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Constitutional Torts, Common Law Torts, and Due Process of Law

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CONSTITUTIONAL TORTS, COMMON LAW TORTS, AND DUE PROCESS OF LAW

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Government officers may harm persons in many ways. When an official inflicts a physical injury, causes emotional distress, publishes defamatory statements, or initiates a malicious prosecution, the victim's traditional recourse is a tort suit brought under common law or statutory principles. But an alternative to ordinary tort may also be available. The growth of damage remedies for constitutional violations in the decades following *Monroe v. Pape*[1] has encouraged litigants to frame their cases as breaches of the Constitution. These litigants may sue for damages under 42 U.S.C. § 1983 when the offender is a state employee, or assert the damages cause of action implied from the Constitution in *Bivens v. Six Unknown Named Federal Narcotics Agents*[2] if the defendant is a federal officer. In either case the Court's task is to fix the boundary of constitutional tort. It must determine whether the plaintiff has a good claim for breach of a substantive constitutional right,[3] or instead must sue under ordinary tort law.

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1. 365 U.S. 167 (1961), *overruled in part by* Monell v. Department of Soc. Servs., 436 U.S. 658 (1978) (overruling *Monroe's* holding that cities were not persons subject to § 1983 liability). *Monroe* held that a federal remedy could be pursued even though there may also be state remedies available. 365 U.S. at 183. Quite apart from the technical holding, *Monroe* also signaled the Supreme Court's endorsement of damages as a remedy, thereby inducing the growth of constitutional damages litigation. *See* Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape *and the Frontiers Beyond*, 60 NW. U. L. REV. 277 (1965).

2. 403 U.S. 388 (1971). For a recent treatment of the *Bivens* doctrine, see Susan Bandes, *Reinventing* Bivens: *The Self-Executing Constitution*, 68 S. CAL. L. REV. 289 (1995).

3. I am not concerned with cases where plaintiffs' rights to procedural fairness are at issue, as where it is conceded that the government may deprive a person of a government job, so long as the deprivation is accompanied by appropriate procedural safeguards. *See, e.g.,* Board of Regents v. Roth, 408 U.S. 564 (1972). These are called "procedural due process" cases. I concentrate on those cases where the claim is that a given injury is constitutionally impermissible, so that the defendant who committed it *must* redress it, whatever procedures may have been followed in carrying it out. Some of these are "substantive due process" cases. Some, under the Court's regime, are Fourth and Eighth Amendment cases. A detailed explanation of the difference between substantive and procedural claims may be found in Michael Wells & Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201, 215-23 (1984).

In this Article I examine the Supreme Court's response to the constitutional theory of recovery. I suggest that the Court's efforts at separating common law torts from constitutional violations may be evaluated along two dimensions. One inquiry addresses the substantive merits of the Court's doctrine. It examines the ends the Court has sought to attain and asks how well the Court has done at achieving those aims. The other set of questions focuses on the Court's methodology and asks whether the Court has adequately explained its rulings in terms of widely accepted means of adjudicating constitutional cases, such as analysis of the text, the framers' intent, precedent, and constitutional values.

I take issue with both the substantive outcomes of many constitutional tort cases and the methodology employed to decide them. These two objections are related, in that the Court's faulty methodological premises obscure the goals it should be pursuing and lead it toward doctrinal principles that do not well serve those goals. The Court, for example, has relied heavily on unpersuasive textual arguments to divide the cases into artificial Fourth, Eighth, and Fourteenth Amendment categories. This misdirected pigeonholing of cases has led the Court to apply different doctrinal principles from one category of cases to the next, despite their essential commonality.

A better analytical model grounds the whole field of "constitutional tort for common law wrongs" in the Due Process Clauses of the Fifth and Fourteenth Amendments. By redressing a variety of personal harms, constitutional tort accords substantive protection to the "liberty" those clauses safeguard against wrongful government deprivation. Unlike the Court's multifaceted approach, an overarching substantive due process theory of liability respects the basic unity among these cases at the boundary of constitutional and common law tort, and rests constitutional tort doctrine upon a firm foundation. A unitary due process approach also more fully implements the central principles that underlie this whole area of the law: that constitutional tort reaches all the interests protected by the common law,[4] that it is mainly concerned with redressing abuses of power by government of-

4. *See* Ingraham v. Wright, 430 U.S. 651, 672-73 (1977).

ficers,[5] and that the government owes special tort obligations to persons under state control.[6]

The root of the problem is not at all unfamiliar to constitutional lawyers. Many of the Justices are ambivalent in their attitudes as to whether and when unelected judges should "make law," and their diffidence leads them to avoid squarely addressing the issues of principle raised by the more difficult constitutional tort cases. Constitutional tort invites the Court to recognize new rights in a field that was barren before *Monroe* triggered massive litigation of this sort. The Court is unwilling to shut the door on these plaintiffs, whose claims it has now felt the need to vindicate for more than three decades. At the same time, the Justices are hesitant to make law forthrightly through the vehicle of substantive due process, a doctrine that has caused the Court trouble for more than a century. The Court's largely textual approach represents an effort to extend constitutional protection to some boundary[7] cases, while minimizing the use of substantive due process. This strategy is self-defeating. The Court's approach falls short because it violates traditional criteria of constitutional legitimacy, such as fair treatment of constitutional text and history. No less important, the Court's approach has produced such a welter of rules that its doctrine, viewed as a whole, is misguided if not incoherent.

Before getting on with the argument, it will be useful to note what this Article is not. It is not a comprehensive treatment of all the substantive issues bearing on the *content* of constitutional tort law.[8] Nor does it deal with the division of responsibility over constitutional torts between state and federal courts.[9] Rather than constructing detailed rules or discussing allocational issues, this Article focuses on the Supreme Court's analytical framework for addressing constitutional tort cases, finds fault with it, and offers an alternative.

5. *See* Daniels v. Williams, 474 U.S. 327, 331 (1986); *see also* Wells & Eaton, *supra* note 3, at 221-34.

6. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 198-200 (1989); Thomas A. Eaton & Michael Wells, *Government Inaction as a Constitutional Tort:* DeShaney *and Its Aftermath*, 66 WASH. L. REV. 107, 142-49 (1991).

7. I use this term as a convenient shorthand for harms that may be litigated in common law tort actions such as battery or defamation, yet may also give rise to constitutional tort liability when the defendant is a government officer.

8. Many of these issues are addressed in earlier articles by a colleague and me. *See* Eaton & Wells, *supra* note 6; Wells & Eaton, *supra* note 3.

9. A recent treatment of this problem may be found in Richard H. Fallon, *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993).

I. COMMON LAW TORTS AND CONSTITUTIONAL TORTS

This Article focuses on what I call boundary cases—that is, cases close to the border between constitutonal and common law tort. These cases differ in an important way from many constitutional tort cases in that they raise issues of *substantive* constitutional law. By contrast, such matters as official immunity, vicarious liability, and damages deal with the remedies available for a proven violation of constitutional rights. This Article deals only with the scope of substantive constitutional protection and not at all with the latter group of problems. Though immunity, damages, and vicarious liability issues have constitutional overtones, they are at bottom matters of statutory interpretation and common law rule. The cases discussed in this Article present the Court with the opportunity, and the obligation, to interpret the Constitution itself.

In addition, the focus here is solely on personal injury-based claims that resemble common law torts and may not be litigated in constitutional terms except by means of a suit for damages. Accordingly, constitutional tort suits charging a violation of the right of free speech do not present the kinds of problems addressed here, because those suits do not raise claims akin to battery, false imprisonment, defamation, malicious prosecution, or the like. Nor does this discussion extend to most suits charging violations of the Fourth Amendment, even though a police search may support a common law tort suit for trespass. A specialized body of constitutional law governing the legality of searches had been developed in suppression hearings in criminal cases before the advent of constitutional damages actions. Constitutional tort merely provided a new remedy for these quintessentially Fourth Amendment violations.

This Article addresses situations in which the substantive constitutional law *followed* the availability of damages. Before *Monroe* and the revival of § 1983, there was no point in thinking in constitutional terms about an injury that took place in the past and, unlike an illegal search, had no bearing on any other legal obligation owed by or to the victim. No constitutional remedy was available in federal court for such harms in any event. Making damage awards possible, as the Court did in *Monroe*, *Bivens*, and other landmark cases of the 1960s and 1970s,[10] had the effect of opening up a whole new field of substan-

10. For example, the Court limited the reach of official immunity in cases like *Wood v. Strickland*, 420 U.S. 308, 322 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974); and *Pierson v. Ray*, 386 U.S. 547, 555, 557 (1967). It authorized suits against municipal governments in *Monell*

tive constitutional litigation, for it gave lawyers an incentive to conceive of past, tort-like harms in constitutional terms.

The Court has divided these harms among three separate doctrinal categories, based on (a) the Fourth Amendment, (b) the Eighth Amendment, and (c) the Due Process Clauses of the Fifth and Fourteenth Amendments. When the police use force to stop a suspect or injure someone in the course of an arrest, the source of the plaintiff's rights is the Fourth Amendment proscription of "unreasonable . . . seizure."[11] The physical harm is a "seizure" and liability turns on whether the use of force was "unreasonable" in the circumstances. So hold *Tennessee v. Garner*[12] and *Graham v. Connor*.[13] *Graham* stressed that the test is a strictly objective one: "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."[14] Proper application of the test requires "careful attention" to such matters as "the severity of the crime at issue," whether the suspect poses an immediate danger to others, and "whether he is actively resisting arrest or attempting to [flee]."[15]

In contrast, the main source of prisoners' rights is the Eighth Amendment's prohibition of "cruel and unusual punishments."[16] The seminal case in this field is *Estelle v. Gamble*, which held that "cruel and unusual punishment" occurs when a state provides egregiously inadequate medical care to a prison inmate.[17] *Farmer v. Brennan*[18] presented a somewhat different fact pattern. The plaintiff, a transsexual, was assaulted by another prisoner.[19] Adopting a position already widely accepted in the lower courts, the Supreme Court held that prisoners have an Eighth Amendment right to protection from assaults by other prisoners when prison officials have knowledge, or reasonably should have had knowledge, that the prisoner faced a substantial risk of harm.[20] Thus, though the Court in *Graham* had rejected state-of-

v. Department of Soc. Servs., 436 U.S. 658, 700-01 (1978), and it denied municipal defendants any immunity defense in *Owen v. City of Independence*, 445 U.S. 622, 657 (1980).

11. U.S. CONST. amend. IV.
12. 471 U.S. 1, 7-8 (1985).
13. 490 U.S. 386, 394-95 (1989).
14. *Id.* at 397; *see, e.g.*, Wilson v. Meeks, 52 F.3d 1547, 1552-53 (10th Cir. 1995).
15. *Graham*, 490 U.S. at 396.
16. U.S. CONST. amend. VIII.
17. 429 U.S. 97, 104 (1976).
18. 511 U.S. 825 (1994).
19. *See id.* at 829-30.
20. *See id.* at 837-38.

mind inquiries in the Fourth Amendment context, it endorsed them here. With regard to medical care and protection from assault, the standard of care is the subjective one of "deliberate indifference."[21] Under this test the official is liable only if he "knows of and disregards an excessive risk to inmate health and safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[22]

Police officers and prison guards account for many, but not all, of the injuries people suffer at the hands of government. Some persons in state custody are not prisoners, and therefore cannot claim the protection of the Eighth Amendment. These persons include, for example, pretrial detainees and involuntarily committed mental patients. Moreover, outside both the police seizure and the custodial contexts, officials injure people in a variety of ways: by defaming them, by losing or damaging their property, by causing accidents, or by failing to afford protection from injuries inflicted by others. Do claims of this kind state constitutional claims for which one may sue under § 1983 or *Bivens*? If so, what is the source of the constitutional claim?

Plaintiffs pursue a due process theory in cases of this sort. They argue that the injury is a "deprivation of life, liberty, or property," and that "due process of law" requires an award of damages to make them whole. The Court has responded in a variety of ways. One approach is to hold that a purported wrong has no constitutional status.[23] Other cases deflect these cases from the federal courts not by declaring the Constitution beside the point, but by requiring the plaintiff to seek due process by pursuing available state law remedies.[24] Some claims

21. Claims by prisoners that guards have attacked them may also state violations of the Cruel and Unusual Punishments Clause. *See* Whitley v. Albers, 475 U.S. 312, 319-21 (1986). In this context, the Eighth Amendment standard is harder for the plaintiff to meet. Rather than "deliberate indifference," he must show that the officer applied force "maliciously and sadistically" for the very purpose of causing harm, or with a "knowing willingness that . . . [harm] occur." Hudson v. McMillian, 503 U.S. 1, 7-8 (1992).

22. *Farmer*, 511 U.S. at 837-38; *see, e.g.*, Pavlick v. Mifflin, 90 F.3d 205, 207-10 (7th Cir. 1996).

23. *See, e.g.*, DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 196-97 (1989) (no constitutional claim is available against a defendant that has not actively injured anyone, but merely failed to render aid to someone in peril); Paul v. Davis, 424 U.S. 693, 711-12 (1976) (harm to reputation, standing alone, is not a deprivation of liberty).

