ValpoScholar Valparaiso University Law Review

Volume 53 | Number 1 pp.47-84

Confronting Governmental Impunity and Immunity "From Below"

Lawrence G. Albrecht

CONFRONTING GOVERNMENTAL IMPUNITY AND IMMUNITY "FROM BELOW"

Lawrence G. Albrecht*

I. INTRODUCTION

The hierarchy of judicial doctrines advancing governmental immunity has created a legal thicket of obstacles for civil and international human rights victims to overcome.[1] Powerful policy pronouncements often accompany judicial decisions dismissing or limiting such litigation—policy that reinforces and often expands judicial absolution of alleged civil and human rights abuses. Impunity or qualified immunity may triumph regardless of the egregiousness of governmental conduct. Missing from this immunity architecture is fulsome judicial consideration of the legal interests of victims of injustice and public policy factors supporting a more balanced and inclusive legal framework. This missing law circumscribes consideration of unsettled or novel constitutional and statutory interpretation and embedded policy assessed from the plaintiff's perspective and impedes the development of law responsive to new realities.

The primary focus of this Article is the quest for judicial recognition of this perspective "from below" in the context of qualified immunity challenges to civil and human rights quests for justice.[2] First, the judicial doctrine of qualified immunity and its inherent policy underpinnings biased toward the defendant's perspective will be addressed.[3] Several significant civil rights cases applying core qualified immunity principles

---

* J.D., Valparaiso University School of Law (1973). President of First, Albrecht & Blondis, S.C., Milwaukee, Wisconsin. The opportunity to present the 2017 Rucker Lecture was a deep honor for the author who is ever thankful to return to his academic home since 1965. The author gratefully acknowledges the research assistance of Bryn I. Baker, J.D., and Alexa C. Bradley, J.D., Marquette University Law School (2018), associate attorneys at First, Albrecht & Blondis, S.C.

1 Related judicial gate-closing doctrines will also be addressed as pertinent to the overall immunity focus.

2 DIETRICH BONHOEFFER, LETTERS AND PAPERS FROM PRISON 17 (Eberhard Bethge ed., Macmillan 1972). The Article's title expressly references the perspective of a 1942 Christmas essay sent by Lutheran pastor, theologian, and anti-Nazi co-conspirator Dietrich Bonhoeffer to family and friends in which he stated: "We have for once learn[ed] to see the great events of world history *from below*, from the perspective of the outcast, the suspects, the maltreated, the powerless, the oppressed, the reviled—in short, from the perspective of those who suffer." *Id.* (emphasis added). Analogous scientific "bottom-up" thinking may "proceed from the influence of interpreted experience to the formulation of theoretical understanding," in contrast to foundationalist "top-down thinking," which descends from the power of pre-existing rules and general principles applied to particular contexts. JOHN POLKINGHORNE, EXPLORING REALITY 93 (Yale Univ. Press 2005).

3 *See infra* Part II.

will also be analyzed.[4] Second, recent international human rights decisions by the Supreme Court and other federal courts will be analyzed to ascertain how the judiciary has responded to specific Congressional enactments, which frame the universal tension between governmental immunity and remedies for civil and human rights violations.[5] As pertinent, principles derived from international human rights law, which exhibit a remedial policy approach supporting judicial doctrines advancing justice "from below," will be referenced.[6] An implicit concern throughout this Article is the broadest question of how to assess the measure of justice available in an entangled world in which the United States' judiciary is confronted with unique civil and human rights crises, but judicial remedies are foreclosed by doctrines that orchestrate a quick judicial side-step.

Viewed within a broad bipolar international legal philosophy lens, the prominence of immunity doctrines—including qualified immunity, which globally shields state U.S. actors from legal accountability for their conduct—is consistent with the core philosophy of legal positivism, which reached its zenith in German law under the Nazis.[7] Positive law forecloses consideration of natural law or ethical or moral values to determine whether exercises of governmental power may be judicially constrained. As a counter-focus, principles of justice "from below" generally align with the fundamental tenets of natural law theology and philosophy associated with Thomas Aquinas (and Aristotle and related Greek philosophy), which promote contemporary judicial openness to human rights values, whether expressly codified or implied under relevant constitutional,

---

4 *See infra* Part II.A.

5 *See infra* Part III.

6 The author is mindful, of course, of the limited U.S. focus on human rights in this Article and affirms the perspective of Nobel Peace Prize winner and former East Timorese leader José Ramos-Horta: "Human rights were not a European invention []. For thousands of years, while Europeans were still living in caves, concepts of human rights and justice were already articulated in the teachings of the major Eastern philosophies and traditions." Seth Mydans, *Letter From Asia; In a Contest of Cultures, East Embraces West*, N.Y. TIMES (Mar. 12, 2003), http://www.nytimes.com/2003/03/12/world/letter-from-asia-in-a-contest-of-cultures-east-embraces-west.html [https://perma.cc/U6AR-P7RH].

7 Carl Schmitt, the "Crown Jurist of the Third Reich," famously wrote: "The Führer protects justice against the worst abuse when he in the moment of danger by force of his leadership status as highest judicial authority creates justice directly." Detlev Vagts, *Carl Schmitt's Ultimate Emergency: The Night of the Long Knives*, 87 GERMANIC REV. 203, 206 (2012). *See generally* MICHAEL BAZYLER, HOLOCAUST, GENOCIDE, AND THE LAW, 212–17 (2016) (analyzing Carl Schmitt and the "State of exception," which further empowers executive conduct during times of self-declared crisis). At its logical end, such crises may result in the paradox of suspending the Constitution to save the Constitution. Impunity facilitates this path to perdition.

statutory, or common law principles.[8] Aquinas taught that God's act of bestowing natural law, as a subset of eternal law, was one aspect of divine providence and that natural law "constitutes the principles of practical rationality" by which human conduct is deemed reasonable or unreasonable.[9] Natural law encompasses the wisdom of human experience, which also resonates with legal pragmatism.[10] William Blackstone, historically the most influential English legal mind, firmly believed in natural law and asserted that any man-made law lacks validity if contrary thereto.[11] Indeed, the natural law philosophy of inalienable rights is enshrined in The Declaration of Independence: "We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty and the pursuit of happiness."[12]

Invocation of this bipolar legal framework is intended to illustrate the vast chasm between the perspectives of the parties in the specific cases analyzed herein and to provoke fresh insights for future development of civil and human rights law. These competing philosophical and moral polarities, particularly prominent in twentieth-century European legal

---

[8] The author's perspective has been influenced by perusal of various Scottish academic Gifford Lectures on natural theology and "bottom-up" thinking. JOHN C. POLKINGHORNE, THE FAITH OF A PHYSICIST: REFLECTIONS OF A BOTTOM-UP THINKER 27 (Fortress Press 1994). *See Gifford Lectures*, WIKIPEDIA, https://en.wikipedia.org/wiki/Gifford_Lectures [https://perma.cc/DEN3-6ZWS]. For a detailed introduction to natural law principles, see generally *The Natural Law Tradition in Ethics*, STAN. ENCYCLOPEDIA PHIL. (Sept. 27, 2011), https://plato.stanford.edu/entries/natural-law-ethics/ [https://perma.cc/E877-97HB] [hereinafter *Natural Law*]. For a self-described "Ur-history" of natural rights focused on developments in the early Middle Ages starting in the twelfth century, see generally Brian Tierney, *The Idea of Natural Rights – Origins and Persistence,* 2 NW. J. HUM. RTS. 1 (2004), https://scholarlycommons.law.northwestern.edu/njihr/vol2/iss1/2 [https://perma.cc/FVW5-XKXN]. Of course, detailed examination of these three legal philosophies is beyond the scope of this Article's framing analysis.

[9] *Natural Law*, *supra* note 8. *See also* THOMAS AQUINAS, ON LAW, MORALITY AND POLITICS, 50–52 (William P. Baumgarth & Richard J. Regan eds., Richard J. Regan trans., Hackett 2003).

[10] *See* BAZYLER, *supra* note 7, at 220–25 (addressing the transformation of legal philosopher Gustav Radbruch from a positivist to a quasi-naturalist perspective, as is reflected in the "Radbruchsche Formal" that extreme injustice is not law). This theme was also central to the famous Hart-Fuller debate during the 1950–60s, which Bazyler also summarizes. *Id.*

[11] *See generally* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, BOOK 2, 40 (1793). Contemporary England understands that the American Revolutionary War was fought, in part, to defend "natural law and the inalienable rights of man." *The American Revolution Revisited*, ECONOMIST (June 29, 2017), https://www.economist.com/united-states/2017/06/29/the-american-revolution-revisited [https://perma.cc/Z9LE-CSAC].

[12] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). This also aligns with the French historical perspective that the Declaration of Independence reflects the universality and rational foundation for individual rights. *See* Hélène Ruiz Fabri, *Human Rights and State Sovereignty: Have the Boundaries Been Significantly Redrawn?, in* HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 33, 38 (Philip Alston & Euan MacDonald eds., 2008).

culture, remain profoundly important and are often implicit in judicial human rights analysis even though not acknowledged as a basis for decision-making.[13] In the secular United States legal culture, pragmatism incorporates analysis of the reasonableness of law based on meaningful consideration of the plaintiff's claims within the contextual consequences of expanding legal rights and restricting future governmental conduct. This competing bipolar framework of values and the often-mediating role of pragmatism will be reviewed in the civil and human rights cases addressed herein.[14] Justice is polysemous and quantum-like in its contextual locus but remains a noble quest for victims of government misconduct.

II. THE TRIUMPH OF QUALIFIED IMMUNITY "FROM ABOVE"[15]

A. Core Qualified Immunity Principles

The regime of qualified immunity, potentially available to every governmental employee sued individually for damages, was significantly advanced by the Supreme Court in a decision resolving whether senior aides and advisors to the President enjoyed derivative absolute immunity.[16] In *Harlow v. Fitzgerald*, the Supreme Court determined that

---

13 *See generally* PHILIPPE SANDS, EAST WEST STREET 81 (Alfred A. Knopf 2016) (providing a detailed review of this subject).

14 It is noteworthy that one of the Supreme Court's newest members, Justice Gorsuch, was strongly influenced by his Oxford dissertation advisor, the natural law scholar John Finnis, whose academic work includes significant analysis of Aquinas and natural law. *See, e.g.*, JOHN FINNIS, AQUINAS 79, 184 (Oxford Univ. Press 1988); *Neil Gorsuch: The Natural*, ECONOMIST, Mar. 25, 2017, at 21. Several members of the Supreme Court received a Roman Catholic education, as did Justice Scalia whom Justice Gorsuch replaced, although any natural law and ethics influence on their respective decision-making analysis in human and civil rights cases is amorphic.

15 This Article does not focus on absolute immunity awarded to governmental officials carrying out specific official duties. For legislatures engaged in legislative tasks, see Tenney v. Brandhove, 341 U.S. 367, 378–79 (1951); prosecutors acting in an official prosecutorial capacity, see Imbler v. Pachtman, 424 U.S. 409, 427 (1976); and judges engaged in judicial duties, see Stump v. Sparkman, 435 U.S. 349, 359–60, 362–64 (1978). These decisions are grounded on the paramount governmental interests inherent in the exercise of such duties. *See also* Van de Kamp v. Goldstein, 555 U.S. 335, 342–44 (2009) (providing further absolute immunity analysis). The primary focus here is qualified immunity and its inherent analytical biases favoring stingy treatment of substantive law supporting the plaintiff's claims, often coupled with generous treatment of the governmental actor's presumed contextual knowledge, although the plaintiff's perspective is irrelevant.

16 *See* Harlow v. Fitzgerald, 457 U.S. 800, 813 (1982) (asserting that presidential aides do not qualify for absolute immunity when performing all of their duties). *See also* Nixon v. Fitzgerald, 457 U.S. 731 *passim* (1982). At its zenith of power, governmental immunity grounded on separation of powers protects the President from the burdens of litigation regarding official conduct while in office. *But see* Clinton v. Jones, 520 U.S. 681, 705–06 (1997)

absolute immunity was contextually inappropriate under its "functional" approach; instead, the Court concluded that qualified immunity was applicable.[17] The Court then determined that the subjective aspect of qualified immunity, whereby immunity was not available if the official took the action with the malicious intent to cause a deprivation of constitutional or other rights, was incompatible with the principle that insubstantial claims should not proceed to trial.[18] Essentially, the Court concluded that the previous balancing of values test set forth in *Butz v. Economou*, with its focus on the subjective intent of the governmental actor, was too costly:

> Not only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying "ministerial" tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment.[19]

Consequently, the Court concluded that *all* government officials performing discretionary duties will be shielded from liability unless they violate "clearly established" rights of which a reasonable person would have known.[20] Qualified immunity shields government officials from liability for civil damages when the official acts in a way that he

(concluding that it is not a violation of separation of powers to bring action against the President while in office); Charlie Savage, *Newly Disclosed Clinton-era Memo Says Presidents Can Be Indicted*, N.Y. TIMES, July 23, 2017, at A17; Adam Liptak, *Trump's Precedent for Immunity Claim? Clinton v. Jones*, N.Y. TIMES, Apr. 4, 2017, at A10.

17 *Harlow*, 457 U.S. at 811. Previously, the Court focused on a functional analysis of government conduct and awarded absolute immunity for official capacity conduct consistent with the official's specific duties but not while the official was engaged in other duties. *Id.* at 810–13.

18 *See* Wood v. Strickland, 420 U.S. 308, 322 (1975); *Harlow*, 457 U.S. at 815–19.

