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Corrective Justice and Constitutional Torts

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Tort liability in the private realm may be understood both as "an instrument aimed . . . at deterrence . . . [and] a way of achieving corrective justice between the parties."[1] Following the common law model, the Supreme Court has borrowed this normative framework for constitutional torts, ruling that the aims of liability for damages are to vindicate constitutional rights and to deter constitutional violations.[2] A recent article by Daryl Levinson takes issue with this approach. Levinson argues that the superficial similarities between public torts and private torts conceal real differences, to which neither the Court nor scholars have paid adequate attention. The main point of his article, *Making Government Pay*,[3] is to attack the "instrumental" rationale for allowing the victims of constitutional wrongdoing to recover damages. According to the instrumental rationale, the point of liability for damages is to deter officials from violating constitutional rights, just as it is said to do in the context of private tort liability. Levinson argues, to the contrary, that government officials do not necessarily respond to liability rules in the same way as private actors.[4]

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[1] Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997).

[2] *See, e.g.*, Memphis Indep. Sch. Dist. v. Stachura, 477 U.S. 200, 306-07 (1986); City of Newport v. Fact Concerts, 453 U.S. 247, 267-68 (1981); Owen v. City of Independence, 445 U.S. 622, 650-54 (1980); Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978); Carey v. Piphus, 435 U.S. 247, 254-57 (1978).

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

[4] *Id.* at 348-87. Much of the article is devoted to the pros and cons of liability for "takings" of private property by government. We are concerned only with Levinson's discussion of liability for other kinds of constitutional violations.

Our focus here is on a secondary theme in Levinson's article. Having cast doubt on the instrumental rationale for constitutional tort law, Levinson turns to "non-instrumental" justifications. He maintains that there is no "persuasive non-deterrence rationale for forcing government to pay compensation to the victims of constitutional torts."[5] While "[t]he strongest non-instrumental case for compensating constitutional torts is based... on corrective justice,"[6] he questions the force of corrective justice arguments and concludes that "we are entitled to some degree of skepticism about the moral necessity of paying money to constitutional tort victims."[7] Levinson puts forward a variety of reasons for his skepticism. They include: (a) doubt whether a collective entity like the government qualifies as a moral agent for purposes of corrective justice;[8] (b) difficulty in identifying a narrow class of victims entitled to rectification for certain types of constitutional violations;[9] (c) uncertainty as to whether money and constitutional harms are in any way commensurable such that monetary damages could possibly be a morally appropriate form of rectification;[10] (d) "the mismatch between compensatory damages and constitutional wrongdoing;"[11] (e) the sacrifice of "distributive justice" entailed by any scheme for achieving corrective justice;[12] and (f) the lack of a "morally compelling reason" for giving corrective justice priority over distributive justice.[13]

In our view, Levinson's case against corrective justice is unpersuasive. In Part I we respond to "e," arguing that he exaggerates the tension between corrective justice and distributive justice in the constitutional tort context. As for objection "f," our aim in Part II is to put forward a "morally compelling" rationale for corrective justice for constitutional torts. Some of the concerns Levinson identifies ("a," "b," "c," and "d") may have force in narrow classes of cases, but

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[5] *Id.* at 402.
[6] *Id.* at 407.
[7] *Id.* at 414.
[8] *Id.* at 408.
[9] *Id.* at 409.
[10] *Id.* at 410.
[11] *Id.*
[12] *Id.* at 411-12.
[13] *Id.* at 412-13.

cannot justify a broad indictment of the corrective justice rationale for constitutional tort liability. They are best addressed in the course of working out the details of constitutional tort doctrine. In Parts II and III we argue that our theory of corrective justice for constitutional torts can cope with such problems as identifying victims entitled to compensation for constitutional violations, the supposed incommensurability between constitutional violations and monetary damages, the possible mismatch between compensatory damages and constitutional wrongdoing, and the government's responsibility for torts committed by its officers.

I. CORRECTIVE JUSTICE AND DISTRIBUTIVE JUSTICE

Levinson's central claim is that there is a conflict between "corrective justice" and "distributive justice," and that the latter "may be of greater relevance and importance."[14] That is, we would do better to remedy the generally unjust distribution of wealth in society than to provide monetary awards for constitutional violations. If Levinson is right about this, then corrective justice fails to justify constitutional tort liability, whether or not any of his other objections to corrective justice have merit. For a variety of reasons, Levinson fails to make his case.

We begin with Aristotle, who makes the classical basic distinction between complete and partial justice.[15] Complete justice is the same as complete virtue. It encompasses and harmonizes all the partial virtues such as courage, temperance, prudence, generosity, and, of course, partial justice. Partial justice is that particular virtue which consists in seeing to it that each person gets or has what rightly belongs to him or her.[16]

Partial justice, in turn, is itself of two sorts, namely distributive justice and corrective justice. Distributive justice is the kind of

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[14] *Id.* at 411.

[15] Though some writers use the term "corrective justice" in other ways, "the subsequent philosophical tradition accepted, and accepts to this day, [Aristotle's] usage." Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 194 (1981).

[16] ARISTOTLE, *Nicomachean Ethics* v. 1. 1129b-1130a, 1003-4 (W.D. Ross trans.), *in* THE BASIC WORKS OF ARISTOTLE 935 (Richard McKeon ed., 1941).

justice "manifested in distributions of honor or money or the other things that fall to be divided among those who have a share in the constitution (for in these it is possible for one man to have a share either unequal or equal to that of another)."[17] It observes a "geometric proportion," according to which each citizen receives benefits, or burdens, according to some set of criteria for determining merit. Corrective or rectifying justice is concerned with transactions between two or more parties. If the transaction is voluntary on the part of all the parties, then corrective justice calls for there to be an equal value of the things exchanged. If the transaction is involuntary—that is, if a person is deprived of something belonging to him without his consent—then corrective justice demands that he receive back what he has been deprived of. Accordingly, corrective justice, whether it is concerned with voluntary or involuntary transactions, calls for the observance of "arithmetic proportion."

For the purpose of considering remedies for constitutional torts, let us make two comments about Aristotle's discussion of distributive and corrective justice. First, on his view, all torts are involuntary transactions. But constitutional torts are special, inasmuch as the tortfeasors are agents of the state, acting in that capacity. Also, these torts consist of violations of constitutional rights. As Levinson points out, these constitutive features of constitutional torts give rise to sticky issues about how to determine just what corrective justice would require as redress. We will return to this matter below and argue that strict "arithmetic proportional" redress is often either not feasible or wrongheaded. Nevertheless, or so we will contend, constitutional torts trigger obligations of corrective justice.

