CIVIL RECOURSE, DAMAGES-AS-REDRESS, AND CONSTITUTIONAL TORTS

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I. INTRODUCTION

In *Torts as Wrongs*, Professors John Goldberg and Benjamin Zipursky discuss the connection between "tortious wrongdoing" and "civil recourse."[1] Their civil recourse theory "sees tort law as a means for empowering individuals to seek redress against those who have wronged them."[2] Goldberg and Zipursky show that modern tort theory is dominated by "loss allocation," which uses liability and damages as instruments for assigning losses to deter unwanted behavior and to compensate the plaintiff.[3] Under loss allocation, the central principle of damages is full compensation—that is, to make the plaintiff whole.[4] The core component of damages, though not the only one, is out-of-pocket expenses. Under civil recourse, by contrast, the aim is to redress the wrong through fair compensation, "requir[ing] of the fact-finder an overtly normative determination based on consideration not only of the losses suffered by the victim, but also of the character of the defendant's conduct, . . . and the power dynamic between the parties."[5]

This Article examines the implications of these distinctions between loss allocation and civil recourse and between damages-as-indemnification (*i.e.*, full compensation) and damages-as-redress (*i.e.*, fair compensation) in the context of constitutional torts. The distinctive feature of this type of litigation is that plaintiffs typically seek retrospective relief rather than injunctions or declaratory judgments aimed at ensuring future compliance with constitutional norms.[6] Typical fact patterns include false

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[1] John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 919 (2010).

[2] Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1770 (2009).

[3] *See* Goldberg & Zipursky, *supra* note 1, at 920 (discussing the views of a variety of scholars who "insist that concepts such as 'wrong,' 'legal wrong,' 'civil wrong,' and 'private wrong' do no real work in explaining how the field hangs together, or what its point is"). These theorists believe that "tort law hangs together as law for the allocation of costs, especially the costs of accidents." *Id.*

[4] *See* John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 435 (2006) (exploring modern torts scholars' views as to the purpose of torts law).

[5] *Id.* at 437.

[6] For materials bearing on many aspects of constitutional tort litigation, see generally

arrest,[7] excessive force by the police,[8] mistreatment of prisoners,[9] malicious prosecution,[10] wrongful confinement,[11] illegal searches and seizures,[12] retaliation for speech that displeases officials,[13] arbitrary interference with property rights,[14] dismissals from government jobs without due process,[15] and restrictions on the speech of public employees[16] and students.[17]

Constitutional tort suits are brought against state officers and local governments under 42 U.S.C. § 1983[18] and against federal

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SHELDON H. NAHMOD ET AL., CONSTITUTIONAL TORTS (3d ed. 2010).

[7] *See, e.g.*, Stearns v. Clarkson, 615 F.3d 1278, 1282–83 (10th Cir. 2010) (discussing the plaintiff's claim that his constitutional rights were violated when he was arrested without probable cause); Reedy v. Evanson, 615 F.3d 197, 213 (3d Cir. 2010) (analyzing the plaintiff's claim that her arrest warrant contained false information).

[8] *See, e.g.*, McAllister v. Price, 615 F.3d 877, 881 (7th Cir. 2010) (discussing the plaintiff's excessive force claim against police); Copeland v. Locke, 613 F.3d 875, 881–82 (8th Cir. 2010) (same).

[9] *See, e.g.*, Langford v. Norris, 614 F.3d 445, 459 (8th Cir. 2010) (stating that deliberate indifference to a prisoner's health is unconstitutional); Thomas v. Ponder, 611 F.3d 1144, 1150–56 (9th Cir. 2010) (discussing the constitutionality of the plaintiff's treatment).

[10] *See, e.g.*, Manganiello v. City of New York, 612 F.3d 149, 161 (2d Cir. 2010) (outlining the elements of a malicious prosecution claim).

[11] *See, e.g.*, Dodds v. Richardson, 614 F.3d 1185, 1192–93 (10th Cir. 2010) (finding that the plaintiff was unnecessarily detained when police prevented him from paying bond); Gipson v. Jefferson Cnty. Sheriff's Office, 613 F.3d 1054, 1055 (11th Cir. 2010) (discussing wrongful imprisonment claim for not releasing plaintiffs after serving their sentences), *vacated*, 649 F.3d 1274 (2011).

[12] *See, e.g.*, Mink v. Knox, 613 F.3d 995, 1003 (10th Cir. 2010) (alleging that search was illegal because officers used an invalid warrant).

[13] *See, e.g.*, Paige v. Coyner, 614 F.3d 273, 280–81 (6th Cir. 2010) (discussing the plaintiff's allegations).

[14] *See, e.g.*, MLC Auto., LLC v. Town of Southern Pines, 532 F.3d 269, 281 (4th Cir. 2008) (detailing when interference with property interests constitutes a violation of due process).

[15] *See, e.g.*, Purvis v. Oest, 614 F.3d 713, 718 (7th Cir. 2010) (alleging due process violation in a school investigation of a sexual relationship between a student and teacher).

[16] *See, e.g.*, Brownfield v. City of Yakima, 612 F.3d 1140, 1147–49 (9th Cir. 2010) (finding a police officer's complaints about his partner and supervisor were not protected by the First Amendment).

[17] *See, e.g.*, Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 251–52 (3d Cir. 2010) (discussing whether a student's First Amendment rights were violated when he was punished for making a fake internet profile of his principal).

[18] The statute provides:

> 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

officers under the implied cause of action recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[19] The leading cases on damages for constitutional torts are *Carey v. Piphus*[20] and *Memphis Community School District v. Stachura*.[21] In these cases, the Court adopted the damages-as-indemnification approach favored by modern tort theory, holding that plaintiffs' recovery is governed by the "compensation principle,"[22] which authorizes recovery of "damages grounded in determinations of plaintiffs' actual losses."[23] According to the Court, the dual aims of damages awards are to make the plaintiff whole and to deter constitutional violations.[24]

Recent Supreme Court decisions suggest the need for a compelling alternative to the loss allocation model, however, as the Court's conservative wing seems to be increasingly skeptical of the general value of constitutional torts. *Ashcroft v. Iqbal*[25] and other recent cases have limited the availability of constitutional tort suits against federal defendants.[26] Justice Scalia has called

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> proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2006). The leading case construing this statute as generally authorizing a retrospective remedy for constitutional violations is *Monroe v. Pape*, 365 U.S. 167, 183 (1961) (construing "under color of" to allow a federal remedy even if a state remedy is available).

[19] 403 U.S. 388, 391–92 (1971) (explaining how an implied cause of action exists for Fourth Amendment violations committed by federal officers regardless of whether state law would punish a private citizen for the same conduct). For more discussion about *Bivens* and its underpinnings, see Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1564 (1972) (arguing that the Court should be able to create constitutionally based remedies the same way it does in the federal statutory context).

[20] 435 U.S. 247, 258–59 (1978) (finding that "the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question").

[21] 477 U.S. 299, 308 (1986) (finding jury instructions allowing for an abstract valuation of a constitutional right inconsistent with *Carey*).

[22] *Carey*, 435 U.S. at 255.

[23] *Stachura*, 477 U.S. at 307.

[24] *Id.* at 306–07.

[25] 129 S. Ct. 1937 (2009).

[26] *See, e.g.*, *id.* at 1948–49 (rejecting "supervisory liability" absent a constitutional violation by the supervisor); Wilkie v. Robbins, 551 U.S. 537, 562 (2007) (rejecting *Bivens*

outright for not extending the *Bivens* doctrine,[27] and in *Iqbal*, the majority of a sharply divided Court hinted that *Bivens* may see no further growth.[28] Other recent rulings have raised more and more obstacles to § 1983 liability.[29] If this Article is right in maintaining that modern negligence theory, with its focus on loss allocation[30] is not a particularly apt source of principles for constitutional torts, a strong case exists for considering other approaches. Justices across the ideological spectrum may have greater confidence in a normative theory like civil recourse that gives vindication of rights priority over the allocation of losses.

At the very least, the civil recourse approach stands in contrast to the loss allocation approach, thus offering a fresh perspective worthy of attention. This Article hopes to show that examining constitutional tort doctrine from the perspective of civil recourse enhances one's understanding of what is at stake in these cases and provides a new set of standards for evaluating the Court's work. Over a broad range of issues, a civil recourse approach holds the promise of shifting the terms of the debate in such a way that a stronger showing is needed to justify rules that foreclose plaintiffs from obtaining vindication of their rights, even if that vindication takes only the form of nominal damages.

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cause of action for land use dispute); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001) (rejecting *Bivens* cause of action for acts of employee at a privately run federal prison); FDIC v. Meyer, 510 U.S. 471, 486 (1994) (rejecting *Bivens* cause of action against a federal agency).

[27] *See Malesko*, 534 U.S. at 75 (2001) (Scalia, J., concurring) (asserting, in an opinion joined by Justice Thomas, that he "would limit *Bivens* and its two follow-on cases [recognizing an implied cause of action] to the precise circumstances that they involved" (citations omitted)).

[28] 129 S. Ct. at 1948 (declaring that "implied causes of action are disfavored" and noting the "limited" circumstances in which *Bivens* claims are available).

[29] *See, e.g.*, Perdue v. Kenny A., 130 S. Ct. 1662, 1674 (2010) (limiting enhanced fee awards to "rare" cases involving successful plaintiffs' attorneys); Van de Kamp v. Goldstein, 555 U.S. 335, 349 (2009) (extending absolute prosecutorial immunity to managerial decisions); Pearson v. Callahan, 555 U.S. 223, 241–42 (2009) (permitting lower courts to dismiss on immunity grounds without first reaching the merits of the claim); Brosseau v. Haugen, 543 U.S. 194, 195 (2004) (upholding defendant's qualified immunity claim). Substantive constitutional holdings also have limited the plaintiff's opportunities to prevail. *See, e.g.*, Engquist v. Or. Dep't of Agric., 553 U.S. 591, 609 (2008) (limiting equal protection "class-of-one" theory of recovery); Town of Castle Rock v. Gonzales, 545 U.S. 748, 768 (2005) (rejecting plaintiff's claimed "property" interest in enforcement of a restraining order).

[30] *See supra* note 3 and accompanying text.

Part II of this Article distinguishes the civil recourse approach to constitutional torts from the Court's focus on compensation and deterrence and shows that civil recourse is a plausible alternative. Part III identifies the sharpest and most consequential difference between these two approaches–namely, their distinctive means of calculating damages; in particular, while the Court's loss allocation approach to damages aims to make the plaintiff whole, the civil recourse approach focuses on providing appropriate *redress*. Part IV explores the implications of moving from the "make the plaintiff whole" principle to "damages-as-redress" across a range of remedial issues, including presumed damages, punitive damages, and nominal damages. Part V identifies ways in which conceiving of damages as a means of redress, rather than as a means of indemnification, may enable plaintiffs to vindicate constitutional rights that now go entirely unremedied due to official immunity defenses. Part VI discusses important issues related to the recovery of attorney's fees awards in constitutional tort cases under the Civil Rights Attorney's Fees Awards Act of 1976.[31] Finally, Part VII identifies, and counters, two major objections to importing civil recourse theory into constitutional torts law.

II. CIVIL RECOURSE

While much of modern tort law is concerned with the allocation of losses, the civil recourse principle holds that the point of tort law should be to empower the plaintiff to exact *redress* for wrongs.[32] Rather than seeking to promote social welfare by compensating persons for losses or deterring misconduct, civil

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[31] 42 U.S.C. § 1988.

[32] Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 5 (1998); *see also* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 606 (2005) ("Government, by taking on the task of maintaining civil society, obtains from individuals a variety of powers that they would otherwise be entitled to exercise. . . . With resort to self-help blocked by the law, government is obligated, at least to some degree, to provide an alternative path for the attainment of satisfaction."); Goldberg & Zipursky, *supra* note 1, at 918 ("As its name indicates, tort law is about wrongs. The law of torts is a law of wrongs and recourse—what Blackstone called 'private wrongs.' " (emphasis omitted) (internal citations omitted)).

recourse theory puts individuals and the rights they hold and wrongs they commit at the core of the case.[33] Torts are wrongs done by the defendant to the plaintiff.[34] Absent the state, plaintiffs would be entitled to take matters into their own hands and exact retribution from the wrongdoer. In lieu of self-help, the state provides the tort remedy as the recourse for vindicating rights.[35] As Zipursky explains in his first article on civil recourse:

> In a civilized society, we are not permitted to "get even"—we are entitled to a private right of action in place of getting even. . . . A private right of action against another person is essentially a response to having been legally wronged by that person, and therefore exists only where the defendant has committed a legal wrong against the plaintiff and thus violated her legal right.[36]

Goldberg and Zipursky characterize civil recourse as an "interpretive" theory of ordinary tort law.[37] To the extent this theory claims to describe tort law, it has encountered some skepticism.[38] Nevertheless, civil recourse theory may describe some aspects of tort law better than its rivals, even if falling short in other areas. For example, even its leading proponents acknowledge that civil recourse theory does not account for key

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[33] *See* Zipursky, *supra* note 32, at 4 ("[T]ort law is built around certain conceptions of 'wrongs,' 'rights,' and 'rights of action.' ").

[34] *See* Goldberg & Zipursky, *supra* note 1, at 918 ("The law of torts is a law of wrongs and recourse . . . ."); *see also* Zipursky, *supra* note 32, at 87 (describing tort law as designating a set of wrongs). Moreover, a tort is a relational wrong. Taking its cue from Judge Cardozo's opinion in *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928), civil recourse holds that "[a] plaintiff may not recover unless the defendant's conduct was wrong relative to her." Zipursky, *supra* note 32, at 87. This is the principle of "substantive standing." *Id.*

[35] *See, e.g.*, Zipursky, *supra* note 32, at 5 (explaining the purpose for a private right of action).

[36] *Id.*

[37] Solomon, *supra* note 2, at 1779 & n.76.

