1-1-1984

Substantive Due Process and the Scope of Constitutional Torts

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I. INTRODUCTION

Ever since the birth of constitutional tort in *Monroe v. Pape,* [1] courts have recognized that many harms inflicted by government may amount to constitutional violations as well as ordinary torts and have struggled to define the appropriate boundary between the two. Everyone agrees that constitutional torts are somehow different from their common law[2] counterparts. Those differences, however, have proven difficult to articulate.[3]

The issue is of practical as well as theoretical interest. Although free to alter or restrict a cause of action arising under state statutory or common law, state legislatures and common law courts cannot modify or abrogate a plaintiff's right to recover constitutional

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[1] 365 U.S. 167 (1961). Although damage actions were occasionally brought before 1961 for violations of constitutional rights, the explosive growth of such suits followed the Supreme Court's decision in *Monroe.* For a discussion of the early development of constitutional tort, see Shapo, *Constitutional Tort:* Monroe v. Pape *and the Frontiers Beyond,* 60 NW. U.L. REV. 277 (1965).

[2] Throughout this Article, the phrase "common law torts" refers loosely to those judge-made and statutory rules of tort liability developed primarily by the states.

There is a form of constitutional common law that plays a significant role in constitutional tort. *See* Wells & Eaton, *Affirmative Duty and Constitutional Tort,* 16 U. MICH. J.L. REF. 1, 18-21 (1982) (discussing rules developed by Supreme Court, such as fourth amendment exclusionary rule, which lack constitutional status but promote constitutional values). This specialized brand of common law is not, however, the topic of this Article.

[3] Courts readily confess that "[n]o problem so perplexes the federal courts today as" defining the boundary between common law and constitutional torts. Jackson v. City of Joliet, 715 F.2d 1200, 1201 (7th Cir. 1983); *see also* cases cited *infra* note 133.

tort damages.[4] This significant difference makes constitutional tort a stronger protection for the injured plaintiff than ordinary tort and more unyielding to legitimate governmental interests in limiting liability. It is important, therefore, to determine the proper scope of constitutional tort. That is, in what circumstances should an injury inflicted by a government actor be cognizable in constitutional tort, and when should the injury be relegated to whatever remedies the state's statutory and common law may provide?

This question is easily resolved when the plaintiff asserts a violation of a specific and peculiarly constitutional right. The government employee who is fired for speech protected by the first amendment, the homeowner whose house is searched without a warrant or the probable cause required by the fourth amendment, and the black prison inmate who is treated more harshly than whites in violation of the equal protection clause all have tort claims for the violation of specific constitutional rights. The law is settled that these plaintiffs can assert their claims in constitutional tort whether or not state law also provides a remedy.[5]

The question is more difficult when the plaintiff's harm is the kind of physical, emotional, or dignitary injury customarily dealt with by state tort law. When prison guards lose an inmate's property, or a school teacher paddles a student, or the police publicly label an unconvicted criminal defendant a shoplifter, the plaintiff cannot claim a breach of any specific substantive constitutional right, but must rely instead on the due process clause of the fifth or fourteenth amendment. In order to succeed, he must convince the court that the defendant's action was a deprivation of life, liberty, or property[6] without due process of law.

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[4] *See* Martinez v. California, 444 U.S. 277, 284 (1980). The *Martinez* Court held that a state law granting the defendants immunity had no bearing on the plaintiff's constitutional tort claim. *Id.*

State law may control certain *procedural* issues, such as the appropriate statute of limitations. *See, e.g.,* Morell v. City of Picayune, 690 F.2d 469, 470 (5th Cir. 1980); *see generally* Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Role of Section 1988,* 122 U. PA. L. REV. 499 (1980).

[5] *See* Monroe v. Pape, 365 U.S. 167, 183 (1961); *see also* Patsy v. Board of Regents, 457 U.S. 496, 516 (1982) (reaffirming supplementary nature of § 1983).

[6] We do not here enter the ongoing debate on what should be considered "property" or "liberty" within the meaning of the Constitution. For a discussion of that debate, see Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-33 (1982). *See generally* Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977); Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 CALIF. L. REV. 146 (1983); Terrell, *Prop-*

The Supreme Court has labored to develop a doctrinal basis to exclude from the scope of constitutional tort those due process claims traditionally controlled by common law tort. Most recently, in *Parratt v. Taylor*,[7] the Court ruled that the negligent loss of property by state officials did not present a constitutional tort claim when state tort remedies provided adequate relief. The Court treated the problem as one of procedural justice and emphasized that a state procedure could meet the demands of due process as well as a federal one. *Parratt* has been both hailed and condemned. On the one hand, some commentators see the decision as providing a "unified theory for handling the relationship between state tort law and federal section 1983 claims."[8] On the other hand, some fear that it signals "a sweeping curtailment of federal civil rights litigation in favor of state courts and remedies."[9]

The thesis of this Article is that both the Supreme Court and its critics have failed to identify and confront the central issue presented by these due process constitutional tort cases. That issue is neither procedural fairness nor the choice between state and federal courts. It is deciding whether a government-inflicted injury to life, liberty, or property violates the substantive protections of

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erty, Due Process and the Distinction Between Definition and Theory in Legal Analysis, 70 GEO. L.J. 861 (1982); Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3 (1983).

The cases in which the boundary between constitutional and common law tort is the least clear are those concerning interests readily characterized as constitutional property or liberty interests. *See, e.g.*, Parratt v. Taylor, 451 U.S. 527, 536 (1981) (tangible personal property); Ingraham v. Wright, 430 U.S. 651, 672-74 (1977) (personal security).

[7] 451 U.S. 527, 543 (1981).

[8] Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies:* Parratt v. Taylor *and* Logan v. Zimmerman Brush Co., 1982 U. ILL. L.F. 831, 833; *see also* Travis & Adams, *The Supreme Court's Shell Game: the Confusion of Jurisdiction and Substantive Rights in Section 1983 Litigation*, 24 B.C.L. REV. 635, 648-58 (1983) (criticizing *Parratt*'s mixing of procedure and substance, but suggesting that the Court adopt exhaustion of state remedies doctrine); Comment, *Federalism, Section 1983 and State Law Remedies: Curtailing the Federal Civil Rights Docket by Restricting the Underlying Right*, 43 U. PITT. L. REV. 1035, 1056 (1982) (approving result reached in *Parratt*, but criticizing reasoning).

[9] Kirby, *Demoting 14th Amendment Claims to State Torts*, 68 A.B.A. J. 166, 167 (1982); *see also* Friedman, Parratt v. Taylor: *Opening and Closing the Door on Section 1983*, 9 HASTINGS CONST. L.Q. 545, 546 (1982) (critical of *Parratt*'s potential to relegate to state law all constitutional tort claims that overlap with traditional tort); Note: *A Theory of Negligence for Constitutional Torts*, 92 YALE L.J. 683, 691-95 (1983) (fearful that *Parratt*'s blurring of common law and constitutional tort principles jeopardizes independence of constitutional tort action).

the due process clauses and thereby warrants a constitutionally derived tort remedy.[10]

In Part II of this Article we examine the Supreme Court's decisions in this area, focusing primarily on *Parratt v. Taylor*. We demonstrate that neither *Parratt* nor its predecessors provide meaningful guidelines to define the boundary between constitutional and ordinary tort. In Part III we argue that the correct approach to the problem is to treat it as a variant of substantive due

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[10] A premise of our approach is that substantive due process is a legitimate tool of constitutional analysis. The substantive due process doctrine recognizes substantive limitations on the use of government power that do not find explicit textual support in the Constitution beyond the due process clause itself. *See infra* text accompanying notes 93-109. The basic objective of this doctrine is to identify and preserve certain individual liberties from the coercive force of government regulations. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-2 (1978).

Although the "economic liberty" strain of substantive due process has been largely repudiated, *see id.* at 427-55, the doctrine has retained vitality in the realm of civil liberties. Many of the civil libertarian substantive due process cases scrutinize governmental restrictions on personal autonomy. *See, e.g.*, City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983) (invalidating certain restrictions on woman's right to terminate pregnancy); Roe v. Wade, 410 U.S. 113 (1973) (recognizing a woman's right of privacy and autonomy to make abortion decision). In other instances, the due process clause compels the government to provide medical care or security to those it confines. *See, e.g.*, City of Revere v. Massachusetts Gen. Hosp., 103 S. Ct. 2979, 2983 (1983) (city has constitutional obligation under due process clause to secure medical attention for criminal suspect shot during his arrest); Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982) (due process clause requires that government protect persons involuntarily committed to mental health facilities from the physical assaults of other patients). The cases we are concerned with implicate the most fundamental aspect of liberty—the right to be free from injury inflicted by the government to one's person or property. *See, e.g.*, Parratt v. Taylor, 451 U.S. 257 (1981) (loss of tangible personal property); Ingraham v. Wright, 430 U.S. 651 (1977) (infliction of corporal punishment).

We recognize, of course, that the legitimacy and precise contours of substantive due process is a highly controversial matter. *Compare* Perry, *Abortion, The Public Morals, and The Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689 (1976) *with* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973). We choose, however, not to become entangled in a lengthy defense of the general doctrine of substantive due process. We simply note that the Supreme Court continues to rely on the doctrine despite harsh criticism. For a sampling of the controversy surrounding substantive due process doctrine, see R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT (1976); J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982); Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343 (1981); Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048 (1968); Van Alstyne, *Cracks in "the New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977).

process doctrine. Applying that analysis, we propose in Part IV four principles for deciding particular cases. The actor's motive, the degree of care exercised, the relation between the amount of force used and legitimate government objectives, and the degree of government control over the plaintiff should be the determining factors in whether a given claim warrants treatment as a constitutional tort.

II. The Supreme Court Cases

The Supreme Court cases bearing directly on the scope of constitutional tort are *Parratt v. Taylor*,[11] *Baker v. McCollan*,[12] *Ingraham v. Wright*,[13] and *Paul v. Davis*.[14] These cases have presented the Court with opportunities to develop a coherent body of doctrine for resolving the boundary issue, as they all concern claims of harm to life, liberty, or property inflicted by government actors. The Court has purported to address this issue, but actually has disposed of the cases on other grounds or has written opinions that are too incoherent to provide any guidance. As a result, the scope of constitutional tort is still unclear, and the issue remains open for debate.

A. Parratt *and its Antecedents*

The Supreme Court's first effort to deal with the scope of constitutional tort was *Paul v. Davis*.[15] A police chief, seeking to control shoplifting, circulated a flyer containing photographs of persons arrested for shoplifting and which identified them as "active shoplifters." The plaintiff's photograph was included; he had been arrested but never convicted, or even tried, for shoplifting. He sought damages for harm to his reputation, and relied[16] on an earlier Supreme Court decision for the proposition that reputation is an aspect of constitutional liberty protected by the due process clause of the fourteenth amendment.[17] The Court, rejecting his claim, ruled

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[11] 451 U.S. 527 (1981).
[12] 443 U.S. 137 (1979).
[13] 430 U.S. 651 (1977).
[14] 424 U.S. 693 (1976).
[15] *Id.*
[16] *Id.* at 697.
[17] Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); *see also* Jenkins v. McKeithen, 395 U.S. 411, 428-29 (1969) (state investigation practice of publicly labeling person "crimi-

that reputation, standing alone, is not an aspect of fourteenth amendment liberty. The Court distinguished the cases cited by the plaintiff on the ground that in them harm to reputation was accompanied by some other deprivation, like the loss of a job or the right to buy liquor.[18]

The opinion itself indicates why the Court strained to limit the reach of its prior decisions. *Paul* presented allegations of defamation that would ordinarily be brought as a common law tort in state court. The plaintiff was able to frame his claim as a constitutional tort only because the defendant was a state actor. The Court feared that, if this circumstance could convert common law defamation into a constitutional tort case, constitutional status could not be denied to suits by "the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle . . . ."[19] Under that broad view of life, liberty, and property, the fourteenth amendment would become "a font of tort law to be superimposed upon whatever systems may already be administered by the States."[20] Such a result, thought the Court, "would come as a great surprise to those who drafted and shepherded the adoption of that amendment."[21]

The plaintiffs in *Ingraham v. Wright*[22] were public school students who had been severely paddled for misbehavior. They claimed violations of the cruel and unusual punishments clause of the eighth amendment and deprivations of liberty without due process of law. The Court, denying the first claim, ruled that the

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nal" triggered procedural due process obligations).

[18] 424 U.S. at 701-10. In *Wisconsin v. Constantineau,* the Supreme Court had held that the state must provide procedural due process before publicly labeling a person an excessive drinker. 400 U.S. at 43. While the label did affect the individual's right to purchase liquor, the opinion focused on the label's stigma. The Court's opinion plainly treats the injury to the plaintiff's reputation alone as warranting procedural safeguards.

The *Paul* Court's reasoning has been effectively criticized by others. *See, e.g.,* Monaghan, *supra* note 5, at 423-29; Shapiro, *Mr. Justice Rehnquist: A Preliminary View,* 90 HARV. L. REV. 293, 322-28 (1976); Tushnet, *The Constitutional Right to One's Good Name: An Examination of the Scholarship of Mr. Justice Rehnquist,* 64 KY. L.J. 753 (1976); Note, *Reputation, Stigma, and Section 1983: The Lessons of* Paul v. Davis, 30 STAN. L. REV. 191 (1977).

[19] 424 U.S. at 698. The concern with constitutionalizing automobile accidents is apparently a recurring fear of the Court. *See* Friedman, *supra* note 9, at 563.

[20] 424 U.S. at 701.

[21] *Id.* at 699.

[22] 430 U.S. 651, 657 (1977).

eighth amendment does not apply to public schools.[23] The Court did agree with the plaintiffs that personal security against physical harm is an aspect of constitutional liberty.[24] The Court pointed out, however, that every state provides tort remedies for excessive corporal punishment and held that these, "[i]n view of the low incidence of abuse, [and] the openness of our schools," provided due process of law.[25] As in *Paul,* the Court was concerned that recognizing a constitutional tort in such a case "would . . . entail a significant intrusion into an area of primary educational responsibility."[26]

In *Baker v. McCollan*[27] the plaintiff had been mistakenly named in an arrest warrant and as a result spent several days in jail. The Court denied his constitutional tort claim because the arrest was made pursuant to a constitutionally valid warrant and he was held for only a few days. In these circumstances, his deprivation of liberty was brought about pursuant to due process of law.[28] The Court distinguished constitutional tort from common law false imprisonment and stressed that the plaintiff may have a good claim "under a tort-law analysis," but that this would not be enough for a constitutional claim.[29] The Court never indicated what additional factors might give a false imprisonment claim constitutional dimension.[30]

The most recent and the most important Supreme Court case is *Parratt v. Taylor.*[31] The plaintiff was a prison inmate who sued prison officials on the ground that they had lost some hobby

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[23] *Id.* at 671. The Court held that the cruel and unusual punishments clause protected only those who had been convicted of crimes. *Id.*

[24] *Id.* at 674.

[25] *Id.* The apparent rationale is that the threat of tort liability deters school officials from inflicting unwarranted corporal punishment. Potential liability reduces the risks of unjustified punishments, thus serving the same purposes as a hearing. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 484-85, 502, 511-12 (1978).

[26] 430 U.S. at 682.

[27] 443 U.S. 137, 141 (1979).

[28] *Id.* at 145-46.

[29] *Id.* at 142.

[30] The Court did "assume arguendo" that at some point a confinement could be so excessive in duration as to violate the constitutional rights of the accused. *Id.* at 145. The only hint as to how long a duration is permissible is one cryptic reference to the right to a speedy trial. *Id.* at 144.

[31] 451 U.S. 527 (1981).

materials belonging to him. In the lower courts[32] the plaintiff successfully argued that the defendants' negligence deprived him of property without due process of law. The Supreme Court agreed that the plaintiff had shown a deprivation of property under the fourteenth amendment,[33] but nonetheless denied his claim because he had not shown that the deprivation was without due process. Relying in part on *Ingraham,* the Court held that due process was served by a state law remedy available to the prisoner.[34] Echoing *Paul,* the Court said that granting constitutional status to the plaintiff's claim "would almost necessarily result in turning every alleged injury which may have been inflicted by a state official . . . into a violation of the Fourteenth Amendment."[35] As in *Paul,* the Court resisted making the due process clause such a " 'font of tort law to be superimposed' " on state systems.[36]

B. *Understanding* Parratt

The foregoing discussion illustrates the Supreme Court's determination to maintain a distinction between common law and constitutional torts. The need to define clearly the boundary between the two stems from two related considerations. The first of these is the concern that courts not ignore principles of federalism. Most constitutional tort actions are brought in federal court and seek to impose federal constitutional obligations on state and local offi-

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[32] *See* Taylor v. Parratt, No. 79-1514 (D. Neb. Jan. 29, 1980), *aff'd mem.,* 620 F.2d 307 (1980); *see also* 451 U.S. at 530.

