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This Article will analyze the course to which Rehnquist seems to have committed the Court, and examine its implications.

2.2 The majority opinion in Davidson/Daniels

Rehnquist starts with a notion of "deliberateness" (a federal concept which he draws out of the notion of "deprivation.") On its face, this would seem to call for a new federal common law of torts. But he instead seems to think that where the common law category of "intent" is present, deliberateness will also be present, so that one can safely defer to state law notions of intent. That isn't so. Well begin by showing that "intent" isn't a unitary concept which can be relied on to yield consistent results. Then we'll compare his conception of deliberateness with common law patterns. Then we'll show the nature of the kinds of decisions which Rehnquist's judicial heirs will have to make in applying his notion.

2.3 Rehnquist suggests that "intent" in the common law is a unitary concept.

Intent is not a unitary concept

<Material to be discussed re this point might include:

- In partial refutation of assertions that it will be difficult to distinguish intentional tort claims from claims not actionable under the 1983/due process rationale, Justice Rehnquist in the Daniels majority opinion indicates that one need not worry overmuch about what "elusive terms" such as 'negligence', 'recklessness', or 'intent' might mean, for, he argues, "differences of degree" are inherent in the law.[22] However, the differences among the categories are not merely differences in degree, and, more importantly, 'intent' itself is not a unitary concept. Justice Rehnquist seems to believe that it is. He writes, for example, that "the difference between one end of the spectrum-- negligence-- and the other--intent-- is abundantly clear"[23] and implies that the only difficult questions would arise if something more than negligence but "less than intentional conduct" is alleged.[24] As we shall see, deciding what constitutes "intentional conduct" is itself a matter of difficulty.

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2.4 The majority opinion also seems to have a conception of what that common law category consists of: ~~a~~ defendant who knows that he is inflicting harm.

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22. 54 LW at 4092

23. 54 LW at 4092

24. See e.g., id. at n.3.

- Justice Rehnquist gives us some limited hints as to what he means by "intent." The first hint is an example. When officials negligently fail to follow proper procedures before depriving an inmate of good time credit, Justice Rehnquist notes that he would consider that "intentional" enough to be actionable under 1983. He would view the officials' deliberate decision not to give the good time credit as the "relevant action" for inquiry, rather than the negligent failure to follow procedures.[25] Although he leaves this choice of focus unexplained, he seems to have in mind that an actionable "intentional" tort combines deliberateness, the imposition of something which is harmful, and the knowledge that it is harmful. Thus, the official who imposes the loss of good time knows he is imposing something which an inmate will find objectionable, and even if the official does not know that he lacks good procedural grounds for the deprivation,[26] he knows that is doing something that requires justification.

- That Justice Rehnquist views intentional torts as embracing these elements (of deliberateness, harm, and knowledge) is also suggested by his citation of Oliver Wendell Holmes as authority.[27] Holmes in the section referenced seems to have had in mind "harms... which were... the intended consequence of the defendant's act"[28] and "actual personal

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25. 54 LW at 4092.

26. Holmes: any deliberate infliction of harm requires justification

27. Rehnquist cites Holmes for the supposedly clear distinction between the two categories, negligence and intent. 54 LW 4092.

culpability."[29] . Holmes at the pages cited makes no attempt at a rigorous definition of the two categories. He does include his famous aphorism ("even a dog distinguishes between being stumbled over and being kicked") and some general historical discussion from which his definitions can be inferred. Contemporary intentional tort law, for example that of battery, does not limit itself either to intended harms or acts which would be considered culpable by most ordinary observers.)

There are some definite merits in Justice Rehnquist's conception.

<Discussion of the merits of his conception might include:

- His conception fits in well with using section 1983 to protect procedural due process. Section 1983 is concerned with abuse of power, and something which is known to be harmful is known to be potentially abusive. The procedural aspect of the due process clause applies particularly well to an occasion when an actor knows (has notice) that he is doing something harmful, and thus might be able to hold a hearing or take other appropriate steps in advance. A requirement of due procedure is apt.

- Often even a deliberate act cannot be preceded with a hearing. E.g., shooting someone in a prison riot. But at least one can conceive of some kind of appropriate procedure. In Whitley, for example, the prison

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28. COMMON LAW, 1963 reprinting at page 7

29. 1963 reprinting at page 8

In the following section we will explore in detail what the "private" law of intentional torts can and cannot contribute to resolving this important question of public law under section 1983.