[38] *See* Jane Stapleton, *Evaluating Goldberg and Zipursky's Civil Recourse Theory*, 75 FORDHAM L. REV. 1529, 1530–31, 1532 (2006) (arguing that certain aspects of civil recourse theory do not necessarily describe tort law, charging that "its descriptive claims are problematic," and suggesting that the project is better understood as "a normative one").

features of negligence, "a tort for which loss is a component."[39] On the other hand, civil recourse may be "more consistent with the *structure* of tort law than corrective justice or economic accounts,"[40] because it explains why "individual victims decide whether to bring lawsuits against their injurers."[41]

A. CIVIL RECOURSE NORMS

While tort theorists focus their attention on Goldberg and Zipursky's interpretive claims, the strength of their thesis does not matter for purposes of this Article. The interest of this Article lies elsewhere, in the normative implications of civil recourse theory for the selection of specific rules of constitutional tort law. This Article treats civil recourse as a source of norms for resolving constitutional tort issues and argues that those norms compel modification of many of the common law rules the Court has chosen to borrow for constitutional tort law. These norms include: (a) at least some violations of constitutional rights are constitutional wrongs; (b) the victim of a constitutional wrong is entitled to recourse; (c) the proper target of recourse is the wrongdoer; (d) the central point of constitutional tort law is to empower the plaintiff to obtain recourse by means of a private cause of action; (e) redress should be available whether the plaintiff can prove physical or emotional harm; and (f) redress should take account of the intangible nature of constitutional rights and wrongs.

The case for adopting civil recourse norms for general and constitutional tort law begins from the premise that the state provides tort law as the means for vindicating our rights against those who have wronged us. Tort litigation replaces self-help by affording plaintiffs an opportunity to vindicate their rights through the courts.[42] Drawing on "the linkage of tort law to

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[39] Goldberg & Zipursky, *supra* note 1, at 955.

[40] Solomon, *supra* note 2, at 1776.

[41] *Id.*

[42] *See* Zipursky, *supra* note 32, at 5 ("I shall argue that our institution of private rights of action embodies a 'principle of civil recourse.' According to this principle, an individual is entitled to an avenue of civil recourse—or redress—against one who has committed a legal wrong against her.").

individual rights [that] goes back at least to Locke," Goldberg maintains that "[g]overnment, by taking on the task of maintaining civil society, obtains from individuals a variety of powers that they would otherwise be entitled to exercise,"[43] including self-help.[44] Having "relinquishe[d] the raw liberty to respond aggressively to having been wronged[, the individual] receives in return a certain level of security . . ., plus the assurance that a civil avenue of redress against wrongdoers will be supplied."[45] The state makes "a political commitment" to an alternative means of obtaining redress to victims of misdeeds, by "empowering them to act against others who have wronged them."[46]

B. CIVIL RECOURSE FOR CONSTITUTIONAL WRONGS

The force of the argument for civil recourse norms is magnified in the constitutional tort context because the rights asserted are more vital and the defendants from whom redress is sought are more powerful and more dangerous. The wrongs for which redress is sought in constitutional torts are violations of the Bill of Rights and the Fourteenth Amendment.[47] These are fundamental protections against government, adopted for the purpose of protecting persons against abuse of power.[48] The defendants are

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[43] Goldberg, *supra* note 32, at 606.

[44] *Id.*; *see also* Goldberg & Zipursky, *supra* note 1, at 973 ("[S]elf-help is for the most part forbidden by the modern state.").

[45] Goldberg & Zipursky, *supra* note 1, at 974.

[46] *Id.* Professor Jason Solomon is concerned that Goldberg and Zipursky "have thus far stopped short of providing a robust normative justification" for civil recourse and undertakes to correct that deficiency. Solomon, *supra* note 2, at 1770; *see id.* at 1785 (" '[A]cting against' another in response to wrongdoing is a distinctive form of 'moral address,' and one which is particularly salient in a society based on liberal individualism, like ours."); *id.* at 1798 ("[A] legal system that provides a state-created mechanism for individuals to obtain redress of wrongs is itself normatively attractive and politically justified.").

[47] *See* Monroe v. Pape, 365 U.S. 167, 171 (1961) (quoting Congress's declaration of the purpose of the legislation).

[48] *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989) ("Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.' " (quoting Davidson v. Cannon, 474 U.S. 344, 348 (1986) (alteration in original))).

themselves officers of the state. Because the rights are fundamental and the wrongdoers exercise the formidable power of the state, there is an especially strong case for recognizing an obligation on the state's part to provide a tort remedy that empowers victims to obtain redress. Thus, even if the state's political commitment to provide a tort remedy against private actors may not have the force Goldberg and Zipursky claim for it in ordinary tort law, it may provide guidance for constitutional torts.[49]

Conversely, the case for a loss-allocation approach is arguably weaker in constitutional tort than in ordinary tort law. The social problem addressed by loss allocation is personal injury and the severe dislocations it causes for victims who face crushing medical expenses, lose their jobs, and may be permanently physically disabled or emotionally shattered.[50] The specific context may be car accidents, product defects, workplace injuries, or mass torts. Across a broad range of personal injuries, there are good reasons to assign a high priority to allocating losses so as to minimize the costs of accidents by imposing liability on actors who can prevent them from occurring and by compensating the victims. Identifying rights and wrongs, and authorizing recourse to redress those wrongs, may have to give way to these goals.

Loss allocation may carry less weight in constitutional tort because rights and wrongs are built into the prima facie case. Constitutional tort plaintiffs must establish a violation of their constitutional rights to win. And that violation is generally rooted in an intangible injury, which only may be accompanied by medical expenses, lost income, or some other out-of-pocket loss, or emotional distress.[51] Accordingly, many constitutional tort plaintiffs receive only nominal damages.[52]

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[49] *See* Solomon, *supra* note 2, at 1779–84 (discussing criticisms of Goldberg and Zipursky's civil recourse theory).

[50] 1 AMERICAN LAW INSTITUTE, ENTERPRISE LIABILITY FOR PERSONAL INJURY 3–11 (1991); G. CALABRESI, THE COSTS OF ACCIDENTS 26–31 (1970).

[51] *See* Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157, 215 (1998) ("Constitutional tort is unlike common law tort in that physical injuries, while by no means unknown, are not a typical consequence of most constitutional violations." (citation omitted)).

[52] *See, e.g.*, Frizzell v. Szabo, 647 F.3d 698, 700–02 (7th Cir. 2011) (approving an award of only nominal damages in an excessive force case although plaintiff's evidence showed that

III. FROM MAKING THE PLAINTIFF WHOLE TO REDRESSING THE WRONG

A distinctive feature of constitutional tort suits is that the plaintiff sues for an injury that occurred in the past and seeks damages as a remedy.[53] *Carey v. Piphus*[54] is the Court's leading constitutional tort case on damages. The plaintiffs were public school students who had been suspended for misbehavior without receiving an adequate due process hearing.[55] The issue before the Court was whether they could obtain significant damages for that procedural due process violation even if the facts were clear and the rules were settled, so that they would have been suspended from school in any event.[56] The students conceded that in such a case no damages could be awarded "to compensate them for injuries caused by the suspensions."[57] Nonetheless, they sought damages for "the injury which is inherent in the nature of the wrong," whether they could "prove that the denial of procedural

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the officer had tased him multiple times, used pepper spray, and jumped up and down on his chest); Kuperman v. Wrenn, 645 F.3d 69, 73 (1st Cir. 2011) (affirming that, were the plaintiff to win on the merits, "as a former prisoner alleging a constitutional violation that occurred during his incarceration, [the plaintiff] may obtain nominal and punitive damages under § 1983"); Guy v. City of San Diego, 608 F.3d 582, 587–88 (9th Cir. 2010) (affirming a nominal damages award for excessive force by the police); Lowry *ex rel.* Crow v. Watson Chapel Sch. Dist., 540 F.3d 752, 762 (8th Cir. 2008) ("[N]ominal damages must be awarded when a plaintiff establishes a violation of the right to free speech."); *see also* NAHMOD ET AL., *supra* note 6, at 555 (collecting cases); James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1622 & nn.100–02 (2011) (collecting cases in which plaintiff received nominal damages).

[53] *See* NAHMOD ET AL., *supra* note 6, at 1. Today, litigants seeking injunctive relief for state officials' ongoing or threatened violations of federal law typically sue under § 1983. But suits for prospective relief were brought long before *Monroe* under a well-established cause of action for injunctive relief. *See* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1081 (5th ed. 2003) ("[M]any suits that might have been brought under § 1983 as interpreted by Monroe were treated instead as actions for a remedy (usually an injunction) implied directly under the Constitution.").

[54] 435 U.S. 247 (1978). For an examination of *Carey*, see generally Jean C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CAL. L. REV. 1242 (1979); *see also* Note, *Damage Awards for Constitutional Torts: A Reconsideration After* Carey v. Piphus, 93 HARV. L. REV. 966–67 (1980) (outlining models for awarding damages after *Carey v. Piphus*).

[55] *Carey*, 435 U.S. at 250–51.

[56] *Id.* at 266–67.

[57] *Id.* at 260.

due process actually caused them some real, if intangible, injury."[58] The Court rejected the plaintiffs' theory, and instead adopted the rules governing damages in ordinary tort law.[59]

A. MAKING THE PLAINTIFF WHOLE: THE "COMPENSATION PRINCIPLE"

On the broad issue of how damages should be awarded in constitutional tort cases, *Carey* cited the Harper and James treatise on torts for the proposition that "[t]he cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty."[60] In the common law, the main policy justifying the compensation principle is that, as a matter of corrective justice between the parties, defendants must make the plaintiffs whole for the harms they have unjustly inflicted.[61] Taking this common law indemnification principle as its guide, the Court ruled that "the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights."[62] Accordingly, the Court required that the plaintiff prove actual harm to obtain compensatory damages for a procedural due process violation.[63] Following this "principle of compensation,"[64] lower courts have awarded constitutional tort plaintiffs the full range of damages available in ordinary tort suits, so long as the plaintiff can prove them.[65]

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[58] *Id.* at 260–61 (internal quotation marks and citations omitted).

[59] *Id.* at 262–64.

[60] *Id.* at 254–55 (citation omitted).

[61] KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 14–15 (3d ed. 2007); MARK A. GEISTFELD, TORT LAW: THE ESSENTIALS 74 (2008).

[62] *Id.* at 254.

[63] *Id.* at 262. The Court adopted the defendants' position that plaintiffs "should be put to their proof on the issue, as plaintiffs are in most tort actions." *Id.*

[64] *Id.* at 257.

[65] According to one court, the "analysis of whether [the plaintiff] suffered an actual injury warranting compensatory damages . . . appears to be the same under both § 1983 and [state tort law]." Randall v. Prince George's Cnty., 302 F.3d 188, 208 (4th Cir. 2002). For recent cases illustrating the range of damages that may be recovered in constitutional tort cases, see *Thomas v. Cook County Sheriff's Department*, 604 F.3d 293, 311, 313 (7th Cir. 2009) (upholding $4,000,000 award), and *Fox v. Hayes*, 600 F.3d 819, 845 (7th Cir. 2010) (upholding $2.7 million award for loss of consortium).

Carey left room for argument that its proof-of-damages requirement only would apply to procedural due process cases, where plaintiffs may not recover for substantive deprivations despite a flaw in the process by which they were imparted. But a few years later, in *Memphis Community School District v. Stachura*,[66] the Court extended *Carey*'s proof-of-damages rule to First Amendment cases and indicated that indemnification principles would apply across the whole range of constitutional torts.[67] Stachura was a public school teacher who claimed to have been punished on account of protected speech.[68] In fact, he had been notified that he was suspended with pay during an "administration evaluation" of his teaching, which never took place.[69] After filing his § 1983 suit, he was reinstated.[70] He pursued the litigation anyway, won on the merits, and obtained a jury verdict for $275,000 in compensatory damages and $46,000 in punitive damages.[71] The trial judge had instructed the jury, in the Court's paraphrase, that they could award damages "based on the value or importance of the constitutional rights that were violated."[72] Following *Carey*'s compensation principle, the Court held that the trial judge's instruction could not "be squared . . . with the principles of tort damages on which *Carey* and § 1983 are grounded."[73] Responding to efforts to distinguish *Carey* as a procedural due process case, the Court said that *Carey* "does not establish a two-tiered system of constitutional rights, with substantive rights afforded greater protection than 'mere'

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[66] 477 U.S. 299 (1986).

[67] *Id.* at 308–10.

[68] *Id.* at 300–02.

[69] *Id.* at 301 (internal quotation marks omitted).

[70] *Id.*

[71] *Id.* at 303.

[72] *Id.* at 302. The Court specifically disapproved of the following language in the instruction:

> The precise value you place upon any Constitutional right which you find was denied to Plaintiff is within your discretion. You may wish to consider the importance of the right in our system of government, the role which this right has played in the history of our republic, [and] the significance of the right in the context of the activities which the Plaintiff was engaged in at the time of the violation of the right.

Id. at 303.

[73] *Id.* at 308.

procedural safeguards."[74] Given the compensation principle announced in *Carey*, there is "simply . . . no room for noncompensatory damages measured by the jury's perception of the abstract 'importance' of a constitutional right."[75]

Carey did acknowledge that modifications of the common law rules of damages may be necessary at times because "the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law of torts."[76] When such disconnects occur, "the task will be the more difficult one of adapting common-law rules of damages to provide fair compensation for injuries caused by the deprivation of a constitutional right."[77] In the years since *Carey* and *Stachura*, however, the Court never has elaborated on these enticing qualifications.

B. FULL COMPENSATION VS. FAIR COMPENSATION

In a significant group of cases, the modern common law approach to damages stands at odds with the civil recourse principle—that tort law is best seen as a state-provided means for injured persons to redress wrongs done to them. There is no conflict in cases in which the injury easily can be measured in money, such as the value of a piece of property or a bill for medical expenses. In such a case, the principle of compensation dovetails with redressing the wrong. In other cases, however—and particularly constitutional tort cases—the defendant produces a more intangible injury, such as pain, suffering, or humiliation. In these cases, the notion that damages exist to make the plaintiff whole may fail to capture the defendant's wrong or the plaintiff's demand for redress. Goldberg makes the following distinction between civil recourse and the "standard modern" torts damages compensation principle:

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[74] *Id.* at 309.

