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# The Constitutional Tort System

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*Constitutional torts—private lawsuits for constitutional wrongdoing—are the primary means by which violations of the U.S. Constitution are vindicated and deterred. Through damage awards, and occasionally injunctive relief, victims of constitutional violations discourage future misconduct while obtaining redress. However, the collection of laws that governs these actions is a complete muddle, lacking any sort of coherent structure or unifying theory. The result is too much and too little constitutional litigation, generating calls for reform from across the political spectrum along with reverberations that reach from Standing Rock to Flint to Ferguson.*

*This Article constructs a framework of the constitutional tort system, drawing on contemporary tort scholarship's rich theorization of a similar set of challenges that emerge in the private law context. By framing constitutional litigation as part of an essentially tort-like system, in which the law seeks to facilitate deterrence and compensation without unduly burdening state action, this Article presents an analytical lens that clarifies, challenges, and transforms the law of constitutional torts.*

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## INTRODUCTION

Qualified immunity is under attack. A growing chorus of voices has questioned whether the doctrine, one of the cornerstones of constitutional tort law, may go too far in its drive to protect risk-averse public officials from personal liability. In the words of its critics, qualified immunity instantiates a regime of "heads government wins, tails plaintiff loses,"[1] depriving plaintiffs whose rights have been violated of redress while undermining a crucial tool for "ensur[ing] accountability and professionalism in law enforcement."[2] This is especially a problem for members of

1. Cole v. Carson, 935 F.3d 444, 471 (5th Cir. 2019) (Willett, J., dissenting).

2. *Qualified Immunity: The Supreme Court's Unlawful Assault on Civil Rights and Police Accountability*, CATO INST. (Mar. 1, 2018), https://www.cato.org/events/qualified-immunity-supreme-courts-unlawful-assault-civil-rights-police-accountability [https://perma.cc/U9P8-Y3ZT]; *accord* Emma Andersson, *When Your Constitutional Rights Are Violated but You Lose Anyway*, ACLU (July 11, 2018, 4:45 PM), https://www.aclu.org/blog/criminal-law-reform/when-your-constitutional-rights-are-violated-you-lose-anyway [https://perma.cc/L5LM-N2U9].

politically marginalized communities, who rely on the powerfully countermajoritarian force of private lawsuits when confronting official misconduct.[3] Yet in the face of these concerns, the Supreme Court has stood firm, doubling down on the strict applicability of qualified immunity: effective governance and policing cannot be sacrificed, not even in service of the rights and liberties enshrined in the U.S. Constitution.[4] The result is an uneasy impasse, in which qualified immunity's supporters argue that the doctrine's application continues to fall short of adequately protecting government officials, while qualified immunity's detractors condemn its severe limitation on the compensation and vindication of constitutional wrongdoing. Taking these respective concerns seriously, qualified immunity may facilitate too much *and* too little constitutional litigation. How can this be?

The answer to this puzzle, this Article posits, may be found by looking beyond qualified immunity to the confused and constricted approach taken throughout the laws governing private lawsuits for constitutional violations more generally. Unmoored from any broader theoretical foundation, the laws of constitutional torts, as these suits are most commonly labeled, have developed in a haphazard and largely siloed fashion. The vigorous debate over the need for qualified immunity, for example, seemingly exists in a world without § 1988, an attorney fee-shifting provision that greatly influences the amount of constitutional tort litigation that is filed.[5] The result is a "proliferation of inconsistent policies and arbitrary distinctions" that "renders constitutional tort law functionally unintelligible."[6]

This Article seeks to cut through this confusion by constructing a model of the constitutional tort *system*, providing an analytical framework through which doctrine can be shaped and evaluated. Rather than trying to assemble a theoretical model of constitutional torts from scratch, this framework bridges the gap between constitutional torts and their private law counterparts, building on contemporary tort theory's rich discussion of similar challenges arising in the private law context. Indeed, the tension at the heart of much of constitutional tort doctrine—how to robustly deter and compensate without chilling societally desirable action—has been a central concern of tort scholarship for decades.[7] Despite these similarities and their shared historical roots,[8] the field of constitutional torts largely disregards the field of torts *writ large*, relying instead on a discordant collection of policy solutions borrowed from the nineteenth century or crafted from whole cloth.[9]

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3. *See* James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251, 1260 (1994).

4. *See, e.g.*, City of Escondido v. Emmons, 139 S. Ct. 500, 504 (2019).

5. 42 U.S.C. § 1988 (2012); *see infra* Part II (examining, among other things, § 1988's powerful normative and positive impact on qualified immunity).

6. John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 208 (2013).

7. The instrumentalist view treats tort suits as tools for accomplishing goals like ensuring compensation and deterrence. *See infra* Part I.

8. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 54 (2018).

9. *See, e.g.*, *infra* Part II. When courts do turn to the common law of torts, it is most commonly to answer a discrete question, such as defining the scope of the underlying constitutional right, *see, e.g.*, Michael Wells, *Constitutional Remedies, Section 1983 and the*

Explicitly framing constitutional torts as comprising a tort-like system yields substantial payoffs. By clarifying the extent to which constitutional tort law is essentially concerned with optimizing the effects of constitutional litigation—*balancing* constitutional rights and liberties against the state's interest in protection and governance[10]—this framework highlights how crudely, and often inconsistently, the collection of reforms used within constitutional tort law work toward such an end.[11] Qualified immunity, for example, seeks to limit the burden of the stress, stigma, and financial costs of litigation on desirable state action. But it offers a binary solution, immunity or no immunity, to a nonbinary problem: the stress, stigma, and financial cost of litigation weigh on decision-making with varying degrees of severity.[12]

This Article's conceptual shift, moreover, reveals an additional problem in this context, pervasive yet overlooked: bias. Unlike private law torts, constitutional torts owe their very existence to the recognition that state decision-making may be influenced by racial prejudice, religious animus, and other such invidious biases. Section 1983, for example, was enacted as part of the Ku Klux Klan Act of 1871 in response to widespread anti-African American hostility throughout the ranks of government officials.[13] Yet, in another move reflecting constitutional tort law's neglect of tort theory, constitutional torts have borrowed their primary deterrence remedy—compensatory damage awards—from their private law counterparts with no consideration of or accounting for this difference. Although state actors who are biased will not be deterred from constitutional wrongdoing to the same extent as state actors who are not, compensatory damages are determined by the nature of the harm—a broken leg, a damaged camera, and so forth—rather than the reason for it. And when bias acts on decision making, compensatory damages will therefore fail to deter wrongdoing appropriately.

Finally, this Article's framework is useful not only for identifying problems but also for identifying solutions. Each of the doctrinal shortcomings and oversights examined in this discussion relates to some failure to balance deterrence and compensation against the need for effective policing and governance. The parallel nature of these problems, highlighted by this Article's analytical framing of constitutional tort law, implies the possibility of a common solution. This Article offers one such reform, adapted from similar proposals in the context of private law torts: damage awards could be increased or decreased (via damage multipliers, caps, or proportional liability) to account for any influence, like the stress of being sued or the bias of state decisionmakers, that might skew the overall effect of the constitutional tort system. Such a reform could provide a more finely tunable

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*Common Law*, 68 MISS. L.J. 157 (1998) (collecting cases), rather than considering how the overlapping rules governing these cases do or should work in conjunction with one another.

10. *See infra* Part II; *cf.* Pearson v. Callahan, 555 U.S. 223, 231 (2009) (gesturing to the importance of balance in this context without fully embracing optimal deterrence).

11. *See, e.g.*, Jeffries, *supra* note 6, at 208.

12. *See infra* Part II (discussing qualified immunity, § 1988 attorney's fees, and a number of other examples of such problems).

13. 42 U.S.C. § 1983; *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1141–53 (1977); *see also* U.S. CONST. amend. XIV.

mechanism for optimizing constitutional litigation, presenting an answer not only to the policy problems associated with qualified immunity—increasingly recognized across the political spectrum—but also to the challenges that arise from § 1988 attorney's fees, indemnification, and a wide variety of additional doctrines and practices in this context.

The stakes could not be much higher. Private suits for constitutional wrongdoing have grown into a significant force, with tens of thousands of such cases filed each year.[14] Indeed, § 1983 inmate cases alone comprise over ten percent of all federally filed cases.[15] And as a result, constitutional tort law's failures reach throughout society; the problems identified by this Article's framework impact not only policing but also prisons, public schools, public health, public housing, and public planning.[16] The consequences of these failures, moreover, are not evenly distributed. Politically vulnerable populations and members of disfavored groups disproportionately bear the brunt of constitutional tort law's disfunction.[17]

This Article proceeds in four parts. Part I examines the applicability of instrumentalism to constitutional torts, concluding that it is not only appropriate but that it also represents the dominant mode of analysis currently used in this context. Part II then builds and applies a tort-like instrumentalist framework for constitutional torts, illustrating the importance of carefully balancing the competing interests implicated by constitutional tort suits and the inadequacy of current doctrine. Part III explores how this framework shines new light on bias's influence on the constitutional tort system, and bias's threat to balance in this context. Finally, Part IV introduces a novel solution to these problems: tailored damage awards present a promising mechanism for facilitating a closer-to-optimal operation of constitutional torts.

## I. INSTRUMENTALISM AND CONSTITUTIONAL TORTS

In *Monroe v. Pape*, the Supreme Court rejuvenated § 1983, giving rise to the modern constitutional tort suit.[18] Since then, constitutional tort law has evolved in fits and starts into its modern form: a patchwork of discrete rules bearing little in common with one another.[19] Although courts routinely gesture to the "common law of torts" in this context, constitutional tort law does not resemble its private law

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14. *Federal Judicial Caseload Statistics 2019*, U.S. CTS. (Mar. 31, 2019), https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019 [https://perma.cc/3RJK-8B5Y].

15. *Id.*

16. Constitutional wrongdoing in the context of policing alone is no small issue; a 2011 Justice Department report estimated that *forty million* people had contact with the police in 2008 and that 776,000 people "experienced force or the threat of force by police at least once." CHRISTINE EITH & MATTHEW R. DUROSE, U.S. DEP'T OF JUST., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008, at 11 (2011).

17. *See, e.g.*, Blumstein, *supra* note 3, at 1260.

18. 365 U.S. 167 (1961).

19. "Even though we know that rights and remedies are connected, interactive, and mutually dependent and defining, constitutional tort law pretends that it is not so." John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 262 (2000).

counterpart. This is, to some extent, a result of its 1871 enabling statute and the special legal requirements that attend suing the government; indeed, William Baude and an ascendant minority of constitutional tort formalists argue that constitutional tort doctrine should be even more historically constrained than it currently is.[20] But in large part, the differences between constitutional and private law torts result not from any such limitations but from the Court's rule-by-rule approach to challenges in this context: the doctrine of qualified immunity has evolved without much regard for the application of § 1988 attorney's fees, which has developed without much regard for the near-universal practice of indemnification, and so forth.[21]

The disjointed nature of constitutional tort law has left open an important threshold question: what *kind* of examination is appropriate for the challenges arising in this context? Contemporary tort scholarship is full of competing theories that explore the normative and positive roles of tort law, any of which could lend a great deal of structure and coherence to the law of constitutional torts.[22] Broadly speaking, these theories fall into two distinct categories—instrumental and noninstrumental. Instrumentalism holds that torts serve as a powerful instrument of public policy: tort law is and should be shaped to facilitate societal goals like efficient deterrence, loss spreading, and compensation.[23] On the other hand, noninstrumental tort theories treat tort law as purely deontological in nature, that is, as being justified by principle rather than presumptively favorable consequences.[24]

There is a tendency in the constitutional tort context to label constitutional rights and liberties as noninstrumental, "as deontological side-constraints that trump even utility-maximizing government actions."[25] But there is little indication that such a perspective has entered significantly into the actual consideration or construction of constitutional torts. To the contrary, a closer examination reveals that constitutional tort law is comprised largely of critiques that loosely reflect—without referencing—the dominant instrumentalist approach to private law torts. Scholars examining constitutional torts have typically focused on the resulting *consequences* of these suits, criticizing doctrines and practices that fail to appropriately facilitate deterrence or compensation.[26] Joanna Schwartz, for example, writes in a recent article about how each jurisdiction's ecosystem of plaintiff's lawyers, defense counsel, judges, juries, and legal rules and remedies shapes how many cases are brought.[27] This is an

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20. *See, e.g.*, Baude, *supra* note 8.

21. *See infra* Section II.B, C.

22. *Cf.* J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012) (building a conceptual framework cognizant of both public and private conceptions of tort law).

23. *See, e.g.*, John Gardner, *What is Tort Law for?*, 30 L. & PHIL. 1, 1–2 (2011).

24. Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 699 (2003).

25. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 367 (2000).

26. *See, e.g.*, *id.*; Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933 (2019); Jeffries, *supra* note 19; Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 286 (1988).

27. Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539 (2020).

instrumentalist (and quintessentially tort-like) mode of analysis—albeit one that has been applied, so far, with little regard for what tort theorists have said about these challenges.[28]

Likewise, the law of constitutional torts as enacted by Congress and the courts is full of tort-like approaches to tort-like problems that don't actually reference torts.[29] Section 1988, for example, enacts a fee-shifting provision designed to incentivize plaintiffs' lawyers to litigate these cases vigorously.[30] There is a lively branch of instrumentalist tort scholarship—again, ignored in discussions of § 1988—concerned with how the incentivization of plaintiff' lawyers influences the broader effects of tort law.[31]

It may well be that constitutional torts are best considered through a noninstrumental tort lens.[32] Such an approach, though, would require a fundamental reimagining of the interests at stake in this context, as well as the rejection of decades of Supreme Court jurisprudence.[33] On the other hand, because constitutional tort law today operates in large part along an instrumentalist valence,[34] a framework rooted in instrumentalism allows for an examination that builds substantially on prior work

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28. *See*, *e.g.*, Kenneth S. Abraham, *Prosser's* The Fall of the Citadel, 100 MINN. L. REV. 1823, 1844 (2016); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961) (pioneering this approach in the context of private law torts); William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851 (1981).

29. Despite the Court's longstanding disfavor for the creation of federal common law, constitutional torts continue to be largely guided by policy-rooted and judge-made (and shaped) doctrines. *See, e.g.*, Hillel Y. Levin & Michael L. Wells, *Qualified Immunity and Statutory Interpretation: A Response to William Baude*, 9 CALIF. L. REV. ONLINE 40, 45 (2018) (arguing that this is appropriate because § 1983 is a common law statute). *Bivens* is more clearly a form of federal common law, although it has become, potentially as a consequence, heavily constrained in recent years. *See, e.g.*, 403 U.S. 388 (1970); William N. Evans, *Supervisory Liability After* Iqbal*: Decoupling* Bivens *from Section 1983*, 77 U. CHI. L. REV. 1401, 1405 (2010). This Article accepts as a basic premise—consistent with the Court's current jurisprudence—that there remains some role for judicial policymaking in the context of constitutional torts.

30. 42 U.S.C. § 1988; *see, e.g.*, Hensley v. Eckerhart, 461 U.S. 424, 429 (1983).

31. In expanding on this discussion, Part II further illustrates the inherent instrumentalism of current constitutional tort scholarship and law.

32. For an example of what that looks like, see, e.g., Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903, 911 (2001) (providing a corrective justice account of constitutional torts); *cf.* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583 (1998) (analogizing constitutional torts to criminal law in an effort to describe qualified immunity using the noninstrumental language of fairness and fault).

33. Take qualified immunity, for example. When viewed noninstrumentally, the question of whether constitutional tort suits chill desirable state action is irrelevant. *Cf.* Michael L. Wells, *The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules,* 19 CONN. L. REV. 53 (1986); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 184–205 (1977).

34. *See, e.g.*, *infra* Section II.C (discussing and highlighting the essential instrumentalism of § 1988 and qualified immunity).

in this context, yielding the possibility of sweeping reform that may nevertheless be adopted under the current legal regime.

## II. CONSTITUTIONAL TORTS AS TORTS

Part II seeks to reverse constitutional tort law's tendency toward ad hoc policymaking by examining these suits through the instrumentalist lens favored in the context of private law torts. Although the policy aims of constitutional torts may not perfectly resemble those in the private law context, Part II applies this tort-like analysis to the particular rules, practices, and policies of constitutional torts. By treating constitutional torts as a private party-driven mechanism for vindicating important public interests—that is, as a kind of a contemporary tort—this discussion reveals both the significance of optimal deterrence in this context and the inadequacy of current doctrine in promoting either optimal deterrence or coherent distributional effects. Part II concludes by resituating prior critiques of constitutional torts within this proposed framework, revealing the essential shared core at the heart of these seemingly disparate analyses.