[33] 451 U.S. at 536-37. *Parratt* was a four-member plurality opinion joined with various qualifications by four Justices in three separately written concurring opinions. The remaining Justice, Justice Powell, concurred in result only. The number of opinions makes it difficult to exact a precise holding. It is nonetheless clear that a majority of the Justices agreed that the negligent loss of property was a deprivation under the fourteenth amendment. This portion of the plurality opinion was accepted also by Justices White, Blackmun, and Marshall. *See* 451 U.S. at 545-46, 554-55. For a more detailed discussion of the various opinions, see Comment, *Due Process and Section 1983: Limiting* Parratt v. Taylor *to Negligent Conduct,* 71 CALIF. L. REV. 253, 255-58 (1982).

[34] 451 U.S. at 542-43. This portion of the plurality opinion was joined by Justices Stewart, Blackmun, and White. *See id.* at 544-46.

In the recent case, Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-36 (1982), the Supreme Court apparently held that the *Parratt* principle only applies to claims that arise from "random and unauthorized act by a state employee," and not to those relating to "established state procedure[s]," because a state *pre*-deprivation hearing is impracticable only in the former situation. *See also* Smolla, *supra* note 8, at 861; *infra* note 55.

[35] 451 U.S. at 544.

[36] *Id.* (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)).

cials. Constitutional tort necessarily intrudes upon the traditional sovereign prerogative of a state to define for itself the tort rules governing its conduct.[37] Maintaining the boundary between common law and constitutional tort, and keeping the latter within narrow limits, helps to reduce federal intrusions upon state autonomy.

Respect for the principles of federalism, however, provides only a partial explanation for the Court's holdings. Federal officials are also subject to constitutional tort liability. While federalism plays no significant role in this context, the importance of separating common law from constitutional tort remains. The importance of making the separation may be understood as part of the broader concern for preserving discretion and diversity in the development of tort law. The due process clause, fears the Court, could engulf all torts committed by all government officials. Such a development would unduly infringe upon the legitimate exercise of legislative and judicial discretion in the shaping of tort rules since constitutional tort cannot be modified by state law.[38] For that reason alone, constitutional tort is inherently less flexible. Furthermore, the extent to which government should be held liable for torts is a matter over which there is considerable disagreement. States with differing positions on the issue are free to adopt different tort rules under common law,[39] but would be bound by a national standard

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[37] The arguable costs of displacing state authority by constitutional tort are catalogued in Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 30-40 (1980). They include:

> (1) the decline in the states' capacity to protect individual liberties,
>
> (2) the preemption of state authority to set standards for the behavior of its own officers,
>
> (3) the replacement of common-law processes with a process that is less democratic, and that produces less flexible and less easily altered rules, and
>
> (4) the loss of substantive contributions by state lawmakers to the development of federal law.

Id. at 35. The Supreme Court itself has acknowledged the "paramount" interest of a state "in fashioning its own rules of tort law." Martinez v. California, 444 U.S. 227, 282 (1980); *see* Smolla, *supra* note 8, at 875-81.

[38] Martinez v. California, 444 U.S. 277, 284 (1980). Congress apparently can modify constitutional tort rules. *Compare* Monroe v. Pape, 365 U.S. 167, 187 (1961) (municipalities are not subject to suit under § 1983) *with* Monell v. Department of Social Servs., 436 U.S. 658, 664-65 (1978) (municipalities are subject to suit under § 1983). In both cases the Supreme Court purported to decide the issue according to legislative intent and expressed no doubts about Congress's ability to modify the constitutional tort action. The point here is that instead of 50 legislative bodies acting independently, there is only one. This necessarily reduces the number of politically responsive avenues for changing the rules.

[39] Some states, for example, impose tort liability on local governments that are negligent

under constitutional tort.

In counterbalance to these concerns for federalism and state discretion lies the plaintiff's interest in being made whole for government-inflicted injuries. By focusing on the similarities between the common law and constitutional claims, however, the Supreme Court has implicitly concluded that common law tort can adequately protect this interest. When there are state law mechanisms for dealing with such claims, the effect of permitting constitutional tort recoveries would be to abrogate state prerogatives and arguably expand the fourteenth amendment further than necessary. Accordingly, the Court in *Parratt* held that constitutional tort will not be available when an "adequate"[40] state remedy is available.

This approach to constitutional tort is superficially plausible because it appears to make an appropriate compromise between the conflicting interests. Problems become apparent, though, upon closer scrutiny. While the *Parratt* solution is potentially an innovative step toward an accommodation, it is fatally flawed as presently articulated. The innovation is in allocating the bulk of decision making to state courts.[41] The objection is that the Court has not yet indicated what, if any, constitutional restrictions it will place on the state tort rules used to decide these cases. The opinion fails to distinguish adequately between the forum in which due process constitutional tort claims will be heard and the substantive law that will govern such claims. For this reason, *Parratt* does not speak at all to the scope problem.

1. Parratt *and the Supplemental Remedy Doctrine.* In order to

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in inspecting buildings or enforcing building codes. *See, e.g.*, Wilson v. Nepstad, 282 N.W.2d 664, 669-70 (Iowa 1979); Adams v. State, 555 P.2d 235, 244 (Alaska 1976); Coffey v. City of Milwaukee, 74 Wis. 2d 526, 533-35, 247 N.W.2d 132, 136-37 (1976). Others insulate governments from liability in such situations. *See, e.g.*, Dinsky v. Town of Framingham, 386 Mass. 801, ____, 438 N.E.2d 51, 56 (1982); Cracraft v. City of St. Louis Park, 279 N.W.2d 801, 806 (Minn. 1979); Stemen v. Coffman, 92 Mich. App. 595, 598, 285 N.W.2d 305, 306 (1979).

[40] 451 U.S. at 544.

[41] Although we have serious reservations about the wisdom of channelling these cases to state courts, we do not address that question here. For different views on the wisdom of using the state courts, compare Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977), with Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981).

Our point is that there are two distinct aspects to the *Parratt* decision. One is the allocation of decision making to state courts, at least in cases involving negligent harm to property. The other, which the Court left unsettled, is the extent to which state courts will be constitutionally required to provide a remedy.

place our objection to *Parratt* in proper perspective, it is useful to examine the Court's innovation in funnelling cases to state courts. The cardinal principle of constitutional tort, established twenty years ago in *Monroe v. Pape*,[42] is that an injured person can sue in federal court under section 1983 even if state law provides a remedy for the government conduct of which he complains. The plaintiffs in *Monroe* brought a constitutional tort action against several policemen who had broken into the plaintiffs' home without a warrant and forced them to stand naked while the officers ransacked the house. One of the plaintiffs was taken to the police station and interrogated for ten hours before being released. He was never charged with a crime.[43] The defendants' conduct violated state law as well as the dictates of the fourth amendment. It was also clear that state tort law provided a "simple remedy" that would give "that full redress which the common law affords for violence done to a person."[44]

In his dissent, Justice Frankfurter urged that state law alone should control this action. He foresaw that treating the claim as a constitutional tort would mandate the establishment of a federally generated body of tort law. This development, he warned, would greatly intrude on a traditional domain of state sovereignty. The values of federalism would be better served if this claim were left to state courts and state law for redress.[45] Justice Douglas, speaking for the majority, was undeterred. "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[46]

Parratt is seemingly inconsistent with *Monroe*. *Monroe* finds coexisting state remedies irrelevant to the constitutional claim, while *Parratt* finds them dispositive. While the tension between the two cases is clear, they may be reconciled with one another. In *Monroe*, the plaintiff asserted a violation of a specific provision of the Bill of Rights, the fourth amendment. The plaintiff in *Parratt*, on the

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[42] 365 U.S. 167, 183 (1961); *see also* Patsy v. Board of Regents, 457 U.S. 496, 516 (1982) (reaffirming supplementary nature of constitutional tort).

[43] 365 U.S. at 169.

[44] *Id.* at 172.

[45] *Id.* at 242 (Frankfurter, J., dissenting). For a recent effort to revive Justice Frankfurter's argument, see Comment, *supra* note 8, at 1079-83.

[46] 365 U.S. at 183.

other hand, relied solely on the due process clause of the fourteenth amendment. The danger of constitutional tort taking over matters best left to the common law is greater when the claim asserts a general injury to life, liberty, or property than when a more specific constitutional right like freedom from illegal searches and seizures is at issue.

This difference with respect to constitutional tort policy can be stated in terms of a more technical distinction between the cases. The ruling in *Monroe* was a construction of the Civil Rights Act, 42 U.S.C. § 1983. The *Monroe* Court held that, if the plaintiff alleged a constitutional violation by a state officer, that violation was committed "under color of" state law within the terms of the statute, even though state law made it illegal and provided a remedy. In *Parratt* the Court held that deprivations of property are not constitutional violations at all when a state remedial scheme is provided. For in that event, there is no deprivation "without due process of law" within the terms of the fourteenth amendment. In short, the *Parratt* Court brings its holding into harmony with *Monroe* by taking state remedies into account in determining whether the plaintiff has shown a constitutional violation, and not whether an established violation is "under color of" state law under the statute.[47]

2. Parratt: Allocative or Substantive? Holding that the existence of state remedies will preclude constitutional tort appears to limit the scope of constitutional protection provided to life, liberty, and property interests. But the extent to which *Parratt* has that effect depends on what the Court decides adequate state remedies

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[47] This reconciliation is more illusory than real. *Parratt*'s attempt to define due process in terms of state tort remedies is plausible only if the claim is viewed in terms of procedural due process. As we demonstrate later, *Parratt* is more accurately characterized as a substantive due process case. *See infra* text accompanying notes 93-103. Substantive due process analysis focuses on the quality of the defendant's conduct and not on the existence of other tort remedies. If the defendant's conduct amounts to a substantive due process violation, the supplemental remedy doctrine of *Monroe* compels the allowance of a constitutional tort action regardless of coexisting state tort remedies. There is no persuasive reason for distinguishing between violations of substantive due process and other constitutional protections. M. PERRY, *supra* note 10, at 117-19; *see also* City of Revere v. Massachusetts Gen. Hosp., 103 S. Ct. 2979, 2983 (1983) (substantive due process right to medical treatment at least as strong as that guaranteed by eighth amendment). Other commentators have noted the inherent tension between the supplemental remedy doctrine of *Monroe* and the state-remedies-as-due-process analysis of *Parratt*. *See* Travis & Adams, *supra* note 8, at 649-53; Note, *supra* note 9, at 694-95.

include. Consider the facts of *Parratt*. Nebraska provided redress for negligent loss of property by the state, and the Court deemed this to be an adequate state remedy.[48] If the Court meant to imply that a state is constitutionally required to make the plaintiff whole upon his proving that the state negligently lost the plaintiff's property, then the primary effect of *Parratt* would be allocational. It would route claims to state courts to be decided under state law meeting federal standards of adequacy. If these standards compel a recovery, then state tort law would provide just as much protection as constitutional tort. Under this reading of *Parratt*, the due process clause would shape state tort law in a fashion analogous to the role played by the first amendment in state libel law. Just as the first amendment restricts the protection provided public figures under state libel law,[49] so would the due process clause expand state law protection against government-inflicted injuries to life, liberty, and property.[50]

On the other hand, if *Parratt* does not require that the plaintiff be made whole, then its effects are more substantive. Several lower courts have interpreted *Parratt* to mean that a state remedy is adequate even if it grants immunities to all the defendants.[51] If these cases are correct, then the scope of constitutional protection of life, liberty, and property could be very narrow. *Parratt* would not only allocate cases to state forums, but would also constitutionally sanction the formulation of substantive state tort law that could leave uncompensated those injured by government action.

The scope of constitutional tort thus depends on what state rem-

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[48] 451 U.S. at 544.

[49] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[50] *See* Smolla, *supra* note 8, at 879. A more general way of making this point is to argue that the state law decisions would not be adequate and independent state grounds precluding Supreme Court review. *See* Standard Oil Co. v. Johnson, 316 U.S. 481 (1942); Minnesota v. National Tea Co., 309 U.S. 551 (1940); Ward v. Love County, 253 U.S. 17 (1920). The rules would emanate from federal constitutional law, but they would be enforced in state courts, subject to Supreme Court review.

[51] *See, e.g.*, Daniels v. Williams, 720 F.2d 792, 797-98 (4th Cir. 1983) (potential state tort remedy is adequate even if claim is ultimately banned by sovereign immunity); Irshad v. Spann, 543 F. Supp. 922, 928-29 (E.D. Va. 1982) (available state tort remedies prevented prisoner from suing correctional officers under civil rights statute for negligent loss of property); Eberle v. Baumfalk, 524 F. Supp. 515, 518 (N.D. Ill. 1981) (Illinois statute exempting police officer from liability due to simple negligence prevented due process suit for injuries suffered by plaintiff resulting from arresting officer's negligence).

edies the Court will require to meet the "adequacy" test of *Parratt*. The problem with the opinion is that the Court provided no standards, and gave no hints, on how this question should be answered. The Court approved of Nebraska's torts claims procedure,[52] but that is the easy case for adequacy. The Court never declared that a state *must* grant redress to a plaintiff who can prove a deprivation of life, liberty, or property.[53] Nor did it examine the scope a state might give to sovereign, municipal, and official immunities against suit.[54] In *Parratt*, the Court never came to grips with the question of whether the due process clause places substantive limitations on a government's power to injure life, liberty, or property without recompense.[55]

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[52] 451 U.S. at 543. Under Nebraska law, as described by the Court, full compensatory damages are recoverable from the state upon proof that its agent lost the plaintiff's property. Punitive damages are not recoverable nor is a jury trial available. *Id.* at 543-44.

[53] On the one hand, the Court affirmed the plaintiff's right to "a meaningful opportunity" to be heard concerning rights and liabilities. *See id.* at 541. Moreover, the Court cited with approval a circuit court opinion rejecting a due process claim on the ground that state law entitled plaintiff to be made whole for his property loss. *See id.* at 542 (quoting Bonner v. Coughlin, 517 F.2d 1311, 1319 (7th Cir. 1975)). But on the other hand, the Court expressly stated: "Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process." *Id.* at 544.

[54] The Court failed to mention the possible application of statutory immunity under NEB. REV. STAT. §§ 81-82, 219(a)-(b) (1981). *See* Comment, *supra* note 33, at 276 n.62.

[55] The Court touched on this issue again in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). In *Logan*, the Court declared a state tort remedy "constitutionally inadequate" to trigger the application of *Parratt* since the state remedy could not "make the complainant entirely whole" for a deprivation of property. *Id.* at 437. Elsewhere in the opinion, however, the Court also suggested that immunity rules precluding recovery might negate the very existence of any constitutionally protected property. *See id.* at 433. Just what use the Court might make of these statements remains to be seen.

The precedential authority of the *Logan* Court's treatment of *Parratt* is open to question since the Court should never have reached *Parratt*'s "adequacy" issue at all. *Logan* was an appeal from a state court judgment that had dismissed a state law private cause of action for employment discrimination because of a state agency's delay in acting on the claim. The delay was not the plaintiff's fault. *Id.* at 426-28. The Court held that the state law cause of action was property within the protection of the fourteenth amendment, and that plaintiff could not constitutionally be deprived of it through the agency's neglect. *Id.* at 431-33.

The Court discussed *Parratt* in response to an argument made by the private employer defendant. The defendant claimed that, once the Court found a constitutional defect in the state's handling of the case, *Parratt* requires the plaintiff to sue the state agency under available state tort law. The problem with this, of course, is that *Parratt* is directed at the situation in which the choice is between a constitutional tort suit in federal court under § 1983 and a state law tort action. The justification for requiring the plaintiff to pursue the

C. *Substantive and Procedural Due Process*

The ambiguity resulting from the *Parratt* Court's failure to elaborate on its adequate state remedies rule can also be described as a failure to articulate whether the holding is a ruling on procedural due process or substantive due process or both. This failure makes the opinion virtually worthless as a guide to the scope of constitutional tort. The Court stated its decision as a ruling on due process, but the due process clauses of the fifth and fourteenth amendments have both a procedural and a substantive component. Procedural due process concerns the method by which government deprives a person of life, liberty, or property. Due process in this context is designed to insure that governmental intrusions upon constitutionally protected interests are accompanied by fair procedures. As recognized by the Court, the objective of "procedural due process is to convey to the individual a feeling that the government has dealt with him fairly as well as to minimize the risk of mistaken deprivations of protected interests."[56]

Substantive due process is a more stringent limit on state power. It protects the individual against certain government actions regardless of the fairness of the procedure used to implement them. Just as the first amendment renders the federal government powerless to prohibit peaceful picketing in front of the Supreme Court,[57] the due process clause prevents states from imposing criminal sanctions for the performance of first trimester abortions.[58] Criminal abortion laws are unconstitutional not because they are attended by unfair procedures, but because the Constitution does not grant government the power to interfere with this

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latter course was the Court's reluctance to turn the fourteenth amendment into a " 'font of tort law.' " Parratt v. Taylor, 451 U.S. 527, 544 (1981) (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)). This justification is wholly lacking in *Logan*, in which the plaintiff did not seek to sue a state actor in federal court. Rather, on Supreme Court review of the state judgment, the plaintiff invoked the Constitution to remove an obstacle to his suit in state court against a private defendant. The straightforward answer to the defendant's argument, then, is that the threshold requirement for the invocation of *Parratt* is a constitutional tort action that can be avoided by an adequate state tort remedy and that this threshold is not met on the facts of *Logan*.