The second comment to be made about the classical distinction between distributive and corrective justice is that corrective justice presupposes both (a) the existence of some logically prior distribution of benefits and burdens, and (b) the fairness or "justice" of the distribution. Without the prior distribution, there is no "ownership" of any good or burden. Hence, properly speaking, no one can deprive another person of anything that he or she does not possess clear title to. This is clearest in the matter of constitutional torts. Prior to the

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[17] *Id.* at v. 2. 1130b; *see also id.* at v. 4. 1131b.

establishment of constitutional rights, there could be no constitutional torts. Levinson's assertion that there is a conflict between distributive justice and corrective justice may rest on a misunderstanding of the relationship between the two. That claim makes sense only if we refuse to distinguish between the constitutional regime and more general aspects of social policy. He pits corrective justice against distributive justice by suggesting that what is at stake is the choice between remedying constitutional violations and correcting an unjust distribution of wealth in society. But the case for remedying constitutional violations is internal to the constitutional regime. Within the realm of constitutional rights and duties, there is no conflict between corrective justice and distributive justice. On the contrary, corrective justice and distributive justice complement one another. A violation of distributive justice has already occurred and corrective justice now requires a remedy.

One can, of course, have reason to challenge the "justice" or fairness of some particular regime of constitutional rights in the name of some ideal of justice, perhaps in the name of Aristotelian complete justice.[18] This challenge is tantamount to a call for a different pattern of distribution. In ordinary discourse, one might say that the proposed redistribution would "correct" the prevailing pattern. But there is a crucial distinction between a "correct," i.e., fair, distribution and a correction of a violated distribution. For present purposes, corrective justice properly refers only to the correction of a violated distribution.

If one focuses on constitutional rights, one regularly finds that what counts as a constitutional right can vary from time to time within the same basic constitutional regime. Thus, we can sensibly speak of the process of distributing rights as a temporally extended, perhaps interminable, process. For example, the French Constitution of October 4, 1958, incorporates the Declaration of the Rights of Man and of the Citizen of August 26, 1789 and the Preamble of the Constitution of October 27, 1946.[19] It also contains provisions

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[18] *See* Levinson, *supra* note 3, at 412 n.223 (complaining that when corrective justice is conceived of as "an instrumental mechanism for protecting distributive justice," it becomes "a quite irrelevant mechanism in the real world, where the existing distribution is far from just").

[19] PETER CAMPBELL & BRIAN CHAPMAN, THE CONSTITUTION OF THE FIFTH REPUBLIC:

for implementing some of its articles by way of an "organic law" (*la loi organique*), a law enacted by Parliament to qualify or supplement the provisions for implementing the Constitution.[20] And a crucial part of the work of the United States Supreme Court is to determine whether previously unacknowledged constitutional rights ought now to be acknowledged.

One can admit that the distribution of rights is ongoing and still insist that distributive justice is logically prior to corrective justice. But on the principle that no law is binding until it has been promulgated, no constitutional tort can be committed against a right until it has been authoritatively determined in a sufficiently clear way. In sum, the corrective justice that we contend is applicable to cases of constitutional torts presupposes some established, known distribution of constitutional rights and is distinct from challenges to the fairness or propriety of this distribution.

Doing corrective justice for constitutional violations does come at a price, in that government will be unable to pursue other worthy aims. But it is not clear that distributive justice will need to be "sacrifice[d]."[21] The reason Levinson thinks it will is that he has in mind a particular conception of distributive justice. He associates distributive justice with greater equality of wealth and income.[22] Corrective justice for constitutional violations may siphon off government funds that could go to that end. But the force of this argument depends on accepting Levinson's account of distributive justice. A libertarian would argue that distributive justice is achieved when free markets are allowed to set wealth and income with little or no government intervention.[23] Since distributive

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TRANSLATION AND COMMENTARY 2 (Basil Blackwell 2d ed. 1959) (1958).

[20] *Id.* at 9-10.

[21] Levinson, *supra* note 3, at 412.

[22] *Id.* at 406 ("[T]he *total* welfare of the victim class [is] the more relevant concern from the perspective of distributive justice."); *id.* at 407 ("[I]t is of no consequence to justice in rectification that the victim happens to be possessed of vast, distributively unjust wealth."); *id.* at 412 ("[C]ompensating constitutional torts cannot be expected to bring society closer to any just distributive pattern and will, in many cases, exacerbate the injustice of the existing distribution by channeling wealth collected from taxpayers to plaintiffs who are less deserving beneficiaries of wealth transfers.").

[23] *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 150-53 (1974) (arguing for minimal state); *see also* Robert Nozick, *Distributive Justice*, 3 PHIL. & PUBLIC AFF. 45 (1973) (discussing Nozick's view and comparing it with other accounts of distributive justice).

justice requires no expenditure of government funds in such a regime, doing corrective justice for constitutional violations does not interfere with distributive justice.

Even accepting Levinson's notion that distributive justice requires redistribution of wealth from the rich to the poor, the fact is that *any* other government expenditure interferes with achieving distributive justice. There is nothing special about the money that may go to constitutional tort victims, such that these funds are the only ones that could have been spent remedying a bad distribution of wealth. Assume, for the sake of argument, that distributive justice (in Levinson's sense) is a more important goal than corrective justice for constitutional violations. It does not follow that sacrificing corrective justice is the best way to pursue Levinson's goal. There may be some other part of the government's budget that stands on even weaker footing. For example, one could plausibly argue that, as between funds for corrective justice for constitutional tort victims and funds for social security payments to wealthy seniors, the latter should be cut before the former. For that matter, the logic of Levinson's argument seems to extend beyond government expenditures. It suggests that government should tax more heavily so that it may spend more on redistribution. Perhaps the payments received as damages by the victims of ordinary torts should be taxed so that more resources could be distributed to the poor. If Levinson is right about the respective merits of distributive justice and corrective justice, then surely private tort law is at least as vulnerable to his criticism as constitutional tort law may be.

The point is that, granting Levinson's position on the importance of distributive justice, he has not shown that there is any real-world conflict between distributive justice and corrective justice. The sensible step to take, upon identifying a need for redistribution, would be to survey the whole range of government taxes and expenditures, identify the least worthy (according to the criteria Levinson finds appropriate), and curtail the least deserving expenditures or increase taxes on the activities that warrant higher levies. It is unlikely that the comparatively small sums currently spent on corrective justice for constitutional torts would rank high on the list of expenditures that should be cut.

