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MARSHALL SHAPO'S *CONSTITUTIONAL TORT* FIFTY-FIVE YEARS LATER

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INTRODUCTION

In 1965, *Northwestern University Law Review* published Professor Marshall Shapo's article, *Constitutional Tort:* Monroe v. Pape *and the Frontiers Beyond.*[1] Professor Shapo's paper analyzed the origins of constitutional tort law, which consists of suits for damages for constitutional violations committed by government officials or the governments themselves. The article began with an account of the post-Civil War background of 42 U.S.C. § 1983, a statute enacted in 1871 to enforce the Fourteenth Amendment. After the Civil War, recalcitrant southerners, acting through groups like the Ku Klux Klan, intimidated the freedmen and their white supporters, organized lynch mobs, burned houses, and, in general, attempted to restore the old order. The statute authorizes a cause of action against "[e]very person" who, acting "under color of" state law, violates constitutional rights.[2] Professor Shapo went on to recount the legislative history of § 1983 and the relevant case law over the next nine decades.[3]

Interestingly, the Supreme Court rarely addressed § 1983 issues during that ninety-year period.[4] Few cases were brought under the statute,[5] and lower courts typically gave it a limited reach. When lower courts did consider § 1983 claims, they mainly read "under color of" as a requirement that the plaintiff show that state law *authorized* the violation, so that the availability of a state remedy would thwart the plaintiff's effort to obtain access to federal court.[6] Under this interpretation, the application of a statute that denies the right to vote to African Americans would be a § 1983 violation, whereas police brutality that violates state law would not.

The centerpiece of Professor Shapo's article was the Supreme Court's 1961 ruling in *Monroe v. Pape*, in which the Court ruled that the lower courts' interpretation of § 1983 was incorrect.[7] The Court explained that "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[8] In

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[1] Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape *and the Frontiers Beyond*, 60 NW. U. L. REV. 277 (1965). I will refer to this article as *Constitutional Tort* for the remainder of this Essay.

[2] 42 U.S.C. § 1983 (2012).

[3] *See* Shapo, *supra* note 1, at 279–319.

[4] Wholly separate from § 1983, the Court developed a cause of action for prospective relief, stemming from *Ex parte Young*, 209 U.S. 123 (1908). *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 927, 927 n.1 (7th ed. 2015). But damages were (and are) not available in *Ex parte Young* litigation.

[5] *See* FALLON ET AL., *supra* note 4, at 986.

[6] *See* Monroe v. Pape, 365 U.S. 167, 214, n.21 (1961) (Frankfurter, J., dissenting).

[7] *Id.* at 168.

[8] *Id.* at 183.

other words, the Court held that a § 1983 cause of action was available whether or not state law provided a remedy for the constitutional violation. This reading considerably enhanced the statute's utility as a tool for enforcing constitutional rights, enabling courts to hold that official acts that violate state law, and for which state law provides a remedy, were also violations of the statute. Professor Shapo then described the case law that emerged in the first few years after *Monroe*.[9]

In the decades after *Constitutional Tort* was published, the volume of § 1983 litigation in the lower courts grew exponentially, the Supreme Court decided many more § 1983 cases, and § 1983 scholarship proliferated.[10] Much of the later judicial and scholarly work builds on Professor Shapo's article, which warrants rereading even today. This brief Essay discusses three reasons why: (1) Professor Shapo's focus on doctrine rather than theory; (2) his recognition of the important distinction between offensive and defensive constitutional remedies; and (3) his emphasis on the "tort" aspect of § 1983 litigation.

I. CONSTITUTIONAL TORT LAW

In *Monroe*, the plaintiff claimed a violation of his Fourth Amendment rights; the Court's holding could have been limited to such cases. But, instead, the Court's holding is broadly stated, and it quickly became apparent that the § 1983 cause of action would not be limited to Fourth Amendment claims, as evidenced by Professor Shapo's discussion in *Constitutional Torts*. His survey of the lower court cases showed that "the post-*Monroe* decisions have included at least a suggestion of a claim under each separate clause of the Bill of Rights," except for the clauses concerned with "judicial mechanics."[11] He inferred, perhaps from the Court's own language in *Monroe*—explaining that the statute "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions"[12]—that "what is developing is a kind of 'constitutional tort.' It is not quite a private tort, yet contains tort elements; it is not 'constitutional law,' but employs a constitutional test."[13] Professor Shapo went on to become a preeminent torts scholar, yet he never returned (in a sustained way)

[9] Shapo, *supra* note 1, at 279–319.

