

The Incoherence of Intentional Torts and Section 1983

1 Introduction

The Supreme Court has often faced the question of whether a person who alleges that a state or local official has caused him injury, can bring a constitutional tort action under section 1983 when state doctrines of sovereign or official immunity make it impossible for the injured person 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 Constitution 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. In the pair of cases known as Daniels/Davidson,² the Court recently faced a different twist on this longstanding problem.

When an official's injurious act does not violate a substantive provision of the Constitution-- when, for example, it does not constitute cruel or unusual punishment, or invidious racial discrimination, or a taking without

1. 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 apply to Bivens suits against federal officials.

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

just compensation -- but does constitute an ordinary, private-law tort under relevant common law standards, the injured person can sue in state court but has no claim under the constitution. But what if his ordinary tort suit in state court is barred by state doctrines of immunity? Has the injured person then been deprived of life, liberty or property without due process of law? In Davidson/Daniels, the Court held that the Fourteenth Amendment's guarantee of procedural due process did not apply to negligently-caused injuries, so that 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.

<Need transhm>

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. Had the Court explicitly taken that line of decision, the impact of Daniels/Davidson would have been different from what

3. I need cites here of cases where substantive violations DID take place

4. This overruled dicta in Parratt v. Taylor which suggested otherwise.

5. 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.

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

it is. 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. On a conceptual level, had state immunity law been declared unconstitutional, ~~it~~ ^{the decision} would at least have ~~been~~ ^{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. Additionally, 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.

7. See the opinion of Justice ____.

8. 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. The general rule is absolute immunity from state 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.

As mentioned above, The Supreme Court in Butz v Economou ^{indicated} held 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 disparate rules on the immunity of state and federal officials when they are sued on state-based claims. (Cm) 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 at _____. (While some of

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 "touchstone", concern with "affirmative abuse of power", as a guide to parsing which injurious behavior should trigger liability and which should not. In addition, 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 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 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. The stages of argument are two: First, it will be suggested that all the intentional torts make different 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.

the language of Butz and related cases might be read as undermining Barr's provision of absolute immunity to state law torts, the Supreme Court more recently cited Barr with approval. Harlow at ____.)

While up to now the court has ^{shown when sued for} ~~treated~~ ^{given} immunity ^{treatment} the same for both federal and state constitutional violations (see Butz), that parallelism of treatment may break down now that the Court is constitutionalizing state intentional torts. 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.

*Butz indicates
also imm from
state law torts;
Dan/Dan indicates
liability for
intentional torts*

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 justify giving section 1983 relief.

2 The incoherence of intentional torts

R thinks of intent as a unitary concept

What is his concept

We will compare it w/ the law &
then return to it

the maj. concept
to be used:

The maj. ~~cc~~ seems to indicate a belief that intent is a unitary concept, & *pres. he* *under diff.*

an effort to meet
In ~~partial~~ *an effort to meet* refutation of assertions that it ~~will~~ *would* be difficult to distinguish intentional tort claims from claims not actionable under the 1983/due process rationale, Justice Rehnquist, ~~in the Daniels majority opinion~~ *stated*, *and* 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. ⁹ 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~~ *as author of the maj* that it is. He writes, for example, that "the difference between one end of the spectrum-- negligence-- and the other--intent-- is abundantly clear" ¹⁰ and implies that the only difficult questions would arise if something more than negligence but "less than intentional conduct" is alleged. ¹¹

9. 54 LW at 4092

10. 54 LW at 4092

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

As we shall see, deciding what constitutes "intentional conduct" is itself a matter of difficulty. We will first try to determine what constitutes Justice Rehnquist's conception, and then compare it with existing law.

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.¹² 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 he does not know that he lacks good procedural grounds for ~~his distinction~~^{the imposition}, he knows that is doing something that requires justification.¹³

12. 54 LW at 4092.

13. Holmes: any deliberate infliction of harm requires justification

What he fails to notice is that much of our law imposes liability for
infringement of interests even when no harm is involved, and sometimes
refuses to impose liability for deliberate decisions which result in harm.

Deliberateness and harm, standing alone, might yield a theory of intentional
torts, but it would not be a theory whose results would match those of our
common law system.

14. Re tort liability in the absence of harm, see trespass. Re liability for
intentional tort in the absence of knowledge of harm, see battery.