### *A. The Subjects of Constitutional Tort Deterrence*

As is the case with private law torts, deterrence is a central consideration when it comes to making and evaluating constitutional tort law. But who, exactly, is deterred by constitutional tort suits? This is an important first-order question for understanding the constitutional tort *system*: a regulatory system that acts directly on potential wrongdoers will operate differently from a system that acts through policymakers who indirectly influence the commission of torts via hiring, firing, training, and other such decisions.

In the private law tort context, the deterrence that flows from tort suits is predominantly conceived in terms of its corporation- and industry-wide effects—that is, in terms of its impacts on policymakers.[35] When it comes to constitutional torts, however, the Supreme Court has long assumed, without much examination, that the threat of litigation primarily influences *individual* potential tortfeasors directly.[36] Indeed, this assumption has played a central role in the creation and development of the doctrine of qualified immunity, which seeks "to shield [individual] officials from harassment, distraction, and liability when they perform their duties reasonably."[37]

As recent research has shown, however, the reality of deterrence in this context is likely more complicated:[38] the deterrent effect of constitutional litigation is split, with any stress or stigmal burdens of litigation falling predominantly on individual tortfeasors while the financial costs of litigation, including the damage awards themselves, are borne almost exclusively by departments and municipalities.

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35. *See, e.g.*, David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 711 (1980).

36. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800 (1982).

37. Pearson v. Callahan, 555 U.S. 223, 231 (2009); *cf.* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1349 (1995) (discussing similar agency-cost problems in the mass torts context).

38. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014).

This is unintuitive. At first glance, the Supreme Court's assumption about the effects of constitutional litigation appears to be correct: because municipal liability's stringent "policy or custom" standard serves as a de facto bar to so many constitutional tort claims brought against municipalities—plaintiffs must show an official policy or a pattern of departmental misconduct so widespread as to "have the force of law"[39]—the overwhelming majority of § 1983 suits for damages are brought against state actors in their personal capacity. Constitutional litigation is therefore predominantly concentrated on individual potential tortfeasors: officers working the beat and so forth.

However, looking only at who is *sued* when evaluating the deterrent effect of constitutional litigation leads to deceiving results. Although individual tortfeasors comprise the bulk of defendants in § 1983 suits, the financial costs of constitutional litigation are borne almost exclusively by the state—municipal governments and the like. This is because indemnification, the practice of the municipality or department paying any settlements or damage awards (and usually also litigation costs) on behalf of its employees, is nearly universal in the context of constitutional wrongdoing; individual constitutional tortfeasors effectively never have to pay for their own misdeeds. In fact, one recent national study revealed that law enforcement officers financially contributed to only 0.41% of all settlements and judgments against them, paying less than 0.02% of the total damages.[40] Indemnification shifts the deterrent effect of damage awards from individual officers to department-level policymakers.[41] And, as a result, it is predominantly policymakers who consider the financial impacts of constitutional litigation. Like their private counterparts, government bureaucrats are therefore positioned to evaluate the costs and benefits of policies giving rise to potential liability before enacting those policies.[42]

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39. *See* Monell v. Dep't of Soc. Servs. of N.Y.C., 436 U.S. 658, 694 (1978); Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 411 (1997) (setting out a searching "deliberate indifference" mens rea requirement); Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 916 (2015) (describing the difficulty of municipal liability litigation).

40. Schwartz, *supra* note 38, at 890. Counterintuitively, this study also indicated that officers *never* contributed towards punitive damages. *Id.* It is less clear how widespread indemnification is outside of the policing context. *See generally* James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 STAN. L. REV. 561 (2020) (reporting similar results in the context of *Bivens* suits in the Federal Bureau of Prisons).

41. The increasing role of third-party insurers in governmental policymaking, *see infra* text accompanying note 110, serves as a backstop that further ensures institutional-level deterrence effects of constitutional tort suits.

42. To what extent governmental policymakers do evaluate the costs and benefits of such policies, however, is a more difficult question. See Section II.D for more discussion. Moreover, the question of how exactly constitutional liability impacts department-, municipal-, and state-level policy is not perfectly straightforward, and is discussed in greater detail in Section II.A. For more on individual decision-making within governmental organizations, see Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 475, 509–10 (2004); PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 125–46 (1983).

This split system ensures that significant deterrence flows from these suits to both the individual actors personally sued (via the stress and stigma of litigation) and departmental policymakers (via the financial burdens of litigation). Constitutional torts may well dissuade officials from taking societally desirable risks; but if so, they do so in a subtly different manner than what is currently assumed.

There are a number of implications that flow from this. For one, the doctrine of qualified immunity may present a more robust shield for the conduct of individual state actors than what the Supreme Court has intended.[43] This is because the doctrine has been shaped around the assumption that the threat of damage awards significantly motivates *individual* potential tortfeasors.[44] If damage awards exert less of a deterrence influence on such individual behaviors than what is commonly understood, because their financial burdens are primarily borne by departments, that means that qualified immunity is more protective than it was intended to be. Likewise, because qualified immunity is applied with no regard for whether an officer will be indemnified, in the event that there are material differences in the practice of indemnification—as there likely are outside of the context of policing—the deterrent effects of constitutional tort suits will be unexpectedly uneven.[45]

Moreover, these split deterrence effects imply that larger damage awards will not necessarily lead to greater individual-level deterrence: as the value of the claim in question increases, the stress and stigma of that claim may remain constant or increase at a lower rate. This suggests that it may be possible to design tonics for stress or stigma that do not similarly diminish damage awards. If true, qualified immunity, which tempers *both* the stress and stigma of litigation and damage awards, is more protective of state action than is strictly necessary.[46]

Finally, indemnification constitutes a de facto form of vicarious liability, a private tort doctrine that shifts the financial costs of wrongdoing from individual employee tortfeasors to their employers.[47] Although *Monell* concluded that the 1871 Congress did not intend to impose vicarious liability through § 1983,[48] the widespread voluntary adoption of this practice through indemnification signals that there may be an appetite for statutory change in this regard. Formalizing the applicability of vicarious liability in this context would, in turn, likely result in a shift in litigation toward the deep pockets of municipalities, thereby easing the undesirable individual-level deterrent effects of constitutional tort suits.[49] Treating constitutional torts more

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43. *See infra* Section II.C.2 (discussing qualified immunity in greater detail).

44. *See infra* Section II.C.2; *see also* Scheuer v. Rhodes, 416 U.S. 232, 240 (1974) (describing, as a primary justification of qualified immunity, "the danger that the threat of [personal] liability would deter [an officer's] willingness to execute his office with the decisiveness and the judgment required by the public good").

45. *See infra* Section II.C.2.

46. If nothing else, this examination therefore shows how badly more research is needed into the deterrence effects of constitutional tort suits.

47. *See, e.g.*, Meyer v. Holley, 537 U.S. 280, 285 (2003).

48. Monell v. Dep't of Soc. Servs. of N.Y.C., 436 U.S. 658, 691–92 (1978).

49. Some states already voluntarily do this. *See* Lisa D. Hawke, *Municipal Liability and Respondeat Superior: An Empirical Study and Analysis*, 38 SUFFOLK U. L. REV. 831, 848 (2005) (reporting study showing that "about half of the cities accept respondeat superior liability under state law for misconduct by individual police officers"). Liability could likewise

like private law torts in this respect would therefore mitigate one of the more significant problems engendered by constitutional litigation—its chill on individual action—potentially obviating the need for qualified immunity altogether.[50]

### *B. Optimal Deterrence*

This discussion brushes up against a second important question in this context: how much deterrence do (or should) constitutional torts seek?

At the very least, it is probably safe to conclude that constitutional torts do not strive for absolute deterrence—although, certainly, no amount of constitutional wrongdoing is desirable.[51] This is because the deterrent effect of constitutional litigation presents a double-edged sword. The threat of damages discourages unconstitutional misconduct, yes. But it also may dissuade officials from *constitutional* actions, as the burdens of litigation and liability lead state actors to shy away from taking societally beneficial and constitutionally permissible risks. A system tailored to ensuring that the Constitution was never violated would thus most likely also undesirably depress state action.[52]

Instead, constitutional tort law appears to strive for "optimal deterrence," albeit with little express recognition of this aim.[53] Too much constitutional litigation chills societally beneficial state action; too little results in the violation of constitutional rights and liberties.[54] Indeed, as is the case with private law torts, whether conceived as a system for maximizing compensation, deterrence, or some more abstract goal like corrective justice, there will always be an inherent tension between the benefits and detriments of constitutional torts—and some point of equipoise at which the value of more constitutional litigation is outweighed by its costs.

Constitutional tort law's unspoken embrace of optimal deterrence (and instrumentalism more generally) is reflected, in part, in the Court's acceptance that compensatory damages "ordinarily suffice to deter constitutional violations."[55] This

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be shifted to states via limited waivers of sovereign immunity, which would allow suits against states in a greater range of circumstances or for larger amounts.

50. *See infra* Section II.C.2 (discussing qualified immunity in greater detail); Fallon, *supra* note 26, at 940 (arguing on behalf of such a scheme). Such a change would be broadly consistent with developments in tort theory: "No longer is individual 'blameworthiness' the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct." Owen v. City of Independence, 445 U.S. 622, 657 (1980).

51. *Cf.* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 180 (1968) (discussing and modeling a similar question in the criminal context, reaching the same conclusion).

52. "Action has significant personal costs without corresponding personal benefits; inaction may have few benefits—personal or social—but little cost as well." Cass Sunstein, *Judicial Relief and Public Tort Law*, 92 YALE L.J. 749, 751 (1983) (concluding, therefore, that "[t]he possibility of personal liability for unlawful action tends to generate inaction, delay, or an unproductive formalism that produces little but documents to defend officials in lawsuits").

53. For a rare recognition of optimality in this context, see Levinson, *supra* note 25.

54. *Cf.* Pearson v. Callahan, 555 U.S. 223, 231 (2009) (gesturing to the importance of balance in this context without fully embracing optimal deterrence).

55. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 310 (1986). It is also reflected

may be contrasted with the approach taken in the criminal defense context, where the Court has relied on far more severe deterrent remedies like the exclusionary rule.[56] Unlike exclusion, which will often result in complete exoneration, compensatory damage awards impose the costs of wrongdoing on the tortfeasor, and only those costs, thereby ensuring that any associated harms of unconstitutional actions are internalized by the tortfeasor.[57] This, in turn, encourages policymakers to act "when it is economically efficient, from a societal point of view, to do so"—i.e., when the benefits of an activity outweigh its harms.[58] But it also means that if there are categories of constitutional wrongdoing for which no amount of rights violation is acceptable, as some scholars have suggested,[59] the current compensatory-damages-based deterrence regime will fall short. Except in those rare circumstances in which injunctive relief can be obtained, to violate the Constitution, the state must merely be willing to pay for any resulting harm.[60]

If this sounds familiar, it is because it is a reflection of "efficient deterrence theory," the dominant instrumentalist view of private law tort deterrence.[61] Efficient deterrence theory holds that that damage awards—generally determined by the extent of harm—will compel policymakers "to internalize the total cost of [the] harmful activity."[62] Constitutional torts' reliance on compensatory damages for deterrence is at least a rudimentary imitation of efficient deterrence in the private law tort context.

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in the Court's application of § 1988 and qualified immunity: both of these rules seek to permit or even encourage some—but not too much—constitutional litigation. *See infra* Section II.C (discussing this in more detail).

56. *See, e.g.*, United States v. Leon, 468 U.S. 897, 980 (1984) (Stevens, J., dissenting); Wainwright v. Witt, 469 U.S. 412, 463 (1985) (Brennan, J., dissenting); *cf.* Levinson, *supra* note 25, at 367 (noting that "constitutional rights are most commonly conceived as deontological side-constraints that trump even utility-maximizing government action"). *But see* Fallon, *supra* note 26 at 964 (describing the "common phenomenon of interest balancing" in substantive constitutional law); Jamal Greene, *A Private Law Court in a Public Law System*, 12 LAW & ETHICS HUM. RTS. 37, 53–58 (2018) (arguing for explicitly adopting such an approach).

57. In practice, this calculus will be muddied by the risk of non-recovery as well as the transaction costs of obtaining compensation, including the stress, stigma, and financial burdens of litigation. Sections II.C and D will discuss these complicating factors in more detail.

58. Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1447 (1993); *see also* Armacost, *supra* note 42, at 475 ("To the extent that chiefs of police view a little bit of brutality as an effective law enforcement tool, they will balance the costs of liability against the perceived gains of aggressive policing.").

59. *See, e.g.*, Levinson, *supra* note 25, at 368 (arguing that the "optimal level of violations of [certain] rights may be close to zero").

60. *Cf., e.g.*, Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 535–38 (1961). The alternative would be to significantly harshen remedies: if the penalty for violating the Constitution was $1 billion or more, violations would approach zero.

61. *See, e.g.*, Galanter et al., *supra* note 58, at 1447; Robert Cooter, *Economic Analysis of Punitive Damages,* 56 S. CAL. L. REV. 79, 82-85 (1982); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 535–38 (1961).

62. Galanter et al., *supra* note 58, at 1447; *see also* Cooper Indus., Inc. v. Leatherman

For an illustration of this, imagine a police department considering whether its officers should be retrained to avoid using chokeholds.[63] Assuming, for purposes of this hypothetical, that chokeholds are an effective means of restraint without a good alternative, allowing officers to use chokeholds will lead to more arrests than will a no-chokeholds policy—and, consequently, to better public safety. On the other hand, chokeholds occupy a constitutional gray area and are prone to abuse.[64] If the police department allows its officers to apprehend suspects using chokeholds, it is likely that additional constitutional harms will result—for which the department will have to pay via § 1983 damage awards.[65] Under the current remedial scheme, if the chokehold policy is likely to result in $100,000 in costs (consisting primarily of the risk-adjusted costs of constitutional litigation) but only $80,000 in benefits (consisting of the utility gains of improved public safety and the money saved from not having to retrain officers), the police department will be incentivized to abandon its use of chokeholds. On the other hand, if the chokehold policy is likely to result in $100,000 in costs but $120,000 in benefits, the police department will be encouraged to continue to use chokeholds—despite the fact that doing so will result in some constitutional harms.[66] Real-world decision-making is not, of course, as easily simplified or quantified as this example implies. For purposes of this discussion, though, it is only important to accept that a rational instrumentalist choice to implement a policy comes down, on a very general level, to some version of weighing the costs and benefits of that policy.

Recognizing the importance of optimal deterrence in this context does not require subscribing to a view of constitutional tort law limited to strictly pecuniary benefits and costs.[67] Nor does it require the calculation of a single universal optimal level of deterrence that applies to all potential rights violations. The nature of the governmental interests implicated by the Fourth Amendment differ from those implicated by the First Amendment, and the rights protected by the Fourth Amendment differ from the rights protected by the First Amendment. As such, the optimal balance between the government's interests and the underlying rights may

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Tool Grp., Inc., 532 U.S. 424, 439 (2001); Levinson, *supra* note 25, at 347 (recognizing "the similarities between the goals (deterrence) and mechanisms (cost-internalization) of private law damages and constitutional cost remedies"). Whether or not damage awards *do* accomplish this in the constitutional context will be discussed in more detail in Section II.C.

63. The chokeholds policy was first used as an illustration of efficient deterrence theory by Daryl Levinson. *See* Levinson, *supra* note 25, at 371.

64. *Cf.* City of L.A. v. Lyons, 461 U.S. 95, 108 (1983) (recognizing the possibility that L.A.'s chokehold policy would result in "injury and death unconstitutionally inflicted").

65. The constitutional violations are, therefore, "a by-product of socially productive government activity." Levinson, *supra* note 25, at 370.

66. This example is intended for illustration and not to imply that these sorts of values may be identified with this level of precision.