[75] *Id.* at 309–10.

[76] Carey v. Piphus, 435 U.S. 247, 258 (1977).

[77] *Id.*; *see also Stachura*, 477 U.S. at 309 (acknowledging that *Carey* recognized that "the elements and prerequisites for recovery of damages might vary depending on the interests protected by the constitutional right at issue" (internal quotation marks and citations omitted)).

> [S]tandard renditions . . . treat tort law as a means by which a person who suffers a harm can have that harm annulled, erased, or indemnified . . . .
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> . . . [T]ort as a law for the redress of wrongs . . . supports a conception of tort damages as *fair compensation*[,] [which] . . . in turn requires of the fact-finder an overtly normative determination based on consideration not only of the losses suffered by the victim, but also of the character of the defendant's conduct, mitigating circumstances that do not rise to the level of recognized defenses, and the power dynamic between the parties.[78]

Even in ordinary tort law, the availability of damages for emotional and other nonpecuniary harm may be seen as at odds with the principle of indemnification because the money awarded does not fully eliminate the distress.[79] What is more, the soft character of emotional harm renders the hard recompense of cash a clumsy and ill-fitting equivalent. Professor Louis Jaffe made much the same point many years ago when he noted that "neither past pain nor its compensation has any consistent economic significance."[80] Yet damages for intangible injuries remain well-established and have withstood efforts to eliminate them. Accordingly, the modern "make-whole" principle is better viewed not as an end in itself but as a means toward *fair* compensation for those kinds of harm.[81]

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[78] Goldberg, *supra* note 4, at 436–37 (emphasis in original).

[79] Thus, Goldberg and Zipursky distinguish between compensation for out-of-pocket losses and compensation for "setbacks that cannot be rectified as such but the impact of which money can *help* ameliorate." Goldberg & Zipursky, *supra* note 1, at 961 (emphasis added).

[80] Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 224 (1953).

[81] *See* Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359, 372 (2006) (noting that there is a "long-standing and dynamic tradition of compensation for intangible loss" and that "compensation has never stood as an end goal in itself of tort law"). In this passage Professor Robert Rabin uses the term compensation in the "make-whole" sense, or what Goldberg calls "full compensation." Goldberg, *supra* note 4, at 436–37; Rabin, *supra*, at 361 (indicating that he will "suggest reservations about the 'make-whole' principle—the notion that tort compensation has conventionally aspired to restore an injury victim to a pre-injury position").

IV. DAMAGES-AS-REDRESS IN CONSTITUTIONAL TORTS

The gap between damages-as-indemnification and damages-as-redress is particularly wide in constitutional torts for a critical reason: the injury consists of violation of a constitutional right itself and so, at bottom, it is *inevitably* intangible.[82] Even when losses are easily calculated—as when a government takes property, when a police officer's excessive force results in hospital bills, or when dismissal from a job leads to lost salary—the monetary loss is merely a *consequence* of the constitutional wrong and does not *precisely* correspond to the constitutional injury. In many other cases, there may be no monetary loss, yet the constitutional injury is manifest.[83] Consider, for example, a plaintiff who tried to exercise his free speech rights by parading in the public streets but was denied by the police in violation of the First and Fourteenth Amendments,[84] or the teacher in *Stachura* who was suspended with pay and then returned to his post after the school investigated his speech.[85] Moreover, the constitutional injury may be severe even where the out-of-pocket loss is not. Plaintiffs suing the police that violate their free speech rights[86] should in principle stand on equal footing with plaintiffs who can prove substantial business losses on account of a police beating,[87] even though, as a practical matter, the latter case probably will result in a greater award.

Constitutional tort plaintiffs (and their lawyers) typically do try to fit their cases into the traditional tort framework, so as to

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[82] *See* Rabin, *supra* note 81, at 371 (characterizing constitutional wrongs as a "tort-type intangible loss").

[83] *See* PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 116 (1983) (asserting that "[m]any constitutional . . . rights . . . cannot readily be converted into monetary terms, and the nominal damages often awarded for their violation are inadequate.").

[84] *See, e.g.*, Irish Lesbian & Gay Org. v. Giuliani, 143 F.3d 638, 642–43 (2d Cir. 1998) (hearing a § 1983 claim regarding denial of a permit to hold a parade).

[85] Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 301 (1986).

[86] *See, e.g.*, *Irish Lesbian & Gay Org.*, 143 F.3d at 649–51 (discussing various types of injuries incurred by the plaintiff); *see also* Lowry v. Watson Chapel Sch. Dist., 540 F.3d 752, 756, 762 (8th Cir. 2008) (holding that students disciplined in violation of their First Amendment rights for wearing black armbands were entitled to nominal damages).

[87] *See, e.g.*, Malloy v. Monahan, 73 F.3d 1012, 1017 (10th Cir. 1996) (outlining the "extensive evidence" of plaintiff's injuries).

secure substantial damages, by seeking recovery for emotional distress. And courts generally have accommodated them. Some courts go so far as to permit juries to award substantial amounts for emotional distress based on the plaintiff's testimony alone, without medical evidence.[88] Not surprisingly, some cases leave little doubt that jurors may leverage their ability to award emotional distress damages so as to craft an award for the constitutional wrong itself, independent of emotional distress evidence. For example, in *Bogle v. McClure*, librarians who had been transferred to menial jobs without salary reductions sued for race discrimination and won.[89] Based solely on their accounts of distress and its effect on their careers, they won $500,000 each for emotional harm.[90] In the absence of any expert testimony in support of the plaintiffs' claims of harm,[91] a more convincing justification for the award may be the jury's assessment that the award was necessary to redress the constitutional wrong.[92]

Using emotional distress as a surrogate for the intangible value of the constitutional right may suffice in some cases, but it is hardly an all-purpose solution to the problem of achieving fair compensation for constitutional wrongs.[93] A given jury may choose a more direct route only to find its intention thwarted by a court that insists on absolute fidelity to compensation-as-indemnification. Consider *Corpus v. Bennett*, an excessive force

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[88] *See, e.g.*, Akouri v. Fla. Dep't of Transp., 408 F.3d 1338, 1345–46 (11th Cir. 2005) (citing principle but still denying plaintiff recovery of compensatory damages for emotional distress because the plaintiff provided insufficient evidence); Price v. City of Charlotte, 93 F.3d 1241, 1254 (4th Cir. 1996) ("[A] plaintiff 's testimony, standing alone, can support an award of compensatory damages for emotional distress based on a constitutional violation . . . .").

[89] 332 F.3d 1347, 1350, 1354, 1359 (11th Cir. 2003); *see also* Forsyth v. City of Dallas, 91 F.3d 769, 774 (5th Cir. 1996) (similarly upholding substantial awards of emotional distress damages based on the plaintiffs' testimony).

[90] *Bogle*, 332 F.3d at 1359.

[91] *Id.*

[92] In this regard it may be helpful to distinguish emotional distress from pain and suffering, an area in which the plaintiff's testimony may well be the best evidence. *See, e.g.*, Hendrickson v. Cooper, 589 F.3d 887, 893 (7th Cir. 2009) (stating that "it is understandable that Hendrickson relied primarily on his own testimony to prove his pain and suffering").

[93] As Daryl Levinson points out, under *Carey* and *Stachura*, "damages are available only for tort-like harms" and thus "are not calibrated to the social costs of constitutional violations." Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 372 (2000).

case in which the jury sought to use the nominal damages category as a means of awarding $75,000 for the intangible value of the constitutional wrong despite finding no compensatory damages.[94] The jury was instructed to decide whether "the use of excessive force by [the] defendant . . . [was] a direct cause of injuries to [the] plaintiff."[95] It answered "no."[96] Then in response to a question asking "what nominal sum of money will fairly and adequately compensate plaintiff . . . for the deprivation of his constitutional rights," the jury "entered $75,000."[97] The jury, however, left blank, as it had been instructed to do, two other questions on the verdict form, including a question on "past pain, disability and emotional distress," "past medical expenses," and "past lost wages," and another question on "future" harms.[98] Reasoning that the jury had found no "actual damages" and thus had ignored its instructions in awarding more than one dollar, the instructed amount to award for nominal damages, the court affirmed the district court's reduction of the nominal damages to a dollar.[99] A court more sensitive to the intangible nature of constitutional rights and more open to the civil recourse principle that the point of constitutional tort law is to redress constitutional wrongs may have treated the nominal award as the jury's estimation of Goldberg's "fair compensation,"[100] especially in light of the precise question the jury was asked to answer: "[W]hat nominal sum of money will fairly and adequately compensate plaintiff . . . for the deprivation of his constitutional rights?"[101]

A. PRESUMED DAMAGES

Applying civil recourse principles would avoid the indirect route for redressing constitutional wrongs, possibly illustrated by the court's ruling in *Bogle* and the jury's aborted effort in *Corpus*, in

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[94] 430 F.3d 912, 914–15 (8th Cir. 2005).
[95] *Id.* at 914 n.2.
[96] *Id.* at 915.
[97] *Id.* at 916.
[98] *Id.* at 915 n.3.
[99] *Id.* at 916.
[100] *See supra* note 78 and accompanying text.
[101] *Corpus*, 430 F.3d at 914 n.3.

favor of a more straightforward one. Rather than cramming constitutional injury into the emotional distress category of damages, courts would instruct jurors to evaluate the constitutional wrong in light of all circumstances about the incident giving rise to the litigation and agree on an appropriate award of damages. In *Thompson v. Connick*, for example, the plaintiff spent eighteen years in prison on death row, "fourteen of which were in solitary confinement" on account of prosecutorial misconduct.[102] The jury awarded, and the Fifth Circuit upheld, an award of $14 million against the city of New Orleans for emotional distress.[103] No doubt a part of this award can be based on emotional distress, but some of it likely represents a backhanded way of recognizing the gravity of the constitutional violation.[104] From a civil recourse perspective on the other hand, one can directly defend the award as redress for the especially serious constitutional wrong.

This modification of the common law principles of damages may be achieved within the *Carey*/*Stachura* model by reviving *Carey*'s dictum that some cases will require courts to "adapt[ ] common-law rules of damages to provide fair compensation for injuries caused by the deprivation of a constitutional right."[105] In undertaking that adaptation, another common law doctrine—presumed damages—could prove helpful. Professor Jean Love suggested as much some years ago, arguing that "although the Court will not recognize presumed general damages for *abstract deprivations* of constitutional rights, the Court might be willing to allow the recovery of presumed general damages for certain *intangible injuries* caused by violations of constitutional rights."[106]

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[102] 553 F.3d 836, 842 (5th Cir. 2008), *rev'd on other grounds*, 131 S. Ct. 1350 (2011). The Supreme Court ruled that the city could not be sued for lack of an "official government policy," 131 S. Ct. at 1359, 1366.

[103] *Thompson*, 553 F.3d at 866.

[104] For a case that features a false conviction and a $14 million award, but no time spent on death row, see *White v. McKinley*, 605 F.3d 525, 528 (8th Cir. 2010). The defendants evidently did not challenge the $14 million verdict for excessiveness. *Id.*

[105] Carey v. Piphus, 435 U.S. 247, 258 (1978); *see also* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 309 (1986) (acknowledging *Carey*'s recognition that "the elements and prerequisites for recovery of damages might vary depending on the interests protected by the constitutional right" (internal quotation marks and citations omitted)).

[106] Jean C. Love, *Presumed General Compensatory Damages in Constitutional Tort Litigation: A Corrective Justice Perspective*, 49 WASH. & LEE L. REV. 67, 80 (1992).

This Article argues that civil recourse theory provides support for the distinction Love draws.

The presumed damages principle—which has moorings in the common law of torts—allows the plaintiff to obtain substantial damages without proving them if the injury is likely to have occurred but also is hard to prove.[107] For example, courts award presumed damages in defamation law, an area in which the injury may occur when people who read or hear the statements avoid having any relations with the plaintiff. In such cases, the plaintiff may have no idea who these people are.[108] Courts also may award presumed damages for dignitary torts, such as assault, battery, and false imprisonment, all of which resemble constitutional tort claims brought under the Fourth Amendment for illegal seizures or excessive force.[109] Like the dignitary torts, a violation of one's constitutional rights clearly wrongs the plaintiff, whether it produces physical or emotional harm. Similar to defamation, these torts may produce an injury hard to prove. There is, however, a difference: unlike defamation, where the harm involves the behavior of unknown third parties, here, the injury is intangible. Under loss allocation theories of tort, that difference may be significant because defamation does produce independently identifiable losses (namely, to reputation), while these constitutional torts may consist only of the violated constitutional right itself. Under civil recourse theory, however, this difference should not matter because the point of the plaintiff's suit is not to recover for an identifiable loss, but to vindicate rights.

Consistent with its general loss allocation approach, the Supreme Court has been wary about approving presumed damages for constitutional torts.[110] *Carey v. Piphus* denied presumed damages for procedural due process violations.[111] The

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[107] 2 DON B. DOBBS, LAW OF REMEDIES 260 (2d ed. 1993).

[108] *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760–61 (1985) (explaining presumed damages in defamation law).

[109] *See* DOBBS, *supra* note 107, at 335–36 (noting the resemblance between dignitary torts and constitutional torts).

[110] *See* Love, *supra* note 106, at 67 ("[T]he Court has circumscribed the types of fact situations in which an award of presumed general damages would be appropriate [in constitutional tort litigation].").

[111] 435 U.S. 247, 264 (1978).

