Constitutional Remedies: Reconciling Official Immunity with the Vindication of Rights

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A great deal of scholarly attention is devoted to constitutional rights and comparatively little to remedies for their violation. Yet rights without remedies are not worth much, and remedial law does not always facilitate the enforcement of rights, even of constitutional rights. This Article discusses an especially challenging remedial context: suits seeking damages for constitutional wrongs that occurred in the past, that are unlikely to recur, and hence that cannot be remedied by forward-looking injunctive or declaratory relief. Typical fact patterns include charges that the police, prison guards, school administrators, or other officials have engaged in illegal searches and seizures, or fired people on account of protected speech, or deprived them of liberty or property without due process of law, or discriminated against them in violation of equal protection. Because these backward-looking suits bear some resemblance to ordinary tort law, the doctrine is often called “constitutional tort.” Plaintiffs sue state and local officers and municipal governments under 42 U.S.C. § 1983, and federal officers under the implied cause of action recognized in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.

The problem addressed in this Article is that, in practice, this retrospective remedy is often illusory. Even if the plaintiff can win on the merits of the constitutional claim, the “official immunity” doctrine blocks many suits for damages against state

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¹ The statute provides, “Every person who, under color of [state law] subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights . . . 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 (2012).

² 403 U.S. 388, 392 (1971).
and federal officers. For example, in *Lane v. Franks*, a government employee had been fired by a supervisor for truthful testimony in response to a subpoena. He sued under § 1983, charging a violation of his First Amendment rights. He prevailed on the merits of the free speech claim, but lost anyway, as the Court upheld the supervisor’s qualified immunity defense.

The policy behind immunity is that, without it, officials would hesitate to act in the public interest for fear of personal liability. The defense has two parts. First, officials engaged in judicial, legislative, or prosecutorial functions are absolutely immune from liability for damages, no matter how egregious their conduct. Second, other officers are shielded from liability unless they have violated “clearly established” constitutional rights. For a sense of what this abstract principle means in practice, consider *Coffin v. Brandau*. A police officer entered the plaintiff’s garage, which was attached to his house, in order to serve a court order. But, the officer had not obtained a warrant authorizing the entry. The black letter Fourth Amendment rule in force at the time prohibited police officers from entering a house to serve a court order without a warrant. The Eleventh Circuit ruled en banc that the entry violated the Fourth Amendment, but it also held that the prior law on entering the house did not “clearly establish” that entering the attached garage would violate the Fourth Amendment and thus upheld the defendant’s official immunity defense.

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4 Id. at 2376.
5 Id.
6 Id. at 2383.
8 See SHELDON H. NAHMOD ET AL., CONSTITUTIONAL TORTS 399 (LexisNexis 3d ed. 2010).
9 Harlow, 457 U.S. at 818.
10 642 F.3d 999 (11th Cir. 2011) (en banc).
11 Id. at 1004–05.
12 Id. at 1003.
13 Id. at 1010.
14 Id. at 1014, 1017; see also Karen Blum et al., *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633, 653–54 (2013). “Hope” is a punning reference to *Hope v. Pelzer*, 536 U.S. 730 (2002), a plaintiff-friendly immunity case that seems to have been forgotten in recent rulings. Id. at 654.
This Article examines a well-settled and routine—but destructive and quite unnecessary—consequence of the interplay between the liability rule and the official immunity doctrine. Consider two plaintiffs, Alice and Bob, each of whom sues for damages under § 1983. Suppose that both plaintiffs lose, but for different reasons. Alice establishes a violation of her constitutional rights, but fails because the defendant successfully asserts official immunity. Bob cannot show that his rights were violated in the first place. Despite the difference between their cases, current Supreme Court doctrine directs that Alice and Bob be treated the same. Both go away empty-handed. Under the Court’s approach, the competing goals behind liability and immunity are balanced in the following way: On the one hand, the aim of constitutional tort law is to compensate the plaintiff and to deter violations of rights. But on the other side of the balance, official immunity carries enough weight to override the compensation and deterrence goals. Thus, the official’s successful immunity defense carries the same force as a successful defense on the merits. Both result in total victory for the defense.

In this Article, I argue for a different conception of constitutional tort law, in which it is recognized that Alice’s case differs fundamentally from Bob’s. The point is not to question official immunity, a doctrine that has broad support from the Supreme Court. My project is to reconcile official immunity with Alice’s legitimate claim for a remedy. I seek to justify an outcome in Alice’s case that provides her with some form of redress, even though compensatory damages are precluded by immunity. The premise of my argument is that tort theory is a valuable resource for understanding, evaluating, and improving


16 See Minneci v. Pollard, 132 S. Ct. 617, 625 (2012) (explaining that an implied remedy under the Eighth Amendment is not available to an inmate in a private prison because state tort law provides “roughly similar incentives...[and] roughly similar compensation” to the proposed constitutional remedy); Carey v. Piphus, 435 U.S. 247, 254–57 (1978) (stating that the “basic purpose” of recovery of damages for constitutional violations is “to compensate persons for injuries caused by the deprivation of constitutional rights,” id. at 254, and another purpose is to “deter the deprivation of constitutional rights,” id. at 256). Later, the Court said that deterrence “operates through the mechanism of damages that are compensatory.” Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986).
the law on suits for damages for constitutional violations. The core principle guiding this approach, taken from the "civil recourse" theory of tort law, is that "what a tort cause of action provides is not an opportunity to hurt the wrongdoer," but "a right to demand that the wrongdoer be held accountable." Public law experts may resist the application of tort theory to a constitutional problem. I hope that the argument will have enough force to win them over.

The gist of the argument is that the Court errs when it treats compensation as an ultimate goal of the litigation. Its mistake lies in confusing means with ends. In tort law, including constitutional tort, compensation is a tool for achieving goals, not an end in itself. In both constitutional tort and ordinary tort, one of the goals is deterrence. But the Court has failed to understand, recognize, or appreciate another goal—one that is quite distinct from the compensatory means often used to achieve it. This goal is vindication of the plaintiff's constitutional rights. In its constitutional tort cases, the Court has jumbled together two distinct concepts, treating compensation and vindication not as means and end but as more or less the same thing. Worse, it often treats compensation as the sole measure of vindication. In Carey v. Piphus, the leading case on constitutional tort damages, the Court set forth "the compensation principle," which is that damages in constitutional tort cases are designed to provide "compensation for the injury caused to plaintiff by defendant's breach of duty." In stressing compensation, the Court has overlooked the linchpin point that "constitutional guarantees have an important intrinsic dimension entirely apart from the injuries to person or property that may or may not accompany their violation."

My thesis is this: Even though the well-entrenched official immunity defense defeats Alice's claim for compensatory damages, she has a compelling case for vindication of her rights. Even though compensation is precluded, some form of vindication should be available, in the form of nominal damages—typically

19 Carey, 435 U.S. at 255 (internal quotation mark omitted); see also Minneci, 132 S. Ct. at 624-25 (stressing the compensation goal).
The instinctive reaction to this proposal is that it is pointless because nominal damages are worth little to the plaintiff. While the objection is not without force, five features of the constitutional context blunt its impact. First, unless and until the Court rethinks official immunity or other basic principles of constitutional tort doctrine, there is no chance the plaintiff will do any better. Second, the Court’s requirement that the plaintiff prove compensatory damages means that few plaintiffs recover very large damages in any event. Third, state tort law may authorize recovery of substantial damages, though the rules will vary from state to state. Fourth, it is possible that a significant number of plaintiffs sue primarily for the sake of obtaining judicial recognition of their rights. They may be, more or less, satisfied with a victory on the merits. In fact, a crucial corollary of the vindication-oriented approach is that compensation is not sufficient for vindication. Thus, the availability of an ordinary tort remedy, which provides compensation but no opportunity to establish the constitutional violation, is not an adequate substitute for a constitutional tort suit.

Fifth, the victorious plaintiff may be able to obtain attorney fees. As we will see, however, the case law is divided on this issue.

Part I makes the crucial point that compensation is a tool and not a distinct goal of tort liability. With civil recourse theory as a guidepost, Part II argues that one of the aims of constitutional tort law is vindication of the plaintiff’s rights. Civil recourse principles teach that vindication may be at least partly achieved even when immunity blocks compensation. Part III shows how the Court’s failure to distinguish vindication from compensation has unnecessarily impeded the vindication of rights. Two important official immunity cases—Camreta v. Greene and Pearson v. Callahan—illustrate the missed opportunities and show how they can be rectified. Part IV explains why courts should award nominal damages and attorney fees to plaintiffs who prevail on the constitutional merits even when defendants escape liability on account of official immunity. Part V expands the analysis beyond the official immunity context. It discusses implications of the vindication-oriented approach for the Bivens cause of action.

21 See infra Part V.
against federal officers for constitutional violations. It also argues that a vindication-centered theory of constitutional torts casts doubt on some of the Court’s rulings in § 1983 cases.

I. COMPENSATION IN TORT LAW: A MEANS, NOT AN END

The “compensation principle” is a common locution in summary discussions of the purposes of tort liability. Nonetheless, this way of speaking is actually a somewhat misleading shorthand for a more complex proposition—that there are good reasons for obliging the defendant to compensate the plaintiff in a given case. Tort law consists largely in identifying those good reasons and debating which rationales should make the list. These reasons may include deterring socially harmful conduct, requiring a blameworthy person to redress the harm, obliging the person who is ultimately responsible for harm to pay for it, spreading losses across a large number of people, and perhaps others. Choosing among these goals is a lively topic in tort theory. For the purpose of separating means from ends, however, it does not matter how they are ranked, only that the award must in principle achieve one or more of them. Otherwise, liability cannot be justified. The problem is that, absent one of these good reasons, compensation is only a transfer from one person to another, which produces no net benefit.


For example, Professor Dobbs’s treatise begins the discussion of tort law’s aims by observing that “[t]he most commonly mentioned aims of tort law are (1) compensation of injured persons and (2) deterrence of undesirable behavior.” 1 DAN B. DOBBS ET. AL., THE LAW OF TORTS 18 (Thomson Reuters 2d ed. 2011). In the very next sentence Dobbs then points out that “[b]oth of these aims, however, are subsumed in whole or part under even broader goals.” Id. The ensuing paragraphs discuss such goals as “[m]orality or corrective justice,” “[s]ocial utility or public policy,” and “[p]rocess,” and then recognize “[p]otential conflicts” among goals. Id. at 18–19; see also ABRAHAM, supra note 24, at 16–17 (similar). Professor Abraham points out that “[t]he desirability of providing compensation to a particular class of injury victims rarely explains the lines that are drawn to distinguish those who are and those who are not entitled to prevail in a tort claim. Rather, time after time, some other factor or factors explain the occasion for the imposition of tort liability, or tort law’s refusal to impose liability.” Id. at 21.

that compensation is the goal while neglecting the crucial qualifier that there must be a good reason for the transfer is to misunderstand tort law's true "compensation principle." Conceiving of compensation as the ultimate goal of tort is to confuse means with ends, and causes with effects.\textsuperscript{27}

Rather than an end in itself, compensation is a tool for achieving several possible goals.\textsuperscript{28} The Court recognized this in \textit{Carey v. Piphus}.\textsuperscript{29} There, the Court said that one of the aims of damages is deterrence.\textsuperscript{30} The means and end relation between compensation and deterrence is straightforward, as is the categorical difference between the two.\textsuperscript{31} But on another crucial point, \textit{Carey} took a misstep that has distorted constitutional tort doctrine ever since. It said that "the basic purpose" of § 1983 damages is "to compensate persons for injuries caused by the deprivation of constitutional rights."\textsuperscript{32} But compensation is not a goal, or a "purpose," as \textit{Carey} put it. Compensation is a means. In tort law, compensation may serve either of two other broad goals besides deterrence. A second broad rationale for tort liability is fairness, or "corrective justice" between the parties. A third is diminishing the "disutility" caused by an injury, by liability rules that spread losses or place liability on a "deep pocket." The aim here is to put the burden of paying claims on institutions and businesses that can and do insure against them or can easily cover them. With regard to both the fairness and "diminishing disutility" goals, the seeming convergence between

\textsuperscript{27} Simons, supra note 26; see also SAUL LEVMORE & CATHERINE M. SHARKEY, FOUNDATIONS OF TORT LAW 1 (Found. Press 2d ed. 2009) ("The goals of tort law are often articulated as compensation, deterrence, and corrective justice. Yet, the academic discussion of tort law in the United States focuses primarily on deterrence and corrective justice, largely because both of these theoretical approaches seek to explain why tort law renders compensation to injured parties.").

