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RACE AND REPUTATION: THE REAL LEGACY OF PAUL v. DAVIS

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[If] the Fourteenth Amendment's Due Process Clause should ex proprio vigore extend to [private citizens] a right to be free of injury wherever the State may be characterized as the tortfeasor... [it] would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.¹

[I]n a "Constitution for a free people," it is an unsettling conception of "liberty" that protects an individual against state interference with his access to liquor but not with his reputation in the community.²

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INTRODUCTION

In Paul v. Davis, the Supreme Court of the United States rejected a due process claim for reputational harm by a plaintiff whose name appeared on a list entitled "Active Shoplifters" that was circulated to local merchants. The plaintiff had been arrested but never prosecuted for shoplifting. The plaintiff's constitutional damages claim was rejected on the ground that mere injury to reputation does not implicate a protected liberty or property interest within the meaning of the Due Process Clause. Following close on the heels of Paul, the Supreme Court decided a series of cases in which plaintiffs sought damages for deprivations of liberty or property, including Parratt v. Taylor, Daniels v. Williams, Hudson v. Palmer, and Davidson v. Cannon. In each of these cases, the Supreme Court, in various ways, further narrowed the class of constitutional damages claims that may be brought under the Due Process Clause.

It is generally thought that the Court's holdings in these cases were driven not so much by a restrictive theory of the underlying constitutional right, but rather by concerns about the scope of the Section 1983 remedy being invoked to enforce that right—the Court feared that a more liberal interpretation of due process in constitutional damages actions would turn every tort-like injury

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4 See id. at 696.
5 See id. at 712.
7 474 U.S. 327, 329 (1986) (affirming denial of damages for injuries prisoner sustained when he tripped over a pillow negligently left in a stairwell by a prison guard).
perpetrated by a governmental official into a federal claim, a result that would "trivializ[e] the [constitutional] right of action provided in [Section] 1983." The Court addressed that concern by narrowing the category of deprivations that count within the meaning of the Due Process Clause.

Scholars have been relentlessly and uniformly negative in their reactions to the Supreme Court's opinion and holding in Paul and less than complimentary in response to Parratt and the cases that followed it. In addition to complaints about the Paul Court's treatment of constitutional history and precedent, a number of critics have attacked the Court's methodology of narrowing the underlying due process right in order to limit the scope of the damages remedy. A remedial problem, these scholars argue, warrants a remedial rather than a substantive solution. The Court's chosen solution, they complain, affects the scope of due process not only in damages actions but in other contexts that may or may not raise the same remedial concerns.

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11 Parratt, 451 U.S. at 549 (Powell, J., concurring).
13 See infra note 28.
14 See infra note 29.
15 See, e.g., Monaghan, State Law Wrongs, supra note 12, at 999 (noting that the Court could have addressed its remedial concerns by construing the § 1983 cause of action as not coextensive with the Fourteenth Amendment).
16 See, e.g., Christina Brooks Whitman, Emphasizing the Constitutional in Constitutional Torts, 72 Chi.-Kent L. Rev 661, 674 (1997) [hereinafter Whitman, Emphasizing the Constitutional] (noting that efforts to contain the § 1983 remedy by a narrowing interpretation of rights "cannot be confined to suits for damages").
The Parratt line of cases was also denounced by scholars on a more fundamental ground: The essential and defining feature of constitutional damages liability under *Monroe v. Pape*—the case that essentially "invented" the Section 1983 cause of action as we know it—is that Section 1983 provides a federal remedy in federal court regardless of whether the conduct at issue violated state as well as federal law. As the Court in *Monroe* took pains to emphasize, the fact that the conduct at issue was "unauthorized" and the state courts stood ready and willing to provide a remedy for any resulting injury was simply irrelevant; the federal Section 1983 remedy was understood to be "supplementary" to any recovery that the states might offer. *Parratt* and its progeny, however, seemed to turn *Monroe* on its head, consigning to state court a large category of would-be constitutional claims, in particular claims involving conduct not authorized by state law and against which the state provided an adequate remedy.

This Article, in part, joins the attack on *Paul* and the Parratt line of cases but from a different angle. The focus of the Article is not primarily on whether a narrow or broad interpretation of the Due Process Clause is appropriate or normatively attractive. What I wish to consider is what difference it makes: What, in other words, is actually lost in the way of substantive protection against particular, governmental misbehaviors by limiting the scope of Section 1983 liability for due process claims? *Academics generally view Paul and the Parratt line of cases as an unqualified and ill-conceived narrowing of substantive constitutional rights and urge a wider scope for Section 1983 claims under the Due Process Clause. I argue, however, that when one steps back and takes a broader view of the way the constitutional furniture, as a whole, has been rearranged in the wake of *Paul*, it produces a considerably different understanding of the due process cases. My thesis is that the Court's jurisprudence in this line of cases matters less—and it matters in very different ways—than the conventional wisdom would suggest. On the one hand, there is less..."
at stake in the overall scope of constitutional safeguards as a result of the Court’s narrowing construction of due process in Section 1983 cases. On the other hand, what is at stake is both important and different from what commentators have generally described.

The Article proceeds as follows: Part I presents a brief legal and intellectual history of Paul v. Davis and Parratt v. Taylor and its progeny, discusses the interaction between the due process right and the Section 1983 remedy in the Court’s jurisprudence, and takes issue both with the Court’s holding in Paul and with certain aspects of the conventional understanding of the cases that followed Paul. This brief background is necessary to set the stage for the arguments that follow.

Part II explains why the scholarly hand-wringing over the alleged narrowing of due process in Paul and the Parratt line of cases is misdirected. Virtually all of the scholarly critique of these cases has focused on claims that are foreclosed entirely from federal court review by the Court’s jurisprudence. A look at the broader landscape, however, reveals that only a small category of claims is actually lost. The vast majority of potential due process claims—and the ones that pose the most profound risk of serious constitutional harm—end up being redirected to other constitutional “homes.” This observation leads me to conclude that scholarly critiques have focused their attention in the wrong place.

I divide the universe of claims that could be described as deprivations of life, liberty, or property into two categories. In the first category, the Court’s rejection of the due process theory results in the total elimination of the federal claim. For example, Parratt closed the door to certain due process claims for which the state provides an adequate remedy, and Daniels foreclosed reliance on due process for governmental action that is merely negligent. Similarly, Paul rejected due process claims alleging mere reputational harm. As these claims have no alternative constitutional “home,” rejection of the due process claim means that there is no federal constitutional protection against the harms alleged. I argue, however, that except for the claim at issue in Paul, and perhaps a small category of claims involving intentional conduct, these lost claims do not implicate the kind of abuse of power that demands a constitutional damages remedy.
More importantly, in a second and much larger category of potential due process cases—involving contexts with the greatest potential for injury to life, liberty, or property by governmental officials—rejection of the due process theory results in redirection rather than elimination of the claim. Deprivations of liberty or property by police officers, for example, are regulated by the Fourth Amendment, and deprivations by prison officials fall under the Eighth Amendment. This redirection of claims, though, is not without consequence. What is at stake in these cases—unlike in *Paul*, which entirely "deconstitutionalized" the interest in reputation—is the difference between what the claim would have looked like under the due process theory and what it looks like as a cause of action under the Fourth Amendment or some other alternative constitutional text. Significantly, the exchange of a due process claim for its constitutional parallel may result in the substitution of an objective standard, such as "probable cause" or "reasonableness," for the subjective "shocks the conscience" or "deliberate indifference" standard of due process. This substitution and its implications have been largely overlooked in the scholarly literature. For example, in the Fourth Amendment context the Court has opted for an objective standard in which subjective intent is irrelevant. This analysis forecloses claims of bad faith and, in particular, claims of racially motivated governmental conduct. Given the history of racially inspired excesses in law enforcement and the racial divisions that still plague twentieth-century America, the foreclosure of intent-based arguments may be the real loss attributable to the Court's due process jurisprudence.

Finally, in Part III, I argue that the other significant claim at stake in the Supreme Court's due process analysis—one whose recognition cannot plausibly be viewed as "trivializing the right of action provided in Section 1983"—is the claim in *Paul v. Davis* itself. The due process claim in *Paul* fits neither of the two categories described in Part II. Unlike deprivations in the search and seizure or prison contexts, there is no alternative constitutional "home," outside of the Due Process Clause, for injury to the interest in reputation. In addition, the claim at issue in *Paul* is qualita-

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tively different from the relatively less serious claims—seeking recovery for negligent loss of a $23 hobby kit or injuries from tripping over a pillow negligently left in a stairwell—represented by the Parratt line of cases. Instead, I conclude, Paul v. Davis is a category unto itself. Ironically, although the principal rationale for the holding in Paul was concern about opening the floodgates to de minimis, tort-like claims, Paul neither fits within the category of cases it was designed to eliminate, nor does it ultimately serve the rationale for its holding. As a result, I argue that Paul v. Davis should be reconsidered, not only because the justification for the holding has been overtaken by subsequent cases that have rid the federal courts of the problematic claims, but because the injury to reputation at issue in Paul is exactly the kind of claim that ought to be governed by federal constitutional law rather than state law.

I. DUE PROCESS IN SECTION 1983 ACTIONS: THE LANDSCAPE

There are perhaps few precedents that have been as universally maligned as the Supreme Court's opinion in Paul v. Davis.21 In Paul, the plaintiff brought suit under Section 1983 and the Due Process Clause of the Fourteenth Amendment against police officers who included his name and picture in a flyer identifying "active shoplifters" that was circulated to local merchants. The plaintiff, who had been arrested but never prosecuted for shoplifting, complained that the "active shoplifter" designation had damaged his reputation, depriving him of a liberty interest within the meaning of the Due Process Clause.22

There was strong precedent for the plaintiff's claim under the facts and holding of an earlier case, Wisconsin v. Constantineau.23 In Constantineau, the Court struck down under the Due Process Clause a state statute authorizing the practice of "posting," which consisted of forbidding by written notice the selling of alcohol to any person who was determined to have become a detriment to herself, her family, or the community as a result of excessive drinking.24 The Court held that the statute effected a deprivation of lib-

22 See id. at 697.
24 See id. at 433–36.
property without due process of law because it failed to afford procedural safeguards prior to the posting. The majority in \textit{Constantineau} reasoned that, "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."\footnote{Id. at 437.}

In an astonishing reinterpretation of \textit{Constantineau}, the \textit{Paul} majority held that the constitutionally offensive conduct at issue in the posting case was not the injury to reputation, but the deprivation of the posted individual's right under state law to purchase or obtain liquor "in common with the rest of the citizenry."\footnote{\textit{Paul}, 424 U.S. at 708.} Even the most generous reading of \textit{Constantineau} compels the conclusion that the holding had virtually nothing to do with a deprivation of the right to buy alcohol and everything to do with injury to a free-standing interest in reputation. The \textit{Paul} Court held, nonetheless, that because the plaintiff's reputational harm was not coupled with injury to some other state-protected interest,\footnote{See, e.g., Board of Regents v. Roth, 408 U.S. 564, 573 (1972) (denying plaintiff's due process claim but recognizing that governmental action defaming an individual in the course of failing to rehire him could trigger due process protections). The plaintiff in \textit{Paul} alleged that he had suffered harm to his future employment possibilities. The majority, however, failed to address that claim. See \textit{Paul}, 424 U.S. at 697.} he had not been deprived of liberty or property within the meaning of the Due Process Clause.

The majority opinion in \textit{Paul} has been widely and deservedly criticized for its analysis of constitutional law and precedent.\footnote{See Melvyn R. Durchslag, Federalism and Constitutional Liberties: Varying the Remedy to Save the Right, 54 N.Y.U. L. Rev. 723, 738–39 (1979) (calling \textit{Paul} "a decision that reduced \textit{stare decisis} to twelve meaningless letters"); Monaghan, Of "Liberty," supra note 2, at 424 (arguing that \textit{Paul}'s "[rationalization] of the earlier cases is wholly startling to anyone familiar with those precedents"); Shapiro, supra note 12, at 328 ("[I]t is simply impossible to reconcile the explication of procedural due process contained in \textit{Paul v. Davis} with prior decisions, like \textit{Constantineau} and \textit{Jenkins} . . . ."); Smolla, supra note 12, at 840 ("Justice Rehnquist, the author of the \textit{Paul} opinion, played distressingly fast and loose with \textit{Constantineau}, and his disingenuous treatment of \textit{Constantineau} has unfortunately given \textit{Paul} a worse reputation than the hapless Mr. Davis ever had.").} Many scholars have understood the Court's holding to result in large part from the Court's view that it could not permit the defamation claim in \textit{Paul} without opening the door of the federal courts to a whole range of other tort-like claims involving depriva-
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tions of life, liberty, or property. The majority feared that finding for the plaintiff in *Paul* would turn every tort committed by a governmental official into a federal claim: "If respondent's view is to prevail... it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under [Section] 1983." The *Paul* Court seemed

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29 See, e.g., Theodore Eisenberg & Stewart Schwab, The Reality of Constitutional Tort Litigation, 72 Cornell L. Rev. 641, 646 (1987) ("Beginning with *Paul v. Davis*, in which the Court held that a person's reputation is not an interest protected by the Fourteenth Amendment's Due Process Clause, commentators have attributed the Court's narrow constitutional constructions to the Court's fear of increasing § 1983 litigation.") (citation omitted); David L. Faigman, Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice, 78 Va. L. Rev. 1521, 1549 (1992) ("Defining 'liberty' in *Paul* effectively became an exercise in limiting the [remedial] consequences flowing from any particular definition employed."); Barbara Kritchevsky, "Or Causes to be Subjected": The Role of Causation in Section 1983 Municipal Liability Analysis, 35 UCLA L. Rev. 1187, 1193 n.23 (1988) ("[T]he fear that there are too many § 1983 actions has led the Court to interpret the Constitution restrictively, reducing the number of lawsuits by narrowing the reach of the document § 1983 protects.") (citing to *Paul*); Harold S. Lewis, Jr. & Theodore Y. Blumoff, Reshaping Section 1983's Asymmetry, 140 U. Pa. L. Rev. 755, 802 (1992) (discussing *Paul* and the *Parratt* line of cases and noting that, "[a]t the same time [the Court was broadening the reach of qualified immunity], the Court was closing the floodgates on [certain § 1983 claims] by narrowing certain predicate constitutional protections."); Ira C. Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv. L. Rev. 933, 969 (1989) (referring to, among other examples, *Paul* and noting that "[r]ecent cases have, for reasons of forum allocation, severed some of the linkage between the Constitution and common law duties); Monaghan, Of "Liberty," supra note 2, at 429 ("[T]he pressure to keep these cases out of the federal courts was great, and so a compromise was struck. Rather than facing the balancing question at the merits stage, the Court struck a compromise at the definitional stage."); Smolla, supra note 12, at 840 ("The Supreme Court in *Paul* obviously found it inconceivable that every common law tort committed by a state official would automatically give rise to a cause of action under section 1983 and the Due Process Clause."); Christina B. Whitman, Government Responsibility for Constitutional Torts, 85 Mich. L. Rev. 225, 275 (1986) (citing *Paul* as the case in which the Court "first expressed [its] concern that constitutional litigation not be a 'font of tort law'"); Steven L. Winter, The Meaning of "Under Color of" Law, 91 Mich. L. Rev. 323, 414 (1992) (citing, among other cases, *Paul* and remarking: "One concern that has explicitly driven the Court's reductive analysis [of § 1983] is the fear that a broader 'reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon... the States.").

