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Constitutional Damages and Corrective Justice: A Different View

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CONSTITUTIONAL DAMAGES AND CORRECTIVE JUSTICE: A DIFFERENT VIEW

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INTRODUCTION

SECTION 1983[1] is a federal statute which creates a fourteenth amendment action for damages against state and local government officials and local governments themselves.[2] Over the years, its scope and coverage have increased dramatically, due in large measure to its broad language and to changes in fourteenth amendment doctrines relating to state action and incorporation.[3] These developments have generated a great deal of controversy and have led to increased judicial reluctance to continue in this direction.[4] Such reluctance can be seen in recent Supreme Court caselaw either refusing to expand, or

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[1] The appropriate section, 42 U.S.C. § 1983, which was enacted by the 42nd Congress in 1871, reads as follows:

> 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1982).

[2] While I refer throughout this Article to § 1983 and damages actions for fourteenth amendment violations, I also include in my analysis implied causes of action for damages against federal officials pursuant to Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[3] See S. Nahmod, Civil Rights and Civil Liberties Litigation: The Law of Section 1983, § 2.02 (2d ed. 1986 & Supp. 1990).

[4] Among the arguments put forth in favor of this reluctance are the following: (1) § 1983 undermines federalism interests; (2) § 1983 overdeters through the unwillingness of state and local government officials to take risks for fear of damages liability; and (3) the § 1983 caseload is overwhelming the federal courts with unimportant matters. See S. Nahmod, supra note 3, § 1.04.

cutting back on, the scope and coverage of section 1983 and related fourteenth amendment doctrine.[5]

Despite considerable activity in other areas, there have been only two Supreme Court decisions involving section 1983 and compensatory damages.[6] These cases, *Carey v. Piphus*[7] and *Memphis Community Schools v. Stachura*,[8] established several principles. First, compensation for actual damages is the guiding criterion in section 1983 cases.[9] Presumed damages thus are not awardable for section 1983 violations. Where actual damages are not proved, the successful plaintiff recovers only one dollar in nominal damages. Second, the federal law of section 1983 damages is to be informed by the common law of damages, which is the starting point for analysis. However, section 1983 damages rules are not conclusively determined by the common law "background of tort liability" even though they may be derived from it. Rather, those rules are ultimately federal rules determined by federal policy.[10]

The *Carey* and *Stachura* compensatory damages rules and their progeny, as developed by the circuits, are not very controversial. The

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[5] For example, the Court has ruled that even though local governments are suable persons under § 1983, states are not, Will v. Michigan Dep't of State Police, 109 S. Ct. 2304 (1989); individual defendants are protected by qualified immunity from § 1983 damages liability unless they violate clearly settled law, Harlow v. Fitzgerald, 457 U.S. 800 (1982); district court denials of an individual defendant's motions for summary judgment on qualified or absolute immunity grounds are immediately appealable, Mitchell v. Forsyth, 472 U.S. 511 (1985); the question of who is a policymaker for local government liability purposes is determined by the trial judge using state law only, thereby removing the jury from this decision, Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989); Praprotnik v. City of St. Louis, 485 U.S. 112 (1988); and the due process clause does not give rise to affirmative duties to protect citizens from danger, DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998 (1989).

[6] There also have been two Supreme Court decisions dealing with punitive damages: Smith v. Wade, 461 U.S. 30 (1983) (at least recklessness or callous disregard is required for a punitive damages award against individuals), and City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (local governments are absolutely immune from punitive damages liability). Neither case is relevant to this Article.

[7] 435 U.S. 247 (1978).

[8] 477 U.S. 299 (1986).

[9] According to the Court in *Carey*, the basic purpose of § 1983 damages liability is "to compensate persons for injuries caused by the deprivation of constitutional rights." *Carey*, 435 U.S. at 254.

[10] The Court in *Carey* observed that damages concepts from tort law will often be helpful in § 1983 cases, especially where the tort interests "parallel closely the interests protected by a particular constitutional right." Where this parallel does not exist, "the task will be the more difficult one of adapting common-law rules of damages to provide fair compensation for injuries caused by the deprivation of a constitutional right." Id. at 258.

exclusion of presumed damages was not expected to have, and indeed has not had, much of an impact on section 1983 litigation.[11] Similarly nonproblematic is the general rule that once a fourteenth amendment violation is found to have caused actual harm to the plaintiff, then she is entitled to recover compensatory damages for that harm, including both special damages for medical costs and economic losses,.as well as general damages for pain, suffering, humiliation, and loss of reputation.[12] It also is worth noting that related damages inquiries into cause in fact[13] and proximate cause[14] typically do not create serious difficulties for trial courts or for juries.[15]

In two thoughtful and provocative articles,[16] Professor John Jeffries, Jr., proposes to change the way in which compensatory damages for constitutional violations are addressed. He starts with Professor Ernest Weinrib's position that corrective justice requires both causation and wrongdoing for noninstrumental compensatory damages liability.[17] He then characterizes section 1983 liability as fault-based by virtue of what he considers the negligence aspect of qualified immunity.[18] Ultimately, he argues for the use of a risk-rule approach to compensatory damages such that "the relation of risk to injury helps determine the appropriate measure of compensation for constitutional violations."[19]

Under Jeffries's risk-rule approach, not all damages foreseeably

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[11] See S. Nahmod, supra note 3, § 4.02.

[12] Id. § 4.03.

[13] Id. § 3.18.

[14] Id. § 3.17.

[15] It is only the rare case in which causation is a serious problem, although it should be noted that cause-in-fact burdens of proof under Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), have lately become controversial after Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1795 (1989). See S. Nahmod, supra note 3, § 4.03 (Supp. 1990). Additionally, courts, including the Supreme Court, occasionally dispose of difficult cases, which might otherwise be treated as raising troublesome duty issues, on proximate cause grounds. Martinez v. California, 444 U.S. 277 (1980) (case resolved on proximate cause grounds) is a good example. But see DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998 (1989) (confronting the duty issue).

[16] Jeffries, Compensation for Constitutional Torts: Reflections on the Significance of Fault, 88 Mich. L. Rev. 82 (1989) [hereinafter Fault Article]; Jeffries, Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts, 75 Va. L. Rev. 1461 (1989) [hereinafter Risk Article].

[17] See Fault Article, supra note 16, at 93-96, as adapted from Weinrib, Causation and Wrongdoing, 63 Chi.-Kent L. Rev. 407 (1987).

[18] See Fault Article, supra note 16, at 96-101; Risk Article, supra note 16, at 1466-70.

[19] Risk Article, supra note 16, at 1461.

caused by unconstitutional conduct should be compensable.[20] There must be a determination of the particular interests protected by the constitutional provision violated, followed by an inquiry into the specific kinds of damage suffered by the section 1983 plaintiff. Jeffries maintains that the successful section 1983 plaintiff can receive compensation only for the specific kinds of damage that coincide with the particular interests protected by the constitutional provision violated. Therefore, other foreseeable damages are not compensable.