[10] *See* FALLON ET AL., *supra* note 4, at 987, 994–95.

[11] Shapo, *supra* note 1, at 323.

[12] Monroe v. Pape, 365 U.S. 167, 187 (1961).

[13] Shapo, *supra* note 1, at 323–24.

to the "interesting amalgam"[14] of tort and constitutional elements he identified in § 1983 litigation.[15]

Nonetheless, his description of the § 1983 damages cause of action was prescient, for the Supreme Court has borrowed heavily from tort law in adjudicating § 1983 issues. It has said that § 1983 "creates a species of tort liability,"[16] and it has identified the aims of constitutional tort as vindication of rights and deterrence of violations,[17] goals that track the common law of torts.[18] As for specific doctrines that mirror tort law, the Court has adopted a common law but–for test for cause in fact,[19] and has curbed recovery for lack of proximate cause.[20] Damages are measured by the common law "compensation principle,"[21] and the test for punitive damages tracks the common law requirement of egregious misconduct.[22] The qualified immunity doctrine has common law roots as well.[23]

Some scholars deplore the Supreme Court's "tort rhetoric."[24] In the leading article denouncing the role of tort terminology, Professor Sheldon Nahmod argues that "the Court, by using tort rhetoric, is attempting to marginalize § 1983 and to make it less protective of fourteenth amendment rights."[25] Professor Nahmod goes on to criticize, often with good reason, several Supreme Court cases that limit the scope of § 1983.[26] But Professor Nahmod's characterization of the Court's references to tort as "rhetoric" already hints that the driving force behind the limits was not any tort *concept*.

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[14] *Id.* at 324.

[15] It is important to note, however, that Professor Shapo's later work in general tort law influenced scholarship on constitutional tort analogues. His book *The Duty to Act* helped to frame the constitutional tort affirmative duty analysis in Professors Eaton and Wells's article *Governmental Inaction as a Constitutional Tort*: DeShaney *and Its Aftermath.* Thomas A. Eaton & Michael Wells, *Governmental Inaction as a Constitutional Tort*: DeShaney *and Its Aftermath*, 66 WASH. L. REV. 107, 108 n.6 (1991).

[16] Imbler v. Pachtman, 424 U.S. 409, 417 (1976).

[17] *See, e.g.*, Felder v. Casey, 487 U.S. 131, 139 (1988); Forrester v. White, 484 U.S. 219, 223 (1988); Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307–10 (1986); Owen v. City of Independence, 445 U.S. 622, 650–51 (1980).

[18] *See* Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997).

[19] *See, e.g.*, Texas v. Lesage, 528 U.S. 18, 20–21 (1999) (per curiam); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

[20] *See* Martinez v. California, 444 U.S. 277, 285 (1980); *see also* County of Los Angeles v. Mendez, 137 S. Ct. 1539, 1548–49 (2017) (remanding for consideration of proximate cause).

[21] Carey v. Piphus, 435 U.S. 247, 255, 257 (1978); *Memphis Cmty. Sch. Dist.*, 477 U.S. at 306–07.

[22] *See* Smith v. Wade, 461 U.S. 30, 48–49 (1983).

[23] *See* Pierson v. Ray, 386 U.S. 547, 555 (1967).

[24] Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719, 1719–20 (1989).

[25] *Id.* at 1720.

[26] *Id.* at 1725–31, 1738–51.

Instead, the Court may deploy tort rhetoric as window dressing for results on other grounds. In particular, the modern Supreme Court has tended to favor government over individual interests in § 1983 litigation, regardless of whether it uses tort rhetoric in its opinions. For example, it has rejected the tort concept of vicarious liability,[27] and it has largely abandoned the tort law roots of qualified immunity.[28]

The larger point is that, the Court's rhetoric aside, tort concepts must, and should, inform the resolution of § 1983 issues. This is the insight reflected in Professor Shapo's characterization of the area as an "amalgam" of constitutional and tort principles. A § 1983 suit for damages raises issues that closely resemble traditional common law tort issues.[29] In both types of litigation, the breach of duty occurred in the past. In both, the breach may or may not be responsible for the plaintiff's current harm, and some principle must be devised to determine whether it is or is not. In both, the amount of harm may be contested, and some principle must be devised to govern the resolution of the dispute. Finally, in both, the defendant may have acted with a greater or lesser degree of fault, and some principle must be chosen to determine how much fault is enough to trigger liability.