19 *Harlow*, 457 U.S. at 816. *See also* Butz v. Economou, 438 U.S. 478, 507–08 (1978). *Butz* reiterated that "[i]nsubstantial lawsuits can be quickly terminated" under the Federal Rules of Civil Procedure for many reasons, including failure to state a claim under FED. R. CIV. P. 12(b)(6). *Id*.

20 *Harlow*, 457 U.S. at 818.

"reasonably believe[s] to be lawful."[21] This focus, the Court concluded, "should avoid excessive disruption of government."[22] In principle, "[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[23] This powerful defensive shield provides "ample room for mistaken judgments" and protects "all but the plainly incompetent or those who knowingly violate the law."[24]

The Court's desired policy objectives of protecting all government actors but the plainly incompetent and those who intentionally violate civil rights, and also avoiding perceived disruption of government affairs resulting from litigation, reflect the fundamental "justice from above" principle contested herein. The Court's recital of the paramount governmental policy interests at stake in qualified immunity cases was expansive, but analytically shallow and a theoretical "top down" postulation:

> These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."
>
> In identifying qualified immunity as the best attainable accommodation of competing values . . . we relied on the assumption that this standard would permit "[i]nsubstantial lawsuits [to] be quickly terminated."[25]

As a consequence of refocusing on the objective reasonableness of the government actor's conduct, contextual pro-government policy considerations can become the exclusive judicially considered perspective. The narrow focus of that lens functions like a legal Photoshop that crops out the plaintiff's perspective, which this Article seeks to restore. *Harlow* was an express policy-based decision.[26] Policy is not immutable, but *Harlow*'s analysis has been interpreted as if chiseled into the Supreme Court's foundation.

---

21 Anderson v. Creighton, 483 U.S. 635, 641 (1997).
22 *Id.* at 653 n.5.
23 Pearson v. Callahan, 555 U.S. 223, 231 (2009).
24 Hunter v. Bryant, 502 U.S. 224, 227 (1991).
25 Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (citations omitted).
26 *See id.* at 819 (explaining the role that public interest played in the Court's ruling).

Emphasizing the power of these governmental interests, the Supreme Court has held that in order to spare the government actor from the unnecessary burdens of litigation, the threshold question of qualified immunity should be resolved at the earliest practical stage of litigation.[27] Qualified immunity is an affirmative defense, but once raised, the *plaintiff* carries the burden of proof to defeat qualified immunity.[28] Consequently, if qualified immunity is raised in a motion to dismiss the complaint, the plaintiff must legally analyze the pleaded facts to establish that settled legal principles demonstrate that: (1) the defendant violated a constitutional or statutory right; and (2) "the right was 'clearly established' at the time of the challenged conduct" so that it would have been "clear to a reasonable officer that her conduct was unlawful in the situation."[29] A right is considered to be "clearly established" when existing precedent has "placed the statutory or constitutional question *beyond debate*."[30] Previously, "clearly established" law was understood to require only that the plaintiff "show either a reasonably analogous case that has both articulated the right at issue and applied it to a factual circumstance similar to the one at hand or that the violation was so obvious that a reasonable person necessarily would have recognized it as a violation of the law."[31]

Furthermore, since *Saucier,* qualified immunity protects government officials even if the actor is mistaken as to what the law requires.[32] If the mistake was reasonable, the government actor is immune, irrespective of certitude that the actor's conduct caused injury to the plaintiff. A government actor's mistake of law will not necessarily result in a violation of the Fourth Amendment, Chief Justice Roberts explained, so long as the mistake is "objectively reasonable."[33] Because "reasonable men make mistakes of law, too," an officer's reasonable mistake of law should not automatically result in a violation of the Fourth Amendment because an officer's similar reasonable mistake of fact is permissible, and it would be

---

27 *See* Butz v. Economou, 438 U.S. 478, 507 (1978).

28 *See Harlow*, 457 U.S. at 815. As a general matter, defendants carry the burden of proof with regard to affirmative defenses raised under Fed. R. Civ. P. 8(c), or otherwise.

29 *See Butz,* 438 U.S. at 507–08 (raising qualified immunity in a motion to dismiss); Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011); Saucier v. Katz, 533 U.S. 194, 201–02 (2001). A court may dismiss the action based on analysis of either prong of this test. *Pearson*, 555 U.S. at 239. *See also* William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 84 (2018); Michael Silverstein, Note, *Rebalancing Harlow: A New Approach to Qualified Immunity in the Fourth Amendment,* 68 CASE W. RES. L. REV. 495, 518–28 (2017) (criticizing, like this Article, judicial expansion of the qualified immunity doctrine).

30 *Ashcroft,* 563 U.S. at 741 (emphasis added).

31 Chan v. Wodnicki, 123 F.3d 1005, 1008 (7th Cir. 1997).

32 *See Saucier*, 533 U.S. at 205.

33 Heien v. North Carolina, 135 S. Ct. 530, 536, 539 (2014).

inconsistent with precedent and the text of the Fourth Amendment to hold otherwise.[34]

As the *White* Court recently reiterated:

> "[C]learly established law" should not be defined "at a high level of generality." As this Court explained decades ago, the clearly established law must be "particularized" to the facts of the case. Otherwise, "[p]laintiffs would be able to convert the *rule* of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."[35]

Rarely would a government defense attorney fail to accept this universal invitation to attack the plaintiff's damages claim as "abstract," not clearly established, or not "particularized" to the factual context—irrespective of certain causation of injury to the plaintiff.[36] Qualified immunity can be rotely analyzed by courts as a "rule" of law, elevated above policy, notwithstanding the absence of the plaintiff's perspective and the empirically undeveloped governmental burdens of litigation.

Qualified immunity may be raised at any stage of the legal process, and given its enshrined doctrinal power to prevent government officials from having to endure the future burdens of litigation, an interlocutory appeal from its denial may be taken, which shuts down the trial court proceedings.[37] Of course, the plaintiff must then suffer the financial and case delay burdens of appellate proceedings, but those burdens are invisible and not a doctrinal concern.[38] A district court's decision to deny

---

[34] *Heien*, 135 S. Ct. at 536.

[35] White v. Pauly, 137 S. Ct. 548, 552 (2017) (per curiam) (emphasis added) (citations omitted) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2001)).

[36] A related but vacuous policy concern is to avoid creating disincentives for government to take innovative actions in new legal contexts. *See* Owen Fiss, *The Example of America*, 119 YALE L.J. POCKET PART 1, 13–14 (2009), https://www.yalelawjournal.org/forum/the-example-of-america [https://perma.cc/22KF-AWNE].

[37] *See* Mullenix v. Luna, 136 S. Ct. 305 (2015); Plumhoff v. Rickard, 134 S. Ct. 2012 (2014).

[38] A case litigated by the author illustrates the powerful impact of qualified immunity on the course of civil proceedings. In *Chasensky v. Walker*, 740 F.3d 1088 (7th Cir. 2014), the plaintiff sued Wisconsin Governor Scott Walker in his individual capacity for damages as a result of his failure to appoint her to a county clerk position because of, inter alia, his interview on Fox News in which he disclosed personal financial information and expressly referenced her former bankruptcy proceeding as the basis for his decision. The Constitution protects specific privacy interests and the Equal Protection Clause prohibits irrational discrimination. The Bankruptcy Act, 11 U.S.C. § 525, expressly prohibits employment discrimination on the basis of a bankruptcy proceeding. After over three years of motions and legal briefing, two trips to the Seventh Circuit, and an ongoing district court order prohibiting the plaintiff from obtaining *any* discovery, the Seventh Circuit ordered the privacy and equal protection claims dismissed on qualified immunity grounds.

qualified immunity is deemed a final decision under 28 U.S.C. § 1291, and is immediately appealable unless material facts regarding its applicability are genuinely disputed, a rare express exception to the non-appealability of interlocutory orders.[39] Why this exception? Because the Supreme Court has concluded that qualified immunity serves an important governmental function.[40] Because the essence of qualified immunity is immunity from suit, its core purpose is effectively lost if a case is erroneously permitted to go to trial.[41]

The foregoing Supreme Court decisions and embedded policy sprouting from *Harlow* have significantly altered the analytical fulcrum and balancing of interests to heavily plate the government's defensive armor with positive law principles.[42] As these decisions and others addressed below demonstrate, plaintiffs' damages claims can be given dismissive "airy-fairy" treatment. Qualified immunity entrenches the legal *status quo*, which is also a desired outcome for judges favoring an "originalist" or "conservative" approach to constitutional interpretation. Analysis of the most recent Supreme Court civil rights decisions addressing qualified immunity will further delineate these concerns.

B. The Supreme Court's Application of Qualified Immunity Principles in Recent Civil Rights Cases

Recent Supreme Court terms included several cases addressing when law enforcement officers may be sued for a monetary remedy. In *White v. Pauly*, the Supreme Court vacated the denial of qualified immunity in a Fourth Amendment excessive force case because there was no clearly settled principle relevant to the unique factual context to place the constitutional claim beyond debate.[43] Relying on analysis in *Anderson*, which instructed that "clearly established law must be 'particularized' to the facts of the case," the Court reiterated that a reasonable officer must know that his conduct would violate a clearly established statutory or constitutional right.[44] This legal fiction presumes, of course, that the officer had previously analyzed all contextually relevant cases establishing rights beyond debate before deciding to act. Because the

---

39 *See* Behrens v. Pelletier, 516 U.S. 307, 320 (1996) (holding that the agent was not a candidate for qualified immunity and denying his appeal). *See also* Johnson v. Jones, 515 U.S. 304, 316–17 (1995) (stating the three reasons why orders such as the one in question are not appealable).

40 *See White*, 137 S. Ct. at 551–52 (explaining that qualified immunity is effectively lost if a case is permitted to go to trial, which should not be).

41 *See id*.

42 *See, e.g.*, *infra* Part II.B (discussing qualified immunity).

43 White v. Pauly, 137 S. Ct. 548, 552 (2017) (per curiam).

44 *Id*. *See also* Anderson v. Creighton, 483 U.S. 635, 640 (1997).

Court created qualified immunity as a foundational rule of justice from above, which "is important to 'society as a whole,'" the officer in *White*, who arrived late at an active police encounter and shot and killed an armed house occupant without giving any warning, was immune.[45] Prior settled Fourth Amendment law did not categorically prohibit the shooting in this presumed novel factual context, and the perspective of the deceased regarding his encounter with the officers was functionally irrelevant.[46] Nor was the enshrined inalienable natural law right to life perspective relevant.[47]

In *County of Los Angeles v. Mendez*, the Supreme Court unanimously struck down the Ninth Circuit's pro-plaintiff "provocation rule."[48] The *Mendez* plaintiffs had been awarded almost four million dollars in damages following a bench trial on the merits of their Fourth Amendment excessive force claims because deputies "intentionally or recklessly provoke[d] a violent confrontation [establishing] an independent Fourth Amendment violation."[49] The two plaintiffs were living in a property shack when they were shot by deputies who invaded—without a warrant and without knocking—while searching for another person.[50] Three Fourth Amendment claims were filed: (1) warrantless entry; (2) knock-and-announce violation; and (3) excessive force.[51] The Ninth Circuit awarded qualified immunity on the knock-and-announce claim but not the warrantless entry claim.[52] Although the Ninth Circuit also concluded that the shooting was reasonable under *Graham*, nevertheless, it applied the "provocation rule" and held the two deputies liable for the use of excessive force because they had entered the shack without a warrant, which was found to be unreasonable and the proximate cause of the shooting.[53]

---

45 *White*, 137 S. Ct. at 551. *See also* City of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015).

46 *See White*, 137 S. Ct. at 552 (reasoning that no settled Fourth Amendment principle mandates that an officer second-guess the previous steps already taken by fellow officers).

47 *See* Ted Sampsell-Jones, *Reviving Saucier: Prospective Interpretations of Criminal Laws*, 14 GEO. MASON L. REV. 725, 747–48 (explaining that natural law theory requires punishing the perpetrator regardless of whether the conduct was defined as illegal).

48 *See* County of Los Angeles v. Mendez, 137 S. Ct. 1539, 1543–44 (2017) (stating that the provocation rule requires one to look at the subjective intent of the officers).

49 *Id.* at 1542.

50 *Id.* at 1544–45.

51 *Id.* at 1545.

52 *Id.* at 1549.

53 *See id.* at 1545 (proving unauthorized force requires: (1) the officer intentionally or recklessly provoked a violent response; and (2) that the provocation is an independent constitutional violation). *Mendez*, 137 S. Ct. at 1542 (citing Graham v. Connor, 490 U.S. 386 (1989)). Alternatively, the Ninth Circuit found that proximate cause policy principles would independently support liability, but that analysis was also reversed.

However, the Supreme Court concluded that the "provocation rule" altered the "settled and exclusive framework" used to determine whether the force used in effecting a seizure conforms with the Fourth Amendment because courts must balance an individual's Fourth Amendment interests against the situational governmental interests and decide "whether the force used to effect a particular seizure is 'reasonable.'"[54] The ultimate issue in an excessive force case remains "whether the totality of the circumstances justifie[s] a particular sort of [search or] seizure."[55] The Court held that the "provocation rule" was inconsistent with *Graham* and other Fourth Amendment precedent because "[t]he rule's fundamental flaw is that it uses another constitutional violation to *manufacture* an excessive force claim where one would not otherwise exist."[56] The Court also narrowed the scope of proximate cause analysis under *Paroline*,[57] applicable in civil rights tort cases, by concluding that the Ninth Circuit "conflated" it.[58] Although not discussed, qualified immunity would have foreclosed any award of damages in that case, even if the Fourth Amendment was expanded to include the "provocation rule."[59]

At issue in *Manuel v. City of Joliet*, was whether to analyze a claim arising from the plaintiff's pretrial detention of forty-eight days under the Fourth Amendment or the Fourteenth Amendment.[60] The prolonged detention was a consequence of false police forensic data regarding pills seized during the plaintiff's traffic stop.[61] The Supreme Court held that, notwithstanding a state judge's finding of probable cause and the start of legal proceedings, the claim could proceed under the Fourth Amendment because the initial probable cause finding was based on fabricated evidence.[62] A Fourth Amendment claim focuses on the objective reasonableness of an officer's conduct, whereas a Fourteenth Amendment substantive due process claim (like an Eighth Amendment post-conviction claim) incorporates a subjective state of mind component, such as deliberate indifference or criminal recklessness, which the plaintiff must prove.[63] The Court did expressly comment on the "contours and

---

54 County of Los Angeles v. Mendez, 137 S. Ct. 1539, 1546 (2017); Graham v. Connor, 490 U.S. 386, 396 (1989).

55 *Mendez*, 137 S. Ct. at 1546–47; Tenn. v. Garner, 471 U.S. 1, 8 (1985).