I appreciate Jeffries's contribution in these articles to a deeply theoretical analysis of section 1983 in general and compensatory damages in particular. There is not nearly enough of this kind of work in the literature.[21] Nevertheless, I propose to criticize Jeffries's risk-rule approach on several grounds. I argue that wrongdoing is inherent in unconstitutional conduct, not in qualified immunity.[22] Consequently, the use of a risk-rule approach to compensatory damages is not normatively compelled. Rather, compensatory damages are normatively justified for all foreseeable harm resulting from unconstitutional conduct. In the course of making my argument, I criticize Jeffries's distinction between constitutional rights that protect individual interests and those that protect systemic interests.[23]

I further contend that Jeffries's application of the risk rule to section 1983 is flawed because section 1983 is better analogized to intentional dignitary torts, where the risk rule does not govern, than to negligence where Jeffries asserts that the risk rule does govern. However, what ultimately is most troubling about his position is the extent of his willingness to allow tort doctrine and its accompanying rhetoric to determine the scope of a federal civil rights statute intended to vindicate fourteenth amendment interests.[24] Significantly, the disagreements between Jeffries and myself are of more than academic interest

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[20] Id. at 1470-84.

[21] In addition to Jeffries' articles, other examples of theoretical contributions in the § 1983 area include: P. Schuck, Suing Government: Citizen Remedies for Official Wrongs (1983); Nahmod, Section 1983 Discourse: The Move from Constitution to Tort, 77 Geo. L.J. 1719 (1989); Wells, The Past and Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules, 19 Conn. L. Rev. 53 (1986); Whitman, Government Responsibility for Constitutional Torts, 85 Mich. L. Rev. 225 (1986).

[22] See infra text accompanying notes 75-82.

[23] See infra text accompanying notes 83-104.

[24] See infra text accompanying notes 118-24.

because the issues raised are beginning to emerge explicitly in the circuits.[25]

I. JEFFRIES'S POSITION ON SECTION 1983 COMPENSATORY DAMAGES, FAULT, AND THE RISK RULE

Jeffries begins by challenging what he calls "the assumption . . . that compensating victims is a sensible, and perhaps a sufficient, rationale for awarding damages for violations of constitutional rights."[26] Focusing on noninstrumental justifications (including nondeterrence) for compensation, he grounds his analysis on the view of Weinrib that both causation and wrongdoing are essential to the Aristotlean concept of corrective justice.[27] Under this view, "fault supplies the moral dimension to the causal relationship."[28]

Jeffries argues that the affirmative defense of qualified immunity, inasmuch as it implicates negligence,[29] constitutes the primary fault element in section 1983 litigation involving individual liability for compensatory damages.[30] Because of this, he goes on to reject the position that "*any* violation of the Constitution is an act of wrongdoing" that is inherently a fault for which corrective justice requires compensation.[31] He then concludes that "there is . . . no noninstrumental basis for compensatory liability without proof of fault."[32]

Jeffries builds on this conclusion in a later article where his goal is to "identif[y] the appropriate measure of compensation for violations of constitutional rights and thus [to] clarif[y] the starting point at

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[25] See, e.g., Rosenstein v. City of Dallas, 876 F.2d 392, 401 (5th Cir. 1989) (Jolly, J., dissenting). The panel decision in *Rosenstein* was vacated and thereafter reinstated as modified by the Fifth Circuit. The modification eliminated all substantive discussion of damages. For an earlier example, see also Cox v. Northern Va. Transp. Comm'n, 551 F.2d 555 (4th Cir. 1976) (misapplying Paul v. Davis, 424 U.S. 693 (1976), to bar recovery for damage to reputation in a case involving a procedural due process violation based on deprivation of liberty interest), which was criticized in S. Nahmod, supra note 3, at § 4.05.

[26] Fault Article, supra note 16, at 83.

[27] Id. at 93-101.

[28] Id. at 95.

[29] Jeffries observes that qualified immunity may comprise gross negligence as well as ordinary negligence. For the purposes of this Article, I use negligence in the qualified immunity setting in the same way that he does.

[30] Id. at 97-101.

[31] Id. at 99.

[32] Id. at 101.

which the debate on deterrence should begin."[33] He again articulates the position that section 1983 liability for compensatory damages is based on what he calls negligence-type fault, which he finds in the qualified immunity doctrine. He similarly repeats his claim that, from a noninstrumental and corrective justice perspective, section 1983 liability for compensatory damages *must* be based on such fault. He further asserts that "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."[34]

To implement this position, Jeffries argues forthrightly for the application of Professor Robert Keeton's risk-rule approach to section 1983 compensatory damages issues. He declares 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."[35] In the course of explaining and defending this risk-rule position, Jeffries distinguishes between those constitutional rights that primarily protect individual interests, such as the fourth amendment,[36] and those that primarily protect systemic interests, such as the first amendment.[37]

It is in cases involving the systemic interests that "measuring damages for constitutional violations becomes problematic [because] 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."[38] Jeffries consequently concludes that "compensation in money damages for *all* injuries resulting from violation of constitutional rights does not make equal sense for all rights."[39]

II. Critique and Analysis

A. Section 1983 Qualified Immunity and Wrongdoing

I assume that Jeffries is on solid ground in claiming that, based upon Weinrib's corrective justice view, both causation and wrongdoing are necessary to make out a normative case for compensation.

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[33] Risk Article, supra note 16, at 1464.
[34] Id. at 1470.
[35] Id. at 1461.
[36] Id. at 1472-77.
[37] Id. at 1477-84.
[38] Id. at 1480.
[39] Id. at 1484.

This claim is indispensable for Jeffries's risk-rule conclusion that "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."[40] However, in arriving at this conclusion, Jeffries is constrained for several reasons to discover the presence of negligence-type fault[41] in section 1983 doctrine. Inasmuch as Keeton derives the risk rule from, and articulates it for, negligence law, the fit between the risk rule and section 1983 wrongdoing is more comfortable for Jeffries to the extent that section 1983 wrongdoing is similarly identified with negligence. Also, and more fundamentally, there is for Jeffries no normative basis for applying the risk rule to section 1983 compensatory damages cases in the absence of such negligence.

Unfortunately, Jeffries's reliance on qualified immunity doctrine for the proposition that section 1983 liability is negligence-based is not convincing. It is true that the Supreme Court ruled in *Anderson v. Creighton*[42] that a "law enforcement officer who participates in a search that violates the Fourth Amendment may [not] be held personally liable for money damages if a reasonable officer could have believed that the search comported with the Fourth Amendment."[43] However, the reference to reasonableness in *Anderson* is misleading because the Court intended something very different from negligence. It announced that a law enforcement officer is not liable unless she violated *clearly-settled* fourth amendment law, determined as of the date of the challenged conduct.[44] This inquiry into the existence of clearly-settled law must be made in a somewhat particularized and fact-specific manner.[45] Thus, the reference to reasonableness is a

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[40] Id. at 1470.

