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DAMAGES FOR CONSTITUTIONAL VIOLATIONS: THE RELATION OF RISK TO INJURY IN CONSTITUTIONAL TORTS

John C. Jeffries, Jr. *

THIS Article explores the appropriate measure of compensation for violations of constitutional rights. Specifically, I wish to examine the relation of risk to injury in constitutional torts. In ordinary tort law, there is a familiar notion that compensatory damages should be limited to injury within the risks that made the actor's conduct tortious. This idea has obvious application in the law of constitutional torts. Basically, the analogy suggests that compensation for violations of constitutional rights should encompass only constitutionally relevant injuries—that is, injuries within the risks that the constitutional prohibition seeks to avoid. On this view, the relation of risk to injury helps determine the appropriate measure of compensation for constitutional violations. This Article develops this idea and identifies some of its implications.

I. OF COMPENSATION AND DETERRENCE

Damages for constitutional violations may be sought under either

* Emerson Spies Professor of Law and John V. Ray Research Professor of Law, University of Virginia. I am grateful to the participants in a faculty workshop at the University of Virginia for helpful criticism of an earlier version of this Article. Special thanks go to Kenneth Abraham, Lillian BeVier, Peter Low, Glen Robinson, and William Stuntz for detailed comments and to J.B. Howard and Matthew Mason for research assistance.

42 U.S.C. section 1983[1] or the parallel common-law remedy based on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[2] These actions are commonly called "constitutional torts," and they are in many respects analogous to ordinary torts.

Both constitutional tort law and ordinary tort law are an uneasy amalgam of regulation and compensation. That is, both regimes share an instrumental concern to inhibit undesirable conduct and a noninstrumental desire to compensate injured persons. In constitutional tort law, at least, the regulatory aspect predominates. Discussion of the incentive effects of damages liability pervades both judicial opinions[3] and academic comment.[4] Compensation is routinely cele-

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[1] The statute provides:

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

42 U.S.C. § 1983 (1982).

[2] 403 U.S. 388 (1971). *Bivens* itself dealt with fourth amendment violations, but subsequent cases have read *Bivens* to mean that a damages remedy is generally available for constitutional violations at the hands of federal officials, absent "special factors counselling hesitation." Id. at 396; see, e.g., Butz v. Economou, 438 U.S. 478 (1978) (upholding a *Bivens* action for claimed violations of due process and free speech); Davis v. Passman, 442 U.S. 228 (1979) (approving a damages action for gender discrimination in employment by a U.S. Congressman); Carlson v. Green, 446 U.S. 14 (1980) (approving a *Bivens* remedy against federal prison officials charged with due process and eighth amendment violations).

[3] Concern with the incentive effects of damages liability (including the prospect of overdeterrence) is especially evident in decisions concerning the immunity defense that government officials can invoke against claims for damages. See, e.g., Scheuer v. Rhodes, 416 U.S. 232, 238-42 (1974) (discussing the qualified immunity from awards of damages available to state and local officials under § 1983); *Butz*, 438 U.S. 478 (extending the same immunity to federal officers sued under *Bivens*); Harlow v. Fitzgerald, 457 U.S. 800 (1982) (facilitating summary judgment of many damages claims in order to avoid a "chilling effect" on the legitimate business of government); Anderson v. Creighton, 483 U.S. 635 (1987) (revisiting and extending the rule of *Harlow*).

[4] There is a rich and extensive literature on the incentive effects of damages liability for unconstitutional government action. Among the most prominent are P. Schuck, Suing Government: Citizen Remedies for Official Wrongs (1983); Epstein, Private-Law Models for Official Immunity, 42 Law & Contemp. Probs. 53 (Winter 1978); Mashaw, Civil Liability of Government Officers: Property Rights and Official Accountability, 42 Law & Contemp. Probs. 8 (Winter 1978).

brated,[5] but rarely decisive.[6] As a result, it is hard to think carefully about compensation for constitutional violations. The goal of compensation is so often displaced by the concern for incentive effects that a kind of thought experiment is required to imagine what an appropriate compensatory remedy would include.

The issue of appropriate compensation for violations of constitutional rights may be inaccessible, but it is not unimportant. Recently, the Supreme Court has vindicated compensation as the controlling value in a particular context. *Owen v. City of Independence*[7] held that a local government, unlike every other "person" sued under section 1983, has no immunity against award of damages. This unusual resort to strict liability was based chiefly on noninstrumental concerns. The Court cited the "injustice" of not compensating victims of municipal malfeasance[8] and invoked "[e]lemental notions of fairness dictat[ing] that one who causes a loss should bear the loss."[9] One swallow does not make a spring, but *Owen* suggests that, at least in one context, the Court is prepared to take noninstrumental concerns seriously.

More pervasively, assumptions about appropriate compensation for violations of constitutional rights form the background for debates about deterrence. Typically, some assumed level of compensation for injury resulting from government unconstitutionality is taken as a kind of natural starting point—a baseline charted by ideas of justice and fairness, from which departures can be justified (if at all) by more or less weighty concerns for incentive effects. Simply stated, the idea of compensation influences our perception of what is right, even as

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[5] See, e.g., Felder v. Casey, 108 S. Ct. 2302, 2308 (1988) (stating that compensation is "the central purpose of the Reconstruction-Era [civil rights] laws"); Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986) (describing the denial of compensation as "contrary to the fundamental purpose of § 1983"); Carey v. Piphus, 435 U.S. 247, 254 (1978) (citing compensation as "the basic purpose of a § 1983 damages award").

[6] See especially the absolute immunity cases, which are so concerned to avoid interference with the legitimate business of government that they completely sacrifice any interest in compensating the victims of official illegality. Nixon v. Fitzgerald, 457 U.S. 731 (1982) (for presidential acts); Imbler v. Pachtman, 424 U.S. 409, 430 (1976) (for prosecutorial conduct "intimately associated with the judicial phase of the criminal process"); Pierson v. Ray, 386 U.S. 547, 553-55 (1967) (for judicial acts); Tenney v. Brandhove, 341 U.S. 367 (1951) (for legislative acts).

[7] 445 U.S. 622 (1980).

[8] Id. at 651.

[9] Id. at 654.

that perception is compromised in the debate on what is sound policy. Focusing on the relation of risk to injury identifies the appropriate measure of compensation for violations of constitutional rights and thus clarifies the starting point at which the debate on deterrence should begin.

II. The Relation of Risk to Injury in Nonconstitutional Torts

In the traditional language of tort law, actors have a duty to avoid unreasonable risk of harm to another. When breach of the duty causes such harm, the actor must make good the loss. The extent of that obligation depends, ordinarily, on the extent of injury. Thus, the actor has a duty to avoid unreasonable risk of harm to another and, where that duty is breached, the obligation to pay for the resulting injury.