3 The incoherence of intentional torts

3.1 No one unitary conception

First, the law of intentional torts cannot serve as a source for something called "intent" because this body of law is not a unity; it is made up of varying torts (battery, intentional infliction of emotional distress, false imprisonment, and so on), many of which have different sources, serve varying purposes, and accordingly have different requirements for intent. Viewed as a source of "the" law of intentionality, intentional tort doctrine is incoherent.

1. Discuss some different torts

2. Is there a unitary conception underlying the various intentional torts, to which the S Ct might make reference?

    a. C & M doesn't work

    b. What about Holmes

I suggested earlier that an entire jurisprudence of the "intentional tort" for procedural due process purposes, would need to be developed. As has been seen, this is inherent in that task at hand, and is nothing unusual; virtually

every area in which "intent" is employed has its own answer to the question of "what kind of intent matters." What is unusual is the Justice's apparent assumption that the task will be easy,[33] a matter of spinning out pre-existing common law categories.[34]

section 3.1 should start here - see p18 of 6 15 Sept

[this is the artifically restored second half- whw knows if the swap file has kept it perfect.]

sputes[35] -- while, for 1983 purposes, the choice should be determined with reference to the purposes of 1983 and the problems of governmental liability which it implicates.

The nature of the decisions to be made can best be understood by bifurcating "intent" into its two components: state of mind (advertence) and the object to which the defendant's state of mind is directed.

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33. Justice Rehnquist admits several possibilities where difficulties might arise, see e.g. 54 LW 4092, but none, surprisingly, in regard to the very notion of defining intent itself.

34. It is the burden of the instant Article to suggest the outlines of the task which in fact awaits the Court of deciding what kinds of actions by officials should be actionable notwithstanding state immunity law and independent of the fact that they violate no substantive provision of the Constitution.

35. Make reference to later discussion of trespass definitions of intent and title questions.

3.2 Advertence and Object

We will turn first to the quality of advertence required, and second to the nature of the object to which the various intentional torts require the advertence be directed.

3.2.1 State of mind (advertence)

"Intent" sounds like a state of mind requirement, but that has not always been so. Old tort cases often treated a finding of "intent" as a legal conclusion ~~derivable from~~ equivalent to facts which might ~~having~~ nothing to do with a defendant's subjective mental state; see, e.g., various statements to the effect that "a man is held to intend the natural and probable results of his acts."[36] Under such a view, ~~actual state of mind might be relevant.~~ a person's acts are not only some evidence of what his mental state might have been, but conclusive evidence of it.*

Most tort opinions today use the word "intent" to denote some particular state of mind. But even today, there is no agreement on what state of mind is indicated. The most salient examples of the varying content which can be given to the state of mind requirement, are desire and knowledge.

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36. Cite

Cek

A defendant might be said to "intend" a result only when he or she affirmatively desires the result to come about.[37] In such a case, the requirement that a plaintiff prove "intent" would be similar to requiring a showing of ill will, or malice (itself a common-law label of much variability). By contrast, the defendant might be held to "intend" any result which he or she knew was substantially certain to follow. The latter is the Restatement approach.[38] In such a case, "intent" has nothing to do with ill-will; an intentional tort could coexist even with a sincere regret on the defendant's part that the harm "had" to be caused.

It is easy to understand why some courts might wish to treat the person who wants to cause harm the same as they treat the person who merely knows he or she will cause harm while pursuing some collateral goal; it is also easy to understand why a court might wish to distinguish between the two cases. Desire and knowledge are different concepts, and deciding what role each should play in triggering liability for "intentional tort" requires deliberate and difficult policy decisions.[39]

<Need illustrations here>

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37. Need a cite here; maybe intentional infliction of emotional distress

38. Cite to the Restatement (second) of Torts.
The question of how certain the knowledge has to be is itself subject to variation. The less certainty is required, the closer the "intent" requirement will come to negligence.