[41] Jeffries uses the terms wrongdoing and fault interchangeably. See infra text accompanying note 70. If fault connotes state of mind, as I believe it does, then Jeffries' use suggests that a person cannot be a wrongdoer if she lacks the requisite state of mind. I think this is incorrect. Wrongdoing is not necessarily the same as fault even though it includes fault. This distinction is important because, as I argue later—see infra note 74 and accompanying text—wrongdoing is inherent in unconstitutionality even if there is no "bad" state of mind. It appears to be in Jeffries' interest to blur the distinction.

[42] 483 U.S. 635 (1987).

[43] Id. at 636-37.

[44] Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[45] In *Anderson*, 483 U.S. at 641, the Court noted that in the case before it the relevant qualified immunity question was "the objective (albeit fact-specific) question whether a reasonable officer could have believed [defendant's] warrantless search to be lawful, in light of

shorthand way of saying that where there is clearly-settled law, a police officer *is held to that standard* irrespective of what the officer actually knew.

It may be suggested that the clearly-settled-law inquiry, even as I have described it, still is an inquiry into the existence of wrongdoing. After all, since the defendant should have known clearly-settled law (whether she did or not), she was a wrongdoer in not acting accordingly. However, this is to misapprehend profoundly the nature and function of qualified immunity. Its primary purpose is not to deny the wrongdoing of a section 1983 defendant who acted in the absence of what Jeffries calls negligence. Its primary purpose is to promote independent decisionmaking by persons who might, when confronted with the spectre of section 1983 liability, refuse to act professionally and properly.

While the Supreme Court made this point clear in the first qualified immunity case decided in 1967,[46] it was expressed more recently by the Court in *Harlow v. Fitzgerald*,[47] when the Court eliminated the subjective component of the qualified immunity test:

> Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'[48]

Qualified immunity is thus essentially instrumental in nature and does not connote wrongdoing or its absence. A defendant who causes a constitutional deprivation which does not violate clearly-settled law is exonerated for public policy reasons. Conversely, a defendant who causes a constitutional deprivation in violation of clearly-settled law is liable because there are no public policy reasons that demand a contrary result.

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clearly established law and the information the searching officers possessed. [Defendant's] subjective beliefs about the search are irrelevant."

[46] See Pierson v. Ray, 386 U.S. 547 (1967), discussed infra, notes 49-51, and accompanying text.

[47] 457 U.S. 800 (1982).

[48] Id. at 819.

This view of qualified immunity derives considerable support from several additional observations. First, the doctrine of qualified immunity itself is not grounded in the text or legislative history of section 1983 but is instead a creation of instrumental policy. The Court acknowledged as much in *Pierson v. Ray*,[49] its seminal qualified immunity decision, when it applied what it erroneously[50] called a "good faith" defense to police officers accused of making unconstitutional arrests. The Court reasoned that "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."[51]

Second, when the Court eliminated the subjective component of the qualified immunity test,[52] and thereafter allowed defendants immediately to appeal denials of motions for summary judgment based on qualified immunity,[53] it did so for the explicit purpose of allowing such defendants to avoid, to the extent possible, the need to proceed to trial. In effect, the Court went far in the direction of converting qualified immunity into absolute immunity,[54] an affirmative defense which similarly is not fault-based. Rather, absolute immunity reflects

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[49] 386 U.S. 547 (1967).

[50] I consider "good faith" erroneous because it was always clear that the qualified immunity test had an objective component and was therefore never purely subjective in nature. At the very least, the use of the term "good faith" is misleading. See S. Nahmod, supra note 3, § 8.11.

[51] *Pierson*, 386 U.S. at 555 (citations omitted). That qualified immunity is a creation of policy also is demonstrated by its unquestioned application to *Bivens* actions against federal officials. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), created a fourth amendment action for damages against federal law enforcement officers. In *Harlow*, the Court without hesitation applied qualified immunity to federal officials and clearly indicated that its decision also applied to § 1983 actions. *Harlow*, 457 U.S. at 818 n.30.

[52] See *Harlow*, 457 U.S. 800.

[53] See Mitchell v. Forsyth, 472 U.S. 511 (1985).

[54] Absolute immunity from damages liability is available to legislators for legislative acts, Tenney v. Brandhove, 341 U.S. 367 (1951), to judges for judicial acts, Stump v. Sparkman, 435 U.S. 349 (1978), and to prosecutors for acts of advocacy, Imbler v. Pachtman, 424 U.S. 409 (1976). It is designed to promote independent decisionmaking and to prevent disruption of government processes. Like qualified immunity, it is a creation of policy, although derived from a common law background. Unlike qualified immunity, there is no inquiry at all into clearly-settled law. Rather, for policy reasons an absolutely immune defendant is protected from liability even if she clearly, knowingly, and maliciously acts unconstitutionally. See generally S. Nahmod, supra note 3, ch. 7 (stating that absolutely immune defendants will have their cases dismissed upon a showing of status and that they acted within their official capacities).

the policy that an absolutely immune defendant who causes a constitutional deprivation is exonerated even where clearly-settled law is violated so as to protect her not only from liability but from the need to defend at all. In short, both qualified immunity and absolute immunity tell us little or nothing about wrongdoing in section 1983 cases.[55]

B. The Section 1983 Prima Facie Case and Wrongdoing

We are thus brought back to the section 1983 prima facie case and Jeffries's rejection of the argument that every constitutional violation itself constitutes wrongdoing. Recall that "fault supplies the moral dimension to the causal relationship."[56] Hence, the presence of what Jeffries calls negligence-type fault in section 1983 cases (through qualified immunity) is crucial to his position that corrective justice warrants the application of a risk-rule approach to compensatory damages. In order to adhere to his risk-rule approach, he must argue that constitutional violations are not in themselves wrongdoing. If Jeffries is wrong about this, as I shall argue he is, then even those constitutional provisions to which he refers as systemic[57] can normatively and noninstrumentally give rise to compensatory damages broader in scope than he considers defensible.

Jeffries correctly observes that section 1983 does not have its own state-of-mind requirement, that it does not create rights but is a vehicle for enforcing them, and that different constitutional provisions have varying state-of-mind requirements ranging from impermissible motivation to nonnegligence.[58] Because he equates fault and wrongdo-

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[55] If I am correct that qualified immunity reflects a policy of promoting independent decisionmaking by government officials, then it should follow that qualified immunity does not protect private defendants who act under color of law. Indeed, it turns out that at least one circuit has so ruled. See Duncan v. Peck, 844 F.2d 1261 (6th Cir. 1988). However, the majority rule among the circuits is that private defendants are protected by qualified immunity. See S. Nahmod, supra note 3, § 8.17 (Supp. 1990). Nevertheless, the majority rule may convincingly be explained not as a statement about the significance of wrongdoing, but rather as reflecting the instrumental policy that private persons should not fear liability when utilizing a procedure, provided by a state legislature, that later turns out to be unconstitutional. See, e.g., Jones v. Preuit & Mauldin, 851 F.2d 1321 (11th Cir. 1988) (en banc), vacated on other grounds, 109 S. Ct. 1105 (1989).