\textsuperscript{28} These goals are discussed in Stephen R. Perry, \textit{Tort Law, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY} 57, 57–78 (Dennis Patterson ed., 1996); see also RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 844 (10th ed. 2012); MARK A. GEISTFELD, TORT LAW: THE ESSENTIALS 42–44 (2008).

\textsuperscript{29} 435 U.S. 247 (1978).

\textsuperscript{30} Id. at 256–57.

\textsuperscript{31} See Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986) (stating that deterrence "operates through the mechanism of damages that are compensatory").

\textsuperscript{32} Carey, 435 U.S. at 254.
compensation as a means and compensation as the ultimate goal is misleading. The goal is actually some moral or utilitarian end that is served by compensation.

Showing why requires a brief foray into tort theory, but one that will drive home the crucial point that “compensation” is always a means, never an end. Taking fairness first, ordinary tort law is mainly concerned with identifying the circumstances in which defendants must pay plaintiffs for physical and emotional injuries. These triggers are breaches of duties owed by defendants to plaintiffs. The relevant circumstance may be that the defendant has intentionally touched, threatened, or imprisoned the plaintiff, or that the defendant has caused harm, or that the defendant has negligently caused harm, or that the defendant caused harm by an abnormally dangerous activity, or that the defendant caused harm by manufacturing a defective product, or that the defendant owed some affirmative duty to help the plaintiff and did not follow through. As a result of the breach, the plaintiff has been hurt, misses time from work, incurs medical bills, suffers from pain or trauma, and now seeks to be made whole or to obtain redress for harms that cannot be fully cured by money. The award—that is, the compensation—more or less accomplishes these goals. But it is nonetheless a mistake to conceive of compensation as the goal. The rationale for obliging the defendant to pay is not “compensation.” Rather, the justification for the award—and thus the goal served by compensation—is that the plaintiff has a right to redress for the breach of duty that triggers liability. No

32 Materials on these and other intentional torts are collected in Epstein & Sharkey, supra note 28, at 3–75.


38 See, e.g., Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 342–43 (Cal. 1976).
one is liable absent such a breach. In other words, no one is liable simply because a plaintiff seeks compensation from that person.\textsuperscript{39}

As for loss spreading, compensation is certainly an essential tool. But the goal is to diminish the “disutility,” which is merely the opposite of “utility,” that is generated by the loss.\textsuperscript{40} This is ordinarily accomplished by distributing the loss over a large number of people rather than having it fall entirely on the injured person.\textsuperscript{41} In this way, the psychological impact of the harm, the “disutility,” is minimized, on account of a principle called the increasing marginal disutility of loss.\textsuperscript{42} This principle holds that as a monetary loss increases, the amount of well-being that is lost—“disutility”—goes up disproportionately to the amount of money that is lost. Thus, a loss of $100 may produce more disutility to one person than it would if one thousand people each paid ten cents into a fund to compensate the injured person.\textsuperscript{43} Putting aside the vocabulary of welfare economics, and stating the point in commonsense terms: The loss would be a crushing blow if the victim were left to absorb all of it. That loss is diminished when it is spread because each of those who pays a tiny fraction of it suffers a minuscule loss. Even when all of those losses are added together, they amount to less than the crushing blow that the uncompensated victim would suffer. Even without spreading, the “diminishing disutility” goal may be satisfied, at least in theory, by identifying a defendant with a “deep pocket,” who has plenty of money. Such a defendant may be so well off that even $100 out of his deep pocket will cause him less disutility than the injured plaintiff would suffer if no payment were made.\textsuperscript{44} In practice, however, “loss spreading” and the “deep pocket” theme tend to converge, as most defendants with deep pockets are businesses who are able to spread losses by

\textsuperscript{39} See CLARENCE MORRIS & C. ROBERT MORRIS, JR., MORRIS ON TORTS 8 (2d ed. 1980) (“The fact that the plaintiff has suffered a loss is no reason, in and of itself, for taking money from the defendant.”).

\textsuperscript{40} See, e.g., GEISTFELD, supra note 28.

\textsuperscript{41} Id.

\textsuperscript{42} Id.

\textsuperscript{43} See, e.g., id. at 42–43 (discussing “[c]ompensation of [i]njuries” by spreading losses).

\textsuperscript{44} See Perry, supra note 28, at 68.
II. VINDICATION IN CONSTITUTIONAL TORTS

From Carey, decided in 1978, through Minneci v. Pollard,\textsuperscript{46} decided in 2012, the Court has asserted that compensation and deterrence are the aims of constitutional tort law.\textsuperscript{47} Scholars have followed the Court's lead without noticing the latent ambiguity of the "compensation" goal.\textsuperscript{48} Ever since Carey, the Court has ignored the distinction between means and ends and has treated compensation as a surrogate for vindication.\textsuperscript{49} Having neglected to separate vindication from compensation, the Court has been content to borrow "principles derived from the common law of torts,"\textsuperscript{50} without making much of an effort to adapt those principles to the constitutional tort context. As a result, it has not generated case law on the nature and purposes of vindication in constitutional torts. For example, it has not addressed such basic questions as why the plaintiff's constitutional rights should be vindicated, in what circumstances, and by what means. Scholarly commentary, though critical of the Court's constitutional tort doctrine in many respects, has followed the Court's lead on this issue.

If vindication is to receive its due in constitutional tort adjudication, it needs a more robust defense than it has received. This Part of the Article argues that the civil recourse theory of general tort law furnishes guidance for understanding and implementing the value of vindication in constitutional torts. Starting from civil recourse principles, the task is to devise rules that reconcile the value of vindication with the policies that underlie the defense of official immunity. I undertake that project in Parts III, IV, and V.

\textsuperscript{45} In this Article, I set aside the "diminishing disutility" goal, which may have little relevance to constitutional torts, in order to focus on the value of vindication.
\textsuperscript{46} 132 S. Ct. 617 (2012).
\textsuperscript{47} Id. at 620, 623–26 (rejecting a Bivens cause of action because state tort law provided sufficient compensation and deterrence); Carey v. Piphus, 435 U.S. 247, 254 (1978) (stating that basic purpose of § 1983 is compensation).
A. Civil Recourse for Constitutional Torts

Because of Carey's failure to distinguish vindication from compensation, the Court has not clearly articulated the value of vindication. By equating vindication with compensation, the Court has dodged basic issues regarding vindication in constitutional torts: What is the point of "vindication"? Is it a viable non-deterrent rationale for imposing constitutional tort liability? Is vindication distinct from "making the plaintiff whole" by compensating the plaintiff, and in what way? On the premise that compensation is not available, can vindication be achieved by other means, and if so, how? Because the Court conflates vindication and compensation and focuses mainly on the latter, the opinions contain no sustained examination of these questions about the distinct value of vindication. There are no cases explaining what vindication is, why it is valuable, what it requires, and the circumstances in which it should control the outcome of litigation.

General tort law has always been a rich source of insights for constitutional tort. So it is with vindication. This Section borrows from civil recourse theory, a relatively recent approach to general tort law that enjoys growing acceptance. My aim is to build a case for vindication and to lay a foundation for answering some of the questions the Court's opinions do not address in anything better than the most fragmentary way.

1. Civil Recourse Theory

The Court has always adjudicated constitutional tort issues "against the background of tort liability that makes a man responsible for the natural consequences of his actions."51 As a result, it has looked to tort law for governing doctrines, such as the "compensation principle" of Carey and the official immunity limit recognized in cases running from Tenney v. Brandhove52 to Rehberg v. Paulk.53 But the Court has also done something more: It has looked to tort law to identify overarching purposes on which the doctrines of constitutional tort law should be built.54

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In *Owen v. Independence*, for example, the Court invoked the values of compensation, deterrence, and loss spreading in holding that local governments may not assert immunity from suit. And the deterrence goal is merely the constitutional version of the policy, long entrenched in ordinary tort law, that liability rules do and should create incentives to engage in socially beneficial behavior and to refrain from socially destructive conduct.

“Civil recourse,” an approach to general tort law developed over the past fifteen years, provides a basis for conceiving of the plaintiff’s case for constitutional tort mainly as an effort to vindicate personal rights. Civil recourse theory conceives of tort law as organized society’s alternative to private violence for wrongful injuries. In the absence of the state, we would be entitled to exact retribution against those who have wronged us. In a civilized society, self-help of this kind must be forbidden. For the sake of social peace, government suppresses most private violence. Having eliminated blood feuds and other forms of vengeance, the state takes on an obligation to provide an alternative means for holding the defendant accountable for the wrong. Wholly apart from deterrence, there is a “distinctive normative goal that is vindicated by giving citizens the ability to proceed in court against those that have wronged them.” Conversely, the defendant is accorded an opportunity to contest the plaintiff’s charge and obtain judicial validation of his or her conduct.

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56 Id. at 651–57.
57 See, e.g., ABRAHAM, supra note 24, at 18–19; GEISTFELD, supra note 28, at 43–44.
60 See id. at 972–73.
61 See id. at 973.
62 Id. at 982.
63 Id.
65 See id. at 64.
Civil recourse theorists, notably Professors John Goldberg and Benjamin Zipursky, claim that "we are entitled to a private right of action in place of getting even."66 Professor Goldberg reasons that "[g] overnment, by taking on the task of maintaining civil society, obtains from individuals a variety of powers that they would otherwise be entitled to exercise."67 Goldberg and Zipursky argue that we "relinquish[] the raw liberty to respond aggressively to having been wronged and receive[] in return a certain level of security . . . , plus the assurance that a civil avenue of redress against wrongdoers will be supplied."68 In making the case that civil recourse is an attractive norm, Jason Solomon adds that ‘acting against’ another in response to wrong-doing is a distinctive form of ‘moral address,’ and one which is particularly salient in a society based on liberal individualism."69 While this approach to tort law was initially developed in the common law context, its reasoning applies fully to constitutional torts as well. Thus, "according to civil recourse theory, a government’s responsibility to enact a law of civil recourse is a responsibility to apply that law not only to private citizens, but also to its officials."70

On the remedial side of the tort case, Professor Goldberg distinguishes between two approaches—“full” compensation and “fair” compensation.71 In “standard modern” tort law, the avowed point of damages is to make the plaintiff whole.72 In this view, tort law is “a means by which a person who suffers a harm can

68 Goldberg & Zipursky, Torts as Wrongs, supra note 58, at 974. But, the extent to which tort law empowers the plaintiff should not be overstated. Ori J. Herstein is no doubt right in arguing that, at the end of the day, the “legal power to alter tortfeasors' legal rights and relations” still belongs to the state. Ori J. Herstein, How Tort Law Empowers, 65 TORONTO L.J. 99 (forthcoming 2015).
69 Jason M. Solomon, Equal Accountability Through Tort Law, 103 NW. U. L. REV. 1765, 1785 (2009). Professor Solomon adds that "a legal system that provides a state-created mechanism for individuals to obtain redress of wrongs is itself normatively attractive and politically justified." Id. at 1798.
72 Id. at 436.
have that harm annulled, erased, or indemnified."\(^{73}\) In civil recourse, the overall aim is to hold the defendant accountable.\(^{74}\) Damages provide "redress" from the wrongdoer to the victim.\(^{75}\) Assessing them "requires of the fact-finder an overtly normative determination based on consideration not only of the losses suffered by the victim, but also of the character of the defendant's conduct."\(^{76}\) Applying this principle to constitutional torts, we shall see that there may be good reasons to disallow compensatory damages, notably when the defendant meets the requirements for official immunity, while nonetheless providing the plaintiff with recourse for constitutional violations, if only by means of nominal damages.

