# CASEBOOK REVIEW

## REFLECTION

## Why Constitutional Torts Deserve a Book of Their Own

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Over thirty years ago, Marshall Shapo coined the term "constitutional tort" to denote a suit brought against an official, charging a constitutional violation and seeking damages.[1] In the years since Shapo's pathbreaking article, the number of such suits has grown exponentially.[2] The suits have generated a host of new substantive and remedial issues, yet conventional casebooks on constitutional law and federal courts give little attention to the area. That Professor Shapiro had four books to include in his review of "Civil Rights" casebooks in the *Seattle University Law Review* is some indication of a demand for teaching materials currently unmet by federal courts and constitutional law casebook offerings.[3] The premise of our book[4] is that "constitutional torts" present a sufficiently large and complex group of problems to warrant a casebook and a course of their own. We will first discuss why constitutional tort issues tend to receive inadequate attention in courses and casebooks on constitutional law and

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1. Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape, *and the Frontiers Beyond*, 60 Nw. U. L. REV. 277 (1965).

2. *See* RICHARD H. FALLON, JR. ET AL., HART & WECLSHER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1121-22 (4th ed. 1996).

3. Stephen Shapiro, *The Right Books for the "Rights" Course: A Review of Four Civil Rights Casebooks*, 21 U. SEATTLE L. REV. 789 (1998) [hereinafter cited as *Shapiro*, Book Review].

4. SHELDON H. NAHMOD ET AL., CONSTITUTIONAL TORTS (1995).

other civil rights topics. Then we will explain the pedagogic advantages of having a separate offering on constitutional torts.

## I. THE DIFFERENCES BETWEEN CONSTITUTIONAL TORTS AND OTHER CIVIL RIGHTS TOPICS

The case for a separate course in constitutional torts rests, in part, on the distinctive features of constitutional tort law, which set it apart from other aspects of public law. Broadly speaking, the constitutional torts course does not primarily address the substantive content of constitutional rights, but rather some of the remedies available for their violation.

Within the universe of constitutional remedies, it is useful to distinguish between offensive and defensive remedies. A defensive remedy is the use of the Constitution as a shield against a civil or criminal enforcement action, as where a criminal defendant, charged with violation of a statute prohibiting the distribution of pornography, asserts that the statute violates the First Amendment. Offensive remedies concern the use of the Constitution as a sword, with the claimant taking the role of plaintiff rather than defendant, pursuing the government or an official for relief. There are two kinds of offensive remedies. One may sue to obtain prospective relief, such as an injunction or a declaratory judgment to prevent current or future harm, or retrospective relief, such as an action for damages to compensate for a past wrong. Suits for damages, generally brought under 42 U.S.C. § 1983, are the domain of constitutional tort.[5]

Distinguishing between rights and remedies and among various kinds of remedies, helps to define the appropriate domains of courses on constitutional law, federal courts, and constitutional torts. To begin with, there are good pedagogic reasons for separate courses on constitutional law and constitutional remedies. Constitutional law casebooks rightly emphasize the broad themes of constitutional structure and individual rights. The proliferation of doctrine on constitutional rights means that giving adequate attention to their breadth and depth will, and should be, the highest priority in basic constitutional law courses. Treatments of the First Amendment, for example, should introduce students to the history and theory of free speech and the Supreme Court's various methodologies for dealing with free speech claims. Many basic Constitutional Law courses must cover not only constitutional rights, but also separation of powers and

5. As are *Bivens* actions, which are constitutional tort claims against federal officials. *See* Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. 388 (1971).

federalism issues. Given the number and importance of these issues of structure and substance, it is hardly surprising to find that constitutional law casebooks devote little space to remedial issues in general and even less to the remedial issues that typically arise in constitutional tort suits. In the Gunther and Sullivan book, for example, one finds virtually nothing about such crucial remedial issues as official immunity, the measure of damages, and causation.[6]

Courses on federal courts typically devote much time to remedial issues, and the Low and Jeffries *Civil Rights Actions* book,[7] itself an outgrowth of a federal courts book,[8] addresses both prospective and retrospective remedies. Our view is that Low and Jeffries do a fine job with prospective remedies, but do so at the expense of a thorough coverage of constitutional torts. Both the strengths and weaknesses of the book are products of its federal courts roots. For both historical and pedagogic reasons, federal courts casebooks mainly address prospective and (to a lesser extent) defensive remedies, giving little attention to the distinctive problems that arise in suits for retrospective relief.