56 *Mendez*, 137 S. Ct. at 1546 (emphasis added).

57 *See* Paroline v. United States, 134 S. Ct. 1710, 1720 (2014).

58 *Mendez*, 137 S. Ct. at 1549.

59 *Id.*

60 Manuel v. City of Joliet, 137 S. Ct. 911, 914 (2017).

61 *Id*. at 915.

62 *See id*. at 922 (remanding for the lower court to address the rules and elements of a Fourth Amendment claim).

63 *Compare* Albright v. Oliver, 510 U.S. 266, 306–07 (1994), *and* Gerstein v. Pugh, 420 U.S. 103, 116–19 (1975) (addressing minimum objective standards and procedures for pretrial

prerequisites of a § 1983 claim" with an implicit "from below" perspective that rejected strict common-law restraints on the scope of civil rights claims.[64] However, the qualified immunity defense, premised on the unsettled status of either claim, looms on remand.[65] On remand, the Seventh Circuit held that the statute of limitations for the surviving Fourth Amendment lack of probable cause claim began upon release from detention and remanded the case to the district court where the qualified immunity defense looms.[66]

Manuel illustrates how the defendant's state of mind may be a significant factor to be considered by plaintiff's counsel in pleading constitutional claims under 42 U.S.C § 1983.[67] In dissent, Justice Alito addressed doctrinal concerns regarding total preclusion of a defendant's state of mind requirement in Fourth Amendment cases:

> [W]hile subjective bad faith, *i.e.*, malice, is the core element of a malicious prosecution claim, it is firmly established that the Fourth Amendment standard of reasonableness is fundamentally objective. . . . These two standards—one subjective and the other objective—cannot co-exist. In some instances, importing a malice requirement into the Fourth Amendment would leave

---

restraints on liberty), *with* Farmer v. Brennan, 511 U.S. 825, 834 (1994) (establishing the deliberate indifference standard for assessing a defendant's potentially culpable state of mind). When a post-conviction claim is raised regarding the conditions of confinement, the Eighth Amendment's two-part test involving the objective seriousness of the conditions and the subjective state of mind of the defendants are analyzed. *Id. See also* Kingsley v. Hendrickson, 135 S. Ct. 2466, 2476 (2015) (considering the requisite state of mind for an excessive force case). The Fourteenth Amendment test may be objective or include a subjective component depending on the nature of the specific claim. *Id*.

64 *Manuel*, 137 S. Ct. at 920.

65 For example, officers who knowingly or recklessly submit an affidavit to obtain a search or seizure warrant that contains falsehoods may, nevertheless, be awarded qualified immunity if the affidavit independently sets forth an objectively reasonable basis to demonstrate probable cause under the Fourth Amendment. Betker v. Gomez, 692 F.3d 854, 860 (7th Cir. 2012).

66 Manuel v. City of Joliet, 903 F.3d 667, 670 (7th Cir. 2018).

67 The text of 42 U.S.C. § 1983 states:

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

However, neither a state nor a state actor sued in official capacity is a "person" suable under § 1983. Will v. Mich. Dep't St. Police, 491 U.S. 58, 62 (1989).

> culpable conduct unpunished. An officer could act unreasonably, thereby violating the Fourth Amendment, without even a hint of bad faith.[68]

The plaintiff's state of mind or emotional injury generally remains irrelevant to overcoming a qualified immunity defense. *District of Columbia v. Wesby*[69] specifically raised the issue of whether officers can discredit a plaintiff's asserted innocent state of mind and be awarded qualified immunity for arresting "trespassers" (sixteen arrestees sued) at a house party without a warrant because Fourth Amendment probable cause precedent was not clearly established in this context.[70] Consequently, even *arguable* probable cause for an arrest warrants summary judgment based on qualified immunity whenever an officer could have suspected that an individual might be lying about his identity.[71] The doctrine of qualified immunity is now even further unmoored from its original purpose of granting immunity only in *qualified* circumstances so as to not undermine core remedial justice principles.

Another recent example of this unmooring was *Kisela v. Hughes*.[72] The Court decided to blanket a law enforcement officer in qualified immunity when the officer shot the plaintiff four times without warning while she was brandishing a kitchen knife at another woman.[73] The Court stated that although the officer was not in apparent danger, it was not clearly established that shooting the plaintiff to protect another person would violate the Fourth Amendment.[74] However, in dissent, Justice Sotomayor, joined by Justice Ginsburg, argued that the majority "sidesteps" inquiring into the reasonableness of the officer's action, which reflects "a one-sided approach to qualified immunity [which] transforms the doctrine into an absolute shield . . . gutting the deterrent effect of the Fourth Amendment."[75] The dissent would have denied qualified immunity based on the officer's unreasonable action in shooting a woman who

---

68 *Manuel*, 137 S. Ct. at 925.

69 District of Columbia v. Wesby, 138 S. Ct. 577, 593 (2018).

70 *See id*. at 585 (describing the issues the Supreme Court granted certiorari to resolve related to qualified immunity of the officers).

71 *See id*. at 592–93. *See also* Muhammad v. Pearson, 900 F.3d 898, 909 (7th Cir. 2018) (stating that any reasonable subjective uncertainty about a person's identity "points toward qualified immunity").

72 Kisela v. Hughes, 138 S. Ct. 1148 (2018) (per curiam).

73 *Id.* at 1151–52.

74 *Id.* at 1153. The Court continued to hold open the question of whether a Court of Appeals' internal precedents may constitute "clearly established law." *Id.*

75 *Id.* at 1158, 1162 (Sotomayor, J., dissenting).

posed no objective threat to him or others, was not suspected of a crime, and who remained calm during the encounter.[76]

C. *Plenary Qualified Immunity Policy Analysis Should Both Minimize the "Clearly Established" Law Mandate and Incorporate Judicial Consideration of the Plaintiff's Injury and Right to a Remedy*

Section 1983 of the United States Code is the primary remedial vehicle for asserting tort liability for damages against government actors under the Constitution and federal statutory provisions in the foregoing civil rights cases.[77] Once liability for damages is legally established, proximate cause tort analysis applies and includes consideration of several policy factors, some favoring an award of damages and justice for the victim even in the absence of certitude regarding the extent of resultant injuries.[78] Although proximate cause analysis only enters the legal process after judicial denial of qualified immunity and other defenses, nevertheless, the interests of the plaintiff reappear in the legal process.[79] A successful assertion of qualified immunity functions like a lacuna that forecloses analysis of the plaintiff's specific legal interests and favorable policy factors inherent in proximate cause analysis and the ultimate liability question. Foreclosing a jury's liability determination authority also precludes the award of remedial relief, including punitive damages, which enforce strong public policy supporting punishment and deterrence of future violation of rights.[80]

Fearing qualified immunity may preclude any judicial analysis that incorporates their clients' perspective "from below," civil rights attorneys are often loathe to file cases seeking to expand substantive legal principles

---

76 *Id.* at 1157 (Sotomayor, J., dissenting).

77 42 U.S.C. § 1983 (2012). Interestingly, when § 1983 was passed by Congress in 1871 no companion statutory qualified immunity limitation was enacted. Yet, the Supreme Court sweeps the common law then in existence to determine who may be entitled to qualified immunity. *See* Filarsky v. Delia, 566 U.S. 377, 384 (2012) (reasoning that the Civil Rights Act of 1871 did not abrogate common-law immunity). *See also* Briscoe v. LaHue, 460 U.S. 325, 345–46 (1983); Tenney v. Brandhove, 341, U.S. 367, 376 (1951). Further, in *Imbler v. Pachtman*, the Supreme Court relied heavily on cases decided after 1871, in order to bestow broad immunity upon public prosecutors when sued for common-law torts. Imbler v. Pachtman, 424 U.S. 409, 419–31 (1976).

78 *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2524–25 (2013). *See also* Gayton v. McCoy, 593 F.3d 610, 624 (7th Cir. 2010). Causation is generally a jury issue and certitude of injury is not required. *Id*.

79 *See* Karen Blum, *The Qualified Immunity Defense: What's "Clearly Established" and What is Not,* TOURO L. REV. 501, 503 (2008) (explaining the exception to the clearly established right standard when an official relies on the legal advice of counsel).

80 *See* Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?,* ALA. L. REV., 1143, 1146–47 (1989) (recognizing deterrence as a goal of punitive damages).

and damages remedies.[81] The supporting legal theory may be deemed novel or relevant precedents may not be factually analogous, inviting defendants to assert qualified immunity and escape any accountability.[82] The phalanx of additional affirmative defenses available, though not unique to civil rights cases, also inhibits prosecution of civil rights cases because of the extraordinary time and expenses inherently involved in playing defense against the myriad of routine motions to dismiss and affirmative defenses to be encountered.[83] This legal culture contributes to the stagnation of legal development in response to new societal, political, and economic developments. Qualified immunity is "anti-textual" and exclusively judge-made law based on policy.[84] Consequently, policy considerations "from below" should be embedded in the analysis. They are absent. From a plaintiff's perspective, why should the court consider whether the underlying law was previously "clearly established" if a violation thereof and consequential damages can be proven, even if the claim is unprecedented?[85] Why should the defendant's state of mind often gain the paramount legal focus in Eighth Amendment cruel and unusual punishment cases, while the victim's subjective state of suffering loses consideration in determining whether a case should proceed?[86] Furthermore, why must qualified immunity be expanded to also shield certain *private* actors in symbiotic relationships with the government?[87] These questions express the limited judicial policy consciousness inherent in qualified immunity contexts, which systemically tilts the balance of competing factors in favor of governmental interests.[88] Rote incantation

---

81 *See* James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1623–24 (2011) (associating qualified immunity claims and nominal damages).

82 Anderson v. Creighton, 483 U.S. 635, 642 (1997).

83 These defenses only multiply if the plaintiff raises a state law tort or related claim because each state has its own regime of governmental immunity premised on the need for government to function effectively without fear of litigation resulting from discretionary decision-making. Stingy judicial interpretations of the "ministerial duty" exception to immunity further expands the scope of discretionary decision-making immunity. See David T. Prosser, Jr., *Reining in Governmental Immunity,* THE VERDICT, Fall 2016, at 39, for a frank acknowledgment of this point by a former Wisconsin Supreme Court Justice.

84 McNair v. Coffey, 234 F.3d 352, 356 (7th Cir. 2000).

85 Ashcroft v. al-Kidd, 563 U.S. 731, 735–36 (2011).

86 *See* Farmer v. Brennan, 511 U.S. 825, 834 (1994) (noting that having the proper state of mind is required to constitute an Eighth Amendment violation).

87 *See* Filarsky v. Delia, 132 S. Ct. 1657, 1663–64 (2012) (setting forth a historical inquiry as to whether the private actor may have enjoyed common-law immunity in 1871 when § 1983 was enacted). *See also* Melchert v. Pro Elec. Contractors, 892 N.W.2d 710, 725 (Wis. 2017) (holding that a private contractor was entitled to governmental immunity under state law for property damages caused while carrying out government contractual specifications).

88 Qualified immunity does not apply in cases seeking only declaratory or injunctive relief; however, courts have never explained why the paramount goal of sparing the

of nineteenth century common law immunity policy principles minimizes consciousness of the plaintiff's perspective.[89]

Qualified immunity policy factors also ignore the legal reality that damages remedies against government officials acting within the scope of their employment duties are generally indemnified by the employing governmental entity, which is consistent with the remedial purpose of civil rights laws that victims actually receive justice.[90] It has been well-settled since *Bell v. Hood* that "[w]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasions, federal courts may use any available remedy to make good the wrong done."[91] Socialized compensation can be viewed as a measure of justice "from below."[92]

It is also noteworthy that Justice Sotomayor has expressly criticized the willingness of the Supreme Court to accept cases in which qualified immunity has been denied, while rarely accepting cases challenging the grant of qualified immunity:

> It also continues a disturbing trend regarding the use of this Court's resources. We have not hesitated to summarily reverse courts for wrongly denying officers the protection of qualified immunity in cases involving the use of force. . . . But we rarely intervene where courts wrongly afford officers the benefit of qualified immunity in these same cases. The erroneous grant of summary judgment in qualified immunity cases imposes no less harm on "society as a whole," . . . than does the erroneous denial of summary judgment in such cases. We took one step toward addressing this asymmetry in *Tolan*. . . . We take one step back today.[93]

---

government from the burdens of litigation should not apply in *all* litigation. Pfander, *supra* note 81, at 1633–34. Establishing the right to a damages remedy generally requires the same litigation burdens as establishing liability for purposes of declaratory or injunctive relief. *Id.*

89 *See* Pfander, *supra* note 81, at 1638 (noting that government liability has roots in the nineteenth century).