[56] Carey v. Piphus, 435 U.S. 247, 262 (1978); *see also* Mackey v. Montrym, 443 U.S. 1, 13 (1979); Matthews v. Eldridge, 424 U.S. 319, 348 (1976).

[57] United States v. Grace, 103 S. Ct. 1702, 1710 (1983).

[58] City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481, 2492 (1983); Roe v. Wade, 410 U.S. 113, 163 (1973).

aspect of liberty.

The Court in its scope cases often has left unclear which aspect of the due process clause it was examining. Some parts of the opinions read as though the only issue before the Court was whether proper procedures were followed in depriving the plaintiff of liberty or property. *Ingraham v. Wright*[59] is the clearest example. There the plaintiff, having lost in the Fifth Circuit, petitioned for certiorari on three grounds: that severe corporal punishment in public schools violated the eighth amendment cruel and unusual punishments clause, that the absence of any hearing before being punished violated the fourteenth amendment guarantee of procedural due process, and that the punishment itself offended substantive due process. The Court granted review on only the first two issues.[60] The Court's subsequent rejection of the plaintiff's due process claim therefore must be understood in strictly procedural terms. What the Court decided was that a student need not be accorded any prepaddling procedural safeguards to assure that the punishment is justified. Rather, in view of the openness of the public schools and the low incidence of abuse of students, state tort remedies were a sufficient check on the unjustified imposition of corporal punishment.[61] The Court did not decide that there were no substantive constitutional limits on the infliction of corporal punishment in public schools.[62]

In *Paul v. Davis*[63] the Supreme Court rejected constitutional protection for the plaintiff's interest in reputation. To attain constitutional status, the Court said, an interest must "have been initially recognized and protected by state law," and reputation did not meet that standard.[64] This reasoning strongly suggests that the Court's holding is a substantive decision denying any constitutional protection to reputation.[65] In a footnote, however, the Court

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[59] 430 U.S. 651 (1977).

[60] *Id.* at 659 & n.12, 679 n.47.

[61] *Id.* at 682.

[62] Other courts have recognized such substantive limits. *See, e.g.*, Hall v. Tawney, 621 F.2d 607, 610-11 & n.4 (4th Cir. 1980) (holding that severe corporal punishment states good constitutional tort claim for violation of substantive due process rights); *see also* Parratt v. Taylor, 451 U.S. 527, 552-53 & n.11 (1981) (Powell, J., concurring in the result) (author of *Ingraham* opinion cites *Hall* with approval).

[63] 424 U.S. 693, 711-12 (1976).

[64] *Id.* at 710.

[65] This is the way lower courts and commentators have read the case. *See, e.g.*, Ray v.

stated that the decision "is limited to the procedural guarantees of the due process clause" and does not address "those substantive limitations on state action which may be encompassed within the concept of 'liberty' expressed in the Fourteenth Amendment."[66] The Court apparently meant that there is no constitutional requirement of notice or a hearing before the police can defame someone, but that it was not deciding whether or not there are any substantive constitutional limits on government power to ruin someone's reputation. While the Court never openly stated its holding in these terms, it is hard to see how the footnote can be reconciled with the rest of the opinion on any other basis.

The holding in *Baker v. McCollan*[67] was that a person held in jail for three days because of mistaken identity was not deprived of liberty without due process of law. While the opinion did not distinguish between procedural and substantive due process, many of the reasons the Court gave to support the decision suggest that the Court was concerned with procedure. The Court pointed out that "[t]he Fourteenth Amendment does not protect against all deprivations of liberty," but only against those "accomplished without due process of law."[68] This distinction is important only to the procedural side of the doctrine, for the import of a substantive due process ruling is that certain aspects of liberty cannot be taken under any circumstances, no matter what process is followed. The Court noted that the confinement was pursuant to a valid warrant under the fourth amendment and that both the speedy trial provisions of the sixth amendment and the bail clause of the eighth amendment would help prevent lengthy incarceration without a determination of guilt.[69] This reasoning suggests the Court was holding that the plaintiff's deprivation of liberty was in accordance with constitutionally valid procedures.

Tennessee Valley Auth., 677 F.2d 818, 823 (11th Cir.), *cert. denied*, 103 S. Ct. 788 (1983); Cook v. Houston Post, 616 F.2d 791, 794 (5th Cir. 1980); Hopper v. Hayes, 573 F. Supp. 1368, 1372 (D. Idaho 1983); Granet v. Wallich Lumber, 563 F. Supp. 479, 483 (E.D. Mich. 1983); L. TRIBE, *supra* note 10, at 970-71; Note, *supra* note 18, at 191-92. *But see infra* note 232.

[66] 424 U.S. at 710 n.5. The Court went on to deny a substantive due process claim based on the right to privacy, *id.* at 712-13, but this footnote leaves open the possibility that some other substantive due process claim might prove more successful.

[67] 443 U.S. 137, 144 (1979).

[68] *Id.* at 145.

[69] *Id.* at 144 & n.3, 145.

Notice, however, that the plaintiff also could have made a substantive due process claim on the facts of *Baker*. His case can be stated not only as a claim that bad procedures were responsible for his confinement, but also that the Constitution requires that he be made whole for *any* mistaken incarceration regardless of the procedures used. The Court's ruling against the plaintiff seems implicitly to reject this claim.[70] Since the Court did not directly address the issue, however, *Baker* should not be viewed as holding that a mistaken imprisonment could never support a substantive due process claim.[71] Indeed, Justice Blackmun's concurring opinion explicitly noted that the majority did not address the substantive due process issue.[72] Accordingly, the scope of substantive constitutional protection of liberty remains an open question after *Baker*.

In *Parratt v. Taylor*,[73] the Court once more confused the procedural and substantive due process issues. The plaintiff's claim was first phrased by the Court in terms sufficiently broad to address both procedural and substantive due process. The Court stated the issue as "the correct manner in which to analyze claims . . . which allege facts that are commonly thought to state a claim for a common-law tort . . . but instead are couched in terms of a constitutional deprivation . . . ."[74] Shortly thereafter, however, the issue was recast as "whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations

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[70] *See id.* at 144 (while detention in some circumstances *might* be unconstitutional regardless of procedures followed, "a detention of three days . . . could not amount to . . . [a constitutional] deprivation").

[71] The majority opinion stated that "[j]ust as '[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner,' *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official." 443 U.S. at 146. The analogy to *Estelle* suggests that false imprisonment brought about by the deliberate indifference of a state official could violate the fourteenth amendment. *See infra* text accompanying notes 169-82.

[72] *Id.* at 147-48 (Blackmun, J., concurring).

[73] 451 U.S. 527 (1981).

[74] *Id.* at 533. The Court then cited a number of lower court cases to show that "the diversity in approaches [to this problem] is legion." *Id.* Some of these cases concern issues that the circuit courts treated as substantive due process claims. *See, e.g.*, Beard v. Mitchell, 604 F.2d 485, 495 (7th Cir. 1979) (loss of life resulting from FBI agent's alleged negligence); Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir.) (allegations of unprovoked attack on prisoner by guard), *cert. denied*, 414 U.S. 1033 (1973); *see also infra* note 129 and accompanying text.

satisfy *procedural* due process."[75] Justices White,[76] Blackmun,[77] and Powell[78] separately expressed their understanding that *Parratt* is limited to questions of procedural due process.

Despite the Court's characterization of the issue, it is exceedingly difficult to see any procedural element in the plaintiff's claim in *Parratt*. Procedural due process is required when the state attempts to advance its interests by intruding upon an individual's life, liberty, or property. It is conceded in these cases that the state may constitutionally interfere with liberty to achieve certain ends. As suggested in *Ingraham v. Wright*[79] and *Paul v. Davis*,[80] for example, corporal punishment may help maintain order in the classroom, and warning merchants of suspected thieves may help reduce levels of crime. Various safeguards might be required, nevertheless, under the rubric of procedural due process in order to reduce the risk of unjustifiable paddling or labeling. By contrast, the defendants in *Parratt* did not take the prisoner's property to achieve some state interest, and the issue was not whether proper procedural safeguards were followed in deciding to take that property. Rather, the defendants negligently lost the property with no claim of justification, and the only genuine question was whether such a negligent deprivation of property stated a claim in constitutional tort to be made whole for the loss. To speak of procedural due process in this context is to do violence to the common understanding of that term and lose sight of its function in constitutional law.

Even so, the Court's reasoning in *Parratt* makes use of procedural due process caselaw. An understanding of those cases and why they are inapposite requires a bit of background. Procedural due process usually demands that the government grant "some kind of hearing"[81] to the individual before deliberately depriving him of liberty or property. Thus, some process is required before

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[75] 451 U.S. at 537 (emphasis added).

[76] *Id.* at 545 (White, J., concurring).

[77] *Id.* at 545 (Blackmun, J., concurring).

[78] *Id.* at 552-53 (Powell, J., concurring in the result).

[79] 430 U.S. 651, 676 (1977).

[80] 424 U.S. 693, 713 (1976).

[81] *See* Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974); *see generally* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

firing a tenured professor,[82] suspending a student from school,[83] or cutting off such government benefits as social security.[84] There are, however, exceptional cases where predeprivation hearings are impractical. For example, the immediate need to stop poisoning justifies confiscating suspect food without a prior hearing.[85] In such instances, the Court has held that due process has been satisfied by a post-deprivation hearing. In *Ingraham v. Wright*[86] the Court pushed this principle a step further. It held that a state tort remedy could provide adequate procedural protection for the student's interest in avoiding unjustified corporal punishment.[87] The Court's rationale appears to be that the threat of tort liability encourages school officials to act more carefully in deciding whether to paddle students. Potential tort liability thus acts as a surrogate for a prepunishment hearing to reduce the risk of unwarranted punishment.

Parratt relies on *Ingraham* and the more conventional post-deprivation remedy cases in holding that a post-deprivation tort remedy satisfies the due process clause when the plaintiff claims negligent loss of property.[88] This rationale strongly indicates that the Court conceived of the issue as a procedural one. The problem with the Court's approach is that the plaintiff's claim in *Parratt* was fundamentally different from the claim in *Ingraham* and the other cases. In those cases, the underlying premise was that the state is constitutionally authorized to take the plaintiff's property or bodily security, if the state does so upon a proper showing of justification. The procedural due process issue was deciding what process is constitutionally required in order to determine whether a sufficient justification exists. In *Parratt* the claim did not proceed from the premise that the deprivation might be justified on proper facts, but that a negligent loss of property is always a constitutional wrong. It is as if, on the facts of *Ingraham*, the plaintiff argued that paddling, or paddling of a certain severity, could never

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[82] Board of Regents v. Roth, 408 U.S. 564, 576 (1972).

[83] Goss v. Lopez, 419 U.S. 565, 576 (1975).

[84] Goldberg v. Kelly, 397 U.S. 254, 266 (1970).

[85] North American Cold Storage Co. v. Chicago, 211 U.S. 306, 320 (1908), *cited in* Parratt v. Taylor, 451 U.S. 527, 538 (1981).

[86] 430 U.S. 651 (1977).

[87] *Id.* at 682.

[88] 451 U.S. at 542.

be administered because it is a violation of his personal security guaranteed by the substantive fourteenth amendment right to liberty. The plaintiff made just this claim in *Ingraham*, but the Court declined to consider it.[89]

When one focuses on the substantive due process deprivation of property issue in *Parratt*, it becomes apparent that the hard question is whether the state is constitutionally required to compensate a plaintiff who can prove that the state negligently lost or destroyed his property, or whether the state instead can avoid liability by adopting immunity rules or other principles similar in effect. As explained earlier,[90] the Court was able to avoid dealing with this issue because the state law in question did provide a remedy in such circumstances. The effect of the case, therefore, is to leave the scope issue just as clouded as it was before the decision.[91]

III. A Substantive Due Process Approach to the Boundary Problem

The Court in *Paul*, *Ingraham*, *Baker*, and *Parratt* never squarely faced the problem of determining the scope of constitu-

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[89] *See* 430 U.S. at 659 n.12.

[90] *See supra* note 34 and accompanying text.

[91] Justice Powell thought that, "[i]f this immunity has the effect of cutting off all state-law remedies, under the Court's reasoning there appears to be a deprivation of procedural due process, actionable in federal court." 451 U.S. at 551 n.9. By contrast, some lower courts have understood the opinion to mean that the state remedy is adequate in spite of the existence of state immunity. *See e.g.*, Daniels v. Williams, 720 F.2d 792, 797-98 (4th Cir. 1983); Groves v. Cox, 559 F. Supp. 772, 777 (E.D. Va. 1983); Irshad v. Spann, 543 F. Supp. 922, 928-29 (E.D. Va. 1982); Eberle v. Baumfalk, 524 F. Supp. 515, 518 (N.D. Ill. 1981). Commentators equally are unsure about the nature of an "adequate" remedy. One author believes that a state tort remedy would be constitutionally adequate under *Parratt* notwithstanding the availability of an absolute immunity. *See* Comment, *supra* note 8, at 1035. Professor Smolla, on the other hand, believes that in some instances an immunity would render the state remedy inadequate and thus open the door for constitutional tort suits. He distinguishes between immunities grounded merely on a "financial interest in avoiding payment" and those that advance "the state's special need to guard the integrity of" its decision-making process. Smolla, *supra* note 8, at 879. The former category of immunities would render the state tort remedy inadequate while the latter would not. This dichotomy is unconvincing. All immunity doctrines are ultimately premised on the belief that potential tort liability will inappropriately inhibit desired conduct. Protecting the public fisc through immunities is but a means to encourage effective action by government officials. *See infra* text accompanying notes 166-68. It is impossible to separate a government's interest in avoiding payment of tort judgments from its interest in protecting the integrity of its decision-making process. *See generally* Cass, *Damage Suits Against Public Officers*, 129 U. Pa. L. Rev. 1110 (1981).

tional tort. The Court's procedural due process analysis and cautionary footnotes enabled it to dispose of the cases without addressing the questions of whether and in what circumstances a government defendant must compensate a victim for physical or other injuries in constitutional tort, even though that defendant has violated no specific provision of the Bill of Rights. Lacking guidance, the lower federal courts have had to cope with the problem on their own and have failed to reach a consensus on how these questions should be answered.[92]

The remainder of the Article puts aside the Supreme Court's opinions and examines the scope problem from a fresh perspective. In Part III we argue that substantive due process is the appropriate doctrinal category for defining the scope of constitutional tort. Taking substantive due process as our starting point, we identify the questions that must be addressed and the competing values that must be ranked or accommodated in resolving the scope issue.

A. Substantive Due Process and Tort Damages

The inmate whose property is destroyed, the mistakenly imprisoned suspect, and the paddled student all assert claims that are more accurately characterized as substantive rather than procedural. These plaintiffs contend that the physical, emotional, or dignitary harm they suffer is itself a constitutional wrong, however

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[92] Lower courts have disagreed as to whether *Parratt* applies to intentional harms. *Compare* McCrae v. Harkins, 720 F.2d 863, 870 (5th Cir. 1983) (*Parratt* does not apply to intentional taking of property) *and* Stringer v. Thompson, 537 F. Supp. 133, 135 (N.D. Ill. 1982) (same) *with* Vicory v. Walton, 721 F.2d 1062, 1065-66 (6th Cir. 1983) (*Parratt* applies to intentional taking or property) *and* Sheppard v. Moore, 514 F. Supp. 1372, 1376 (M.D.N.C. 1981) (same).

The lower courts have also differed in their understanding of which protected interests are subject to *Parratt*'s analysis. *Compare* Wakinekona v. Olim, 664 F.2d 708, 715 (9th Cir. 1981) (*Parratt* does not apply to deprivations of liberty), *rev'd on other grounds*, 103 S. Ct. 1741 (1983) *and* Elam v. Montgomery, 572 F. Supp. 797, 803 (S.D. Ohio 1983) (same) *with* Daniels v. Williams, 720 F.2d 792, 795 (4th Cir. 1983) (*Parratt* applies to negligent deprivations of liberty) *and* Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981) (*Parratt* applies to intentional deprivations of liberty), *aff'd on other grounds*, 103 S. Ct. 1483 (1983).

Finally, what constitutes an adequate remedy under *Parratt* is subject to dispute. *Compare* Irshad v. Spann, 543 F. Supp. 922, 928-29 (E.D. Va. 1982) (state remedy is adequate even if there is immunity defense) *with* Whorley v. Karr, 534 F. Supp. 88, 89 (W.D. Va. 1981) (dictum) (state remedy would not be adequate if immunity defense was available). For other examples, see Comment, *supra* note 33, at 269-71; Casenote, *Defining the Parameters of Section 1983:* Parratt v. Taylor, 23 B.C.L. REV. 1219, 1242-44 (1982).

proper is the procedure used to inflict that harm. For this reason, the appropriate constitutional doctrine for considering their claims is not procedural but substantive due process.[93]

At first this may seem a surprising conclusion, for constitutional torts appear to bear little resemblance to the typical substantive due process case.[94] That doctrine is ordinarily invoked as a defense against criminal prosecutions or similar government actions. Substantive due process is the Supreme Court's instrument for invalidating statutes that do not violate any of the express prohibitions listed in the Bill of Rights, but that threaten fundamental values, including personal autonomy "in making certain types of important decisions,"[95] that the Court deems worthy of constitutional protection.[96] Thus, the Court has struck down laws forbidding

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[93] These plaintiffs may also assert procedural claims, such as, for example, that the teacher used a flawed procedure in determining that the student had misbehaved and should be punished. But we put aside the procedural issue and focus on the claim that the harm must be compensated for even if proper procedures were followed.

