Strip Searches and the Silo Effect: Adopting a Holistic Approach to *Charter* Remedies

Gary S. GILDIN*

* Professor of Law and G. Thomas and Anne G. Miller Chair in Advocacy, Penn State Dickinson School of Law, Carlisle, Pennsylvania, United States of America, ©.

I. INTRODUCTION

One of the most publicized cases of the United States Supreme Court's past term arose out of an event that occurred when Savana Redding was a 13-year-old student at Safford Middle School in Safford, Arizona.[1] Kerry Wilson, the Assistant Principal, summoned Savana to his office. Wilson accused Savana of supplying prescription and over the counter dosages of common pain relievers to fellow students, in violation of school policy prohibiting non-medical use, possession or sale of drugs. When Savana denied the accusation, Wilson and his administrative assistant, Helen Romero, searched Savana's backpack but found no pills or other contraband. Wilson then directed Romero to take Savana to the office of the school nurse, Peggy Schwallier, and to search Savana to see if she had any pills on her person. Romero and Nurse Schwallier ordered Savana to strip down to her bra and underpants. They then instructed Savana to tug her bra out and to the side and to pull out the elastic on her underpants, exposing portions of Savana's breasts and pelvic area. The strip search turned up neither pills nor other contraband.[2] Savana's mother filed a civil action against Assistant Principal Wilson, administrative assistant Romero, Nurse Schwallier, and the Safford School District alleging the strip search deprived Savana of her federal constitutional right to be free of unreasonable searches and seizures.[3]

When the Supreme Court issued its opinion on June 25, 2009, the media touted Savana's constitutional victory. Civil libertarians celebrated an increasingly rare instance of the Court upholding a claim that governmental action contravenes the Fourth Amendment of the

---

1 *Safford Unified School Dist. v. Redding*, 129 S. Ct. 2633 (2009).

2 *Ibid.* at p. 2638.

3 "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend. IV.

Constitution. The Court found the officials were justified in searching Savana's backpack and outer clothing in the privacy of Assistant Principal Wilson's office because two other students and staff members had informed school officials that Savana was involved in distribution of pills. However, because a strip search of adolescents is more embarrassing, frightening, humiliating, and degrading and has the potential to cause serious emotional damage, school officials must possess a higher degree of suspicion before such invasive searches can be deemed "reasonable" under the Fourth Amendment. The Court ruled a school official may require a student to strip down to and pull out his or her underwear only where either a) the amount or nature of the drugs allegedly being distributed poses a danger to students, or b) there is specific reason to suspect a student is concealing contraband in her undergarments. As neither condition was satisfied, the Court held the school officials' strip search of Savana was constitutionally unreasonable.[4]

While casting the Supreme Court's opinion as a major victory for Savana and civil liberties, commentators paid little or no attention to Savana's entitlement to a remedy. Where a deprivation of constitutional rights causes economic, physical or emotional damage to the citizen, the legal system must assign the risk of that loss among three actors. First, the individual government official who causes the harm can be held personally liable. Second, the governmental entity on whose behalf the public official was acting can be required to pay damages, in addition to or in lieu of the official. Finally, the victim may be denied compensation and left to absorb the injuries resulting from constitutional wrongdoing.

Section 24(1) of the *Charter* delegates to the courts of Canada the important responsibility of allocating the losses where government has contravened the *Charter* and injured one of its citizens:

> Anyone whose rights or freedoms, as guaranteed by the *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just under the circumstances.

Courts react to claims brought by litigants rather than proactively legislate general rules. Therefore, the Supreme Court of Canada cannot simply issue a general edict dictating how damages caused by *Charter* wrongs are to be distributed among the official, entity and victim. Instead, the cumulative impact of the Court's decisions in individual cases will

---

4 *Safford Unified School Dist.*, 129 S. Ct., at pp. 2642–2643.

determine the ultimate allocation of the risk of loss from invasions of rights secured by the *Charter*.

The process by which the United States Supreme Court determined who should absorb the damages caused by constitutional violations stands as a cautionary tale as the courts of Canada embark on the task of deciding when, and from whom, an award of damages is an "appropriate and just" remedy for *Charter* breaches. The United States Supreme Court developed its jurisprudence in three discrete silos: 1) immunity of individual officials, 2) entity liability for damages, and 3) standards for issuance of equitable and declaratory relief. The Court consistently neglected to consider how its rulings in one of the three silos, when applied in concert with other doctrines, affect the final allocation of losses caused by constitutional wrongdoing. As a consequence, innocent victims like Savana Redding often are left without any remedy for infringement of their fundamental constitutional liberties.

This article proposes that in litigating and adjudicating any single issue that arises when a citizen seeks to recover damages for a *Charter* violation, the advocates and judges must adopt a holistic approach, assessing how resolution of that one issue will impact the overall assignment of the risk of loss. More specifically, counsel and the court must always consider how the answer to the question posed in the case at bar will affect plaintiffs' and future citizens' ability to obtain a viable remedy for deprivations of *Charter* rights in light of 1) rules regarding immunity of individual officials; 2) doctrines approving or limiting the liability of governmental entities; *and* 3) the availability of injunctive or declaratory relief to redress the constitutional violation.

II. THE FIRST SILO: IMMUNITY OF INDIVIDUAL PUBLIC OFFICIALS FROM LIABILITY FOR DAMAGES FOR CONSTITUTIONAL DEPRIVATIONS IN THE UNITED STATES

The United States Supreme Court has actively expanded immunity for individual officers sued for damages caused by their breach of federal constitutional rights. Notably, the Court has not considered whether, once denied recovery from the public official, the citizen alternatively will be able to obtain compensation for his injuries from the entity on whose behalf the official has acted.

