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Some Objections to Strict Liability for Constitutional Torts

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SOME OBJECTIONS TO STRICT LIABILITY FOR CONSTITUTIONAL TORTS

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Qualified immunity protects officials from damages for constitutional violations unless they have violated "clearly established" rights. Local governments enjoy no immunity, but they may not be sued on a vicarious liability theory for constitutional violations committed by their employees. Critics of the current regime would overturn these rules in order to vindicate constitutional rights and deter violations. This Article argues that across-the-board abolition of these limits on liability would be unwise as the costs would outweigh the benefits. In some contexts, however, exceptions may be justified. Much of the recent controversy surrounding qualified immunity involves suits in which police officers are sued for excessive force. The case for qualified immunity is weak in that context. But, in other contexts, the case for qualified immunity is much stronger, making calls for its complete abolition unwise.

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I. INTRODUCTION

When officers and local governments violate constitutional rights, their victims may sue under 42 U.S.C. § 1983[1] in order to vindicate their rights and deter future violations.[2] But § 1983 litigation does not fully vindicate rights and deter rights violations because many hurdles stand in the way of recovery—even when the plaintiff can prove a constitutional violation.[3] This Article is

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[1] The statute provides that "[e]very person who, under color of [state law], subjects, or causes to be subjected, any . . . person . . . to the deprivation of any [constitutional rights] shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (2018).

[2] *See, e.g.*, Felder v. Casey, 487 U.S. 131, 139 (1988) ("Section 1983 creates a species of liability in favor of persons deprived of their federal civil rights by those wielding state authority."); Forrester v. White, 484 U.S. 219, 223 (1988) (discussing how "liability encourages [government] officials to carry out their duties in a lawful and appropriate manner" and compensates victims when deterrence fails); Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 306–10 (1986) (describing the purpose of § 1983 damages as compensation and deterrence); Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) ("In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees."); Owen v. City of Indep., 445 U.S. 622, 650–51 (1980) (explaining "[t]he central aim of the Civil Rights Act" and noting that "[a] damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees"); Robertson v. Wegmann, 436 U.S. 584, 590–91 (1978) ("The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law."); *cf.* Ziglar v. Abbasi, 137 S. Ct. 1843, 1856–57 (2017) (noting that similar purposes are served by the "implied" cause of action against federal officials for constitutional violations). The "implied" cause of action doctrine, first recognized in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), differs from § 1983 litigation because it exists "absent statutory authorization." *Ziglar*, 137 S. Ct. at 1854. Over the past several decades, the Court has steadily limited its scope, largely due to separation of powers concerns. *See* Hernandez v. Mesa, 140 S. Ct. 735, 739 (2020) (stating that "the Constitution's separation of powers requires [the Court] to exercise caution before extending *Bivens*"); *Ziglar*, 137 S. Ct. at 1848 ("The question is whether Congress or the courts should decide to authorize a damages suit. Most often it will be Congress . . . ." (citation omitted)). To the extent the *Bivens* doctrine remains viable despite those concerns, the qualified immunity doctrine applies, and the analysis in this Article is relevant to its scope.

[3] For example, a state government cannot be sued under § 1983, no matter how egregious its acts. *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) ("[N]either a State nor its officials acting in their official capacities are 'persons' under § 1983."). Likewise, absolute immunity precludes suits for damages against legislators, judges, prosecutors, and witnesses, no matter how egregious their conduct. *See* JOHN C. JEFFRIES, JR., PAMELA S. KARLAN, PETER W. LOW & GEORGE A. RUTHERGLEN, CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 49–89 (4th ed. 2018) (providing an overview of the absolute immunity doctrine).

concerned with two especially important obstacles to the success of § 1983 plaintiffs: (1) qualified immunity, which protects officers from suits for damages unless they violated clearly established law; and (2) the rule that local governments may not be sued on a vicarious liability theory for constitutional torts committed by their employees. Both doctrines have drawn criticism from scholars and commentators across the political spectrum in the aftermath of the police killing of George Floyd in Minneapolis.[4] Members of Congress have introduced bills that would abolish[5] or limit qualified immunity.[6]

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[4] *See, e.g.*, The Editorial Board, *How the Supreme Court Lets Cops Get Away with Murder*, N.Y. TIMES (May 29, 2020), https://www.nytimes.com/2020/05/29/opinion/Minneapolis-police-George-Floyd.html (criticizing qualified immunity for providing police officers "a get-out-of-jail-free card in far too many instances"); Clark Neily, *To Make Police Accountable, End Qualified Immunity*, CATO INST. (May 31, 2020), https://www.cato.org/commentary/make-police-accountable-end-qualified-immunity (arguing that qualified immunity betrays conservatives' "stated commitment to textualism"); Orion de Nevers, *A Dubious Legal Doctrine Protects Cities from Lawsuits over Police Brutality*, SLATE (June 2, 2020, 2:16 PM), https://slate.com/news-and-politics/2020/06/monell-supreme-court-qualified-immunity.html (arguing that lack of municipal liability for employees' actions "creates serious injustice").

It is worth noting that the officers involved in George Floyd's case will almost certainly not benefit from qualified immunity. It is clearly established law that the police may not use force—much less deadly force—against a person who is not resisting arrest, fleeing, or threatening anyone. *See* Graham v. Connor, 490 U.S. 386, 396 (1989) (stating that the reasonableness of the force used depends on "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight"); Estate of Lopez v. Gelhaus, 871 F.3d 998, 1018–21 (9th Cir. 2017) (discussing several cases where the reasonableness of force factors were analyzed); Ciolino v. Gikas, 861 F.3d 296, 303–06 (1st Cir. 2017) (same); Hadley v. Gutierrez, 526 F.3d 1324, 1330 (11th Cir. 2008) ("Our cases hold that gratuitous use of force when a criminal suspect is not resisting arrest constitutes excessive force."). As for the officers who stood by, it is clearly established in several circuit courts of appeals that they could be sued on a "bystander liability" theory. *See* SHELDON H. NAHMOD, MICHAEL L. WELLS, THOMAS A. EATON & FRED SMITH, CONSTITUTIONAL TORTS 243–44 (4th ed. 2015) (describing the elements of the "bystander liability" theory); *see, e.g.*, McManemy v. Tierney, 970 F.3d 1034, 1039 (8th Cir. 2020) (noting that a "failure-to-intervene claim" attaches where an officer does not act to stop an unconstitutional use of force by another officer).

[5] For example, the House of Representatives passed the George Floyd Justice in Policing Act of 2020 on March 4, 2021. H.R. 7120, 116th Cong. § 102 (2020) (proposing to abolish qualified immunity for suits against "local law enforcement officer"); *see also* Ending Qualified Immunity Act, H.R. 7085, 116th Cong. § 4 (2020) (amending 42 U.S.C. § 1983 to clarify that qualified immunity is not a defense).

[6] Catie Edmondson, *Democrats Unveil Sweeping Bill Targeting Police Misconduct and Racial Bias*, N.Y. TIMES (June 8, 2020), https://www.nytimes.com/2020/06/08/us/politics/dem

First, under the "qualified" immunity doctrine, officers "are shielded from liability for civil damages insofar as their conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known."[7] According to the U.S. Supreme Court, qualified immunity keeps a lid on the "social costs" of this type of litigation, which include:

> the expenses of litigation, the diversion of official energy from pressing public issues, . . . the deterrence of able citizens from acceptance of public office[,] . . . [and] the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."[8]

Second, *Monell v. Department of Social Services* held that a local government is liable for constitutional torts caused by its "policy" or "custom."[9] But *Monell* also held that local governments cannot be sued on a *respondeat superior* theory for torts committed by their employees in the course of their employment.[10] That is, the principle of vicarious liability, though well-established in ordinary tort law,[11] does not apply to § 1983 litigation. Unless the constitutional violation is directly committed by a policymaker, the plaintiff must show "deliberate indifference" on the part of the government's policymakers in order to prevail.[12] In tandem, qualified immunity and the "no vicarious liability" doctrine make it hard for plaintiffs

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ocrats-police-misconduct-bill-protests.html (describing recently proposed legislation that seeks "to alter . . . qualified immunity").

[7] *Harlow*, 457 U.S. at 818.

[8] *Id.* at 814 (third alteration in original) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)); *see also id.* at 816–17 (discussing the "substantial costs [that] attend the litigation of the subjective good faith of government officials").

[9] 436 U.S. 658, 691 (1978).

[10] *Id.* at 693–94.

[11] *See* RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 649–66 (12th ed. 2020) (excerpting and discussing cases that show the longstanding role of vicarious liability in ordinary tort law).

[12] *See* Connick v. Thompson, 563 U.S. 51, 61 (2011) (explaining the "deliberate indifference" requirement in the context of a "failure to train" claim); Bd. of the Cnty. Comm'rs v. Brown, 520 U.S. 397, 407 (1997) (establishing that "deliberate indifference" is the correct standard for municipal liability and that "simple or even heightened negligence will not suffice").

to win, whether they sue an officer or the local government that employs the officer.

The recent legislative proposals respond to a general sense that Mr. Floyd's death highlighted the need for reform. But they are not just spur-of-the-moment reactions. Many analysts find fault with a regime in which the vindication of constitutional rights is sacrificed for the sake of minimizing social costs.[13] A recent, and especially powerful, critique focuses on qualified immunity. In a series of articles, Professor Joanna Schwartz has dismantled the Court's rationale for qualified immunity.[14] Drawing on an impressive body of empirical research and analysis, much of it her own, she has shattered several of the U.S. Supreme Court's cherished myths. She has shown (among other things) that "officers are virtually always indemnified" by their employers,[15] that "legal liability was not among [surveyed officers'] top ten thoughts when doing their work,"[16] and that qualified immunity does not, in practice, significantly diminish the expenses of constitutional tort litigation.[17] Professor Schwartz contends that the benefits of

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[13] *See, e.g.*, Michael L. Wells, *Qualified Immunity After* Ziglar v. Abbasi*: The Case for a Categorical Approach*, 68 AM. U. L. REV. 379, 402–17 (2018) (surveying the academic criticisms of qualified immunity and the lack of vicarious liability for local governments).

[14] *See, e.g.*, Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 316 (2020) [hereinafter Schwartz, *After Qualified Immunity*] (outlining "five predictions" of what "constitutional litigation after qualified immunity" would look like based on her empirical studies); Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U. L. REV. 1101, 1101–02 (2020) [hereinafter Schwartz, *Qualified Immunity's Selection Effects*] (analyzing the "role qualified immunity plays in decisions to forgo" lawsuits against police officers who violate one's civil rights); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1799 (2018) [hereinafter Schwartz, *The Case Against Qualified Immunity*] ("If the Court did find an appropriate case to reconsider qualified immunity, and took seriously available evidence about qualified immunity's historical precedents and current operation, the Court could not justify the continued existence of the doctrine . . . .").

[15] Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) [hereinafter Schwartz, *Police Indemnification*]; *see also* 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, 579–80 (2020) (discussing an empirical study finding that in over 95% of the cases studied, individual defendants contributed no personal resources to the resolution of *Bivens* claims brought against them).

[16] Schwartz, *After Qualified Immunity*, *supra* note 14, at 352.

[17] *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 60 (2017) (finding, based on her empirical studies, that "qualified immunity may actually increase the costs and delays associated with Section 1983 litigation").

qualified immunity are small, yet the doctrine frustrates the vindication and deterrence goals of § 1983 litigation.[18] She concludes that qualified immunity is unjustified and should be abolished.[19]

The persuasive power of Professor Schwartz's thesis may vary depending on its target. We must distinguish between (a) the current U.S. Supreme Court doctrine on qualified immunity, and (b) the general principle that qualified immunity is sometimes appropriate. The current doctrine is a comparatively easy target as it protects "all but the plainly incompetent or those who knowingly violate the law."[20] Even defendants who meet those criteria may escape liability "unless the right's contours were sufficiently definite that *any* reasonable official in the defendant's shoes would have understood that he was violating it."[21] Professor Schwartz makes a strong case that this approach is unnecessarily protective of official misconduct.[22]

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[18] *See* Schwartz, *Qualified Immunity's Selection Effects*, *supra* note 14, at 1163–64 (arguing that "a growing body of empirical research makes clear that qualified immunity doctrine is not achieving its intended policy goals" and "amplifies the burdens and risks of constitutional litigation" for civil rights plaintiffs).

[19] *See* Schwartz, *The Case Against Qualified Immunity*, *supra* note 14, at 1800 (stating that the Court "should restrict or do away with the qualified immunity defense altogether"). A quite different objection to qualified immunity is that it is "unlawful" because it is not authorized by § 1983. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 47 (2018) (concluding that the "legal rationales" for qualified immunity do not "hold up"). Indeed, the statute makes no mention of the doctrine. In my view, the short answer to Baude's objection is that § 1983 is properly understood as a broadly worded "common law statute," for which the Court must and does develop a workable body of doctrine. Hillel Y. Levin & Michael L. Wells, *Qualified Immunity and Statutory Interpretation: A Response to William Baude*, 9 CALIF. L. REV. ONLINE 40, 42 (2018); *see also* Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 256–57 & n.29 (making a similar point); Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1854–75 (2018) (discussing other grounds for rejecting Baude's view).