In this regard, another of Levinson's arguments needs to be laid to rest. Levinson worries that constitutional tort liability can "protect and entrench a deeply unjust status quo distribution of holdings."[24] No one familiar with the case law could take this concern seriously. The reality is that most constitutional tort plaintiffs are the kinds of people who get beaten up by the police, prosecuted on dubious grounds, subjected to harsh prison conditions, or fired for what their bosses consider insubordinate speech.[25] Though surely there are exceptional cases in which a rich plaintiff forces taxpayers to compensate him for constitutional violations, these are few and far between. Constitutional tort liability simply does not contribute to the gap between rich and poor. If anything, its overall effect is to narrow that gap.

Finally, recall that Levinson's asserted aim in discussing corrective justice is to ask whether it provides a "noninstrumental defense[ ] of a compensation requirement"[26] for constitutional violations. All that he is able to show, by his own admission, is that "we are entitled to some degree of skepticism about the moral necessity of paying money to constitutional tort victims."[27] Even if the latter judgment is right, Levinson has not shown that corrective justice is an unsound rationale for constitutional tort liability. It is not necessary to establish that compensation is a moral necessity in order to hold that corrective justice provides a good justification for constitutional tort liability. One can grant all of Levinson's objections to the "moral necessity" of corrective justice for constitutional violations, and still maintain that the appropriate institutions of government may legitimately conclude that corrective justice is a sufficiently worthy goal to justify a tort remedy. And, of course, those institutions have done precisely that. In 1871 Congress enacted 42 U.S.C. § 1983, which authorizes a sweeping tort remedy against state officers.[28] In *Bivens v. Six Unknown Named Federal*

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[24] Levinson, *supra* note 3, at 411.

[25] See the compilations reported in Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 690-92 (1987). Though the study is now somewhat dated, examination of the current federal reporters would confirm its continuing validity on this point.

[26] Levinson, *supra* note 3, at 406.

[27] *Id.* at 414.

[28] The statute is the Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983 (1994).

Agents,[29] the Supreme Court created a similar cause of action against federal officers.

II. A "MORALLY COMPELLING REASON" FOR RECTIFYING CONSTITUTIONAL VIOLATIONS

Levinson notes that the literature on corrective justice contains "conflicting and abstruse" reasons for rectifying wrongs.[30] One problem with that body of literature is that, in the private law context, the real dispute is likely to concern the determination of substantive rights and obligations, which is a matter of distributive justice. The diversity of rationales offered for corrective justice reflects the variety of arguments over whether the substantive liability rules should be based on negligence or strict liability, and over how those terms should be defined.[31] In constitutional torts, that debate can be ignored, for the issues of distributive justice are settled by reference to the whole body of constitutional text and principle. Accordingly, the basic rationale for corrective justice is

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Whether Congress actually intended that the statute serve as a broad vehicle for vindicating constitutional rights is not at all clear. *See, e.g.*, Michael Wells, *The Past and the Future of Constitutional Torts*, 19 CONN. L. REV. 53, 65-68 (1986) (showing that legislative history addresses other matters). The Supreme Court has read it broadly for forty years, *see Monroe v. Pape*, 365 U.S. 167 (1961), and has steadfastly maintained that the aims of the remedy include the vindication of constitutional rights as well as deterrence of constitutional violations. *See, e.g.*, Felder v. Casey, 487 U.S. 131, 139-42 (1988); Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 305-10 (1986); Carey v. Piphus, 435 U.S. 247, 254 (1978); *see also* John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 84-96 (1989); Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157, 190-91 (1998) [hereinafter Wells, *Constitutional Remedies*].

[29] 403 U.S. 388 (1971). Both the Court, *see id.* at 395-97, and Justice Harlan, in his opinion concurring in the judgment, *see id.* at 407-08, relied on corrective justice as well as deterrence in justifying the cause of action. *See also* Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1121 (1989) (arguing that "enforcement of the Constitution through the recognition of remedial damages awards is not only an appropriate exercise of judicial power, it is also an indispensable component of constitutional oversight").

[30] Levinson, *supra* note 3, at 413.

[31] *See* Posner, *supra* note 15, at 191-201 (discussing various theories of tort liability). Judge (then Professor) Posner goes on to argue that "corrective justice . . . is not only compatible with, but required by, the economic theory of law." *Id.* at 201. But basing liability rules on economic efficiency (whatever its merit) seems as much a matter of distributive justice as any other substantive theory of tort liability.

more straightforward: A government or official has violated someone's constitutional right, thereby violating the regime of distributive justice. A remedy of some kind is required in order to rectify the wrong.[32]

Perhaps this is not the "morally compelling" ground for corrective justice that Levinson demands. There are, as he tirelessly reminds us, other constructive ways in which the government could dispense its resources. In this Part, we suggest a more elaborate defense of corrective justice for constitutional torts, one that does not depend either on the role of corrective justice solely as a correlative of distributive justice, nor on the accounts of corrective justice in general tort theory. It is, instead, distinctive to the constitutional context, though its reach is not necessarily limited to remedies for violations of the United States Constitution, or any particular constitution for that matter. The case that we will make will not amount to the "grand unified theory" that Levinson would require.[33] Levinson's demands are excessive. In the domain of practice, legal or otherwise, one cannot rightly insist upon Cartesianesque certitude. Good reasons are all that are ever available. And every good reason is in principle subject to replacement. Our claim for our case is simply that it is a good one, one that deserves to stand until a better alternative comes along.

A. PAUL RICOEUR'S "CAPABLE MAN"

We claim that the basic justification for the constitutional distribution of rights and the correction of violations of them is best understood in terms of their contributions "to persons living a distinctively human life."[34] These rights and their enforcement ought to have as their basic objective the protection and promotion of the distinctive capabilities of persons. Persons, as Paul Ricoeur has seen, are fundamentally defined "by *powers* that achieve their full efficacy only within a system of political existence or, in other

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[32] Whether that remedy includes the payment of money is a separate question. *See infra* text accompanying notes 53-54, 75-82.

[33] Levinson, *supra* note 3, at 414.

[34] James Gordley, *Tort Law in the Aristotelian Tradition*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 132 (David Owen ed., 1995) [hereinafter PHILOSOPHICAL FOUNDATIONS].

words, in the setting of a city. In this respect, a reflection on capable man constitutes the [philosophical] anthropological preface that political philosophy needs."[35] It is because of their distinctive powers that people can and ought to have rights.

