXI, and XXII.32 Similarly, the Fourteenth Amendment provides for “equal protection of the laws,” while Article 26 of the ICCPR establishes the right to “equal protection of the law,” and Article II of the

23. U.S. Const. amend. IV.
25. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/1.4 Rev. 10 (2004) [hereinafter American Declaration]. The United States is considered to be bound by the provisions of the American Declaration through its membership in the Organization of American States and its obligations under the Charter of that intergovernmental body. See infra note 165 and accompanying text.
26. U.S. Const. amend. IV.
27. Id. amends. V, XIV.
28. Id. amend. VIII.
29. ICCPR, supra note 24, art. 9; American Declaration, supra note 25, art. I.
30. ICCPR, supra note 24, art. 7.
31. U.S. Const. amend. I.
32. ICCPR, supra note 24, arts. 18–22; American Declaration, supra note 25, arts. III–IV, XXI–XXII.
American Declaration establishes the right to “equal[ity] before law.”

Of course, there are some areas in which international human rights standards provide greater protections than the U.S. Constitution. International human rights instruments include treaties that cover broader social, economic, and cultural rights than those set forth in the U.S. Constitution. There are also a few areas, most notably freedom of speech, where the U.S. Constitution arguably protects rights more fully and stringently than international human rights instruments. Still, the core human rights protected under international law have counterparts in U.S. civil rights law.

B. THE UNITED STATES’ ASSERTIONS THAT IT PROVIDES INTERNATIONAL HUMAN RIGHTS PROTECTIONS THROUGH ITS DOMESTIC HUMAN RIGHTS SYSTEM

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

Thus, when the United States ratified the ICCPR in 1992, the report of the Senate Committee on Foreign Relations stated that U.S. civil rights protections were sufficiently extensive such that ratification of the ICCPR did not entail or

33. U.S. CONST. amend. XIV; ICCPR, supra note 24, art. 26; American Declaration, supra note 25, art. II.
34. See Restatement (Third), supra note 20, § 701 reporters’ n.8. Louis Henkin cited examples of this phenomenon, including the broad provisions in international human rights law against cruel or degrading punishment as compared to the limitation in the U.S. Constitution prohibiting cruel and unusual punishment only upon conviction for a crime, which makes the protection inapplicable in cases of corporal punishment in schools; the prohibition on double jeopardy in international human rights instruments as compared to the rulings of the Supreme Court that allow trial by both the federal and state governments for the same acts; the provisions in international human rights law that require respect and protection for a person’s honor and reputation as compared to Supreme Court decisions holding that reputation is neither a liberty nor a property interest protected by the Constitution. HENKIN, supra note 18, at 150.
require acceptance of any additional obligations. The Committee explicitly noted that implementing legislation was not necessary given the general compatibility of domestic law with the ICCPR. Finally, the Committee and the full Senate made ratification contingent on the inclusion of language making the ICCPR non-self-executing. The terms of the ratification thus made clear that the obligations accepted upon ratification of the ICCPR would be met only through existing U.S. law.

In subsequent reports to the United Nations regarding the ICCPR, the United States emphasized its position that its human rights obligations were fulfilled through the functioning of the U.S. domestic civil rights system. In 1994, the first report of the United States to the Human Rights Committee of the United Nations asserted that the U.S. Constitution, particularly the Bill of Rights, contains protections of the “most important rights and freedoms.” In explaining the decision of the United States to declare the provisions of the ICCPR non-self-executing, the report goes on to say that the “fundamental rights and freedoms protected by the Covenant are already guaranteed as a matter of U.S. law...and can be effectively asserted and enforced by individuals in the judicial system on those bases.”

In 1995, the United States echoed the same theme when its representatives appeared before the Human Rights Committee. U.S. representatives from the Department of State told the Committee that no special or implementing legislation was needed after ratification of the ICCPR because the treaty “essentially embodied the individual rights and freedoms enjoyed by Americans under their Constitution and Bill of Rights.” The representatives went on to say that the non-self-executing nature of the ICCPR did not present any problem because “United States domestic law establish[es] numerous mechanisms by

39. See id. at 5, 26.
40. See id. at 19; see also 138 Cong. Rec. 6, 8071 (1992) (making the Senate’s advice and consent “subject” to the declaration that the substantive provisions of the ICCPR “are not self-executing”). A treaty that is not self-executing does not have immediate direct applicability in domestic law unless the U.S. Constitution or previously enacted legislation is sufficient to give it effect. Rather, new legislation is required to incorporate the provisions into U.S. law. See Restatement (Third), supra note 20, § 111(3) cmt. h.
41. The Human Rights Committee is the United Nations body that supervises the implementation of the ICCPR. See generally ICCPR, supra note 24, arts. 28–45 (establishing the Human Rights Committee and setting out rules for its composition and procedures).
43. Id. ¶ 8 (emphasis added).
which the Covenant rights it guarantee[s can] be protected and asserted.”

In 1998, several years after ratification of the ICCPR, the United States made similar assertions before the United Nations Human Rights Commission, the political human rights body of the United Nations. In a heated response to the report of a United Nations Special Rapporteur who visited the United States to analyze issues of police brutality and the application of the death penalty, the official U.S. delegation to the Human Rights Commission stated that the Rapporteur should devote most of his time to countries with “serious problems” rather than reporting on the United States. In this context, the United States again noted that its domestic law was so protective that it had not been necessary to adopt implementing legislation to give effect to the ICCPR’s provisions in domestic law. The letter stated that “the basic rights and fundamental freedoms guaranteed by the [ICCPR] . . . have long been protected as a matter of federal constitutional and statutory law.”

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

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


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

C. THE CHALLENGE TO THE UNITED STATES’ CLAIM TO AN EFFECTIVE DOMESTIC HUMAN RIGHTS SYSTEM

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

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

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


50. See U.N.H.R.C., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶¶ 13, 15, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004) [hereinafter General Comment No. 31] (noting that the ICCPR “does not require . . . incorporation . . . into national law” and States Parties may effectively assure the rights guaranteed in that treaty in a number of ways, including through “application of comparable constitutional or other provisions of law”); see also HENKIN, supra note 18, at 17.

51. See U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., THE SEPTEMBER 11 DETAINES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 195–97 (2003) (finding “significant problems in the way the September 11 detainees were treated” including a failure to provide notice of immigration charges in a timely manner; extended detention periods and “no-bond” policies that were not justified; refusal to distinguish
Other violations of individuals’ rights that do not reach the same level of notoriety occur all too often. Police officers and prison officials use excessive force and engage in abuse and even torture against detainees. They conduct unfounded and unlawful searches and seizures and coerce confessions. And, corrections officials around the United States continue to sexually abuse women in jails and prisons. The U.S. government has not denied that law enforcement authorities in the United States sometimes violate the civil rights protections found in the U.S. Constitution.

Unfortunately, the U.S. civil rights regime fails in the essential task of addressing these violations and providing reparations to victims. The sovereign immunity rules preventing suit against government actors constitute a grave limitation on the ability of victims to obtain redress for human rights viola-

between terrorism suspects and others caught up in the terrorism investigations; and physical and verbal mistreatment of detainees); U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEE’S ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK 28–30, 46 (2003) (finding evidence that officers engaged in verbal abuse, including the use of insults with racial connotations, and “slammed detainees against the wall, twisted their arms and hands in painful ways, stepped on their leg restraint chains, and punished them by keeping them restrained for long periods of time”). Constitutional suits based on these cases are currently working their way through the judicial system. Some claims have already been dismissed on immunity and other grounds. See Turkmen v. Ashcroft, No. 02 CV 2307 (JG), 2006 WL 1662663, at *40, *43, *46, *54 (E.D.N.Y. June 14, 2006); cf. Elmaghraby v. Ashcroft, No. 04 CV 1409 JG SMG, 2005 W.L. 2375202 (E.D.N.Y. Sept. 27, 2005) (denying motion to dismiss constitutional claims regarding conditions of detention at the Metropolitan Detention Center on qualified immunity grounds but allowing the possibility of renewal of qualified immunity defense at a subsequent stage in the proceedings).


53. See Martin A. Geer, Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law—A Case Study of Women in United States Prisons, 13 HARV. HUM. RTS. J. 71, 74 (2000); RESPONSE TO COMMITTEE AGAINST TORTURE, supra note 49, at 103 (recognizing that in 2004, eleven allegations of sexual misconduct by Bureau of Prisons personnel were substantiated but that no compensation was paid to any of the victims).

tions. Those rules lay bare the disingenuousness of the United States’ claim to vigilant domestic human rights protection.

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

II. HOW SOVEREIGN IMMUNITY RESTRICTS REDRESS FOR CIVIL RIGHTS VIOLATIONS

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

A. THE IMPORTANCE OF COMPENSATION FOR CIVIL RIGHTS VIOLATIONS

The victim of a civil rights violation that cannot be fully undone can be made

55. Other significant limitations on the effectiveness of the U.S. system as a human rights protection regime exist. For example, the insistence that the U.S. Constitution and Bill of Rights do not apply extraterritorially, political question and foreign affairs doctrines, and absolute immunities for certain categories of actors and actions create problems for human rights protection by limiting the faculty of the courts to ensure human rights accountability. See Henkin, supra note 18, at 105 & n.‡ (expressing the belief that “all efforts to limit the role of courts” in adjudicating rights cases, including the political question doctrine and other similar doctrines, are counter to “rights theory”). This Article, however, focuses only on sovereign immunity limitations on suits for compensation.

whole only if compensation is available.\textsuperscript{57} It is also fundamentally unfair to require innocent victims of wrongdoing at the hands of government officials, who are empowered by the public for the public good, to bear the costs of the harm they suffer on their own rather than to spread those costs among the population.\textsuperscript{58} By preventing such unfairness, a system that provides compensation for violations serves the important purpose of affirming the vitality of the rule of law and the legitimacy of the government and the courts.\textsuperscript{59} Monetary liability also provides an important sanction and deterrent against further abusive acts and is sometimes the only meaningful deterrent available.\textsuperscript{60}

In the United States, the possibility of addressing civil rights violations through the payment of compensation to victims is restricted. Although a constitutional tort structure exists, allowing victims to seek government liability and payment of compensation through suit, the U.S. legal system currently does not allow governmental liability and full compensation for many constitutional violations. The doctrine of sovereign immunity limits the ability of victims of civil and human rights abuses by the U.S. government from seeking redress and from bringing accountability compensation suits.

B. THE GENERAL CONTOURS OF SOVEREIGN IMMUNITY

The concept of sovereign immunity has a history in the United States as long as the history of civil rights protections.\textsuperscript{61} The doctrine is not explicitly set forth in the U.S. Constitution.\textsuperscript{62} Rather, it was transposed onto the U.S. system from English law, which at the time of the adoption of the Constitution still assumed

\textsuperscript{57} See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 409–10 (1971) (Harlan, J., concurring in the judgment) (noting that for certain victims of constitutional violations damages are the only appropriate remedy); Amar, supra note 14, at 1427; Chemerinsky, supra note 14, at 1215.

\textsuperscript{58} See Owen v. City of Independence, 445 U.S. 622, 651, 655 (1980) (“[I]t is fairer to allocate . . . financial loss to the . . . costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights . . . have been violated.”); Peter H. Schuck, Suing Government: Citizen Remedies for Official Wrongs 22–23 (1983).

\textsuperscript{59} See Schuck, supra note 58, at 23; Jackson, supra note 14, at 607–09.

\textsuperscript{60} See Schuck, supra note 58, at 16–17 (noting that actions not likely to be repeated and decisions below the policy level can often only be reached through tort liability); Ronald A. Cass, Damage Suits against Public Officers, 129 U. Pa. L. Rev. 1110, 1134, 1178–79 (1981) (noting that damages liability provides incentives to government actors to consider adequately the effects of their actions on others); Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1788 (1991) (noting the “systemic function” of damages actions in providing deterrents to unconstitutional action); see also Hudson v. Michigan, 126 S. Ct. 2159, 2165–68 (2006) (suggesting that civil liability for official violations of the Fourth Amendment’s knock and announce rule, rather than the exclusionary rule, should serve as the principle deterrent to such violations).

\textsuperscript{61} The first explicit references to sovereign immunity came in the 1800s. See, e.g., Reeside v. Walker, 52 U.S. (11 How.) 272, 290 (1851) (stating that no action can be sustained against the government unless by its own consent); United States v. McLemore, 45 U.S. (4 How.) 286, 288 (1846) (stating that government cannot be sued “except with its own consent”); Cohen v. Virginia, 19 U.S. (6 Wheat.) 264, 411–12 (1821) (stating that, with exceptions, “no suit can be commenced or prosecuted against the United States”).

\textsuperscript{62} See Jackson, supra note 14, at 523; Vázquez, supra note 14, at 859 n.1, 900.
that “the King could do no wrong.” Sovereign immunity has always been closely tied to another British conception intended to limit governmental liability—the rule making respondeat superior, or enterprise responsibility, applicable in tort actions involving private citizens, inapplicable to the government.

In varying forms, sovereign immunity protects governments and their components against suits brought by individuals alleging constitutional violations and seeking compensation. The doctrine also significantly limits the extent to which individual agents of the federal, state, or local government may be sued for damages in civil rights cases. The exact contours of the sovereign immunity protection have changed over time, but the doctrine still constrains courts’ ability to hear some claims of unlawful conduct perpetrated by government actors. Sovereign immunity is not a liability standard imposing a different or higher burden of proof in cases against the government, but instead is a bar to suit that applies to protect governmental entities without regard to the nature, merits, or strength of the constitutional claim at issue. The doctrine thus restricts the possibility, even for victims of established constitutional violations, to obtain redress for the harm they have suffered.

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

C. SOVEREIGN IMMUNITY PROTECTIONS FOR THE FEDERAL GOVERNMENT

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

The United States did consent to certain limited types of suits when it passed

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63. Feres v. United States, 340 U.S. 135, 139 (1950); see Chemerinsky, supra note 14, at 1201.
64. See Schuck, supra note 58, at 29–39.
65. See Jackson, supra note 14, at 527.
66. See Alden v. Maine, 527 U.S. 706, 749 (1999) (“It is unquestioned that the Federal Government retains its own immunity from suit not only in state tribunals but also in its own courts.”); Ickes v. Fox, 300 U.S. 82, 96 (1937) (“[N]o rule is better settled than that the United States cannot be sued except when Congress has so provided . . . .”).
67. The general immunity of the United States is so well established that few civil rights victims, other than the occasional pro se litigant, attempt to bring claims against the federal government under the U.S. Constitution. See Settles v. U.S. Parole Comm’n, 429 F.3d 1098, 1105–06 (D.C. Cir. 2005) (dismissing constitutional claims against the U.S. Parole Commission because it is “axiomatic that the United States may not be sued without its consent” (internal quotation marks omitted)). Almost no case law is available on this point other than the general assertions in cases like Alden v. Maine, which reference federal government immunity as a principle that must be accepted without explanation or citation. See Alden, 527 U.S. at 749; Ickes, 300 U.S. at 96; see also Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment) (“[T]he sovereign still remains immune to suit.”).
the Federal Tort Claims Act (FTCA)\textsuperscript{68} in 1946. The FTCA waives immunity for certain tort claims against the United States and relaxes the immunity of the United States to suits for damages based on ordinary accidents and torts committed by the U.S. government and its officials.\textsuperscript{69} However, it did not open the door in a meaningful way to litigants seeking redress for constitutional violations.

