Essay

Disaggregating Constitutional Torts

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In the four decades since *Monroe v. Pape*,[1] the Supreme Court has crafted a vast body of law on money damages for violations of constitutional rights. After twenty-five years of following those decisions, I have come to think that *Monroe* was wrong. The error lay not in the result, which was admirable, but in the attribution of that result to a Reconstruction-era statute applicable indifferently to all rights. Treating the availability of damages as a transsubstantive exercise in statutory interpretation obscures important differences among rights and suppresses clear thinking about remedies. A better strategy would abandon the "one-size-fits-all" approach and adapt remedies to specific rights. The availability of money damages would then depend on an assessment of their role in enforcing particular rights—and especially on the availability of alternative remedies that make damages more or less needful.

The *Monroe* Court based its decision on the Civil Rights Act of 1871, now codified at 42 U.S.C. § 1983,[2] citing famously inapposite legislative

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1. 365 U.S. 167 (1961).
2. The statute provides, in pertinent part:

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

42 U.S.C. § 1983 (1994).

history for the proposition that Congress had imposed federal damages liability for violations of federal rights by state officers, regardless of the adequacy of state law.[3] Whether that was in fact Congress's intent is still controversial,[4] although the weight of opinion supports the Court's view.[5] More compelling than the shards of legislative history was the manifest hardship of making civil rights plaintiffs demonstrate the inadequacy of state law before seeking federal relief. One need only think of the difficulty of proving selective prosecution to imagine the burden of having to show a "custom" or "usage" of indifference to federal rights in order to get redress in any individual case. Of this very powerful reason for creating a free-standing federal remedy, the *Monroe* Court said nothing at all.

Monroe thus began a jurisprudential tradition that still afflicts the law of § 1983. Questions are asked and answered as if they were of interest only to antiquarians.[6] The history invoked is never conclusive, often irrelevant,[7] and sometimes absurd.[8] Results are attributed to offhand remarks of long-

3. Writing for the Court, Justice Douglas found that the statute had three aims: (1) to override discriminatory state laws; (2) to provide a federal remedy where procedural obstacles corrupted the enforcement of state law; and (3) "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Monroe*, 365 U.S. at 173-74. Obviously, these purposes do not necessarily signal an intent to create a federal remedy where state law is adequate in both theory and practice.

4. *See, e.g.*, Eric H. Zagrans, *"Under Color of"* What *Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 502 (1985) (arguing that "[a]s a matter of statutory construction *Monroe* is flatly wrong").

5. *See, e.g.*, David Achtenberg, *A "Milder Measure of Villainy": The Unknown History of 42 U.S.C. § 1983 and the Meaning of "Under Color of" Law*, 1999 UTAH L. REV. 1, 5 (seeking to dispel the "remarkably persistent myth that the Forty-second Congress never intended the provision to cover constitutional wrongs unless those wrongs were actually authorized by state law"); Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323, 325 (1992) (condemning the "Frankfurter-Zagrans misinterpretation of section 1983" as "not only wrong, but wildly ahistorical").

6. For an example of this approach, see *Smith v. Wade*, 461 U.S. 30 (1983), in which the Court engaged in an extensive review of nineteenth-century sources to support its conclusion that punitive damages should be available for "callous indifference" to federal rights. *Id.* at 56. Three Justices performed a similar historical exegesis to support a requirement of "bad faith or improper motive on the part of the defendant" before damages could be awarded. *Id.* (Rehnquist, J., dissenting). Only Justice O'Connor thought that the Court should consult "the policies underlying § 1983 to determine which rule [is] best." *Id.* at 93 (O'Connor, J., dissenting).

7. *Monroe* itself is an example. More flamboyant is *Pulliam v. Allen*, 466 U.S. 522 (1984), in which the Court recounted the techniques through which the King's Bench asserted primacy among English courts as a basis for concluding that American judges were not absolutely immune from injunctive relief. *Id.* at 529-36. The Court conceded that "[t]he relationship between the King's Bench and its collateral and inferior courts is not precisely paralleled in our system by the relationship between the state and federal courts," *id.* at 535, but insisted that the history of this question, as it arose in a different country in a different era and under a different legal system, was nonetheless "highly relevant," *id.* at 536.

8. See, for example, *Owen v. City of Independence*, 445 U.S. 622 (1980), in which the Court considered whether municipalities and other local governments would have the same qualified immunity from damages liability available to all other "persons" sued under § 1983. The Court found that, for most purposes, municipalities enjoyed absolute, not qualified, immunity in the nineteenth century and inferred that they therefore should have no immunity at all in the twentieth. *Id.* at 638-50.

dead legislators who could not have foreseen the issues at hand or the constitutional landscape in which they arise. One can only sympathize with Justices who feel obliged to divine what members of the Forty-second Congress would have thought, had they thought, of something that never crossed their minds. It's rather like asking, "If I had a sister, would she like cheese?"[9]

Worse, the relentless historicity of § 1983 decisions diverts attention from the merits. Important issues are resolved without discussion of any reason why we should care. In *Monroe*, for example, the Court expressly disavowed "policy considerations" in ruling that municipalities could not be sued under § 1983.[10] In *Monell v. Department of Social Services*, the Court again ignored policy concerns in reaching precisely the opposite conclusion.[11] One may admire the Court's willingness to admit error, but surely, somewhere along the way, the Justices should have considered whether municipal liability is a good idea. Either they had no view on that question, or they felt constrained by the methodology of statutory interpretation not to reveal their reasoning.

Fortunately, the preoccupation with history seems to be receding. As precedents accumulate and the field matures, the Court increasingly turns to its own prior utterances as the starting point for analysis. This approach allows more room for consideration of policy and practicality. Recent opinions say less about the views of Representatives Blair and Shellabarger[12] and more about the advantages and disadvantages of competing positions.[13] Of course, the results remain controversial, but the shift toward candid discussion of the concerns that might move a rational Justice (or student or professor) to favor one outcome over another is surely to be welcomed.[14]

9. I have forgotten from whom I stole this remark.

10. *Monroe*, 365 U.S. at 191 ("We do not reach those policy considerations.").

11. 436 U.S. 658 (1978) (discussing exclusively legislative intent and the reasons for departing from stare decisis).

12. Representative Blair's detailed criticism of the Sherman amendment figured largely in the Court's reconsideration of municipal liability in *Monell*, 436 U.S. at 673-75. Representative Shellabarger sponsored H.R. 320, which eventually became § 1983. His remarks are cited in *Monroe*, 365 U.S. at 185, 228 & n.41, 232 n.48, and in *Monell*, 436 U.S. at 669-73, 683-84.

13. Early examples are the cases in which the Court has eliminated the "subjective branch" of qualified immunity in an effort to streamline § 1983 litigation and avoid trial of insubstantial claims. *E.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 813-18 (1982) (extensively analyzing the "balance between the evils inevitable in any available alternative" scheme of qualified immunity).

14. For trenchant criticism of the traditional approach, see Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51 (1989), which criticizes the Court's "manipulation" of legislative history and other sources as "transparent"; Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741 (1987), which criticizes the Court's reliance on history in official immunity cases; and Michael Wells, *The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules*, 19 CONN. L. REV. 53, 54 (1986),

Unfortunately, another legacy of *Monroe* remains firmly entrenched. By anchoring constitutional tort actions in the brief generalities of § 1983, the *Monroe* Court severed the law of money damages from the rights they enforce. The statute itself creates no rights. It provides a cause of action for redressing deprivation of "rights, privileges, or immunities" created elsewhere. There is no textual opportunity to differentiate among constitutional violations or to calibrate specific remedies. So far as appears, all remedies are available for all rights on the same terms. Even though we know that rights and remedies are connected, interactive, and mutually dependent and defining,[15] constitutional tort law pretends that it is not so. Instead, the *Monroe* approach is comprehensive and categorical. It gives the same remedial answer to every constitutional question.

By imprisoning remedial choice in the methodology of statutory historicism, the Supreme Court has locked out concerns that should matter. In particular, current doctrine awards or withholds money damages without regard to alternative remedies. Instead, damages should be integrated with other means of redress in remedial strategies for particular rights. In other words, we should disaggregate constitutional tort law to allow a better fit between damages remedy and constitutional right.

The suggestion that money damages should vary with the underlying claim presupposes that they not be available in every case. If optimal enforcement were maximum enforcement, every constitutional violation would trigger money damages, and there would be no case for mediating doctrine. The argument for differentiating remedial strategies across rights assumes that sometimes less is better. Put differently, the argument assumes that there is, and sometimes should be, a gap between constitutional rights and damages remedies.[16]

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which urges the Court to "discard legislative intent as an analytic tool for adjudicating constitutional tort claims."

15. *See, e.g.*, Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999) (advancing a typology of right-remedy interaction).

16. The normative aspect of this proposition is opposed by the weight of academic opinion, which favors strict liability for all constitutional violations. *See, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1490-91 (1987) (endorsing the "remedial imperative" of governmental liability); Mark R. Brown, *Correlating Municipal Liability and Official Immunity Under Section 1983*, 1989 U. ILL. L. REV. 625, 631 (contending that governmental liability and officer immunity should be correlated to eliminate any gap between right and remedy); Mark R. Brown, *The Demise of Constitutional Prospectivity: New Life for* Owen*?*, 79 IOWA L. REV. 273, 311-12 (1994) [hereinafter Brown, *The Demise of Constitutional Prospectivity*] (condemning immunity from award of damages even for violations of newly declared constitutional rights); Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 756 (1992) (endorsing strict governmental liability for constitutional violations); Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997, 1019 (1990) (endorsing compensatory damages for all foreseeable harms resulting from constitutional violations); Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 229-30 (1986) (endorsing strict governmental liability for constitutional violations).

Under current law, that gap not only exists, but is very large. It results from a requirement of fault, beyond the mere fact of unconstitutionality, on the part of officer defendants sued under § 1983.[17] The liability standard is negligence with respect to illegality. Its doctrinal home is qualified immunity, which bars the award of damages for injuries resulting from unconstitutional acts that "a reasonable officer could have believed . . . to be lawful."[18] As administered, qualified immunity precludes damages for a substantial range of constitutional violations, especially where the underlying standards are murky or unclear. Occasionally, localities can be sued directly under § 1983 and held liable without proof of fault, but the circumstances are very limited.[19] In the great bulk of cases, civil rights plaintiffs must sue government officers, all of whom can claim at least qualified immunity from liability for money damages.[20] Qualified immunity is the doctrinal wedge that separates damages from other remedies.