A. THE ORIGIN OF THE CIVIL ACTION TO REDRESS INFRINGEMENTS OF CONSTITUTIONAL RIGHTS

Unlike the *Charter*, the United States Constitution does not address remedies to be afforded persons deprived of their liberty. In the wake of the Southern states' refusal or inability to enforce rights to equality codified in the post-Civil War Amendments to the Constitution, Congress enacted the Civil Rights Act of 1871, 42 U.S.C. § 1983 (Section 1983). Section 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured in any action at law, suit in equity or other proper proceeding for redress.[5]

Section 1983 provided a new mechanism and a different forum for vindication of constitutional rights. Persons suffering a deprivation of constitutionally-guaranteed liberty at the hands of persons acting on behalf of state or local governments could initiate an "action at law, suit in equity, or other proper proceeding for redress." Because Congress did not trust state courts to enforce the mandates of the Constitution, the citizen could file this newly created civil action in federal court. As the Supreme Court recognized in *Mitchum v. Foster:*[6]

> Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century…. The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights--to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'

Section 1983 does not provide a remedy where a federal, as opposed to state or local, government official breaches the Constitution and causes harm to a citizen. In 1971, the Supreme Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* partially closed that gap, authorizing persons harmed by unconstitutional conduct

---

5 42 U.S.C. § 1983 (1979).

6 *Mitchum v. Foster*, 407 U.S. 225 (1972), at p. 242, quoting *Ex Parte Virginia*, 100 U.S. 339 (1879), at p. 346.

of a federal official to file a civil lawsuit for damages.[7] Although Congress had not legislated such an action, the Court reasoned, "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."[8] As money damages is the "ordinary remedy for an invasion of personal interests in liberty,"[9] absent a declaration by Congress that victims of constitutional wrongs be relegated to a different, equally effective remedy,[10] citizens could lodge a civil damage action against federal officers who violate their constitutional rights.[11]

B. THE EXPANDING IMMUNITY OF INDIVIDUAL OFFICIALS FROM LIABILITY FOR DAMAGES

The Supreme Court has held that public officials sued under Section 1983 and *Bivens* may avail themselves of immunity from liability for damages caused by their violation of the Constitution.[12] The Court's immunity decisions rest exclusively upon the governmental interests that support sheltering the official from monetary accountability. The Court did not in turn consider whether once the official is relieved from liability, the citizen whose rights had been invaded may receive compensation for harms from the entity.

The Court could have construed Section 1983 to deny immunity to

---

7 *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, at pp. 391–92 (1971).

8 *Ibid.* at p. 392, *quoting Bell v. Hood*, 327 U.S.678 (1946), at p. 684.

9 *Ibid.* at p. 395.

10 *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (refusing *Bivens* action for violation of due process arising out of denial of Social Security benefits because Congress did not include damage remedy in its comprehensive remedial scheme).

11 The Court has authorized *Bivens* claims alleging discrimination in employment alleged to have violated the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228 (1979), and prison officials' violation of the Eight Amendment's guarantee of freedom from cruel and unusual punishment. *Carlson v. Green*, 446 U.S. 14 (1980). However, the Court has repudiated *Bivens* actions where there are "special factors counseling hesitation." *Bivens*, at p. 396. *See Wilkie v. Robbins*, 127 S.Ct. 2588 (2007); *United States v. Stanley*, 483 U.S. 669 (1987); *Chappell v. Wallace*, 462 U.S. 296 (1983); *Bush v. Lucas*, 462 U.S. 367 (1983).

12 The Court has ruled the immunity of federal officials should mirror the immunity of their state counterparts. Therefore, the Court's interpretations of immunity under Section 1983 apply equally to federal officials sued in *Bivens* actions. *Butz v. Economou*, 438 U.S. 478 (1978), at p. 504.

officials who contravene the Constitution. The language of Section 1983 is unconditional, providing a cause of action against "every person" who causes a deprivation of constitutional rights; the statute makes no mention of immunity. The legislative history admonishes courts to broadly and liberally construe the statute to afford a remedy to persons injured by unconstitutional acts. The purpose of Section 1983 is "the enforcement … of the Constitution on behalf of every individual citizen of the Republic … to the extent of the rights guaranteed to him by the Constitution."[13] Senator Edmunds, the manager of the bill in the Senate, stated that the Act was "so very simple and really reenacting the Constitution."[14] The only immunity prescribed by the United States Constitution is the protection of legislators from being challenged for any "Speech and Debate."[15] If the Court interpreted Section 1983 as a re-codification of the Constitution with the addition of a civil damage action, then there would be no immunity beyond the Speech and Debate Clause.

Despite the absence of generalized immunity in the text of the Constitution or statute, and the legislative prescription to liberally construe Section 1983 in favor of granting relief, in *Pierson v. Ray* the Court held Congress intended to allow the defense of individual immunity.[16] Officials sued under Section 1983 could assert common law immunities that prevailed in 1871 when Congress enacted the statute.

Pierson arose out of the arrest of fifteen white and African-American Episcopal clergymen who challenged segregationist practices by using the whites-only waiting room at a bus terminal in Jackson, Mississippi. The clergymen peaceably walked into the waiting room. However, police officers arrested them for violating the Mississippi statute that criminalized congregating with others in a public place in a manner that risked a breach of the peace. Following a non-jury trial, the judge summarily found the clergymen guilty and sentenced them to four months in jail. After the convictions were overturned, the clergymen filed a Section 1983 action for damages against the trial judge and the police officers who made the arrest. The suit alleged the clergymen had been prosecuted and convicted for engaging in non-violent conduct protected by the Constitution.

---

[13] Globe App. 87 (Remarks of Rep. Bingham), cited in *Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 658 (1978), at p. 685 n. 45.

[14] Cong. Globe 42nd Cong., 1st Sess. 569 (1971), cited in *Monell*, at p. 685.

[15] U.S. Const. Art. I, § 6.

[16] *Pierson v. Ray*, 386 U.S. 547 (1967).