The obligation to compensate, however, does not extend to all consequences of the actor's conduct. The obligation is curtailed by the requirement of a certain relation between harm risked and injury caused. The required connection is often, although incompletely, expressed in terms of foreseeability. Doctrinally, the limitation of liability is usually accomplished in the name of "proximate" or "legal" cause. Alternatively, the relation of the risk created to the injury sustained may be said to fix the scope of the actor's duty. Under either formulation, risk and injury are directly related. The actor has a duty to avoid risking certain harms (or harms to certain persons), and it is injury of that sort (or to those persons) that supports the claim for compensation.

Of course, the link between creation of risk and realization of risk is partly fortuitous. Conduct posing unreasonable risk of harm may cause injury or not, or injury more or less severe, depending on the circumstances. There is great variation in the extent of liability that may flow from a breach of duty. Liability differs *in degree* from one situation to the next. But usually there remains a relation *in kind* between duty owed and injury caused. The actor's freedom is restricted in the first place in order to avoid risk of certain harms, and it is the occurrence of those harms that triggers the obligation to compensate. Wrong and injury derive from the same risk.

It happens, however, that sometimes wrong and injury do not coincide. That is, sometimes conduct deemed wrongful because it creates

an unreasonable risk of a particular harm, causes injury of an entirely different sort. In such cases, there is a *qualitative* disparity between the reason that the act is wrong and the specific injuries that result from its commission.

This kind of disparity is important in tort theory, but uncommon in the cases. Scholars usually resort to hypotheticals, such as the following from Robert Keeton:

> The proprietor of a restaurant places an unlabeled can of rat poison beside cans of flour on a shelf near a stove in the kitchen. The can explodes and kills someone. If the restaurateur was negligent because of the risk of poisoning, but had no reason to know of the risk of explosion, is she liable for the death?[10]

Keeton's answer is "No." The negligent actor is liable only for injury "within the scope of the risks by reason of which the actor is found to be negligent."[11] In other words, liability extends only to injury caused by the negligent aspect of the defendant's conduct. In Keeton's hypothetical, the restaurateur was negligent in disregarding the risk that the rat poison would be eaten. That risk did not occur. The risk that did occur (explosion) was one with respect to which the restaurateur was not negligent. Therefore, no liability.

Keeton calls this the "risk rule" and treats it as fundamental to negligence theory. Others would frame the point differently, but the general argument that liability for negligence should be limited to the kinds of risks that made the conduct negligent is widely familiar.[12]

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[10] Paraphrased from R. Keeton, Legal Cause in the Law of Torts 3 (1963). The hypothetical is based on Larrimore v. American Nat'l Ins. Co., 184 Okla. 614, 89 P.2d 340 (1939).

In another version, the instrument of injury is a loaded handgun. The defendant is negligent with respect to the risk of shooting, but has no reason to suspect that a child will pick up the gun and drop it on her toe. Is defendant liable for the latter harm?

[11] R. Keeton, supra note 10, at 10. The full formulation reads: "A negligent actor is legally responsible for the harm, and only the harm, that not only (1) is caused in fact by his conduct but also (2) is a result within the scope of the risks by reason of which the actor is found to be negligent."

[12] See Palsgraf v. Long Island R.R., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928) ("The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.") (citations omitted); Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co. (The Wagon Mound (No. 1)), [1961] App. Cas. 388, 425-26 (P.C.) (N.S.W.) ("It is irrelevant to the question whether B is liable for unforeseeable damage that he is liable for foreseeable damage, as irrelevant as would the fact that he had trespassed on Whiteacre be to the question whether he has trespassed on Blackacre.").

That is not to say that the limitation is uniformly observed. In fact, the precedential basis for the risk rule is far more variegated than this discussion suggests.[13] Nevertheless, this brief summary may suffice to show that the relation of risk to injury as a way of fixing the scope of compensation is a concept well known in ordinary tort law.

The same idea surfaces in antitrust law. The Supreme Court has held that private antitrust plaintiffs must show more than injury caused by an antitrust violation. Rather, they must prove *antitrust* injury—that is, injury specifically related to the anticompetitive effect of the antitrust violation.[14] In the language of this Article, antitrust plaintiffs must show injury within the risk that the antitrust laws seek to avoid. Other sorts of injury, although caused by the antitrust violation, are not compensable. This result does not differ in kind from the principle described above; it is simply a particularly well-defined application of the relation of risk to injury as a boundary of appropriate compensation.

III. Constitutional Torts and the Premise of Fault

Damages actions for violations of constitutional rights are in many respects analogous to ordinary tort actions. The two regimes are similar in structure. Both rely on private claimants. Both are enforced by the threat or fact of civil litigation. Both reward successful claim-

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[13] Exactly what the precedents do say is not altogether clear. There are at least three types of cases. First, there are cases in which risk and injury involve different persons—that is, in which conduct deemed negligent because it risks harm to certain persons injures a person outside that risk. In these cases, the limitation of liability is most strictly observed. See Restatement (Second) of Torts § 281(b) (1965). At the other extreme are cases in which risk and injury are the same, save for a matter of degree—that is, conduct causes injury of exactly the sort risked, only more severe. Such cases are usually decided under the rule of the eggshell cranium, and full liability prevails. In the third category are intermediate cases, in which a person within the relevant risk is injured in a manner outside that risk. That is, the person is within that class to whom injury is risked, but the injury is of a wholly different sort than should have been anticipated. Keeton's rat poison hypothetical is illustrative. In such cases, the results are inconsistent.

[14] See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977). In *Brunswick Corp.*, certain bowling centers challenged Brunswick's acquisition of the plaintiffs' failing competitors as a violation of the antimerger provisions of the Clayton Act. The plaintiffs proved that their profits would have been greater had the competitors been allowed to fail. It was clear that the plaintiffs had been injured and that the injury was caused by the antitrust violation, but the Supreme Court unanimously denied recovery. The Court reasoned that plaintiffs had not proved the sort of injury that the antitrust laws were designed to prevent.

ants with compensatory judgments. Most importantly, both regimes are based on fault.

The last point requires explication. Nominally, damages actions for violations of constitutional rights do not require proof of fault, except as dictated by the definition of the underlying right. That is, proof of the defendant's negligence is not a necessary part of the plaintiff's cause of action under section 1983.[15] Of course, section 1983 does not create rights; it only provides a mechanism for their enforcement. Proof of fault may be required by the definition of the underlying right, and many constitutional rights are so defined that their violation requires some form of culpability.[16] In such cases, the particular motivation underlying government conduct may determine constitutionality. Other constitutional violations are defined without regard to culpability.[17] In these cases, the plaintiff's case under section 1983 or the analogous *Bivens* remedy will not require proof of negligence or any other kind of culpability. In short, the cause of action is not itself fault based, even though the underlying right may have a fault component.