The modern Federal Courts course is a product of two post-World War II developments: the rise of the Legal Process movement in the 1950s and the Warren Court activism in the 1950s and 1960s.[9] The Legal Process school of jurisprudence produced Federal Courts' leading casebook, Henry Hart and Herbert Wechsler's *The Federal Courts and the Federal System*,[10] and an agenda that emphasized the allocation of decision-making power between the federal and state governments and among the branches of the national government through such doctrines as sovereign immunity, abstention, justiciability, ripeness, mootness, standing, and equitable discretion. These doctrines are mainly relevant to suits for prospective relief and have particular importance in broadly-framed suits seeking to reform institutions. Warren Court decisions on such matters as school

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6. *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW (13th ed. 1997).

7. PETER W. LOW & JOHN CALVIN JEFFRIES, JR., CIVIL RIGHTS ACTIONS: SECTION 1983 AND RELATED STATUTES (2nd ed. 1994).

8. PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS (4th ed. 1998).

9. *See* Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 617-36 (1991).

10. The book is now in its fourth edition. *See supra* note 2.

desegregation and reapportionment opened the doors of the federal courts to such litigation.[11]

It is appropriate for Federal Courts courses to stress the many issues related to prospective remedies. Beginning with sovereign immunity, and continuing on with the *Ex parte Young*[12] lawsuit against state officials for prospective relief, *Pullman and Younger*[13] abstention, and the various justiciability doctrines that define the kinds of disputes federal courts will hear, one encounters common themes of governmental accountability, the role of courts as agents of social change, and the proper relationship between federal courts and state governments. Yet there is little time in such a course to discuss the seemingly pedestrian tort law issues that arise in constitutional damages actions. Perhaps for this reason, the authors of federal courts books give short shrift to constitutional torts. They contain the major Supreme Court cases, scholarly commentary on the central issues in the area, and little else.[14]

One problem with such an approach is that the Supreme Court has decided comparatively few constitutional tort cases. Teachers of public law courses, accustomed to finding nearly everything they need in the corpus of Supreme Court opinions, may be surprised to learn that, on a number of important constitutional tort topics, the Supreme Court has had little to say. For example, there is just one important Supreme Court opinion on cause-in-fact in the constitutional tort context[15] and only two opinions on damages.[16] Yet issues on these topics often arise in the course of constitutional tort litigation and must be addressed by lower courts. Excluding lower court cases on these topics has the effect of depriving students of the opportunity to learn about the reality of constitutional tort litigation. Even where the Supreme Court has spoken repeatedly, as with official immunity, a host of key issues has been left to the lower courts and, therefore, can only be taught effectively by studying lower court cases. The Supreme Court's immunity cases state the law in highly abstract terms: an

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11. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

12. 209 U.S. 123 (1908).

13. Younger v. Harris, 401 U.S. 37 (1971); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

14. *See, e.g.*, FALLON, *supra* note 2, at 1111-84; ROBERT N. CLINTON ET AL., FEDERAL COURTS: THEORY AND PRACTICE 815-931 (1996); HOWARD P. FINK ET AL., FEDERAL COURTS IN THE 21ST CENTURY 256-76 (1996).

15. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

16. Memphis Community School Dist. v. Stachura, 477 U.S. 299 (1986); Carey v. Piphus, 435 U.S. 247 (1978).

official exercising executive functions is immune unless the official violated "clearly established law."[17] One can have no idea what this means without examining its application by the lower courts, as we do in our casebook. "Clearly established law" means different things in different contexts[18] and in different courts.[19]

Consequently, there are significant practical obstacles to trying to teach the subject of constitutional torts effectively while fitting it into a course that emphasizes substantive constitutional law or prospective remedies.

A potential solution, adopted in the Abernathy and Eisenberg casebooks,[20] is to separately teach constitutional torts with modern federal statutes forbidding discrimination on the basis of race, gender, age, disability, and so on. However, while these statutes share some common themes with Section 1983, they have generated complex and distinctive bodies of law that, in our view, deserve separate treatment in the law school curriculum.

## II. PEDAGOGIC CONSIDERATIONS

A primary concern of authors who craft a casebook is whether other professors will understand the authors' teaching objectives. Most authors strive to present materials clearly, but without spoonfeeding students. They want to include materials that stimulate thought and discussion without being too obscure. A major challenge is to strike the proper balance between being clear and leaving the student with challenging questions to contemplate. Professor Shapiro's comments are a welcomed reassurance that we achieved some success in this regard. Of course, we tried to organize and present the material in a "straightforward way,"[21] hoped that our notes would be "focused" and "thought provoking,"[22] and are pleased that Professor Shapiro

17. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

18. *See* John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 81 (1998).