[94] Note, however, that, while the Supreme Court has not employed a substantive due process analysis, a number of lower courts have used substantive due process as a method of evaluating constitutional tort claims, either alone or in combination with a procedural due process analysis. *See, e.g.*, Palmer v. Hudson, 697 F.2d 1220, 1222 n.2 (4th Cir.), *cert. granted*, 103 S. Ct. 3535 (1983); Wakinekona v. Olim, 664 F.2d 708, 712 (9th Cir. 1981), *rev'd on other grounds*, 103 S. Ct. 1741 (1983); Harbulak v. County of Suffolk, 654 F.2d 194, 196 (2d Cir. 1981); White v. Rochford, 592 F.2d 381, 383 (7th Cir. 1979); Flores v. Edinburg Consol. Indep. School Dist., 554 F. Supp. 974, 978 (S.D. Tex. 1983); Holmes v. Wampler, 546 F. Supp. 500, 503 (E.D. Va. 1982); Howse v. DeBerry Correctional Inst., 537 F. Supp. 1177, 1180 (M.D. Tenn. 1982).

Commentators occasionally acknowledge the substantive side to due process constitutional tort claims, but they do not attempt to develop standards for determining when such a claim is valid. *See* Comment, *supra* note 33, at 262; Casenote, *supra* note 92, at 1248-49.

[95] Whalen v. Roe, 429 U.S. 589, 599-600 (1977).

[96] Identifying the source of these fundamental values is the subject of intense debate. One relatively uncontroversial source is the Bill of Rights itself. Selected provisions are binding on the states through the due process clause of the fourteenth amendment. The underlying rationale for "selective incorporation" is that particular provisions of the Bill of Rights are "so rooted in the traditions and conscience of our people as to be ranked as fundamental" and, therefore, are "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937). Thus, "liberty" within the meaning of the due process clause of the fourteenth amendment encompasses all those incorporated protections of the Bill of Rights, including freedom of speech. These incorporated provisions are substantive restrictions on the states' exercise of their police powers. In a very real sense, therefore, all decisions that invalidate state conduct on the basis of the Bill of Rights are substantive due process cases. *See generally* L. TRIBE, *supra* note 10, at 567-69.

Far more controversial is the source of substantive protections not expressly listed in the Bill of Rights. Some commentators find support for these protections in the natural law traditions that prevailed at the time of the Constitution's adoption. *See* 2 B. SCHWARTZ, THE

abortions[97] or the use of contraceptives[98] and certain laws regulating marriage and family life.[99] The right that is recognized in these decisions is rooted in the due process clause, but it is not a procedural right. The "right" to an abortion, like the first amendment right to publish a newspaper, is a substantive right against government interference in one's activities. Although it is verbally awkward to employ the due process clause as the foundation for these rules, the Court plainly believes that they are important enough to warrant this contortion of language.[100]

Our assertion is that claims for damages in tort can also appropriately be viewed as substantive due process cases because here too the party challenges the constitutional validity of some govern-

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BILL OF RIGHTS: A DOCUMENTARY HISTORY 1029 (1971) (remarks of James Madison); Craven, *Personhood: The Right to be Let Alone*, 1976 DUKE L.J. 699. Others focus on widely shared ideas about the public welfare. *See* Perry, *supra* note 10; Ratner, *supra* note 10.

We suspect that judicial decisions reflect more a political accommodation of conflicting individual and governmental interests than a disciplined application of philosophical principles. *See* Wells & Eaton, *supra* note 2, at 21-25; *cf.* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975) (human rights are protected by courts relying on "contemporary moral and political ideas not drawn from the constitutional text").

The literature addressing the legitimacy and scope of judicial review is vast. For more detailed discussions of this topic, see P. BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982); J. ELY, *supra* note 10; M. PERRY, *supra* note 10; *Symposium: Constitutional Adjudication and Constitutional Theory*, 56 N.Y.U.L. REV. 259 (1981); *Symposium: Judicial Review Versus Democracy*, 42 OHIO ST. L.J. 1 (1981).

[97] City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481, 2504 (1983); Roe v. Wade, 410 U.S. 113, 164 (1973).

[98] Eisenstadt v. Baird, 405 U.S. 438, 454 (1972); Griswald v. Connecticut, 381 U.S. 479, 485 (1965); *see generally* L. TRIBE, *supra* note 10, at 921-34.

[99] *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494, 506 (1977); Boddie v. Connecticut, 401 U.S. 371, 383 (1971); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 403 (1923); *see generally* L. TRIBE, *supra* note 10, at 985-90 (such actions by Court demonstrates view that the family has constitutional right to decide its own composition and its own political and social views).

[100] Some of the awkwardness stems from the Court's narrow construction of the privileges and immunities clause in the Slaughter-House Cases, 83 U.S. (16 Wall) 36, 75-83 (1873). Many of the substantive protections later found in the due process clause would semantically fit more comfortably within the privileges and immunities clause. *See* J. TEN BROEK, EQUAL UNDER LAW 236-39 (1965).

Some critics of substantive due process doctrine find textual support for similar restrictions on government power in other open-ended provisions of the Constitution, such as the ninth amendment. *See, e.g.*, J. ELY, *supra* note 10, at 39-40; Laycock, *supra* note 10, at 363-64. At least some of the constitutional torts we examine here can withstand this threshold objection because they can be framed as violations of the provisions of the Bill of Rights. *See, e.g.*, Soto v. Sacramento, 567 F. Supp. 662, 670 (E.D. Cal. 1983) (right to be free from excessive force in an arrest is protected by the fourth amendment).

ment action.[101] There are two differences between constitutional tort damages and traditional substantive due process, but neither of these is strong enough to overshadow the fundamental similarity between them. First, a distinction may be drawn on the nature of the remedy sought by the plaintiff. In the traditional cases, the government is trying to imprison or otherwise penalize the individual by using the legal process, and the plaintiff invokes substantive due process as a defense to the threatened government action. The defensive use of constitutional rights is adequate in this context to protect him against government overreaching.[102] In the tort context, the government actor has already hurt the plaintiff, and the only possible remedy (apart from criminal or administrative penalties) is to award damages to make him whole for his injury. The difference, then, is that in tort the individual is *made* whole, while in the traditional case he is *kept* whole. This distinction merely reflects the different ways in which government might improperly harm someone.

The other difference relates to the type of analysis that is employed in the two areas. The terms of the debate in traditional substantive due process analysis are familiar to all students of constitutional law. The state by its legislature seeks to impose some obligation on the individual in pursuit of the public good. It argues that in a democracy its accountability to the voters is all the justification the program requires, in the absence of conflict with the specific substantive provisions of the Bill of Rights. The individual responds that substantive "liberty" in the due process clause embraces more than the Bill of Rights and includes the right of autonomy in personal decision making and the right of families to be

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[101] While substantive due process constitutional tort claims most frequently will be predicated on government action, *see, e.g.*, Shillingford v. Holmes, 634 F.2d 263 (5th Cir. 1981), they occasionally may be based on *inaction*. *See, e.g.*, Bruner v. Dunaway, 684 F.2d 422, 426 (6th Cir. 1982) (law enforcement officers present but not actively participating in beating of plaintiff), *cert. denied*, 103 S. Ct. 816 (1983); *see generally* Wells & Eaton, *supra* note 2 (affirmative duty to act will be imposed on government officials in certain circumstances).

[102] *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Rochin v. California, 342 U.S. 165 (1952); *see also infra* notes 115-24 and accompanying text. Substantive due process claims may also be asserted in declaratory judgment actions. *See, e.g.*, Doe v. Bolton, 410 U.S. 179, 192-202 (1973) (portions of Georgia abortion statute held unconstitutional). Declaratory judgment actions are essentially defensive in that they seek to prevent threatened government interference with some protected interest. The declaratory judgment remedy is merely invoked at an earlier stage than criminal defenses.

free of certain forms of state regulation. Broadly stated, the court's task is to choose between democratic values and the competing claims of personal or familial autonomy.[103]

The analytical structure of a constitutional tort case varies from this pattern because of the differences in the factual circumstances that give rise to tort suits. In the tort context the government actor has already injured the individual in some way, as by defaming, or physically attacking, or imprisoning him. Unlike the criminal defendant, the tort plaintiff does not assert autonomy in personal decision making as the counterweight to government discretion. Rather, he claims that the government has invaded his interest in physical or emotional well-being, or reputation, or personal privacy, or property. The task of the court is to identify the circumstances in which these interests warrant constitutional protection.

The Supreme Court decision in *Rochin v. California*[104] links traditional substantive due process doctrine with this new strain. In *Rochin,* the defendant had been suspected of selling narcotics. When confronted by the police he swallowed a number of capsules. After unsuccessfully attempting to retrieve the capsules by hand, the police forcibly extracted them from the defendant's stomach and introduced them as evidence at the defendant's trial.[105] The Supreme Court, reversing the conviction, held that the government's conduct in obtaining the evidence violated the due process clause. Due process was denied because the forced stomach pumping "offend[ed] those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."[106] In a phrase that has endured as a shorthand for the holding, the Court said that the government's conduct "shocks the conscience."[107]

Here, then, is a hybrid case. The government's conduct involves the infliction of physical, emotional, and dignitary injury ordinarily remedied in tort, yet the Court permitted Rochin to use that conduct as a due process defense to a criminal prosecution. It seems even more appropriate to allow a suit for tort damages based on

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[103] L. TRIBE, *supra* note 10, at 564-75.
[104] 342 U.S. 165 (1952).
[105] *Id.* at 166.
[106] *Id.* at 169.
[107] *Id.* at 172.

the constitutional violation, for then the remedy is more directly tied to the breach and society's interest in criminal punishment is not denied on account of the policemen's errors.[108] Only the absence of this last step separates *Rochin* from our substantive due process approach to harm to life, liberty, and property.[109]

The usual differences in context between tort and defensive cases mean that most traditional substantive due process precedents will be inapposite in the tort context. Yet the essential unity of the two variants of substantive due process remains. In both areas, the basic question is the same: Within the universe of state actions that harm individuals, which of those actions should the Court proscribe as deprivations of constitutionally protected life, liberty, or property, and which should be left for the states to grant or deny remedies for at their discretion? Stated in institutional terms, the issue in both kinds of cases is when, if ever, should the courts make constitutional rules that nullify the choices of politically responsive governments with regard to social policy and when should courts leave those choices standing.

B. Asking the Right Questions

Recognizing that substantive due process is the appropriate doctrinal category is only the first step toward resolving the boundary problem. The next step is to identify the competing individual and governmental interests at stake in these tort suits, rank them in order of importance, and search for ways to accommodate them. This is a contemporary instance of the classic problem in constitutional law of individual liberty against the state. The plaintiff's interest in support of liability is compensation for physical, emotional, or dignitary harm inflicted by the government actor. The government counters that its financial resources would be unduly strained by the imposition of liability. Moreover, if individual officers are held liable, argues the government, they will be reluctant

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[108] *Cf.* Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49 (arguing that tort damages are more appropriate than the exclusionary rule as a means of remedying fourth amendment violations).

[109] The Court has taken this last step in cases closely analogous, if not identical, to the constitutional tort context. *See* City of Revere v. Massachusetts Gen. Hosp., 103 S. Ct. 2979, 2983 (1983) (substantive due process duty to provide medical care to pretrial arrestee); Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982) (substantive due process duty to protect involuntarily committed mental patients from physical assaults).

to take actions that might risk tort liability, and they, therefore, might become too cautious in carrying out their duties. Finally, as in other conflicts over the scope of constitutional rights, government defendants can invoke the principle that, in a representative democracy, policy conflicts generally should be resolved by politically responsive legislatures rather than by courts. Some special justification is needed to warrant judicial intervention under the Constitution since such decisions cannot be overturned by legislation.

A strong proponent of either set of values can resolve the scope problem without much further analysis. By giving great weight to the individual's interest in recovery, constitutional tort can be justified for any personal injury caused by government. Similarly, advocates of government discretion and strong legislatures can defend a narrow scope for constitutional tort. It is likely, however, that neither of these extreme positions would receive wide support. In our view, a better approach, therefore, is to adopt a more pragmatic view, to acknowledge that both individual and government concerns are valid and should be accommodated. The task thus becomes one of identifying the kinds of cases in which the plaintiff's interests are strong enough to overcome the countervailing government interests. By focusing on this inquiry, it is possible to fashion decisional guidelines that permit some of these injuries to be treated as constitutional torts, while leaving others to state tort systems.

1. The Plaintiff's Interest. The plaintiff's interest in recovery for damage to his property and for physical, emotional, and dignitary harm is a concept familiar to every first-year law student. It is the basis for the plaintiff's claim in virtually all areas of common law tort. If, however, the plaintiff's interest is taken into account by ordinary tort law, why should a plaintiff ever be allowed to sue in constitutional tort?[110] The problem with this question is that it rests on a faulty premise. The question assumes that the interests at stake in substantive due process constitutional tort litigation are identical to those at issue in common law tort suits.[111] Compensation for the kinds of harm cognizable in common law tort is only

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[110] *See,* Whitman, *supra* note 37, at 21.

[111] This is an assumption shared by some commentators as well. *See* Smolla, *supra* note 8, at 870; Friedman, *supra* note 9, at 564-65.

one of the plaintiff's interests in constitutional tort suits, and the common law might not give adequate respect even to this interest in traditional tort damages.

One difference between governmental and private tort flows from the special role of government as the keeper of public order. Because of that role, statutes and common law rules accord government actors broad discretion to use force without fear of civil or criminal liability.[112] Individuals generally acquiesce in governmental threats and use of force in circumstances where they might either resist or flee or turn to government for help if similarly threatened or harmed by some private person. For this reason, victims are more vulnerable to the exercise of illegitimate or excessive force by government actors. The individual will often be less willing and less able to resist or escape a beating inflicted by a police officer than, for example, a beating inflicted by a drunk in a bar.[113]

There is another, more subtle, reason why governmental injuries sometimes warrant the imposition of constitutional tort liability. A government actor can violate a different kind of duty from that owed by a private defendant. Individuals in our society are largely left free to pursue their own ends without regard for others, save a general duty not to hurt others by negligent conduct. The relationship between government and the individual is radically different. In a free society government is neither an autonomous actor nor a master to whom the people must acquiesce. The function of government is to serve the people and to enhance the conditions of life. The broad purpose of all constitutional limits on government power is to try to ensure that government does not stray from that

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[112] *See, e.g.*, Landrum v. Moats, 576 F.2d 1320, 1327-29 (8th Cir.), *cert. denied*, 439 U.S. 912 (1978); Jacobs v. City of Wichita, 531 F. Supp. 129, 130 (D. Kan. 1982) (common law rule permits use of deadly force against all fleeing felons).

[113] *See, e.g.*, Grimm v. Leinart, 705 F.2d 179, 180 (6th Cir.) (criminal investigator for county sheriff coerced plaintiff under threat of legal process to accompany him for period of several hours), *reh'g granted*, 710 F.2d 233 (1983); *see also* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 394 (1971). In explaining why constitutional tort is appropriate for a fourth amendment violation, even though state law trespass is also a possible remedy, the Supreme Court noted:

> [A person] may bar the door against an unwelcome private intruder or call the police if he persists in seeking entrance . . . [but the] mere invocation of [governmental] power by a . . . law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well.

Id. at 394.

role.

A fundamental aspect of the concept of government as servant is that the government must treat individuals with some minimal level of concern and respect for their well-being,[114] even when it has good reason for doing them some harm. Abusive conduct by a government actor violates this duty, and it is, therefore, appropriate to employ constitutional law to impose sanctions for such conduct. *Rochin v. California*[115] is the Supreme Court case that most clearly supports this proposition. Recall that there the Court cited "those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses" as constitutional grounds for striking down a conviction.[116]

Other substantive due process cases deal with a different kind of problem and are only obliquely relevant to constitutional tort. Even so, there are echoes in them of this emphasis on governmental sensitivity toward persons. For example, in *Meyer v. Nebraska*[117] the Supreme Court struck down a statute forbidding the teaching of foreign languages in private schools on the ground that

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[114] The term "concern and respect" is borrowed from R. DWORKIN, TAKING RIGHTS SERIOUSLY 272 (1977). We refer the reader to Dworkin for the arguments supporting this view of the proper role of government. Dworkin uses the notion of concern and respect to support a broad role for government in redistributing resources to the poor. For present purposes the notion need only denote respect for the individual's interests in physical integrity, peace of mind, and personal dignity in situations where the government's acts threaten those interests. *See also* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 647 (10th ed. 1980) (Court has taken "very embracive" view of constitutional liberty in substantive due process cases); Wells & Eaton, *supra* note 2, at 23-26 (developing position that concern and respect for the individual lies at heart of substantive due process doctrine). While we prefer to speak in terms of "concern and respect," the same idea is reflected by terms like "personhood," "autonomy," "intimacy," "identity," and "dignity." *See* L. TRIBE, *supra* note 10, at 889.