90 *See, e.g.*, IND. CODE § 34-13-4-1 (Westlaw through 2018); CAL. GOV'T CODE § 825 (Westlaw through 2018) (providing examples of state indemnification statutes).

91 Bell v. Hood, 327 U.S. 678, 774 (1946).

92 *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1856, 1866 (2017) (citing Anderson v. Creighton, 438 U.S. 635, 638 (1987)) (recognizing the existence of social costs in government accountability cases). To the contrary, the plurality opinion in *Abbasi* concluded that indemnification is one of many "substantial costs" the government must bear in litigating damages claims.

93 Salazar-Limon v. City of Houston, 137 S. Ct. 1277, 1282–83 (2017) (citations omitted).

In *Tolan*, the Supreme Court reversed the Fifth Circuit's summary judgment grant of qualified immunity because of the lower court's egregious dismissive treatment of the plaintiff's opposing evidence, and the Court implicitly acknowledged the asymmetric treatment of plaintiffs and defendants in qualified immunity summary judgment analysis.[94] But that was a very rare case, indeed.

Largely ignored in recent Supreme Court decisions is the *Pearson* Court's counter-balancing directive "to hold public officials accountable when they exercise power irresponsibly."[95] Restoring legal consciousness of this directive is the pervasive theme of this Article.[96] However, governmental immunity remains the uber-powerful counter-force. In moral language, qualified immunity represents the triumph of amoral governmental power over human values. This fulsome judicial minting of qualified immunity and related positivist doctrines will now be analyzed in recent human rights cases to assess even broader doctrinal expansion of the governmental impunity template to international conduct.[97]

III. JUDICIAL TREATMENT OF SOVEREIGN AND QUALIFIED IMMUNITY AND RELATED POLICY-BASED DEFENSES IN INTERNATIONAL HUMAN RIGHTS CASES

This Article's focus now expansively shifts to consider legal principles and embedded policy pronouncements in Supreme Court and selected federal court decisions awarding governmental immunity or otherwise curtailing remedies for international human rights abuses.[98] Whether new

---

94 Tolan v. Cotton, 134 S. Ct. 1861, 1868 (2014) (per curiam).

95 *Pearson*, 129 S. Ct. at 815.

96 To align with "bottom-up" thinking, immunity analysis should proceed from "the basement of evidence and experience" wherein each plaintiff is uniquely legally situated to inform "higher" general legal principles favoring governmental power. JOHN POLKINGHORNE, FAITH, SCIENCE AND UNDERSTANDING 203 (Yale Univ. Press 2000).

97 *See infra* Part III. With respect to the immunity focus of this Article, a bright line does not separate civil rights and human rights cases. Often, cases raise both sets of claims. For example, see Medellin v. Texas (*Medellin I*), 552 U.S. 491, 500 (2008), and Medellin v. Texas (*Medellin II*), 554 U.S. 759, 759–60 (2008), wherein claims were raised under both the U.S. Constitution and the Vienna Convention on Consular Relations, art. 36.1(b), and the subsequent series of related challenges by foreign nationals who claimed they were detained without proper timely notice to respective consular officials, including Mordi v. Zeigler, 770 F.3d 1161, 1167 (7th Cir. 2014), in which the specific Vienna Convention claim was dismissed on qualified immunity grounds.

98 *See infra* Part III.A. The primary purpose of Part III is to demonstrate that the Supreme Court's application of the full panoply of immunity doctrines will be even more pronounced in cases involving asserted national security interests or military conduct, whether within or outside the United States. Cases seeking to impose governmental and individual liability for international human rights violations are often dismissed on other powerful doctrinal

norms of liability are set forth in Congressional enactments that are relevant or responsive to recent geopolitical events also will be addressed within this immunity analysis.[99]

A. International Human Rights Law Openings to Justice "From Below"?

Multitudes of human rights cases have been filed in federal courts in recent years, raising a panorama of novel international and domestic legal claims. As an initial matter, it must be noted that in a trio of cases the Supreme Court has checked the President's national security power asserted in the wake of September 11. In *Rasul v. Bush*, the Court held that federal courts have jurisdiction to consider habeas corpus challenges to the legality of detaining foreign nationals at Guantánamo Bay.[100] In *Hamdi v. Rumsfeld*, the Supreme Court held that the President cannot hold U.S. citizens as "enemy combatant[s]" indefinitely without affording them a meaningful opportunity to defend themselves, which comports with basic due process principles.[101] Further, in *Hamdan v. Rumsfeld*, the Supreme Court restricted the President's power to create special military commissions for enemy detainees at Guantánamo and held that the Geneva Conventions apply to al-Qaeda detainees (and presumably other alleged foreign terrorist organization members).[102] Some legal commentators were strident in their support of executive branch authoritarianism and impunity from legal challenge in response to *Hamdi* and in anticipation of the Court's ruling in *Hamdan*.[103]

---

grounds including state secrets, political question, or other policy grounds not addressed herein.

99 *See infra* Part III.B. Analysis on this point is limited to a summary of the relationship between international human rights events and immunity principles in prominent selected cases, rather than an exhaustive analysis of all relevant cases.

100 *See* Rasul v. Bush, 542 U.S. 466, 481 (2004) (reasoning that citizenship is not a factor to determine whether detainees at Guantánamo Bay can invoke federal court).

101 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004). Justice Sandra Day O'Connor famously stated in her plurality opinion: "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Id.* at 536.

102 Hamdan v. Rumsfeld, 548 U.S. 557, 629–35 (2006). *See also* David Scheffer, Hamdan v. Rumsfeld*: The Supreme Court Affirms International Law*, JURIST (June 30, 2006), http://www.jurist.org/forum/2006/06/hamdan-v-rumsfeld-supreme-court.php [https://perma.cc/8WC8-HBHL] (recognizing that international law is embedded in U.S. law). The Court's detailed analysis of the relevant controlling provision of the Geneva Convention of 1949 may be a significant judicial milestone regarding the incorporation of international law.

103 *See, e.g.*, Ruth Wedgwood, *Rule of Law: Judicial Overreach*, WALL ST. J., Nov. 16, 2004, at A24; David B. Rivkin Jr. & Lee A. Casey, *Geneva Convention and POWs*, WASH. TIMES (Nov. 16, 2004), http://www.washingtontimes.com/functions/print.php?StoryID=20041115-091908-8539-r [https://perma.cc/2TJU-3SVJ].

In a fourth pertinent decision, *Boumediene v. Bush*, the Supreme Court struck down parts of the Military Commissions Act of 2006 and held that foreign detainees at Guantánamo have a right to judicial review under a three-part balancing of interests test.[104] The Court reasoned: "[t]o hold that the political branches have the power to switch the Constitution on or off at will . . . [would] lead[] to a regime in which Congress and the President, not this Court, say 'what the law is.'"[105] Thus, government and military conduct that allegedly violates human rights under the Constitution is not inherently absolutely immune from legal challenge.[106] While damages were not at issue before the Supreme Court in these cases, retired Justice John Paul Stevens, who authored the majority opinion in *Hamdan*, has proposed that "certain" Guantánamo Bay detainees should receive reparations analogous to those received by Japanese-Americans detained during World War II.[107]

Former Seventh Circuit Judge Richard A. Posner, who criticized the *Hamdan* ruling, pragmatically argued for greater executive branch authority to confront terrorist threats, although within the pragmatic

---

[104] *See* Boumediene v. Bush, 553 U.S. 723, 765–66 (2008) (prohibiting government officials from manipulating the standards used to restrain their powers). In this habeas corpus proceeding, the Court articulated a balancing test regarding application of the Constitution's Suspension Clause: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Id*. at 766. Lakhdar Boumediene and fellow prisoner Mustafa Ait Idir published an account of their experiences in Guantánamo entitled WITNESSES OF THE UNSEEN: SEVEN YEARS IN GUANTÁNAMO (Redwood Press 2017). *See also* Sabrina Toppa, *I Want Americans to Know That Guantánamo Happened Not to Monsters, but to Men*, MOTHER JONES (May 6, 2017), http://www.motherjones.com/media/2017/05/lakhdar-boumediene-guantanamo-book-witnesses-of-the-unseen/ [https://perma.cc/BB93-BHW2] (describing Bourmediene's treatment in Guantánamo Bay). *See also* Military Commissions Act of 2006, Pub. L. No. 109-366, 10 U.S.C. § 94849 (2006).

[105] *Boumediene*, 553 U.S. at 765.

[106] One commentator expressly opined that *Boumediene* was an express rejection of Carl Schmitt's positivist legal philosophy. *See* Scott Horton, *A Setback for the State of Exception*, HARPER'S MAG. (June 13, 2008), https://harpers.org/blog/2008/06/a-setback-for-the-state-of-exception/ [perma.cc/4JND-A7JN] (comparing the liberties George W. Bush attempted to take with checks and balances during war time, which the Court struck down, to Schmitt's legal thinking). *See infra* note 124 (discussing Carl Schmitt further).

[107] *See* Mark Berman, *John Paul Stevens Says Some Guantanamo Detainees Should Be Given Reparations*, WASH. POST (May 5, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/05/05/john-paul-stevens-says-some-guantanamo-bay-detainees-should-be-given-reparations/ [https://perma.cc/5MFU-C6LG]. *See also* Korematsu v. United States, 323 U.S. 214 (1944); 50a U.S.C. § 1989b (1988); Irvin Molotsky, *Senate Votes to Compensate Japanese-Americans Internees*, N.Y. TIMES (Apr. 21, 1988), http://www.nytimes.com/1988/04/21/us/senate-votes-to-compensate-japanese-american-internees.html [https://perma.cc/4Q5J-85QU]. Japanese-Americans detained during World War II waited 46 years before receiving reparations.

context of counter-weighing competing individual and moral interests.[108] District Court Judge Jed S. Rakoff, however, has specifically critiqued "the shallowness of the judicial response to executive excesses committed in the name of national security."[109] This stark conclusion aptly summarizes Owen Fiss's circumspect and somewhat gloomy survey of related post-September 11 constitutional developments that Judge Rakoff reviewed.[110]

B. Recent Human Rights Decisions and the Future Immunity Landscape

Individual government actors are often named defendants in human rights cases, while other cases focus on the conduct of corporations or private entities acting jointly with, or separate from, government actors. Sovereign immunity, qualified immunity, and the pastiche of other gate-closing doctrines are thus raised in more novel and expansive contexts.[111] How courts have analyzed immunity and related defenses, with or without judicial consciousness of the justice "from below" counter-point, is the focus of the following analysis. Recall, however, that rote recital of an immunity defense may require a court to dip but one toe in the judicial decision-making pool.[112]

1. The Triumph of National Security Interests over Human Rights Remains Intact

The doctrines of immunity and separation of powers triumphed in the recent Supreme Court decision in *Ziglar v. Abbasi*, which consolidated three cases involving six non-citizen Muslim men arrested and detained

---

[108] *See* RICHARD A. POSNER, NOT A SUICIDE PACT (Oxford Univ. Press 2006) (claiming that there should be modification to constitutional rights in times of crisis like war). *See also* Emily Bazelon, *Maximum Security*, N.Y. TIMES BOOK REV., Sept. 10, 2006, at 29.

[109] Jed S. Rakoff, *'Terror' and Everybody's Rights*, N.Y. REV. BOOKS (Sept. 29, 2016), http://www.nybooks.com/articles/2016/09/29/terror-and-everybodys-rights/ [https://perma.cc/XC7D-BLSZ].

[110] OWEN FISS, A WAR LIKE NO OTHER: THE CONSTITUTION IN A TIME OF TERROR 164–67 (2015). The preceding quartet of Supreme Court cases are given extensive analysis therein.

[111] Lewis v. Clarke, 137 S. Ct. 1285, 1290–94 (2017). For example, in *Lewis*, a Mohegan tribal member defendant who was sued in his individual capacity sought to assert tribal sovereign immunity. The Supreme Court reiterated that in a civil rights suit against a state officer in his *individual* capacity, the Eleventh Amendment is inapplicable. *See* Hafer v. Melo, 502 U.S. 21, 25 (1991) (directing courts to focus on who the real defendant in interest is in determining whether sovereign immunity bars the case). An *official* capacity suit for damages against a state official, however, implicates the Eleventh Amendment, which immunizes state sovereignty from damages suits in federal court, subject to limited exceptions. *See* Kentucky v. Graham, 473 U.S. 159, 165–66 (1985) (demonstrating that an official capacity suit is a suit against an entity, rather than an individual).

[112] *See supra* Parts II.A, II.C (analyzing significant civil rights cases applying core qualified immunity principles).

in solitary confinement in the heart of Brooklyn for months following the terrorist attacks of September 11.[113] These men alleged that they were tortured, subjected to multiple physical assaults and other abuses, and endured inhumane detention conditions. They brought multiple *Bivens* damages claims under the Fourth and Fifth Amendments and a conspiracy claim under 42 U.S.C. § 1985(3) for violation of their equal protection rights.[114] The Court's plurality opinion, authored by Justice Kennedy, rejected the advocated expansion of *Bivens* because it would contextually violate "separation-of-powers principles for a court . . . to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation."[115] Claims that challenge national security or immigration policy or practices are particularly improper for courts because interpretation interferes with presidential or congressional powers and expertise.[116] Courts must also defer to the governmental costs of allowing such claims to be litigated: "[c]laims against federal officials often create substantial costs, in the form of defense and indemnification."[117] The counter-balancing cost of denying

---

[113] Ziglar v. Abbasi, 137 S. Ct. 1843 (2017) (per curiam). *Abbasi* drew swift media attention. *See, e.g.*, Editorial, *The Justices Act Like Grown-Ups*, WALL ST. J., June 20, 2017, at A16; Adam Liptak, *Supreme Court Says Bush Officials Cannot Be Sued for Post-9/11 Policies*, N.Y. TIMES, June 20, 2017, at A15; Richard Wolf, *Bush Officials Aren't Liable for 9/11 Detentions*, USA TODAY, June 20, 2017, at 8A.