19. *Compare* Jenkins v. Talledega City Bd. of Educ., 115 F.3d 821, 826-27 n.4 (11th Cir. 1997) (seemingly requiring authority directly on point in order to defeat qualified immunity) *with* Sweaney v. Ada County, 119 F.3d 1385, 1389 (9th Cir. 1997) (denying that absence of authority directly on point is necessarily fatal to a claim).

20. CHARLES F. ABERNATHY, CIVIL RIGHTS AND CONSTITUTIONAL LITIGATION (2nd ed. 1992); THEODORE EISENBERG, CIVIL RIGHTS LEGISLATION: CASES AND MATERIALS (4th ed. 1996).

21. *See Shapiro*, Book Review, *supra* note 3, at 804 (stating the material in our book is presented and organized in a straightforward way).

22. *See id.* at 800 (stating that our notes are thought-provoking and more focused than Abernathy's).

agrees that our expanded use of appellate cases "makes a lot of sense."[23]

Professor Shapiro correctly observes that our focus is on the enforcement, primarily through actions for damages, rather than on the substance of constitutional rights.[24] The availability of a damage remedy is the main reason why Section 1983 actions are commonly called "constitutional torts." As discussed in the preceding section, Section 1983 is an important body of law often left out of, or only briefly covered in, courses on torts, constitutional law, and federal courts. This would be reason enough to justify a separate course in and casebook on the subject. But there are additional pedagogic reasons why we believe such a course and casebook is warranted.

One valid criticism of the traditional law school curriculum is that the courses tend to divide law into discrete doctrinal compartments. Students learn about causation in their course on torts. They may study about claim and issue preclusion in courses on civil procedure. Most Constitutional Law courses are hard-pressed to survey substantive doctrine and have little time to spend on remedies. There are good reasons why most law school courses tend to have narrow doctrinal foci. One simply cannot teach (or learn) everything at once. First year courses provide foundations upon which other and increasingly more complex subjects are developed. Moreover, in any course there are choices to be made between depth and breadth of coverage. Time spent covering the nuances of damage remedies for violations of constitutional rights can come only at the expense of covering substantive constitutional law. Most professors choose to concentrate on substantive doctrine, so students spend most of their time studying a series of seemingly discrete individual trees in the forest of law.

The practice of law, however, is not so readily compartmentalized. In representing real clients, practicing attorneys must integrate their knowledge of substantive law, remedies, and procedure. A course in constitutional torts provides an exceptional opportunity for students to integrate what they have learned in a number of other courses. At its core, Section 1983 litigation incorporates elements of torts, constitutional law, federal courts, civil procedure, and remedies. A course in constitutional torts, in other words, allows students to focus on the forest instead of the trees.

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23. *Id.* at 804.
24. *Id.*

Professor Shapiro noted that our casebook "may also be suitable for a paper or project course."[25] This is precisely what we do in our courses. One approach that we have used is to incorporate practice-oriented exercises at the end of the course. In recent years, we have assigned students projects in drafting complaints, in preparing and responding to motions for summary judgment based on an assertion of qualified immunity, in preparing jury instructions, and in drafting an application for attorney's fees. Resources for such projects are readily at hand. Treatises on Section 1983 litigation and more traditional form books can help guide students through the initially awkward stages of drafting.[26] Practicing attorneys have been exceedingly generous in sharing pleadings and other documents from actual cases to provide the substantive basis for these exercises. One purpose of these exercises is to demonstrate concretely how theory and doctrine translate into real world practice.

Another approach would be to require a more traditional paper on matters of contemporary interest. Topics of such papers could include when law is "clearly settled" for purposes of qualified immunity,[27] the standard of proving a governmental policy or custom after *Board of the County Commissioners of Bryan County v. Brown*,[28] interlocutory appeals of denials of motions for summary judgment on grounds of qualified immunity after *Johnson v. Jones*,[29] or the scope of qualified immunity in improper motive cases after *Crawford-El v. Britton*.[30] These and a host of other recent cases can provide a springboard into thoughtful and productive scholarly papers.[31]

A separate course in constitutional torts also allows for detailed consideration of important issues of statutory and constitutional interpretation. The text of Section 1983[32] is quite short and the

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25. *Id.* at 804-05.