39. Apply to examples in the case-- intent re good time, intent re the forgotten note, etc.

R's concept of Lebb { what does it mean re mental st
what does it leave open

<Maybe deliberation is the appropriate test for advertence. If so, as Blackmun suggests, it would go beyond traditional lines dividing negligence from intent. Deliberate nonaction.>

3.2.2 Object

Perhaps even more variable than the issue of what kind of advertence counts as an "intentional" state of mind is the question of the object to which the state of mind is directed. To what must the defendant be adverting (desiring, knowing, or whatever) in order to be guilty of an intentional tort? This issue, the most important for section 1983 purposes, is often obscured, at least partly because the cases and Restatement seem to work hard to conceal the fact that intentional tort liability is often imposed for harm which in ordinary language one would call 'unintended', neither desired nor known.[40] No matter how complete one's definition of the internal mental state which will constitute "intent", the law must still move on to another task, the task of deciding what entitlements should be free from such intentional infl.[41]

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40. One example of frankness on this score was in pre-Sullivan libel law, where a defendant who honestly thought he was writing fiction could be guilty of defaming someone whose name was the same as that of one of the defendant's characters. But libel at that stage, often referred to as a "strict liability" tort, rather than as an "intentional" tort, so that its typicality of the general run of intentional torts is often ignored.

41. "The intent with which tort liability is concerned... is an intent to bring about a result which will invade the interests of another in a way that the law forbids." Prosser at 36 (emphasis added). The decision on what interests should be free from advertent acts is logically separate from the decision on what constitutes advertence.

considered negligence, and would not satisfy the relevant requirement for liability under most intentional tort doctrines.[42] Yet in both cases the defendant may have an "intentional" state of mind, however such quality of advertence ~~is defined~~; all that has changed is its object.

- Within the general category of intentional torts, the object can change from tort to tort. For battery, the defendant will be guilty whether or not he intends a harm, so long as he intends a contact which someone else (the court) thinks is harmful.[43] Similarly, for trespass, the defendant will be guilty if he intentionally steps foot on another's land, whether or not he knew he was trespassing, that is, regardless of whether or not he reasonably believed his presence on the land was rightful.[44] For intentional interference with contract, by contrast, the defendant will not be liable unless he or she intended not only to affect the plaintiff, but to affect the plaintiff in regard to a contract of which the defendant had actual knowledge.[45] In all these cases, the crucial variable is the courts' decision on what constitutes the interest to be protected.

- All this variation should suggest the sharpness of the point so casually disposed of by Rehnquist, above: deciding what is the "relevant action"

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42. Where there is virtual certainty that some harm will be caused, but the identity of the victim is unknown, the tort is often called "unintentional" yet a strict liability, intentional-tort-like result, is imposed. Products liability. (Cite Latin here.)

43. Discussed below.

44. Cites

45. Cites, and more explanation. Also check intentional infliction of emotional distress.

in a series of actions. Why focus on the intentional deprivation of good time rather than the negligence which led to it.

- The variations are not explainable by any one simple model. Calabresi and Melamed might explain making something an intentional tort when the nature of the impact was known- but trespass etc don't fit. Holmes's explanation also doesn't hold water. (Explain) If there is no unity, then common law precedent won't answer the Court's needs.

Once the importance of "object" is admitted, the next question is, why not be satisfied with saying that "the object of an intentional tort is certainty." That notion is consistent with Rehnquist's view and Holmes's view; why does it not give a final answer to the question?

The problem is that while "certainty" can be distinguished from "risk" as an object of a defendant's mental state, "certainty" cannot stand alone. One inevitably needs to know, "certainty as to what." Every act has multiple meanings, according to the viewpoint of observers. Consider the act of kissing, or playing a joke. The potential defendant (he who kisses or jokes) may believe that what he is doing is neither offensive nor harmful. The potential plaintiff (he who is kissed or who has the joke played upon him) may believe, to the contrary, that what has been done is indded offensive or harmful. The potential judge (or society, or any onlooker), may have a different assessment of the meaning of the act.

Consider the differing results which would come about from honoring the different perspectives.[46] If liability for intentional torts hinged on the

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46. These questions also arise, of course, in regard to rape law.

- All this relates also to the q of whether the court can "import" each intentional torts (see below)

- The "object" in our parlance is an entitlement. A substantive theory of entitlements is necessary.

