Despite these clearly established standards, litigation has rarely benefited a plaintiff when the defense of qualified immunity is raised. With such a tight pact of "brotherhood" amongst law enforcement officers, and a fear of future retribution for their own acts, victims may find the standards laid out in legal precedent ineffective. As it would be not be a surprise for most occurrences to be interpreted as a tactic that another similarly situated official would utilize. Because many law enforcement officers would fear retribution of being under future scrutiny for future actions, it is reasonable to suggest that their testimony would be in affirmation to an officer's actions.

CONCLUSION

Because litigation rarely affords remedy to victims who file a §1983 action, there is little being done to limit the exercise of uninhibited power against individuals by law enforcement officers. With that being said, the only other option Americans have, in order to put a halt to law enforcement corruption and tyranny by government officials is to demand a shift in authority, thus placing more power in the hands of US citizens. As Thomas Jefferson once said, "All tyranny needs to gain a foothold is for people of good conscience to remain silent." It is time for Americans to step up, take affirmative action, promote those government officials who prove to be moral and acting within legal boundaries and immediately remove those who promote corruption without hesitation. Law enforcement officers are defined as being public servants; it is time Americans held them to a higher standard, as to avoid total control. The unadulterated, egotistical and clear abuse of power is illustrative of the emergence of government corruption, one in which this great nation's foundation was built to combat.

An Issue of Individual Sovereignty: The Loss of Constitutional Rights –

An Unadjudicated Issue Summarized

By: Ryan Chae

America has long since been known as the land of the free, and although this notion maintains some legitimacy, corruption runs rampant more than ever, slowly limiting the democracy of a once truly free nation. Some of the most prominent philosophers who founded this great state argued against the establishment of government due to their fear of tyranny. Despite their best efforts through the US Constitution, tyranny may well be on its way through the form of governmental corruption as a mere stepping stone to a total paradigm reversion of a time reminiscent of 18th Century England; the very thing our forefathers rebelled against.

THE FORMATION OF PROTECTIONS

In 1871, Congress enacted 42 U.S.C. §1983 to provide a cause of action for those who suffered infringement on constitutionally or statutory guaranteed rights at the hand of a government official, in an attempt to ensure that such rights are respected, and if violated, would allow the victim to seek remedy. However, many public officials, such as law enforcement officers claim immunity from §1983 actions. And, despite the fact that §1983 does not explicitly define or grant immunity from such causes, the United States Supreme Court has consistently interpreted §1983 to implicitly afford immunity to some individuals.

Perhaps one of the most challenging of these implied immunities is the Doctrine of Qualified Immunity. *Bivens v. Six Unknown Named Agents*[1], first acknowledged this immunity and was decided as an effort to shield government officials from the liability of violating another individual's federally established constitutional rights through the execution of their assigned duties. This protection PASSIVE VOICE BOICE was afforded to encourage government officials, primarily law enforcement officers, to promptly perform their assigned duties without fear of retribution for carrying out those duties, thus allowing for unhindered performance. Although the Doctrine does allow for more prompt, decisive performance of law enforcement officers, some unanticipated detriments have come as a result. Thus, one must consider, if there are no limitations on these immunities, would this not enable the uninhibited use of power, force, and ultimate control of constitutionally guaranteed rights?

As a result of the judiciary's uncertainty in interpreting the Doctrine, and the results that ambiguity has had, the answer may very well be yes. While some officials utilize this protection for the fair and just execution of their assigned duties, this is not always the case. Some view this

[1] *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

afforded protection as a way only to remove inhibitions that promote ethical, moral and a fair execution of such lawful duties, thus allowing ultimate, unadulterated power.

Now, without any fear of retribution and a rare occurrence of prosecution of those violating rights deliberately, Americans are starting to see a corrupted state come to fruition, as more and more Americans are reporting unnecessary use of excessive force by law enforcement officials. Moreover, it is increasingly evident that a new breed of law enforcement is well on its way - one which can be defined as egocentric, corrupt, fearless, and abusive. Such mottos as "To Serve and Protect" may well be on its way to being a distant fantasy, where reality is something more similar to that of Big Brother,[2] if left unchallenged.

THE BIG PICTURE

Such corruption is well portrayed in a recent article by the *Sun Sentinel*[3], where an 84 year old African-American, wartime veteran was unlawfully detained, silenced, and denied his right to question the activity of Fort Lauderdale Police Officers[4]. Even more disturbing, he was brutally injured to the point of nullifying his lower limbs, thus rendering him immobile without the use of a wheelchair. All of these injuries were obtained from him merely questioning the activities of law enforcement officers outside of his home, which he thought was questionable. Fortunately, the man in this occurrence was aware of his constitutionally afforded rights and the clear violation and denial of those rights by law enforcement officers. He has since filed suit in federal court, which is currently pending.[5]

More pertinent to this issue is that Americans are rarely able to successfully litigate such corruption, as the judicial system revels in the ambiguity of qualified immunity. The court often allows the defense of qualified immunity to be vastly encompassing, thus rendering officials almost invincible from a §1983 action. As one judge recently stated, "[w]adding through the doctrine of qualified immunity is one of the most morally and conceptually challenging tasks federal appellate court judges routinely face."[6]

ANALYSIS

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[2] George Orwell, *Nineteen Eighty-Four (1949).*

[3] Paula McMahon and John Burstein, *Disabled Veteran says Fort Lauderdale Officer Broke His Hip*, SunSentinel, (November 2, 2011), http://articles.sun-sentinel.com/2011-11-02/news/fl-fort-lauderdale-police-lawsuit-20111102_1_eula-johnson-street-crimes-unit-arrest.

