CONSTITUTIONAL REMEDIES AND THE MORALITY OF GOVERNMENTAL ACTION: A RESPONSE TO GARVEY

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I. INTRODUCTION

In his book, *What Are Freedoms For?*, John Garvey takes issue with traditional liberal justifications for freedom. In particular, he disputes two assumptions that underlie such justifications. The first assumption is that freedom is about protecting a universal right to make choices because freedom of choice is itself a good thing. The second is that freedom of choice means one choice is as good as another. Garvey rejects both of these assumptions. He argues that the American system is not about the freedom to choose but about the freedom to act. There is, moreover, “no general right to freedom; there are only particular freedoms.” These particular freedoms, Garvey argues, allow individuals freely to engage in certain activities—for example, relationships, religion, and speech—not because freedom of choice is good but because the protected activities are good.

The flip-side of Garvey’s view of freedom is that it imposes duties on the government not to interfere. These governmental duties, like the freedoms they protect, have a moral component: just as particular freedoms protect people’s rights to engage in certain activities because they are highly valued, so it is “bad” for the government to infringe on people’s freedom to do those “good” things. This modern view that the government not only lacks the power to interfere with certain activities but also has a duty to avoid doing so is reflected in the Supreme Court’s use of such

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2. *Id.* 1-2.
3. *Id.* at 2.
4. *Id.*
5. *Id.* at 12.
6. *Id.* at 17.
7. *Id.* at 198.
8. *Id.* at 198-99.
words as “violation” and “wrong” to describe unconstitutional action.9 The government’s duty to respect freedoms, Garvey argues, also provides a justification for “punishing” public officials who violate that obligation by subjecting the offending officials to suits for money damages.10 Finally, Garvey posits that “[i]t is not always wrong for the government to interfere with [protected freedoms]”; it matters whether the government’s actions were intentional.11 The government violates its duty to respect our rights when public officials deliberately restrict those rights.12 Bad intentions, Garvey concludes, “are a part of what it means to violate the Constitution.”13

I have no particular quarrel with Garvey’s moral account of freedom as applied to the particular freedoms that serve as the paradigm for his theory.14 It strikes me as historically and intuitively correct that the protections of religious liberty, speech, and privacy reflect a judgment that religion, free expression, and the formation of close relationships are valued activities that should receive special protection from governmental interference. I also find quite persuasive Garvey’s recent application of his theory of freedoms to the issue of assisted suicide in which he concludes that the protection of life does not require a correlative protection of the right to die.15 I will leave it to the experts in these areas of constitutional law to discuss the precise implications of Garvey’s theory for the respective existing regimes of substantive constitutional law.

My comments focus on the second part of Garvey’s book: his theory of governmental duty. Garvey’s account of governmental obligations is the mirror image of his theory of individual freedoms. His theory of freedoms, however, only explains the relatively limited category of constitutional rights that can plausibly be viewed as freedoms to engage in good activities. It does not address many constitutional rights—such as rights protected by the Fourth and Fifth Amendments—that cannot adequately be explained by the notion that they protect

9. See id. at 195-98 (explaining the historical development from the 19th and early 20th century explanation of constitutional rights as limitations on governmental power, see Ex parte Young, 209 U.S. 123 (1908), to the modern (post-1960s) view that the government has an affirmative obligation to respect constitutional rights, see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)).
10. Id. at 160, 198.
11. Id. at 199.
12. Id. at 215.
13. Id. at 216-17.
14. I do have reservations about how we can tell which constitutional rights are about the freedom to do good things, and thus have a moral content, and which are not, and therefore have no moral implications. See id. at 235 (noting that “[s]ome constitutional restraints are matters of moral indifference, such as the rule against federal taxes on exports, and the rule against interstate compacts without Congress’s consent.”).
valued activities. Of course, a theory need not explain everything in order to be useful. The limited scope of Garvey’s theory of freedoms, however, also limits the scope of his theory of governmental obligations. Thus, Garvey’s account of governmental duties cannot explain what is surely true: that the government’s obligation to avoid trenching on constitutional rights extends equally to rights protected by the Fourth and Fifth Amendments as to those covered by the First Amendment, even though the former do not fit his moral theory of rights. In addition, Garvey posits that constitutional damages liability is a signal of governmental wrongdoing and that liability should attach whenever the government deliberately infringes on constitutional freedoms. It turns out, however, that some intentional violations do not, in fact, give rise to damages liability whereas some unintentional violations do. Thus, although a key part of Garvey’s account is the Bivens model of damages liability as a signal of constitutional wrongdoing, his moral account is incomplete as a descriptive theory of constitutional damages law.