24. *See, e.g.*, Parratt v. Taylor, 451 U.S. 527, 541 (1981) (prisoner complaining of loss of property by "random and unauthorized" acts of prison officials must pursue state remedies), *overruled in part* by Daniels v. Williams, 474 U.S. 327 (1986) (overruling *Parratt's* holding that negligence is sufficient for procedural due process); Ingraham v. Wright, 430 U.S. 651, 675-83 (1977) (state tort remedy provides due process to student complaining of corporal punishment administered without adequate procedural safeguards).

involving physical injury receive more sympathetic treatment. Starting from the premise that personal security from physical harm is an aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment,[25] the Court has held that pretrial detainees are entitled to medical care,[26] and that involuntarily committed mental patients have a constitutional right to safe conditions, enforceable directly in federal court.[27] Liability, however, may not be based on negligence.[28] In order for the plaintiff to establish a due process violation under this theory, the harm must result from an "abuse of power."[29]

II. CONSTITUTIONAL TORTS AND CONSTITUTIONAL INTERPRETATION

Most of the cases summarized in Part I are wrongly decided, or wrongly reasoned, or at least I shall so argue. The basic problem with these cases is that the Court pursues in them two mutually incompatible objectives. It wants to accord some constitutional tort rights to persons injured by the state, and at the same time it is determined to minimize the use of substantive due process methodology in doing so. To these ends, the Court will employ any convenient means, whether the rationalizations it employs can withstand careful scrutiny. The Court ignores its own longstanding precedents and principles, constructs legal fictions, twists words out of shape, and creates whole new areas of law without acknowledging what it is doing.

This flight from substantive due process has grave consequences for constitutional tort rights. By attaching its constitutional tort doctrine to an array of dubious sources, the Court makes that doctrine an easy target for the very critics of judicial activism it seems to be seeking to humor. As a result, the Court's hodgepodge creation of doctrinal categories raises the danger of wholesale doctrinal collapse. In addition, the Court's practice of deriving its rulings from ill-fitting textual sources has profound and pernicious effects on the content of constitutional doctrine. Built upon faulty premises, the Court's principles do not well serve the constitutional values that are at stake in the resolution of boundary cases.

25. *See Ingraham*, 430 U.S. at 673-74.
26. *See* City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983).
27. *See* Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982).
28. *See* Daniels v. Williams, 474 U.S. 327, 329-330 (1986).
29. *See* Collins v. City of Harker Heights, 503 U.S. 115, 125-26 (1992).

A. Tort Themes

1. Tort Law and Constitutional Claim Foreclosure

Some of the Court's boundary cases invoke the common law of torts as a reason for denying constitutional tort claims. In *Paul v. Davis,* the plaintiff sued a police chief for defaming him by falsely telling local merchants he was an active shoplifter.[30] The plaintiff, a photographer for a local newspaper, framed his suit as a constitutional tort, claiming that the harm to his reputation was a deprivation of Fourteenth Amendment "liberty" without due process of law.[31] Denying Davis's claim, the Court defined the liberty protected by the Fourteenth Amendment far more narrowly than it had in preceeding cases.[32] It held that defamation deprives one of liberty only if it is accompanied by the loss of some government benefit, such as a job.[33] This holding departs from the spirit, if not the letter, of *Wisconsin v. Constantineau,*[34] decided a few years before *Paul.* In that case the Court curbed the state's power to post signs identifying someone as prone to "excessive drinking" and denying him the right to buy liquor on the ground that this scheme threatened the individual's "liberty."[35] Though *Paul* denied any break with the past, the opinion in *Constantineau* placed far more emphasis on the harm to one's reputation than on the lost opportunity to buy liquor.[36] The Court there found a Fourteenth Amendment violation because liberty is threatened "[w]here a person's good name, reputation, honor, or integrity is at stake . . . ."[37]

Why did *Paul* pull back from *Constantineau* and other decisions according "liberty" broader scope? The Court evidently feared that a decision in favor of the plaintiff would destroy the boundary between common law tort and the Constitution. Not only would persons accused of crimes by the police have constitutional claims, but so also would "the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehi-

30. 424 U.S. 693, 695-97 (1976).

31. *See id.* at 697.

32. *See, e.g.*, Robert Jerome Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983*, 51 S. CAL. L. REV. 355 (1978) (criticizing *Paul's* restrictive approach to "liberty"); Henry Paul Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405, 423-26 (1977) (discussing *Paul's* treatment of Fourteenth Amendment "liberty").

33. *See Paul*, 424 U.S. at 708-09; *see, e.g.*, Davis v. City of Chicago, 53 F.3d 801, 804 (7th Cir. 1995).

34. 400 U.S. 433 (1971).

35. *See id.* at 435-36.

36. *See id.* at 435-37.

37. *Id.* at 437.

cle."[38] The Court found it "hard to perceive any logical stopping place to such a line of reasoning."[39] It "would seem almost necessarily to result in every legally cognizable injury . . . [committed by a state actor] establishing a violation of the Fourteenth Amendment."[40] The Court refused to "make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."[41]

2. Tort Remedies as Satisfying Constitutional Concerns

In *Paul*, the Court did not inquire into state tort law to determine whether it furnished a remedy.[42] But some of the cases that rely on state tort law to foreclose constitutional tort claims do take pains to examine state law and find a remedy there. The plaintiff in *Parratt v. Taylor* was a state prisoner whose property was lost by officials of the prison.[43] The inmate's suit is most plausibly understood as stating a substantive due process claim.[44] Though agreeing with him that the loss amounted to a deprivation of property, the Court held that post-deprivation state remedies provided him with due process of law.[45] Hence his § 1983 suit was dismissed for failure to state a constitutional violation.[46] As in *Paul*, the Court emphasized the need to maintain the boundary between constitutional and common law torts, finding it "hard to perceive any logical stopping place to . . . [the plaintiff's] line

38. *Paul*, 424 U.S. at 698.

39. *Id.* at 698-99.

40. *Id.* at 699.

41. *Id.* at 701; *see also* Sheldon Nahmod, *Section 1983 Discourse: The Move From Constitution to Tort*, 77 GEO. L.J. 1719, 1728 (1989) (on the use of tort rhetoric in *Paul*).

Paul's tort theme is echoed in *Baker v. McCollan*, 443 U.S. 137 (1979), where the Court turned down a constitutional tort claim for false imprisonment. Here, the plaintiff was mistakenly named in an arrest warrant and spent several days in jail. *See id.* at 141. He sued for deprivation of liberty without due process of law. *See id.* Though conceding that the sheriff took McCollan's Fourteenth Amendment liberty, the Court denied the claim. *See id.* at 144. Because the warrant itself was valid, and he was held for only a few days, the government's conduct did not amount to a constitutional violation. *See id.* Although the plaintiff may have a good claim for common law false imprisonment under "traditional tort law principles," a constitutional claim required more. *See id.* at 145-46. The Court did not specify just what the plaintiff would have to show to make out a constitutional violation, other than hinting that a longer confinement might meet the test.

42. If it had done so, it would have discovered that Kentucky officials were largely shielded from liability. *See* Randolph J. Haines, Note, *Reputation, Stigma, and Section 1983: The Lessons of* Paul v. Davis, 30 STAN. L. REV. 191, 204 n.88 (1977).

43. 451 U.S. 527, 529 (1981), *overruled in part* by Daniels v. Williams, 474 U.S. 327 (1986) (overruling *Parratt's* holding that negligence is sufficient for procedural due process).

44. *See, e.g.*, Fallon, *supra* note 9, at 342; Wells & Eaton, *supra* note 3, at 222-23.

45. *See Parratt*, 451 U.S. at 543.

46. *See id.* at 543-44.

of reasoning."[47] Under this rationale, the Court opined, everyone injured in a car accident with a state vehicle would have a constitutional tort suit.[48] Quoting *Paul*, the Court declared that this "would make of the Fourteenth Amendment a font of tort law to be superimposed upon . . . [state choices]."[49] If the Court in *Parratt* really meant to say, as it seems to have done, that no substantive constitutional violation can occur until and unless state remedies prove fruitless, then the case is at odds with *Home Telephone & Telegraph Co. v. City of Los Angeles*,[50] a landmark case in the law of constitutional remedies.[51] *Home Telephone* held that a constitutional violation is committed when the officer acts, notwithstanding the availability of state remedies or the illegality of the act under state law.[52] Unless the Court is prepared either to overrule *Home Telephone*, which it has shown no inclination to do, or else explain how the constitutional violation in *Parratt* deserves special treatment, the opinion in *Parratt* must be judged a failure.[53]

47. *Id.* at 544.

48. *See id.*

49. *Id.* (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)); *see also* Hudson v. Palmer, 468 U.S. 517 (1984). Recent examples of litigation over application of the *Parratt/Hudson* principle include *Hellenic American Neighborhood Action Committee v. City of New York*, 101 F.3d 877 (2nd Cir. 1996); *Zakrzewski v. Fox*, 87 F.3d 1011 (8th Cir. 1996); *Doherty v. City of Chicago*, 75 F.3d 318 (7th Cir. 1996); *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1044 (1996); *Alexander v. Ieyoub*, 62 F.3d 709 (5th Cir. 1995); and *Copeland v. Machulis*, 57 F.3d 476 (6th Cir. 1995).

50. 227 U.S. 278 (1913).

51. *See* Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 995 (1986); *see also* Fallon, *supra* note 9, at 352.

52. *Home Tel. & Tel. Co.*, 227 U.S. at 283-86.

53. *See* Monaghan, *supra* note 51, at 994-96. Perhaps this is why the Court appears to have retroactively rewritten the opinion in *Parratt*, turning it into a procedural due process case. *See* Zinermon v. Burch, 494 U.S. 113, 128-29 (1990). As *Zinermon* explains, it is sometimes appropriate to put off procedural protections until after the state has deprived someone of liberty or property, as when officers must act quickly in an emergency. *Id.* at 128; *see also* Laura Oren, *Signing Into Heaven:* Zinermon v. Burch, *Federal Rights, and State Remedies Thirty Years After* Monroe v. Pape, 40 EMORY L.J. 1, 13-19 (1991).

For an effort to rehabilitate *Parratt*, see Fallon, *supra* note 9, at 345-55. Fallon argues that *Parratt* should be viewed "as launching a body of federal abstention doctrine, under which federal courts should sometimes decline to exercise jurisdiction in cases that lie within the literal terms of their statutory authority." *Id.* at 345.

For present purposes we can safely suspend judgment on the wisdom of Fallon's suggestion. As he recognizes, even if many cases were routed to state courts under "*Parratt* abstention," there would remain the need to develop constitutional principles for testing the adequacy of state remedies. *See id.* at 345-55. As part of that project, the Court would need to confront the issues raised in this article.

B. Garner, Graham, *and Excessive Police Force*

Tennessee v. Garner ruled that a police officer violates the Fourth Amendment when he uses deadly force to apprehend "an apparently unarmed suspected felon."[54] The Fourth Amendment bars unreasonable seizures, and it is unreasonable to use deadly force "unless . . . the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."[55] This holding rests on the premise that the use of deadly force is a "seizure" within the meaning of the Fourth Amendment. The Court disposed of the definitional issue in a few sentences: It is a seizure because "[w]henever an officer restrains the freedom of a person to walk away, he has seized that person."[56] Since deadly force restrains the freedom of a person to walk away, "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."[57]

Suppose the police injure someone without using deadly force. In *Graham v. Connor* the Court "ma[de] explicit what was implicit in *Garner's* analysis," namely, "that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . ."[58] The opinion contains nothing further to support the proposition that damage claims for excessive police force are within the ambit of the Fourth Amendment. No Justice dissented from the Court's holdings on the scope of the term "seizure" in either *Graham* or *Garner*.[59]

Is it so clear that the use of force is a "seizure" within the meaning of the Fourth Amendment? One could hardly argue with the Court's observation in *Garner* that shooting someone dead restrains

54. 471 U.S. 1, 3 (1985).

55. *Id.* Recent examples of this fact pattern include *Elliott v. Leavitt*, 99 F.3d 640 (4th Cir. 1996); *Salim v. Proulx*, 93 F.3d 86 (2nd Cir. 1996); *Gardner v. Buerger*, 82 F.3d 248 (8th Cir. 1996); *Sevier v. City of Lawrence*, 60 F.3d 695 (10th Cir. 1995); and *Fikes v. Cleghorn*, 47 F.3d 1011 (9th Cir. 1995).

56. *Garner*, 471 U.S. at 7.

57. *Id.*

58. 490 U.S. 386, 395 (1989) (emphasis in original). Recent examples of excessive force litigation include *Joos v. Ratliff*, 97 F.3d 1125 (8th Cir. 1996); *Cox v. Treadway*, 75 F.3d 230 (6th Cir.), *cert. denied*, 117 S. Ct. 78 (1996); *Bodine v. Warwick*, 72 F.3d 393 (3rd Cir. 1995); *Taft v. Vines*, 70 F.3d 304 (4th Cir. 1995); *Brown v. Bryan County*, 67 F.3d 1174 (5th Cir. 1995); *Alexis v. McDonald's Restaurants of Massachusetts, Inc.*, 67 F.3d 341 (1st Cir. 1995); and *Williamson v. Mills*, 65 F.3d 155 (11th Cir. 1995).

59. *See Graham*, 490 U.S. at 399 (Blackmun, J., concurring in part and concurring in the judgment); *Garner*, 471 U.S. at 25 (O'Connor, J., dissenting).

the corpse's movement. Earlier cases do hold that a significant restraint on movement is a seizure. The syllogism seems complete.