[114] Bivens v. Six Unknown Named Agents Fed. Bureau Narcotics, 403 U.S. 388 (1971). In *Bivens*, the Court authorized judicial creation of a constitutional claim for damages against a federal officer or employee, albeit in specific, limited contexts. *Bivens* claims have been extended to encompass other claims. *See, e.g.*, Davis v. Passmon, 442 U.S. 228 (1979) (extending *Bivens* to cover due process employment claims); Carlson v. Green, 446 U.S. 14 (1980) (allowing *Bivens* to cover Eighth Amendment inmate claims). *But see, e.g.*, United States v. Stanley, 483 U.S. 669 (1987) (refusing to allow *Bivens* to cover personal injury claims by military personnel). *See also* 42 U.S.C. § 1985(3) (2010) ("If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.").

[115] *Abbasi*, 137 S. Ct. at 1856. Justices Sotomayor, Kagan, and Gorsuch did not participate in the case.

[116] Governmental interest in preserving national security remains "an urgent objective of the highest order." Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010).

[117] *Abbasi*, 137 S. Ct. at 1856.

justice to the victims of these detailed human rights stains was only briefly mentioned.[118]

Further, the Court granted qualified immunity on the asserted conspiracy claims for two reasons. First, there was no clearly established law on whether the same executive branch employees or agents are *distinct* enough to conspire within the meaning of § 1985(3).[119] Second, open communication among federal officials should be encouraged regarding policy decision-making, particularly in an asserted national security context.[120] Unaddressed in this intellectual arabesque was why such communication should be legally encouraged when the net result was torture. One answer may be the continuing vitality of *autoritas*, *non veritas*, *facit legem*, which stands for the idea that positivist exercises of power, not virtue, make the law and immunize the actors.[121]

Justices Breyer and Ginsburg vehemently dissented, and set forth a balanced and reflective assessment of the competing interests at stake.[122] According to the dissent, "History tells us of far too many instances where the Executive or Legislative Branch took actions during time of war that, on later examination, turned out unnecessarily and unreasonably to have deprived American citizens of basic constitutional rights."[123] The policy analysis in *Abbasi* resonates with the positivist "state of exception" legal

---

118 Governmental assertion of "special factors," analyzed in *Bivens*, will likely preclude creating a claim for damages directly under the Constitution and require express Congressional authorization. *See* Carlson v. Green, 446 U.S. 14, 44 (1980). *See also* FISS, *supra* note 110, at 184–92 (noting "special factors" *favoring* creating a claim for damages have been tightly circumscribed in Supreme Court *Bivens*-related decisions).

119 *Abbasi*, 137 S. Ct. at 1868–69.

120 *Id.* at 1868.

121 A stark comparator is the Chinese legal system, which has made significant progress expanding the availability of remedies in certain types of legal proceedings against the government while maintaining absolute impunity from challenges to state authority in military or political matters. *See See You in Court*, ECONOMIST, Sept. 30, 2017, at 41.

122 Ziglar v. Abbasi, 137 S. Ct. 1843, 1874–75 (2017) (Breyer, J. dissenting). Justice Breyer is receptive to the limited import, or "cross-referencing," of international legal principles and potentially binding international law in federal court statutory decisions. *See* STEPHEN G. BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 245 (Alfred A. Knopf 2015). Justice Breyer asserted that "cross-referencing will speed the development of 'clusters' or 'pockets' of legally like-minded nations whose judges learn things from one another . . . ." *Id.* Justice Gorsuch, appearing with Justice Breyer at Harvard University, also embraced this perspective in his first public remarks since joining the Supreme Court and noted similarities between United States and English judicial philosophy: "The similarities are profound . . . great respect for *certain* human rights. We believe in *certain* forms of limited government, separation of powers." *See* Adam Liptak, *Gorsuch Rejects Doubts Over 'Rule of Law Today,'* N.Y. TIMES, June 4, 2017, at A17 (emphasis added).

123 *Abbasi*, 137 S. Ct. at 1884.

philosophy of Carl Schmitt.[124] Even rote invocation of national security interests by the government, whether evidence-based or an appeal to fear and prejudice, dramatically shifts the judicial balance of interests and equities to enhance the asserted government interests.[125]

Alleged national security concerns, contested as fueled solely by discrimination, also permeated the broader context of two Fourth Circuit and Ninth Circuit challenges consolidated in *Trump v. International Refugee Assistance Project*.[126] In *Trump*, the Supreme Court partially vacated injunctions and ordered restricted enforcement of an Executive Order which, inter alia, suspended entry into the United States of individuals from six predominantly Muslim countries for ninety days.[127] The Supreme Court refused to stay or vacate a Hawaii District Court order interpreting *Trump* to authorize grandparents and other relatives of American residents to enter the country while the plenary legal proceedings progressed.[128] In September 2017, the Ninth Circuit held that

---

[124] Throughout his dozens of published books and articles supporting the Third Reich, Carl Schmitt grounded his fealty to Hitler and executive power on the positivist principle that authority makes law, not virtue. *See* Vagts, *supra* note 7, at 87. Even today Schmitt has both influence and credibility. *See, e.g.*, Paul Gottfried, *The Concept of Carl Schmitt*, AM. CONSERVATIVE (Oct. 15, 2015), http://www.theamericanconservative.com/articles/the-concept-of-carl-schmitt/ [https://perma.cc/G5HY-BLXN].

[125] Indeed, this positivist perspective is expansive in conservative legal thinking, which even analyzes human rights law as a "dangerous game" when state sovereignty is challenged by international conduct seeking to halt human rights abuses. *See* Ingrid Wuerth, Lecture, *International Law and Peace Among Nations*, MARQ. UNIV. L. SCH. (2017), https://law-media.marquette.edu/Mediasite/Play/e5e7f191068c4795bb51130415c5eb7e1d [https://perma.cc/UL5S-GC7T].

[126] *See* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017) (per curiam). The Court also paid homage to Justice Scalia's prior statement that the balance of equities must also encompass "the interests of the public at large." *Id.* (citing Barnes v. E-Sys, Inc. Grp. Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers)). At its irrational extreme and without principled judicial braking, discriminatory fears of "the other," including foreign national children already in the U.S., leads down a legal path toward "Exxilon justice." *See Doctor Who: Death to the Daleks* (BBC television broadcast Feb. 23, 1974). The evidentiary metrics used for measuring the public interest remain amorphic but may elevate political fear-mongering and prejudice over the perspectives of minority communities.

[127] *See* Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (listing the countries relevant to the travel ban as Iran, Libya, Somalia, Sudan, Syria, and Yemen).

[128] *See* Trump v. Hawaii, 138 S. Ct. 34 (July 19, 2017) (denying motion for clarification order). *See also* Adam Liptak, *Trump Refugee Restrictions Allowed for Now; Ban on Grandparents Is Rejected*, N.Y. TIMES, July 20, 2017, at A16 (noting that while legal challenges to the travel ban proceeded, grandparents and other relatives of American citizens would be exempt from the travel ban); Debra Cassens Weiss, *Supreme Court Allows More Extended-Family Exemptions to Travel Ban*, ABA J. (July 19, 2017), http://www.abajournal.com/news/article/supreme_court_allows_grandparent_exemption_to_travel_ban [https://perma.cc/4GUD-SDH3]. Justice Ginsburg frankly stated that the President's policy was "too restrictive" to be

grandparents, grandchildren, brothers- and sisters-in-law, uncles, aunts, nieces, nephews, cousins, and refugees working with a resettlement agency satisfy the "bona fide relationship" requirement imposed by the executive order.[129] Subsequently, Justice Kennedy issued a temporary order allowing exclusion of most refugees,[130] and the Supreme Court issued an order in both pending cases requiring briefing on whether a Presidential Proclamation ("Travel Ban 3.0"), further amending and expanding the two prior travel bans, rendered the cases moot.[131]

The continuing vitality of *Youngstown Sheet & Tube Co. v. Sawyer* and its progeny as a brake on Presidential power to make law remains uncertain in this context.[132] Dozens of federal court lawsuits challenging the President's respective immigration and refugee Executive Orders and Proclamations have been filed.[133] In 2018, the Supreme Court issued a decision upholding the validity of the President's Orders and Proclamations in *Trump v. Hawaii*.[134] In a 5-4 decision, the majority concluded that the President had the constitutional authority to prevent the entry of individuals from six majority-Muslim nations because the

---

enforceable, given the family interests at stake. Adam Liptak, *On Justice Ginsburg's Summer Docket: Blunt Talk on Big Cases*, N.Y. TIMES, Aug. 1, 2017, at A13.

129 Hawaii v. Trump, 871 F.3d 646, 655 (9th Cir. 2017). *See also* Miriam Jordan, *Court Ruling Opens Door Once Closed To Refugees*, N.Y. TIMES, Sept. 8, 2017, at A9.

130 *See* Adam Liptak, *Justices Halt Move to Lift Parts of Ban On Refugees*, N.Y. TIMES, Sept. 12, 2017, at A19; Matt Zapotosky, *Supreme Court Allows Broad Enforcement of Travel Ban – At Least for a Day*, WASH. POST (Sept. 11, 2017), https://www.washingtonpost.com/world/national-security/justice-dept-again-asks-supreme-court-to-allow-broad-enforcement-of-travel-ban/2017/09/11/6c3853ae-970b-11e7-87fc-c3f7ee4035c9_story.html?utm_term=.92165c8ddb16 [https://perma.cc/LFS4-9AQR].

131 *See* Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 50 (Sept. 25, 2017); Robert Barnes, *Administration Says Supreme Court Should Stop Review of Past Travel Bans*, WASH. POST (Oct. 5, 2017), https://www.washingtonpost.com/politics/courts_law/administration-says-supreme-court-should-stop-review-of-past-travel-bans/2017/10/05/f5d07c68-a9e4-11e7-b3aa-c0e2e1d41e38_story.html?utm_term=.d4a9039fbba7 [https://perma.cc/Y6Z8-FXLB] (mentioning that courts have asked for new briefing regarding whether the issue is moot due to Trump's replacement of the travel ban); Michael D. Shear et al., *Justices Cancel Hearing on Travel Ban as Questions Linger on New Policy*, N.Y. TIMES, Sept. 26, 2017, at A12 (discussing the fact that courts have been reluctant to hear issues relating to the travel ban since Trump replaced the previous travel ban); Michael D. Shear, *Trump Imposes New Travel Ban on 7 Countries*, N.Y. TIMES, Sept. 25, 2017, at A1 (noting the new travel ban rendered the previous orders, and related issues, moot); Michael D. Shear & Ron Nixon, *Ban on Travel Will Be Replaced With New Schedule of Targeted Restrictions*, N.Y. TIMES, Sept. 23, 2017, at A11.

132 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 592 (1952) (Jackson, J., concurring).

133 *See Civil Rights Challenges to Trump Refugee/Visa Order*, C.R. LITIG. CLEARINGHOUSE (July 21, 2018), https://www.clearinghouse.net/results.php?searchSpecialCollection=44 [https://perma.cc/5Q3T-M4KX]. *See also* Boumediene v. Bush, 553 U.S. 723, 765 (2008); *infra* Section III.B.2.

134 Trump v. Hawaii, 138 S. Ct. 2392, 2408 (2018).

only prerequisite for such action is that the President finds that "entry of the covered aliens would be detrimental to the interests of the national interest [of the United States]."[135]

2. Does the U.S. Constitution Apply to a Cross-Border Shooting or Does Impunity Reign?

In *Hernandez v. Mesa*, the Supreme Court was confronted with the tragic cross-border shooting and killing by a border patrol agent of a fifteen-year-old Mexican national playing with friends in a cement culvert separating Ciudad Juárez from El Paso.[136] The Court had agreed to review three questions: (1) whether the child's parents may assert any *Bivens*-based claim for damages against the agent; (2) whether the shooting violated the Fourth Amendment; and (3) whether qualified immunity mandates dismissal of the parents' Fifth Amendment due process claim.[137] The Court remanded the *Bivens* claim in light of its preceding *Abbasi* decision and also the Fourth Amendment question, which "is sensitive and may have consequences that are far reaching."[138] With respect to the Fifth Amendment claim, the Court held that the en banc Fifth Circuit had erred in granting the border agent qualified immunity premised on the alien status of the child who had no significant voluntary connections to the United States.[139] The Court noted "however, that Hernández's nationality and the extent of his ties to the United States were unknown to Mesa at the time of the shooting."[140] After reciting relevant qualified immunity principles, including analysis of "the facts that were knowable to the defendant officers," the Court concluded that the lower court erred

---

135 *Id.*

136 *See* Hernandez v. Mesa, 137 S. Ct. 2003, 2005 (2017) (per curiam) (recounting the death of Sergio Adrian Hernandez Guereca). The opinion recites the complex procedural history regarding the underlying motion to dismiss the complaint in its entirety. *Id*. at 2005–06.

137 *Id.* at 2004–05.

138 *Hernandez*, 137 S. Ct. at 2007. This language implicitly reflects a pragmatic approach to the competing positive law and natural law interests at stake. How this is contextually resolved remains for future judicial resolution. Justice Thomas dissented on this point, however, and simply concluded that *Bivens* cannot be extended beyond its original context. *Id*. at 2008 (Thomas, J., dissenting).

139 *Id*. at 2007. *See also* Boumediene v. Bush, 553 U.S. 723, 765 (2008). The Court in *Boumediene* reasoned: "Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'" *Id.* (quoting Murphy v. Ramsey, 114 U.S. 15, 44 (1885)).