In Part I of this Article, I discuss a number of important constitutional rights that cannot adequately be explained as protecting freedoms to engage in valued activities. In Part II, I raise important issues concerning the relationship between morality and intent in Garvey’s account of governmental duties and demonstrate that Garvey’s theory of governmental duty is both over- and under-inclusive as applied to constitutional damages law. In Part III, I propose a refinement of the relationship between morality and intent that takes account of the role of constitutional damages law.

II. MORALITY AND FREEDOM

Garvey’s moral theory of constitutional freedoms is bottomed on the notion that freedom allows individuals to “engage in certain kinds of actions that are particularly valuable,” which, in turn, gives rise to a correlative obligation on the part of governmental actors to avoid interfering with those valued activities. As I will explain more fully below, however, many rights cannot plausibly be characterized as protecting good activities. Surely that cannot mean that the government has no moral

16. Garvey, supra note 1, at 198.
18. Garvey, supra note 1, at 19.
obligation to avoid interfering with such rights. But if the government does have such a duty, what is the source of that duty?

Consider, for example, the Fourth Amendment right to be free from unreasonable searches. Courts and commentators have traditionally spoken of the Fourth Amendment in terms of privacy.\textsuperscript{19} As Fourth Amendment law has framed it, police officers may not search for evidence in areas that are shielded from public view and that are likely to contain the kinds of things that most people would wish to keep private.\textsuperscript{20} "The paradigmatic infringement of [the privacy protected by the Fourth Amendment] is the act of reading someone's correspondence or listening to her telephone conversations, or perhaps rummaging through her bedroom closet."\textsuperscript{21}

If the Fourth Amendment were only about privacy, the protection against unreasonable searches could fall under the "Garvian" rationale that explains the right to privacy in other contexts such as child rearing and education,\textsuperscript{22} procreation,\textsuperscript{23} marriage,\textsuperscript{24} and family living arrangements.\textsuperscript{25} Garvey explains the right to privacy—what he calls the "freedom of intimate association"—as protecting the freedom to pursue "love" of various kinds, including familial love, friendship, and erotic love.\textsuperscript{26} Love, Garvey argues, is "an essential part of a good life."\textsuperscript{27} "[W]e attach great value to certain kinds of love, and wish to be left free to pursue them."\textsuperscript{28} The freedom of

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\textsuperscript{20} Compare Oliver v. United States, 466 U.S. 170, 179 (1984) (holding that the Fourth Amendment does not restrict searches of "open fields"—large tracts of land that are not near a residence—because they "do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference"); with United States v. Karo, 468 U.S. 705, 714 (1984) (holding that the Fourth Amendment restricts monitoring of activities and things inside houses where "the individual normally expects privacy"). See generally Stuntz, supra note 19, at 1029.

\textsuperscript{21} Stuntz, supra note 19, at 1021.


\textsuperscript{25} See Moore v. City of East Cleveland, 431 U.S. 494, 503-06 (1977).

\textsuperscript{26} Garvey, supra note 1, at 29. Garvey's phrase is shorthand for the Supreme Court's statement in Board of Directors of Rotary International v. Rotary Club that "the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights." Board ofDirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 545 (1987).

\textsuperscript{27} Garvey, supra note 1, at 28.

\textsuperscript{28} Id.
intimate association is about keeping the government out of certain arenas—the home, the bedroom, the private social club—in which loving relationships are likely to be nurtured and grow. Similarly, the Fourth Amendment could be said to protect freedom of intimate association by preventing the government from monitoring the kinds of private areas—especially the home—where caring relationships are most likely to occur, and the kinds of intimate communications—for example, correspondence and telephone conversations—that characterize such relationships.

The privacy explanation for the Fourth Amendment is fine as far as it goes, but it does not go far enough. A large chunk of Fourth Amendment law is not explained by concerns about privacy but by the need to regulate coercive encounters between police officers and citizens. As William Stuntz has recently argued, “[w]hen the police gather information in ways that involve neither a confrontation nor a trespass, they are usually exempt from Fourth Amendment regulation, no matter how private the information they seek.” But when a law enforcement officer “confronts a citizen, the Fourth Amendment will apply to almost anything the officer examines,” even a “crumpled cigarette packet taken from a suspect’s pocket.” These aspects of Fourth Amendment law are not about protecting the freedom of intimate relationships but about guarding against police coercion. They are not about protecting people’s right to do “good” things but they are about keeping the government from doing “bad” things.