It is, however, unacceptably facile, for it ignores the precept that the meaning of legal terms depends largely on their context. The pre-*Garner* cases define seizure as restraint in a wholly different context from *Garner*. The precedents start from the premise that privacy is the value behind Fourth Amendment restrictions on the police. They take it as given that the Fourth Amendment applies to arrests and address the question whether it also applies to lesser restraints, such as stopping and frisking someone who looks suspicious.[60] The aim of the inquiry, as in the bulk of Fourth Amendment law before *Garner* and *Graham*, is to balance the state's regulatory interests against the individual's interest in privacy.[61] The more intrusive the stop, the stronger the individual's interest in privacy, and the more justification will be required. Apart from *Garner*, *Graham*, and a few other exceptions,[62] Fourth Amendment law is aimed at identifying the kinds of government surveillance or restraint that threaten someone's legitimate interest in privacy, and at determining what means are appropriate for protecting that privacy interest.

The personal interest at stake in *Garner* and *Graham* is not privacy, or even freedom of mobility, but personal security against physical harm. The blunt truth is that the Court in *Garner* and *Graham* significantly extended the range of interests protected by the Fourth Amendment, and did so with virtually no discussion of the step it was

60. *See Garner*, 471 U.S. at 7; *Graham*, 490 U.S. at 395 n.10. For the proposition that "[w]henever an officer restrains the freedom of a person to walk away, he has seized that person," the Court in *Garner* cited *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975), where the Court said a random vehicle stop near the border is a seizure, and thus subject to the Fourth Amendment's reasonableness requirement. *Id.* at 884. For the proposition that "it is not always clear just when a minimal police interference becomes a seizure," the Court cited *United States v. Mendenhall*, 446 U.S. 544 (1980), where the issue was whether a criminal defendant had given consent to a search.

Graham relies mainly on *Garner*. The opinion also cites *Terry v. Ohio*, 392 U.S. 1, 16-19 (1968), where the issue was whether the Fourth Amnendment applies to a police officer's "stop and frisk." *Graham* also cites *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989). *Brower* is indeed a constitutional tort case, brought by the estate of someone killed while attempting to elude police, who were chasing him at high speed. *See id.* at 594. The Court held that no "seizure" took place, as the "detention or taking must itself be wilful." *Id.* at 596. The Court's authority for the proposition that the Fourth Amendment covers a suit for damages resulting from physical harm is *Garner*. *See id.* at 595.

61. *See* William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1043-44 & n.93 (1995) ("privacy protection . . . is the heart of the liability rule" and cases like *Garner* and *Graham* are rare in Fourth Amendment law).

62. *See, e.g.*, Soldal v. Cook County, 506 U.S. 56 (1992) (Fourth Amendment protects property interests); Gerstein v. Pugh, 420 U.S. 103 (1975) (Fourth Amendment, not Due Process Clause, determines what post-arrest proceedings are required for suspects detained on criminal charges).

taking. There is nothing in the background of the Fourth Amendment,[63] nor in the Fourth Amendment precedents before *Garner*, to support the notion that one of the amendment's aims is to protect the interest in personal security against physical harm.[64]

C. *In Prison: Medical Care, Assault, and "Punishment"*

Before *Estelle v. Gamble*[65] the Court treated the Eighth Amendment's prohibition on "cruel and unusual punishments" as a bar on certain especially harsh or demeaning criminal sanctions and as a requirement of proportionality between the crime and the sentence. "The primary principle" governing such cases "is that a punishment must not be so severe as to be degrading to the dignity of human beings."[66] Applying that principle the Court has told us that in some circumstances the death penalty violates the Cruel and Unusual Punishments Clause,[67] that expatriation as a punishment for brief wartime desertion violates it,[68] and that imposing criminal punishment for the status of drug addiction is also unconstitutional.[69] Viewing the Cruel and Unusual Punishments Clause in this way is fully in accord with the framers' aims. The clause was taken from the 1689 English Declaration of Rights, and the English background indicates that it was targeted at deliberately inflicted, truly punitive sanctions.[70] The few references to cruel and unusual punishments in the debates over ratifi-

63. *See, e.g.*, LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 221-46 (1988) (Fourth Amendment's origins lie in privacy concerns); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 396-411 (1995).

64. *Albright v. Oliver*, 114 S. Ct. 807 (1994), is vulnerable to a similar criticism. There the Court foreclosed a substantive due process suit for malicious prosecution, holding that "it is the Fourth Amendment, and not substantive due process, under which . . . claims [of unjustified prosecutions] must be judged." *Id.* at 811 (plurality opinion); *see also* Reed v. City of Chicago, 77 F.3d 1049 (7th Cir. 1996); Singer v. Fulton County Sheriff, 63 F.3d 110 (2nd Cir. 1995), *cert. denied*, 116 S. Ct. 1676 (1996).

Though the *Albright* plurality does not explain just what the elements of the Fourth Amendment cause of action may be, the opinion seems to me to take an exceedingly narrow view of the interests at stake in such a case. Someone complaining that a prosecution is motivated by malice raises issues that go far beyond the question of whether there were reasonable grounds for the arrest.

65. 429 U.S. 97 (1976).

66. Furman v. Georgia, 408 U.S. 238, 271 (1972) (Brennan, J., concurring); *see also* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

67. *See, e.g.*, *Furman*, 408 U.S. at 240 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concuring); *id.* at 310 (White, J., concurring); *see also Gregg*, 428 U.S. at 220-21 (White, J., concurring in the judgment).

68. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958).

69. *See* Robinson v. California, 370 U.S. 660, 666-67 (1962).

70. *See* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839 (1969).

cation of the Constitution and the Bill of Rights show that the framers wished to make this English tradition part of our fundamental law.[71]

Without support in the text of the Eighth Amendment, the intent of the framers, or prior cases, *Estelle* extended the reach of the Eighth Amendment into new territory, holding that an inmate deprived of adequate medical care stated a cruel and unusual punishment claim.[72] The Court made short work of the objection that inadequate medical care is not "punishment" within the meaning of the Eighth Amendment. It began by summarizing some of the precedents, all of which concerned deliberate infliction of some hardship as punishment.[73] These precedents, in turn, "establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met."[74] No one dissented on this point.

There is, indeed, a compelling case for constitutional sanctions against officials' indifference to inmates' medical needs. The force of that case, however, should not obscure the basic difference between *Estelle* on the one hand, and the intent of the framers and the earlier Eighth Amendment cases on the other. Inadequate medical care is not a hardship, purposely imposed as punishment, that goes too far in depriving the prisoner of human dignity. The personal interest at stake in *Estelle* is the far more general interest in security against physical harm that is threatened *whenever* someone is exposed to danger. The same is true of cases like *Farmer v. Brennan*,[75] where the prisoner asserts a right to protection against assault by other inmates,

71. *See Furman*, 408 U.S. at 258-63 (Brennan, J., concurring); *id.* at 316-28 (Marshall, J., concurring). The American framers evidently were especially concerned with forbidding "'tortures' and other 'barbarous' methods of punishment." *Gregg*, 428 U.S. at 170 (opinion of Stewart, Powell, and Stevens, JJ.) (quoting Granucci, *supra* note 70, at 842).

72. Estelle v. Gamble, 429 U.S. 97, 102-03 (1976).

73. *See id.* at 102-03 & n.7. The Court cited *Gregg v. Georgia*, 428 U.S. 153 (1976) (death penalty); *Robinson v. California*, 370 U.S. 660 (1962) (punishment for the status of being a drug addict); *Trop v. Dulles*, 356 U.S. 86 (1958) (expatriation as a punishment for wartime desertion); *Francis v. Resweber*, 329 U.S. 459 (1947) (executing someone a second time after the first attempt fails); *Weems v. United States*, 217 U.S. 349 (1910) (fifteen years imprisonment for falsifying an official public document); *In re Kemmler*, 136 U.S. 436 (1890) (electrocution as method of carrying out death penalty); and *Wilkerson v. Utah*, 99 U.S. 130 (1879) (firing squad as method of carrying out the death penalty).

The Court also cited *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968), where the Eighth Circuit, in an opinion written by future Justice Blackmun, issued an injunction forbidding prison whipping. *Jackson* fits within the Eighth Amendment tradition, in that the whippings were inflicted as punishment for misbehavior in prison.

74. *Estelle*, 429 U.S. at 103.

75. 114 S. Ct. 1970 (1994).

without necessarily claiming that guards deliberately permitted the assault for the purpose of punishing him.[76]

Estelle is hardly the first case to depart from the narrowly conceived intent of the framers of the Eighth Amendment. In determining what punishments are "cruel and unusual," the Court has not bound itself to history. Instead, it applies "evolving standards of decency."[77] But even this style of openness to incrementally redefining the provision's coverage does not validate *Estelle*. Before *Estelle*, the target of the prohibition remained deliberate punishments and only the standards for determining which deliberate punishments are appropriate changed over time. *Estelle*, much in the manner of *Garner* and *Graham*, works a fundamental change in the Eighth Amendment's coverage, transforming it from a directive aimed at limiting permissible punishments to a rule that regulates conditions inside prisons.

The point of belaboring the inadequacies of the opinions in *Garner*, *Graham*, and *Estelle* is not to urge these cases be overruled, though I will argue later that some aspects of their holdings should be reconsidered.[78] It is to drive home the point that the Court, in wrapping these holdings in Fourth and Eighth Amendment mantles, offers unconvincing justifications for their holdings. The cases present important interpretive problems: With the growth of damages as a constitutional remedy, should personal injuries inflicted by the police or suffered in prison receive constitutional protection? If so, why? And through what constitutional provision should the new right be implemented? These questions are not adequately addressed simply by pouring new and unfamiliar content into the terms "seizure" and "punishment." There are powerful arguments, based on widely held constitutional values, in favor of imposing limits on police force and duties on prison officials toward inmates. There are countervailing values that would counsel judicial abstinence. None of those considerations are openly discussed in *Estelle*, *Garner*, and *Graham*.

76. *Whitley v. Albers*, 475 U.S. 312 (1986), is a closer case. There the issue was the scope and source of inmates' rights against excessive force by guards. *See id.* at 327. The Court said the Eighth Amendment is the source of those rights. *See id.* Since a guard's application of force is the imposition of physical pain as a sanction, this seems within the Eighth Amendment tradition, while *Estelle* and *Farmer* are not. In any event, this particular ruling has little practical impact, as the Eighth Amendment and Fourteenth Amendment standards would be virtually the same. *See id.* In contrast, the choice of an Eighth Amendment test has important consequences for the content of the doctrine in *Estelle* and *Farmer*. *See infra* text accompanying notes 206-210.

77. *Trop*, 356 U.S. at 101.

78. *See infra* text accompanying notes 165-222.

D. Personal Security

Ingraham v. Wright[79] is the cornerstone of constitutional tort suits for physical injury that do not fall within the Court's Fourth and Eighth Amendment categories. The plaintiffs were junior high school students who had been paddled for misbehavior.[80] Their suit claimed that they were denied due process in that no procedural safeguards preceded the punishment they endured.[81] Though these plaintiffs lost on the merits,[82] the Court in the course of rejecting their claims established a key premise for physical injury suits brought under the Due Process Clause. Before finding that the state tort remedy for excessive corporal punishment satisfied due process, it held that the term "liberty" in the Fourteenth Amendment embraces "personal security" from physical pain.[83] *Ingraham's* "personal security" holding reaches far beyond corporal punishment cases. It has become the basis for a general rule that physical injury caused by the government may be a deprivation of "liberty" that supports a constitutional tort claim.[84]

79. 430 U.S. 651 (1977).

80. *See id.* at 653.

81. *See id.*

82. The Court held that state tort remedies were an adequate surrogate for pre-paddling procedural protections. *See id.* at 675-83. The Court was quite confused in supposing that the state tort remedy provided procedural protections rather than substantive ones. As the availability of the state tort remedy does not turn on whether such procedural safeguards as notice and a hearing were afforded the student, the state tort remedy does nothing to ensure the correctness of the decision to punish a student, nor serve any other procedural due process value. *See* Fallon, *supra* note 9, at 351 n.239.

83. *See Ingraham*, 430 U.S. at 673-74.

84. *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982), held that an involuntarily committed mental patient has a due process right to "safe conditions", citing *Ingraham* for the proposition that "the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause."

In *Davidson v. Cannon*, 474 U.S. 344 (1986), and *Daniels v. Williams*, 474 U.S. 327 (1986), prison inmates sued for physical injuries. Davidson was injured by another inmate after requesting protection. *See Davidson*, 474 U.S. at 345-46. Treating the case as raising a due process claim, the Court said that the physical injury was a loss of "liberty," and cited the discussion of physical injury in *Ingraham*. *See id.* at 346. Davidson lost because negligence on the part of officials is not sufficient to make out a "'deprivation'" of life, liberty, or property. *See id.* at 348.

The plaintiff in *Daniels* fell over a pillow left on a prison stairwell by a sheriff's deputy. *See Daniels*, 474 U.S. at 328. Again, the officer was, at most, negligent and mere negligence does not "deprive" a person of liberty. *See id.* at 330-31. But the Court did not challenge the plaintiff's claim that the physical injury was a loss of Fourteenth Amendment "liberty," even though it was not sustained in the course of punishment.

Before denying Joshua DeShaney's claim that officials should have protected him from abusive treatment by his father, the Court reported, with no apparent disapproval, his claim that under *Ingraham* personal security from physical injury is an aspect of liberty. *See* DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 195 (1989).