Court noted that "it is not reasonable to assume that every departure from procedural due process . . . inherently is as likely to cause distress as the publication of defamation *per se* is to cause injury to reputation and distress."[112] In addition, in a case like *Carey*, "whatever distress a person feels may be attributable to the justified [substantive] deprivation rather than to deficiencies in procedure."[113] In *Stachura* the Court specifically rejected a trial judge's instructions that would have authorized the jury to award damages for a First Amendment violation "based on the value or importance of the constitutional rights that were violated."[114] The plaintiff tried to defend the instruction by arguing among other things that it "authorized a form of 'presumed' damages—a remedy that is both compensatory in nature and traditionally part of the range of tort law remedies."[115] The Court responded that presumed damages are appropriate only "[w]hen a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish" because in such a case they may "roughly approximate the harm that the plaintiff suffered."[116] The challenged instructions, however, "did not serve this purpose" because they "called on the jury to measure damages based on a subjective evaluation of the importance of particular constitutional values."[117] Because the jury's award was "wholly divorced from any compensatory purpose, [it could not] be justified as presumed damages."[118]

In both *Carey* and *Stachura*, the Court rebuffed plaintiffs who sought presumed damages for constitutional torts. Neither decision, however, closes the door entirely on a properly presented claim for presumed damages. Though constitutional tort plaintiffs generally work within the *Carey/Stachura* framework, a few lower courts have awarded presumed damages in the quarter century since *Stachura* without attracting the Supreme Court's wrath.[119]

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[112] *Id.* at 263.
[113] *Id.*
[114] Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 302, 304 (1986).
[115] *Id.* at 310.
[116] *Id.* at 310–11.
[117] *Id.*
[118] *Id.*
[119] *See, e.g.*, Siebert v. Severino, 256 F.3d 648, 655 (7th Cir. 2001) ("The law recognizes that

And there are indeed viable grounds for carving out a role for presumed damages despite the skepticism expressed in *Carey* and *Stachura*. The Court in *Carey* stressed the distinction between the procedural violation, for which damages were sought, and the substantive deprivation, which may have been entirely justified.[120] The absolute no presumed damages holding therefore may be limited to procedural due process cases. *Stachura* does not repudiate presumed damages per se, but it distinguishes such damages, when properly understood, from the award in that case for the "abstract value" of constitutional rights.[121] In a lengthy footnote, for example, the Court cited "a long line of cases . . . authorizing substantial money damages as compensation for persons deprived of their right to vote."[122] These cases, unlike the disapproved jury instruction, "involve nothing more than an award of presumed damages for a nonmonetary harm that cannot easily be quantified."[123]

In *Stachura*'s voting rights footnote, the Court's preoccupation with the loss allocation approach to torts rears its head. After recounting the old cases, the Court drives home its point by remarking that "whatever the wisdom of these decisions in the context of the changing scope of compensatory damages over the course of this century, they do not support awards of noncompensatory damages such as those authorized in this case."[124] Statements like this illustrate the contribution that civil recourse theory can make in shaping the future of constitutional tort law. Civil recourse provides a coherent and attractive alternative to the Court's practice of using the main trends of ordinary tort law as its guide. In particular, civil recourse theory provides sturdy support for the old presumed damages decisions. And at the least it argues strongly against endorsing "the changing scope of compensatory

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law-abiding citizens can sue and recover general (or presumed) damages for a Fourth Amendment violation, even without proof of injury." (citing Hessel v. O'Hearn, 977 F.2d 299, 301 (7th Cir. 1992))); *see also* NAHMOD ET AL., *supra* note 6, at 564 (providing other examples of courts receptive to presumed damages in the Seventh, Ninth, and Sixth Circuits).

[120] Carey v. Piphus, 435 U.S. 247, 263 (1978).

[121] *Stachura*, 477 U.S. at 308.

[122] *Id.* at 311 n.14.

[123] *Id.*

[124] *Id.* at 312 n.14.

damages over the course of [the twentieth] century" as a guideline for resolving constitutional tort issues.[125]

B. PUNITIVE DAMAGES

In the common law, juries may award punitive damages in tort cases for a number of reasons, including to fill gaps in compensatory relief, avoid underdeterrence of tortious conduct, "express[ ] the community's abhorrence at the defendant's act, . . . [and] head off breaches of the peace by giving individuals injured by relatively minor outrages a judicial remedy . . . ."[126] Civil recourse theory boils these multifarious aims down to two core purposes: one based on the public interest in "punish[ing] a defendant who has acted egregiously," the other grounded in "our legal system's recognition that the plaintiff has a right to *be punitive*."[127] This Section will focus on the latter, private plaintiff-centered rationale, as it alone is emblematic of a civil recourse approach to constitutional torts.

A basic issue that arises in applying civil recourse principles to constitutional torts is the proper standard for imposing punitive damages. *Smith v. Wade*, the Court's leading case on this topic, arose out of a prison guard's failure to protect an inmate from an attack by another inmate, in violation of the plaintiff's Eighth Amendment rights.[128] *Smith* held that punitive damages could be awarded not only "when the defendant's conduct is shown to be motivated by evil motive or intent," as the defendant had proposed, but also "when it involves reckless or callous indifference to the federally protected rights of others."[129] Justice Brennan's opinion for the Court justified this holding primarily by relying on

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[125] *Id.*

[126] Kemezy v. Peters, 79 F.3d 33, 35 (7th Cir. 1996).

[127] Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 106 (2005). Zipursky goes on to argue that "[i]nsofar as punitive damages are basically civil, and not about criminal punishment, they do not merit the special constitutional scrutiny afforded to criminal defendants." *Id.* at 107. The quasi-criminal aspect of punitive damages has no special relevance to constitutional torts and will not be examined herein.

[128] 461 U.S. 30, 32 (1983).

[129] *Id.* at 56.

nineteenth and twentieth century tort law, without making any explicit reference to underlying tort theory.[130]

From a civil recourse perspective, the issue raised by *Smith* concerns the breadth of the plaintiff's right to be punitive. Civil recourse theory holds that the state empowers the plaintiff to sue to redress the wrong committed by the defendant.[131] In cases in which the defendant has acted egregiously, the plaintiff's right to redress should extend beyond compensatory damages. In other words the greater the wrong, the greater the right of redress. Thus, "[h]aving suffered this insult, the plaintiff is herself entitled to redress at a different level."[132] Zipursky explains:

> The imposition of punitive damages reflects a judgment that a private person is entitled, in light of the wrong done to him or her, to act upon the defendant in a manner that exceeds what is necessary to restore her holdings—to be compensated for the injury done. She is entitled to exact a punitive sanction from the defendant in light of what he did to her and how he did it.[133]

The Court in *Smith v. Wade* framed the issue before it as one of determining *what common law courts do*. Had it applied civil recourse theory, however, it would have asked *whether the plaintiff's right to punitive damages* extends beyond cases of "evil motive or intent," so as also to reach cases of "reckless or callous indifference."[134] The difference between the two approaches is this: *Smith* applies the same rule across the whole range of constitutional torts,[135] whereas civil recourse permits a more nuanced approach, perhaps allowing courts to choose different rules depending on context. For example, because the plaintiff in

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[130] *Id.* at 38–55. Justice Rehnquist's dissent also focuses on the common law, especially from the nineteenth century. *Id.* at 57–84 (Rehnquist, J., dissenting).

[131] *See supra* note 1 and accompanying text.

[132] *See* Zipursky, *supra* note 127, at 151.

[133] *Id.* at 154.

[134] 461 U.S. at 56.

[135] *See id.* (specifying that its holding concerning punitive damages regards actions under § 1983).

Smith was a prisoner, and thus wholly dependent on the defendant for protection, the case for applying a broader punitive damages rule gained strength. On the other hand, the Eleventh Circuit, applying *Smith*, upheld a $14 million punitive award to librarians who were transferred to menial jobs on account of their race, in addition to the $500,000 each plaintiff received in compensatory damages.[136] Arguably, the standard for awarding punitive damages should be more demanding when the plaintiff is neither helpless nor the victim of physical harm—civil recourse theory would support that doctrinal flexibility.[137]

C. CAUSAL CONNECTION BETWEEN BREACH AND INJURY

To obtain damages the constitutional tort plaintiff must prove not only a constitutional violation and damages, but also a causal link between the violation and the damages.[138] For example, a plaintiff who establishes both a procedural due process violation and an injury, like the plaintiff in *Carey*, will not necessarily recover. The *Carey* Court "requir[ed] the plaintiff [to show] that

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[136] Bogle v. McClure, 332 F.3d 1347, 1359, 1362 (11th Cir. 2003).

[137] Besides *Smith*, the only other constitutional tort punitive damages case from the Supreme Court is *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), in which the Court held that municipal governments may not be held liable for punitive damages. *Id.* at 271. The Court relied partly on nineteenth century tort law and partly on policy considerations. *Id.* at 259–66. Thus, one aim of punitive damages is retribution, but "[a] municipality . . . can have no malice independent of the malice of its officials." *Id.* at 267. As for deterrence, "it is far from clear that municipal officials . . . would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality." *Id.* at 268. Under a civil recourse approach, by contrast, neither the deterrence argument (whatever its validity) nor the common law background would resolve the issue of municipal liability for punitive damages. The issue would turn on whether the Court's assertion that "[a] municipality . . . can have no malice independent of the malice of its officials" is a convincing answer to the claim that city policy makers have not only violated the plaintiff's constitutional rights, but have done so in pursuit of the city's aims and have done so with an appropriately egregious state of mind. In a footnote, the Court seemed to recognize this possibility. *Id.* at 267 n.29 ("It is perhaps possible to imagine an extreme situation where the taxpayers are directly responsible for perpetrating an outrageous abuse of constitutional rights."). But neither the Court nor lower courts have made use of this dictum in the thirty years since *City of Newport*.

[138] *See, e.g.*, Conn v. City of Reno, 591 F.3d 1081, 1098 (9th Cir. 2010) (requiring a causal connection between an officer's omission and subsequent injury). *See generally* Thomas A. Eaton, *Causation in Constitutional Torts*, 67 IOWA L. REV. 443 (1982) (discussing a range of causation issues).

he actually suffered distress *because of* the denial of procedural due process itself."[139] By contrast, civil recourse theory would authorize plaintiffs to recover at least nominal damages upon proving violations of their constitutional rights even if they suffer no harm. In what follows, one should bear in mind that the argument for nominal damages in this context is wholly separate from the argument advanced above for presumed damages. Neither of them entails or negates the other.

1. Nominal Damages Absent Causation of Harm. *Carey* recognized that recourse to the courts has some value even where the plaintiff cannot prove actual damages. After requiring proof of harm to obtain compensatory relief, the Court turned to the problem of plaintiffs who could prove a constitutional violation but show no damages.[140] Looking to the common law for guidance, Justice Powell noted that "[c]ommon-law courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money."[141] Thus, plaintiffs suing for such torts as battery, assault, false imprisonment, and defamation may prevail on the merits without proof of harm and obtain nominal damages, typically one dollar. Building on this common law principle, *Carey* held that nominal damages would be available for procedural due process violations.[142] Ever since *Carey*, nominal damages have been routinely available for constitutional torts whether actual harm is proven.[143]

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[139] Carey v. Piphus, 435 U.S. 247, 263 (1978) (emphasis added).

[140] *Id.* at 266.

[141] *Id.*

[142] *Id.* at 266–67.

[143] *See, e.g.*, Lowry *ex. rel.* Crow v. Watson Chapel Sch. Dist., 540 F.3d 752, 762 (8th Cir. 2008) ("[N]ominal damages must be awarded when a plaintiff establishes a violation of the right to free speech."); KH Outdoor, LLC v. City of Trussville, 465 F.3d. 1256, 1260–61 (11th Cir. 2006) (holding that nominal damages are recoverable if the party establishes a violation of constitutional rights); Schneider v. Cnty. of San Diego, 285 F.3d 784, 794–95 (9th Cir. 2002) (reprimanding district court for failing to award nominal damages on the plaintiff's procedural due process claims).

The Court addressed a variation on this theme in *Wilkins v. Gaddy*, 130 S. Ct. 1175 (2010) (per curiam). The Fourth Circuit had ruled that a prison inmate suing a guard for beating him must "show[ ] . . . significant injury in order to state an excessive force claim." *Id.* at 1178. The Court reversed, holding that the Eighth Amendment violation turned on "the nature of the force," not the extent of the harm inflicted. *Id.* at 1179. The brief per

Having shown some appreciation for the value of vindicating constitutional rights in its treatment of nominal damages, the Court in *Carey* nonetheless took a wrong turn from the perspective of civil recourse theory. In describing the rationale for nominal damages, Justice Powell chose to minimize the value of vindication:

> By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.[144]

Applying this principle to constitutional torts, the plaintiff who establishes a due process violation, but proves no harm, would be entitled to nominal damages "not to exceed one dollar."[145]

Civil recourse theory would demand a reformulation of *Carey*'s rationale for nominal damages. Justice Powell's reasoning undervalues vindication by treating it as a kind of public value rather than a right held by the plaintiff. Justice Powell "recognizes the importance to organized society that . . . rights be scrupulously observed," and the propriety of vindicating rights by way of private suits for damages.[146] The thrust of his conclusion, however, is that any such vindication can and should be subordinated to other considerations. According to civil recourse

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curiam opinion treated the case as an occasion for correcting the Fourth Circuit's misapplication of Eighth Amendment precedent. From a civil recourse perspective, the outcome in *Wilkins* is correct because a wrong is sufficient to impose liability, even if no compensable harm results.

[144] *Carey*, 435 U.S. at 266.

[145] *Id.* at 266–67. The continuing influence of this account of nominal damages can be seen in *Guy v. City of San Diego*, 608 F.3d 582, 587 (9th Cir. 2010) ("An award of nominal damages is intended to serve as a symbol that defendant's conduct resulted in a technical, as opposed to injurious, violation of plaintiff's rights." (quoting Cummings v. Connell, 402 F.3d 936, 945 (9th Cir. 2005) (internal quotation marks omitted))).