Modern Fifth Amendment jurisprudence presents a similar problem for Garvey’s theory of freedoms. Although once rooted in concerns about privacy, Fifth Amendment law has moved toward police coercion as the primary focus. For example, modern doctrine regulating police interrogation places two primary limitations on law enforcement officials: officers must stop asking questions if the suspect asks them to do so, and if the suspect asks for a lawyer, questioning may not begin again unless further communication is initiated by the suspect. This

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29. Stuntz, supra note 19, at 1056.
30. Id. at 1056-57; see also Louis Michael Seidman, Response: The Problems with Privacy’s Problem, 93 Mich. L. Rev. 1079, 1090-92 (1995) (arguing that when “collateral costs”—violence, damage to property, disruption, humiliation—are not imposed by police activity, modern Fourth Amendment doctrine usually does not provide protection).
31. Professor Stuntz applauds the movement of Fourth Amendment law toward a focus on regulating police coercion but concludes that the law still has a ways to go in that regard. See Stuntz, supra note 19, at 1071-72.
32. See Michigan v. Mosley, 423 U.S. 96, 100 (1975) (quoting Miranda v. Arizona, 384 U.S. 436, 473-74 (1966)) (holding that if a suspect indicates “in any manner, at any time prior to or during questioning, that he wishes to remain silent,” the questioning must stop).
33. See Edwards v. Arizona, 451 U.S. 477, 484-85 (1981). See generally Stuntz, supra note 19, at 1069-71 (arguing that “[c]oercion has come to the fore, and privacy has taken a back seat” in modern Fifth Amendment law); Seidman, supra note 30, at 1082-83 (arguing that the Fifth
regime does very little to protect privacy but it does have the effect of discouraging the most coercive police tactics, because these tactics are most likely to motivate the suspect to stop the interrogation.\textsuperscript{34} The Fifth Amendment, like the Fourth, has more to do with limiting the government's freedom to act badly than it does with protecting people's rights to do good things.

Many other constitutional claims, especially in the criminal procedure area, raise similar problems for Garvey's theory; they are best explained not as \textit{indirect} obligations correlative to freedoms to engage in good acts but as \textit{direct} limitations on governmental conduct. This idea also plays a subsidiary role in the First Amendment context: Part of the reason we err on the side of protecting materials of dubious intrinsic value—pornography or nude dancing—is to rein in flawed governmental enforcers who might otherwise misuse their regulatory power to censor other, more valuable expression such as political speech.\textsuperscript{35} Other examples of claims that are problematic for Garvey include Fourth Amendment excessive force claims, Eighth Amendment claims of deliberate indifference to the health and safety of prisoners, and procedural due process claims, to name a few.

An obvious rejoinder to the objection I have outlined above is that Garvey's account is only \textit{intended} to account for a certain kind of right: the kind of right that protects X's freedom to do x. The problem with that answer is that it means Garvey's moral theory of governmental constraints is similarly limited. It explains why the government has a moral obligation to avoid infringing on X's freedom to speak, to engage in religious observance, and to engage in intimate relationships. But it does not explain why public officials have a similar obligation to avoid violating X's Fourth, Fifth, and Eighth Amendment rights and why officials can be hauled into federal court under section 1983\textsuperscript{36} or \textit{Bivens}\textsuperscript{37} for violating those rights. Although it is surely correct, as Garvey himself concedes, that some governmental constraints are "matters of moral indifference,"\textsuperscript{38} it is difficult to argue that the government's duty to avoid conducting intrusive and unwarranted searches of private homes or applying abusive or excessive physical force in effecting an arrest fall into that category. The source of the government's obligations under the Fourth, Fifth, and

\textsuperscript{34} Stuntz, supra note 19, at 1071. Professor Stuntz argues, however, that Fifth Amendment law has not gone far enough in protecting against coercive police tactics. \textit{Id.} at 1071-72.

\textsuperscript{35} Garvey recognizes this point. \textit{See} GARVEY, supra note 1, at 26.


\textsuperscript{38} GARVEY, supra note 1, at 235. Garvey provides as examples of "amoral" constitutional restraints the rule against federal taxation of imports and restraints on the formation of interstate compacts. \textit{Id.}
Eighth Amendments—and the justification for treating as wrongdoers governmental officials who trench on the rights protected by those provisions—cannot, however, be found in Garvey's moral theory of freedoms.