The FTCA allows suits against the federal government only “under circumstances where the United States, if a private person, would be liable” under the local law where the act or omission occurred.\textsuperscript{70} In order to bring a suit under the FTCA, then, a victim of a constitutional rights violation must shoehorn the claimed violation into a common tort claim.\textsuperscript{71} This is not always possible.\textsuperscript{72} The FTCA undesirably subjects determinations about compensation for violations of federal constitutional rights to the vagaries of state tort law.\textsuperscript{73}

In essence, the FTCA serves, in certain circumscribed circumstances, to place the United States in the same position as a private actor for purposes of tort liability. Of course, the government is not simply a private actor, but rather has unique power and authority. Yet the FTCA vehicle provides no room for asserting or recognizing the special harm caused when the government violates rights set forth in the U.S. Constitution—rights specifically intended to protect the individual against abuse by an overbearing government.\textsuperscript{74}

The FTCA includes additional limits that prevent it from providing a meaningful remedy for victims of constitutional violations. The waiver of immunity contains numerous broad exceptions. For example, claims based on intentional

\textsuperscript{69} Id.; see Dalehite v. United States, 346 U.S. 15, 28 (1953) (“Uppermost in the collective mind of Congress [in drafting the FTCA] were the ordinary common-law torts . . . [such as] negligence in the operation of vehicles.” (internal quotation marks omitted)).
\textsuperscript{71} For example, an unlawful search and seizure might be brought as a trespass or false imprisonment claim and would be required to meet the applicable standards under state tort law. The use of excessive force by a law enforcement officer might be litigated as an assault claim.
\textsuperscript{72} See SCHUCK, supra note 58, at 114–15. For example, it is difficult to imagine which torts might be invoked in cases involving unlawful surveillance or procedural due process.
\textsuperscript{73} See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392–94 (1971) (holding that federal constitutional violations may not be defined by looking to “inconsistent or even hostile” state tort laws).
\textsuperscript{74} See id. at 391–92 (emphasizing the unique harm caused when government actors violate the law); id. at 409 (Harlan, J., concurring in the judgment) (noting that injuries inflicted by government officials are “substantially different in kind” from the harm caused by private persons and rejecting the possibility that damages available as between private persons would be sufficient to compensate for violations of the Constitution); Una A. Kim, Government Corruption and the Right of Access to Courts, 103 Mich. L. Rev. 554, 569 (2004) (noting that harm caused by governments is “qualitatively different” than harm caused by private actors, because government actors have a particular ability to harm and because the harm they cause involves a unique “moral injury’ not similarly implicated outside of the context of government action”); Cornelia T.L. Pillard, Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability under Bivens, 88 Geo. L.J. 65, 71–72 (1999) (quoting the opinion of Justice Brennan in Bivens as making it evident why a state tort law approach to constitutional violations is inadequate given the unique harm caused by “governmental power”).
torts, such as assault and battery or false imprisonment, are excluded from the coverage of the FTCA except when committed by law enforcement officials.\textsuperscript{75} Thus, some serious constitutional violations cannot be claimed against the United States through the FTCA.

The greatest limitation on the effectiveness of the FTCA as a means of redressing constitutional violations is its discretionary function exception to the waiver of sovereign immunity. That provision disallows claims “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused.”\textsuperscript{76} This exception has been interpreted broadly to protect numerous government activities.\textsuperscript{77} In theory, a constitutional violation should not fall within the discretionary function exception, because “[f]ederal officials do not possess discretion to violate constitutional rights.”\textsuperscript{78} In practice, however, the discretionary function exception operates much like qualified immunity, discussed further below, to grant the benefit of the doubt to government actors and to disallow actions against the government in many cases.\textsuperscript{79}

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

D. SOVEREIGN IMMUNITY AND RELATED PROTECTIONS FOR STATE AND LOCAL GOVERNMENTS

Victims of constitutional violations are not more successful with suits for damages against state and local governments. The sovereign immunity doctrine grants states broad immunity from claims by private individuals seeking damages for constitutional violations in federal court, and localities enjoy a related


\textsuperscript{76} 28 U.S.C. § 2680(a) (2000).

\textsuperscript{77} See Dalehite v. United States, 346 U.S. 15, 35–36 (1953) (explaining that the discretionary function exception includes more than high level decisions to initiate programs and activities and that, so long as there is room for governmental decisionmaking, it extends to the actions of lower level actors or administrators in planning and coordinating programs or activities).

\textsuperscript{78} Medina v. United States, 259 F.3d 220, 225 (4th Cir. 2001) (quoting U.S. Fid. & Guar. Co. v. United States, 837 F.2d 116, 120 (3d Cir. 1988)).

\textsuperscript{79} See, e.g., Lawrence v. United States, 340 F.3d 952, 958 (9th Cir. 2003) (finding FTCA suit barred because the supervision of a convicted felon by federal parole officers is a discretionary function); Adras v. Nelson, 917 F.2d 1552, 1556 (11th Cir. 1990) (finding FTCA suit barred because the decision to deny release or parole to immigration detainees seeking admission is a discretionary function); Pooler v. United States, 787 F.2d 868, 871 (3d Cir. 1986) (finding FTCA suit barred because the conduct of criminal investigation leading to prosecution is a discretionary function). The plaintiffs in these cases brought their claims of governmental misconduct as FTCA actions and thus were limited in their ability to assert constitutional harms and shape their cases as constitutional tort claims. The cases nonetheless give a sense of the breadth of the discretionary function exception even in FTCA cases that, were it not for the limitations of sovereign immunity, might otherwise be brought as constitutional tort claims.
form of protection.

The Supreme Court has repeatedly held that sovereign immunity prevents individuals from bringing constitutional claims against states in federal court. The only determination a court is to make is whether the suit is against the state; if so, it must dismiss the case on immunity grounds—even if the constitutional violation is established and egregious.

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

In any case, victims of constitutional violations at the hands of local governments also face significant difficulties in obtaining compensation. The most important barrier to recovery against local governments is the requirement that the government itself engage in direct action that results in a constitutional violation. In *Monell v. Department of Social Services*, the Supreme Court

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80. See *Quern v. Jordan*, 440 U.S. 332, 341 (1979) (deciding that Section 1983 does not override states’ sovereign immunity and therefore disallowing constitutional actions against the state in federal court under Section 1983); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996) (holding that Congress may not generally abrogate state sovereign immunity to allow suits against states to proceed in federal court based on federal law). *Statutory* civil rights claims may be brought against states in the discrete set of cases—for example employment and housing discrimination matters—in which Congress has both successfully abrogated the states’ immunity pursuant to the enforcement provisions of the Fourteenth Amendment to the U.S. Constitution and also provided a statutory cause of action. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (permitting abrogation of state immunity pursuant to Section Five of the Fourteenth Amendment); *see also* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-4 (2000) (prohibiting discrimination in employment and providing a statutory cause of action for damages when employment discrimination occurs); *Fair Housing Act*, 42 U.S.C. §§ 3601–3631 (2000) (prohibiting discrimination in housing and providing a statutory cause of action for action for damages when housing discrimination occurs).

81. Given this rule, few victims of violations attempt to bring constitutional claims against the states. Occasionally, the federal courts have the opportunity to reaffirm the sovereign immunity of states in cases where they determine that a particular government actor, sued as a local entity, is instead properly characterized as a state actor. See, e.g., *Lawrence v. Chabot*, 182 F. App’x 442, 450 (6th Cir. 2006) (holding that the Michigan Board of Law Examiners and the State Bar of Michigan are state entities protected by Eleventh Amendment sovereign immunity and therefore not subject to suit alleging that bar admission proceedings were conducted unconstitutionally).


83. Many government actors that operate on the local level are nonetheless characterized as state government entities entitled to sovereign immunity. See, e.g., *Bockes v. Fields*, 999 F.2d 788, 790–91 (4th Cir. 1993) (disallowing a claim against a social services agency on the grounds that the agency was a state entity entitled to governmental sovereign immunity); *Lewis v. Bd. of Educ.*, 262 F. Supp. 2d 608, 614 (D. Md. 2003) (finding that a school board was a state entity entitled to governmental sovereign immunity). Although law enforcement entities are often local actors, some—for example, state troopers and state park police—are properly designated as state actors. See S.C. Troopers Fed’n Local 13 v. S.C. Dep’t of Pub. Safety, 112 F. App’x 883, 895 (4th Cir. 2004); *Giancola v. W. Va. Dep’t of Pub. Safety*, 830 F.2d 547, 552 (4th Cir. 1987).

ruled that local governments may not be held responsible for constitutional violations on a respondeat superior theory as a result of the unlawful actions of government employees, even though private employers are generally subject to liability on that basis.\textsuperscript{85} Instead, victims of violations must show that the local government itself had a policy that directly led to constitutional violations.

In practice, victims of constitutional violations by local government officials have an extremely difficult time showing that those violations resulted from official government policy. The decision of the Fourth Circuit in \textit{Carter v. Morris}\textsuperscript{86} provides an example. The case involved the arrest, based on a false identification, of Pamela Carter, who was then allegedly mistreated and subjected to racial epithets while held by police officers from the Danville, Virginia, police department.\textsuperscript{87} Carter sued the City of Danville.\textsuperscript{88} The Fourth Circuit recognized that in the absence of an official written policy, \textit{Monell} allowed local government responsibility for constitutional violations to be established through evidence of a custom allowing its agents to commit constitutional violations.\textsuperscript{89} However, to show such a custom, the court required proof of a permanent, widespread practice of abuse.\textsuperscript{90} Here the court refused to find a custom or policy and impose liability, despite Carter’s evidence of numerous

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\item \textsuperscript{85} \textit{Monell}, 436 U.S. at 691, 693. Of the various immunity barriers to suit described in this Article, the \textit{Monell} rejection of respondeat superior liability most approaches a substantive law limitation rather than sovereign immunity protection. The Supreme Court has treated the issue as one of substance, rejecting immunity (both governmental sovereign immunity and qualified immunity) for local governments but instead imposing the requirement of direct action. See \textit{id.} at 663 (rejecting governmental sovereign immunity for municipalities); see also \textit{Owen v. City of Independence}, 445 U.S. 622, 638 (1980) (rejecting qualified immunity for local governments). However, the Supreme Court has suggested that the unavailability of the respondeat superior theory of liability in cases against local governments derives from sovereign immunity-like concerns about federalism and separation of powers. See \textit{Monell}, 436 U.S. at 693 (finding it improper to impose respondeat superior liability because doing so would impose obligations on local arms of the state when Congress, in drafting Section 1983, had determined that the imposition of such liability would raise constitutional concerns regarding state sovereignty). \textit{But see Owen}, 445 U.S. at 655 n.39 (finding that the imposition of liability where the local government has directly violated the Constitution, rather than where the local government is asked to control fully the actions of its agents or respond for the harm they cause, does not raise constitutional problems). Commentators have also noted that the rejection of respondeat superior liability is essentially one component of a larger sovereign immunity scheme protecting the government from liability. See \textit{Schuck, supra} note 58, at 38; \textit{Karen M. Blum, From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts}, 51 \textit{Temp. L.Q.} 409, 412–14 (1978) (noting that the \textit{Monell} decision, although providing for municipal liability under Section 1983, also operated to preserve, in some form, the immunity that municipalities enjoyed before \textit{Monell} in the face of increasing challenges to those immunities). The intertwined nature of immunity and rejection of respondeat superior is reflected in the experience of other countries. In other countries, the rejection of sovereign immunity has almost always been closely followed by or even triggered by an acceptance of government liability for the actions of its agents. See \textit{infra} notes 242, 260, 279 and accompanying text. It is therefore appropriate to treat the \textit{Monell} rejection of respondeat superior liability as part of the immunity structure protecting government entities from suit in the United States.
\item \textsuperscript{86} 164 F.3d 215 (4th Cir. 1999).
\item \textsuperscript{87} \textit{See id.} at 217.
\item \textsuperscript{88} \textit{Id.} at 216.
\item \textsuperscript{89} \textit{See id.} at 218 (quoting \textit{Monell}, 436 U.S. at 691).
\item \textsuperscript{90} \textit{See id.}
prior incidents spanning nearly two decades in which officers from the police department beat handcuffed suspects, engaged in other shows of excessive force, and then improperly handled complaints about those abuses. As Carter demonstrates, the preclusion of respondeat superior liability makes it so difficult to sue local governments that it results in “something close to effective immunity.”

E. INDIVIDUAL GOVERNMENT OFFICERS AND QUALIFIED IMMUNITY

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

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

In some instances, the government itself does insure payment of a final damage award against an employee either directly or through a government-paid insurance regime, but this is not always the case. No empirical information is available to establish the frequency with which governments or government

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91. See id. at 219–20.
93. See *Alden v. Maine*, 527 U.S. 706, 754–57 (1999) (suggesting that state sovereign immunity does not confer a right to disregard the Constitution because alternative means of enforcing constitutional obligations exist, including the ability to bring suit against individual officials).
94. See 403 U.S. 388, 397 (1971).
95. Because of the broad sovereign immunity available to states, actions against state officials may be examined to determine whether they are truly against the individual official or actually constitute disguised suits against the state. See *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974) (stating that the Eleventh Amendment “bars suits not only against the State when it is the named party but also when it is the party in fact”); *Edelman v. Jordan*, 415 U.S. 651, 668–69, 678 (1974) (holding that a court award of retroactive welfare benefits resulting from wrongful denial of benefits by state officials violates the Eleventh Amendment). In practice, this requirement that a court look beyond the pleadings to determine the true effect of a claim has had little impact on suits against state officials sued personally under Section 1983 for constitutional harms, even when the state will eventually pay any damages award through indemnification of the individual officer. See *Vázquez*, supra note 14, at 875–76 (stating that the Supreme Court has clarified that “the Eleventh Amendment does not bar suits against state officials acting in their official capacities, as long as the damages are sought from the official personally”). The Supreme Court has held that state sovereign immunity does not apply when a state official is confronted with a claim against him personally alleging that he deprived another of a federal right under the color of state law. See *Scheuer*, 416 U.S. at 237 (citing *Ex parte Young*, 209 U.S. 123, 159–60 (1908)).
97. See *Schuck*, supra note 58, at 98.
insurance plans pay damages awards to victims. Although some commentators have suggested that government satisfaction of constitutional tort claims against individual officials is commonplace, the rules and practices in place suggest that a significant, albeit undefined, number of victims suing individual officials do not receive compensation from government funds and are therefore unlikely to receive full compensation for damages suffered.