[56] Fault Article, supra note 16, at 95.

[57] See Risk Article, supra note 16, at 1470-84.

[58] Fault Article, supra note 16, at 96-98; Risk Article, supra note 16, at 1467.

ing[59] and identifies them with states of mind which "vary from right to right,"[60] he is forced to find wrongdoing elsewhere than in the prima facie case. Jeffries finds it in the qualified immunity doctrine. This explains why he critically characterizes the Court's decision in *Owen v. City of Independence*[61] as an unwise strict liability case.[62] He refuses to accept the "intuition" that "fault is inherent in unconstitutionality," so that "the reasonableness of an official's conduct is irrelevant, and every constitutional violation, regardless of circumstance, is presumptively appropriate for rectification by money damages."[63]

His justifications for this refusal are intriguing but unconvincing. First, he observes that qualified immunity negligence-type fault derives from the law of "constitutional torts," not constitutional law itself. He considers this derivation advantageous because "it does not imply a redefinition of the rights themselves nor any limitation of their traditional application."[64] But even if it is true that qualified immunity is not derived from constitutional law, so what? The identical statement about advantage can be made even if one takes the position that wrongdoing is inherent in unconstitutionality. Qualified (and absolute) immunity can still play important and instrumental policy roles regardless of which of these positions is taken.

Jeffries's second argument is that viewing wrongdoing as inherent in unconstitutionality is "more responsive to the traditional rhetoric of constitutional law than to much of its current doctrine."[65] While "[t]raditionally, constitutional rights are described as fundamental and timeless[, i]n fact, some are neither."[66] He notes that in many cases the Supreme Court has refused to give retroactive effect to declarations of new constitutional rights. He again criticizes *Owen*, but this time as an example of a case in which a governmental actor was held liable for damages even though the procedural due process requirements violated were apparently declared for the first time in

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[59] See supra note 41 and infra text accompanying note 70.

[60] Fault Article, supra note 16, at 97.

[61] 445 U.S. 622 (1980) (holding that local governments are not protected by qualified immunity from liability for compensatory damages).

[62] Fault Article, supra note 16, at 87-90.

[63] Id. at 99-100.

[64] Id. at 100.

[65] Id.

[66] Id.

Owen itself.[67] Jeffries maintains that "[i]n these circumstances, it is surely odd to describe the municipality's action as intrinsically wrongful."[68]

There are several difficulties with this argument. Jeffries sets up a straw man when he asserts that constitutional rights traditionally are described as "fundamental and timeless." I know of no one who so describes them in the sense he means. Constitutional rights are derived from textual or historical sources through interpretation by the judiciary. They are not "out there" simply waiting to be discovered. Moreover, after constitutional rights are derived through interpretation, there may be instrumental or other policy reasons *independent of their existence* which compel only prospective application. For example, the doctrine of nonretroactivity that Jeffries mentions[69] has its most frequent application in cases involving criminal procedure and convicted defendants. If all newly declared rights automatically were applied retroactively, state and federal criminal proceedings frequently would be disrupted, extensive resources, having been already expended, would have to be expended once again on retrials and many guilty defendants could go free. This does not mean, though, that such unconstitutional conduct does not constitute wrongdoing.

One does not have to view constitutional rights as "fundamental and timeless" in the way Jeffries seems to mean in order to maintain that wrongdoing is indeed inherent in all constitutional violations. But it probably is not the kind of wrongdoing that he has in mind. Jeffries uses fault and wrongdoing interchangeably and defines them "in the conventional legal sense as culpability, including culpable inadvertence, as in the violation of a legal norm of which the actor should have been aware."[70] His repeated emphasis on negligence-type fault suggests that he envisions some sort of state-of-mind requirement which he identifies with negligence and more generally with wrongdoing. However, this conflation of fault and wrongdoing is seriously questionable. Fault connotes state of mind, but wrongdoing, while including fault in Jeffries' sense of the term, is considerably broader in scope.

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[67] 445 U.S. 622.

[68] Fault Article, supra note 16, at 101.

[69] Id. at 100-01.

[70] Id. at 96 n.49.

Even where wrongdoing is grounded on negligence, it frequently turns out that no particular state of mind is required beyond volitional conduct. This is because the negligence standard primarily is objective in nature. There are many situations in which a defendant is held liable for negligent conduct even though that particular defendant could not realistically have acted otherwise. As the famous tort case of *Vaughn v. Menlove*[71] demonstrates, defendants often are held to a socially created standard of reasonable care even though they have done all that could be expected of them (short of not engaging in the activity altogether) given their mental capacity.[72] In a very real sense, we announce that because such defendants live and operate in our society, they are held at their peril to know certain things and to act accordingly.[73] When they do not, they are negligent and liable for the harm caused.

Consequently, it is not exclusively negligence or any particular state of mind that constitutes wrongdoing. Rather, wrongdoing is a social construct that does not necessarily include states of mind or fault. So long as there is a judicial declaration that a given constitutional provision articulates a given standard of conduct—with or without any particular state of mind added, as the case may be—then there is wrongdoing of the kind that normatively makes out the noninstrumental case for compensation.[74] Under this approach to wrongdoing and constitutional violations, there is no need to resort to qualified immunity, as Jeffries does. Thus, his argument for a risk-rule approach that limits section 1983 compensatory damages is considerably weakened, if not altogether undermined.

III. A Different View

A. Wrongdoing as Inherent in Unconstitutionality

1. Consistency with Weinrib

Jeffries' analysis of wrongdoing and qualified immunity is flawed because it identifies qualified immunity with wrongdoing and rejects

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[71] 3 Bing. N.C. 468, 132 Eng. Rep. 490 (1837).

[72] See W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on Torts § 32 (5th ed. 1984) [hereinafter Prosser and Keeton on Torts].

[73] Id. at 182-85 (see subheading entitled "Knowledge").