III. WHY DOES INTENT MATTER?

In this Part, I take up a second and more serious problem with Garvey's moral theory of governmental obligation: his account of the role of intent. Garvey views intent as defining the boundary between governmental interference that is merely "bad" and governmental interference that is "wrong."\(^{39}\) But that cannot be the whole story, as Garvey himself recognizes. For example, governmental actions that restrict freedoms unintentionally, such as a restriction on hand billing that was intended to prevent litter, may be unconstitutional.\(^{40}\) Moreover, if—as Garvey's analysis suggests—Bivens-style damages liability is a signal of constitutional "wrongdoing,"\(^{41}\) then "intentional" interferences with protected freedoms should always give rise to damages liability while merely "unreasonable" interferences ordinarily should not. This turns out not to be true. As I will demonstrate in more detail below, the role of intent in constitutional damages liability is more complicated than Garvey's analysis would suggest.

It is a familiar notion in the law that intentions matter and that, in general, the more deliberate the injurious conduct, the more culpable the perpetrator is thought to be. In tort law, for example, a defendant who deliberately punches the plaintiff in the nose is treated differently from a defendant who accidentally hits the plaintiff in the face while carelessly swinging a cane. While the careless defendant may be liable for compensatory damages, the defendant who acts intentionally or recklessly may also be subject to punitive damages designed to punish the defendant and express the moral outrage of the community. Intentions are especially important in penal law, where mens rea as to prohibited conduct or circumstances is understood to be an essential part of the definition of a crime. Differences in mental state may affect the nature of the criminal penalty, determine whether a crime is a felony or a misdemeanor, or define the boundary between actions that are criminal and actions that are not.

\(^{39}\) Id. at 199.

\(^{40}\) Id. at 210 (noting that unintentional restrictions on speech are subject to a more "forgiving" test but may ultimately be unconstitutional).

\(^{41}\) See id. at 160 ("The theory that the government has a duty to respect freedom also permits us to punish officials who violate this duty."); see also id. at 198 (noting that the availability of damages liability under Bivens signaled a "new view of what it means to have a right").
Intentions matter, as well, in Garvey's account of constitutional wrongdoing; but it is a bit unclear exactly how they matter. As Garvey frames it: "Bad intentions have an intrinsic significance; they are a part of what it means to violate the Constitution."42 Consider the possible meanings of that statement: It could be taken to mean that only intentional interferences can violate the Constitution. But that is an inaccurate description of substantive constitutional law, as Garvey recognizes. Along with Garvey's First Amendment hand billing example, there are many other examples where the Constitution forbids unreasonable or other unintentional infringements.43 Another possible reading is that while the government has a duty to avoid conduct that interferes with protected freedoms, only intentional conduct is sufficiently wrongful to justify damages liability. That reading, however, also turns out not to be an accurate statement of the law. For example, law enforcement officials who were at most "unreasonable" in believing that their search would disclose evidence of criminal activity may nonetheless be subject to damages liability if their actions violated "clearly established [Fourth Amendment] law."44 Similarly, police officers who use unreasonable amounts of force to effect an arrest or prison guards who unintentionally lose or destroy an inmate's property have acted unconstitutionally, and these unintentional, but unconstitutional actions entitle injured individuals to bring damages actions under Bivens or its section 1983 counterpart.45 On the other hand, even intentional interferences with protected rights may not always result in damages liability. For example, a governmental official who intentionally fires an employee in retaliation for constitutionally protected speech may not, in fact, be liable in damages.46 Similarly, a college admissions official who intentionally considers race in granting admission to African-American or Hispanic

42. Id. at 216-17.
43. Id. at 210.
44. Anderson v. Creighton, 483 U.S. 635, 639 (1987) (holding that a police officer will be liable in damages for conducting an unreasonable (i.e., illegal) search if a reasonable official would not have taken the same actions in light of clearly established Fourth Amendment law).
45. See Graham v. Connor, 490 U.S. 386, 396-97 (1989) (holding that the application of unreasonable force during an arrest, investigative stop, or other seizure violates the Fourth Amendment); Daniels v. Williams, 474 U.S. 327, 328, 334 (1986) (holding that negligent misconduct does not violate the Due Process Clause but suggesting that something less than intentional conduct may be enough to trigger due process protections). In both excessive force cases and due process cases, defendants may be subject to damages liability if their unintentional conduct violated clearly established constitutional law of which a reasonable person would have known. See Anderson v. Creighton, 483 U.S. at 645 (holding that the "clearly established law" analysis for qualified immunity applies to all constitutional claims under § 1983).
46. See, e.g., Melton v. City of Oklahoma City, 879 F.2d 706, 730 (10th Cir. 1989), rev'd in part on other grounds, 928 F.2d 920 (10th Cir. 1991) (en banc) (holding that a governmental employer who fired his employee for engaging in protected speech had violated the First Amendment but was not liable in damages because the employer had acted reasonably under clearly established constitutional law).
applicants may not be liable in a suit for damages even if the court concludes that the official acted unconstitutionally. 47

In short, while I agree with Garvey's basic conclusion that constitutional constraints on governmental action have a moral component and that the morality of these constraints is bound up with notions of intent, his account is only part of the story.