30 *Paul*, 424 U.S. at 698. Either all analogous tort-like claims also belong in federal court, the Court reasoned, or there is something different about injury to reputation that entitles it, but not other tort-like injuries, to a constitutional damages remedy. The Court could find no support for the second conclusion, and it found untenable
determined to keep this feared onslaught of constitutional tort cases out of the federal courts. Indeed, the above quote and surrounding discussion suggest that the Court was much more worried about opening the way for a future deluge of "tort-like," federal claims than it was about the particular claim at issue in Paul.\footnote{As will be explained in more detail below, this conclusion is borne out by the Court's due process jurisprudence as it developed in subsequent cases. The single expression of concern by the Court that was specific to the defamation claim at issue in Paul was that police officers could be subject to liability for announcing their belief that an identified arrestee was "responsible for a particular crime in order to calm the fears of an aroused populace." 424 U.S. at 698. I address this concern infra Part III.} Cases that followed on the heels of Paul appeared to bear out the Court's fear that Section 1983 and the Due Process Clause could indeed become a "font of tort law."\footnote{Paul, 424 U.S. at 701.} These cases—a case seeking recovery for the negligent loss of a prisoner's $23 hobby kit,\footnote{See Parratt v. Taylor, 451 U.S. 527, 529 (1981).} a damages claim by a prisoner who was injured when he tripped over a pillow carelessly left in a stairway,\footnote{See Daniels v. Williams, 474 U.S. 327, 328 (1986).} a claim for damages in connection with a prisoner's papers and personal property removed during a shakedown search\footnote{See Hudson v. Palmer, 468 U.S. 517, 519 (1984); see also Davidson v. Cannon, 474 U.S. 344, 345 (1986) (analyzing a claim by a prisoner against prison guards who allegedly failed to protect him from assault by another inmate).}—exemplify the extent to which these claims resemble common law torts and underline the difficulty of articulating sensible limits on the open-ended language of the Due Process Clause.\footnote{See generally Wells & Eaton, supra note 12, at 221–32 (recognizing the need for limitations on the scope of governmental liability under the Due Process Clause and advocating an approach that balances the governmental and individual interests at stake).}

At another level, however, the Court's analysis in Paul is quite puzzling: The Court seemed to assume that if a plaintiff has a tort-like claim, then, by definition, he cannot have a claim for constitutional injury. As the majority in Paul explained:

[R]espondent's complaint would appear to state a classical claim for defamation actionable in the courts of virtually every State....

...[Yet r]espondent brought his action...not in the state courts...but in a United States District Court...assert[ing] not
a claim for defamation... but a claim that he had been deprived of rights secured to him by the Fourteenth Amendment of the United States Constitution. Concededly if [these] allegations had been made about respondent by a private individual, he would have nothing more than a claim for defamation under state law.\textsuperscript{37}

The Court's reasoning is perplexing in a number of ways. First of all, the Court appears to have it exactly backwards: As a matter of positive law, even traditional forms of "property" have legal existence only because—indeed precisely because—the coercive power of the state can be invoked against anyone who interferes with them.\textsuperscript{38} The availability of tort recovery or the existence of administrative procedures is evidence that property rights do exist rather than evidence that they do not. Thus, the mere existence of a tort remedy for defamation does not support the Court's conclusion that the plaintiff has no protected interest in reputation, and it arguably cuts in exactly the opposite direction.

Secondly, there is a sense in which it was inevitable that Section 1983—at least as interpreted in \textit{Monroe v. Pape}\textsuperscript{39}—would overlap with state tort and criminal law.\textsuperscript{40} A large part of the rationale behind the passage of the Civil Rights Act of 1871—Section 1 of which gave rise to Section 1983—and its predecessor, the Civil

\textsuperscript{37} 424 U.S. at 697–98.

\textsuperscript{38} Professor Smolla has commented on the key role state tort law plays in a property regime:

My confidence that my automobile is truly "my property" exists largely because the force of state tort law will be invoked at my initiative against anyone who steals it from me. Similarly, my entitlement to an interest in reputation... in the post-realist world... exists because of the positive force of the law of torts.

Smolla, supra note 12, at 846 (citation omitted). Professor Smolla suggests that the most coherent explanation for the result in \textit{Paul} is not the one that the Court gave—that state law did not recognize Mr. Davis's reputation as a protected interest—but precisely the opposite: Because state law did protect Davis's interest in reputation, he had suffered no deprivation of due process. See id. at 846–47. This is the view that the Court ultimately adopted in the cases that followed \textit{Paul}. See id. at 847.

\textsuperscript{39} 365 U.S. 167 (1961).


Rights Act of 1866, was concern that state and local officials were either unable or unwilling to enforce state and local law to protect the newly freed slaves. The legislators were especially concerned about the activities of the Ku Klux Klan and the inadequacy of state and local executive and judicial action in controlling the Klan’s racially motivated, unlawful acts and in bringing the perpetrators of these acts to justice. The array of federal remedies embodied in the 1871 Act was intended to fill the gap by providing a remedy for the states’ failure to enforce their own laws to protect the rights of African-American individuals. The original purpose of the Act as described above has been largely eclipsed by the holding in Monroe and the incorporation of the Bill of Rights, which together generated a whole new set of affirmative,

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See generally Monroe, 365 U.S. at 172–73 (discussing legislative history); Robert J. Kaczorowski, Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction, 61 N.Y.U. L. Rev. 863, 883, 920 (1986) (describing as the purpose of Reconstruction Era civil rights legislation to “enforce in law the status and rights of blacks as freemen, a status Southern whites had refused to recognize” and to “combat Ku Klux Klan terrorism”). But see Zagrans, supra note 40, at 528–29 (arguing that whereas § 2 of the Civil Rights Act of 1871 was aimed at the activities of the Ku Klux Klan, § 1—the precursor to § 1983—was aimed at unequal laws and not at unauthorized lawless acts).

For a detailed discussion of the historical background and legislative history of the Civil Rights Acts of 1866 and 1871, see generally Kaczorowski, supra note 43 (discussing the legislative history of the Fourteenth Amendment and contemporaneous civil rights statutes); Winter, supra note 29 (examining the changing meanings of the phrase “under color of” state law); Zagrans, supra note 40 (analyzing the legislative history of the Civil Rights Act of 1871 and proposing a definition of “under color of” state law consistent with congressional intent).

Section 2 of the 1871 Act imposed federal criminal and civil liability upon persons who conspired to hinder state or federal officials in the performance of their duties or otherwise obstructed justice or deprived others of equal protection of the laws. See § 2, 17 Stat. at 13–14. Section 3 authorized the President to employ the armed forces to put down any insurrection or domestic violence that the State was unwilling or unable to control. See § 3, 17 Stat. at 14. Section 4 authorized the President to suspend the writ of habeas corpus if an insurrection became a threat to public safety. See § 4, 17 Stat. at 14–15. Section 5 prohibited individuals who were suspected of being Klan members from serving on juries in cases under the Act. See § 5, 17 Stat. at 15. Section 6 provided that anyone who was injured by Klan violence could recover damages from anyone who knew of the threat of injury, was in a position to prevent it, and failed to do so. See § 6, 17 Stat. at 15.

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constitutional rights that could be enforced under Section 1983. In recent times, the largest categories of Section 1983 cases, for example Eighth Amendment cases by prisoners and excessive force cases against law enforcement officials, seem far removed from the original purpose of the Civil Rights Act of 1871. Nonetheless, it should be remembered that once upon a time, Section 1983 was primarily a federal back-up for failed enforcement of state law.

Finally, and perhaps most importantly, what one is tempted to say to the Paul majority’s assertion that a private individual would merely have a tort remedy under these circumstances is “So what?” The tort-like quality of the plaintiff’s injury in Paul is irrelevant to the question of whether the harm also implicates a constitutional right. Indeed, the fact that the harm would constitute only a common law tort but for the fact that it was perpetrated by a governmental actor is exactly the point. Many (though not all) constitutional rights are rights as against the government for engaging in conduct that would be simply tortious if perpetrated by private parties. For example, trespass, destruction or removal of private property, false imprisonment, and assault become constitutional claims precisely when governmental officials rather than private parties enter an individual’s home without authorization, arrest a suspect without probable cause, or use excessive force against an arrestee. The fact that the injuries resulting from an illegal search or seizure overlap with the kinds of harms that could describe a

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48 See 1A Martin A. Schwartz, Section 1983 Litigation Claims and Defenses § 3.13, at 227 (3d ed. 1997) (reporting that excessive force claims against state and local law enforcement officials constitute the largest category of § 1983 claims).

49 “[M]any state-caused constitutional violations necessarily retain much of the substance of common law torts.” Monaghan, State Law Wrongs, supra note 12, at 992. Professor Henry Paul Monaghan criticizes the Court for its apparent view that a clear line exists between constitutional claims and mere state law wrongs. See id. at 992–93. For additional criticism of the Court’s attempt to define the boundary between constitutional torts and common law torts, see Wells, supra note 12.
common law tort does not render official actions any less unconstitutional. Indeed, identical harms committed by public officials are more serious and troubling precisely because the perpetrators are the very individuals we have entrusted to uphold the law against the harm-causing activities of private villains. Moreover, the inevitable overlap between state-caused constitutional violations and state law wrongs means that there is no stable line that precisely divides constitutional torts from common law torts.

Scholars have widely faulted the Court for attempting to resolve the perceived remedial problem raised by *Paul* and the *Parratt* line of cases—too many tort-like damages claims in federal court—with a substantive solution: limiting the scope of the underlying constitutional right. In *Paul* the Court held that reputation is not a protected interest within the meaning of the Due Process Clause; in *Parratt* the Court held that if state compensa-
tory remedies are available and adequate the plaintiff has received all the process she is due, and in Daniels the Court held that merely negligent conduct does not even implicate the Due Process Clause. Critics attack these holdings on the ground that if the remedy is the problem, the solution should be remedial rather than a "vehicle for rethinking the substance of constitutional law."

Rather than limiting the scope of the underlying constitutional right, the Court could, for example, have found a way to interpret the Section 1983 cause of action as not coextensive with the Fourteenth Amendment. Alternatively, the Court could have recast Parratt as a doctrine of abstention or exhaustion for a limited category of tort-like due process claims. By contrast, the Court's substantive approach only indirectly affects the damages remedy and, in addition, negatively affects the scope of the underlying right in other remedial contexts.

Scholars are surely correct that the Court's due process holdings were motivated in large part by the Court's desire to keep a

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55 See 451 U.S. at 543-44.
56 See 474 U.S. at 330-31. For other examples of the Court's narrowing interpretation of due process, see, e.g., DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 197 (1989) (finding no duty to protect under the Due Process Clause); Martinez v. California, 444 U.S. 277, 284-85 (1980) (rejecting on causation grounds a due process claim against parole board for releasing parolee who murdered plaintiff's decedent); Ingraham v. Wright, 430 U.S. 651, 672 (1977) (finding that corporal punishment of student did not violate due process).
57 Whitman, Emphasizing the Constitutional, supra note 16, at 667. Professor Christina Brooks Whitman takes issue with Professor Michael Wells's substantive proposal for differentiating constitutional and common law torts because it makes constitutional claims simply a subset of tort rather than recognizing that the two regimes have two very different subject matters. See id. at 667-69 (responding to Wells, supra note 12).
59 See Fallon, supra note 12, at 312.
60 See Monaghan, State Law Wrongs, supra note 12, at 988. Professor Monaghan ultimately concludes that Parratt cannot be explained in exhaustion or ripeness terms because a finding of adequate state procedures completely bars access to the federal courts on the constitutional claim. See id. at 990.
61 See also Durchslag, supra note 28, at 743-48 (proposing that the Court's font-of-tort-law concerns could have been handled through the mechanism of official immunities); Monaghan, Of "Liberty," supra note 2, at 429 (suggesting that the Court could have addressed the concerns underlying the Paul holding by interpreting § 1983 "less than literally ... so as not to embrace all the interests encompassed by the 'liberty' (and 'property') of the due process clause") (citation omitted).
class of constitutional damages claims out of federal court. Moreover, similar concerns have also been invoked to explain other holdings in which the Court is described as having narrowed the right in order to control the reach of Section 1983. Despite Monroe's bold language proclaiming that the Section 1983 remedy is wholly "supplementary," the Court has, under various theories, carved out a sizable array of claims for which the federal cause of action is unavailable.

On the other hand, it bears noting that despite dire predictions to the contrary in the wake of Paul and Parratt, the Court has continued to reaffirm a general "no exhaustion" rule for Section 1983 claims. The Court has not moved, for example, toward requiring Fourth Amendment claimants to make use of available state remedies, notwithstanding the tort-like quality of the injuries in such cases. The same can be said for the rest of the incorporated portions of the Bill of Rights as well as substantive due process claims involving privacy or familial interests.

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62 By finding, through a variety of analytical mechanisms, no constitutional violation, the Court relegates this class of claims to resolution in state court under a common law cause of action. For a discussion of the forum allocation aspects of the Court's constitutional jurisprudence, see generally Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105 (1977) (asserting that federal courts tend to be more forceful than state courts in vindicating constitutional claims).

63 See, e.g., Barry Friedman, When Rights Encounter Reality: Enforcing Federal Remedies, 65 S. Cal. L. Rev. 735, 740 (1992) (using structural reform litigation to describe how courts adjust the breadth of rights to take account of anticipated remedial difficulties); Zagrans, supra note 40, at 504 (discussing ways in which the Court has narrowed the reach of constitutional damages liability).

64 The no exhaustion rule originated in Monroe. See Monroe, 365 U.S. 167, 183. It was reaffirmed in Patsy v. Board of Regents, 457 U.S. 496, 516 (1982); accord Albright v. Oliver, 510 U.S. 266, 284–85 (1994) (Kennedy, J., concurring) (noting that courts have been “cautious in invoking the rule of Parratt” due, in part, to “a recognition of the important role federal courts have assumed in elaborating vital constitutional guarantees against arbitrary or oppressive state action”).