Looking at the plaintiff's case, however, tells only half the story. Nearly every defendant subject to a damages action for violation of constitutional rights has a defense of qualified immunity. Originally framed in the context of false arrest, the defense was said to require a

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[15] See Daniels v. Williams, 474 U.S. 327, 328 (1986), which correctly characterizes Parratt v. Taylor, 451 U.S. 527 (1981), as having decided that proof of the defendant's culpability is not part of the cause of action created by § 1983. There is no reason to suppose any different conclusion for the analogous *Bivens* remedy against federal officers.

[16] For example, the equal protection guarantee against racial discrimination is violated only where there is racially discriminatory motivation. Disproportionate impact is not enough. See, e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976). Another example comes from the line of cases from Parratt v. Taylor, 451 U.S. 527 (1981), through Daniels v. Williams, 474 U.S. 327 (1986). After a false start, the Supreme Court concluded that the "deprivation" of life, liberty, or property prohibited by the due process clause means *intentional* deprivation. Id. at 328. Mere negligence in causing injury to life, liberty, or property does not implicate due process concerns. Id.; cf. Walz v. Tax Comm'n, 397 U.S. 664 (1970) (requiring that laws challenged as an establishment of religion have a secular purpose).

[17] For example, the enforcement of an excessively vague penal statute is unconstitutional, even though the arresting officers (and, for that matter, the enacting legislators) may have acted entirely in good faith. See, e.g., Powell v. Stone, 507 F.2d 93 (9th Cir. 1974), rev'd on other grounds, 428 U.S. 465 (1976). Similarly, the decision of what process is due for government deprivation of property does not depend on whether the relevant government official might reasonably have supposed that some lesser protection would suffice.

showing of "good faith and probable cause" for the unlawful action.[18] Recent cases have deemphasized the subjective branch of the defense, so that today, the defendant need only show that the conduct was objectively reasonable.[19] This defense is quite generally available in damages actions for violations of constitutional rights.[20]

Thus, despite the circumlocution of qualified immunity, damages actions for violations of constitutional rights are, very generally, negligence-type actions.[21] With rare exceptions, the damages remedy for constitutional violations requires some finding of fault. Of course, it is

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[18] Pierson v. Ray, 386 U.S. 547, 557 (1967). Subsequent cases have extended this immunity to most federal officials. See, e.g., Butz v. Economou, 438 U.S. 478, 504 (1978) (noting that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials").

[19] See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"); see also Anderson v. Creighton, 483 U.S. 635 (1987) (ruling that a police officer is entitled to summary judgment precluding liability for actions that a reasonable officer could have believed lawful).

In both *Harlow* and *Anderson*, the Court was concerned with the prospect of widespread discovery based on the bare allegation that the defendant acted in subjective bad faith. See *Harlow*, 457 U.S. at 816-18. Hence, the Court authorized prediscovery summary judgment where the defendant's conduct was objectively reasonable. *Anderson*, 483 U.S. at 641; *Harlow*, 457 U.S. at 818. Whether the same result would obtain where the plaintiff makes plausible and detailed allegations of subjective bad faith remains to be seen.

[20] There are important deviations. On the one hand, certain defendants are absolutely immune from the award of damages. This rule applies to states and state agencies, which are not "person[s]" within the meaning of § 1983, see Quern v. Jordan, 440 U.S. 332 (1979), and to persons engaged in legislative, judicial, and certain prosecutorial activities. See the cases cited supra note 6.

On the other hand, as has been noted, local governments are strictly liable for violations of constitutional rights. See Monell v. Department of Social Servs., 436 U.S. 658 (1978), which held that a local government, unlike a state or state agency, is a "person" within the meaning of § 1983 and therefore subject to suit, and Owen v. City of Independence, 445 U.S. 622 (1980), which held that a local government, unlike every other "person" who may be sued under § 1983, has no defense of qualified immunity.

The scope of strict liability, however, is sharply curtailed by the rule that liability of localities must be based on an official policy or custom, not merely on respondeat superior for the acts of employees. *Monell*, 436 U.S. at 690-95. The meaning of official policy or custom is disputed, but it clearly restricts the direct liability of local governments to a small fraction of the unconstitutional acts of their agents. See P. Low & J. Jeffries, Federal Courts and the Law of Federal-State Relations 965-88 (2d ed. 1989).

[21] I use this awkward phrase to avoid specifying whether the fault required by the law of qualified immunity is better described as "negligence" or "gross negligence." The decisions can be read either way.

perfectly possible to think that it should not. Some have endorsed strict enterprise liability for violations of constitutional rights.[22] I have explained elsewhere why I think this suggestion misguided,[23] but the merits of that question will not be canvassed here. For present purposes, it is enough to say that the existing damages remedy for violations of constitutional rights *is* predominantly fault based. I intend to explore the appropriate measure of damages in a fault-based regime for redressing violations of constitutional rights.

The premise of fault is important to this argument. It explains why the relation of risk to injury in constitutional torts has normative significance apart from supposed incentive effects. In my view, the normative case for compensation does not rest on the mere fact of injury. Injury is an inevitable part of life and of living in an organized society; there neither is, nor could there be, any generalized moral claim that all injury should be set right. The normative case for compensation rests, rather, on *wrongful* injury. It is the relation of wrong to injury—not merely the relation of act to injury—that justifies compensation. Of course, act and injury may be linked by causation, but causation itself is morally neutral. Wrongdoing is required to show why *this* causal agent—as opposed to all the others that invariably exist—is morally obliged to make good the loss. In short, fault supplies to causation the moral dimension essential to a noninstrumental case for compensation.[24]

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[22] As noted supra note 20, *Owen* supports strict enterprise liability within the realm of an official policy or custom of local government. For other commentators supporting this position, see P. Schuck, supra note 4, at 101; Mead, 42 U.S.C. § 1983 Municipal Liability: The *Monell* Sketch Becomes a Distorted Picture, 65 N.C.L. Rev. 518 (1987). See also the opinions of Justice Stevens, the only Justice to have endorsed strict governmental liability outside the context of an official policy or custom. E.g. City of St. Louis v. Praprotnik, 108 S. Ct. 915, 937 n.1, 946-50 (1988) (Stevens, J., dissenting); Pembaur v. City of Cincinnati, 475 U.S. 469, 489-91 (1986) (Stevens, J., concurring in part and concurring in the judgment).