IV. MORALITY, INTENT, AND REMEDIES

In this Part, I outline a somewhat different story about the morality of governmental conduct and the role of intent in constitutional cases. My story begins with the notion that constitutional wrongdoing is different from and worse than other kinds of civil wrongdoing because constitutional rights are different from other kinds of rights. 48 This idea was articulated in Justice Harlan's concurring opinion in *Monroe v. Pape*, 49 the case that essentially "created" the section 1983 cause of action in constitutional cases. 50 Justice Harlan argued that the section 1983 remedy for constitutional injuries should be supplementary to any remedy provided by the states because

a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right. . . . It would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a

47. Cf. Cygnar v. City of Chicago, 865 F.2d 827, 846 (7th Cir. 1989) (denying damages liability for intentional racial discrimination where defendant's actions arose from a good-faith affirmative action plan that was not clearly illegal under current law).

48. The next seven paragraphs draw extensively from Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 Vand. L. Rev. 583 (1998), in which these ideas are developed in more detail.


state official can cause and against which the Constitution provides protection.51

The supplementary federal remedy was justified, according to a majority of the Court, because the federal courts are the preeminent protectors of federal constitutional rights, a view that has been affirmed many times in post-Monroe section 1983 opinions.52

The view that constitutional rights are “different” or “special” is also evident in the Court’s handling of a class of due process claims seeking damages for deprivations of life, liberty, or property. These claims involved such “tort-like” injuries as the negligent loss of a prisoner’s $23.50 hobby kit,53 damage to an inmate’s noncontraband personal property,54 injury to a prisoner who tripped over a pillow negligently left in the stairway by a prison guard,55 and injuries resulting from an assault on a prisoner by a fellow inmate.56 In rejecting this class of claims, the Court was motivated, in part, by the desire to avoid “trivializing” constitutional rights by equating them to ordinary state law rights.57 “Our Constitution deals with the large concerns of the governors and the governed,”58 the Court explained. Thus, when governmental “officials cause injuries in ways that are equally available to

52. See, e.g., Albright v. Oliver, 510 U.S. 266, 285 (1994) (Kennedy, J., concurring) (recognizing the “important role federal courts have assumed in elaborating vital constitutional guarantees against arbitrary or oppressive state action”); Will v. Michigan Dept. of State Police, 491 U.S. 58, 66 (1989) (noting that a “principal purpose behind the enactment of § 1983 was to provide a federal forum for civil rights claims”); Patsy v. Board of Regents, 457 U.S. 496, 500 (1982) (noting the “paramount role of the federal courts in protecting constitutional rights”) (quoting Steffel v. Thompson, 415 U.S. 452, 472-73 (1974)); Mitchum v. Foster, 407 U.S. 225, 242 (1972) (stating that “[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal [constitutional] rights”); McNeese v. Board of Educ., 373 U.S. 668, 672 (1963) (holding that requiring litigants to exhaust administrative remedies before asserting a claim in federal court would conflict with the notion that § 1983 is a supplementary remedy and that the federal courts are the “chief . . . tribunals for enforcement of federal rights”). In a few contexts, the Court has exhibited a willingness to trust state courts with the enforcement of federal rights. See, e.g., Allen v. McCurry, 449 U.S. 90, 105 (1980) (holding that res judicata is applicable to § 1983 cases even where, as in the Fourth Amendment context, that may mean trusting the state courts to “render correct decisions on constitutional issues”); Parratt v. Taylor, 451 U.S. 527, 544 (1981) (foreclosing federal remedy for certain tort-like, procedural due process claims if existing state post-deprivation remedies are available and adequate), overruled in part on other grounds by, Daniels v. Williams, 474 U.S. 327 (1986).
58. Daniels v. Williams, 474 U.S. at 332.
private citizens, constitutional issues are not necessarily raised."59 These statements reinforce the view that constitutional damages actions should be reserved for certain kinds of harms, specifically harms that involve "real abuses by [governmental] officials in the exercise of governmental powers."60