In *Collins v. City of Harker Heights*, 503 U.S. 115, 177 (1992), the Court denied relief to a city worker who alleged he was injured as a result of the city's deliberate indifference to workers' safety. But the Court found no problem with his claim that personal security against physical injury is an aspect of liberty. *See id.* at 127 & n.10.

Ingraham rests on firmer historical footing than the artificial Fourth and Eighth Amendment rationales advanced in *Graham* and *Estelle*. The Court relied on Blackstone, who had identified the rights of Englishmen as including "the right of personal security, the right of personal liberty, and the right of private property," and defined "personal security" as consisting of "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."[85] The reliance on Blackstone seems justified, for Blackstone was one of the main sources of English law in eighteenth century America.[86] Whatever else the framers of the Fifth and Fourteenth Amendments may have had in mind, it is widely agreed that they meant to accord constitutional protection to these rights.[87] In addition to relying on the framers' demonstrable intent, *Ingraham* drew upon judicial precedent. The Court noted that under its cases liberty has long encompassed a broad right "to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[88] Surely protection from physical assault by government officers falls among these "privileges."

Whether life, liberty, and property should receive *substantive* as well as procedural protection, as is required for an effective body of constitutional tort law, is a separate question. Despite persistent attacks from critics of substantive due process,[89] the Court retains the doctrine,[90] and its defenders have mustered strong historical argu-

A corollary of this principle is that some interests are *not* sufficiently fundmental to deserve constitutional protection. *See, e.g.*, Dover Elevator Co. v. Arkansas State Univ., 64 F.3d 442, 446 (8th Cir. 1995) (simple breach of contract is not a constitutional tort).

85. WILLIAM BLACKSTONE, COMMENTARIES *129.

86. *See, e.g.*, LAWRENCE MEIR FRIEDMAN, A HISTORY OF AMERICAN LAW 112 (2d ed. 1985); KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 52 (1989); CHARLES F. MULLETT, FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION, 1760-1776 65 (1933). Blackstone's account of the liberties of Englishmen is consistent with the views of other sources that influenced the framers. *See* Sheldon Gelman, *"Life" and "Liberty": Their Original Meaning, Historical Antecedents, and Current Significance in the Debate Over Abortion Rights*, 78 MINN. L. REV. 585, 649-50 (1994).

87. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 21, 28-29 (1977); JOHN PHILIP REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION 69 (1988); *see also* Cong. Globe, 39th Cong., 1st Sess. 1118 (Rep. Wilson) (on the Fourteenth Amendment). Perhaps fidelity to history would have been better served had *Ingraham* treated personal security as an aspect of Fourteenth Amendment "life" rather than "liberty." *See* Gelman, *supra* note 86, at 650-51.

88. Ingraham v. Wright, 430 U.S. 651, 673 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)); *see also* Monaghan, *supra* note 32.

89. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 28-32 (1990); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980).

90. *See, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion); Roe v. Wade, 410 U.S. 113 (1973); Meyer v.

ments in support of it.[91] In any event, substantive due process is not likely to go away, as it is "deeply and pervasively entrenched in the constitutional system."[92] So long as the doctrine remains in force in other contexts, there is no evident reason to reject it as a basis for constitutional tort damages. Even so, the Court has qualms about employing it in the constitutional tort context. Those concerns are an important source of the Court's inability to construct a viable body of substantive constitutional tort law. Their merits are addressed in Part III. For now, it is enough to note some of the ways in which this reluctance has stunted the sound development of constitutional tort doctrine as a means of protecting the fundamental interest in personal security.

Ingraham could have been the starting point of a body of constitutional tort law grounded in the Due Process Clause, including rules that tell us what kinds of official conduct violate the constitution as well as which do not. So far, however, the Court has undertaken only the negative side of this project. It has said that various kinds of official action do not support liability, but has declined opportunities to identify the elements of a personal security-based constitutional tort. For example, in *Ingraham* itself some of the students said they were

Nebraska, 262 U.S. 390 (1923). The doctrine is more extensive than some of its critics may imagine. The decisions applying the substantive rights contained in the first eight amendments to the states by means of "incorporating" them into the Due Process Clause amount to substantive due process, as they grant substantive protection through the Due Process Clause. *See* Laurence Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1297 n.247 (1995) (discussing this and other points in the course of a defense of substantive due process against the argument that it is free-wheeling and unconstrained); *cf.* Monaghan, *supra* note 32, at 413-14 (1977) (though the Court has turned its back on the economic due process doctrine of the early twentieth century, it has not abandoned the expansive definition of "liberty" it articulated in them).

91. *See, e.g.*, FRANK R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE 3-25 (1986) (tracing the antecedents of substantive due process in English law back to Magna Carta); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941 (discussing both English and early American law).

Other historical defenses of substantive due process stress the more general "natural law" orientation of the eighteenth century framers. *See, e.g.*, Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 715-16 (1975); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1177 (1987); *see also* Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 365 (1928-1929); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); MULLETT, *supra* note 86, at 65.

For a persuasive defense of substantive due process that relies only partly on history, see Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1237-68 (1987).

92. Fallon, *supra* note 9, at 314 n.23. I share Fallon's view, *see id.*, that an article on constitutional torts is not the place to engage in extended arguments about the general validity of substantive due process.

paddled twenty or more times.[93] Besides their procedural due process theory, they argued that the punishment violated their substantive rights.[94] They maintained that, even if proper procedures were followed, the spankings were so severe as to violate the Eighth Amendment and the substantive component of the Due Process Clause.[95] The Court denied their Eighth Amendment claim on the ground that the Cruel and Unusual Punishments Clause applies only to criminal punishment,[96] and declined to address their substantive due process theory.[97]

Later constitutional tort cases follow a pattern of focusing attention on government actions that do not violate the constitution. *Daniels v. Williams*, for example, declares that negligence is not sufficiently egregious to cross the constitutional line.[98] *DeShaney v. Winnebago County Department of Social Services* denies any general affirmative right to protection by the state from harm at the hands of private actors.[99] *Collins v. City of Harker Heights* rejects a municipal employee's charge that the city's indifference to his safety can be a constitutional violation.[100] One searches the cases in vain for some definitive indication of what sorts of official conduct *do* give rise to a breach-of-the-constitution claim. There are, of course, dozens of circuit court decisions featuring official conduct of varying levels of egregiousness on which the Supreme Court could have ruled had it wished to do so.

The Court, by its choice of cases and by what it says in the ones it does take, has provided only a fragmentary, indefinite, and undependable account of the scope of substantive due process constitutional

93. Ingraham v. Wright, 430 U.S. 651, 657 (1977).

94. *See id.* at 658-69.

95. *See id.*

96. *See id.* at 659-71.

97. *See id.* at 659 n.12. Lower courts have addressed this issue, finding that the constitutionality of corporal punishment under a substantive due process standard depends on

> such factors as the need for application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Metzger v. Osbeck, 841 F.2d 518, 520 (3rd Cir. 1988) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)). *Compare* P.B. v. Koch, 96 F.3d 1298 (9th Cir. 1996) *and* Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980) (possible constitutional violation) *with* Woodard v. Los Fresnos Indep. Sch. Dist., 732 F.2d 1243 (5th Cir. 1984) (no violation).

98. 474 U.S. 327, 330 (1986); *see also* Davidson v. Cannon, 474 U.S. 344, 347 (1986).

99. 489 U.S. 189, 195 (1989).

100. 503 U.S. 115, 130 (1992). For a recent application of *Collins*, see *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995).

tort rights. In essence, the Court remains in a position to deny any claim it pleases.

III. Redrawing the Boundaries of Constitutional Tort: Doctrinal Foundations

If I am right that the Court has based constitutional tort law upon the flimsiest of doctrinal foundations, two further questions arise: Why did the Court choose to proceed as it has? And how may this body of law be rehabilitated? These two questions are related in that understanding why the Court has failed to lay a more solid foundation for constitutional tort law is the first step toward rebuilding the organizing principles of constitutional tort.

Answering the first question requires us to look beyond the particular issues that come up in the boundary cases. In order to appreciate why the Court has approached substantive constitutional tort questions so gingerly, we must put them in the context of the ongoing debate over the Court's institutional role. The boundary cases present only an illustration of the very general problem of whether and when the Court should exercise a creative role. The Court's unwillingness to face this problem squarely in constitutional tort cases reflects a deep and general ambivalence toward judicial activism.

A. The Court's Dilemma

In constitutional tort cases the Court faces powerful forces that pull it in opposite directions. On one side, there is a strong case for extending constitutional protection to some personal injuries that, in the past, would have been litigated solely as common law torts. Some actions by government officials are sufficiently outrageous as to provoke even conservative judges to impose constitutional sanctions against them.[101] At the same time, the Court is hesitant to undertake the lawmaking effort that extension entails, and is especially reluctant to do so under the banner of substantive due process.

Before the barriers to constitutional damage actions fell, no one conceived of the boundary cases as raising constitutional issues, for there was no constitutional remedy available in any event. One consequence of the growth of damages as a remedy was to remove the great obstacle to framing such cases in constitutional terms. In effect,

101. See, for example, Justice Frankfurter's opinion in *Rochin v. California*, 342 U.S. 165, 172 (1952), finding that pumping a suspect's stomach against his will in order to retrieve evidence "shocks the conscience" in violation of the Due Process Clause.

the advent of the damages remedy gave rise to a new conception of rights as including protection against past, tort-like harm. The Court embraced this new understanding of rights with little dissent on matters of basic principle. Across the philosophical spectrum, there has been a broad consensus among modern Justices that at least some personal injuries ought to receive substantive constitutional protection. This is a striking development, and one that has far-reaching implications. Without that vital premise, *Ingraham*, *Graham*, and *Estelle* would not exist.

Why did the Court not openly proclaim its consensus on the transformed conception of rights? Perhaps part of the answer is that the unanimity on this point seemed to make the new approach self-evident. Even among commentators, *Ingraham*, *Graham*, and *Estelle* stirred no wrath. Once it was introduced, the new view of rights may have seemed the natural order of things to lawyers weaned on the common law, so much so that it encountered little direct resistance from anyone and quickly became dominant. This is not to say that everyone was happy with the new regime. Objections were raised to recoveries based on a wide range of reasons. Immunity,[102] causation,[103] and damages[104] became the principle fields of battle. Still, no one seriously challenged the basic proposition that there is sometimes a constitutional right to be made whole for harm caused by government, either in the boundary cases or in other contexts.

The mere fact of consensus, however, hardly explains the Court's failure to account for the emergence of its new constitutional tort doctrine. There is another, more cogent, explanation for the Supreme Court's failure to address constitutional tort issues more directly. In

102. *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 639 (1987); Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (both holding that the qualified immunity accorded executive officials is judged by an objective test, so that the official's state of mind is irrelevant). On lower courts' implementation of these cases, see Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187 (1993). For a critical reaction to *Anderson* and *Harlow*, see David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23 (1989).

103. *See, e.g.*, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (plaintiff loses where there are two motives for the challenged action, and a constitutionally permissible motive is the "but for" cause). *See generally* Thomas A. Eaton, *Causation in Constitutional Torts*, 67 IOWA L. REV. 443 (1982).

104. *See, e.g.*, Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 304-313 (1986) (award of damages may not be based on the abstract value of constitutional rights); Carey v. Piphus, 435 U.S. 247, 262-64 (1978) (no presumed damages for procedural due process violations). *See generally* Jean C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CAL. L. REV. 1242 (1979); Jean C. Love, *Presumed General Compensatory Damages in Constitutional Tort Litigation: A Corrective Justice Perspective*, 49 WASH. & LEE L. REV. 67 (1992).

all of its work, the Court feels strong institutional pressure to refrain from judicial invention, or at least to maintain the appearance that it does not make law. This pressure is a product of the antidemocratic nature of judicial activism. No one can even be appointed to the Court, it seems, without dutifully assuring senators at the confirmation hearing that judges merely apply the law rather than make it.[105]

For many current Justices, the problem is not only one of appearances. Their performance overall suggests that they really do believe in some measure of judicial restraint.[106] At the same time, anyone other than a rigid positivist would agree that judges must do more than mechanically apply fixed rules. While judges are constrained by legal materials, they exercise a creative function in the reasoned elaboration of those materials to new problems, or old problems seen in a new light.[107]

This account describes what most Justices generally try to do, in constitutional tort cases as in other areas. But the Court's reluctance to avow that it "makes law," here as elsewhere, leads it to look for ways to seem to be doing something else. In the constitutional tort context, the Court's solution is to avoid confronting the choice between restraint and creativity by pretending that the conflict does not exist. In pursuit of this strategy, the Court in *Graham* and *Estelle* offers fictional accounts of the interests protected by constitutional provisions and crams more meaning into the terms "seizure" and "punishment" than the framers' aims and precedent can bear. Despite prior cases to the contrary, *Paul* invokes fear of intruding on the domain of state tort law as an excuse for not extending constitutional protection to reputation, and *Parratt* treats the existence of state remedies as a justification for throwing the plaintiff out of federal court.

105. *See* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 782 (1983). Confirmation hearings since Tushnet made this observation only tend to corroborate it.

106. Most would agree that the current Court has not undertaken the sort of massive restructuring of social and political institutions that marked a period of judicial activism like the 1960s. Even so, some may question the depth of the current Court's commitment to judicial restraint. The Court does strike down its share of statutes and regulations. *See, e.g.*, United States v. Lopez, 115 S. Ct. 1624 (1995) (Congress may not do whatever it pleases under the authority of the commerce clause); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) (federal race-based remedies are subject to strict scrutiny); Miller v. Johnson, 115 S. Ct. 2475 (1995) (striking down state apportionment scheme).