66 See Parratt, 451 U.S. at 536 (suggesting that the Parratt analysis is not applicable to claims alleging violations of amendments applicable to states by incorporation under Fourteenth Amendment); Sheldon H. Nahmod, Due Process, State Remedies, and Section 1983, 34 U. Kan. L. Rev. 217, 234 (1985) (noting that application of “Parratt to incorporated provisions [of the Bill of Rights] would be fundamentally inconsistent with Monroe v. Pape”).
The remedial explanation, then, is only part of the story behind the Court's specialized jurisprudence in the due process cases. The Court's holdings in *Paul* and the *Parratt* line of cases were also driven by a view about the substantive right, quite apart from the availability of the damages remedy. Lurking in the Court's opinions—in embryonic form in *Paul* but more explicitly in subsequent cases—is the notion that many of the tort-like claims the Court envisioned under a broad reading of the Due Process Clause simply do not reach constitutional dimensions. As Justice William Rehnquist explained in *Daniels*:

*To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law.*

... Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."7

Similarly, in his concurrence in *Parratt*, Justice Lewis Powell worried that constitutionalizing claims such as the one at issue in that case would "trivializ[e] the [constitutional] right of action provided in [Section] 1983."69 The constitutional damages remedy, Justice Powell explained,

> was enacted to deter real *abuses* by state officials in the exercise of governmental powers. It would make no sense to open the federal courts to lawsuits where there has been no affirmative abuse of power, merely a negligent deed by one who happens to be acting under color of state law.70

While some scholars have recognized the Court's substantive rationale for its holdings in this line of cases, many view the substantive aspects of *Paul* and *Parratt* and its progeny as merely a negative side...

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68 474 U.S. at 332.
69 451 U.S. at 549.
70 Id.; see also Albright v. Oliver, 510 U.S. 266, 284 (1994) (Kennedy, J., concurring) ("The commonsense teaching of *Parratt* is that some questions of property, contract, and tort law are best resolved by state legal systems without resort to the federal courts, even when a state actor is the alleged wrongdoer.").
effect of the Court's remedial concerns. Moreover, while there is apparent agreement that much has been lost in the way of substantive constitutional protection, little attention has been paid to identifying exactly what is at stake in the Court's narrowing of due process protection. In Part II below, I propose to put aside, for the moment, considerations about the Court's remedial approach and take a closer look at its substantive effects.

II. DUE PROCESS AND ITS ALTERNATIVES

If the Due Process Clause were construed broadly, there would be virtually unlimited circumstances that could give rise to claims that the government has "deprive[d]" a person of "life, liberty, or property, without due process of law." When a law enforcement officer seizes evidence of a crime, or a prison official damages personal property during a shakedown search, or a police officer accidentally rams a bystander's car during a police chase, the government has arguably deprived the victims of "property." Similarly, a public school student who is subjected to corporal punishment, a child who is removed from her parent's custody and placed in foster care by social services, and a prisoner who is placed in administrative segregation have plausibly been deprived of "liberty." And finally, an individual who is shot and killed by police officers or whose death results from a high speed police chase could be said to have been deprived of "life" within the meaning of the Due Process Clause.

As noted in Part I, the open-ended language of the Due Process Clause—and its potential to turn any tort by a governmental official into a federal claim—has led the Court to seek ways to avoid the potentially broad reach of damages liability for violations of due process. As explained more fully below, the Court has fore-

71 U.S. Const. amend. XIV.
72 The Due Process Clause could, and perhaps should, be read to guarantee only procedural rights. For better or worse, however, due process has been construed to include a substantive as well as a procedural component. An analysis of whether or not this view is correct is beyond the scope of this Article.
73 See Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.").
closed tort-like due process claims in two different categories of cases, with very different implications. The first category comprises claims, such as the one at issue in *Parratt v. Taylor*,\(^\text{74}\) that have no alternative constitutional home; rejection of the due process theory in these cases amounts to an absolute denial of constitutional damages liability for the official harms at issue. Scholarly criticism has primarily focused on this first category of claims that are lost entirely. However, in many, perhaps most, cases in which there is no recovery under the Due Process Clause, the Court has permitted a parallel claim under some other constitutional provision. Denial of the due process theory in such cases merely redirects the claim to another constitutional home.

While the lost claims have aroused significant scholarly attention and criticism, the redirected claims have largely been ignored.\(^\text{75}\) It might appear that very little is at stake when only one of two alternative theories of constitutional liability is foreclosed. I argue, however, that it is the redirected rather than the lost claims that are most troubling. Little or nothing of constitutional import is lost by virtually eliminating the first category of due process claims. But the redirection of the second category of claims has troubling implications, especially in cases with a racial component. The irony of *Paul*\(^\text{76}\) and the *Parratt* line of cases is that apart from *Paul* itself, which I discuss in Part III, the really important loss of substantive constitutional protection results not from the claims that have been eliminated—which have tended to be the focus of the critics—but from the claims that have been reallocated.

### A. The Problem of Lost Claims

Given the recent history of Section 1983 jurisprudence, it is not surprising that the Supreme Court's holdings in *Paul* and *Parratt* produced howls of protest: *Monroe v. Pape*\(^\text{77}\) had literally revolutionized constitutional damages liability by holding that Section 1983's text, "under color of any statute, ordinance, regulation, custom, or usage, of any State,"\(^\text{78}\) covered actions that were illegal and

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\(^{74}\) 451 U.S. 527 (1981).

\(^{75}\) For a notable exception, see Wells, supra note 12, at 651 n.188.

\(^{76}\) 424 U.S. 693 (1976).

\(^{77}\) 365 U.S. 167 (1961).

\(^{78}\) Id. at 168 (quoting 42 U.S.C. § 1983 (1994)).
therefore unauthorized under state law.\textsuperscript{79} The police officer defendants in \textit{Monroe} had argued that their allegedly unlawful search and seizure were not "under color of" state law because their conduct also violated the Constitution and Illinois law.\textsuperscript{80} They pointed out, moreover, that Illinois law provided a remedy for the injuries alleged by the plaintiffs and the courts of Illinois stood ready and willing to give them the full redress afforded by the common law.\textsuperscript{81} The \textit{Monroe} Court found it unnecessary to inquire into either the illegality of the defendants' actions or the availability of a remedial alternative; the Court held that the Section 1983 plaintiffs were entitled to come directly to federal court with their federal claim. As the \textit{Monroe} Court made clear, "It is no answer [to a claim for compensation under federal law] 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."\textsuperscript{82}

\textit{Paul} and \textit{Parratt} appeared to turn \textit{Monroe} on its head. \textit{Monroe} had opened up the federal courts to constitutional claims regardless of whether or not the conduct also violated state law. In so doing, it permitted Section 1983 liability for what most everyone would agree is the largest and most important category of constitutional damages claims: those in which officials have acted "under color of" state law only in the sense that the harm resulted from a "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer [was] clothed with the authority of state law."\textsuperscript{83} Under \textit{Paul} and the \textit{Parratt} line of cases, however, an entire class of would-be federal Section 1983 claims—in particular, claims involving random and unauthorized\textsuperscript{84} or merely negligent\textsuperscript{85} conduct

\textsuperscript{79} See id. at 183–87.
\textsuperscript{80} See id. at 184.
\textsuperscript{81} See id. at 172.
\textsuperscript{82} Id. at 183.
\textsuperscript{83} Id. at 184 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). The Court in \textit{Classic} was construing the criminal analogue of § 1983, codified at 18 U.S.C. § 242 (1994). For a discussion of the historical use of the phrase "under color of law" prior to its incorporation into § 1983, see generally Winter, supra note 29, at 328 (providing historical evidence that "under color of law" connoted "action by an officer that appear[ed] in a false light" and had only "the appearance of lawful authority" and defending the Court's construction of § 1983 in \textit{Monroe}).
\textsuperscript{84} See \textit{Parratt}, 451 U.S. at 541.
The Real Legacy of Paul v. Davis

and claims alleging reputational harm—were shut out of federal court. Moreover, the Court's reasoning in these cases was precisely that the claims at issue involved mere state law violations and could be handled just fine by state courts. In other words, the Court appeared to have taken away in Paul and Parratt the "supplementary remedy" it had so magnanimously bestowed in Monroe. 86

Of the two categories of would-be due process claims—those that are lost and those that are redirected—it is perhaps not surprising that the former have engendered the most scholarly attention. These claims, including the ones at issue in Paul and Parratt, have no other constitutional home outside of the Due Process Clause. It turns out, however, as I explain in more detail below, that what is at stake after one has separated out cases that can be brought under alternative provisions—primarily the First, Fourth, and Eighth Amendments and traditional substantive due process—suggests that scholarly focus on the lost claims is misguided.

The underlying facts of Parratt and its progeny signal the kinds of claims that tend to fall into this residual category of tort-like due process cases. In Parratt, the plaintiff/inmate brought a damages claim for $23 to replace a hobby kit that had arrived for him in the mail and then had been lost or misplaced by prison officials while the plaintiff was in segregation.87 The plaintiff in Daniels v. Williams88 sued for injuries sustained when he slipped on a pillow negligently left in a stairway by a prison official.89 In Hudson v. Palmer90 the plaintiff sought compensation for noncontraband property—including legal papers, letters, and other unspecified personal property—that was allegedly destroyed during a shake-

86 After Parratt, there was speculation about whether the rule eliminating constitutional protection for random and unauthorized conduct applied to traditional substantive due process claims, including claims under the Bill of Rights as incorporated against the states by the Due Process Clause of the Fourteenth Amendment. See, e.g., Leon Friedman, Parratt v. Taylor: Opening and Closing the Door on Section 1983, 9 Hastings Const. L.Q. 545, 546-47 (1982) (criticizing the Parratt holding because it could relegate to state law all constitutional tort claims that overlap with traditional common law torts). As the vast majority of § 1983 claims derive from the Bill of Rights through the Fourteenth Amendment, that result would have been a functional reversal of Monroe.
87 See 451 U.S. at 529.
89 See id. at 328.
down search. And finally, in *Davidson v. Cannon* the plaintiff, who sustained injuries as the result of an attack by another inmate, brought suit against prison officials who negligently failed to investigate an alleged threat of assault by a fellow prisoner. Importantly, as I have already noted, it is not the fact that these claims are tort-like that distinguishes them from other constitutional claims and makes them undeserving of constitutional protection. Rather, it is that these claims as a group are systematically less likely to involve serious governmental misbehavior of the sort that implicates constitutional interests.

To see why, recall what is and what is not included within this category of rejected due process cases. The holding in *Daniels* eliminates from constitutional review due process claims alleging deprivations of life, liberty, or property resulting from governmental conduct that is merely negligent. *Parratt* forecloses recovery for such deprivations if a state remedy is available and adequate. The *Daniels* and *Parratt* rules, however, apply to only a relatively narrow class of cases. First, neither of these holdings would apply to a claim that the harm resulted from a consciously designed or established procedure that itself resulted in the deprivation of a protected interest. Only a deprivation that was "random and unauthorized"—an unpredictable departure from otherwise adequate procedures—would trigger a *Parratt-Daniels* analysis. Second, these holdings have no application to claims against governmental officials under the incorporated portions of the Bill of Rights, including deprivations of life, liberty, or property involving police officers or prison officials, or deprivations that implicate speech, politics, or religion. Neither do they apply to claims alleging

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91 See id. at 519–20.
93 See id. at 345–46.
94 See supra notes 36–51 and accompanying text.
95 See *Parratt*, 451 U.S. at 543 ("Although [the complainant] has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure."); Zinermon v. Burch, 494 U.S. 113, 138 (1990) (distinguishing *Parratt* on the basis that the challenged procedure that risked depriving complainant of property was not "unauthorized" by state); Logan v. Zimmerman Brush Co., 455 U.S. 422, 435–36 (1982) (explaining that *Parratt* was not designed to reach situations in which the "state system itself" through its procedures "destroys a complainant's property interest").
96 *Parratt*, 451 U.S. at 541.
violations of substantive due process involving privacy, marriage, or parental, or familial interests, or to claims alleging violations of the right to the equal protection of the laws. Third, even where Parratt requires recourse to a state remedy, its effect is to block access to federal court only if the state remedy is both adequate and available. Thus, the federal courts continue to have a role in monitoring whether there is some appropriate remedy—either state or federal—against virtually all governmental deprivations of life, liberty, or property.

What remains after putting aside claims that are exempt from the Parratt-Daniels analysis are merely accidental or careless deprivations that occur in a narrow range of contexts and that do not result from a formal procedure that is itself unconstitutional. Along with the negligently lost hobby kit in Parratt and the carelessly placed pillow that caused injury in Daniels, such cases might include, for example, a claim seeking recovery for injuries and property damage sustained in an auto accident caused by a police officer's negligent driving, or injury to an employee resulting from

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97 There is some uncertainty in the cases and in the literature as to whether Parratt does or should apply to the residual category of tort-like substantive due process cases as opposed to procedural due process claims. See, e.g., 1 Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation: The Law of Section 1983 § 3.53, at 3-134 to 3-138 (4th ed. 1998) (describing an apparent shift in the circuits toward applying Parratt to substantive due process claims); IA Schwartz, supra note 48, § 3.22, at 365-68 (noting that Zinermon resolved that the Parratt doctrine applied only to procedural due process claims). Compare Albright v. Oliver, 510 U.S. 266, 284-85 (1994) (Kennedy, J., concurring) (seeming to suggest that Parratt analysis would apply to a substantive due process claim of malicious prosecution), with id. at 313 (Stevens, J., dissenting) (arguing that Parratt is "categorically inapplicable" to substantive due process).

98 Federal courts also retain a role in defining the kinds of interests that count for purposes of due process protection. See Smolla, supra note 12, at 868-70.

99 There has been a significant amount of litigation and scholarly discussion surrounding the question of what makes a state remedy "adequate" for purposes of due process. See, e.g., id. at 878 (arguing that federal review of adequacy of state remedies is "slightly more rigorous than ... minimal rationality review"). Some members of the Supreme Court, for example Justice John Paul Stevens in Daniels, and some lower courts have concluded that a governmental official's assertion of tort immunity in state court would not render the state remedy adequate. Governmental immunity at the state and local level, however, has been largely abrogated or severely restricted in most jurisdictions. See W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 131, at 1055-56 (5th ed. 1984). Moreover, public officials in their individual capacities are ordinarily not immune in state court if their actions were characterized by bad faith, malice, or some other invidious motive, or in some jurisdictions by objectively unreasonable behavior. See id. § 132, at 1059-60.
negligent maintenance of a work site. I think it is fair to say that these kinds of claims are not the "stuff" of constitutional law. First, there is nothing particularly governmental in nature about the acts at issue beyond the fact that the defendant was a governmental official. \(^{10}\) Constitutional tort recovery ought to be reserved for harms that are enabled by the unique power and authority of government over the lives, property, and liberty of citizens. \(^{10}\) For example, government actors often have broad discretion to use coercion or force in a fashion not available to private individuals. But the claims described above did not result from conduct by the government in its unique role as preserver of the public order. These claims are substantively indistinguishable from private torts and thus provide no reason to invoke a constitutional remedy in federal court. Second, the harm-causing conduct in these cases is merely careless. It involves neither an abuse of power nor the use of power as an instrument of oppression. \(^{10}\) Even scholars who generally advocate broader constitutional protection than is currently available under the Due Process Clause express doubt as to whether merely careless deprivations of the sort described above implicate any constitutionally significant interest. \(^{12}\)

*Hudson,* however, cannot easily be dismissed on the grounds described above; the plaintiff in *Hudson* claimed that prison officials deliberately destroyed personal property during a search of his prison cell. If so, the alleged deprivation resulted from intentional conduct by a governmental official who was in a position of power over the plaintiff and who was in the process of exercising that power, precisely the kind of official deprivation that raises constitu-

\(^{10}\) See, e.g., *Daniels*, 474 U.S. at 332.