[23] See Jeffries, Compensation for Constitutional Torts: Reflections on the Significance of Fault, 88 Mich. L. Rev. 82 (1989).

[24] The underlying conception is Aristotelian corrective justice. See Aristotle, Nicomachean Ethics bk. V, chs. 2-4, at 1130a13 to 1132b20; Posner, The Concept of Corrective Justice in Recent Theories of Tort Law, 10 J. Legal Stud. 187 (1981); see also Epstein, Nuisance Law: Corrective Justice and Its Utilitarian Constraints, 8 J. Legal Stud. 49 (1979) (discussing the application and limits of a corrective justice approach to the law of nuisance); Weinrib, Causation and Wrongdoing, 63 Chi.-Kent L. Rev. 407 (1987) (offering a noninstrumental explanation for the law of negligence through the concept of corrective justice). For a fuller attempt to derive the requirement of fault from the theory of corrective justice as applied to constitutional violations, see Jeffries, supra note 23.

The relation of risk to injury tracks the moral dimension of causation. It links the injury for which compensation is sought to the fault that justifies compensation. Not all injury counts, because not all injury is constitutionally relevant. Sometimes, conduct violative of a constitutional right will cause injury unrelated to the kinds of risks that constitutional prohibitions were designed to avoid. In such cases, there is a disjunction between the reason the act is wrongful and the specific injury that results from its commission. When this occurs, "but for" causation lacks moral significance. Whatever considerations of deterrence may suggest, the noninstrumental case for compensation for constitutional torts reaches only those injuries caused by the wrongful—i.e., unconstitutional—aspect of the government's behavior. Injury outside the constitutionally relevant risks is morally indistinguishable from the very broad range of injury caused by lawful government action. Unless a contrary answer is indicated by consideration of incentive effects, such injury is appropriately noncompensable.

IV. The Relation of Risk to Injury in Constitutional Torts

The relation of risk to injury in constitutional torts is surprisingly varied. Some constitutional provisions are much like ordinary tort duties. They guard individuals against specified harms by directly prohibiting the infliction of such harms. Violation of these provisions is likely to cause exactly the kind of injury that the prohibition was designed to avoid. In these cases, radical disparity between harm risked and injury caused is exceedingly unlikely.

A good example of a tort-like constitutional right is the takings clause.[25] Private citizens are secured against private "takings" by ordinary tort law. The government's power of eminent domain threatens the same harm, but traditional sovereign immunity would preclude a remedy. The fifth amendment fills the gap by requiring compensation. The result is a constitutional remedy for government "takings" (as that term is narrowly defined) that roughly parallels the ordinary tort remedy for private misconduct. The constitutional provision directly bars specified harm to individuals, and violation of that

[25] "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

provision gives rise to damages claims by those individuals for the constitutionally relevant injury. The case for compensation is exactly met.

Other constitutional provisions are not like ordinary tort duties. They prohibit conduct that is wrongful only, or differently, if done by government. Some of these provisions are not aimed directly at preventing specified harms to identifiable individuals. Rather, they seek to prohibit certain government actions. These actions may be thought unacceptable for reasons not easily captured by a focus on specified harms to individuals. Of course, at some level of generality, all constitutional rights may be seen as duties imposed on government to avoid injury to the people. But the link between such duties and the occurrence of particular harms to particular individuals may be exceedingly indirect.

Disparity between risk and injury is especially likely where constitutional doctrine is prophylactic. In modern constitutional law, many rules have that focus. They are not aimed directly at conduct causing a particular harm, but at antecedent or related conduct that is easier to monitor or suppress. This is true not only of overtly prophylactic requirements, such as *Miranda* warnings,[26] but also of many nominally substantive doctrines. The fourth amendment warrant requirement is an important example.[27] In these and other instances, modern constitutional law prohibits conduct not immediately productive of constitutionally relevant harms. Rather, the relation between the conduct proscribed and the harm ultimately feared is strategic and indirect.

This characteristic of modern constitutional law explains the importance of the relation of risk to injury in constitutional torts. The point is not merely that the prohibited conduct may not cause the kind of harm that the prohibition aims to prevent; the failure of causation is altogether commonplace. The point is rather that violation of a constitutional prophylaxis often produces constitutionally irrele-

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[26] As everyone who watches television knows, Miranda v. Arizona, 384 U.S. 436 (1966), requires that custodial suspects be informed of their right to remain silent, that statements made may be used against them, and that they have the right to an attorney. These warnings create a prophylaxis against coerced or involuntary confessions that might otherwise go undetected.

[27] See Meltzer, Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General, 88 Colum. L. Rev. 247, 271-72 (1988).

vant injury. The greater the distance between conduct proscribed and harm ultimately feared, the greater the prospect that proscribed conduct may cause injury of a different sort. The more constitutional doctrine is prophylactic and strategic in its structure, the more likely it is that unconstitutional conduct will cause injury unrelated to constitutional concerns. And because constitutional prohibitions are far more likely to be prophylactic and strategic than are ordinary tort duties, constitutional torts are correspondingly more likely to yield injury unrelated to risk. While it requires some imagination to come up with examples of ordinary tort injuries unrelated to perceived risks, examples abound in constitutional law.

It should be emphasized that disparity between the reason an act is wrongful and the kind of injury that may result from its commission is by no means an invariant feature of constitutional torts. Rather, it is an attribute of some constitutional guarantees, to a greater or lesser extent, under some conceptions of their content. Thus, a limitation of damages liability to constitutionally relevant injury—that is, to injury of the sort that the prohibition aims to prevent—will be more or less consequential, depending on the right in issue. What is needed is individuated analysis of the appropriate measure of damages for various constitutional rights. Two examples will reveal the kind of inquiry that I have in mind.

A. Unreasonable Search and Seizure

Few constitutional rights seem more suited to ordinary compensatory damages than the fourth amendment guarantee against unreasonable search and seizure. At least, so the *Bivens* Court thought. Justice Brennan described award of damages for fourth amendment violations as "hardly . . . a surprising proposition."[28] Indeed, the aptness of the traditional tort remedy seems to have been thought so obvious as to require little argument. The Court contented itself with noting that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."[29] Justice Harlan agreed; he thought it "clear" that injury from an unlawful search was "a claim . . . that, if proved, would be properly compensa-

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[28] 403 U.S. 388, 395 (1971).