This Essay argues that the law of qualified immunity should be refined and rethought. It not only should differentiate damages from other remedies, but also should differentiate damages among rights. Neither the rationales for, nor the arguments against, qualified immunity apply equally to all constitutional violations. Costs and benefits are distributed unevenly. Much depends on the effectiveness of money damages in redressing particular violations and on the efficacy and availability of other remedies. Current law suppresses such concerns. A better approach would disaggregate constitutional torts and adapt remedial strategies to specific wrongs.

This Essay proceeds from the descriptive to the normative. Part I begins with a review of the rationales for qualified immunity. There are at least two distinct rationales for limiting money damages for constitutional violations, and neither applies in all contexts. Analyzing the functions of qualified immunity doctrine under current law reveals significant variation in the role and utility of money damages in different circumstances.

Part II is explicitly normative. It presses the argument that differences among constitutional violations should be acknowledged and exploited in the law on money damages. In some contexts, damages will be an essential mechanism of enforcement; in others, damages can be treated as a backup remedy aimed at special situations. The analysis depends crucially on the

17. John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 54-59 (1998) (documenting the centrality of fault in § 1983 litigation).

18. Anderson v. Creighton, 483 U.S. 635, 641 (1987).

19. Jeffries, *supra* note 17, at 58-59 (detailing doctrinal restrictions on strict liability of local governments).

20. On the absolute immunity of officers performing legislative, judicial, and certain prosecutorial functions, as well as the likely ways around that defense by suing another defendant, see *id.* at 57.

availability of other remedies. Part II sketches the kind of integrated right-remedy analysis toward which courts should move.

Part III is a brief conclusion. It calls for reconceptualizing and reorganizing the law of § 1983.

I. THE THREE FACES OF QUALIFIED IMMUNITY

The Supreme Court espouses a unified-field theory of qualified immunity. In Justice Brennan's words, the law of qualified immunity reflects a balance struck "across the board," rather than with reference to particular claims.[21] In *Anderson v. Creighton*, the Court endorsed that remark, adding that "we have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated."[22] Doctrinally, therefore, qualified immunity applies comprehensively to all damages actions brought against state and local officers under § 1983, as well as to analogous actions against federal officers under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[23] In all such cases, the defendant is immune from award of money damages "if a reasonable officer could have believed" in the legality of the act that caused the plaintiff's injury.[24]

Of course, practical lawyers seeking practical guidance do not stop with generalities. They look for precedents similar to the case at hand. The search for recurring factual patterns has particularized to some extent the law of qualified immunity, as decisions are collected about police officers, hospital administrators, school officials, and so forth.[25] Nevertheless,

21. Harlow v. Fitzgerald, 457 U.S. 800, 821 (1982) (Brennan, J., concurring).

22. 483 U.S. at 643; *see also* Crawford-El v. Britton, 523 U.S. 574, 605 n.2 (1998) (Rehnquist, C.J., dissenting) (quoting the statement from *Creighton*).

23. 403 U.S. 388, 397 (1971) (authorizing damages actions against federal officers for violation of the Fourth Amendment). The immunities available to federal officers under *Bivens* are the same as those available to state and local officers under § 1983, and the two lines of cases are cited interchangeably. *E.g.*, Butz v. Economou, 438 U.S. 478, 504 (1978) (concluding that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials").

24. Hunter v. Bryant, 502 U.S. 224, 228 (1991) (per curiam) (holding that Secret Service agents are entitled to qualified immunity for unconstitutional arrest "if a reasonable officer could have believed" that the arrest was lawful); *Creighton*, 483 U.S. at 641 (same standard).

25. *E.g.*, 2 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, at §§ 8.28-.99 (4th ed. 1999) (analyzing separately the qualified immunity of school officials, mental-hospital officials, prison employees, law enforcement officers, and state and local government executives); 1B MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 9.14 (3d ed. 1997) (cataloguing qualified immunity cases for law enforcement officers, prison officials, school officials, mental-hospital administrators, and other state and local officials).

doctrinally and at some meaningful level of application, qualified immunity remains constant for all claims.

Functionally, however, qualified immunity is surprisingly complex. There are at least two rationales for limiting money damages for constitutional violations, and qualified immunity sometimes serves one purpose and sometimes another. In a great many cases, it plays no part at all. These variations do not arise from the law of qualified immunity but from the substantive claims to which that issue applies. They arise, in short, from variations among rights. Differences in the role of qualified immunity reflect differences in the role of money damages in redressing constitutional violations. Three examples will illustrate possible interactions between qualified immunity and specific constitutional violations.

A. *Search and Seizure*

It is no accident that illegal search and seizure is so often invoked to make the case for qualified immunity. As conventionally understood, that case rests on overdeterrence—the risk that strict liability for constitutional violations would unacceptably inhibit the legitimate business of government.[26] The overdeterrence rationale purports to apply to constitutional torts generally but in fact makes sense (if at all) only in some contexts. Nowhere is the fear of overdeterrence more plausible than in claims of illegal search and seizure.

Of course, awarding money damages for constitutional violations is *intended* to deter. That is the point.[27] Maximum deterrence would be achieved not by the fault-based regime of qualified immunity but by holding governments strictly liable for all injuries caused by

26. PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 64-77 (1983); Jeffries, *supra* note 17, at 70-71, 73-74.

27. On compensation as a noninstrumental concern, see John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 99-101 (1989), which argues that the noninstrumental rationale of corrective justice does not *require* strict damages liability for constitutional violations. This argument has been criticized on its own terms, but more strongly on the ground that it ignores the primacy of instrumental concerns in the law of § 1983. *E.g.*, Brown, *The Demise of Constitutional Prospectivity*, *supra* note 16, at 298 (arguing that qualified immunity is essentially instrumental, as its purpose is not to deny redress for wrongdoing but to promote independent decisionmaking by officials); Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 836-37 (1992) (disputing the assumption "that we can meaningfully discuss noninstrumental or nondeterrent rationales for § 1983's remedial scheme without considering deterrence"); Nahmod, *supra* note 16, at 1004 (arguing that qualified immunity is "essentially instrumental in nature"). *Contra* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 666-720 (1998) (justifying qualified immunity on the ground that civil damages liability has a "moral blaming function" analogous to criminal prosecution and is therefore appropriate when the officer had "fair notice" of illegality).

unconstitutional behavior.[28] Strict liability would force government to internalize the costs of constitutional violations, including those not avoided by cost-justified precautions in hiring, training, supervision, and the like. Requiring government to bear the full costs of such actions would not only induce it to take such precautions, it would also depress activity levels for conduct that is likely to involve constitutional error despite reasonable care.[29] In the private sector, this effect is often welcomed. Forcing private actors to internalize all accident costs, including those not prevented by reasonable precautions, may lead to socially desirable reductions in activity levels.[30] That is why the liability rule for ordinary torts often leans toward strict liability, sometimes by adopting that standard outright, as in cases of ultrahazardous activity,[31] and sometimes by administering the negligence standard in ways that push it in that direction.[32] The case for qualified immunity in constitutional tort actions rests on the claim that the government is somehow different, that requiring the government to bear the costs of all constitutional violations would reduce legitimate governmental activities to *sub*optimal levels.

This claim was brilliantly advanced by Peter Schuck.[33] Focusing on the discretionary choices of "street-level" officials, Schuck noted that police officers, prison guards, welfare administrators, school superintendents, and the like deliver basic government services on terms that are often nonconsensual and sometimes coercive. Their actions produce conflict and

28. Here, as elsewhere, I use "strict liability" to refer to the liability rule that would obtain if the fault requirement of qualified immunity were eliminated from § 1983. In some cases, the underlying constitutional violation would require a reprehensible state of mind quite apart from the law of § 1983. In those cases, eliminating the defense of qualified immunity would render liability "strict" only in a limited sense. A better formulation might be that eliminating qualified immunity would render damages liability *potentially* strict, depending on the content of the underlying right. Jeffries, *supra* note 17, at 57 (explaining this point).

29. *See* KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 164-65 (1997) (explaining the effect of strict liability on activity levels); Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 6-7 (1980) (stating that, in general, activity levels will be lower under strict liability than under a fault-based regime).

30. ABRAHAM, *supra* note 29, at 164-65.

31. RESTATEMENT (SECOND) OF TORTS § 519 (1977) (discussing strict liability for "abnormally dangerous activity"); *see also id.* § 520(f) (stating that among the factors to be considered in determining whether an activity is "abnormally dangerous" under section 519 is whether "its value to the community is outweighed by its dangerous attributes").

32. I have in mind here such practices as the pronounced disinclination of many courts to enter summary judgment for defendants in negligence cases, thus opening the door for juries to impose liability with or without fault. For example, it has been recognized for decades that liberal use of res ipsa loquitur to prove negligence leans toward strict liability. *E.g.*, Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) ("In leaving it to the jury to decide whether the inference [of negligence] has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability."); ABRAHAM, *supra* note 29, at 97 (describing res ipsa loquitur as "a way of obtaining under-the-table strict liability").

33. SCHUCK, *supra* note 26, at 59-81. For a similar view, see, for example, Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 638-40 (1982), which argues that both exclusion of evidence and officer liability for Fourth Amendment violations risk overdeterrence of legitimate law enforcement activity.

harm. While negative outcomes can readily be translated into adverse legal claims, the benefits of good performance are hard to capture. These skewed incentives may bias discretionary choices. Rather than attempting to maximize the net benefits of their actions, street-level officials may seek merely to minimize their costs. The result is a bias toward inaction, defensiveness, and bureaucratic self-protection.

This bias is reinforced by an asymmetry in legal remedies. Those injured by affirmative conduct have no trouble stating a claim for relief. The defendant is known, and causation is clear. By contrast, those harmed by a failure to act often have difficulty identifying the right defendant and linking their injuries to specific inaction.[34] Even when the defendant is known and causation clear, government officers exercising discretionary authority cannot be held liable for failure to act absent a legally enforceable duty to act.[35] Consequently, an officer's exposure to liability for wrongful acts is vastly greater than his or her exposure to liability for wrongful inaction, even though erroneous action and erroneous inaction may be equally costly. This asymmetry in the availability of redress reinforces the incentives for government officers to protect themselves by doing less.