[20] Ziglar v. Abbasi, 137 S. Ct. 1843, 1867 (2017) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

[21] Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) (per curiam) (emphasis added) (quoting Plumhoff v. Rickard, 572 U.S. 765, 778–79 (2014)).

[22] *See* Schwartz, *Qualified Immunity's Selection Effects*, *supra* note 14, at 1109 ("[Q]ualified immunity undermines government accountability in underappreciated ways: by discouraging lawyers from filing cases involving novel claims, making it more difficult for lawyers to make a living bringing civil rights cases, and causing lawyers to abandon this line of work.").

Wholesale repudiation of qualified immunity raises a distinct set of issues. Abolition would, in effect, impose a kind of strict liability in the sense that officers—or the governments they work for—would be liable for damages even when they have no fair warning that their acts violate constitutional rights. In this Article, I show that Professor Schwartz's impressive body of empirical work does not fully support her normative conclusion that qualified immunity must be abolished. My argument is based on two premises. First, constitutional "rights and remedies are inextricably intertwined"[23] such that "not every constitutional-rights violation should always elicit . . . an individually effective remedy."[24] Availability of damages should turn on a variety of factors that bear on the advantages and disadvantages of a particular remedy in a particular context.[25] For example, there are good reasons to abolish qualified immunity in fact patterns like Mr. Floyd's, in which the police use excessive force.[26] The case for across-the-board abolition of qualified immunity is weaker.

Second, in comparing the pluses and minuses of a damages remedy, it is appropriate to draw from the conceptual apparatus of ordinary tort law because the vindication and deterrence framework of constitutional tort law closely resembles that of tort theory.[27] The point here is not that ordinary tort law should be mechanically

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[23] Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999).

[24] Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 940 (2019). In fact, few critics of immunity seem willing to apply the logic of abolition across the whole range of constitutional torts. Full-fledged vindication and deterrence would seem to require abolition of absolute immunity as well as qualified immunity, yet neither Professor Schwartz nor other critics of immunity seem to go so far as to advocate holding judges and legislators liable for constitutional torts. They seem to accept, if only implicitly, the proposition that there are solid grounds for some limits on recovery. Thus, the issue is not *whether* to limit recovery, but *how much* to limit it.

[25] *See* Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 482–83, 495 (2011) (explaining the "Equilibration Thesis").

[26] *See infra* notes 227–231 and accompanying text.

[27] *See* Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997) (proposing "a mixed theory of tort law" that "attend[s] to both deterrence and corrective justice"); Ariel Porat, *The Many Faces of Negligence*, 4 THEORETICAL INQUIRIES L. 105, 106 (2003) (discussing the need for negligence law to balance interests outside of those of the injurer and victim).

applied to § 1983 cases.[28] Rather, the task is to adapt common law principles to the constitutional tort context.[29] Tort principles are relevant, though not dispositive, because § 1983 "creates a species of tort liability"[30] and "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[31] As the U.S. Supreme Court recently described the relationship between § 1983 and the common law, "[c]ommon-law principles are meant to guide rather than to control the definition of § 1983 claims."[32]

Tort theory distinguishes between two goals: vindication of rights and deterrence of future violations.[33] With respect to vindication, Professor Schwartz and other critics are on solid ground. Unfettered liability would enable more effective vindication of rights, and vindication achieves corrective justice between the plaintiff and the defendant—a viable goal of constitutional torts.[34] With respect to deterrence, the current doctrine is likewise lacking. But the shortcomings of the current approach do not justify the abandonment of all constraints on liability. There are two objections to the deterrence rationale for strict liability. First, tort theory suggests that strict liability may not deter many more violations

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[28] Professor Fallon would "substantially jettison the ordinary, private-law tort system as an anchor for thinking about constitutional remedies." Fallon, *Bidding Farewell*, *supra* note 24, at 939. One of his reasons is that some constitutional violations, such as "discriminatory conduct directed at particular individuals and infringements of the free speech rights of public employees," do not resemble common law torts. *Id.* at 974. Another concern is that we should not "return to a common law regime in which governmental officials were subject to the same liability rules as ordinary citizens." *Id.* at 939. I hope to show that, despite these concerns, the issues raised by backward-looking suits for damages for constitutional violations have much in common with the issues raised by ordinary tort suits and that tort principles can be helpful in resolving those issues.

[29] *See, e.g.*, Carey v. Piphus, 435 U.S. 247, 258 (1978) ("[T]he interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right. In such cases, it may be appropriate to apply the tort rules of damages directly to the § 1983 action.").

[30] Imbler v. Pachtman, 424 U.S. 409, 417 (1976).

[31] Monroe v. Pape, 365 U.S. 167, 187 (1961).

[32] Manuel v. City of Joliet, 137 S. Ct. 911, 921 (2017).

[33] *See supra* notes 2–3, 27.

[34] *See* Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903, 903 (2001) ("Following the common law model, the Supreme Court has . . . rul[ed] that the aims of liability for damages are to vindicate constitutional rights and to deter constitutional violations.").

than replacing the current doctrine with a negligence system.[35] Second, no matter what the liability rule is, tort law is not well-designed to effectively deter violations. Its deterrent impact depends on several contingencies, including the willingness of injured persons to sue, the damages awarded by juries, and how tortfeasors respond to the liability.[36] If the goal is to undertake a systematic effort to discover and remedy abuses, administrative oversight or litigation aimed at obtaining injunctive relief may be more effective than suits for damages.[37] Part II examines issues related to deterrence.

Professor Schwartz's focus on the abolition of qualified immunity is not the only path to strict liability. Some critics would overturn *Monell*'s "no vicarious liability" rule in order to eliminate the hurdles plaintiffs face in obtaining relief.[38] Their starting point is *Owen v. City of Independence*,[39] decided two years after *Monell*. That case held that local governments have no immunity.[40] These analysts would combine *Owen* with the elimination of *Monell*'s "no vicarious liability" rule. That proposed change in the municipal liability doctrine would effectively create a regime that resembles the "no qualified immunity" approach, though it would cover only local governments. In one sense, this approach would amount to a

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[35] *See generally* John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207 (2013) (arguing for the negligence principle).

[36] *See* JULES L. COLEMAN, RISKS AND WRONGS 374–85 (1992) (explaining why "backward-looking" tort liability cannot effectively deter harmful conduct in the future).

[37] For a discussion of other means of deterring constitutional violations, see generally Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247 (1988).

[38] *See, e.g.*, Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 963 (2015) (advocating that the Court "revisit *Monell*" and adopt "respondeat superior liability" for municipalities); JEFFRIES ET AL., *supra* note 3, at 217–18 (collecting sources that "favor strict liability either of the officer defendant or the government employer"). This idea must be distinguished from a version of vicarious liability in which the government would be allowed to assert the officer's qualified immunity, as suggested in Fallon, *Bidding Farewell*, *supra* note 24, at 978–79. Fallon's suggested approach would probably streamline constitutional tort litigation by linking the plaintiff to the ultimate source of recovery, but it would not impose strict liability. *See id.* at 979 ("[I]nsofar as indemnification happens anyway, it would be better to dispel confusion about where financial responsibility lies.").

[39] 445 U.S. 622 (1980).

[40] *See id.* at 638 (holding that "municipalit[ies] may not assert the good faith of its officers or agents as a defense to liability under § 1983" because "neither history nor policy supports a construction of § 1983 that would justify . . . qualified immunity" for local governments).

less radical, more incremental change than eliminating qualified immunity altogether because the current regime already imposes strict liability for unconstitutional acts by government "policymakers."[41]

The policy issues that bear on this path to strict liability largely track the "no qualified immunity" route—but they are not identical. Variations between the two approaches will be noted from time to time throughout this Article. In particular, the Court in *Owen* advanced a distinct rationale for strict liability, suggesting that—as in some other areas of modern tort law—strict liability may be justified as a matter of "equitable loss-spreading."[42] Governments may be able to spread losses as well as the manufacturer of a product, for example, because governments can cover the cost of constitutional tort litigation by buying liability insurance.[43] The loss-spreading rationale for strict liability is examined in Part III.

Both deterrence and loss spreading lend some support to the adoption of some form of a strict liability regime. But strict liability—whether by municipal vicarious liability or the elimination of qualified immunity—would generate a new set of constitutional litigation costs. First, indemnification shifts the cost of liability from the officer to the government, but the cost does not vanish. The cost is borne not only by governments and taxpayers, but by the whole range of beneficiaries of government services. The cost of liability would increase, perhaps substantially, as more plaintiffs would recover in a world without the qualified immunity defense or under vicarious liability theories. Second, the burden imposed on local governments from expanded liability may subtly influence judicial decisionmaking over time, thereby diluting constitutional protections. Strict liability's success in assuring greater vindication and deterrence over the short term would thus generate substantial long-term costs. Third, Professor Schwartz

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[41] This point is illustrated by *Pembaur v. City of Cincinnati*, 475 U.S. 469, 474, 478–80 (1986), which held the city liable for the act of its policymaker, though the unconstitutionality of that act was not established until several years later. *See* Michael L. Wells, *The Role of Fault in § 1983 Municipal Liability*, 71 S.C. L. REV. 293, 295–96 (2019) (explaining how *Owen* and *Monell* have created "a kind of strict liability . . . when a local government's policy or custom" violates a person's constitutional rights).

[42] *Owen*, 445 U.S. at 657.

[43] *See* Richardson v. McKnight, 521 U.S. 399, 420 (1997) (Scalia, J., dissenting) (discussing the availability of civil-rights liability insurance to public entities).

focuses solely on social costs versus vindication of rights.[44] But either the abolition of qualified immunity or the imposition of vicarious liability would raise a different kind of objection—one based on fairness rather than costs and benefits. Long before *Harlow*, the Court recognized that imposing liability on officers is unfair when the law is in flux and they act in good faith, such that they cannot reasonably foresee that their acts violate constitutional rights.[45] That fairness argument may have weight even when the damages are paid by a government. It is no wonder that, despite the *Marbury* dictum,[46] the Court has never embraced a general principle that a remedy should be available for every violation of a constitutional right. Part IV discusses these costs of eliminating qualified immunity.

A cost-benefit approach to constitutional remedies does not imply across-the-board rejection of strict liability. In some contexts, the benefits of strict liability may be sufficiently strong, and the costs sufficiently minor, to justify its adoption. Part V discusses two such contexts. First, current municipal liability doctrine imposes strict liability on local governments for unconstitutional acts by their policymakers.[47] The cost-benefit approach supports that rule. The second context would require a change in current law, but one that seems to enjoy widespread support.[48] Under the qualified immunity doctrine, police officers cannot be held liable for excessive force unless the plaintiff can show not only that the force was unreasonable,[49] but also that the officer made an unreasonable

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[44] *See supra* notes 14–18 and accompanying text.

[45] *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 319 (1975) ("Liability for damages for every action which is found subsequently . . . to have caused compensable injury would unfairly impose . . . the burden of mistakes made in good faith . . . ."); Pierson v. Ray, 386 U.S. 547, 555 (1967) (stating that a police officer should be excused "from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional").

[46] *See* Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

[47] *See Owen*, 445 U.S. at 650 (holding that qualified immunity does not cover "injuries occasioned by a municipality's unconstitutional conduct").

[48] For examples of criticisms of qualified immunity in the context of police excessive force cases, see *supra* note 4.

[49] *See* Graham v. Connor, 490 U.S. 386, 388 (1989) (holding that excessive force claims "are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard").

mistake as to the reasonableness of the force.[50] This "two bites at the apple" approach to reasonableness affords police officers more protection against liability than they need or deserve, and on this narrow issue, the case for abolishing qualified immunity is strong.[51] Efforts to reform the qualified immunity doctrine, including those currently under consideration, would be on stronger ground if they were to focus on this particular application of qualified immunity instead of abolishing it altogether, as the Amash bill would for all § 1983 cases and the George Floyd Justice in Policing Act of 2020 would for all cases against correctional officers and local police. [52]

Besides her emphasis on the superiority of eliminating qualified immunity for vindicating rights, Professor Schwartz points out that the abolition of qualified immunity would enable litigants to resolve constitutional tort claims on the merits more quickly, at less cost.[53] Part VI examines some of her specific criticisms of the current constitutional tort regime. Many of abolition's benefits can be obtained at lower cost by surgical interventions instead of the wholesale overhaul she proposes. In particular, some of her concerns could be alleviated simply by overturning the cases that give rise to the complications: *Pearson v. Callahan*,[54] which allows courts to resolve qualified immunity issues without reaching the merits, and *Mitchell v. Forsyth*,[55] which allows many defendants to obtain interlocutory appeals of denials of qualified immunity.