[29] Id.

ble in damages."[30] He noted that the fourth amendment protects "personal interests" in "privacy" and that those interests are closely analogous to the interests involved in traditional tort claims of trespass and false imprisonment.[31] The judicial experience in dealing with the common-law torts indicated to Harlan that the courts were "capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of Fourth Amendment rights."[32] Harlan therefore endorsed a compensatory remedy, but with characteristic caution, also noted that damages might not be equally suitable for other rights.[33]

Both Brennan and Harlan referred to, but did not stress, the fourth amendment's protection of "personal" interests. The word suggests something important. Measuring damages for these violations seems straightforward in part because the fourth amendment[34] is so easily understood as a "personal" constitutional right. It is "personal" in the sense that it directly and immediately protects privacy interests held by individuals. Individuals are protected as such, not as proxies for society at large. An unlawful search invades chiefly the rights of the person searched. Of course, all wrongs to individuals have aggregate effects, but here it is at least meaningful to say that the wrong is done *to* an individual and that resulting harm is suffered *by* that individual. Strategic concerns seem distinctly secondary.

This means that, at least in one dimension, the relation between risk and injury is immediate and direct. The fourth amendment protects personal interests in privacy; damages claimants are those

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30 Id. at 408 (Harlan, J., concurring in the judgment).

31 Id. at 408-09.

32 Id. at 409.

33 Id. at 409 n.9.

34 I refer to the substantive guarantee against unreasonable search and seizure, not to its enforcement by means of the exclusion of evidence. According to the Supreme Court, the suppression of illegally seized evidence is not a "personal" constitutional right, but rather "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." United States v. Calandra, 414 U.S. 338, 348 (1974) (quoted in Stone v. Powell, 428 U.S. 465, 486 (1976)). The availability of the exclusionary remedy is therefore adjusted according to the Court's perception of the incremental deterrent effect that might be achieved in a particular context. See, e.g., United States v. Leon, 468 U.S. 897 (1984) (holding that exclusion is not required where officers acted in reasonable, good-faith reliance on an invalid warrant); *Calandra*, 414 U.S. 338 (holding the exclusionary remedy inapplicable to grand jury proceedings). Nothing in these cases has any apparent application to damages actions.

persons whose privacy interests have not been respected. The amendment guards against risks to identifiable individuals, and violations give rise to damages claims by those same individuals. There is a match between the incidence of risk and the incidence of actionable injury. The "personal" nature of the fourth amendment right is simply a way of labeling this congruity. It is the same congruity that exists in ordinary tort cases, and it supports compensatory damages for injury caused by unlawful search and seizure.

In another respect, however, the issue is problematic. From a purely noninstrumental perspective, routinely awarding damages for *all* injuries caused by fourth amendment violations would go too far. Although there is a correspondence between the incidence of risk and the incidence of injury, there is a potential mismatch between the kind of risk against which the fourth amendment guards and the kind of injury that may result from its violation. Injury caused by unlawful search may be qualitatively unrelated to constitutional concerns, even though it is "but for" caused by the constitutional violation.

Suppose, for example, that a police officer conducts an unlawful search and finds nothing. This is an actionable wrong, and the person searched would have a claim for damages to the extent of his or her injury. The injury, however, would likely be insignificant. A search that uncovers nothing (unless accompanied by some additional wrong such as assault) is likely to be little more than an inconvenience. Of course, consequential damages would be available if the victim suffers "pain and suffering" from the invasion of privacy, but the unsuccessful search ordinarily does modest harm.

Compare the case of the unlawful search that uncovers incriminating evidence. The wrong is the same, but the injury is considerably more severe. The person searched would face the prospect of criminal charge, trial, conviction, and punishment. In some circumstances the exclusionary rule would bar use of the illegally obtained evidence, but that is not invariably so,[35] and in any event the accusation is in itself injurious. Harms associated with criminal accusation and trial would certainly be foreseeable (indeed, desired) consequences of an unlawful search. If all such injury were compensable, however, the result would be a radical disparity between the kind of harm against which

[35] See, e.g., Walder v. United States, 347 U.S. 62 (1954) (allowing use of illegally obtained evidence for purposes of impeachment).

protection is desired (unreasonable invasion of privacy) and the kind of harm for which compensation would be sought (criminal prosecution and trial). A regime compensating individuals for all injury caused by government unconstitutionality would end up awarding money damages to offset losses that should be attributed to (and that are also "but for" caused by) the claimant's own misconduct. The result would be a wealth transfer from society generally to those guilty of criminal wrongdoing. The prospect is peculiar, if not perverse.

The limitation of constitutional tort liability to constitutionally relevant risks would avoid this result. It would measure damages by the kind of injury that the fourth amendment was designed to prevent. The victim of an unconstitutional search could recover damages for invasion of privacy. Monetary compensation would not extend to harms flowing from the discovery of incriminating evidence and consequent criminal prosecution. This result would accord with the conceptual structure of a fault-based regime of compensation for constitutional torts and also, I think, with common sense. After all, injury from criminal prosecution can scarcely be considered a societal wrong. Enforcement of the criminal laws is a good thing. The costs imposed on violators are not constitutionally disapproved, but morally right and socially useful. The concern of the fourth amendment is not to curtail criminal prosecution, but to avoid unfounded (and therefore abusive) invasions of privacy. Compensation for violations of the fourth amendment should redress the invasion of privacy, not the costs of criminal prosecution.

If any argument is to be made against so tailoring compensation, it is likely to be based on instrumental concerns. For instance, the objection might be raised that limiting damages to constitutionally relevant harms would invite unlawful searches by allowing the police to "buy" fourth amendment violations at too low a price. This might be true, if there were no alternative sanctions (exclusion of evidence, administrative discipline, civil fines, or punitive damages) to discourage such behavior. Obviously, analysis of the optimal deterrence of fourth amendment violations would require consideration of all these approaches. No such comprehensive analysis can be made here, but it may be useful to point out some implications that might flow from focusing on the relation of risk to injury.

Suppression of illegally seized evidence is desirable because it creates incentives to avoid illegal searches. Suppression may also be objectionable, however, for at least two reasons. First, suppression benefits only the guilty; it has no application to unlawful searches that uncover no incriminating evidence. Second, suppression is vastly overcompensatory. Letting the murderer go free because the constable blundered seems incommensurate with the wrong done. The windfall benefit to the guilty offender will rarely be viewed with satisfaction; to most observers, it will be an occasion for regret. The Supreme Court's response to these tensions has been not only to curtail the remedy of suppression,[36] but also to adopt both substantive[37] and institutional[38] restrictions on the right itself.

A money damages remedy for fourth amendment violations would ameliorate the objections to suppression, but only at some cost in vitiating deterrence. Money damages would be preferable to suppression in that the remedy would be available to all victims of unlawful searches, not merely to those found to possess incriminating evidence. This would be a good thing. If, however, compensation were limited to constitutionally relevant injury (i.e., the invasion of privacy), recoveries might be so modest that law enforcement authorities would tend to regard them merely as a cost of doing business. At least in serious cases, the authorities might willingly pay the fine for invasion of privacy as a means of securing criminal conviction. Ultimately, the question is empirical, but risk seems great that a strictly compensatory remedy would be instrumentally inadequate.

