of federal law are not subject to this statute, the Supreme Court has held that a right to damages for a violation of Fourth Amendment rights arises by implication and that this right is enforceable in federal courts.[415]

Although a damages remedy might be made more effectual,[416] legal and practical problems stand in the way.[417] Law enforcement officers have available to them the usual common-law defenses, the most important of which is the claim of good faith.[418] Such "good faith" claims, however, are not based on the subjective intent of the officer. Instead, officers are entitled to qualified immunity "where clearly established law does not show that the search violated the Fourth Amendment,"[419] or where they had an objectively reasonable belief that a warrantless search later determined to violate the Fourth Amendment was supported by probable cause or exigent circumstances.[420] On the practical side, persons subjected to illegal ar-

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cers have used excessive force in the course of an arrest or investigatory stop are to be analyzed under the Fourth Amendment, not under substantive due process. The test is "whether the officers' actions are 'objectively reasonable' under the facts and circumstances confronting them." Graham v. Connor, 490 U.S. 386, 397 (1989) (cited with approval in Scott v. Harris, 550 U.S. 372, 381 (2007), in which a police officer's ramming a fleeing motorist's car from behind in an attempt to stop him was found reasonable).

[415] Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). The possibility had been hinted at in Bell v. Hood, 327 U.S. 678 (1946).

[416] *See*, *e.g.*, Chief Justice Burger's dissent in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 411, 422–24 (1971), which suggests a statute allowing suit against the government in a special tribunal and a statutory remedy in lieu of the exclusionary rule.

[417] Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

[418] This is the rule in actions under 42 U.S.C. § 1983, Pierson v. Ray, 386 U.S. 547 (1967), and on remand in *Bivens* the court of appeals promulgated the same rule to govern trial of the action. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972).

[419] Pearson v. Callahan, 555 U.S. ___, No. 07–751, slip op. (2009), quoted in Safford Unified School District #1 v. Redding, 557 U.S. ___, No. 08–479, slip op. at 11 (2009). In Saucier v. Katz, 533 U.S. 194 (2001), the Court had mandated a two-step procedure to determine whether an officer has qualified immunity: first, a determination whether the officer's conduct violated a constitutional right, and then a determination whether the right had been clearly established. In *Pearson*, the Court held "that, while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." 555 U.S. ___, No. 07–751, slip op. at 10. *See also* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[420] Anderson v. Creighton, 483 U.S. 635 (1987). The qualified immunity inquiry "has a further dimension" beyond what is required in determining whether a police officer used excessive force in arresting a suspect: the officer may make "a reasonable mistake" in his assessment of what the law requires. Saucier v. Katz, 533 U.S. 194, 205–06 (2001). *See also* Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (because cases create a "hazy border between excessive and acceptable force," an officer's mis-