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The Constitutionalization of Intentional Torts:

Finding One's Way Amid the Incoherence of Intentional Tort Doctrine for the Sake of Section 1983

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1 Introduction

The Supreme Court has often faced the question of whether an individual who alleges that he has been injured by a state or local official or by a local governmental entity, can bring a constitutional tort action under section 1983[1] when state doctrines of sovereign or official immunity would make it impossible for the individual to prosecute an ordinary tort suit in the relevant state court. The Court has consistently held that when an official violates a substantive provision of the Constitution, only an immunity which is consistent with the purposes of section 1983 and the

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1. Congress passed what is now 42 U.S.C. section 1983 as part of the Ku Klux Klan Act of 1871. That section provides that:

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

For simplicity, we will usually refer to the potential defendant under section 1983 as an "official", but it should be understook that the class of defendants can be broader, including, e.g., local governmental entities. (Although the section is written in terms of "every person", the Supreme Court has held that municipal corporations can be liable under section 1983. Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978).)

Constitution[2] can be tolerated. The Court has, accordingly, elaborated a jurisprudence of constitutional immunity, setting forth its own rules as to when an official or a governmental entity will be privileged to commit a constitutional tort.[3] In the recent pair of decisions known as Daniels/Davidson,[4] the Court faced a different twist on this longstanding problem.

Sometimes an official's injurious act does not violate a substantive provision of the Constitution-- when, for example, the act does not constitute cruel or unusual punishment, or invidious racial discrimination, or a taking without just compensation[5] -- but does constitute an ordinary, private-law tort under relevant common law standards. Negligent infliction of bodily harm caused by an on-duty policeman driving too fast might be an example. Standing alone it raises no constitutional claim; the injured individual's recourse is

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2. Thus, a local governmenal entity has no sovereign immunity. Owen v. City of Independence. State or city officials engaged in discretionary actions usually have qualified official immunity. Pierson, etc., and Harlow.

Because of the Eleventh Amendment, states cannot be sued under 1983 in federal court, so that, strictly speaking, state sovereign immunity is not implicated by these decisions. However, some section 1983 actions have been brought against states in state court. (Cite)

3. For state and local officials, section 1983 provides the basis for suit. The immunity line of cases includes: (describe briefly Pierson v. Ray, Scheur v Rhodes, Owen v City of Independence, and Harlow v Fitzgerald.) For federal officials, Bivens sets forth a rationale for implying tort rights of action directly from the Constitution, and Butz v Economou makes clear that section 1983 immunity rules will generally apply to Bivens suits against federal officials as well.

4. DANIELS v. WILLIAMS, ___ US ___, 54 LW 4090 (1986) and DAVIDSON v CANNON, ___ US ___, 54 LW 4095 (1986)

5. I need cites here of cases where substantive violations did take place

to state court in a negligence suit.[6] But what if the injured person's ordinary tort suit in state court is barred by state doctrines of immunity? Has the injured individual then been deprived of life, liberty or property without due process of law?[7] In Davidson/Daniels, the Court held that the Fourteenth Amendment's guarantee of procedural due process did not apply to negligently-caused injuries, on the ground that such injuries were not "deprivations" under the Constitution;[8] therefore, a person negligently injured by a governmental official would have no recourse if state immunity rules barred his tort suit. The Court also indicated, in dicta, that procedural due process was implicated for intentionally-caused injuries, and that a person who was intentionally injured by a state or local official, if he is precluded by state immunity law from having a post-deprivation hearing, could proceed under section 1983. It is the import of this open door for intentional tort suits which will concern us here.[9]

<Need transition.>

At bottom, it might seem as if the Court has decided that certain immunity law is itself unconstitutional as applied to intentional torts. But the court did not go that route. < Perhaps it was fearful of trying to

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6. Cf., Parratt v. Taylor (allegation of negligent destruction of hobby kit by prison official states no violation of the Constitution's substantive provisions)(overruled on other grounds in Daniels/ Davidson)

7. Set forth text of 14th Amendment here.

8. Daniels v. Williams, 54 LW at 4091 - 4092. This overruled dicta in Parratt v. Taylor which suggested otherwise.

9. This Article seeks to explicate the kind of questions which the Court will have to face when, in the future, litigants frustrated by state immunity rules bring constitutional tort actions founded in procedural due process. See ___, infra.

justify holding unconstitutional laws which predated the 14th amendment, and which were concerned with state goals largely unrelated to the concerns (with federal-state relations, systematic abuse of power etc.) which was its focus.[10] But insofar as these cases allow an end run around state doctrines of official immunity, invalidation of such state law is the sub silentio holding of these cases; therefore, the same questions of justification arise.

In many ways, an outright holding of unconstitutionality would have been preferable. Had the Court explicitly taken that line of decision, the impact of Daniels/Davidson would have been different from what it is.

1. On a practical level, had state immunity law been declared partially unconstitutional, litigants suing intentional tortfeasors would simply continue their suits in state court. Under Daniels/Davidson, however, such litigants will come to federal court under section 1983. Given the supposed flood of litigants in federal court, opening the federal doors seems an odd result.