2. Recourse for Constitutional Violations

Applying civil recourse principles to constitutional tort law does not oblige us to endorse every tenet of the theory. Notwithstanding the descriptive and interpretive claims of civil recourse theorists, for example, vindication—as opposed to deterrence and loss spreading—may not be a paramount value in ordinary tort law.\(^{77}\) But, that issue does not concern us here. Whatever the merit of Goldberg and Zipursky's global theory of torts, the civil recourse norm—that the state should provide access to the courts for the vindication of rights—is especially strong in the constitutional tort context. In this area, the rights for which recourse is sought are, by their nature, core features of our system of government. Unlike common law tort rights, they cannot be erased or modified as the legislature sees fit. The general purpose of the Bill of Rights and the Fourteenth Amendment, where most of those rights are located, is to safeguard individual liberty and equality against abuses of power

\(^{73}\) Id.

\(^{74}\) Goldberg, *Tort Law at the Founding*, supra note 70, at 86–87.


\(^{76}\) Id. at 437.

\(^{77}\) For a skeptical view of the interpretive claims made by civil recourse theorists, see Emily Sherwin, *Interpreting Tort Law*, 39 FLA. ST. U. L. REV. 227, 236–41 (2011); see also id. at 228 & n.3 (discussing economics-oriented approaches). Mark Geistfeld argues that "[w]ith the development of liability insurance in the twentieth century, tort liability began to function [as a form of loss sharing] with increased regularity." GEISTFELD, supra note 28, at 43.
by officials. Those officials—the defendants from whom relief is sought—differ from most other tort defendants in that they possess the power of the state, with its near-monopoly on the legitimate use of force. Since the rights asserted in constitutional tort serve more fundamental values than ordinary tort rights, and since especially powerful constitutional tort defendants pose a greater threat to our rights than most other tort defendants, the plaintiff's interest in civil recourse for violations of these rights by these defendants is considerably enhanced. It follows that the case for obliging the state to provide recourse for constitutional tort is, if anything, more powerful than for other torts.

Most plaintiffs in any type of tort litigation would welcome a large monetary recovery. But, the plaintiff's paramount interest in recourse is a conspicuous feature of many constitutional tort suits. The limits on recovery enforced by official immunity doctrine and the damages rules from Carey and Stachura suggest that many, and perhaps most, constitutional tort plaintiffs are not motivated by a large award. These plaintiffs probably conceive of their lawsuits mainly as efforts to obtain judicial validation of their claims, with the hope of monetary recovery as a distinctly secondary motivation. Constitutional tort cases typically arise out of disagreeable encounters with government officers, whether with the police, with prison and school authorities, or with supervisors in government offices. The officer, often armed and always in a position of power, humiliates the plaintiff by hitting, handcuffing, or firing the plaintiff for something the plaintiff said. The plaintiff is not only injured, but also outraged by abusive treatment and seeks to hold the officer accountable. Despite the fact-intensive legal issues these


80 See Bishop v. Glazier, 723 F.3d 957, 959–60 (8th Cir. 2013) (snowstorm assistance on highway by a deputy officer allegedly led to excessive force).

81 See Mlodzinski v. Lewis, 648 F.3d 24, 30–31 (1st Cir. 2011) (officer forced innocent, non-threatening, handcuffed 15-year-old girl to the ground while executing warrant).

82 These unpleasant, humiliating, and sometimes harrowing encounters with the police occur in a variety of contexts. Illustrative cases include Bishop, 723 F.3d
cases usually present, and the ensuing risk of losing on account of official immunity, plaintiffs persist in bringing them. It appears that the desire to have one’s day in court against officers and governments is strong enough to overcome the obstacles to recovery and the meager monetary rewards of victory. A realistic assessment of this type of litigation is that plaintiffs come to court to seek vindication of their rights. And their felt need to do so suggests that our courts should attend to the value of fostering such vindication as they frame the law of constitutional tort.

B. Official Immunity

Uncompromising fidelity to the value of vindication would require the imposition of liability whenever the plaintiff could establish a violation of the plaintiff’s constitutional rights. Yet

at 959–60 (snowstorm assistance allegedly led to excessive force); Poole v. City of Shreveport, 691 F.3d 624, 625 (5th Cir. 2012) (traffic stop); Khan v. Normand, 683 F.3d 192, 193 (5th Cir. 2012) (deadly force used against mentally ill man); Phillips v. Cmty. Ins. Corp., 678 F.3d 513, 516 (7th Cir. 2012) (traffic stop); Morris v. Noe, 672 F.3d 1185, 1189–90 (10th Cir. 2012) (arrest for domestic dispute); Montoya v. City of Flandreau, 669 F.3d 867, 869–70 (8th Cir. 2012) (arrest for domestic dispute); Glenn v. Washington County, 673 F.3d 864, 866 (9th Cir. 2011) (police shooting of intoxicated and distraught 18-year-old); Rosenbaum v. Washoe County, 663 F.3d 1071, 1073–74 (9th Cir. 2011) (arrest for scalping tickets); Mlodzinski, 648 F.3d at 27 (officer forced innocent, non-threatening, handcuffed 15-year-old girl to the ground while executing warrant); Huckaby v. Priest, 636 F.3d 211, 213–14 (6th Cir. 2011) (police mistakenly thought homeowners were burglars); Frizzell v. Szabo, 647 F.3d 698, 699–700 (7th Cir. 2011) (traffic stop).


The civil recourse value of providing the plaintiff with access to the courts to demand accountability is noted by Scott Hershovitz, Harry Potter and the Trouble with Tort Theory, 63 STAN. L. REV. 67, 71–74 (2010) (discussing some of the “collateral benefits” of tort litigation, which include, for example, “empower[ing] people to demand answers from those they believe injured them,” id. at 72, and the “value in public conversations about what we owe one another,” id. at 74). For an argument that the suing for “vindication of insulted honor” is a “morally valuable activity,” see Oman, supra note 64, at 32. Writing of civil recourse in general tort law, Oman asserts that the plaintiff’s agency—that is, his role in initiating and pursuing the litigation—is a key component of its value. Id. at 56. Moreover, “[t]he claims of [wronged] honor are strongest in the case of intentional torts,” especially those that “arise out of situations in which the tortfeasor has deliberately treated the victim as an object that he can harm with impunity.” Id. at 64. Many constitutional tort plaintiffs probably (rightly or wrongly) think of their cases in this way, even though they also seek significant monetary relief. The money may serve as a tangible measure of the wrong to the plaintiff’s honor.
the rules governing recovery are actually quite restrictive. Liability is often denied, and vindication is blocked, even when the plaintiff can prove a constitutional violation. The main reason is the official immunity defense, much of which was given its current form in Harlow v. Fitzgerald. Official immunity is the Court’s response to “the implicit asymmetry in the incentives faced by public officials when left wholly unprotected by any immunity doctrine.” Unlike private businesses, officials do not reap most of the benefits of their actions. If they were liable for all of their constitutional violations, they would tend to be too cautious. The police may fail to arrest a suspect who has committed crimes and will commit more of them, or a supervisor may fail to dismiss a destructive subordinate, or a prosecutor may fail to bring charges. On account of these efforts at self-protection, society as a whole will bear an unacceptably high cost for the deterrence of constitutional violations.

With these concerns in mind, the Court draws a distinction between two types of immunity. Officers engaged in judicial, prosecutorial, or legislative functions may assert absolute immunity from damages. Other officials may assert “qualified” immunity. Before Harlow, an official could lose qualified immunity for either of two reasons: (1) if he should have known that he was violating constitutional rights, which is an objective test, or (2) if he acted with bad faith or malice, which is a subjective test. Sensitive to what Harlow called “the need to

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87 See Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 691 (1978) (refusing to hold government vicariously liable for constitutional violations committed by their employees).
88 457 U.S. 800 (1982). Other obstacles include the rule that state governments may not be sued under § 1983, see generally Will v. Mich. Dep’t of State Police, 491 U.S. 58 (1989), and the rule that local governments are not vicariously liable in suits for damages for constitutional violations committed by their employees, see Monell, 436 U.S. at 691.
89 EPSTEIN & SHARKEY, supra note 28, at 1341.
90 Id. at 1341–42.
91 Id. at 1341.
94 See Harlow, 457 U.S. at 807.
protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority. The Court abandoned the subjective prong of the test. Harlow shielded officers engaged in executive or administrative functions from liability unless they violate "clearly established statutory or constitutional rights of which a reasonable person would have known." In practice, this may mean that an officer is not protected from liability when he fails to infer that a rule requiring a warrant to enter a living room also applies to an attached garage. Immunity is well-entrenched as a core principle of constitutional tort law. Any effort to clarify and enhance the role of vindication in constitutional torts must give due regard to this defense and to the important countervailing values it implements. Immunity will always impede the full vindication of constitutional rights, just because it blocks compensation. An important theme of this Article, however, is that the unavailability of compensation need not stand in the way of other measures that provide some vindication for victims of constitutional violations.