The principles that govern the outcomes of ordinary tort cases should not be automatically applied to constitutional tort. But they are a starting point for an argument over whether and how to modify the principles to suit the needs of the constitutional tort context. In this sense, it is appropriate to decide § 1983 cases "against the background of tort liability."[30]

In practice, however, the Court has borrowed tort principles to suit its immediate purposes but has often neglected the distinctive issues that arise in the application of common law tort principles to § 1983. For example, in *Carey v. Piphus*[31] and *Memphis Community School District v. Stachura*,[32] the Court adopted the common law "compensation principle" as the measure of damages for constitutional torts. But the Court also recognized that common law tort rules of damages may not "provide a complete solution to the damages issue in every § 1983 case."[33] In this set of cases, "the interests protected by a particular constitutional right may not also be protected by an

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[27] *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 692 (1978).

[28] *Compare Pierson*, 386 U.S. at 555 (borrowing the common law "good faith" defense), *with* Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982) (abandoning the "good faith" prong of qualified immunity in favor of a strictly objective test).

[29] *See* Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157, 164–76 (1998).

[30] *See* Monroe v. Pape, 365 U.S. 167, 187 (1961).

[31] 435 U.S. 247, 255 (1978).

[32] 477 U.S. 299, 306 (1986).

[33] *Carey*, 435 U.S. at 258.

analogous branch of the common law of torts."[34] In that event, "the task will be the more difficult one of adapting common-law rules of damages to provide fair compensation for injuries caused by the deprivation of a constitutional right."[35] It is a dismaying fact that, in the four decades since *Carey*, the Court has taken no steps to build on this insight. Its failure to do so is hardly compatible with the notion that the Court has a strong interest in the application of tort principles to constitutional tort law.[36] Modern constitutional tort law would be more coherent, and more effective at vindicating rights and deterring violations, if the Court had paid more attention to the "interesting amalgam" Professor Shapo identified fifty-five years ago.

II. OFFENSIVE VERSUS DEFENSIVE REMEDIES

Once the Supreme Court read "under color of" broadly in *Monroe*, a whole new set of issues arose regarding what remedy a plaintiff may obtain upon proving a § 1983 violation. One of the lessons Professor Shapo draws from the post-*Monroe* cases is that the § 1983 cause of action is available to a broad range of constitutional violations that bear little resemblance to those committed by the Ku Klux Klan in the post-Civil War period.[37] This Part will examine Professor Shapo's categorization of offensive and defensive remedies and how, while some may argue for a less limited approach to damages, Professor Shapo was one of the first to identify remediation as an essential part of rights. His idea was one that would require a delicate balance between protecting rights and limiting the burden on the government.

A recurring theme in the second half of *Constitutional Tort* is Professor Shapo's recognition of the differences between offensive and defensive remedies. A defensive remedy is a shield against criminal or civil liability. For example, a bookseller charged with distributing obscene materials may attempt to raise the First Amendment as a defense. When the right-claimant becomes a plaintiff, he attempts to use the Constitution as a sword to obtain damages or prospective relief. For example, the bookseller may attempt to sue the police under § 1983 for damages for false arrest. Offensive remedies, in particular the damages remedy authorized by *Monroe*, will not necessarily

[34] *Id.*

[35] *Id.*

[36] For some suggestions as to how common law tort doctrine may be adapted to the constitutional tort context, see Wells, *supra* note 29, at 196–222; Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 CHI.-KENT L. REV. 617, 618 (1997); and Eaton & Wells, *supra* note 15, at 159–65.