2. On a conceptual level, had state immunity law been declared unconstitutional, the decision would at least have made clear where the unconstitutionality lay. Under Davidson/Daniels, one instead faces an odd conceptual disjunction: as a result of a legislative or judicial decision to give immunity, an individual executive-branch official can be liable for causing a deprivation without due process.[11]

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10. The Court in Davidson/ Daniels did not address the impact of those opinions on Martinez v California, 444 US 277 (1980) (held, that a California statute giving immunity to tort claims did not violate due process).

11. See the opinion of Justice ___.

3. Had the Court overtly declared that immunity rules could be unconstitutional as applied to intentional torts, the question of the availability of immunity defenses could be more easily dealt with in the context of particular applications, allowing a more detailed consideration, for example, of issues such as the state or federal source of the immunity to the state-based tort.[12]

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12. In addition to the federal law governing immunity to constitutional torts (represented by cases such as Pierson, Owen, Harlow, etc., see note ___, supra) there is federal precedent governing the kind of immunity which federal officials have when they are sued for state torts such as defamation. The general rule is absolute immunity from state-law-based tort liability for any act, even intentional, in the outer perimeter of the federal official's duties. BARR v MATEO (absolute liability for allegedly defamatory statements by federal official, even if the statements were made with a malicious intent to harm). The Barr rule can protect federal officials even when the state law of official immunity might not protect them. (Cites.)

The Supreme Court in Butz v Economou indicated that state and federal officials should have identical degrees of immunity when sued for constitutional torts. In the same opinion, the Court indicated a willingness to preserve Barr v. Mateo, although Barr's grant of absolute immunity could result in disparate immunity rules for state and federal officials when suit is brought on state-based claims. (Cite.) The primary ground for allowing federal officials "special" immunity from state-based torts was consideration of federal/state friction: keeping federal officials free of indirect state controls. Butz v. Economou at ___. (Despite the Court's reluctance in Butz to overrule Barr, some of the language of Butz and related cases might have been read as undermining the logic of Barr's provision of absolute immunity for federal officials accused of state law torts. However, the Supreme Court recently put the question of Barr's vitality temporarily to rest by citing it with approval. Harlow at ___.)

While up to now the court has given the same immunity treament to both federal and state officers when sued for constitutional violations (see Butz), that parallelism of treatment may break down now that the Court is constitutionalizing state intentional torts. Barr v. Mateo indicates absolute immunity should be given federal officials who commit intentional state law torts; Davidson/Daniels indicates liability should follow for intentional violations. Either Barr v Mateo has to go, or the Davidson/Daniels guarantee of procedural due process will not be extended to federal officials' tortious acts.

4. And, most importantly, by taking this route, this Article will argue that the Court has committed itself to creating a whole new jurisprudence of intentional torts, recreating the problem of federal [13] common law thought largely laid to rest by Erie.

5. <May want to continue with the following:>

   - Had the Court held that state law of official immunity could be unconstitutional as applied to certain kinds of intentionality, then state courts would simply compare existing state torts with that "kind" of intentionality, and then bar or not bar the plaintiff's action. But instead the court has to decide what is a "deprivation" of life liberty or property- a unitary inquiry which is not the same as the various inquiries underlying various tort law. The Court's inquiry which could be the source for an [14] entire new form of tort.

   - At a minimum, it will mean the Court choosing between different jurisdictions' versions of a given tort.

[15] The Court's route of decision has advantages. Most notably, by keying the right of action to section 1983, the Court could employ that section's

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13. Demonstrating that the Court will have to create this jurisprudence is the burden of this Article at pages ___, infra.

14. For current tort law doesn't match any neat idea of of "depriv of life, lib, prop."

15. other than enabling the court to "duck" the question of whether doctrines of official immunity are constitutional.

[16] "touchstone", concern with "affirmative abuse of power", as a guide to parsing which injurious behavior should trigger liability and which should not. In addition, as intimated above, the Court might have thought that by taking this route, it could avoid the necessity of deciding the merits of governmental and official immunity rules. But this Article will argue that as the Court in the years ahead seeks to grapple with the issue of what constitutes an "intentional tort" actionable under section 1983, it will find itself necessarily dealing with those policy issues.

The instant Article argues that common law tort notions of "intent" do not offer the Court any coherent guidance for handling future cases alleging deprivation of procedural due process in the presence of state immunity rules, and that when such cases arise the Court should face the merits of the policies underlying immunity rules rather than trying to adopt the incoherent categories of existing tort law. First, it will be suggested that the various intentional torts do not all make the same judgments about what kinds of intent are required, that such decisions necessarily implicate substantive decisions about entitlements, and that the Court will necessarily have to make a similar set of decisions in section 1983 suits. Second, it will be argued that in at least one significant segments of suits which the common law would denominate "negligent," application of Justice Rehnquist's own premises would [17] justify giving section 1983 relief.