67. *See infra* Section II.C, discussing the inherent value of constitutional rights. Indeed, as the Court has recognized, efficient deterrence may not even represent the preferable paradigm throughout *private law* torts: "Citizens and legislators may rightly insist that they are willing to tolerate some loss in economic efficiency in order to deter what they consider morally offensive conduct, albeit cost-beneficial morally offensive conduct; efficiency is just one consideration among many." Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 439–40 (2001) (quoting Galanter et al., *supra* note 58, at 1450).

depend on *which* interests and *which* rights are affected; optimal deterrence in the context of the Fourth Amendment may not be optimal in the context of the First Amendment.[68]

Indeed, although there has been little discussion of how this balance should be conducted, the Court has implicitly recognized the existence of right-by-right and interest-by-interest differences in its jurisprudence on injunctive relief. Injunctive relief is not a perfectly parallel remedy to damage awards—among other things, the usefulness of injunctive relief is limited by the difficulty of predicting future wrongdoing, the availability of a civil rights bar ready to quickly file, and courts' willingness to grant this extraordinary remedy[69]—but the legal test for issuing an injunction implicitly reflects a similar acceptance of optimal deterrence: to halt a constitutional violation through injunctive relief, a plaintiff must not only prove likely constitutional wrongdoing, but that "the balance of equities tips in his favor, and that an injunction is in the public interest."[70] Courts considering injunctive relief have repeatedly declined to balance formulaically the rights and interests in question, applying instead a context-specific evaluation that assigns different weights to different interests.[71]

### *C. Nonoptimal Deterrence*

Although the current doctrine is full of discussions of the importance of maximizing deterrence or minimizing the disruption of effective governance and policing, constitutional tort law's rule-by-rule approach has facilitated little

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68. *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1789–90 (1991) ("For example, our constitutional tradition recognizes a stronger interest in relief from continuing coercion—for instance, in reversing an unconstitutional conviction—than in obtaining remedies for the government's violation of the contract clause."); Levinson, *supra* note 25 at 368 ("Some types of constitutional violations resemble intentional torts or crimes in that they can be avoided with minimal effort or precaution-taking by government. The optimal level of violations of these rights may be close to zero.").

69. As the civil rights and civil liberties response to aggressive policing of the Standing Rock NoDAPL movement illustrates, these sorts of access issues can present a real problem for litigators: although a wide range of potential constitutional abuses were well-publicized by early September 2016, the first and only attempt to seek any sort of injunctive relief was filed in late November—and it was denied. Dundon v. Kirchmeier, No. 1:16-CV-406, 2017 WL 5894552, at *1 (D.N.D. Feb. 7, 2017), *aff'd*, 701 F. App'x 538 (8th Cir. 2017); *see also, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1858 (2017) ("[I]f equitable remedies prove insufficient, a damages remedy might be necessary to redress past harm and deter future violations."); *We Are the ACLU of North Dakota*, ACLU N.D., https://www.aclund.org/en/about/staff [https://perma.cc/PK3J-6VSP] (listing a single ACLU staff attorney responsible for managing any litigation throughout all of North Dakota, South Dakota, and Wyoming).

70. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

71. *See, e.g.*, Hill v. McDonough, 547 U.S. 573, 584 (2006) (recognizing the "State's *strong* interest in enforcing its criminal judgments without undue interference from the federal courts" (emphasis added)); Alexander v. United States, 509 U.S. 544, 554 (1993) (recognizing that the Court has "interpreted the First Amendment as providing greater protection from prior restraints than from subsequent punishments").

consideration of balance or optimization. The result has been a collection of constitutional tort remedies that work ineffectively, or in tension with each other, toward this end.

### 1. Section 1988 and Nonoptimal Deterrence

Section 1988, for example, is a fee-shifting statute that generally results in the state paying plaintiffs' attorney's fees in successful constitutional litigation.[72] This ensures that even low-value cases and cases seeking purely injunctive relief are litigated; the importance of vindicating constitutional rights is such that Congress felt justified in breaking from the longstanding U.S. tradition of each party paying its own fees in litigation.[73]

But this is not the extent of § 1988's import. Section 1988's provision of attorney's fees for all constitutional tort suits points to a view of the constitutional torts system that is concerned more generally with enhancing the protection of constitutional rights and liberties: attorney's fees *plus* compensatory damages will provide greater deterrence than compensatory damages alone.[74] Such an approach would be consistent, broadly speaking, with that taken in the criminal defense context; as Justice Stevens powerfully wrote in his dissent in *United States v. Leon*, "[I]t is the very purpose of a Bill of Rights to identify values that may not be sacrificed to expediency."[75] It does not, however, necessarily imply a rejection of optimal deterrence; § 1988 attorney's fees simply shift the systemic deterrent effect of constitutional torts toward more (and potentially above-efficient) deterrence.

The Court has also read another purpose into § 1988's enhancement effect: to offset constraints on compensatory damage awards in this context. In *Carey v. Piphus*, the Court held that compensatory damages could not be awarded based on the presumed inherent value of the constitutional provision at issue; awards must be limited to only those injuries that *accompany* a constitutional violation.[76] This means

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72. 42 U.S.C. § 1988. Because, however, the statute speaks in the general terms of the "prevailing party," courts may also (though rarely do) shift fees to § 1983 plaintiffs as well—albeit "only where it is shown that [the] suit was clearly frivolous, vexatious, or brought for harassment purposes." S. REP. 94-1011, at 5 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5912.

73. *See* 42 U.S.C. § 1988; S. REP. No. 94-1011, at 6 (discussing the purpose of attorney's fees in, among other things, ensuring that even low-value cases and cases seeking injunctive relief are litigated); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 240 (1975) (holding that only Congress can authorize an exception to the "American Rule").

74. *See, e.g.*, David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 853–54 (2002) (discussing and defining the compensation-centered private law tort understanding of optimal deterrence).

75. 468 U.S. 897, 980 (1984) (Stevens, J., dissenting). Anything less fails to recognize the "transcendent importance of the Bill of Rights," Wainwright v. Witt, 469 U.S. 412, 463 (1985) (Brennan, J., dissenting), instead relegating the Constitution to little more than a utility-maximizing tort statute. Meltzer, *supra* note 26, at 286 (discussing differences between civil and criminal remedies for the deterrence of constitutional wrongdoing).

76. 435 U.S. 247, 253 (1978) (basing holding, in part, on an attempt to apply the "common law" of tort compensation to constitutional violations); John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L.

that an employee fired without due process may not be able to recover more than nominal damages if her employer can later show good cause for her firing—despite the individual and societal value of whatever process has been lost. Such a rule skews the systemic effect of constitutional torts, disfavoring the underlying constitutional interests at stake, especially in the context of violations of due process. But because of § 1988, the Court was not dissuaded: "[T]he potential liability of § 1983 defendants for attorney's fees provides additional—and by no means inconsequential—assurance that agents of the State will not deliberately ignore due process rights."[77]

The problem with these respective justifications for § 1988 is that attorney's fees add to the value of lawsuits with little regard to the underlying purposes implicated by these suits: it is cases that are more complicated or more resolutely defended that will yield the richest attorney's fees, not cases involving the greatest threats to the most sacred of constitutional values.[78] Section 1988 may facilitate above-efficient deterrence and compensation, but it does so in a haphazard manner, disconnected from whatever it is that justifies additional deterrence. Likewise, although attorney's fees *can* offset the Court's narrow view of compensatory damages in this context, they rarely will, instead providing too much or too little compensation based on factors exogenous to the right or liberty at issue. Under either justification for attorney fee shifting, constitutional torts demand *better* deterrence rather than simply more deterrence. Section 1988 provides the latter but not necessarily the former.[79]

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REV. 1461, 1475 (1989) (proposing that constitutional damage awards should be limited to "constitutionally relevant risks." For example, "Compensation for violations of the fourth amendment [sic] should redress the invasion of privacy, not the costs of criminal prosecution.").

77. *Carey*, 435 U.S. at 257 n.11 (citation omitted); *see also* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986) ("Deterrence is also an important purpose of this system, but it operates through the mechanism of damages that are *compensatory*—damages grounded in determinations of plaintiffs' actual losses." (emphasis in original)). This is not the only justification for the Court's ruling: the Court also expressed concern over how such awards would be determined. *Id.* Also, as Daryl Levinson has noted, "one interesting hypothesis is that the Court was reluctant to allow monetary recovery for the intrinsic value of constitutional rights because of the need to maintain incommensurability between rights and money. If the value of constitutional rights and cash could be compared on a single metric, then it would be more difficult to think of constitutional rights as qualitatively different from other social interests and values. Yet the legitimacy of constitutionalism depends on maintaining the incommensurability of constitutional rights so they can work as trumps." Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 934 n.327 (1999).

78. The actual financial calculus associated with bringing suits in this context is more complicated, although not in a way that renders § 1988 more coherent. For plaintiffs' lawyers, who typically foot the bill for these suits, the likelihood of litigation success and the costs of litigation (the latter of which often consists largely of expert fees) are also important considerations in the determination of what cases are brought. The result is that § 1988 primarily incentivizes the litigation of cases with a high likelihood of success (or settlement) that require little by way of expert testimony.

79. As Maggie Lemos has indicated, fee shifting provisions like § 1988 may actually be ineffective or even counterproductive in facilitating constitutional litigation. Margaret H.

### 2. Qualified Immunity and Nonoptimal Deterrence

Even while it has approved of § 1988's role in incentivizing constitutional tort suits, the Supreme Court has also expressed concern about the drawbacks of too much litigation in this context, albeit with little acknowledgment of § 1988's potential role in any such crisis.[80]

This concern springs from the recognition that the overwhelming majority of the conduct deterred by constitutional tort suits—policing, public policy programs, and so forth—also produces societal benefits, often substantial. As a consequence, the Supreme Court has been quick to identify litigation externalities that may lead to too much deterrence: the "fear of being sued," for example, may "dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties."[81] Similarly, individual potential wrongdoers in the "government [may] not fully internalize the [dispersed] social benefits of [their] activity."[82] And when constitutional torts deter good state action along with the bad, the resulting consequences can be serious, undermining the government's role in safeguarding and furthering the public interest.[83]

This concern regarding systemic overdeterrence (although rarely framed by the Court in such instrumentalist terms) has fueled the creation of an entire court-created legal doctrine: qualified immunity.[84] Under the doctrine of qualified immunity, state

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Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782 (2011).

80. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800 (1982) (disregarding § 1988); Malley v. Briggs, 475 U.S. 335 (1986) (same); Saucier v. Katz, 533 U.S. 194 (2001) (same); Pearson v. Callahan, 555 U.S. 223 (2009) (same). *Monroe v. Pape*, 365 U.S. 167 (1961), predates § 1988, which was enacted in 1976, Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641.

81. *Harlow*, 457 U.S. at 814 (internal modifications omitted) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d. Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)). Put in other words, lawsuit risk-aversion might lead public officials to be overly sensitive to the *costs* imposed by constitutional litigation.

82. Levinson, *supra* note 25, at 354 (emphasis added) (describing another concern repeatedly raised by the Supreme Court).

83. "[T]he public interest requires decisions and actions to enforce laws for the protection of the public." Scheuer v. Rhodes, 416 U.S. 232, 241 (1974), *abrogated on other grounds by* Harlow v. Fitzgerald, 457 U.S. 800 (1982); *cf.* Coffee, *supra* note 37, at 1349.

84. John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999) ("The threat of overdeterrence—more accurately, the threat of unintended deterrence of socially desirable activity—justifies limiting damage recoveries in order to protect the legitimate but nonconstitutional interests at stake in the business of government."). This oft-cited *policy* justification for qualified immunity may not formally ground the rule. *See, e.g.*, Baude, *supra* note 8, at 78–79 (recognizing this reasoning but indicating that "the Court has [so far] used more traditional legal arguments as the opening wedge for these policy concerns"). On the other hand, several recent decisions of the Supreme Court have implied otherwise. *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1866 (2017) ("The qualified immunity rule seeks a proper balance between . . . competing interests."); City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015) ("Because of the importance of qualified immunity 'to society as a whole,' the Court often corrects lower courts when they wrongly subject individual officers to liability." (citation omitted) (quoting *Harlow*, 457 U.S. at 814)); White v. Pauly, 137 S. Ct. 548, 551 (2017) (reiterating qualified immunity's special status due to its

officials acting in their official capacity are only liable when they violate "clearly established" constitutional law.[85] This effectively gives defendants in constitutional litigation the benefit of the doubt. When a constitutional violation *could have been* based off of a reasonable mistake of law—even if it, in fact, wasn't—qualified immunity requires dismissal.[86] At least in theory, this frees state action from the choking collar of liability.[87]

The doctrine of qualified immunity may, however, go beyond simply providing a resolution for such externality-related failures in optimal deterrence. In direct tension with (and with no regard for) § 1988, qualified immunity depresses the deterrence that would otherwise flow from compensatory damage awards:[88] the objective reasonableness standard ensures, in the balance between the competing interests at stake, that it is the *state* that benefits from its mistakes. By placing the entire burden of uncertainty on the victims of constitutional wrongdoing, qualified immunity shifts the systemic deterrent effect of constitutional litigation toward less overall deterrence.[89]

Moreover, as is the case with § 1988, qualified immunity employs a standard that is poorly tailored to the underlying issues at stake. Of the many factors identified by the Court that might increase the deterrent value of constitutional litigation to above-optimal levels, qualified immunity's standard addresses only one: protecting state

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importance "to society as a whole" (quoting *id.*)); Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of Monroe v. Pape*, 78 UMKC L. REV. 889, 910 (2010) ("Like absolute immunity, qualified immunity is entirely policy-driven."); Fallon, *supra* note 26, at 946 n.46 (tracing "the origins of official immunity" to *Spalding v. Vilas*, which based its finding of official immunity on "general considerations of public policy and convenience" (quoting Spalding v. Vilas, 161 U.S. 483, 498 (1896)); *id.* at 994 (noting that in *Allen v. McCurry* and *University of Tennessee v. Elliott*, "the Court held that suits under § 1983 were foreclosed under preclusion principles that had not yet emerged at the time of § 1983's enactment").

85. *Harlow*, 457 U.S. at 818 (1982).

86. *See id.* at 818–19.

87. Recent research by Joanna Schwartz implies, however, that the doctrine may not work: few cases are actually dismissed on qualified immunity grounds. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017). It may be, however, that the doctrine of qualified immunity winnows out cases prefiling, which would not be reflected in Schwartz's study.

88. At the very least, sub-efficient deterrence is one result of the doctrine of qualified immunity. *See, e.g.*, Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1523 (2016); 2 SHELDON H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 8:5 (4th ed. 2016) (expressing concern about the Fourteenth Amendment specifically); *see also* Jeffries, *supra* note 84, at 99–100 ("Qualified immunity reduces government's incentives to avoid constitutional violations."); *cf.* Ziglar v. Abbasi, 137 S. Ct. 1843, 1870-71 (2017) (Thomas, J., concurring) (expressing reservations about qualified immunity, albeit for non-policy reasons); Zadeh v. Robinson, No. 1750518, *slip op.*, Aug. 31, 2018, http://www.ca5.uscourts.gov/opinions/pub/17/17-50518%20-CV0.pdf [https://perma.cc/5CAE-JL6T] (Willett, J., concurring) (same).

89. As Myriam Gilles observes in *In Defense of Making Governments Pay*, qualified immunity essentially shifts the scienter requirement for constitutional torts from negligence to recklessness or intentionality. Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 856–57 (2001).

officials from the consequences of their reasonable mistakes.[90] The extent to which stress or stigma are likely to accompany a suit, on the other hand, does not factor into the question of whether qualified immunity applies.[91] Although qualified immunity's applicability at early stages of litigation helps guard against the stress and stigma of litigation, there will be cases with enormous stress and stigma burdens to which qualified immunity does not apply; and there will be cases that give rise to virtually no stress or stigma that are quickly dismissed under qualified immunity.

The means by which qualified immunity acts is similarly ill-suited to the doctrine's underlying purposes. Qualified immunity seeks to mitigate the associated effects of litigation—stress, stigma, litigation costs, and so forth—that can chill desirable policing and governance.[92] Although each of these factors weighs on state action in a matter of degree, qualified immunity offers a resolution that is strictly binary: immunity or no immunity. This disjunction between the nature of the problem and the nature of the resolution means that even if individual applications of qualified immunity appear defensible, the systemic effect of the doctrine will be nonoptimal.[93] And because these problems with qualified immunity's standard and resolution are likely to manifest unevenly throughout constitutional tort law,[94] qualified immunity may give rise to too much *and* too little constitutional litigation.

Finally, qualified immunity's development with little regard for the broader constitutional tort system has resulted in numerous additional potential issues related to the interactions among qualified immunity and other doctrines and practices. For one, qualified immunity's inattention to the split deterrent effects in this context may yield widespread (and unnecessary) under-compensation: numerous victims of constitutional wrongdoing are deprived of redress even where recovery would not

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90. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 231 (2009).

91. *See, e.g.*, Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (recognizing stress and stigma as key deterrence concerns implicated by constitutional litigation).

92. *See, e.g.*, Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

93. This may be illustrated with the following example: Imagine a constitutional suit for $100,000 in compensatory damages that gives rise to $25,000 in accompanying transaction costs and nonpecuniary harms. Left alone, the deterrence value of this suit ($125,000) is greater than necessary to internalize the societal harms in question ($100,000). Under the doctrine of qualified immunity, there are two possibilities: (1) the suit would go forward, providing, if successful, $125,000 in deterrence value, which is $25,000 too much; or (2) the suit would be dismissed, providing $0 in deterrence, which is $100,000 too little.