One may find these arguments persuasive, as the courts evidently do, but the analysis is incomplete. The diagnosis of skewed incentives ignores the fact that governments routinely defend their officers against constitutional tort claims and indemnify them for adverse judgments.[36] Of course, in cases of flagrant misconduct (of the sort that might trigger criminal prosecution), a government might cut its employee loose, but it is hard to imagine a case of simple search and seizure (unaccompanied by assault or other grievous harm) provoking that reaction. Thus, although government officers cannot capture the social benefits of their actions, neither do they pay the full costs. Their incentives may be *reduced*, but they are not necessarily *skewed*.

Despite this qualification, there are at least three reasons to worry about overdeterrence. The first is government employment law. Under civil

34. *See* SCHUCK, *supra* note 26, at 80 (noting that persons injured by affirmative wrongdoing are far more likely to seek redress than the "invisible victims of official self-protection"); Jerry L. Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, 42 LAW & CONTEMP. PROBS. 8, 29 (1978) (discussing the "problematic" nature of causes of action for a law enforcement officer's failure to act).

35. For a famous example, see *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 196-97, 202 (1989), which concludes that a state's failure to protect a victim of child abuse did not violate due process.

36. Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 686 (1987) (finding no cases in which "an individual official had borne the cost of an adverse constitutional tort judgment"); Jeffries, *supra* note 17, at 49-50 (asserting that, "[s]o far as can be assessed," governments defend their officers against constitutional tort claims and indemnify them for adverse judgments); Lant B. Davis et al., Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 810-12 (1979) (reporting government defense and indemnification of police officers in Connecticut).

service rules, most government workers cannot be fired simply for not doing a good job. Generally, government workers face discharge only for demonstrably bad performance—provable misconduct or neglect that justifies civil service termination.[37] Under this regime, rational government employees might well be preoccupied with avoiding egregious mistakes. Second, this incentive-based cautionary bias may be reinforced by employee self-selection. Risktakers may be drawn to the private sector, where they are more likely to be rewarded, while risk-avoiders seek out government work for job security.[38] Finally, there is a political asymmetry between on-budget costs, which mean higher taxes, and off-budget costs, which (at least in the first instance) fall elsewhere.[39] Government action may trigger civil liability, which must be accounted for in the department's budget. Government inaction does not carry the same risk. The error costs of not searching a criminal suspect or not suspending a disruptive student may be equal to the error costs of taking such actions, but the burdens are borne by the suspect's subsequent victims or by the student's affected classmates. Such costs may eventually be brought to bear on government officers through the political process, but the mechanisms for bringing them to bear are diffuse, indirect, and long-term. It therefore seems plausible that government managers weigh on-budget costs more than off-budget costs and that this asymmetry reinforces the bias toward caution and inaction.[40]

37. For the procedural protections afforded federal employees, see 5 U.S.C. §§ 1101-1105 (1994), which provides merit selection and job security. *See generally* Richard A. Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 VA. L. REV. 196, 211-31 (1973) (describing the history of the federal civil service). For all government workers, including those employed by states and localities, the tradition of civil service is undergirded and reinforced by the requirements of procedural due process. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 539 (1985) (holding that public employees who can be discharged only "for cause" under civil service regulations have property rights in their jobs).

38. Don Bellante & Albert N. Link, *Are Public Sector Workers More Risk Averse Than Private Sector Workers?*, 34 INDUS. & LAB. REL. REV. 408, 411-12 (1981) (reporting empirical results consistent with economic reasoning suggesting that risk-averse workers will be more likely to seek government work); *see also* SCHUCK, *supra* note 26, at 57 (opining that civil service employees "probably tend to be more risk-averse with respect to litigation and liability than individuals generally").

39. *See* Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 800-01 (1993) (arguing that the increased tax burdens resulting from civil liability generate media attention and public concern); *cf.* Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 961 (1985) (noting the "prioritizing discipline" that the budget process imposes on direct expenditures). The tendency to undervalue off-budget costs is essentially the problem of unfunded mandates. Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1114-17 (1997). On the political penalties for raising taxes, see Jeffries, *supra* note 17, at 77 n.107.

40. This observation seems more than plausible to me, but recent literature has shown the need for caution, at least, in tracing the incentive effects of civil liability on government actors. Daryl Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347-48 (2000) (suggesting that "government cannot be expected to respond to forced financial outflows in any socially desirable, or even predictable way").

I have made these arguments in detail elsewhere,[41] but they remain fundamentally speculative. Hard data are not available, nor are they likely to become so. The best I can say is that the overdeterrence rationale for qualified immunity seems *sometimes* sound to me. More to the point, it seems sound to the Supreme Court. Recent decisions support a robust conception of qualified immunity, one that protects against damages liability whenever a (barely) reasonable officer could have believed his or her actions to be lawful.[42] Current doctrine rests squarely on the overdeterrence rationale. Although in my opinion the Justices have not given sufficient attention to the implications of employer defense and indemnification, at least they have explained why they think qualified immunity is a good idea, and their reason is overdeterrence.[43]

Even if the validity of this concern cannot be proved, this much seems certain: If there is any context in which the threat of strict damages liability for constitutional violations would seriously inhibit the legitimate activities of government, search and seizure is it. Note how closely the circumstances of investigative searches support the overdeterrence rationale. Searches are conducted by street-level officers, only occasionally on orders from senior managers. The officers typically have discretion not to act. The decision whether to act is made on the spot, often based on sketchy information subject to conflicting interpretations. Decisions are made retail; that action is or is not justified in one situation says almost nothing about another. Most important, the standards for determining the legality of search and seizure are notoriously vague. Questions about what constitutes "reasonable suspicion" or "probable cause" are irreducibly judgmental and therefore ultimately discretionary. If every error automatically triggered penalties, police officers—and those who employ them—would be expected to steer clear of the danger zone by not searching in a doubtful case.[44]

41. Jeffries, *supra* note 17, at 75-77.

42. *See, e.g.*, Wilson v. Layne, 526 U.S. 603 (1999) (holding officers immune from liability for inviting media representatives to accompany them in an arrest in the home, despite the unanimous conclusion of all federal judges who have considered the issue that the media "ride-alongs" violate the Fourth Amendment).

43. *E.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (discussing "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties'" (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949))); *see also* Anderson v. Creighton, 483 U.S. 635, 645-46 (1987) (following *Harlow* in expansively interpreting qualified immunity).

44. For another formulation of this point, see Jeffries, *supra* note 17, at 73-74. I explain:

> To put this point into a practical context, one need only imagine a supervisor instructing police officers (as all police are instructed these days) on the law of the Fourth Amendment. Under the regime of qualified immunity, the instructor would explain the rules of search and seizure and enjoin adherence to them, but would also tell the officers that reasonable mistakes would not be held against them. Now imagine the same situation under a regime of strict liability. The supervisor would instruct her charges not only to be careful about probable cause but also, and more importantly, *not*

Under current law, this problem does not exist. On the contrary, prevailing interpretations of qualified immunity insulate officers (and the governments that employ them) from damages liability for all but the most flagrantly abusive searches. Under current doctrine, search-and-seizure issues arise not in claims for compensation but on motions to suppress evidence. In this setting, police officers may feel that they have little at stake. Moreover, the fact that there is something to suppress means that the search uncovered incriminating evidence. Typically, the complainant is guilty of a nontrivial crime. Faced with a succession of guilty defendants objecting to successful searches, judges might well give officers the benefit of the doubt.[45] Under current law, therefore, overdeterrence is not a problem. If, however, qualified immunity were eliminated, the prospect of officer liability for unlawful search and seizure might induce debilitating caution.

For present purposes, the important point is to recognize that the conditions that make overdeterrence a realistic fear in the realm of search and seizure do not necessarily obtain elsewhere. The search-and-seizure context is distinguished by the abstractness of the controlling legal standards, the necessity of applying those standards case by case, and the resulting devolution of discretion to street-level officials. Some government actions have similar characteristics, but others do not. The concern for overdeterrence is therefore neither uniform nor comprehensive, but on the contrary quite local. For illegal search and seizure, qualified immunity may well be justified by the risk that strict liability would unacceptably inhibit legitimate law enforcement. In other contexts, qualified immunity serves different purposes and implicates different concerns.

B. *Freedom of Speech*

One feature of the law of search and seizure not mentioned so far is its stability. Over the past generation, the Supreme Court has reduced protection for automobiles[46] and nibbled at exclusion,[47] but the basic rules

> to search in any doubtful case. Under strict liability, the supervisor would require a kind of super-probable cause, steering well clear of the constitutional standard in order to avoid liability for inevitable mistakes. In consequence, there would be fewer searches.

Id. (footnote omitted).

45. *See* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 403-04. Slobogin examines the effect of "representativeness" and "availability" on search-and-seizure decisions. "Representativeness" means that judges are likely to associate Fourth Amendment interests with the guilty defendants who come before them in suppression hearings. "Availability" means that judges will rely overmuch on their memory of suppression hearings, all of which (one assumes) involved searches that were successful in uncovering incriminating evidence.

46. *See* Pennsylvania v. Labron, 518 U.S. 938 (1996) (rejecting a requirement of "exigency" apart from the existence of probable cause and a mobile vehicle); California v. Acevedo, 500 U.S.

have remained largely unchanged.[48] Other areas of constitutional law have seen more growth. In these areas, qualified immunity's chief function is to facilitate change.[49] By denying damages to persons injured by discarded past practices, qualified immunity reduces the cost of innovation. It enables courts to adopt new rules without requiring payment to those who did not benefit from the new rule in the past. Without that limitation, the costs of compensation might well prove paralyzing. Requiring full remediation for past failure to comply with newly announced rules would stifle constitutional innovation and risk rigidity and ossification in constitutional law.