II. DETERRENCE

The deterrence rationale for constitutional tort liability follows the economic approach to general tort law, which views liability rules as tools to distinguish between acts that are and are not cost-

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[50] *See* Saucier v. Katz, 533 U.S. 194, 206 (2001) (stating that even if an officer applied unreasonable force, qualified immunity still applies if "the mistaken belief was reasonable").

[51] *See* Wells, *supra* note 13, at 426 ("[T]he rationale for a second bite at the apple is weaker in excessive force cases . . . .").

[52] *See supra* notes 5–6 and accompanying text.

[53] *See* Schwartz, *After Qualified Immunity*, *supra* note 14, at 342–43 (noting that "[c]ivil rights trials . . . take far less time than qualified immunity motions and appeals take to resolve," so "the defense may not actually reduce the cost, time, and complexity of litigation").

[54] 555 U.S. 223, 242 (2009) ("[T]he judges of the district courts and the courts of appeals are in the best position to determine the order of decisionmaking that will best facilitate the fair and efficient disposition of each case.").

[55] 472 U.S. 511, 526–27 (1985).

justified, actors as rational risk calculators, and liability for damages as a disincentive to risk injury to others. The theory is that these rational actors duly account for the threat of liability and modify their behavior accordingly.[56] A key feature of relying on tort litigation to deter is that liability for damages does not *compel* the defendant to comply with the rule.[57] If the *relevant* actor finds that the cost of compliance with the rule is higher than the benefit of compliance, the actor is free to ignore the rule, obtain the benefits of non-compliance, and pay damages.[58]

This principle applies in the constitutional tort context as well.[59] In *Carey v. Piphus*, the leading case on constitutional tort damages, the Court rejected the notion of using damages to obtain *absolute* deterrence.[60] It adopted the common law "compensation principle" as the measure of constitutional tort damages.[61] As for deterrence, "[t]o the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no

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[56] *See* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32–33 (1972) (explaining when liability for negligence should incentivize costly preventative measures and when it should not). For a more systematic, less intuitive, development of this thesis, see WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 54–73 (1987).

[57] *See, e.g.*, Bates v. Dow Agrosciences LLC, 544 U.S. 431, 445 (2005) ("[A]n event, such as a jury verdict, that merely motivates an optional decision is not a requirement.").

[58] *See* Posner, *supra* note 56, at 33 ("When the cost of accidents is less than the cost of prevention, a rational profit-maximizing enterprise will pay tort judgments to the accident victims rather than incur the larger cost of avoiding liability.").

[59] The constitutional tort context is not precisely parallel to the private law context. Constitutional tort liability has distinctive "social costs," which include "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982); s*ee also id.* (discussing "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties'" (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2nd Cir. 1949))). In *Harlow*, the Court invoked those costs as grounds for qualified immunity. *See id.* at 817–18 ("[W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery."). Indemnification undercuts that rationale, see Jerry L. Mashaw, *Civil Liability of government Officers: Property Rights and Official Accountability*, 42 LAW & CONTEMP. PROBS. 8, 27 (1978), but the costs do not vanish. They are shifted to government. For discussion of the role those costs should play in setting the liability rule for constitutional torts, see *infra* Section IV.A.

[60] 435 U.S. 247, 257 n.11 (1978) (explaining that punitive damages were not appropriate in this case because "petitioners did not act with a malicious intention to deprive respondents of their rights").

[61] *Id.* at 255.

evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages."[62] The policy underlying this approach is that "it is excessively costly to strictly minimize the abuse of power by government officials." [63] Accordingly, "the optimal level of abuse of power will be greater than zero."[64] The goal, then, must be "optimal" deterrence, which—in the economic approach to torts—means that constitutional violations would be deterred by liability rules up to the point at which the costs of further deterrence would outweigh the benefits. Thus, in the constitutional tort context, deterrence theory does not promise a world in which *no* constitutional rights violations occur. If that is the goal, some other enforcement mechanism must be found, such as administrative regulation or injunctive relief.[65]

A. DOUBTS ABOUT DETERRENCE

Even with regard to ordinary torts, it is not clear just how much the prospect of liability modifies behavior.[66] Effective deterrence through tort litigation requires not only liability, but liability that will influence the relevant actor's behavior. Doubts about the effectiveness of tort-law incentives are compounded by mulcting governments.[67] First, under the current doctrine, the measure of damages in constitutional tort does not fully account for the value of constitutional rights, thus providing insufficient incentives for governments to curb officers' constitutional violations.[68] Second,

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[62] *Id.* at 256–57.

[63] Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 675 (2015).

[64] *Id.*

[65] *See* Fallon, *Bidding Farewell*, *supra* note 24, at 972–73 (discussing injunctive relief); Meltzer, *supra* note 37, at 265–76, 309–11 (discussing, e.g., habeas corpus, the exclusionary rules, and class actions); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1288–89 (1976) (discussing institutional reform litigation).

[66] *See* Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 422–23 (1994) (finding "the strong version of the deterrence argument" to be implausible, but also finding support for "the moderate form of the deterrence argument," i.e., that tort liability has *some* deterrent effect).

[67] *See* Meltzer, *supra* note 37, at 283–85 (discussing several reasons why a tort remedy may not effectively deter).

[68] *See id.* at 285 ("[F]rom the agency's standpoint, the value of misconduct in particular cases . . . may seem to exceed the harm suffered by the victim of the illegality, especially when discounted by the likelihood of suit and recovery."). *See generally* John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*,

governments act through their policymakers, but judgments are paid by the governments.[69] The gap between the incentives of the principal and those of the agent—a basic feature of agency law—suggests that policymakers may have different incentives than the particular government in whose name they act.

1. The Measure of Damages. Despite occasional large payouts in high profile cases,[70] damages awards are often small in constitutional tort litigation. Part of the problem is that many constitutional tort plaintiffs have had run-ins with the police and may not elicit sympathy from a jury.[71] As Daniel Meltzer noted, "in many cases the harm suffered by individuals from the constitutional violation itself may be small, widely dispersed, and intangible, providing little incentive for potential plaintiffs to sue."[72] Following *Carey*'s "compensation principle,"[73] the Court in *Memphis Community School District v. Stachura* rejected a jury instruction that would have allowed recovery based on the abstract value of constitutional rights and "the importance of the right[s] in our system of government."[74] Under *Carey*, the Court ruled, "*no* compensatory damages [may] be awarded for violation of [a constitutional] right absent proof of actual injury."[75] *Stachura* does not take a firm stand on the award of presumed damages,[76] and only

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75 VA. L. REV. 1461 (1989) (discussing how to appropriately measure damages for constitutional torts).

[69] *See, e.g.*, Schwartz, *Police Indemnification*, *supra* note 15, at 890 ("Police officers are virtually always indemnified. Between 2006 and 2011, in forty-four of the country's largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9225 civil rights damages actions resolved in plaintiffs' favor . . . .").

[70] *See, e.g.*, Burke v. Regalado, 935 F.3d 960, 1034–36 (10th Cir. 2019) (upholding a $10 million jury award for the death of a pretrial detainee).

[71] *See* Meltzer, *supra* note 37, at 284 (noting that "potential plaintiffs . . . are individuals who are in contact with the criminal justice system" and who face a "lack of sympathy" from juries).

[72] *Id.*

[73] *See supra* notes 60–61 and accompanying text.

[74] 477 U.S. 299, 303 (1986).

[75] *Id.* at 308; *see also* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 372–73 (2000) (noting that this rule produces "underdeterrence").

[76] *See Stachura*, 477 U.S. at 310–11 ("When a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish, some form of presumed damages may possibly be appropriate."). The Court distinguished the faulty "value of constitutional rights" instruction from a hypothetical "presumed damages" instruction:

a few lower courts have adopted that approach.[77] Often, the plaintiff receives only nominal damages.[78] In one recent case, a motorist was illegally stopped and then incarcerated for sixty-five days.[79] He received a recovery of one dollar.[80] But a more general problem exists, too. Punitive damages are sometimes only available against an officer—not municipal governments[81]—and only for egregious misconduct.[82] Overall, the deterrent impact of constitutional tort damages is probably real but not especially strong.

2. The Principal-Agent Problem. The second reason to doubt the deterrent value of constitutional tort awards is that governments ordinarily are complex enterprises that involve many actors. The incentives of these actors do not always align with the goals of avoiding § 1983 liability, in part because a principal-agent problem

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> [P]resumed damages may roughly approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure. As we earlier explained, the instructions at issue in this case did not serve this purpose, but instead called on the jury to measure damages based on a subjective evaluation of the importance of particular constitutional values. Since such damages are wholly divorced from any compensatory purpose, they cannot be justified as presumed damages.

Id. at 303, 311. But the Court did not affirmatively endorse presumed damages.

[77] *See, e.g.*, King v. Zamiara, 788 F.3d 207, 214 (6th Cir. 2015) ("[C]ourts have allowed plaintiffs to recover presumed damages for actual injuries caused by constitutional violations that are 'likely to have occurred' but difficult to measure, even when the injury claimed is neither physical harm nor mental or emotional distress."); *see also* NAHMOD ET AL., *supra* note 4, at 567 (discussing cases in which courts have and have not been "receptive to presumed damages" in lieu of "proving actual harm").

[78] *See, e.g.*, Grisham v. City of Fort Worth, 837 F.3d 564, 567 (5th Cir. 2016) (describing a consent decree in which the plaintiff received nominal damages of one dollar); Rentas v. Ruffin, 816 F.3d 214, 223 (2d Cir. 2016) (discussing when the court awards nominal damages in response to a finding of a constitutional violation); Corpus v. Bennett, 430 F.3d 912, 916 (8th Cir. 2005) (affirming the district court's reduction of "the damages award to a nominal sum"); Schneider v. Cnty. of San Diego, 285 F.3d 784, 794 (9th Cir. 2002) (explaining why plaintiffs receive nominal damages "as a matter of law" when they provide a violation of their constitutional rights).

[79] Martin v. Marinez, 934 F.3d 594, 596–97 (7th Cir. 2019).

[80] *See id.* at 606 ("The decision regarding those damages was left to the jury, which determined one dollar was the proper amount.").

[81] *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981) (holding that municipal governments are immune from liability for punitive damages).

[82] *See* Smith v. Wade, 461 U.S. 30, 56 (1983) (explaining punitive damages are available "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").

exists: governments and government employees are two different things. Governments act through agents, and in this context, as in others, the interests of agents may often diverge from those of the principal.[83]

One group of agents consists of the government's policymakers. Since policymakers are not themselves liable—or likely will be indemnified if they are—officers in charge of allocating government resources may actually pay more attention to their "[p]olitical preferences,"[84] than to a detached assessment of the *government*'s costs and benefits. Suppose, for example, the local electorate favors vigorous law enforcement. Even if the police are regularly sued, and even if (in the hypothesized world of vicarious liability or "no qualified immunity") the municipality is regularly held liable, it is unlikely that the police chief will take strong steps to avoid constitutional violations in a way that diminishes vigorous law enforcement. This is true whether the liability rule is strict liability or negligence. The violations cost the police chief nothing personally, while the continued vigorous law enforcement serves to enhance her public image. Similarly, a school district superintendent, knowing that the government will pay the damages if he is sued, may further his own career by suppressing the critical speech of teachers, even though the First Amendment protects that speech. As a result of this self-aggrandizing behavior, the government's conduct may have little to do with traditional cost-benefit calculation.[85]

The police chief and school superintendent in these hypotheticals qualify as policymakers for § 1983 purposes,[86] but the principal-agent problem is not confined to policymaking officials. The problem exists *whenever* a misalignment exists between the incentive structure of the person whose behavior is targeted by the legal rule and the incentives the legal rule aims to create. Suppose the police chief and superintendent strive to enforce the First and Fourth

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[83] *See* Levinson, *supra* note 75, at 380 (discussing how "agency 'slippage' or 'drift' makes the consequences of constitutional cost remedies . . . difficult to predict").

[84] *Id.* at 355.

[85] *See* Edward Rubin, *Rational States?*, 83 VA. L. REV. 1433, 1441 (1997) ("[T]here is no basis for simply ascribing rational behavior to political institutions.").

[86] *See* McMillian v. Monroe Cnty., 520 U.S. 781, 785 (1997) ("Our cases on the liability of local governments under § 1983 instruct us to ask whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue.").

Amendments. Lower-level officials, such as school principals and police officers also seek to get ahead in their careers, and they may not be deterred by their supervisors' oversight efforts. In sum, as Professor Levinson notes, "[s]treet-level officials will often have the incentives and means to pursue their own objectives, which may well deviate from managerial preferences,"[87] to the detriment of effective deterrence of constitutional violations.