Progress might be made if compensation were combined with a narrowly tailored exclusionary rule targeted to the deterrence shortfall. Perhaps there might be a scheme of presumed or liquidated damages, calculated to redress the dignitary injury of abusive invasion of privacy by unlawful search. The prospect of such awards would create a useful disincentive for casual disregard of fourth amendment precedent. And quite apart from incentive effects, such awards would have

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[36] See, e.g., *Leon*, 468 U.S. 897.

[37] See, e.g., New York v. Belton, 453 U.S. 454 (1981) (upholding the warrantless search of the passenger compartment of an automobile incident to the lawful arrest of the occupants, without requiring probable cause to believe that the automobile contained evidence of crime).

[38] See, e.g., Stone v. Powell, 428 U.S. 465 (1976) (withdrawing federal habeas review from fourth amendment claims considered and rejected by state courts). The Court's decision could be seen as permitting, if not authorizing, a "close is good enough for government work" attitude toward administering the rule of exclusion.

a salutary role in affirming for all citizens, not just for criminal wrongdoers, the constitutional values underlying the fourth amendment. Suppression would be reserved for situations where a compensatory regime of liquidated damages might predictably yield inadequate deterrence—chiefly, cases of intentional fourth amendment violations in the investigation of serious crimes.

Obviously, this sketchy suggestion leaves many questions unanswered, but the point of these remarks is not to pretend to a comprehensive solution to fourth amendment law. It is, rather, to support a single observation: Whatever the criteria of judgment—whether deterrence or compensation or some blend of both—there would be no plausible reason to award money damages for *all* injuries caused by unlawful searches. Damages for costs of defending criminal charges would effect a wealth transfer most would find more perverse and more objectionable than the suppression of evidence. Consulting the relation of risk to injury indicates why such damages are not required by any noninstrumental theory of compensation. To put the point differently, I hope to have shown that there is no *non*deterrence rationale for awarding damages for injuries unrelated to fourth amendment concerns. This simple statement seems to me a useful clarification of, even though not a complete solution to, the problem of fourth amendment enforcement.

B. Free Speech

More difficult problems attend the appropriate measure of damages in free speech cases. Unlike the fourth amendment, the first amendment guarantee against laws abridging the freedom of speech is not usually understood as a strictly "personal" right. Of course, there is an aspect of free speech ideology based on the protection of personal autonomy in matters of belief and expression. Often phrased in terms of self-realization and self-fulfillment, this conception treats free speech as a right held individually by individuals. Some version of this idea surfaces in many first amendment theories[39] and predomi-

[39] See, e.g., T. Emerson, The System of Freedom of Expression 6 (1970) (relating freedom of speech to the premise that "[t]he proper end of man is the realization of his character and potentialities as a human being" and concluding that "suppression of belief, opinion, or other expression is an affront to the dignity of man, a negation of man's essential nature").

nates in a few.[40] More commonly, however, theorists recognize an instrumental relation between freedom of speech and societal decisionmaking. This idea is expressed most generally in Holmes's metaphor of the "marketplace of ideas."[41] More narrowly, the instrumental conception relates freedom of speech to representative democracy.[42] Under this view, freedom of speech is secured to make democracy work. This premise suggests that the kind of speech with which the constitutional guarantee is most concerned is speech relevant to self-government—or, more briefly, "political" speech.[43] This emphasis on the relation of free speech to the constitutional process of self-goverument has many adherents, including some who insist on its exclusivity[44] and others who merely recognize its strength.[45]

For present purposes, this divergence among theorists is unimportant. Whatever one's conception of the organizing principles that *should* guide first amendment adjudication, this much is clear:

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[40] See, e.g., Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. Rev. 964 (1978) (treating the free speech clause as creating a realm of individual self-expression and self-determination); Scanlon, A Theory of Free Expression, 1 Phil. & Pub. Aff. 204, 215-22 (1972) (suggesting a conception of freedom of expression based on the notion of personal autonomy).

[41] [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[42] The connection was influentially explored in the works of Alexander Meiklejohn. See A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948); A. Meiklejohn, Political Freedom (1960); Meiklejohn, The First Amendment Is an Absolute, 1961 Sup. Ct. Rev. 245.

[43] "Political" appears in quotation marks because the relation of speech to democratic self-government can be drawn narrowly to include only overtly political speech or broadly to encompass discourse on any topic of societal concern. See, e.g., Meiklejohn, The First Amendment Is an Absolute, 1961 Sup. Ct. Rev. 245, 255-57 (arguing for protection of all thought and communication that promote wise self-governance, including education, philosophy, science, literature, and the arts, as well as public discussion of public issues).

[44] See, e.g., Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971) (arguing from the relation to political decisionmaking that first amendment protection should be limited to explicitly political speech).

[45] See, e.g., BeVier, The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle, 30 Stan. L. Rev. 299 (1978) (expounding a more generous conception of "politieal" speech); Kalven, The *New York Times* Case: A Note on "The Central Meaning of the First Amendment", 1964 Sup. Ct. Rev. 191 (emphasizing the centrality of the right to criticize government); Schauer, The Role of the People in First Amendment Theory, 74 Calif. L. Rev. 761 (1986) (treating the first amendment as a way of implementing popular sovereignty).

Existing first amendment doctrine is strongly, albeit incompletely, oriented toward a systemic rationale. In its rhetoric[46] and in its decisions,[47] the Supreme Court emphasizes societal concerns and systemic solutions. Indeed, many important lines of cases make sense only under this conception. The most obvious example is the overbreadth doctrine,[48] which invites facial invalidation of a law because of its effect on third parties. The concern for preserving the systemic functions of free speech also underlies the familiar conclusion that a would-be listener can claim a constitutionally protected interest in another's speech.[49] The same approach explains many other first

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[46] See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (especially the often-quoted reference to "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

[47] See, for example, the long line of libel cases. Beginning with *New York Times*, 376 U.S. 254 (1964), the Supreme Court has substantially curtailed recovery under the common-law actions of libel and slander. The engine of reform has been the fear that the traditional rules of liability for defamatory falsehood would induce press self-censorship and "thus dampen[ ] the vigor and limit[ ] the variety of public debate." Id. at 279. Note that, despite equivocation in *New York Times* itself, see id. at 279 n.19 (alluding to the value of false statements in the public debate), later decisions have held that defamatory falsehood is not itself protected speech. See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (stating that "there is no constitutional value in false statements of fact"). Thus, the constitutional protection afforded some defamatory falsehood is based exclusively on a systemic concern.