[74] This is comparable to liability for trespass on land where the trespasser is a wrongdoer even if she made an innocent mistake in going onto the plaintiff's property.

the plausible claim that wrongdoing is inherent in unconstitutionality. Significantly, this claim also appears consistent with Weinrib's view of causation and wrongdoing in tort law. It is true that Weinrib, whose normative views are relied on so extensively by Jeffries, focuses on tort law in general and negligence in particular in his discussion of the moral need for both causation and wrongdoing.[75] However, this is only because tort law is the subject at hand in the article in question.[76]

As I read his article, Weinrib maintains that both causation and negligent wrongdoing are normatively required for tort law compensation: causation explains why *this plaintiff* is entitled to recover and negligence explains why *this defendant* is obligated to compensate.[77] His purpose is to "vindicate . . . tort law as the expression of a single normative [noninstrumental] conception integrating the plaintiff's injury and the defendant's negligence."[78] To quote Weinrib:

> In institutional terms, [the] relationship [between injury and negligence] is expressed by the lawsuit between the parties, with its assumption that the transference of a single sum can simultaneously satisfy the plaintiff's entitlement against the defendant and discharge the defendant's debt to the plaintiff. If a parallel doctrinal relationship exists, particularization of the plaintiff through causation must allow for linkage to the defendant, and particularization of the defendant through wrongdoing must similarly allow for linkage with the plaintiff.[79]

Weinrib's conclusion, in short, is that "wrongdoing and causation [are] the interpenetrating aspects of a unified conception of tort."[80]

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[75] See Weinrib, supra note 17.

[76] Indeed the entire symposium issue—of which Weinrib's article is a part—is entitled Symposium on Causation in the Law of Torts, 63 Chi.-Kent L. Rev. 397 (1987).

[77] "Causation represents the relationship's physical aspect, the direction of energy from the defendant to its impingement upon the plaintiff. The negligence standard is the relationship's moral aspect, with its insistence that the potential for harm inherent in activity not violate the equal status of those whom it might affect." Weinrib, supra note 17, at 430. But see Coleman, Property, Wrongfulness and the Duty to Compensate, 63 Chi.-Kent L. Rev. 451 (1987) (criticizing Weinrib's corrective justice position); Epstein, Causation—In Context: An Afterword, 63 Chi.-Kent L. Rev. 653 (1987) (criticizing Weinrib). See generally Wright, Causation in Tort Law, 73 Calif. L. Rev. 1735 (1985) (discussing difference between negligence and causation).

[78] Weinrib, supra note 17, at 410.

[79] Id. at 429.

[80] Id. at 444.

The law of section 1983 compensatory damages liability comfortably can be fit into Weinrib's normative model. Causation explains why *this plaintiff* is entitled to recover and unconstitutional conduct explains why *this defendant* is obligated to compensate, although it may imply more.[81] This captures the institutional relationship between a section 1983 plaintiff and defendant, whether the defendant is an individual or a local government: both causation and unconstitutional conduct exemplify that relationship. Indeed, one might describe the section 1983 relationship in right/duty terms in a manner parallel to Weinrib's description of the tort relationship: "The plaintiff's [constitutional] right to be free of wrongful [unconstitutional] interferences with his person and property is correlative to the [constitutional] duty on the defendant to abstain from such [unconstitutional] interferences."[82]

Important advantages flow from my position that the normative implications for section 1983 encompass all damages attributable to constitutional wrongdoing. It is no longer necessary to distinguish, as Jeffries does, between individually and systemically focused constitutional rights. There are other principled ways of drawing lines around damages liability. Additionally, Jeffries's position compels the trial judge to distinguish, for damages purposes, among various constitutional interests, and thus to reach difficult constitutional questions in order to resolve what ought to be straightforward damages issues. In contrast, my position that wrongdoing is inherent in unconstitutionality does not compel such distinctions.

2. *The Questionable Distinction Between Individual and Systemic Rights*

Under Jeffries's risk-rule approach, it is important that there be a meaningful distinction between those constitutional provisions that "guard individuals against specified harms by directly prohibiting the infliction of such harms"[83] and "provisions . . . seek[ing] to prohibit

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[81] This includes, for example, particular views regarding the state-citizen relationship and the nature of political society. See Nahmod, supra note 21, at 1747-50.

[82] Weinrib, supra note 17, at 430. Viewing the § 1983 plaintiff-defendant relationship in this way is very different from "the notion of the private enforcement of a public standard" which, according to Weinrib, does not "preserve tort law . . . as a fully understandable phenomenon." Id. at 447.

[83] Risk Article, supra note 16, at 1470.

certain government actions."[84] In the latter instance, because "the relation between the conduct proscribed and the harm ultimately feared is strategic and indirect, . . . violation of a constitutional prophylaxis often produces constitutionally irrelevant injury."[85] Consequently, for Jeffries it makes considerable sense—indeed, it appears necessary—to apply a normatively derived risk-rule approach derived from qualified immunity in order to exclude "constitutionally irrelevant" damages from section 1983 liability.

However, that the distinction is as clear cut as Jeffries wants to make it is questionable. Indeed, attempting to make the distinction tends to lead to disjunctive thinking in which a particular constitutional right is primarily either individual or systemic. Constitutional rights, however, are more complex than that. The "takings" clause,[86] which Jeffries characterizes as a tort-like constitutional right, surely is systemic as well. It is directed at government conduct of the sort that affects many. Conversely, the fourth amendment's warrant requirement, which he characterizes as systemic and prophylactic, also is directed at protecting individuals.

Yet Jeffries is compelled for theoretical reasons to attempt such a determination for *all* constitutional rights in order to decide in individual cases whether there exist "constitutionally irrelevant" damages which normatively should be excluded from section 1983 liability. In contrast, if wrongdoing is inherent in all constitutional violations, there is no normative need to draw *this* distinction (although other lines may have to be drawn) in connection with section 1983 compensatory damages for constitutional violations. Perhaps the best way to demonstrate this is to consider the fourth and first amendment hypotheticals that Jeffries uses in support of the application of a risk-rule approach.

a. The Fourth Amendment Hypothetical

Jeffries's fourth amendment hypothetical[87] is one in which a police officer's search violative of the fourth amendment uncovers incriminating evidence, and it turns out, as sometimes happens, that the

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[84] Id. at 1471.

[85] Id. at 1470-71.

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

[87] Discussed in Risk Article, supra note 16, at 1474-77.

exclusionary rule does not bar the use of this evidence. The criminal defendant is charged, tried, convicted, and punished. Since all that occurred is reasonably foreseeable, according to Jeffries, this defendant, when he becomes a section 1983 plaintiff suing for damages for the violation of his fourth amendment rights, would be entitled to compensatory damages for all the harm stemming from that violation in the absence of a risk-rule approach. Jeffries argues against such a "peculiar, if not perverse" result on the grounds that the plaintiff's own misconduct contributed to the harm and that liability for all such damages "would be a wealth transfer from society generally to those guilty of criminal wrongdoing."[88] He allows recovery only for invasion of privacy, the interest protected by the fourth amendment, while disallowing recovery for harm resulting from the discovery of incriminating evidence and the criminal prosecution.[89]

But it is not necessary to adopt Jeffries's risk-rule approach and its normative qualified immunity underpinnings in order to deal with this unusual[90] hypothetical sensibly. We might concede that from a normative point of view—premised on the position that wrongdoing is inherent in unconstitutionality—the plaintiff is at least prima facie entitled to all damages resulting from the fourth amendment violation and still avoid what might be considered an unpalatable result.[91] In addition to the defendant, various independent decisionmakers are causally responsible for plaintiff's damages as well, including the prosecutor, the trial judge, and the jury. It may thus be possible to deal with the compensatory damages issue not through Jeffries' risk-rule approach, but rather by focusing on causation in fact or superseding cause.