Just as constitutional rights are especially valued in comparison with other kinds of rights, it follows that constitutional violations would be viewed by society as especially serious and deserving of opprobrium. There is reason to think this is so. Constitutional violations involve governmental abuses of power of the most serious kind. Moreover, the implications of official misconduct go far beyond the concrete harm to persons or property suffered by any individual victim. Public officials are charged with upholding and enforcing the law and acting in the public good. When the government "is unfaithful, when the actors who embody it do not conform to the law, the harm is greater [than private harm] because it is experienced as the most basic form of betrayal."61 The betrayal of trust that results when officials use their public offices to engage in lawbreaking is experienced by the entire community. Consider, for example, the public outcry that resulted after the beating of Rodney King by Los Angeles police officers. The image of a circle of uniformed law enforcement officials beating an unarmed man lying crumpled on the ground is

60. Id. at 549. At first glance, Davidson v. Cannon appears to defy description as a de minimis or trivial claim. Unlike the plaintiffs in Parratt v. Taylor and Hudson v. Palmer, the complainant in Davidson suffered significant physical injury. Davidson v. Cannon, 474 U.S. at 349 (Blackmun, J., dissenting). It is not, however, the extent of harm or injury that determines whether a tort-like claim reaches constitutional dimensions. Rather it is the nature of the governmental conduct that gave rise to the injury: Did the defendant's actions have a connection to something "governmental in nature" beyond the mere fact that the defendant was a governmental official? Daniels v. Williams, 474 U.S. at 332. Did the official's harm-causing actions involve an abuse of governmental power or the use of power as an instrument of oppression? See Collins v. Harker Heights, 503 U.S. 115, 126 (1992). The facts at issue in Davidson urge the conclusion that the plaintiff's claim did not rise to the level of a constitutional abuse of power. The Supreme Court found no evidence that the defendant had ignored specific evidence of an imminent, serious threat of harm to the plaintiff. Given the information known to the defendant, he was at most negligent in believing that the plaintiff was not in serious danger and that there was no urgent need for further investigation or intervention. Davidson v. Cannon, 474 U.S. at 348. Davidson would have been a different case if, for example, the defendant had stood by and watched as plaintiff was beaten up by fellow inmates, see, e.g., Morales v. New York State Dep't of Corrections, 842 F.2d 27, 30 (2d Cir. 1988) (finding liability), or had ignored, repeated, and reported threats of violence to the plaintiff, see, e.g., Hamilton v. Leavy, 117 F.3d 742, 746 (3d Cir. 1997) (finding liability), or had ignored the known risks of the violent tendencies of the plaintiff's fellow inmates, see, e.g., Ryan v. Burlington County, 708 F. Supp. 623, 634-35 (D.N.J. 1989) (finding liability). For more extensive development of these ideas, see Barbara E. Armacost, Paul v. Davis Revisited: Due Process in Section 1983 Cases (forthcoming).
troubling in a way that a private beating is not. A more recent incident involving a young Haitian arrestee who was allegedly beaten and sodomized by New York City police officers in the bathroom of the police station produced a similar reaction. When the malefactor is a governmental official whose injurious conduct was made possible by her official authority and position, "ordinary injury is augmented by the abuse of government power."62 In such cases, wrongdoing that could be described as "trespass, assault and battery, false imprisonment, or defamation take[s] on new urgency."63 If the law-enforcers cannot be trusted, then who can? Governmental abuse of power creates a sense of indignation on the part of the governed, and special opprobrium is reserved for abusers of the public trust.64

This view of constitutional rights has two important implications: First, being labeled a "constitutional violator" in an action for damages has more serious implications than, for example, being labeled a "tortfeasor" or a "contract-breaker." As I have argued elsewhere, liability for constitutional wrongdoing comes with an implication of moral blame that is more akin to criminal liability than to civil liability.65 The moral blame derives from the importance we generally attribute to constitutional rights and the values they protect, and from the betrayal of trust that occurs when governmental officials use their public offices to misbehave. It is not surprising, then, that the law uses words such as "violation" and "wrong" to describe governmental conduct that tramples on constitutional rights. The blaming role of constitutional damages liability also explains why the Supreme Court remains stubbornly committed to retaining individual liability in suits under section 1983 and Bivens, even though the ubiquity of indemnification means that most officials do not ultimately bear the costs of liability. Liability that identifies a particular official—rather than a governmental bureaucracy—as a "constitutional wrongdoer" vindicates important societal and moral interests and reinforces the special place of constitutional rights in our jurisprudence, even if the official does not actually pay the judgment.66


63. Whitman, supra note 62, at 250.

64. See Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("[W]hen the [g]overnment becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.").