At least in theory, the aggregated effects of qualified immunity could still result in optimal deterrence: if 20% of such suits were dismissed under qualified immunity, the risk-adjusted cost of litigation would be $100,000 (80% x $125,000 + 20% x $0). Because, however, the percentage of suits dismissed under qualified immunity is not influenced by the nonpecuniary costs at stake in a type of suit—stress, stigma, and so forth—there is little reason to believe that qualified immunity will facilitate anything close to optimal levels of constitutional litigation.

94. *See, e.g.*, Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (describing the heightened importance of qualified immunity in the "Fourth Amendment context"); Gilles, *supra* note 89, at 857 (observing qualified immunity's particular applicability in the context of negligence torts, where officers' heat of the moment decisions implicate fact- and context-dependent inquiries with few well-developed standards).

likely result in the chilling of desirable state action.[95] Moreover, a constitutional tort lawsuit might ultimately yield anywhere from nothing to several multiples of what compensatory damages alone would provide (once attorney's fees are included), with the difference turning on a single judge's determination of whether a constitutional violation was clearly established—and *not* of whether the Constitution was violated or whether the constitutional violation was particularly objectionable. This greatly magnifies horizontal inequity and unpredictability, as the judge who is assigned or the jurisdiction in which a case is brought become even more important to the resolution of the case. Indeed, the harshness of qualified immunity may be prompting some judges to be reluctant in its application, which would further amplify such effects.

As this discussion shows, qualified immunity has been shaped without proper consideration for either its purposes or its effects. Irrespective of whether these failures merit fully replacing the doctrine,[96] this Article provides a template for how policy-driven changes to qualified immunity (and § 1988 and other rules in this context) *should* be considered by courts.

### *D. Resituating Prior Critiques*

This Article is not the first to question or criticize the operation of constitutional tort law. (Qualified immunity arises out of one such line of criticism.) Part II therefore concludes by examining, through this Article's instrumentalist lens, a number of other critiques of constitutional torts. This, in turn, reveals a common thread running throughout—to which Part III adds: "damages that compensate for actual harm" *do not* "ordinarily suffice to deter constitutional violations."[97]

Importantly, although this discussion illustrates the numerous ways in which the constitutional tort system may be skewed or imbalanced, it does not strike at the deeper normative question of balance.[98] Ensuring neither too much nor too little constitutional litigation must be, even in the face of these critiques, a primary policy consideration of constitutional tort law.

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95. Indeed, under qualified immunity, it is possible that an officer who violates her department's guidelines may be immunized from liability, irrespective of whether the guidelines in question were correctly and carefully crafted to protect a constitutional right. Such a rule encourages neither careful policing nor responsible policy design.

96. *See infra* Part IV.D.

97. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 310 (1986). The Supreme Court's continued acceptance of this rule is especially perplexing given that most § 1983 "damages" take the form of settlements. Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 589 (2000). And although settlement values typically closely track the perceived value of the case in question, they rarely constitute the full amount demanded.

98. *See supra* Section II.B.

### 1. Political, Not Economic, Costs

First, in *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, Daryl Levinson argues that "government actors respond to political, not market, incentives."[99] As a result, "[t]he only way to predict the effects of constitution cost remedies is to convert the financial costs they impose into political costs."[100] This insight does not necessarily imply that constitutional torts result in systemic overdeterrence or underdeterrence, but rather that the behavioral effects of constitutional litigation may be different than what is widely assumed: political cost translation effects can render compensatory damage awards inadequate—or too strong.

Levinson's argument may be illustrated by returning to the chokehold hypothetical. Imagine, for example, that the police department in question answers to a voting population that is somewhat inattentive to tax increases but is very cognizant of public safety. $100,000 in chokehold-related § 1983 damages, passed through to the population via higher taxes, may therefore generate only $50,000 in political costs. On the other hand, the $80,000 in public safety benefits created from using chokeholds may give rise to $80,000 in political capital. In such circumstances, a policy that the police department should abandon under efficient deterrence theory (because its costs—$100,000—exceed its benefits—$80,000) may be left in place (because its *political* costs—$50,000—do not exceed its *political* benefits—$80,000).

This is, however, only a problem insofar as political costs diverge from economic costs. As Myriam Gilles writes, "constitutional damage remedies, although denominated in dollars, clearly translate into the political currency that moves political actors."[101] On the other hand, Marc Miller and Ronald Wright have argued that tort liability may, paradoxically, financially *benefit* police departments, as "city council members, county boards, and city and county administrators . . . reward police with larger budgets, since the political returns for higher police funding and appearing tough on crime may be worth the budgetary cost."[102] Further research is needed to determine to what extent and when economic and political costs diverge.

This is not, however, the only way in which Levinson's insight complicates the view of constitutional deterrence. Individuals and communities harmed by

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99. Levinson, *supra* note 25, at 347.

100. *Id.* (noting that "any such model will be highly contextual, complex, and controversial"); *cf.* SCHUCK, *supra* note 42, at 125. *But cf.* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 567–70 (1986); Edward Rubin, Commentary, *Rational States?*, 83 VA. L. REV. 1433, 1439–42 (1997).

101. Gilles, *supra* note 89, at 861. It may rarely be the case that $100,000 in economic costs does not generate roughly $100,000 in political costs.

102. Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 782 (2004). More recent research, however, has shown that such risks may be overstated: "[S]ettlements and judgments in suits against law enforcement agencies and officers are not always—or even usually—paid from jurisdictions' general funds." Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1148 (2016) (reporting results of empirical study on this question).

unconstitutional misconduct will express their distaste for these harms through voting decisions—thereby directly imposing the political costs of wrongdoing on the relevant policymakers.[103] The tyranny of the majority means, however, that these first-level political consequences will often—but not always—prove insufficient to ensure adequate deterrence.[104] And whereas the politically powerful may seek recourse through their influence, politically vulnerable individuals and communities—whose voices and votes may carry little weight with policymakers—must depend more fully on constitutional litigation to ensure adequate deterrence.

Similarly, where the benefits of state action accrue to a community that lacks political power, those benefits may be undervalued by state policymakers: the political capital generated by aiding a politically powerless community will often be less than the political capital generated by aiding a politically influential community.[105] This effect could cut toward overdeterrence and therefore suboptimal employment of state action that disproportionately benefits those individuals and communities with less electoral influence.

### 2. Governmental Failure to Internalize Costs

Second, several scholars have described governance-related problems that may limit the deterrent effect of constitutional litigation. Underlying each of these critiques is a broader skepticism about constitutional deterrence—that is, that constitutional actors are unlikely to undertake (or are incapable of undertaking) the sort of careful cost-benefit analyses on which optimal deterrence relies.

In *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, Joanna Schwartz shows that many police departments do not adequately collect or track data on damage awards and, therefore, they lack the information necessary to internalize properly the costs of their constitutional wrongdoing.[106] The informational failures observed by Schwartz likely cut toward underdeterrence: constitutional decisionmakers cannot be deterred by damage awards of which they are unaware.[107]

Another concern, closely related, is that the deterrent effect of damage awards may be weakened when damages awarded against one governmental branch or office are paid by another.[108] For example, suits involving law enforcement are often paid

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103. These effects are not additive, and so they do not give rise to a threat of overdeterrence: when compensatory damages are sufficient to make injured parties and communities whole, there should be no negative spillover political consequences of constitutional wrongdoing.

104. *See* Levinson, *supra* note 25, at 364 (discussing a range of political internalization problems related to the tyranny of the majority).

105. *See id.*

106. *See, e.g.*, Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. Rev. 1023 (2010); *see also* PAUL CHEVIGNY, THE EDGE OF THE KNIFE 102 (1995) (reporting that neither the L.A. nor the N.Y.C. police department appeared to respond to constitutional liability with material policy changes).

107. It is also possible that ignorance could lead to overdeterrence; for example, policymakers may have an exaggerated idea of the liability risks their department faces.

108. Michael T. Morley, *Public Law at the Cathedral: Enjoining the*

from the general funds of governments rather than by the law enforcement agencies directly. Although some such costs of constitutional wrongdoing may trickle down from the general funds to the agencies in question, any disconnect between who pays and who commits the tort is likely to result in underdeterrence: departmental policymakers have less incentive to make changes in response to costs borne by departments other than their own. Recent research, however, has blunted the force of this concern. In a nationwide study, Joanna Schwartz revealed that settlements and judgments are not, in fact, usually paid from the general funds of jurisdictions—and, additionally, that more than half of law enforcement agencies financially contributed to judgments and settlements for which they were responsible.[109]

Moreover, these concerns are both mitigated by the reliance of states on private insurance to pay settlements: even if state policymakers are unaware of the direct costs of constitutional wrongdoing (because of their information-collection failures, because of general fund structural issues, or because of a broad-based agnosticism toward optimal deterrence), their insurance companies pay close attention, passing along the costs of riskier practices to the governmental departments in the form of higher premiums.[110] In fact, as John Rappaport notes in *An Insurance-Based Typology of Police Misconduct*, best practices resulting from cost-internalization in the constitutional context are increasingly being driven by these insurers, which demand departmental policy shifts to minimize perceived liability.[111] It may, therefore, be unnecessary for state policymakers to understand the direct constitutional costs of their policies; so long as the costs of insurance policies accurately reflect the constitutional liability incurred by the state, policymakers will indirectly internalize those costs in their decision-making.[112] There are likely

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*Government*, 35 CARDOZO L. REV. 2453, 2468 (2014) ("[M]any agencies are not required to pay large damage awards out of their own budgets; rather, such judgments typically are paid from the general fund of the municipality, state, or federal government."); NAT'L RSCH. COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 279 (Wesley Skogan & Kathleen Frydl eds., 2004) (explaining how "damages in these suits are . . . not even paid out from the police budget but out of general city funds"); SAMUEL WALKER, THE NEW WORLD OF POLICE ACCOUNTABILITY 33 (Claudia A. Hoffman, Edward Meidenbauer & Jerry Westby, eds., 2005) ("[O]ne agency of government (the police) perpetrates the harm, another agency defends it in court (the law department), and a third agency writes the check (the treasurer)."). *But see* Schwartz, *supra* note 102, at 1298. One closely related concern is that "government officials will not always be able to influence the conduct of low-level government actors that interact with the public and are most likely to be named as defendants." *Id.* at 1152; *cf.* SCHUCK, *supra* note 42, at 125–26.

109. Schwartz, *supra* note 102.

110. *Id.* at 1163–64; John Rappaport, *An Insurance-Based Typology of Police Misconduct*, 2016 U. CHI. LEGAL F. 369 (2016) (noting that "nearly all" law enforcement agencies rely on private insurers for constitutional liability payments).

111. Rappaport, *supra* note 110, at 1163–64.

112. *See id.*; Schwartz, *supra* note 102, at 1149 ("Accordingly, pressures and obligations imposed by outside insurers are an important and underappreciated consequence of liability for smaller law enforcement agencies."). The nation's largest cities are predominantly self-insured, but such departments also tend to be more sophisticated (and less indifferent) toward the liability costs of policing. *Id.*

inefficiencies in such a system.[113] Filtering the costs of constitutional liability through an insurer may not always result in accurate cost assessment by departmental policymakers.[114] But there is no reason to believe that such inaccuracies are systemically biased toward either underdeterrence or overdeterrence.

### 3. Uneven Enforcement

Third, successful constitutional litigation may be too sporadic or haphazard to sufficiently deter constitutional wrongdoing.[115] As is the case in the context of private law torts, many of those who are harmed choose not to sue for reasons unrelated to the merits of their claims—such as, for example, for fear of retaliation.[116] Moreover, many potential plaintiffs who would otherwise sue are barred by the various immunity doctrines that apply to constitutional litigation—including not only qualified immunity, but absolute immunity for officials performing judicial, prosecutorial, or legislative functions.[117] On top of these immunities, the Court's jurisprudence in this context is rife with other obstacles for plaintiffs—from potentially heightened pleading standards under Federal Rule of Civil Procedure 8,[118] to the procedural due process doctrine,[119] to the increasing unavailability of attorney's fees for § 1983 litigation.[120] Thus, numerous plaintiffs harmed by

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113. *See* Kenneth S. Abraham, *Cost Internalization, Insurance, and Toxic Tort Compensation Funds*, 2 VA. J. NAT. RES. L. 123, 125 (1982) (discussing issues, including moral hazard, with insurance in the context of toxic torts).

114. *See, e.g.*, Rappaport, *supra* note 110 (discussing a number of ways in which insurance-based civil rights regulation fails); Andrea Cann Chandrasekher, *Empirically Validating the Police Liability Insurance Claim*, 130 HARV. L. REV. F. 233, 235 (2017) (arguing for the necessity of empirically testing Professor Rappaport's claims).

115. Chen, *supra* note 84, at 910; Meltzer, *supra* note 26, at 284; Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 863–64 (2012) (discussing a Bureau of Justice statistics report suggesting that people who believe they have been mistreated by the police only sue approximately one percent of the time).

116. *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 430 (1974); Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 500 (1955); *cf. id.* at 508 (discussing the issues that incarcerated individuals face in bringing civil suits); *see also* Meltzer, *supra* note 26, at 284.

117. Pierson v. Ray, 386 U.S. 547 (1967) (judicial immunity); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutorial immunity); Tenney v. Brandhove, 341 U.S. 367, 372–76 (1951) (legislative immunity); *see also* Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 232 (2006) (arguing that qualified immunity is approaching absolute immunity). For a discussion of uneven enforcement in the private law context, much of which also applies here, see Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 366 (2003).

118. Chen, *supra* note 84, at 912 (arguing that *Iqbal*'s requirement that the plaintiff "plead factual matter that, if taken as true, states a claim that . . . [the official defendants] deprived him *of his clearly established constitutional rights*" establishes a higher level of specificity for constitutional claims (alteration in original) (emphasis in original) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 666 (2009)).

119. *Id.* at 913 (pointing out several ways in which the Court's due process decisions disadvantage § 1983 litigation).

120. Farrar v. Hobby, 506 U.S. 103, 115 (1992) (refusing to award attorney's fees for a

constitutional violations will never sue, and numerous plaintiffs harmed by constitutional violations who do sue will never recover. The result is systemic underdeterrence: these practical and legal obstacles to recovery depress the risk-adjusted costs of litigation. If only a small fraction of victims of constitutional wrongdoing ultimately recover, compensatory damages alone will fall significantly short of what is necessary to deter wrongdoing adequately.

#### 4. Switching Costs

A fourth concern is that indirect costs in this context, such as the cost of averting wrongdoing (retraining and so forth) and of the litigation itself, may influence the deterrent effect of constitutional litigation. Policies that might be optimal in a cost-less world could nevertheless be discouraged by such switching costs. For example, a new program that will yield $100,000 in benefits and $10,000 in risk-adjusted compensatory damages is desirable, at least from an economic standpoint. But if switching to the program requires sufficiently expensive retraining or if it is likely to give rise to protracted litigation (adding >$90,000 in switching costs), the department might reasonably decide not to make the switch. The influence of switching costs on the effects of constitutional litigation can tilt toward either overdeterrence or underdeterrence: litigation-related costs will add to the deterrent value of a suit, potentially leading to overdeterrence; retraining-related costs, on the other hand, detract from the benefits of a change, potentially leading to underdeterrence.

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These critiques often lead to a sort of fatalism about constitutional deterrence: because constitutional litigation's impact on wrongdoing is complicated, deterrence should be abandoned as a policy goal of constitutional torts (and then, presumably, largely ignored).[121] But protecting constitutional rights is no less important in jurisdictions in which police departments are partially ignorant of or indifferent to the constitutional costs of their policies. Nor is the societal toll of overdeterrence diminished when political considerations lead the state to undervalue certain benefits of its policies. So long as constitutional tort suits remain a colorable path to recovery, litigation will continue to deter to some extent.[122] And that deterrence is likely either to sweep too broadly or to fall short. Irrespective of the difficulty of obtaining such

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recovery of nominal damages); Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 605 (2001) (refusing to award attorney's fees when the lawsuit prompts a *voluntary* change in state policy); *see generally* Chen, *supra* note 84, at 915 (discussing the Court's growing reluctance to award attorney's fees in the context of constitutional litigation).

121. The compensatory purpose of constitutional torts is regularly treated likewise.

122. Carlson v. Green, 446 U.S. 14, 21 (1980) ("It is almost axiomatic that the threat of damages has a deterrent effect."); *see also* Richard Frankel, *Regulating Privatized Government Through § 1983*, 76 U. CHI. L. REV. 1449, 1515 (2009); John T. Parry, *Judicial Restraints on Illegal State Violence: Israel and the United States*, 35 VAND. J. TRANSNAT'L L. 73, 11–15 (2002); Imbler v. Pachtman, 424 U.S. 409 (1976).

a goal, it is therefore important for constitutional tort law to be well tailored to achieve an optimal amount of litigation.[123]

## III. DECISION-MAKING BIASES

Viewing constitutional torts through the instrumentalist lens of private law torts points also—through both its interpretive framework and the contrasts that it underscores between these two respective types of lawsuits—to another problem in this context: biases of state decisionmakers will distort the deterrent effect of constitutional tort damage awards.