[146] *Carey*, 435 U.S. at 266.

theory, the whole point of the tort remedy is to provide plaintiffs with access to the courts to obtain meaningful redress for the violation of their rights, regardless of whether the plaintiff has suffered compensable injury.[147] There may be other means of affirming the importance of rights to society at large, but their availability is no answer to the plaintiff's argument for vindicating *the plaintiff's own* rights.

2. Mixed Motives. There is a special causation rule for situations in which the defendant acts with mixed motives, one of them constitutionally suspect, in taking adverse action against the plaintiff. In *Mt. Healthy School District Board of Education v. Doyle*, a teacher charged that officials fired him on account of protected speech.[148] A lower court had allowed him to win by showing that the unconstitutional motive "played a substantial part in the decision."[149] The Supreme Court took a different approach, however, adopting a version of the general common law "but-for" causation test for attaching liability to official decisions, even those motivated *in part* by unconstitutional reasons.[150] Even if plaintiffs show that their protected speech was a substantial factor behind the adverse employment action, they would still lose if the defendants can establish that they would have been fired for other reasons in any event.[151] Writing for a unanimous Court, Justice Rehnquist explained that:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.[152]

To the extent constitutional torts are aimed at determining who should bear a loss, this holding seems justified. Plaintiffs who

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[147] *See supra* note 32 and accompanying text.
[148] 429 U.S. 274, 276 (1976).
[149] *Id.* at 284 (internal quotation marks omitted).
[150] *Id.* at 286–87.
[151] *Id.* at 287.
[152] *Id.* at 285.

would have lost their job anyway should not get a windfall just because one reason for the firing was unconstitutional. As with general principles of damages, the Court's implicit premise seems to be that constitutional tort law exists to allocate losses.[153] Attentiveness to civil recourse theory, with its focus on redressing private rights, may well have produced a different causation rule. If one views the plaintiff in a case like *Mt. Healthy* as the target of an unconstitutional motive—indeed a *substantial* one—perhaps some remedy should be available, at least nominal damages. Even if lost wages cannot be traced to the illicit motive, that motive nonetheless figured in the constitutional violation. Yet under the Court's test, the plaintiff must lose whenever the defendant can satisfy the mixed-motive test.

Contrary to civil recourse theory, the Court in *Mt. Healthy* seems to conflate the plaintiff's interest in compensatory damages with the interest in vindicating rights, so that the former is the measure of the latter. The Court put the point this way: "The constitutional principle at stake is sufficiently vindicated if . . . an employee is placed in no worse a position than if he had not engaged in the conduct."[154] But, again, this line of reasoning has a question-begging quality. To be sure, this assertion may offer an adequate answer to the plaintiff's request for compensatory damages. It does not, however, explain why nominal damages are

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[153] The Court's inability to perceive of a suit for retrospective relief as anything but an effort to obtain compensatory damages is illustrated by *Texas v. Lesage*, 528 U.S. 18, 19–21 (1999) (per curiam), in which the Court ruled that an unsuccessful applicant challenging an affirmative action program could not obtain any *retrospective* relief absent proof that he would have been admitted, even though a similarly unsuccessful applicant would have standing to seek *prospective* relief on the theory that he was entitled, as a matter of equal protection, to be considered under constitutionally valid criteria. In some contexts, however, the Court seems to take a different view. *Cf.* Wilkins v. Gaddy, 130 S. Ct. 1175 (2010) (per curiam). *Wilkins* was a § 1983 damages suit brought by a prisoner, in which the plaintiff charged excessive force by guards but did not "assert[ ] that his injuries had required medical attention." *Id.* at 1177. The District Court dismissed the complaint for failure to assert more than "a *de minimus* [sic] injury." *Id.* (internal quotation mark omitted). The Supreme Court reversed. *Id.* In doing so, it reaffirmed the well-settled Eighth Amendment principle that "[w]hen prison officials maliciously and sadistically use force to cause harm . . . contemporary standards of decency always are violated . . . whether or not significant injury is evident." *Id.* at 1178 (quoting Hudson v. McMillian, 503 U.S. 1, 9 (1992)) (internal quotation marks omitted).

[154] *Mt. Healthy*, 429 U.S. at 285–86.

unavailable when an unconstitutional reason at least contributed to the adverse employment action.[155] Throwing the plaintiff's case out of court does not put him "in no worse a position than if he had not engaged in the conduct."[156] Arguably, the plaintiff suffered a wrong because of the bad motive and thus is entitled to recognition of that wrong, at least through a public declaration of the wrongdoing and a nominal damages award.

Taking a civil recourse approach does not necessarily dictate recovery of even nominal damages for any plaintiff who can show that an unconstitutional motive was a substantial factor in the adverse action. The strength of the plaintiff's case, even when seeking only nominal damages to vindicate one's own rights, depends on how much the unconstitutional motive influenced the outcome. Perhaps it should not be sufficient for the plaintiff to show that the unconstitutional motive was a substantial factor. Borrowing a test from the law of defamation, for example, the Court might allow plaintiffs to recover nominal damages only upon showing that the *dominant purpose* of the official who acted against them was an unconstitutional one.[157] The dominant-purpose test could replace the test entirely for mixed-motives cases.[158] The argument advanced here is more modest. Under this approach, *Mt. Healthy* would remain a bar to plaintiffs who seek compensatory damages but who cannot survive the but-for test. Plaintiffs, however, would be entitled to a jury instruction that they win on the constitutional merits and are entitled to *nominal* damages if the jury is persuaded that the defendant's dominant purpose was to disadvantage them by denying their exercise of constitutional rights.

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[155] For an argument that questions the Court's ruling without drawing the distinctions made here between vindication and deterrence and between compensatory damages and nominal damages, see Michael Wells, *Three Arguments Against* Mt. Healthy: *Tort Theory, Constitutional Torts, and Freedom of Speech*, 51 MERCER L. REV. 583, 585–86 (2000) (arguing for "a rule that allows the plaintiff to recover full damages whenever the constitutional violation was sufficient to cause them").

[156] *Mt. Healthy*, 429 U.S. at 285–86.

[157] *See* RESTATEMENT (SECOND) OF TORTS § 603 cmt. A (1977) (defining how one may abuse a qualified privilege depending on one's purpose in publishing defamatory matter).

[158] *See* Wells, *supra* note 155, at 589 (presenting the dominant-purpose test as an alternative to the *Mt. Healthy* but-for test).

V. REMEDIAL EQUILIBRATION

Constitutional rights do not exist in a vacuum. They "are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence."[159] A remedial scheme might take as its goal to make the plaintiff whole for violations of constitutional rights by compensating the plaintiff who can establish a constitutional violation, causation, and damages. Our system of constitutional remedies, however, has never been so simple and so focused. The reality of constitutional litigation is that other factors have considerable influence on remedial doctrine.[160] Of particular significance, there always has been significant resistance to the prospect that plaintiffs may bring lawsuits against state officials and local governments under federal law and recover substantial damages from those officials for doing their jobs.[161] The Court's response to those pressures has been shaped by the loss allocation model and its indemnification principle.[162] Assuming that the aim of damages is to make the plaintiff whole for the loss caused by any actionable violation, it is awkward, if not impossible, to modulate recovery to reflect the need to give officials some leeway—at least as much as the Court has, often precluding all retrospective relief by recognizing an official immunity defense or narrowly defining substantive constitutional rights. Under a civil recourse approach, the Court easily could adopt a more fine-tuned approach to remedial equilibration. Damages-as-redress can be adjusted so as to allow vindication of rights—either by redefining substantive rights or by

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[159] Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999). The concern here is with remedial equilibration in connection with traditional backward-looking tort remedies. For a discussion of prospective remedies, see generally Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies-And Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006) (discussing courts' application of justiciability doctrines in the context of injunctive remedies).

[160] *See* Fallon, *supra* note 159, at 637 (advancing the thesis "that courts, and especially the Supreme Court, decide cases by seeking what they regard as an acceptable overall alignment of doctrines involving justiciability, substantive rights, and available remedies").

[161] *See, e.g.*, *id.* at 689 (noting the Rehnquist Court's expansion of state sovereignty and official immunity doctrines).

[162] *See supra* Part III.A.

retooling official immunities—without *fully* indemnifying the plaintiff.

A. LIMITS ON SUBSTANTIVE RIGHTS

In the past, the Supreme Court has sometimes responded to concerns about expanding constitutional tort obligations by declining to recognize a constitutional violation in the first place. In *Paul v. Davis*[163] and *Siegert v. Gilley*,[164] the Court turned away plaintiffs who claimed that the defendants made defamatory statements about them, causing demonstrable harm to their reputations. *Paul* held that reputation, standing alone, is not part of the "liberty" or "property" protected by the Due Process Clause of the Fourteenth Amendment.[165] In reaching this result, the Court expressed its unwillingness to treat § 1983 as "a font of tort law to be superimposed" on state protections.[166] *Siegert* presented an even more difficult problem for the Court because the complaint alleged that the defendant acted "maliciously and in bad faith [in] publishing a defamatory *per se* statement . . . which [he] knew to be untrue, or with reckless disregard as to whether it was true or not."[167] Unmoved by these allegations, the Court simply relied on its earlier ruling, pointing out that "[o]ur decision in *Paul v. Davis* did not turn . . . on the state of mind of the defendant, but on the lack of any constitutional protection for the interest in reputation."[168]

As a matter of constitutional principle, *Paul* and *Siegert* are hard to swallow because they seem to permit state officers to inflict serious harm based on utterly inexcusable motives without any accountability to the injured person.[169] The explanation for

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[163] 424 U.S. 693 (1976).

[164] 500 U.S. 226 (1991).

[165] *See* 424 U.S. at 710–12 (distinguishing cases in which the harm to reputation was accompanied by denial of some other "right vouchsafed . . . by the State").

[166] *Id.* at 701.

[167] 500 U.S. at 229 (internal quotation marks omitted).

[168] *Id.* at 234.

[169] The lower courts have softened the impact of the cases, with the Supreme Court's implicit approval or indifference, by permitting recovery under the "stigma-plus" doctrine. To prevail, the plaintiff must show not only a stigma resulting from the defendant's actions, but also some other deprivation, such as a job. *See, e.g.*, Humphries v. Cnty. of Los Angeles,

Paul and *Siegert* seems to lie in a concern about unleashing a torrent of litigation resulting in huge judgments for defamation by officers, in which findings of malice may be dubious but hard for appellate courts to overturn.[170] This account of *Paul* and *Siegert* suggests that the Court started from the premise that allowing plaintiffs to sue would necessarily result in damages awards because some plaintiffs would be able to satisfy the remedial requirements. That premise is a familiar one in common law negligence, and it is taken for granted in any body of tort law with allocation of losses as its aim. With loss allocation as integral to its understanding of tort law, the Court may have perceived the issue presented by these cases as binary: The plaintiff either would be permitted to recover compensatory damages or denied all relief on the merits. Given that stark choice, the Court opted for the latter.[171]

Starting from the premise that constitutional tort law is a system of civil recourse may lead to a different outcome. Under civil recourse principles, the aim of the litigation is redress, which requires vindication of the plaintiff's rights but does not necessarily demand full compensation.[172] Redress is a much more flexible aim than loss compensation.[173] In the common law tradition, one either obtains compensation or one does not. The only cases in which partial compensation is the norm is where the plaintiff is at fault. Many injured persons, though, never obtain

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554 F.3d 1170, 1188 (9th Cir. 2009) ("*Paul* provides that stigma-plus applies when a right or status is 'altered *or* extinguished.' " (quoting Paul v. Davis, 424 U.S. 693, 711 (1976))); Velez v. Levy, 401 F.3d 75, 90 (2d Cir. 2005) ("[W]e conclude that this combination of activities implicated [plaintiff's] 'stigma-plus' liberty interest . . . .").

[170] *See* Levinson, *supra* note 159, at 893 (noting that "the Court may have feared the wholesale federalization of tort claims against state and local government officials").

[171] This analysis puts aside the possibility, as it seems the Court did, of imposing a rule of absolute immunity from defamation liability for all officials. *Cf.* Barr v. Matteo, 360 U.S. 564, 574–76 (1959) (holding that policy making executive officials are absolutely immune from liability for common law defamation).

[172] *See* Solomon, *supra* note 2, at 1776–77 (noting this distinction between civil recourse and corrective justice).

[173] *See* Goldberg & Zipursky, *supra* note 1, at 962 ("The wrongful causing of a loss entails relief in the form of loss shifting. By contrast, to understand a tort as a wrong that generates a right of action in its victim leaves the issue of remedies open."); Zipursky, *supra* note 32, at 88 (distinguishing "the question of whether a plaintiff has a right of action from the question of what form of remedy is available to her if she does have a right of action").

complete redress against the wrongdoer, if only because the wrong cannot be measured in money.[174] Because redress is a matter of degree, it can be compromised more readily than loss without threatening the coherence of the remedial system.[175] It would be defensible under a civil recourse model, for example, to hold that the consequence of establishing liability is not an award of compensatory damages but a simple finding of liability combined with nominal damages. In such a world, victims of defamation by state officials might not be completely vindicated, but they would be better off than under the current regime, in which they are left with no recourse at all.

B. OFFICIAL IMMUNITY

Official immunity shields defendants from liability even when they have violated a plaintiff's constitutional rights and caused actual damages.[176] This doctrine, deeply entrenched in the common law,[177] is rooted in the perceived need to avoid overly deterring beneficial official acts. Without such protection, officers would act too cautiously for fear of liability.[178] The premise is that fear of liability affects official behavior, such that litigation risks impose costs not only on innocent officials but on "society as a

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[174] *See* Goldberg, *supra* note 4, at 437–38 (contrasting "tort as a law for the redress of wrongs, which in turn supports a conception of tort damages as *fair compensation*" with "tort as a law of indemnification, which in turn supports a conception of tort damages as *full compensation*, which requires the factfinder to set damages at an amount equal to the losses suffered by the tort victim as a result of the tort").

[175] *Cf.* Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 748–49 (2003) (separating the issue of whether a claimant is "entitled to an avenue of recourse" against a defendant from the issue of the nature of the remedy to which the plaintiff is entitled).