65. See Armacost, supra note 48, at 665-75.

66. Id. at 663-64, 675-76 (arguing that there is independent value in attaching the label "wrongdoer" to individual officials rather than to faceless governmental entities even if the individuals do not ultimately pay the judgment).
The second implication of this high view of constitutional rights follows from the first: If constitutional damages liability carries with it some level of societal opprobrium, then, by analogy to criminal law, only blameworthy defendants should be subject to such liability. The Supreme Court has explicitly recognized the analogy between constitutional damages liability and criminal liability in the recent case of *United States v. Lanier*.57 *Lanier* involved the prosecution of a local judge under 18 U.S.C. section 242, the criminal counterpart of section 1983.58 As the *Lanier* Court explained, "the qualified immunity test is simply the adaptation of the fair warning standard to give [governmental] officials . . . the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of criminal statutes."69

Fair notice in criminal law ensures against liability without fault by providing a narrow exception to the normal rule that ignorance of the law is no excuse. It is well accepted that most criminal defendants who claim ignorance of the law are nonetheless sufficiently blameworthy to justify penal liability because criminal fault inheres in the "badness" of the prohibited conduct. No one needs a criminal statute to tell her that murder, burglary, or assault are wrong. Occasionally, however, a criminal statute—often a regulatory provision—poses the risk that the average, law-abiding citizen in the defendant's circumstances could inadvertently violate that statute.70 Under these circumstances intentional conduct is not enough; only an intention *not to comply with the statute*, despite knowledge of its contents, makes the

68. *Id.* at 1222-23.
69. *Id.* at 1227. The full text of the Court's explanation is as follows:

In the civil sphere . . . qualified immunity seeks to ensure that defendants "reasonably can anticipate when their conduct may give rise to liability," by attaching liability only if "[t]he contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." So conceived, the object of the "clearly established" immunity standard is not different from that of "fair warning" as it relates to law "made specific" for the purpose of validly applying [18 U.S.C.] § 242. The fact that one has a civil and the other a criminal law role is of no significance; both serve the same objective, and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes. To require something clearer than "clearly established" would, then, call for something beyond "fair warning."

*Id.* (internal citations omitted; emphasis added). For a fuller exposition of the parallel between qualified immunity and fair notice in criminal law, see Armacost, *supra* note 48, at 617.

70. See, e.g., *Lambert v. California*, 355 U.S. 225, 229-30 (1957) (holding that behavior that would be engaged in by the ordinary, law-abiding citizen cannot be the grounds for criminal conviction absent knowledge of illegality).
defendant’s conduct blameworthy.\textsuperscript{71} In such cases, ignorance of the law will be excused.\textsuperscript{72}

This brings me to the last step in my story, which is why intentional conduct alone is not enough to justify constitutional damages liability and the attendant label constitutional wrongdoer. The key is found in the analogy between fair notice in criminal law and qualified immunity in constitutional damages law. Qualified immunity protects officials from liability in constitutional cases if they \emph{could have believed} their conduct was constitutional even if, in fact, it was not.\textsuperscript{73} The logic behind the immunity analysis is that if the law did not clearly prohibit the defendant’s conduct—and indeed any reasonable official acting in good faith would have done what the defendant did—the defendant is not blameworthy. Like fair notice in criminal law, qualified immunity ensures against liability without fault.

This is where the role of intent requires more attention than it receives in Garvey’s account. Just as intentional conduct in the criminal context is not blameworthy if the ordinary, law-abiding citizen in the defendant’s shoes would have done the same thing, intentional conduct—even if it violates the Constitution—may not warrant section 1983 liability. The question is whether the defendant’s behavior—whether intentional or unintentional—was blameworthy. Qualified immunity approaches that issue by asking whether the offending official could reasonably have believed her conduct was constitutional under \emph{clearly established law}.\textsuperscript{74} This analysis uses the objective clarity of the law as a proxy for fault: If the law governing the official’s actions was sufficiently clear that any reasonably conscientious official would have known and followed it, or if the conduct was sufficiently egregious that it contained indicia of its own wrongfulness, the official is blameworthy and subject to damages liability for her unconstitutional conduct. Conversely, if case law governing the official’s conduct did not clearly proscribe her actions, she is not blameworthy and qualified immunity will attach.\textsuperscript{75} Governmental

\textsuperscript{71} \textit{See generally} 1 Wayne R. LaFave \& Austin W. Scott, Jr., Substantive Criminal Law § 2.3, at 130-31 (1986) (noting that “it is possible willfully to bring about certain results and yet be without fair warning that such conduct is proscribed”).