- The due process clause says "life, liberty, or property." While all torts implicate rights, they don't all implicate property. Property rights are a particular subset. And they don't all implicate liberty- cf, Paul v Davis.

- And as to those which do implicate property, note this. One keynote of property is the right to exclude, which can be violated without having any temporal harm. (Discuss the notion of gatekeeper fees, etc.) Non-harmful intrusions are especially important now that intellectual property is becoming more and more important: the essence of what the owner has is the right to profit, not the right to be free from harm. (The"takings" case of the wire on the building might be useful here. Also check that recent sov imm case re copyright infringement)

<Now discuss liability for things which aren't harmful; distinguishing rights from interests>

3.3 Absence of privilege

In addition to advertence and object (which must be proved by plaintiff in an intentional tort suit), there also must be an absence of privilege. This is not usually stated as part of the prima facie case; the plaintiff need

jurisdictions require only that the plaintiff show that the defendant intended to cause a contact with the plaintiff's person, and that the contact is of a kind which in the eyes of the law is offensive or harmful. This seems to be the Restatement view as well.[51] <Discuss how the Restatement hedges.> The defendant need not intend any harm or offense to be held liable under such a view. A defendant who causes a contact which he or she thinks will be pleasant or inoffensive to the plaintiff may therefore be guilty of an intentional tort. This is one of the lessons taught by the famous cases of Garratt v. Dailey and Vosburg v Putney, where children who intended to cause contacts, but who intended no harm, and who were probably not even negligent,[52] were held liable for battery.

3.4.1 Normative choices, and sov immunity

Inherent in these decisions is a normative choice: to place a plaintiff's interest in bodily integrity ahead of a defendant's interest in being free from legal punishment except where he or she has the knowledge necessary to form a morally culpable judgment. This may be a sound normative choice in this context, but a different choice may be appropriate where the defendant is a governmental official who can plausibly claim not only a lack of moral culpability, but also the various prudential arguments (such as "need for unchilled vigorous exercise of his office") which underlie the doctrines of official immunity.

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51. Cite.

52. Negligence law generally uses a flexible "reasonable care" standard for children. (Explain.)

The touchstone of developing such a theory would be deliberateness (cites) and abuse of governmental power (cites) and need for government (cites). Should it be enough to show that there was opportunity for deliberation? etc Our job here is not to parse out the resulting rules, but to identify the structure of decision.

One may respond to the above by saying, yes, intentional torts themselves aren't very coherent, but it's best for the court to stumble along using common law precedent as best as it can because otherwise it will be reordering private entitlements. My reply is that I think it is inevitable that it reorder private entitlements. There is an unavoidable link in this area between substantive and procedural due process.

3.5 Can the court just "import" the various intentional tort categories- battery, defamation. etc?

Can the Justices just adopt state law categories?

No.

1. At a minimum, where jurisdictions differ they'll have to choose which jurisdiction

2. Where the alleged bad acts are close to substantive contitutional deprivations, the court may want to collapsed one into the other (cf., Whitley- battery claim (actually, there denominated "substantive due process) collapsed into 8th am inquiry when inmate sues because of being shot in course of prison disturbance.)

3. More importantly, each state law category is itself the result of history and policy choice. How a given policy choice should balance with issues of immunity is a case-by-case inquiry.

No, it has already said it won't. Battery- Whitley. Defamation- Pau v Davis.

What are the dimensions of the problem? First, is the interest "life, liberty or property."

Second, what protection should be given the interest as against the state's interest in protecting the freedom of action of governmental agents.

4 Returning to Rehnquist's conception

How does his conception seem to resolve the above questions?

<Discuss>

His premises seem to lead to abandoning the neg/intentional dividing line in re delib refusals to act.

5 Deliberate refusals to act

Once one accepts the willingness to constitutionalize intentional torts implicit in the Rhenquist approach, the call of the Blackmun/Marshall dissent to broaden the definition of "deprivation" into certain parts of the "negligence" domain seems well-nigh irresistable.

Justice Blackmun was concerned with the possibility that deliberate omissions wouldn't be actionable, while they can embody the worst kinds of governmental oppression. (Examples: driver arrested, cops leave his car on the highway with the children inside; the Detroit cops who allegedly left the bus open so that neighbors could rob it.)