[176] *See, e.g.*, Aczel v. Labonia, 584 F.3d 52, 57–58 (2d Cir. 2009) (holding that if a jury finds both that the plaintiff suffered damages and that the defendant is entitled to qualified immunity, judgment must be entered in defendant's favor).

[177] A classic formulation of official immunity, but by no means the earliest, is Judge Learned Hand's in *Gregoire v. Biddle*, 177 F.2d 579, 580–82 (2d Cir. 1949) (justifying official immunity by a public policy that favors leaving "unredressed the wrongs done by dishonest officers" to "subject[ing] those who try to do their duty to the constant dread of retaliation").

[178] *See* Forrester v. White, 484 U.S. 219, 223 (1988) (cautioning that "the threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties"); Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982) (stating that "public officers require this protection [of immunity] to shield them from undue interference with their duties and from potentially disabling threats and liability").

whole," including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office."[179] In addition, there is concern 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.' "[180] The underlying problem is that, unlike a private actor, the official cannot capture the benefits of bold actions that risk harm to others.[181] Absent a shield from liability, officials may too often err on the side of stasis and inaction.

Building on these premises, the Court has described its immunity doctrine as embodying an effort to reach a proper balance between the policies favoring immunity and the value of providing a remedy for violations of constitutional rights.[182] In suits against officials exercising discretionary functions, the Court has ruled that qualified immunity is "the best attainable accommodation of competing values."[183] The rule is that such officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[184] Officials who exercise prosecutorial, judicial, or legislative functions are entitled to absolute immunity, which is available regardless of their motives.[185] The rationale for

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[179] *Harlow*, 457 U.S. at 814.

[180] *Id.* (alteration in original) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

[181] *See* Richardson v. McKnight, 521 U.S. 399, 408–12 (1997) (analyzing whether immunity should be extended to guards in a privately managed prison); RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 1337–38 (9th ed. 2008) (discussing "the implicit asymmetry in the incentives imposed on public officials left wholly unprotected by any immunity doctrine").

[182] *See Harlow*, 457 U.S. at 813–14 ("The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative."); *see also* Forrester v. White, 484 U.S. 219, 223 (1988) (discussing "the undeniable tension between official immunities and the ideal of the rule of law").

[183] *Harlow*, 457 U.S. at 814, 818.

[184] *Id.* at 818.

[185] *See, e.g.*, Van de Kamp v. Goldstein, 129 S. Ct. 855, 864–65 (2009) (upholding prosecutorial immunity); Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998) (endorsing legislative immunity); Stump v. Sparkman, 435 U.S. 349, 364 (1978) (finding judicial immunity). The Court has adopted what it calls a *functional* approach for deciding whether an officer enjoys absolute immunity in a given case. *See, e.g.*, *Forrester*, 484 U.S. at 230

enhanced protection for these functions, though not fully articulated in the opinions, is that the need to limit litigation is especially strong in these contexts. In connection with judicial immunity, for example, the Court worries that "[i]f judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous but vexatious, would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits."[186] When either qualified or absolute immunity is available, the suit is dismissed and the plaintiff recovers nothing.

1. Nominal Damages. The Court justifies immunity as an accommodation between the social value in compensating the plaintiff and deterring constitutional violations, on the one hand, and the social need to avoid overdeterrence of bold and effective official action, on the other.[187] Current doctrine provides that an official who successfully asserts immunity is entitled to dismissal of the suit. Thus, even nominal damages are not available. Indeed, if the whole point of damages is to make the plaintiff whole, nothing more remains at stake in the litigation once that objective is foreclosed by immunity.

Adopting the damages-as-redress principle would provide grounds for a different approach because recovery of compensatory damages no longer would be the *sole* point of the litigation. According to this principle, vindication of the plaintiff's rights is a separate and independent value.[188] Thus, one may distinguish, as the Court does not, between (a) protecting the defendant from the threat of liability for damages and (b) protecting from a judgment that the defendant violated the plaintiff's constitutional rights.[189]

(holding that a judge is not shielded by absolute immunity for personnel decisions).

[186] *Forrester*, 484 U.S. at 226–27. Note, however, that absolute judicial immunity only extends to "judicial acts." *Id.* at 230. *Forrester* itself held that judges enjoy no absolute immunity for their decisions on hiring and firing court employees. *Id.*

[187] *See Harlow*, 457 U.S. at 819 (exploring the policy concerns of governmental immunities).

[188] *See supra* notes 32–33 and accompanying text.

[189] In *Camreta v. Greene*, 131 S. Ct. 2020 (2011), the Court took a potentially significant step toward recognizing this distinction. The Ninth Circuit had ruled against the officials on the constitutional issue but had awarded them qualified immunity. *Id.* at 2027. The officials sought Supreme Court review of the ruling on the merits. *Id.* at 2028. One of the obstacles they faced was establishing Article III standing, which required them to show that

The avoiding overdeterrence rationale may justify immunity from *damages* without necessarily justifying immunity from *liability*. By conflating the two issues—liability and damages—the Court seems to indicate an indifference to vindication as an independent value, separate from compensation for loss. The Court's unarticulated premise seems to be that the only important issue is who should bear the loss and that, having decided that the plaintiff should do so, its work is done. The Court does not cite *Carey*'s dismissive treatment of vindication, but the attitude manifested in *Carey* looms in the background.[190]

Under the civil recourse damages-as-redress principle, the plaintiff's interest in vindication could be satisfied by allowing even a nominal damages award.[191] The case for nominal damages is not necessarily compelling, as the need to avoid overdeterrence may remain. Yet, it is surely weaker because that need may be adequately satisfied by disallowing substantial damages awards. Officials who know that they may be held liable for one dollar may be pushed to some degree toward caution but not nearly so much as those who know that substantial damages may be awarded against them. Officials, after all, already are vulnerable to injunctive relief for *all* constitutional violations,[192] and the Court has never considered the overdeterrence problem to be serious enough to foreclose such prospective relief. Given the ready availability of prospective relief, it seems implausible that the threat of nominal damages adds any force to the case for

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they "suffered an injury in fact." *Id.* (citation and internal quotation marks omitted). Despite their victory below, the Court ruled that they had standing to do so. *Id.* For one, the constitutional ruling "may have prospective effect on the parties," because an "official [who] regularly engages in [the challenged] conduct . . . must either change the way he performs his duties or risk a meritorious damages action." *Id.* at 2029. Similarly, if the plaintiff "may again be subject to the challenged conduct, she has a stake in preserving the court's holding." *Id.* For present purposes, the key point is that the ruling on the merits has independent force, despite the finding on immunity.

In keeping with this Article's focus on civil recourse theory, the argument advanced here—in favor of nominal damages even if officials have immunity—stresses the vindication goal of constitutional tort. For a different kind of argument in favor of nominal damages in this context, focusing on deterrence rather than civil recourse, see Pfander, *supra* note 52.

[190] *See supra* notes 53–77 and accompanying text.

[191] *See supra* Part IV.C.*1*.

[192] *See Camreta*, 131 S. Ct. at 2044 ("[C]onstitutional plaintiffs may seek declaratory or injunctive relief pursuant to standard principles of justiciability.").

immunity. In any event, the Court should address that question on its own merits. It should not conflate vindication and loss allocation by treating "liability for substantial compensatory damages"[193] as the cost of the litigation when the less restrictive alternative of allowing nominal recoveries may provide for vindication without seriously deterring worthy official behavior at all.

Under current law, officials are entitled to absolute immunity from liability for damages when they act in a judicial, prosecutorial, or legislative function.[194] Absolute immunity protects such officials even if they violate clearly established law and act maliciously to deliberately harm the plaintiff. Why should the policies that drive these immunities bite so hard that they foreclose even a recovery of nominal damages in the most egregious cases? Apart from legislators,[195] these officials may be held liable for prospective relief under current law,[196] so it does not appear that adding vulnerability to nominal damages would significantly affect their willingness to act in ways that could lead to non-compensatory liability. Only if there are reasons not yet articulated in the case law should these officials be spared *absolutely* from suits seeking to vindicate constitutional rights by imposing mere nominal damages. One such reason may be the availability of attorney's fees for a prevailing plaintiff. Arguably, the threat of such a fee award will deter the officer in the same way, if not to the same extent, as the threat of compensatory liability on the merits. If that is so, the problem can be addressed without barring relief altogether by a rule that precludes fee awards against officials who have immunity from compensatory damages. Another concern is that the costs of defending the suit,

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[193] Hurley v. Atl. City Police Dep't, 933 F. Supp. 396, 426 (D. N.J. 1996), *aff'd*, 174 F.3d 95 (3d Cir. 1999).

[194] *See supra* note 185 and accompanying text.

[195] Current law protects legislators from both prospective and retrospective remedies. *See* Sup. Ct. of Va. v. Consumers Union of the U.S., Inc., 446 U.S. 719, 731–34 (1980) (discussing precedent that held legislators immune from liability for damages and prospective relief).

[196] *See, e.g.*, Pulliam v. Allen, 466 U.S. 522 (1984) (judges are not immune from prospective relief); *see also* JOHN C. JEFFRIES, JR. ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 94–97 (2d ed. 2007) (discussing the distinction, drawn by the Court's immunity rulings, between retrospective and prospective relief).

even for just nominal damages, will inhibit these officials. If this is a sufficiently serious concern, perhaps it should override the plaintiff's interest in vindication. In evaluating the strength of this defense-costs argument, however, it is important to note that the governmental unit may well pay them.

2. The Order of Battle. Even if there are strong grounds for denying nominal damages when defendants are able to successfully assert absolute or qualified immunity, Courts still may further the civil recourse values of redress and vindication by making a more subtle change in current doctrine. In any immunity case, there are two issues: (1) whether the defendant violated the plaintiff's constitutional rights and (2) if so, whether the defendant is nonetheless entitled to immunity. *Pearson v. Callahan* addressed the order in which these two questions should be decided.[197] Before *Pearson* the Court, in *Saucier v. Katz*, had directed lower courts first to decide whether a constitutional tort had occurred.[198] *Pearson* changed course, holding that "[t]he 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."[199] After *Pearson*, a court still might start with the constitutional side of the case and reach the immunity defense only after finding for the plaintiff on the constitutional merits.[200] But now the court may elect to assume, without deciding, that the plaintiff prevails on the constitutional issue, address the immunity

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[197] 555 U.S. 223, 227 (2009) (holding the mandated order from prior cases "should not be regarded as an inflexible requirement"). For a pre-*Pearson* analysis of the issue, arguing against the view the Court took in that case, see Michael L. Wells, *The "Order-of-Battle" in Constitutional Litigation*, 60 SMU L. REV. 1539, 1543 (2007). For post-*Pearson* assessments of the Court's approach, see Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 163–75, and John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 117–31.

[198] 533 U.S. 194, 201 (2001) (mandating this approach).

[199] 555 U.S. at 236.

[200] *See* Ass'n for L.A. Deputy Sheriffs v. Cnty. of Los Angeles, 648 F.3d 986, 997 (9th Cir. 2011) (noting that the order of analysis is within the court's discretion); *see, e.g.*, Moore v. City of Desloge, 647 F.3d 841, 846 (8th Cir. 2011) (treating the constitutional issue first); Coffin v. Brandau, 642 F.3d 999, 1006 (11th Cir. 2011) (same); Mlodzinski v. Lewis, 648 F.3d 24, 32 (1st Cir. 2011) (same).

issue first, and rule for the defendant without ever resolving the constitutional question.[201]

Pearson may promote efficient judicial administration because the *Saucier* "procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case."[202] But more is at stake in these cases than judicial time and government dollars. To the extent lower courts take advantage of the opportunity *Pearson* offers them to avoid constitutional questions, the effect of this rule is to deny deserving plaintiffs the opportunity to obtain any vindication at all, even a mere public declaration that they suffered a constitutional wrong. In addition to blocking even nominal damages for specific plaintiffs, *Pearson* will slow down, in a systematic way, the clear articulation of substantive constitutional norms. Rights that cannot be asserted either defensively or in suits for prospective relief will remain undefined.[203] To the extent those rights are inchoate, defendants will successfully assert immunity time and again, frustrating the plaintiff's interest in recourse.[204] Vindication of rights would be better served by greater clarity as to the constitutional rights persons hold, not less. To be sure, constitutional avoidance may retard the growth of doctrines that restrict constitutional rights. The development of such doctrines cannot be seen as frustrating the vindication of rights, however, because the very point of these doctrines is to reveal when there are no rights to vindicate at all.[205]

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[201] *See, e.g.*, James v. Rowlands, 606 F.3d 646, 652–53 (9th Cir. 2010) (ruling for defendants on immunity without deciding whether they committed a constitutional violation); PJ *ex rel.* Jensen v. Wagner, 603 F.3d 1182, 1197 (10th Cir. 2010) (same). Sometimes the judges on a panel disagree as to which issue they should address first. In *Weise v. Casper*, 593 F.3d 1163, 1167 (10th Cir. 2010), for example, the majority chose to dispose of the case on qualified immunity grounds without reaching the First Amendment issue. The dissent, however, would have decided the constitutional issue first. *Id.* at 1171 (Holloway, J., dissenting).

[202] *Pearson*, 555 U.S. at 236–37.

[203] *See* Jeffries, *supra* note 197, at 132–36 (pointing out that "[t]he real problem with *Pearson* . . . is that constitutional tort actions are sometimes primary").

[204] *See* Wells, *supra* note 197, at 1558–65 (discussing tensions between the avoidance policy and the aims of constitutional tort).

