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Foreword: Symposium Re-Examining First Principles: Deterrence and Corrective Justice in Constitutional Torts

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SYMPOSIUM

FOREWORD

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> *The purpose of [constitutional torts] is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails*[1]

It has long been accepted that deterrence and vindication are two of the primary purposes of the body of law we know as "constitutional torts."[2] Justices of every ideological stripe have acknowledged deterrence and vindication as the legitimate objectives of suits

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* J. Alton Hosch Professor of Law, University of Georgia. This Symposium is an outgrowth of a program sponsored by the Civil Rights Section of the AALS at the AALS Annual Meeting in San Francisco in January, 2001. I want to thank the panelists for their thoughtful and provocative papers and Emily Hammond for her research assistance.

[1] Wyatt v. Cole, 504 U.S. 158, 161 (1992) (O'Connor, J.).

[2] The phrase "constitutional tort" was coined by the author of the Afterword to this Symposium, Marshall Shapo, in his classic exploration of the subject. Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape *and the Frontiers Beyond*, 60 NW. U. L. REV. 277 (1965). This phrase has come to encompass both suits brought against local governments and state officials under 42 U.S.C. § 1983, and suits brought directly against federal officials under the United States Constitution in what are referred to as *Bivens* actions. *See* Bivens v. Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (applying later form of action).

against governments and government officials who violate a person's constitutional rights. Justices with philosophies as divergent as Brennan's and Scalia's agree that civil rights actions serve an essential vindicatory function.[3] Justices Breyer, O'Connor, Blackmun, White, Marshall, and Powell have authored opinions that embrace the deterrent effect of such actions.[4] The acceptance of deterrence and vindication as the twin goals of constitutional torts is so complete that the Justices and most scholars appear to take them as a given. The issues that divide members of the Court and commentators do not pertain to *whether* deterrence and vindication are legitimate and achievable goals, but rather *how* best to achieve them.

Professor Daryl Levinson challenged this orthodoxy in a provocative article that asserts that constitutional tort actions do not deter wrongdoing and may not advance the goal of corrective justice.[5] Levinson's article invites—indeed, demands—scholars in

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[3] Carlson v. Green, 446 U.S. 12, 24 (1980) (Brennan, J.) (noting the "essentiality of the survival of civil rights claims for complete vindication of constitutional rights" (quoting Green v. Carlson, 581 F.2d 669, 674-75 (7th Cir. 1978)) (internal quotations omitted); Anderson v. Creighton, 483 U.S. 635, 638 (1987) (Scalia, J.) ("When government officials abuse their offices, action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees.") (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (Powell, J.)) (internal quotations omitted).

[4] Richardson v. McKnight, 521 U.S. 399, 403 (1997) (Breyer, J.) ("[Section] 1983 basically seeks to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide related relief.") (quoting *Wyatt*, 504 U.S. at 161) (internal quotations omitted); Wyatt v. Cole, 504 U.S. 158, 161 (1992) (O'Connor, J.) ("The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-68 (1981) (Blackmun, J.) ("If a government official acts knowingly and maliciously to deprive others of their civil rights, he may become the appropriate object of the community's vindictive sentiments."); *id.* at 268 ("the deterrence of future abuses of power by persons acting under color of state law is an important purposes of § 1983"); Butz v. Economou, 438 U.S. 478, 505 (1978) (White, J.) ("If... all [federal] officials exercising discretion were exempt from personal liability, a suit under the Constitution could provide no redress to the injured citizen, nor would it in any degree deter federal officials from committing constitutional wrongs."); Robertson v. Wegman, 436 U.S. 584, 590-91 (1978) (Marshall, J.) ("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."); Carey v. Piphus, 435 U.S. 247, 254-57 (1978) (Powell, J.) (discussing compensation and deterrence purposes of § 1983 as comparable to purposes of tort liability).

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

this field to re-examine first principles of constitutional tort law that largely have been taken for granted. This Symposium provides a forum for a careful and thoughtful consideration of whether constitutional tort law can deter wrongdoing and is consistent with principles of corrective justice. This brief introduction cannot do justice to Levinson's arguments, and the reader is encouraged to read his article in its entirety. I offer the following synopsis of his arguments to set the stage for the responses that appear in this Symposium.