[115] 342 U.S. 165 (1952).

[116] *Id.* at 169; *see* Parratt v. Taylor, 451 U.S. 527, 549, 552-53 (1981) (Powell, J., concurring in the result). Justice Powell cited *Rochin* in support of this proposition. *Id.* at 553 n.11. Earlier, writing for the Court in *Ingraham*, he had relied on *Rochin* as authority for the proposition that personal security against physical harm is an aspect of fourteenth amendment liberty. Ingraham v. Wright, 430 U.S. 651, 673-74 (1977). *See also* Youngberg v. Romeo, 457 U.S. 307, 324 (1982) (using substantive due process to uphold involuntarily committed mental patients' constitutional right to treatment); Vitek v. Jones, 445 U.S. 480, 491-92 (1980) (Constitution protects liberty against physical restraints independently of state law); L. TRIBE, *supra* note 10, at 913-21 (discussing cases involving governmental intrusion on the body).

[117] 262 U.S. 390 (1923).

constitutional liberty embraces "not merely freedom from bodily restraint but also the right of the individual to . . . enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[118] Among those privileges, the Court concluded, is the right to study what one pleases. *Griswold v. Connecticut*[119] invalidated laws forbidding the sale of contraceptives because the marital relationship is "intimate to the degree of being sacred"[120] and the law sought "to achieve its goals by means having a maximum destructive impact on that relationship."[121]

These considerations persuade us that the courts should recognize a constitutional right against some harms inflicted by governments and their officers. Even so, a critic of our proposal might point out that state law often provides adequate protection to these concerns and argue that this protection renders the constitutional right superfluous. An illustration is the common law rule that permits police officers to use force in apprehending suspects, but holds them liable if the force used is excessive.[122] Given the availability of such a remedy, the argument goes, constitutional tort is a redundant and unnecessary intrusion upon an area of the law ordinarily left to the states. One response to this argument is that the general adequacy of state remedies is open to question. Dissenting in *Ingraham,* for example, Justice White questioned the efficacy of Florida's state law remedies for excessive corporal punishment.[123] Furthermore, a formally adequate state rule may be de-

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[118] *Id.* at 399.

[119] 381 U.S. 479 (1965).

[120] *Id.* at 486.

[121] *Id.* at 485. *See* Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (plurality opinion). Here, the Supreme Court struck down a city zoning ordinance that rigidly defined permissible family relationships. "[T]he Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns." *Id.* at 506. *See also* Wells & Eaton, *supra* note 2, at 23-24 (reviewing constitutional implications of *Moore* and *Griswold*).

[122] *See, e.g.,* King v. City of Chicago, 66 Ill. App. 3d 356, 384 N.E.2d 22 (1978); McCluskey v. Steinhoist, 45 Wis. 2d 350, 173 N.W.2d 148 (1970); *see generally* Littlejohn, *Civil Liability and the Police Officer: The Need for New Deterrents to Police Misconduct,* 58 U. DET. J. URB. L. 365 (1981).

[123] Ingraham v. Wright, 430 U.S. 651, 694 n.11 (1977) (White, J., dissenting). A more concrete example involves the use of deadly force by police officers to effect an arrest. Many states authorize police officers to use deadly force in circumstances where its use violates the constitutional rights of the criminal suspect. *See, e.g.,* Garner v. Memphis Police Dep't, 710

valued by onerous procedural rules and unsympathetic fact-finding.[124]

Suppose, however, that a state's tort law does permit recovery for abuse of government power, both in principle and in practice. This may be a good reason to require the plaintiff to pursue his remedy in state court under state law, but it does not defeat the proposition that those courts should recognize a constitutional right to recovery and be subject to Supreme Court review of state judgments for compliance with the constitutional standard. The assertion that state law is "adequate" implicitly recognizes that state law must be measured by its effectiveness in meeting the constitutional concerns we have identified. It confuses ends with means to go further and argue that the state remedy renders the constitutional right itself superfluous.

2. Limitations on the Reach of the Plaintiff's Interest. Of course it does not follow that constitutional tort is appropriate for every injury that might be recognized by the common law of torts. On the contrary, the plaintiff's interest in concern and respect from government is both a justification for constitutional tort and a limit on its reach. In defining the boundary of constitutional tort, courts should not focus their attention exclusively on the plaintiff's interest in recovery for physical harm. Rather, courts should ask whether the circumstances of a given case indicate a threat to concern and respect. Only an affirmative answer to this question will justify imposing constitutional tort liability.

F.2d 240, 246-47 (6th Cir. 1983), *noted in* 18 GA. L. REV. 137 (1983); Mattis v. Schnarr, 547 F.2d 1007, 1019 (8th Cir. 1976), *vacated sub nom.* Ashcroft v. Mattis, 431 U.S. 171 (1977); Jacobs v. City of Wichita, 531 F. Supp. 129, 131-32 (D. Kan. 1982). In such instances, constitutional tort provides the only basis for recovery. *See* Note, *supra* note 18, at 204 n.88 (questioning ability of plaintiff in *Paul* to recover under Kentucky libel law); Comment, *supra* note 33, at 276 n.62 (questioning whether plaintiff in *Parratt* would be barred from recovering under Nebraska's tort claims act because of act's immunity provision).

[124] *Cf.* Neuborne, *supra* note 41, at 1115-28 (discussing why plaintiff's attorneys in suits against state defendants prefer to litigate in federal rather than state courts). The obstacles to generating an effective state-based response to the problem of government abuse are exacerbated by the context in which many of the cases arise. The victims of abuse are often criminal suspects, members of racial minorities, and others on the fringe of the political mainstream. Their problems will often attract little sympathy from elected or other politically sensitive officials. Friedman, *supra* note 9, at 577; *cf.* City of Los Angeles v. Lyons, 103 S. Ct. 1660, 1672 n.3 (1983) (Marshall, J., dissenting) ("[I]n a City where Negro Males constitute 9% of the population, they have accounted for 75% of the deaths resulting from the use of chokeholds.").

This requirement sharply distinguishes constitutional tort from traditional tort law. Common law courts and legislatures may consider a wide variety of policy considerations in fashioning liability rules. They may take as their guiding concern, for example, the compensation of victims and the widest possible spreading of losses. In that event the scope of recovery will be broad, with few defenses available to defendants, such as governments, who can spread losses. On the other hand, decision makers may choose to adopt tort rules that minimize the cost of accidents and encourage accident avoidance. Lawmakers with this aim might come up with a radically different set of rules that grant or deny recovery in order to give the plaintiff or defendant an incentive to take a cost-justified precaution.

Determining the scope of constitutional tort requires the identification of cases in which statutory and common law policy choices should be abrogated and replaced with constitutional rules establishing a right to recovery that is largely beyond political change. The only appropriate justification for rejecting statutory and common law liability rules is that they do not adequately respect the individual's claims to have and to hold life, liberty, and property against intrusions by the state. This standard places significant limitations on the permissible scope of constitutional tort. A constitutional tort obligation should not be adopted because it facilitates loss spreading or cost reduction since these goals do not bear on the individual's rights of autonomy against the state.[125]

3. The Defendant's Conduct. What matters in constitutional tort, then, is whether the defendant's conduct has passed the boundary of acceptable governmental behavior toward individuals and not merely whether the plaintiff has been harmed, or how severely. The Supreme Court in *Rochin v. California*[126] intuitively understood this point, although it did not develop the underlying

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[125] Traditional tort policy becomes a relevant consideration after a constitutional violation is established. *See e.g.*, Smith v. Wade, 103 S. Ct. 1625, 1636 (1983) (rules of tort common law concerning punitive damages held applicable in action for eighth amendment violations); Owen v. City of Independence, 445 U.S. 622, 638 (1980) (basing its finding on tort common law, court disallowed qualified immunity to municipal corporation in constitutional tort claim). For discussions of the role of tort policy in constitutional tort litigation, see Wells & Eaton, *supra* note 2, at 18-26; Eaton, *Causation in Constitutional Torts*, 67 IOWA L. REV. 443 (1982); Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5 (1974).

[126] 342 U.S. 165 (1952).

analysis. The Court articulated a "shock the conscience" standard for invalidating convictions under the due process clause and held that the forcible stomach pumping in that case met the standard.[127] As our analysis suggests, the *Rochin* approach focuses the inquiry on whether the defendant's conduct is bad enough to justify a constitutional sanction. The only difference between the Court's holding and constitutional tort is that in *Rochin* the sanction involved permitting the individual to use the government's conduct as a defense in a criminal proceeding, while constitutional tort allows the individual to sue for damages.

The Supreme Court has never formally[128] taken that last analytical step, but several lower federal courts have done so. The most influential decision is the Second Circuit's ruling in *Johnson v. Glick*.[129] In *Glick*, the plaintiff was a pretrial detainee who allegedly was attacked by a correctional official and then denied medical attention. The court held that, while these allegations did not state a claim under the eighth amendment, they stated a good substantive due process violation and could support an award of tort damages.[130] Judge Friendly, writing for the court, explained that *Rochin* "must stand for the proposition that, quite apart from any 'specific' of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law."[131] The challenge of *Rochin* and *Glick* is to articulate the precise guidelines for determining when a substantive due process violation exists. It is to this task that we now turn.

IV. Four Principles for Deciding Boundary Cases

Rochin is right to focus on the defendant's conduct in deciding whether constitutional tort should be available, but the Court's "shock the conscience" test is too vague and subjective to provide

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[127] *Id.* at 172.

[128] As we have noted, individual members of the Court have expressed a willingness to base constitutional tort violations upon substantive due process. *See supra* notes 62, 66, 72, 75-78 and accompanying text.

[129] 481 F.2d 1028 (2d Cir. 1973).

[130] *Id.* at 1031-32.

[131] *Id.* at 1032. Recent cases that rely on *Glick* include Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981); Barnier v. Szentmiklosi, 565 F. Supp. 869, 879-80 (E.D. Mich. 1983); Albers v. Whitley, 546 F. Supp. 726, 733 (D. Or. 1982); Howse v. DeBerry Correctional Inst., 537 F. Supp. 1177, 1181 (M.D. Tenn. 1982).

guidance for lower courts deciding particular cases.[132] The development of more concrete standards has been retarded in the Supreme Court by the Court's continued refusal to confront the scope issue directly. Although lower courts have not evaded the problem, their efforts to deal with it suffer from the Supreme Court's lack of leadership.[133] Their standards in constitutional tort cases, therefore, are often as vague as the *Rochin* test. Courts state that constitutional tort should be available not for every injury cognizable at common law, but only when there is an "abuse"[134] or "misuse"[135] of power, or when the governmental defendant's conduct was "severe,"[136] "reprehensible,"[137] or "egregious."[138] Using these characterizations to explain their rulings, the courts have held that constitutional tort is appropriate when a passive arrestee is shot, beaten, or threatened,[139] when a prison guard deliberately permits

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[132] *See, e.g.,* Schiller v. Strangis, 540 F. Supp. 605, 616 (D. Mass. 1982); Note, *supra* note 18, at 197 & n.46.

[133] *See, e.g.,* Sellers v. Roper, 554 F. Supp. 202, 204 (E.D. Va. 1982) (district judge admitting that he is "rudderless" in deciding when beating of inmate by prison guard is constitutional tort); Martin v. Covington, 541 F. Supp. 803, 804 (E.D. Ky. 1982) ("[T]he Supreme Court has not yet made it clear exactly where the line is to be drawn between those governmental actions which are merely torts and those which are constitutional violations."); *see also* Schiller v. Strangis, 540 F. Supp. 605, 613 (D. Mass. 1982); Howse v. DeBerry Correctional Inst. 537 F. Supp. 1177, 1181 (M.D. Tenn. 1982); Guyton v. Phillips, 532 F. Supp. 1154, 1159 (N.D. Cal. 1981).

[134] *See, e.g.,* Williams v. Kelley, 624 F.2d 695, 697 (5th Cir. 1980), *cert. denied,* 451 U.S. 1019 (1981).

[135] *See, e.g.,* Smith v. Hill, 510 F. Supp. 767, 772 (D. Utah 1981).

[136] *See* Tefft v. Seward, 689 F.2d 637, 639 n.1 (6th Cir. 1982); *see also* Ricketts v. Derello, 574 F. Supp. 645, 646 (E.D. Pa. 1983) ("serious physical abuse" required).

[137] *See, e.g.,* Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981), *aff'd on other grounds,* 103 S. Ct. 1483 (1983).

[138] *See, e.g.,* Hull v. City of Duncanville, 678 F.2d 582, 584 (5th Cir. 1982); Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1981); Ellsworth v. Mockler, 554 F. Supp. 1072, 1074 (N.D. Ind. 1983); Holmes v. Wampler, 546 F. Supp. 500, 503 (E.D. Va. 1982); Howse v. DeBerry Correctional Inst., 537 F. Supp. 1177, 1181 (M.D. Tenn. 1982); Ayler v. Hopper, 532 F. Supp. 198, 200 (M.D. Ala. 1981).

[139] *See, e.g.,* Schiller v. Strangis, 540 F. Supp. 605, 619 (D. Mass. 1982); Larson v. Wind, 536 F. Supp. 108, 112 (N.D. Ill. 1982); Wright v. City of Reno, 533 F. Supp. 58, 63 (D. Nev. 1981); Guyton v. Phillips, 532 F. Supp. 1154, 1159 (N.D. Cal. 1981); DiGiovanni v. City of Philadelphia, 531 F. Supp. 141, 144 (E.D. Pa. 1982); Kedra v. City of Philadelphia, 454 F. Supp. 652, 675 (E.D. Pa. 1978); *see also* Nelson v. Kroger Co., 550 F. Supp. 846, 853 (N.D. Ill. 1982); Standridge v. City of Seaside, 545 F. Supp. 1195, 1198 (N.D. Cal. 1982); Martin v. City of Covington, 541 F. Supp. 803, 804 (E.D. Ky. 1982). *But see* Collings v. Lundry, 603 F.2d 825, 827 (10th Cir. 1979).

a group of prisoners to attack another inmate,[140] or when a prison guard intentionally destroys the prisoner's radio.[141] They have rejected constitutional tort liability for a government's negligently designed streets,[142] for slippery prison floors,[143] and for breach of contract.[144] Yet even this vague "egregiousness" standard is not uniformly followed.[145] Some courts rule that mere negligence is enough for liability,[146] while others say that even malicious or severe intentional harm is not cognizable in constitutional tort.[147]

We propose four specific standards for resolving the boundary issue. Constitutional tort should be available: (1) when the defendant acts with an impermissible motive or ill will toward the plaintiff, (2) when his intrusion on the plaintiff is unreasonably disproportionate to the legitimate goal that intrusion serves, (3) when the defendant's recklessness causes injury to a plaintiff under substan-

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[140] *See, e.g.*, Wright v. El Paso County Jail, 642 F.2d 134, 135 (5th Cir. 1981); Holmes v. Goldin, 615 F.2d 83, 85 (2d Cir. 1980); Abraham v. County of Washoe, 547 F. Supp. 548, 550 (D. Nev. 1982); *see also* Clappier v. Flynn, 605 F.2d 519, 533 (10th Cir. 1979) (officials liable if their conduct is "so grossly incompetent, inadequate or excessive as to shock the conscience").

[141] *See, e.g.*, Fries v. Barnes, 618 F.2d 988, 990-91 (2d Cir. 1980). *But cf.* McRae v. Hankins, 720 F.2d 863, 869-70 (5th Cir. 1983) (applying *Parratt* to deny constitutional tort for intentionally exposing inmate's property to theft); Moore v. Gluckstern, 548 F. Supp. 165, 166-67 (D. Md. 1982) (applying *Parratt* to deny constitutional tort for intentional deprivation by guards of prisoner's jewelry).

[142] York v. City of Cedartown, 648 F.2d 231, 233 (5th Cir. 1981).

[143] *See* Daniels v. Williams, 720 F.2d 792, 796 (4th Cir. 1983); Mitchell v. West Virginia, 554 F. Supp. 1215, 1217 (N.D. W. Va. 1983); Robinson v. Cuyler, 511 F. Supp. 161, 163 (E.D. Pa. 1981); *see also* Dollar v. Haralson County, 704 F.2d 1540, 1543-44 (11th Cir.) (no cause of action against county for negligently failing to construct bridge over dangerous stream), *cert. denied*, 104 S. Ct. 399 (1983); Covington v. Allsbrook, 636 F.2d 63, 63 (4th Cir. 1980) (putting saccharin in prisoner's drink without informing him of cancer risk is not constitutional tort), *cert. denied*, 451 U.S. 914 (1981).