[4] *K.A. v. State*, 12 So.3d 869 (2009).

[5] *Dock Williams v. City of Fort Lauderdale*, Southern District of Florida (2011).

[6] Charles R. Wilson, "Location, Location, Location": Recent Developments in the Qualified Immunity Defense, 57 N.Y.U. Ann. Surv. Am. L. 455, 447 (2000).

Before one is able to assess the severity of this issue, it is first and foremost imperative to gain a basic understanding of the Doctrine of Qualified Immunity. In accordance with relevant case law and statutes, the Doctrine allows law enforcement officers to employ an array of tactics while investigating and detaining an individual without facing penalties for actions that normal citizens are not typically permitted to perform. However, as detailed by the Supreme Court in *Harlow v. Fitzgerald*[7], qualified immunity shields government officials from actions, "... insofar as their conduct does not violate a clearly established statutory or constitutional right which a reasonable person would have known."

The court in *Harlow*[8] established a standard, which qualified immunity must meet in order to raise a proper defense in litigation; however the standard has been so broadly interpreted that the fine line distinguishing qualified immunity from absolute immunity[9] is often blurred. It has thus become routine practice for law enforcement officers to commonly raise a defense of qualified immunity for even some of the most gross and heinous displays of unwarranted excessive force.

In addition to the standard set by the court in *Harlow,* other attempts have been made to narrow the scope of the applicability of qualified immunity as a properly raised defense. One such standard was that decided in *D.G. v. State,* clarifying that, "[I]t is important to distinguish between an officer 'in the lawful execution of any legal duty' and a police officer who is merely on the job."[10] With this standard in mind, an officer would not be eligible to properly raise a defense of qualified immunity in litigation if the action against him as brought in conjunction with his failure to properly initiate and carry out contact with a subject.[11]

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

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

[9] The Westfall Act, 28 U.S.C. Sec. 2679(b)(1) (2009) provides federal employees absolute immunity from tort claims for actions taken in the course of their official duties, and gives the Attorney General the power to certify that a federal employee sued for wrongful or negligent conduct was acting within the scope of his office or employment at the time of the incident. Once that certification takes place, the U.S. government is substituted as the defendant instead of the employee, and the lawsuit is then governed by the Federal Tort Claims Act. Additionally, if the lawsuit began in state court, the Westfall Act provides that it shall be removed to federal court, and renders the Attorney General's certification "conclusive" for purposes of the removal. Once the certification and removal take place, the federal court has the exclusive jurisdiction over the case, and cannot decide to send the lawsuit back to state court. In this case, the U.S. Supreme Court also ruled that certification can take place under the Westfall Act in instances where the federal employee sued asserts, and the Attorney General also concludes that the incident alleged in the lawsuit never even took place. Osborn v. Haley, No. 05-593 2007 U.S. Lexis 1323. (Aele Law Library of Case Summaries).

[10] *D.G. v. State*, 661 So.2d 75, 76 (1995).
[11] *Id.*

For example, a law enforcement officer who is in the process of executing a legal duty, would be one conducting an investigation with arguable probable cause of violating, plotting, or attempting to violate the law. Generally speaking, although it is within the scope of the law enforcement officer's authority to question any citizen, it is not the citizen's obligation to adhere to the officer's contact, as provided in the Fourth Amendment of the US Constitution, which allows all peoples to be free from unlawful search and seizures. Thus, an officer who chooses to approach and contact a citizen cannot lawfully demand that individual to respond or act to the requests of that officer. [12]

For instance, if a law enforcement officer were to approach an individual merely reading outside of a cafe, the officer has the authority to inquire of the person's activities, however without arguable probable cause, the law enforcement officer cannot lawfully detain or demand a response from that individual[13], thus empowering the individual to not only ignore the law enforcement officer, but legally walk away and disengage the officer altogether[14]. Thusly, if a §1983 action were to arise from this instance, because the officer detained the individual anyway, the officer could not properly raise a defense of qualified immunity, as he would not have arguable probable cause to detain or restrict the individual's freedom of walking away. And consequently, the officer would be open to liability of a violation of Fourth Amendment rights.

The last standard to consider is that determined in *Storck v. City of Coral Springs*[15], where the court stated that a violation would only occur if another similarly situated official found the defendant's actions to be unjust.[16] For instance, if a law enforcement officer utilized a "take-down" tactic while detaining an individual, resulting in injury to the detainee, testimony from another, non-partisan law enforcement officer verifying the actions to be just and rational would consequently allow for a properly raised defense of qualified immunity. However, if the officer testifying refutes the actions of the arresting officer, thus claiming it irrational, then theoretically, the arresting officer would be barred from raising a defense of qualified immunity, thus establishing liability in a §1983 action.

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[12] *Rinehart v. State of Florida*, 778 So.2d 331(1993).
[13] *Jay v. State*, 731 So.2d 774 (1999).

[14] DISCLAIMER: The Undergraduate Law Journal, its writers, affiliates, partners, or members, do not promote or encourage general disregard for law enforcement. Although legal precedent does support your right to exercise such actions, the Undergraduate Law Journal does not encourage this and consequently does not accept liability for refuting this disclaimer.

[15] *Storck v. City of Coral Springs*, 354 F.3d 1307 (2003).

[16] ("Unless a government agent's act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit.") *Storck v. City of Coral Springs*, 354 F.3d 1307 (2003).