III. HOW THE COURT'S "ALL-OR-NOTHING" APPROACH UNDERVALUES VINDICATION

If constitutional tort is to remain a viable remedy for anything other than egregious violations, a way must be found to satisfy both the plaintiff's legitimate demand for vindication and the state's interest in shielding officers from liability. The key step in reaching a compromise is to recognize that the Court's conflation of compensation and vindication is gratuitous, and is indeed the root of a major obstacle to compromise. As a consequence of confusing means with ends, the Court has misunderstood the conflict between the vindication goal and the "avoiding unwanted deterrence" constraint, and has squandered opportunities to devise suitable accommodations between the two. Having neglected "vindication of rights" as a freestanding goal, the Court reasons that deterrence is the sole non-compensatory aim of constitutional torts. Since immunity blocks

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96 Harlow, 457 U.S. at 807 (internal quotation marks omitted).
97 Id. at 818; see also Reichle v. Howards, 132 S. Ct. 2088, 2093 (2012).
98 See supra text accompanying notes 10–14.
99 See Harlow, 457 U.S. at 806.
both compensation and deterrence, a successful immunity defense leaves the plaintiff with no remedy at all. In fact, the availability of an immunity defense may even deprive the plaintiff not only of a remedy, but even of a ruling on the merits of the plaintiff's constitutional claim. This Part of the Article examines some untoward consequences of the Court's overemphasis on compensation, using two illustrative cases: *Pearson v. Callahan*¹⁰¹ and *Camreta v. Greene*.¹⁰² These are cases in which compensation is not an issue, yet vindication is an achievable goal. For the Court, however, vindication is not a factor.¹⁰³ In the Court's view, once compensation is out of the picture, the only task the cases present is resolving the tension between the forward-looking goals of deterrence and avoiding unwanted deterrence.¹⁰⁴

A. The Pearson Case

*Pearson* concerned an issue Justice Breyer, the author of the opinion, called the "order of battle."¹⁰⁵ That expression refers to a problem that arises in § 1983 and *Bivens* suits seeking damages from officials.¹⁰⁶ In these cases the plaintiff must win on two points in order to prevail.¹⁰⁷ One is the substantive constitutional issue; the other is official immunity, a defense which casts a long shadow over many constitutional tort cases, because it can block recovery no matter how strong the plaintiff's case may be on the constitutional merits and no matter what worthy aims may be served by liability.¹⁰⁸

Since the plaintiff must prevail on both the merits and immunity in order to win, a court convinced of the defendant's immunity but uncertain of the underlying merits may prefer to skip the merits and proceed directly to immunity. Each of the two approaches—merits first or immunity first—has benefits and corresponding costs. The main cost of deciding the merits first is

¹⁰³ See id. at 2030–31; *Pearson*, 555 U.S. at 232.
¹⁰⁴ See *Camreta*, 131 S. Ct. at 2032; *Pearson*, 555 U.S. at 231, 240–41.
¹⁰⁵ 555 U.S. at 234 (internal quotation mark omitted).
¹⁰⁷ *Pearson*, 555 U.S. at 232.
¹⁰⁸ *Id.* at 231.
that doing so expends "scarce judicial resources"\textsuperscript{109} on constitutional issues that could be avoided.\textsuperscript{110} Since the defendant would ultimately prevail in any event, the benefits of this procedure seem to come with no additional downside to the plaintiff, beyond the disappointment of losing a case the plaintiff would have lost anyway. Yet, the Court has struggled with the order of battle. The cost of avoidance, according to the opinions on the issue, is a \textit{systemic} one—the elaboration of constitutional doctrine may be stunted if courts opt for immunity rulings over rulings on the merits.\textsuperscript{111} Thus, the benefits of reaching the merits first include "the development of constitutional precedent," defining constitutional rights, and limiting the future availability of qualified immunity.\textsuperscript{112} Citing these benefits, the Court in \textit{Saucier v. Katz}\textsuperscript{113} had directed lower courts to address the constitutional merits first, and only reach immunity upon finding a violation.\textsuperscript{114}

Just eight years later, \textit{Pearson} overruled \textit{Saucier} in favor of a case-by-case approach, in which the lower courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."\textsuperscript{115} The Court identified a number of circumstances that may tip the scales in favor of deciding the immunity issue first, such as "substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case," especially when "the constitutional question is so factbound that the decision provides little guidance for future cases," or "when it appears that the question will soon be decided by a higher court," or when the constitutional decision "rest[s] on an uncertain interpretation of state law," or when "the precise factual basis for the plaintiff's claim or claims may be hard to identify," or when "the briefing of constitutional questions is woefully

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\textsuperscript{109} \textit{Id.} at 236–37.
\textsuperscript{111} \textit{Pearson}, 555 U.S. at 236.
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} 533 U.S. 194 (2001).
\textsuperscript{114} \textit{See id.} at 194.
\textsuperscript{115} \textit{Pearson}, 555 U.S. at 236; \textit{see, e.g.}, \textit{Toevs v. Reid}, 685 F.3d 903, 910 (10th Cir. 2012).
\end{flushleft}
inadequate.” Conversely, it would seem to follow that a ruling on the merits should come first when guidance is a realistic aim, as when the plaintiff seeks to invoke a clear and general rule.

From the perspective of vindication, however, this way of approaching sequencing misses the main point of constitutional tort law. *Pearson* focuses on guidance for the future, not accountability for the past. Completely absent from the Court’s cost-benefit framework, and from its catalogue of analytically relevant factors, is anything whatsoever that deals with the value of vindicating constitutional rights. Not surprisingly, the root of the problem is the Court’s confusion of means with ends in *Carey* and the mistaken premise that compensation and vindication are one and the same. The law in this field rightly takes as a starting point that the defendant wins on the immunity issue. Contrary to the view of the Court in *Pearson*, however, that state of affairs does not take concerns about vindication of rights off the table. To be sure, if compensation and vindication are two words for the same thing, there can be no vindication of rights in a case where an immunity defense precludes a compensatory recovery. If that were so, the value of vindication would not figure in resolving the order-of-battle issue.

But compensation and vindication are *not* the same thing. In fact, in a civil recourse regime the vindication value is undercut every time a court declines to reach the merits. The organizing norm of such a regime, after all, is the plaintiff’s “natural, . . . legitimate, morally appropriate, and warranted” entitlement to have the wrongdoer held accountable for the wrong. An opportunity to obtain a ruling on the merits is a threshold requirement for satisfying the plaintiff’s legitimate claim for recourse, whether or not he ultimately prevails. The point is not that civil recourse principles must always control the order of battle; it is only that these principles deserve consideration as part of the matrix of factors that bear on whether courts should decide the merits or the immunity issue.

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117 *Id.* at 242.
118 See Zipursky, *Substantive Standing, Civil Recourse, and Corrective Justice*, supra note 17, at 310.
119 *Id.* at 321.
120 See *id.* at 322.
121 *Id.* at 306.
first. Despite the vindication-based rationale for an unbending "merits first" rule, the Court rightly noted that other factors bear on the question of whether to initially address the constitutional merits.\footnote{See John C. Jeffries, Jr., Reversing the Order of Battle in Constitutional Torts, 2009 SUP. CT. REV. 115, 121-32 (2010).} For example, concerns about efficient judicial administration favor deciding the immunity issue first in some cases. It makes sense to dispose of cases quickly on immunity grounds when it is hard to determine the specifics of the plaintiff’s claim without extensive factual development, yet it is clear that the putative right asserted by the plaintiff is not clearly established, whatever its precise content might be. In addition, the policy of avoiding unnecessary constitutional decisions may favor immunity-based dispositions of some cases, especially when the issue is a controversial or novel one or the merits ruling depends on resolving unsettled questions of state law. To say that policies of efficiency and constitutional avoidance are worthy of attention, however, is not to say that they are the only policies that count. The value of rights vindication likewise should influence sequencing decisions.

B. Mootness and Standing in Camreta

Camreta v. Greene\footnote{131 S. Ct. 2020 (2011).} grew out of an investigation of Nimrod Greene, a man suspected of sexual abuse of a child.\footnote{Id. at 2027.} Greene had a daughter, identified in the opinion by the initials “S.G.”\footnote{Id.} Bob Camreta, a child protective services caseworker, and James Alford, a deputy sheriff, went to the daughter’s school and interviewed her without first obtaining a warrant authorizing them to do so.\footnote{Id. at 2027.} S.G.’s mother, Sarah Greene, sued Camreta, Alford, and other defendants on S.G.’s behalf, claiming a violation of her Fourth Amendment rights.\footnote{Id.} On appeal from a district court’s grant of summary judgment to Camreta, the Ninth Circuit panel made two rulings.\footnote{Id.} It first found that Camreta, a state officer, violated S.G.’s Fourth Amendment

rights in connection with the interview.\textsuperscript{129} Second, it held that the rights were not clearly established at the time so that the defendant was entitled to qualified immunity.\textsuperscript{130} Camreta, who had escaped liability because of the immunity ruling, sought Supreme Court review of the Ninth Circuit’s application of the Fourth Amendment.\textsuperscript{131} Before the Court could rule, another significant event occurred: The plaintiff, who was about to turn eighteen, moved out of the state.\textsuperscript{132} The Supreme Court ultimately addressed two issues: whether Camreta had standing to raise the Fourth Amendment issue despite his victory in the court below, and whether the plaintiff’s move rendered the case moot.\textsuperscript{133}

The Court held that Camreta had standing because he had established an “injury in fact.”\textsuperscript{134} How can a winner claim to have suffered an injury? The Court began its answer to this question by noting that even the “prevailing party below” may have the necessary “personal stake” to justify a finding of standing.\textsuperscript{135} It continued:

This Article III standard often will be met when immunized officials seek to challenge a ruling that their conduct violated the Constitution. That is not because a court has made a retrospective judgment about the lawfulness of the officials’ behavior, for that judgment is unaccompanied by any personal liability. Rather, it is because the judgment may have prospective effect on the parties.\textsuperscript{136}

In particular, the official “must either change the way he performs his duties or risk a meritorious damages action.”\textsuperscript{137}

The Court’s reasoning here is explicitly and exclusively forward-looking. As the Court framed the case, a key feature is that official immunity precluded the plaintiff from obtaining damages.\textsuperscript{138} The Court’s explanation of the aim behind rulings on

\textsuperscript{129} Id. at 1030.  
\textsuperscript{130} Id. at 1031–33.  
\textsuperscript{131} Camreta, 131 S. Ct. at 2027.  
\textsuperscript{132} Id. at 2034.  
\textsuperscript{133} Id. at 2026.  
\textsuperscript{134} Id. at 2028 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (internal quotation marks omitted) (describing the “injury in fact” requirement)).  
\textsuperscript{135} Id. at 2029.  
\textsuperscript{136} Id.  
\textsuperscript{137} Id. (citing Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 337–38 (1980)).  
\textsuperscript{138} Id. at 2031.
the merits echoes Pearson's deterrence-based grounds for reaching the merits.\(^{139}\) The “injury” has nothing to do with the backward-looking ruling that Camreta violated the child's rights.\(^{140}\) It exists solely “because the judgment may have prospective effect on the parties.”\(^{141}\) Later in the opinion, the Court drives this point home in the course of explaining why it finds this case appropriate for its consideration, despite its general refusal, “[a]s a matter of practice and prudence,” to hear cases at the request of a prevailing party.\(^{142}\) Rulings on the merits in immunity cases “have a significant future effect on the conduct of public officials,” and indeed are designed to do so, in order “to promote clarity—and observance—of constitutional rules.”\(^{143}\) The alternative of routinely avoiding the merits “threatens to leave standards of official conduct permanently in limbo,”\(^{144}\) and to “frustrate ‘the development of constitutional precedent’ and the promotion of law-abiding behavior.”\(^{145}\)

After holding that Camreta had standing to challenge the lower court’s Fourth Amendment ruling, the Court declined to reach the merits because it deemed the case moot.\(^{146}\) As with the treatment of Camreta’s standing, the Court’s reasoning here was forward-looking. Because the immunity ruling rendered compensation unavailable, the Court simply assumed that the past violation could not be vindicated.\(^{147}\) Focusing solely on the future, the Court ruled that the case had become moot because S.G. had moved to Florida and was nearing her eighteenth birthday, at which point she would no longer be subject to investigations by Camreta or other child protection officers, even if she returned to Oregon.\(^{148}\) As a result, “she face[d] not the slightest possibility of being seized in a school in the Ninth Circuit’s jurisdiction as part of a child abuse investigation.”\(^{149}\) She could “no longer claim the plaintiff’s usual stake in

\(^{140}\) Camreta, 131 S. Ct. at 2029.
\(^{141}\) Id.
\(^{142}\) Id. at 2030.
\(^{143}\) Id.
\(^{144}\) Id. at 2031 (citing Cnty. of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998)).
\(^{145}\) Id. (quoting Pearson v. Callahan, 555 U.S. 223, 237 (2009)).
\(^{146}\) Id. at 2033.
\(^{147}\) Id. at 2034.
\(^{148}\) Id.
\(^{149}\) Id.
preserving the court’s holding because she no longer needs protection from the challenged practice.” For similar future-oriented reasons, the case was also moot as to Deputy Sheriff Alford. Because he “no longer work[ed]...in law enforcement” and “[would] not again participate in a child abuse investigation, he ha[d] lost his interest in the Fourth Amendment ruling.”