In essence, qualified immunity is a variant of nonretroactivity. Unlike the 1960s doctrine of that name,[50] however, qualified immunity applies not only to the occasional dramatic break from prior law, such as *Miranda*,[51] but also (and more importantly) to the small-scale, evolutionary growth and clarification that are the lifeblood of the law. Qualified immunity thus operates on a vastly broader scale than the old nonretroactivity doctrine but is shallower in effect. It bars only money damages. Other remedies remain in place to enforce new rights. Nevertheless, qualified immunity and nonretroactivity are functional cousins: Both facilitate reform by reducing the cost of innovation. Without a limit on costs, there would be less reform.[52]

565 (1991) (finding that police authority to engage in a warrantless search based on probable cause extends to closed containers within vehicles); New York v. Class, 475 U.S. 106 (1986) (stating that probable cause is not necessary to ascertain a vehicle identification number after a valid traffic stop); United States v. Ross, 456 U.S. 798 (1982) (holding that searches justified under the automobile exception to the warrant requirement can be as thorough as searches authorized by warrants).

47. *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984) (holding that illegally seized evidence is admissible if police had a good faith belief in the validity of a warrant subsequently found to be not supported by probable cause); United States v. Havens, 446 U.S. 620 (1980) (holding that illegally seized evidence is allowed for purposes of impeachment of testimony relating to the crime charged); United States v. Janis, 428 U.S. 433 (1976) (holding that exclusion of illegally seized evidence is not required at an IRS hearing).

48. The two expansions in Fourth Amendment rights in the last thirty years were *Payton v. New York*, 445 U.S. 573 (1980), which required warrants for arrests in the home, thereby limiting searches incident to such arrests, and *Tennessee v. Garner*, 471 U.S. 1 (1985), which limited the use of deadly force.

49. This discussion recapitulates John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 95-105 (1999).

50. The standard citation is *Linkletter v. Walker*, 381 U.S. 618 (1965), which held that the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643 (1961), did not apply retroactively to cases that had become final before that decision.

51. *Miranda v. Arizona*, 384 U.S. 436 (1966), was held nonretroactive in *Johnson v. New Jersey*, 384 U.S. 719 (1966).

52. *See, e.g.*, Mackey v. United States, 401 U.S. 667, 676-77 (1971) (Harlan, J., concurring in part and dissenting in part) (recognizing that the nonretroactivity doctrine facilitated "long overdue reforms, which otherwise could not be practicably effected" (quoting Jenkins v. Delaware, 395 U.S. 213, 218 (1969))).

When I first broached this argument, some readers questioned the endorsement of constitutional innovation. That reaction reflects the rhetoric of constitutional law, which looks unswervingly to the past. Supreme Court opinions emphasize prior decisions, traditional understandings, and original intent. Far from celebrating change, they disguise it.[53] Although the rhetorical commitment to the past obscures and devalues constitutional change, a moment's reflection reveals that it is continuing, inevitable, and—in my view—ultimately desirable. That is not to say that I celebrate change for its own sake. Constitutional innovations are sometimes mistaken, often unnecessary, and always destabilizing. Nevertheless, the capacity of constitutional law to respond to new circumstances is an enormous strength. Unless the world in which we live is going to stop changing, constitutional law must change also. Indeed, given the technological, economic, social, and political transformations since the nation's founding, it is hard to imagine that the original Constitution could have survived in recognizable form had it lacked the capacity for internal growth.[54] That the Constitution has proved to have that capacity, despite its aura of permanence and immutability, depends crucially on the limitation of damages liability for newly disapproved past practice.

Examples of the potential antagonism between retrospective damages and future rights are not hard to find. The conflict surfaces not only in the occasional paradigm-shifting pronouncement,[55] but also in the small-scale innovations that show up annually in casebook supplements. Virtually all such publications have something new to report about freedom of speech, which for at least five decades has been the premier growth industry in constitutional law.

53. Jeffries, *supra* note 49, at 95-96 (describing various techniques for "claiming continuity while embracing innovation").

54. I have observed:

> [I]t is hard to imagine what our Constitution would be if original understandings had been faithfully maintained without "translation" to changed circumstances. Most likely, we would have had a succession of increasingly prolix organic documents, as heavily amended prior versions became too cumbersome or outdated. Ironically, the reason that we still have some version of the original Constitution and that we can refer (more or less meaningfully) to the intent of the Framers is the document's capacity for internal growth.

Id. at 97 (footnote omitted).

55. For an extended speculation on the effect that retrospective damages liability would have had on the law of school desegregation, see *id*. at 101-03. The analysis focuses on *Brown v. Board of Education*, 347 U.S. 483 (1954), and especially on *Green v. County School Board*, 391 U.S. 430 (1968). *Green* transformed *Brown*'s ruling that government stop requiring segregation into an affirmative command that government act to eliminate segregation. The essay asks "what the Court would have done if announcing an 'affirmative duty' to eliminate racially identifiable schools had meant huge damages judgments against Southern school districts" and concludes that "it seems entirely plausible that *Green* might have come out differently under a regime of strict liability in money damages." Jeffries, *supra* note 49, at 103.

Consider, for example, the line of cases beginning with *Elrod v. Burns*.[56] Before that decision, successful Republican candidates for sheriff fired every Democratic deputy in sight, and Democrats did the same thing in reverse.[57] Political patronage of this sort had been widespread at least since the days of Andrew Jackson, with antecedents running back to the nation's founding.[58] In *Elrod*, five Justices decided to replace that system with a form of civil service more consistent with the values of the First Amendment. The prevalence of statutory civil service schemes may have encouraged this step,[59] as did the expansion of public sector employment.[60] Probably more important was the ideological momentum of the Court's own rulings expanding First Amendment freedoms in other contexts.[61] In any event, *Elrod* was not a sport. Four years later, the Justices extended its reasoning to public defenders, thereby narrowing the class of "policymaking" or "confidential" employees who could be hired and fired based on politics.[62] More recently, the Court ruled (five to four) that *Elrod* protected government workers not only against politically motivated dismissal, but also against political favoritism in a variety of other employment decisions, including hiring, promotion, and transfer.[63] Finally, in 1996, the Justices concluded that the same principles should apply to independent contractors, who are now protected against political favoritism that benefits their competitors.[64]

None of these decisions was dictated by precedent. Each required some degree of innovation, ranging from the sharp left turn in *Elrod* itself to the more or less logical extension of *Elrod*'s reasoning in subsequent cases. In taking these steps, the Justices did not have to worry about imposing damages liability for past patronage. If sued for damages, state and local employers would have successfully invoked qualified immunity for acts reasonably believed to have been lawful when done. Without that protection, the situation would have been radically different. Many

56. 427 U.S. 347 (1976).

57. *Id.* at 351 ("It has been the practice of the Sheriff of Cook County, when he assumes office from a Sheriff of a different political party, to replace non-civil-service employees of the Sheriff's Office with members of his own party when the existing employees lack or fail to obtain requisite support from, or fail to affiliate with, that party.").

58. *See generally* DAVID H. ROSENBLOOM, FEDERAL SERVICE AND THE CONSTITUTION 47-55 (1971) (examining the historical development of the "spoils system").

59. *Elrod*, 427 U.S. at 353-54 (noting the decline in patronage employment in the wake of the Pendleton Act of 1883).

60. *Id.* at 356 (noting that as government employment rises, patronage increases the incumbent party's "power to starve political opposition by commanding partisan support, financial and otherwise").

61. *E.g.*, *id.* at 356-60 (discussing the inconsistency of political patronage with modern free speech decisions).

62. Branti v. Finkel, 445 U.S. 507 (1980).

63. Rutan v. Republican Party, 497 U.S. 62 (1990).

64. O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712 (1996).

thousands of deputy sheriffs, court bailiffs, jail guards, process servers, and other patronage employees would have been entitled to money damages for discharge or other employment action based on political affiliation or loyalty. Would that prospect have altered the constitutional decision? Would the Justices have been concerned, as they have been elsewhere, about the impact of civil liability on municipal taxation and services?[65] Would they have recoiled at the unfairness of imposing liability on defendants who did what had always been done and who had no reason to do otherwise? Would they have hesitated to reward plaintiffs who got their positions through the same political patronage that they now decried?[66] It is, of course, impossible to say with certainty what would have happened in a state of affairs that did not exist, but it seems clear that the prospect of damages liability for past practice would have cut against expanding First Amendment rights. Indeed, it is plausible to think that the concern would have proved decisive.

Much the same can be said of commercial speech. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[67] the Supreme Court ruled that commercial advertising was not so removed from First Amendment values as to lack all constitutional protection. For a time it appeared that the "commonsense differences"[68] between commercial advertising and political debate meant that the former could be regulated whenever the government had a good reason,[69] but recent decisions have pushed commercial advertising closer to the highly protective rules for other content-based restrictions on speech.[70] The cases in this line are more numerous than those concerning political patronage and more muddled. At any given point, government officers could reasonably have thought lawful restrictions that the courts later found unconstitutional. Commercial speech plaintiffs therefore won injunctions, declaratory judgments, perhaps

65. *E.g.*, City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981) (citing the prospect of increased taxes or reduction of services as a reason for disallowing punitive damages against municipalities).

66. *Cf. Elrod*, 427 U.S. at 377 (Powell, J., dissenting) ("The named respondents, several discharged employees and another employee threatened with discharge, are all Republicans who concededly were hired by Elrod's predecessor because of their political affiliations.").

67. 425 U.S. 748 (1976).

68. *Id.* at 771 n.24 (noting "commonsense differences between speech that does 'no more than propose a commercial transaction' and other varieties" (citation omitted)).

69. *E.g.*, United States v. Edge Broad. Co., 509 U.S. 418 (1993) (upholding a federal statute banning lottery advertisements by radio stations in nonlottery states as serving the state's substantial interest in reducing the demand for casino gambling); Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986) (upholding a law prohibiting advertising of casino gambling to residents of Puerto Rico as justified by the same substantial interest); Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (articulating a four-part test focusing, inter alia, on "whether the asserted governmental interest is substantial").

70. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (striking down a law prohibiting liquor price advertising); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (striking down a law prohibiting the display of alcohol content on beer labels).

negation of regulatory penalties, but not compensatory damages. Had the law been otherwise, such claims surely would have surfaced. Presumably, the large drugstore chains that were barred from drug price advertising by the regulation in *Virginia State Board of Pharmacy* would have made money had such advertising been allowed. Their lost profits might have been considerable. The same might have been true for the low-price retailers in *44 Liquormart*.[71] If the Justices had faced the prospect of potentially enormous damages judgments for lost profits due to government regulation, they might have thought twice about the decisions. Again, it is plausible to believe that requiring full compensation for past harms would have inhibited constitutional innovation.