B. OPTIMAL DETERRENCE

The problems discussed in Section A are best understood as reasons to doubt the *efficacy* of deterrence rather than as decisive objections to the deterrence rationale. Governments buy liability insurance and have an incentive to keep rates down.[88] Despite low damages, and despite the principal-agent problem, plenty of evidence suggests that liability insurers pressure governments to minimize constitutional tort liability.[89] Thus, deterrence probably works to some extent.[90]

On that premise, the next question is which liability rule is best suited to deter constitutional violations. The liability rule choices are not limited to strict liability or current law. Another alternative could be to impose liability upon a showing of "fault," as that term is generally defined in traditional negligence law: proof that the relevant officer could reasonably foresee that his act would result in a constitutional violation and that he failed to take proper precautions to avoid the violation.[91] For plaintiffs, this approach would present a lower hurdle than current law without wholly eliminating the qualified immunity defense. In order to isolate and

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[87] Levinson, *supra* note 75, at 384.

[88] *See, e.g.*, John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1542 (2017) ("Municipalities nationwide purchase insurance to indemnify themselves against liability for the acts of their law enforcement officers.").

[89] *See id.* at 1573–95 (discussing insurers' loss-prevention practices as a form of private regulation of public actors).

[90] *See id.* at 1547 ("[I]nsurers transform vague, uncertain liability exposure into finely grained policies backed by differentiated premiums and the threat of coverage denial. *That* is a substantial part of how civil liability deters misconduct in insured jurisdictions.").

[91] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (AM. LAW INST. 2010) ("Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.").

analyze the *comparative* merits of strict liability versus these alternative liability rules, the ensuing discussion brackets the principal-agent and measure-of-damages problems noted in Section A and stipulates that deterrence is a significant goal of constitutional tort law.

1. Strict Liability vs. Current Doctrine. Imposing vicarious liability or eliminating qualified immunity would increase payouts, intensify pressure from insurance companies, and probably achieve more deterrence than the current qualified immunity doctrine. Deterrence cannot occur without the threat of liability, and the current doctrine often produces no liability.[92] Indeed, Professor Schwartz's "no qualified immunity" proposal derives much of its normative force from the defendant-friendly features of the current official immunity doctrine.[93] Thus, constitutional tort deterrence does not apply at all to some officers because they are absolutely immune from damages.[94] Most officers are immune from damages if "any" reasonable officer could have believed that he was acting constitutionally.[95] The Court recently stated that "qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'"[96] The plaintiff cannot even win by showing that the particular officer acted with an unconstitutional motive or believed he was acting unconstitutionally, so long as (presumably) a single reasonable officer would believe the act to be constitutionally valid.[97]

The qualified-immunity obstacle is exacerbated because many constitutional doctrines are flexible standards rather than bright-line rules, including doctrines that generate a steady stream of

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[92] *See, e.g.*, Schwartz, *Police Indemnification*, *supra* note 15, at 953 (explaining how widespread indemnification for police officers "frustrates § 1983's deterrence goals by limiting the impact of compensatory and punitive damages awards on individual officers").

[93] *See supra* notes 14–17 and accompanying text.

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

[95] Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) (per curiam) (quoting Plumhoff v. Rickard, 572 U.S. 765, 778–79 (2014)).

[96] Ziglar v. Abbasi, 137 S. Ct. 1843, 1867 (2017) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

[97] *See* Wells, *supra* note 13, at 422 ("[Q]ualified immunity inquiries focus solely on the state of the law at the time of the constitutional violation, thus excluding evidence of a defendant's impermissible motives or reckless disregard of a plaintiffs constitutional rights.").

constitutional tort litigation.[98] These include, for example, public employee speech cases, which often require courts to balance the value of the speech against its potential for disruption,[99] and police excessive force cases, which turn on an evaluation of all of the circumstances of the encounter between the officer and the plaintiff.[100] In such cases, the "clearly established law" issue is more accurately described as "clearly established application of law to fact."[101] Since the facts vary from case to case, the law bearing on the specific encounter is often uncertain.

By focusing on "clearly established law" rather than common sense notions of fault, courts have awarded qualified immunity for a broad range of dubious official conduct. Government officials have avoided liability when they fired a professor for testifying truthfully at a criminal trial,[102] when they left a man tied to a pole in a parking lot in the middle of the night,[103] and when they simply stole the plaintiff's property.[104] They have also avoided liability on the ground that a reasonable officer might distinguish between the front door of a plaintiff's house—as to which clearly established law precluded his entry—and the door of an attached garage,[105] or between eyeglasses—which clearly established law required prison officers to provide to inmates—and hearing aids.[106]

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[98] For a brief summary of the difference between rules and standards, and how the Court approaches choosing between the two, see Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 646 (2014).

[99] *See* Connick v. Myers, 461 U.S. 138, 142 (1983) (outlining the Court's balancing test for evaluating infringements on public employees' free expression rights).

[100] *See* Graham v. Connor, 490 U.S. 386, 396 (1989) (explaining that assessment of excessive force claims "requires a careful balancing" of the parties' interests and "careful attention to the facts and circumstances of each particular case").

[101] *See* Wells, *supra* note 13, at 431–32.

[102] Lane v. Franks, 573 U.S. 228, 243 (2014).

[103] Robles v. Prince George's Cnty., 302 F.3d 262, 266, 270–71 (4th Cir. 2002).

[104] Jessop v. City of Fresno, 936 F.3d 937, 939–40, 942 (9th Cir. 2019).

[105] *See* Coffin v. Brandau, 642 F.3d 999, 1016–17 (11th Cir. 2011) (en banc) (holding that the law was not clearly established because it was not "a matter of obvious clarity[that] an open attached garage is either a part of the home, or entitled to the same level of protection as the home").

[106] *See* Gilmore v. Hodges, 738 F.3d 266, 274–75 (11th Cir. 2013) (noting that while the court had "long held that deprivation of needed eyeglasses . . . stated an Eighth Amendment violation," the court could "find precious little case law addressing an official's failure to supply a severely hearing impaired inmate with hearing aids").

Suits against local governments often fail for similar reasons. *Monell* and *Owen* impose strict liability for constitutional violations committed by policymakers but require "deliberate indifference"—a higher-than-negligence showing of culpability—in a clear majority of cases in which the violation is committed by a subordinate.[107] When plaintiffs try to sidestep qualified immunity by suing local governments for unconstitutional acts committed by lower-level officials, they are often thwarted by the "deliberate indifference" requirement. In *Connick v. Thompson*, for example, a jury in New Jersey convicted the plaintiff of murder and sentenced him to death.[108] He proved that lower-level prosecutors had violated his constitutional right, under *Brady v. Maryland*,[109] to obtain exculpatory evidence and that the local district attorney's office had a history of *Brady* violations, with four convictions overturned in the past decade.[110] His *Monell* theory against the city was that the district attorney, a policymaker, inadequately trained his assistants.[111] The jury—properly instructed under the "deliberate indifference" standard—held the city liable under that test.[112] But the Supreme Court reversed.[113] The Court explained that deliberate indifference is a "stringent standard of fault,"[114] that "[a] pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train,"[115] and that none of the earlier four conviction reversals were sufficiently similar to this one because "[n]one of those cases involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind."[116]

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[107] *See, e.g.*, Bd. of the Cnty. Comm'rs v. Brown, 520 U.S. 397, 407 (1997) ("A showing of simple or even heightened negligence will not suffice."); *supra* note 12.

[108] 563 U.S. 51, 54–55 (2011).

[109] *See* 373 U.S. 83, 86 (1963) (holding that the suppression of a confession violated the Due Process Clause of the Fourteenth Amendment).

[110] *Connick*, 563 U.S. at 57, 62 (finding that the prosecutor's office had committed a *Brady* violation and that four previous convictions had been overturned due to *Brady* violations).

[111] *Id.* at 59; *see also* City of Canton v. Harris, 489 U.S. 378, 388 (1989) (recognizing the "inadequate training" theory).

[112] *Connick*, 563 U.S. at 57.

[113] *Id.* at 72.

[114] *Id.* at 61 (quoting Bd. of the Cnty. Comm'rs v. Brown, 520 U.S. 397, 410 (1997)).

[115] *Id.* at 62 (quoting *Brown*, 520 U.S. at 409).

[116] *Id.* at 62–63; *see also* Wells, *supra* note 41, at 306–12 (discussing lower court cases concerning liability for poor training, supervision, and hiring).

2. Strict Liability vs. Negligence. In light of the current doctrine's shortcomings, strict liability would surely win the deterrence comparison between the two. But the case for strict liability is weaker when it is compared to a less government-protective alternative than the current doctrine. Some of the Supreme Court's qualified immunity jurisprudence supports the application of general negligence principles to decide qualified immunity issues.[117] This approach would borrow the common law "reasonable person" test, would require officers to exercise reasonable care under the circumstances, and would procure many of the benefits of "no qualified immunity" without incurring many of its costs. On occasion, the Court has taken a similar route. In *Hope v. Pelzer*, for example, the Court said that the purpose of qualified immunity is to provide "fair notice" to the official that his act is unconstitutional.[118] On that premise, the Court required the defendant to draw reasonable inferences from earlier cases, even where no prior case featured "materially similar" facts.[119]

In *Hope*, an Alabama prisoner, on a hot summer day, was attached to a hitching post and denied drinking water for eight hours as punishment for his disobedience.[120] An earlier case from the same circuit court, *Ort v. White*, held that a prisoner could be denied water until he complied with orders,[121] but the court distinguished such "necessary coercive measures" from punishment for prior misbehavior, which would violate the Eighth Amendment.[122] Thus, *Ort* distinguished a hypothetical fact pattern

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[117] The role of fault in these qualified immunity cases is not that negligence should serve as the general standard of care, as it does, for example, in tort suits arising from traffic accidents. Qualified immunity is a context in which the "function of negligence is to serve as a secondary legal norm parasitic on a primary legal norm." Kenneth W. Simons, *Dimensions of Negligence in Criminal and Tort Law*, 3 THEORETICAL INQUIRIES L. 283, 317 (2002). Thus, the relevant aspect of the behavior is the officer's state of mind with respect to the constitutionality of the act. Unless he can reasonably foresee that the act is unconstitutional, he is no more blameworthy than someone who uses force in self-defense under a mistaken, but reasonable, belief that his victim is attacking him. *Cf.* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 21 & cmt. h (AM. LAW INST., Tentative Draft No. 5, 2020) (recognizing a defense in this situation).

[118] 536 U.S. 730, 739 (2002).

[119] *Id.* at 739–41.

[120] *Id.* at 734–35.

[121] 813 F.2d 318, 325 (11th Cir. 1987).

[122] *Id.* at 327; *see also Hope*, 536 U.S. at 743 (examining how the Eleventh Circuit explained the distinction between "necessary coercive measures" from punishment in *Ort*).

roughly similar to the facts of *Hope*, in which the prisoner was punished by denial of drinking water after he was willing to obey orders and was no longer resisting.[123] *Hope* explained that the "premise" of *Ort*, along with other materials, gave "fair warning" that such punishment, as distinguished from "coercive measures" aimed at eliciting compliance with orders, would violate the prisoner's Eighth Amendment right.[124]

Hope clearly implies that officers are required to draw inferences. Drawing on *Hope*, some scholars have suggested that the qualified immunity doctrine may be reformed by adopting a rule akin to common law negligence, under which officers would be liable when they could reasonably foresee that their acts would violate a plaintiff's constitutional right.[125] If that principle were consistently enforced, officers would be held liable when they fail to draw reasonable inferences—a norm that has stood the test of time in common law torts.[126] Officers would be obliged to infer that garage doors are like front doors, that hearing aids are like eye glasses, and that they are not allowed to steal.[127] As applied to local governments, a case like *Connick v. Thompson* would come out in the plaintiff's favor under a negligence test.[128] Even if the Court was right in finding that the four earlier reversals did not provide enough notice to meet the "deliberate indifference" test,[129] the reversals certainly would suffice to show negligence on the part of the district attorney in his training and supervision of assistants.[130]

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[123] *See Hope*, 536 U.S. at 743 ("Hope was not restrained at the worksite until he was willing to return to work. Rather, he was removed back to the prison and placed under conditions that threatened his health.").

[124] *Id.*

[125] *See, e.g.*, Jeffries, *supra* note 35, at 259–60 ("[Q]ualified immunity should hew closely to notice as a proxy for fault. . . . Notice as a proxy for fault does not require a precedent precisely on point. . . . Notice is, or should be, a broader and more practical concept than the search for a factually similar precedent.").

[126] *See id.* at 259–63 (discussing the applicability of this reformed standard to instances where a reasonable officer should have known of the illegality of their actions).

[127] *See* Wells, *supra* note 13, at 431–38 (discussing how a looser standard for liability would apply to previously decided cases); *supra* notes 104–106 and accompanying text.

[128] *See supra* notes 108–116 and accompanying text.