\(^{10}\) See Wells & Eaton, supra note 12, at 229–30 (noting that governmental actors have a “different kind of duty from that owed by a private defendant” that arises from the government’s special role as “keeper of the public order”).

\(^{12}\) See Collins v. City of Harker Heights, 503 U.S. 115, 126 (1992) (arguing that the Due Process Clause was intended to address abusive or oppressive government action).

\(^{12}\) Professors Michael Wells and Thomas Eaton note that negligence typically “does not imply a moral judgment of blameworthiness,” and it “does not denote ill will or subjective lack of concern for the plaintiff’s welfare.” Wells & Eaton, supra note 12, at 240 (citations omitted). They conclude that negligently caused harms are “rather far removed from the Constitution’s focus on individual autonomy against abuse of government power.” Id.
tional concerns. For that reason *Hudson* may have been wrongly decided, but in a sense *Hudson* is exactly the case that makes my point. Almost any conduct more egregious than the facts of *Hudson* would give rise to a claim under some other constitutional provision. For example, a destruction of property (or liberty) that rose to the level of "cruel and unusual punishment" could state a claim under the Eighth Amendment. Alternatively, an official deprivation that was sufficiently egregious could constitute a violation of substantive due process. Similarly, the Takings Clauses of the Fifth and Fourteenth Amendments stand in opposition to state action intended to deprive individuals, including prisoners, of their legally protected property interests. Moreover, were the destruction of property to have resulted from a search or seizure anywhere outside of the prison context, the Fourth Amendment would have provided relief. An intentional deprivation of the sort at issue in *Hudson* is also the most likely to give rise to a meaningful remedy against governmental officials under state law because state and local officials are ordinarily not immune from liability when their harm-causing conduct was intentional as opposed to merely negligent.

It might also be useful to say a bit more about *Davidson*, which at first glance appears, like *Hudson*, to defy description as a de minimis claim. Unlike the plaintiffs in *Parratt* and *Daniels*, whose losses were quite small, the plaintiff in *Davidson* suffered significant injury when prison officials failed to protect him from assault by a fellow inmate. The extent of the harm or injury, though, is not what determines whether a tort-like claim reaches constitutional dimensions; it is the nature of the governmental conduct

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105 See *Hudson*, 468 U.S. at 530.


107 See *Hudson*, 468 U.S. at 539 (O'Connor, J., concurring).

108 The Fourth Amendment does not apply to the search of a prison cell. See id. at 527 (weighing "the interest of society in the security of its penal institutions" against "the interest of the prisoner in privacy within his cell" and striking the balance "in favor of institutional security").


110 The Plaintiff's attacker assaulted him with a fork, "breaking his nose and inflicting other wounds to his face, neck, head, and body." *Davidson*, 474 U.S. at 346.
giving rise to the injury that is significant. The relevant inquiry is whether the defendant’s harm-causing actions involved an abuse of governmental power or the use of power as an instrument of oppression.\textsuperscript{111} Merely careless or negligent conduct is not rendered more culpable simply because it results in greater rather than lesser harm. The facts of \textit{Davidson} urge the conclusion that the defendant’s conduct did not rise to the level of a constitutional abuse of power. The defendants failed to follow up on a note from the plaintiff informing them that he had been threatened by a fellow inmate. But the plaintiff took no steps other than writing the note to inform prison authorities that he feared an attack, such as requesting protective custody.\textsuperscript{112} The plaintiff himself testified that he had not foreseen an actual attack and had written the note to exonerate himself in the event a fight ensued.\textsuperscript{113} Given the defendants’ prior dealings with the plaintiff, who had a practice of contacting the Assistant Superintendent of the prison directly when he had a serious problem,\textsuperscript{114} and the information known to the defendants prior to the attack, they were, at most, negligent in failing to follow up on plaintiff’s note.\textsuperscript{115} \textit{Davidson} would have been a different case if, for example, the defendant had stood by and watched as the plaintiff was beaten up,\textsuperscript{116} ignored repeated and reported threats of violence to the plaintiff,\textsuperscript{117} or ignored known risks of the violent tendencies of fellow inmates.\textsuperscript{118}

\textsuperscript{112} See \textit{Davidson}, 474 U.S. at 346.
\textsuperscript{113} See id.
\textsuperscript{114} See id. at 345.
\textsuperscript{115} Injuries resulting from governmental failure to protect from third-party harm are not cognizable under the Due Process Clause except when the plaintiff is in custody or perhaps in some custody-like relationship with governmental officials. See De\textit{Shaney} v. Winnebago County Dep’t. of Soc. Servs., 489 U.S. 189, 197–200 (1989). See generally Barbara E. Armacost, Affirmative Duties, Systemic Harms, and the Due Process Clause, 94 Mich. L. Rev. 982 (1996) (arguing that federal courts found no duty to protect under the Due Process Clause for the same reasons that state courts have largely rejected such claims in the tort context: to avoid involving courts in decisions involving the allocation of limited public resources).
\textsuperscript{116} See, e.g., Morales v. New York State Dep’t of Corrections, 842 F.2d 27, 29–30 (2d Cir. 1988) (finding liability).
\textsuperscript{117} See, e.g., Hamilton v. Leavy, 117 F.3d 742, 747 (3d Cir. 1997) (finding liability).
In sum, although I do not claim that no culpable or abusive conduct will ever slip through the cracks of the Court's due process jurisprudence, the Court has—albeit in an indirect and not particularly glamorous way—separated out a category of unmomentous cases that probably do not belong in federal court. These cases tend not to involve any significant abuse of governmental power; indeed, often "[t]he only tie between the [claims] and anything governmental in nature" is the fact that the defendants are public officials. When governmental officials "cause injuries in ways that are equally available to private citizens"—and there is no claim of unequal treatment or invidious discrimination—there is no particular reason to invoke the Federal Constitution in federal court.

B. Redirected Due Process Claims: The Fourth Amendment Experience

As noted above, scholars writing in response to the Court's holdings in Paul, Parratt, and Daniels have decried the apparent loss of constitutional protection attributable to the Court's narrowing of due process. In order to make an accurate assessment of the actual loss, however, it is necessary to appreciate a group of related cases. These are cases that fall within a potential overlap between the scope of the Due Process Clause and the scope of some other constitutional provision. Many claims that could be characterized as deprivations of life, liberty, or property occur in contexts that may also implicate other constitutional provisions. For example, a deprivation of property during a search or seizure comes within the purview of the Fourth Amendment. Deprivations of liberty including stops, arrests, and law enforcement practices such as the use of deadly force, police dogs, tasers, and roadblocks may also implicate the Fourth Amendment. Interferences with liberty or property in the prison context may implicate the Eighth Amendment prohibition against cruel and unusual punishment. Finally, a deprivation of liberty or property in retaliation for the exercise of religion or speech may give rise to a First Amendment claim or, if motivated by considerations of race, to an equal protection claim. The result of this overlap is

that many claims that are not cognizable under the Due Process Clause are not eliminated but only redirected to a different constitutional home.

The Supreme Court has expressly recognized this phenomenon that "[c]ertain wrongs...can implicate more than one of the Constitution's commands," and the Court has rejected any automatic preemption of one constitutional provision by another. Thus, when multiple constitutional rights are implicated courts are directed to analyze the applicability of each provision in turn, rather than to "identify[] as a preliminary matter [a particular] claim's 'dominant' character." If, however, the choice is between the "more generalized notion of 'substantive due process'" and a more "explicit textual source of constitutional protection," the proper choice is the latter. As a plurality of the Court explained in Albright v. Oliver, the course of decisions holding most of the protections contained in the Bill of Rights enforceable against the states under the Fourteenth Amendment "has substituted, in these areas of criminal procedure, the specific guarantees [contained in the Bill of Rights]...for the more generalized language contained in the earlier cases construing the Fourteenth Amendment."

When the Court rejects a due process claim in a case involving a potential overlap between due process and, for example, the Fourth or the Eighth Amendment, the case simply goes forward under the alternative constitutional text. That means the Court has explicitly preserved—exempt from the limitations imposed by its due process jurisprudence—large categories of important claims involving deprivations of life, liberty, or property. In so doing, the Court has reaffirmed the vitality of Monroe's supplementary remedy and signaled that the Fourth Amendment right at issue in that case

122 See United States v. James Daniel Good Real Property, 510 U.S. 43, 49 (1993) ("We have rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another.").
123 Soldal, 506 U.S. at 70.
125 510 U.S. 266 (1994).
126 Id. at 273; see also id. at 281 (Kennedy J., joined by Thomas J., concurring) (agreeing with the plurality that an allegation of arrest without probable cause must be analyzed under the Fourth Amendment). But see id. at 303 (Stevens, J., dissenting) (disputing the plurality's "cramped view" of the Fourteenth Amendment).
and claims that fall within other, more targeted provisions of the Constitution are to be treated differently from the class of claims at issue in *Paul* and *Parratt*. What is at stake when a claim is redirected or recharacterized is the difference between the elements of a due process claim and the elements of the substituted claim. In some cases, as when the Court held in *Whitley v. Albers*\(^{127}\) that the Eighth Amendment rather than the Fourteenth Amendment is the source of constitutional protection for injuries to prisoners,\(^ {128}\) the choice of a constitutional hook has had virtually no effect on the substance of the claim. In suits challenging conditions of confinement or seeking to recover for harms by governmental officials, the Eighth Amendment's protection of prisoners against "cruel and unusual punishment" is virtually identical to the Fourteenth Amendment's protection of pre-trial detainees against "deprivations of life, liberty, or property."\(^ {129}\) In other cases, as when the Court held that excessive force claims and malicious prosecution claims must be litigated under the Fourth Amendment rather than under the Due Process Clause, the change of constitutional home does matter. The significance of these observations, which will be explored in more detail below, has not been fully appreciated in discussions of *Paul* and *Parratt* and its progeny.

A large and important category of potential claims against the government that implicate interests in life, liberty, or property involves law enforcement activities. Many of these potential claims fall squarely within the meaning of the Fourth Amendment's search and seizure provisions as interpreted by the Supreme Court. On occasion, litigants challenging enforcement actions have sought to escape the parameters of the Court's Fourth Amendment jurisprudence by invoking the broader language of the Due Process Clause. Most of these attempts have been rejected on the ground that the context-specific commands of the Fourth Amendment pre-empt the open-ended text of the

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127 475 U.S. 312 (1986).
128 See id. at 327.
Due Process Clause. If the result in such cases is simply a redirection of the claim, what exactly is lost when would-be due process cases are required to be litigated under the Fourth Amendment? I consider that question using two examples of redirected claims—excessive force claims and malicious prosecution claims.

I. Excessive Force, Due Process, and the Fourth Amendment

Prior to the Supreme Court’s holding in *Graham v. Connor,* the lower courts had analyzed virtually all excessive force claims—regardless of the context in which the incident occurred—under a substantive due process analysis. Under that theory, a use of force that was so excessive as to “shock the conscience” could constitute a deprivation of the victim’s liberty interest in bodily integrity. In *Graham* the Supreme Court explicitly

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130 The recent case of County of Sacramento v. Lewis, 118 S. Ct. 1708 (1998) is a notable exception. In *Lewis* the Court held that a claim involving the death of a passenger during a high-speed police chase must be brought under the Due Process Clause rather than under the Fourth Amendment. See id. at 1715. Such a claim would only give rise to liability if the pursuing officers acted with intent to harm. See id. at 1720.

131 This Article focuses on the redirection of claims from the Due Process Clause to the Fourth Amendment in order to illustrate that redirection has consequences. Given the current Supreme Court’s view that due process is a residual category for claims not covered by more specific provisions, there are sure to be redirections of other claims with unique implications for the scope of constitutional damages liability.


134 This test derived from Justice Felix Frankfurter’s opinion in *Rochin* v. California, 342 U.S. 165 (1952). In *Rochin,* the defendant challenged his drug conviction on the ground that key evidence used at trial was forcibly obtained by pumping his stomach. See id. at 166–67. The Supreme Court reversed the conviction, reasoning that the means used to collect evidence from the defendant did “more than offend some fastidious squeamishness or private sentimentalism about combatting [sic] crime too energetically.... [It was] conduct that shocks the conscience.” Id. at 172.
rejected "the notion that all excessive force claims brought under [Section] 1983 are governed by [the] generic [due process] standard." Rather, the analysis must begin by "identifying the specific constitutional right allegedly infringed by the challenged application of force." The Court concluded that all excessive force claims in the context of searches and seizures are to be analyzed under the Fourth Amendment rather than under the Due Process Clause. Just three years earlier, in *Whitley v. Albers*, the Court had similarly held that the Eighth Amendment rather than the Fourteenth Amendment is the source of constitutional protection for inmates alleging unjustified force by prison officials. The Fourth and Eighth Amendments, the *Graham* Court explained, "are the two primary sources of constitutional protection against physically abusive governmental conduct." Consequently, after *Whitley* and *Graham*, the substantive due process analysis is applicable to a much narrower class of cases: claims of excessive force alleged by pre-trial detainees, claims involving corporal punishment of public

Glick, 481 F.2d 1028 (2d Cir. 1973), cert. denied, 414 U.S. 1033 (1973), the United States Court of Appeals for the Second Circuit applied the *Rochin* test to a claim of excessive force brought by a pre-trial detainee. See id. at 1032–33. The *Glick* test was subsequently adopted by virtually every jurisdiction as the universal standard for excessive force claims, regardless of the context. See 1A Schwartz, supra note 48, § 3.13, at 232.

*Id.* at 394 (emphasis added).

490 U.S. at 394.

475 U.S. 312 (1986).

See id. at 327; accord *Graham*, 490 U.S. at 395 n.10 ("Any protection that 'substantive due process' affords convicted prisoners against excessive force is, we have held, at best redundant of that provided by the Eighth Amendment.") (citation omitted).

490 U.S. at 394.

Significantly, *Graham* would likely require *Rochin*—the case that gave rise to the substantive due process, "shocks the conscience" test—to be litigated under a Fourth Amendment rather than a due process theory since the Court has applied the Fourth Amendment to forcible extraction cases. See *Winston v. Lee*, 470 U.S. 753 (1985) (analyzing under the Fourth Amendment whether a suspect may be forced to submit to surgical extraction of a bullet that allegedly constituted evidence of a crime).

See *Bell v. Wolfish*, 441 U.S. 520, 535–39 (1979). The Court has left open the question of whether the Fourth Amendment provides protection against the application of excessive force "beyond the point at which arrest ends and pretrial detention begins." *Graham*, 490 U.S. at 395 n.10; see also 1A Schwartz, supra note 48, § 3.13, at 229 (noting lower court decisions holding that "substantive due process remains a source of residual constitutional protection for excessive force claims not governed by the Fourth or Eighth Amendments"). In *Deshaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the Court left open the possibility that in addition to pretrial detainees, plaintiffs in other custodial situations—such as children in foster care—
school children, and, as the Court has recently held, claims of injury to bystanders during law enforcement actions.