For present purposes, the most relevant constitutive characteristics of persons are (a) their capacity to act, and (b) their capacity to make ethical or moral imputations.[36] First, to act is to intervene in the natural causal processes of the world and thereby to inaugurate a new causal sequence that would not otherwise have come into being when and where it did. This "interventive" or "inaugurative" causality never operates independently of natural causal processes. But neither is it wholly reducible to them. Exercising the capacity to act, then, involves two inextricably linked sorts of causality.[37]

A second basic constituent of the "capable man" is the capacity to make ethical or moral judgments. In the first instance, these judgments apply to actions. The capable man judges actions, his own or others', to be good or bad, permitted or forbidden. On the basis of these assessments of actions, the capable man can then make judgments about the person or persons to whom the actions are imputed.[38]

One should notice that the ethical or moral judgment does not add something external to an action. Every human action, by its very nature, calls for ethical and moral assessment. Does it aim at some genuine good? And is it right for this agent to aim for this good on this occasion? Furthermore, one should notice that ethical and moral judgments are not expressions of mere preferences or interests. Rather, they claim to be rationally defensible assess-

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[35] PAUL RICOEUR, *Morale, éthique et politique*, *in* POUVOIRS, RÉVUE FRANÇAISE D'ÉTUDES CONSTITUTIONELLES ET POLITIQUES 5 (1993). Ricoeur, a distinguished contemporary French philosopher, makes it plain that human powers are inherently fragile and vulnerable to both natural and human dangers. In his writings on politics and ethics he has explicitly acknowledged his debt to the work of John Rawls. In the end, though, he presents an alternative to Rawls's position rather than an endorsement.

[36] PAUL RICOEUR, *Who Is the Subject of Rights?*, *in* THE JUST 3-4 (David Pellauer trans., University of Chicago Press 2000).

[37] PAUL RICOEUR, *The Concept of Responsibility*, *in* THE JUST, *supra* note 36, at 23-24. Ricoeur's account is similar to but not the same as the Aristotelian-Thomistic account of what differentiates human action properly so called from mere motions made by humans. For this latter account, see Gordley, *supra* note 34, at 140-41.

[38] RICOEUR, *supra* note 36, at 4.

ments of preferences and interests. They are what Charles Taylor calls "strong evaluations."[39]

B. THE TWO FACES OF GOVERNMENT: WHY WE HAVE CONSTITUTIONAL RIGHTS

The possession of these two basic capacities is a necessary but not a sufficient condition for one to be an efficacious agent. For the actualization of these powers, a person must also both interact with other capable persons and be the beneficiary of the continual mediation of institutionalized forms of association. Only in this way can a person's capabilities become real powers to which real rights can correspond.[40] Some of these other persons stand in face-to-face relationship with the agent. But many others are also implicated in actions of any moment. The agent is bound to these others through the mediation of different orders of large scale social systems or "orders of recognition" that structure the interaction.[41] Among these orders are pedagogical systems, scientific systems, monetary systems, health systems, and, of central interest in the present context, legal systems. It is within these systems that persons receive recognition as holders of specific positions or roles, *e.g.*, teacher or physician. In legal systems in democratic societies, there are multiple positions of office and there is the position of citizen. In these societies every office holder is also a citizen, and the position of citizen is in principle always prior to and more permanent than any holding of office. Only through the set of institutionally recognized roles that are legally ascribed to him or her does the "capable man" take his place as a full-fledged participant in his or her political society. And all of the constitutional rights accorded to him or her are accorded in recognition of his or her membership in the body politic.[42]

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[39] CHARLES TAYLOR, SOURCES OF THE SELF 4, 14, and *passim* (1989).

[40] For present purposes we need not ask whether there are any other capacities that are necessary for a person to be a genuine rights bearer.

[41] RICOEUR, *supra* note 36, at 6. Ricoeur adopts the phrase "orders of recognition" from Jean-Marc Ferry. Face-to-face relationships are, of course, also institutionally structured. *Id.*

[42] The according of constitutional rights to children and resident noncitizens can readily be understood in a Lockean fashion. These persons are or can be en route to full citizenship

A closer look at this picture of "capable man" also reveals his irremediable vulnerability. For one thing, his capacities are subject to being sapped by disease and other natural ills. But more to the present point is the vulnerability that comes from his unavoidable dependencies on other persons and on institutions, particularly the political and legal institutions. His capabilities are subject to attack from both crimes and torts of various sorts, including constitutional torts.

The possibility of constitutional violations is irremovable from political life. Not only does the state empower its citizens by organizing them to make decisions and to accomplish together things that they could not accomplish without this organization,[43] but every state that we know of has as one of its defining properties the possession and exercise of a monopoly of legitimate violence. There is always a relation of domination between the rulers and the ruled. Furthermore, there is always a struggle to gain or hold rulership. Hence there is the irremediable danger that the use the ruler makes of state violence will cross the boundary into illegitimacy.[44] In short, the ultimate objective of all rationally defensible politics is to make the empowering function of the state prevail as far as possible over its dominating, disempowering function. But the former, history shows, can never wholly eliminate the latter. This is the fundamental paradox of political life.[45]

Taken together, the vulnerability of the capable man, the citizen, and the paradoxical character of the state itself provide the basic rationale for constitutional rights. These rights are designed to protect the vulnerable capabilities from the unjustified exercises of

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even though they are not yet in possession of it. *See generally* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

[43] Eric Weil defines the state as "the organization of a historical community; organized into a state, the community is capable of making decisions." This definition, found in his LA PHILOSOPHIE POLITIQUE 131 (1984), is cited with approval by Paul Ricoeur in his FROM TEXT TO ACTION 330 (Kathleen Blamey & John B. Thompson trans., Northwestern University Press 1991) (1986).

[44] Paul Ricoeur, *Ethics and Politics*, *in* FROM TEXT TO ACTION, *supra* note 43, at 331; Paul Ricoeur, *Fragility and Responsibility*, 21 PHIL. & SOC. CRITICISM, Sept.-Nov. 1995, at 20-21. For comparison, see RAYMOND ARON, POLITICS AND HISTORY 23-24 & 43-46 (Miriam B. Conant ed. & trans., The Free Press 1978).

[45] PAUL RICOEUR, *The Political Paradox*, *in* HISTORY AND TRUTH 247 (Charles A. Kelbley trans., Northwestern University Press 1965) (1964).

the dominating power inherent in politics. But the threat of unjustified exercises can never be fully extirpated. Hence the possibility—indeed, given the historical record—the likelihood of constitutional torts is ever present.