[37] *See* Shapo, *supra* note 1, at 320–26.

be available for every violation of a constitutional right.[38] Commenting on *Colon v. Grieco*, a case in which a New Jersey District Court declined to allow the defendant to recover damages when he was detained for ten days without a charge,[39] Professor Shapo notes that "the most provocative issue presented" in many post-*Monroe* cases relates to "the application of the statute as a sword in the context of [constitutional] provisions which principally have been interpreted as shields."[40] He pointed out "that a significant difference lies between overturning a criminal conviction because the defendant's Bill of Rights guarantees have been violated (or overruling a defendant officer's justification in a trespass action) and the affirmative grant of a civil action for damages."[41] And the criminal justice fact pattern illustrated by *Colon* is not unique. Later in the article, Professor Shapo returns to this point in discussing § 1983 litigation aimed at enforcing Fourteenth Amendment rights in other contexts.[42]

Professor Shapo perceived a need for some restraint on liability in order to avoid "the development of a variety of federal common law without a correspondingly compelling federal interest."[43] Perhaps influenced by Justice Frankfurter's federalism-based *Monroe* dissent,[44] Professor Shapo recommended that "the federal judiciary should tread warily in utilizing a civil damage remedy against local law enforcement officers, where much that is vital to the case grows uniquely from the local situation."[45] He suggested a rule that recovery be limited to cases in which the defendant's conduct was "outrageous."[46]

Reading the article fifty-five years after it was published, one may suggest that Professor Shapo was too quick to favor limits on the damages remedy. He could not have foreseen the increasing importance of the damages remedy as the Court expanded the scope of constitutional protection in the late 1960s and 1970s. For example, *Pickering v. Board of Education* held that government employees could not be dismissed for speech protected

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[38] Writing in 1965, Professor Shapo noted that few defenses had yet emerged. *See id.* at 324. The main defense is qualified immunity, which the Supreme Court recognized in *Pierson v. Ray*, 386 U.S. 547 (1967).

[39] *See* Shapo, *supra* note 1, at 302 & n.127 (discussing Colon v. Grieco, 226 F. Supp. 414 (D.N.J. 1964)).

[40] *Id.* at 303.

[41] *Id.*

[42] *Id.* at 322 ("Even given the broad language of the statute, it seems questionable that a breach of this constitutional shield must in all cases call forth the response of this statutory sword.").

[43] *Id.* at 326–27.

[44] Monroe v. Pape, 365 U.S. 167, 237–42 (1961) (Frankfurter, J., dissenting).

[45] Shapo, *supra* note 1, at 325.

[46] *Id.* at 327.

by the First Amendment.[47] *Estelle v. Gamble* held that prisoners have an Eighth Amendment right to some level of medical attention.[48] In *Board of Regents v. Roth* and its companion case, *Perry v. Sindermann*, the Court recognized that government employees may have "property" or "liberty" interests in their employment, and when they do, they cannot be dismissed without due process.[49] Much of current constitutional tort litigation concerns efforts to enforce these guarantees. In all of these contexts, a damages remedy may be the only effective means of vindicating constitutional rights and deterring violations. Because the violation is in the past, it will not likely be repeated, and it is not linked to any ongoing legal process against the right-claimant.[50]

The more important point is that, in distinguishing "sword" from "shield" remedies, Professor Shapo anticipated Professor Daryl Levinson's critique of "rights essentialism" by several decades. Rights essentialism is the view that "rights can be talked about and understood—indeed, can be *best* understood—in complete isolation from (merely) remedial concerns."[51] Following Professor Shapo's lead, Professor Levinson goes on to reject the understanding of rights in favor of "remedial equilibration," which holds that "[r]ights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence."[52] Finally, drawing on Professor Levinson's work, Professor Richard Fallon has articulated "the Equilibration Thesis," which "holds that courts, and especially the Supreme Court, decide cases by seeking what they regard as an acceptable overall

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[47] 391 U.S. 563, 574–75 (1968); *see also* Connick v. Myers, 461 U.S. 138, 152 (1983) (holding that a public employee who speaks on a matter of public concern may nonetheless be fired if the disruption caused by the speech outweighs its value).

[48] 429 U.S. 97, 104–05 (1976); *see also* Farmer v. Brennan, 511 U.S. 825, 847 (1994) (holding that prisoners have an Eighth Amendment right to be protected from attacks by other prisoners).