The Supreme Court held that the trial judge was absolutely immune. Absolute immunity affords judges blanket shelter from liability for damages caused by any judicial acts within their jurisdiction, even where the judge acts maliciously. The Court reasoned absolute immunity serves the interest of the public "that the judges should be at liberty to exercise their functions with independence and without fear of consequences."[17] Notably, the Court did not consider whether citizens would be able to obtain compensation or other relief from other sources for the injuries caused by the deprivation of their constitutional rights.

The Court further held that while the arresting officers were not absolutely immune, they could invoke the qualified immunity recognized at common law. That immunity frees an official from monetary liability when he acts in good faith to enforce a statute that he reasonably believed was valid, even though the statute later was struck down as unconstitutional. Although the Supreme Court had held the Mississippi breach of the peace statute unconstitutional, that decision had been issued after the arrests of the clergymen in the *Pierson* case. As with its endorsement of absolute judicial immunity, the Court did not address whether the clergymen could obtain any meaningful remedy for the harms flowing from the unconstitutional arrest, conviction and incarceration if on remand the court held the police officers immune from damages liability.

The qualified immunity endorsed in *Pierson* was relatively narrow, triggered only when an official in good faith is carrying out the dictates of legislation the officer reasonably believes is valid. This immunity recognizes that individual government employees should not be personally liable in damages when the true wrongdoer is the legislature. However, over the next 40 years, the Court repeatedly expanded qualified immunity well beyond this original common law boundary.

In *Scheuer v. Rhodes*,[18] the Court extended immunity to all good faith official action that is objectively reasonable, whether or not prescribed by statute.[19] As the Court ruled in *Scheuer*:

---

[17] *Ibid.* at p. 554.

[18] *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

[19] Although the avowed source of immunity under Section 1983 was the legislature's intent to incorporate common law immunities recognized in 1871, the Court generally extended immunity to all public officials under Section 1983 without inquiring whether the official would have had immunity at common law. *Procunier v. Navarette*, 434 U.S. 555 (1978), at pp. 568–69 (Stevens, J. dissenting).

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and the responsibilities of the office and *all the circumstances* as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time *and in light of all the circumstances* coupled with good faith belief that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.[20]

Scheuer no longer required that the official point to a statute that authorized his unconstitutional conduct. However, the immunity test did demand the officer's belief in the propriety of his conduct be reasonable under "all the circumstances." The Court later abandoned this prerequisite to immunity, holding a government employee would automatically satisfy the objective tier of immunity whenever the constitutional right violated was not "clearly established."[21] Courts no longer would assess whether the officer was acting in accordance with a statutory mandate or behaved reasonably under all the circumstances; instead, the state of federal constitutional law became singularly relevant to–indeed dispositive of–the official's claimed immunity.[22]

The Court further enlarged immunity by its subsequent articulation of when a right is and is not deemed clearly established. A right is not considered clearly established merely because the Court recognized the general existence of the right. Instead, there also must be factual proximity between the precedent cases and the specific unconstitutional actions giving rise to the case at bar. While it is not necessary that the "very action in question has previously been held unlawful … in light of pre-existing law the unlawfulness must be

---

[20] *Scheuer*, at pp. 247–48 (emphasis added).

[21] *Procunier v. Navarette*, 434 U.S. 555 (1978).

[22] If the right *was not* clearly established, plaintiff could not defeat immunity by demonstrating the officer's acts violated a state statute or regulation, *Davis v. Scherer*, 468 U.S. 183 (1984), or were unreasonable under all the circumstances. *Procunier v. Navarette*, 434 U.S. 555 (1978). However, if the right *was* clearly established, the official nonetheless could successfully assert immunity by demonstrating either a) he did not know and should not have known of the right, or b) he did not know and should not have known that his conduct violated the right. *Ibid*. Thus while factors extrinsic to the state of federal constitutional law are rejected as a basis for defeating immunity, in advocating for immunity the officer who violated the Constitution could continue to rely upon state statues or regulations authorizing his action or other factors supporting the reasonableness of his conduct.

apparent."[23] Before a right can be categorized as clearly established, case law must give an official "fair warning" that his conduct is unconstitutional.[24] The Court has unapologetically acknowledged the breadth of this re-defined immunity, noting that qualified immunity shelters "all but the plainly incompetent or those who knowingly violate the law."[25]

Under the original immunity standard, to escape civil liability for the harms caused by his breach of the Constitution, an official not only must satisfy an objective test but also must act subjectively in good faith.[26] However, in *Harlow v. Fitzgerald*, the Court abrogated the subjective good-faith pre-requisite to immunity.[27] After *Harlow*, even officials who maliciously intend to trample the constitutional rights of a citizen are insulated from monetary liability whenever the right was not clearly established.

The Court broadened immunity to ensure that fear of liability does not deter capable persons from seeking office and to spur public officials to engage in prompt, forceful, independent and principled decision-making without being unduly concerned about monetary liability. The Court reasoned that it is preferable that officials risk injuries from error than refrain from acting.[28] The Court abrogated the requirement that the official act in good faith to be immune so courts could quickly dismiss insubstantial claims, sparing public officials the burdens of litigation and distraction from carrying out their work duties.

While repeatedly expanding the immunity of the individual official, the Court never addressed whether the victim would be compensated by the entity for the injuries caused by the official's unconstitutional acts.[29] As this article will discuss next, in a second silo of cases the Court held that a person deprived of federal constitutional rights can never recover damages from the federal and state government,

---

[23] *Anderson v. Creighton*, 483 U.S. 635 (1987), at p. 640.

[24] *Hope v. Pelzer*, 536 U.S. 730 (2002), at pp. 739–741.

[25] *Malley v. Briggs*, 475 U.S. 335 (1986), at p. 341.

[26] *Wood v. Strickland*, 420 U.S. 308 (1975).