[129] *See* Connick v. Thompson, 563 U.S. 51, 62 (2011) ("Those four reversals could not have put Connick on notice that the office's *Brady* training was inadequate with respect to the sort of *Brady* violation at issue here.").

[130] *See id.* (noting that "courts had overturned four convictions because of *Brady* violations by prosecutors in Connick's office").

Does strict liability, in either the "no qualified immunity" or vicarious liability version, more strongly deter violations than a general negligence principle? It might be thought that strict liability is more dissuasive than fault because it imposes liability for all violations, not just those violations that involve a policymaker's negligence.[131] But economic analysis of common law torts suggests caution.[132] If that analysis applies to constitutional torts as well, it is not clear that more liability will result in fewer violations. Deterrence works by forcing an actor to account for the costs and benefits of his act. A simple economic model implies that, under negligence, a government is liable when the costs of precautions are lower than the benefits of implementing them.[133] If (as I am stipulating in this Section) the officer's interests are aligned with those of the government, he will take precautions in those instances. Strict liability would hold the government liable when the costs of precautions are greater than the benefits. But it does not follow that the officer will take further precautions in order to avoid liability. A rational officer, seeking to minimize overall costs to the government, would prefer to incur a cost rather than take a precaution that costs more than it is worth.[134]

This brief account does not encompass every consideration that might favor one rule over the other, but it does suggest that the actual difference between strict liability and negligence in deterring violations is probably small, at least in private tort law.[135] Why?

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[131] *See* Jeffries, *supra* note 35, at 240 ("Across-the-board strict liability would make damages for constitutional violations routine and would thereby heighten the disincentives for governments to engage in conduct that might result in constitutional violations.").

[132] *See, e.g.*, *supra* notes 36, 66 and accompanying text.

[133] *See supra* notes 56–58 and accompanying text.

[134] *See* Posner, *supra* note 56, at 32 ("If the cost of safety measures or of curtailment . . . exceeds the benefit in accident avoidance to be gained by incurring that cost, society would be better off, in economic terms, to forgo accident prevention."); *id.* at 33 ("Where the measures necessary to avert the accident would have consumed excessive resources, there is no occasion to condemn the defendant for not having taken them."); *id.* at 41 ("Punishment for negligence would close an important safety valve in the negligence system. A standard of care is necessarily a crude approximation to optimality. Allowing enterprises a choice whether to comply or pay the social costs of violation may permit a closer approximation.").

[135] *See, e.g.*, KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 202 (5th ed. 2017) (comparing negligence with strict liability and finding that "the choice is often problematic"); Stephen G. Gilles, *Negligence, Strict Liability, and the Cheapest Cost-Avoider*, 78 VA. L. REV. 1291, 1313–20 (1992) (comparing the fault standard's optimal care test with strict liability's "cheapest cost-avoider" test).

Because even under strict liability, rational actors in the private sphere will not invest resources to stop injuries when the cost of paying for them is lower than the cost of preventing them. For constitutional torts, the implication is that, under both approaches, decisionmakers will sometimes find it justifiable to risk constitutional violations when the costs of preventing them are prohibitive.[136] It follows that strict municipal liability is unlikely to result in a significantly lower number of constitutional violations than would a rule of reasonable care for a constant level of government activity.[137] For example, suppose policymakers determine that violations of the Fourth Amendment's limits on "stop and frisk" practices produce great benefits in law enforcement that are worth the low liability costs, even if all victims sue and win.[138] In such a case, the level of deterrence effectuated by strict liability and negligence-based liability would seem to be much the same.

This convergence of strict liability and negligence does not mean that there are no grounds for preferring one over the other. Two differences between the rules are relevant to the choice between them. First, strict liability is simpler to administer because it avoids litigating the negligence issue. This point is important because it suggests that the default position should be in favor of strict liability. For example, this difference is an important basis for the strict products liability rule for manufacturing defects.[139] If the two

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[136] *See, e.g.*, Kramer & Sykes, *supra* note 19, at 284–85 (arguing that both strict and negligence-based liability "can motivate the municipality to adopt cost-effective measures to reduce the incidence of misconduct"); *see also* Vermeule, *supra* note 63, at 675, 678 (arguing that "it is excessively costly to strictly minimize the abuse of power by government officials," and that "given positive costs of enforcing constitutional rules, and competing uses for the relevant resources, some level of official abuse of power will be inevitable").

[137] *See* Kramer & Sykes, *supra* note 19, at 285 (noting the similar outcomes and suggesting that "by singling out negligent supervisory officials and identifying the measures that they should have taken, a negligence-based approach to vicarious liability might be more effective than strict vicarious liability at motivating cost-effective monitoring, training, and similar measures: negligence cases would generate a body of information about required precautionary measures for the guidance of other municipalities").

[138] This is a plausible assumption since plaintiffs may not recover based on the abstract value of constitutional rights but only for the harm they have suffered. *See supra* note 75–76 and accompanying text.

[139] *See* Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring in the judgment) (noting that use of a negligence rule would be "needlessly circuitous").

approaches produce similar deterrence and one costs less to administer than the other, then strict liability should be favored unless there are good reasons to favor negligence. But the constitutional tort context may differ from products liability in this regard. Part IV, below, suggests that good reasons do exist to depart from this default position in constitutional torts because the costs of strict liability may be higher than fault.

Second, studies of ordinary tort law suggest that the choice of strict liability over negligence will affect defendants' "activity level," a term borrowed from the jargon of economic analysis of torts.[140] It reflects the intuition that the more an activity costs us, the less of it we will do. Because the costs of an activity are higher under strict liability, people will engage in less of that activity under strict liability than under negligence.[141] In ordinary tort law, the "activity level" rationale may help explain the rule that actors are strictly liable for abnormally dangerous activities, such as transporting hazardous materials.[142] But this factor may cut in the opposite direction in the constitutional tort context. What is good policy for abnormally dangerous activities may not be good policy for judicial oversight of government. In particular, the "activity level" factor suggests that strict liability would lead to less policing, imprisoning, schooling, and governing activity that can produce constitutional violations. But it is far from clear that the overall benefits to society of this outcome would justify its costs, even if one consequence is a reduced number of constitutional violations. Unlike abnormally dangerous activities, policing and educating are probably not among the "class of activities . . . in which activity-level changes by

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[140] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 176 (4th ed. 1992) ("[P]otential injurers subject to a rule of strict liability will automatically take into account possible changes in activity level . . . in deciding whether to prevent accidents.").

[141] *See id.* at 176–77 (explaining how strict liability rules reduce activity level); Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 2–3 (1980) (explaining that a strict liability rule induces potential tortfeasors to consider both their level of care and their level of activity).

[142] *See, e.g.*, Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 916 F.2d 1174, 1177 (7th Cir. 1990) (explaining the activity level rationale behind holding a shipper of hazardous chemicals strictly liable for the consequences of a spill).

potential injurers appear to be the most efficient method of accident prevention."[143]

III. LOSS SPREADING

In ordinary tort law, compensation to the injured person and spreading the loss are sometimes considered distinct rationales for strict liability.[144] Thus, Justice Roger Traynor favored strict liability for defective products because, among other things, "the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."[145] In *Owen v. City of Independence*,[146] the U.S. Supreme Court touched on this development in the common law and seemed to accord it a role in constitutional torts. Justice Brennan wrote in his opinion for the Court: "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."[147] Other than this observation, the Court did not discuss loss spreading in *Owen*, and it has not relied on this policy in the forty years since *Owen*. A fair assessment is that the status of loss-spreading as a rationale for § 1983 strict liability remains unclear, at best.

A. THE VALUE OF LOSS SPREADING

The theory behind loss spreading is that strict liability will transfer funds from the defendant to the injured person, lessening the victim's harm.[148] This gain in welfare occurs even if the

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[143] POSNER, *supra* note 140, at 177–78; *see also* Kramer & Sykes, *supra* note 19, at 286 (noting that, in the public sector, "even if greater cost internalization would reduce the scale of activity, it is impossible to know whether such a reduction would be beneficial").

[144] It is important to note, however, that compensation as a tort "norm" can be defended, without resort to reliance on loss spreading, as a means of implementing "the value of individual autonomy or equal freedom." Mark A. Geistfeld, *Compensation as a Tort Norm*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 65, 66 (John Oberdiek ed., 2014).

[145] Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring in the judgment).

[146] 445 U.S. 622 (1980).

[147] *Id.* at 657.

[148] *See* Joseph H. King, Jr., *A Goals-Oriented Approach to Strict Tort Liability for Abnormally Dangerous Activities*, 48 BAYLOR L. REV. 341, 351 (1996) ("The underlying premise for loss-spreading is that accident costs should be 'collectively, not individually, borne,' because a loss causes less social and economic disruption if it is shared by many

defendant is not negligent or otherwise blameworthy and even if the transfer does not achieve greater deterrence than it would under negligence liability. Of course, the funds that are transferred to the victim come from the defendant. How, then, does the transfer result in any net gain? The answer lies in a concept called "the increasing marginal disutility of loss."[149] A huge loss to the victim of a major injury will cause considerable harm, or "disutility," to that person. But suppose the loss can be distributed over a large group of people by slightly adding to the price of a product or increasing taxes to residents of a municipality. By comparison, the disutility felt by each of the purchasers or taxpayers—even when added altogether—will be lower than the disutility felt by the victim of a devastating physical injury.[150] Thus, holding an actor liable who can spread losses, such as a product manufacturer or a municipal government, can diminish the overall disutility.[151] Putting aside the vocabulary of welfare economics and stating the point in commonsense terms: The loss would be a crushing blow if the victim were left to absorb all of it. That loss is diminished when spread because each of those who pays a tiny fraction of it suffers a minuscule loss. Even when all of those losses are added together, they amount to less than the harm that the uncompensated victim would suffer.

A variation on this line of reasoning is that, even without spreading, the "diminishing disutility" goal may be satisfied by identifying a defendant with a "deep pocket," or plenty of money. Such a defendant may be so well off that even a $100 loss will cause him less disutility than the injured plaintiff would suffer if no payment was made.[152] In practice, however, "loss spreading" and

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people." (footnote omitted) (quoting Michael J. Trebilcock, *The Future of Tort Law: Mapping the Contours of the Debate*, 15 CAN. BUS. L.J. 471, 472 (1989))).

[149] Michael L. Wells, *Constitutional Remedies: Reconciling Official Immunity with the Vindication of Rights*, 88 ST. JOHN'S L. REV. 713, 721 (2014).

[150] *See id.* ("This principle holds that as a monetary loss increases, the amount of well-being that is lost—'disutility'—goes up disproportionately to the amount of money that is lost. Thus, a loss of $100 may produce more disutility to one person than it would if one thousand people each paid ten cents into a fund to compensate the injured person.").

[151] *See, e.g.*, MARK A. GEISTFELD, TORT LAW: THE ESSENTIALS 42–43 (3d ed. 2008) (discussing "[c]ompensation of [i]njuries" by spreading losses).

[152] *See* Stephen R. Perry, *Tort Law* ("[T]otal disutility will in theory be reduced, again because of the diminishing marginal utility of money, by shifting a $100 loss from someone worth $100 to someone else worth $1,000."), *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 57, 68 (Dennis Patterson ed., 1996).

the "deep pocket" theme tend to converge because most defendants with deep pockets are businesses that can spread losses by raising prices, or, in the constitutional tort context, governments that can spread losses by raising taxes.

B. LOSS SPREADING AND CONSTITUTIONAL TORTS

The central point is that, under any version of the "diminishing disutility" rationale, "loss spreading" (or compensation) is a means toward that goal rather than an end. Again, one can easily lose sight of that point. It is plausible to describe both the means employed and the goal achieved as compensation, yet that description of the goal is incomplete and imprecise. The goal is not merely to compensate, but to diminish the amount of disutility (the end) by compensating from a certain type of source (the means). Absent spreading or deep pockets, the "diminishing disutility" goal simply is not realized. There seems to be no coherent argument that simply taking $100 from A and giving it to B will diminish the disutility of the loss.

Apart from the brief reference in *Owen*, neither loss spreading nor the "deep pocket" theory has gained a foothold in constitutional tort doctrine. One reason may be that Justice Brennan, the author of the Court's opinion in *Owen*, was more willing than most of the Justices to rely candidly on modern tort policy.[153] Another likely reason is that the emphasis on compensation in general tort theory is strongest in contexts in which losses are typically great, such as the types of physical injuries that often result from defective products. Those are the contexts in which the injured person's welfare is most seriously jeopardized and the case for loss spreading is strongest. By contrast, constitutional torts often involve small monetary claims, if only because § 1983 juries cannot be instructed to consider the value of the constitutional right in awarding damages for a violation.[154] A third reason—and to my mind the

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[153] *Compare* Smith v. Wade, 461 U.S. 30, 38–48 (1983) (Brennan, J., writing for the Court) (discussing historical to present day view of punitive damages), *with id.* at 66 (Rehnquist, J., dissenting) ("The decisions of state courts decided well after 1871, while of some academic interest, are largely irrelevant to what Members of the 42d Congress intended by way of a standard for punitive damages.").