140 *Hernandez*, 137 S. Ct. at 2007. This statement is an express acknowledgement of the agent's perspective "from above," even if its ultimate weight in the case's outcome on remand remains to be measured. The child's perspective, however, has yet to enter judicial consciousness.

in granting the motion to dismiss because of qualified immunity, but the issue could be raised again on remand.[141]

Justices Breyer and Ginsburg dissented in part and concluded that the Fourth Amendment claim, remanded for further analysis, should go forward.[142] The dissent set forth six sets of legal and policy principles that legally cemented the border culvert between the United States and Mexico "as having sufficient involvement with, and connection to, the United States to subject the culvert to Fourth Amendment protections."[143] In their view, the Fourth Amendment issue was, therefore, proper for resolution on the merits, although they agreed with the remand of the *Bivens* and Fifth Amendment qualified immunity questions for further pre-trial analysis.[144] On remand, the Fifth Circuit held that extending *Bivens* in the case would be improper because doing so would "interfere with the political branches' oversight of national security and foreign affairs," and because it "would create a remedy with uncertain limits."[145]

However, in *Rodriguez v. Swartz*, the Ninth Circuit concluded that a U.S. border patrol agent was not entitled to qualified immunity when he shot across the border and killed a teenage Mexican citizen without any legal justifications, in violation of the Fourth Amendment.[146] The Ninth Circuit also allowed the extension of *Bivens* because there was no other adequate remedy available, it was not clear that Congress deliberately chose to preclude a remedy, and no policy factors precluded such a remedy.[147] The judicial treatment *Rodriguez* receives going forward may be of great significance.

3. The Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act ("FSIA") broadly shields foreign states from suits in U.S. courts with very limited exceptions.[148]

---

141 *Id.* (citing White v. Pauly, 137 S. Ct. 548, 550 (2017) (per curiam)).

142 *Id*. at 2008. The dissent cited to *Wood v. Moss* for the prior extension of *Bivens* to Fourth Amendment claims. *Id*. at 2008 (Breyer, J., dissenting) (citing Wood v. Moss, 134 S. Ct. 2056, 2065 (2014)).

143 *Id*. at 2011 (Breyer, J., dissenting).

144 *Id* at 2007.

145 Hernandez v. Mesa, 885 F.3d 811, 823 (5th Cir. 2018). *See also* Adam Liptak, *Two U.S. Agents Fired into Mexico Killing Teenagers. Only One Faces a Lawsuit*, N.Y. TIMES (Aug. 20, 2018), https://www.nytimes.com/2018/08/20/us/politics/agents-border-killings-supreme-court.html [https://perma.cc/5BKA-Q7DC] (noting that the Supreme Court has been hesitant to extend *Bivens*).

146 *See* Rodriguez v. Swartz, 899 F.3d 719, 731, 748 (9th Cir. 2018) (stating that the teen killed had a "Fourth Amendment right to be free from the objectively unreasonable use of deadly force by an American agent acting on American soil").

147 *See id*. at 748.

148 28 U.S.C. § 1604 (1976).

Foreign sovereign immunity is a powerful jurisdictional bar, as was reiterated in *Bolivarian Republic of Venezuela*.[149] At issue therein was whether the "expropriation exception" to immunity was applicable when private property rights are taken in violation of international law.[150] Minimizing its review of the disputed factual background arising from nationalized oil drilling rights in Venezuela, the Supreme Court focused instead on sovereign immunity's power to mandate early dismissal of claims.[151] Writing for a unanimous Court, Justice Breyer's opinion significantly increased the pleading burden in FSIA cases by requiring the plaintiff to establish a sovereign immunity exception *with certainty*.[152] The Court's holding built upon threshold jurisdictional principles set forth in *Verlinden*, further enshrined governmental immunity's outcome-determinative power at the very onset of legal proceedings, and advanced *Verlinden*'s immunity policy analysis, which supports sparing the government from the significant burdens of defending litigation.[153] The United States, despite its adversarial diplomatic posture toward Venezuela, filed an amicus brief in support of Venezuela, arguing in favor of the strong presumption of governmental immunity, buttressed by comity principles.[154] The Supreme Court's powerfully reiterated impunity doctrine resonates with positive law theory and expressly

---

[149] Bolivarian Republic Venez. v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1322–23 (2017).

[150] *Id.* at 1314–16 ("The expropriation exception applies to 'any case . . . in which rights in property taken in violation of international law are in issue and that property . . . is owned or generated by an agency or instrumentality of the foreign state . . . engaged in a commercial activity in the United States.'").

[151] *See id.* at 1321 (stating that sovereign immunity typically shields sovereigns from suits). Comity principles are often factored into the sovereign immunity analysis. *See, e.g.*, Hilton v. Guyot, 159 U.S. 113, 143 (1895) (articulating comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws"). Comity analysis has blossomed in international human rights cases as another gate-closing doctrine that further supports governmental impunity. *See, e.g.*, Harlan S. Abrams & Brian E. Mattis, *The Duty to Decide vs. the Daedalian Doctrine of Abstention*, 1 U. PUGET SOUND L. REV. 1, 12.

[152] *Bolivarian Republic Venez.*, 137 S. Ct. at 1316. *But see* Bell v. Hood, 327 U.S. 678, 682 (1946) (holding that federal courts have jurisdiction in cases arising under the Constitution that are not "wholly insubstantial and frivolous"). *Bell* no longer rings like a clarion call to liberally construe the plaintiff's claims in civil and human rights cases.

[153] *See* Verlinden B.V. v. Cent. Bank Nigeria, 461 U.S. 480, 493–94 (1983) (addressing the concerns that foreign relations in the United States have regarding federal questions). *See also Bolivarian Republic Venez.*, 137 S. Ct. at 1318–19 (discussing the FSIA's exceptions to foreign immunity).

[154] *See* Brief for the United States as Amicus Curiae in Support of Petitioners at 20, Bolivarian Republic Venez. v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312 (2017) (No. 15-423), 2016 WL 4524346, at *1. When it comes to shared sovereign immunity interests, hostile governments can jointly act like a band of brothers.

forecloses a plaintiff's ability to overcome jurisdictional barriers under FSIA (or otherwise) by emphasizing the plaintiff's injuries or, as disdained by the Court, "through artful pleading."[155] Simply put: pleader beware![156]

However, the Supreme Court earlier held in *Samantar* that FSIA immunity does not extend to foreign officials.[157] Therefore, the door has been left slightly ajar for torture victims to recover damages directly from their foreign torturers, assuming that they have reachable assets.[158] On remand in *Samantar*, the district court denied the individual defendants' sovereign immunity motion to dismiss, and later entered a $21 million damages judgment against a Somali government actor found liable for torture dating back to the 1980s.[159] Subsequently, the Fourth Circuit affirmed the denial of individual immunity.[160]

Also, plaintiffs have been successful in overcoming FSIA governmental immunity when, for strategic or political reasons, the foreign state decides not to participate in the case. In *Leibovitch*, for example, a default judgment of $67 million was entered regarding a 2003 highway terrorist attack by members of Palestine Islamic Jihad, funded in part by Iran.[161] However, efforts to collect Iranian assets have been judicially frustrated, and the estate of a seven-year-old Israeli girl, her permanently disabled three-year-old sister (an American citizen), and surviving family members continues its seemingly quixotic search for justice.[162] In *Rubin v. Islamic Republic of Iran*, the Seventh Circuit reviewed the earlier District of Columbia District Court $71.5 million default judgment against the Islamic Republic of Iran under the state sponsor of terrorism exception to FSIA immunity because Iran provided material support to Hamas suicide bombers who grievously injured eight U.S.

---

155 OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390, 396 (2015). *See supra* note 7 and accompanying text (noting how immunity doctrine resonates with positive law theory).

156 *See* Ashcroft v. Iqbal, 556 U.S. 662, 671 (2009) (commanding lower courts to review more aggressively plaintiff's jurisdictional pleadings in analyzing motions to dismiss under the Federal Rules of Civil Procedure).

157 Samantar v. Yousuf, 560 U.S. 305, 325–26 (2010). Of course, officials who allegedly engaged in torture or other human rights violations may raise a panoply of other defenses during the course of legal proceedings. *Id* at 324–25.

158 *Id*.

159 *See* Yousuf v. Samantar, No. 1:04cv1360, 2011 WL 7445583, at *1 (E.D. Va. Feb. 15, 2011) (denying motion); Yousuf v. Samantar, No. 1:04cv1360, 2012 WL 3730617, at *16 (E.D. Va. Aug. 28, 2012) (entering judgment).

160 Yousuf v. Samantar, 699 F.3d 763, 778 (4th Cir. 2012), *cert. denied*, 134 S. Ct. 897 (2014). Separately, a federal bankruptcy court held that the judgment against the defendant was non-dischargeable because the asserted injuries were caused by willful and malicious conduct. Yousuf v. Samantar, 537 B.R. 250, 256 (Bankr. E.D. Va. 2015).

161 Leibovitch v. Islamic Republic of Iran, 852 F.3d 687, 689 (7th Cir. 2017).

162 *See id*. *But see* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1329 (2016) (granting summary judgement for plaintiffs).

citizens in Jerusalem.[163] Over a decade of fruitless post-judgment legal proceedings followed in multiple jurisdictions to attach and execute on Iranian assets, including the Seventh Circuit's conclusion that ancient Persian art and artifacts located in four Chicago collections were beyond reach.[164] The Supreme Court announced in June 2017 that it would hear the case and determine whether the ancient artifacts could be used to pay the default judgment.[165] After setting forth a sweeping history of foreign sovereign immunity law, the Court unanimously held that the ancient artifacts could not be used to pay the default judgment.[166]

Two cases pending before the Supreme Court in the 2018–19 term may further elucidate the scope of FSIA immunity. At issue in *Republic of Sudan v. Harrison*[167] is whether a plaintiff who sues a foreign state under FSIA may effectuate service of legal process by mail sent to the Ministry of Foreign Affairs "via" or in "care of" the foreign state's embassy in the United States.[168] Of significance to this Article is the perspective of the United States. The case concerns a notorious 2000 al-Qaeda attack on the U.S.S. Cole while refueling in Aden, Yemen, which killed seventeen American sailors, injured forty-two more, and resulted in a default judgment of $314 million in damages.[169] Nevertheless, the United States filed an amicus curiae brief[170] in support of Sudan arguing that allowing service via embassies will generally undermine sovereign immunity and embassy protections under the Vienna Convention on Diplomatic Relations and harm its ability to defend itself in foreign litigation,

---

163 *See* Rubin v. Islamic Republic of Iran, 830 F.3d 470, 473 (7th Cir. 2016) (noting that more than a decade of litigation followed to attempt to collect the unpaid judgement from Iran).

164 *See id*. at 473.

165 *See* Rubin v. Islamic Republic of Iran, 137 S. Ct. 2326, 2327 (2017). *See also* Lawrence Hurley, *U.S. Top Court Takes up Fight over Ancient Persian Artifacts*, REUTERS (June 27, 2017), https://www.reuters.com/article/usa-court-iran/u-s-top-court-takes-up-fight-over-ancient-persian-artifacts-idUSL1N1JO0MB [https://perma.cc/M99K-7CJN].

166 *See* Rubin v. Islamic Republic of Iran, 138 S. Ct. 816, 826–27 (2018).

167 Republic of Sudan v. Harrison, 802 F.3d 399 (2d Cir. 2015), *cert. granted*, 138 S. Ct. 2671 (2018). *See also* Adam Liptak, *A Thought Experiment in Court Over How to Sue a Country*, N.Y. TIMES, Nov. 7, 2018, at A13 [hereinafter Liptak, *Thought Experiment*]; Robert Barnes, *Supreme Court Seems Divided on Whether Sudan Properly Served with USS Cole Lawsuits*, WASH. POST (Nov. 7, 2018), https://www.washingtonpost.com/politics/courts_law/supreme-court-seems-divided-on-whether-sudan-properly-served-with-uss-cole-lawsuits/2018/11/07/7ab7c3d2-e2bf-11e8-8f5f-a55347f48762_story.html?utm_term=.284e6e07f57b [https://perma.cc/JGK3-F2AF].

168 Harrison v. Republic of Sudan, 802 F.3d 399, 402, 405 (2d Cir. 2015).

169 Liptak, *Thought Experiment*, *supra* note 167.

170 Brief for the United States as Amicus Curiae Supporting Petitioner, Republic of Sudan v. Harrison, 138 S. Ct. 2671 (2018) (No. 16-1094), 2018 WL 4043178, at *10–26.

including the approximately 1000 lawsuits pending in over 100 countries.[171]

At issue in *Jam v. International Finance Corp.*[172] is whether the International Organizations Immunities Act,[173] which grants commercial organizations the "same immunity" granted to foreign governments, must be interpreted consistent with the scope of immunity granted foreign sovereigns when the Act was passed in 1945.[174] Harmed fishermen and farmers near the Tata Mundra Power Plant in India, financed by the International Finance Corporation, contend that the Act must be interpreted consistent with the evolution of immunity law under FSIA, which does not currently extend to commercial acts.[175]

4. Judicial Narrowing of the Alien Tort Statute

The human rights community widely views *Kiobel v. Royal Dutch Petroleum Co.* as a catastrophic gate-closing *ukase* for greatly expanding the "presumption against extraterritoriality" doctrine.[176] This doctrine forecloses jurisdiction and thereby immunizes conduct outside the U.S. unless Congress expressly states otherwise—language absent from the 1789 Alien Tort Statute ("ATS") enactment.[177] Commentary on *Kiobel* is expansive, including commentary by Justice Breyer, author of the main concurring opinion.[178] Justice Breyer's concurrence rejected the concept of universal jurisdiction, even if the alleged international torts rise to the level of *hostis humani generis* or internationally condemned violations of

---

171 The specific immunity argument raised by the U.S. is whether Article 22 of the Vienna Convention, which states that "[t]he premises of [the embassy] shall be inviolable," prohibits service in this manner. Vienna Convention on Diplomatic Relations art. 22(1), 23 U.S.T. 3237, 500 U.N.T.S. 106. *See also* Brief for the United States as Amicus Curiae Supporting Petitioner, Republic of Sudan v. Harrison, 138 S. Ct. 2671 (2018) (No. 16-1094), 2018 WL 4043178, at *20–21.