Since its creation as part of the Ku Klux Klan Act of 1871 ("Klan Act"), a central aim of constitutional tort law has been to remedy the biases of state actors.[124] The Klan had imposed its own "legal regime" across the South from 1868 to 1871, acting through vigilantes and members holding official positions in government to unravel the reforms introduced following the conclusion of the Civil War.[125] The Klan Act specifically targeted such discriminatory animus, "aim[ing] to break the rebellion, restore order to the South, and vindicate the rights of Freedmen."[126] On the other hand, private law torts spring mainly from the common law and most typically concern circumstances in which no more than negligence is at issue.[127] Reflecting this, Oliver Wendell Holmes (as well as subsequent scholars) rooted the development of tort law in the need to balance business interests against the harms that business can create.[128] Despite these foundational differences, constitutional tort law has borrowed its central deterrence remedy—compensatory damage awards—from private law torts with little examination and no modification to account for any such

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123. *Cf.* Meltzer, *supra* note 26, at 286 ("The Supreme Court has recognized the shortcomings of traditional tort remedies—and has accordingly embraced [different] deterrence remedies—most clearly in criminal cases like *Hillery* and *Mapp*.").

124. *See, e.g.*, Eric A. Harrington, *Judicial Misuse of History and § 1983: Toward a Purpose-Based Approach*, 85 TEX. L. REV. 999, 1006 (2007) (discussing § 1983); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (discussing the Fourteenth Amendment); S. REP. NO. 1011, 94th Cong., 2d Sess.-94, at 6, (1976), *as reprinted in* 1976 U.S. CODE CONG. & AD. NEWS C.C.A.N. 5908, 5913 (discussing § 1988).

125. Harrington, *supra* note 124, at 1005–06.

126. *Id.* at 1006.

127. O. W. HOLMES, JR., THE COMMON LAW 111 (1881) (noting that the basis for tort liability is the failure "to use such care as a prudent man would under the circumstances"). Constitutional torts are not *all* intentional torts, *see* Gilles, *supra* note 89, at 857, and bias *can* also influence negligence, *see infra* Part III, but this distinction nevertheless illustrates an important difference between the purpose and circumstance of constitutional and private law torts.

128. *Id.* HOLMES, *supra* note 127 (noting also that this essential theory of negligence was established through judicial grants of immunity seeking to benefit businessmen and business enterprises); *see also, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 300 (2d ed. 1985) (examining the history of tort liability and concluding that it was driven by the Industrial Revolution, "to the age of engines and machines . . . [that] have a marvelous capacity to cripple and maim their servants").

distinctions.[129]

This Part defines and describes bias, providing a foundation for understanding the scope of bias's impact on decision-making in the constitutional context. By influencing the judgment of state actors, bias may distort the systemic effect of compensatory damage awards, skewing the balance between the competing interests at stake.

### *A. Bias's Many Influences*

For purposes of this Article, the term "bias" describes a disposition that leads to an incorrect or improper valuation of an action's costs or benefits.[130] Bias need not be contemptible to influence the deterrent effect of constitutional litigation—a policymaker may, for example, be biased toward a discredited interrogation method, like polygraph evidence.[131] But when suboptimal policy determinations are based on innocent mistakes, like a misplaced faith in the reliability of polygraphs, the damage done to the underlying deterrence interests is no less great than when policy miscalculations stem from invidious motives.

Bias influences deterrence in three primary ways. First, bias may contribute to misconceptions around key facts or assumptions—like in the polygraph example. In effect, this form of bias taints the decision in question. This can be illustrated by returning yet again to the chokehold hypothetical: Imagine, now, that the police department in question is predominantly white and is policing a predominantly non-white neighborhood. Such a department should not pursue a chokehold policy that produces $80,000 in benefits and $100,000 in costs. But what if the relevant decisionmaker in the department believes, as a result of her racial biases, that the population in question is more violent than is actually the case, and that the chokehold policy will therefore produce *$120,000* in benefits? Such a department will proceed with a chokehold policy that, under efficient deterrence theory, it should reject—because racial bias leads the relevant decisionmaker to overvalue the presumptive benefits of the policy.

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129. Private law torts may not, of course, be entirely untouched by such influences. But for a variety of reasons, prejudice and other bias presents a greater concern in the context of constitutional wrongdoing. Private investors, for example, have a strong self-interest in ensuring that firm managers do not act irrationally at the cost of firm profits, and so firm managers who fall victim to decision-making biases will be replaced. *See, e.g.*, Edward Rubin, Commentary, *Rational States?* 83 VA. L. REV. 1433, 1438 (1997); Levinson, *supra* note 25, at 355. And those firms that fail to successfully winnow out biased managers will eventually fail, leading to a sort of market-based natural selection that will favor firms that effectively guard against bias. *Id.* Still, the impact of bias on private law decision-making has also been overlooked. I will explore this question in a subsequent article.

130. This is, essentially, a reformulation of Kenneth Arrow's widely used definition of discrimination as "the valuation in the market place of personal characteristics of the worker that are unrelated to worker productivity." TITO BOERI & JAN VAN OURS, *Antidiscrimination Legislation in* THE ECONOMICS OF IMPERFECT LABOR MARKETS 95 (2d ed. 2013).

131. *See* Renée McDonald Hutchins, *You Can't Handle the Truth! Trial Juries and Credibility*, 44 SETON HALL L. REV. 505, 529 n.99 (2014). Such a policymaker may overvalue the benefits of using polygraph evidence, leading to an overuse of polygraph testing.

Second, bias can create nonpecuniary value—like the illicit joy that springs from harming a member of a disfavored community—that will directly add to the costs or benefits that underlie constitutional decision-making.[132] For example, a sheriff who derives racist utility from a chokehold policy that injures a particular racial minority will be less deterred by the threat of compensatory damages than a sheriff who does not.[133] Similarly, a sheriff who answers to a community that derives, in the aggregate, net racist utility from a chokehold policy that injures a particular racial minority group will be less deterred by the threat of compensatory damages than a sheriff who does not: even if the sheriff herself is not racist, the political benefits of appeasing her electorate will influence whatever decisions she makes.

Finally, when the nonpecuniary value that springs from bias influences individuals making decisions with collective impacts, it will lead to agency-cost problems.[134] This is because individual decisionmakers do not experience all of the societal benefits and costs of their actions, but they are fully affected by any personal benefits and costs. Bias-derived utility can therefore create circumstances in which the policy that maximizes utility for the individual decisionmaker is not the policy that maximizes utility for society.[135] In the above chokehold hypothetical, for example, because the sheriff in question will only personally experience a fraction of the chokehold policy's societal benefits (say, $800) and costs ($1,000), she need only derive a small amount of personal racism-related utility (>$200) to implement an inefficient policy: then the *personal* benefits ($800 + >$200) of the policy would exceed its *personal* costs ($1,000). Among other things, this illustrates the outsized impact that biases can have on decision-making; in this example, the sheriff need only derive $201 in personal utility from her bias to choose a policy that results in a net societal loss of *$20,000* in utility.

### *B. Are Bias's Effects Improper?*

When bias undermines the decision-making process, by corrupting assumptions or by creating agency-cost problems, it presents a serious threat to the constitutional regulatory scheme. There are no acceptable circumstances from the standpoint of optimal deterrence in which bias leads decisionmakers to incorrectly value the costs or benefits of their actions or to maximize individual utility at the expense of societal utility. Any scheme reliant on deterrence depends also on the underlying decision-making of the actors in question. And when a factor like bias systemically taints those

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132. This is analogous to the "taste for discrimination" described by Gary Becker in the employment context; the utility that springs from bias will put a thumb on the scale of deterrence. GARY S. BECKER, ACCOUNTING FOR TASTES 140–41 (1998); *see also* BERNARD E. HARCOURT, AGAINST PREDICTION at 111–18 (2007) (mapping this theory on to police profiling determinations).

133. Whenever the net value of bias-derived utility is positive, [benefit-derived utility] + [bias-derived utility] > [benefit-derived utility].

134. Pecuniary effects can also give rise to agency-cost problems. *See, e.g.*, Robert A. McBride, *Policing for Profit: How Urban Municipalities' Focus on Revenue Has Undermined Law Enforcement Legitimacy*, 9 FAULKNER L. REV. 329, 331 (2018).

135. *Cf.* Coffee, *supra* note 37, at 1349 (outlining this problem in the context of mass torts).

decisions—especially when the result is uniform underdeterrence or overdeterrence—it undermines the whole system.

It is less instantly clear, however, whether the utility that is directly produced from bias must be excluded from calculations of optimal deterrence: from a strictly utilitarian standpoint, the joy that a racist derives from her bigotry, as despicable that preference may be, also adds to the overall societal utility of the action in question.[136] Paradoxically, this would mean that optimal deterrence sometimes favors a policy *because of*, and not in spite of, that policy's racist (or sexist, or xenophobic, etc.) consequences.

Such a result is plainly untenable. Constitutional tort suits exist to enforce the policy aims of § 1983 and the Constitution, not to blindly maximize utility. Adopting an absolutist version of utilitarianism in this context, therefore, makes little sense. A more sensible approach may, instead, be to look to the policies underlying § 1983 and the Constitution in determining what kinds of utility should factor into calculations of optimal deterrence. Utility derived from bias would not be incorporated into cost-benefit decision-making when doing so would thwart these policy goals.

There are a number of biases that might give rise to such troubling utility. Classical prejudices, for example—racism, sexism, xenophobia, religious animosity, and other biases that relate to identity—are inherently inconsistent with the Constitution's anti-discrimination goals. Indeed, it was the need for a remedy against racially biased state actors that gave rise to § 1983; and the Fourteenth Amendment's Equal Protection Clause was borne out of fears of racial prejudice.[137] As such, it should not matter how much utility a state actor derives from discriminating on the basis of race, sex, national origin, religion, etc., for purposes of calculating whether the costs of that discriminatory action outweigh its benefit.

Viewpoint-based biases—biases springing from the tendency to, intentionally or unintentionally, disfavor perspectives with which one disagrees—are likewise troubling from the standpoint of constitutional tort policy.[138] When the state considers how aggressively to police a protest or what potentially unwholesome content to censor, the degree to which the relevant state actors sympathize with the underlying viewpoint may influence the state's ultimate determination. Yet as the Supreme Court has made clear: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea

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136. *Cf.* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 41 (1974) (recognizing the theoretical challenge posed by "utility monsters," individuals who get "enormously greater sums of gains in utility from any sacrifice of others than these others lose").

137. Section 1983 was passed as part of the Ku Klux Klan Act of 1871 to "target[] the Klan, including those members holding official positions in government." Harrington, *supra* note 124, at 1006 (2007). For a description of the Fourteenth Amendment's foundations, see McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (noting the "historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States"). Both § 1983 and the Fourteenth Amendment are phrased vaguely, presumably to act as a guard against discrimination more broadly.

138. Viewpoint bias may also result in favoritism displayed toward perspectives with which one agrees.

simply because society finds the idea itself offensive or disagreeable."[139] Allowing the utility that springs from suppressing a disagreeable viewpoint to justify a policy that suppresses that viewpoint would thwart the First Amendment's purposes.

Not all biases that concerningly affect constitutional decision-making are, of course, invidious. Take, for example, bias toward law and order. The utility that results from the promotion of law and order is a natural, expected, and—at least to some extent—desirable goal of policing and governance. Yet an officer who overvalues the benefits of orderliness will nevertheless be suboptimally deterred from wrongdoing when the effect of that wrongdoing is to increase order.[140] Although such a mistake may be innocent or even well meaning, the effect—underdeterrence—is still undesirable.[141] Similarly, departmental solidarity, exhibited through the "thin blue line," is an organizational strength of many service organizations, contributing to a cohesiveness and comradery that draws many to the field.[142] But it also leads officers to be biased toward their colleagues—by, for example, adopting a "code of silence" in the face of accusations of wrongdoing—and therefore toward behavior that fails to maximize overall societal utility.[143] When these biases undermine the decision-making process, by tainting policymakers' underlying assumptions or by creating agency-cost problems, it does not matter if the underlying reason was invidious or anodyne.

### *C. Bias and Other Deterrence Skews*

Of course, bias does not affect deterrence in isolation; it will often work in conjunction with other factors that weigh on the deterrent impact of constitutional

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139. Texas v. Johnson, 491 U.S. 397, 414 (1989).

140. For instance, strategically citing some of those who jaywalk may reflect an appropriate valuation of law and order as it applies to jaywalking, whereas detaining every jaywalker, using violence when necessary, likely overvalues the need to ensure adherence to this minor traffic law. Other than recognizing that absolute and ruthless enforcement of all laws will not be universally desirable, this Article does not take a position as to what specific laws demand what specific levels of enforcement.

141. Even such seemingly innocuous biases might stand in opposition to the Constitution's goals. As the Supreme Court has recognized in the context of the First Amendment, "a certain amount of unrest and disorder is a price that must be paid lest there be only noncontroversial or impotent protest." Note, *Equity on the Campus: The Limits of Injunctive Regulation of University Protest*, 80 YALE L.J. 987, 1005 (1971); City of Houston v. Hill, 482 U.S. 451, 471–72 (1987). Yet when sufficiently strong, the utility that springs from preferences for law and order may outweigh the costs that result from suppressing protest—leading optimal deterrence to favor the suppression of speech that the Constitution seeks to protect. Taken to its furthest extreme, it is possible to imagine a society in which government propaganda has convinced the broader population that upholding laws and maintaining order is sufficiently valuable such that the costs of any constitutional wrongdoing in pursuit of that goal are overwhelmed by the brainwashed public's utility gained from law and order.

142. Ann C. Hodges & Justin Pugh, *Crossing the Thin Blue Line: Protecting Law Enforcement Officers Who Blow the Whistle*, 52 U.C. DAVIS L. REV. ONLINE 1, 10 (2018) (describing the unofficial "code of silence" common throughout law enforcement when it comes to testimony that may implicate a fellow officer).

143. *See also* Armacost, *supra* note 42, at 454.

litigation.

This includes, first, the problem of economic costs translating unevenly into political costs.[144] Indeed, one circumstance in which uneven translation is particularly likely to arise is when bias is present.[145] One factor that may influence a population's sensitivity to a tax increase is the underlying *reasons* for the increase in question;[146] a community with racist preferences may be more willing to tolerate a tax increase when it results from a policy that injures a disfavored population—thereby diminishing the political costs of such a policy.[147]

Second, bias can aggravate the sorts of information-related problems that lead policymakers to fail to account for the liability costs of their decisions.[148] Implicit in the goal of carefully monitoring policymaking liability is the idea that there should be checks on official policymaking. Law-and-order bias and intra-departmental bias, however, each weigh in favor of granting officials greater discretion—and therefore toward less oversight.[149] Similarly, policymakers may be less likely to implement necessary information-gathering processes when a disfavored community would be the primary beneficiary of careful tracking.[150] The likelihood that a government office is properly tracking its liability may therefore be tied, at least in part, to the biases held within that department. Moreover, when a department does not have adequate processes to track its liability, and deterrence therefore relies on individual officials noticing liability awards, bias may influence what awards are noticed or remembered. A state official biased against a religious minority, for example, may be less likely to remember (or "remember") damage awards springing from policies that harm that minority population, thereby decreasing the deterrent effect of such liability.[151]

Third, bias will lead to even greater unevenness in the pursuit and success of these suits, which will also have a distorting effect on the resulting deterrence. Bias in official decision-making will often reflect bias in the justice system and/or the community. This, in turn, will influence what cases are brought and what cases

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144. *See* Levinson, *supra* note 25.

145. This is beyond the scope of Levinson's article. *Id.*

146. *See, e.g.*, Andrew D. Appleby, *Pay at the Pump: How $11 Per Gallon Gasoline Can Solve the United States' Most Pressing Challenges*, 40 CUMB. L. REV. 3, 57 (2009).

147. This can cut both ways. In a racism-sensitive community like Portland, Oregon, the fact that an unconstitutional policy appears to have been motivated by racial bias might amplify the political consequences of any resultant economic damages.

148. Schwartz, *supra* note 106.

149. *See supra* Section II.D.