In these and other First Amendment areas, the effect of qualified immunity is not to avoid overdeterrence of street-level officials, but to liberate courts from the straitjacket of retroactivity and so to facilitate the growth and development of constitutional law. That different rationales apply in different contexts is exactly what we should expect. Despite the categorical generality of qualified immunity doctrine, the defense functions differently for different rights.

C. *Non-Rights*

To say that qualified immunity prevents overdeterrence and facilitates change is not to say that the doctrine precisely tracks these rationales. On the contrary, qualified immunity exists as a rule of fixed and invariant content. For all rights and in all situations, it precludes damages liability for acts that "a reasonable officer could have believed . . . to be lawful."[72] This doctrinal formulation does not fit all situations. In some cases where the Court is reluctant (rightly or wrongly) to approve a federal damages remedy, qualified immunity does not readily apply. In these cases, the Court sometimes avoids unwanted civil liability not by limiting the damages remedy, but by narrowing the underlying right. Restriction of rights therefore functions as an alternative to qualified immunity. So far as damages are concerned, the two strategies are equivalent.

Here the right-remedy dynamic is the same as that discussed in connection with the First Amendment, but viewed from the opposite direction. Sometimes the Court deploys qualified immunity to avoid money damages, a move that allows and invites expansion of rights. At other times the Court constrains rights to avoid money damages, a move that precludes enforcement of rights by other means. A complete picture of qualified immunity must include cases where it is invoked and cases where it is

71. 517 U.S. 484.
72. Anderson v. Creighton, 483 U.S. 635, 638 (1987).

unavailable. In the same way that the movement of one heavenly body can confirm the gravitational pull of its unseen neighbor, decisions of "non-rights" can reflect the effect on constitutional law of a one-size-fits-all approach to the damages remedy.

A case in point is *Paul v. Davis*.[73] The chief of police of Louisville, Kentucky, distributed Edward Charles Davis's name and mug shot in a list of "active shoplifters," even though Davis had been accused but not convicted of that offense. Davis could have sued for defamation under state law, but instead sought damages under § 1983, asserting that he had been deprived of constitutionally protected "liberty" without due process of law. Anxious to avoid making the Fourteenth Amendment a "font of tort law,"[74] the Supreme Court construed the "life, liberty, or property" protected by due process to exclude reputation. The effect of this ruling was not merely to preclude money damages, but to pretermit any federal constitutional scrutiny of official condemnation of identified individuals.

Although *Paul* has been attacked on many grounds,[75] some observers have expressed sympathy with the Court's desire not to convert every officer error into a constitutional tort.[76] As several scholars have noted, this prospect could have been avoided by limiting the damages remedy rather than by gutting the underlying right.[77] To see the difference, one must look to some other remedy. What if § 1983 had never been enacted (or had been narrowly construed), and Mr. Davis had merely tried to enjoin his inclusion on a list of "active shoplifters"? Or what if Louisville had passed an ordinance requiring Mr. Davis to register as an "active shoplifter" because he had once been arrested for that offense? Suppose that Davis refused to register and raised his federal constitutional claim as a defense against

73. 424 U.S. 693 (1976).

74. *Id.* at 701.

75. *See, e.g.*, JOHN C. JEFFRIES, JR. ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 233-35 (2000) (discussing and referencing various grounds for criticizing *Paul*).

76. *E.g.*, Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 429 (1977) (describing the Court's response to the staggering array of § 1983 complaints as "understandable, if not acceptable"); Rodney A. Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies:* Parratt v. Taylor *and* Logan v. Zimmerman Brush Co., 1982 U. ILL. L. REV. 831, 836-41 (arguing that permitting Davis's § 1983 claim would have unnecessarily converted a state tort into a constitutional violation).

77. *E.g.*, Melvyn R. Durchslag, *Federalism and Constitutional Liberties: Varying the Remedy To Save the Right*, 54 N.Y.U. L. REV. 723, 742-48 (1979) (suggesting that qualified immunity might be a more appropriate way of narrowing the scope of constitutional torts while preserving the rights that § 1983 is meant to protect); Monaghan, *supra* note 76, at 429 (speculating that it might have been better to read § 1983 "less than literally . . . so as not to embrace all the interests" protected by due process); Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 678 (1997) (arguing that an expansion of immunity is preferable to a contraction of rights as a way of controlling the financial burdens on local governments and reducing incentives to sue). For an argument that *Paul* matters less than it seems, because most of the claims excluded from procedural due process resurface under other constitutional guarantees, see Barbara E. Armacost, *Race and Reputation: The Real Legacy of* Paul v. Davis, 85 VA. L. REV. 569, 586-617 (1999).

punishment for that omission. Would the Supreme Court then have found that he had no right? Or would the Justices have allowed injunctive or defensive relief despite their concern about money damages? There is, of course, no way to be sure, but the idea that the Justices would have approved of a law requiring registration and public condemnation of persons merely *accused* of crimes seems incredible. If that is true, *Paul v. Davis* is an example of the § 1983 tail wagging the constitutional dog.[78] The Court declared a non-right in order to avoid an unwelcome remedy.

This phenomenon is not unique to *Paul v. Davis* or even to procedural due process. It also occurs in the construction of "substantive" rights, especially those that protect against acts done with malicious motivation. Qualified immunity tends not to matter where the underlying constitutional violation requires malicious motivation.[79] This is not merely to say that violation of the underlying right requires a particular state of mind. That is true of most rights. Procedural due process, for example, is triggered when the government *intentionally* deprives a person of life, liberty, or property, but not when such injury results from mere negligence.[80] Qualified immunity nevertheless arises in procedural due process cases when government officers reasonably but mistakenly believe that the process provided was all that was due.[81] Violation of other rights, however, requires a motivation widely understood to be reprehensible. For those rights, qualified immunity becomes functionally irrelevant.

The interaction of qualified immunity with the state-of-mind requirements for violation of underlying rights is illustrated by the law on racial discrimination. The Equal Protection Clause bars purposeful discrimination.[82] Someone who purposely discriminates against racial minorities cannot claim that he or she reasonably thought such action to be lawful. The defense is irrelevant because it is factually incredible. A person who purposely discriminates *in favor of* minorities, by contrast, may well be reasonable in thinking such action permissible. The law of affirmative

78. For another narrow construction of "liberty" in the context of a § 1983 damages action, see *Siegert v. Gilley*, 500 U.S. 226, 233-34 (1991), which held that, regardless of motivation, defamation by a government officer is not a constitutional violation. *Paul* and *Siegert* are examples of what Daryl Levinson calls "remedial deterrence," which occurs when "the threat of undesirable remedial consequences motivat[es] courts to construct the right in such a way as to avoid those consequences." Levinson, *supra* note 15, at 884-85.

79. This point is explained in detail in Jeffries, *supra* note 17, at 55-56, which describes the mental state, if any, required for constitutional violations.

80. Daniels v. Williams, 474 U.S. 327, 330-31 (1986) (holding that due process is not violated by negligent deprivations).

81. *E.g.*, McGhee v. Draper, 564 F.2d 902, 915 (10th Cir. 1977) (affirming a directed verdict for school officials who dismissed a teacher without adequate procedural safeguards because earlier decisions "did not stake out the extent of the procedural rights which we now recognize").

82. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

action remains notoriously unsettled, and, depending on the circumstances, preferences for minorities may be valid. Thus, while it is not possible to say that qualified immunity is irrelevant whenever violation of the underlying right requires a particular state of mind, one can say that for some state-of-mind requirements—namely, those specifying a motivation everywhere recognized as malicious—qualified immunity will not matter.

Requiring malicious motivation to prove a constitutional violation narrows the underlying right. A heightened culpability requirement can therefore function as an alternative to qualified immunity as a way to curtail potential liability. The fact that heightened culpability and expanded immunity are, so far as damages are concerned, functionally equivalent may lead courts to require malicious motivation in all enforcement contexts when their real concern is money damages.

Substitution of this sort may have occurred in *County of Sacramento v. Lewis*.[83] In that case, a deputy sheriff signaled two boys on a motorcycle to stop, and gave chase when they did not. Though the boys were suspected of nothing more than failure to stop, the deputy pursued them in a squad car, sometimes approaching to within 100 feet of the fleeing motorcycle at speeds of 100 miles per hour. Eventually, the passenger, sixteen-year-old Philip Lewis, fell from the motorcycle and was killed by the police car. His parents sued the deputy, but the Supreme Court ruled that the boy's right to life was not infringed unless the deputy acted with the actual intent to hurt him. Mindless incompetence and reckless indifference did not suffice.

The Justices reached this decision in the context of a damages claim, which may be the only way the issue would arise. Under *City of Los Angeles v. Lyons*,[84] perhaps no one would have standing to enjoin such actions, even if high-speed chases for any and all reasons were explicitly authorized by code or regulation. *Lewis*, however, held that even a proper plaintiff could not enjoin a chase policy unless it authorized pursuit of suspects *in order to* hurt them. This exaggerated culpability requirement precludes damages liability as effectively as would an expanded version of qualified immunity, but with potentially greater consequences. Whether the Court would have reacted differently had it faced this claim in another remedial context is impossible to say, but *Lewis* may be another example of the prospect of monetary damages inducing a restrictive definition of the underlying right.

Of course, the fact that some constitutional arguments are received less hospitably than one might wish does not necessarily say anything about constitutional tort law or qualified immunity. When restrictive

83. 523 U.S. 833 (1998).

84. 461 U.S. 95, 105-06 (1983) (holding that a person injured by an unnecessary "chokehold" had standing to seek damages for his injuries but not, absent proof of likely recurrence or that choking was properly authorized, to seek injunctive relief).

interpretations are reached in § 1983 actions, however, the possibility exists that rights are being restricted across the board in order to accommodate concerns specific to money damages. Qualified immunity acknowledges that possibility by decoupling damages from other remedies. When qualified immunity applies, its effect is to prevent overdeterrence and to facilitate change. When qualified immunity is not available (or the option of exploiting it is not explored), courts may avoid money damages by narrowing rights. If this occurs—and I think it does—then the incentive arises from the rigidity of current doctrine in insisting that the same formulation of qualified immunity must apply to all rights on the same terms.