172 Jam v. Int'l Fin. Corp., 860 F.3d 703 (D.C. Cir. 2017), *cert. granted*, 138 S. Ct. 2026 (2018).

173 22 U.S.C. § 288a(b).

174 Jam v. Int'l Fin. Corp., 860 F.3d 703, 704 (D.C. Cir. 2017).

175 *Id.* at 704–05. *See generally* Richard Garnett, *Precarious Employment? Varying Approaches to Foreign Sovereign Immunity in Labor Disputes*, 51 INT'L LAW. 25 (2018) (providing background and application of the FSIA "commercial activity" exception to immunity).

176 *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1670 (2013). The Nigerian plaintiffs in *Kiobel* alleged that the international oil corporation, which has extensive and multifaceted operations in the United States, aided and abetted the Nigerian government in the commission of multiple human rights violations against the local population in order to advance oil exploration in the Ogoni River Delta region. *Id.* at 1662–63.

177 *See supra* note 176 and accompanying text. *See also* 28 U.S.C. § 1350 (2006). The Alien Tort Statute grants subject matter jurisdiction over civil suits brought by aliens alleging tortious violations of international treaties under customary international law. *Id.*

178 *Kiobel*, 133 S. Ct. 1671 (Breyer, J., concurring).

law.[179] *Kiobel*'s impact is significant because, since the landmark *Filartiga* decision in 1980, federal courts had been, albeit with judicial croaks and groans, slowly opening jurisdictional doors and expanding the scope of international human rights claims actionable under the ATS to encompass torture and related abuses, corporate connivance with governmental human rights abuses, and even befoulment of the environment.[180] The Supreme Court held earlier, in *Sosa v. Alvarez-Machain*, that federal courts were open to foreigners who claim they are the victims of human rights abuses anywhere in the world if the egregious conduct violated norms of international law and if the defendant is either present in the U.S. or has significant interests in the U.S. to establish personal jurisdiction.[181] Post-*Kiobel*, however, international human rights justice has been stymied by deference to the power of foreign governmental interests and international corporations and the ongoing failure of Congress to update the 1789 enactment to reflect contemporary international entanglements between countries in military and economic affairs.[182]

The post-*Kiobel* legal tsunami of decisions dismissing human rights cases against powerful corporate and governmental interests has reverberated all the way to South Africa. The Khulumani Support Group sued twenty banks and corporations in 2002—eleven years before *Kiobel*—and alleged that corporate conduct during the apartheid era in South Africa supported and enabled human rights abuses against the majority black population.[183] The Khulumani plaintiffs detailed the defendants' support of South African industries that economically enriched and entrenched the apartheid government and allegedly made these defendants complicit in human rights abuses, which caused specific

---

179 *See* BREYER, *supra* note 122, at 134–64. *See also* BAZYLER, *supra* note 7, at 179–81.

180 BAZYLER, *supra* note 7, at 180. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (placing great importance on human rights, especially the right not to be tortured). The holding was later codified by the Torture Victim Protection Act of 1991, as a note in 28 U.S.C. § 1350 (1991). *See, e.g.*, Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified as note in 28 U.S.C. § 1350). *See also infra* Section III.B.7 (discussing the Torture Victim Protection Act).

181 Sosa v. Alvarez-Machain, 542 U.S. 692, 700–02 (2004). The ATS does not expressly address who can be sued thereunder nor does it limit jurisdiction over any defendant contingent on the physical location of the tort or the defendant. *See* BAZYLER, *supra* note 7, at 330.

182 In other relevant contexts, Congress has statutorily narrowed sovereign immunity. The Federal Tort Claims Act, for example, sets forth a limited waiver of sovereign immunity that allows individuals to pursue personal injury or death claims against the federal government when caused by government employees. 28 U.S.C. § 2675(a).

183 *See In re* S. Afr. Apartheid Litig., 56 F. Supp. 3d 331, 331–32 (S.D.N.Y. 2014). *See also Apartheid Reparations Lawsuits (re So. Africa)*, BUS. & HUM. RTS. RES. CTR. (Oct. 9, 2017), https://www.business-humanrights.org/en/apartheid-reparations-lawsuits-re-so-africa [https://perma.cc/4YTH-GJ8B] (collecting analysis of other ATS lawsuits).

injuries to the plaintiffs.[184] During the protracted legal proceedings, *Kiobel* was decided, and ultimately the Khulumani lawsuit was dismissed due to failure to establish a sufficient United States nexus between the conduct of the remaining defendants, IBM and Ford, and specific human rights abuses by the former apartheid government.[185] Thus, international justice for these apartheid victims was foreclosed. In an ironic later development, the current South African government, controlled by the former revolutionary African National Congress party, formally notified the United Nations of its plan to leave the International Criminal Court because it "is in conflict and inconsistent with" South African law granting government officials "diplomatic immunity."[186] Former Constitutional Court of South Africa Justice Richard Goldstone starkly criticized this post-revolutionary turn backward toward impunity as "unfortunate on legal, moral and political grounds."[187] Also, South African President Jacob Zuma survived his eighth no-confidence vote with the support of African National Congress National Assembly members, despite dozens of legal investigations regarding corruption allegations that have not impacted his absolute legal and political immunity.[188]

Judicial principles of universal jurisdiction championed by domestic courts in Spain and elsewhere are non-starters in the United States under the ATS and otherwise, absent the fanciful idea that Congress will enact

---

184 *See Apartheid Litig.*, 56 F. Supp. 3d at 334 (describing plaintiffs' grievances against IBM). Valparaiso University School of Law hosted a four-day symposium in 1987 entitled "Perspectives on South African Liberation." The symposium essays, edited by the author and published by Hamline University School of Law in volume 5 of *The Journal of Law and Religion* 259 (1987), addressed, inter alia, the intertwined governmental and corporate foundation of apartheid, which was immune from legal challenge, and whether apartheid positivist law was morally worthy of obedience.

185 *See In re* S. Afr. Apartheid Litig., 633 F. Supp. 2d 117, 123 (S.D.N.Y. 2009) (dismissed by Ntsebeza v. Ford Motor Co). *See also Apartheid Litig.*, 56 F. Supp. 3d at 334.

186 Sewell Chan & Marlise Simons, *South Africa to Withdraw from International Criminal Court,* N.Y. TIMES (Oct. 21, 2016), https://www.nytimes.com/2016/10/22/world/africa/south-africa-international-criminal-court.html [https://perma.cc/E8H8-XNQ6]. *See also* Marlise Simons, *South Africa Should Have Arrested Sudan's President, I.C.C. Rules*, N.Y. TIMES (July 6, 2017), https://www.nytimes.com/2017/07/06/world/africa/icc-south-africa-sudan-bashir.html [https://perma.cc/T5JR-U9AW] (stating that South African courts informed South African diplomats that they were required to arrest Omar Hassan al-Bashir).

187 Chan & Simons, *supra* note 186. Perhaps readers will recall the prescient lyrics of The Who in *Won't Get Fooled Again*: "Meet the new boss / same as the old boss." THE WHO, WON'T GET FOOLED AGAIN (Track Records 1971).

188 *See* Gabrielle Steinhauser, *South African President Survives a Strong Challenge*, WALL ST. J., Aug. 9, 2017, at A5. *See also South African's President Survives His Toughest Challenge Yet*, ECONOMIST (Aug. 9, 2017), https://www.economist.com/middle-east-and-africa/2017/08/09/south-africas-president-survives-his-toughest-challenge-yet [https://perma.cc/UG3B-GBN8].

specific statutory language to expand subject matter jurisdiction to foreclose immunity for U.S. actors whose salacious international deeds are outsourced to non-U.S. actors.[189] Furthermore, the Supreme Court recently resolved an appeal that consolidated five extremely procedurally complex lawsuits that expressly raised the issue not reached in *Kiobel* of whether corporations may *ever* be sued under the ATS. The Supreme Court held in *Jesner v. Arab Bank, PLC*[190] that foreign corporations could not be defendants under the ATS.[191] The majority (5-4) opinion by Justice Kennedy traced, in great detail, the relevant history of Congressional and Supreme Court developments since passage of the ATS.[192] Of course, in any case against a government or private actor in which subject matter jurisdiction has been established, additional immunity and other defenses await resolution.

A trial had been scheduled in September 2017 in *Salim v. Mitchell* to determine whether two psychologists working under CIA contracts should be held accountable under the ATCA for the torture of two former

---

189 The universal jurisdiction of Spanish courts was established in the Judicial Power Organization Act No. 6/1985 of 1 July (Official Gazette No. 157 of 2 July). The act authorizes Spanish jurisdiction where Spaniards or "foreigners outside the national territory" commit certain egregious offenses. *Scilingo* remains the only case in which Spain has exercised its universal jurisdiction and subsequently ordered a criminal sentence. S.T.S., Oct. 1, 2007 (R.G.D., No. 798) (Spain) http://www.derechos.org/nizkor/espana/juicioral/doc/sentenciats.html [https://perma.cc/62M8-T46S]. Mr. Scilingo received a 1084-year sentence for crimes against humanity committed in Argentina, including genocide, 30 counts of murder, 286 of torture, 255 of terrorism, and 93 of causing injury. *Id. See also* Aritz Parra, *Spain's National Court Drops Probe into Syrian Crimes*, FOX NEWS, http://www.foxnews.com/world/2017/07/21/spains-national-court-drops-probe-into-syrian-crimes.html [https://perma.cc/N75N-2K6X]. As of October 2017, over 470,000 people have been killed in the ongoing civil war in Syria, and nearly half the country's population has been displaced, yet only one human rights war-crime case has been brought, in Spain, against Syrian governmental and military officials for well-documented human rights atrocities committed during the initial six years of lawlessness. *Id.* However, a panel of Spanish judges later decided that the Spanish National Court did not have jurisdiction to investigate the case. *Id. See also* The Editorial Board, *Frustration Over a War and Its Crimes*, N.Y. TIMES, Aug. 9, 2017, at A18. The complex and frustrated U.N.-created entities charged with investigating human rights abuses in Syria appear stymied. *See also* Nick Cumming-Bruce, *Ex-Judge Chosen by U.N. to Gather Evidence of Syria War Crimes*, N.Y. TIMES, July 4, 2017, at A5 (reporting that a French judge will prepare evidence of war crimes committed in Syria); Anne Barnard et al., *As Atrocities Mount in Syria, Justice Seems Out of Reach*, N.Y. TIMES, Apr. 16, 2017, at A1 (revealing that only a few Syrian war crimes are being pursued by European judges).

190 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018).

191 *Id.* at 1403.

192 *See* Adam Liptak, *Supreme Court Bars Human Rights Suits in the U.S. Against Foreign Corporations*, N.Y. TIMES, Apr. 25, 2018, at B2.

detainees and the death of one detainee in secret prisons in Afghanistan.[193] Although the U.S. government and CIA officers enjoy sovereign and qualified immunity, respectively, the court did not extend such immunity to the private actors.[194] Both sides made extensive arguments expressly referencing German law during the Holocaust and the subsequent human rights liability principles resulting from the Nuremberg trials.[195] The district court denied the psychologists' renewed motion to dismiss for lack of jurisdiction in August 2017 and reiterated that a jury would hear the case.[196] A confidential settlement was reached promptly thereafter.[197] To date, no one has been held legally accountable under the ATCA or otherwise for torture and other human rights violations arising from the "enhanced interrogation" policies and practices implemented in the aftermath of September 11.[198]

5. The Antiterrorism Act

Waldman v. PLO, another illustrative gate-closing case, concerned a series of terrorist attacks in Israel that killed American and Israeli citizens and resulted in a $655.5 million judgment under the Anti-Terrorism Act following a seven-week trial on the merits against the Palestinian Authority and the Palestine Liberation Organization.[199] However, the

---

193 Salim v. Mitchell, 183 F. Supp. 3d 1121, 1123–25 (E.D. Wash. 2016). *See also* Sheri Fink & James Risen, *Lawsuit Aims to Hold 2 Contractors Accountable for C.I.A. Torture*, N.Y. TIMES, Nov. 28, 2016, at A10 (discussing the aim of *Salim*).

194 *See Salim* 183 F. Supp. 3d at 1130 (explaining qualified immunity for private actors).

195 *See* Sheri Fink, *2 Psychologists in C.I.A. Interrogations Can Face Trial, Judge Rules*, N.Y. TIMES, July 29, 2017, at A18 (offering information on public policy ideas developed after the Nuremberg trials). *See also* M. Gregg Bloche, *When Torture Becomes Science*, N.Y. TIMES, Aug. 13, 2017, at SR6 (providing a legal and psychiatric summary of case issues); Ariel Dorfman, *Shakespeare's Torture Test*, N.Y. TIMES, July 23, 2017, at SR8 (addressing Iago's evil and the necessity of retaining humanity when confronting evil).