1. Mootness of the Plaintiff’s Case

Decoupling vindication from compensation enables us to examine the mootness and standing issues in Camreta from a fresh perspective. A case is moot if the plaintiff no longer has any stake in its outcome. The Court reasoned that S.G. had no backward-looking stake because of official immunity. From a civil recourse perspective, the problem with this analysis is that, once again, it conflates compensation with vindication. Camreta is a case in which the plaintiff had sought civil recourse for the encounter with Camreta and obtained a ruling that he violated her daughter’s Fourth Amendment rights. That ruling, if it is allowed to stand, is a form of vindication in itself, whether or not any other relief is available. In a meaningful sense, Camreta has been held accountable, as civil recourse requires, and certainly more so than he is when the case is simply dismissed. The vindication value of that ruling does not vanish just because the incident will not recur, or just because official immunity is an insuperable barrier to obtaining damages, or because of both of these factors taken together.

2. The Defendants’ Article III “Injury”

The Court’s main holding in Camreta was that Camreta could appeal to the Supreme Court despite his victory on immunity in the Court of Appeals. From a vindication

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150 Id. at 2025.
151 Id. at 2034 n.9.
152 Id.
153 Id. (citing Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997)).
154 Id. at 2034.
155 Id.
156 Id. at 2026.
157 For an argument that nominal damages should be awarded in such a case, see Part IV.
158 Camreta, 131 S. Ct. at 2026.
perspective, this holding is correct, but the Court’s reasons are incomplete. In the eyes of the Court, the “injury” giving Camreta standing to pursue an appeal was that his future conduct may be affected by the ruling against him on the merits of the Fourth Amendment issue. But under a civil recourse approach, the issue whether the defendant has shown an Article III “injury” does not depend solely on the future impact of the ruling on the merits. A corollary of treating the lower court’s Fourth Amendment ruling as a vindication of S.G.’s rights, without regard to any future threat to her, is that the ruling is also a condemnation of the officer’s conduct, without regard to any future consequences for him. Just as civil recourse empowers the plaintiff to seek to hold the supposed wrongdoer accountable, so also it provides the defendant an opportunity to show that he is in fact not a wrongdoer. Camreta’s interest in overturning the lower court’s ruling is the mirror image of the plaintiff’s interest in upholding it. His Article III “injury” is the lower court’s ruling that he violated the plaintiff’s Fourth Amendment rights.

Two other aspects of the Court’s ruling would be affected by switching from an exclusively forward-looking methodology to a backward-looking approach. First, the Court drew a sharp distinction between appeals taken from district courts to circuit courts, and appeals taken from circuit courts to the Supreme Court. The two contexts differ, it explained, because a district court ruling would not “clearly” establish a rule which officers must obey in the future on pain of losing immunity. From a backward-looking civil recourse perspective, however, the Court’s distinction is beside the point. If the plaintiff is entitled to vindication of some kind for the violation that occurred in the past, a finding by a district court produces “injury” to the defendant just as surely as does a ruling by an appellate court. The defendant would have standing to appeal not only from the circuit court to the Supreme Court, but also from the district court to the circuit court.

159 Id. at 2029.
161 See id.
162 Camreta, 131 S. Ct. at 2033 & n.7.
163 Id. at 2033 n.7.
Second, a vindication-oriented rationale would eliminate a distinction the Court drew between the two officers. The Court awarded standing to Camreta, who was still an officer and who thus would be constrained in the future by the Ninth Circuit’s ruling on the Fourth Amendment claim. Taking a forward-looking view, however, it suggested that the case was moot as to Deputy Sheriff Alford, who “no longer works for Deschutes County or in law enforcement” and thus has “lost his interest in the Fourth Amendment ruling.” From the perspective of vindication, both defendants would have standing to appeal, for Alford surely has not “lost his interest” in obtaining review of a ruling that condemned him for abridging the highest law of the land. From this perspective, Alford’s interest is exactly the same as Camreta’s as he seeks to overturn the merits ruling of the lower court.

IV. NOMINAL DAMAGES DESPITE OFFICIAL IMMUNITY

Official immunity simply cannot be squared with compensation, and official immunity seems to be a firmly settled principle. There seems to be no inclination on the part of any member of the Court to question the basic doctrine on immunity. But separating vindication from compensation offers possibilities for compromise. If I am correct that vindication is the ultimate goal and compensation is a means for achieving it, it follows that other means may suffice, if only imperfectly, to further the vindication goal. The way is open to accomplish significant vindication of rights without radically transforming current official immunity doctrine. The two values—vindication of rights and shielding officials from monetary liability—can both be accommodated by awarding nominal damages to plaintiffs who prevail on the merits of their constitutional claims but are denied compensation on account of official immunity. Under my proposal, such plaintiffs would be eligible for attorney fee awards, but this would hardly undermine official immunity. Current doctrine grants no immunity from prospective relief, except for legislators, yet plaintiffs who obtain injunctions and declaratory judgments are routinely awarded attorney fees.

164 Id. at 2029.
165 Id. at 2034 n.9 (citing Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997)).
166 Id.
A. Nominal Damages as Vindication

Richard Fallon identifies in the case law a theme he calls the "Equilibration Thesis," which posits that constitutional rights, remedies, and immunities are "flexible and potentially adjustable components of a package of rights and enforcement mechanisms that should be viewed, and assessed for desirability, as a whole." Fallon focuses on official immunity, a defendant-friendly doctrine, yet one that serves the socially constructive goal of avoiding over-deterrence of beneficial official conduct. Immunity is "a potential mechanism for achieving the best overall bundle of rights and correspondingly calibrated remedies within our constitutional system." The doctrine is well-entrenched, enjoys broad support on the current Court, and will not disappear. But it need not stand in the way of some measure of vindication. The key to proper application of the Equilibration Thesis is to identify all of the values that courts should strive to keep in equilibrium, and give each its due. Thus, the other side of the equation also requires attention. One value on the plaintiff’s side, much in evidence in Camreta and Pearson, is deterrence. But it is not the only one. Vindication, too, is a value that should weigh in the balance.

Let us stipulate that the immunity doctrine forecloses compensatory damages in the cases to which it applies. The Court should clarify the means and end relation between compensation and vindication. It should recognize that vindication is the goal and compensation is just a tool for achieving that goal. Taking vindication as the ultimate goal invites the consideration of other means by which the plaintiff may obtain recourse, even in cases in which compensatory damages are foreclosed by immunity. We have already seen two ways in which vindication could be boosted: (1) by reaching the constitutional issue first in order-of-battle cases, and (2) by rejecting standing and mootness objections in cases like Camreta. But these two reforms, standing alone, may well not suffice to satisfy plaintiffs’ demands for vindication. Both of them leave

167 Fallon, supra note 48, at 480.
168 Id. at 479.
169 Id. at 480.
open the question of what remedy may be available to a plaintiff who cannot obtain compensatory damages on account of immunity.

Another option would more fully realize civil recourse principles without greatly disturbing the equilibrium between rights and remedies. Current constitutional tort law should be modified so as to allow an award of nominal damages of $1 to plaintiffs who prevail on the merits but lose only because of immunity. Under civil recourse principles, the point of the litigation is not “making the plaintiff whole,” but “fair and reasonable redress to the victim of a tortious wrong.” Redress may be accomplished by nominal damages. Applying this principle to constitutional torts, the task is to reconcile the values behind official immunity with the plaintiff’s legitimate demand for redress. Striking the appropriate balance could be achieved by replacing the Court’s all-or-nothing approach to damages with a nominal damages compromise.

Three objections to this approach need to be addressed. First, a skeptic may object that nominal damages are worthless, or even insulting, to the plaintiff. But, there are good reasons to

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170 This change would benefit many constitutional tort plaintiffs who can show that their rights were violated, but not all of them. Some plaintiffs—notably, those whose constitutional rights are violated in the course of the criminal process, leading to their convictions—may still be denied vindication by the doctrine of Heck v. Humphrey, 512 U.S. 477 (1994). Heck holds:

   [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus.

   Id. at 486–87 (footnote omitted). Heck reflects “a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction,” and reluctance to “permit a convicted criminal defendant to proceed with a malicious prosecution claim would permit a collateral attack on the conviction through the vehicle of a civil suit.” Id. at 484 (internal quotation marks omitted). Arguably, these policies are strong enough to foreclose even nominal damages.

171 Goldberg & Zipursky, Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette, supra note 160, at 574.

172 Id. A declaratory judgment may also suffice. The potential problem with that alternative is that declaratory relief is traditionally conceived as an alternative to an injunction. In constitutional tort cases, the wrong is entirely in the past and ordinarily is unlikely to recur. In these circumstances, declaratory relief may be seen as inappropriate. Cf. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 106 (1998) (denying plaintiff’s request for declaratory relief for a past wrong).
resist this objection. For one thing, the issue is not nominal damages versus more substantial damages. The consensus on the Court in favor of immunity means that the issue is nominal damages versus nothing. In addition, the constitutional tort damages rules do not favor large recoveries in any event. Plaintiffs recover only damages they can prove and cannot obtain damages for "the abstract value of a constitutional right." The circumstances of many constitutional tort suits suggest that plaintiffs are motivated by a desire for judicial recognition that the officer committed a constitutional wrong. In these cases, nominal damages can serve "the expressive function of law—the function of law in 'making statements' as opposed to controlling behavior directly." To some extent, this aim can be met by judicial statements that the plaintiff's rights were violated. But in a civil recourse regime, nominal damages serve another, more subtle goal: The award compels the wrongdoer to do something, however small, to redress the wrong.

The second objection is that nominal damages are already available in certain cases. In Carey, the Court authorized the award of nominal damages to plaintiffs who won on the constitutional merits but could not prove compensatory damages. But, in Carey the Court misunderstood the role of nominal damages, just as it misunderstood the relation between compensation and vindication. The Court stressed society's interest in enforcing constitutional rights. The aim of nominal damages, the Court said, was to "recognize[] the importance to organized society that those rights be scrupulously observed." On the contrary, an award of nominal damages is, first and foremost, a means of providing redress to the plaintiff.

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174 See supra note 82.
176 See supra note 85.
178 Id.
179 Id.
180 For another, quite different argument in favor of nominal damages in such cases, see James E. Pfander, Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages, 111 COLUM. L. REV. 1601 (2011). Nothing in this Article takes issue with Pfander's basic thesis, yet there are differences between the two approaches. While Professor Pfander approves Carey's holding that an award of nominal damages vindicates the plaintiff's rights, id. at
Operating under Carey's dubious premise that vindication and compensation are more or less the same thing, the Court has not had occasion to consider a vindication-oriented nominal damages approach.

A third objection is that the policy behind official immunity from compensatory damages may also be threatened by nominal damages awards. According to Harlow, those aims are not only to shield officials from paying damages, but also to spare them such burdens as "the expenses of litigation, [and] the diversion of official energy from pressing public issues." Those burdens are present in suits for nominal damages too, even if the monetary stakes are not as high. The answer to this objection is that it depends on a value judgment that the Court has squarely rejected. Outside the compensatory damages context, almost all officials are already obliged to put up with the costs of being subjected to litigation challenging the constitutional validity of their official acts. Apart from legislators, officials have no immunity against suits for prospective relief. The Court's policy judgment is that—compensatory damages aside—the value of providing access to the courts to vindicate rights overrides the value of shielding officials from the burdens of litigation.

