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Chicago-Kent Law Review
Government officers sometimes invade interests that may be protected by the common law. The Supreme Court has found that some of these injuries are also constitutional torts, but it has not yet articulated coherent distinctions between constitutional and common law torts. This Article suggests ways in which those distinctions may be drawn, and argues that the Due Process Clause is the appropriate vehicle for this genre of constitutional tort.

Professor Whitman challenges the claim that constitutional damage claims under § 1983 encompass a discrete substantive area of liability that shares features with common-law tort actions. She argues that it is important to separate questions of constitutional substance from questions of appropriate remedies. Both appeal to torts as a ground of affirmative definition of constitutional liability and efforts to define constitutional protections in opposition to torts are distractions from the hard work of constitutional interpretation.

Federal Courts have long looked to the common law in filling gaps in § 1983's rather sparse language. The Supreme Court, in *Heck v. Humphrey*, required a § 1983 plaintiff to plead and prove the elements of the most closely analogous common law action. In this Article, Professor Beermann argues that this development is inconsistent with § 1983 fundamentals under which the availability of a § 1983 action is not dependent on whether a common law remedy would also be available. The Article also looks somewhat more broadly at the relationship between § 1983 and the common law, and the common law's influence on some constitutional rights commonly enforced in § 1983 actions.
Section 1983 and Sex Abuse in Schools: Making a Federal Case Out of It

Laura Oren 747

When teachers sexually abuse children in their charge, a federal cause of action arises under 42 U.S.C. § 1983 for the constitutional violation inflicted by the school official. This Article argues that what it calls the “Ingraham dilemma” establishes that sex abuse in schools constitutes a substantive deprivation of a federally-guaranteed “liberty interest” within the meaning of the Due Process Clause of the Fourteenth Amendment. Moreover, just like police officers who have been held responsible for their abuse of state-sanctioned power, rogue teachers who misuse the trust and authority inherent in their position act “under color of state law” as required by the statutory elements of § 1983. Finally, those appellate courts, which uncritically embrace the standard of “deliberate indifference,” should instead take more account of the background of tort liability when determining whether supervisory defendants who have notice of the likelihood of constitutional harm may be held individually liable under the 1871 civil rights statute.

The Restructuring of Narrative and Empathy in Section 1983 Cases

Sheldon Nahmod 819

In the last decade the United States Supreme Court has dramatically changed § 1983 qualified immunity rules in order to make them more protective of defendants. Thus, qualified immunity has become objective in nature, plaintiffs’ discovery has been severely limited until the qualified immunity issue has been resolved, and defendants who lose their qualified immunity motions for summary judgment are entitled to interlocutory review. Professor Nahmod argues that, as a structural matter, these substantive and procedural changes privilege defendants’ narratives, marginalize the counter-narratives of plaintiffs and direct decision-makers, the judges, to empathize more with defendants than with injured plaintiffs. Professor Nahmod suggests that, at least in close cases, judges are thereby encouraged to alleviate the potential damages liability of defendants.

Student Notes and Comments

“Partnership Buster” in the Federal Government: The Relationship Between 5 U.S.C. § 7106(a) and (b)(1)

James J. Powers 837

This Note analyzes the Federal Service Labor-Management Relations Statute (“FSLMRS”) and Executive Order 12871 to determine the proper relationship between prohibited and permissive subjects of bargaining in the federal sector. The Note concludes that recent judicial and administrative decisions have misinterpreted the FSLMRS by holding permissive subjects are always negotiable regardless of their interference with management reserved rights. To avoid the future negotiations of management reserved rights between agencies and unions, the Federal Labor Relations Authority should recalibrate and narrow its definition of permissive subjects of bargaining.

How Far Is Too Far: Analyzing the Collateral Law Applicable in State Court Section 1983 Litigation

Scott T. Schutte 875

Section 1983 cases are becoming increasingly common in state court. This Note considers the “converse-Erie” problem that this causes: what collateral law should be applied when a state collateral law does not directly conflict with the purposes of § 1983, but nonetheless is less generous to plaintiffs than the collateral law available in federal court? Mr. Schutte analyzes the only Supreme Court case to directly consider the issue, and also surveys the various approaches suggested in the academic literature. The Note concludes that the best approach is a balancing of interests that takes
into consideration both the federal interest in vindicating constitutional rights and the state's interest in applying its own collateral law scheme.

**Drawing the Iron Curtain: Prisoners' Rights from *Morrisey v. Brewer* to *Sandin v. Conner***

Robert A. Surrette 923

In 1995, the United States Supreme Court in *Sandin v. Conner* reconfigured the analysis for determining when a prisoner has a protected liberty interest entitling him or her to procedural protections set forth under the Fourteenth Amendment. This Article argues that the new standard set forth by the Court in *Sandin* is fraught with ambiguity. The Article concludes that the lower courts will struggle with the new standard and the Court's objective of reducing prisoner's rights litigation will not likely be met.