The federal government has a stated general rule against paying judgments assessed against its employees in *Bivens* actions. Also, when an individual government agent is terminated from employment, sometimes as a result of the abuse committed, neither federal nor local governments will generally assume responsibility for a judgment against the agent. In addition, the litigation insurance protection provided by some governments to its agents specifically excludes acts of intentional or malicious misconduct. Such provisions pre-

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99. See Pillard, *supra* note 74, at 76–77 (asserting that indemnification of individual officials for damages liability under *Bivens* is “a virtual certainty”); Vázquez, *supra* note 14, at 880 (suggesting that “in reality, damage judgments rendered against individual state officers are usually paid by the state”).

100. See 28 C.F.R. § 50.15 (2005) (explaining that Department of Justice employees may request indemnification from the Department of Justice, and the Attorney General may order such indemnification, but only if it “is in the interest of the United States”); U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 4-5.412(F) (1998) (“[A] federal employee [is] personally responsible for the satisfaction of a judgment entered solely against the employee; there is no right to compel indemnification from the United States or any agency thereof . . . .”); see also Telephone Interview with Alexander Reinert (July 10, 2006) (stating that federal government attorneys representing federal officials regularly assert that the federal government will refuse to pay the damages awards if *Bivens* actions are successful and officials are found to have acted unconstitutionally). Reinert regularly litigates *Bivens* and Section 1983 claims and is currently litigating claims against the federal government for the abuses committed against 9/11 detainees described above. See *supra* note 51. The federal government may indemnify federal employees when damages are awarded to victims of constitutional violations and apparently does so in some cases. See Pillard, *supra* note 74, at 76–77. What is unclear is how frequently such indemnification is provided. However, these general rules disfavoring government payment of *Bivens* claims virtually ensure that some relevant number of victims will go without payment of damages.

101. See E-mail from Victor Glasberg to Denise Gilman (July 28, 2006) (on file with author). Victor Glasberg, an attorney in Alexandria, Virginia, regularly litigates *Bivens* and Section 1983 claims in federal court. This scenario is particularly problematic because the rights victim will probably be unable to recover damages from the individual official personally if the official has fewer assets due to unemployment and cannot be subjected to garnishment of wages. See Vázquez, *supra* note 14, at 881 n.92 (suggesting that government payment of damages will not be impeded by a rule of indemnification only for damages actually paid by the individual official, even if the official has no assets, because the official’s wages may be garnished and that payment indemnified by the government).

102. See, e.g., N.Y. PUB. OFF. LAW § 17 (McKinney 2005) (providing indemnification to employees for judgments against them except where the employee engaged in “intentional wrongdoing”); Va. Dep’t of the Treasury, Div. of Risk Mgmt., Commonwealth of Virginia Risk Management Plan (2001), http://www.radford.edu/fac-man/Safety/risk_man/risk_plan.htm (insuring government officials acting within the scope of employment except when conduct was “intentional, malicious or willful and wanton”); *see also* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270 n.30 (1981) (listing a number of state statutes that generally require municipal corporations “to indemnify their employees for
clude government payment of compensation for many constitutional claims, which often require a showing of intentional conduct to be successful.

Because the applicable law and regulations do not require government payment of individual officers’ damages liability, victims of constitutional violations have no right to such payment nor any guarantee that they will receive it. Governments are least likely to ensure that compensation is paid in those cases in which their officials engage in the most serious human rights abuses that result in the employee’s termination or exclusion from insurance or indemnification coverage. Therefore, the victims of the most egregious violations will often go uncompensated.

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

Qualified immunity is another layer of sovereign immunity that provides protection against suits brought against government agents rather than the government itself. As the Supreme Court has made clear, qualified immunity...
“springs from the same root considerations that generated the doctrine of sovereign immunity” barring suit against governments.  

Pursuant to the doctrine of qualified immunity, an official who violates the civil rights protections found in the U.S. Constitution may nonetheless be immune from suit for damages in court under *Bivens* or Section 1983. The government official will be immune from liability so long as the conduct in question was objectively reasonable. A government agent may be stripped of immunity and held responsible only if a reasonable official would have known that he was violating a constitutional standard that was “clearly established at the time” of the action.  

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

The substantive standards that must be met to establish constitutional violations are stringent, reflect the special nature of government action, and often require highly intentional action by government officials. For example, to establish a violation of the Eighth Amendment for failure to provide medical attention to a prisoner, the complainant must show that government officials

106. *Scheuer*, 416 U.S. at 239.
108. *Id.* at 818–19. Pursuant to this standard, the central inquiry in most qualified immunity cases is whether the law establishing a violation was clear at the time the action took place. *See, e.g.*, *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002) (stating that qualified immunity shields officers from liability for unconstitutional behavior if “their actions did not violate ‘clearly established statutory or constitutional rights of which a reasonable person would have known’” (quoting *Harlow*, 457 U.S. at 818)). However, the objective reasonableness standard also still sometimes requires an inquiry as to whether the individual government official knew or should have known what the law required, or expressed disregard for the law’s requirements. *See Harlow*, 457 U.S. at 819; *id.* at 820–21 (Brennan, J., concurring). For example, a police officer who seeks or executes an arrest warrant without probable cause may still enjoy qualified immunity if reasonably competent officers would have disagreed as to whether probable cause existed. *See* *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986); *Michalik* v. *Hermann*, 422 F.3d 252, 259 (5th Cir. 2005).
acted with “deliberate indifference to a prisoner’s serious illness or injury.” To make out a claim of excessive force under the substantive due process protections of the Fifth or Fourteenth Amendments, a plaintiff may be required to show that law enforcement actions were “grossly disproportionate to the need for action” and “inspired by malice.” To establish a violation of the equal protection rights established in the Fifth and Fourteenth Amendments, plaintiffs must prove intentional discrimination. Nonetheless, even when a constitutional violation can be made out based on these stringent standards, qualified immunity wraps another protective layer around the conduct of government officials and requires an additional analysis of reasonability.

The Supreme Court has made this point even more clearly by establishing that when litigation is filed against an individual officer, courts must first determine whether, if proven, the allegations raised would establish a constitutional violation. Then and only then will the court proceed to analyze whether the responsible official should enjoy immunity. By creating this two step process, the Supreme Court has left no doubt that the qualified immunity analysis is separate from the inquiry into constitutionality and bars suit for constitutional violations unless the victim can also show that a reasonable official should have known that he was violating a clearly established constitutional right.

The Supreme Court has also held that qualified immunity is “an immunity from suit rather than a mere defense to liability.” If the officer is entitled to immunity, the suit should be dismissed at a preliminary stage. Specifically, the Supreme Court generally requires that the determination regarding qualified immunity and dismissal be made before discovery begins. The Supreme Court has concluded that such an early dismissal is possible because the

111. Petta v. Rivera, 143 F.3d 895, 902 (5th Cir. 1998); see United States v. Cobb, 905 F.2d 784, 789 (4th Cir. 1990); King v. Blankenship, 636 F.2d 70, 73 (4th Cir. 1980); see also Sacramento v. Lewis, 523 U.S. 833, 846–47 (1998) (holding that, in general terms, executive action only violates substantive due process when it constitutes an “abuse of power” that “shocks the conscience”).
113. See Maldonado v. City of Altus, 433 F.3d 1294, 1308, 1316 (10th Cir. 2006) (finding evidence of intentional discrimination in violation of the Fourteenth Amendment but granting qualified immunity); Robles v. Prince George’s County, 302 F.3d 262, 271 (4th Cir. 2002) (finding a violation of Fourteenth Amendment due process rights because of grossly disproportionate and malicious police action but nonetheless granting qualified immunity); Petta, 143 F.3d at 900, 902–03, 914 (same); cf. Skrich v. Thornton, 280 F.3d 1295, 1301 (11th Cir. 2002) (“In this Circuit, a defense of qualified immunity is not available in cases alleging excessive force in violation of the Eighth Amendment, because the use of force maliciously and sadistically to cause harm is clearly established to be a violation of the Constitution . . . .” (internal quotation marks omitted)).
116. See Jordan v. Bryant, 502 U.S. 224, 227–28 (1991) (noting that qualified immunity questions should be resolved “at the earliest possible stage in litigation” and “long before trial”); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (stating that “discovery should not be allowed” until the qualified immunity determination is made as to whether the law at issue was clearly established).
applicability of qualified immunity is a question of law for the judge to decide in an objective and categorical manner rather than a fact-based inquiry.\textsuperscript{117} Thus, the victim of an unconstitutional action by a government official may be deprived of the right even to have a court begin to uncover the merits of the claim.

The qualified immunity standard is interpreted in a manner that is highly protective of government officials involved in constitutional wrongdoing and that grants officials significant deference.\textsuperscript{118} As the Supreme Court has emphasized, the standard amply protects officials who make “mistaken judgments” and violate the constitutional rights of victims.\textsuperscript{119} The immunity protects “all but the plainly incompetent or those who knowingly violate the law.”\textsuperscript{120}

Because of its reach, qualified immunity prevents victims of a broad range of constitutional violations committed by government officials from obtaining redress.\textsuperscript{121} As one scholar has noted, although qualified immunity may seem to have more modest effect than full sovereign immunity, in reality it “has operated as a virtually complete bar to recovery.”\textsuperscript{122} Qualified immunity has been identified as the main reason for the “remarkably low success rates” in \textit{Bivens} actions.\textsuperscript{123} Some estimate that, in thirty or more years of litigation under \textit{Bivens}, thousands of federal employees have been subjected to suit, but only about 100 of these suits have resulted in final judgments providing relief in the form of damages to plaintiffs alleging constitutional violations.\textsuperscript{124}

\textit{Wilson v. Layne},\textsuperscript{125} decided by the Supreme Court in 1999, demonstrates the

\begin{footnotesize}
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\item[117.] \textit{Harlow}, 457 U.S. at 818–19. Although the focus is on an early adjudication of immunity, the facts sometimes must be known before the applicability of qualified immunity can be decided. See, e.g., \textit{Anderson v. Creighton}, 483 U.S. 635, 646 n.6 (1987) (allowing, in certain circumstances, limited discovery on issues relevant to qualified immunity); \textit{Taylor v. Vt. Dep’t of Educ.}, 313 F.3d 768, 793 (2d Cir. 2002) (determining that a ruling on qualified immunity would be premature at the motion to dismiss stage if an issue turns on factual questions). Qualified immunity is sometimes raised early and, if not granted, raised and decided again during successive stages of litigation.

\item[118.] See \textsc{Michael Avery et al., Police Misconduct: Law and Litigation} § 3:12 (3d ed. 2005) (noting that the qualified immunity defense provides “the utmost deference for law enforcement officials”).


\item[120.] \textit{Id.} at 341.

\item[121.] See \textit{Jackson, supra} note 14, at 566 (noting that plaintiffs “rarely” succeed in overcoming the qualified immunity defense); John C. Jeffries, Jr., \textit{The Right-Remedy Gap in Constitutional Law}, 109 \textit{Yale L.J.} 87, 89–90 (1999) (arguing that, as a result of qualified immunity, “many victims of constitutional violations get nothing, and many others get redress that is less than complete”); \textit{Vázquez, supra} note 14, at 876–77 (noting that current qualified immunity standards leave “many violations of federal law unremedied”).

\item[122.] \textit{Pillard, supra} note 74, at 94.

\item[123.] \textit{Id.} at 79.

\item[124.] Helene M. Goldberg, \textit{Tort Liability for Federal Government Actions in the United States: An Overview}, in \textit{Tort Liability of Public Authorities in Comparative Perspective} 521, 531 (Duncan Fairgrieve et al. eds., 2002) [hereinafter \textit{Comparative Tort Liability}]. Obviously, it cannot be assumed that all of the claims filed were meritorious. It is likely, though, that many more might have reached a favorable result if it were not for the operation of qualified immunity.

\item[125.] 526 U.S. 603 (1999).
\end{enumerate}
\end{footnotesize}
difficulty of overcoming the qualified immunity bar to suit in *Bivens* cases. That case involved the actions of officials who brought members of the press into the home of a suspect’s parents when executing an arrest warrant. The suspect was not present, but reporters photographed the father in underpants and the mother in her nightgown.126 The suspect’s parents brought suit against the involved officers, which proceeded as a *Bivens* claim.127 The Supreme Court unanimously held that the officers’ actions violated the Fourth Amendment to the U.S. Constitution.128 However, the Court nonetheless held that the officers must be granted immunity pursuant to a qualified immunity analysis and upheld dismissal of the suit against the officers.129

Qualified immunity has similarly served as a substantial barrier to success on Section 1983 actions. The Fourth Circuit’s decision in *Robles v. Prince George’s County*130 is a case in point. In *Robles*, the victim brought suit under Section 1983 against police officers who tied him to a metal pole in a deserted parking lot and abandoned him there after arresting him on a traffic warrant at about 3:30 am.131 The court found that the officers’ behavior was unrelated to any legitimate law enforcement purpose and held that their actions violated the Due Process Clause of the Fourteenth Amendment.132 Nevertheless, the court affirmed the decision of the district court granting summary judgment on qualified immunity grounds. The court held that the officers should have known that their “Keystone Kop” conduct was wrongful, but did not have sufficient notice from the case law that their conduct constituted a constitutional violation.133

An empirical review of cases involving qualified immunity issues demonstrates that more than half of those cases that reach the federal circuit courts to be decided on a qualified immunity defense result in a dismissal or denial of relief on qualified immunity grounds. The author’s analysis of all cases brought under *Bivens* or Section 1983 in which the circuit courts of appeals took up a qualified immunity defense during the first six months of 2006 shows that the courts ruled on the qualified immunity defense in 133 cases. The courts barred suit on qualified immunity grounds in seventy-one of those 133 cases. The courts of appeals held in another twelve cases that qualified immunity provided an alternative ground for their decision dismissing suit or denying relief.134

126. See id. at 607.
127. The suit was originally brought as both a *Bivens* and Section 1983 claim, but the United States District Court of Maryland converted all claims against the individual officers into *Bivens* claims. The District Court also converted several claims into FTCA actions against the United States. The FTCA claims were eventually resolved out of court after the Supreme Court’s decision. See U.S. District Court, District of Maryland (Greenbelt), Civil Docket for Case #8:94-cv-01718-PJM.
128. See Layne, 526 U.S. at 614.
129. See id. at 615.
130. 302 F.3d 262 (4th Cir. 2002).
131. See id. at 267.
132. See id. at 270.
133. See id. at 271.
134. These cases involve a grant of qualified immunity on at least one claim as to at least one defendant. In some cases the courts granted qualified immunity as to some defendants or some claims
F. THE INADEQUACY OF STATE COURT AND STATE LAW ALTERNATIVES TO FEDERAL COURT ADJUDICATION OF CONSTITUTIONAL CLAIMS

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

The Supreme Court has made constitutional litigation against state governments in state courts extremely unlikely. The Court has held that Section 1983 does not authorize suit against states even in their own courts.135 The Court reached this conclusion as a matter of statutory interpretation of the coverage of Section 1983, but that interpretation was explicitly informed by sovereign immunity considerations.136 Constitutional claims may be brought against localities in state courts under Section 1983 but are subject to the same Monell requirement of establishing direct government responsibility for unconstitutional action that has proved to be such a stringent limitation in federal court. Individual officials are similarly entitled to the same problematic qualified immunity protections described above.