[27] *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

[28] *Scheuer*, at p. 242.

[29] In *Harlow v. Fitzgerald*, the Court did acknowledge that "the resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative." *Harlow*, at p. 813.

and may obtain damages from a local government only for its employees' unconstitutional conduct that constitutes the policy or custom of the entity.

III. THE SECOND SILO: LIABILITY OF ENTITIES FOR DEPRIVATIONS OF CONSTITUTIONAL RIGHTS

The Supreme Court's cases immunizing individual public officials from monetary liability for constitutional wrongs did not consider whether the citizen will be able to obtain redress for his injuries from the entity. In the same fashion, the Court's cases precluding entity liability did not weigh how absolute and qualified immunity ordinarily prevents the victim from obtaining damages from the individual official.

While the Court's individual immunity decisions do not differentiate between federal, state and local officers, its rulings on liability of the three levels of entities have diverse origins and reasoning pathways.

A. LIABILITY OF STATE GOVERNMENTAL ENTITIES

A citizen deprived of federal constitutional rights at the hands of a state official may never recover damages from the state entity on whose behalf the official acted. The Eleventh Amendment of the United States Constitution shields states from being sued in federal court without their consent.[30] Congress does have the power to override the States' Eleventh Amendment immunity and to hold states liable for damages caused by constitutional breaches by state officials. However, in *Quern v. Jordan*, the Court held the Congress that enacted Section 1983 did not intend to exert that power.[31]

The *Quern* Court's reasoning focused almost exclusively on the constitutional structure of government. The Court held Congress did not intend to disturb the historic distribution of power between the federal and

---

[30] "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. While the text of the Amendment bars only citizens of another state from suing a state, the Supreme Court has held the Eleventh Amendment prohibits a suit against a state brought by one of its own citizens. *Hans v. Louisiana*, 134 U.S. 1 (1890).

[31] *Quern v. Jordan*, 440 U.S. 332 (1979).

state governments. The Court ignored how its structural analysis, when merged with the Court's individual immunity jurisprudence, impacted the allocation of losses when a state official deprives a citizen of federal constitutional rights.[32] After *Quern*, the citizen will receive no compensation from either the entity or public official for injuries caused by a state official's invasion of constitutional liberties whenever the right was not clearly established, even if the official acted with malice.

B. LIABILITY OF FEDERAL GOVERNMENTAL ENTITIES

For different reasons, the federal government may never be held liable for damages caused by its employees' violation of rights guaranteed by the United States Constitution. Section 1983 supplies a civil action only to remedy deprivations of constitutional rights caused by state and local officers. If the wrongdoer is an agent of the federal government, the citizen's cause of action is founded in the cause of action the Court implied in *Bivens*.

In *Federal Deposit Insurance Company v. Meyer*, the Court held that *Bivens* endorses a civil cause of action only against the individual official and does not authorize civil suits against federal entities.[33] The *Meyer* Court offered two justifications for limiting *Bivens* to suits against officials. First, entity liability would compromise *Bivens*' goal of deterring individual officials from invading constitutional freedoms. Second, because suits to recover damages from entities could have substantial fiscal consequences, Congress rather than the Court must approve that broader liability.

---

[32] The Court did aver that putting damages off-limits would not render Section 1983 (and implicitly the constraints of the federal constitution) meaningless as to state entities. The Court believed the injured citizen could obtain effective relief from the state because the Eleventh Amendment does not bar suits seeking equitable relief. *Quern*, at p. 345. Contrary to this supposition, the Court's third silo severely constrains the circumstances under which courts may issue equitable relief to redress constitutional wrongdoing. *See* Section IV, *infra*.

[33] *Federal Deposit Insurance Company v. Meyer*, 510 U.S. 471 (1996).

As with its decision sheltering States, the Court did not wrestle with the interface between its rejection of federal entity liability and the individual immunity silo. Having ruled out the governmental entity as a bearer of the losses caused by violation of rights by federal officials, the Court again left the innocent citizen without compensation for his harms whenever the federal official successfully interposes the absolute or qualified immunity defense.

C. LIABILITY OF LOCAL GOVERNMENTAL ENTITIES

The impediments to state and federal entity liability do not limit suits against local governments. While guarding the States against unconsented suits in federal court, the Eleventh Amendment does not bar federal actions against local governmental entities.[34] Unlike the federal government, Congress did authorize suits against local governments when it passed Section 1983.

In adjudging the accountability of local government under Section 1983, the Court overtly recognized that entity liability is necessary as a matter of policy. In *Owen v. City of Independence, Missouri*, the Court held local governments sued under Section 1983 could not assert any absolute or qualified immunity available to the individual official whose acts caused the deprivation of constitutional rights.[35] The Court reasoned that compensation is "a vital component of any scheme for cherished constitutional guarantees."[36] Holding an entity accountable for harms caused by its officials' unconstitutional conduct not only would make the victim whole; government liability also would induce line officials to err in favour of protecting constitutional rights and would provide an incentive to supervisors to take steps to minimize the risk of constitutional wrongdoing.[37]

By the time it decided *Owen*, however, the Court already had undermined the twin aspirations of compensation and deterrence. In *Monell v. Department of Social Services of the City of New York*, the Court held the 1871 Congress had not intended to hold a local government vicariously liable whenever one of its officials deprived a

---

[34] *Monell*, at p. 690 n.54.

[35] *Owen v. City of Independence*, Missouri, 445 U.S. 622 (1980).

[36] *Ibid.* at p. 651.

[37] *Ibid*. at p. 652.

citizen of constitutional rights.[38] Instead, under Section 1983, the entity may be required to pay damages only where the official's action represented the "custom or policy" of the local polity. *Monell* left an enormous void in accountability for harms caused by unconstitutional acts at the local government level. Where the right violated was not clearly established, thus immunizing the official, the risk of loss falls upon the victim whenever the official's unconstitutional act does not amount to policy or custom.