In any event, nothing in my argument turns on whether the Court really takes restraint seriously. On the contrary, to the extent the reluctance to use substantive due process is merely a matter of appearances, the Court's evasive tactics are all the more open to criticism.

107. For a detailed discussion of the elements of constitutional adjudication, see Fallon, *supra* note 99.

The rudiments of a substantive due process treatment of the boundary problem appear in *Ingraham* and *Daniels*, but the Court never develops this approach much beyond telling us what substantive due process does *not* cover.

The Justices' aversion to substantive due process brings us to the core of the problem with constitutional tort doctrine. On the one hand, substantive due process is the appropriate doctrinal home for boundary cases. *Ingraham's* definition of "liberty" as embracing personal security from physical injury furnishes a far more secure foundation for these torts than the Fourth and Eighth Amendment rationales offered in *Graham* and *Estelle*.[108] On the other hand, asking the Court to employ substantive due process exacerbates the Court's dilemma. This is the doctrinal category that has gotten the Court into more political trouble than any other for over a century, from *Scott v. Sandford*[109] to *Lochner v. New York*,[110] through the Court's retreat from *Lochner* in the 1930s,[111] and on to *Roe v. Wade*[112] and the controversy that continues to rage over that case. The criticism may be unfair, and it may be more appropriately directed at the substantive doctrines for which it is the vehicle.[113] Be that as it may, the Court is especially wary of lawmaking under the rubric of substantive due process.[114]

In constitutional tort cases, the Court has admitted as much. *Collins v. City of Harker Heights* declared that it "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended."[115] So it is that *Graham v. Connor*[116] rejected

108. *See supra* text accompanying note 78.

109. 60 U.S. (19 How.) 393 (1857).

110. 198 U.S. 45 (1905).

111. *See e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144 (1938); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); *see also* STRONG, *supra* note 91, at 103-09.

112. 410 U.S. 113 (1973).

113. *See* Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 989 (1979).

114. *See, e.g.*, RICHARD A. POSNER, OVERCOMING LAW 179 (1995); Fallon, *supra* note 9, at 326, 349 & n.226. Professor Fallon also notes the Court's concern about the burden of such suits on scarce judicial resources. *See id.* at 348-49. I share Justice Harlan's view that curbing access to federal court for constitutional claims is not the right response to the resource problem. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410-11 (1971) (Harlan, J., concurring); *see also* Michael Wells, *Against an Elite Federal Judiciary: Comments on the Report of the Federal Courts Study Committee*, 1991 B.Y.U. L. REV. 923 (arguing that the best-solution to the resources problem is to increase the size of the federal judiciary); Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 28 (1980) ("to begin from caseload is to put things backwards").

115. 503 U.S. 127, 125 (1992); *see also* Albright v. Oliver, 114 S. Ct. 807, 821 (1994) (Souter, J., concurring).

the substantive due process approach used by many lower courts in excessive police force cases in favor of a contrived Fourth Amendment approach. "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."[117] A few years later, *Albright v. Oliver*[118] spurned a substantive due process theory of recovery for malicious prosecution in favor of a Fourth Amendment approach. The Court relied on both *Graham's* preference for "an explicit textual source,"[119] and *Collins's* admonition to stay away from substantive due process as much as possible.[120]

B. Biting the Substantive Due Process Bullet

Making law under a veneer of fictions allows the Court to achieve desired substantive goals while shielding itself from criticism of its creative role. Over time, however, the veneer is sure to wear away. Enemies of substantive constitutional tort, when they emerge, will find it easy to expose the inadequacy of the reasoning in cases like *Graham* on "seizure" and *Estelle* on "punishment." They will have even less trouble taking aim at the fragmentary substantive due process analysis in cases like *Daniels*, *Collins*, and *DeShaney*. Resting constitutional tort doctrine on such shaky underpinnings exposes the Court to the charge that constitutional tort is nothing more than judicial legislation, unsupported by constitutional text, history, or structure.

Since the Justices do not stand for election, the Court's decisions lack the legitimacy conferred by the democratic process upon legislative decisions made by persons elected to legislative office.[121] Instead, the Court must defend its rulings through the reasoned elaboration of

116. 490 U.S. 386 (1990).

117. *Id.* at 395. At least one lower court has gone a step further, holding that even claims arising from corporal punishment of public school students may be shoehorned into the Fourth Amendment. *See* Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010, 1012-14 (7th Cir. 1995); *see also* P.B. v. Koch, 96 F.3d 1298, 1303 & n.4 (9th Cir. 1996).

118. 114 S. Ct. 807 (1994).

119. *Id.* at 813.

120. *See id.* at 812; *cf.* Whitley v. Albers, 475 U.S. 312, 327 (1986) (Eighth Amendment rather than substantive due process is the ultimate source of prisoners' rights against guards' use of excessive force).

121. I do not mean to suggest that *judicial* decisions are more easily legitimized when made by elected judges. On the contrary, the stronger argument may be that an elected judiciary is more susceptible to allowing inappropriate considerations to influence its decisions. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

legal principles and policies. Unless the Supreme Court candidly justifies its rulings in terms of precedent, the framers' intent, analysis of the constitutional text, and other widely recognized methods of constitutional interpretation, the Court can fairly be accused of abandoning the judicial function and acting as a naked power organ. Charges of this sort are familiar to any reader of Supreme Court opinions and scholarly commentary upon them.

What is to be done? It is imperative to the legitimacy of the whole enterprise to build the structure of constitutional tort law upon a more secure foundation. One way of doing this is to abandon the field, concede that the doctrine lacks adequate support in legal materials, repudiate or significantly curtail substantive constitutional tort rights, and leave plaintiffs with only common law and statutory remedies.

Apart from simply confessing error, current doctrine offers several avenues by which the Court might pursue such a strategy. A Court bent on judicial restraint might take *Paul v. Davis*[122] as its model. Under such a regime, no injury that may be litigated as a common law tort would be actionable as a constitutional tort. A modified version of this approach, based on *Parratt v. Taylor*,[123] would foreclose the constitutional suit under § 1983 only where the state tort law offers what the Court considers an adequate remedy.[124] So far these approaches have gotten nowhere. The Court has not extended *Paul* beyond the defamation context[125] and it has explicitly limited *Parratt* to procedural due process claims.[126] Alternatively, the Court might retain its current doctrinal structure but make it so difficult to prove constitutional wrongs that few plaintiffs will ever succeed.

Retreating from constitutional tort in any of these ways would save the Court from charges of judicial legislation, but at a heavy price. The Court would have to forsake the principle that some tort-like harms committed by officials warrant a constitutional damages remedy. Yet on that principle there seems to be consensus among the Justices, if we may judge by the absence of dissenting opinions on this issue in cases like *Estelle*, *Graham*, and *Ingraham*.

122. 424 U.S. 693 (1976).

123. 451 U.S. 527 (1981), *overruled in part by* Daniels v. Williams, 474 U.S. 327 (1986).

124. For an analysis of what might constitute an adequate state remedy, see Fallon, *supra* note 9, at 355-66.

125. *But cf.* Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992) (relying in part on *Paul* in refusing constitutional protection to a city worker claiming that the city showed deliberate indifference to its employees' safety).

126. *See supra* note 53.

Happily, the Court is not required to choose between the harsh regime of *Paul* and the three-piece structure of constitutional tort doctrine reflected in the rationales of *Estelle* and *Graham*. There is a better alternative. The Court should jettison *Estelle* and *Graham*, and rebuild the law of constitutional tort on a single, unitary substantive due process base. Taking this step would require the Court to confront and answer various criticisms of substantive due process, a task that is long overdue.

C. *Meeting the Challenges to Substantive Due Process*

Some of the objections to substantive due process are global in their nature. They have nothing to do with constitutional tort law in particular. At the most general level, critics claim that courts should not make law, and, in particular, should not make law in constitutional cases, since constitutional rulings cannot be easily nullified by other branches of government.[127] If these critics are right, then much of our constitutional law is misconceived, for judicial lawmaking is deeply rooted in our legal system.[128] But the general attack on judicial lawmaking has no *particular* consequences for the boundary cases. So long as the Supreme Court rejects it and acts creatively in other contexts, there is no ground for singling out constitutional tort for artificial restrictions. Actually, democratic values are threatened *less* by constitutional tort than by the use of substantive due process in cases like *Roe v. Wade*,[129] where the Court struck down the decision of a democratically elected legislature. The typical constitutional tort case does not directly challenge majority rule by nullifying legislative decisions. More often, it imposes liability on unelected government officers sued for their discretionary acts.

In *Graham v. Connor*,[130] *Albright v. Oliver*,[131] and *Collins v. City of Harker Heights*[132] the Court seems to endorse a narrower version of the attack on judicial activism in general and substantive due pro-

127. *See, e.g.*, BORK, *supra* note 89, at 264-65 (1989); *see also* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

128. This point is best made by comparisons between our system and others. An excellent treatment may be found in P. S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS (1987) (showing that, by comparison to English law, American law relies much more heavily on substantive than formal reasoning).

129. 410 U.S. 113 (1973).

130. 490 U.S. 386 (1989).

131. 114 S. Ct. 807 (1994).

132. 503 U.S. 115, 126 (1992); *see also Albright*, 114 S. Ct. at 820-21 (1994) (Souter, J., concurring).

cess in particular. According to this objection, courts should not employ the substantive due process rubric, or should use it sparingly, because the "guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."[133] This, however, is hardly a good reason for distinguishing the principles of substantive due process from other organizing principles of constitutional law. The Court has often entered new areas where there are few guideposts, as when it imposed First Amendment restrictions on commercial advertising,[134] and when it extended the Equal Protection Clause to "fundamental interests."[135] Ironically, the extension of the Fourth Amendment to excessive force claims in *Graham* and the use of the Eighth Amendment to guarantee prisoners' right to medical care in *Estelle* (as well as protection from assault in *Farmer*) provide equally good examples of "open-ended" innovation, for the preexisting body of Fourth and Eighth Amendment law offered no guidance on the resolution of such claims.

For that matter, the Court in *Graham*, *Albright*, and *Collins* does not propose to abandon substantive due process, only to avoid it whenever possible. Substantive due process remains the doctrinal pigeonhole for privacy and autonomy rights,[136] for the protection of pretrial detainees,[137] for safeguarding involuntarily committed mental patients,[138] and for vindicating the interests of a wide variety of other persons whose claims cannot be shoehorned into the Fourth or Eighth Amendments.[139] In striking contrast to the constitutional tort cases, the "open-ended" nature of substantive due process itself receives

133. *Collins*, 503 U.S. at 125; *see also Albright*, 114 S. Ct. at 820 (Souter, J., concurring) (arguing that the Court should avoid duplication of constitutional protection).

134. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). The precedents and all information on the framers' intent indicated that the area was not within the ambit of free speech. *See* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 486-88 (1985). Given the absence of support in the background of free speech for protection of any advertising, the references in the text of the amendment to "speech" and "press" hardly offer guidance as to what advertising will and will not be protected.

135. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 660-62 (1969) (Harlan, J., dissenting).

136. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992); Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Roe v. Wade, 410 U.S. 113 (1973).

137. *See* Revere v. Massachusetts General Hosp., 463 U.S. 239, 244 (1983); *see, e.g.*, Weyant v. Okst, 101 F.3d 845, 856 (2nd Cir. 1996).

138. *See* Youngberg v. Romeo, 457 U.S. 307, 315 (1982).

139. *See* Daniels v. Williams, 474 U.S. 327 (1986). Though the plaintiff here was a prisoner, his injury was caused by tripping over a pillow left in a stairwell. *See id.* at 326. He litigated it as a due process claim, and the Court treated it as such. *See id.*; *see also* Graham v. Connor, 490 U.S. 386, 395 & n.10 (1989) (discussing the range of plaintiffs covered by the Fourth Amendment standard announced in that case).

kindlier treatment in the abortion context, where the Court has rejected efforts to undo *Roe v. Wade*.[140] In *Planned Parenthood v. Casey*,[141] the centrist plurality acknowledged that the "boundaries [of substantive due process] are not susceptible of expression as a simple rule."[142] Even so, the Justices may not "shrink from the duties of [their] office."[143] Rather, "adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment."[144] The Court should approach the constitutional tort cases in the same spirit.

Graham, *Albright*, and *Collins* do not articulate any principle for distinguishing cases that are appropriate for substantive due process from those that are not, other than a predilection to cram every case in the Bill-of-Rights ballpark into one of the first eight amendments. But this preference cannot be based on a policy of limiting judicial creativity, for courts actually exercise as much a creative role whether the doctrinal peg is the Fourth Amendment's ban on "unreasonable . . . seizures," or the Eighth Amendment's ban on "cruel and unusual punishments," or the Fifth and Fourteenth Amendment protection against the "depriv[ation] of . . . liberty . . . without due process of law." The main reason why the Court prefers "explicit textual source[s] of constitutional protection"[145] is a desire to keep up appearances. The Court favors the Fourth and Eighth Amendments over due process only because they appear to contain more specific language, and because substantive due process is associated in the public mind with heavily criticized cases like *Lochner v. New York*[146] and *Roe v. Wade*.[147] Given these realities, it will not be so *apparent* that the Court is breaking new ground when it makes liability rules under the Fourth and Eighth Amendment rubrics. Even more important, when the Court does break new ground it skirts the need to cope with objections from critics of abortion and the many other foes of *Lochner* and *Roe*.