Suppose, for example, that the incriminating evidence unlawfully seized is not the only evidence used against the section 1983 plaintiff as the basis for his prosecution, conviction, and imprisonment. If the defendant can prove by a preponderance of the evidence that the plaintiff would have been prosecuted, convicted, and imprisoned even

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[88] Id. at 1475.

[89] Id. at 1474-75.

[90] This kind of scenario apparently does not arise very often in the real world. Indeed, a quick look at the damages and proximate cause cases collected in S. Nahmod, supra note 3, chs. 3 & 4, does not reveal any such case in the circuits.

[91] Perhaps the result is unpalatable because we do not like criminals. Interestingly, the first amendment hypothetical used by Jeffries, discussed infra, notes 97-104, features the operator of an adult bookstore—another unsavory character.

in the absence of the incriminating evidence, then the defendant is absolved from damages liability *for those events* on cause-in-fact grounds.[92] There is thus no need to reach the proximate cause issue.

In the alternative, suppose the unlikely situation in which the incriminating evidence is indeed the primary, if not the only, evidence used in the decisions of the prosecutor, the judge, and the jury. Here, the proximate cause issue must be reached and, when it is, it plausibly can be dealt with in superseding cause terms.[93] Under such an approach, it could be argued that the "intervening acts of the prosecutor, . . . judge and jury . . . each break the chain of causation unless plaintiff can show that these intervening acts were the result of deception or undue pressure by the defendant [police officer]."[94] That is,

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[92] See Carey v. Piphus, 435 U.S. 247 (1978) (holding that proof, by a preponderance of the evidence, that an allegedly unconstitutional school suspension was independently justified precludes the presumption of compensable damages), and especially, Mount Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977) (holding that proof, by a preponderance of the evidence, that petitioner's employment would have been terminated in the absence of allegedly protected conduct bars the recovery of compensatory damages); see also S. Nahmod, supra note 3, § 4.03 (Supp. 1990) (questioning the interpretation of *Mount Healthy* in light of Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1795 (1989)).

Clearly, where there is no causal connection whatever between a plaintiff's harm and a defendant's unconstitutional conduct, then under Weinrib's approach there can normatively be no liability for any damages at all. This case is very different from the fourth amendment case discussed in the text which, because it assumes a fourth amendment violation that causes various harms to the plaintiff, questions the extent of the defendant's liability for those harms.

[93] The circuits address similar compensatory damages issues in just such superseding cause terms. For example, in Barts v. Joyner, 865 F.2d 1187 (11th Cir. 1989), the plaintiff claimed that her detention and transportation to a police station by the defendant police officers in violation of the fourth amendment rendered them liable for her subsequent criminal trials for murder, her conviction (followed by acquittal after a second trial), her incarceration for eight months, and the resulting aggravation of her Rape Trauma Syndrome. The Eleventh Circuit disagreed and determined that she was held unconstitutionally only for three hours prior to her confession but that thereafter, because of her confession and other information, the defendants had probable cause to hold her. Accordingly, the defendants were only liable for damages suffered during those three hours and for any other damages directly resulting from that detention, but not for subsequent events. The court reasoned: "The intervening acts of the prosecutor, grand jury, judge and jury . . , each break the chain of causation unless plaintiff can show that these intervening acts were the result of deception or undue pressure by the defendant policemen." Id. at 1195. In this case, the plaintiff did not produce any evidence of such deception or undue influence. The Eleventh Circuit also went on to distinguish Malley v. Briggs, 475 U.S. 335 (1986)—which held that a judge's decision does not always break the chain of causation even in the absence of deception or undue pressure—as dealing only with procuring the unlawful arrest in the first place, and not with events following an arrest that has already incorrectly occurred.

[94] *Joyner*, 865 F.2d at 1195.

even if we assume that the defendant is normatively responsible for all damages resulting from the incriminating evidence unlawfully seized,[95] we can take the position that for instrumental reasons, such as a concern with overdeterrence, we do not want to award all damages to the plaintiff in the absence of deception, undue pressure, or misrepresentation by the defendant police officer.[96]

Consequently, there is no real need to use the risk-rule approach in order to avoid a compensatory damages result which may be considered instrumentally unwise. Money damages can be limited in many cases through the use of causation in fact or superseding cause without artificially limiting to privacy alone the interests protected by the fourth amendment.

b. The First Amendment Hypothetical

According to Jeffries, first amendment cases pose even more difficult compensatory damages problems because "theorists recognize an instrumental relation between freedom of speech and societal decisionmaking."[97] That is, "first amendment doctrine is strongly, albeit

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[95] Normatively, it also may be argued that because the plaintiff committed the crime for which he was charged, tried, convicted, and imprisoned, his conduct constitutes wrongdoing which causally contributed to his harm. Under this argument there would be an apportionment of damages as a normative matter so that the defendant is not held responsible for *all* damages. There would thus be no need to use superseding cause instrumentally. However, I must confess that I am not entirely comfortable with this kind of in pari delicto argument because it amounts to shifting a portion of the wrongdoing (and therefore damages as well) to the plaintiff for conduct antecedent to the defendant's fourth amendment violation.

[96] See Borunda v. Richmond, 885 F.2d 1384, 1390 (9th Cir. 1988), a case in which plaintiffs were successful in their claim that the defendant police officers arrested them without probable cause, thereby forcing them to defend themselves in a criminal trial, which resulted in their acquittals. On appeal, the defendants argued that the district court should not have admitted into evidence the attorney's fees expended during the prior state criminal proceeding as an element of § 1983 damages. The Ninth Circuit disagreed and emphasized that in § 1983 cases a plaintiff is entitled to recover compensatory damages for all injuries resulting from a constitutional deprivation, including economic injuries such as attorney's fees that were the consequence of the unconstitutional arrest. The Ninth Circuit went on to acknowledge that in many circumstances police officers were insulated from liability for damages arising after the unconstitutional arrest on proximate cause grounds "since the prosecutor filing the criminal complaint is presumed to have exercised independent judgment in determining that probable cause for an arrest exists." However, in this case that presumption was rebutted by evidence that the defendants made misrepresentations to the prosecutor which brought about the filing of the criminal complaint. Thus, "[t]he amount of attorneys's fees incurred during the criminal prosecution was a direct and foreseeable consequence of the [defendants'] unlawful conduct." Id.