[49] Bd. of Regents v. Roth, 408 U.S. 564, 573, 577 (1972) (concluding that respondent had not shown he had a liberty or property interest in re-employment but describing circumstances in which such interests do exist); Perry v. Sindermann, 408 U.S. 593, 599, 602 (1972) (finding that a teacher may have "property" or "liberty" interests in the decision as to the renewal of a teaching contract and remanding for a determination as to whether respondent had an "entitlement to job tenure" based on length of employment as a public college professor).

[50] *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in judgment). It is important to distinguish between § 1983, on the one hand, and suits brought against federal officers under the federal common law remedy recognized in *Bivens.* The Court has severely restricted access to the latter remedy, most recently in *Hernandez v. Mesa*, 140 S. Ct. 735, 737 (2020) (denying a *Bivens* remedy for a cross-border shooting).

[51] Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) (emphasis in original) (applying qualified immunity to federal officers).

[52] *Id.*

alignment of doctrines involving justiciability, substantive rights, and available remedies."[53]

Professor Shapo also recognized that the link between rights and remedies has a normative aspect, which is why he suggested a requirement that "the defendant's conduct be outrageous" in order for the plaintiff to obtain damages for constitutional violations.[54] Two years after Professor Shapo's article appeared, the Supreme Court adopted a different limit. In *Pierson v. Ray*, the Supreme Court held that police officers sued for Fourth Amendment violations for false arrest would have a defense based on "good faith and probable cause."[55] This case was the starting point for a "qualified immunity" doctrine, based partly on fairness to defendants and partly to limit the burden on government for damages litigation.[56] Later cases applied this rule, or a version of it, to other officers, including a state governor,[57] a cabinet officer,[58] and school board members.[59] Finally, in *Harlow v. Fitzgerald*, the Court stated an across-the-board qualified immunity doctrine.[60] Citing the "social costs" of constitutional tort litigation, *Harlow* held that "[g]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known."[61] Professor Fallon defends *Harlow*[62] on the ground that "official immunity doctrines perform an equilibrating function by diminishing the social costs that constitutional rights would have if officers who violated them were always strictly liable in suits for damages."[63]

Professors Shapo, Levinson, and Fallon are on solid ground in recognizing the need for remedial equilibration. But one must distinguish between the question of whether such an equilibrating doctrine is appropriate and the question of what its content should be. In practice, the Court's

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[53] Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 637 (2006).

[54] Shapo, *supra* note 1, at 327 (emphasis omitted).

[55] 386 U.S. 547, 557 (1967).

[56] *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1866 (2017); Harlow v. Fitzgerald, 457 U.S. 800, 813–14 (1982); Wood v. Strickland, 420 U.S. 308, 319–20 (1975).

[57] Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974).

[58] Butz v. Economou, 438 U.S. 478, 507 (1978).

[59] *Wood*, 420 U.S. at 318.

[60] 457 U.S. at 821 (Brennan, J., concurring). This point was made explicitly by Justice Brennan. *Id.*; *see, e.g.*, Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 955–56 (2019).

[61] *Harlow*, 457 U.S. at 818.

[62] *See* Fallon, *supra* note 60, at 975.

[63] Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 485 (2011).

application of the "clearly established law" test has led it to rule that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[64] As such, while other analysts may favor even less protection for government officers[65] than Professor Shapo's proposal, his "abuse of power" proposal is more defendant-protective than the Court's current test, where even a malicious official may escape liability "unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it."[66]

Most significantly, at the dawn of constitutional tort Professor Shapo recognized the distinction between offensive and defensive remedies and laid the foundation for the understanding that rights are defined in part by their remedies. He understood the normative connection between rights and remedies and foresaw that the advent of a sword-like damages remedy would require some attention to the costs and the benefits of such broad remedies.

III. THE CASE FOR DOCTRINAL SCHOLARSHIP

While legal scholarship has trended toward the interdisciplinary, *Constitutional Tort* is an example of a purely doctrinal work whose contributions have stood the test of time. In this Part, I examine the shift from doctrinal to interdisciplinary scholarship and explain why Professor Shapo's doctrinal scholarship defies the trend and serves as an indispensable resource to scholars and practitioners.