[154] *See supra* notes 74–78 and accompanying text. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 308 (1986) (holding that "*no* compensatory damages could be awarded for

decisive one—is that the loss-spreading rationale, by its own logic, gives no weight to either the deterrence rationale or the costs of strict liability. Those costs are discussed in Part IV.

IV. COSTS OF STRICT LIABILITY

As discussed, strict liability—whether by abolition of qualified immunity or by vicarious liability—would produce benefits in the form of more effective vindication of rights, streamlined litigation of constitutional tort claims, and some loss spreading. It is not so clear that strict liability would more effectively deter constitutional violations. Even if it does, neither deterrence nor corrective justice nor loss spreading should overpower all countervailing considerations in § 1983 damages litigation. The remaining question is whether those benefits are worth their associated costs. Such costs are not measured in dollars. One cost, discussed in Section A, relates to the distribution of public resources. The second, addressed in Section B, concerns the long-term impact of abolishing qualified immunity on the content of constitutional rights. Section C addresses the third issue: whether strict liability would be fair to defendants. All three of these costs weigh against strict liability. Part V suggests that strict liability may be appropriate for a limited set of cases, though, despite its costs.

A. DISTRIBUTIVE JUSTICE

Both deterrence and corrective justice rationales ignore the impact of liability rules on *distributive* justice. Deterrence theory holds that liability should be imposed on the actor who can take the cheapest precaution.[155] The implication is that, as between a poor person who has the cheapest precaution, call him Al, and a richer person who could take similar—albeit more expensive—precautions, call him Bob, liability should attach to Al. Similarly, a core principle of corrective justice is that the wrongdoer cannot

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violation of that right absent proof of actual injury" because "the abstract value of a constitutional right may not form the basis for § 1983 damages").

[155] *See* John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 549–50 (2003) ("[T]he economic deterrence analyst will want to know not only what precautions are efficient to take, but who is the 'cheapest cost avoider'—the actor in a position to implement those precautions most cheaply.").

avoid payment by pointing to other circumstances that are irrelevant to the wrong itself.[156] The defendant has an obligation of corrective justice even if the victim is rich and the tortfeasor is poor and even if the victim is evil and the tortfeasor is virtuous. Tort theorists describe this point by distinguishing between corrective justice and "distributive justice," which involves the general fairness of the distribution of wealth and other benefits.[157] Corrective justice is widely seen as the dominant aspect of justice in ordinary tort law, which generates litigation focused on narrowly framed private interests on both sides.[158]

When plaintiffs seek damages from local governments, either through direct liability or indemnification, the values served by distributive justice carry more weight than they do in ordinary tort law because governments, by definition, make distributive justice decisions.[159] Moreover, in § 1983 municipal liability cases, payment to a constitutional tort victim will not come from a private tortfeasor, but from funds that would otherwise be spent on some public purpose—including programs that may have benefited the constitutional tort victim or persons more deserving of aid than the victim. These programs include education, social services, road maintenance, health care, police and fire protection, and all other functions of local government. As a practical matter, the choice may be between paying for constitutional torts and helping people who have suffered, or who are threatened by, more serious misfortunes than constitutional torts. In the short run, taxes could be increased to fund the extra liability, but at some point, taxpayers likely would resist the tax hikes. In the end, constitutional tort liability

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[156] *See id.* at 570 (stating that the aim of corrective justice is to "order[] that the full value of the loss be transferred to the responsible party via a damage payment equal to the value of the loss").

[157] *See* Levinson, *supra* note 75, at 407–08 (distinguishing distributive from corrective justice).

[158] *See* Jules L. Coleman, *The Practice of Corrective Justice* ("The claims of corrective justice are limited or restricted to parties who bear some normatively important relationship to one another. A person does not . . . have a claim in corrective justice to repair *in the air*, against no one in particular."), *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 53, 66–67 (David G. Owen ed., 1995).

[159] *See* Levinson, *supra* note 75, at 413 & n.230 (suggesting that there is a division of labor between distributive justice, which is "primarily relevant to the political process and public law," and corrective justice, which is "primarily relevant to judicial resolution of private law disputes").

doubtlessly can and does displace other uses of public funds. Governments may respond to strict liability by engaging in less of the activity that produces liability, again with unhappy consequences. For example, to the extent governments curb aggressive policing in order to diminish liability costs, all citizens will be exposed to greater risk of crime.[160]

This public/private distinction highlights a basic difference between common law torts and constitutional torts. The former deal with the rights and obligations of persons who are "juridical equals," while the latter involve "relationships of juridical inequality."[161] More importantly, the public/private distinction has a bearing on the selection of the proper liability rule for constitutional tort actions under § 1983. Governmental strict liability for constitutional torts is a form of "enterprise liability,"[162] which "expresses the maxim that those who profit from the imposition of risk should bear the costs of the accidents that are a price of their profits."[163] With constitutional torts, however, the residents of the municipality will, to a significant extent, comprise both sets: those who are at risk from constitutional violations by government and those who benefit from the constitutional violations.

Since constitutional tort liability would interfere with functions that benefit the public as a whole, the public/private distinction furnishes a rationale for rejecting qualified immunity or imposing vicarious municipal liability. Indeed, Professor Daryl Levinson even asserts that the public/private distinction "would seem to exclude compensation for constitutional torts from the corrective sphere."[164] Levinson may overstate the force of the distinction because it does not necessarily "exclude" the possibility of liability based on a corrective justice theory.[165] Levinson is right, however, in recognizing that constitutional tort liability is far removed from private tort liability because of the demands of distributive justice.

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[160] This "unintended deterrence" problem is discussed at length in John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 73–78 (1998).

[161] Peter Cane, *Tort Law and Public Functions*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS, *supra* note 144, at 148, 148–49.

[162] *See* JEFFRIES ET AL., *supra* note 3, at 217–18 (discussing the Court's rejection of any immunity defense for local governments and citing sources that favor general strict liability).

[163] Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1287 (2001).

[164] Levinson, *supra* note 75, at 413.

[165] *Id.*

The key point is that the legitimate activities of government are very real, and, therefore, they must play some role in determining the scope of governmental liability for constitutional torts.

B. THE VALUE OF A GAP BETWEEN RIGHTS AND REMEDIES

For many purposes, separating constitutional remedies from constitutional rights may be helpful so as to focus on the distinctive issues raised by each body of the doctrine. But the relations between the two cannot always be ignored: "[r]ights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence."[166] When the issue is whether to abolish qualified immunity, as Professor Schwartz proposes, a decision to loosen restrictions on remedies may well lead to weaker substantive constitutional protections.

Richard Fallon and John Jeffries have reflected at length on this topic. They have shown that these sorts of rights/remedies trade-offs can and do occur. Professor Fallon discerns in the case law on constitutional litigation a theme he calls the "Equilibration Thesis," which holds that "substantive rights, causes of action to enforce rights, rules of pleading and proof, and immunity doctrines all are flexible and potentially adjustable components of a package of rights and enforcement mechanisms that should be viewed, and assessed for desirability, as a whole."[167] One implication of the equilibration thesis is that "when courts regard the social costs of the existing bundle of rights and enforcement mechanisms as excessive, they might consider calibrating adjustments in any of the components of the package."[168] The equilibration thesis cannot predict with certainty the implications of any given change in remedial rules, but it does suggest that broader remedies may lead to "further, equilibrating adjustments."[169] To illustrate this thesis in the constitutional tort context, Fallon focuses mainly on official immunity, but he notes that the same reasoning applies to municipal liability.[170] Remedial equilibration suggests that, over

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[166] Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999).

[167] Fallon, *supra* note 25, at 480.

[168] *Id.* at 482.

[169] *Id.* at 486.

[170] *Id.* at 497–98.

time, a remedial expansion is likely to dilute constitutional rights.[171] Thus, even for the remedial maximalist, the ultimate effect of imposing strict § 1983 liability on municipalities may be deeply disappointing. Doing so could cause courts to contract rights, so as to make fewer forms of government conduct actionable in the first place.[172] And if this sort of constitutional boomerang effect occurs, remedial maximalists are likely to find themselves in a world in which even fewer plaintiffs can secure any § 1983 remedy at all. In short, the result may be no overall gain—or even a diminution—in the general level of protection of those rights.

Professor Jeffries adds a dynamic dimension to this line of analysis. He highlights that constitutional law gradually evolves as new problems arise and as attitudes change about the appropriate scope of constitutional protection.[173] Absent limits on damages liability, constitutional innovation will become especially costly because persons who have good constitutional claims under the hypothesized new regime could sue for damages that governments could not have anticipated and planned for.[174] Judges may hesitate to recognize new rights out of concern for the disruption of effective government that can result from new and costly burdens imposed by abrupt changes in constitutional law. In other words, according to Jeffries, "limiting money damages for constitutional violations fosters the development of constitutional law . . . by reducing the costs of innovation."[175] Jeffries recognizes that persons with constitutional claims at the time of the innovation will find themselves without a "backward-looking" remedy.[176] He counts this as a cost but views it as one worth bearing. In his view, the overall

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[171] *See* Levinson, *supra* note 23, at 887 ("[R]ights can be effectively enlarged, abridged, or eviscerated by expanding, contracting, or eliminating remedies. School desegregation, for example, is a case of remedial expansion of the *Brown* right.").

[172] *See* Fallon, *supra* note 25, at 487 ("Without official immunity, the Court might begin to interpret § 1983 . . . so that it would provide a cause of action to sue for damages for only a subset of constitutional violations.").

[173] *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 96–97 (1999) (providing several examples of how "the constitutional agenda is constantly changing").

[174] *See id.* at 109 ("It is precisely in these cases [of constitutional uncertainty or innovation] that the curtailment of money damages serves the useful purposes of avoiding excessive inhibition of the legitimate activities of government and reducing the costs of constitutional change.").

[175] *Id.* at 90.

[176] *Id.*

impact of liability-limiting doctrines is "a healthy bias toward the forward-looking."[177]

Professor Schwartz challenges the validity of Fallon and Jeffries's concerns.[178] She asserts that "over the past fifty years, the Supreme Court has progressively strengthened qualified immunity's protections for defendants on the one hand, and weakened plaintiffs' substantive constitutional protections on the other."[179] The first claim is accurate, but the second is not—at least with respect to the types of constitutional protections that generate a significant amount of constitutional tort litigation. For example, in *Board of Regents v. Roth*[180] and *Perry v. Sindermann*,[181] the Court recognized that the "property" and "liberty" guarantees of the Fourteenth Amendment were not limited to common law interests but also applied to government jobs and other benefits.[182] This doctrinal shift continues to produce litigation over the scope and application of due process protections.[183] The Court has recognized that the Due Process Clause applies to involuntary commitment to mental hospitals[184] and to the treatment of mental patients.[185] It has ruled that egregious misbehavior by officials violates the substantive component of the Due Process Clause;[186] that pretrial detainees are entitled to heightened protection under the Due Process Clause;[187] and that prisoners' Eighth Amendment rights

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[177] *Id.* at 91.

[178] *See* Schwartz, *After Qualified Immunity*, *supra* note 14, at 317–26 (responding to Fallon and Jeffries's argument).

[179] *Id.* at 322–23 (footnote omitted).

[180] 408 U.S. 564, 576 (1972).

[181] 408 U.S. 593, 599–601 (1972).

[182] *See generally* Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977) (describing the implications of Fourteenth Amendment Supreme Court cases and the new interpretations of "liberty" and "property" when defined separately under the Constitution).

[183] *See* NAHMOD ET AL., *supra* note 4, at 98–114 (discussing the term "property"); *id.* 114–25 (discussing the interpretation of "liberty"); *id.* 125–34 (discussing the Fourteenth Amendment's procedural "due process" doctrine).

[184] *See* O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) ("A finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement.").

[185] *See* Youngberg v. Romeo, 457 U.S. 307, 322–33 (1982) (recognizing "liberty interests in safety and freedom from unreasonable restraints").

[186] Cnty. of Sacramento v. Lewis, 523 U.S. 833, 849 (1998).

[187] *See* Kingsley v. Hendrickson, 576 U.S. 389, 391–92 (2015) (stating that "a pretrial detainee must show . . . only that the officers' use of that force was *objectively* unreasonable").

apply not only to deliberate punishments but also to prison conditions, medical care,[188] and protection from other prisoners.[189] *Graham v. Connor* held that police excessive force violates the Fourth Amendment[190]; *Village of Willowbrook v. Olech* recognized the viability of a "class of one" Equal Protection claim[191]; and *Connick v. Myers* set up a framework for adjudicating public employee speech claims.[192] This body of case law may not be as rights-protective as Professor Schwartz (or I) would like, but it founded modern constitutional tort litigation and authorized recovery to a significant number of plaintiffs. Given the Court's conservative bend over the past fifty years, these protections doubtfully would be as strong as they are without qualified immunity.