There are good grounds to argue that these should be considered "intentional".

1. Grounds in precedent. The Restatement divides the categories of intentional and negligent torts this way, but not all courts do. For example: to allow plaintiff employees to sue their employers despite worker comp law (which doesn't allow suits for negligence), courts in New Jersey and Ohio have held that a deliberate decision not to remove a hazardous substance from the workplace states an intentional tort. (Application here: governmental employer; or hazardous substance in a school, with suit brought by a student for injuries sustained.)

2. Grounds in conceptual analysis.
   - It seems that these are considered at most matters of negligence law because there is no harm caused. ("Act" can be viewed as a proxy for causation.) We don't see people as being equally culpable when they cause harm as when they allow it to happen.
   - Is there really no harm caused? A closer look at duty to aid cases would show it's generally imposed only when harm IS being imposed. The person who starts to aid and then stops, or who the plaintiff trusts & therefore doesn't seek other aid... these defendants make the plaintiffs worse off. They cause harm. If so

(that is, if what's really going on isn't an "exception" to the no duty to aid rule, but rather an articulation where harming, not aiding, is really the issue), then we needn't be so reluctant to treat these cases like any other cases of intentionally caused harm.

- Re Rehnquist's conception, we see a similar argument. He is worried about persons holding state power and deliberately abusing it to cause harm. This set of concerns fits the refusal to act case.

- If one WANTS harm to be caused, and does something so it will be caused, he shouldn't be heard to complain of being held liable when the very act he hoped for comes to pass. (old Prosser?)

- (Don't forget the SPRECHER footnote)

- First, define harm as "worse off than what would have happened anyway" (feinberg) By examining what wd have happened anyway, we can get into issues of governmental power. All the diff ways government alters life (arrests you and leaves your house unlocked.) Very much at the core of 1983. Once the govtal power is imposed, then duties follow.

<On my "harm" theory, remember to include a discussion of what constitutes being worse off [53] >

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53. If I key the worse off inquiry to the effect of a defendant's particular acts, rather than to how the defendant's entire existence affects the

6 Summary and conclusion

Despite protestations of procedural due process, the majority in D/D is making a substantive decision to prefer state officer liability over state immunity doctrine, at least in some circumstances amounting to "deprivation of life, liberty, or property." The court will need to define "deprivation" with

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plaintiff, I need a theory of what counts as the relevant action. In the cop-leaving-the-car-open case, I clearly want to include the acts of arresting the parent and taking him away, as well as the act of leaving the children in the open car, as part of the relevant act for purposes of the "worse off" query. But once I've broadened the "act" query that much, might it not be argued that I could simply stay within the Restatement test? The answer might be that 1983 policy can give a guide to WHAT COUNTS as a relevant act, and that isolating the "worse off test" merely makes the nature of this inquiry easier to see.

But need I key it to acts? At first it seems I do, for if the tortfeasing defendant had, by coincidence, also been the employer, that would make no difference to the tort suit. Defendant would still have to pay lost wages, even though he or she had been the source of the original wages. But wait. If plaintiff hadn't worked for this defendant, he or she would probably have worked for another employer. (While there are many instances in which application of the SPRECHER footnote test, of "what would have happened if the defendant hadn't existed", is speculative, it isn't very speculative that a typical plaintiff would have worked for someone even if not for this particular person.) Therefore, even if the "worse off" query is kept broadly tuned to "would you have been worse off in a world without the defendant," the test might be usable, assimilatable to actual tort usages.

But I don't think I'd want to go that route. First, there's the practical problem of determining numbers in a damage award. If the test for harm was, "worse off in a world without defendant," then the injured plaintiff couldn't collect as damages from the defedant/employer any premium over otherwise-available wages which that particular employer had made available to plaintiff. Which would would mean lost of difficult factual inquiry. Second, there's the conceptual problem. Unless the tortfeasing act is RELATED TO the premium which the defendant/employer paid, it just doesn't feel right to reduce the amount collectable by the amount of the premium. There just doesn't seem to be a connection between them. Third, our law generally doesn't look at the overall worthiness (or lack thereof) of persons; it concerns itself with specific acts. The other route would be "playing Gd"- both an impossible task and not an appropriate one.

Also see \fuller\torpr7-9.43

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