26. *See, e.g.*, SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 (4th ed. 1997); MARTIN A. SCHWARTZ AND JOHN E. KIRKLIN, SECTION 1983 LITIGATION: STATUTORY ATTORNEY'S FEES (3d ed. 1997); JOHN WITT ET AL., SECTION 1983 LITIGATION FORMS (1994).

27. *See, e.g., supra* note 17.

28. 520 U.S. 397 (1997).

29. 515 U.S. 304 (1995).

30. 118 S. Ct. 1584 (1998).

31. One of us, Sheldon Nahmod, has also used the casebook for two and three hour exam-courses in constitutional torts.

32. 42 U.S.C. § 1983 (1979) reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

legislative history does not address most modern constitutional tort issues.[33] Substantive constitutional law looks very different in the 1990s than it did when Section 1983 was enacted in 1871. How should a court purport to apply this remedial statute to issues that are not explicitly resolved by the text of the statute and, perhaps, were not even considered by the legislature at the time of enactment? To what extent do or should text, history, and perceptions of modern policy drive the development of Section 1983 doctrine? These questions pervade the Supreme Court's treatment of immunity[34] and municipal liability issues.[35] They are also issues on which the Justices and legal commentators diverge in opinion.[36]

As the label implies, constitutional tort claims raise substantive constitutional law issues and tort issues of a nonconstitutional nature. To what extent does or should one influence the other? For example, does the constitutional underpinning of the substantive right support the adoption of rules of damages[37] and causation[38] that are different from those applied in common law torts? In fact, causation and damages issues present subtly different problems when the source of the rights is the Constitution. Rules made in the general tort context and based on the general policies underlying tort law are not necessarily appropriate for the constitutional tort.

Consider, for example, the black-letter tort rule that the plaintiff must prove damages in order to recover them.[39] This rule makes perfect sense in the context of the ordinary tort, where the most pressing concern is to provide justice to victims of physical injury inflicted by negligence. The harm in such a case is normally easy to identify. On the other hand, when the breach of duty is a constitu-

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laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

33. *See* Michael Wells, *The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules*, 19 CONN. L. REV. 53, 65-68 (1986).

34. *See, e.g.*, Anderson v. Creighton, 483 U.S. 635 (1987); Harlow v. Fitzgerald, 457 U.S. 800 (1982).

35. *See, e.g.*, City of Canton v. Harris, 489 U.S. 378 (1989); Monell v. New York City Dept. of Social Servs., 436 U.S. 658 (1978).

36. For a detailed discussion of this point, see *Crawford-El v. Britton*, 118 S. Ct. 1584 (1998).

37. *See, e.g.*, Memphis Community School Dist. v. Stachura, 477 U.S. 299 (1986); Carey v. Piphus, 435 U.S. 247 (1978).

38. *See, e.g.*, Martinez v. California, 444 U.S. 277 (1980); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

39. RESTATEMENT (SECOND) OF TORTS § 912 (1977).

tional violation, the harm may be exceedingly abstract. The black-letter common law tort rule may present an insurmountable obstacle to people who, having wrongfully been denied a parade permit, seek to vindicate their free speech rights. Bringing out distinctions of this kind requires a book that specializes in constitutional torts, rather than one that treats them merely as a vehicle for enforcing substantive constitutional rights or as an auxiliary to prospective remedies.

A converse problem is whether the content of nonconstitutional doctrine should have an impact on the definition of substantive constitutional rights. Consider, for example, the argument that the availability of a damage remedy under state tort law should be taken into account in defining the scope of substantive federal constitutional rights.[40] On a number of occasions, the Supreme Court has prefaced a ruling that there had been no violation of substantive constitutional rights by observing that the plaintiff could seek redress under state tort law.[41] Such opinions certainly suggest that the scope of substantive federal constitutional rights may be influenced by state tort law. The doctrine on these matters is complex and controversial and is more likely to be fully developed in a course on constitutional torts than in a course on constitutional law or federal courts.

There are a variety of pedagogic justifications for a separate course and casebook on constitutional torts. The number of reported Section 1983 cases appearing in the advance sheets speaks to the subject's immense practical importance. At the same time, a separate course offers an attractive vehicle for integrating various bodies of law and invites detailed discussions on statutory and constitutional interpretation.

40. Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 CHI.-KENT L. REV. 617, 624-26 (1997).

41. *See, e.g.*, Parratt v. Taylor, 451 U.S. 527 (1981), *overruled in part on other grounds by* Daniels v. Williams, 474 U.S. 327 (1986); Baker v. McCollan, 443 U.S. 137 (1979); Paul v. Davis, 424 U.S. 693 (1976).