In Graham the Supreme Court called for the substitution of a Fourth Amendment claim for the substantive due process claim urged by the plaintiff. Thus, future litigants who are subjected to excessive force during a search or seizure retain constitutional protection for any resulting injuries; they must simply invoke the Fourth Amendment instead of the Due Process Clause. Their claims, however, will not be identical to the claims they would have brought under a substantive due process theory. The redirection changes the character of the claims, and the change is not without consequence.

The most significant effect of substituting a due process cause of action for a Fourth Amendment claim is a modification in the underlying intent standard from a subjective to an objective test. Recall that prior to Graham many courts had analyzed excessive force claims under a substantive due process, "shocks the conscience" theory, regardless of the context in which the events giving rise to the claim occurred. To determine whether governmental conduct could be said to "shock the conscience," lower courts considered four factors summarized by the United States Court of Appeals for the Second Circuit in Johnson v. Glick:

the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the 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.

may have a cause of action under the Due Process Clause for governmental failure to protect. See id. at 201 n.9.

142 See Ingraham v. Wright, 430 U.S. 651, 653 (1977). The Court analyzed the claim in Ingraham as a procedural due process claim alleging deprivation of a protected liberty interest. The Court left open the question of whether severe corporal punishment could give rise to a separate substantive due process claim. See id. at 679 n.47. Most lower courts have held that the application of excessive corporal punishment against public school students may violate substantive due process. See generally 1A Schwartz, supra note 48, § 3.13, at 235 n.499 (citing cases).


144 See 490 U.S. at 395.


146 Id. at 1033.
The Fourth Amendment standard laid out in *Graham* has significant overlap with the old substantive due process standard. Under *Graham*, the proper inquiry is whether the amount of force applied was “reasonable” under the circumstances, which requires a balancing of the “nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.” The *Graham* balancing test, like the first three factors of the *Glick* test, calls for a fact-specific inquiry to determine whether the amount of force applied was justified by the circumstances, “including the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether he [was] actively resisting arrest or attempting to evade arrest by flight.”

The most important difference between the two standards is that *Glick* required a court to consider the motive behind the official’s application of force to determine whether the force was applied in good faith. By contrast, motive is irrelevant to the Fourth Amendment analysis. As the Court explained in *Graham*: “An officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional.”

The switch from a subjective, malice standard to an objective, reasonableness standard has had a somewhat counterintuitive effect in this class of cases: Instead of expanding liability as might have been expected, it has actually contracted the scope of constitutional protection, resulting in the virtual elimination of an important category of claims. One would ordinarily predict—as, for example, in tort law—that the choice of a reasonableness standard over an intent standard would expand the scope of claims that could be litigated and won by plaintiffs; it is easier to show that a defendant was merely careless—engaged in conduct that created an unreasonable risk of harm—than it is to show that she actually in-

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147 *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (internal quotation marks omitted)).
148 Id. at 396.
149 Id. at 397.
tended to cause the harm. Conversely, in terms of culpability, there is a sense in which negligence could be viewed as a "lesser included" mens rea of intent: If a defendant is shown to have intended to cause harm, proof of intent should suffice for liability that requires only a showing that the defendant was careless or reckless with regard to that harm.

There are at least two reasons why the switch from a subjective to an objective standard does not have the effect suggested by the tort law analogy. First, in the Fourth Amendment context, proof of bad intent or malice does not encompass negligence in the manner described above; the Supreme Court has held that subjective intent is irrelevant. The only question is whether, under the circumstances, a reasonable official could have believed that her search would reveal evidence of crime or that the amount of force she applied was necessary. Thus, as I explain in more detail below, the move to an objective standard forecloses a category of claims in which a governmental official’s conduct was objectively reasonable but invidiously motivated. The second reason why the move from a subjective to an objective standard does not have the expected liability-broadening effect is that Fourth Amendment reasonableness is much more forgiving toward defendants than the objective standard of tort law negligence.

On issues of causation, tort law generally tends to be more generous in claims alleging intentional conduct as compared to claims alleging negligence. See, e.g., Vosburg v. Putney, 56 N.W. 480, 480 (Wis. 1893) (holding defendant liable for all harms resulting from an intentional harmful contact whether or not those harms were foreseeable). Even in negligence cases, however, a defendant who creates an unreasonable risk of harm is liable for any harm that follows directly from the defendant's negligent conduct. See In re Polemis & Furness, Withy & Co., 1921 K.B. 560, 567, 570 (describing the rule of proximate causation that is followed in most American jurisdictions). Thus, except in the limited category of cases in which the injury was quite remote from the harmful conduct, the extended reach of causation in intentional tort cases probably does not significantly increase the scope of liability.

The Model Penal Code takes this view with regard to the requirement of mens rea. Section 2.02(5) ranks the four Model Penal Code culpability terms—purpose, knowledge, recklessness, and negligence—such that proof of purpose also satisfies a mens rea requirement of knowledge, recklessness, or negligence. See Model Penal Code § 2.02(5) (1985). The reasoning behind the hierarchy is that "if negligence is sufficient, the defendant is more culpable not less, if purpose, knowledge, or recklessness can be proved." Richard J. Bonnie et al., Criminal Law 149 (1997). Thus, "if the prosecutor proves the defendant more blameworthy than is required by the offense charged, the defendant should be convicted." Id.
To take the second point first, the Fourth Amendment standard differs from common law negligence in ways that make the constitutional standard much more difficult for plaintiffs to meet: In a hypothetical case the defendant's actions are judged by what the hypothetical reasonably prudent person would have done under similar circumstances. The reasonable person test makes little or no allowance for normal human frailties, mistakes, lapses in judgment, inattention, or variations in ability, aptitude, intelligence, dexterity, physical attributes, or moral judgment.\textsuperscript{5} Moreover, a person who has developed superior knowledge or skill may be held to an even higher standard of care, one that is commensurate with that individual's greater expertise or experience.\textsuperscript{153}

While common law negligence makes little accommodation for individual characteristics and circumstances, Fourth Amendment reasonableness is highly contextualized. To see why, consider the circumstances surrounding the use of force by law enforcement personnel. Police officers use force against suspects every day as part of the job they are hired to do. What the law must do is separate appropriate uses of force from inappropriate ones. In the same way that tort law uses a negligence standard to differentiate good and bad conduct by ordinary citizens, the Fourth Amendment employs an objective standard to separate out good and bad conduct by police officers. When the Fourth Amendment standard is applied to excessive force claims, the evidence breaks into two categories: first, whether the police officer had reason to believe that the suspect had committed a crime and was fleeing or resisting...
arrest; and second, whether the officer applied only the amount of force that was reasonably necessary to capture the suspect. Most excessive force cases turn on the second of these. Officers have probable cause to arrest many criminal suspects who are uncooperative, but they will not be justified in using force against all of them. Thus, the second kind of evidence is the key to most excessive force cases.

But courts are not very confident about their ability to determine after the fact whether any particular use of force was justified, especially in the "tense, uncertain, and rapidly evolving" circumstances in which police officers are required to function. Thus, the Fourth Amendment standard tends to be much more deferential toward law enforcement officers than evaluation under an ordinary reasonableness standard would be. The constitutional standard is highly sensitive to the facts and circumstances as they would have appeared to the officer on the scene and gives the benefit of the doubt to the officer's judgment. Moreover, unlike the tort standard, which holds experts to a higher standard, the Fourth Amendment holds police officers to a functionally lower standard by deferring to their unique experience, knowledge, and skills in dealing with criminal suspects. The law treats law enforcement personnel with this kind of deference in order to avoid one kind of error: If the law forbids too much, it endangers police officers, something no one wants to do. But in avoiding one kind of error, the law produces an error of a different sort: It predictably forbids too little.

This brings me to my second point. Probably the best way to differentiate between uses of force that are appropriate and those that are not is to ask whether the surrounding circumstances—especially any statements the officer made—indicate that the officer had a bad

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154 Graham, 490 U.S. at 397.
155 See id. at 396 (discussing the need to avoid relying on "20/20" hindsight).
156 See, e.g., United States v. Davis, 458 F.2d 819, 821 (D.C. Cir. 1972) (stating that probable cause "is to be viewed from the vantage point of a prudent, reasonable, cautious police officer... guided by his experience and training") (emphasis added); 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 3.2(c), at 37-41 (3d ed. 1996). In the usual case, taking account of the experience and expertise of the individual official means that the officer will receive the benefit of the doubt, but the experience-expertise rule occasionally cuts the other way. See id. § 3.2(c), at 40-41.
motive. It may be fruitless or unwise to try to second-guess whether a particular use of force was reasonable under all the circumstances, and the courts are predictably unwilling to do so. But an officer who makes racist, malicious, or violent statements while beating a suspect is much more likely to have applied too much force for the wrong reasons. The Rodney King case provides a good example. Although objective evidence suggested that King had a plausible claim of excessive force, one of the most damning aspects of the case was the racist statements some of the officers made immediately prior to the beating.\^157

If the best way to differentiate between good and bad force is to take a broad view of all the surrounding circumstances, there is another reason why a subjective standard is much better suited to the task. Excessive force cases arise from interactions between police and citizens that have unfolded over time as the parties act and react to each other. The confrontation that proximately resulted in the application of force may be the last in a series of escalating confrontations provoked by the speech and actions of governmental officials as well as by the words and conduct of the arrestee. An application of force could appear reasonable at the moment it occurred while a view broader in time—including statements made before, during, and after the incident—might suggest that the official provoked the original encounter or escalated the confrontation to the point where force was necessary.\^158 It might be thought that an objective analysis would be more likely to consider all of the relevant circumstances in a broad time frame while a subjective standard might focus only on what was in the

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\^157 Twenty minutes before the arrest of Rodney King, one of the officers who was later involved in the King beating transmitted a computer message describing a domestic dispute in which he had intervened. The officer described the incident as "right out of Gorillas in the Mist," a comment "associating blacks with apes—an association that has deep roots in European-American culture." Randall Kennedy, Race, Crime, and the Law 120 (1997) (citation omitted). The reply by the receiving officer—"hahaha...let me guess who be the parties"—used "distinctively African-American argot," which tended to confirm the racial connotation of the reference. Id. At the state trial of the officers involved in the King beating, jurors agreed that the "gorillas" comment was indicative of racial prejudice, but there was disagreement about whether the remark was specifically related to the beating. D.M. Osborne, Reaching for Doubt, Am. Law., Sept. 1992, at 66.

\^158 See, e.g., cases discussed at infra note 160.
official's mind at the moment the force was being applied. It
turns out that the opposite is true.

Analysis of subjective motivation tends to be quite open-ended.
It has to be. Courts that are called upon to determine the presence
or absence of bad faith almost always lack direct evidence of a de-
fendant's underlying motivation for her actions. Unless the defen-
dant unwittingly incriminates herself by directly revealing her bad
motives, courts must rely instead on indirect evidence in the form
of statements or conduct that accompanied or surrounded the inci-
dent in question. Moreover, this indirect evidence cannot be lim-
ited only to conduct and statements contemporaneous with the
relevant event. It must reach backward and forward in time in or-
der to give context to the incident as to which subjective motiva-
tion is at issue. For example, in a racial discrimination case a court
would likely consider statements made before and after as well as
during the event that could suggest the defendant acted with racial
or other invidious motivation. Other relevant evidence in a race
case might include a pattern of conduct suggesting bad faith, for
example, a police officer who stops only Hispanic drivers or a
prosecutor who indicts only African-American suspects. In a case
that requires a showing of malice or deliberate indifference, a court
might consider as evidence of bad faith statements or conduct sug-
gesting that the defendant anticipated the harmful consequences
that resulted from her harm-causing conduct; such evidence would
support the conclusion that the defendant's actions were knowing
or intentional rather than accidental. These examples illustrate the
broad-ranging inquiry—broad in scope as well as in time—that
tends to accompany an inquiry into subjective intent.

By contrast, the objective standard freezes the time frame and
looks only at the circumstances at the moment that force was
applied. The time-limited nature of the objective analysis
eliminates most of the kinds of evidence that could separate a bad
use of force from a good one, including noncontemporaneous
statements and evidence of a discriminatory pattern. The objective
standard even shields from scrutiny any evidence of the officer's
role in creating the need for force in the first place; Graham
"deems irrelevant the officer's conduct leading up to the use of

197 See generally 1A Schwartz, supra note 48, § 3.14, at 244–45 (citing cases).
force, including conduct that may have exacerbated the tension and created the need for the force employed.\textsuperscript{160}

All of this points to the virtues of a subjective standard and demonstrates the real loss occasioned by the Court’s reallocation of excessive force claims from the Due Process Clause to the Fourth Amendment. For not only did the Court in \textit{Graham} adopt an objective standard, in \textit{Whren v. United States},\textsuperscript{161} the Court confirmed that subjective intent is completely irrelevant to the Fourth Amendment showing.\textsuperscript{162} The objective standard is very forgiving in this context because the exigencies of law enforcement require it. But that means some instances of culpable excessive force will slip through the cracks. One mechanism that could make up for some—though not all—of the unavoidable limitations of the objective standard in separating good from bad conduct is to permit the

\textsuperscript{160} Id. at § 3.14, at 245; see, e.g., Wilson v. Meeks, 52 F.3d 1547, 1553–54 (10th Cir. 1995) (holding that regardless of what led up to the shooting, the officer's reasonable fear for his life at that moment entitled him to qualified immunity); Bella v. Chamberlain, 24 F.3d 1251, 1256 (10th Cir. 1994) (holding that in excessive force cases “we scrutinize only the seizure itself, not the events leading to the seizure”), cert. denied, 513 U.S. 1109 (1995); Drewitt v. Pratt, 999 F.2d 774, 780 (4th Cir. 1993) (defining issue as “whether at the moment of the shooting [officer] had probable cause to believe that [the suspect] posed a threat of death or serious bodily harm to him”); Fraire v. City of Arlington, 957 F.2d 1268, 1276 (5th Cir. 1992) (holding irrelevant evidence that police officer manufactured circumstances that gave rise to the seizure and noting that “regardless of what had transpired up until the shooting itself, [the suspect’s] movements gave the officer reason to believe, at that moment, that there was a threat of physical harm”), cert. denied, 506 U.S. 973 (1992).

\textsuperscript{161} 517 U.S. 806 (1996).