The only remaining avenue—litigation of federal constitutional grievances against state and local governments and officials as state law claims—is also an unacceptable alternative to federal court litigation of claims under the U.S. but denied qualified immunity or failed to rule on qualified immunity as to other defendants or claims. In fifty-eight cases, the courts of appeals denied qualified immunity at the procedural juncture at issue in the decision reviewed (usually at the motion to dismiss or summary judgment stage). However, qualified immunity could still be granted at a later stage. Those fifty-eight cases included eight in which qualified immunity was granted as to some claims or defendants but denied as to others. Detailed results from this research are on file with the author.

These statistics regarding the effect of qualified immunity differ from the numbers provided above by Helene M. Goldberg in relation to Bivens actions. See Goldberg, supra note 124. The numbers provided by Goldberg do not isolate the effect of qualified immunity but rather highlight the overall low success rates for Bivens actions. Those overall success rates are likely affected by qualified immunity but also by other factors such as the applicable substantive law and the underlying merits of the claims. The empirical research set forth here does not attempt to analyze overall success rates for Bivens or Section 1983 actions and so cannot be compared directly with the statistics provided by Goldberg. The empirical research set forth in the text accompanying this note also differs from the numbers provided by Goldberg because it covers both Bivens and Section 1983 actions. There may be differences between Bivens and Section 1983 actions in the effect of qualified immunity and in overall success rates, but this Article does not attempt to uncover those differences.

135. See Will v. Mich. Dep’t of State Police, 491 U.S. 58, 64 (1989) (concluding that given the sovereignty of the states, Congress could not have intended that a state would be a “person” subject to suit within the meaning of Section 1983); see also Alden v. Maine, 527 U.S. 706, 754 (1999) (holding that Congress may not abrogate state sovereign immunity and subject states to private suit, even in their own courts).

136. See Will 491 U.S. at 66–67 (“[I]n deciphering congressional intent as to the scope of § 1983, . . . we decline to adopt a reading of § 1983 that disregards [the Eleventh Amendment].”).

137. See Howlett v. Rose, 496 U.S. 356, 375 (1990) (concluding that a state court’s refusal to entertain certain Section 1983 claims against local governments when it entertained similar state law actions constituted an impermissible immunity contrary to federal law and violated the Supremacy Clause).
Constitution. A number of state and local government entities enjoy state law sovereign immunity in their own courts that completely precludes this alternative. In addition, as with FTCA claims, litigation of federal constitutional violations as state law claims requires victims to frame their claims according to the different state law standards applicable in each state and makes recovery for a federal violation dependent on state law. Such litigation fails to recognize the unique nature of constitutional/human rights claims, making full compensation awards very unlikely.

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

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

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

G. THE EFFECT OF SOVEREIGN IMMUNITY DOCTRINES

The preceding description demonstrates how the layers of sovereign immunity interact to preclude many suits for damages against government actors who commit constitutional violations. Distilling these layers of sovereign immu-

138. See Niese v. City of Alexandria, 564 S.E.2d 127, 133 (Va. 2002) (invoking Virginia law sovereign immunity to dismiss tort claims based on police officer’s repeated rapes of the victim while on police duty and in police uniform).
139. 311 F.3d 899 (8th Cir. 2002).
140. Id. at 902.
141. Id. at 902–03.
142. See id. at 904–05.
143. See id. at 901, 906–07.
144. For additional troubling cases, see Gomes v. Wood, 451 F.3d 1122, 1135, 1138 (10th Cir. 2006) (holding that placement of child into protective custody without notice and a hearing based on report by doctor who identified injury but stated that he felt comfortable leaving the child in her mother’s care
nity to reveal which constitutional claims for damages survive is a difficult task. In summary, though, no suit for compensation alleging violations under the U.S. Constitution may proceed against the states of the United States. Nor can any such suit be pursued against the federal government, unless the constitutional harms can effectively be brought under the FTCA as tort claims recognized under state law and framed to avoid the broad exceptions to government liability, including the discretionary function exception. Plaintiffs may bring claims for compensation against local governments, but face the difficult hurdle of establishing direct government responsibility for constitutional violations under Monell. Constitutional claims may be brought against individual federal, state, or local government officials, who may not have the resources to pay successful claims, but qualified immunity leads to dismissal, often early in the litigation, of a significant number of those claims.

As one scholar has noted, “the promise of monetary compensation for constitutional violations has not been fulfilled.”145 The result is that “many victims of constitutional violations get nothing, and many others get redress that is less than complete.”146 The system leaves victims of recognized constitutional violations without an opportunity to obtain compensation for the harm they have suffered, creating a serious right-remedy gap that is even acknowledged, to some degree, by the U.S. government.147

violated family’s due process rights, but that qualified immunity was appropriate because reasonable officials might disagree about reasonableness of the conduct); Maldonado v. City of Altus, 433 F.3d 1294, 1315–16 (10th Cir. 2006) (holding that the imposition by the city of a policy requiring employees to speak only English violated the equal protection rights of Hispanic workers under the Fourteenth Amendment, but that qualified immunity was appropriate because the right to speak a foreign language in the workplace was not clearly established); Owens v. Lott, 372 F.3d 267, 280 (4th Cir. 2004) (holding that a strip search of all persons on the premises of a home where drugs might be found was unreasonable and violated the Fourth Amendment, but that qualified immunity was appropriate), cert. denied sub nom. Donaldson v. Lott, 543 U.S. 1050 (2005); and Rasul v. Rumsfeld, 414 F. Supp. 2d 26, 41–45 (D.D.C. 2006) (dismissing, on qualified immunity grounds, allegations by detainees at Guantanamo regarding extended deprivation of liberty without counsel or a hearing, frequent beatings, insufficient shelter and food, and other humiliating treatment, because the law was not clearly established as to whether constitutional rights extend to aliens held at territory under the complete jurisdiction and control of the United States but over which the United States does not have sovereignty). Many other suits are never brought in the first place because the chances of successfully obtaining redress are so slim. See U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CONTACTS BETWEEN POLICE AND THE PUBLIC: FINDINGS FROM THE 2002 NATIONAL SURVEY, at v (2005) (reporting that less than twenty percent of persons who believed that police had improperly engaged in the use of force or threat of force against them filed a complaint or lawsuit against the authorities); E-mail from Victor Glasberg to Denise Gilman, supra note 101.

145. Jeffries, supra note 121, at 89.
146. Id.
147. See Initial ICCPR Report, supra note 42, ¶ 98 (recognizing qualified immunity limitations on suits for damages under Section 1983 and the discretionary function and intentional tort exceptions to the government’s waiver of immunity under the FTCA); Amar, supra note 14, at 1487 (noting the “wide remedial gap” created by the expansion of qualified immunity without a corresponding relaxation of government sovereign immunity); Chemerinsky, supra note 14, at 1202 (noting that “[t]he effect of sovereign immunity is to place the government above the law and to ensure that some individuals who have suffered egregious harms will be unable to receive redress for their injuries”); Jackson, supra note
III. THE FAILURE OF THE U.S. CIVIL RIGHTS SYSTEM TO MEASURE UP AS AN EFFECTIVE HUMAN RIGHTS SYSTEM UNDER INTERNATIONAL LAW

Given the limitations imposed by sovereign immunity, the U.S. civil rights system fails to measure up as an effective human rights system. This Part lays out the reasons why the U.S. civil rights regime is inadequate for the protection of human rights under international human rights law standards.

It is appropriate to turn to international law to gauge the adequacy of the U.S. system. To assess the claim that the United States has an effective domestic human rights system, one must judge the system by some external standard. It would be circular to analyze the system’s adequacy under the U.S. Constitution and interpretations of that document. The question here is whether the U.S. constitutional system adequately protects human rights as effectively as would the international human rights system. Indeed, the United States has invoked its domestic civil rights system as a defense against further international involvement. The U.S. system should thus be judged by international human rights standards to determine whether the system actually provides an adequate substitute for greater international commitments or whether international human rights law would require more or different protections.

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

A. STRUCTURAL INCOMPATIBILITY OF THE U.S. SYSTEM WITH INTERNATIONAL HUMAN RIGHTS PROTECTION

The doctrine of sovereign immunity places government actors in a privileged position vis-à-vis the people of the United States. Whereas individuals can sue...
private actors and obtain compensation for a wide range of conduct.\textsuperscript{150} individuals are greatly restricted in their ability to sue the government and its officials for compensation, as described above.

This structure, which provides special protections for government actions even when they violate civil/human rights, is diametrically opposed to the central purpose and rationale of human rights protection pursuant to international law. The primary purpose of international human rights law is “the safeguard of the individual in the face of the arbitrary exercise of the powers of the State.”\textsuperscript{151}

International human rights law recognizes that the State and its agents are in the strongest position both to protect human rights and also to harm them. The citizens cede great power to the State, and the State is expected to use that power to protect the citizenry.\textsuperscript{152} When the State instead abuses the rights of its citizens it can cause great harm because of its overwhelming strength, and it also breaches the trust that the citizens place in the State to provide proper protection. International human rights law acknowledges that violations of rights committed by the State are qualitatively worse than harms caused by private individuals.\textsuperscript{153}

\textsuperscript{150} See, e.g., Richardson v. McKnight, 521 U.S. 399, 412 (1997) (denying qualified immunity to employees of a private prison management firm sued under Section 1983 despite the government-like functions they fulfilled). In an age of privatization of many government functions, the holding in Richardson may bode well for the ability of victims to obtain relief for some constitutional violations committed by private entities carrying out state governmental functions. Unfortunately, any broadening of liability resulting from the case will not extend to private entities carrying out federal government functions. The Supreme Court has held that Bivens actions are not available against private entities acting under color of federal law. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70–72 (2001). In addition, the FTCA specifically precludes claims against “any contractor with the United States.” 28 U.S.C. § 2671 (2000).

\textsuperscript{151} Roca, Terry, & Marsano Case, 2001 Inter-Am. Ct. H.R. (ser. C) No. 71, ¶ 89 (Jan. 31, 2001); see also Velasquez Rodriguez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, at 151 (July 29, 1988) (noting that human rights impose limits on government because they derive “from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State”); Gomez Paquiyauri Brothers Case, 2004 Inter-Am. Ct. H.R. (ser. C) No. 110, at 36 (July 8, 2004) (affirming that human rights law is established to provide the individual with means to protect internationally recognized human rights as against the State); Nigel S. Rodley, Can Armed Opposition Groups Violate Human Rights?, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY 297, 299 (Kathleen E. Mahoney & Paul Mahoney eds., 1993) (tracing the development of human rights as a response to the rise of the modern nation-state with its increased power and authority).

\textsuperscript{152} See American Declaration, supra note 25, para. 1 (recognizing that “juridical and political institutions, which regulate life in human society, have as their principal aim the protection of the essential rights of man”).

\textsuperscript{153} See DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 50 (1999); see also Loayza Tomayo Case, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, at 462 (Nov. 27, 1998) (noting the harm caused by “a breach of the trust that the person had in government organs duty-bound to protect him and to provide him with the security needed to exercise his rights and to satisfy his legitimate interests”); Rodley, supra note 151, at 302 n.10 (“May it not . . . follow that the torment is particularly aggravated when the agents of the pain or suffering are precisely those who are supposed to protect against or at least potentially provide relief from the acts causing the suffering?”). To be sure, the theory of civil rights in the United States also emphasizes the power of the government and the corresponding duty to protect rather than violate rights. See Ogden v. Saunders, 25 U.S. (1 Wheat.) 213, 346–47 (1827).
International human rights law thus imposes the greatest burdens of human rights protection on the State. It focuses on the responsibility of States in relation to human rights rather than on the responsibility of private entities or individuals, and generally provides a means of redress only for victims of the actions and omissions of States.154

Through its adherence to sovereign immunity protections for government actors, the U.S. system turns human rights protection on its head, protecting the government against the citizenry rather than the reverse.

B. THE FAILURE OF THE UNITED STATES TO MEET ITS OBLIGATION UNDER INTERNATIONAL HUMAN RIGHTS LAW TO PROVIDE REPARATIONS/COMPENSATION

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

1. The International Human Rights Law Requirement of Compensation

Almost all international human rights declarations and treaties, including those that are binding on the United States, impose an obligation on the State to provide compensation for violations of rights that occur.155 This obligation appears in specific articles of the international instruments that provide for a right to an effective remedy as well as in the general obligation imposed on States by international norms to respect and ensure human rights.

The ICCPR, which is binding on the United States, provides in Article 2, paragraph 3, that States Parties to the treaty must “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective

(Marshall, J.) (declaring that the right of coercion is surrendered by citizens to the government and imposes on government the duty of protecting rights and furnishing a remedy when they are violated). However, U.S. doctrine has not addressed the contradiction between these principles and the role that sovereign immunity plays in impeding accountability and redress for civil rights violations.

154. See ICCPR, supra note 24, art. 2 (establishing that each State Party to the ICCPR undertakes to respect and to ensure the rights recognized in that treaty); General Comment No. 31, supra note 50, ¶¶ 6, 8 (noting that obligations are binding on States); Org. of Am. States, Inter-Am. Comm’n on Human Rights, Third Report on the Situation of Human Rights in Colombia, at 71, OEA/Ser.L/V/II.102, doc. 9, rev. 1 (Feb. 26, 1999) (“Under the individual petition procedure set forth in its Statute and the American Convention on Human Rights, the Commission’s jurisdiction extends only to situations where the international responsibility of a member State is at issue.”); Richard B. Bilder, An Overview of International Human Rights Law, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 3, 9 (Hurst Hannum ed., Transnational Publishers 2004) (hereinafter HUMAN RIGHTS PRACTICE); Rodley, supra note 151, at 300, 318. The government may, in some cases, be liable for violations of human rights through its failure to control or sanction private actors, but private actors themselves do not violate human rights. See General Comment No. 31, supra note 50, ¶ 8 (noting that the obligations of the ICCPR are binding on States and do not “have direct horizontal effect” so as to bind private persons or entities); Rodley, supra note 151, at 309.