1606, 1608, 1620, his primary focus is on the forward-looking deterrence-based goal of working out the content of constitutional rights in a post-Pearson world, id. at 1611–18. Thus, "[t]he whole point of the litigation would be to clarify the constitutional norm in a world of uncertainty." Id. at 1619. Furthermore, "[s]uch an [approach] could contribute much to the clarity and flexibility of constitutional tort litigation." Id. at 1608. With guidance in mind, Pfander makes a cogent argument that the policy of avoiding overdeterrence is comparatively weak when the plaintiff seeks only nominal damages.

Professor Pfander looks mainly to the future, while my rationale for nominal damages looks to the past. In addition, a practical difference between Professor Pfander's forward-looking approach and the vindication-oriented, backward-looking approach is that Pfander would limit this type of recovery to plaintiffs who "expressly declar[e] in the complaint that they do not intend to seek and will not accept any compensatory or punitive damages or an award of costs and attorney's fees." Id. at 1607. By contrast, I argue in Part IV.C that the civil recourse approach favors fee awards in cases brought to vindicate rights, whether or not the plaintiff recovers anything more than nominal damages.


163 See Pfander, supra note 180, at 1625.
B. Bridging the Gap Between Prospective and Retrospective Relief

Under current official immunity doctrine, forward-looking constitutional remedies—injunctive and declaratory relief—are often more readily available than backward-looking relief in the form of compensatory damages. In the context of prospective relief, constitutional rights are regarded as inherently valuable. In practice, vindication is a strong enough reason for forward-looking relief without proof of harm other than the violation itself. Even when the issue is whether to grant a preliminary injunction pending resolution on the merits, plaintiffs alleging First Amendment violations often obtain them, as they are “entitled to a presumption of irreparable harm.”

When the issue is backward-looking relief, however, Carey’s confusion of means with ends endures and sometimes blocks vindication of the plaintiff’s rights. Let us grant that compensation should be denied. It does not follow that all forms of vindication should be denied. The tort-like structure of suits for backward-looking relief has evidently diverted the Court’s attention from a commonplace feature of prospective remedies. In litigation contexts in which there is no compensatory damages issue, the independent and free-standing value of vindication is self-evident. Rights are vindicated every day by forward-looking injunctive or declaratory relief. By treating compensation and vindication as more or less the same thing, the Court has created an artificial and unwarranted distinction between the

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184 A litigant seeking an injunction is required to show “irreparable injury,” but in modern constitutional litigation, this is not a high hurdle. See Elrod v. Burns, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” (citing N.Y. Times Co. v. United States, 403 U.S. 713 (1971))). Recent illustrations include Moss v. Spartanburg County School District Seven, 683 F.3d 599, 607 (4th Cir. 2012) (“Feelings of marginalization and exclusion are cognizable forms of injury, particularly in the Establishment Clause context . . . .”), cert. denied, 133 S. Ct. 623 (2012), Associated Press v. Otter, 682 F.3d 821, 825–26 (9th Cir. 2012) (holding that denial of access to the press to view even the preliminaries of an execution would be irreparable injury), and Legend Night Club v. Miller, 637 F.3d 291, 302–03 (4th Cir. 2011) (“[M]onetary damages are inadequate to compensate for the loss of First Amendment freedoms.”).

systematically ineffective backward-looking constitutional tort remedy and the systematically effective forward-looking injunctive or declaratory remedy.

Maintaining the means and end relation between compensation and vindication, as is done in the civil recourse regime, makes it apparent that vindication is the ultimate goal of both prospective and retrospective relief. The differences between the forward-looking and backward-looking contexts fade, and the parallels between prospective and retrospective relief grow more pronounced. If constitutional violations carry with them “a presumption of irreparable harm” in the forward-looking injunction context, why should they not carry with them a similar presumption in the backward-looking non-injunction context? And if such a “presumption of irreparable harm” is present, how can it not logically demand some form of vindication? Nominal damages for retrospective relief serve the same vindicatory goal as some suits for prospective relief, a context in which no compensatory damages are awarded, yet rights are vindicated and attorney fees are available.

Distinguishing compensation from vindication enables us to conceive of prospective and retrospective remedies as two parts of a unified scheme aimed primarily at vindicating constitutional rights. Compensatory damages and immunity aside, the only difference that remains is a fortuitous one—the moment in time at which the constitutional violation takes place. In the case of prospective relief, the constitutional violation is threatened or ongoing, while in constitutional torts it is in the past and completed. In City of Los Angeles v. Lyons, for example, the plaintiff had been choked by a police officer at a traffic stop. His effort to obtain prospective relief was denied because he could not show a sufficient likelihood that he would be choked again. By contrast, the plaintiff stopped by the police in

186 Of course, the “basic and essential” remedy is raising rights defensively, as a shield against criminal or civil liability. See John C. Jeffries, Jr. & George A. Rutherford, Structural Reform Revisited, 95 CALIF. L. REV. 1387, 1391–95 (2007). Since that remedy is constitutionally required, not many hard questions arise concerning its availability. The main issues for the law of constitutional remedies concern the prospective and retrospective remedies discussed in the text.

188 Id. at 95.
189 Id. at 111.
Kolender v. Lawson\textsuperscript{190} had standing to seek prospective relief.\textsuperscript{191} The difference is that the Kolender plaintiff had been stopped fifteen times and could show the necessary likelihood of a future encounter with the police.\textsuperscript{192} The plaintiff's interest in vindication is the same in the two cases, except that the Kolender plaintiff’s rights were violated more often, giving his grievance a quantitative but not a qualitative edge over that of Lyons. Yet, the prospects for vindication are quite different for the two plaintiffs. The Lyons plaintiff was obliged to overcome the immunity defense in order to win any relief at all.\textsuperscript{193} Even if he could get over that hurdle, were the case to arise today, he may be ineligible for attorney fees unless he could prove actual damages.\textsuperscript{194} In contrast, the Kolender plaintiff, upon winning on the merits, could obtain an injunction without showing any compensable damages, and attorney fees would be recoverable because of the attainment of that relief.\textsuperscript{195}

The remedial gap between Lyons and Kolender illustrates a general theme. In Zamecnik v. Indian Prairie School District \# 204,\textsuperscript{196} school officials violated students’ free speech rights by forbidding messages on t-shirts.\textsuperscript{197} While an award of damages is likely to be small and produce little if any deterrence in such a case, a proper set of facts would produce a different outcome. In Zamecnik, one of the students had graduated by the time the case was decided, so that the only possible relief for that plaintiff was an award of damages.\textsuperscript{198} But another remained in school.\textsuperscript{199} Adding this one detail entirely transformed the remedial landscape. The student who remained could obtain \textit{prospective}
injunctive relief against the First Amendment violation, as well as a full award of attorney fees. Thus, students who can show a continuing interest in speaking may fully vindicate their rights without satisfying Carey’s requirements. But students who happen to have graduated are sent away with only nominal damages.

Under current doctrine, it is not even clear that this latter set of plaintiffs may obtain an award of attorney fees. This seemingly ancillary attorney fees issue is actually one of great practical importance, because the availability of a fee award may be critical to enforcement of constitutional rights. The underlying point here is simply that “[i]n the real world, rights are meaningful only when the cost of protecting them is lower than the cost of attacking them.” Thus, the fee lowers the plaintiff’s costs of defending the plaintiff’s rights while increasing the defendant’s costs in resisting their enforcement.

C. Attorney Fees

The Civil Rights Attorney’s Fees Awards Act of 1976 authorizes a court to award a “reasonable” attorney fee to a “prevailing party” as part of the costs, in cases brought under

200 Id. That plaintiff obtained a preliminary injunction, and would have been entitled to a permanent one upon succeeding on the merits. See id. at 875, 882.

201 Lefemine v. Wideman, 133 S. Ct. 9, 11–12 (2012) (per curiam). The Court remanded for a determination of whether there were any “special circumstances” that would justify a lower award. Id. at 12; see Lefemine v. Wideman, 758 F.3d 551, 556–59 (4th Cir. 2014) (finding no such special circumstances).

202 The availability of prospective relief is bolstered by two other principles. First, even if a particular dispute over rights is in the past, plaintiffs who have a continuing interest in asserting their rights may do so by showing that the issue is “capable of repetition, yet evading review.” Roe v. Wade, 410 U.S. 113, 125 (1973) (internal quotation marks omitted); see also FALLON ET AL., supra note 15, at 190. In Irish Lesbian & Gay Organization v. Giuliani, for example, a group denied a parade permit for St. Patrick’s Day, 1995, was nonetheless authorized to seek prospective relief for future parades by showing that its members had a continuing interest in demonstrating and that a challenge to any particular parade would “evad[e] review” on account of the time required to litigate any particular permit denial. 143 F.3d 638, 648 (2d Cir. 1998) (internal quotation marks omitted). Second, some cases can be structured as class actions, with new plaintiffs always entering the class. The advantage of framing the litigation in that way is this: Even when some plaintiffs’ claims become moot, others will have live claims, and prospective relief will be available. See U.S. Parole Comm’n v. Geraghty, 445 U.S. 388, 403–04 (1980).

§ 1983 and other civil rights statutes. Congress sought to make it more attractive to lawyers to take these cases in which monetary awards are often small in any event. The civil recourse aim of empowering the plaintiff is reflected in the Senate Report on the bill, which noted that “fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.” In Farrar v. Hobby, the Court held that a plaintiff who receives nominal damages is a prevailing party. The Court stressed that “the prevailing party inquiry does not turn on the magnitude of the relief obtained.”

But it does not follow that the plaintiff who receives nominal damages is always entitled to attorney fees. Farrar went on to hold that “[i]n some circumstances, even a plaintiff who formally ‘prevails’ under § 1988 should receive no attorney’s fees at all.” The reason behind the nominal award is the crucial factor: “When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all.”

Farrar was just such a case. Joseph Farrar had partly owned a school for disturbed teenagers and Texas officials had shut it down. Farrar sued Hobby—then the lieutenant governor of Texas—and other officials, seeking $17 million in damages. His theory was that they had deprived him of liberty and property without due process of law in violation of his Fourteenth Amendment rights. The case was tried by a jury which found that Hobby had violated Farrar’s due process rights, but that “Hobby’s conduct was not ‘a proximate cause of any damages’ suffered by Joseph Farrar.” On these facts, the Court ruled that Farrar should not receive a fee, as he had not established the necessary

206 Id. at 2.
208 Id. at 112.
209 Id. at 114.
210 Id. at 115.
211 Id. (citation omitted).
212 Id. at 105–06.
213 Id. at 106.
214 Id.
215 Id.
causal link between the violation and his loss.\textsuperscript{216} Lower courts are divided on the question of whether attorney fees may be awarded in cases in which the gap between what is asked for and the nominal award received is not as great as in \textit{Farrar}.\textsuperscript{217}

How should the \textit{Farrar} framework apply to the “nominal damages despite immunity” fact pattern? On the one hand, the plaintiff may be able to show that vindicating rights is a primary rationale for the litigation. A plaintiff avoids the \textit{Farrar} obstacle, so long as the plaintiff’s failure to obtain attorney fees is solely due to immunity, not inability to show that the violation caused damages. If these conditions are met, the case for attorney fees is strong under civil recourse principles because fees bolster the plaintiff’s efforts to hold the wrongdoer accountable.