Why should the Court give up its efforts to avoid substantive due process as much as possible? Just what is wrong with shoving cases

140. 410 U.S. 113 (1973).
141. 505 U.S. 833 (1992).
142. *Id.* at 849.
143. *Id.*
144. *Id.*
145. Graham v. Connor, 490 U.S. 386, 395 (1989).
146. 198 U.S. 45 (1905).
147. 410 U.S. 113 (1973).

into the Fourth and Eighth Amendments even though the interests at stake in them differ from the traditional concerns of those amendments? These questions raise a basic issue of legal theory that needs to be identified and addressed: How should judges proceed in adjudicating cases? Should they limit themselves to such materials as precedents; the text of statutes and constitutional provisions; the intent of the framers of those provisions; and principles and policies expressed in statutes and prior cases? Or may they weigh the costs and benefits of one outcome against another and decide for themselves which best serves the public good?

D. Constitutional Tort and the Principle of Integrity

A family of legal theories, exemplified by the Legal Process[148] and most famously expounded in recent years by Ronald Dworkin, holds that courts do not and should not rely on value judgments of this kind. Rather, judges should rule in accordance with the "legal materials."[149] Judges may not pick and choose among these materials in an ad hoc way, but must strive for what Dworkin calls "integrity." Integrity requires that judges "conceive the body of law they administer as a whole rather than as a set of discrete decisions that they are free to make or amend one by one, with nothing but a strategic interest in the rest."[150]

Integrity "provides protection against partiality or deceit or other forms of official corruption,"[151] and "contributes to the efficiency of law" by avoiding the need for detailed rules.[152] Most important is its role in securing the legitimacy of judicial decisions. Adherence to the principle of integrity helps to legitimate the state's use of coercive power. "A state is legitimate if its constitutional structure and practices are such that its citizens have a general obligation to obey political decisions that purport to impose duties on them."[153] Giving the

148. *See, e.g.*, HENRY M. HART, JR., & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 141-50 (1994); ROBERT E. KEETON, JUDGING 1 (1990); HERBERT WECHSLER, *Toward Neutral Principles of Constitutional Law*, *in* PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW: SELECTED ESSAYS 3, 21 (1961); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1249-50 (1987); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987); J. Harvie Wilkinson III, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779, 780, 792-98 (1989).

149. *See* HART & SACKS, *supra* note 148, at 113-14, 141-43.

150. RONALD DWORKIN, LAW'S EMPIRE 167 (1986); *see also id.* at 181-83, 191-92, 213-14, 219-20, 227-29.

151. *Id.* at 188.

152. *See id.* at 188-89.

153. *Id.* at 191.

losers in disputes about rights and obligations an explanation in terms of legal materials "assumes that each person is as worthy as any other, that each must be treated with equal concern according to some coherent conception of what that means."[154] Accordingly, "[a] community of principle . . . can claim the authority of a genuine associative community and can therefore claim moral legitimacy . . . ."[155]

If we take this account of adjudication as our guide to evaluating constitutional tort doctrine, the Court's boundary cases fall short of what is required. On the worst reading of these cases, they represent a cynical effort to maintain a facade of restraint, behind which the Court covertly makes law without admitting or justifying its actions. From this perspective, the boundary cases make a mockery of judicial "integrity." On the other hand, if the Court's unwillingness to use substantive due process is animated by sincere concern about the legitimacy of judicial invention, it has responded in just the wrong way. Integrity is not achieved by *pretending* that an express provision of the Constitution applies to a problem, when the history of the provision belies the claim. It is earned by candidly identifying the constitutional principles that bear on the problem, and reasoning from those premises to the resolution of the case at hand.[156]

E. Pragmatism and Constitutional Tort

Not everyone agrees that the proper centerpiece of judicial aspiration is the process-oriented "integrity" championed by Ronald Dworkin. A competing vision of the judicial function holds that judges should be pragmatic rather than principled.[157] Pragmatists question the value of what I have called "legitimacy," and consequently denigrate the importance of such legal process values as candor,[158] consistency with history,[159] and resolving new problems by reasoning from principles embedded in legal materials.[160] Results are

154. *Id.* at 213.

155. *Id.* at 214. Dworkin regards "integrity" as a constraint on both courts and legislatures. Other scholars in the Legal Process tradition emphasize the importance of process values in legitimating *judicial* creativity, *see, e.g.*, Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365-71 (1978), especially in constitutional cases in a system based on majority rule. *See, e.g.*, WECHSLER, *supra* note 148, at 21; Wilkinson, *supra* note 148, at 780, 792-98.

156. *See* Shapiro, *supra* note 148, at 737.

157. *See, e.g.*, POSNER, *supra* note 114, at 4-15; *see also* Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1 (1996).

158. *See, e.g.*, POSNER, *supra* note 114, at 401-02.

159. *See, e.g., id.* at 401.

160. *See, e.g., id.* at 398-99.

what matter most, and judges sometimes make "legislative judgment[s]."[161]

On this view, process values are not irrelevant, for stability, predictability, democracy, and treating-like-cases-alike are important systemic values against which the benefits of judicial lawmaking must be weighed.[162] Accordingly, even a pragmatist may be swayed by the analysis in the foregoing sections. Simply because of the dissonance between the Court's categorical approach and process values, a pragmatist may endorse substantive due process.

It must be admitted, however, that for many pragmatists, integrity and other process values are decidedly secondary in importance. Since continuity with the past is not the paramount value, a pragmatic evaluation of the boundary cases turns largely on their consequences. If the doctrine serves worthy ends at an acceptable cost, its failure to respect process values may not be a sufficient reason to condemn it.[163] Prudentially avoiding substantive due process, a doctrine that "stinks in the nostrils of modern liberals and modern conservatives alike,"[164] may be a good enough reason for forcing as many cases as possible into other constitutional provisions. If, however, the Court's treatment of the boundary cases not only devalues process, but also produces an inferior body of doctrine, then even pragmatists not much concerned with process would find it faulty. In Part IV I hope to show that the Court's "shoehorn" approach to constitutional tort law has indeed influenced the development of substantive doctrine much for the worse.

IV. The Doctrinal Downside of the Categorical Approach

The Court's misguided reliance on tort concepts in *Paul v. Davis*[165] and its artificial division of the cases into Fourth, Eighth, and Fourteenth Amendment categories have had demonstrably unfortunate consequences for the development of doctrine. This approach has produced rules that do not well serve the constitutional values at

161. *See id.* at 131.

162. *See id.* at 4, 20-21, 25-27; Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1432-33 (1995); *see also* Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1343-49, 1353, 1374-76 (1988) (meeting the objection that pragmatism is unprincipled and lacks respect for history, and illustrating the pragmatic approach).

163. *See, e.g.*, POSNER, *supra* note 114, at 399-401.

164. *Id.* at 179.

165. 424 U.S. 693 (1976).

stake in the cases.[166] The Court's approach has created arbitrary distinctions between cases that should receive similar treatment.[167] And the Court's approach sometimes fails to make distinctions between fact patterns that should be treated differently.[168]

Putting the boundary cases on a substantive due process foundation would address these problems by facilitating four concrete doctrinal reforms. First, a substantive due process approach would broaden the range of interests protected through constitutional tort, by giving *Ingraham* its full due and by calling cases like *Paul* and *Albright* into question. Second, this approach would focus attention on the defendant's state of mind, negating the contrary approach of *Graham*. Third, this approach would undercut the holding of *Farmer v. Brennan* that prisoners must show subjective "deliberate indifference" in order to recover for prison assaults or inadequate medical care.[169] And finally, this approach avoids one awkward feature of the Court's categorical approach: the need to draw empty distinctions among fact patterns that are functionally identical, such as the cases of two victims of police shootings, one of whom is in custody and the other not.

A. Protected Interests

According to *Paul v. Davis*, a person's reputation receives no constitutional protection unless the defamatory statement is accompanied by the loss of something else, like the loss of a government job or of the right to buy liquor.[170] The ambiguous plurality opinion in *Albright v. Oliver*[171] may have similar implications. Before *Albright* many lower courts recognized a constitutional tort suit for malicious prosecution as a matter of substantive due process, though they differed among themselves over the level of prosecutorial misconduct needed to make out a claim.[172] The plurality in *Albright* said that someone complaining about a "pretrial deprivation of liberty" must sue under the Fourth Amendment, but left the scope of the Fourth Amendment cause of action unclear.[173] If the Court meant that one

166. *See infra* text accompanying notes 170-79.
167. *See infra* text accompanying notes 211-28.
168. *See infra* text accompanying notes 211-28.
169. 114 S. Ct. 1970, 1979 (1994).
170. 424 U.S. 693, 702-12 (1976).
171. 114 S. Ct. 807 (1994).
172. *See id.* at 811 & n.4.
173. *See id.* at 813. Justices Kennedy and Thomas concurred in the judgment. Following *Parratt v. Taylor*, 451 U.S. 527 (1981), they maintained that no deprivation "without due process" had occurred, on account of the availability of state tort remedies. *See Albright*, 114 S. Ct. at 817-19.

may sue only for an illegal arrest, then the effect of its ruling is to deny constitutional protection to the interest in being free of badly motivated prosecutions in the absence of incarceration.[174] *Paul* illustrates the Court's penchant for deferring to the common law of torts, while *Albright* relies on *Graham* and seems to be a product of the Court's preference for the "specifics" of the Bill of Rights.

If, as I have proposed, constitutional tort is built around substantive due process, both of these cases must be reconsidered. The theory of "liberty" set forth in *Ingraham v. Wright*,[175] decided a year after *Paul*, is the lynchpin of a substantive due process approach. *Ingraham* cannot be reconciled in principle with *Paul*, for *Ingraham* relies on the common law tradition for guidance as to the content of the "liberty" protected by the Due Process Clause. The Due Process Clause "was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown."[176] Those liberties included not just "personal liberty," meaning freedom of movement, but also "personal security,"[177] which in turn "consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."[178] It appears, then, that most common law torts, including defamation, implicate constitutionally protected "liberty." *Paul* cannot survive under a substantive due process model for resolving boundary cases.[179]

174. *See Albright*, 114 S. Ct. at 829-31 (Stevens, J., dissenting).

175. 430 U.S. 651 (1977); *see supra* text accompanying notes 79-92.

176. *Ingraham*, 430 U.S. at 672-73. While this Article is about the constitutional status of tort-like injuries, it should be noted that the interests protected by the Due Process Clause are not *limited* to those recognized by the common law. There are constitutional liberty, *see, e.g.*, Vitek v. Jones, 445 U.S. 480 (1980), and property, *see, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985), interests unknown to the common law.

Whether interests other than those created by the common law receive *substantive* protection under the Due Process Clause remains an open question in the Supreme Court. For diverse views, compare *Parkway Garage, Inc. v. Philadelphia*, 5 F.3d 685, 692 (3rd Cir. 1993) ("[s]ubstantive due process protects citizens from arbitrary and irrational acts of government" such as improperly motivated denial of a building permit or business license), with *McKinney v. Pate*, 20 F.3d 1550, 1553 (11th Cir. 1994) (someone claiming he was dismissed from a government job "by an arbitrary and capricious non-legislative government action" states only a procedural and not a substantive due process claim). *See generally* David H. Armistead, Note, *Substantive Due Process Limits on Public Officials' Power to Terminate State-Created Property Interests*, 29 GA. L. REV. 769 (1995).

177. *See Ingraham*, 430 U.S. at 673.

178. BLACKSTONE, *supra* note 85, at *129.

179. Whether *Albright* withstands scrutiny under a substantive due process framework based on eighteenth century common law is a harder question. The answer may depend on whether malicious prosecution deprives a person of "uninterrupted enjoyment of his life," in Blackstone's formulation. In my view it is appropriate to so characterize malicious prosecution.

Another question regarding the scope of constitutionally protected interests has arisen in some cases. Suppose a police officer, prison guard, or other official threatens the plaintiff, thereby causing severe, provable emotional distress. No physical intrusion has taken place, yet

B. State of Mind

Just because "liberty" receives a broad definition in a substantive due process regime, it does not follow that any common law tort is also a constitutional tort. Deciding which injuries get constitutional status is like any other inquiry into the scope of constitutional rights. The general problem is to determine whether the defendant's actions should be evaluated by law that is made through or is at least subject to revision through the democratic process, or by constitutional rules that stand outside the democratic process. Constitutional protection should be available only when the state's acts impinge on a value of constitutional dimension properly shielded from diminution due to the vicissitudes of popular rule.[180] The First Amendment does not protect every instance of expression, and the Fourth Amendment does not vindicate every invasion of privacy. Nor should constitutional tort redress all ordinary torts committed by state officers in the course of their work.[181]

In the constitutional tort context, the Court has decided that the primary value served by substantive due process is stopping egregious misconduct amounting to a severe misuse of power on the part of a government official. The inquiry focuses on whether the official's conduct is fairly characterized as "arbitrary",[182] "oppressi[ve],"[183] or an "abuse of power."[184] Under this approach, the officer's state of mind will more often than not be a decisive factor in deciding substantive due process constitutional tort cases,[185] at least cases in which the actor is not confined by the state or otherwise under state control.[186]

the threat may satisfy the elements of the common law tort of assault, or it may amount to the intentional infliction of emotional distress. Should constitutional tort be available? Lower courts are divided. *Compare* Bender v. Brumley, 1 F.3d 271 (5th Cir. 1993) *and* Swoboda v. Dubach, 992 F.2d 286 (10th Cir. 1993) (threats not sufficient) *with* McDowell v. Jones, 990 F.2d 433 (8th Cir. 1993) (threats generally not sufficient but terrorizing prisoner with threats of death would be). *See also* Robertson v. Plano City of Texas, 70 F.3d 21 (5th Cir. 1995).