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16. Cites

17. Consider adding here: concept of intent is expanding (or becoming diluted), as is tort liability in general.

2 The Justices' conceptual structure

2.1 Stevens and Rehnquist compared

Here we have deprivation of a state-created entitlement (tort right) by a state-created bar (immunity). Putting them together, doesn't that just mean "no entitlement"? Such is the Hohfeld/Stevens view.

Stevens seems to take a Hohfeldian view. It is clear and coherent. [Explain] All that is required is system, lack of fundamental unfairness, in the categories; states can define state-given entitlements as they wish so long is there no oppresiveness in them (e.g., defining Blacks to have less
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liberty or property than whites .)

Rehnquist for the majority is on conceptual quicksand.

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18. Conceptual structure of the justices

There is a link between substantive and procedural due process. Examining the justice's conceptual structures will make this clearer.

If one took a Hohfeldian view, then immunity law never "deprives" one of an entitlement; it merely redefines the entitlement. (To make a distinction between preexisting state rights and federal actions is easy; look at the source. But to make a distinction between state rights and state limitations is not so easy.) For the concept of "proc due process" to make sense as applied to immunity law, one needs a theory of what counts as a redefinition-- and what counts as a deprivation.
- We could be entering the same kind of morass as we're already in re 5th amendment "takings" law, with the everpresent question of what
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distinguishes a taking from a police power regulation.

19. To the extent that "deprivation" and "taking" have diff meanings (in the latter, the govt gets a benefit; in the former, it need not), we don't HAVE to get into the "takings" morass to answer due proc questions. See other memo I wrote.

1. Maybe he means to conceptualize the entitlement as separate from the bar. If we give strictly federal content to "intentional deprivation of life liberty property" then that separation is easy to see.

2. But it is far from clear he wants to give strictly federal content to this. "Property" is pretty clearly a state-law concept. So one would imagine that part of the test would be federal ("deprivation", "life", "liberty") and part would be state ("property")
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   a. We'll see later than Rehnquist does want to make use of state notions. To the extent he does, he falls into the Stevens trap: how can a state no-right be a right.

   b. To the extent he's developing independent federal notions of "depriv of life,liberty, property" he'll have to develop a whole new jurisprudence of tort law.

3. But even if one could give "deprivation of life, liberty, property" a strictly federal conception, he would still have to face the question of what is "due process." Isn't it due process (as Stevens suggest) to decide what category something fits into?

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20. While "life and liberty" might have had an independent meaning in the minds of the drafters, "property" would seem inevitably to refer to state law conceptions.

D/D both dealt with infringement of a LIBERTY interest through personal injury. If "property" merely means state law conceptions, maybe intentional deprivations of property won't be actionable even if intentional deprivs of life or liberty would be. Hohfeld. If that happens, it could also be justified by the "takings" clause- that is, since the Constitution says that re PROPERTY, one has to pay only for "takings", we won't make you pay for deprivations too.

4. Rehnquist seems to insist that fair categorizing isn't enough. That for certain deprivations, what's "due" isn't just a categorization, or even just a hearing, but a hearing ending with compensation. That's a decision which necessarily implicates a judgment on whether or not the state law bar should be honored.

   a. Most of us would call that sort of judgment substantive. But Rehnquist calls it part of procedural due process.

   b. We have in the past seen the Justices ask how serious a deprivation is, as part of asking how much procedure is due- whether there need be a full trial, or just some sort of hearing, and if so what sort of hearing; or whether the hearing procedure need be held prior to the deprivation or whether it can be held after the deprivation, and so on. Goldberg v Kelly; the paddling case (Wood v Strickland?); etc. But here the choice isn't just how much procedure is due, but what the result of the procedure (payment or nonpayment) should be. It no longer looks like procedural due process.

   c. It looks like Rehnquist is saying, when persons acting under color of state law deprive one of liberty etc, payment is due. This collapses the "due process" clause into the "takings" clause.

      i. The Stevens view is preferable; it keeps a distinction between due process and takings clauses.

      ii. There is sense behind the distinction. (See other memo).

   d. The only way to make sense of what R is doing is to see it as Lochneresque substantive due process: a policy judgment. He seems to be deciding that when there's a depriv of l,l,prop by a person acting under state law, then, as a policy matter, compensation must follow. Inherent in that is a decision that the 14th Am has given policies against protecting individuals from deliberate state-inflicted harm more importance than the policies protecting governmental actors' freedom of action.[21]

      i. That is a hard position to defend. And though it may in the end be defensible, R never articulates a defense for it in D/D.

      ii. Looking back to PARRATT,about all we see defending such a position is language from Monro v. Pape about how compensation should follow harm. There's similar language in OWEN. And of course tort law as a whole has drastically expanded in a pro-plaintiff direction ever since Macpherson v. Buick. But that some opinion also contains contradictory railing against use of any such overarching principle (cf., civil law).

5. Because this substantive choice is hidden in a procedural pocket, its implications are not immediately clear.

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21. Schuck gives the best accounting of the freedom of action rationales.