I. PROFESSOR LEVINSON'S CHALLENGES

A. CHALLENGE NUMBER 1: CONSTITUTIONAL TORTS AND DETERRENCE

Professor Levinson maintains that constitutional tort liability does not deter violations of constitutional rights. The fundamental problem, according to Levinson, is that government does not respond to monetary incentives in the same way as does a private firm. The type of cost-benefit analysis that underlies economic explanations of private conduct is problematic in the public sector. Levinson sees problems on both the cost and benefit side of the traditional equation. In the first place, the benefits of violating constitutional rights are not readily converted into a monetary value.[6] For example, it is difficult, if not impossible, to place a dollar value on the benefits of suppressing unpopular, but constitutionally protected speech. With regard to costs, Levinson asserts that government officials do not respond to liability incentives in the same manner as private entities. The problem is that political incentives, rather than monetary reward, drive political decisionmaking. "Because government actors respond to political, not market, incentives, we should not assume that government will internalize social costs just because it is forced to make budgetary outlay."[7]

According to Levinson, deterring constitutional violations would remain problematic even if government officials responded more

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[6] *Id.* at 350-52.
[7] *Id.* at 347.

directly to economic incentives. The problem lies in the counter-majoritarian nature of many constitutional rights. "So long as the social benefits of constitutional violations exceed the compensable costs to the victim and are enjoyed by a majority of the population, compensation will *never* deter a majoritarian government from violating constitutional rights, because the majority of citizens will gain more from the benefits of government activity than they lose from the taxes necessary to finance compensation payments to victims."[8] In other words, constitutional tort liability will not deter unconstitutional law enforcement practices that target minority populations, as long as a majority believes it benefits more from such practices than it pays out in claims.

B. CHALLENGE NUMBER 2: DO CONSTITUTIONAL TORTS ACHIEVE CORRECTIVE JUSTICE?

Levinson expresses doubts as to whether constitutional torts can advance the goal of corrective justice. While Levinson identifies a number of problematic aspects of attempting to vindicate constitutional rights through a damage remedy, four points merit particular attention. First, Levinson states that "it is not clear whether a collective entity like the government can qualify as a moral agent for purposes of corrective justice."[9] Constitutional wrongdoing is "best understood as an institutional, not individual, phenomenon."[10] Imposing liability on individual government officials, he argues, "will be arbitrary from a moral point of view . . . ."[11] Moreover, the fact that taxpayers bear the ultimate obligation to compensate the constitutional tort victim "further attenuates the connection between moral responsibility and the burden of rectification."[12]

Second, Levinson maintains that since many constitutional rights are "systemic"[13] in nature, awarding compensation to a few specific

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[8] *Id.* at 370 (emphasis in original).
[9] *Id.* at 408.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* at 409. That is, constitutional rights "prohibit government actions for reasons having nothing to do with preventing specified forms of harms to identifiable individuals." *Id.*

individuals in such cases "would be entirely artificial" from a corrective justice perspective.[14] Third, and relatedly, Levinson points out the "mismatch" between monetary damages and the constitutional values being vindicated.[15] He maintains that "constitutional harms and dollars are *incommensurable*, meaning they cannot be compared on a single metric, or ranked on a single scale of value."[16] This mismatch is compounded by the fact that the relationship between the potential monetary award and the injury to constitutional values "is seldom proportional and often entirely arbitrary."[17] Levinson illustrates this point by positing two examples of First Amendment violations. In the first case an adult entertainment establishment is forced out of business by an unconstitutional municipal ordinance; and in the second case peaceful political demonstrators are wrongfully dispersed by the police.[18] According to Levinson, the latter represents a more serious impingement on core First Amendment values, but the former would likely produce a more substantial monetary recovery.[19]

Fourth, Levinson argues that corrective justice is achieved only at the sacrifice of distributive justice. That is, litigating and paying judgments to constitutional tort plaintiffs diverts resources that could be used for other more important public purposes, such as redistributing wealth through social spending.[20]

II. THE RESPONSES

Since the responses appear in full in this Symposium, I will only briefly preview what is to follow. Professors Gilles and Serr respond to Levinson's arguments pertaining to deterrence. Professor Gilles develops an argument that, despite differences between the public and private sectors, government officials do in fact respond to potential constitutional tort liability. Gilles argues that rational

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[14] *Id.*
[15] *Id.* at 410.
[16] *Id.* (emphasis in original).
[17] *Id.*
[18] *Id.* at 410-11.
[19] *Id.* at 411
[20] *Id.* at 412-13.

public officials would want to deter constitutional violations because litigation disrupts the day-to-day functioning of officials and their departments, liability costs can adversely affect departmental budgets, and negative publicity associated by constitutional tort claims often translates into "political currency that moves political actors."[21] Gilles asserts that the real obstacles to deterring constitutional violations are various immunity doctrines that over-protect local governments and their officials. Gilles suggests a variety of ways in which constitutional tort law might better achieve deterrence. Among her suggestions are greater focus on municipal "customs" that lead to constitutional violations,[22] increased use of punitive damages,[23] and expanded use of structural reform injunctions.[24]