15. Here I have in mind the deliberate refusal to act cases. Discuss here how
it's "really" a case of harm imposed.

left of
law is
expansive
not a
civil law
system

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. Holmes in the section referenced seems

to have had in mind "harms... which were... the intended consequence of the
defendant's act" and "actual personal culpability."

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.

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

17. 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.

18. COMMON LAW, 1963 reprinting at page 7

19. 1963 reprinting at page 8

add how Holmes deals w trespass etc +
why it doesn't work.

a demanding act of
care such as
current law

R seems to think "int(tent" prec can answer Q

In developing this public law jurisprudence, it is true that the existing common law of torts can help structure the questions to be asked (and thus reveal the nature of the questions the Justices have not yet answered). Additionally the concern in the due process clause with "life, liberty, or property" might be well served by paying close attention to the way that private law had ordered those three interests and the entitlements which protect them. (Any rule of tort law embodies an ordering of these interests. If a defendant in the exercise of his liberty injures the property or person of a plaintiff, the law must decide which interest shall prevail in the circumstances presented.)^{*} However, traditional tort precedent cannot provide any ultimate solution to the answer of what should count as intentional, either as a general matter, or for section 1983 purposes.

*See gully
Held.*

As to section 1983 itself, the varying intentional torts arose in circumstances where the focus was not on the "abuse of governmental power" so crucial to that act,²¹ and where the conceptions of "intent" employed historically by the courts often have little to do with the notion of "deliberation" which fascinates Justice Rehnquist and some other members of the Court. Coupled with the large role which historical accident played in the formation of the various torts,²² any match between their functioning and the ultimate purposes of section 1983 is largely coincidental.

21. The intentional torts are particularly sensitive to the plaintiff's interest-- bodily integrity is treated quite differently from interest in personal property, for example-- while section 1983, according to these recent opinions, is to be keyed to the defendant's abuse of governmental power.

22. The problem is that the criteria upon which courts have depended to identify what the X should be in a given tort is responsive to historic tort concerns-- such as, re trespass, the need to have a mode for testing boundary disputes-- while, for 1983 purposes, the choice of X should be determined w reference to the purposes of 1983 and the problems of governmental liability which it implicates.

Trespass definitions of intent and title questions.

More generally, 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), all 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.

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

Advertence and Object

Private tort law has taught us that there are two key issues in defining "intent": what state of mind is required, and the nature of the object to which that state of mind must be directed, in order to constitute a cause of action. We will turn first to the quality of advertence required, and second to the nature of the object, ~~or "X"~~ to which the various intentional torts require the advertence be directed.

The most salient examples of the varying content which can be given to the state of mind requirement, are desire and knowledge. A defendant might be said to "intend" a result only when he or she affirmatively desires the result to come about.²³ In such a case, the requirement that a plaintiff prove "intent" would be similar to requiring a showing of malice (itself a common-law label of much variability).²⁴ 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.²⁴ 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.

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

24. 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.

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.²⁵

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

even in negligence,
the defendant intends
something - 24 he intentionally
invokes the tort, for example.

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 advertent (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". 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 intended harm.

26. 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.

27. "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.

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. 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. 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. In all these cases, the crucial variable is the courts' decision on what constitutes the interest to be protected.

29. Discussed below.

30. Cites

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

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.

The presence of these variations makes clear the need for both a principled way of choosing between the various possible models of intentionality and its object, and for a focus on particular conflicts. The common law focused on particular conflicts. In battery, as mentioned, some 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.³² 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,³³ were held liable for battery. 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.

32. Cite.

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

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. Examining the justice's conceptual structures will make this clear.

Conceptual structure of the justices

New outline

1. What Davidson/Daniels decided
2. In deciding "no negligence", R doesn't quite realize the size of the task remaining. "Intentional tort" isn't a self-executing concept.
3. Some deliberate causing of harm isn't intentional tort
4. Some deliberate acts where the actor doesn't know he's causing harm (so he doesn't know there's need for deliberate) are intentional
5. The Ct doesn't just mean to use "common law categories" or it would allow suit for battery in WHITLEY
6. While up to now the court has treated immunity law the same for both federal and state constitutional violations (see Bivens), that parallelism of treatment may break down now. For in Barr v Mates there was a declaration of federal immunity to state torts-- an intentional tort (libel) no less. Either Barr has to go, or the Davidson/Daniels guarantee of procedural due process will not be extended to federal officials' acts.