II. BEYOND REMEDIAL UNIFORMITY

That qualified immunity plays different roles for different constitutional violations is exactly what one should expect. The strictures in the Constitution were not conceived as predicates for money damages.[85] They were aimed in the first instance at empowering the target of a government prosecution or enforcement proceeding to resist that action on the ground that it violated the superior law of the Constitution. Indeed, this defensive remedy may be the only one actually required by the Constitution.[86] It should not be surprising that constitutional prohibitions aimed chiefly at disabling government enforcement proceedings do not always readily convert into occasions for compensatory damages.

The potential dissonance between tort remedies and constitutional rights is especially great in modern constitutional law, which is full of prophylactic rules and doctrines that extend constitutional protections beyond what principle might require. Such strategies are not limited to overtly prophylactic pronouncements, such as the warning requirements of *Miranda v. Arizona*,[87] but are a routine part of the definition of rights.[88] The

85. The Takings Clause may be an exception. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779 n.244 (1991) (noting that the Takings Clause "can be read as expressly requiring a damages remedy ('just compensation') when a taking has occurred").

86. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 73-76 (1996) (holding that Congress can withhold injunctive relief as well as damages); United States v. Stanley, 483 U.S. 669, 683-84 (1987) (holding that no damages remedy need be provided for injuries inflicted by unconstitutional acts in the military, regardless of the inadequacy of remedial alternatives). For a scholarly exchange on the question of whether constitutional rights must function as a sword as well as a shield, see John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2516-17 (1998), which discusses a system of enforcement based on defensive invocation of constitutional rights and officer suits based on private wrongs; and Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2551 (1998), which disputes Harrison's "radical" conception and suggests a broader approach to determining when remedies are constitutionally required.

87. 384 U.S. 436 (1966).

greater the prophylactic sweep of a particular rule or doctrine, the more likely it is to encompass interests conceptually distant from the underlying constitutional concern. Awarding money damages for all harms caused by constitutional violations raises the specter of compensation for injuries that the Constitution is not meant to prevent.[89] An example would be the guilty victim of a warrantless search who, if the evidence were not excluded, could claim damages not only for the invasion of privacy but also for the (socially desirable) injuries of criminal trial, conviction, and punishment. To the Supreme Court, at least, this prospect seems absurd.[90] For present purposes, the point is not whether recovery of damages for constitutionally irrelevant injuries—more precisely, for injuries unrelated to the risks that the constitutional prohibition was designed to avoid—is on balance desirable.[91] The point here is merely to confirm that the adaptation of constitutional thou-shalt-nots to awards of compensatory damages poses questions unique to that remedy and that those questions depend (at least in part) on the nature of the underlying right.

It is my contention that the liability rule for money damages should vary with the constitutional violation at issue. The logical place to locate this argument is the doctrine of qualified immunity, which differentiates damages from other remedies. Qualified immunity should be used not only to distinguish damages from other remedies, but also to differentiate damages among rights. For some constitutional violations, damages should be much more readily available than under current doctrine; for others, they perhaps should be further constrained. The considerations that attend such choices spring not only from policies generally applicable to the damages remedy, but also from the content and context of constitutional violations. The current law of § 1983 accommodates the former set of concerns but ignores the latter.

88. *See* Levinson, *supra* note 15, at 903-04 (arguing that prophylactic rules are ubiquitous because of the necessity that constitutional doctrine be "rule-like" if it is to "have any useful meaning in governing the primary behavior of government"); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988) ("'[P]rophylactic' rules are not exceptional measures of questionable legitimacy but are a central and necessary feature of constitutional law.").

89. *See generally* John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461 (1989) (exploring the potential mismatch between the rationales for constitutional rights and the interests vindicated by the award of money damages for their violation).

90. *See* Heck v. Humphrey, 512 U.S. 477, 487 n.7 (1994) (holding that the compensable injury for illegal search "does *not* encompass the 'injury' of being convicted and imprisoned" for one's crimes).

91. *Compare* Jeffries, *supra* note 89, at 1461 (arguing that money damages for violations of constitutional rights ordinarily should compensate only "constitutionally relevant injuries—that is, injuries within the risks that the constitutional prohibition seeks to avoid"), *with* Nahmod, *supra* note 16, at 1011-21 (disputing that view).

To put the same point another way, we should reject the radical dissociation of right and remedy immanent in current doctrine. One need not go so far as to believe that there is no distinction between right and remedy in order to recognize that they are interdependent and related.[92] By constructing constitutional tort law as an elaborate body of remedial doctrine applicable indifferently to all rights, the Supreme Court has denied what all sensitive observers of the field—including, of course, the Justices themselves—know to be true: Rights cannot sensibly be crafted apart from remedies, or vice versa. Each depends on, interacts with, and helps define the other. The law of § 1983 should embrace that insight.

To that end, qualified immunity should lose its fixed doctrinal content. It should be treated as a cluster of related variables, more or less like mens rea in the criminal law. At some level of abstraction, the state-of-mind requirement plays a consistent role in the definition of crimes, but the precise content varies. It varies not only with the consequence of conviction (intentional homicide is punished more severely than negligent homicide), but also with the nature of the proscribed conduct. Sometimes the actus reus of crime is richly indicative of fault; sometimes it is morally ambiguous. Generally speaking, lesser culpability suffices for realized harms (homicide and arson, for example), and higher culpability is required for inchoate or preliminary acts (such as attempts). The mens rea for a particular offense cannot sensibly be specified without reference to underlying conduct.

Just as mens rea is a doctrinal category presumptively applicable to all crimes but varying among them, qualified immunity should become the doctrinal home of rules governing money damages for constitutional violations, and those rules should be allowed to vary among constitutional claims. Stated most radically, there should be a separate defense of qualified immunity—or rather the *possibility* of a separate defense of qualified immunity—for each kind of constitutional violation. Just as the generalities of the First Amendment are disaggregated into different doctrines, the law of money damages should be also. Doctrinal categories—such as commercial speech or content-neutral regulations of time, place, and manner—sort the variegated landscape of free speech claims into manageable units of analysis and adjudication. The availability of money damages should proceed along the same lines. There is no reason to think that this approach would splinter constitutional tort law into tiny fragments; each constitutional violation is not unlike every other. But equally, there is no reason to think that all versions of qualified immunity would look the

92. I am not sure that anyone believes that there is never utility in distinguishing right from remedy, but at times Daryl Levinson comes close. *See, e.g.*, Levinson, *supra* note 15, at 922 (discussing the futility of distinguishing between "the real and the remedial" in constitutional law).

same. What is needed is the doctrinal freedom to adjust the damages remedy to the policies and practicalities of specific kinds of claims.

Once one turns from trying to frame a uniform damages remedy for all constitutional violations and seeks instead to make money damages responsive to particular kinds of claims, a crucial consideration leaps into view. The role of money damages in remedying constitutional violations depends on the alternatives. Different rights have different remedies. This is true not only for those doctrines explicitly dubbed remedial,[93] but also for remedial rules and strategies incorporated into the definition of rights.[94] To design a remedial package suitable for a specific kind of constitutional violation, one must have some sense not only of the considerations that attend the use of particular remedies, but also of the costs and benefits of the alternatives.

Although the relevance of alternative remedies seems obvious, it is a consideration suppressed and ignored by constitutional tort law. This is because alternative remedies do not exist "across the board" and categorically, as qualified immunity is said to, but in particular constitutional contexts. A brief return to the three areas discussed in Part I will illustrate the kinds of concerns that should come into play.

A. *Search and Seizure*

As currently configured, constitutional tort law does little to redress illegal search and seizure.[95] Contributing factors include unsavory plaintiffs, de minimis injuries,[96] and perhaps defendant perjury.[97] Most important is the defense of qualified immunity. As applied to the murky and judgmental

93. The exclusionary rule is an example. *See* United States v. Calandra, 414 U.S. 338, 348 (1974) (describing the exclusionary rule as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved").

94. *See* Levinson, *supra* note 15, at 885-87, 899-904 (discussing situations where "the definition of a right may effectively incorporate a remedy, most commonly the equivalent of a prophylactic, preventive injunction" and labeling this phenomenon "remedial incorporation").

95. *See* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE SEARCH AND SEIZURE EXCLUSIONARY RULE 45 (1986) (reporting "fewer than three dozen" reported Fourth Amendment cases brought under § 1983 in the previous two decades). Successful damages actions are much more likely when illegal search and seizure leads to ancillary harms, such as gross indignity or destruction of property. *E.g.*, Bonitz v. Fair, 804 F.2d 164, 173 (1st Cir. 1986) (allowing recovery for body cavity searches of female inmates in the presence of male correctional officers).

96. Again, compensable injuries are de minimis if limited to the invasion of privacy against which the Fourth Amendment protects. Compensable injuries would be enormous if they included arrest, trial, and punishment. *See* Jeffries, *supra* note 89, at 1474-75 (describing as "peculiar, if not perverse" a regime that would compensate illegally searched individuals for criminal conviction and punishment for crimes they had actually committed).

97. *See* Patton, *supra* note 39, at 763-64 (discussing the police "code of silence" as a barrier to § 1983 recovery for excessive force).

standards of the Fourth Amendment, qualified immunity covers a wide range of illegal conduct that could reasonably have been thought lawful. Just as there is no context in which the overdeterrence rationale for qualified immunity has greater force or plausibility, there is also no context in which the defense has greater consequence in precluding damages for constitutional violations.

Whether this situation is acceptable or outrageous depends on the efficacy of exclusion. Since *Mapp v. Ohio*,[98] exclusion of evidence has been the chief means of enforcing the Fourth Amendment. In the four decades since that decision, contention has not waned. The remedy remains durably controversial, as scholars debate whether the gains from denying law enforcement officials the fruits of illegal searches justify the windfall benefits for guilty offenders.[99] The Supreme Court has responded with grudging acceptance of the continuing need for exclusion, coupled with a marked readiness to find exceptions.[100] The broad terms of the exclusionary rule debate are too familiar to recount here, and in any event I have nothing new to say. My purpose in broaching this topic is to set the stage for three observations about the Fourth Amendment and money damages.