155. See RESTATEMENT (THIRD), supra note 20, § 703 cmt. c (noting that international human rights agreements generally require a state party to provide remedies internally for violations of human rights and that a failure to provide such remedies constitutes an additional human rights violation).
remedy.”156 The United Nations Human Rights Committee, in overseeing and interpreting the ICCPR, has established that an effective remedy includes compensation. In its General Comment analyzing the legal obligations imposed by the ICCPR, the Human Rights Committee specified that the provision requiring an effective remedy can only be fulfilled if “appropriate compensation” is made available to victims of human rights violations.157 In its General Comment addressing torture, the Human Rights Committee stated unequivocally that “States may not deprive individuals of the right to an effective remedy, including compensation.”158

The Human Rights Committee has specifically emphasized the requirement of compensation in its interactions with the United States. After reviewing the United States’ first report to the Human Rights Committee, the Committee urged the United States to ensure that “victims be compensated” in cases of excessive use of force by the police.159

The Convention Against Torture, also binding on the United States, explicitly establishes the obligation to provide compensation in Article 14, stating that the victim of an act of torture, or the family of that victim if death results, should be guaranteed the “right to fair and adequate compensation.”160 The Committee against Torture has also emphasized this right to compensation in its dealings with the United States. In the conclusions and recommendations that it issued to the United States in 2006, the Committee against Torture expressed concern that some victims of abuse by U.S. government officials have faced difficulties obtaining redress and adequate compensation. The Committee then specifically urged the United States to ensure that “mechanisms to obtain full redress, compensation, and rehabilitation are accessible to all victims of . . . abuse . . . perpetrated by its officials.”161

The American Convention on Human Rights (American Convention), which is the regional treaty governing human rights in the Americas, also establishes, in Article 25, the right of individuals to judicial protection and a remedy for
human rights violations. In addition, Article 1 of the American Convention requires States Parties to “ensure to all persons . . . the free and full exercise of [the] rights and freedoms” protected therein. Although the United States has not ratified this treaty, it nonetheless provides important guidance regarding the international human rights law standards that have been adopted and accepted by the States of the Americas. The treaty and its interpretations have additional persuasive weight, because the United States is considered to be bound by the American Declaration of the Rights and Duties of Man through its membership in the Organization of American States (OAS) and its obligations under the Charter of that intergovernmental body. The American Convention builds

162. American Convention, supra note 36, art. 25.
163. Id. art. 1.
164. The United States signed the treaty on June 1, 1977, but has not yet ratified the instrument. As a result, the United States is bound not to take actions that would defeat the object and purpose of the treaty. See Vienna Convention on the Law of Treaties art. 18, Apr. 24, 1970, 1155 U.N.T.S. 331.
165. The United States ratified the OAS Charter on June 15, 1951, and the agreement entered into force for the United States on December 13, 1951. See Charter of the Organization of American States (as amended through 1993), Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 [hereinafter OAS Charter]. The OAS Charter identifies the protection of “fundamental rights of the individual” as a central principle agreed upon by the “American States.” Id. art. 3(1). Through its ratification of the OAS Charter and its membership in that organization, the United States committed itself to the principles of the organization, including the protection of human rights. The Charter also emphasizes the importance of the human rights obligation by setting up an instrumentality for achieving compliance with the commitment, in the form of the Inter-American Commission on Human Rights (the Inter-American Commission). The document establishes the Inter-American Commission as a principle organ of the OAS with faculties to accomplish the purposes and principles of the body and specifically charges the Inter-American Commission with promoting and monitoring “the observance and protection of human rights.” Id. arts. 53(e), 106, 145. The mandate of the Inter-American Commission and the nature of the human rights obligation accepted by the member States of the OAS is further developed in the Statute of the Inter-American Commission on Human Rights (the Statute), approved by the General Assembly of the OAS. See O.A.S. Res. 447, 9th Sess., Vol. 1 at 88 O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80 (Oct. 1979). The Statute reaffirms the role of the Inter-American Commission as the organ of the OAS responsible for addressing human rights issues and defines human rights as the rights set forth in the American Declaration as well as in the American Convention. See id. art. 1(2). Thus, for purposes of the OAS, for countries not ratifying the American Convention, human rights are those protected in the American Declaration. Based on the provisions in the OAS Charter and the Statute, the Inter-American Commission has repeatedly held that the United States is bound to respect the provisions of the American Declaration. See, e.g., Workman v. United States, Case 12.261, Inter-Am. C.H.R., Report No. 33/06, ¶ 70 (2006), available at http://www.cidh.oas.org/annualrep/2006eng/USA.1226eng.htm (interim report deciding admissibility); Haitian Ctr. for Human Rights v. United States, Case 9647, Inter-Am. C.H.R., Report No. 3/87, OEA/Ser.L./V/II.71, doc. 9 rev. 1 ¶¶ 48–49 (1987); Roach v. United States, Case 10.675, Inter-Am. C.H.R., Report No. 3/87, OEA/Ser.L./V/II.71, doc. 9 rev. 1 ¶¶ 15–17 (1981). Although the United States has never explicitly accepted the American Declaration as a legally binding instrument, the U.S. government has accepted the applicability of the American Declaration as a source for reviewing its own actions. In fact, the United States regularly argues the merits of petitions before the Inter-American Commission, asserting that its actions are consistent with the American Declaration. See Workman, Case 12.261, ¶ 63 (setting forth the United States’ argument in an interim report deciding admissibility that the petition should be rejected “on the basis that it fails to state a violation of the American Declaration”); Haitian Ctr. for Human Rights, Case 10.675, ¶ 51 (setting forth the United States’ submission that its actions are “consistent with the human rights standards of the American Declaration”); Roach & Pinkerton, Case
upon and develops the standards found in the American Declaration.166

The Inter-American Court of Human Rights (the Inter-American Court), which serves as the final authoritative body interpreting the American Declaration and the American Convention,167 has emphatically established the duty of States to provide compensation to human rights victims. The Inter-American Court first expounded upon the obligation to provide compensation for human rights violations in 1988 in its seminal decision in the Velasquez Rodriguez Case.168 The case was brought against the government of Honduras alleging that members of the Honduran military and intelligence services had abducted Manfredo Velasquez Rodriguez, a university student.169 The security forces took Velasquez in an unmarked car, constituting an arrest without warrant, and then held, interrogated, and tortured him. Because the police and security forces refused to acknowledge his arrest and detention, the Inter-American Court concluded that Velasquez had “disappeared.”170 After finding a number of violations of the American Convention, the Inter-American Court noted that Article 25 of the American Convention requires an effective remedy when human rights are violated. The court expounded on the type of remedy required when it analyzed the State’s duty under Article 1 of the American Convention to “ensure” the rights and freedoms delineated in the treaty. The court held that, in addition to the obligation to investigate violations that take place and to sanction those responsible, States must provide compensation “for damages resulting from the violation.”171 Since that time, the Inter-American Court has repeatedly reaffirmed the obligation of States to provide reparations, including monetary compensation, for human rights violations.172

9647, ¶ 38 (setting forth the United States’ argument that the Inter-American Commission should look to the American Declaration for the “relevant standards” in analyzing the claim against the United States and that domestic law is “not inconsistent” with the applicable human rights standards).


167. The Inter-American Court is an autonomous judicial institution established pursuant to the American Convention with the authority to decide cases arising under the American Convention and to issue advisory opinions regarding the proper interpretation of the treaty. See American Convention, supra note 36, arts. 52–60. Unlike the Inter-American Commission, the Inter-American Court is not an organ of the OAS.


169. See id. at 92–93.

170. Id. at 140–43.

171. Id. at 152.

172. See, e.g., Ituango Massacres Case, Int.-Am. Ct. H.R., ¶¶ 340–43 (July 1, 2006) (finding that a domestic procedure for providing compensation was insufficient when strict statutes of limitations and other barriers prevented full access to the procedure); Case of Moiwana Village, Int.-Am. Ct. H.R. (ser. C.) No. 125, ¶ 166 (June 15, 2005) (awarding a right to compensation for denial of justice and continuing displacement resulting from massacre of villagers); Bulacio v. Argentina, Int.-Am. Ct. H.R. (ser. C) No. 100, ¶ 38 (Sept. 18, 2003) (analyzing a friendly settlement of a claim involving police abuse resulting in death and finding a violation of the American Convention in the failure of the State to
2. The Incompatibility with International Human Rights Law of Limitations on Compensation in the United States

Because of the application of sovereign immunity described above, the U.S. civil rights system fails to meet the central human rights protection obligation of providing compensation when violations occur. To constitute an effective domestic human rights system, the U.S. legal system must ensure that U.S. constitutional rights, which mirror international human rights norms, are not subject to violation without compensation.\(^{173}\)

International human rights law does not impose specific requirements regarding the manner in which compensation must be provided. However, it does require that victims of human rights violations be provided with a meaningful route for obtaining redress.\(^{174}\) The United States has not provided such a mechanism. As discussed above, the U.S. system precludes suit against the government. Moreover, suits against individual officials do not reliably result in compensation, because officers often are unable to pay if a judgment is rendered against them and because qualified immunity frequently protects them from such a judgment in the first place.

The Inter-American Court and the Inter-American Commission on Human Rights, the entities responsible for interpreting the American Declaration and American Convention in the first instance and for applying the American Declaration in cases against the United States,\(^{175}\) have both made clear that the

\(^{173}\) As noted above, in a few areas, the U.S. Constitution arguably provides greater protection than international human rights instruments. See supra note 36 and accompanying text. The United States could convincingly argue that it need not provide compensation for violations in those areas in order to claim an effective domestic human rights system under international standards.


State does not comply with its responsibility to provide compensation if it leaves payment to victims in the hands of individual officials who may not have the ability to pay a judgment. In the Gomez Paquiyauri Brothers Case, involving the Peruvian government’s kidnapping and killing of two young brothers unjustly accused of involvement in guerrilla activities, the courts of Peru entered a judgment against low level Peruvian government officials ordering the payment of compensation. The family was nonetheless unable to recover any monies. In its submissions to the Inter-American Court, the Inter-American Commission took the position that Peru had failed in its obligation to provide compensation because it had ordered the payment of compensation by officials without resources and had not taken actions to ensure that payment was made. The Inter-American Court of Human Rights agreed and found that Peru was liable under international human rights law to provide proper compensation.

Nor does international human rights law permit a rule under which compensation will be forthcoming only in those limited cases where qualified immunity protections for government officials, like those established in U.S. law, are overcome. Put in other terms, the international human rights law requirement of compensation does not apply only in those cases in which a government official commits a human rights violation and, in doing so, also acts in a manner that is objectively unreasonable in light of well-established human rights standards.

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

violations. See, e.g., Haitian Ctr. for Human Rights, Case 10.675, ¶ 56 (noting that the U.S. government had not disputed that petitioners met the requirements for the presentation of a petition to the Inter-American Commission).

177. See id. ¶ 3.
178. See id.
179. See id. ¶ 184.
180. See id. ¶ 189.
181. See infra notes 188–89.
182. ICCPR, supra note 24, art. 9.
183. See id. art. 7.
184. See, e.g., id. art. 4; American Convention, supra note 36, art. 27.
under the relevant standards, the right to redress, including compensation, attaches immediately.185

In the United States, qualified immunity permits recovery for rights violations against individual officials only if a plaintiff can make an additional showing of individual culpability or fault in relation to the lawfulness of the action that led to a human rights violation.186 It essentially requires a victim to establish that the official in question knew or should have known that he was engaged in a violation of constitutional rights.187 Human rights law, on the other hand, considers all violations of the substantive human rights norms that are attributable to State actors operating within the scope of their employment to result in a requirement of redress, including compensation.188 No consideration is given to the individual culpability of the actor committing the violation.189

The requirement of specific culpability under the qualified immunity standard in the United States is a byproduct of the immunity rules, which force suits to be directed against individual officials rather than against the government.190 But under international human rights law, the State always retains the ultimate obligation to provide redress for violations committed by government actors.191 The United States may not avoid its responsibility as a State to ensure that compensation is paid for human rights violations by requiring victims to proceed against individual officials and then protecting those officials with qualified immunity.

The United States has argued that various domestic means of enforcing rights, other than through individual suits for compensation, provide an adequate remedy for human rights violations. Specifically, the United States has identified criminal proceedings against violators, pattern and practice suits

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185. See, e.g., ICCPR, supra note 24, art. 2.
186. See Jeffries, supra note 121, at 89 (interpreting qualified immunity as requiring proof of fault, essentially of “negligence with respect to illegality”).
187. See id. at 94; supra notes 107–113.
188. See Bamaca Velasquez Case, 2000 Inter-Am. Ct. H.R. (ser. C) No. 70, at 558 (Nov. 25, 2000) (“[A]ccording to the rules of international human rights law, the act or omission of any public authority constitutes an action that may be attributed to the State and involve its responsibility . . . .”); Velasquez Rodriguez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, at 152–53 (July 29, 1988) (“Any violation of rights . . . carried out by an act of public authority or by persons who use their position of authority is imputable to the State.”).
189. See Paniagua Morales et al. Case, 1998 Inter-Am. Ct. H.R. (ser. C) No. 37, at 183 (Mar. 8, 1998) (stating that a court need not “determine the perpetrator’s culpability or intentionality” in establishing a rights violation); Velasquez Rodriguez, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, at 152–53, 154 (explaining that human rights violations do not depend upon determinations of “psychological factors . . . in establishing individual culpability” and emphasizing that “the intent or motivation of the agent who has violated . . . rights . . . is irrelevant”).
190. See Pillard, supra note 74, at 79–80.
brought by the federal government, and habeas corpus petitions as avenues providing adequate enforcement of human rights.\footnote{192} But none of these other mechanisms allows human rights victims to initiate proceedings that have the possibility of resulting in redress in the form of compensation. Thus, because international human rights law makes an award of compensation indispensable, U.S. human rights obligations cannot be satisfied exclusively by any of these other remedies.

Furthermore, the United States may have the authority, and even the duty, to employ methods of human rights protection other than compensation. Compensation alone may not be adequate in some cases. For example, international human rights law generally requires States to pursue sanctions against those committing serious human rights violations.\footnote{193} However, even where the provision of compensation is not the only response to human rights violations that is required, it is nonetheless a required response. Other means of enforcement cannot replace its crucial role under international human rights law.\footnote{194}

C. THE IMPERMISSIBILITY UNDER INTERNATIONAL HUMAN RIGHTS LAW OF THE SOVEREIGN IMMUNITY DOCTRINES APPLIED IN THE UNITED STATES

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

The United Nations Human Rights Committee has concluded that immunity provisions are incompatible with the ICCPR. In its General Comments interpreting the obligations of States under the ICCPR, the Human Rights Committee has stated that States do not respect their ICCPR obligations when they apply

\footnote{192. \textit{See Third ICCPR Report, supra} note 54, ¶¶ 131–37 (listing examples of criminal prosecutions and pattern and practice suits); \textit{Initial ICCPR Report, supra} note 42, ¶ 98.}


\footnote{194. The international community reaffirmed the importance of compensation even in cases pursued as criminal matters when it adopted the Rome Statute establishing the International Criminal Court (the ICC). \textit{See Rome Statute of the International Criminal Court} art. 75, July 17, 1998, 2187 U.N.T.S. 90. The statute requires the ICC to provide for reparations, including monetary compensation, to the victims of violations that result in proceedings before that tribunal. The order of compensation may be made against the person convicted by the ICC and is to be enforced by the States parties to the statute. \textit{See id.}}
“amnesties” or “immunities and indemnities.” The Human Rights Committee’s conclusions are based in part on the requirement that States must provide compensation for violations and must not “deprive individuals of the right to an effective remedy.” The Human Rights Committee has also specifically noted that official status cannot justify immunity from legal responsibility. In another pronouncement, the Human Rights Committee commented that a grant of immunity to officials is incompatible with Article 2 of the ICCPR, which enshrines the right to an effective remedy.