Constitutional Tort focuses on the statute, its legislative history, and case law; it contains a bit of history, but no economics, no philosophy, no psychology, nor any other discipline external to law. It is a fine example of doctrinal scholarship, a style that used to dominate the law reviews, and is an enduring illustration of the value of the traditional approach. Doctrinal scholarship focuses on the content and application of cases, statutes, and administrative regulations. It draws on the text, background, and purposes of cases and enactments, traces their evolution over time, and examines the soundness of the strictly legal reasoning courts use to justify their rulings. Professor Shapo wrote *Constitutional Tort* before "the decline of law as an autonomous discipline,"[67] a shift which, among other things, brought with it the rise of the field of interdisciplinary scholarship that now prevails. Judge

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[64] Ziglar v. Abbasi, 137 S. Ct. 1843, 1867 (2017) (citation and internal quotation marks omitted).

[65] *See, e.g.*, John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 209 (2013) (favoring a negligence approach); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1800 (2018) (favoring abolition of qualified immunity).

[66] Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) (citation omitted).

[67] Richard A. Posner, *The Decline of Law as an Autonomous Discipline:1962–1987*, 100 HARV. L. REV. 761, 761 (1987).

Posner, an avatar of the new approach, contrasts the early 1960s, when "the lawyer's traditional faith in the autonomy of his discipline seemed well founded,"[68] with developments in the quarter-century that followed. For a variety of reasons,[69] by the mid-1980s the conception of law as an autonomous discipline had been "dethroned."[70] In the thirty-odd years since Judge Posner's essay, the trend he discerned has only grown more pronounced.[71] Judge Posner appreciated, as we all do, the contributions other disciplines make to understanding and making law.

Today no one advocates a return to the old days. For the reasons Judge Posner identified, there is a compelling case for bringing other perspectives to bear on legal problems.[72] Though some proponents of the newer approaches would banish doctrinal scholarship or consign it to an inferior status,[73] it does not follow that doctrinal scholarship lacks value. Every scholar, whatever the methodology, starts with a perspective from which to examine reality. The author necessarily excludes other angles from which the topic at hand may be studied in order to isolate the feature—economic, philosophical, historical, or otherwise[74]—that she wants to explore. The value of any scholarly work depends on whether the author's project yields interesting insights otherwise inaccessible to the reader. Lessons from economics, philosophy, and history, among other disciplines, can provide valuable insights into law and legal institutions. But the benefits always come at a cost. Any framework is, after all, a frame, and necessarily sacrifices the insights available from looking at the topic from other angles. All of the external perspectives on law have in common the rejection of law

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[68] *Id.* at 764.

[69] *See id.* at 766–77. Judge Posner discusses, among other things, "shattering of the political consensus," "a boom in disciplines that are complementary to law, particularly economics and philosophy," a collapse in "confidence in the ability of lawyers on their own to put right the major problems of the legal system," a desire on the part of leading scholars "to be innovators rather than imitators," "the continuing rise in the prestige and authority of scientific and other exact modes of inquiry," and "the increasing importance of statutes and of the Constitution, compared to common law, as sources of law." *Id.* at 767, 769, 772–73.

[70] *Id.* at 761.

[71] Lynn M. LoPucki, *Dawn of the Discipline-Based Law Faculty*, 65 J. LEGAL EDUC. 506, 506–07 (2016) (documenting the growth of Ph.D.s on law faculties); James G. Milles, *Leaky Boundaries and the Decline of the Autonomous Law School Library*, 96 LAW LIBR. J. 387, 387 (2004).

[72] *See, e.g.*, Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U. L. REV. 1101, 1101 (2020). In this and other recent articles, Professor Schwartz relies on a massive empirical study to suggest radical reform of constitutional tort law.

[73] *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34–35 (1992); David E. Van Zandt, *The Relevance of Social Theory to Legal Theory*, 83 NW. U. L. REV. 10, 24–25 (1989).

[74] For convenience, I will refer to economists, historians, and philosophers as a shorthand for the whole array of interdisciplinary approaches to law.

as an autonomous discipline.[75] Thus, all of them sacrifice the insights that come from the internal perspective. The internal perspective is the framework of doctrinal scholarship. It, too, creates a frame. Its shortcoming is that it cannot generate the knowledge that comes from any of the external approaches, but its strength is that it produces knowledge that none of the external approaches, even taken together, can generate. And the knowledge it produces is probably of more use to lawyers, judges, and students than most of what they will learn from other disciplines.