[48] The overbreadth doctrine is often, although perhaps incorrectly, characterized as a rule allowing "third party standing." See generally Monaghan, Overbreadth, 1981 Sup. Ct. Rev. 1 (examining the third party standing characterization); Monaghan, Third Party Standing, 84 Colum. L. Rev. 277, 282 (1984) (arguing that "[m]any third party standing cases ought to be understood in first party terms"). It is instructive to compare this doctrine with the especially restrictive "standing" rules attached to the enforcement of fourth amendment rights. See generally Slobogin, Capacity to Contest a Search and Seizure: The Passing of Old Rules and Some Suggestions for New Ones, 18 Am. Crim. L. Rev. 387 (1981) (discussing the line of cases that replaced references to a defendant's "standing" to invoke the exclusionary rule with an inquiry into the scope to the defendant's reasonable expectations of privacy).

[49] See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976) (allowing a challenge to restrictions on drug price information by would-be recipients of that information on the ground that, where a willing speaker exists, "the protection afforded is to the communication, to its source and to its recipients both"); Procunier v. Martinez, 416 U.S. 396, 408-09 (1974) (holding that censorship of letters written by prison inmates implicates the first amendment rights of recipients and justifies constitutional scrutiny without regard to whether the inmate's right to free speech survives incarceration), limited by Thornburgh v. Abbott, 109 S. Ct. 1874 (1989); Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972) (also recognizing a first amendment right to receive information); Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (recognizing constitutional protection for receipt in the United States of mail sent from abroad by a noncitizen).

amendment doctrines, including the law of obscenity,[50] campaign finance,[51] corporate speech,[52] and other areas. That is not to say that the universe of first amendment cases is consistent, or to deny that there are counterexamples to the observations made above. The point is simply that substantial parts of existing first amendment doctrine are unmistakably grounded in an appreciation of the systemic value of free speech in a democratic society.

When "systemic" rights are at issue, measuring damages for constitutional violations becomes problematic. The trouble is that the risk to society against which such prohibitions are designed to guard is not necessarily congruent with the kinds of injuries that may result to individuals. Stated in the terms of this Article, there is a disparity between the incidence of risk and the incidence of actionable injury. In some situations, the unconstitutional act will have no measurable

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[50] If first amendment doctrine were oriented primarily toward notions of individual autonomy and personal self-fulfillment, obscenity would seem to warrant full protection. Cf. Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45, 82 (1974) ("There is no reason whatsoever to believe that the freedom to determine the sexual contents of one's communications or to be an audience to such communications is not as fundamental to . . . self-mastery as the freedom to decide on any other communicative contents."). The fact that obscenity is not protected speech, Roth v. United States, 354 U.S. 476 (1957), is consistent with a perception of its relative unimportance in political debate and societal decisionmaking. This view is reinforced by the caveat that material is not legally obscene, no matter how pornographic, if it has "serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24 (1973). The fact that someone really likes it is not enough.

[51] See Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981); Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam). It is hard to believe that spending money would rank high on a constitutional priority of personal autonomy, see Wright, Politics and the Constitution: Is Money Speech?, 85 Yale L.J. 1001, 1005-06 (1976) (arguing that campaign giving and spending are not expressions of "ideas" and are therefore not "speech" but only "speech-related conduct"), but easy to see a connection between campaign expenditures and political debate. See BeVier, Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform, 73 Calif. L. Rev. 1045 (1985) (arguing from a systemic perspective that campaign giving and spending are activities near the core of the first amendment).

[52] See First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978), which held that the first amendment protects political speech sponsored by a corporation. The Court said that the issue was not "whether corporations 'have' First Amendment rights" but whether the statute "abridges expression that the First Amendment was meant to protect." Id. at 776. By focusing on the character of the speech without regard to the status of the speaker, the Court emphasized the societal or systemic value of having that speech heard, as distinct from any direct expressive rights of the corporate speaker. See also Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530 (1980) (finding first amendment protection for a power company's inclusion in its mailings of statements advocating nuclear power).

impact on any identifiable individual.[53] In those cases, a strictly compensatory remedy would not function. In other circumstances, government unconstitutionality will cause injury to individuals, but injury of a sort quite different from the risk at which the constitutional prohibition is aimed. In those situations, the connection between the constitutionally relevant risk (of harm to society) and the injury actually caused (to individuals) may be mere coincidence.

Suppose that *A*, an entrepreneur, operates an "adult" bookstore, selling magazines, video cassettes, "marital aids," and the like. Additionally, *A* offers a live show featuring a nude dancer. Patrons enter small booths equipped with coin-operated timers. Upon deposit of a coin or token, the dancer can be viewed for a few minutes, after which a panel or curtain slides back into place. From these activities, *A* turns a handsome profit. Suppose further that the locality tries to shut down these operations under a zoning ordinance prohibiting all "live entertainment" in the town. The bookstore is closed, litigation results, and eventually the ordinance is held unconstitutional.[54] In the meantime, however, *A*'s business has been destroyed. Perhaps the lost income prevented timely mortgage payments, or the clientele has been attracted to a similar facility in a neighboring town; in any event, *A* no longer has a profitable enterprise.

If damages were unconstrained by the relation of risk to injury, *A* could recover from the locality an amount sufficient to offset the loss resulting from closing the business. The locality acted unconstitutionally, and the action caused injury. Moreover, the locality's action would likely be found in negligent disregard of existing overbreadth precedents. Thus, even without regard to the rule of strict liability for the official policy of local governments, the locality would have to pay money damages for *A*'s loss.

The trouble is that the damage to *A*'s business enterprise is not the sort of injury that the first amendment is concerned to prevent. In free speech terms, the relevant harms are (1) primarily, the contraction of social discourse resulting from the inhibition of "live entertainment," and (2) secondarily, the consequent restriction on individual

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[53] Violations of the establishment clause are especially likely to fall in this category, a fact that accounts for the special standing rules sometimes available for raising such claims. See Flast v. Cohen, 392 U.S. 83 (1968). But see Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982).

[54] See Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981).

self-fulfillment.[55] For the former, it is society at large that has suffered the relevant harm, not *A* personally. Indeed, it seems likely that the societal harm feared by the Court would not flow from the unavailability of nude dancing but from the prospect of suppressing other "live entertainment" of greater value. The connection between *A*'s lost profits and the potential systemic damage of other possible applications of the zoning ordinance is truly obscure. In terms of individual self-fulfillment, the connection is not much better. In this view, the relevant injuries are suffered by the expressive nude dancer and the self-fulfilling patrons, or perhaps by the unidentified and unidentifiable individuals elsewhere in society who might suffer a restriction in self-realization if other forms of "live entertainment" were suppressed. Again, the relation of these noninstrumental concerns to *A*'s business injury is exceedingly indirect.