[144] Buck v. Village of Minooka, 552 F. Supp. 298, 300 (N.D. Ill. 1982) (ordinary breaches of contract by state do not rise to level of due process violations); *see also* Braden v. Texas A&M Univ., 636 F.2d 90, 93 (5th Cir. 1981) (dictum).

[145] *See, e.g.*, Braden v. Texas A & M Univ., 636 F.2d 90, 90-93 (5th Cir. 1981); Manning v. Lockhart, 623 F.2d 536, 538 (8th Cir. 1980).

[146] *See, e.g.*, Flores v. Edinberg Consol. Indep. School Dist., 554 F. Supp. 974, 980 (S.D. Tex. 1983).

[147] Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1352-53 (9th Cir. 1981), *aff'd on other grounds*, 103 S. Ct. 1483 (1983); Ingraham v. Wright, 525 F.2d 909, 912 (5th Cir. 1976) (en banc), *aff'd on other grounds*, 430 U.S. 651 (1977); Dandridge v. Police Dep't, 566 F. Supp. 152, 153-61 (E.D. Va. 1983); Sellers v. Roper, 554 F. Supp. 202, 206 (E.D. Va. 1982) (dicta); Rhodus v. Dumiller, 552 F. Supp. 425, 427 (M.D. La. 1982); Samuels v. Department of Corrections, 548 F. Supp. 253, 255 (E.D.N.Y. 1982).

tial control by the state, or (4) when a defendant recklessly harms a plaintiff not under state supervision. In our view, these standards identify the cases in which the defendant's conduct is bad enough to justify overriding statutory and common law to recognize constitutional tort.

Our confidence in these principles is bolstered by our examination of the lower court caselaw. Many of the results in the cases can be squared with our proposals, even if the opinions themselves often offer little or no reasoning to support those results. Some of the more thoughtful opinions do articulate these or similar standards, but even those opinions do not offer a very elaborate defense for the standards. An example is the opinion in *Johnson v. Glick*,[148] the often-cited case in which the Second Circuit relied on *Rochin* to permit a pretrial detainee to maintain a constitutional tort action for abusive treatment. Writing for the court, Judge Friendly declared:

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the 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.[149]

Note that these standards are similar to the first two of our proposed principles, except for the court's use of "the extent of the injury inflicted" as a criterion for recovery. The problem with the opinion is that Judge Friendly does not explain how he got from the "shock the conscience" test of *Rochin* to these more specific standards. As a result, the merits of the *Glick* approach can easily be overlooked by courts that lack Judge Friendly's intuitive perception and do not have the time or inclination to develop an analytical defense of the standards.[150] The analysis presented in Part III supporting substantive due process and in Part IV concerning specific rules for deciding cases demonstrates that the *Glick* stan-

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[148] 481 F.2d 1028 (2d Cir. 1973).

[149] *Id.* at 1033. Many courts have relied on these standards. *See supra* note 131.

[150] For example, the Supreme Court in *Parratt* was aware of *Glick* and cited it as one of several approaches to the boundary problem. The *Parratt* Court, however, wholly ignored *Glick* in its own unsuccessful struggle to articulate a standard. 451 U.S. at 533.

dards do not rest on intuition alone.

At the same time, the *Glick* guidelines are themselves open to two criticisms. First, the court's "extent of the injury inflicted" test should be rejected. Second, and more important, the standards should not be viewed as "factors" to be weighed on a case-by-case basis. Rather, a bad motive should by itself be a sufficient condition for a court to apply constitutional tort, as should disproportion between force and justification. Recklessness should also suffice for liability, at least in situations where the government has control over the plaintiff, and perhaps more generally. This recklessness standard is not mentioned by *Glick*. As one court recently noted, the *Glick* formulation is not much of an improvement over *Rochin* when the criteria are viewed as "factors." It "does not instruct the factfinder as to how much weight should be given to each factor." Instead, the question whether "the constitutional line has been crossed . . . is left ultimately to the discretion of the factfinder."[151] We explain each of these objections in the course of defending our own approach in the ensuing sections.

Our principles not only identify cases that ought to receive constitutional status; they also exclude from constitutional tort many cases that are actionable under the common law by denying constitutional status to harms caused by mere negligence. Before discussing cases that should be accorded constitutional treatment, we explain why negligence and strict liability are not sufficient justifications.

A. Negligence and Strict Liability

The common law ordinarily imposes liability when a private defendant negligently causes harm and sometimes even holds him strictly liable, as when he employs a negligent worker, or manufactures a defective product, or engages in an abnormally dangerous activity. Often, however, government officials are effectively shielded from liability for negligence by state law good faith immunity rules as well as other obstacles to recovery. This scheme raises the question of whether constitutional tort liability should be imposed on the defendant under a negligence, or even a strict liability standard in order to guarantee that the injured plaintiff can re-

[151] Schiller v. Strangis, 540 F. Supp. 605, 616 (D. Mass. 1982).

cover in spite of state law. One reading of the ambiguous opinion in *Parratt v. Taylor*[152] is that the negligent defendant must pay damages because a state tort remedy which does not permit recovery will be deemed "inadequate" to satisfy due process.[153] Justice Powell, concurring in the result, read the opinion this way[154] and so have a number of lower federal courts. Relying on *Parratt*, they have ruled that negligence is sufficient to establish constitutional tort liability.[155]

Viewed from the perspective of substantive due process, the case for a constitutional tort claim for negligent harm is unconvincing. One of the major arguments for negligence (and strict liability) is that such a standard is necessary to give the defendant proper incentives to take cost-justified, economically correct precautions.[156] This rationale lacks independent force in constitutional tort since the policy of minimizing accident and accident-avoidance costs has no constitutional underpinning. The case for constitutional tort must be based on the plaintiff's interest in freedom from government intrusions onto his person or property. This interest is present whenever he suffers an injury, but it is not *especially* strong when the defendant is merely negligent.

Consider some of the principles of negligence law. Negligence is

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[152] 451 U.S. 527 (1981).

[153] *Id.* at 534-35. The Court reasoned that "[n]othing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights . . . . Section 1983, unlike its criminal counterpart, 18 U.S.C. § 242, has never been found by this Court to contain a state-of-mind requirement." *Id.* at 534. The answer to this argument is that state of mind can be relevant to whether a constitutional right was violated. *See generally* Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State of Mind Requirement*, 46 U. CIN. L. REV. 45 (1977).

[154] *See* 451 U.S. at 551 n.9 (Powell, J., concurring in result). Justice Powell thinks that the *Parratt* holding under this interpretation is an unwise extension of constitutional tort, and we agree with him. We do not agree, however, with his further assertion that intent is always necessary. The problem with his opinion in *Parratt*, and perhaps the reason it did not attract more votes, is that his opinion depends solely on the dictionary definition of "deprives" to support his claim that "deprives" in the fourteenth amendment requires intent. Even his quotation from the dictionary does not support his point. *See also* Smolla, *supra* note 8, at 875-79 (suggesting that states would not be free, in most instances, to grant immunity to officials).

[155] *See, e.g.*, Fernandes v. Chardon, 681 F.2d 42, 55 (1st Cir. 1982); Mills v. Smith, 656 F.2d 337, 340 (8th Cir. 1981); Seguin v. Eide, 645 F.2d 804, 811-12 (9th Cir. 1981), *vacated*, 130 S. Ct. 2446 (1983); Flores v. Edinburg Consol. Indep. School Dist., 554 F. Supp. 974, 980 (S.D. Tex. 1983); *cf.* McClelland v. Facteau, 610 F.2d 693, 697 (10th Cir. 1979) (predating *Parratt*).

[156] *See, e.g.*, Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1, 2 (1980).

an objective standard of care that is met whenever the defendant's conduct does not measure up to that of the mythical reasonable person. Typically, it does not imply a moral judgment of blameworthiness.[157] It does not denote ill will or subjective lack of concern for the plaintiff's welfare,[158] and it cannot support an award of punitive damages signifying societal disapproval of the defendant.[159] When the plaintiff carelessly disregards his own safety, recovery of even compensatory damages will be diminished or barred entirely.[160] More or less arbitrary rules of proximate cause[161] and concededly arbitrary limits on damages for emotional harm[162] further restrict recovery for negligence. All of these principles operate even when the plaintiff's injuries are severe. Taken together, these principles show that negligence is not commonly viewed as a particularly grave intrusion on the victim. Mislaying an inmate's property,[163] failing to enforce the speed limit,[164] and building dangerous streets[165] are rather far removed from the Constitution's focus on individual autonomy against abuse of government power. This kind of government conduct shows no particular lack of concern and respect for the individual.

At the same time, there is a strong argument against negligence liability for government officials. Unlike private individuals, public servants cannot capture for themselves the benefits of efficient government. They will likely be paid the same whether or not they save money by cutting out wasteful safety measures. For this reason, their incentives will be skewed toward taking too many pre-

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[157] *See* O.W. HOLMES, THE COMMON LAW 107-08 (1881).

[158] *See, e.g.*, Vaughn v. Menlove, 132 Eng. Rep. 490 (1837).

[159] *See, e.g.*, Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 842-43 (2d Cir. 1967); *cf.* Smith v. Wade, 103 S. Ct. 1625, 1637 (1983) (all Justices agreeing that something more than simple negligence is necessary to support award of punitive damages in constitutional tort action); *see generally* RESTATEMENT (SECOND) OF TORTS § 908 (1977).

[160] *See, e.g.*, Li v. Yellow Cab Co., 13 Cal. 3d 804, 828-29, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975); *see generally* Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697 (1978).

[161] *See, e.g.*, Petition of Kinsman Transit Co., 338 F.2d 708, 719-20 (2d Cir. 1964), *cert. denied*, 380 U.S. 944 (1965); *see generally* L. GREEN, JUDGE AND JURY (1930).

[162] *See, e.g.*, Dziokonski v. Babineau, 375 Mass. 555, 568, 380 N.E.2d 1295, 1302 (1978); *see generally* Pearson, *Liability to Bystanders for Negligent Infliction of Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477 (1982).

[163] *See* Parratt v. Taylor, 451 U.S. 527 (1981).

[164] *See* Hull v. City of Duncanville, 678 F.2d 582 (5th Cir. 1982).

[165] *See* York v. City of Cedartown, 648 F.2d 231 (5th Cir. 1981).

cautions. They know that if they do not take a reasonable precaution, they can be held liable for damages. This consequence gives them an incentive to take every safety measure that a jury, acting with hindsight, might decide a reasonable person would take. Government officials, however, feel a much weaker incentive to stop taking precautions when they are no longer cost-justified, as the officials themselves neither pay the cost of the safety measure nor capture the efficiency gained if it is eliminated. They will probably take too many precautions, and government will be less effective than it should be in pursuing wholly legitimate aims.[166] Whether or not this "overdeterrence" argument is empirically true,[167] it is plausible enough to warrant leaving the policy judgment on negligence liability to legislators and common law judicial decisions and not to decide it by an inflexible constitutional tort rule.[168]

B. Recklessness and Deliberate Indifference

In the common law, where negligence is almost always enough for liability, courts usually pay little attention to precise formulations of the more extreme forms of negligence—gross negligence, recklessness, and wilful and wanton misconduct. The difference is usually important only in such questions as whether punitive damages can be recovered, or whether a guest statute limiting liability to gross negligence is applicable in a given case.[169] In constitutional

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[166] For a thorough presentation of this argument, see Cass, *supra* note 91, at 1133-59; Schuck, *Suing our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281. When the suit is brought against the government itself, as opposed to one of its officials, the problem of overdeterrence is somewhat diminished. *See* Owen v. City of Independence, 445 U.S. 622, 653 (1980); Madden, Allard & Remes, *Bedtime for* Bivens*: Substituting the United States as Defendant in Constitutional Tort Suits*, 20 HARV. J. ON LEGIS. 469, 478-86 (1983). Even so, because ordinary negligence is not that great an affront to personal dignity, the likelihood that the problem of overdeterrence may be diminished is not sufficient alone for negligence to warrant treatment under constitutional tort.

[167] It has been suggested that public and private tortfeasors are more similar than the textual description suggests. *See, e.g.*, Sunstein, *Judicial Relief and Public Tort Law*, 92 YALE L.J. 749, 756 (1983). In particular, Sunstein suggests that many bureaucrats are rewarded for efficiency and many low-level private sector employees do not capture the benefits of aggressive action. *Id.*

[168] Accordingly, we think that the cases cited at *supra* note 124 are wrongly decided.

[169] *See, e.g.*, Bickford v. Nolen, 240 Ga. 255, 257, 240 S.E.2d 24, 26 (1977) (guest rule); Harrell v. Ames, 265 Or. 183, 188-91, 508 P.2d 211, 213-15 (1973) (punitive damages); *cf.* Burk Royalty Co. v. Walls, 616 S.W.2d 911, 914 (Tex. 1981) (gross negligence supports award of exemplary damages in worker's compensation death case).

tort, these standards take on greater importance. If liability is denied for negligence because negligence is not enough of an affront to the plaintiff, perhaps liability can be justified for reckless conduct on the ground that the affront to the plaintiff is greater.

In this section we argue that recklessness should suffice for liability. At the same time, we acknowledge that the argument for recklessness is stronger in cases when the government exercises control over the plaintiff. Accordingly, a court that values the government's interest in discretion somewhat more highly than we do (but not highly enough to preempt constitutional tort entirely) might impose liability for recklessness only in control cases while denying it in other situations.

1. Control. The government differs from private defendants in that it may legitimately exercise control over individuals against their will, a privilege rarely accorded private actors and then only for brief periods in narrow settings. When the government exercises such control, notably by imprisoning convicted criminals, it significantly alters their ability to protect themselves from danger. The prisoner is surrounded by dangerous people from whom he cannot escape. The prison environment affecting his health and well-being is wholly beyond his control. This circumstance significantly affects the balance of equities between plaintiff and defendant. When the government makes the individual more vulnerable to harm by imprisoning him, fairness demands that the government take some measures to protect him from the risks.[170]

The Supreme Court has recognized that government control warrants imposing constitutional duties to protect and provide for the incarcerated. This duty is variously articulated in terms of "recklessness," "callous indifference," or "deliberate indifference." The particular label is relatively unimportant. The principle is that serious disregard for the medical and security needs of those over whom government exercises control crosses the boundary of common law tort and becomes a matter of constitutional concern. This principle was first clearly stated in *Estelle v. Gamble.*[171] A prisoner sued in constitutional tort claiming that his inadequate medical treatment amounted to a violation of the cruel and unusual pun-

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[170] *See* Daniels v. Gilbreath, 668 F.2d 477, 487 (10th Cir. 1982); Spriggs v. City of Chicago, 523 F. Supp. 138, 142 n.3 (N.D. Ill. 1981); *see also* Wells & Eaton, *supra* note 2, at 37-41.

[171] 429 U.S. 97 (1976).

ishments clause of the eighth amendment.[172] The Supreme Court held that he could not recover by showing ordinary medical malpractice. That was a matter for state tort law. But constitutional tort would be available if the prison officials showed "deliberate indifference" to his medical needs because "such indifference [would] . . . offend 'evolving standards of decency' in violation of the Eighth Amendment."[173] More recently, in *Smith v. Wade*,[174] the Supreme Court affirmed an award of punitive damages against a prison guard whose "callous indifference" resulted in the beating and sexual assault of an inmate. In the course of its opinion, the Court made clear that a "reckless or callous indifference to" an inmate's need for protection can support a constitutional tort claim.[175]

While *Estelle* and *Wade* were argued and decided under the eighth amendment, the "recklessness" or "deliberate indifference" standards articulated in those cases can also support a claim under the due process clause. The Supreme Court has repeatedly noted that the constitutional protections afforded prisoners under the eighth amendment may be available to others as a matter of substantive due process.[176] The most recent example is *City of Revere v. Massachussetts General Hospital*,[177] in which a criminal suspect named Kivlin was shot by police in the course of his arrest. Unlike the prisoner in *Estelle*, Kivlin could not base his constitutional claim for medical care under the eighth amendment because "there had been no formal adjudication of guilt."[178] Yet the Supreme Court agreed that his "due process" right to medical care was "at

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[172] *Id.* at 99-101.

[173] *Id.* at 106.

[174] 103 S. Ct. 1625 (1983).

[175] *Id.* at 1638. The Court's opinion is technically limited to the issue of punitive damages and does not directly address what standard is necessary to support liability in the first instance. *Id.* at 1628. Yet the standards for awarding punitive damages have never been less exacting than those required to support compensatory damages. *See id.* at 1638-40. If the "reckless or callous indifference" standard will support punitive damages, then it should also support liability in the first instance.

[176] *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982); Bell v. Wolfish, 441 U.S. 520, 535-37 (1979) (pretrial detainee receives, under due process clause, some protection afforded sentenced inmates under eighth amendment); *cf.* Ingraham v. Wright, 430 U.S. 651, 671 (1977) (refusing to apply eighth amendment standards to issue of corporal punishment in public schools, but reserving substantive due process issue).

[177] 103 S. Ct. 2979 (1983).