The Court's subsequent restrictive interpretations of which official acts constitute "policy" multiplied the number of instances where the citizen would not be compensated for his injuries. The Court held only the acts of select officials who exert "final authority" under state law could be deemed policy.[39] If the local entity's failure to train caused the constitutional violation, the entity is not liable unless the need for training was so obvious that the government's failure to provide guidance was "deliberately indifferent."[40] The Court required citizens to prove an even higher level of culpability to hold a municipality responsible for its mistake in hiring the employee who caused the constitutional deprivation. Plaintiff may recover damages only if the entity was deliberately indifferent to the risk that if hired, the applicant would commit the particular constitutional violation giving rise to the civil claim.[41]

As was true of its repudiation of state and federal entity liability, the Court did not weigh the impact of its local government jurisprudence on the allocation of losses caused by breach of constitutional obligations. The Court's rejection of vicarious liability and its narrowing interpretations of which official acts rise to the level of policy progressively exempt local governments from accountability. When blended with parallel decisions widening the swath of individual immunity, the Court's rulings on local entity liability increasingly deprive the victim of compensation for his injuries.

---

38 *Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 658 (1978).

39 *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

40 *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989).

41 *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397 (1997).

IV. THE THIRD SILO: OBSTACLES TO INJUNCTIVE AND DECLARATORY RELIEF TO REDRESS CONSTITUTIONAL VIOLATIONS

In theory, a court could opt to be stingy about awarding damages to redress infringements of civil liberties because it views injunctive or declaratory relief as a less intrusive, preferred remedy. While money damages satisfy the victim's interest in being compensated for economic, physical or emotional harms resulting from unconstitutional conduct, payment of damages impinges upon the government's fiscal ability to meet the needs of its larger constituency. Although a declaratory judgment or an injunction does not make the victim whole, these remedies may afford some measure of vindication for the deprivation. An award of equitable relief further exerts some deterrent without insisting the government dip into the treasury to pay for damages caused by its past unconstitutional misdeeds.

As was true of the evolution of its individual immunity and entity liability doctrines, the United States Supreme Court adjudicated the criteria for injunctive and declaratory relief without analyzing how those standards would intersect with the Court's other two silos. As a consequence, the Court erected significant obstacles to the ability of victims of constitutional wrongdoing to secure an injunction or a declaratory judgment, even where neither the individual official nor the entity may be ordered to pay damages.

The Court could construe traditional standards for equitable relief to readily enjoin constitutional violations where the law bars a plaintiff from recovering damages from the individual officer or government entity. First, in the absence of damages there is no remedy at law adequate to redress deprivation of federal constitutional rights.[42] Second, the public interest should regularly favor cessation of governmental action that contravenes constitutional norms. Third, the balance of hardships customarily will incline in favor of issuance of the injunction. The plaintiff will suffer inordinately if the court refuses the injunction. Not only will he have endured infringement of his constitutional rights; absent an award of equitable relief, the plaintiff will obtain no meaningful

---

[42] Even if plaintiff could recover damages from the individual official and/or the entity, the remedy at law could be inadequate because it is difficult if not impossible to measure damages for constitutional invasions where the losses are not economic. Indeed, the Court has recognized an invasion of First Amendment rights is per se irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

redress for that wrong. Conversely, before reaching the issue of remedy, the court must have found a constitutional violation. In making this preliminary ruling, the court already will have determined that the government's interests in engaging in the activity do not outweigh the individual's stake in autonomy.[43]

Contrary to the "urban legend" that American courts routinely grant structural injunctions to remedy violations of the Constitution, the United States Supreme Court has applied the general requisites to injunctive relief in a manner that makes it exceptionally difficult to enjoin unconstitutional acts. The Court has announced that injunctions are "to be used sparingly, and only in a clear and plain case."[44] The Court has not accepted that injunctions should be issued more liberally when the right in issue is of constitutional stature. Instead the Court has admonished lower courts to be more restrained in enjoining unconstitutional conduct, invoking the maxim "that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs.'"[45]

The Court has created two additional hurdles to a citizen's ability to secure equitable relief to redress constitutional wrongs. The Court has found that federal courts should be inhibited from issuing injunctions by the interest in assuring the federal government does not unduly invade the sovereignty and prerogatives of the states. Even though Congress deliberately shifted enforcement of constitutional rights from state to federal courts when it enacted Section 1983, the Court ruled that considerations of federalism "militate heavily against the grant of an injunction except in the most extraordinary circumstances."[46]

The Court also has strictly construed constitutional limits on the federal judicial power codified in Article III of the United States Constitution to further cabin injunctive and declaratory relief in constitutional cases. Article III restricts the power of the federal judiciary

---

[43] While this balancing of governmental and individual interests emanates from tests the United States Supreme Court has developed for assessing when a right is protected, s.1 of the Charter makes such balancing a textually required step in evaluating when government has violated a Charter right.

[44] *Rizzo v. Goode*, 423 U.S. 362 (1976), at p. 378, *citing Irwin v. Dixon*, 9 How. 10 (1850), at p. 33.

[45] *Ibid.* at p. 378–79, *citing Cafeteria & Restaurant Worker Union Local 473 AFL-CIO v. McElvey*, 367 U.S. 886 (1961).

[46] *Ibid.* at p. 379.

to "cases and controversies."[47] Under the Court's interpretation of Article III, a citizen who has endured an invasion of constitutional rights is not entitled to obtain an injunction or declaratory judgment unless he will be subjected to the same treatment in the future. In *Ashcroft v. Mattis*, Missouri police officers shot and killed Mr. Mattis' son, who was running, unarmed, from police officers after breaking into a golf course office.[48] The Mattis family filed a Section 1983 action alleging the officers violated their son's right under the Fourth Amendment of the Constitution to be free from unreasonable force. Because a Missouri statute authorized use of deadly force whenever a fleeing felon ignores an order to halt, the lower courts held the individual officers were immune from monetary liability. The Eleventh Amendment plainly precluded recovery of damages from the state. However, the court of appeals issued a declaratory judgment finding the use of deadly force violated the Constitution because the Mattis' son did not pose a risk of death or serious bodily harm to the officers or the public.