Some constitutional rights primarily protect the citizen from governmental interference in his or her conduct, *e.g.*, holding private property. Others provide the citizen with a share in governing, *e.g.*, the right to vote and to run for elective office.[46] These two sorts of rights reflect the two-sided relationship between the citizen and the state. On the one hand, the citizen is not exclusively a creature of the state. On the other hand, the citizen is a participant in the works of the state, including those of incorporating others into citizenship and determining state policies. Thus, the recognition that constitutional rights accord the citizen is also twofold. They recognize both the individual and the communal dimensions of the person's citizenship.[47] When government officers commit constitutional torts, the basic loss that the victims suffer is the deprivation of the recognition due them as citizens. Obviously, the direct victim of a particular tort suffers the corresponding sort of wrongful loss. Wrongful imprisonment deprives the victim of his physical liberty. A violation of free speech rights deprives the victim of some opportunity to express his views, and so on. But the common kernel of all constitutional wrongs is the deprivation of due recognition of citizenship.

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[46] Levinson argues that some constitutional prohibitions, such as "prohibiting the racial gerrymandering of electoral districts, prayer in school, warrantless searches, or race-based affirmative action" are really "systemic" rather than personal. Levinson, *supra* note 3, at 409 (footnotes omitted). In such cases, "it would be entirely artificial to pretend that these individuals were the only victims or that their harms . . . were especially important or unjust from a moral point of view." *Id.* No doubt some constitutional rights are primarily aimed at achieving systemic values. To the extent this is true of a particular right, the argument for corrective justice is perhaps weaker but not reduced to nought. Unless *all* constitutional rights fall into this category (a claim Levinson does not make), the case for corrective justice remains strong with regard to those rights aimed primarily at guaranteeing personal liberty rather than making the system work better. And even violations of "systemic" values ought to be rectified.

[47] PAUL RICOEUR, *The Act of Judging*, *in* THE JUST, *supra* note 36, at 132.

C. THE CASE FOR "OFFENSIVE" CONSTITUTIONAL REMEDIES

We have argued that the constitutionally protected freedom of citizens is an intrinsic constituent of democratic political life. If this is so, then whatever else a person loses by being the victim of a constitutional tort, he or she is thereby deprived of the recognition due him or her as a citizen.[48] The government or official responsible for the wrong has betrayed the power entrusted to him or her, and the resulting deprivation always deserves rectification of some kind. In certain circumstances, this can be done defensively, as by invoking the Constitution as a "shield" against criminal or civil liability. But often the citizen's rights are violated in ways that cannot be rectified by raising the Constitution as a shield. Consider, for example, the person who is beaten by the police or the teacher who is fired on account of protected speech. In such a case, the victim must himself have access to the courts to seek an offensive, "sword-like" remedy. Constitutional tort provides such a remedy.

The rationale that Tony Honoré gives for tort law in general provides the starting point for our claim that all constitutional torts deprive their victims of due recognition of their constitutional standing. He says that the objective of both tort law and criminal law is to proclaim to society that there are some actions that are not to be done.[49] The point of "creating a tort, as opposed to a crime, is to define and give content to people's rights by providing them with a mechanism for protecting them and securing compensation if their rights are infringed."[50] Furthermore, if a state is to observe the rule of law, then it must "set out and enforce certain rights of the citizen, even against itself."[51]

One can distinguish within the general rationale for tort and criminal law between the educative function and the deterrent function. Tort law educates those who want to do justice to others by telling them what sort of conduct is just. The deterrent function

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[48] For purposes of this piece, we will use the term "citizen" for anyone who has constitutional rights.

[49] Tony Honoré, *The Morality of Tort Law—Questions and Answers*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 34, at 75.

[50] *Id.*

[51] *Id.* at 77 n.8.

warns those who are not concerned to do justice that their failure to do so will not go unredressed. In the assessment of any particular tort or criminal law, one ought to evaluate both the soundness of what it says justice calls for and how well it deters violations of that law. We assume here that the educative function is primary. These laws, we take it, are made for citizens who are recognized as free and equal, having, as Rawls says, two basic moral powers, namely "a capacity for a sense of justice and for a conception of the good.... Their having these powers to the requisite minimum degree to be fully cooperating members of society makes persons equal."[52] A law that deters well but misstates what justice calls for is worse than a law that states well what justice calls for but does not deter well.

D. INDIRECT VICTIMS

Furthermore, by emphasizing the centrality of recognition, one can readily see that the damage done by a constitutional tort can, and not infrequently does, extend to other persons in addition to the direct victim or victims. This is so for two related reasons. First, unlike in cases of common law torts, the tortfeasor is an agent of the state acting in his official capacity. Second, the state is the institution that distributes recognition to its several citizens according to the positions and roles that they hold. The very *raison d'etre* for constitutional rights is to protect the citizen's capacity to function as a full member of the body politic. A constitutional tort committed against one citizen can, and not infrequently does, give other citizens reason to fear that they too may become the direct victims of some deprivation of due recognition. Obvious examples of damage wrought by constitutional violations that extend well beyond the direct victim are the cases in which the members of an ethnic or racial minority regard the state agent's tortious action against one of their fellows as a manifestation of a lack of due recognition of the full citizenship of the entire minority. At least some constitutional torts, then, not only inflict a wrongful loss on their direct victims, but also have indirect victims and thereby

[52] JOHN RAWLS, POLITICAL LIBERALISM 19 (1993).

disturb social peace. Corrective justice ought to acknowledge these indirect victims as well as the direct ones.

The wrongful loss that indirect victims suffer does not, of course, include any directly associated monetary loss. It is limited to the threat of lack of due recognition from the state of the rights they need to exercise their citizenly capacities. There is no obvious way to quantify this loss or to translate it into monetary terms to determine what corrective justice should require for reparation. This fact may seem to render the notion of indirect victims otiose for purposes of corrective justice. Not so. But the correction primarily comes to indirect victims through the reparation made to the direct victims.[53] We say "primarily" because injunctions against tortious actions by governmental agents can plausibly be interpreted as a way to remove the threat of lack of due recognition the indirect victims fear. In this respect, the deterrent force of injunctions can rightly be interpreted as belonging to the corrective justice that the tort in question demands rather than a mere instrument designed to reduce the incidence of future tortious conduct.[54]

III. REMEDIAL ISSUES

The case for corrective justice requires not only "a morally compelling reason" why a constitutional violation calls for a remedy,

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[53] Many indirect victims are refused access to the federal courts, largely for reasons having to do with the Supreme Court's conception of the appropriate role of constitutional adjudication. In *Allen v. Wright*, 468 U.S. 737 (1984), for example, parents of black public school children sought to bring a nation-wide class action to challenge the Internal Revenue Service's policies on granting tax exempt status to private schools, on the ground that the IRS standards encouraged racial segregation. They claimed that they suffered "the stigmatizing injury often caused by racial discrimination." *Id.* at 755. The Court held, among other things, that they did not have standing to sue because they had not alleged that they or their children were the direct victims of racial discrimination. The Court took the view that allowing access to the federal courts for such an "abstract stigmatic injury . . . would transform the federal courts into no more than a vehicle for the vindication of the value interests of concerned bystanders." *Id.* at 756 (citation and internal quotation marks omitted).