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

Both the Human Rights Committee and the Inter-American Court have thus far addressed the question of immunities largely in the context of amnesties from criminal prosecution, which have only collateral consequences on victims’ ability to receive damages. However, nothing in their pronouncements suggests that immunities from suit for compensation are any less problematic than criminal amnesties under international human rights law. In fact, their interpretations highlight the impact that any immunity provisions have on the right to an effective remedy and the right to reparations. The central concern of these bodies is that the application of immunities makes it impossible for States to comply with their obligations in responding to human rights violations that occur, including the obligation to provide compensation.

The Inter-American Commission on Human Rights did have an opportunity to address provisions explicitly providing immunity from civil suit for government actors. In its 1994 report on the human rights situation in El Salvador, the Inter-American Commission analyzed the amnesty law adopted in El Salvador in 1993. That amnesty extinguished all liability for individuals who commit-

195. General Comment No. 31, supra note 50, ¶ 18; see General Comment No. 20, supra note 158, ¶ 15.
196. General Comment No. 20, supra note 158, ¶ 15.
197. See General Comment No. 31, supra note 50, ¶ 18.
200. See id. at 421.
201. Id.
202. See supra notes 195–199.
ted acts of violence during El Salvador’s civil war, including those that the report of the United Nations Truth Commission for El Salvador identified as having committed human rights violations. The Inter-American Commission expressed special concern that the amnesty precluded civil liability and therefore directly affected the rights of human rights victims. The Commission concluded that the amnesty violated the American Convention because it precluded criminal prosecution of actors involved in serious human rights violations, but also because it “eliminate[d] any possibility of obtaining adequate pecuniary compensation . . . for victims.”

The European Court of Human Rights (European Court), interpreting the European Convention on Human Rights (European Convention), has had greater occasion to analyze in depth the issue of immunities in the context of civil litigation for compensation. That court has determined that the grant of immunities from suit to government actors necessarily leads to a breach of the obligations of the State under international human rights law. The European Convention is obviously not binding on the United States. However, the decisions of the European Court provide useful guidance in understanding the contours of the general right to compensation for violations under international human rights law and the permissibility of limitations on that right imposed through immunities. The interpretations of the European Court are particularly helpful because the European Convention establishes the right to access a court to seek redress for violations of human rights and the right to obtain a remedy in terms similar to those included in the ICCPR, the Convention against Torture, and the American Declaration.

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

In 1998, in the case of Osman v. United Kingdom, the European Court issued a decision that left little room for doubt on the illegitimacy of immunities under the international human rights law norms included in the European Convention. The decision addressed standards applied by the United Kingdom in civil suits against the police, which, in the view of the European Court,

204. See id.
205. Id. at 77.
206. Compare European Convention on Human Rights arts. 6, 13, Nov. 4, 1950, 213 U.N.T.S. 221 (requiring a “fair and public hearing” for determinations of civil rights and establishing the right to an “effective remedy” for violations of rights), with ICCPR, supra note 24, arts. 2, 14 (requiring States Parties to “ensure” rights and requiring a “fair and public hearing” for determinations of rights and obligations), and American Convention, supra note 36, arts. 1, 25 (requiring States Parties to “ensure” rights and establishing the right to “effective recourse” for violations of rights).
provided “immunity on the police” for acts and omissions related to their law enforcement activities.209

The Osman case involved allegations that the police had failed to protect the Osman family from a gunman. The court believed that the police had been advised that the gunman was hostile toward one member of the family. However, the police did not prevent the gunman from attacking the family in a shooting that resulted in the death of one member of the family and serious injury to another.210 The family brought a negligence suit against the police in the British courts. The British appellate court dismissed the Osman family’s suit against the police on the grounds that public policy precluded an action against the police in “negligence in the investigation and suppression of crime.”211

The European Court then analyzed the British courts’ dismissals of the case against the police as one of denial of access to a court under Article 6 of the European Convention.212 The European Court held that the immunity provided to the police in the domestic proceedings amounted “to an unjustifiable restriction on an applicant’s right to have a determination on the merits of his or her claim against the police.”213 The European Court also held that the British courts were required to examine the claims made against the police on the merits in an adversarial proceeding that would require the police to “account for their actions and omissions” rather than to dismiss those claims on immunity grounds.214

The Osman case established the impermissibility under European human rights law of immunities that allow for categorical dismissals of suits against the government through the application of objective or bright line tests without litigating the individual facts of each case and analyzing the specific acts or omissions in question. The sovereign immunities applicable in the United States, which prohibit suits against the government altogether and which require dismissal of suits against individual officers whenever the objective determination is made that their actions did not violate “clearly established” law, would not pass the European test.215

In the subsequent 2001 case of Z and Others v. United Kingdom,216 the European Court changed its interpretation of British law but did not alter in any way its holding that immunities are incompatible with the European Convention. Z and Others involved a claim that local authorities in the United Kingdom had failed to take adequate measures to protect four children who were abused

209. Id. at 3170.
210. See id. at 3142–44.
211. Id. at 3143.
212. See id. at 3165–71; European Convention on Human Rights, supra note 206, art. 6 (providing the right to a hearing).
214. Id. at 3171.
215. See supra Part II.
and neglected by their parents. A suit for damages was filed on the children’s behalf against the local authority, and the British courts dismissed the claim.217

The European Court held that the decisions of the British courts dismissing the children’s claim did not violate Article 6 of the European Convention guaranteeing access to the courts, because they did not result from the application of immunity.218 The European Court found that the British courts had analyzed the law of negligence actions and determined that British law did not allow for establishment of a duty of care—a required element for a negligence action—in this context of administering a welfare program. The European Court concluded that the inability of the children to sue the local authorities “flowed not from an immunity but from the applicable principles governing the substantive right of action in domestic law.”219

However, the European Court concluded that the United Kingdom was responsible, by omission, for a violation of Article 3 of the European Convention, which protects the right to be free from inhuman or degrading treatment.220 In addition, the United Kingdom was found to have violated Article 13, guaranteeing a remedy for rights violations, because the domestic court system had not provided a remedy for the violation of Article 3 of the Convention.221 In reaching this conclusion, the European Court emphasized the State’s obligation to provide a remedy for human rights violations, including compensation for damages at a minimum.222

The change in the European Court’s characterization of the bases for dismissal of negligence actions in the United Kingdom appears to reflect a new understanding of British negligence law available to the European Court for the first time in Z and Others. In Z and Others, the lawyers for the United Kingdom made a particular effort, based on the scholarly work that had been conducted internally in Britain after Osman, to better explain British standards for dismissing negligence claims.223 In addition, the law in the United Kingdom changed modestly after Osman and before Z and Others. British legal standards incorporated greater individualized determinations in negligence cases in order to move further away from any appearance of immunity.224

217. See id. at 3.
218. See id. at 30.
219. Id. at 32.
220. See id. at 25; European Convention on Human Rights, supra note 206, arts. 3, 13.
222. See id. The European Court therefore ordered Great Britain to pay damages for the violations of Articles 3 and 13 of the European Convention. See id. at 41, 42, 43.
223. See id. at 32 (reviewing the reasoning in Osman in light of clarifications subsequently made by the domestic courts).
224. See id. (noting with approval recent developments regarding the law of negligence in the domestic courts that allow a more balanced, individualized inquiry and thus eliminate the possibilities for an effective immunity); Jane Wright, The Retreat from Osman: Z v. the United Kingdom in the European Court of Human Rights and Beyond, in COMPARATIVE TORT LIABILITY, supra note 124, at 55, 60–61 (noting that, after Osman, British courts started making decisions based on individualized justice rather than attempting to constrain demands on the public purse through immunities from suit); J.A.
Nowhere in *Z and Others* does the European Court qualify its holding in *Osman* that categorical immunities, which bar human rights claims, are impermissible. In fact, the European Court referenced the rule against immunities while deciding that the case before it did not present an immunity question. The European Court’s decision in *Z and Others* must therefore be seen both as a reaffirmation that immunities impermissibly restrict the ability of victims of human rights violations to obtain redress, and also as a warning that limitations on substantive domestic law may also lead to breaches of State human rights obligations; however, the two situations may be addressed under different provisions of the European Convention.

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

**IV. The International Trend Away from Sovereign Immunity**

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

Comparative studies of governmental liability regimes have identified the trend toward the abolition of sovereign immunity. Fifteen years ago, a study published by the United Kingdom National Committee of Comparative Law and the British Institute of International and Comparative Law found that, through a combination of developments, legal systems had “gradually but
dramatically” altered their prior position of insistence on sovereign immunity. The study noted that none of the legal systems included therein, including England and Wales, Scotland, New Zealand, Australia, Belgium, France, Ireland, Italy, Germany, and the European Community, continued to apply a full-fledged sovereign immunity doctrine. The authors of the study concluded that the general picture that emerged from their comparative analysis was one “of a widening of governmental liability.” In addition, they found that immunities were declining and “the grounds for obtaining compensation” were expanding. More recently, authors in the United States have also noted the trend in Europe toward setting aside rules of sovereign immunity and allowing for greater government liability.

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

The remainder of this Part describes briefly the manner in which the legal systems of the United Kingdom, France, and Argentina provide human rights protections by allowing suits for compensation against the government without the barrier of sovereign immunity. The legal systems in these three States

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227. See id. The study specifically noted, in contrast, that the doctrine of sovereign immunity had not “received its quietus” in the United States. Id.
228. Id. at 15.
229. Id.
231. See Bradley & Bell, supra note 226, at 5 (noting that constitutional or legislative amendments have “often” been the source of changes to immunity doctrines).
232. See id. at 5, 15 (citing Ireland and Italy as examples of countries in which changes in immunity doctrines have come through judicial decision based on new interpretations of constitutional requirements).
233. See id.; Pfander, supra note 230, at 635–49.
234. By describing the legal systems of these three countries and urging comparison with the U.S. system, I do not suggest that these countries have perfect human rights records or even that their records are better than that of the United States. It is nonetheless useful to study the manner in which
handle human rights claims largely through regular noncontractual (common tort or tort-like civil liability) schemes. In each country, these schemes have explicitly developed as human rights protection systems where constitutional and other rights claims can be heard without the application of sovereign immunity.

A comparison of these other systems with the civil rights regime in the United States is instructive. The experience in these three countries suggests these legal regimes have balanced competing concerns to provide redress for victims when human rights violations do take place.

235. The United Kingdom has recently provided, through adoption of the Human Rights Act 1998, a means of bringing suit against the government that looks similar to a constitutional tort system. The substantive rights protected under the Human Rights Act are those in the European Convention. See infra notes 255–57 and accompanying text. Both Argentina and France regularly look to international human rights conventions to determine the scope of government responsibility under their tort-like systems. See infra notes 272–75, 291–94, and accompanying text.

236. See T.R. Hickman, Tort Law, Public Authorities, and the Human Rights Act 1998, in COMPARATIVE TORT LIABILITY, supra note 124, at 17, 25 (noting that English courts and commentators “have long recognized the centrality of tort law’s role in vindicating individual rights”); Marie-Aimee de Latournerie, The Law of France, in GOVERNMENTAL LIABILITY: A COMPARATIVE STUDY, supra note 226, at 221 (noting that violations of individual rights are given higher status by the courts in the hierarchy of treatment of liability claims); MaríA Gracela Reiz, Responsabilidad del Estado (1969) (explaining that the system of State responsibility in Argentina not only protects the rights set forth in the Constitution but is based on and required by the constitutional mandate of rights protection).

237. As discussed above, the U.S. system allows certain civil rights claims against the federal government to proceed as tort claims through operation of the FTCA. See supra notes 68–79 and accompanying text. However, the FTCA is a system of such a limited nature that it does not compare to these tort-based protection systems operating in other countries. Nor was it intended to serve as a means for protecting civil or human rights.

238. Data on success rates in actions for damages against the government alleging human rights violations for these three countries and the United States is not available. It is therefore not possible to compare success rates in the United States with those in the other three countries. Such a comparison would be unsatisfactory, and possibly misleading, in any case. It would be important to account for the frequency of human rights violations in each country so that the raw numbers regarding cases in which damages were recovered would actually yield a rate of success in obtaining reparations in relation to the total number of violations taking place. The task of defining a rate of human rights violations is itself very difficult and would likely lead to differing conclusions depending on the precise standards used. Even if this difficulty could be accounted for, a vast array of factors could affect success rates in proceedings for damages and therefore obscure the impact that sovereign immunity or its absence has on that rate. These factors include, for example, differences in the specific substantive law defining the causes of action available for human rights harms, the litigiousness of a specific society that might lead to the presentation of fewer or greater numbers of claims without merit, the capability and interest of the private Bar in bringing human rights claims and the availability of legal aid support, and the ability of victims of human rights violations to forego judicial proceedings for obvious violations by obtaining reparations through nonjudicial mechanisms. The use of comparative law to shed light on the U.S. legal system always carries a significant risk that “apples will be compared to oranges.” Legal systems are complicated structures with many interrelated parts, and it is often difficult to separate out one aspect of a system for comparison when other aspects of the two systems may also be different in relevant ways. Nonetheless, a comparison of elements of the U.S. legal system to elements of other legal systems almost always provides valuable insight into the manner in which another legal system has managed a given problem, which may prove helpful in determining how the United States may best handle a similar problem. The point of the comparative law section in this Article is to provide some information on the path that sovereign immunity has taken in other countries as a source of perspective for examining sovereign immunity in the United States. This Article does not claim that these other
that the United States could choose a path away from sovereign immunity without harm to its legal system. In doing so, the United States would bring its protections for human rights more closely into line with international standards, close a widening gap between it and other countries boasting well-developed legal systems, and vindicate the United States’ own constitutionally guaranteed rights.

A. THE UNITED KINGDOM

The development of the law in the United Kingdom, resulting in the abolition of sovereign immunity more than fifty years ago, is illuminating because the sovereign immunity doctrines applicable in the United States originally derived from British law. The last remnants of sovereign immunity available in the United Kingdom in relation to suits for damages against the government were eliminated in 1947 with the passage of the Crown Proceedings Act.239 That legislation made the central government (the “Crown”) liable to suit.240 Local governments had already been liable.241 With the abolition of sovereign immunity at all levels came the applicability of the doctrine of respondeat superior. Thus, under British law, government entities are vicariously liable to third parties when an employee official acts unlawfully in the course of his or her employment.242 The effect is that governmental institutions and their employee officials are jointly liable for wrongful acts, and suits for compensation can be brought against either—with the government paying any damages awarded in either case.243 Recovery of compensation from government actors for human rights abuses is now available in a wide range of cases in the United Kingdom.244

Victims of abuses generally bring actions against government actors in the

countries award damages more frequently or more completely than the United States in cases of human rights violations. Rather, this Article asserts that it is instructive to see that three other countries have managed to eliminate sovereign immunity protections and thereby strengthen their domestic mechanisms for redressing human rights violations without great negative consequences. The comparison would be less instructive if the other three legal systems were generally not seen to be effective human rights protection systems for reasons not relating to sovereign immunity, but that is not the case.