The Supreme Court held the appellate court lacked power to award declaratory relief because there was no Article III case or controversy. Obviously the Mattis' deceased son would not be at risk of a subsequent shooting. The Court found neither the hypothetical danger that the Mattis' surviving son would be a victim of an unjustified use of force nor the family's emotional satisfaction from vindicating their deceased son's rights was sufficient to constitute a case or controversy for declaratory relief.

The Supreme Court reinforced its cramped interpretation of Article III in *City of Los Angeles v. Lyons*.[49] In *Lyons*, the Court reversed the injunction that suspended the City's policy authorizing its police officers to use potentially deadly choke-holds to subdue citizens who present no risk of serious harm to the officers or public. Los Angeles police officers had stopped Adolph Lyons because one of the tail lights on his car had burned out. The officers ordered Lyons to put his hands on his head and frisked him for weapons. When Lyons removed his hands from his head, one of the officers applied a choke-hold, rendering Lyons unconscious. It was undisputed that at least 16 persons had died from the application of choke-holds by Los Angeles police officers. Nonetheless, the Court held Lyons did not present an actual case or controversy for

---

47 U.S. Const. Art. III.

48 *Ashcroft v. Mattis*, 431 U.S. 171 (1977).

49 *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

injunctive relief under Article III because it was speculative that a) he would be stopped by a police officer in the future, and b) if stopped, the officers would subject Lyons to a choke-hold.

The Court's restrictive standards for issuance of injunctive relief, its concern that federal courts not unduly impinge on the sovereignty of the States, and the Court's strict interpretation of the Article III case or controversy requirement make it difficult for persons whose constitutional rights have been infringed to secure an injunctive or declaratory remedy. However, the Court did not consider how its injunctive and declaratory relief jurisprudence would interact with its qualified immunity and entity liability doctrines. The case of Savana Redding vividly demonstrates the impact on the citizen's ability to obtain redress for constitutional breaches when the three silos are commingled.

V. CONNECTING THE SILOS: THE REMEDY FOR THE VIOLATION OF SAVANA REDDING'S FOURTH AMENDMENT RIGHTS

The case of Savana Redding is a telling example of the consequence of the Supreme Court's failure to view in concert its individual immunity doctrines, its jurisprudence on entity liability, and its erection of substantial obstacles to injunctive and declaratory relief. As noted earlier, while Savana prevailed on her claim that the strip search violated her constitutional rights, the end of the story–the remedy for that violation–has yet to be written.

Savana had only one viable remedy for the deprivation of her Fourth Amendment rights. As the school officials unearthed no evidence of wrongdoing and no criminal charges were lodged against Savana, she had no occasion to redress the violation of her rights by seeking to suppress evidence under the exclusionary rule.[50] Because Savana had long-since graduated from middle school by the time the Supreme Court issued its ruling, an injunction prohibiting middle school officials from strip searching her in the future without the necessary elevated suspicion of wrongdoing would be unavailing as a practical matter. In any event, under the three impediments to equitable relief, as a legal matter Savana was not entitled to an injunction. Savana was not likely to afford the costs and endure the emotional toll of a lawsuit if the only remedy available were a declaratory judgment that the search had violated her rights. Even

[50] *Mapp v. Ohio*, 368 U.S. 871 (1961).

were Savana and her attorneys willing and able to withstand years of litigation merely for the sake of vindicating a constitutional principle, under Article III she did not have standing to bring an action to declare the search unconstitutional. For like the Mattises and Mr. Lyons, Savana could never prove she would engage in conduct that would subject her to another strip search by middle school officials. Thus Savana sought the only available remedy that would provide her meaningful redress—money damages.

There is no question that Savana was injured by the strip search. In ruling the search unconstitutional, the Court credited Savana's subjective account that stripping down to her bra and underpants, and then exposing her breasts and pelvic area to two school officials, was "embarrassing, frightening, and humiliating."[51] The Court found Savana's reaction consistent with the experience of members of her peer group. Because of "adolescent vulnerability," the "patent intrusiveness" of the strip search is exacerbated, potentially resulting in "serious emotional damage."[52]

While finding the strip search was unconstitutional and caused Savana emotional harm, the Court held the individual officials were immune from paying damages. The Supreme Court had previously ruled the Fourth Amendment required school officials "to limit the intrusiveness of a search 'in light of the age and sex of the student and the nature of the infraction.'"[53] The Court agreed that under this standard, school officials did not have constitutional justification to strip search Savana. They neither possessed information suggesting danger to students from the amount or potency of the drugs Savana allegedly gave her fellow students, nor harboured reason to suspect that Savana had hidden pills in her underwear. Although the general standard by which school searches were to be evaluated was settled, the Court had not specifically adjudicated the constitutionality of strip searches. Because the lower courts had divided over whether strip searches of students were unconstitutional, the Supreme Court held Savana's right was not clearly established.[54] Consequently, the Court ruled, Assistant Principal Wilson, administrative assistant Romero, and Nurse Schwallier were entitled to dismissal of the action on the ground of qualified immunity.

---

[51] *Safford Unified School District v. Redding*, 129 S. Ct., at p. 2641.

[52] *Ibid*.

[53] *Ibid*. at p. 2643, quoting *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), at p. 342.

[54] *Ibid*. at p. 2644.

The Court did not acknowledge that Savana would be left remediless. To the contrary, because local governmental entities may not invoke immunity, the Court remanded the case to the court of appeals to consider the school district's liability for damages resulting from the deprivation of Savana's Fourth Amendment liberty.