[54] One should avoid trivializing the notion of indirect victim by "globalizing" it, by saying that if one citizen is wrongfully harmed, then all are. Who would be left with any obligation to take remedial measures? Globalizing victimhood, like globalizing responsibility for the commission of the tort in question, betrays ignorance of justice rather than a refined sense of it, for justice of all sorts has to do with the discriminating and allotting of separable positions and portions.

but also an explanation of who can reasonably be held accountable for committing the tort, whether any defenses are available, and the remedy that may be obtained upon establishing a violation. In this Part, we deal with these remedial matters.

If our analysis thus far stands up, then adjudication of constitutional tort cases ought to have a two-fold objective. The first, short-term objective is to bring the issue to a close by determining whether the plaintiff suffered a wrongful loss at the hands of a governmental agent, and just what the plaintiff lost therefrom. If there has been a wrongful loss, then this determination ought also to specify the appropriate reparation and who is to make it. This first objective of judicial action is to settle the issue between the plaintiff and the state. It is pursued through § 1983 suits and *Bivens* actions, and through the rationale that the judge in any particular case gives for his or her decision. This rationale should make it clear: (a) that the arguments of both parties have received due consideration; (b) that the scope of the wrongful loss has been acknowledged; and (c) that the kind and degree of responsibility for the occurrence has been reasonably imputed. Fulfilling this objective is tantamount to determining what corrective justice requires by way of reparation to the direct victim.

The second, longer-range objective of constitutional tort law is to promote social peace. The resolution of these claims ought to contribute to a continuing effort to recognize and vindicate the constitutional rights of all citizens. That is, decisions in constitutional tort cases ought to foster, or at least to avoid undercutting, in all persons involved therein a willingness to embrace their citizenship and the responsibility attached to it. At bottom, this is a responsibility to participate in the constitutionally structured enterprise of sharing social benefits and burdens in such a way that the ongoing sharing is as conducive as possible to the preservation and flourishing both of the individual members of the society and of the political and legal institutions constitutive of it.[55]

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[55] Our account of the twofold objective of judicial action is derived from PAUL RICOEUR, *The Act of Judging*, *in* THE JUST, *supra* note 36, at 130-32. Though our account does not demand exactly what Rawls's second principle of justice does, especially in its second condition, it better reflects the historical, always reasonably contestable character of our particular constitutional arrangements. Rawls's second principle reads: "Social and economic

With these goals in mind, we argue that corrective justice for violations of constitutional rights demands at least a formal recognition by the relevant government authorities that the victims' rights have been violated and that they have suffered harm from the violations. Furthermore, in at least some cases, corrective justice also demands that the victims receive some monetary compensation, whether or not this compensation is demonstrably an economic or politically efficient way to reduce the incidence of subsequent constitutional torts. Thus, satisfying the requirements of corrective justice is not merely one possible means to achieve a desired end. It is itself part and parcel of the overall doing of justice in political life.

A. APPROPRIATE DEFENDANTS

Jules Coleman has argued that any viable account of corrective justice must recognize the centrality of human agency and correlativity. Thus, the demands of corrective justice spring only from wrongful losses occasioned by human agency. Correlativity means that, in every plausible account of corrective justice, "there is presumed to be a relationship between the parties that makes the claim of corrective justice appropriate to them—and not to others."[55] These features of corrective justice relate to two issues in the constitutional tort context. The "human agency" requirement bears on the much-debated and often-litigated question of whether a government may be held liable for the actions of its employees. Correlativity has received little attention in the cases, but it is the linchpin of one of Levinson's arguments against efforts to achieve corrective justice for constitutional torts.

1. Governmental Liability. When an official commits a constitutional tort, there are two obvious candidates for the role of compensator, namely the official who commits the constitutional violation

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inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society." RAWLS, *supra* note 52, at 291; *see also* Gordley, *supra* note 34, at 133-34.

[55] Jules Coleman, *The Practice of Corrective Justice*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 34, at 67.

and the governmental agency whose agent he or she is.[57] From a corrective justice perspective, the official who does the wrong ought to be presumptively liable, for corrective justice "requires those who have without justification harmed others by their conduct to put the matter right."[58]

Whether the government that employs the tortfeasor ought to be liable is a thornier question. Suppose a city police officer, while on the job, violates the department's own (strictly enforced) rules by beating suspects. In such a case, the city hardly seems to be responsible for the plaintiff's injuries. Though there may be good grounds for holding the city liable, corrective justice is not one of them. On the other hand, suppose the city council enacts an ordinance that, in violation of the Equal Protection Clause of the Fourteenth Amendment, requires pregnant women to quit work. In these circumstances, it seems fair to ascribe the violation to the government itself. Corrective justice requires that a line be drawn somewhere in between these extremes, at a point where the government's responsibility for the tort is too attenuated to justify ascribing the officer's action to the government.

In constitutional tort doctrine, this issue arises in a variety of contexts, including: (a) situations in which high-level officers act unconstitutionally, (b) cases in which high-level officers ignore widespread unconstitutional customs by lower-level employees; and (c) cases in which the government fails adequately to train lower-level employees. Under current law, the plaintiff must show that the constitutional violation was caused by the "government's policy or custom."[59] While the case law in the area is confusing and

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[57] Our analysis here assumes that a tortfeasor can be identified. Sometimes constitutional violations result from systemic failings, for which no one in particular can be blamed. *See* Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 225-26 (1986); *see also* Levinson, *supra* note 3, at 408. In such cases, an award of damages may not be justified on corrective justice grounds. All the same, vindication of the victims' rights calls for recognition that a wrong has been done and, if the wrong has not already ceased, for injunctive relief aimed at reforming governmental institutions. *See* Levinson, *supra* note 3, at 416-17; Whitman, *supra*, at 260; Christina B. Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 41-67 (1981). Of course, this kind of judicial intervention raises problems of its own.

[58] Tony Honoré, *The Morality of Tort Law—Questions and Answers*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 34, at 78-79.