\textsuperscript{72} For a recent article arguing that ignorance of law excuses the defendant who is not morally blameworthy, see Dan M. Kahan, Ignorance of Law Is an Excuse—But Only for the Virtuous, 96 Mich. L. Rev. 127 (1997).

\textsuperscript{73} Anderson v. Creighton, 483 U.S. 635, 641 (1987). Qualified immunity is the rule for all executive officials with the exception of prosecutors who have absolute immunity. It is also the default rule for judges, legislators, and prosecutors who are performing other than judicial, legislative, or prosecutorial functions, respectively. \textit{See}, e.g., Mitchell v. Forsyth, 472 U.S. 511, 555 (1985) (Brennan, J., concurring in part and dissenting in part) (noting that absolute immunity for judges, legislators, and prosecutors is restricted to certain official functions).

\textsuperscript{74} Malley v. Briggs, 475 U.S. 335, 349 (1986).

\textsuperscript{75} \textit{See} Armacost, supra note 48, at 619-21.
Officials, like criminal defendants, are only blameworthy if they violated a clear legal standard.

Intent, then, does matter in assessing the morality of governmental conduct, but it matters in ways that are more complicated than Garvey's theory suggests. It should now be clear, for example, why the mere fact that racial discrimination is intentional is not dispositive of damages liability. On the one hand, in today's legal climate, intentional discrimination against someone because she is African-American or Hispanic is obviously and inherently bad behavior. Such conduct is, without more, sufficiently blameworthy to warrant damages liability. On the other hand, the legal and societal propriety of "benign" discrimination—affirmative action—in college admissions, even if intentional, remains unsettled. An official who makes admissions decisions that are reasonable under current law but are later judged unconstitutional is not sufficiently blameworthy to justify liability. Her only error was in failing to predict the direction of constitutional law. In such cases, culpability requires more than deliberate conduct; it requires the knowing violation of a clear legal duty as evidenced by settled case law. Thus, qualified immunity protects from liability officials who act in good faith in contexts in which the constitutional standard is unsettled.

I could give multiple examples of intentional conduct that is not blameworthy. For example, a prison official who intentionally places a smoker and a non-smoker in the same cell is not blameworthy simply because the Supreme Court later decided that exposure to second-hand smoke may violate the Eighth Amendment. The deliberateness of the conduct does not make the defendant culpable because it is possible to willfully take certain actions and yet be without fair warning—either from case law or moral intuition—that the conduct is constitutionally prohibited. Similarly, a governmental employer who fires an employee for disruptive speech is not blameworthy just because she gets it wrong under a case-by-case standard that balances the employee's interest in commenting on matters of public concern against the employer's interest in "promoting the efficiency of the public [workplace]."

Officials cannot sensibly be faulted for failing to predict what is constitutionally

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76. McKinney v. Anderson, 924 F.2d 1500, 1509 (9th Cir. 1991), aff'd sub nom. Helling v. McKinney, 509 U.S. 25 (1993) (holding that prison officials were immune from damages liability because "at the time the defendants acted, there was no clearly established liability for exposing prisoners to environmental tobacco smoke").

77. See LaFave & Scott, supra note 71, § 2.3, at 130-31.

78. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); see, e.g., DiMeglio v. Haines, 45 F.3d 790, 804-07 (4th Cir. 1995) (holding that an employer who retaliated against an employee for engaging in protected speech was not liable in damages because, among other reasons, the employer could reasonably have believed that the employee's comments were sufficiently disruptive to outweigh his interest in speaking).
permissible under a balancing test that is notoriously difficult to apply to particular facts. Finally, a police officer whose only “fault” consisted in failing correctly to anticipate whether a court would agree with her assessment of the requisites of probable cause in a particular situation is also not blameworthy. In sum, it is the clear law analysis of qualified immunity, rather than merely the defendant’s intentions, that determines—in Garvey’s terms—whether the government’s conduct was merely “bad” or it was “wrong.” For purposes of fault—and the label constitutional wrongdoer—it is not enough that governmental officials “intentionally” trampled on constitutional rights if they could not reasonably have appreciated what those rights required.

V. CONCLUSION

This Article offers what I believe to be a more nuanced account of the government’s moral obligation to respect constitutional rights. My explanation takes its cue from the scope of constitutional damages law rather than from the scope of substantive constitutional law. If section 1983 liability is an important “signal” of constitutional wrongdoing that is deserving of societal opprobrium and retribution, then a theory of governmental duty should take account of the scope of constitutional damages law. My account also provides an explanation that is not limited to governmental infringements of the more limited category of rights implicated in Garvey’s moral theory of governmental duties.