[205] An interesting empirical study "provides evidence that while a mandatory sequencing regime [i.e., requiring courts to resolve the constitutional issue first] may disadvantage plaintiffs bringing § 1983 actions, it may also have a rights-affirming effect for plaintiffs,

VI. ATTORNEY'S FEES

In enacting the Civil Rights Attorney's Fees Awards Act of 1976[206] Congress sought to encourage lawyers to take cases brought under § 1983 and similar statutes to enforce constitutional rights.[207] The Act authorizes the court to award attorney's fees to a "prevailing party" as part of the costs.[208] Courts ordinarily calculate the fee by determining "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."[209] Courts may modify this figure, called the "lodestar," depending on the "results obtained" in the case.[210] In determining the degree of success, one factor is the amount of damages obtained.[211] A plaintiff who succeeds only on some claims will receive a lower fee award unless the claims are so interrelated that time spent on one theory cannot be separated from time spent on another.[212] The statute authorizes fee awards to plaintiffs who obtain prospective relief as well.[213]

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thereby benefiting potential future plaintiffs bringing similar § 1983 claims." Greg Sobolski & Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of* Pearson v. Callahan, 62 STAN. L. REV. 523, 526–27 (2010).

206 42 U.S.C. § 1988 (2006).

207 *See* THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976, S. REP. NO. 94-1011, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1908, 5910 (noting that "fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain").

208 42 U.S.C. § 1988(b). The statute reads, in pertinent part: "In any action or proceeding to enforce [§ 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ." *Id.* The Court reads the statute as permitting an award to a victorious defendant "only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." Hensley v. Eckerhart, 461 U.S. 424, 429 n.2 (1983); *see, e.g.*, Fox v. Vice, 131 S. Ct. 2205, 2217 (2011) (noting that where an attorney's work is necessary for both frivolous and related, non-frivolous claims, attorney's fees should not be awarded for the overlapping work).

209 *Hensley*, 461 U.S. at 433; *see also* Gisbrecht v. Barnhart, 535 U.S. 789, 801 (2002) (explaining that since *Hensley*, "[t]he 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence" (quoting Burlington v. Dague, 505 U.S. 557, 562 (1992)) (internal quotation marks omitted)).

210 *Hensley*, 461 U.S. at 434.

211 Farrar v. Hobby, 506 U.S. 103, 114–16 (1992) (limiting attorney's fees for prevailing party who only recovered nominal damages).

212 *Hensley*, 461 U.S. at 434–35.

213 *See* NAHMOD ET AL., *supra* note 6, at 709.

By defining success in terms of dollars won, the Court seems to have rejected civil recourse principles, which would measure success by whether the plaintiff obtained redress for the constitutional wrong. *Farrar v. Hobby*[214] illustrates the problem. There, the plaintiff obtained a finding that the defendant had violated his constitutional rights, but he received only nominal damages.[215] The Court held that the plaintiff was a prevailing party within the terms of the statute, but also ruled that "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all."[216] Some reasoning in the opinion suggests that the Court believes that constitutional tort suits mainly concern loss allocation. For example, the Court cited *Carey v. Piphus*[217] for the proposition that nominal damages would be available absent proof of harm but then declared that "[i]n a civil rights suit for damages . . . the awarding of nominal damages also highlights the plaintiff's failure to prove actual, compensable injury."[218] One could infer from this language that the absence of compensable loss undermines the plaintiff's claim to a fee award, perhaps in every case.

In the years since *Farrar*, lower courts have divided on the issue of whether attorney's fees are available for plaintiffs who secure only nominal damages.[219] If and when the Supreme Court addresses this question, civil recourse principles would weigh heavily on the plaintiff's side. *Farrar* itself suggests that a categorical reading of the case is mistaken. For example, a plaintiff who from the outset seeks only nominal damages to vindicate a right is not covered by the reasoning of *Farrar*, which stresses the gap between the relief the plaintiff sought and that obtained.[220] In addition, the Court split 5-to-4, and Justice

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[214] 506 U.S. 103 (1992).

[215] *Id.* at 107.

[216] *Id.* at 115 (citation omitted).

[217] *See supra* notes 54–59 and accompanying text.

[218] *See supra* notes 54–59 and accompanying text.

[219] *See* NAHMOD ET AL., *supra* note 6, at 709–10 (citing cases on both sides of the issue). For a recent illustration, see *Guy v. City of San Diego*, 608 F.3d 582, 588–90 (9th Cir. 2010) (overturning district court's refusal to award a fee).

[220] *Farrar*, 506 U.S. at 115 (noting that "[a] plaintiff who seeks compensatory damages but receives no more than nominal damages . . . should receive no attorney's fees at all").

O'Connor wrote a separate concurring opinion in which she stressed that "an award of nominal damages can represent a victory in the sense of vindicating rights even though no actual damages are proved."[221] The problem in *Farrar* is that the plaintiff was unable to show a causal connection between the defendants' violation of his due process rights and the $17 million in business losses for which he sued.[222] In these circumstances, it seems appropriate to characterize his nominal damages award as "technical" success.[223] According to civil recourse theory, however, the point of the cause of action for many plaintiffs is to empower them to seek redress, not to make them whole for harm suffered. Plaintiffs who sue to vindicate their constitutional rights, win on the constitutional claim, yet fail to persuade the jury of compensatory damages may be more deserving of a fee award under this theory.

On another point, Justice O'Connor's concurring opinion in *Farrar* stands at odds with civil recourse theory. In particular she suggested that in deciding on a fee award in a nominal damages case, the court should consider "[t]he difference between the amount recovered and the damages sought," "the significance of the legal issue on which the plaintiff claims to have prevailed," and whether the plaintiff "accomplished some public goal."[224] The first of these considerations may have a bearing on whether vindication was the point of the litigation, whether the plaintiff genuinely succeeded, whether a fee award is appropriate, and the proper size of the fee. Thus, failure to obtain a large award after having sought one arguably suggests that simple vindication was not the plaintiff's primary goal in bringing suit. The other two factors stand on a different footing. Applying them, lower courts have granted or denied fees based on considerations that shift attention away from the plaintiff's success at redressing the personal wrong—the goal of the suit under civil recourse theory.[225]

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[221] *Id.* at 121 (O'Connor, J., concurring).

[222] *Id.* at 106.

[223] *Id.* at 113–14 (internal quotation marks omitted).

[224] *Id.* at 121–22 (O'Connor, J., concurring).

[225] *See, e.g.*, Guy v. City of San Diego, 608 F.3d 582, 589 (9th Cir. 2010) (stating that although the plaintiff received only nominal damages, "we conclude that a fee award serves a purpose beneficial to society by encouraging the City of San Diego to ensure that all of its

Simply put, the value of the plaintiff's success to the public at large has nothing to do with the nature and severity of the harm suffered by the plaintiff.[226] In the end, perhaps considerations that focus on the public interest should control application of the fee statute, but if so, that result should flow from principles of statutory interpretation, including fidelity to Congress's underlying purpose. And it should not be overlooked that basing fees on public-oriented concerns is incompatible with the distinctive vision of civil recourse theory. To the extent that civil recourse norms should govern fee awards for nominal damages, in particular, the decisive factor is whether the plaintiff succeeded on the plaintiff's terms, not whether the litigation produced benefits for the public.

VII. OBJECTIONS

A. AN INAPPROPRIATE RESOURCE

A central principle of statutory interpretation is that courts should follow the legislature's directives.[227] Since § 1983 was enacted by the Forty-Second Congress in 1871, it is quite reasonable to question the legitimacy of using civil recourse, or any other modern tort theory, to resolve cases arising under that statute. Perhaps the only appropriate sources for interpreting the statute are its language, its legislative history, and the common law as it stood in 1871. Such a view of the statute presents an array of problems, however.

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police officers are well trained to avoid the use of excessive force"); Mahach-Watkins v. Depee, 593 F.3d 1054, 1061–63 (9th Cir. 2010) (awarding a fee because the legal issue was significant and accomplished a public goal).

[226] Sometimes courts mention *both* the public benefit theme and the intangible nature of the right vindicated by the litigation. *See, e.g.*, Lowry *ex rel.* Crow v. Watson Chapel Sch. Dist., 540 F.3d 752, 765 (8th Cir. 2008) (noting that "[p]laintiffs obtained an injunction that benefitted all of the students in the school district, and the free speech right vindicated was not readily reducible to a sum of money").

[227] *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 13 (1994) (documenting the proposition that "[t]heories of statutory interpretation in the United States have in this century emphasized the original meaning of statutes, and debates have focused on identifying the best evidence of that original meaning").

To begin with, if the Court limits itself in this way, it would be entirely unable to resolve many important questions because the statute is brief and sweeping,[228] the legislative history is mainly concerned with other parts of the Civil Rights Act of 1871,[229] and the common law doctrine we now refer to as "torts" was in its infancy.[230] As a result, "[t]he text and history of § 1983 cannot themselves establish the boundaries of the statute's enforcement."[231] Even if the Court could discover sufficient materials to work effectively with § 1983, constitutional torts law has a broader reach. It includes suits against federal officers under the federal common law cause of action recognized in *Bivens*[232] to which the statute is inapplicable.

For present purposes, a sufficient answer to this unauthorized source objection to using civil recourse theory is that the Supreme Court pays little attention to the argument that § 1983's text and background are the only appropriate sources for adjudicating constitutional tort issues. Although a few of the Court's opinions do rely on 1871 materials, many others do not.[233] Thus, throughout the history of constitutional tort litigation, the Court routinely has resorted to principles, policies, and theories that

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[228] *See supra* note 18 and accompanying text.

[229] *See* Michael Wells, *The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules*, 19 CONN. L. REV. 53, 65–68 (1986) (discussing the legislative history of the Civil Rights Act of 1871). The statute was aimed at suppressing Ku Klux Klan terrorism in the South after the Civil War by means of criminal penalties, by authorizing the President to suspend habeas corpus and send troops to quell disturbances, and by authorizing the now § 1983 private cause of action. Most of the debate concerned the general issue of whether the statute was needed. As for the particulars of the statute, there was more debate concerning whether the President should be authorized to send troops than about the private remedy. *Id.*

[230] Holmes's essays written in the 1870s have been described as "the first serious attempt in the common law world to give torts both a coherent structure and a distinctive substantive domain." Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1232, 1256 (2001).

[231] Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 54 (1989).

[232] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) ("Having concluded that petitioner's complaint states a cause of action under the Fourteenth Amendment, we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment." (internal citations omitted)).

[233] Thus, the key ruling on qualified immunity, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), does not rely at all on historical arguments. *See also* JEFFRIES ET AL., *supra* note 196, at 186–88 (questioning whether the Court's use of history actually accounts for its holdings).

were not available to the Forty-Second Congress. Civil recourse theory stands on the same footing as this array of post-1871 materials. In fact, if civil recourse theory were rejected simply on the basis of its modernity, then most of the Court's constitutional tort doctrine would have to go with it.

In *Owen v. City of Independence*, for example, Justice Brennan examined the history of municipal immunity[234] but went on to discuss "considerations of public policy."[235] The official immunity decisions give a tip of the hat to history,[236] but the most important decision of all, *Harlow v. Fitzgerald*, abandons historical analysis altogether in favor of relying on policy considerations.[237] Notably, *Harlow* was a *Bivens* case in which the Court opted for a uniform rule for all constitutional tort cases regarding official immunity.[238] Uniformity could be achieved only by dropping the pretense that § 1983 cases were to be adjudicated only by implementing 1871 legislative intent, rather than through tort policy as utilized in *Bivens*.

The Court's treatment of collateral estoppel in § 1983 cases is part and parcel of this same story. In 1871, that doctrine applied only in cases of "mutuality," so a party would be estopped from relitigating an issue in a later case only if the party asserting estoppel also would be bound by the earlier ruling.[239] In *Allen v. McCurry*, however, the Court rejected the mutuality requirement in § 1983 litigation in favor of the modern doctrine, which rejects this strict limit on collateral estoppel.[240] Put bluntly, the Court rejected the rule the Forty-Second Congress would have presumed

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[234] 445 U.S. 622, 638–50 (1980).

[235] *Id.* at 650.

[236] *See, e.g.*, Tower v. Glover, 467 U.S. 914, 920–22 (1984) (considering the history of § 1983); Stump v. Sparkman, 435 U.S. 349, 355–56 (1978) (citing history); Pierson v. Ray, 386 U.S. 547, 553–55 (1967) (citing centuries-old case law); Tenney v. Brandhove, 341 U.S. 367, 372–76 (1951) (same).

[237] 457 U.S. 800, 813–14 (1982) (conducting policy-based inquiry balancing competing values); *see also* Forrester v. White, 484 U.S. 219, 224 (1988) (describing the "functional approach" the Court uses to decide immunity questions).

[238] 457 U.S. at 818 n.30.

[239] *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 335 (1979) (noting that at common law, collateral estoppel only applied when mutuality existed).

[240] 449 U.S. 90, 97 (1980). The Court noted that "the requirement of mutuality of estoppel was still alive in the federal courts until well into this century," indicating the Court's modern rejection of it. *Id.*

to be applicable in favor of a doctrine shown to be more sensible in ensuing years.[241]

A realistic account of the Court's methodology in developing constitutional tort law would acknowledge that the Court has employed a variety of methods and materials. Sometimes the Court does approach § 1983 cases with a focus on traditional methods of statutory interpretation. In *Monell v. Department of Social Services*, for example, the Court based its ruling against municipal vicarious liability solely on its analysis of § 1983's legislative history.[242] Sometimes the Court actually has looked to the tort law as it stood in 1871.[243] Other cases, however, borrow directly from modern tort law, as *Carey* did in adopting "the compensation principle."[244] The Court's immunity cases often rely on modern tort policy,[245] attempting to balance the constitutional values served by imposing liability with the constraints on liability necessary to assure effective government.[246] Taken as a whole, the Court's § 1983 case law suggests that it sometimes takes due account of the background and aims of the statute but that it also—and often—considers other factors as well.[247] Whatever the

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[241] *Id.* at 97–101; *see also id.* at 114 (Blackmun, J., dissenting) (noting that the Forty-Second Congress would not have approved of the modern rule).