First, money damages and exclusion of evidence are substitutes. We conceivably could have both, but unless we are willing to sacrifice the Fourth Amendment completely, we could not have neither. Thus it is indefensible, if not exactly illogical, to support restrictions on money damages without embracing exclusion (or some other remedy). Similarly, it will not do to bemoan the costs of exclusion unless one is willing to accept the costs of civil liability (or vice versa). Scholars who recognize the point have contributed to a growing literature that considers these remedies comparatively rather than in isolation.[101] Note, however, that this literature

98. 367 U.S. 643 (1961).

99. For a representative sample of the voluminous literature, see CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 45 & n.2 (2d ed. 1986), which cites studies reporting few convictions lost due to application of the exclusionary rule; Slobogin, *supra* note 45, at 365 n.2, which cites sources supportive of exclusion; and *id.* at 369 n.6, which cites empirical studies of the efficacy of exclusion.

100. *See* Slobogin, *supra* note 45, at 375 n.39. Slobogin summarizes the law as follows:

> [I]llegally seized evidence is not excluded when it is introduced in any of the following manners: (1) in a proceeding other than the criminal trial; (2) against someone whose rights were not violated; (3) for impeachment purposes; (4) when the search was conducted in good-faith reliance on a statute, warrant, or computer printout; or (5) the evidence would inevitably have been discovered anyway or bears only an attenuated connection to the illegality.

Id.

101. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 811-16 (1994) (criticizing exclusion and endorsing strict liability in money damages); Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 969-80 (1983) (proposing a system of restitution to victims of unlawful searches as an alternative to exclusion of evidence); Slobogin, *supra* note 45 (criticizing exclusion and endorsing an enforcement regime based on money damages); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991) (examining the

is not "about" § 1983. Nor could it be. The doctrinal and intellectual tradition of § 1983 does not invite, or even admit, comparison of money damages with remedies applicable only to specific rights.

Second, redressing flagrant Fourth Amendment violations is not the problem. In cases of extravagant illegality, qualified immunity plays no role. Deterrence of officers who willfully flout Fourth Amendment rights is entirely to the good, and punishing such behavior will not inhibit legitimate activity. The challenging case is not the flagrant violation but the borderline mistake, the everyday close call that might or might not be found to have crossed a shadowy line. It is precisely such actions that qualified immunity protects, because it is precisely such actions that strict liability would inhibit. Yet if reasonable mistake is the situation in which qualified immunity is most needed, it is also the situation in which exclusion is most regretted. Few lament suppression of evidence seized by blatantly illegal acts, and if they do, other remedies are at hand.[102] It is where the constable merely "blunders" that the price may seem too high.[103] In this context, the choice between damages and exclusion is hard indeed. Perhaps a partial solution would be to elaborate the warrant requirement, which, when used, gives officers a safe harbor against award of damages but provides a check on the after-the-fact bias that leads judges to validate borderline illegal searches that produced incriminating evidence.[104]

Third, and most instructive, there is an important category of Fourth Amendment violations where exclusion is irrelevant. These are not simply the unsuccessful searches, as a credible threat of exclusion would inhibit searches ex ante, before the officers could know for sure what they would find. The interesting category consists of searches not *intended* to be successful, at least not in the sense of leading to arrest and prosecution. There are many other reasons to search, including self-protection, destruction of contraband, maintenance of police authority, and simple harassment.[105] A threat to suppress evidence that the police do not expect to find or intend to use is next to meaningless. For such cases, exclusion is

different functions served by the warrant requirement under damages and exclusion enforcement regimes).

102. *E.g.*, Slobogin, *supra* note 45, at 366 (endorsing exclusion "when police fragrantly abridge Fourth Amendment rights or illegally seize private papers").

103. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.) ("The criminal is to go free because the constable has blundered.").

104. Stuntz, *supra* note 101, at 909-10 (noting that warrants amount to a "presumptive defense" in subsequent damage actions); *id.* at 916 (discussing warrants as a cure for the "after-the-fact" bias in suppression hearings).

105. *E.g.*, Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 36-49 (2000) (assessing the prevalence and causes of arrests without prosecution); Neil A. Milner, *Supreme Court Effectiveness and the Police Organization*, 36 LAW & CONTEMP. PROBS. 467, 476-80 (1971) (discussing reasons for making arrests without expectation of successful prosecution).

irrelevant, and reliance on it to enforce the Fourth Amendment is mere pretense. The remedy is damages or nothing.

The lack of alternative enforcement suggests that searches not designed to lead to arrest should be compensated more readily by money damages than current doctrine allows. That conclusion would seem to follow from Fourth Amendment reasoning, but some judges may have an intuition that not all such searches are illegitimate. They may think that, so long as the search could be justified by its relation to illegal activity, the police should be allowed to engage in it, even if they do so for different reasons.[106] In other words, judges may believe that the felt need of law enforcement officers to maintain their authority on the street requires judicial tolerance of a wide range of stop-and-search activity that could be termed harassment.[107] How tightly to control such activity is a difficult question for which I have no pat answer. At the least, however, one can say that the problem of searches not designed to uncover evidence is different from the problem of illegal searches generally—different because of the irrelevance of exclusion. It follows that this category of Fourth Amendment violation would require a different enforcement strategy, one that might well include specially favorable rules on the availability of money damages.

In my view, an overall strategy for enforcing the Fourth Amendment would likely involve some combination of exclusion, damages, and the occasional systemic injunction. Exclusion (with exceptions for impeachment and so forth) would be the remedy of choice for most cases of ordinary police error. Damages would not be necessary or suitable for most such cases, but would be crucial in redressing illegal searches not intended to lead to arrest and prosecution. Finally, injunctive relief, though obviously impractical for most Fourth Amendment violations, could play a useful role in coercing reform of institutional culture in departments that have a pattern of pervasive unconstitutional behavior.

Obviously, these few observations do not resolve the difficulties of enforcing the Fourth Amendment, but perhaps they suffice to suggest that a sensible strategy would take advantage of all remedial opportunities, deploying each where it would be most useful. Nothing in the law of exclusion prevents this sort of tailoring. Indeed, the current regime of exclusion with exceptions illustrates the Court's attempt to follow precisely this approach. Similarly, injunctions are essentially ad hoc and may be issued or withheld as circumstances permit. The law of § 1983, however,

106. *See, e.g.*, Whren v. United States, 517 U.S. 806 (1996) (upholding the stop of a vehicle as justified by probable cause to believe that a traffic offense had been committed, notwithstanding the officer's subjective intention to uncover drug trafficking).

107. *See, e.g.*, Chicago v. Morales, 527 U.S. 41, 106-07 (1999) (Thomas, J., dissenting) (emphasizing the need to rely on the discretion of police officers to determine whether groups of loiterers include persons who threaten the public peace).

asserts that money damages are governed by strict remedial uniformity, not only among the situations comprehended by the Fourth Amendment but across all constitutional rights. This is the mistake. No doctrine that makes money damages available (or unavailable) on the same terms for all rights can hope to accommodate the range of considerations that should come into play.

B. *Freedom of Speech*

Just as the exclusionary rule dominates the landscape of the Fourth Amendment, facial review looms over the First. The overbreadth doctrine allows those whose speech could validly be proscribed to challenge an overbroad law on the ground that it would be unconstitutional as applied to others.[108] In this way, one claimant stands for all. Much the same effect is achieved by the rule against prior restraints. What is especially noxious about prior restraint is not that it is prior—the threat of punishment always precedes, as the fact of punishment always follows, the act in question—but rather that preclearance requirements invite overbreadth in application.[109] The rule disfavoring prior restraints targets laws likely to prove overbroad in administration, even if the particular application is unobjectionable.[110] Facial review is also implicit in the rule that a content-neutral regulation of the time, place, and manner of speech will be struck down if it gives executive officers uncontrolled discretion.[111] Discretion carries the risk that the law will be administered nonneutrally. Striking down such laws is overbreadth in a time frame: Rather than wait for evidence of bias in enforcement, the courts invalidate laws that have that potential, even if the experience to date is unobjectionable.

In all versions, facial review operates to reduce the number of claimants needed to enforce First Amendment rights. That is its purpose and effect.

108. Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 845 (1970) (noting that statutes may be reviewed for overbreadth "without regard to the constitutional status of a particular claimant's conduct").

109. *E.g.*, John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 422 (1983) (discussing how "[t]he administrative apparatus erected to effect preclearance may screen a range of expression far broader than that which otherwise would be brought to official attention"); *see also* Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 22-23 (1981) (detailing disadvantages of licensing systems, including that "the initial decision to disallow speech is made by an administrative officer who specializes in suppression").

110. Jeffries, *supra* note 109, at 425 ("A rule of special hostility to administrative preclearance is just another way of saying that determinations under the overbreadth doctrine should take account not only of the substance of the law but also of the structure of its administration.").

111. *See, e.g.*, City of Lakewood v. Plain Dealer Pub'g Co., 486 U.S. 750, 772 (1988) (citing the mayor's uncontrolled discretion as a reason for invalidating an ordinance requiring permits for placement of newspaper vending machines on public property); Saia v. New York, 334 U.S. 558, 560 (1948) (invalidating an ordinance against sound amplification devices because it gave the chief of police unguided discretion to permit or forbid them).

Reliance on remedial opportunities (such as actions for money damages) to encourage enforcement is therefore diminished. If one claimant wins for all, others need not apply. It follows that constitutional tort actions are relatively unimportant in vindicating First Amendment rights—at least for the kinds of claims encompassed by facial review. For most free speech claims, § 1983 can safely be relegated to backup status, providing a (probably redundant) remedy if the government continues to invoke laws found facially unconstitutional. Qualified immunity would not matter, as no officer could reasonably believe in the legality of enforcing laws adjudged invalid across the board.

For most of the First Amendment landscape, therefore, current doctrine works well. Qualified immunity precludes money damages when belief in the legality of regulation is reasonable. The curtailment of retrospective relief lessens the cost of innovation and facilitates expansion of rights. The resulting tendency toward underenforcement of existing rights is offset by facial review. While the opportunities to vindicate free speech claims are reduced, each successful claim counts for more. The good sense in this arrangement cannot be seen by looking at damages alone; it becomes apparent only when the field of vision expands to include other strategies for enforcing the First Amendment.