- 240. Id.; see John Bell, The Law of England and Wales, in GOVERNMENTAL LIABILITY: A COMPARATIVE STUDY, supra note 226, at 17, 18–20; Pfander, supra note 230, at 616.
- 243. See Bell, supra note 240, at 19–20; Flogaitis, supra note 241, at 447; Hickman, supra note 236, at 31. In some cases, the government may seek to recoup any compensation that it pays from the individual official committing the violations. See Bell, supra note 240, at 19–20.
- 244. See Telephone Interview with Richard Hermer, Barrister, Doughty Street Chambers, in London, Eng. (July 14, 2006) (stating that very few legal doctrines limit the government’s liability in the United Kingdom and suits seeking damages for a broad range of governmental conduct are frequently successful). Richard Hermer regularly litigates government abuse cases in the United Kingdom under the tort system and under the Human Rights Act.
form of tort claims, and substantive tort law in the United Kingdom has persisted in considering certain special factors that may limit liability of government actors. Thus, public officials may in some limited circumstances avoid responsibility by alleging that they acted in good faith or acted within a statutory authorization.245

However, these substantive law protections for government actors should not be considered a de facto revival of sovereign immunity that defeats human rights protections. As described above, as a result of the decisions of the European Court of Human Rights in the Osman and Z and Others cases, the British courts have more carefully delineated and delimited the special considerations granted to the government.246 These special considerations are therefore on the decline.

In any case, the substantive law limitations on tort suits have been almost completely limited to the context of negligence claims alleging governmental failures to protect against harm by third party non-government actors.247 These cases have received much attention, in part because of their treatment by the European Court of Human Rights, but they do not accurately portray the extent to which government liability is available in most cases. Cases alleging intentional and affirmative governmental wrongdoing are regularly allowed.248 For example, “[a]ssault[] and false imprisonment are particular favourites in actions against the police.”249

For example, in 2003, a British court awarded almost $500,000 in damages to a black delivery driver who was detained when he arrived at a company that was in the process of being searched by police and was then subjected to racial epithets and brought up on false charges.250 In 2005, in the case of O’Brien v. Chief Constable of South Wales,251 the British House of Lords reaffirmed the ability of individuals eventually acquitted after criminal proceedings to bring claims against the police for malicious prosecution and misfeasance in public
O’Brien claimed that his conviction and imprisonment for eleven years resulted from an improper investigation conducted by police officials. The British courts not only allowed the claim to proceed, but allowed O’Brien to present evidence in support of his claim suggesting misconduct in earlier investigations conducted by the same officers.

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

B. FRANCE

In France, local public bodies and the central (or national) government alike may readily be sued for damages without any sovereign immunity barriers. French law provides a useful perspective because substantive liability in France is expansive, yet the French system has not deemed it necessary to counter broad government exposure to liability with immunity protections.

As early as the 1870s, French courts declared that the State was liable for damages caused by the government and by its agents acting in relation to their governmental functions. In 1905, in a case involving a police operation, the

252. See id. at 540–42, 555–56, 580.
254. Id. at [79]–[81].
256. See Bailey, supra note 248, at 161, 177 (noting the effect that the Human Rights Act has had on the domestic law of negligence by impacting the scope of the negligence tort and providing an independent claim when negligence law is unsatisfactorily limited).
257. See id. at 161 (noting that the case law under the Human Rights Act has already provided notable examples of awards of damages); Telephone Interview with Richard Hermer, supra note 244.
258. See de Latournerie, supra note 236, at 217–19.
259. See Pfander, supra note 230, at 623.
260. See Tribunal des conflits [TC] [Tribunal of Conflicts], July 30, 1873, Rec. Lebon 117 (Fr.) (establishing state responsibility for the actions of individual agents acting in relation to their government service); Tribunal des conflits [TC] [Tribunal of Conflicts], Feb. 8, 1873, D. 1873, III, 20 (Fr.) (establishing the possibility of holding the state responsible and assigning jurisdiction over damage claims against the state to the administrative courts). The government pays for claims involving actions
Conseil d’État, the highest French administrative court, specifically clarified that no immunity-type protection was due to the government in suits for compensation.261 The court determined that it was not proper to engage in any “public law immunity” analysis considering whether government officials were involved in discretionary functions or otherwise due special consideration.262 One narrow immunity ground for “acts of State” persists as a protection for the national government, but only in cases involving the conduct of foreign affairs.263

French law generally requires a claim for damages to be based on a showing of objective wrongdoing or “illegality” without any need to show intentional or even negligent misfeasance.264 The courts may refer to the rights and duties set forth in the European Convention on Human Rights, to which France is a party, to determine the legality of a given action.265 For certain types of sensitive governmental actions or decisionmaking, including some types of police activity, a more stringent standard is applicable.266 Even in those cases, though, the standard is roughly one of gross negligence (faute lourde).267

In some cases, the French courts will award compensation to individuals who have suffered harm at the hands of the government even if no government official or entity has engaged in wrongdoing at all.268 As an example, French law will award damages to an individual harmed when the police use weapons issued by the State in an operation to maintain public order without any regard

or omissions by its employees in the course of employment from public funds. See Pfander, supra note 230, at 623. The government may seek to recoup any compensation that it pays from the individual official committing the violations. See Le Conseil d’Etat, Analyse: Laruelle et Delville, Analyse des grands arrest du Conseil d’Etat et du Tribunal des conflicts, http://www.conseil-etat.fr/ce/jurisp/index_ju_la33.shtml (describing the 1951 Laruelle case); Flogaitis, supra note 241, at 442. Interestingly, an official who is sued individually and found liable for damages as a result of actions or omissions related to his employment may also seek compensation from the government for that liability. See Conseil d’Etat [CE Ass.] [Council of State], Apr. 12, 2002, Rec. Lebon 238689 (Fr.) (holding the state liable for payment of half of a $660,000 damages award assessed against a former Vichy government official for his involvement in the persecution of French Jews during World War II).

261. See Conseil d’Etat [CE] [Council of State], Feb. 10, 1905, Rec. Lebon 10365 (Fr.) (finding no immunity in relation to the claim that police had caused harm by firing a bullet into a home while trying to kill a rampaging bull); Roberto Caranta, Public Law Illegality and Governmental Liability, in COMPARATIVE TORT LIABILITY, supra note 124, at 272, 344 (discussing the Tommasco Greco case).

262. Caranta, supra note 261, at 344.

265. See Brown & Bell, supra note 264, at 226.
266. See id. at 191–92.
267. See id.

268. See, e.g., Brown & Bell, supra note 264, at 193–94 (noting that when the state creates a risk that “materializes and an individual is occasioned injury or loss,” the state can be held liable); Cees van Dam, European Tort Law 478 (2006) (explaining that because “the State acts in the interest of the entire community,” it must compensate individuals to whom it “causes disproportional damage”); Caranta, supra note 261, at 276 (“In certain situations, French public administration can be held liable even if no illegality is present.”); Pfander, supra note 230, at 624 (“French administrative law imposes no-fault liability in cases where the state has engaged in conduct that creates a risk of injury . . . .”).
to the fault of the officers involved. The rationale is that no single individual should bear the burden of harm caused when the government acts to the benefit of society as a whole. The French liability regime explicitly recognizes the special and extensive powers given to the government and imposes corresponding special duties on government actors not applicable to individuals.

Victims of governmental abuses may thus bring a range of claims against government actors in France, including actions relating to human rights abuses. For example, the Conseil d’Etat recently held the State responsible for payment of damages resulting from the actions of a former Vichy official who had arranged the deportations of Jews to Auschwitz between 1942 and 1944. In another case demonstrating the potential for government liability even in cases involving less obvious rights violations, the Conseil d’Etat awarded damages suffered by the complainant as a result of a delay in the adjudication of an earlier civil claim he had brought in the French administrative courts. In doing so, the court applied the provisions of the European Convention on Human Rights to find a human right to a prompt hearing.

C. ARGENTINA

The legal system in Argentina provides a particularly interesting point of comparison for the U.S. system. Argentina’s relevance as a country within the Americas with a well-developed legal system is augmented by the fact that the Argentine Constitution was modeled very closely on the U.S. Constitution.

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

Originally, victims of abuses had no recourse against the government directly. The Supreme Court of Argentina, explicitly recognizing the jurisprudence of the U.S. courts, adopted a strict sovereign immunity doctrine in 1864, completely precluding suit against the government.\footnote{278 See \textit{Mairal}, supra note 276, at 97 n.305.}

Since that time, however, Argentine law has parted ways with the United States on the issue of sovereign immunity. In 1933, the Supreme Court of Argentina decided the \textit{Devoto} case, which held that the government could be sued for the actions of its officials, including negligent actions.\footnote{279 See \textit{Reiriz}, supra note 236, at 85–86.} The court thus eliminated sovereign immunity and a previously existing ban on respondeat superior liability in one decision. Sovereign immunity has now ceased to be an impediment to suits for damages against government actors.\footnote{280 See also Corte Suprema de Justicia \textit{[CSJN]} [Supreme Court of Argentina] 21/3/1995, “Rebesco, Luis Mario v. Policía Federal Argentina (Estado Nacional—Ministerio del Interior) s/ daños y perjuicios,” Fallos (Arg.), available at http://www2.csjn.gov.ar/jurisp/principal.htm (search by party name) [hereinafter \textit{Rebesco Case}] (stating that the exercise of state functions relevant to the police power does not impede the State’s responsibility to the extent that a victim is deprived of property or essential individual rights as a result).}

A human rights victim may sue both the government and any individual officials responsible for rights violations. When the court awards damages against a government official, the government is jointly liable.\footnote{281 See Corte Suprema de Justicia \textit{[CSJN]} [Supreme Court of Argentina], 31/8/1999, “Tarnopolsky, Daniel v. Estado Nacional y otros s/ proceso de conocimiento,” Fallos (Arg.), available at http://www.csjn.gov.ar/documentos/cfal3/cons_fallos.jsp (search using date and party names) [hereinafter \textit{Tarnopolsky Case}] (specifically recognizing that the Tarnopolsky family’s decision to sue both an individual officer and the government was legally proper and affirming awards of damages against both the individual officer and the government imposed on a joint liability basis); see also \textit{Cód. Civ.}, arts. 1112, 1113. The government may then seek to recuperate any damages paid to the victim from the official. See \textit{Cód. Civ.}, arts. 1109, 1112.}

Argentine law generally requires a victim to establish some level of wrongdoing on the part of government officials in order to establish governmental liability. The requirement can be met by establishing fault or negligence of the officials or by demonstrating that they carried out their official functions in an “irregular” manner.\footnote{282 See \textit{Cód. Civ.}, arts. 1109, 1112; \textit{Reiriz}, supra note 236, at 89–90.} Responsibility of the government for the “irregular” conduct of its officials applies whenever the government has assumed responsibility for a function, such as a public service or industry, and its officials cause harm in the “irregular” exercise of that function.\footnote{283 See \textit{Reiriz}, supra note 236, at 89–90.} The liability is so broad as to encompass official acts committed in times of war when they fail to adhere to the proper and limited nature of legitimate war powers.\footnote{284 Id. at 94–95.}

The Argentine system places emphasis on establishing the responsibility of individual officials and imputing that responsibility to the government. However, the law also recognizes that the central issue is the wrongful exercise of
government authority. Thus, Argentine law does not necessarily require the victim of human rights abuses to identify the individual officers responsible for a violation or to describe with specificity their wrongdoing—the fact that the harm resulted from governmental actions is usually sufficient to establish government responsibility. In certain circumstances, as with the French system, the government may be required to pay damages for its harmful actions even if they are fully valid and lawful. For example, the Supreme Court of Argentina has held that the government is responsible for payment of damages suffered by an individual accidentally shot by the police while caught in the crossfire between police and criminal suspects. The court has specifically noted that the government incurs responsibility in such situations even when the police action was fully legitimate. As in France, the Argentine supreme court’s jurisprudence emphasizes the importance of compensating individuals who suffer damages in the course of government actions intended for the benefit of the society as a whole.

The Argentine system has thus evolved to provide significant protection for victims of human rights abuses. Individuals must cloak their claims in the language of civil law violations (tort-like claims), such as abuse or usurpation of power or unlawful imprisonment, but they regularly and successfully invoke the rights protections in the Argentine Constitution and international human rights treaties to provide contour to those claims. In 1999, for example, Daniel Tarnopolsky brought a claim against the federal government and individual military officials seeking compensation for the disappearance of several of his family members by the Argentine military during the dictatorship of the 1970s. The Supreme Court of Argentina emphasized the unique nature of disappearances, as recognized by the Inter-American Convention on the Forced Disappearance of Persons, and affirmed an award of almost $1.5 million. In a case involving more recent violations, the Supreme Court found a violation of the Argentine Constitution and of human rights as a result of the government’s failure to protect an inmate who was killed by fellow inmates in a provincial prison. The court ordered the government to pay more than $300,000 in damages.

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285. **Id.** at 96–97; see Corte Suprema de Justicia [CSJN] [Supreme Court of Argentina], 10/4/2003, “Gothelf, Clara Marta v. Santa Fe, Provincia de s/ daños y perjuicios,” available at http://www2.csjn.gov.ar/jurisp/principal.htm (search by party name) [hereinafter Gothelf Case].

286. **Rebescó, supra** note 236, at 97; see Rebesco Case, supra note 280.

287. See generally **Rebesco Case, supra** note 280.

288. See id.

289. See id.

290. See id.

291. See **Tarnopolsky Case, supra** note 281.

292. See id.

293. See **Gothelf Case, supra** note 285.

294. See id.
V. A CALL FOR CHANGE

If the United States wishes to hold itself forth as the international standard bearer for human rights, it must remove sovereign immunity, including both governmental sovereign immunity and qualified immunity, as a barrier to claims based on the U.S. Constitution alleging violations of rights protected under international human rights law. Otherwise, the United States may not claim that it provides effective human rights protections within the United States and promote its model to the world while limiting its own international involvement in human rights.