\textsuperscript{162} In \textit{Whren} two motorists were stopped by police officers purportedly for violating various traffic laws. When the officers approached the car they observed the passenger holding plastic bags of crack cocaine. The driver and passenger were arrested and charged with violating various federal drug laws. The defendants challenged the stop on the ground that it was not justified by probable cause to believe they were involved in illegal drug dealing. They argued that the officers' asserted ground for the stop—violation of the traffic laws—was pretextual. The Supreme Court held that the reasonableness of a Fourth Amendment search or seizure does not depend on the “actual motivations of the individual officers involved” if “the circumstances, viewed objectively, justify that action.” Id. at 813; accord Scott v. United States, 436 U.S. 128, 136 (1978) (declining to exclude wiretap evidence obtained by agents who made no effort to comply with applicable regulations because “[s]ubjective intent alone...does not make otherwise lawful conduct illegal or unconstitutional”) (citation omitted); United States v. Robinson, 414 U.S. 218, 236, 221 n.1 (1973) (upholding arrest for traffic violations against defendant’s allegation that arrest was “mere pretext for a narcotics search,” and declining to invalidate lawful post-arrest search on grounds that it was not motivated by justifiable officer safety concerns).
plaintiff to introduce evidence of bad faith. *Whren* closes the door to that possibility by holding that bad motive is irrelevant to the determination of whether an action regulated by the Fourth Amendment was reasonable, except for the limited purpose to undermine the credibility of the officer's account of the immediate circumstances that prompted the force.\(^\text{163}\)

In my view this is all quite troubling, especially given the lingering reality that racial discrimination continues to have a significant negative effect in the law enforcement context.\(^\text{164}\) There is reason to believe that members of racial minorities are much more likely than their counterparts to be subjected to inappropriate or abusive police conduct of all kinds. For example, the Christopher Commission, which investigated the Los Angeles Police Department in the wake of the Rodney King beating, concluded that the Department's pattern of using excessive force was "aggravated by racism."\(^\text{165}\) Racial minorities are also significantly more likely to be subject to less obvious forms of discrimination such as low-level harassment\(^\text{166}\) and police targeting.\(^\text{167}\) But short of bringing an equal

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\(^{163}\) See *Graham*, 490 U.S. at 399 n.12.


\(^{165}\) Independent Comm'n on the Los Angeles Police Dep't, *Report of the Independent Commission of the Los Angeles Police Department* xii (1991); see Paul Chevigny, *Edge of the Knife: Police Violence in the Americas* 45 (1995) (noting that Los Angeles police officers reportedly "do not use the chokehold on middle-class white people, nor make them lie down on their faces on the pavement," but "the use of the prone-out technique in minority communities was 'pretty routine,' that police had been taught 'that aggression and force are the only things these people respond to'"; Jerome H. Skolnick & James J. Fyfe, *Above the Law: Police and the Excessive Use of Force* 24, 114 (1993) (noting that victims of police brutality are often members of racial or ethnic minorities and that police officers often act on racial stereotypes).

\(^{166}\) See David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 Sup. Ct. Rev. 271, 308–16, 323–24 (noting that minorities are more likely than whites to be the targets of low-level police harassment as well as
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protection claim for invidiously motivated police action, a prospect that holds out little promise of success, the only option after Graham and Whren is for courts to try to smuggle in evidence of invidious motivation as part of the reasonableness calculus.

more serious police misconduct); Charles J. Ogletree, Jr., et al., Criminal Justice Inst. at Harvard Law School for the Nat'l Ass'n for the Advancement of Colored People, Beyond the Rodney King Story: An Investigation of Police Conduct in Minority Communities 23, 40 (1995) (citing 1995 study by NAACP that concluded "[p]olice officers... rely on race as the primary indicator of both suspicious conduct and dangerousness" and that "[v]erbal abuse and harassment seem to occur almost every time a minority citizen is stopped by a police officer").


168 In order to make out a pretextual stop claim under the Equal Protection Clause, a minority motorist would have to show that similarly situated white motorists were not stopped. Cf. United States v. Armstrong, 517 U.S. 456, 469 (1996) (requiring plaintiffs bringing discriminatory prosecution claim to show "that similarly situated defendants of other races could have been prosecuted, but were not"). Moreover, before the claimant could obtain access to government files—where information that could support such allegations might be found—the claimant would be required to provide "some evidence" of the merits of the claim. Cf. id. (applying this burden of proof to discriminatory prosecution claims). Not surprisingly, selective enforcement cases are very difficult to bring and even more difficult to win. See generally Richard H. McAdams, Race and Selective Prosecution: Discovering the Pitfalls of Armstrong, 73 Chi.-Kent L. Rev. 605 (1998) (arguing that Armstrong virtually forecloses proof of meritorious selective enforcement cases).

169 Professor Pamela Karlan has concluded that police practices like the one upheld under the Fourth Amendment in Whren would "stand a good chance of being held unconstitutional" under conventional equal protection doctrine. Pamela S. Karlan, Race, Rights, and Remedies in Criminal Adjudication, 96 Mich. L. Rev. 2001, 2007 (1998). But see Harris, supra note 167, at 550-53 (expressing doubt that pretextual stop claims will be successful under the Equal Protection Clause); Maclin, supra note 164, at 337-38 n.22 (concluding that "successful equal protection challenges to pretextual traffic stops by minority motorists will be rare"). Perhaps it is too early to tell, but the proof of the pudding is in the eating and, as to post-Whren pretextual stop cases and excessive force claims that have been successful under the Equal Protection Clause, the pudding is rather thin. See, e.g., United States v. Bullock, 94 F.3d 896, 898-99 (4th Cir. 1996) (disallowing evidence allegedly showing other instances of racially motivated, pre-textual stops because "evidence concerning past stops would enmesh the court in collateral issues" and holding that challenger had failed to meet...
A very few lower courts have begun to move in this direction. For example, in *Brown v. City of Hialeah*, the plaintiff brought suit under Section 1983 alleging excessive force and sought to introduce evidence of racial slurs made by police officers during his arrest and beating. The United States District Court for the Middle District of Florida excluded the evidence. The court of appeals reversed, reasoning that

the fact that a police officer yelled racial epithets while urging fellow officers to “kill” the arrestee is one [in the totality of circumstances confronting the officials at the time of the arrest] that a jury should be allowed to consider in assessing the objective reasonableness of the officers’ force...

As the cases (or lack thereof) attest, plaintiffs and courts will have to stretch very hard to get in evidence of even blatant racism. Evi-

the “rigorous standard” required by *Armstrong*, cert. denied, 519 U.S. 1119 (1997); *United States v. Bell*, 86 F.3d 820, 823 (8th Cir.) (denying claimant’s equal protection claim because although he showed that all the arrestees during a month period for riding a bicycle after dark without lights were black, he presented no evidence about the number of white bicyclists who were not prosecuted for riding their bicycles without lights), cert. denied, 117 S. Ct. 372 (1996); *State v. Scott*, 926 S.W.2d 864, 871 (Mo. Ct. App. 1996) (affirming denial of discovery of trooper’s ticket books because defendant had offered “no evidentiary support [for his equal protection claim] via other means at his disposal” and because a pattern of disproportionate ticket issuance to minorities would prove neither that the trooper was targeting racial minorities—because not every stop results in a ticket—nor that the trooper was stopping racial minorities in order to search for drugs).

The Supreme Court in *Graham* may have opened the door to this strategy by noting that evidence that an officer harbored ill will toward an arrestee could be considered by the fact-finder in assessing the credibility of the officer’s account of the circumstances that prompted the use of force. See *Graham*, 490 U.S. at 399 n.12.

30 F.3d 1433 (11th Cir. 1994).

During the arrest the officer’s remarks were captured by a listening device that he had concealed on his body. They included the following: “Did you get that, nigger?” and then, “Kill him, kill him, kill him... Kill that son-of-a-bitch.” Id. at 1434 (internal quotation marks omitted). On the tape the plaintiff is also referred to as a “coon.” Id. at 1434 n.1. Similarly, in *Albritten v. Dougherty County*, 973 F. Supp. 1455 (M.D. Ga. 1997), the court permitted the plaintiff to introduce evidence that one of the arresting officers yelled “I’m tired of y’all niggers” as he began to beat the plaintiff. Id. at 1457 (internal quotation marks omitted). The court noted that “a showing that the use of force against Albritten was predicated upon race-based animus, would indicate that the force used was beyond that which was reasonable to subdue Albritten in order to search him for drugs and weapons.” Id. at 1465.
dence that is less blatant will almost never be deemed relevant to the *Graham* analysis.  

In sum, there is a significant cost to adopting a wholly objective standard with no place for arguments about subjective motivation. While those who favor broader liability for governmental misbehavior might applaud the Supreme Court's substitution in *Graham* of an objective for a subjective test, the switch is both less beneficial and more costly to plaintiffs than it would initially appear. It is less beneficial because the highly contextualized objective test—which, of necessity, gives the benefit of the doubt to governmental officials—will be hard for plaintiffs to meet. And it is more costly because *Whren* foreclosed the only avenue for making up some—though not all—of the losses resulting from a standard that forbids too little. The end result is to take important claims involving bad—often racially motivated—conduct away from plaintiffs.

2. Malicious Prosecution Without the "Malice"

Another category of Fourth Amendment cases in which the substitution of an objective for a subjective standard raises similar concerns involves claims of malicious prosecution. Prior to *Al-

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173 *Brown* and *Albritten*, discussed supra notes 170–71 and accompanying text, are the only reported cases found by the author in which evidence of racist or malicious statements was deemed relevant to the Fourth Amendment analysis.

174 See generally Wells, supra note 12, at 651 & n.188 (asserting that the highly contextualized standard employed in Fourth Amendment cases tends to favor government officials). Professor Wells argues for a return to a unified, substantive due process analysis for all excessive force claims, regardless of context. See id. at 640–45.

175 For a recent article noting the trend toward "objectifying" certain claims and defenses in constitutional criminal law, decrying the negative effects of that trend on combating racial discrimination, and offering solutions, see Andrew D. Leipold, Objective Tests and Subjective Bias: Some of the Problems of Discriminatory Intent in Criminal Law, 73 Chi.-Kent L. Rev. 559 (1998). The Court's holding in *Graham* creates an additional puzzle: What standard governs a claim of excessive force after the initial arrest but before the arresting officer has either freed the arrestee or placed her in pre-trial detention? The Fourth, Fifth, Seventh, and Eleventh Circuits have held that the Fourth Amendment applies only to the initial seizure but not to any subsequent mistreatment of arrestees or pre-trial detainees. See, e.g., Riley v. Dorton, 115 F.3d 1159, 1163–64 (4th Cir.) (discussing positions taken by the Fifth, Seventh, and Eleventh Circuits), cert. denied, 118 S. Ct. 631 (1997). It is unclear what would explain a difference in the constitutional standard of protection of arrestees at the place of arrest versus at the police station.
bright v. Oliver, many lower courts had allowed constitutional claims for malicious prosecution under the Due Process Clause. These claims mimicked the elements of the analogous common law cause of action: the institution of a criminal case, an acquittal, the absence of probable cause to prosecute, and a malicious motivation behind the initiation of the prosecution. In order to make out a constitutional claim, some courts had also required a showing that the prosecution was sufficiently "egregious" or was intended to violate some other enumerated constitutional right, such as the First Amendment or the Equal Protection Clause.

Albright changed all that. The plaintiff in Albright brought suit under the Due Process Clause claiming that governmental officials, who had mistakenly charged and arrested him based on the testimony of an unreliable informant, had deprived him of liberty without due process, that is, the right "to be free from criminal prosecution except upon probable cause." A majority of the Court held that the plaintiff's malicious prosecution claim was not cognizable under a theory of substantive due process. The Justices reached that result by a number of significantly different

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177 See id. at 270 n.4. These early cases were not always clear about exactly which constitutional text they were invoking to support the malicious prosecution claim. See id. (cataloging cases).
178 See, e.g., White v. Frank, 855 F.2d 956, 959 n.2 (2d Cir. 1988); Keeton et al., supra note 99, § 119, at 871.
179 See, e.g., Torres v. Superintendent of Police, 893 F.2d 404, 409 (1st Cir. 1990) (holding that a plaintiff raising a malicious prosecution claim must show a "misuse of the legal proceedings ... so egregious as to subject the individual to a deprivation of a constitutional dimension"). But see Taylor v. Meacham, 82 F.3d 1556, 1561 n.3 (10th Cir.) (noting that decisions requiring an "egregious" misuse of the legal process for a § 1983 malicious prosecution claim presumed that the Fourteenth Amendment's Due Process Clause was the relevant constitutional provision), cert. denied, 117 S. Ct. 186 (1996).
180 See generally Torres, 893 F.2d at 409–10 (surveying the decisional law).
181 510 U.S. at 269.
182 See id. at 271 (plurality opinion); id at 276 (Scalia J., concurring); id. at 276 (Ginsburg, J., concurring). The plurality expressed no view on the question of whether the plaintiff could have prevailed under the Fourth Amendment. See id. at 275. In the event, however, that the plaintiff was charged but not arrested or "seized" within the meaning of the Fourth Amendment, it would be substantive due process or nothing. See, e.g., Singer v. Fulton County Sheriff, 63 F.3d 110, 116–17 (2d Cir. 1995) (holding that Fourth Amendment malicious prosecution claim by plaintiff arrested without a warrant and released after arraignment requires a showing of some post-arraignment deprivation of liberty that rises to the level of a constitutional violation), cert. denied, 517 U.S. 1189 (1996).
routes. Importantly, however, a plurality took the narrow view that all pre-trial malicious prosecution claims can be litigated—if at all—only under the Fourth Amendment. The plurality reasoned that the Fourth Amendment is the "explicit textual source of constitutional protection" that the Framers adopted to address matters involving pre-trial deprivations of liberty. In light of this more targeted constitutional safeguard for the same interest, the Court rejected the plaintiff's attempt to "expand the concept of substantive due process" with its "scarce and open-ended" "guideposts for responsible decisionmaking." When confronted again with a perceived overlap between the Due Process Clause and the Fourth Amendment, the Court chose the latter.

There are a number of serious problems with the plurality's analysis. First, the Supreme Court purports to be applying the principle of choosing the "more 'explicit textual source of constitutional protection'" when two potentially applicable constitutional provisions "target[] the same sort of governmental conduct," in other words, to be simply substituting a Fourth Amendment claim for an identical due process claim. But Fourth Amendment claims and malicious prosecution claims are not aimed at the same governmental conduct, and, moreover, they seek relief for different kinds of harms. The gravamen of an unconstitutional arrest claim is a restraint of liberty that either was not reasonably justified at its inception or was carried out in an unreasonable manner. Correspondingly, the kinds of harms most likely to be sustained as a result of an illegal arrest include either injuries resulting from the detention itself (e.g., lost wages or emotional harm) or injuries sustained as a result of rough handling during the arrest (e.g., bodily injury or property damage). The gravamen of a malicious prosecution

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183 Given the diversity of analysis among the various opinions in Albright, the precise scope of the Fourth Amendment claim for malicious prosecution remains to be worked out in specific cases. It is also unclear whether the Court would recognize a residual substantive due process claim if there was no adequate state remedy, see Albright, 510 U.S. at 286 (Kennedy, J., concurring), and the injury to reputation was more than de minimis, see id. at 290–91 (Souter, J., concurring).


185 Albright, 510 U.S. at 273 (quoting Graham, 490 U.S. at 395).

186 Id. at 271–72 (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).


188 See Albright, 510 U.S. at 289 (Souter, J., concurring).
claim, by contrast, is the illicitly motivated charge rather than any restraint of liberty that might also accompany a criminal prosecution. Correspondingly, the harm sought to be remedied results from the charge itself. As Justice John Paul Stevens pointed out in his dissent in Albright, "although in most cases an arrest or summons to appear in court may promptly follow the initiation of criminal proceedings, the accusation itself causes a harm that is analytically, and often temporally, distinct from the arrest." The harm is the societal stigma and resulting injury to reputation, professional and social standing, prospects for employment, and the like, that can result merely from a charge of a serious crime.