150. This sort of bias-induced carelessness may well have played a significant role in the Flint water crisis. *See, e.g.*, Andrew Buncombe, *Flint Water Crisis: Race 'Was Factor' in Authorities' Slow and Misleading Response, Says City's Black Mayor*, INDEPENDENT (May 28, 2018), https://www.independent.co.uk/news/world/americas/flint-water-crisis-michigan-racism-city-mayor-karen-weaver-police-a8369981.html [https://perma.cc/93VM-AML9].

151. This, also, can cut both ways. A Bosnian-American policymaker, for example, may be particularly likely to remember any constitutional liability that results from a policy that harms Bosnian-Americans, thereby inflating the relative deterrence effectuated by such awards. *See, e.g.*, Henri Tajfel & John Turner, *An Integrative Theory of Intergroup Conflict*, *in* THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS 33 (William G. Austin & Stephen Worchel eds., 1979) (discussing how individuals favor members of their own group).

succeed—thereby changing the risk-adjusted cost of litigation. When a victim of constitutional wrongdoing ascribes to a disfavored viewpoint, for example, she may face a relatively uphill battle in obtaining counsel or in succeeding at trial[152]: the subset of Massachusetts-licensed attorneys who would consider representing a chapter of the KKK in a Takings claim is relatively small; and a typical Massachusetts jury is probably less likely to find in favor of a KKK victim, all else equal.[153] Bias's influence on liability determinations, moreover, extends beyond simply coloring the sympathies of jurors: numerous constitutional torts include legal elements vulnerable to bias. Whether police have used excessive force, for example, turns on, among other things, the factfinder's assessment of how much danger the suspect in question presented to the arresting officer(s). A juror who has internalized an unfounded fear of a particular racial group will, because of her bias, be more likely to judge as reasonable an officer's use of force against a member of that group.[154]

Finally, the amount of stigma or even stress that results from a constitutional tort suit will depend, similarly, on workplace and community biases. A public health official accused of overzealously quarantining immigrants from a certain country may face little stigma—and might even be celebrated—in a town in which the immigrant population in question is disfavored or distrusted. Sheriff Joe Arpaio, for example, appears to have politically benefited from at least some of his unruly and constitutionally dubious stances and actions. Such effects cannot be universalized; a constitutional violation that is taboo in one community may be viewed as unremarkable or even desirable in another.[155]

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152. These effects will also cut both ways. Even when it is not legally relevant, bias may be a persuasive part of a plaintiff's narrative, and the apparent presence of certain types of bias in constitutional wrongdoing may induce high-quality plaintiffs' firms, like the Southern Poverty Law Center, to take a case. In such circumstances, bias may give rise to contradictory effects on deterrence: official bias may create decision-making flaws that lead toward less deterrence while also increasing the likelihood of litigation and liability, thereby leading to more deterrence. Offsetting effects will be most common when official biases run counter to community preferences; whereas, the effects of bias are most likely to compound when the biases of governmental policymakers reflect biases in the broader community.

153. This isn't to say that bias will always or even usually deprive such victims of a chance at redress. But by limiting the pool of potential attorneys and by precoloring the sympathies of the jury, bias will serve as an additional obstacle to liability judgments, thereby skewing the risk-adjusted costs of litigation.

154. *Cf.* Isabel Wilkerson, *Mike Brown's Shooting and Jim Crow Lynchings Have Too Much in Common. It's Time for America to Own Up*, GUARDIAN (Aug. 25, 2014), http://www.theguardian.com/commentisfree/2014/aug/25/mike-brown-shooting-jim-crow-lynchings-in-common [https://perma.cc/FEW6-Q4FT] (discussing Mike Brown and other instances in which internalized racism influenced and then "justified" state action). By this same token, bias may also contribute to the calculation of compensatory damages or settlements.

155. This, too, illustrates qualified immunity's clumsiness: qualified immunity applies with equal force irrespective of whether or to what extent bias influences the stress and stigma of litigation—including in circumstances in which community biases result in the celebration of those accused of constitutional wrongdoing.

### *D. Bias and Bias-Based Torts*

Bias is unique among factors that distort the constitutional tort system insofar as it is a required element of some constitutional torts: plaintiffs in such cases will not be able to recover without proving bias. The inclusion of bias as an element of a claim in some torts does not, however, in any way mitigate its systemic influence on deterrence. To the contrary, bias is *especially* a concern in such circumstances.

Many constitutional violations do not directly turn on the motivations of the state actor in question. In First Amendment speech cases, for example, the legal inquiry often involves whether a facially non-discriminatory speech regulation is narrowly tailored to a significant government interest—a question in which bias is not an element.[156] On the other hand, some constitutional violations do require a showing of some impermissible bias such as racial animus or hostility to speech.[157] Section 1985(3), for example, provides a federal cause of action, similar to § 1983, for victims targeted because of "racial, or perhaps otherwise class-based, invidiously discriminatory animus";[158] it is impossible to succeed under § 1985(3) without showing bias.

For claims that do not involve bias as an element, bias's influence on deterrence is straightforward: when present, bias will weigh on the cost-benefit analysis, thereby skewing constitutional litigation's deterrent effect. The question is less intuitive (but equally straightforward) for claims for which bias is a required element. On the one hand, the deterrent effect of such bias torts reaches only biased potential tortfeasors. But so long as damage awards remain predominantly compensatory, the inclusion of bias as an element of the tort will do nothing to mitigate bias's distorting effect on deterrence. Indeed, the key difference between bias-required torts and bias-indifferent torts is that when bias is an element of liability, there will be no possible tortfeasor for whom bias has *not* distorted the deterrent effect of constitutional litigation.

This may be illustrated with an example. Imagine two police departments considering two policies, one of which is justified largely on racial animus. If these policies create identical (let's say $80,000 in) legitimate societal utility, and each of these policies give rise to identical (let's say $100,000 in) risk-adjusted litigation costs, then efficient deterrence suggests identical results: that the policies should not be pursued. The question at the heart of efficient deterrence (do the policy's costs—$100,000—exceed its benefits—$80,000?) is not affected by the elements of the underlying tort. And insofar as the costs of a policy largely take the form of compensatory damage awards—which are determined by the nature of, and not the reasons for, the policy's harm—the court's recognition of bias as an element of the wrong in question will ensure no additional deterrence: the fact that one department was motivated by racial animus in adopting an identically harmful policy is

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156. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968); *see also, e.g.*, Graham v. Connor, 490 U.S. 386, 397 (1989) (describing the Fourth Amendment's objective reasonableness inquiry that does not turn on the actual motivations (improper or not) of the officer in question).

157. *See, e.g.*, 42 U.S.C. § 1985(3).

158. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 268 (1993) (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)).

immaterial for purposes of calculating compensatory damages.[159] Indeed, because bias is a difficult-to-prove additional element for liability, bias torts may provide *less* deterrence than non-bias torts; all else equal, including bias as a required element of liability will increase the risk of nonrecovery and thereby decrease the risk-adjusted cost of litigation.[160]

## IV. TAILORING DAMAGES TO DETERRENCE

Treating constitutional torts more like private law torts helps clarify a number of problems. But it also suggests the possibility of a uniform solution. Each of these problems—the stress and stigma of litigation, economic-political cost translation effects, bias, and so forth—troubles the operation of the constitutional tort system by amplifying or diminishing the deterrent effect of compensatory damage awards. Such additive or detractive influences can, however, be offset by increasing or decreasing the damage award in question. Indeed, private law tort theory offers a number of proposals that do exactly this, including damage multipliers, damage caps, and proportional recovery.[161]

### *A. Countering Underdeterrence Through Exemplary Damages*

When bias, governmental cost internalization failures, or something else renders compensatory damage awards inadequate, exemplary damages present a promising mechanism for nevertheless ensuring the optimal effect of constitutional torts.[162]

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159. Because bias's skewing effect is exogenous to a policy's harmfulness, even if bias pushes decisionmakers toward actions that do more harm, and therefore give rise to more in compensatory damages, underdeterrence will nevertheless result. A bias-motivated chokehold policy giving rise to $110,000 in harms will only generate $110,000 in compensatory damages (and therefore $110,000 in deterrence)—enough to internalize all of the policy's harms but none of bias's influence.

160. It is possible that bias torts may be more likely to result in a judgment, or in higher settlements—although the opposite may be true as well: judges and juries are generally reluctant to formally recognize that a state actor was biased.

161. *See, e.g.*, A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 890–91 (1998) (discussing advantages and disadvantages of these respective mechanisms for tailoring damage awards).

162. *See* Smith v. Wade, 461 U.S. 30, 50 (1983) (recognizing the importance of the availability of exemplary damages "if one assumes that there are substantial numbers of officers who will not be deterred by compensatory damages"). The term 'exemplary damages' is typically used interchangeably with 'punitive damages.' To avoid the retributivist connotations of 'punitive,' this Article uses 'exemplary damages' throughout. For others who have noted this semantic confusion, see, for example, Ciraolo v. City of New York, 216 F.3d 236, 245 (2d Cir. 2000) (Calabresi, J., concurring) (noting that the term "'punitive damages' . . . contributes greatly to . . . confusion" because it "improperly emphasizes the retributive function of such extracompensatory damages at the expense of their multiplier-deterrent function"); Polinsky et al., *supra* note 161, at 890–91 ("[T]he adjective 'punitive' may sometimes be misleading. This is because extracompensatory damages may be needed for deterrence purposes in circumstances in which the behavior of the defendant would not call for punishment.") (emphasis omitted); *cf.* Sharkey, *supra* note 117, at 364–65 ("[I]t makes

This may be illustrated by returning, briefly, to this Article's discussion of the problem in Parts I and II. Optimal deterrence entails weighing a policy's benefits [b] against its costs [c]. A policy is justified under efficient deterrence theory when [b]>[c]. Stress and stigma, bias, and so forth, however, skew this equation. When a sheriff derives $10,000 in improper bias-related utility from a policy, for example, she will consider whether [b] + $10,000 > [c].[163] This Part proposes adding a reciprocal amount of exemplary damages and thereby proportionally increasing the costs of wrongdoing: under the proposed exemplary damages regime, the sheriff would consider whether [b] + $10,000 > [c] + $10,000—i.e., whether [b]>[c]. Such a reform could be applied to address any one factor, or any combination of factors, that skews the systemic effect of constitutional torts.[164]

This use of exemplary damage awards resembles a Pigouvian tax correcting for systemic failures in constitutional deterrence.[165] The direct impact of such a remedy would be to internalize one or more of these skewing effects in the manner described above, preserving optimal deterrence. But direct deterrence will only reach parties who know that they are so influenced. Although a sheriff who recognizes that his decision is motivated in part by bias-derived utility can anticipate and incorporate the cost of bias-related exemplary damages into his decision-making, a policymaker who mistakenly believes that a community is more dangerous than it actually is will not understand that her belief is mistaken, let alone influenced by bias. She will therefore not be swayed by the possibility of any resulting bias-related damages in her decisions.

This may not, however, be a major concern: exemplary damages will also give rise to indirect, institutional effects that will reach even unknowingly or unconsciously affected decisionmakers. This will be true if vicarious liability is adopted in this context, but it also will be true if the costs of these deterrence failures continue to be imposed on states and municipalities through indemnification: either way, exemplary damages serve as a powerful incentive to implement policies that

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sense to entertain seriously the idea of a nonretributive rationale for punitive damages.").

163. For a discussion of what it means for bias-derived utility to be "improper," see *supra* Section III.B. Given the prevalence of settlements in this context, it may not be possible to tailor deterrence this precisely. Nevertheless, increasing the presumptive value of a judgment will also increase the settlement value, and so the prevalence of settlements will not necessarily thwart this proposal.

164. Indeed, using exemplary damages to correct deterrence failures related to uneven enforcement follows directly from the rich body of private law tort scholarship on the use of damage multipliers in circumstances in which the risk of non-recovery undermines the deterrence effect of compensatory awards. *See generally, e.g.*, Polinksy et al., *supra* note 161 (proposing damage multipliers to account for risk-of-nonrecovery problems). When only half of all constitutional wrongs result in a compensatory damage award, doubling the total damages via exemplary damage awards will counteract the underdeterrence that would otherwise result. *See, e.g.*, *id.*; Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?* 40 ALA. L. REV. 1143, 1148 (1989); Polinsky et al., *supra* note 161.

165. Pigouvian taxes are taxes on activities that generate negative externalities. *See, e.g.*, Thomas Merrill & David M. Schizer, *Energy Policy for an Economic Downturn: A Proposed Petroleum Fuel Price Stabilization Plan*, 27 YALE J. REG. 1, 4 (2010). Pigouvian taxes are generally set to match the marginal cost of the externality in question so as to correct the resulting market failure. *Id.*

guard against even unconscious deterrence failures.[166] A state that is indirectly penalized for its health department's failure to track its liability-related expenditures will take steps to better track such costs; and a municipality that knows its hiring, firing, supervising, and policymaking decisions each could give rise to bias-related liability will take steps to moderate the influence of bias in and through such decisions.[167]

### *B. Countering Overdeterrence Through Damage Reductions*

Exemplary damages cannot, however, be used when faults in the constitutional tort system lead to overdeterrence. This is because exemplary damages are a one-way ratchet: they only add to the costs of constitutional tort suits and therefore can only increase their deterrence value. If exemplary damages function as a quasi-Pigouvian tax on state bias, this Article's framework suggests the need also for a Pigouvian subsidy-like reform: a way to decrease the deterrent effect of constitutional litigation. Private tort law also provides several such mechanisms, including damage proportional liability;[168] when the stress and stigma of litigation, bias, or some other factor appears likely to lead to overdeterrence, compensatory damage awards should be accordingly reduced to below-compensatory levels.[169]

Such a reduction might appear to strike at constitutional tort law's compensatory purposes.[170] To the extent that it does, this shouldn't necessarily doom the proposal. As the doctrine of qualified immunity makes clear, the Supreme Court, at least,

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166. Armacost, *supra* note 42, at 505–06. Such an increased use of exemplary damages could discourage the practice of indemnification. It seems unlikely, however, that holding individual officers accountable for their departments' policymaking failures will result in *fewer* departments paying exemplary awards on their officers' behalf. *See generally* Schwartz, *supra* note 38, at 890 (observing that every single officer in her nationwide study was indemnified for exemplary damages).

167. For example, research suggests that African Americans are less susceptible to anti-African American biases, and so ensuring that policies that impact predominantly African-American communities are made by or in consultation with African-American policymakers could be an effective step toward diminishing the influence of conscious and unconscious anti-African American biases. *See, e.g.*, R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1190 (2006); Anthony G. Greenwald, Mark A. Oakes & Hunter G. Hoffman, *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 399 (2003); E. Ashby Plant, B. Michelle Peruche & David A. Butz, *Eliminating Automatic Racial Bias: Making Race Non-Diagnostic for Responses to Criminal Suspects*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 141 (2005) (showing mixed success in training subjects to minimize effects of this bias).

168. Damage caps, which are not Pigouvian-like, also will lead to such an end.

169. This would operate in the same manner as exemplary damages described above: when bias detracts from the perceived benefits of a policy, for example, subtracting an equivalent amount from the damages awarded will counterbalance its influence. Expressed algorithmically, where [b] - $10,000 > [c], the costs could be adjusted such that [b] - $10,000 > [c] - $10,000, or [b] > [c].

170. *Cf., e.g.*, Hardin v. Straub, 490 U.S. 536, 539 (1989) (identifying "§ 1983's chief goals [as] compensation and deterrence").

believes that overdeterrence in this context is a sufficiently serious concern to require the sacrifice of some amount of otherwise deserved compensatory relief.[171] Damage caps and proportionally tailored liability demand less of a loss of compensation than qualified immunity.[172]

Compromise may be unnecessary, though; it is possible to guard against overdeterrence without sacrificing compensation. Looking again to the private law, the doctrine of *cy pres* provides a possible model for a solution. *Cy pres* is an equitable practice used in class actions, in which judges distribute portions of the judgments or settlements to uninvolved charitable interests.[173] Applying this general principle—that equity sometimes demands decoupling the plaintiff's recovery from the judgment itself—exemplary damage awards from previous suits could be used to create a common fund for offsetting downward adjustments to compensatory damage awards.[174] So long as underdeterrence is at least as big of a problem as overdeterrence, the amounts of exemplary damages collected would be sufficient to ensure that every injured plaintiff is made whole. Where, for example, a $10,000 exemplary damage award was necessary to internalize the effects of bias and ensure optimal deterrence, this $10,000 would then be available in a subsequent case to compensate an injured plaintiff for any reduction to her compensatory damage award. In effect, therefore, deterrence-related exemplary damages would be used as insurance dedicated to preserving the compensatory role of constitutional litigation even when optimal deterrence militates that some plaintiffs receive sub-compensatory relief.