Professor Serr is in full agreement with Gilles that the deterrent potential of constitutional tort law is hampered by existing doctrine that, in his view, over-protects defendants. Serr's article focuses primarily on the Supreme Court cases dealing with the liability of local governments. Drawing on his experience as counsel for the plaintiffs in an important recent Supreme Court case,[25] Serr concludes that "the Supreme Court has by judicial fiat and judicial intervention imposed extra-textual barriers to recovery that have so narrowly restricted the scope of municipal liability under § 1983 as to make it practically unavailable to litigants."[26] If constitutional torts fails to deter constitutional wrongdoing, it is because "the Court's overzealous guarding of the municipal treasury has turned § 1983's promise of a federal remedy into a virtually empty promise."[27] In Serr's view, the deterrent potential of constitutional tort

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[21] Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 861 (2001).

[22] *Id.* at 867-68.

[23] *Id.* at 871-75.

[24] *Id.* at 875-79.

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

[26] Brian J. Serr, *Turning Section 1983's Protection of Civil Rights into an Attractive Nuisance: Extra-Textual Barriers to Municipal Liability Under* Monell, 35 GA. L. REV. 881, 883 (2001).

[27] *Id.*

cannot be assessed empirically "until the justice system provides a meaningful threat of legal accountability."[28]

Professors Dauenhauer and Wells tackle the corrective justice issues. They maintain that rather than competing, principles of corrective and distributive justice "complement one another."[29] More specifically, principles of distributive justice determine the distribution of rights and corrective justice addresses what remedy is appropriate when those rights are violated.[30] Borrowing from the writings of contemporary French philosopher Paul Ricoeur, Dauenhauer and Wells argue that when governments or their officials deprive individuals of their constitutional rights, they diminish the victim's capacity to be "a full-fledged participant in his or her political society."[31] A remedy should be provided to restore the victim's ability to act as a "capable man."[32] The moral claim for a remedy in the constitutional tort context is all the stronger because of the "paradoxical character of the state"—the state is both the chief protector of and the principal threat to the constitutional rights of its citizens.[33]

Dauenhauer and Wells acknowledge "the difficulty of making up for such intangible harms by way of cash payments," but note that similar arguments have been rejected in analogous common-law tort contexts, such as awarding damages for pain and suffering, emotional distress, and dignitary injuries.[34] "Whatever its deficiencies, monetary compensation is better than nothing. It can provide victims with new opportunities to exercise their capacities, opportunities they would not otherwise have had."[35]

A particularly intriguing feature of Dauenhauer and Wells' conception of corrective justice is its allowance for various immunities. Some form of governmental immunity is needed, they argue, to preserve "government's ability to perform necessary functions,"

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[28] *Id.* at 902.
[29] Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903, 907 (2001).
[30] *Id.* at 905-07.
[31] *Id.* at 914.
[32] *Id.* at 912-14.
[33] *Id.* at 915.
[34] *Id.* at 927.
[35] *Id.*

including protecting the rights of others.[36] In this respect, Dauenhauer and Wells formulate a vision of corrective justice that offers a remedy proportional to both the loss suffered by the victim and the government's capacity to provide it while remaining an efficiently functioning entity.

It is fitting that this Symposium concludes with the comments of Professor Marshall Shapo. It was Professor Shapo's scholarship that carved out constitutional torts as a distinct subject of academic inquiry more than thirty-five years ago. His observations today remind us that whether viewed through the lens of moral philosophy or economic theory, claims seeking redress for violations of constitutional rights are, and always have been, a species of tort. Thus, when re-examining first principles, we are inevitably informed and influenced by developments in this traditional first-year common law subject. Yet, Shapo puts his insightful finger on the distinctive feature of constitutional torts that makes it worthy of independent study: "a governmental official inflicting indignities on a citizen who cannot defend herself, let alone retaliate. The constitutional tort provides a legal kicker in this type of case, precisely because of the relation of power—monopoly power, in fact—and vulnerability."[37]

As long as governments and their officials have the potential to abuse power, there will be a need for a constitutional tort remedy. As long as there remains a need for that remedy, periodic re-examinations of first principles, such as that contained in this Symposium, will invite scholars and jurists alike to think seriously about whether the law is achieving its stated purposes.

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[36] *Id.* at 924.

[37] Marshall S. Shapo, *Afterword*, 35 GA. L. REV. 931, 935 (2001).