On remand, Savana will confront the Court's entity liability silo, which requires that she prove it was the policy or custom of the school district to conduct strip searches without the constitutionally required suspicion. The Court's opinion cited no regulation formally promulgated by the school board mandating or approving strip searches. It is highly improbable that the Assistant Principal, his administrative assistant and the school nurse are persons with final authority to establish policies for the Stafford School District. Because it was not clearly established that strip searches were unconstitutional, the need for training on strip searches would not be obvious. Thus the district arguably was not deliberately indifferent in training. The Court also pointed to no evidence that the district harboured information that any of the three officials posed a risk of violating the particular constitutional right—evidence that would be necessary to render the district liable for deliberate indifference in hiring. If, as seems likely, Savana is not entitled to recover damages from the school district on remand, she will have no remedy for the embarrassment, fright and humiliation caused by the unconstitutional conduct of the school officials.[55]

VI. AVOIDING THE SILO EFFECT: A HOLISTIC APPROACH TO *CHARTER* REMEDIES

The courts of Canada need not and should not be guided by the substance of American constitutional remedies jurisprudence. The

[55] A litigant no longer is guaranteed to procure a ruling on the constitutionality of the government's action where he brings claim for damages against the individual official that is dismissed because of immunity. In *Saucier v. Katz*, 533 U.S. 194 (2001), the Court held that where an official raises the defense of qualified immunity, the court first must determine whether, under the facts as alleged, the official's conduct violated the Constitution. Only after determining there was a constitutional violation should the court consider whether the right was clearly established. In *Pearson v. Callahan*, 129 S. Ct. 808 (2009), the Court reversed *Saucier*, holding a judge has discretion as to where to commence the analysis. The court could choose to first judge whether the constitutional right violated was clearly established. If the answer to that inquiry is "no," the court can dismiss the case without ever ruling whether the conduct breached the Constitution.

discrete origin of the cause of action for damages in the United States, the disparate relevance of federalism in the two countries, and the different sources and contours of immunity demand that Canadian courts take a fresh look at how to allocate the losses caused by deprivations of rights secured by the *Charter*.[56]

To avoid allocating the risk of loss from *Charter* violations in a manner that ultimately is neither appropriate nor just, the Canadian courts also must take pains not to mimic the process of decision-making in silos that has characterized development of American doctrine. Counsel for victims of *Charter* wrongs likewise must expand their advocacy. Both the judge and attorney must consider how disposition of the pinpoint remedies issue presented, when viewed in concert with other remedial doctrines that are not before the court, will impact the overarching ability of persons to obtain meaningful relief for infringements of *Charter* rights.

A holistic approach to *Charter* remedies requires the following questions to be answered in *every* case in which the *Charter* has been violated but the defendant argues he should not have to pay damages. When an individual public official seeks to be exempted from personal liability for dispossessing a citizen of rights guaranteed by the *Charter*, the advocate and the court must examine whether the victim will be able to obtain compensation from the entity. Where the entity asks to be excused from payment of damages caused by one of its official's violation of the *Charter*, the litigants and judge must assess whether the injured person alternatively will be awarded damages from the individual official. If the analysis, properly widened, leads to the conclusion that similarly situated victims of *Charter* wrongs will not be able to recover damages from either the individual official or the entity, the lawyers and court must investigate whether courts are willing to issue injunctions or declaratory judgments in lieu of damages. If injunctive or declaratory relief will be the lone remedy available, counsel and the court further must weigh 1) whether it is fair to leave the innocent citizen to bear the losses resulting from the government's breach of the *Charter*; 2) whether it is institutionally desirable that rather than award damages, courts routinely issue declaratory judgments or accept the supervisory burdens and intrusions on other branches of government that accompany injunctions; and 3) whether persons deprived of their rights will have the means and

---

[56] *See* Gary S. Gildin, *Allocating Damages Caused by Violation of the Charter: The Relevance of American Constitutional Remedies Jurisprudence*, 24 Nat'l J. Const. L. 121 (2009).

sufficient incentive to file *Charter* claims if they may obtain only a declaratory judgment or injunction should they succeed in the litigation.[57]

If the proffered defense to the relief in the *Charter* case at bar will deprive the plaintiff—and similarly-situated future victims of *Charter* violations—recovery of damages against the individual and entity, and injunctive or declaratory relief is unavailable or ineffective, the advocates and court must answer the most critical question. As the Supreme Court of Canada observed in *R. v. 974649 Ontario, Inc.*, "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach."[58] What true meaning, then, attaches to a fundamental right guaranteed by the *Charter* if there is no remedy when government violates that right?

The courts of Canada not only have the advantage of being forewarned by the silo effect of United States constitutional remedies doctrine; the Canadian judiciary is better situated constitutionally than its American judicial brethren and sisters to adopt an integrative approach to *Charter* remedies. Article III of the United States Constitution limits the judicial power to "cases and controversies." The United States Supreme Court strictly construed this clause to limit the judicial power to issues necessarily presented by the facts of the individual case. Accordingly, the Court has not examined how individual immunity, entity liability, and the pre-requisites to equitable and declaratory relief interact in constitutional cases. By contrast, s. 24(1) of the *Charter* assigns the judiciary the responsibility to determine what remedy for *Charter* violations is "appropriate and just." As the Supreme Court of Canada has acknowledged, this provision requires courts to consider both fairness to the litigants and the larger ramifications of its remedial decision on the public interest.[59] Under this broader constitutional mandate, the courts of

---

[57] *See Ward v. Vancouver (City)*, [2009] B.C. J.N. 91, at para. 63 (Where suit seeks redress for past Charter violations, "[a] declaration of breach . . . has no ongoing benefit and is not a remedy at all."); Raymond L. MacCallum, *The Rule in Schacter: Rights Without Remedies*, in Debra M. McAllister & Adam M. Dodek, eds., *The Charter at Twenty: Law and Practice* (Toronto: Ontario Bar Association 2002), at pp. 325–326.