180. *See* William Burnham, *Separating Constitutional and Common-Law Torts: A Critique and a Proposed Constitutional Theory of Duty,* 73 MINN. L. REV. 515, 554-55 (1989).

181. *See id.* at 551-52.

182. Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992).

183. Daniels v. Williams, 474 U.S. 327, 331 (1986) (internal quotation marks and citations omitted).

184. *Id.* at 332. For similar formulations, see *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989); *Davidson v. Cannon*, 474 U.S. 344, 348 (1986). *See also* Rochin v. California, 342 U.S. 165, 172-73 (1952) (due process protects against "conduct that shocks the conscience" or "afford[s] brutality the cloak of law").

185. Where the issue is *procedural* due process, the defendant's state of mind is not, and should not be, the crucial factor. *See* Burnham, *supra* note 180, at 525-37. *Daniels* reads as though the Court thinks otherwise. Professor Burnham shows why this is wrong. *See id.*

186. Confinement cases, as we shall see, present some special problems. *See infra* text accompanying notes 205-10.

The policeman who acts in good faith in employing a certain level of force, mistakenly believing his actions are justified, may do substantial harm. But he has not abused his power or used it as an "instrument of oppression,"[187] even if he fails the test of "objective reasonableness." He has made what is, at least from his perspective, an innocent mistake and should not be liable for a constitutional tort. A prosecutor who sets out to destroy someone by bringing a groundless prosecution, and who knows it is without merit, does engage in the kind of abuse of power that ought to be condemned by constitutional tort. A social worker who knows a four-year-old child is being abused by his father, possesses the power to remove the child from the home, yet does nothing to save him from the attacks, ought to be liable for a constitutional tort.

Current doctrine decides each of these hypothetical cases the other way. The first case is based on *Graham v. Connor*, where the Court stressed that "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."[188] The second is suggested by the opinion in *Albright v. Oliver*, where the Court followed *Graham's* reasoning and rejected substantive due process claims for malicious prosecution in favor of an as yet undefined Fourth Amendment standard.[189] The third is a variant of *DeShaney v. Winnebago County Department of Social Services*, where the Court wholly excluded the imposition of a constitutional duty upon the social workers, no matter how much knowledge they may have of the child's predicament.[190]

Nor are these the only cases in which state of mind makes no difference to the Court. *Baker v. McCollan*[191] seems to hold that a

187. Davidson v. Cannon, 474 U.S. 344, 348 (1986); *see also* Daniels v. Williams, 474 U.S. 327, 332 (1986) ("Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person.").

188. 490 U.S. 386, 397 (1989). Those who favor strong restraints on government misconduct may applaud *Graham's* holding that a policeman may be found liable under an objective test. Keep in mind, however, that the objective test may in practice be hard to meet, as it takes account of the emergency conditions under which policemen work. *See id.* at 396-97. At the same time, the Court has wholly excluded recovery based on the officer's bad motives, though it will often be possible to get evidence of those motives entered into evidence. *See id.* at 399 n.12.

189. 114 S. Ct. 807, 811 & n.4, 813 (1994). For example, *Albright*, disapproves of *Torres v. Superintendent of Police of Puerto Rico*, 893 F.2d 404, 409 (1st Cir. 1990), a case that gave decisive weight to the defendant's motive. *Albright*, 114 S. Ct. at 811 n.4.

190. 489 U.S. 189, 202 & n.10 (1989) (even if the defendants had "the requisite 'state of mind' to make out a due process violation," they would still lose, "[b]ecause . . . the Due Process Clause did not require the State to protect Joshua from his father").

191. 443 U.S. 137, 145 (1979).

three day imprisonment pursuant to a valid warrant cannot be a constitutional tort, even if the jailor is recklessly unaware that the plaintiff is the wrong man.[192] Relying on *Paul*, the Court in *Siegert v. Gilley*[193] dismissed the constitutional claim of a former government employee who alleged that his former supervisor had "maliciously and in bad faith" defamed him.[194]

In my view, all of these cases are wrong, and the Court's error can be traced to the faulty foundations upon which constitutional tort doctrine is built. The Court's basic mistake lies in its failure to ground the doctrine in substantive due process, with its emphasis on abuse of power. Missing the *limiting* nature of this principle, the Court in *Paul*, *Baker*, and *DeShaney* grossly exagerates the risk of overlap between common law and constitutional torts. Missing the *unifying* nature of this principle, the Court in *Graham* artificially divides constitutional tort cases into Fourth, Eighth, and Fourteenth Amendment categories.

Siegert is a corollary of *Paul*, and one that illustrates the implications of *Paul's* misguided concern about turning the due process clause into "a font of tort law to be superimposed upon whatever systems may already be administered by the States."[195] Given *Paul's* holding that reputation is not a constitutionally protected interest, the defendant's state of mind in harming the plaintiff's reputation cannot make any difference. Yet a government official's calculated, knowingly false, and malicious destruction of someone's reputation is just the kind of government conduct at which constitutional tort should be directed.[196]

The Court in *DeShaney* went astray in a different way. Unlike *Paul*, the opinion did not maintain (at least directly) that constitutional tort would inappropriately intrude on the domain of the common law. The common law, however, seems to have exerted a powerful influence on the decision, though one that is not acknowledged by the Court. For the Court did, in effect, adopt the common law's distinction between misfeasance and nonfeasance. Like a court

192. *See* Wells & Eaton, *supra* note 3, at 255-56.

193. 500 U.S. 226 (1991). In order to win, the plaintiff must show some injury in addition to the stigma. *See id.* at 234. For a good treatment of the doctrine, see *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994).

194. *See Siegert*, 500 U.S. at 229-35. Unlike *Paul*, *Baker* has evidently been consigned to the obscurity it deserves. *See, e.g.*, Pinaud v. County of Suffolk, 52 F.3d 1139 (2d Cir. 1995); Cannon v. Macon County., 1 F.3d 1558, 1563 (11th Cir. 1993); Sanders v. English, 950 F.2d 1152, 1162 (5th Cir. 1992).

195. Paul v. Davis, 424 U.S. 693, 701 (1976); *see also* Baker v. McCollan, 443 U.S. 137, 145 (1979) (distinguishing constitutional tort from false imprisonment).

196. *Cf.* Monaghan, *supra* note 32, at 433 (anticipating *Siegert*).

applying the common law rule, it dismissed any notion that the defendant's knowledge should count against him. A constitutional approach that properly stresses abuse of power, however, would have been less likely simply to parrot the common law of torts,[197] and would have taken most seriously the question whether a badly motivated failure to act on the part of state officials might justify constitutional tort liability.[198]

Graham advances no justifications grounded in constitutional principle to support the "objective reasonableness" rule, and is squarely at odds with the abuse of power principle laid down in cases like *Daniels*, *Davidson*, and *Collins*.[199] *Graham's* rejection of state of mind inquiries seems to be largely a consequence of the Court's categorical approach, under which it divides the cases among the Fourth, Eighth, and Fourteenth Amendments.[200] An objective test is called for, the Court explains, on account of the text of the Fourth Amendment, which forbids "unreasonable . . . seizures," and prior cases that give that term an objective gloss in protecting privacy.[201] If "abuse of power" were the touchstone of liability for constitutional tort law, the Fourth Amendment would be banished from the constitutional law of police beatings, and the officer's state of mind could become the focal point of inquiry.

197. *Cf.* Michael Wells & Thomas A. Eaton, *Affirmative Duty and Constitutional Tort*, 16 U. MICH. J.L. REFORM 1, 3-13 (1982) (arguing that since the common law rule is based largely on respect for individual autonomy, and since governments have no claim to autonomy, it is inappropriate to justify a no-duty rule for governments by reference to the common law rule for individuals).

198. *DeShaney's* narrow holding against liability is not necessarily discredited by paying more attention to state of mind. The case raises other issues as well, such as the problem of reconciling the imposition of a duty on the officer to protect the child with the officer's potential liability to the parent for unjustifiably removing the child from the home. *See* POSNER, *supra* note 114, at 208-10.

199. *See supra* text accompanying notes 182-87.

200. Though the Court does not say so in *Graham*, it has elsewhere offered another reason for its aversion to subjective inquiries. In setting the test for official immunity from paying damages, the Court has moved away from a subjective to a wholly objective test. *See* Anderson v. Creighton, 483 U.S. 635 (1987); Harlow v. Fitzgerald, 457 U.S. 800 (1982). In that context, the Court stresses that subjective inquiries result in more trials, and officials should be spared the burden of going to trial if possible. *See Harlow*, 457 U.S. at 816. Subjective inquiries also permit more intrusive discovery, which is "peculiarly disruptive of effective government." *Id.* at 817.

These considerations do not seem compelling. A plaintiff's showing that the defendant has abused his power ought to be enough to overcome them. At any rate, outside the immunity context the Court has not remained faithful to the principle of favoring objective inquiries. *See, e.g.*, Farmer v. Brennan, 571 U.S. 825, 828-29 (1994) (subjective inquiry governs obligation of prison officers to protect inmates from assault); Collins v. City of Harker Heights, 503 U.S. 115, 125-26 (1992) (city not liable for harm to its employee due to unsafe working conditions because no abuse of power was shown); Daniels v. Williams, 474 U.S. 327, 330-31 (1986) (subjective inquiry governs constitutional tort liability in substantive due process context).

201. *See* Graham v. Connor, 490 U.S. 386, 394-97 (1989).

Of course, the Court should not dismiss out of hand the rule announced in *Graham*, simply because the opinion offered an unpersuasive, formalistic defense of it. The Court should instead address the comparative merits of "objective reasonableness" and "abuse of power" as principles of constitutional tort. What is the substantive case in favor of "objective reasonableness"? The test resembles, if it is not identical to, the negligence test that governs liability in many areas of ordinary tort law.[202] Throughout tort law, the general aim of the reasonableness test is to accommodate the competing interests of plaintiffs and defendants in protection from injury and freedom of action. In many contexts, however, lawmakers grant special exemptions from the reasonableness test for the sake of pursuing policies they deem worthy of extra protection. Most important, for our purposes, through rules of sovereign and official immunity legislatures and courts have often acted to protect the public fisc and to encourage government officials to act without timidity. Precisely because these rules are of subconstitutional stature, they—like the reasonableness standard itself—are subject to legislative adjustment.

The point of the Court's most persuasive constitutional tort cases—cases like *Daniels*, *Davidson*, and *Collins*—is that constitutional tort should be reserved for harms that are sufficiently egregious as to justify a sanction that is not subject to political dilution. The basic weakness of *Graham* is not merely that the opinion fails to discuss such matters of constitutional principle, but that its holding seems to collapse the Constitution into the common law. Perhaps I am wrong and a better opinion can be written, showing why "objective reasonableness" really is an appropriate *constitutional* standard.[203] At least for now, however, the case for the *Graham* rule has not been made. Though some plaintiffs may win more easily under that rule, the substantive due process approach, with its emphasis on abuse of power as the key to liability, would better serve the goal of separating

202. These areas include not only accidental injuries, but also intentional torts, where defendants may seek to justify their actions by claiming defenses such as self defense and defense of property. The issue in such cases is not whether, with hindsight, the force used was necessary. It is whether the defendant acted reasonably in the circumstances.

203. One might argue, for example, that "mental entities in law—intent, premeditation, 'free will' . . . are entities of distinctly dubious ontology" and "propose that we can do without the concept of mind in the strong sense even when analyzing judicial behavior." RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 167-68 (1990). This tack is unavailable to the Court as a defense of *Graham*, unless it is prepared to jettison other cases where constitutional tort liability depends on the defendant's state of mind. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825 (1994); Whitley v. Albers, 475 U.S. 312 (1986).

the cases that warrant *constitutional* tort status from those that do not.[204]

C. *Confinement*

In *Graham* the Court observed that the objective test it had forged for excessive force by the police was not inconsistent with the subjective test that governs the rights of prisoners to medical care and protection against assaults. The latter cases, the Court explained, are covered by the Eighth Amendment's "cruel and unusual punishments" clause, and "the terms 'cruel' and 'punishments' clearly suggest some inquiry into subjective state of mind, whereas the term 'unreasonable' does not."[205] In a similar vein, *Farmer v. Brennan* declared that the Eighth Amendment "deliberate indifference" standard governing conditions of confinement is a subjective test, because that amendment "does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments'" and "an official's failure to alleviate a significant risk that he should have perceived but did not . . . cannot under our cases be condemned as the infliction of punishment."[206]

In *Farmer* as in *Graham*, the Court's Bill-of-Rights-oriented approach steered it wrong. *Farmer's* textual argument and its citations to pre-*Estelle* Eighth Amendment cases are beside the point, because the proper doctrinal rubric for inmate rights to medical care and safe conditions is the Due Process Clause rather than the Eighth Amendment.[207] Rather than struggling to fit these claims into a procrustean Eighth Amendment bed, the Court ought to have addressed the issue in terms of substantive due process principles, identifying the compet-

204. While I share the view expressed in cases like *Daniels* that some sort of egregious official behavior is necessary to warrant the imposition of constitutional rules, this understanding of the scope of constitutional tort rights has drawn criticism from Professor Whitman, who argues (in a pre-*Graham* article) that instead of "defining constitutional cases as falling into some particularly egregious subcategory of torts," the Court should have "tak[en] the opportunity to develop a vocabulary, truly independent from tort, that could be used to discuss the special problems created by the massing of power in institutions." Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 275 (1986).