[59] Monell v. N.Y. City Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).

contradictory, a recent formulation of the Supreme Court's standard for resolving this question is whether the municipal government is the "moving force" behind the constitutional violation.[60] Critics have called for a variety of broader liability rules,[61] and there may be good deterrence arguments in favor of their view. This may be an issue on which deterrence and corrective justice point in different directions. Since corrective justice stresses the importance of holding liable the person who truly is responsible for the wrong, it could support. a comparatively narrow role for governmental liability, and one that is closer to that of the current Supreme Court. But this essay is not the place to address that difficult question.

2. Correlativity and Taxpayers. In ordinary tort law the wrongdoer typically pays the plaintiff's damages, thus satisfying the corrective justice requirement of correlativity. Levinson contends that correlativity cannot be achieved in constitutional tort, because the loss ultimately falls not on the right-violating officials but on the taxpayers, who themselves have done nothing wrong.[62] In the usual case, however, the defendant is in fact the offending official, given the current limits on governmental liability. If the official is indemnified by the government, as he well may be,[63] that arrangement is separate from the tort suit and the corrective justice it aims to achieve. When the government itself is liable, the taxpayers do foot the bill, and Levinson's argument has greater force. Even here, however, the argument is stronger in theory than in practice. After all, the composition of the universe of taxpayers in a given municipality is likely to be about the same as that of the universe of voters. It is also likely that the voters/taxpayers reap whatever benefits (such as more effective law enforcement) that result from constitutional violations. If this is a reasonably accurate picture of the real world, it does not seem unfair to hold the voters/taxpayers to account for the misbehavior of either the persons they elect or the persons hired by those elected officials.

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[60] Bd. of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 404 (1997).

[61] *See* JOHN C. JEFFRIES, JR. ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 204-05 (2000) (citing articles that call for expansion of governmental liability).

[62] Levinson, *supra* note 3, at 408-09.

[63] *See* John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50 & n.16 (1998).

B. DEFENSES

Assuming that a constitutional violation has occurred and that an appropriate defendant has been identified, our case for corrective justice suggests that certain defenses to liability may be appropriate. It follows from our argument that absolute immunity from all relief, of the kind currently enjoyed by legislators,[64] is inconsistent with the requirements of corrective justice. But of course there are good reasons for placing limits on the government's liability. Unrestricted official or governmental liability would surely impair government's ability to perform its necessary functions,[65] and may even stunt the growth of substantive constitutional law.[66] This result is in no one's interest, not even that of the victim. At bottom, the victim's basic interest, if he is rational, is to live in a well functioning society.[67] The fundamental objective of corrective justice in cases of constitutional torts is to restore the victim to fully recognized membership in the society. Compensation that would substantially hamper the government's work would run counter to the very point of corrective justice. It makes no sense to insist, as the Roman proverb has it, "fiat justitia, ruat coelum."[68]

In practice, then, corrective justice for constitutional torts requires that any restitution over and above the reaffirmation of the victim's full citizenship be proportional not only to (a) the victim's

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[64] *See, e.g.*, Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 731-34 (1980) (holding that officials acting in legislative capacity are absolutely immune from suit for both prospective and retrospective relief).

[65] *See* Harlow v. Fitzgerald, 457 U.S. 800, 813-14 (1982) (reasoning that prospect of lawsuits and liability may make officials too cautious); *see also* PETER SCHUCK, SUING GOVERNMENT 59-81 (1983) (describing adverse impact of official liability on delivery of public services); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1793-97 (1991) (arguing that basing liability on new law may disrupt government's ability to carry out its functions effectively).

[66] *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90-91 (1999) (stating that courts would be reluctant to recognize rights unless remedies can be limited).

[67] With due regard for the differences between crime and tort, what Ricoeur says about retribution for criminal offenses is nonetheless applicable here: "The retributive function of the [criminal] sentence ought to be subordinate to its restorative function for both public order and the dignity of the victims to whom justice is rendered." PAUL RICOEUR, LA MÉMOIRE, L'HISTOIRE, L'OUBLI 420 (Éditions du Seuil 2000).

[68] "Let justice be done, though heaven fall." M. FRANCES MCNAMARA, 2,000 FAMOUS LEGAL QUOTATIONS 449 (1992).

wrongful loss, but also to (b) the government's capacity to provide it while still performing its functions effectively. What this latter requirement amounts to for any particular government at any particular time can only be determined by experimenting with various definitions of partial immunity and various compensatory schemes. Because the work of balancing corrective justice and effective government must always take place in contexts subject to change, the experimenting cannot sensibly aim to achieve definitive results. For example, the Supreme Court currently takes account of "effective government" concerns through the official immunity doctrine, under which some officials are absolutely immune from suits for damages, while others are liable only for violating clearly established rights.[69] Governments, however, enjoy no immunity whatsoever, once the "official policy" requirement is met.[70] But this arrangement should not be viewed as an ineluctable implication of corrective justice. As we learn more about constitutional tort law and its impact on the ability of government to deliver services, Congress or the Supreme Court may be persuaded that immunity is unneeded, or, conversely, that it should be extended to municipal governments as well as officers.

In particular, principles of corrective justice may support one modification of current doctrine in favor of a broader immunity rule. In *Harlow v. Fitzgerald* the Court rejected any inquiry into the subjective fault of the officer, preferring to focus on whether he had violated clearly established law.[71] Thus, an officer who sincerely believes that he is acting properly will nonetheless be held liable if the rule is clear.[72] John Jeffries has argued, to the contrary, that fairness to the officer weighs against liability in situations where the officer is not at fault.[73] These may include, for example, cases

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[69] *See, e.g.*, Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998) (noting absolute immunity for legislators); *Harlow*, 457 U.S. at 818 (describing qualified immunity absent violation of clearly established law for executive officers).

[70] Owen v. City of Independence, 445 U.S. 622, 657 (1980).

[71] 457 U.S. at 814-19. Before *Harlow*, the defendant lost if he failed *either* the subjective or the objective test. *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 321-22 (1975).

[72] *See* Elder v. Holloway, 510 U.S. 510, 516 (1994) (ruling that "[w]hether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law").