[178] *Id.* at 2983.

least as great as" those afforded prisoners under the eighth amendment.[179]

Taken together, these cases strongly support the principle that, when a person is under government control, recklessness defines the boundary between common law and constitutional tort. The element of control extends, of course, beyond persons being arrested or detained for trial. Another obvious group of persons within government control are inmates of public mental health institutions.[180] A less obvious case of control is illustrated by *White v. Rochford*.[181] There the police stopped a car on an expressway, took the driver away, and left two small children stranded in the car for several hours. The court held that the officers could be liable for the harm the children suffered, even though the harm was not deliberate.[182]

Since the vulnerability argument is equally applicable to all these situations, the same rule for liability should apply. If a deliberate indifference or recklessness standard is appropriate for prisoners, it should also be applied to others under government control. Yet the eighth amendment roots of the current rule for prisoners does not permit its extension to those other situations. This doctrinal limitation, however, has not deterred the Supreme Court and some lower courts from treating the other control cases like prisoner cases, although the courts have not adequately explained the logical basis of their decisions.[183] We think these courts reach the correct results and that the right way to defend those results is to employ the substantive due process argument

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[179] *Id.* Note that, while the Court acknowledged that this was a "due process" case, the Court never openly referred to substantive due process. Nonetheless, it is clear that "despite semantic subterfuges, substantive due process by any other name is still substantive due process." Perry, *supra* note 10, at 689 n.4.

[180] *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 317 (1982). One lower court has held that voluntarily admitted mental patients are not entitled to constitutional protection. Estate of O'Brien v. Wilkins, 511 F. Supp. 707, 708 (N.D. Fla. 1981). This decision is open to criticism. The voluntarily admitted mental patient is just as helpless as the involuntarily admitted patient to fend for himself on a day-to-day basis. *Cf.* Milonas v. Williams, 691 F.2d 931, 942-43 (10th Cir. 1982) (parental consent to behavior modification at special school cannot legitimate otherwise unconstitutional practice), *cert. denied*, 103 S. Ct. 1524 (1983).

[181] 592 F.2d 381 (7th Cir. 1979).

[182] *Id.* at 384-85.

[183] *See, e.g.*, City of Revere v. Massachusetts Gen. Hosp., 103 S. Ct. 2979, 2983 (1983); Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982); Doe v. New York City Dep't of Social Servs., 649 F.2d 134, 141-42 (2d Cir. 1981).

presented here.

2. No Control. The case for applying a recklessness standard in the absence of government control is less compelling since the element of government-induced vulnerability is not present. There are good reasons, nonetheless, why this standard should apply here as well. The less care the government defendant takes, the more persuasive is the plaintiff's claim that the dereliction of duty violated not only his common law claim to physical safety but also a constitutional right to personal respect from government officers. As the common law recognizes by awarding punitive damages for extremely careless conduct, the reckless defendant not only physically injures his victim but insults him as well.[184] This insult is all the greater when the agent of the harm is a government officer who supposedly is a servant of the people. In addition, the countervailing policy against overdeterrence of beneficial government action diminishes in strength as the degree of care diminishes. It is harder to maintain that government officers will not vigorously perform their jobs for fear that they will be successfully sued for gross negligence than when the threat is a suit for simple negligence.[185] The risk to the officer that his conduct will be viewed as reckless is less than the risk that it will be found negligent.

The overdeterrence argument, nonetheless, is not without force even here and, coupled with a strong preference for legislative decision making, might still carry the day. The heart of the overdeterrence argument lies in the fear that courts and juries will be unable or unwilling to distinguish between simple negligence and recklessness. Admittedly this distinction is often difficult to articulate,[186] and there are instances in which seemingly simple negligence has been deemed wilful and wanton misconduct.[187]

The Supreme Court's recent approval of a recklessness standard

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[184] RESTATEMENT, *supra* note 159, at comment c.

[185] As the Supreme Court recently noted, "there is no societal interest in protecting those uses of a prison guard's discretion that amount to reckless or callous indifference." Smith v. Wade, 103 S. Ct. 1625, 1640 (1983).

[186] The Supreme Court has recognized that terms like "gross negligence" and "wantonness" are "slippery" terms to define with precision. Smith v. Wade, 103 S. Ct. 1625, 1631 n.8 (1983); *see also* Burk Royalty Co. v. Walls, 616 S.W.2d 911, 915 (Tex. 1981) (court confessing that its prior attempts to define term "gross negligence" were "somewhat confusing").

[187] *See, e.g.*, Stephens v. United States, 472 F. Supp. 998, 1017 (C.D. Ill. 1979) (government's failure to post warnings that there were tree stumps beneath shallow waters of reservoir was found to be wilful and wanton misconduct in context of common law tort).

for awarding punitive damages suggests, however, that the term is not "too vague to be fair or useful."[188] The Court's confidence in the standard is shared by many lower courts that hold defendants liable for reckless conduct, but take pains to distinguish between ordinary negligence and recklessness.[189] Thus, a policeman who carelessly fires his gun is not liable to those he injures in constitutional tort, while one who does so with callous disregard of the risk to the plaintiff may be liable.[190] A supervisor or government that should be, but is not, aware of its employees' transgressions will not have to pay damages, but one that does know about them and fails to act will be held liable.[191]

C. *Intent to Harm*

The common law generally holds that an unconsented touching coupled with an intent to touch are sufficient to establish a prima facie case of intentional tort, subject only to reasonable self-defense and sometimes defense of others and defense of property.[192] This is the rule for private individuals, but for government actors there are a variety of other privileges that reflect the government's virtual monopoly on the routine use of legitimate force to carry out its aims. For example, policemen are allowed to use force to stop fleeing suspects and to control arrestees,[193] and school authorities may confine[194] or paddle[195] students who misbehave.

In constitutional tort the issue is what substantive due process limits should be placed on government officers' discretion to harm individuals intentionally. What constitutional limits are appropriate depends upon whether the actor's motive for harming the vic-

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[188] Smith v. Wade, 103 S. Ct. 1625, 1637 (1983).

[189] *See* Hughes v. Blankenship, 672 F.2d 403, 406 (4th Cir. 1982); Hays v. Jefferson County, 668 F.2d 869, 874 (6th Cir.), *cert. denied*, 103 S. Ct. 75 (1982); Daniels v. Gilbreath, 668 F.2d 477, 488 (10th Cir. 1982); Bowen v. Watkins, 669 F.2d 979, 988 (5th Cir. 1982).

[190] *See, e.g.*, Hughes v. Blankenship, 672 F.2d 403, 406 (4th Cir. 1982).

[191] *See, e.g.*, Orpiano v. Johnson, 632 F.2d 1096, 1101 (4th Cir. 1980), *cert. denied*, 450 U.S. 529 (1981). For a contrary view, see Note, *supra* note 9 (advocating constitutional tort liability for supervisors whose negligence allowed subordinate to deprive others of constitutional rights).

[192] *See generally* RESTATEMENT (SECOND) OF TORTS §§ 18, 63-86 (1964).

[193] *See, e.g.*, Schumann v. McGinn, 307 Minn. 446, 240 N.W.2d 525, 538 (1976).

[194] *See, e.g.*, Sindle v. New York City Transit Auth., 33 N.Y.2d 293, 297, 307 N.E.2d 245, 248, 352 N.Y.S.2d 183, 186-87 (1973).

[195] *See, e.g.*, Tinkham v. Kole, 252 Iowa 1303, 1308, 110 N.W.2d 258, 261 (1961).

tim is constitutionally legitimate. In the case where the motive is not legitimate, a strong, and we think conclusive, argument can be made for constitutional tort. On the other hand, if the defendant acts in good faith pursuant to a constitutionally permissible state policy, the issue of constitutional tort liability should turn on the relationship between the force he uses and the objective he is trying to achieve.

1. Bad Motive. The best case for liability arises when the defendant acts under the pretext of a legitimate state purpose but his true motive is to achieve some personal goal such as revenge, or some constitutionally illegitimate public goal, like punishing a criminal suspect without a trial. The policeman who treats a suspect roughly may use force because he believes such force is necessary to the arrest,[196] or his reason may be improper.[197] In such a case, the argument for constitutional tort is at its strongest. Government officers cannot persuasively maintain that their vigor in acting for the public interest will be diminished by a rule that holds them liable when the plaintiff can show a bad motive. Such defendants must therefore fall back on the argument that the threat of litigation by itself will deter them from vigorously discharging their obligations. Admittedly, even under a bad motive standard of liability, the officer may be forced to defend meritless and perhaps even frivolous law suits. Moreover, the risk of erroneous judgments is always present.

We find this argument unpersuasive. There are other ways of combatting frivolous law suits, such as requiring losing plaintiffs to pay attorney's fees when the facts are clear enough to support a

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[196] *See, e.g.*, Peterson v. Davis, 551 F. Supp. 137 (D. Md. 1982); Alberts v. City of New York, 549 F. Supp. 227 (S.D.N.Y. 1982); Akili v. Ward, 547 F. Supp. 729 (N.D.N.Y. 1982); Bailey v. City of New Orleans, 533 F. Supp. 193 (E.D. La. 1982).

[197] *See, e.g.*, Webster v. City of Houston, 689 F.2d 1220, 1227 (5th Cir. 1982), *reh'g granted*, 711 F.2d 35 (5th Cir. 1983); Black v. Stephens, 662 F.2d 181, 188-89 (3d Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982); Holmes v. Goldin, 615 F.2d 83, 85 (2d Cir. 1980); Buise v. Hudkins, 584 F.2d 223, 229-30 (7th Cir. 1978), *cert. denied*, 440 U.S. 916 (1979); Schiller v. Strangis, 540 F. Supp. 605, 611-13 (D. Mass. 1982); Hilliard v. Scully, 537 F. Supp. 1084, 1090 (S.D.N.Y. 1982); Larson v. Wind, 536 F. Supp. 108, 112 (N.D. Ill. 1982).

If the officer is motivated by *both* illegitimate and legitimate concerns, a question of causation is presented. The Court has previously ruled that constitutional tort will not lie when the challenged government conduct would have occurred even without the illegitimate motivation. Mount Healthy City School Dist. v. Doyle, 429 U.S. 274, 287 (1977). The Court's approach to mixed motive government conduct cases is, in effect, a modification of the common law "but-for" test of cause in fact. *See* Eaton, *supra* note 125, at 452-61.

finding of harassment.[198] In addition, the state can diminish the harm from harrassment by providing its officers with legal services, or even indemnification.[199] It is fairer to cope with harassment through measures such as these than to deny relief to plaintiffs with meritorious claims.

In any event, the plaintiff's interest in recovery in bad motive cases is strong enough to outweigh the potential deterrent effect of litigation costs. A victim might incur the same physical injuries from properly motivated government action, but wrongly motivated harm results in dignitary injuries as well. The individual must expect that he will be treated roughly by government when there is good reason for it and that he will sometimes be the victim of mistakes.[200] The suspect who is physically harmed when he refuses to submit to arrest[201] and the prisoner who is mistaken for someone else[202] suffer physical and emotional harm, but their injuries include no element of insult. When the motive for those injuries is bad, however, the victim is not accorded the concern and respect due him from the government. In a nation of free people, government officers must be permitted to use force, but they are still our servants and not our masters. A tort remedy can be an effective economic reminder to them of their proper role,[203] as well as a symbolic affirmation of the limits of governmental power.[204]

2. *Severity of Injury.* Many of the lower courts have acknowledged that bad motive is relevant to constitutional tort liability under an "egregiousness" test, although they do not articulate their reasons.[205] Perhaps because they grasp the point intuitively

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[198] *See, e.g.,* Prochaska v. Marcoux, 632 F.2d 848, 853-55 (10th Cir. 1980), *cert. denied,* 451 U.S. 984 (1981); *cf.* Christiansberg Garment Co. v. EEOC, 434 U.S. 412, 417-24 (1978) (discussing standards for awarding attorney's fees to defendants in Title VII actions).

[199] *See* Cass, *supra* note 91, at 1174-87; Shuck, *supra* note 166, at 351-52.

[200] *See* L. TRIBE, *supra* note 10, at 913.

[201] *See, e.g.,* Bailey v. City of New Orleans, 533 F. Supp. 193, 196 (E.D. La. 1982) (every act of resistance by plaintiff arrestee required defendant policeman to exert greater force to retain control of situation).

[202] *See, e.g.,* Baker v. McCollan, 443 U.S. 137, 145-47 (1979).

[203] Just how effective a deterrent the tort remedy provides is open to debate. *Compare* Project, *Suing the Police in Federal Court,* 88 YALE L.J. 781 (1979) *with* Posner, *supra* note 108, at 49.

[204] *See* Love, *Damages: A Remedy for the Violation of Constitutional Rights,* 67 CALIF. L. REV. 1242, 1264 (1979).

[205] *See, e.g.,* Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1981); Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981); Tanner v. McCall, 625 F.2d 1183, 1193 (5th Cir. 1980),

and not analytically, they do not give motive quite the force it deserves. Applying the factors set forth in *Johnson v. Glick*,[206] they often hold that even a bad motive will not be sufficient justification to apply constitutional tort if the harm suffered is not too great.[207] But the argument for liability based on motive does not rest on the severity of the measurable harm.[208] The argument turns on the lack of any good reason to tolerate badly motivated harm and the personal affront suffered by the plaintiff. An illustrative case is *Howse v. DeBerry Correctional Institute*.[209] Two guards had attacked an inmate, who sued in constitutional tort for damages. The court correctly reasoned that the issue was one of substantive due process and quoted the "articulate discussion"[210] of the problem in *Johnson v. Glick*.[211] The *Howse* court conceded that the actions of the guards "were not an effort to maintain discipline." Rather, they were a reaction to the inmates' assertion, "in each defendant's presence, that each had engaged in a variety of homosexual practices at the prison." Nevertheless, because the attacks "were not totally unprovoked" and because "plaintiff actually suffered no physical harm whatsoever, aside from momentary physical discomfort," the constitutional tort action could not be maintained.[212]

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cert. denied, 451 U.S. 907 (1981); Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980); Henderson v. Counts, 544 F. Supp. 149, 153 (E.D. Va. 1982); Howse v. DeBerry Correctional Inst., 537 F. Supp. 1177, 1181 (M.D. Tenn. 1982).

[206] 481 F.2d 1028, 1033 (2d Cir. 1973); *see* text accompanying note 149.

[207] *See, e.g.*, Tefft v. Seward, 689 F.2d 637, 639 (6th Cir. 1982); Wise v. Bravo, 666 F.2d 1328, 1333-35 (10th Cir. 1981); Stacey v. Ford, 554 F. Supp. 8, 9 (N.D. Ga. 1982); Henderson v. Counts, 544 F. Supp. 149, 153 (E.D. Va. 1982); Williams v. Pecchio, 543 F. Supp. 878, 879-80 (W.D.N.Y. 1982); Howse v. DeBerry Correctional Inst., 537 F. Supp. 1177, 1182 (M.D. Tenn. 1982).

[208] This does not mean that severity of harm is wholly irrelevant to liability. The more severe the harm, the easier it is for the finder of fact to infer a bad motive. Our point is that severity should serve only this evidentiary function and should not be a prerequisite to liability.

[209] 537 F. Supp. 1177 (M.D. Tenn. 1982).

[210] *Id.* at 1181.

[211] 481 F.2d at 1033.

[212] 537 F. Supp. at 1182. *Howse* also illustrates another problem that can surface in motive cases. One part of the court's explanation for the holding was that the attacks, made in retaliation for accusations of homosexual conduct, "were not totally unprovoked." *Id.* at 1182. This argument raises the question of what motives are constitutionally improper. The court seems to hold that an angry reaction to words is a constitutionally permissible reason for the use of force, even though on identical facts words like these would not excuse or justify a common law battery. The effect of the holding is to give government officers a greater privilege than the ordinary citizen to use force to satisfy personal grudges.

To the extent this decision relies on the principle that the severity of the physical harm should be considered, we think it is wrong. The measurable damage from a constitutional violation may be only a small part of the actual harm. The dignitary injury suffered from physical coercion by government power and the intangible harm to constitutional values are often of more constitutional significance than physical damage.[213] An uncompensated violation of the body or of freedom of movement can suggest, both to government officials and individuals, that personal autonomy is not in itself very important and should be taken seriously only when substantial physical damage is done. The individual's interest in a remedy when government officials use force for personal ends, under color of government authority, does not depend on measurable harm for its vitality. Recovery should not be limited to cases in which such harm can be proved.[214]

3. Legitimate Force and Disproportion. Suppose, however, that the defendant is not motivated by a personal grudge, or by a desire to punish the plaintiff summarily, or by some other constitutionally illegitimate reason. The defendant instead uses force or otherwise intentionally harms the plaintiff in pursuit of a constitutionally permissible government policy. The police chief who publicizes the plaintiff's shoplifting arrest in order to warn merchants,[215] the teacher who paddles a student to discipline him,[216] and the jailor who uses force to subdue an uncooperative prisoner[217] all fall into this category. When, if ever, can the plaintiff make out a case in constitutional tort under such circumstances?