That leaves retaliation. Claims of retaliation for the exercise of First Amendment freedoms do not benefit from facial review. The laws involved in such cases do not purport to regulate speech; they deal with public employment, prison discipline, or other workaday business of government. Retaliation plaintiffs allege that facially innocuous laws have been misused to punish free expression. Obviously, a successful claim of this sort does not vindicate the rights of others. Each abuse requires its own redress.

If the courts are to safeguard protected speech against illegal retaliation, they must find a way to encourage such claims and to hear them case by case. For this role, damages actions are ideal. They encourage retaliation victims to vindicate their rights, they provide an appropriate disincentive for government officers tempted to misuse their powers, and they run scant risk of inhibiting legitimate activity. The problem, if there is one, is that the ordinary rules of civil litigation invite harassment by ideological plaintiffs and by those, such as prisoners, for whom litigation can be fun. One has only to imagine the range of discovery arguably relevant to an allegation of improper motive to see the risk involved. This concern prompted the Supreme Court to eliminate the "subjective" branch of qualified immunity in order to foreclose meritless cases before trial.[112] In effect, the Court

112. Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982) (precluding discovery and trial, notwithstanding allegations of malice, where the officer's misconduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

adopted a special rule of summary judgment to take account of the peculiar litigation incentives in constitutional tort cases.

When confronted with the question of whether something similar should be done for illicitly motivated constitutional violations, however, the Court balked. *Crawford-El v. Britton*[113] involved a litigious and outspoken life-term prisoner who was transferred from one facility to another due to overcrowding. He claimed that boxes of belongings were given to his brother-in-law, a corrections employee, rather than shipped directly to the new institution, in order to punish him for inflammatory interviews and previous lawsuits. As the Chief Justice remarked in dissent, the act of delivering boxes "would seem to be about as far from a violation of the First Amendment as can be conceived," but the "claim of illicit motive . . . transforms a routine act in the course of prison administration into a constitutional tort."[114] Chief Justice Rehnquist concluded that the defendant in an illicit-motive constitutional tort claim should be entitled to summary judgment if "he can offer a lawful reason for his action and the plaintiff cannot establish, through objective evidence, that the offered reason is actually a pretext."[115] Justice Scalia, also in dissent, endorsed a more draconian rule that would have barred recovery whenever "the asserted grounds for the official action were objectively valid," regardless of evidence of improper motive.[116] The majority shared the dissenters' concerns but refused to go so far in limiting retaliation plaintiffs. Instead, the majority suggested that trial judges make more vigorous use of existing procedures to weed out unfounded claims.[117]

It seems to me that the *Crawford-El* majority was right to temporize, notwithstanding the realistic risk that government officials will be subjected to harassment by litigation. The decisive reason is the lack of alternative remedies. Protecting the First Amendment rights of prisoners, government employees, and others subject to bureaucratic control requires that retaliation plaintiffs be allowed to prove their claims. Otherwise, there is no constraint. Here, as in few other First Amendment contexts, constitutional tort actions really matter.[118]

113. 523 U.S. 574 (1998).

114. *Id.* at 607 (Rehnquist, C.J., dissenting).

115. *Id.* at 605.

116. *Id.* at 612 (Scalia, J., dissenting).

117. *Id.* at 597-601 (detailing procedures available to federal trial judges).

118. After completing this Essay, I had the pleasure of reading an excellent article analyzing First Amendment retaliation claims by public employees in terms broadly consistent with the approach suggested here. *See* Michael Wells, *Section 1983, the First Amendment, and Public Employee Speech: Shaping the Right To Fit the Remedy (and Vice Versa)*, 35 GA. L. REV. (forthcoming Spring 2001).

C. *Non-Rights*

When one considers decisions such as *Paul v. Davis*[119] and *County of Sacramento v. Lewis*,[120] the suspicion arises that the Court may have resorted to a crabbed and contemptuous construction of a constitutional right merely to avoid federalizing litigation over damages. In response, some have suggested that these decisions should have been based on an expansive construction of qualified immunity rather than on a restrictive definition of the underlying right.[121] Following that suggestion would yield important advantages. Using qualified immunity to curtail civil liability decouples damages from injunctions and other remedies. It leaves open the possibility that a claim the courts are unwilling to redress by money damages might be vindicated through other means. Limiting liability by constricting rights, by contrast, means that injunctions, defenses, and other remedies are also precluded.

Whether a broad or narrow ground of decision is preferable depends on the claim involved. Sometimes a categorical bar to all federal intervention is exactly right; other times, it may not be. One disturbing thing about *Paul* and *Lewis* is the suspicion that the Justices may have foreclosed all forms of relief while focusing only on money damages. The opinions give no evidence that they considered any other context. The risk is not only that the Justices may err in construing the Constitution (which is just another way of saying that the rest of us remain free to think so), but that they may reach a decision without having fully considered the consequences.

The magnitude of this risk depends importantly on one's attitude toward injunctions. Especially controversial is the systemic or structural reform injunction, in which courts undertake to supervise the performance of departments or agencies that persistently violate the Constitution. For those who categorically oppose such intervention, there is no point in preserving the possibility of injunctive relief. For those who think that such injunctions are sometimes warranted, however, the decoupling of damages is potentially very valuable, as it preserves the possibility of other remedies in an appropriate case.

Personally, I think that the value of structural reform injunctions is often underestimated, especially in law enforcement. There are many kinds of unconstitutional police behavior that are unlikely to be redressed even by a well-functioning regime of money damages. Police brutality cases are an example. As anyone who follows the newspapers knows, juries typically

119. 424 U.S. 693 (1976).
120. 523 U.S. 833 (1998).
121. *Supra* note 77 and accompanying text.

side with the cops.[122] Their reason for doing so is not moral depravity or even virulent racism (though no doubt racial fears and prejudices corrupt clear thinking), but an essentially understandable sympathy for the police. In the words of Scott Turow,

> Jurors are loath to convict because they know that cops on the job are trying to protect not only themselves but, more importantly, us. The jurors. Their families. Yes, some cops are bullies; some want the job so they can handle a gun. But most are decent, well-intentioned folks who have taken up a calling that is not particularly well-paid and in which, for our benefit, they face risks every day far greater than those most of us confront when we leave for the office.[123]

Against the backdrop of these assumptions, the occasional case of gratuitous brutality is hard to spot. Almost always (videotapes aside), there is uncertainty about the facts and conflicting testimony from police officers and their accusers. With the best of intentions and the purest of minds, jurors may have no way of finding the occasional bad apple in a barrel they believe to be generally good. In such a situation, the advantage of a structural reform injunction is that it allows an aggregate, as opposed to individualized, approach to evidence of misconduct. Even if no specific instance can confidently be pronounced unconstitutional, an epidemiological approach to excessive force might identify departments that are institutionally slack or culturally corrupt or politically out of control.

My own view is that structural reform injunctions can be used—and sometimes have been used—very effectively to address the problem of defective institutions, but that is another essay. For the present, I rest on the minimal proposition that the *possibility* of structural reform as a meaningful way of enforcing the Constitution should not be precluded prematurely by decisions aimed at money damages. Decoupling damages from injunctions at least ensures that remedial difficulties applicable only in one context do not automatically infect others.

III. CONCLUSION

This Essay has attempted to clarify and reconceptualize constitutional tort law. Current doctrine severs remedies from rights and authorizes

122. *E.g.*, Scott Turow, *Presumed Guilty: You Think You Know Why the Diallo Cops Were Acquitted. Think Again*, WASH. POST, Mar. 5, 2000, at B1 ("In my eight years as an assistant U.S. attorney, police beating cases—prosecutions for a cop's use of excessive force—were the only class of crimes for which our office had a losing record in court.").

123. *Id.*

money damages on terms that apply indifferently to all constitutional violations. This remedial uniformity is faithful to the *Monroe* model of statutory interpretation, but at odds with the differences among rights in enforcement strategies and opportunities. In fact, even under current doctrine, various constitutional claims *do* have—and under any plausible understanding, *should* have—remedial variation. Restructuring the law of § 1983 to accommodate this insight would invite recognition of the differences among rights and promote clear thinking about remedies to enforce them.

Disaggregating constitutional torts would reorient our thinking in three important ways. First, it would inhibit the tendency, evident in virtually all discussions of § 1983, to cite one kind of constitutional violation as if it stood for all.[124] Reasoning based on one type of unconstitutionality will apply across the board only if the particular represents the general. In constitutional tort law, that is rarely true. Virtually any assertion about the role of qualified immunity, or the availability of alternative remedies, or the utility of damage actions in enforcing constitutional rights, will make no sense in some contexts. That does not mean that we should abandon theoretical and systematic analysis of constitutional tort remedies, but it does suggest a need for caution in generating comprehensive doctrine from specific examples.

Second, disaggregation of constitutional tort law would encourage remedial comparison. The crucial question in enforcing the Fourth Amendment is not whether the exclusionary rule works well or poorly. The question is—or at least should be—whether it works better than the available alternatives. The same is true of money damages. The costs and benefits of damages liability as a means of enforcing the Fourth Amendment cannot be assessed in isolation. The efficacy of exclusion is also relevant. Such comparisons are local, not global. The fact that exclusion of evidence provides meaningful redress for illegal search and seizure in some contexts does not mean that it applies to all, much less that it has relevance for other constitutional rights. Just as remedial opportunities vary among rights, the comparative advantage of remedial mechanisms will vary as well. The straitjacket of remedial uniformity imposed by the current law of § 1983 hinders comparative evaluation of alternative strategies. A more flexible approach to remedial choice would invite attention to that concern.

Finally, I hope that thinking of remedies in relation to specific rights would lead to better enforcement of the Constitution. If the costs and benefits of civil liability vary across rights, remedial uniformity precludes

124. *See, e.g.*, Jeffries, *supra* note 17, at 73-74 (defending a general rationale for qualified immunity by reference to the specific example of illegal search and seizure).

optimal enforcement. Crafting remedial strategies to redress particular kinds of constitutional violations would hold out the prospect, at least, of securing greater compliance at lower cost. Muddled thinking about the relationship between rights and remedies in constitutional law not only leads to intellectual confusion and misplaced argument; it also contributes to shortfall and sloppiness in redressing constitutional violations. A better understanding of the *differential* role of civil liability in enforcing various rights would not make the hard choices go away, but it would remove the conceptual blinders that prevent us from seeing those choices clearly. Disaggregating constitutional torts would be a step in the right direction.