Moreover, whereas any harm sought to be remedied by a claim of unconstitutional seizure is largely defined by the period in which the claimant remains in custody, the harm resulting from an invidiously motivated prosecution does not depend either on the fact or the duration of any subsequent seizure. There is, to be sure, some overlap between claims of unconstitutional arrest and malicious prosecution, if only because they often occur together. For the Court to conclude, however, that a substantive due process claim for malicious prosecution would necessarily duplicate a cause of action for unconstitutional arrest is to mischaracterize the claim.

Second, and relatedly, requiring malicious prosecution claims to be brought under the Fourth Amendment as the plurality prescribes would limit the analysis to a determination of whether the prosecution was objectively reasonable, since under Graham the defendant’s motivation is irrelevant. But the essence of malicious prosecution is subjective bad faith. Consider the kinds of decisions that could lead to claims of malicious prosecution: Most invidious
charging decisions will not be decisions to charge innocent people with crimes, but decisions to charge—selectively and for the wrong reasons—people who are guilty of low-level crimes that do not usually lead to criminal prosecution. This is because substantive criminal law covers much more conduct than prosecutors can begin to enforce; most criminal conduct goes uncharged. Moreover, while there are institutional checks on the decision to charge, at least in serious cases, judicial regulation of the decision to charge one suspect over another is virtually nonexistent. In the vast majority of cases, the plaintiff's claim is that the criminal prosecution was unlawful not because the prosecutor lacked probable cause but because the prosecution was motivated by reasons other than the desire to bring the plaintiff to justice. The only way to get at that kind of misbehavior is through some kind of bad faith or bad motive inquiry. But the Fourth Amendment's exclusive focus on objective reasonableness leaves virtually no place for the argument that the official's decision to prosecute was motivated by ill-will or invidious intent unless the prosecution was undertaken in retaliation for speech or religious observance or involved racial or other discrimination in violation of equal protection. In the latter case, a malicious prosecution claim would add nothing to whatever claims already exist under the First and Fourteenth Amendments.

Not surprisingly, the lower courts are in disarray after Albright. Some courts have managed to avoid Albright altogether by disposing of malicious prosecution claims on grounds that do not require them to address the issues left open by the Supreme Court.

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1. The leading case is Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973).

2. See, e.g., Lee v. Mihalich, 847 F.2d 66, 70 (3d Cir. 1988) (defining actual malice necessary for the tort of malicious prosecution as "either ill will in the sense of spite, lack of belief by the actor himself in the propriety of the prosecution, or its use for an extraneous improper purpose"); Bell v. Brennan, 570 F. Supp. 1116, 1118 (E.D. Pa. 1983) (holding that official "must act maliciously or for a purpose other than bringing defendant to justice").

3. See, e.g., Gehl Group v. Koby, 63 F.3d 1528, 1535 n.8 (10th Cir. 1995) (holding that Albright does not foreclose a claim that the prosecution was in retaliation for the exercise of speech).

4. See, e.g., Lennon v. Miller, 66 F.3d 416, 425 (2d Cir. 1995) (dismissing on grounds of qualified immunity because a reasonable official could have believed there was probable cause for the charges); Johnson v. Louisiana Dep't of Agric., 18 F.3d 318, 321 (5th Cir. 1994) (expressing doubt as to whether any malicious prosecution claim lies after Albright but finding it unnecessary to resolve the constitutional
or by permitting claims to go forward under the First Amendment or the Equal Protection Clause. Of courts that have sought to apply Albright, most have read the case "virtually to foreclose reliance on substantive due process as the basis for a viable malicious prosecution claim under section 1983." What remains of malicious prosecution claims under the Fourth Amendment, however, is virtually nothing. In order to prevail, plaintiffs must make out the elements of a Fourth Amendment claim and, in addition, some or all of the elements of a common law malicious prosecution claim. Thus, a constitutional claim of malicious prosecution is not cognizable unless the plaintiff was "seized" as well as charged and unless the arrest was without probable cause. Under this regime it is unclear how far any Fourth Amendment protection against malicious prosecution can reach in the pre-trial context. For example, in Albright the basis of the claim was that a police detective gave false testimony at a preliminary hearing. But at the time of the hearing the plaintiff had already been released on bail. Thus, he was no longer "seized" within the meaning of the Fourth Amendment, unless one subscribes to the theory that a person is effectively "seized" as long as a prosecution is pending, a view that lower courts have already rejected. Under a more conventional understanding of seizure, only events that occurred while a plaintiff was actually in custody would be relevant to a claim of malicious prosecution, and only harms arising out of the seizure itself would be remediable. If so, claims of malicious prosecution are simply traditional Fourth Amendment claims with additional issues because the underlying proceedings had not been terminated in the plaintiff's favor); Lindenman v. Umscheid, 875 P.2d 964, 976 (Kan. 1994) (noting that the "six separately filed opinions" in Albright do not resolve the "embarrassing' split of authority" on whether malicious prosecution is cognizable under the Due Process Clause but ruling that, in any event, any such claim was defeated by the existence of a common law tort remedy) (quoting Albright, 510 U.S. at 271 n.4).

156 See, e.g., Gehl Group, 63 F.3d at 1535 n.8 (noting that Albright does not preclude a claim that a criminal prosecution violated the First Amendment).


158 See 1A Schwartz, supra note 48, § 3.20, at 327–31 (discussing lower court cases construing Albright).

159 Only Justice Ruth Bader Ginsburg has adopted this view. See Albright, 510 U.S. at 277–79 (Ginsburg, J., concurring).

160 See, e.g., Riley v. Dorton, 115 F.3d 1159, 1162–64 (4th Cir. 1997) (cataloging the views of the circuits).
elements that make the plaintiff's job more difficult and add nothing to her recovery if she is successful.

As illustrated by the Fourth Amendment exemplar, much—but not all—of what would otherwise be lost by the Supreme Court's foreclosure of tort-like, substantive due process claims has been preserved in the form of parallel claims under other constitutional texts. The alternative claims are similar but not necessarily identical. For example, what is at stake in the replacement of substantive due process with the more targeted provisions of the Fourth Amendment is that subjective motivation becomes irrelevant to the constitutional claim. This change entails an important, and potentially troubling, loss of substantive constitutional protection.

C. The Landscape after Paul and Parratt

It is useful at this point to step back for a moment and summarize again exactly what categories of claims are not affected or eliminated by the Court's jurisprudence in Paul and the Parratt line of cases. First, the analysis in these cases has no applicability to traditional procedural due process claims challenging the adequacy of official state procedures. Wrongful deprivations of life, liberty, or property resulting from systematically deficient procedures are not "random and unauthorized" and thus will continue to go forward unencumbered. Second, police officers' use of force against the person or property of citizens is regulated by the special standards of the Fourth Amendment, rather than by due process. Third, prison and jail officials who cause deprivations of life, liberty or property fall within the purview of the Eighth Amendment or Fourteenth Amendment. Fourth, deprivations involving issues of race, politics, or religion are governed by the Equal Protection Clause of the Fourteenth Amendment or by the First Amendment. And, finally, some deprivations will call forth the protections of the Takings Clause or will trigger a substantive due process analysis. Thus, when one considers the entire landscape of potential constitutional claims alleging official harms to life, liberty, or property, the real gaps in coverage have resulted not from the foreclosure of claims such as the ones at issue in Parratt but from the redirection of claims such as the ones at issue in Albright and Graham.

200 Parratt, 451 U.S. at 541.
III. THE LINGERING PROBLEM OF PAUL v. DAVIS

This brings me back to where I started, to *Paul v. Davis.*\(^{201}\) The Court’s holding in *Paul* fits neither of the categories outlined in Part II above: Unlike claims against law enforcement officers or prison guards, the claim in *Paul* alleging injury to reputation has no alternative constitutional home outside of the Due Process Clause. As the plaintiff’s claim involved neither search nor seizure nor confinement in prison nor invidious discrimination, it was due process or nothing. The claim in *Paul,* however, does not look at all like the category of claims epitomized by *Parratt v. Taylor*\(^{202}\) and its progeny. The injury in *Paul*—resulting from official publication and circulation of plaintiff’s name and photograph on a list of active criminals—was not caused in a way that is “equally available to private citizens.”\(^{3}\) To the contrary, it occurred in a context that is quintessentially governmental and raises a serious potential for abuse of governmental power. Yet the plaintiff in *Paul* did not even receive the benefit of federal review of the adequacy of state process. In sum, *Paul* describes the one case where the Supreme Court’s narrowing of the due process right matters the most.\(^{204}\)

The facts of *Paul* began with a decision by the Chiefs of Police for the Louisville metropolitan area to take steps for the purpose of alerting local merchants to persons who might be engaged in shoplifting during the Christmas season. To that end the two men compiled and distributed to approximately 800 Louisville merchants a “flyer” addressed to “Business Men In The Metropolitan Area” from “The Chiefs of The Jefferson County and City of Louisville Police Departments.”\(^{205}\) The flyer purported to advise the merchants and their security personnel about individuals who were known to be “active in [the] criminal field [of shoplifting].”\(^{206}\) The flyer indicated that these persons, who were

\(^{201}\) 424 U.S. 693 (1976).
\(^{202}\) 451 U.S. 527.
\(^{203}\) Id. at 552 n.10 (Powell, J., concurring).
\(^{204}\) I am not arguing that plaintiffs should recover for reputational harm regardless of the circumstances. See infra notes 232–39 and accompanying text. My dispute is with the complete elimination of constitutional protection for the interest in reputation.
\(^{205}\) *Paul,* 424 U.S. at 695.
\(^{206}\) Id.
listed in alphabetical order with their names and pictures, had been "arrested . . . or . . . active in various criminal fields in high density shopping areas," and each page of the flyer was headed "City of Louisville[,] Jefferson County Police Departments[,] Active Shoplifters."\(^{207}\)

The respondent, Edward Charles Davis, was included in the flyer because he had been arrested in Louisville on a charge of shoplifting. At the time the flyer was circulated Davis had been arraigned, had pleaded not guilty, and the charge had been "filed away with leave [to reinstate],"\(^{208}\) leaving the charge outstanding but unresolved as to his guilt or innocence. Shortly after the flyer appeared the charge was dismissed by a judge of the local police court.\(^{209}\) Davis alleged that the flyer, and in particular the designation "active shoplifter" appearing at the head of the page where his name and picture also appeared, had deprived him of liberty without due process of law. Davis alleged that his appearance in the flyer would hinder his freedom to enter business establishments—for fear of being suspected of shoplifting and possibly apprehended—and would impair his future employment prospects.\(^{210}\)

The Supreme Court in *Paul* reasoned that it could accept Davis's claim for injury to reputation on one of two theories: Either the Due Process Clause "make[s] actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state-law tort claims" or injury to "reputation is somehow different in kind from the infliction" by government officials of injury to other state-protected interests.\(^{211}\) As to the first, the Court found it untenable that every governmental action that would be tortious at common law would lead to liability under the "life, lib-

\(^{207}\) Id.

\(^{208}\) Id. at 696 (internal quotation marks omitted).

\(^{209}\) See id.

\(^{210}\) See id. at 697. When the flyer was circulated Davis was employed as a photographer by a local newspaper. After seeing the flyer and hearing Davis's side of the story, his supervisor advised Davis that he would not be fired but that he "had best not find himself in a similar situation in the future." Id. at 696 (internal quotation marks omitted). Davis's supervisor testified that as a result of the flyer, he was unable to give Davis any assignments in the "mercantile establishment." Davis v. Paul, 505 F.2d 1180, 1184 (6th Cir. 1974) (internal quotation marks omitted), rev'd sub nom. Paul v. Davis, 424 U.S. 693 (1976).

\(^{211}\) *Paul*, 424 U.S at 699.
property, or property” language of the Due Process Clause. The Court also rejected the defamation-as-different theory, reasoning that the words “liberty” and “property” do not single out reputation from other interests that might be protected by state law.

In my view, the Court is wrong on both counts. In order to avoid making of Section 1983 a “font of tort law,” the Paul majority sought a limiting principle for treating injury to reputation differently from other claims of tortious injury by governmental officials. Finding none, the Court rejected Davis’s claim. Ironically, though, the Court’s holding did not have the liability-limiting effect sought by the Paul majority, as cases like Parratt and Daniels v. Williams make clear. Indeed, Paul did not even solve the “parade of horribles” posed in the majority opinion as reasons for rejecting Davis’s claim. The Court’s holding does nothing to prevent “survivors of an innocent bystander mistakenly shot by policemen or negligently killed by a sheriff driving a government vehicle” from suing their injurers for deprivations under the Due Process Clause. It took the holdings in Parratt and Daniels to put fact patterns like these beyond the reach of the Due Process Clause. As for the Court’s assertion that the text of the Due Process Clause precluded singling out defamation for constitutional protection, it is too late in the day (as the majority surely realized) to credit the argument that the words “liberty” or “property” are insufficiently broad to encompass

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212 See id. at 699–701.
213 See id. at 701.
214 Id.
216 Paul, 424 U.S. at 698.
217 Daniels would foreclose constitutional review of the claims posed by the Paul majority because the harm-causing conduct was merely negligent. See Daniels, 474 U.S. at 332–33. Parratt would eliminate the federal claim if the plaintiffs in these cases had an adequate state remedy. See Parratt, 461 U.S. at 543. Depending on the facts, the bystander cases would fall under the Fourth Amendment regulation of deadly force, see Tennessee v. Garner, 471 U.S. 1 (1985) (holding that a law enforcement officer may use deadly force against a suspect consistent with the Fourth Amendment only where the official reasonably believes the suspect poses a threat of serious physical harm to the officer or others), or under the Court’s recent holding in County of Sacramento v. Lewis, 117 S. Ct. 1708 (1998) (holding that injury to a passenger during high-speed chase is governed by the Fourteenth rather than the Fourth Amendment and that recovery requires a showing of intent to cause harm).
a reputational interest.\(^{28}\) Moreover, as I explain in more detail below, there are strong practical and theoretical reasons to distinguish defamation, especially defamation in the criminal context, from other tort-like claims.

Government authority in the criminal context has always been treated with special concern, as the history of criminal procedure attests. Law enforcement officials wield enormous power—much of it largely unreviewable—to investigate crime and bring charges against those suspected of criminal activity. Much of the time, the authority possessed by law enforcement personnel is all to the good; officials must have sufficient power to investigate and prosecute crime in order to protect the rights of law-abiding citizens. But the very power that makes it possible for officials to discover and prosecute crime creates significant opportunities for officials to abuse their power and cause serious harm. One of the most damaging and potentially irreversible harms caused by police or prosecutorial misconduct is the stigmatization that accompanies an unfounded arrest, charge, or accusation of criminal conduct. Even if the arrestee is eventually released, the charges are dropped, or the investigation is terminated, the damage to the victim’s reputation, livelihood, social relationships, and the like may already have occurred. It is a very difficult thing to recover one’s good name in the court of public opinion; there is no forum for arguing that one is innocent, and, in any event, one’s personal protestations would likely be greeted with suspicion.