There is nothing inherently problematic with using exemplary damages in this manner. Plaintiffs have no moral or legal entitlement to exemplary damages awarded to deter rather than to punish.[175] Therefore, redistributing these awards would simply deprive certain plaintiffs of what would otherwise be a windfall.[176] Indeed, this

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171. And, as Section IV.D discusses, this Article's approach likely represents a more effective and more efficient approach.

172. Another advantage of damage caps or proportionally reduced damage awards is that they would still result in a judgment, thereby facilitating any expressive or civil recourse-related goals of the constitutional tort system. *Cf.* John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Laws Wrongs*, 115 YALE L. J. 524, 621–22 (2005).

173. *See* Chris J. Chasin, Comment, *Modernizing Class Action Cy Pres Through Democratic Inputs: A Return to* Cy Pres Comme Possible, 163 U. PA. L. REV. 1463, 1469 (2015).

174. This proposal follows, generally, from private law scholarship on decoupling. *See, e.g.*, Albert Choi & Chris William Sanchirico, *Should Plaintiffs Win What Defendants Lose? Litigation Stakes, Litigation Effort, and the Benefits of Decoupling*, 33 J. LEGAL STUD. 323 (2004); Mitchell Polinsky & Yeon-Koo Che, *Decoupling Liability: Optimal Incentives for Care and Litigation*, 22 RAND J. ECON. 562 (1991); David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871 (2002).

175. *Cf.* Noah Smith-Drelich, *Performative Causation*, 93 S. CALIF. L. REV. 379 (2020) (discussing theoretical justifications for proportional liability).

176. *See, e.g.*, Sharkey, *supra* note 117, at 370 n.65 ("[T]hat the damages are paid to the plaintiff is, from an economic standpoint, a detail. It is payment by the defendant that creates incentives for more efficient resource use. The transfer of the money to the plaintiff affects his

proposal would redistribute exemplary damages in a manner that facilitates tort law's—and, specifically, constitutional tort law's—goals of deterrence and compensation; defendants would pay an amount necessary to ensure that they are optimally deterred while plaintiffs would receive an amount necessary to ensure that they are fully compensated.[177]

### *C. Current Legal Status of Damage Tailoring*

What, if any, aspects of this Article's proposal can be adopted under existing law? The answer is, surprisingly, a great deal: because qualified immunity screens out all but intentional or reckless constitutional violations—which is conveniently also the Supreme Court's standard for awarding exemplary damages—exemplary damage awards are currently available to amplify the deterrent effect in nearly every case that survives to the liability stage of litigation.[178] Reducing compensatory damages to subcompensatory levels, on the other hand, may fall too far afield of anything approved under the common law to be adopted without congressional intervention, even if plaintiffs are nevertheless fully compensated through redistributed exemplary awards. But this Article's examination nevertheless suggests the need for some reform in this respect.

#### 1. Adding Deterrence Through Exemplary Damages

This Article's proposal for exemplary damages can be largely adopted to supplement qualified immunity under even a narrow and uncontroversial reading of the Supreme Court's standard for § 1983 damage awards: nearly any case that survives qualified immunity will also satisfy the burden for exemplary damages.[179]

In *Smith v. Wade*, the Supreme Court held that punitive damages could be awarded under § 1983 "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."[180] The "reckless or callous indifference" or "evil motive" in question pertains to the tortfeasor's "knowledge that [he] may be acting in violation of federal law, not [his] awareness that [he] is engaging in

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wealth but does not affect efficiency or value." (footnote omitted) (quoting RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 78 (1972))).

177. This would also have the benefit of mitigating the tendency for exemplary damages to incentivize frivolous litigation or to motivate plaintiffs to take insufficient precautions. *See, e.g.*, Polinsky et al., *supra* note 161, at 923.

178. If, however, the doctrine of qualified immunity is either substantially changed or eliminated entirely, this Article's proposal will have to remain limited largely to those circumstances in which qualified immunity would have applied. *Cf.* Ciraolo v. City of New York, 216 F.3d 236, 242 (2d Cir. 2000) (Calabresi, J., concurring) (calling for the Court to revisit municipalities' immunity to punitive damages); Gilles, *supra* note 89, at 871 (same).

179. The fact that few courts actually do award exemplary damages under § 1983 is not a reflection of the limited permissibility of such awards; it instead reflects what is, this Article suggests, an ill-informed practice of reserving exemplary damages for truly extraordinary circumstances.

180. Smith v. Wade, 461 U.S. 30, 54–55 (1983).

discrimination."[181] Put more simply, exemplary damages are permitted for reckless or intentional violations of the law.

Qualified immunity, in turn, allows cases to proceed against only reckless or intentional tortfeasors: "qualified immunity . . . provides ample protection to all but the plainly incompetent or those who knowingly violate the law."[182] This means that for all nonmunicipal defendants subject to damage awards,[183] exemplary damages are thus available.[184]

The primary doctrinal limitation on exemplary damages awarded for deterrence purposes will instead be the Court's due process jurisprudence. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court imposed a *de facto* single-digit cap on the ratio of exemplary damages to compensatory damages.[185] Therefore, in the event that optimal deterrence requires a ten-to-one or higher ratio of exemplary-to-compensatory damages, *Campbell* may stand as an obstacle to fully implementing this Article's proposed use of exemplary damages.[186] More fundamentally, *Philip Morris USA v. Williams* forbids the award of exemplary damages based on injuries to nonparties.[187] In some circumstances, this Article's proposal would base exemplary damages on the *conduct* of nonparties, which raises even greater due

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181. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 535–36 (1999) (discussing and applying the § 1983 standard set forth in *Smith v. Wade*, 461 U.S. at 30, 37, to § 1981 actions).

182. Malley v. Briggs, 475 U.S. 335, 343 (1986). If there is any space between "plain[] incompeten[ce]" and recklessness, it is small: for public officials, to violate "clearly established" federal law approaches constituting recklessness per se. *Id.* at 349; *see Recklessness*, BLACK'S LAW DICTIONARY (Garner ed. 2005) (defining recklessness as "[c]onduct whereby the actor does not desire harmful consequence but . . . foresees the possibility and consciously takes the risk" or, alternatively, as "[a] state of mind in which a person does not care about the consequences of his or her actions").

183. Municipal defendants cannot assert qualified immunity, but they are also not subject to exemplary damages. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 259–602 (1981). As a result, municipal defendants would represent the biggest gap in this Article's proposed deterrence regime. Although suits against municipal defendants only account for a small proportion of damages awarded through constitutional litigation, municipal immunity from punitive damages should therefore be reconsidered. *See supra* Section II.A (suggesting changes to vicarious liability in this context); *see also* Filarsky v. Delia, 566 U.S. 377, 392 (2012) (holding that qualified immunity applies to all but several narrow categories of non-state actors).

184. *See, e.g.*, Ngo v. Reno Hilton Resort Corp., 140 F.3d 1299, 1302 (9th Cir.), *opinion amended on denial of reh'g*, 156 F.3d 988 (9th Cir. 1998) ("[B]ecause the state of mind required to prove a Section 1983 violation was as high as that required to sustain a punitive damage award at common law, a plaintiff who satisfied the former standard necessarily satisfied the latter."). *But cf.* Meltzer, *supra* note 26, at 277–78 (speculating that the Court's *criminal* constitutional deterrence regime might be explained by the hypothesis that "the Court is not fully comfortable empowering defendants as private attorneys general to seek remedies whose primary or exclusive purpose is general deterrence of constitutional violations").

185. 538 U.S. 408, 425 (2003).

186. *But see infra* Section IV.E (discussing an incremental approach). *Campbell* may also not be an obstacle: it is unclear whether caps on punitive damage ratios should (or do) apply to all intentional torts, which often result in only nominal damage awards.

187. 549 U.S. 346, 353 (2007); *see infra* Section IV.E (discussing how it may be possible to identify the existence of bias by looking beyond the circumstances of the case at issue).

process concerns—at least to the extent that the legal fiction of individual liability is maintained in this context.[188] For example, exemplary damages would be justified under this Article's proposal against an officer using a chokehold pursuant to a biased chokehold *policy*, even if bias did not play a role in the individual tortfeasor's decision to use the chokehold in question. However, by more formally recognizing vicarious liability or otherwise ensuring that liability burdens in this context actually fall on departments and municipalities—while also eliminating the Court's bar on punitive damages against municipalities—such due process concerns could be lessened.[189] Alternatively, courts could more consciously tailor § 1988 attorney's fees to these underlying deterrence interests: a court might resist awarding attorney's fees except when bias, informational problems, or some other factor leads compensatory damage awards to fall short and then award only partial attorney's fees unless deterrence demands a full award.[190] Such a use of § 1988 would be consistent with the statute's motivating purpose.[191]

2. Reducing Deterrence Through Diminished Compensatory Damages

The second part of this Article's proposed reform, the suggestion that overdeterrence can be combatted through compensatory damage reductions, may require congressional action to be adopted: although this proposal would satisfy the

188. *See* Schwartz, *supra* note 38.

189. *See* SCHUCK, *supra* note 42 at 68–70 (arguing for governmental enterprise liability). Because such changes are consistent with modern tort law's evolving conception of injury and responsibility, the Court could adopt them under § 1983. *Compare* Smith v. Wade, 461 U.S. 30, 34 (1983) (noting that the Court, in its § 1983 jurisprudence, "look[s] first to the common law of torts (*both modern* and as of 1871)" (emphasis added)), *id.* at 34 n.2 ("[I]f the prevailing view on some point of general tort law had changed substantially in the intervening century . . . we might be highly reluctant to assume that Congress intended to perpetuate a now-obsolete doctrine."), Imbler v. Pachtman, 424 U.S. 409, 420 (1976) (recognizing a common-law immunity—prosecutorial immunity—that first came into existence twenty-five years after § 1983 was enacted), *and* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258–59 (1981) ("[T]he Court's willingness to recognize certain traditional immunities as affirmative defenses has not led it to conclude that Congress incorporated *all* immunities existing at common law."), *with* Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993) (implying that the Court can add immunities not recognized in 1871 under § 1983, but that it cannot abrogate immunities that were well-recognized at that time), *and* Baude, *supra* note 8, at 54–55 & n.43 (noting that "it is the Court's position now" to look only to "*traditional* common law"). If the Court is bound by immunities recognized in 1871, *City of Newport v. Fact Concerts, Inc.* recognized that "[b]y the time Congress enacted what is now § 1983, the immunity of a municipal corporation from punitive damages at common law was not open to serious question." 453 U.S. at 247, 259 (1981).

190. One potentially important consequence of relying on tailored attorney's fees in this manner is that it would shift the question from one for a jury to one for a judge.

191. *See* 42 U.S.C. § 1988; S. REP. NO. 94-1011, at 94th Cong., 2d Sess. 6 (1976), *as reprinted in* 1976 U.S.C.C.A.N. CODE CONG. & AD. NEWS 5908, 5913. Another possible limitation comes from dicta in *Ziglar v. Abbasi*, where Justice Kennedy noted that these general sorts of determinations are best left to the legislature. 137 S. Ct. 1843, 1858 (2017).

compensatory and deterrence purposes of tort law—especially if redistributed exemplary damage awards are used to make injured plaintiffs whole—it may nevertheless fall too far afield of any remedy recognized in the common law to be adopted by judicial action alone.

As the Supreme Court has repeatedly recognized, to resolve questions about what types or amounts of damages for § 1983 suits are appropriate, courts should look to "principles derived from the common law of torts."[192] Although this Article's proposed use of exemplary damages to guard against underdeterrence is consistent with the common law understanding of exemplary damage awards—courts, including the Supreme Court, have regularly approved similar uses of exemplary damages[193]—there is no established corresponding approach to *over*deterrence in the common law.[194] As a result, even if it would satisfy the policy aims of § 1983 to sometimes reduce damage awards to sub-compensatory levels, this is not a part of the reform that can be unilaterally adopted by the courts.[195]

Yet ad hoc attempts to limit (and amplify) the effect of constitutional litigation may already occur throughout the legal system in the form of rights-manipulation. As Richard Fallon argues, "we should not think of the right to sue . . . for damages relief as a constant . . . . The availability of a right to sue is as much a variable as official immunity."[196] As a result, "[t]he definition of rights" may "vary with social costs," with courts taking social costs into account in defining the scope and reach of

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192. *See, e.g.*, Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 305 (1986); *see also* Smith v. Wade, 461 U.S. 30, 31 (1983). The Supreme Court has taken this dictate seriously, starting, and usually ending, its discussion of constitutional tort damages with references to the Restatements, Prosser on Torts, and other such seminal sources. *See also supra* note 189; *cf.* Carlson v. Green, 446 U.S. 14, 22 (1980) (analogizing *Bivens* to § 1983 in the context of exemplary damage awards). Section 1985(3), on the other hand, is not, exactly. *See* Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (noting that § 1985(3)'s invidious intent requirement ensures that the statute does not become "a general federal tort law").

193. *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996) (acknowledging, as one permissible justification for punitive damages, the difficulty of detecting an injury); Perez v. Z Frank Oldsmobile, Inc., 223 F.3d 617, 621 (7th Cir. 2000) (Easterbrook, J.) ("Frauds often escape detection, and the need to augment deterrence of concealable offenses is a principal justification of punitive damages."); Ciraolo v. City of New York, 216 F.3d 236, 244–45 (2d Cir. 2000) (Calabresi, J., concurring) (approving of this use of punitive damages while noting the roots of tort law's "multiplier" idea in Gary Becker's criminal deterrence scholarship); Kemezy v. Peters, 79 F.3d 33, 35 (7th Cir. 1996) (Posner, C.J.) ("When a tortious act is concealable, a judgment equal to the harm done by the act will underdeter.").

194. One *statutory* response to overdeterrence has been damage caps on compensatory awards, which do entail reducing compensatory damages to below-compensatory levels in certain circumstances. Such damage caps, however, have been almost exclusively statutory and, therefore, should not be considered part of even the modern common law of tort remedies. *See, e.g.*, Scott DeVito & Andrew Jurs, *An Overreaction to A Nonexistent Problem: Empirical Analysis of Tort Reform from the 1980s to 2000s*, 3 STAN. J. COMPLEX LITIG. 62, 69 (2015).

195. *See* Shaakirrah R. Sanders, *Uncapping Compensation in the Gore Punitive Damage Analysis*, 24 WM. & MARY BILL RTS. J. 37, 40 (2015) (noting that "[c]ap-approving courts hold that legislative authority includes the power to alter common law rights to compensatory damages").

196. Fallon, *supra* note 26, at 965.

rights.[197] In other words, courts may tailor constitutional tort recovery to accomplish this essential set of goals by limiting or expanding the rights at stake, as they may already be doing in the context of free exercise.[198] If true, this Article's proposal would formalize and lend transparency to a practice that has already been adopted, albeit in an ad hoc manner.

### *D. Tailored Damages and Qualified Immunity*

This Article's proposal of tailoring damage awards to deterrence addresses, among other things, the primary policy basis for qualified immunity: the chilling effect that the stress and stigma of litigation has on desirable state action. As such, this Article's proposed reform presents a direct, and potentially preferable, alternative to the controversial doctrine.

One advantage that this Article's proposal has over qualified immunity is that its proportional approach can be more precisely tailored to deterrence and be applied broadly to counterbalance any factor that gives rise to overdeterrence. This approach will also result in closer-to-full compensation for victims of constitutional wrongdoing than will qualified immunity. Even if deterrence-based exemplary awards from other cases are not used (or are insufficient) to offset reductions in compensatory damages, because tailored damages entail only reducing compensatory damages as much as is necessary to counterbalance problematic influences on deterrence, plaintiffs may still be left with some compensation for their injuries. On the other hand, because qualified immunity dismisses cases outright, it will always entail denying plaintiffs any compensatory relief whatsoever.

Moreover, because this Article's proposal combats overdeterrence via *post*-judgment relief, it will facilitate the continued development of constitutional law. This, in turn, will lead to fewer instances in which the constitutionality of a policy or action remains unclear and, consequently, to fewer instances in which state actors may reasonably be mistaken about the appropriateness of their actions.[199] Qualified immunity, on the other hand, operates prejudgment, simultaneously discouraging the development of constitutional law—after *Pearson v. Callahan*, courts may apply qualified immunity without resolving the underlying constitutional question[200]—while dismissing cases because constitutional law is underdeveloped.[201]

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197. *Id.* at 967–68; *see, e.g.*, Washington v. Davis, 426 U.S. 229, 247–48 (1976); Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 878–79 (1990); *see also* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889–90 (1999) (labeling this practice "remedial deterrence").

198. *See, e.g.*, Fallon, *supra* note 26, at 968.

199. In this very general sense, this Article's proposal is consistent with James Pfander's proposal that plaintiffs should be able to avoid qualified immunity (and facilitate the development of constitutional law) by challenging conduct for only nominal damages. *See* James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601–28 (2011).