A. THE JUSTIFICATIONS OFFERED FOR SOVEREIGN IMMUNITY SHOULD FALL

To convert the U.S. civil rights system into a human rights protection regime, the right to compensation must override the justifications offered in support of sovereign immunity. Sovereign immunity, including both governmental sovereign immunity and qualified immunity, is justified in jurisprudence and commentary in the United States as necessary to protect the public fisc and prevent the “overdeterrence” of official decisionmaking and action that might result from the risk of litigation and liability.295

The problem with these rationales for sovereign immunity is that they fail altogether to take into account the right of victims of abuses to obtain compensation for harm they suffer at the hands of the government. International human rights law, in no uncertain terms, requires redress, including compensation, to be provided to victims of governmental abuses.296

The justification based on the risk of overdeterrence has not been substantiated in any meaningful way and is inherently problematic. Presumably the Supreme Court wishes to avoid underdeterrence of constitutional violations, as well as overdeterrence, by establishing a system that provides the optimal level of deterrence. After all, an important goal of compensation for governmental abuses, beyond providing redress to individual victims, is to ensure governmental accountability and to deter future violations.297

Yet the Supreme Court of the United States invokes the overdeterrence risk to justify the qualified immunity available to government officials without explaining or supporting its assertion that making government officials susceptible to suit would lead them to act with excessive caution. It is just as plausible to

295. See Alden v. Maine, 527 U.S. 706, 751–52 (1999) (suggesting that the political process should determine the allocation of resources rather than the courts or private individuals); Hunter v. Bryant, 502 U.S. 224, 229 (1991) (reasoning that officials should not be put in a position of always erring on the side of caution for fear of being sued); Reeside v. Walker, 52 U.S. 272, 291 (1850) (holding that the U.S. government may not be sued unless an act of Congress exists ordering the disbursement of funds); Chemerinsky, supra note 14, at 1217 (arguing that immunity is designed to protect the government treasury); Vázquez, supra note 14, at 877 (suggesting that qualified immunity is designed to prevent overdeterrence).

296. See supra Part III.B.1.

297. See Fallon & Meltzer, supra note 60, at 1736.
argue that immunity leads government officials to be unduly bold in their actions and thus causes underdeterrence of rights violations. Nor has the Court ever addressed the possibility that a more appropriate level of deterrence could be provided by taking the focus away from suits against individual officials and making government itself liable. Scholars studying alternative liability systems for constitutional torts have suggested that government liability would provide the most effective level of deterrence. The system may require adjustment if for no other reason than to ensure adequate deterrence.

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

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

The preference for the treasury ought to give way in the face of the right to compensation afforded to individuals under international human rights law. While the government may properly be parsimonious with its funds elsewhere, it should not invoke sovereignty to refuse payment to a victim who has suffered

298. See Pillard, supra note 74, at 92; Vázquez, supra note 14, at 878.

299. See Schuck, supra note 58, at 18, 98 (suggesting that the government is in the best and cheapest position to effect change to shape future government behavior); Cass, supra note 60, at 1178–79 (suggesting that the government itself could also be overdeterred as a result of potential liability but nonetheless concluding that direct governmental liability would provide the optimal level of deterrence while also ensuring the award of damages in meritorious cases).

300. If it were established, as it has not been, that susceptibility to suit led to such significant overdeterrence of government action that officials were unable to carry out their obligation, including under international human rights law, to protect the well-being and safety of the public, then that reality would need to be taken into account in formulating the most appropriate domestic system for the protection of human rights. Even then, though, the optimal response would not be to firm up immunity. Instead, as discussed below, the most effective and desirable option would be to adopt a constitutional tort system that directs suit against the government rather than individual officials and thereby greatly decreases the deterrent effect on individual officials. See infra notes 311–12 and accompanying text.

301. See Owen v. City of Independence, 445 U.S. 622, 655 & n.39 (1980) (rejecting an argument that qualified immunity should be available to municipalities on the loss spreading theory that it is more reasonable “to distribute the loss [resulting from a constitutional violation] to the public as a cost of the administration of government, rather than to let the entire burden fall on the injured individual”).

302. See Chemerinsky, supra note 14, at 1217.
rights violations at the government’s own hands. 303

B. GOVERNMENTAL SOVEREIGN IMMUNITY AND QUALIFIED IMMUNITY FOR OFFICIALS SHOULD BE ELIMINATED IN RELATION TO CONSTITUTIONAL CLAIMS

In order to eliminate sovereign immunity protections in cases involving constitutional violations, the Supreme Court must act. Because the Court has held that sovereign immunity has constitutional underpinnings, 304 a legislative change would be ineffective in overcoming all aspects of sovereign immunity. The U.S. Congress could ameliorate the negative impact of sovereign immunity by taking steps, such as amending the FTCA, to waive explicitly and fully the federal government’s immunity from suit for constitutional torts, or by limiting or eliminating qualified immunity. 305 However, congressional action would be unsatisfactory because it could only provide a piecemeal and partial solution in an area of the law already lacking in coherency. 306 Of course, a clearly stated constitutional amendment could eliminate sovereign immunity, but the lengthy and uncertain amendment process does not provide an attractive resolution to the urgent problem presented by the inability of victims to obtain compensation for human rights violations.

To provide for greater human rights protection in the U.S. legal system, governmental sovereign immunity must be fully and completely eliminated in constitutional cases involving rights protected under international human rights law. Once governmental sovereign immunity is eliminated, most victims of civil rights violations will choose to sue the government rather than individual officials. Suit against the government will provide the most direct and effective means of obtaining compensation for harm caused by government actors.

To ensure that suit against the government is feasible, the elimination of sovereign immunity for constitutional tort claims should include the acceptance

303. As Justice Souter aptly stated in his dissent in Alden v. Maine, a civil rights victim seeking compensation “is not a dunning bill collector, but a citizen whose federal rights have been violated.” 527 U.S. 706, 803 (1999) (Souter, J., dissenting).

304. See id. at 728 (majority opinion) (“[S]overeign immunity derives . . . from the structure of the original Constitution itself.”).

305. There is no doubt that the Supreme Court could eliminate qualified immunity, because it is a judicially created doctrine in the first place. See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 71 n.15 (1996) (noting that the Constitution provides the basis for state sovereign immunity but not for qualified immunity offered to state and federal officials); Vázquez, supra note 14, at 886. Congress is also free to waive immunity for the United States through further expansion of the FTCA. See Reeside v. Walker, 52 U.S. 272, 290 (1850) (establishing that sovereign immunity prevents suit except where consent to suit is provided through an act of Congress).

306. For example, an expansion of federal liability under the FTCA still would not resolve the inability of victims of rights violations to sue state and local governments. See supra Part II.D. Likewise, elimination of qualified immunity alone would not address the situation in which an individual official is unable to pay a damages award and the government is unwilling or unable to cover that award. See supra notes 97–104 and accompanying text. An overall elimination of governmental sovereign immunity and qualified immunity would allow victims of federal, state, and local government violations to obtain appropriate redress.
of respondeat superior liability.\textsuperscript{307} The unavailability of a respondeat superior or vicarious liability theory to establish government liability has always been closely linked to sovereign immunity.\textsuperscript{308} For the same reason that sovereign immunity is rejected, the theory of respondeat superior liability should be available to individuals bringing civil rights tort claims against the government just as it is available to litigants in other tort contexts.

The qualified immunity that protects government officials should also be eliminated. In some cases, victims of civil rights violations might still wish to bring suit against individual officials even after the elimination of governmental sovereign immunity. An individual government official may have acted in a particularly egregious or personal manner such that the victim wishes to identify the specific official as the perpetrator of a rights violation.\textsuperscript{309} As shown above, qualified immunity makes it unacceptably difficult to secure the liability of a government official even in cases in which constitutional rights are involved.

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

In this way, victims of rights violations will be guaranteed recovery of any compensation to which they are entitled in suits against government officials. The system will appropriately recognize that, regardless of the entity or individual sued, the ultimate obligation to guarantee compensation remains with the government—as is required under international human rights law. By eliminating qualified immunity and providing for joint liability, the system will more fairly and consistently recognize the reality that the government should and usually does respond to suits against officials involving actions taken within the scope of government employment.\textsuperscript{310}

At the same time, individual officers would be protected from financial ruin

\textsuperscript{307} Moreover, the current rule that disallows local government liability on a respondeat superior theory should be eliminated. \textit{See supra} note 85 and accompanying text.

\textsuperscript{308} \textit{See} Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 383, 422 (1971) (Burger, J., dissenting) (noting that a remedy against the government itself for violations of Fourth Amendment rights would be desirable and would necessarily require, as part of the waiver of sovereign immunity, the incorporation of respondeat superior principles). \textit{See generally} Schuck, \textit{supra} note 58, at 29–39 (discussing the different treatment of the doctrine of respondeat superior in private and public tort law and the influence of the doctrine of sovereign immunity in public tort law).

\textsuperscript{309} \textit{See} Bradley & Bell, \textit{supra} note 226, at 10 (suggesting that an individual should be permitted to choose whether to sue the government or an individual official); Schuck, \textit{supra} note 58, at 110 (treating a victim’s desire for personalized retribution as a legitimate interest not fulfilled by governmental liability).

\textsuperscript{310} \textit{See} Pillard, \textit{supra} note 74, at 67 (“\textit{V}irtually without exception, the government represents or pays for representation of federal officials accused of constitutional violations and pays the costs of judgments or settlements.”).
resulting from liability for their official conduct. Any remaining concern about overdeterrence should thus be resolved. If the government itself must pay for human rights violations even when the suit is brought against an individual official, the risk largely disappears. The risk of underdeterrence might still exist, but at least any harm caused by constitutional violations that were not prevented will not be borne by the victim but rather by the society as a whole.

C. THE EFFECT OF THE ELIMINATION OF SOVEREIGN IMMUNITY

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

The proposal for change set forth in this Part does not argue for any modification of the rigorous substantive constitutional standards already in place and does not therefore expand constitutional rights or restrict the government’s range of action. Instead, it seeks to ensure that current constitutional law norms are respected and enforced—and that compensation is available when they are not. The elimination of sovereign immunity would simply allow government actors to be sued for compensation when the substantive law requirements establish that a civil rights/human rights violation has taken place. In those cases victims must be permitted to seek compensation, or the United States fails to provide adequate human rights protections.

The elimination of sovereign immunity to ensure greater human rights protection does not implicate any change in the rules on punitive damages applicable in the United States. International human rights law does not, as it has

311. Under this joint liability scheme, the government might in some cases require the individual official to pay some or all of the damages awarded or might seek indemnification from the individual official for amounts paid by the government. Such instances would likely be rare. See Schuck, supra note 58, at 111 n.9; Cass, supra note 60, at 1184. They would, however, provide a limited and appropriate means for ensuring that government officials be held financially responsible when they have acted particularly egregiously while still ensuring compensation for the victim of their abuse.

312. See Owen v. City of Independence, 445 U.S. 622, 653 n.37 (1980) (noting that suit against the government seeking compensation out of government funds did not imply the same risk of a chilling effect on the exercise of government decisionmaking as suits against officials in their personal capacity); Cass, supra note 60, at 1178–79, 1187–88; Chemerinsky, supra note 14, at 1219.

313. A related question involves the fate of the fee shifting mechanisms currently available in the United States in cases involving constitutional claims if the United States were to hone more closely to international standards in providing remedies for human rights violations. There is no requirement under international human rights law that the government responsible for a rights violation pay the fees charged by the victim’s private attorney in seeking damages for that violation. However, international human rights law does guarantee the right to access a court and a full hearing and the right to a remedy. See ICCPR, supra note 24, arts. 2, 14; American Convention, supra note 36, arts. 8, 25; American Declaration, supra note 25, art. XVIII. These rights impose an obligation on the government to ensure access to legal counsel when legal representation is indispensable to the proper prosecution of a case involving important legal concerns. See Advisory Opinion OC-11/90, 1992 Inter-Am. Ct. H.R. (ser. A) No. 10, at 27–28 (Aug. 10, 1990) (holding that legal counsel must be provided by the government when
developed until now, require that punitive damages be awarded to victims of human rights violations.314 Punitive damages are provided in addition to compensation for harm actually suffered,315 and international human rights law requires only that victims of violations be made whole for the damages they actually suffered. The ability of the U.S. system to provide human rights protections is therefore not undercut by continuing to preclude punitive damages in constitutional claims against governmental entities.316 The very strict limitations on the availability of punitive damages in constitutional claims against individual officials may also be maintained.317

It is possible that the elimination of sovereign immunity might lead to a backlash of increased substantive protection for the government.318 If sovereign immunity is not available to protect government actors from suit, the courts or Congress, or both, might restrict substantive rights so as to make claims for compensation less likely to succeed on the merits. To some degree, the United States may properly modify the contours of the rights it protects. There is a limit however.319 The United States cannot deprive constitutional rights of real meaning as a way of ensuring that, even without sovereign immunity barriers, victims will be unable to sue to obtain redress for governmental abuse. If the United States significantly diluted its rights protections, it would not be appropriate to operate from the premise that the substantive protections in domestic law closely match the protections provided under international human rights law. The theoretical availability of suit against the government for damages would no longer make the U.S. civil rights system an effective human rights system if substantive human rights protections no longer existed in U.S. constitutional law. The United States can and should resist any temptation to dilute its

necessary to obtain access to the courts and a fair hearing); Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A) at 4, 15–16 (1979) (holding that the right of access to the courts may sometimes compel the state to provide for the assistance of a lawyer when such assistance proves indispensable, for example by reason of the complexity of the procedure or the case). Claims in U.S. courts involving allegations of constitutional/human rights violations are both of obvious importance and also complex. The United States is therefore under an obligation to ensure the ability of individuals, including indigents and others without great economic resources, to obtain the services of a lawyer to litigate claims of constitutional violations. If the fee shifting provisions that currently exist were eliminated, the United States would probably be required to promulgate some other mechanism, such as legal aid for constitutional claims, to comply with its international human rights obligations.

314. See Shelton, supra note 153, at 286 (noting that both the European and the Inter-American Court of Human Rights have thus far refused to award punitive damages).


316. See id. at 271 (holding that municipalities enjoy immunity from the award of punitive damages against them).

317. To obtain punitive damages against an official, a victim of a civil rights violation must show that the defendant not only engaged in intentional conduct, but that he did so either with the intent to violate federal rights or with a reckless disregard for whether his conduct would violate such rights. See Avery et al., supra note 118, § 13:11, at 671.

318. See Jeffries, supra note 121, at 90, 99–100 (arguing that the existence of sovereign immunity allows the law to evolve to include greater protections).

319. See supra notes 216–25 and accompanying text (discussing Z and Others v. United Kingdom).
CONCLUSION

The United States should begin to accept that its domestic legal system is not perfect. Although the United States fairly boasts that the U.S. Constitution enshrines most important human rights, the legal system does not provide adequate protections to ensure that those rights are respected and that their violation results in redress. International human rights law and comparative law provide an important perspective on the steps that the United States can and must take to provide more effective human rights protection in this country. One important step is the elimination from the U.S. legal system of sovereign immunity doctrines as an impediment to damages claims for human rights violations. More generally, the problems with sovereign immunity laid out in this Article demonstrate the fallacy of the United States’ insistence that human rights are fully protected in the United States. The United States should increase its receptiveness to the improvements that could be made through active involvement in the international human rights community and the acceptance of additional human rights commitments. The United States will be better, not worse, for the change.