Moreover, because governmental officials have a virtual monopoly on criminal enforcement, the power to cause this kind of reputational harm is uniquely governmental. A private individual who falsely accuses another of criminal conduct speaks only for herself. Yet, the victim of a false accusation of infamous crime by a private party can sue for defamation with no showing of actual harm to reputation; reputational harm is viewed as so likely to result from

\(^{28}\) The modern Supreme Court has read “liberty” within the meaning of the Due Process Clause to encompass a broadly defined right to privacy that is largely unconstrained by text and constitutional history. Given this jurisprudential background, surely the Court was not “compelled to reject freedom from defamation as a protected interest.” Monaghan, Of “Liberty,” supra note 2, at 426. Indeed, Monaghan argues that the Court’s conclusion that injury to reputation “implicates no constitutionally protected interest stands wholly at odds with our ethical, political, and constitutional assumption about the worth of each individual.” Id. at 427.
the attribution of criminality that damages are presumed. It fol-
lows that when law enforcement officials identify an individual as a
criminal wrongdoer—whether by arrest, charge, or press confer-
ence—the potential for reputational harm is virtually certain. The
words and actions of police officers and prosecutors are viewed as
official declarations of the law enforcement arms of government.
An arrest or charge is a "public act" that brands the subject as a
criminal in the eyes of others; it has the potential to "disrupt his
employment, drain his financial resources, curtail his associations,
subject him to public obloquy, and create anxiety in him, his fam-
ily, and his friends." By virtue of its unique role as criminal law
enforcer, the government is empowered to cause a kind of harm for
which there is no true private analogue.

Of course, the public interest requires that governmental offi-
cials be afforded considerable leeway in connection with their law
enforcement activities. A rule of potential liability for every offi-
cial misstatement, erroneous arrest, or dismissed charge would
seriously hamper legitimate law enforcement. But much of the
history of criminal procedure is the story of the law's attempt to
find a balance between protecting the needs of law enforcement and
limiting the possibility that officials will misbehave. Indeed, it is pre-
cisely the need for careful balancing—to curb governmental misbe-
behavior without unduly hampering police and prosecutors—that
militates for a federal rule of defamation in the criminal context.
By contrast, the current rule leaves virtually unregulated a broad
range of harm-causing conduct by officials wielding quintessen-
tially governmental power.

Had the Paul majority been more honest in its treatment of
precedent, the Court would have found ample case support for the
proposition that government-inflicted injury to reputation implic-
ates a protected interest within the meaning of the Due Process
Clause. Many of the holdings reviewed by the Paul Court turn in
large part on whether or not the governmental conduct alleged to

220 Albright, 510 U.S. 266, 296 (1994) (Stevens, J., dissenting) (quoting United States
v. Marion, 404 U.S. 307, 320 (1971)).
221 Unlike claims governed by Parratt, which are constitutionally regulated to the
extent that the state must provide an adequate remedy, Mr. Davis's defamation claim
never even got on the constitutional map.
have caused reputational harm is viewed as akin to an adjudication, especially a criminal adjudication. The Court has viewed such criminal quasi-adjudications as raising serious due process concerns. For example, in *Jenkins v. McKeithen*\(^\text{22}\) the plaintiff challenged the activities of the Labor-Management Commission of Inquiry, whose stated purpose was the "investigation and findings of facts relating to violations or possible violations of [state or federal] criminal laws" in connection with labor-management relations.\(^\text{223}\) The Commission's duty when it found probable cause to believe that criminal laws had been broken was to report its findings to federal or state prosecutors or to file charges itself. The Commission had no authority to decide questions of guilt or innocence and its recommendations and findings had no legal significance. The Court held that in light of the Commission's function, which the Court described as "very much akin to making an official adjudication of criminal culpability,"\(^\text{224}\) the Commission's proceedings violated the Due Process Clause.\(^\text{225}\) Crucial to the Court's holding was its conclusion that the Commission was "empowered to be used and allegedly is used to find *named individuals* guilty of violating the criminal laws... and to *brand them as criminals*."\(^\text{226}\)

Significantly, the Court never questioned that reputational harm resulting from being branded as a criminal (with or without loss of employment or other "right previously held under state law")\(^\text{227}\) would implicate a protected interest.

The *Jenkins* Court cited two earlier cases involving similar challenges under the Due Process Clause: *Hannah v. Larche*,\(^\text{228}\) upholding the constitutionality of the Civil Rights Commission,\(^\text{229}\) and *Joint Anti-Fascist Refugee Committee v. McGrath*,\(^\text{230}\) reviewing a challenge to the validity of the Attorney General's designation of particular organizations as "Communist" on a list which he fur-

\(^{222}\) Id. at 414.
\(^{223}\) Id. at 427.
\(^{224}\) See id. at 428.
\(^{225}\) Id. at 428 (emphasis added).
\(^{226}\) Id. at 428 (emphasis added).
\(^{227}\) Paul, 424 U.S. at 708.
\(^{228}\) 363 U.S. 420 (1960).
\(^{229}\) See id. at 451.
nished to the Civil Service Commission. 231 What is most significant about these cases is not the results but how the Justices defined the terms of the debate: The Justices agreed that the due process issue turned on whether or not the governmental entity at issue exercised an adjudicatory or merely an investigative function. With one exception, 222 the disagreements were limited to the largely factual question of how to characterize the particular functions attributable to the governmental entity at issue. 233 These cases raised the clear implication that governmental defamation in a quasi-adjudicatory context would trigger a due process claim for reputational harm.

As the Paul Court closed the door entirely to constitutional claims for injury to reputation, the Court never reached the question of what the scope of such claims might look like. Importantly, just as permitting recovery for reputational harm need not turn every tort into a constitutional claim, recognizing reputation as a

231 See id. at 124–25.
222 See id. at 202–03 (Reed, J., dissenting) (“It may be assumed that the listing is hurtful to [plaintiff’s] prestige, reputation and earning power.... [But a] ‘mere abstract declaration’ by an administrator regarding the character of an organization, without the effect of forbidding or compelling conduct... ought not to be subject to judicial interference.”) (quoting Rochester Tel. Corp., v. United States, 307 U.S. 125, 143 (1938).
233 See Jenkins, 395 U.S. at 442 (Harlan, J., dissenting) (“[If] some of my Brethren understand the complaint to allege that in fact the Commission acts primarily as an agency of ‘exposure,’ rather than one which serves the ends required by the state statutes... [then] the area of disagreement between us may be small or nonexistent.”). Compare Hannah, 363 U.S. at 441 (“[The Civil Rights Commission] is purely investigative and fact-finding. It does not adjudicate[,]... hold trials or determine anyone’s civil or criminal liability. It does not issue orders[,]... indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property.”), with id. at 500 (Douglas, J., dissenting) (“The Civil Rights Commission, it is true, returns no indictment. Yet in a real sense the hearings on charges that [the plaintiff] has committed a federal offense are a trial.”); compare Anti-Fascist Comm., 341 U.S. at 142 (Black, J., concurring) (“In the present climate of public opinion... the Attorney General’s much publicized findings, regardless of their truth or falsity, are the practical equivalents of confiscation and death sentences for any blacklisted organization not possessing extraordinary financial, political or religious prestige and influence.”) and id. at 175 (Douglas, J., concurring) (“This is not an instance of name calling by public officials... This determination [that an organization is subversive] has consequences... [that] flow from actions of regulatory agencies that are moving in the wake of the Attorney General’s determination to penalize or police these organizations.”), with id. at 164 (Frankfurter, J., concurring) (“[P]ublicly designating an organization as within the proscribed categories of the Loyalty Order does not directly deprive anyone of liberty or property.”).
protected interest does not mean that every false statement would result in constitutional liability. First, and most important, only false statements or statements that attribute criminality without a proper adjudication, as distinguished from statements that merely report an arrest or other official action, would give rise to a due process claim of reputational harm. A police officer who simply reported that a particular individual had been arrested or charged would not be subject to liability for defamation simply because the arrest or charge turned out to be unwarranted, even though injury to reputation could result. Even truthful reporting of law enforcement actions can, and often does, cause reputational harm. But in that case harm results from society’s reaction to a reported fact—the subject has been arrested or charged—and not from a statement that brands the subject as a criminal without proper adjudication. The gravamen of Mr. Davis’s complaint in Paul was not that his arrest was announced to area merchants but that he was listed as an “active shoplifter”; the only basis for that listing was one unresolved arrest by a store security guard that was subsequently dismissed.

The distinction between statements that brand or accuse and those that simply report law enforcement actions would serve as a sensible limiting principle for the due process cause of action for governmental defamation. Although reputational harm can result when a criminal charge, arrest, or search is simply reported, governmental officials cannot take such actions in the first place without satisfying constitutional requirements. Prior to searching or arresting a suspect, officials must obtain a warrant or otherwise satisfy the probable cause requirement. Similarly, though a criminal charge need not be supported by probable cause, in most jurisdictions a prosecutor’s charging decision in serious cases is subject to institutional checks, such as the approval of a grand jury or the concurrence of a judicial officer at a preliminary hearing.

24 In the federal system, as a Fifth Amendment requirement, and in about half the states, as a matter of state law, a felony charge must be approved by a grand jury unless the defendant has waived that right. See generally 2 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 15.1(a)–(b) at 686–87 (2d ed. 1992) (discussing federal and state requirements).

25 See generally id. § 14.2 at 661–67 (discussing a defendant’s right to a preliminary hearing). Prosecutors may also be subject to ethical rules that constrain their charging decisions. See, e.g., Model Code of Professional Responsibility DR 7-103(a)
Moreover, individuals who are harmed by an unconstitutional search or arrest, and under limited circumstances by an unfounded criminal charge,\textsuperscript{236} can bring suit to recover for resulting harms, including injury to reputation. The ex ante limitations on law enforcement actions coupled with the potential for recovery if constitutional limitations are exceeded makes a separate cause of action for reputational harm from mere reporting unnecessary.

Second, claims of reputational harm would also be limited by the rule laid down in \textit{Daniels v. Williams}, foreclosing liability unless the defendant’s harm-causing actions were more than negligent. Under \textit{Daniels}, even false statements would not give rise to a defamation claim unless the speaker was at least reckless as to the accuracy of the statements offered. In addition, ordinary immunity rules would provide a margin of error for officials who reasonably believed their actions were consistent with clearly established constitutional standards.\textsuperscript{237}
Third, *Parratt v. Taylor*, which held that certain tort-like deprivations do not violate the Due Process Clause if there is an adequate remedy under state law, would also serve as a limitation on the scope of liability for reputational harm. While *Parratt* could seriously limit the availability of a federal remedy for official defamation—a result I ultimately disfavor—it would at least guarantee federal review to ensure a minimally adequate state remedy. Even this limited review would be better than the current rule, which affords no constitutional protection at all for reputational injury. In my view, however, injury to reputation resulting from extra-judicial attribution of criminality should give rise to a federal claim without resort to state court. Such injury is not in the same category as the low-level, tort-like claims that led the Court to adopt the *Parratt* rule. As argued above, injury to reputation in the criminal context results from conduct that is uniquely governmental; it is not caused in a way that is "equally available to private citizens." Thus, unlike the claims at issue in cases like *Parratt* and *Daniels*, defamation in connection with statements attributing criminality should give rise to a federal constitutional claim regardless of the availability of a state remedy.

Fourth, the recognition of constitutional defamation claims in the criminal context need not lead to recovery for all reputational injury resulting from governmental action. Consider, for example, defamation in employment, the only other context in which the Supreme Court has considered (and rejected) a claim of injury to reputation. While injury to reputation by attribution of criminality raises special concerns relating to the government's unique role in investigating and prosecuting crime, defamation in the employment context would not implicate officials in a uniquely governmental role. Moreover, treating defamation in employment differently would comport with well-established constitutional rules specially applicable to government employers. For example, public em-

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28 *Parratt*, 451 U.S. at 552 n.10 (Powell, J., concurring).
29 See Seigert v. Gilley, 500 U.S. 226, 231 (1991) (foreclosing recovery for alleged reputational harm resulting from a negative reference by plaintiff's prior governmental employer). The Court's opinion in *Seigert* cited *Paul* as foreclosing any further discussion of reputation as a protected interest. See id. at 233–34. Thus, the Court found it unnecessary to consider whether permitting defamation claims against governmental employers raised different concerns from those at issue in the criminal context.
ployers have more leeway under the First Amendment to restrict the speech of their employees than public officials have to regulate speech by the general public.\textsuperscript{240} Similarly, there may be good reasons for striking the balance differently when considering defamation claims in the employment context as compared to the criminal context at issue in \textit{Paul}.

For the reasons suggested above, the recognition of a due process claim for reputational harm is not likely to open the floodgates or to trivialize constitutional rights. In addition, the holding in \textit{Paul} has become constitutional dead wood. Its rationale has been overtaken by the holdings in \textit{Parratt} and \textit{Daniels}, which addressed the Court's "font of tort law" concern. \textit{Paul} could be reversed without undermining any of the goals for which the holdings in \textit{Paul} and \textit{Parratt} and its progeny were originally designed.

\textbf{CONCLUSION}

The irony of \textit{Paul v. Davis} is that this much-maligned case neither fits into the category of cases it was designed to eliminate from the federal courts nor accomplishes its purpose of preventing a flood of tort-like cases into federal court. Instead, the Supreme Court seized on the wrong thing—eliminating any protected interest in reputation—and chose the wrong case—one in which the federal remedy was justified—in order to confront the legitimate remedial and substantive concerns that were eventually addressed by \textit{Parratt} and its progeny. More importantly, the damage done by \textit{Paul v. Davis} could now be undone without undermining any of the purposes for which it was handed down twenty-three years ago.

There is, however, another irony that is implicit in the academic response to \textit{Paul} and \textit{Parratt}. While most of the scholarly attention has been focused on claims that are entirely foreclosed by the Court's due process jurisprudence, the most significant loss has been overlooked altogether: the loss that occurs when claims

\textsuperscript{240} The government is understood to have "a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large." \textit{Waters v. Churchill}, 511 U.S. 661, 671 (1994). This additional freedom to regulate speech results because a governmental employer has another, sometimes competing, obligation along with its duty to respect First Amendment rights: to ensure that the tasks it is charged to perform are performed as "effectively and efficiently as possible." Id. at 675.
are redirected. For example, the redirection of excessive force and malicious prosecution claims from the Due Process Clause to the Fourth Amendment and the resulting switch from a subjective standard to an objective one have serious implications in a world where invidious racial motivations remain a significant causal factor in governmental misconduct. Although this Article has focused on the redirection of Fourth Amendment claims, the current Supreme Court's disposition to reserve due process for residual claims not addressed by a more specific constitutional provision suggests that similar redirections may occur in other contexts. These additional redirections may or may not prove troubling. At the very least, however, they deserve an increased level of attention.