[97] Risk Article, supra note 16, at 1478.

incompletely, oriented toward a systemic rationale."[98] His first amendment hypothetical, intended to show that the harm resulting to an individual is different in kind from the harm at which the first amendment is directed, concerns the operator of an adult bookstore which provides live shows featuring nude dancers in addition to books and magazines.[99] A local government attempts to shut down the bookstore by passing a zoning ordinance prohibiting all live entertainment. Ultimately, the ordinance is held unconstitutional but, in the meantime, the plaintiff's business is completely destroyed.

Jeffries contends that if damages were not limited by the risk rule, the plaintiff could recover for the entire loss resulting from closing the business. However, this is problematic for him for several reasons. To the extent that a relevant harm is the "contraction of social discourse,"[100] then it is society that has suffered the harm. Also, to the extent that individual self-fulfillment is a relevant harm, the nude dancers and the patrons have suffered the harm. Finally, Jeffries asserts that since "[z]oning laws routinely restrict the use of property, often in ways costly to owners," what happened to plaintiff's business "is also the sort of harm to which modern constitutional interpretation is notoriously indifferent."[101] He concludes that, because the local government's fault is unrelated to the plaintiff's harm, the plaintiff would thus not be entitled to compensatory damages as a normative matter. Jeffries even goes on to question whether *any* compensatory damages in this case are necessary to serve the instrumental function of deterrence inasmuch as the successful assertion of the overbreadth doctrine could provide the basis for injunctive relief.[102]

I disagree with Jeffries's characterization of the relevant first amendment harms. He is too quick to assert that the relevant harm in the contraction of social discourse is only to society. Whatever we think of the plaintiff bookstore owner, he suffers from this contraction as a member of society (whether he knows or cares about it) and because it is his bookstore that can no longer contribute to social discourse. In addition, his interest in individual self-fulfillment has been

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[98] Id. at 1479.
[99] Id. at 1481-82.
[100] Id. at 1481.
[101] Id. at 1482.
[102] Id. at 1483-84.

harmed, because he can no longer sell books and magazines as well as provide nude dancing. Thus Jeffries's characterizations are far too narrow, in part reflecting his initial distinction between individual and systemic harms.[103]

I also find troubling his observations that "modern constitutional interpretation is notoriously indifferent [to the sort of harm suffered by the plaintiff]" and that "[o]nly the coincidence of [plaintiff's] economic injury and an essentially unrelated first amendment concern makes the claim work."[104] Even though many constitutional challenges to zoning regulations lose in litigation, some do not. In addition, it surely is no "coincidence" that the defendant's unconstitutional conduct in this hypothetical is both the cause of plaintiff's business losses and constitutes wrongdoing. Indeed, it is for this very reason that the application of Weinrib's corrective justice approach to this hypothetical normatively justifies damages liability for all of the plaintiff's business losses.

c. An Administrative Difficulty with Jeffries's Position

In order to apply his risk-rule approach to the hypotheticals, Jeffries is forced, or at least considers himself forced,[105] to discern just what the particular fourth and first amendment interests are. If I understand him correctly, a trial judge applying this approach for damages purposes must similarly articulate and separate these interests for the jury. However, a requirement that these interests be identified raises issues about the nature of the particular constitutional provision being considered that are even more difficult in most cases than the question whether the constitutional provision has been violated in the first place. For example, determining whether there has been a constitutional violation in the fourth amendment hypothetical is considerably easier than deciding thereafter, for damages purposes, just which individual and systemic interests the fourth amendment is

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[103] This demonstrates that under a risk-rule approach, the breadth with which the risk is described makes a pivotal difference in the result. Robert Keeton discusses this at length in R. Keeton, Legal Cause in the Law of Torts ch. II (1963). Jeffries tends to characterize risks very narrowly in the fourteenth amendment damages context. However, nothing in his qualified immunity/fault-based approach forces him to do this. He could just as well have described fourteenth amendment risks more broadly.

[104] Risk Article, supra note 16, at 1482-83.

[105] See supra note 103, which suggests that Jeffries too narrowly describes the relevant risks, even under a risk-rule approach.

intended to protect, and then distinguishing among them. Similarly, deciding in the first amendment hypothetical whether there has been a constitutional violation is easier than deciding which individual and systemic interests the first amendment is intended to protect, and then distinguishing among them as well.

In the case of the first amendment, this question is a deeply theoretical one about which judges and scholars differ,[106] and one which should only be answered when it is necessary to do so. Yet because Jeffries insists on the normative presumption that such section 1983 plaintiffs are entitled only to compensatory damages for the harm to their individual interests, his risk-rule approach dictates that we confront this kind of question head on even after the threshold constitutional violation has been found. I contend that in so doing, he overloads the compensatory damages issue, an issue which ought to be relatively straightforward, both at the section 1983 interpretation level and in application.

In contrast, the identification of unconstitutional conduct with wrongdoing normatively justifies awarding compensatory damages for all foreseeable harm resulting from unconstitutional conduct.[107] That is, I insist on the normative presumption that section 1983 plaintiffs who prove a constitutional violation are entitled to compensatory damages for all such harm. This avoids the need to distinguish among compensable individual interests and uncompensable systemic ones. When it becomes necessary to draw lines limiting awards for compensatory damages, that is better done, as I suggest, through the application of causation-in-fact doctrine or superseding cause doctrine. Except for those cases in which there is no causal connection whatever between the defendant's unconstitutional conduct and the plaintiff's harm,[108] these doctrines do not affect the initial normative basis for awarding compensatory damages for unconstitutional conduct.

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[106] Jeffries clearly recognizes this. See Risk Article, supra note 16, at 1477-78. For a discussion of different first amendment theories in connection with artistic expression, see Nahmod, Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment, 1987 Wis. L. Rev. 221.

[107] This is not to say that there are not instrumental policy reasons for limiting the scope of liability for resulting damage through the use of cause-in-fact or superseding cause doctrines. See discussion supra and text accompanying notes 75-82.

[108] In such a case, one of Weinrib's crucial links between plaintiff and defendant—causation in fact—is absent and there is consequently no normative basis for liability for damages.

By way of summary, then, Jeffries and I differ significantly in our respective views of the relationship between section 1983 liability and wrongdoing, which he grounds in qualified immunity doctrine and I ground in unconstitutional conduct. Even though, like Jeffries, I assume that Weinrib is correct about corrective justice and its requirement of both causation and wrongdoing, Jeffries and I reach different conclusions respecting section 1983 and wrongdoing. My view leads me to conclude that compensatory damages liability for all foreseeable harm resulting from unconstitutional conduct is normatively justified. His view leads him incorrectly to apply a risk-rule approach to such compensatory damages.