[58] *R. v. 974649 Ontario, Inc.*, [2001] 3 S.C.R. 575, at paras. 19–20.

[59] *Doucet-Boudreau v. Nova Scotia (Board of Education)*, [2003] 3 S.C.R. 3, at paras. 23–25 and 55–59; *Ontario v. 974649 Ontario, Inc.*, [2001] 3 S.C.R. 575. *See also Kodellas v. Saskatchewan (Human Rights Commission)*, [1989] 5 W.W.R. 1 at p. 14 (Sask. C.A.) (In deciding if remedy is appropriate, court considers person whose right was violated; in determining if remedy is just, court mulls fairness to all affected).

Canada must be mindful of repercussions of individual decisions affecting *Charter* remedies on the global allocation of the risk of loss from violations of the *Charter*.

In *Hislop v. Canada (Attorney General)*, the Supreme Court of Canada took an important first step in adopting a holistic approach to *Charter* remedies.[60] The *Hislop* Court ruled that a qualified immunity from monetary liability for infringement of *Charter* rights should be available. Immunity is extended where the government official acted in reliance on a statute subsequently held unconstitutional by a court decision that effectuated a substantial change from existing law. However, courts should not automatically confer immunity whenever there is a substantial change in the law voiding the statute under which the government acted. In deciding whether to grant immunity, the *Hislop* Court ruled, judges must consider whether denying retroactive monetary relief will be unfair to the citizen deprived of his *Charter* rights. Where a prospective injunction or declaratory judgment will be "hollow" or "meaningless" to the prevailing plaintiff, courts should be more willing to deny immunity and award damages.[61] *Hislop* thus invites counsel and the court to reject the very silo approach that the United States Supreme Court utilized in crafting its remedies doctrine in constitutional cases.

Ironically, the Supreme Court of Canada's commitment to a holistic approach to *Charter* remedies will be tested in a case arising out a strip search: *City of Vancouver v. Ward*.[62] Cameron Ward, a lawyer, was arrested and taken to the police lock-up in Vancouver on what proved to be the erroneous suspicion that Ward intended to throw a pie at Prime Minister Chretien, who was presiding over a ceremony in the Chinatown area of Vancouver. Acting under a contractual arrangement between the City and the Province, provincial correctional officers took charge of Ward when he arrived at the prison and required Ward to remove all his clothing except his underwear. Ward filed an action for damages alleging that the arrest, the impoundment of his car, and his detention for four hours in the lock-up violated his *Charter* rights. Ward also sought damages under s. 24(1) of the *Charter* for the deprivation of his rights inflicted by the strip search.

The trial judge agreed that the Province of British Columbia's

---

60 *Hislop v. Canada (Attorney General)*, [2007] 1 S.C.R. 429.

61 *Ibid*. at para. 116.

62 SCC Docket No. 33089.

correction officers infringed Ward's *Charter* rights when they strip-searched him at the lock-up. The trial judge dismissed the action against the individual corrections officers, but awarded Ward $5,000 in damages from the Province. On appeal, the Province conceded that the strip search was unreasonable and breached Ward's rights under s.8 of the *Charter*.[63] However, the Province argued it should not be liable for damages for that breach because the officers conducting the strip search acted in good faith under the Correctional Centre Rules and Regulations regarding searches of inmates admitted to the Centre.[64]

A divided Court of Appeal rejected the Province's immunity defense and affirmed the trial court's order that the Province pay damages for the strip search. The majority distinguished the line of cases that provides qualified immunity where a plaintiff complains of official action taken in accordance with a statute and asks to have the statute declared unconstitutional under s. 52 of the *Charter*. The court noted that the correction officers who strip-searched Ward were relying on prison policy rather than a statutory mandate. Furthermore, Ward did not ask the court to strike down the prison policy under s. 52 but requested only that the court award him damages under s. 24(1).[65] Limiting Ward to a declaration that his rights had been breached, the court of appeals reasoned, would give Ward "only a pyrrhic victory, not a true remedy."[66]

In *Ward*, counsel and the Supreme Court of Canada will have an important opportunity to avoid the silo effect and to adopt a systemic approach to *Charter* damages. The *Ward* appeal presents the deceptively narrow issue of whether the Province should be immune for damages caused by its officials' violation of the *Charter*, taken in the absence of a tort, bad faith or malice, in reliance on the Correctional Centre Rules and Regulations. However, the advocates and Court must recognize and assess how resolution of that single issue will impact the larger policy question of where to assign the risk of the economic, physical or emotional losses caused by breaches of the *Charter*. If the Province is immunized and the individual correctional officers who strip-searched Ward are not liable, is it fair and desirable that Ward, the victim, be left to

---

63 *Ward v. Vancouver* (City), [2009] B.C.J. No. 91, at para. 47.

64 The Province also argued that it was not liable for damages because there was no proof that the officers committed a tort in addition to breaching the *Charter*. *Ibid.* at para. 47.

65 *Ibid.* at para. 58.

66 *Ibid.* at para. 63.

absorb the damages caused by the government's undisputed violation of s. 8 of the *Charter*? If public officials and the entity are shielded from damages, should equitable or declaratory relief be available to citizens in these types of case? Will the prospect of an injunction or declaratory judgment as the lone remedy be a sufficient inducement to the citizenry to bring suits to vindicate *Charter* rights and a sufficient deterrent of unconstitutional conduct? Only by recognizing the interdependence of its individual decisions on redress for *Charter* violations can the courts of Canada truly take remedies seriously, thereby fulfilling their constitutional mandate to afford appropriate and just relief to persons injured by the government's breach of the *Charter*.