196 *See* Salim v. Mitchell, 183 F. Supp. 3d 1121, 1133 (E.D. Wash. 2017) (denying defendant's motion to dismiss for lack of jurisdiction); Salim v. Mitchell, 268 F. Supp. 3d 1132 (E.D. Wash. 2017) (denying the psychologists' motion for summary judgment and stating that similar arguments were raised by defendants in a previous motion to dismiss); Larry Siems, *Creators of the CIA's 'Enhanced Interrogation' Program to Face Trial*, GUARDIAN (Aug. 8, 2017), https://www.theguardian.com/law/2017/aug/08/cia-torture-program-lawsuit-trial-enhanced-interrogation [https://perma.cc/NY8U-QS6P].

197 *See* Sheri Fink, *Ex-Detainees Reach Settlement With 2 Psychologists in C.I.A. Torture Case*, N.Y. TIMES, Aug. 18, 2017, at A12; Sara Randazzo, *CIA Psychologists, Ex-Detainees, Reach Settlement*, WALL ST. J., Aug. 18, 2017, at A4.

198 One of the psychologists in *Salim v. Mitchell* published a book that explained the program and noted that the CIA had awarded medals to the psychologists for their work. *See* JAMES E. MITCHELL & BILL HARLOW, ENHANCED INTERROGATION: INSIDE THE MINDS AND MOTIVES OF THE ISLAMIC TERRORISTS TRYING TO DESTROY AMERICA (Crown Forum 2016).

199 *See generally* 18 U.S.C. § 2331 (codifying the Antiterrorism Act); Waldman v. PLO, 835 F.3d 317, 322 (2d Cir. 2016), *cert. denied*, Sokolow v. PLO, 138 S. Ct. 1438 (2018). *See also*

Second Circuit vacated the award and ordered that the lawsuit be dismissed because of insufficient connection between the Palestinian defendants and the United States to meet the jurisdictional demands of the Anti-Terrorism Act.[200]

6. Justice Against Sponsors of Terrorism Act

In 2016, Congress overrode a veto by President Obama to enact the Justice Against Sponsors of Terrorism Act, which amends FSIA and the Antiterrorism and Effective Death Penalty Act of 1996, to authorize personal jurisdiction over foreign states and civil damages claims in specified contexts.[201] This legislation is poised to disrupt the longstanding international law doctrine that shields foreign governments from lawsuits, and it expressly authorizes families of victims of the September 11 terrorist attacks to sue the Saudi Arabian government for any official conduct supportive of the alleged Saudi Arabian conspirators who had connections with terrorist groups.[202] However, the law has been criticized for potentially opening judicial doors for foreign countries to sue U.S. military personnel regarding military operations and other conduct outside the U.S.[203] This criticism, which was accepted by President Obama, further illustrates why political and military opposition to restricting governmental impunity and qualified immunity for government and military actors will ever be in conflict with developing civil society norms of human rights "from below."[204]

Benjamin Weiser, *Court Throws Out $655.5 Million Terrorism Verdict Against Palestinian Groups*, N.Y. TIMES, Aug. 31, 2016, at A22.

200 *See Waldman*, 835 F.3d at 322. *See also* 18 U.S.C. § 2334; Int'l Shoe Co. v. Shartel, 279 U.S. 429, 434 (1929) (setting forth "minimum contacts" analysis to determine if a sufficient connection to a particular forum exists for purposes of litigation).

201 28 U.S.C. § 2254(d); 28 U.S.C. § 1605B. *See also* Mark Mazzetti, *New Law Shifts Fight on Claims for 9/11 Victims*, N.Y. TIMES, Sept. 30, 2016, at A1 (examining the interaction between the veto and 9/11 lawsuits); Jennifer Steinhauer, Mark Mazzetti & Julie Hirschfeld Davis, *Congress Allows Saudis to be Sued Over 9/11 Attacks*, N.Y. TIMES, Sept. 29, 2016, at A1 (expounding upon the consequences of the vote to override President Obama's veto of the bill, which allows families of 9/11 victims to sue Saudi Arabia for any role undertaken in the plot). *See also* Julie Hirschfeld Davis, *Obama Vetoes Saudi 9/11 Bill, but Congressional Override Is Expected*, N.Y. TIMES, Sept. 24, 2016, at A1.

202 *See* 28 U.S.C. § 1605B (placing responsibility on foreign states for terrorist attacks in the United States). *See also* The Editorial Board, *The Risks of Suing the Saudis for 9/11*, N.Y. TIMES, Sept. 28, 2016, at A24 (discussing the problems associated with suing the Saudi Arabian government).

203 *See The Risks of Suing the Saudis*, *supra* note 202.

204 *See Brother Against Brother*, ECONOMIST, Feb. 11, 2017, at 72 (summarizing historical analysis dating to the Roman Empire regarding this perpetual conflict and the incomplete mission of law to contextually balance these irreconcilable and competing interests of governmental inviolability and individual rights).

Ongoing U.S. sanctions against Iran for state-sponsored terrorism were addressed by the International Court of Justice in *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights*,[205] wherein the U.S. argued that Iran's continuing request for sanctions relief under international law would "cause irreparable prejudice to the sovereign rights of the United States to pursue its policy towards Iran."[206] Nevertheless, the court ordered the U.S. to remove any sanctions that impede exportation of goods required for humanitarian assistance to Iran.[207]

7. Sloping Toward Impunity: The Torture Victim Protection Act, The Detainee Treatment Act, and Judicial Foreclosure of a Right of Action Thereunder

Another prominent human rights case and other related precedents illustrate the judicial minting of a statutory license to torture due to the award of wholesale immunity for such conduct.[208] In *Vance v. Rumsfeld*, statutory damages claims stemming from the Iraq War were brought against former Secretary of Defense Donald Rumsfeld, who allegedly created policies that authorized and resulted in the torture of U.S. civilians in Iraq.[209] The sharply divided en banc Seventh Circuit (8-3) held that neither an implied statutory nor common-law claim for damages should be created under *Bivens*.[210] Furthermore, even if such a claim existed under the Torture Victim Protection Act ("TVPA"), it could not be brought

---

[205] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Order, 2018 I.C.J. 175 (Oct. 3). Iran claims that sanctions violate this Treaty between Iran and the United States, 8 U.S.T 899, which was signed at Tehran, Iran, on August 15, 1955.

[206] *Id.* at 24, ¶ 87.

[207] *Id.* at 26–27, ¶¶ 98, 102.

[208] 28 U.S.C. § 1350. A cause of action was created for U.S. citizens, and foreign nationals, to file torture or extrajudicial killing lawsuits. *Id. See also* 10 U.S.C. § 801; 42 U.S.C. §§ 2000dd–2000dd-1 (codifying the Detainee Treatment Act).

[209] *See* Vance v. Rumsfeld, 701 F.3d 193, 196 (7th Cir. 2012) (en banc) (explaining the torture practices used against the defendants). This decision was consistent with other prior decisions that addressed analogous claims. *See, e.g.*, Lebron v. Rumsfeld, 670 F.3d 540, 562 (4th Cir. 2012); Doe v. Rumsfeld, 683 F.3d 390, 397 (D.C. Cir. 2012); Ali v. Rumsfeld, 649 F.3d 762, 792–93 (D.C. Cir. 2011); Arar v. Ashcroft, 585 F.3d 559, 571–81 (2d Cir. 2009) (en banc). For the interested reader, the plaintiffs' complaint was detailed in 387 paragraphs over 79 pages. The initial merits panel decision in *Vance* set forth 81 pages of analysis. That decision was vacated and replaced by the en banc opinion that covered 83 pages. But the majority opinion's consideration of the plaintiffs' torture and suffering required only four pages of attention.

[210] *See Vance*, 701 F.3d at 201–02. Although the Detainee Treatment Act authorizes criminal prosecution and may have limited civil application to enforce injunctions, the enactment expressly blocks damages liability.

against Secretary Rumsfeld.[211] The majority opinion by Judge Easterbrook, which reads like a positivist government's dream brief, left no doubt that even if the torture claim against Secretary Rumsfeld was statutorily authorized, it would not survive the "clearly established law" high hurdle of qualified immunity because "a public official's inability to ensure that all subordinate federal employees follow the law has never justified personal liability."[212] Chief Judge Wood's concurring opinion expressly and quite summarily concluded that Secretary Rumsfeld "is entitled to qualified immunity."[213]

The dissent flailed at the sweeping scope of immunity "granting the entire U.S. military an exemption from all *Bivens* liability, even to civilians."[214] The absolute civil immunity awarded to U.S. military and civilian personnel was, the dissent argued, in direct opposition to the liability principles of the TVPA, which, analogously, authorizes civil remedies for: (1) a victim of Syrian military torture, if the torturer is located in the U.S.; and (2) family survivors, if the torture results in death.[215] These remedies, the dissent stated, apply to victims of torture by every government in the world, except one: "civilian U.S. citizens who are tortured or worse by our own military have no such remedy. That disparity attributes to our government and to our legal system a degree of hypocrisy that is breathtaking."[216]

8. Even the United Nations Enjoys Immunity for Its Own Human Rights Violations

United States federal courts may be closed to human rights cases brought against the United Nations—the enshrined protector of the Universal Declaration of Human Rights—because of immunity.[217] In *Georges v. United Nations*, tort and contract claims arising from the tragic

---

[211] *See* Editorial, *Getting Away with Torture*, N.Y. TIMES, Nov. 24, 2012, at A28 (criticizing the opinion's cynical analysis of the defendant's significant burden of responding to such lawsuits). Donald Rumsfeld was already retired from office when the lawsuit was filed.

[212] *Vance*, 701 F.3d at 203. It is true that high level government officials are not *vicariously liable* for the conduct of their subordinates. *See* Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009). However, they may be individually liable if they, inter alia, directly supervise illegal conduct or fail to supervise or train subordinates to prevent such conduct. *See generally* MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES, § 7.19(c), at 7-239 (4th ed. 2010).

[213] *Vance*, 701 F.3d at 206.

[214] *Id.* at 212 (Hamilton, C.J., dissenting).

[215] *Id. See also* 28 U.S.C. § 1350 note, §§ 2(a), 3(b) (setting forth jurisdiction for an alien's tort suit).

[216] Vance v. Rumsfeld. 701 F.3d 193, 211 (7th Cir. 2012) (Hamilton, C.J., dissenting).

[217] *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (ensuring rights for a standard of living).

2010–13 cholera outbreak in Haiti were dismissed because the United Nations enjoyed legal immunity under various international agreements.[218] The outbreak, caused by atrocious U.N. sanitation practices, killed more than 9000 innocent civilians and infected over 800,000 people.[219] Still, the Second Circuit affirmed the dismissal because Article II of the U.N. Charter enshrines U.N. immunity unless expressly waived.[220] Because Article II explicitly details the only restriction on U.N. immunity, the Second Circuit determined that immunity must triumph over the Haitian victims.[221] It is clear from *Georges* that the sweeping immunity held by the United Nations often will present an insurmountable hurdle for victims of human rights abuses—even when those abuses are clearly caused by *the* paramount international organization entrusted to advance human rights.[222]

IV. CONCLUSION

This Article has primarily focused on judicial foreclosure of civil and human rights claims based on judge-created doctrinal immunity policies that mirror asserted governmental interests. In particular, judicial analysis of the qualified immunity doctrine inherently requires a *de minimis* focus on the plaintiff's interests in favor of perfunctory dismissal of all claims that are not historically well established, regardless of the gravamen of the injuries claimed. This doctrine and omnipotent sovereign immunity enactments, coupled with wholesale judicial expansion thereof, undermine core principles of remedial justice and significantly impede the progress of law to the detriment of justice "from

---

218 Georges v. United Nations, 84 F. Supp. 3d 246, 251 (S.D.N.Y. 2015), *aff'd*, 834 F.3d 88, 90 (2d Cir. 2016).

219 *See Georges*, 84 F. Supp. 3d at 247 (explaining how many Haitians were infected with cholera); *Georges*, 834 F.3d at 90. *See also* G.A. Res. 217 (XXV) 1, Universal Declaration of Human Rights (Dec. 10, 1948) (enshrining, inter alia, every person's right to a standard of living adequate for health and well-being); *UN Immunity Beats Back Legal Claims by Haitian Cholera Victims, Battle Continues*, ABA NEWS (Feb. 5, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/02/un_immunity_beatsba.html [https://perma.cc/3Y5N-GTCQ] (discussing the fight of Haiti's cholera victims).

220 *See* Georges v. United Nations, 834 F.3d 88, 90 (2d Cir. 2016) (citing 21 U.S.T. 569, 25 (1970)) (granting legal immunity, in every country, to the United Nations).

221 *See id*. The United Nations must, in an affirmative act of secular positivist *zimsum*, deign to expressly waive its immunity. That the U.N. did not do so in the Haitian case is a travesty of justice.

222 What would Eleanor Roosevelt, who was unanimously chosen to chair the UN Committee that drafted the Universal Declaration of Human Rights, and the multitude of other prominent human rights advocates who advanced the human rights mission of the United Nations say about this impunity? *See generally* Richard N. Gardner, *Eleanor Roosevelt's Legacy: Human Rights*, N.Y. TIMES (Dec. 10, 1988), http://www.nytimes.com/1988/12/10/opinion/eleanor-roosevelt-s-legacy-human-rights.html [https://perma.cc/5QFJ-KR2Z].

below." This legal reality poses a paramount and multifaceted future challenge for civil and human rights advocates. Significant progress in U.S. civil rights law in recent decades has advanced across a wide spectrum of substantive law. However, securing remedial damages justice against government entities and actors in all substantive fields of civil rights and human rights law remains a daunting challenge. May the legal advocates for victims of governmental misconduct ever be immune from the Hydra-like limitations on their pursuit of justice for those who suffered "from below."