[242] 436 U.S. 658, 691–92, 692 n.57 (1978). Critics of *Monell* charge that the Court misread the legislative history. Vodak v. City of Chicago, 639 F.3d 738, 747 (7th Cir. 2011); *see, e.g.*, David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2196 (2005) ("The Court's conclusions rest on historically inaccurate assumptions about the nineteenth-century justifications for respondeat superior."); Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 250 (1987) ("The *Monell* Court read the language and history of § 1983 erroneously.").

[243] *See, e.g.*, Smith v. Wade, 461 U.S. 3, 34 (1983) ("In the absence of more specific guidance, we looked first to the common law of torts (both modern and as of 1871) . . . ."); Owen v. City of Independence, 445 U.S. 622, 638–50 (1980) (finding insufficient evidence of municipal immunity at common law to warrant § 1983 municipal immunity).

[244] Carey v. Piphus, 435 U.S. 247, 255 (1978). The Court noted that the Forty-Second Congress did not directly address the issue of damages but recognized that the compensation principle dominates modern lower courts. *Id.*

[245] *See, e.g.*, *Owen*, 445 U.S. at 650–56 (discussing "considerations of public policy" that count against municipal immunity).

[246] *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 813–14 (1982) (stating that "[t]he resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative").

[247] Commentators across the ideological spectrum agree that the Court does, and should, exercise a creative function in addressing constitutional tort issues. *See, e.g.*, Paul M.

shortcomings of this approach, it also has its merits, including pragmatic adaptation of the doctrine in light of changed conditions and openness to new insights. New ideas always have been welcome in constitutional tort law, and the ideas behind civil recourse theory should be no exception to the extent they reflect important values.

B. AN INADEQUATE REMEDY

A different objection to drawing on civil recourse norms in constitutional tort law is that attentiveness to those norms would result in insufficient protection for constitutional rights. Constitutional tort law is a crucial element in our three-pronged system of remedies for constitutional violations. Besides these tort suits, only two other remedies may be available depending on the circumstances. First, the Constitution may serve as a shield against an enforcement action brought against the holder of the right. Persons who are charged with crimes or named as defendants in civil cases, for example, may assert constitutional rights as defenses. Criminal defendants charged with subversive advocacy and civil defendants sued for defamation possess well-recognized defenses based on the First Amendment. The second mechanism is prospective relief. Persons who are subject to ongoing or threatened future constitutional violations may seek injunctions or declaratory judgments. Constitutionally dubious statutes or ongoing practices like a school district's restrictions on student speech[248] may be challenged in this way.

Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 622 n.49 (1981) (explaining that the Supreme Court has held that "the post-Civil War jurisdictional and remedial statutes . . . leav[e] much to interpretation in light of contexts and postulates not always visible on their surface"); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1051–54 (1989) (noting how "the old meta-rule [of statutory interpretation] has lost much of its force, but the common law exercises a substantial influence on statutory interpretation in other ways"); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 421 (1989) (stating that sometimes "the words [of statutes] necessarily require courts to look to sources outside of the text").

[248] *See, e.g.*, Lowry *ex rel.* Crow v. Watson Chapel Sch. Dist., 540 F.3d 752, 762–63 (8th Cir. 2008) (affirming district court holding "permanently enjoining defendants from disciplining any student for wearing a band substantially similar to those worn by plaintiffs in this case").

The value of constitutional torts as part of the tripartite system of constitutional remedies is that, in some fact patterns, neither of these other remedies is available and constitutional wrongs will go unaddressed in the absence of tort relief. These are situations in which the constitutional violation occurred in the past and recurrence is unlikely, such as when the police have broken up a particular peaceful demonstration, a government agency has fired a particular person for protected speech, or prison guards have mistreated a particular inmate. In each of these cases, there is no enforcement proceeding against the right holder, so the right may not be raised defensively. Prospective relief is also unavailable because the violation occurred in the past and is unlikely to recur, so the forward-looking equitable relief makes no sense and indeed would offend the jurisdictional restraints imposed by the Constitution.[249] As a result, in these situations the only means available for vindicating constitutional rights is a constitutional tort suit. Because the real-world value of a right depends on the remedies available for it,[250] constitutional torts thus can be seen as every bit as essential to the system of constitutional remedies as constitutional defenses and suits for prospective relief.

The problem with current constitutional tort law is that the retrospective remedy is systematically less effective than either of its partner remedies. When the putative right-holder is the defendant in an enforcement proceeding, ordinarily there will be no obstacle to raising the right defensively. When the challenged action is ongoing or threatens to recur, the putative right-holder ordinarily will have easy access to injunctive or declaratory relief, so long as the plaintiff can satisfy the Court's requirements of standing, ripeness, and lack of mootness. Though plaintiffs whose claims require resort to a constitutional tort suit will have no difficulty with those requirements, they still may lose, despite the soundness of their claims, because of official immunity, lack of vicarious liability, or difficulties in proving damages or causation.

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[249] *See* City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) (holding that plaintiff was not entitled to an injunction "[a]bsent a sufficient likelihood that he will again be wronged in a similar way").

[250] *See* Levinson, *supra* note 159, at 887 (noting that "the cash value of a right is often nothing more than what the courts . . . will do if the right is violated").

The resulting danger is a general under-enforcement of those constitutional norms that typically depend on tort suits for enforcement.[251]

Civil recourse theory does not fully solve this problem and in some ways exacerbates it. For example, a central feature of civil recourse theory is to leave crucial decisions in the hands of the aggrieved person. The tort system *empowers the plaintiff* to seek redress.[252] To the extent plaintiffs are unable or unwilling to do so, officials who violate constitutional rights will face no consequences.[253] In addition, official immunities remain a hurdle under a civil recourse approach. By focusing on empowering the victim, civil recourse theory casts doubt on the current practice of allowing suits by survivors of victims who have died in the interval since the constitutional violation, at least where the death is unrelated to that breach.[254] On the other hand, civil recourse theory favors presumed damages.[255] In addition, more plaintiffs would have access to nominal damages if, in accordance with civil recourse norms, the causation and immunity doctrines only blocked recovery of substantial damages.[256]

Given this mixed picture, it is unclear whether a civil recourse approach to constitutional torts is optimal from the perspective of one bent on securing a robust panoply of constitutional remedies. So how is civil recourse theory to be defended against the

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[251] *See* Jeffries, *supra* note 197, at 117 ("If, however, constitutional rights are to function as operational limits on government rather than mere figures of rhetoric, there must be an adequate *structure* of enforcement.").

[252] *See* Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 99–100 (2010) (arguing that tort "empowers" victims); Solomon, *supra* note 2, at 1805, 1806 (discussing how tort law upholds the authority of the victim by giving her an opportunity to hold the tortfeasor accountable).

[253] For this reason, a civil recourse approach would rule out a private attorney general theory of constitutional torts in which a litigant could bring a *qui tam* action, where the victorious plaintiff obtains a bounty for bringing suit to enforce the law. In any event, specific statutory authorization is required for such suits. *See* Evan Caminker, Comment, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341, 345–46 (1989) (describing two doctrinal hurdles to qui tam actions, (1) the exclusive authority of the Executive Branch to enforce public interests and (2) Article III's standing requirements).

[254] For a collection of cases on this and other issues bearing on suits brought by persons other than the direct victims of constitutional wrongs, see NAHMOD ET AL., *supra* note 6, at 581–92.

[255] *See supra* Part IV.A.

[256] *See supra* notes 145–48 and accompanying text.

underenforcement-based line of attack? The best defense is one of confession and avoidance. The confession: civil recourse theory only has these shortcomings in the eyes of those whose concerns focus on avoiding underenforcement of constitutional rights. Avoidance means that this supposed shortcoming must be situated within the larger context of the law of constitutional remedies. The ultimate goal of the three-pronged system—asserting rights defensively, asserting them prospectively, and asserting them retrospectively in suits for damages—is not to ensure that a satisfactory remedy exists for every violation. Supreme Court precedent simply does not support that proposition.[257] The availability of constitutional remedies is better understood as "a principle, not an ironclad rule."[258] A more realistic aim is to devise "a general structure of constitutional remedies adequate to keep government within the bounds of law."[259] While the tripartite structure of constitutional remedies is hardly perfect, it provides an array of tools for achieving that aim.

This Article is concerned with the tort prong of this system, i.e., the rules governing backward-looking relief. The core argument for following civil recourse theory in addressing these rules is that, whatever its failings, the theory concentrates on the *constitutional* dimension of the case. Thus, civil recourse consistently and broadly favors at least *some* vindication of constitutional rights and *some* redress of constitutional wrongs. By contrast, ordinary tort law focuses on the allocation of losses that *result from* constitutional violations. In focusing on loss rather than vindication of rights, ordinary tort principles may well miss the main point of constitutional tort law.

Attentiveness to civil recourse principles would help avert the danger, already apparent in much of the case law, of assimilating constitutional tort into ordinary tort law or other forms of regulation. Of particular importance, during the past thirty years, the Court has denied the *Bivens* cause of action to litigants who

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[257] *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 87 (1999) (pointing out that "a right-remedy gap is probably inevitable in constitutional law and is in any event deeply embedded in current doctrine").

[258] Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778 (1991).

[259] *Id.* at 1736.

could have pursued civil service remedies,[260] social security remedies,[261] military justice remedies,[262] remedies under the Federal Tort Claims Act,[263] or state tort remedies.[264] In similar fashion, on several occasions the Court has adverted to the availability of state tort remedies in rejecting liability under § 1983.[265] To the extent constitutional tort law resembles ordinary tort or administrative regulation, as it does when it focuses on loss allocation, the case for requiring resort to state tort law and other non-constitutional remedies is comparatively strong. A civil recourse approach, however, highlights the distinctive role of redress in constitutional torts and therefore is better suited to repel the tendency to erode constitutional rights in this way. If judges and lawmakers are unconvinced of the benefits of loss allocation in constitutional torts and find that civil recourse offers a more appealing rationale for this type of litigation, they will be less likely to curb the freestanding vibrancy of § 1983 and *Bivens*.

VIII. CONCLUSION

Civil recourse theory has much to offer constitutional tort law by freeing it from the notion that the sole or main point of such litigation is to make the plaintiff whole. These suits are brought to

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[260] *See* Bush v. Lucas, 462 U.S. 367, 388–90 (1983) (denying a *Bivens* cause of action to a federal employee).

[261] *See* Schweiker v. Chilicky, 487 U.S. 412, 424–29 (1988) (concluding that a *Bivens* cause of action was unavailable); *see also* Wilkie v. Robbins, 551 U.S. 537, 549–62 (2007) (considering other administrative remedies and denying *Bivens* claim).

[262] *See* Chappell v. Wallace, 462 U.S. 296, 298–304 (1983) ("[I]t would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers.").

[263] *See* Hui v. Castaneda, 130 S. Ct. 1845, 1851, 1848 (2010) (preventing the litigant's *Bivens* claim).

[264] *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 73–74 (2001) ("The caution toward extending *Bivens* remedies into any new context . . . forecloses such an extension here."); *see also* Alba v. Montford, 517 F.3d 1249, 1254 (11th Cir. 2008) (applying the "alternative remedies" principle to deny *Bivens* claim).

[265] Admittedly, the principal cases are old, but they still are viable precedents. *See* Parratt v. Taylor, 451 U.S. 527, 543–44 (1981) (stating that state remedies may provide all the process that is due in connection with a deprivation of property); Ingraham v. Wright, 430 U.S. 651, 674–82 (1977) (noting that the availability of a state tort remedy provides sufficient process in connection with corporal punishment); Paul v. Davis, 424 U.S. 693, 711–12 (1976) (rejecting plaintiff's attempt to bring a constitutional tort suit for defamation and leaving the matter to state tort law).

redress constitutional wrongs. Civil recourse thinking puts rights, wrongs, and vindication at the core of the litigation and furnishes a normatively attractive set of principles for resolving the remedial issues raised in § 1983 and *Bivens* cases. The Supreme Court has not paid heed to this basic point. Rather, it typically has acted on the unexamined and dubious premise that constitutional torts should reflect the main currents of modern tort law, an area dominated by the general theme of allocating losses. Rather than thinking carefully about the distinctive features of constitutional torts, the Justices–and indeed many of their critics–have drawn superficially appealing, but fundamentally mistaken, analogies to the general principles of modern negligence law, under which there is no liability without loss.

Professor Cass Sunstein once observed that "[r]easoning by analogy is the most familiar form of legal reasoning."[266] In view of the striking similarities between constitutional torts and common law torts, it is understandable that the Court has looked to the common law for solutions to constitutional tort issues. Arguments by analogy appeal to judges for a variety of reasons. Borrowing old solutions for kindred problems saves time and effort. Fairness, prudence, and stability favor resorting to established rules developed in one context to deal with ostensibly similar situations. Judges follow the doctrine of precedent all the time, and arguments by analogy resemble (and are themselves analogous to) arguments from precedent.

The familiarity of an argument, however, is not an indication of its force. In law as elsewhere, the strength of an argument by analogy depends on whether the two things analogized are sufficiently similar to justify treating them the same.[267] As Judge Posner notes in his critique of analogical reasoning, "what is really involved is querying (or quarrying) the earlier case for policies that may be applicable to the later one."[268] Is constitutional tort law sufficiently akin to ordinary tort law, and particularly to ordinary

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[266] Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 741 (1993).

[267] *See id.* at 745 (explaining that the force of an argument from analogy depends on whether "*A* and *B* are 'relevantly' similar, and that there are not 'relevant' differences between them").

[268] RICHARD A. POSNER, OVERCOMING LAW 518 (1995).

negligence law, to validate the Court's arguments by analogy? The answer emphatically is no. Constitutional torts protect a more fundamental set of rights against a more powerful set of defendants. Few of the policies that are relevant to the loss allocation goals of modern tort theory have much bearing on constitutional torts. Going forward, the Supreme Court should respond to these realities. It should abandon the common law analogies that have come to dominate § 1983 cases and the *Bivens* doctrine and rebuild the intellectual structure of constitutional tort doctrine from the ground up. Hopefully, this Article has shown some ways in which civil recourse theory can contribute to that project.