[73] Jeffries, *supra* note 63, at 71; John C. Jeffries, Jr., *Compensation for Constitutional*

in which he has a good excuse for not knowing the law or for reasonably obeying orders. Our theory of corrective justice can accommodate such considerations. A defense may seem at odds with the short-term aim of fully vindicating rights. Recall, however, that the long-term aim of corrective justice for constitutional torts is to promote social peace.[74] This can be achieved only if everyone's interests, including those of persons in government service, receive due respect. A good faith defense may be defended on the ground that officials deserve some consideration of the difficulties they face in their work and the mistakes they will inevitably make. For example, suppose that a rookie police officer shows that the training he received was wrong and thus led him unknowingly to commit a tort. Or suppose that a veteran officer (whose limited abilities resulted in a long career in minor positions) is thrust by an emergency into a wholly unfamiliar context and, under the pressure of the moment, in good faith obeys an order that makes him commit a tort. In such cases, it would be unjust to exact retribution from the officer.

C. DAMAGES AND OTHER REMEDIES

Once the appropriate defendants are identified and any defenses are taken into account, the analysis of corrective justice turns to remedies. What corrective justice essentially aims at is reparation or rectification of wrongful losses. Some remedies are available even if the immunity doctrine precludes the recovery of damages. In constitutional tort cases, a judicial finding in favor of the plaintiff is itself an essential part of the reparation that corrective justice requires. Through it, the state repudiates the violation of the direct victim's rights and acts to allay the fears of the indirect victims. Recognizing this, the Supreme Court ruled in *Carey v. Piphus*[75] that plaintiffs who prove violations of their constitutional rights may recover nominal damages of one dollar even if they show no other

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Torts: Reflections on the Significance of Fault, 88 MICH. L. REV. 82, 98-101 (1989). For a contrary view, see Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997, 1006-09 (1990).

[74] *See supra* text accompanying notes 53-55.

[75] 435 U.S. 247, 266-67 (1978).

harm. According to the Court, "[b]y making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed."[76] But in many cases, simply to reaffirm the recognition due to the direct victims is insufficient correction. They have also suffered more specific losses.

Some of these losses are readily compensable by money damages. If the plaintiff has been fired on account of constitutionally protected speech, the wrongdoer can be made to make up for the lost salary. If the police use excessive force in arresting the plaintiff, the defendants can pay the hospital bills. Other losses generally cannot be fully restored. Suppose, for example, the police break up a lawful demonstration in a public park, thereby violating the plaintiff's First Amendment right of free speech. Or suppose the police unlawfully search the plaintiff's suitcase, doing no tangible harm in the process. A lost moment cannot be recaptured. Nor can a precise dollar value be assigned to such losses. Levinson is surely right to note,[77] as others have before him,[78] the difficulty of making up for such intangible harms by way of cash payments. But courts have rejected this argument in the common law context, and should do so in the constitutional tort context as well. The complaint is often made as an objection to allowing the victims of ordinary torts to recover damages for intangible losses in the form of "pain and suffering."[79] Courts have defended damages for pain and suffering in ordinary tort law as a reasonable way to make the best of a bad situation. Whatever its deficiencies, monetary compensation is better than nothing.[80] It can provide victims with new opportunities to exercise their capacities, opportunities they would not otherwise have had. Admittedly, monetary compensation for constitutional tort victims cannot be made strictly according to Aristotelian "arithmetic proportion." How could one reasonably set a dollar figure on a deprivation of one's right to free speech? Yet it is the

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[76] *Id.*

[77] Levinson, *supra* note 3, at 410.

[78] *See, e.g.*, Louis Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 224-25 (1953).

[79] *See* DAN B. DOBBS, THE LAW OF TORTS 1050-53 (2000); *see also* Jaffe, *supra* note 78.

[80] *See, e.g.*, McDougald v. Garber, 536 N.E.2d 372, 374-75 (N.Y. 1989).

most practicable way to rectify the wrong.[81] In these cases, a monetary compensation is due the victim in justice.[82]

IV. CONCLUSION

If, as we have argued, constitutional rights are necessary to protect citizens' basic capacity to be efficacious agents, then a properly understood distributive justice obligates the state to distribute these rights equitably to all citizens. In cases of constitutional torts, corrective justice enforces these rights. Therefore, the government, as agent of the entire citizenry, does not violate distributive justice when it rectifies in an appropriate way violations of these rights. In some cases, the appropriate way is to give monetary compensation, drawn from tax revenues, to the victims. This use of tax revenues, rather than running afoul of distributive justice,[83] enables the taxpaying citizenry to do their part to rectify the constitutional harms inflicted by an agent of their government. Thereby they also promote social peace in their society, an objective that every good citizen ought to endorse.

Even though Levinson is right that for many types of constitutional violations the identification of the victims entitled to rectification is problematic, and even though one cannot return to the victim precisely what he lost,[84] it is still right to hold that corrective justice is applicable to these violations. The reparation ought to be recognizably appropriate to the damage. It ought always to include reaffirmation of the direct victim's full citizenship. By implication, this reaffirmation will serve to rectify the harm done to any indirect victims. And it will usually include some compensation, regularly

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[81] Another doctrine applied in some common law tort cases is to allow the jury to award "presumed" damages. This, too, can furnish a means for pursuing corrective justice for constitutional torts. *See* Wells, *Constitutional Remedies*, *supra* note 28, at 217.

[82] This reasoning does not, of course, justify the imposition of punitive damages, which serve the goals of punishment and deterrence and are avowedly not aimed at compensating the plaintiff. For discussions of the role of punitive damages in constitutional tort law, and arguments for lifting limits on their availability in order to better achieve the deterrence goal, see *Ciraolo v. City of New York*, 216 F.3d 236, 242 (2d Cir. 2000) (Calabresi, J., concurring), and Michael Wells, *Punitive Damages for Constitutional Torts*, 56 LA. L. REV. 841, 841 (1996).

[83] As Levinson, *supra* note 3, at 408-09, seems to argue.

[84] *Id.* at 408-10.

monetary in form, meant to enable the direct victim to take advantage of new opportunities.

Admittedly, our argument cannot pretend to have furnished Cartesianesque answers to all the questions concerning who are the victims of constitutional torts and exactly what reparation is due them. There are no Cartesianesque answers that fit the exigencies of human conduct, always contextualized as it is by relative scarcity or abundance of material resources and by always changing historical circumstances. But neither are there Cartesianesque answers about what distributive justice demands in a particular society at a particular time in its history. Nonetheless, justice, whether distributive or corrective, is always connected somehow to conduct. Just as it would make little sense to conclude from the impossibility of Cartesianesque answers that distributive justice is inapplicable to the determination and distribution of constitutional rights, so it makes little sense to conclude on these grounds that corrective justice is inapplicable to constitutional matters. Here, as in all matters of human practice, one can rightly paraphrase Aristotle and say that one ought to be satisfied with the degree of precision that the subject matter allows.