But Professor Schwartz cites impressive empirical research, much of it her own, which shows that "most law enforcement agencies do not collect [the relevant] information about lawsuits brought against their officers";[193] that "lawsuit payouts have no financial consequences for the majority of large law enforcement agencies across the country";[194] and that "[a]vailable evidence of indemnification and budgeting practices suggest that courts should not be overly concerned about damages awards against individual officers and agencies."[195] Professor Schwartz may be correct in her assessment of the current impact of constitutional tort liability. But it appears that someone is paying attention to the costs of constitutional tort suits. Another recent empirical study provides evidence that "insurance companies can and do shape police

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[188] *See* Estelle v. Gamble, 429 U.S. 97, 104 (1976) (holding that "deliberate indifference to serious medical needs of prisoners" violates the Eighth Amendment).

[189] *See* Farmer v. Brennan, 511 U.S. 825, 847 (1994) ("[A] prison official may be held liable under the Eighth Amendment . . . if he knows that inmates face a substantial risk of serious harm and disregards that, risk by failing to take reasonable measures to abate it.").

[190] 490 U.S. 386, 394 (1989) ("Where . . . the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment . . . .").

[191] 528 U.S. 562, 564 (2000) (per curiam).

[192] 461 U.S. 138, 146 (1983) ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.").

[193] Schwartz, *The Case Against Qualified Immunity*, *supra* note 14, at 1821–22.

[194] *Id.* at 1823.

[195] *Id.* at 1828.

behavior" by imposing training and oversight requirements as conditions of coverage.[196]

Even if Professor Schwartz is correct in her general assessment of the current situation, her empirical evidence cannot tell us what would happen if liability were extended by eliminating qualified immunity, as she proposes, or by global municipal liability, as other remedial maximalists recommend. The countervailing case for caution is that, other things equal, costly *changes* in official immunity or municipal liability doctrine may lead to a lower level of constitutional protection, not only by imposition of damages liability in many cases in which defendants currently prevail, but also by encouraging others to bring claims that would clearly be barred under the current immunity doctrine.

C. VINDICATION OF RIGHTS VS. FAIRNESS TO DEFENDANTS

Abolition of official immunity would involve imposing liability on officers who commit constitutional violations, even though they fully complied with the constitutional law in force at the time they acted. Would the abolition of official immunity be fair to officers? One answer might be that officers lack standing to raise a fairness objection since they are typically indemnified. There are three problems with this answer. First, it is contingent on the jurisdiction's willingness to continue to indemnify. Second, it ignores the officer's interest in avoiding the stigma of possible unjust liability.[197] Third, it does not resolve the fairness issue but merely reframes it. Now, the issue may be whether abolition would be fair to governments who ultimately pay. That is the core fairness issue and the focus of the ensuing discussion. But similar factors are at play no matter how the fairness issue is framed.

In *Owen v. City of Independence*,[198] the Court brushed aside concerns about the fairness of denying immunity to governments. Rather, the Court said, "Elemental notions of fairness dictate that one who causes a loss should bear the loss."[199] Since "the public at large . . . enjoys the benefits of the government's activities . . . it is

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[196] Rappaport, *supra* note 88, at 1549.

[197] *See* Wells, *supra* note 149, at 737–39 (arguing that defendants in constitutional torts cases also have an interest in being vindicated).

[198] 445 U.S. 622, 637–38 (1980).

[199] *Id.* at 654.

the public at large which is ultimately responsible for its administration."[200] Consequently, "[i]t hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby."[201] One way of understanding—or perhaps building upon—this rhetoric is to see it as conforming with the idea that municipalities are not merely abstract entities that collect and dispense money. They are, in essence, collaborative social projects undertaken by all those who fund them and enjoy the benefits they provide. These human beings are thus "stakeholders" rather than mere bystanders or strangers to the city's activities. Because they elect city leaders, who in turn oversee other municipal employees, these stakeholders bear some responsibility for the acts of both elected and appointed officials.

Owen advanced this anti-immunity rationale for a limited purpose.[202] The Court ruled only that local governments were liable for constitutional torts caused by their "official policy" or "custom."[203] Professor Schwartz and other remedial maximalists would, in effect, take *Owen*'s reasoning much further. They would impose liability on a municipality, and thus on the municipality's stakeholders, just because a street-level official has violated a constitutional right. But this view reaches too far. Even if vindication and deterrence are served by strict liability, it is not fair to city stakeholders to make them pay for *all* violations, no matter how newfangled, unforeseeable, or otherwise excusable the violation turns out to be.

In the first place, contrary to the Court's pronouncement in *Owen*, the proposition that "one who causes a loss should bear the loss" is not an "[e]lemental notion[] of fairness,"[204] or at least not an uncontested one in the common law of torts. Simple causation, standing alone, does not typically suffice to establish liability. Something more is *always* required, whether it be negligence, or an

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[200] *Id.* at 655.

[201] *Id.* at 654.

[202] *Id.* at 657 ("In sum, our decision holding that municipalities have no immunity from damages liability flowing from their constitutional violations harmonizes well with developments in the common law and our own pronouncements on official immunities under § 1983.").

[203] *Id.*

[204] *Id.* at 654.

intentional invasion of the plaintiff's interests, or an abnormally dangerous activity, or the introduction of a defective product into the stream of commerce.[205]

In the second place, the common law's reluctance to base liability on nothing more than causing a loss is justified, in large part, by the unfairness of imposing liability without fault. Obvious differences exist between constitutional torts and common law torts, but the nature of this unfairness is essentially the same in both contexts: in carrying out the activities of daily life that make up the subject matter of ordinary tort law, and in carrying out the activities of government that make up the subject matter of constitutional torts, actors face choices among alternative courses of action. *Any* choice may produce an injury, of either the common law or the constitutional variety. The basic task, in both common law and constitutional torts, is to determine whether, in light of the injury that occurred, the actor will be liable for the choice that the actor made. If the actor cannot appreciate, on the basis of the facts then reasonably available to him, that one course of action is riskier than another, he does not make a choice to risk harm to others when he acts. This is so even if, as events unfold, the act the officer has chosen turns out to generate more risk of injury—whether that injury is a common law wrong or a constitutional violation—than the alternative would have produced. In either case, imposing liability would be unfair because the actor has not chosen to generate excessive risk. A defendant who crashes his car into the plaintiff's building, for example, "causes loss" to another. But the driver is not liable if he lost control of the car on account of an unforeseeable epileptic seizure or suddenly turns the wheel to avoid running over a child.[206]

Turning to constitutional torts, consider two scenarios. In scenario (a), an officer (call him Oscar) faces a choice between two courses of action, which we will call "alpha" and "beta." Oscar chooses alpha. Stipulate that, *at the time Oscar acted*, it was clear to a reasonable person that "alpha" was in fact a choice of highly

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[205] Desmond M. Clarke, *Causation and Liability in Tort Law*, 5 JURIS. 217, 217 (2014) (explaining that "the mere fact that someone's behaviour affects another causally is not enough to imply liability").

[206] *See* Hammontree v. Jenner, 97 Cal. Rptr. 739, 741 (Cal. Ct. App. 1971) (explaining that the "liability of a driver, suddenly stricken by an illness rendering him unconscious, for injury resulting from an accident occurring during that time rests on principles of negligence").

doubtful constitutionality and that "beta" was not. Oscar is at fault and should even be denied official immunity because he could reasonably foresee that alpha would expose other people to a serious risk of constitutional violation, while beta would not.[207] If Oscar is a policymaker—or if a policymaker is at fault in hiring Oscar, training him, or supervising him—the local government should be liable as well.[208]

Now consider scenario (b), in which, at the time Oscar acted or failed to head off his subordinate's act, he could not reasonably foresee more constitutional danger from alpha than from beta because the law at that time did not distinguish between the two. In that event, Oscar did not choose to expose others to the risk of greater constitutional danger because he had no reason to know that this course of action would violate the Constitution, and he did not choose to risk that consequence. In *Pembaur v. City of Cincinnati*,[209] for example, the County Prosecutor, a policymaker, instructed police officers to enter a doctor's office without a warrant to serve "capiases," ordering them to appear before a grand jury.[210] This entry violated the doctor's Fourth Amendment rights, but the unconstitutionality of the entry became manifest only later when the Court decided *Steagald v. United States*.[211] The case law at the time of the event evidently "permit[ted] law enforcement officials to enter the premises of a third person to serve a capias."[212] If the unconstitutional consequence was "concealed," as I have stipulated, holding the prosecutor liable is unfair, and holding Cincinnati and its stakeholder-residents liable for the challenged act is equally

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[207] *See* John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 95 (1989) (noting that both wrongdoing and causation are needed before seeking corrective justice in an official immunity context).

[208] *See* Wells, *supra* note 41, at 306 (noting that policymakers may be liable for "the hiring, training, and supervising of relatively low-level government workers . . . who deal with potential constitutional tort victims on a daily basis").

[209] 475 U.S. 469 (1986).

[210] *Id.* at 472 & n.1.

[211] 451 U.S. 204, 211 (1981) (finding that entry into the home of a third person without a search warrant, absent exigent circumstances, violates the Fourth Amendment).

[212] *Pembaur*, 475 U.S. at 475.

unfair.[213] As Justice Holmes put the point, "[a] choice which entails a concealed consequence is as to that consequence no choice."[214]

V. POCKETS OF STRICT LIABILITY

The costs identified in Part IV support a general rule that negligence is the appropriate sorting mechanism for imposing constitutional tort liability. But the principle underlying that rule is that liability should depend on a comparison of costs and benefits. The cost-benefit approach advocated in this Article rejects a "one size fits all" approach. Instead, those costs must be balanced against the benefits of strict liability in each particular constitutional tort context.[215] In some cases, the benefits of strict liability may outweigh the costs.

A. STRICT LIABILITY FOR UNCONSTITUTIONAL GOVERNMENT POLICIES

The current municipal liability doctrine distinguishes between two sets of cases: (a) those in which the unconstitutional act is committed by a street-level officer (a majority of the reported cases), and (b) those in which the unconstitutional act is committed by a government or its policymakers. Strict liability is the rule for category (b).[216] These are instances in which local governments

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[213] *See also* Owen v. City of Indep., 445 U.S. 622, 657 (1980) ("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."). In *Owen*, policymakers fired the plaintiff without a hearing, which was allowed under Court doctrine at that time. *Id.* at 634. Two months later, the Court ruled that employees had a procedural due process right to a hearing in such circumstances. *Id.* The Court ruled that the city was liable under the new ruling. *Id.* at 657.

[214] OLIVER WENDELL HOLMES, THE COMMON LAW 76 (Mark DeWolfe Howe ed., 1963). For a roughly similar line of reasoning in the qualified immunity context, see generally Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583 (1998).

[215] A corollary of this line of reasoning is that, in a given context, the benefits of liability may be *especially* low compared to the costs, so much so that absolute immunity may be the appropriate rule. *See, e.g.*, Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1138–48 (1981) (arguing that the high costs and low benefits of litigation against legislators and judges may justify the absolute immunity these officers enjoy).

[216] Category (a) cases typically require a showing of "deliberate indifference" on the part of policymakers in order to impose strict liability. In my view, that rule is too favorable to the government. Negligence should be sufficient for liability. *See* Wells, *supra* note 41, at 299–

enforce unconstitutional policies,[217] as well as "single act" cases like *Pembaur*, in which municipal policymakers commit constitutional violations.[218] In these situations, policymakers enact an unconstitutional rule of general application,[219] or enforce an informal top-down custom to similar effect, or give a single non-recurring order. *Monell* and *Pembaur* illustrate the point that in each of these situations the government is strictly liable, even if the policy or the single act of the policymaker seems to be valid under the law at the time and is only later determined to be unconstitutional. Application of the negligence principle would shield governments from liability in some of these cases. Nonetheless, good reasons may exist to retain the current strict liability rule for these category (a) cases.

When the government's policymakers directly violate constitutional rights, the benefits of strict liability may be sufficiently high to justify an exception to the general negligence rule for this narrow category of constitutional torts. First, government responsibility for the violation in these cases is manifest since the government's policymaker commits the violation.[220] Second, vindication of rights is more fully realized by removing the negligence requirement. Third, litigation that challenges formal rules and top-down customs may implicate especially strong vindication and deterrence concerns because most rules and customs apply to many specific instances. They will typically affect others besides the plaintiff. Thus, the benefits of the plaintiff's victory will probably be shared by others. Fourth, removing the negligence hurdle simplifies the litigation and avoids the risk that a jury will in some cases find no negligence, and thus

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300 (arguing that the deliberate indifference standard "puts too many hurdles in the path of plaintiffs" and advocating that the Court replace this standard "with an objective test similar to the reasonableness rule of common law negligence").