The balance of interests is closer here than in bad motive cases. The plaintiff cannot maintain, as he can in bad motive cases, that the intentional harm is not justified and hence should be actionable. Nor can he show that he has not received the respect due him from government. He should expect to be subjected to intentional harm when he provokes it, like the unruly student or prisoner or

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[213] *See* Smith v. Heath, 691 F.2d 220, 226-27 (6th Cir. 1982); Love, *supra* note 204, at 1281-85; *see also* Ryland v. Shapiro, 708 F.2d 967, 976 (5th Cir. 1983); Herrera v. Valentine, 653 F.2d 1220, 1227-31 & nn.6-9 (8th Cir. 1981).

[214] Accordingly, we think that the cases cited *supra* note 207 were incorrectly decided.

[215] *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976).

[216] *See, e.g.*, Rhodus v. Dumiller, 552 F. Supp. 425 (M.D. La. 1982).

[217] *See, e.g.*, Peterson v. Davis, 551 F. Supp. 137 (D. Md. 1982); Akili v. Ward, 547 F. Supp. 729 (N.D.N.Y. 1982).

suspect. For these reasons, it would be unwise to adopt a general rule that any intentional harm is cognizable in constitutional tort, and it is not surprising that courts have rejected that alternative.

It does not follow that constitutional tort should *never* be available when the actor's purpose is legitimate. Even when the use of force or other intentional harm is permissible, limits on the extent of intentional intrusions on the plaintiff's body, emotions, reputation, and other interests may be appropriate. Corporal punishment of students is an appropriate use of force, but a severe beating is not.[218] The same is true for policemen's treatment of arrestees[219] and treatment afforded inmates by prison guards.[220] The factor that distinguishes proper from improper force in these cases is the relation between force and justification. Harm that is grossly disproportionate to the legitimate government aim should be cognizable in constitutional tort.

Under this standard there will be some cases in which a great deal of government force is acceptable, as in quelling a prison riot,[221] or in dealing with a rowdy arrestee.[222] In others, hardly any force will be tolerable. In *Shillingford v. Holmes*,[223] for example, the court held that a single blow with a nightstick was excessive force against someone who was trying to photograph the police

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[218] *Compare* Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980) (severe beating alleged) *with* Ware v. Estes, 328 F. Supp. 657, 660 (N.D. Tex. 1971) (ordinary paddling), *aff'd mem.*, 458 F.2d 1360 (5th Cir.), *cert. denied*, 409 U.S. 1027 (1972).

[219] *Compare* Bruner v. Dunaway, 684 F.2d 422, 424 (6th Cir. 1982) (police beat plaintiff) *and* Roberts v. Marino, 656 F.2d 1112, 1114 (5th Cir. 1981) (police beat plaintiff, who was already wounded and helpless) *with* Harbulak v. County of Suffolk, 654 F.2d 194, 195-97 (2d Cir. 1981) (policeman reached across motorist's body to put summons on dashboard of car) *and* Bailey v. City of New Orleans, 533 F. Supp. 193, 196 (E.D. La. 1982) (policeman used substantial but necessary force to subdue recalcitrant arrestee).

[220] *Compare* Ridley v. Leavitt, 631 F.2d 358, 359-60 (4th Cir. 1980) (beating prisoner after disturbance is over is excessive) *with* Peterson v. Davis, 551 F. Supp. 137, 143-45 (D. Md. 1982) (tear gas to stop riot is not excessive); *see also* Anderson v. Coughlin, 700 F.2d 37, 44 (2d Cir. 1983) (twelve-hour keeplock so that guards could attend funeral of murdered guard is constitutionally permissible).

[221] *See, e.g.*, Albers v. Whitley, 546 F. Supp. 726, 732-35 (D. Or. 1982).

[222] *See, e.g.*, Bailey v. City of New Orleans, 533 F. Supp. 193 (E.D. La. 1982); Jordan v. Five Unnamed Police Officers, 528 F. Supp. 507 (E.D. La. 1981).

[223] 634 F.2d 263, 266 (5th Cir. 1981). The court, following the *Glick* test, did not distinguish sharply between motive and disproportion. The opinion could be read as suggesting that both are necessary. *See also* Ware v. Reed, 709 F.2d 345, 351-52 & n.11 (5th Cir. 1983); Buskirk v. Seiple, 560 F. Supp. 247, 250 (E.D. Pa. 1983). Under our approach, either bad motive *or* disproportion would establish liability.

making an arrest, not only because the motive was probably illegitimate, but also because of the disproportion between any legitimate need to maintain order and the use of a nightstick.

The policy justification for such a rule is straightforward. The presence of a legitimate governmental interest justifies the use of force or other action to harm the plaintiff, but it does not wholly obliterate the plaintiff's interest in government respect for his physical and emotional well-being. The obvious compromise is to permit the use of force, but to avoid giving government officers an unlimited discretion. A disproportion test accomplishes that aim. It requires an examination of the facts in every case to determine just what the victim might have done to warrant the force used. Short of a rule that either hamstrings the police or leaves the individual defenseless, it is hard to see any alternative to case-by-case adjudication in this area.

There is ample case law in the lower federal courts to support such a disproportion rule.[224] The egregiousness test often reaches the right result because disproportionate force, like badly motivated government action, can often be characterized as egregious. But disproportion and motive are better standards than egregiousness because they identify more precisely the circumstances to look for in analyzing a fact situation. We also can support them with concrete reasons why they should be controlling principles. Egregiousness, abuse, and outrage are intuitively appealing terms for describing cases in which constitutional tort should be available, but in the development of workable doctrine they are no substitute for specific criteria and specific reasons to support those criteria.

V. Conclusion: The Supreme Court Decisions Reexamined

Defining the scope of constitutional tort in terms of substantive due process invites a reexamination of the Supreme Court's leading decisions. The application of our proposed decisional guidelines suggests that the claims raised in *Parratt v. Taylor*[225] and *Paul v. Davis*[226] lie outside the scope of constitutional tort. They are to be addressed solely within the framework of a state tort system. By

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[224] *See supra* notes 218-23 and cases cited therein.

[225] 451 U.S. 527 (1981).

[226] 424 U.S. 693 (1976).

contrast, *Ingraham v. Wright*[227] presents a proper constitutional tort claim. *Baker v. McCollan*[228] is, in many ways, the most difficult test for our analysis. The facts alleged in *Baker* illustrate the difficulty in distinguishing between simple negligence and recklessness.

Parratt is the easiest case to resolve. The negligent loss of a hobby kit is the weakest case for constitutional tort. Perhaps for this reason the Supreme Court selected *Parratt* as its vehicle for defining the scope of constitutional tort.[229] In *Parratt,* there was no evidence of any intent to injure or recklessness. The most the plaintiff could prove was that his property was misplaced while it and he were under the defendant's custody. Under our guidelines, such claims of simple negligence are properly restricted to the common law tort system, in which states are free to decide for themselves whether to provide compensation.

Paul is a case that should be analyzed under the disproportion principle. There was no indication that the defendant police chief acted from an improper motive when he circulated the list of "active shoplifters." There was no allegation that Chief Paul harbored any personal animosity toward Davis or desired to injure him in any way. The apparent objective was to reduce the incidence of shoplifting. Circulating the names of persons arrested for that crime allows merchants to maintain a particularly watchful eye and thus advances this legitimate goal. There is, without question, a cost to the plaintiff in publicizing his arrest. The arrest may have been the result of error and the charge unfounded.[230] The plaintiff may suffer embarrassment or other injury as a result of the publication. Yet, to some extent, such risks inherently attach to any arrest. While the matter is not beyond debate,[231] given the limited circulation, publicizing the names of persons arrested for shoplifting is not a disproportionately intrusive means to combat crime.

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[227] 430 U.S. 651 (1977).

[228] 443 U.S. 137 (1979).

[229] The role of state tort law in satisfying due process was not discussed by the lower courts in *Parratt* and was raised for the first time in the petition for certiorari. After the Court granted certiorari in *Parratt,* Taylor sought to have the case dismissed, claiming he had no interest in recovering his judgment from the defendant. *See* Friedman, *supra* note 9, at 553-54.

[230] *See, e.g.,* Baker v. McCollan, 443 U.S. 137, 141 (1979).

[231] See Note, *supra* note 18, at 230, in which the author would characterize *Paul* as an "intent to injure" case.

The case for treating *Paul* under constitutional tort is strengthened, however, by the defendant's use of the phrase "active shoplifters." There was no evidence that the plaintiff was an active shoplifter at the time the flyer was distributed. Had the circular read "persons recently arrested for shoplifting" or "suspected shoplifters," it would have been entirely accurate. The defendant's misuse of words, though not trivial, does not alter the basic flavor of the case. The defendant's conduct was properly motivated by a desire to advance a legitimate function of government. The publication was restricted to those most directly concerned with shoplifting. Under these circumstances, the defendant's conduct lacks the elements of abusiveness necessary to give rise to a constitutional tort action.[232]

Ingraham illustrates how the concept of disproportion can support a claim for constitutional tort. The plaintiff complained of the severity of the corporal punishment inflicted by public school officials. Normal punishment was "one to five 'licks' " on the buttocks with a wooden paddle.[233] One student, however, was paddled fifty times for skipping school.[234] Another was paddled fifty times for allegedly making an obscene phone call. A different student later confessed to having made the call.[235] Ingraham himself earned twenty licks for being too slow to respond to his teacher's instructions.[236] Many of these incidents produced injuries requiring medical attention.[237] While the goal of maintaining classroom decorum is laudable, there are constitutional limits on its attainment. Severe physical punishment is disproportionate to the offense of playing hookey or slowly responding to instructions. Post-*Ingraham* courts have recognized that, if sufficiently severe or improperly motivated, corporal punishment in public schools may be un-

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[232] *See also* Sadiqq v. Bramlett, 559 F. Supp. 362, 368 (N.D. Ga. 1983) (defendants' transmission of inaccurate information into plaintiff's FBI file would support constitutional tort action if they "intentionally and maliciously acted to deprive . . . [the plaintiff] of his constitutional rights").

[233] Ingraham v. Wright, 430 U.S. 651, 656 (1977).

[234] Ingraham v. Wright, 498 F.2d 248, 258 (5th Cir. 1974), *rev'd on rehearing*, 525 F.2d 909 (5th Cir. 1976) (en banc), *aff'd*, 430 U.S. 651 (1977).

[235] *Id.* at 258.

[236] 430 U.S. at 657.

[237] Ingraham suffered a hematoma which caused him to miss several days of school. Another student was struck so severely as to deprive him of the full use of his arm for a week. *Id.* Other instances are recounted in 498 F.2d at 257-59.

constitutional.[238] We believe that the allegations in *Ingraham* demonstrate a sufficiently disproportionate use of force to warrant recourse under constitutional tort.

The most troublesome case is the mistaken arrest of the plaintiff in *Baker*. The defendant sheriff did not act out of an improper motive, nor was the arrest and confinement disproportionate to the suspected offense. But the plaintiff was within the defendant's custody. We have argued that, when the defendant has custody of the plaintiff, the defendant's recklessness can support a claim in constitutional tort. Whether *Baker* should have proceeded in constitutional tort thus depends on whether the defendant's conduct amounted to recklessness as opposed to simple negligence.

The majority characterized the mistaken arrest as a case of simple negligence. The plaintiff was the person named in the arrest warrant issued in Amarillo, Texas. His name was listed in the warrant because the person sought by the police was using the plaintiff's name on an altered driver's license.[239] Under this view of the facts, the defendant's confinement of the plaintiff was, at most, simple negligence. Yet, as argued in the dissent, there was also evidence that the defendant's conduct was more blameworthy. The defendant had reason to know that the person sought was using an alias and therefore was not the individual named in the warrant. Moreover, the defendant did not disclose the risk of misidentity to the arresting officers in Dallas, Texas. At the time the defendant took custody of the plaintiff, he failed to follow customary identification procedures that would have revealed that he had the wrong person.[240] Whether these allegations transcend simple negligence is admittedly a matter of opinion. It is, however, the type of opinion

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[238] Parratt v. Taylor, 451 U.S. 527, 553 n.11 (1981) (Powell, J., concurring); Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980); *cf.* Coleman v. Franklin Parish School Bd., 702 F.2d 74, 76-77 (5th Cir. 1983) (denying substantive due process claim but allowing child to pursue equal protection theory). Courts within the Fifth Circuit continue to adhere to that circuit's denial of the substantive due process claims in *Ingraham*. *See* Hale v. Pringle, 562 F. Supp. 598, 600-01 (M.D. Ala. 1983); Rhodus v. Dumiller, 552 F. Supp. 425 (M.D. La. 1982).

[239] 443 U.S. at 140. The plaintiff was named Linnie McCollan. His brother, Leonard, procured a fake driver's license bearing Linnie's name and identification number. Leonard was subsequently arrested in Amarillo, Texas, on narcotics charges and booked as Linnie Carl McCollan. After Leonard jumped bail, a warrant was issued for Linnie Carl McCollan. The real Linnie McCollan was arrested in Dallas, Texas, when a routine check upon being stopped for a traffic violation revealed the outstanding warrant. *Id.* at 140-41.

[240] *Id.* at 150-51 (Stevens, J., dissenting).

that juries are customarily called upon to give. Indeed, the Court recently approved submitting such a question to the jury in the context of awarding punitive damages.[241] Eight days of wrongful confinement is a serious intrusion upon one's liberty. Given the importance of the interest invaded and the defendant's awareness of the risk, we believe a reasonable jury could conclude that the defendant was reckless.[242] Therefore, the plaintiff should have been permitted to present his claim in constitutional tort.[243]

The fundamental problem with the Supreme Court's efforts to date is the failure to think clearly about the boundary problems the cases present and to fashion appropriate standards for resolving. *Ingraham* and *Paul* evade the issue by a combination of expansive states' rights rhetoric and footnotes that render the hold-

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[241] Smith v. Wade, 103 S. Ct. 1625, 1640 (1983).

[242] *Cf.* Douthit v. Jones, 619 F.2d 527, 532 (5th Cir. 1980) (incarceration of plaintiff 30 days beyond expiration of his sentence without valid commitment order gives rise to constitutional tort claim).

[243] Application of our proposal to *Baker* also demonstrates that few cases can be dismissed before a hearing. Claimants may allege that defendants were reckless in order to state a claim in constitutional tort and secure a federal forum. They could go one step further and attach a pendant state tort claim for simple negligence. Thus, our proposal is not likely to reduce the federal caseload, a goal of paramount importance to some. *See* Whitman, *supra* note 37, at 26-30. The *Parratt* state-tort-as-due-process sleight of hand, by contrast, lends itself to the dismissal of many claims. A sufficient answer to this argument is that our proposal addresses substantive law to be applied in these cases, and not the forum in which they are litigated. *See supra* note 41. Nothing in our analysis precludes state court adjudication of constitutional tort cases. *Cf.* Fair Assessment Real Estate Ass'n v. McNary, 454 U.S. 100, 115-16 (1982) ("principles of comity" require that damage actions for unconstitutionally collecting state taxes be brought in state court under federal substantive law). But we also think that reduction of the federal caseload is a wholly inappropriate basis upon which to define the scope of constitutional protection of life, liberty, and property. In the first place, recent research suggests that constitutional tort claims demand fewer judicial resources than critics have claimed. *See* Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 526-33 (1982). More importantly, the *Parratt* analysis would reduce federal caseload in a highly selective and arbitrary manner. It would allocate to state court claims based on the due process clauses, while permitting analytically similar eighth amendment claims to be brought in federal court. *See supra* text accompanying notes 170-83. Furthermore, there is no convincing explanation why constitutional tort, as opposed to diversity jurisdiction, should be the candidate for the judicial pruning of jurisdiction. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 401 (1971) (Harlan, J., concurring). As the Supreme Court recently noted, caseload problems are the responsibility of Congress under its Article III power to regulate the federal court system. *See* Patsy v. Board of Regents, 457 U.S. 496, 512 n.13 (1982). Finally, any reduction in the federal docket will increase the caseload on an already overloaded state court system. *See* NATIONAL COURT STATISTICS PROJECT, STATE COURT CASE LOAD STATISTICS: ADVANCE REPORT 1981-82 (1983).

ings quite narrow, and the *Baker* opinion distorts the facts to make the case easier. *Parratt* is the most disappointing of the lot. The opinion is an analytical maze that leads the reader down one blind alley after another. The Court held that claims of negligent deprivations of property must be raised in state court if there is an adequate state remedy. But it left open all the hard questions: whether this rule extends to intentional or reckless harms, whether it extends to deprivations of life and liberty, what criteria a state remedy must satisfy in order to be deemed adequate, and whether the Court's rule is directed only to procedural due process claims or to substantive due process claims as well.

The Court should abandon *Parratt,* begin again with *Rochin v. California*[244] as its leading case, and use the concepts of recklessness, motive, disproportion, and control to decide scope cases. These are the factors that distinguish tort claims that warrant constitutional protection from those that do not. In addressing the boundary problem, the Court could learn much from the judges of the lower federal courts. As our discussion demonstrates, there is a wealth of authority supporting our approach in the caselaw of the circuit and district courts.

[244] 342 U.S. 165 (1952).