200. 555 U.S. 223, 232 (2009).

201. *See, e.g.*, Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CALIF. L. REV. 1, 2 (2015) (showing that *Pearson* has resulted in some freezing of constitutional development); *see also* Jonathan M. Freiman, *The Problem of Qualified*

Qualified immunity is not, however, without its advantages. For one, qualified immunity sets forth a relatively clear standard, at least in theory.[202] As a result, state officials can reasonably predict whether they will be held liable before acting. Predicting by how much a court will reduce compensatory damages, on the other hand, is a far more challenging proposition, especially because the whims of individual judges could lead to some variability in damage award adjustments.[203] Although better-developed and defined applications of this Article's proposal will help, a system that is inherently ad hoc will be less predictable on an individual basis than a system defined by a bright-line rule, especially one like qualified immunity that is geared toward individual decision-making.[204] Collectively, though, the opposite may be true: because individual variations in proportional judgments will have less of an impact on the overall cost burden to departments than do individual variations in the strictly dichotomous liability or no liability qualified immunity decision, this Article's proposal could lead toward greater *institutional* cost predictability—even while it decreases *individual*-level cost predictability.

An additional potential advantage of qualified immunity is its early applicability, which, through its forestalling of the burdens of litigation, offers greater protection against overdeterrence than is available under this Article's proposal.[205] As a result, if there are categories of cases in which reducing compensatory awards to zero will still result in too much deterrence, qualified immunity will lead to closer-to-optimal outcomes. There are two potential responses to this.

First, the Pigouvian subsidy-like reform suggested by this Article need not stop applying when compensatory damage awards are zeroed out: in circumstances in which overdeterrence is sufficiently great, *defendants* could be compensated (again, potentially funded with redistributed exemplary damage awards) so as to obtain optimal deterrence.[206] For example, an officer forced to endure costly and embarrassing litigation for alleged wrongdoing who is ultimately vindicated at trial could be remunerated for his hassle. Somewhat disconcertingly, this approach could also lead to courts compensating even those officers held liable for constitutional wrongdoing so as to partially offset the burdens of litigation. Yet, as counterintuitive as this seems, such a result represents a substantial advantage over qualified immunity, as it provides a mechanism for negating the overdeterrence effected by the stigma and inconvenience of litigation in successful cases. For example, efficient deterrence favors an action that creates $1000 in societal harms and $1500 in societal benefits. Where, however, such an action will result in a suit that imposes $2000 in litigation-related burdens on a defendant, compensatory damages could be reduced to $0 and overdeterrence would nevertheless ensue (because the costs of wrongdoing

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*Immunity: How Conflating Microeconomics and Law Subverts the Constitution*, 34 IDAHO L. REV. 61, 80 (1997).

202. Malley v. Briggs, 475 U.S. 335, 343, 341 (1986).

203. This predictability problem could be obviated by implementing a statutory system with clear-cut triggers and automatic damage adjustments.

204. However, as Section II.A indicates, qualified immunity's emphasis on individual-level deterrence is likely misplaced.

205. Saucier v. Katz, 533 U.S. 194, 200 (2001).

206. *Cf.* Fallon, *supra* note 26, at 940 ("It would be colossally imprudent to furnish damage remedies to everyone [victimized by some act of constitutional wrongdoing].").

to the defendant, $2000, would exceed the benefits of acting, $1500). As perverse as it would appear to compensate the tortfeasor in this circumstance *for her wrongdoing*, if >$500 in compensation is not provided, the costs of acting will exceed the benefits and overdeterrence will result. Such a compensated tortfeasor would still be deterred, albeit through the partially offset burdens of litigation.[207]

If the idea of compensating constitutional wrongdoers is sufficiently unpalatable, however, another reform could be to preserve the doctrine of qualified immunity in some form or for some circumstances. For example, as Myriam Gilles has observed, qualified immunity appears directed toward protecting state actors from negligent heat-of-the-moment decisions.[208] But the doctrine currently applies—at least in theory—to constitutional wrongdoing that arises from both situationally rushed and careful decision-making. Limiting qualified immunity to only exigent circumstances would better tailor the standard's application to the subset of behaviors most likely to implicate its underlying concerns.[209]

Regardless of whether the doctrine of qualified immunity is discarded, limited, or preserved in whole, this Article's proposal would be beneficial. This is because there are circumstances in which qualified immunity does not apply and yet the nonpecuniary burdens of suits can lead to overdeterrence. And, of course, the application of qualified immunity does not mitigate (but instead aggravates) the substantial threat of *underdeterrence* discussed elsewhere in this Article. In fact, by winnowing liable parties to only the "the plainly incompetent" and "those who knowingly violate the law,"[210] qualified immunity concentrates liability on those defendants who are particularly likely to have been influenced by bias or some other factor that impacts deterrence. The need for deterrence-correcting exemplary damages is therefore widespread under the current qualified immunity regime.

### *E. Determining Damages*

This Part concludes by discussing one practical obstacle to this Article's proposal: the difficulty that courts will face in identifying factors that distort the constitutional tort system. It will be rare, for example, for an official policymaker explicitly to admit to the influence of bias in her decision-making. Yet uncovering bias, stress, stigma, or any other such influence is a necessary prerequisite for a court considering tailoring damage awards.

Fortunately, many of these effects will be revealed by circumstantial evidence. There are times at which the broader context of a particular policy will strongly

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207. Needless to say, such a policy might appear to reward wrongdoing, in which case it could lead decision makers to incorrectly appraise the disadvantages of violating the Constitution.

208. Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 857 (2001).

209. Other alternatives could be to return to the subjective standard in qualified immunity or to limit qualified immunity's application to circumstances in which it is necessary to avert grave injustice or to prevent irremediable overdeterrence. The current doctrine places the burden on the plaintiff to show that the violated right in question was clearly established. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 232 (2009).

210. Malley v. Briggs, 475 U.S. 335, 343, 341 (1986).

suggest that bias influenced the decision-making in question; it could be fair to apply a rebuttable presumption of racism throughout much of the Jim Crow South, for example.[211] A similar approach may be useful in evaluating the stress or stigma burdens of a suit: claims brought under the Takings Clause will generally impose fewer stigma-related burdens on defendants than claims brought under the Eighth Amendment; and certain types of cases—claims demanding significant discovery, for example—are far more likely to give rise to protracted litigation than others.[212] Distortions in deterrence caused by problems with uneven enforcement can likewise be revealed circumstantially: a state without a well-staffed affiliate of the ACLU and with no other comparable public-interest organization may be able to operate with more impunity vis-à-vis civil rights violations than a state with numerous NGOs and plaintiffs-side firms ready and willing to litigate over wrongdoing. Along similar lines, state-by-state and circuit-by-circuit differences in precedent will render claims that are nearly guaranteed in one jurisdiction dubious propositions if filed elsewhere.[213] And underdeterrence will result everywhere for certain types of claims that are universally disfavored—like, following *Employment Division, Department of Human Resources of Oregon v. Smith*, a large proportion of claims brought under the Free Exercise Clause.[214]

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211. For a more recent example of bias influencing decision-making, the DOJ Civil Rights Division's 2015 Report on Ferguson revealed widespread "law enforcement practices [that were] directly shaped and perpetuated by racial bias." U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE DIVISION, FERGUSON POLICE DEPARTMENT 70 REPORT (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf. More generally, bias is likely to arise in outgroup policymaking: as a large body of social science research has established, people are more likely to harbor ill will against or negative stereotypes about groups to which they do not belong. *See, e.g.*, Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) (presenting a study and describing a large body of research "highlight[ing] the robustness and frequency of [the stereotypic association of Black Americans as violent and criminal]"); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 11 (1995) (also discussing implicit biases more generally); Anthony G. Greenwald, Debbie E. McGhee & Jordan L. K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1476–77 (1998).

212. Decreasing damage awards due to the stress of the case could perversely incentivize defense lawyers to unnecessarily draw out cases: by doing so, defense lawyers (who are typically paid by the hour) will earn more *and* their clients, if found guilty, will be responsible for paying less.

213. One recent example of how important jurisdiction can be in constitutional claims is the recent ACA case, in which litigants filed in the Northern District of Texas, in part because the district only has one judge, who was thought to be favorable to their claims. Adam Liptak, *Texas' One-Stop Shopping for Judge in Health Care Case*, N.Y. TIMES (Dec. 24, 2018), https://www.nytimes.com/2018/12/24/us/politics/texas-judge-obamacare.html [https://perma.cc/2FF3-PX8R]. Political effects may also play a role in this. *See, e.g.*, Andreas Broscheid, *Comparing Circuits: Are Some U.S. Courts of Appeals More Liberal or Conservative Than Others?*, 45 LAW & SOC'Y REV. 171, 188–89 (2011).

214. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 874 (1990); *see also* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1988); Lukumi Babalu

A number of these problems with deterrence will also result from, and be revealed by, structural decision-making problems. A police department that has no procedure for tracking the liability that results from its policymaking, for example, is unlikely to base its policymaking on correct assessments of that liability.[215] Similarly, a municipality in which damage awards are paid through a general fund and therefore do not as directly translate into consequences for the liable departments will be more susceptible to information-based deterrence failures.[216] And, somewhat more subtly, decision makers will be particularly vulnerable to political distortions in the perceived costs or benefits in question when the population affected by a policy has little political capital and, therefore, limited ability to exert any direct political influence on decision makers.[217]

Basing exemplary damage awards on such circumstantial and structural evidence will not only help correct for any distorting effects but it will also encourage policy changes, incentivizing states and municipalities to introduce or improve on preventative measures to guard against the effects of bias-inducing circumstances.

Identifying the existence of a problem, however, is only half the battle: a court must also produce some estimate of its effects. To some extent, this is a problem in the context of private law torts as well, where calculations of emotional distress and other similarly difficult-to-measure damages are the norm.[218] Yet the number of overlapping effects at play in this context and the particularly high stakes of getting it right may set constitutional torts apart.

Fortunately, perfection may not be necessary. Because there is no acceptable amount of influence for biases to exert on constitutional deterrence,[219] courts may continually ratchet up bias-related exemplary damages until there is no longer any evidence of bias in the department or municipality in question. Take, for example, a police department beset with indicia of bias that has implemented a policy giving rise to constitutional wrongs. If a court awards bias-related exemplary damages, one of

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Aye, Inc. v. Hialeah, 508 U.S. 520, 521 (1993).

215. Schwartz, *supra* note 106, at 1069–70.

216. Schwartz, *supra* note 102, at 1150.

217. *See supra* Section II.D; Levinson, *supra* note 25, at 379. As such, policies that disproportionately impact politically vulnerable populations are less likely to correctly value or balance the costs and benefits at stake than policies that disproportionately affect populations with political influence. And because politically vulnerable populations will often also be disfavored out-groups, deterrence problems resulting from distortions in the translation of the costs of litigation will disproportionately coincide with instances in which bias also influences constitutional deterrence: these effects will aggregate. As described in Section II.D, however, political-to-economic cost translation issues aren't exclusive to bias. *See supra* Section II.D; *see also* Levinson, *supra* note 25, at 348 (stating deterrence problems may sometimes manifest absent any bias).

218. *See, e.g.*, Mark Geistfeld, *Placing A Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CALIF. L. REV. 773, 775 (1995) (discussing the "inherent difficulties in placing a monetary value on [certain losses]"); Samuel R. Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable'?*, 126 U. PA. L. REV. 281, 290 (1977) (describing how "[s]ome courts have based the hourly rate multiplier (which may range as high as 400% of the normal rate)" on amorphous factors like "the risk of non-recovery").

219. *See supra* Section III.B (discussing when bias's effects are unacceptable).

three things might happen: the department will make policy changes that fully mitigate the bias in question, the department will make policy changes that do not fully mitigate the bias, or the department will make no policy changes. If, in a subsequent lawsuit against that department, the reviewing court discerns that the bias in question appears to persist, it would be justified in awarding relatively more exemplary damages.[220] Exemplary damage awards would then be increased in every subsequent lawsuit until they are sufficient to prompt effective policy change.[221]

Although attempts to closely tailor damage awards to deterrence in individual cases could lead to a more rapid perfection of constitutional deterrence, ad hoc tailoring is not necessary for this approach to succeed. In fact, a fixed damage multiplier that increases with every subsequent holding that a previous award of exemplary damages prompted no meaningful change could eventually accomplish the same goals: such an approach would lead to incremental policy change that continued until the municipality or department in question implemented a set of policies that effectively immunized the decision makers in question against bias or other deterrence problems discussed throughout this article.[222]

This same approach may not be as promising when bias or some other influences on deterrence leads to *over*deterrence.[223] This is because the salve for

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220. Because courts lack institutional capacity to undertake this sort of multi-case long-term review, the onus of bringing a failure to adapt could be on the plaintiff litigating. Plaintiffs have proven adept at this sort of investigatory work—especially when appropriately financially motivated. *See, e.g.*, Noah Smith-Drelich, *Performative Causation*, 93 S. CAL. L. REV. 379, 389–90 (2020) (describing the important investigatory role of plaintiffs' lawyers).

221. This Article does not take a position as to what specific changes might suffice to inoculate official decision-making against bias and other such deterrence skews. Much, however, has been written on this subject. *See, e.g.*, Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1491, 1567 (2005); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1118 (2006); *see also* Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 202 (2006), *available at* https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1157&context=law_and_economics [https://perma.cc/M328-M69E] (focusing on innocuous biases).

222. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 896 n.69 (1998). For a discussion of how fixed punitive damages can lead to hyperenforcement, and for a proposal resolving this problem, see Bert I. Huang, *Surprisingly Punitive Damages*, 100 VA. L. REV. 1027, 1030 (2014). Given that the judges and juries examining the existence of bias in official decision-making may themselves be biased, a fixed incremental approach may also be an attractive option: such an approach requires only the identification of bias, which may be less vulnerable to the skewing effect of *adjudicator* biases than attempts to measure bias.

223. Part of the difficulty is that there may be no way to determine how much policing is optimal: decreases in policing, even when accompanied by increases in crime, may be a *feature*, and not a fault, of constitutional liability. For instance, in the wake of Black Lives Matter's emergence as a political movement, there has been some speculation about whether a "Ferguson effect"—wherein police, fearing post-Ferguson civil or criminal liability, have taken a relatively timid approach to policing—has contributed to a rise in national homicide rates. *See, e.g.*, HEATHER MACDONALD, THE WAR ON COPS: HOW THE NEW ATTACK ON LAW AND ORDER MAKES EVERYONE LESS SAFE (2016); Dara Lind, *The "Ferguson effect," a Theory That's Warping the American Crime Debate, Explained*, VOX (May 18, 2016, 9:40 AM),

overdeterrence—reducing the damages awarded—also has the effect of diminishing a department's incentive to mitigate the influence in question. This may even give rise to a negative feedback loop wherein reduced damage awards disincentivize policies that guard against bias, leading to more bias, leading to further reduced damage awards.[224] As such, there is less leeway in the context of overdeterrence to use an incremental approach rather than attempting to closely tailor damages to deterrence.

## CONCLUSION

Enforcement and recovery gaps are likely prevalent throughout the constitutional tort system, especially in the context of the policing or governing of marginalized, oppressed, or politically powerless communities. This is not, however, a *necessary* consequence of the need to ensure effective governance and policing; tailored damage awards may present a better tool for balancing the competing interests implicated by constitutional torts.

The usefulness of this Article's instrumentalist tort-like framework is not limited to the preceding (admittedly far-reaching) discussion; it also presents a promising lens for considering and remediating new problems that may arise in constitutional tort law in the future. Should the Supreme Court decide to revisit its absolute immunity doctrine for policy reasons, for example, it should do so on these terms. Protections like prosecutorial immunity are undoubtedly important, but they come at a real cost. When the Court fails to consider the inherent tradeoffs of its jurisprudence, it risks creating doctrines like qualified immunity that poorly balance the interests at stake.

The point of this examination is not, however, to resolve every problem that arises in the context of constitutional litigation. Instead, this Article seeks, through its reconstruction of constitutional torts, to lend greater coherence to this confused and confusing area of the law and to better facilitate the optimal operation of the constitutional tort system.

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https://www.vox.com/2016/5/18/11683594/ferguson-effect-crime-police [https://perma.cc/7Y8C-32DQ] (describing social science research linking Laquan McDonald's death to a decrease in arrests for homicide and non-fatal shootings and to a corresponding increase in those crimes). Although the "Ferguson effect" is generally described in negative terms, it may represent a net-beneficial change: a slight increase in crime may simply be the price that society must pay to diminish the prevalence in officer-involved killings.

224. The difficulty of using incrementalism to combat overdeterrence is one factor that weighs in favor of a categorical approach, like qualified immunity.