[217] *See Owen*, 445 U.S. at 650 (rejecting "a construction of § 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations").

[218] *See* Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986) ("[I]t is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances.").

[219] *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 661 (1978) (analyzing a policy requiring female employees to take pregnancy leave at five months of pregnancy).

[220] *See* Bd. of the Cnty. Comm'rs v. Brown, 520 U.S. 397, 404–05 (1997) ("Where a plaintiff claims that a particular municipal action *itself* violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straightforward.").

sacrifice vindication and deterrence for no good reason. Fifth, the strict liability rule is already in place and seems to work well in practice.[221] Experience with it, in the narrow category to which it applies, has given rise to no outcry for change and does not suggest any compelling need for change. No current U.S. Supreme Court Justice seems to have raised any objection to it.

Ultimately, it is fair to say that retaining the rule of strict liability for category (b) cases carries with it some costs linked to less fairness, less distributive justice, and the "rights-retrenchment" risk due to remedial equilibration.[222] On balance, however, these costs may be worth bearing in this small set of constitutional tort cases. This line of reasoning would also support imposing strict liability on state governments as well, if not for the Court's rulings that states are not among the "person[s]" who may be sued under § 1983.[223]

B. EXCESSIVE FORCE LITIGATION

In most fact patterns, the current qualified immunity rule distinguishes between (a) the substantive constitutional rule violated by the officer and (b) the clarity of that constitutional rule and of its application to the facts at hand. The basis for a defense, either under current law or the negligence alternative I have proposed, is that (a) and (b) raise distinct issues, such that they should be kept separate. With respect to (b), the fairness and deterrence goals of constitutional tort law are better served by basing liability on negligence rather than strict liability.

In one context, however, the distinction between (a) and (b) is illusory, at least as a practical matter. These are cases in which the police use force in connection with an arrest. The constitutional rule is that an officer's use of force is a seizure, which violates the Fourth Amendment's prohibition on "unreasonable . . . seizures" if the force

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[221] *See* cases cited *supra* notes 217–218.

[222] *See supra* Part IV.

[223] 42 U.S.C. § 1983 (2018); *see also* Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) ("We hold that neither a State nor its officials acting in their official capacities are 'persons' under § 1983."); Quern v. Jordan, 440 U.S. 332, 345 (1979) (stating that "§ 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States").

is excessive.[224] The question of "whether the force used to effect a particular seizure is 'reasonable' . . . requires a careful balancing of 'the nature and quality of the intrusion . . .' against the countervailing governmental interests at stake."[225] But qualified immunity adds another layer of protection against liability. Under current law, an officer may win even if his use of force is excessive (and thus unreasonable) if he can show that he made a reasonable mistake as to the reasonableness of his force.[226] Although the two issues are analytically distinct, the "cumulation of messages . . . has led many lower courts to reject civil liability for excessive force in circumstances where such liability seems fully justified."[227]

The cost-benefit approach to qualified immunity suggests that the benefits of qualified immunity are comparatively weak in this context. Fair notice to the officer is satisfied by the plaintiff's burden to show a lack of reasonableness as to the need for and amount of force in order to prevail on her Fourth Amendment issue. Qualified immunity requires a further inquiry into whether the officer made a reasonable mistake as to Fourth Amendment reasonableness. But that extra layer of protection is not necessary to ensure that he is treated fairly. From the standpoint of incentives, the Fourth Amendment's reasonableness hurdle only assures that the liability rule will deter the use of force when there is no plausible rationale for the use of force or its amount given the circumstances. Thus, "qualified immunity would impart only a very slight addition to the protections built into the constitutional standard for excessive force."[228]

Conversely, the benefits of strict liability may be especially high in the excessive force context. Recall that strict liability is sometimes justified in common law torts on the theory that some activities are "abnormally dangerous," even if necessary.[229] In such contexts, strict liability is imposed in order to diminish the "activity

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[224] Graham v. Connor, 490 U.S. 386. 394 (1989) (observing that excessive use of force claims are "most properly characterized as . . . invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons . . . against unreasonable . . . seizures' of the person." (quoting U.S. CONST. amend. IV)).

[225] *Id.* at 396 (quoting Tennessee v. Garner, 471 U.S. 1, 8 (1985)).

[226] *See* Saucier v. Katz, 533 U.S. 194, 206 (2001) (stating that even if an officer applied unreasonable force, qualified immunity still applies if "the mistaken belief was reasonable").

[227] Jeffries, *supra* note 35, at 267–68.

[228] *Id.* at 267.

[229] *See supra* note 142–143 and accompanying text.

level" of these activities, such as blasting or the transportation of hazardous substances.[230] In general, this "activity level" rationale for strict liability seems inapplicable to the governmental activities that give rise to most constitutional tort suits. But it may be appropriate to apply this reasoning to the narrow context of police use of force. A string of recent incidents involving excessive force has given rise to calls for reform of police practices.[231] In this context, strict liability may serve a purpose similar to that of the common law rule on abnormally dangerous activities. If governments respond to strict liability by reducing the targeted activity, then strict liability would lead to fewer uses of force by the police. The result would be to cut back on violations of constitutional rights without sacrificing fairness to officers and governments or overly deterring effective police work.

VI. COLLATERAL BENEFITS OF ABOLISHING QUALIFIED IMMUNITY

The qualified immunity doctrine increases the complexity—and thus the cost—of litigation. The problem is not just that courts must address an issue besides the substantive merits. Two U.S. Supreme Court doctrines increase the cost even further by adding to the complexity of constitutional tort litigation. Professor Schwartz argues, rightly, that eliminating qualified immunity would eliminate these added complications and thus lower the cost of constitutional tort litigation.

First, in any constitutional tort case, the plaintiff must win both on the merits and on immunity. In *Pearson v. Callahan*, the Court said that trial judges have discretion to decide the immunity issue before the merits.[232] When a judge upholds immunity, it becomes unnecessary to reach the merits at all.[233] That decision may then be

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[230] *See supra* notes 140–142 and accompanying text.

[231] *See, e.g.*, Jon Kamp & Valerie Bauerlein, *Viral Videos from Protests Fuel Broader Debate Over Policing*, WALL ST. J. (June 6, 2020, 11:58 AM) https://www.wsj.com/articles/viral-videos-from-protests-fuel-broader-debate-over-policing-11591398962 (discussing incidents of police excessive force during demonstrations and protests sparked by the killing of George Floyd during an arrest); *see supra* note 4.

[232] 555 U.S. 223, 236 (2009).

[233] *See id.* at 237 (stating that, by deciding the immunity issue first, district courts can avoid "[u]nnecessary litigation of constitutional issues" that "wastes the parties' resources" and that exacerbates "heavy caseloads").

reversed on appeal, thus requiring another trip to the district court, or the appellate court may uphold the immunity claim, perhaps leaving the state of the law uncertain.

The second cost generator is *Mitchell v. Forsyth*, which allowed interlocutory appeals from denials of qualified immunity.[234] Thus, a defendant may assert qualified immunity in a motion to dismiss the complaint and in a motion for summary judgment.[235] If she loses, she may be entitled to immediately appeal that ruling, delaying further proceedings on the merits.[236] In theory, she may raise immunity in a motion to dismiss, appeal the judge's denial, lose the appeal, raise immunity again in a motion for summary judgment, and again appeal the judge's denial.[237] An additional complication is that some, but not all, denials of qualified immunity are immediately appealable.[238] The Court has distinguished between denials of immunity based on questions of law and those based on findings of evidence sufficiency.[239] When a denial of qualified immunity is based on the judge's determination that the plaintiff's evidence is sufficient to permit success at trial, an interlocutory appeal is not available.[240] Issues can then arise as to whether a given denial of immunity falls on one side or the other of this line.[241]

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[234] 472 U.S. 511, 530 (1985).

[235] *See* Behrens v. Pelletier, 516 U.S. 299, 306–07 (1996) (explaining that, under *Mitchell*, a defendant can assert qualified immunity at "successive stages").

[236] *See id.* at 307 ("*Mitchell* clearly establishes that an order rejecting the defense of qualified immunity at *either* the dismissal stage *or* the summary judgment stage is a 'final' judgment subject to immediate appeal.").

[237] *Id.*

[238] *See* Johnson v. Jones, 515 U.S. 304, 307 (1995) (holding that denials of qualified immunity based on issues of fact are not immediately appealable).

[239] *See Behrens*, 516 U.S. at 313 (explaining that denials of immunity based on issues of law are final decisions, whereas denials based on findings of evidentiary sufficiency are not).

[240] *Johnson*, 515 U.S. 307.

[241] *See, e.g.*, Felders *ex rel.* Smedley v. Malcom, 755 F.3d 870, 878–79 (10th Cir. 2014) (noting that "the district court ultimately denied summary judgment because issues of fact remained" but still finding that the court had "jurisdiction to consider [the defendant's] legal challenges" to several determinations); George v. Morris, 736 F.3d 829, 834–36 (9th Cir. 2013) (finding that the challenges to the trial court's denial of qualified immunity largely concerned the sufficiency of evidence provided by respondent, yet still reviewing the trial court's order to determine whether the petitioners were entitled to qualified immunity as a matter of law); Fancher v. Barrientos, 723 F.3d 1191, 1199–1200 (10th Cir. 2013) (holding that several of the challenges to the trial court's denial of qualified immunity were purely concerned with issues of fact rather than law, thus the court lacked jurisdiction to review them).

Professor Schwartz points out that these doctrines generate significant costs because of (1) the need to adjudicate the immunity issue, (2) the uncertainty as to substantive rights that *Pearson* can produce, and (3) the tendency of both doctrines to require trips up to the circuit court and back down again. Her research amply supports that "qualified immunity actually increases the time, cost, and complexity of civil rights cases in which the defense is raised."[242] Some of those costs relate to the litigation of the immunity issue[243] and cannot be avoided without abolition. But others are directly linked to the *Mitchell* doctrine. For example, "cases can be suspended while qualified immunity motions and appeals are pending."[244] Her research found "formal discovery stays—lasting 152 days, on average—in almost 6% of the cases in the docket dataset in which qualified immunity was raised at the motion to dismiss stage."[245] In addition, "interlocutory appeals were pending for 441 days on average before being decided."[246] *Pearson*'s impact, though harder to quantify, has led to "confusion about the scope of constitutional rights" since "[a]pproximately one-quarter of circuit court decisions grant defendants qualified immunity without first ruling on the constitutionality of defendants' behavior."[247] The uncertainty means that qualified immunity will be available in the next case and the one after that, until a court eventually resolves the constitutional issue. By hypothesis, some of the claims that were denied will turn out to be meritorious, and the vindication and deterrence goals will have been thwarted by *Pearson*.

Mitchell and *Pearson* generate significant costs. Professor Schwartz and others document the magnitude of those costs. But her solution—the abolition of qualified immunity—is not proportionate to the problem. Those costs can be largely, if not wholly, eliminated without jettisoning qualified immunity. All that is necessary is to overrule *Mitchell* and *Pearson*. To put the point more precisely: suppose that, absent this set of costs, the case for

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[242] Schwartz, *After Qualified Immunity*, *supra* note 14, at 338.

[243] *See id.* at 338 ("[T]hey spend time and money researching, briefing, writing, arguing, and deciding motions raising qualified immunity.").

[244] *Id.* at 340.

[245] *Id.*

[246] *Id.*

[247] *Id.* at 318 & n.33 (citing Professor Schwartz relies on Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 33–34 (2015)).

abolition falls short because an assessment of the pluses and minuses of keeping a modified version of the doctrine comes out in favor of retention, as I have suggested in Parts II and III. In that event, the costs associated with *Pearson* and *Mitchell* would not suffice to tip the scales because those costs can be eliminated by overruling *Pearson* and *Mitchell* without giving up the benefits of maintaining a qualified immunity doctrine.

VII. CONCLUSION

U.S. Supreme Court cases on qualified immunity have pushed the doctrine too far in favor of defendants. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law,"[248] and even defendants meeting those criteria may escape liability "unless the right's contours were sufficiently definite that *any* reasonable official in the defendant's shoes would have understood that he was violating it."[249] By documenting the failings of this doctrine, Professor Schwartz's empirical studies have made a strong case for reform. The municipal liability doctrine, which currently requires proof of policymakers' "deliberate indifference" to subordinates' constitutional violations, is also overly protective of government defendants in many of its applications. But the solution is not to eliminate qualified immunity or to impose vicarious liability. The costs of strict liability would be considerable, and many of the benefits could be obtained at lower cost by adopting the negligence principle as the liability rule in both contexts.

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[248] Ziglar v. Abbasi, 137 S. Ct. 1843, 1867 (2017) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

[249] Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) (per curiam) (emphasis added) (quoting Plumhoff v. Rickard, 572 U.S. 765, 778–79 (2014)).