The disparity between constitutionally relevant harms and actionable injury can also be seen from another perspective. Not only is *A*'s injury unrelated to concerns that can plausibly be assigned to the first amendment, it is also the sort of harm to which modern constitutional interpretation is notoriously indifferent. Zoning laws routinely restrict the use of property, often in ways costly to owners. The takings clause provides little protection. Unless there is a physical invasion of the property,[56] zoning restrictions are typically upheld, even though the economic injury to the owner is anything but de minimis.[57] Thus, if *A*'s business had been destroyed by an ordinance regulating set-backs, requiring off-street parking, or doing anything else that did not happen to intersect the first amendment, there would be little likelihood of a plausible claim for damages. The injury to *A* could be exactly the same, both in nature and magnitude, but it would not be actionable under section 1983. Only the coincidence of *A*'s

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[55] "Secondarily" is the inference that one would draw from the Supreme Court's obscenity decisions. See supra note 50. I do not mean to suggest that a different priority would be normatively implausible.

[56] See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that a law requiring landlords to allow cable installation for a nominal fee amounted to a compensable taking because of the permanent physical occupation of private property).

[57] See, e.g., Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (upholding the uncompensated designation of Grand Central Terminal as an "historic landmark," with the consequence that the owner could not erect on top of the terminal a multistory office building of considerable value).

economic injury and an essentially unrelated first amendment concern makes the claim work.

Here, the implications of this analysis are dramatic. If damages were limited to constitutionally relevant concerns, *A* would have no plausible claim for compensation. Act and injury are linked by "but for" causation, but wrong and injury are not. There is a complete disjunction between the risk at which the constitutional prohibition is aimed and the injury for which compensatory damages are sought. To put the point more simply, the government's fault is unrelated to *A*'s injury. Compensation is not required.

Again, this is not to say that awarding damages to *A* would serve no purpose. An instrumental rationale might well exist. The prospect of damages no doubt would help deter unconstitutionality and would encourage government to take great pains to know (or anticipate) the law. Presumably, a larger award, however calculated, would increase deterrence. Reasoning of this sort may well justify penalties apart from, and additional to, compensatory damages. But the difference in rationale may be consequential. It is hardly inevitable that a deterrence rationale would focus on the economic value of the claimant's injury to fix the amount of damages. Indeed, given the unusual incentive structure of overbreadth cases, it is entirely plausible to believe that *no* recovery of damages would be required from a strictly deterrence point of view.

This rather surprising conclusion rests on the following observations. Overbreadth doctrine invites facial attack and categorical invalidation of overbroad laws. Repeated challenge to the law's case-by-case application is not required. This means that injunctive or declaratory relief is peculiarly potent in overbreadth cases; it allows one litigant to vindicate the claim of an entire class. As a matter of deterrence, therefore, it is not necessary to create incentives for repeated litigation; one injunction is enough. Given this situation, it seems unlikely that there would be a failure of deterrence, even if no money damages were available. Many litigants likely have sufficient incentive, either economic or ideological, to challenge overbroad laws, and their ability to mount such challenges is greatly augmented by the

availability of attorney's fees.[58]

Of course, these observations might be modified by closer inspection. The point here is not to attempt comprehensive analysis of the overbreadth doctrine, but to bring into sharper focus the significance of the noninstrumental rationale for awarding money damages in such cases. If, as has been suggested, there is no strong deterrence justification for money damages in overbreadth cases, the compensatory rationale would control. In my view, there is a compelling, noninstrumental reason to compensate overbreadth plaintiffs for all first amendment injury, without regard to whether such damages are needed for incentive effect. But it seems to me equally clear that there is no noninstrumental case for constitutionally irrelevant injury that happens to be caused by the government's act. If that conclusion is sound, it refines and clarifies the appropriate measure of compensatory damages in such cases.

V. AFTERWORD

I have argued that the idea of limiting tort liability to the harms resulting from the risks that made the conduct negligent suggests a useful clarification of the law of constitutional torts. An analogous rule would limit damages liability for constitutional violations to harms that the constitutional prohibition was meant to prevent. Compensatory damages for constitutional violations would be limited to constitutionally relevant injury. Injury unrelated to the constitutional risk would be treated as all the other myriad harms that result from government action—as a necessary cost of living in an organized society.

Another way to put the point is to say that compensation in money damages for *all* injuries resulting from violation of constitutional rights does not make equal sense for all rights. The examples used here suggest that compensation for all resulting harm would be a natural and appropriate response to governmental takings, a more erratic remedy for unlawful searches, and still more problematic as an adjunct to the first amendment overbreadth doctrine.

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[58] The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (1982)), authorizes recovery of fees by any prevailing plaintiff in a § 1983 action. Award of damages is not required.

This Article is framed as a comment on the appropriate measure of damages, rather than as a survey of differences among rights, for two reasons. First, I believe that *some* compensation—that is, compensation for some kinds of harms—is appropriate for all constitutional rights. I therefore wish to avoid any implication that compensation might be categorically inappropriate for specific rights.

Second, focusing on the variable measure of compensation, rather than on differences among rights, fits our habit of mind regarding section 1983. That statute creates a damages remedy applicable indifferently to all federal rights. At least in its current codification, no textual warrant exists for distinguishing among rights. Of course, one is entitled to think (as I do) that the law of section 1983 has transcended the original statutory authorization,[59] but the long tradition of attribution to the statutory text continues to constrain flexibility.[60] By focusing on a conceptual limitation of damages liability, I hope to offer an analysis applicable to all rights and thus not offensive to the apparent categoricalness of section 1983.

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[59] See the comment on judicial methodology in P. Low & J. Jeffries, supra note 20, at 940-41; see also Wells, The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules, 19 Conn. L. Rev. 53, 57-68 (1986) (criticizing the Court's approach to § 1983).

[60] The best example is the statute's reference to rights secured by the Constitution "and laws" of the United States. In reliance on that undifferentiated text, the Court held that § 1983 provides a private damages action for *all* federal statutes. See Maine v. Thiboutot, 448 U.S. 1 (1980). This conclusion may be defensible as a matter of policy, but the Court evidently did not think so, for it has subsequently spent a good deal of time inventing implausible explanations for why particular statutes should be excepted from this rule. See, e.g., Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) (finding, despite the lack of any direct supporting evidence, a legislative intent to preclude the remedy created by *Maine v. Thiboutot*); Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981) (concluding that the "bill of rights" provisions of the Developmentally Disabled Assistance and Bill of Rights Act were not enforceable rights, but merely nonbinding expressions of congressional preference).