A retort to this reasoning is that the “nominal damages despite immunity” case presents a factor that is not present in \textit{Farrar} or the lower court cases that apply it. The new factor is that the defendant is immune from liability for damages. For this reason, the case presented under my nominal damages proposal is unlike \textit{Farrar} and other nominal damages cases adjudicated under the current “no distinction between defendant victory on the merits and defendant victory on immunity” doctrine. The difference is not merely a factual one, for this type of case would implicate the policy of avoiding unwanted deterrence of official action. In order to hold that attorney fees may be awarded, the Supreme Court would have to curb the impact of official immunity to the extent the issue is not compensatory damages, but just attorney fees. It would have to decide not only that the plaintiff has a strong claim to them, but also that, on the attorney fees issue, the civil recourse value of empowering the plaintiff outranks the immunity policy.

This objection is not as strong as it may at first appear, for it ignores the doctrine on prospective relief. The point here is not just that, legislators aside, officials are subject to prospective relief, but also that attorney fees are routinely available for prospective relief. That is, the Court distinguishes between money paid as damages and money paid as attorney fees, allowing recovery of the latter in prospective relief cases while

\textsuperscript{216} \textit{Id.} at 115–16.
\textsuperscript{217} See NAHMOD ET AL., \textit{supra} note 8, at 709–10; see also Gray ex rel. Alexander v. Bostic, 720 F.3d 887, 894 (2013) (holding no fee where plaintiff sought $25,000 and received nominal damages).
denying recovery of the former in official immunity cases. *Lefemine v. Wideman* is illustrative. The plaintiff and other members of Columbia Christians for Life ("CCL") told the sheriff that they planned to hold a demonstration against abortion at a busy intersection. The sheriff responded that if they proceeded, they would be arrested, as they had been at a similar demonstration several years earlier. Lefemine sued the sheriff under § 1983, asserting a First Amendment violation and seeking "nominal damages, a declaratory judgment, a permanent injunction, and attorney's fees." The District Court granted a permanent injunction against content-based restrictions on CCL's speech. Following the rule this Article challenges, the court denied nominal damages on account of official immunity. It also denied the request for attorney fees. The Fourth Circuit affirmed the denial of attorney fees, reasoning that Lefemine was not a "prevailing party," as the injunction did not "alter[ ] the relative positions of the parties.

In a per curiam opinion, the Supreme Court reversed. Lefemine was a prevailing party because he "desired to conduct demonstrations . . . with signs that the defendant police officers had told him he could not carry. He brought this suit in part to secure an injunction to protect himself from the defendants' standing threat of sanctions. And he succeeded in removing that threat." Moreover, absent as yet unidentified "special circumstances," he should receive a fee.

Underlying the Court's distinction between retrospective and prospective relief—granting official immunity for the former but not the latter—is a policy judgment concerning the proper balance between avoiding unwanted deterrence, on the one hand,
and the plaintiff's interest in a remedy on the other. That judgment, only partially articulated in the opinions but implicit in their outcomes, is that the defendant's interest is too strong, and plaintiff's interest is too weak, to justify compensatory damages.\textsuperscript{229} In the prospective relief context, however, the balance tips in favor of relief. As a corollary, the rule that attorney fees are available in prospective relief cases must be based on a policy judgment that awarding a fee does not unduly deter the official either.

Now consider the nominal damages context. The impact of nominal damages is quite similar, if not identical, to that of prospective relief. In both cases the official is not required to pay compensatory damages, yet the official's conduct is constrained going forward by the ruling on the merits. There is a difference between the two. In an injunction case, the constraint is the prospect of being held in contempt if the official violates it. In a nominal damages case, the constraint is the one the Court identified in its ruling on the defendant's standing to appeal in \textit{Camreta v. Greene}\textsuperscript{230}—the prospect of liability for compensatory damages once the law is clear and official immunity is no longer a hurdle for the plaintiff.\textsuperscript{231} That difference aside, the two contexts are alike. On the issue of whether an attorney fee award would unduly deter the official, there is no difference between the two non-compensatory remedies. The Court implicitly holds in \textit{Lefemine} that an award does not overly deter in the context of prospective relief.\textsuperscript{232} The same judgment seems to follow for the nominal damages context.

V. IMPLICATIONS FOR THE \textit{BIVENS} DOCTRINE AND ALTERNATIVE REMEDIES

Besides challenging the Court's treatment of remedial, "order-of-battle," standing, and justiciability issues in official immunity cases, a vindication-oriented approach to constitutional torts has implications for other aspects of constitutional tort doctrine as well. In particular, it provides grounds for questioning the notion that the availability of state

\textsuperscript{229} The Court explicitly balances interests in this way in \textit{Harlow v. Fitzgerald}, 457 U.S. 800, 814 (1982).
\textsuperscript{231} \textit{Id.} at 2030–31.
\textsuperscript{232} \textit{Lefemine}, 133 S. Ct. at 11.
remedies can preclude constitutional tort liability, a theme that appears with increasing frequency in the Court's doctrine on implied remedies for constitutional violations by federal officers.

*Minneci v. Pollard*\(^{233}\) concerned an effort by Pollard, an inmate at a privately-run federal prison in California, to obtain damages from employees for violations of his Eighth Amendment right against cruel and unusual punishment.\(^{234}\) Claiming that he had been denied necessary medical attention, Pollard sought relief under the implied cause of action for constitutional violations recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,\(^{235}\) a case in which the Court held that the target of a search by federal officers could sue them for violating his Fourth Amendment rights despite the absence of a federal statute authorizing the suit.\(^{236}\) *Bivens* established that a cause of action for damages could be implied directly from the Constitution.\(^{237}\) The broad issue in *Bivens* cases is one of separation of powers—whether the federal courts can and should authorize remedies for violations of federal law under their power to make federal common law, or whether the creation of such remedies should be left up to Congress.\(^{238}\) In the context of remedies for violations of federal statutes, the Court has severely restricted judicially-crafted damage remedies.\(^{239}\) In the constitutional context, the Court has, ever since the 1980s, steadily retreated from *Bivens*,\(^{240}\) without quite abandoning the basic principle.\(^{241}\) The aspect of that retrenchment that concerns


\(^{234}\) *Minneci*, 132 S. Ct. at 620.

\(^{235}\) 403 U.S. 388 (1971).

\(^{236}\) Id. at 396.

\(^{237}\) Id.

\(^{238}\) Id. at 397.

\(^{239}\) See generally Alexander v. Sandoval, 532 U.S. 275 (2001); see also FALLON ET AL., supra note 15, at 705–08.

\(^{240}\) The lower courts have followed suit. For example, a recent D.C. Circuit case holds that "military, national security, [and] intelligence" matters are special factors weighing against recognizing a *Bivens* cause of action. Doe v. Rumsfeld, 683 F.3d 390, 394 (D.C. Cir. 2012).

us here is the Court’s growing allegiance to the proposition that the existence of an “alternative, existing” process will foreclose the Bivens cause of action.242

A. Alternative Remedies and the Bivens Doctrine

Given this context, observers expected that Richard Pollard would lose his case if the Court were to follow the precedents.243 And he did.244 For present purposes, the importance of the case lies in the reason why he lost—namely, that he had available to him a California state law remedy.245 A decade earlier, in Correctional Services Corp. v. Malesko,246 the availability of a state law tort remedy had foreclosed Bivens for a prisoner suing a private corporation operating a federal prison.247 Pollard tried to distinguish his case on the ground that he was suing guards employed by the private corporation and not the corporation itself, but the Court found it “difficult to square Pollard’s argument with Malesko’s reasoning.”248 Writing for the majority, Justice Breyer explained that “Pollard’s Eighth Amendment claim focuses upon a kind of conduct that typically falls within the scope of traditional state tort law,”249 which “provides an alternative, existing process capable of protecting the constitutional interests at stake.”250 According to the Court, both compensation and deterrence were served by the state remedy, because “[s]tate tort law . . . can help to deter constitutional violations as well as to provide compensation to a violation’s victim.”251

Pollard sought to head off this outcome by pointing out that the state tort remedy, a California statute that authorized suits for negligence against prison guards and other


245 Id.


247 Id. at 71–73.

248 Minneci, 132 S. Ct. at 624.

249 Id. at 623.

250 Id. (internal quotation marks omitted).

251 Id. at 624.
custodians, was less effective than a Bivens remedy because state law could and did limit the amount of recoverable damages. For example, California law caps recoveries for emotional distress. But the Court ruled that “[s]tate-law remedies and a potential Bivens remedy need not be perfectly congruent.” All that is needed is that they provide “roughly similar incentives” and “roughly similar compensation.”

A vindication-oriented approach would radically alter the analysis of Minneci. The Court’s premise is that the payment of money for a violation of state tort law, when it happens to coincide with damages for a constitutional violation, will both compensate and deter the constitutional violation “roughly” as well as a payment of money for the constitutional violation itself in a Bivens suit. If the aims of constitutional tort were the same as the aims of ordinary tort law, the Court would stand on firm ground. But the vindication of constitutional rights brings into play a distinct value. By pointing out that the state tort remedy may “provide compensation to a violation’s victim,” the Court in Minneci may be trying to bring vindication into the matrix of policies bearing on the implied cause of action issue. Any such effort is doomed to fail. The reason why is simple: Minneci reflects the Court’s erroneous conflation of vindication with compensation in Carey. Contrary to the teaching of that case, compensation for injury is distinct from vindication of rights. Suppose a plaintiff receives compensation for an injury through worker’s compensation insurance, or as a result of the application of a state law liability rule aimed at deterrence, or even one aimed at vindicating state law tort rights. However welcome the money may be, the award does nothing to provide the injured person with an opportunity to vindicate federal constitutional rights. The issue of whether or not plaintiff’s constitutional rights were violated is not at issue in the state tort

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252 See id. at 625.
253 See id. (discussing CAL. CIV. CODE § 3333.2(b) (West 1997) and other state law provisions that limit damages).
254 Id. (citing Bush v. Lucas, 462 U.S. 367, 388 (1983)).
255 Id.
256 Id.
258 Minneci, 132 S. Ct. at 624.
case. For that reason alone, it is not possible for state tort law damages to provide recourse for the constitutional wrong any more than worker's compensation can do. As the Court recognized in Bivens, state tort law and the Bill of Rights protect different interests, even if the same set of facts can give rise to both kinds of claims.\(^{259}\)

A civil recourse approach to constitutional torts calls into question not only Minneci but a long line of predecessor cases going back to Bush v. Lucas,\(^{260}\) in which the availability of an alternative remedy foreclosed a Bivens suit.\(^{261}\) In Bush, as well as in Schweiker v. Chilicky,\(^{262}\) alternative remedies were available under federal administrative law, rather than state tort law.\(^{263}\) But this difference is functionally insignificant. In Bush, a federal employee sought a Bivens remedy for a First Amendment violation.\(^{264}\) The Court pointed to alternative remedies made available by the civil service regime governing federal employees.\(^{265}\) Chilicky concerned a claim by social security recipients that officials had deprived them of their Fifth Amendment due process rights.\(^{266}\) A remedy was available under the federal social security statutes.\(^{267}\) In each of these cases, however, the remedy was for statutory violations. Civil recourse demands a remedy for the constitutional violations.\(^{268}\)

Put simply, an alternative remedy satisfies civil recourse requirements only if it allows the plaintiff to vindicate the plaintiff's constitutional rights. For example, a state court suit in

\(^{259}\) Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394 (1971). In Bivens, the specific right at issue was the Fourth Amendment. Id. at 391–92. The Court has recognized the gap between the protection afforded by ordinary tort rights and by constitutional rights in the Eighth Amendment context as well. Estelle v. Gamble, 429 U.S. 97, 106 (1976); see, e.g., McCaster v. Clausen, 684 F.3d 740, 746 (8th Cir. 2012).