However, there is considerably more than this that separates Jeffries and me. First, even under Jeffries' view that qualified immunity supplies the requisite wrongdoing in section 1983 cases, it does not necessarily follow that the risk rule should be applied. Indeed, it turns out that the risk rule is misplaced. Second, Jeffries and I have very different positions on the proper role of tort law and its accompanying rhetoric in section 1983 interpretation.

B. The Flawed Risk Rule-Section 1983 Analogy

Robert Keeton's risk rule for negligence is:

> 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.[109]

The application of this rule to Keeton's hypothetical, involving an exploding can of negligently unlabeled rat poison which injures a nearby person, results in a finding of no liability because the risk that did occur, the explosion, is not one with respect to which the defendant's conduct is negligent.

The risk rule, as applied in this example and in most, although not all, other negligence cases, arises in situations in which the issue is *liability*. However, Jeffries instead describes the risk rule "as a way of fixing the scope of *compensation* [which] is a concept well known in ordinary tort law."[110] Liability and compensation are certainly intertwined, but they also are analytically distinguishable. That he does

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[109] R. Keeton, supra note 103, at 10.

[110] Risk Article, supra note 16, at 1466.

not distinguish between them obviously facilitates his later attempt to use the risk rule in a section 1983 compensatory damages context. But this move blurs an important distinction between section 1983 liability and compensatory damages. There can be, at one and the same time, liability for nominal damages of one dollar and no compensatory damages at all.[111] In contrast, the prima facie case for negligence requires actual damages; nominal damages are not allowed.

That nominal damages are not allowed for negligence but are allowed under section 1983 suggests that, even assuming with Jeffries that qualified immunity supplies the requisite wrongdoing for normative purposes, the more appropriate analogy is between section 1983 and intentional dignitary torts such as assault, offensive battery, and false imprisonment. This analogy is more appropriate than that between section 1983 and negligence because it recognizes the dignitary nature of constitutional violations and such intentional torts. Just as compensatory damages in dignitary tort cases can include damages for physical, emotional, and economic harm, so too can compensatory damages in section 1983 cases.[112]

If the better analogy for damages purposes is between section 1983 and intentional dignitary torts, then the rationale of the risk rule is inapplicable to section 1983 cases. Consider that Robert Keeton rejects as "untenable" the argument that "by analogy to the Risk Rule in negligence cases, the scope of liability for an intentional tort should be limited to results within the intent"[113] because "it would produce a narrower scope of liability for the more blameworthy type of tort."[114] If the focus is on the scope of liability for unintended harm resulting from intentional conduct, then, according to Keeton, "the course of decisional development appears to have been one of somewhat broader liability . . . ."[115] Indeed, the Restatement of Torts permits liability for all damage resulting from intentionally tortious

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[111] Carey v. Piphus, 435 U.S. 247 (1978) (precluding the recovery of compensable damages, but allowing the recovery of $1 in nominal damages).

[112] See Prosser and Keeton on Torts, supra note 72, at 39-54. In addition, the authors further support the analogy between § 1983 and these dignitary torts: "The establishment of the technical cause of action [for assault], even without proof of any harm, entitles the plaintiff to vindication of the legal right by an award of nominal damages." Id. at 43. The same is true for battery, id. at 40, and false imprisonment, id. at 48.

[113] R. Keeton, supra note 103, at 101.

[114] Id.

[115] Id.

conduct unless, through hindsight, the resulting harm appears extraordinary.[116]

In short, applying a negligence-based risk rule to section 1983 compensatory damages issues is seriously questionable even if one grants Jeffries's premise that qualified immunity supplies the requisite wrongdoing.[117] However, I believe that there is an even more fundamental theoretical difference between us—one that is grounded in our respective views of the appropriate role of tort doctrine in section 1983 interpretation.

C. The Dangers of Tort Rhetoric in Section 1983 Litigation

I recently argued at some length[118] that the Supreme Court increasingly has moved from emphasizing constitutional rhetoric in section 1983 cases to using tort rhetoric. This strategic shift has profound implications for section 1983 and related constitutional doctrine. The use of tort rhetoric tends to determine the doctrinal outcomes in many section 1983 cases and, perhaps more subtly, also tends to encourage a certain way of thinking about section 1983 on the part of judges and lawyers. Such tort rhetoric allows the Court to remove certain state conduct from fourteenth amendment coverage. In addition, it enables the Court to use tort doctrines to decide section 1983 cases and to manipulate those doctrines and related cost-benefit analyses to limit section 1983.[119] Moreover, it masks classical liberal theories of federalism, of the state-citizen relationship, and of political society.[120]

It is against this background of the Court's increasing use of tort rhetoric to limit section 1983, and to structure the way in which we think about it, that Jeffries's position should be understood. He candidly states that he thinks that the "law of section 1983 has transcended the original statutory authorization"[121] even though he is forced to recognize that "the long tradition of attribution to the statu-

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[116] Id. at 102.

[117] In addition, the fact that Jeffries ultimately concludes that some constitutional rights are systemic in nature and therefore unlike ordinary negligence suggests that the analogy on which he bases so much of his argument—between negligence and § 1983—is suspect at the outset.

[118] See Nahmod, supra note 21.

[119] Id. at 1739-44.

[120] Id. at 1745-50.

[121] Risk Article, supra note 16, at 1485.

tory text continues to constrain flexibility."[122] Because of the "apparent categoricalness" of section 1983's language, he cannot justifiably distinguish among constitutional rights. Instead, he offers his "conceptual limitation of damages liability" as a way around section 1983 language and tradition. Jeffries's purpose is thus clear.

His method for limiting the scope of section 1983 liability is similarly transparent: to use tort law's risk-rule doctrine and its accompanying rhetoric, even though the risk rule is derived from, and applied to, negligence, not constitutional law, and even though the determination of negligence requires cost-benefit analysis, unlike most constitutional violations.[123] It is this strategy that is most troubling to me in the final analysis. It marginalizes the constitutional core of section 1983 by forgetting, or choosing to ignore, that section 1983 is a federal statute enacted to promote the policies implicated in the fourteenth amendment.[124]

IV. CONCLUSION

Jeffries's position is provocative and well-argued, requiring the reader to think deeply about section 1983, damages for fourteenth amendment violations, and tort law. Nevertheless, I strongly disagree with his position. I maintain that wrongdoing is inherent in unconstitutionality and that Jeffries's risk-rule approach does not follow from Weinrib's view of corrective justice. Jeffries's position also is fundamentally unsound as a matter of section 1983 policy because it inappropriately allows tort doctrine to determine the scope of section 1983 liability for damages. The risk rule of negligence law and its accompanying rhetoric simply do not belong in section 1983 damages jurisprudence.

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[122] Id.

[123] Procedural due process is an exception. Mathews v. Eldridge, 424 U.S. 319 (1976).

[124] I have argued this point for some time. See Nahmod, Section 1983 and the "Background" of Tort Liability, 50 Ind. L.J. 5 (1974).