I am skeptical that courts are competent to solve the admittedly grave concerns that arise from "the massing of power in institutions." Courts are better at resolving "bipolar" disputes where a sharply presented issue divides the two sides than at dealing with the many-sided, "polycentric" problems presented by the general growth of government power. *See* Fuller, *supra* note 155, at 393-405. I worry, too, that judicial judgments will displace legislative ones under Professor Whitman's scheme more often than is healthy in a democracy.

205. *Graham*, 490 U.S. at 398.

206. 511 U.S. 825, 837-38 (1994).

207. *See supra* text accompanying notes 65-78.

ing values and assessing their comparative strength in the confinement context.

For purposes of defining the scope of governmental duty in constitutional tort, there is a big difference between persons who are free to come and go as they please and those confined by the state. Toward the latter group, "the Constitution imposes upon the State affirmative duties of care and protection . . . ."[208] Granted that higher duties are owed inmates, what is the liability rule? That inmates are owed greater care than the general public does not necessarily mean an objective standard should govern liability.[209] It does, however, undercut *Farmer's* facile conclusion that a subjective test is required simply because the Eighth Amendment forbids certain "punishments." If there are good reasons why a subjective test should apply to prison officials sued by inmates, the Court should bring them into the open, rather than rest its case on a textual exegesis that merely obscures the real issues at hand.[210]

208. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 198 (1989); *see also* Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 1030-35 (1996). Elsewhere I have argued that the Constitution imposes affirmative duties not only where someone is confined, but also in other circumstances where the state exercises substantial control over person's well-being. *See* Eaton & Wells, *supra* note 6, at 123-27; *see also* Laura Oren, DeShaney's *Unfinished Business: The Foster Child's Due Process Right to Safety*, 69 N.C. L. REV. 113 (1990); Laura Oren, *The State's Failure to Protect Children and Substantive Due Process:* DeShaney *in Context*, 68 N.C. L. REV. 659 (1990). For a contrary view, see Armacost, *supra*, at 1025-29.

209. For the view that liability should be quite broad, see Christina B. Whitman, *Governmental Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 272-73 (1986) (arguing that liability should be available where "[g]overnmental practices and institutional structures . . . create special and impermissible harms whether they are the result of deliberate decisions or inadvertence."). Though Whitman's argument is apparently not limited to confinement cases, it seems to me to be strongest in that context.

210. The appropriate standard may vary depending on the nature of the claim. Consider two prisoner suits decided the same day. In *Daniels v. Williams*, 474 U.S. 327, 328 (1986), the inmate slipped on a pillow and claimed that it was negligently left in a stairwell by a deputy. Taking "abuse of power" as the touchstone of liability for a deprivation of due process, the Court denied relief. *See id.* at 332. "Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law." *Id.* A bit later, the Court observed that "[t]he only tie between the facts of this case and anything governmental in nature is the fact that respondent was a sheriff's deputy . . . and petitioner was an inmate . . . ." *Id.*

The other case is *Davidson v. Cannon*, 474 U.S. 344, 345 (1986), where the prisoner was atacked by another inmate, after requesting protection from prison officials. Applying *Daniels*, the Court held that their negligent failure to respond was not a constitutional violation. *See id.* at 347. But the cases are quite different, for here, unlike *Daniels*, the state "render[ed] a person vulnerable and strip[ped] him of his ability to defend himself . . . ." *Id.* at 355 (Blackmun, J., dissenting). In such circumstances, the case for constitutional tort liability is strong. *See id.* at 355-56; *see also* Burnham, *supra* note 180, at 569-70.

D. Arbitrary Distinctions

Whatever else may be said for or against it, the categorical approach creates a host of doctrinal peculiarities. For example, the duty to protect persons confined by the state includes not only prisoners,[211] but also pretrial detainees[212] and involuntarily committed mental patients.[213] But the latter two categories of claimants must bring their cases under the Due Process Clause, even though prisoner rights rest on the Eighth Amendment.[214] Since the Eighth Amendment reasoning of *Farmer* does not apply to pretrial detainees and mental patients, the Court may ultimately apply an objective test to their suits.[215] In that event, there may well be cases in which two persons confined in the same cell and given the same treatment by the same guards each bring suit, with the result that one wins because he is a "prisoner" while the other loses because he is a "pretrial detainee." The Court might choose to treat these two persons the same, which in turn may lead it to afford differing legal treatment to pretrial detainees and mental patients.[216] Then the court would have to explain why two plaintiffs whose rights come from the very same source are subject to very different constitutional rules.[217] Finally, the Court might treat all

211. *See* Estelle v. Gamble, 429 U.S. 97, 104-05 (1976).

212. *See* City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983).

213. *See* Youngberg v. Romeo, 457 U.S. 307, 324 (1982).

214. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 198-99 (1989).

215. *See Youngberg*, 457 U.S. at 312 n.10 (district court in a mental patient case erroneously used the deliberate indifference standard articulated in *Estelle*); *cf.* Wilson v. Williams, 83 F.3d 870, 876 (7th Cir. 1996) (apparently applying an objective test in a suit by a pretrial detainee for excessive force, though the opinion is somewhat ambiguous).

216. For a recent case holding that the rights of pretrial detainees are governed by a standard identical to that of *Farmer*, see Murphy v. Walker, 51 F.3d 714, 717 (7th Cir. 1995); *cf.* Hale v. Tallapoosa County, 50 F.3d 1579, 1582 (11th Cir. 1995). In *Hale* the Court appears to state that the rights of pretrial detainees are *at least* equal to those of prisoners, *Hale*, 50 F.3d at 1582 n.4, but it fails to grant full recovery and fails to consider whether he might prevail under any other standard, so the effect of the opinion is to apply *Farmer*.

Neither case speaks to the rights of mental patients.

217. *See, e.g.*, Neely v. Feinstein, 50 F.3d 1502, 1507-08 (9th Cir. 1995) (gross negligence standard for mental patients; deliberate indifference standard for pretrial detainees).

As Sheldon Nahmod has pointed out to me, this is already the case with regard to the Eighth Amendment. Under *Estelle* and *Farmer*, prisoners who complain of inadequate medical care must meet a "deliberate indifference" standard. Inmates complaining of physical abuse by a guard must show that the guard applied force "maliciously and sadistically for the very purpose of causing harm," Whitley v. Albers, 475 U.S. 312, 320-21 (1986), or with "a knowing willingness that . . . [harm] occur." Hudson v. McMillian, 503 U.S. 1, 7 (1992).

There may be good reasons for the difference, in that "the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns," while "officials confronted with a prison disturbance must balance the threat unrest poses . . . against the harm inmates may suffer if guards use force." *Id.* at 6.

This difference is, of course, consistent with my argument that the constitutional value at stake in medical cases is not protection from cruel and unusual punishment, but personal secur-

three groups alike, concluding that even though the Due Process Clause does not proscribe "punishments," the subjective test it justified in terms of Eighth Amendment text in *Farmer* nonetheless applies to due process cases as well. None of these alternatives is appealing. They highlight the artificiality of the Court's categorical model.

Another line-drawing problem arises in connection with *Graham*. After *Graham*, lower courts must determine whether a given encounter with the police is an "arrest," an "investigatory stop," or is otherwise covered by the Fourth Amendment.[218] If it is not, then lower courts have held that substantive due process, with its subjective test, is the only possible basis for a constitutional tort suit.[219] A criminal suspect injured at a roadblock can sue under *Graham*, with its objective test.[220] An innocent bystander injured in the course of a high-speed chase sues under substantive due process, where a subjective test apparently governs.[221] Does that make any sense? In a similar vein, once an arrest is made, courts must determine the point in time at which an arrestee, with rights defined by *Graham*, becomes a pretrial detainee, covered only by substantive due process.[222] In other words, different standards may apply depending on whether force is applied outside the police car, in the police car, or at the jail a few minutes later. Again, it is hard to see any justification in terms of constitutional tort principle for these distinctions. A general substantive due process approach would eliminate the need for them.

E. Other Constitutional Tort Issues

In keeping with the general scope of this Article, my aim in this Part has been to examine those aspects of constitutional tort doctrine that have suffered most under the Court's analytical framework, rather than to set forth a comprehensive treatment of all aspects of

ity, and that this interest is not well-served by conceiving of the area in Eighth Amendment terms in the first place.

218. *See* Kathryn R. Urbonya, *The Constitutionality of High-Speed Pursuits Under the Fourth and Fourteenth Amendments*, 35 ST. LOUIS U. L.J. 205, 269-70 (1991).

219. *See, e.g.*, Jones v. Wellham, 104 F.3d 620, 628 (4th Cir. 1997); Wilson v. Northcutt, 987 F.2d 719, 722 (11th Cir. 1993).

220. *See* Brower v. County of Inyo, 489 U.S. 593, 596-97 (1989); Horta v. Sullivan, 4 F.3d 2, 10 (1st Cir. 1993).

221. *See, e.g.*, Fagan v. City of Vineland, 22 F.3d 1296, 1303 (3rd Cir. 1994) (en banc) ("shock the conscience" test applies).

222. *See* Graham v. Connor, 490 U.S. 386, 395 n.10 (1989). *See also Brothers v. Klevenhagen*, 28 F.3d 452 (5th Cir. 1994), where the majority and dissenting opinions offer diverse views on this issue.

the doctrine. Earlier articles, written by me and my colleague Tom Eaton, address many of the issues I have passed over here. We argue, for example, that under a substantive due process approach to constitutional tort a distinction should be drawn between unintentional injuries and cases where the defendant intended to harm the plaintiff. In the former group of cases, negligence should be insufficient for liability,[223] but recklessness or deliberate indifference should be enough.[224] In cases of deliberate harm, the motive behind the defendant's action is crucial. Policemen should, of course, be allowed to use force to stop suspects and control arrestees, for example, but not for an impermissible reason like revenge or extrajudicial punishment.[225] Even where the application of force is justified, courts should require that the amount of force be proportionate to the need for it. Corporal punishment may be constitutionally acceptable, but a student should not receive thirty whacks with a paddle for coming late to class one day.[226] The severity of injury, standing alone, should not make a difference one way or the other in determining the liability issue, but should be relevant to damages.[227] Higher constitutional duties are triggered not only by involuntary confinement, but by other forms of state action that expose persons to danger, such as voluntary confinement in a mental institution, placement of a child in a foster home, state interference with private rescue efforts, and failing to follow through on an undertaking to protect the plaintiff from private violence.[228]

CONCLUSION

Everyone understands that rights and remedies are related, in that rights have little real value in the absence of effective remedies for their violation. The development of constitutional tort law illustrates another, more subtle, connection between rights and remedies: A new remedy sometimes prompts the assertion of new rights that were virtually inconceivable in the past. Before damages became widely available as a remedy for constitutional violations, few lawyers thought of past tort-like harm in constitutional terms. Once litigants began to assert constitutional tort claims, the new conception of rights seemed perfectly natural. Perhaps the most striking feature of consti-

223. *See* Wells & Eaton, *supra* note 3, at 238-41.
224. *See id.* at 241-46.
225. *See id.* at 246-48.
226. *See id.* at 250-52.
227. *See id.* at 248-50.
228. *See* Eaton & Wells, *supra* note 6, at 142-59.

tutional tort is the quick and uncontroverted embrace of new constitutional rights by the Supreme Court.

Problems arise not on the question of whether there are any constitutional rights against the infliction of personal injuries, but in identifying the constitutional foundations of those rights and specifying the kinds of government conduct that transgresses the Constitution. Ambivalent about judicial law making and especially suspicious of the doctrine of substantive due process, the Court made two unwise decisions in addressing cases at the boundary between constitutional tort and common law tort. One was to rely on the availability of common law causes of action as a justification for excluding some cases from the realm of constitutional tort. The other was to place constitutional tort cases into three separate doctrinal categories, with some governed by the Fourth and Eighth Amendments, and substantive due process serving only for those that could not be crammed into another doctrinal pigeonhole. The result has been a constitutional tort doctrine that rests on flimsy foundations, and a body of rules that do not serve the constitutional values that ought to animate judicial lawmaking in the area.

In the boundary cases the central aim of constitutional tort should be to protect the broad range of common law interests encompassed within Fourteenth Amendment "liberty," in circumstances where the official's conduct is fairly characterized as an abuse of power. The appropriate doctrinal category is substantive due process, however uncomfortable the Court may be with that doctrine. The Court ought either to cast its lot with the critics of substantive due process, or else to face them down. If the Justices really believe that they may not make law, then constitutional tort doctrine must be jettisoned in any event, along with a wide range of other constitutional doctrines. But if they think, as their holdings seem to indicate, that a creative judicial role making is sometimes appropriate and that tort law is an area meeting the criteria for judicial invention, then the proper course is to say so, and to offer real justifications rather than the false ones found in many of the opinions. The legitimacy of judicial law making turns not on whether the Court can avoid references to substantive due process as much as possible, but on whether it can offer persuasive reasons grounded in constitutional values for its creative work.