\(^{261}\) Id. at 390.


\(^{263}\) See id. at 428–29; Bush, 462 U.S. at 385.

\(^{264}\) Bush, 462 U.S. at 368.

\(^{265}\) Id. at 381–82, 385–88.

\(^{266}\) Schweiker, 487 U.S. at 414.

\(^{267}\) Id. at 424.

\(^{268}\) Whether constitutional tort recovery ought to be denied for reasons other than the availability of another remedy is a separate issue. See Wilkie v. Robbins, 551 U.S. 537, 550 (2007) (holding that, whether or not there were alternative remedies, other factors may justify denying a Bivens remedy). In any event, the Bivens remedy is probably not constitutionally required. See FALLON ET AL., supra note 15, at 740–41.
which Pollard could sue the private prison guards for constitutional violations would satisfy civil recourse, even though an ordinary state tort remedy would not.\textsuperscript{269} The distinction between regimes that satisfy vindication and those that do not can be a subtle one, and—when this distinction is recognized—superficially similar cases can produce very different results. In \textit{Chilicky}, the social security laws gave plaintiff a remedy only for money wrongfully withheld under the statute.\textsuperscript{270} No finding of unconstitutionality was required, and there is no plausible sense in which the remedy could be viewed as a means of vindicating constitutional rights, nor did the Court suggest otherwise. \textit{Bush} is a trickier case. There, the employee was entitled to raise a constitutional claim in the civil service proceeding as grounds for finding a statutory violation.\textsuperscript{271} Thus, a finding by the judge of a constitutional violation could prove decisive in the plaintiff’s favor.\textsuperscript{272} Nothing in the reasoning of \textit{Bush}, however, suggests that this statutory incorporation of constitutional law was decisive, or even important.\textsuperscript{273} In short, \textit{Bush}—like \textit{Chilicky}—focused on compensating for the underlying statutory injury.\textsuperscript{274} It did not focus on vindicating one’s constitutional rights.\textsuperscript{275}

\textbf{B. Alternative Remedies for Constitutional Violations by State Officials}

In \textit{Minneci}, the plaintiff tried to bring a \textit{Bivens} implied cause of action against defendants who acted under color of federal law.\textsuperscript{276} The ruling has no direct application to suits brought under § 1983, in which plaintiffs seek relief on constitutional

\textsuperscript{269} Cf. \textit{Haywood v. Drown}, 556 U.S. 729, 735 (2009) (stating that state courts may not decline jurisdiction over § 1983 cases absent a “valid excuse” (internal quotation marks omitted)). Of course, § 1983 was not available to Pollard, as it only applies to defendants acting under color of state law and Pollard was a federal prisoner. \textit{See id.} at 731.

\textsuperscript{270} \textit{Schweiker}, 487 U.S. at 427.


\textsuperscript{272} \textit{See} Gene R. Nichol, \textit{Bivens, Chilicky, and Constitutional Damages Claims}, 75 VA. L. REV. 1117, 1147–49 (1989) (discussing grounds on which the Court in \textit{Chilicky} could have, but chose not to, distinguish \textit{Bush}).

\textsuperscript{273} In \textit{Chilicky}, the Court pointed out that “[t]he \textit{Bush} opinion, however, drew no distinction between compensation for a ‘constitutional wrong’ and the restoration of statutory rights that had been unconstitutionally taken away.” 487 U.S. at 427.

\textsuperscript{274} \textit{Bush}, 462 U.S. at 388.

\textsuperscript{275} \textit{Id.}

grounds against officers acting under color of state law. But make no mistake—the Court’s reliance on state remedies, and the civil recourse critique of its reasoning, have implications for § 1983 litigation as well. Seeing why requires a recognition that the relation of state remedies to federal causes of action has a long and checkered history. In *Monroe v. Pape*, the Court held that the actions of the Chicago police in searching the plaintiff’s house were actionable under § 1983 despite the availability of a parallel state law tort remedy. Later, the Court applied this same rule to state administrative as well as judicial proceedings.

Other cases, however, have given greater weight to the availability of state remedies. There are three examples of this. First, citing an unwillingness to turn § 1983 into “a font of tort law,” *Paul v. Davis* declined to allow § 1983 suits for defamation, and remitted plaintiffs to their state remedies. Second, in defining the content of the Due Process Clause, *Zinermon v. Burch* carved out a role for state remedies, though in a rather different context. Ordinarily the state is obliged to provide a person with due process before deprivation of liberty or property. *Zinermon* held that even after the deprivation has occurred, state law may provide the process that is due for deprivation of liberty or property, provided a pre-deprivation hearing is impracticable. Third, *Williamson County Regional Planning Commission v. Hamilton Bank*, illustrates yet another variant on the state remedies theme. There, the § 1983 plaintiff sued for a regulatory taking on account of the Planning

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281 *Id.* at 701.
282 494 U.S. 113 (1990); *see also Parratt v. Taylor*, 451 U.S. 527, 542 (1981) (a pre-*Zinermon* holding to similar effect); *Ingraham v. Wright*, 430 U.S. 651, 690 (1977) (stating that state tort remedies provide procedural due process to students seeking a remedy for corporal punishment).
Commission's restrictions on its uses of property. The Court, however, ruled that the suit would not be ripe until Hamilton Bank had pursued state remedies.

No general principle links together all of these references to state remedies. The reasons for directing plaintiffs to pursue state remedies, or declining to do so, vary from case to case and need not be canvassed here. From the perspective of vindication and civil recourse, however, a guiding principle emerges. If vindication of constitutional rights were the sole value controlling “state remedies” issues, the key question in all of these cases would be whether a given state remedy authorizes the plaintiff to sue for a constitutional violation. Despite Monroe, a state that provided access to its courts for constitutional claims, as all states are presumptively required to do, would meet civil recourse requirements, so long as state courts gave due regard to constitutional guarantees.

Many of the Court’s rulings favoring state courts would probably meet this test, but not all of them do. The ruling in Paul, for example, can be understood in either of two ways, neither of them attractive. First, the Court may have meant to say that there is no constitutionally protected interest in reputation, no matter how malicious the defendant’s statements, so there would be no occasion for civil recourse in any constitutionally-based defamation case. But this reading of the opinion is undermined by Paul itself, in which the Court ruled that the Due Process Clause did give constitutional protection to a plaintiff who could show that the stigma was accompanied by some other state-imposed burden. Thus, the Court in Paul distinguished between the plaintiff’s allegation that he had been falsely identified as a shoplifter from an earlier

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286 Id. at 175.
287 Id. at 186; see, e.g., Elena v. Municipality of San Juan, 677 F.3d 1, 7–8 (1st Cir. 2012) (applying this principle).
289 For the classic expression of the argument that the federal courts should be favored because state courts are not sufficiently sympathetic to constitutional claims, see Burt Neuborne, The Myth of Parity, 90 HARV. L. REV. 1105, 1105–06, 1115–16, 1120–21 (1977).
290 In Siegert v. Gilley, the Court declined to distinguish a case in which the plaintiff alleged facts similar to these. 500 U.S. 226, 233–34 (1991).
case which accorded due process rights to a plaintiff who was not only stigmatized by being identified as a drunk but also lost the right to purchase liquor.291

Second, the Court may have intended to treat state tort law as a surrogate for a constitutional claim. Such a ruling would be squarely at odds with the civil recourse norm. To the extent Minneci means that plaintiffs with constitutional claims must pursue state tort remedies instead of the federal Bivens remedy, Minneci is a contemporary version of this second interpretation of Paul. Perhaps it could still be distinguished from Paul, but only because of the separation of powers concern that inheres in Bivens litigation on account of the lack of congressional authorization, a factor that is not present in § 1983 cases.

CONCLUSION

Recent Supreme Court constitutional tort cases have made it harder than ever for plaintiffs to recover damages for constitutional violations. Connick v. Thompson292 barred recovery to a man who, on account of prosecutorial misconduct, had been convicted of a crime he did not commit and spent many years on death row.293 Ashcroft v. Iqbal294 limited the liability of supervisors for acts of their subordinates.295 Rehberg v. Paulk296 applied the absolute immunity of witnesses to include grand jury witnesses.297 Filarsky v. Delia298 broadened the immunity available to officials to include a private attorney working part time on an official investigation.299 One reason for the lack of success of the plaintiff’s side may well be that a majority of the Justices on the current Court hold restrictive views of constitutional protections and therefore tend to resist expanding the scope of individual constitutional rights. But that cannot be

293 Id. at 1358–60, 1365. The prosecutors could not be sued on account of absolute prosecutorial immunity, and the city could not be sued because the evidence of failure to properly train the errant prosecutors was insufficient to show an “official policy.” Id. at 1360 (internal quotation marks omitted).
295 Id. at 677.
297 Id. at 1510.
299 Id. at 1667–68.
the whole explanation, for many recent cases that cabined access to damages relief were decided by large majorities that included the so-called “liberal” Justices. 300

Part of the blame for the decline of constitutional tort law emanates from the original sin committed in Carey, when another unanimous Court 301 blurred the distinction between compensation and vindication. The Court’s failure to appreciate, or at least articulate, the means and end relation between compensation and vindication led to the devaluation of vindication and, especially in later cases, the glorification of deterrence as the core rationale for constitutional tort liability. Putting so much weight on deterrence poses grave danger to the future of constitutional tort law. Efforts at deterrence may be ineffectual on account of official immunity and other limiting doctrines. 302 For that reason, the Justices may have come to believe that comparatively little is at stake for the plaintiff in any event. If that is so, then extending immunity further, as was done in Rehberg and Filarsky, or narrowing the scope of municipal liability, as was done in Connick, or further restricting the Bivens remedy, as was done in Minneci, may appear to come at little cost.

300 For example, Rehberg, in which the Court extended absolute immunity to a “complaining witness” in a grand jury proceeding, was a unanimous decision. 132 S. Ct. at 1500, 1507. In Reichle v. Howards, five other Justices joined Justice Thomas’s majority opinion finding that Secret Service officers who arrested a protester did not violate clearly established law, two Justices concurred in the judgment, and one did not participate. 132 S. Ct. 2088, 2090, 2095, 2097 (2012). Chief Justice Roberts wrote for a unanimous Court in Filarsky, holding that a private attorney hired to conduct an internal affairs investigation was entitled to qualified immunity. 132 S. Ct. at 1659, 1667–68. There were two concurring opinions. Id. at 1668, 1669. By contrast, the “official policy” issue does seem to divide the Court on ideological lines. Connick v. Thompson was a 5-4 case, with Justice Ginsburg writing a dissenting opinion, joined by Justices Breyer, Sotomayor, and Kagan. See 131 S. Ct. 1350, 1353, 1370 (2011).

As for the cases discussed in this Article, there was no sharp ideological divide between liberals and conservatives. Justice Ginsburg was the only dissenter in Minneci v. Pollard, 132 S. Ct. 617, 626 (2012). The Justices disagreed among themselves on several issues in Camreta and Pearson, but none of them took the vindication-oriented approach advocated here.


There is a great problem presented by these cases: They ignore the truth, and even the possibility, that the vindication of personal rights is a worthy aim—an aim that is sufficiently valuable and vibrant in and of itself to sustain a robust body of constitutional tort law whether or not liability deters many constitutional violations. It is time for the courts to redirect attention to the value of vindication, to decouple it from compensation, and to install it as an organizing norm in the field of constitutional tort law.