A systematic problem with the perspective of the economist, the historian, the philosopher, and so on, is a tendency to exalt that perspective over all others. This tendency reflects a psychological phenomenon called "the law of the instrument,"[76] which holds, in colloquial terms, that "if the only tool you have is a hammer . . . treat everything as if it were a nail."[77] A historian interested in law probably will not regard this as a problem when he studies or reads legal history because he cares only about the truths the historian can provide. The same is true of the economist or the philosopher. But the consumers of legal scholarship include lawyers, students, and judges. They may benefit from economic, historical, and philosophical analysis, but they will rarely be fully satisfied with it. In order to understand a judicial opinion, they need to know more than the historical context in which it arose, or the philosophical premises underlying it, or the economic implications of alternative approaches. They need to know more or less precisely what the earlier cases held and how the court reasoned from those holdings to the outcome here, or how the court distinguished the earlier cases. In order to evaluate the holding, they need to know the strong points and the weak points in the court's reasoning, and they need some guidance as to whether there is room to argue the strength or weakness of any given point. Sometimes, the economist, the historian, or the philosopher can (and will choose to) help with this project. More often, it will be the doctrinal scholar, with his or her training in the "artificial reason" of the law,[78] who provides guidance. Seen in this way, the distinctive contribution of traditional legal scholarship is that it does *not* bring some other discipline to bear on legal problems.

Following the doctrinal model, Professor Shapo tells the lawyer, the judge, the law student, and even the interdisciplinary scholar, most of what

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[75] *See generally* Van Zandt, *supra* note 73 (discussing the ways in which legal theory may be considered a subset of social theory).

[76] *See* ABRAHAM KAPLAN, THE CONDUCT OF INQUIRY: METHODOLOGY FOR BEHAVIORAL SCIENCE 28 (1964).

[77] *See* ABRAHAM H. MASLOW, THE PSYCHOLOGY OF SCIENCE: A RECONNAISSANCE 15–16 (1966).

[78] The term is borrowed from Sir Edward Coke. *See* Prohibitions Del Roy, 6 Coke Rep. 280, 282 (1608), *quoted in* Posner, *supra* note 67, at 762 n.1.

he or she needs to know about *Monroe*, its antecedents, and its early progeny. Anyone interested in learning about constitutional tort (including scholars from other disciplines) will benefit from spending some time with the paper. Bringing no external frame to the development of constitutional tort law, Professor Shapo uses the analytical and synthetic tools of a lawyer to examine the background of § 1983, its drafting, its use by courts over time, its revival in *Monroe*, and its post-*Monroe* development. For example, Professor Shapo's discussion of statutory interpretation reflects the conventions of the time.[79] It is not as theory-laden as the approaches developed in later decades by Professor William Eskridge,[80] or Professors William Baude and Stephen Sachs.[81] Precisely because he does not shape the evidence to fit a theory, Professor Shapo's treatment of statutory interpretation complements other approaches.

Professor Shapo's research into the ninety-year history of the statute before *Monroe* is similarly helpful. His analysis of the cases decided during this period clarifies the issues and holdings,[82] providing the background needed for anyone seeking to better understand the topic, rather than forcing the case law into a theoretical frame that may obscure as much as it would reveal. The latter half of the paper turns to the years after *Monroe*. In this section, Professor Shapo surveys and categorizes the "crazy quilt" of post-*Monroe* lower court case law.[83] His doctrinal approach makes the variety of lower court rulings available to any reader.[84] His strictly legal analysis of the diverse approaches in the case law is accessible to lawyers, students, and judges wrestling with narrow legal issues from an internal perspective and

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[79] Professor Shapo does not cite any sources for his approach to statutory interpretation, Shapo, *supra* note 1, at 279–82, probably because it was the consensus view that statutes should be interpreted according to their purposes. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 148 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); *see also* Posner, *supra* note 67, at 774–77 (discussing the pitfalls of certain modes of statutory interpretation).

[80] *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483 (1987) (arguing that interpretation of a statute should take into account changes in society and unforeseen circumstances).

[81] *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1082 (2017) (arguing that statutory "interpretation . . . [is] governed by law").

[82] The line of Supreme Court cases between the enactment of § 1983 and *Monroe* includes *Myers v. Anderson*, 238 U.S. 368 (1915); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Lane v. Wilson*, 307 U.S. 268 (1939); *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939); *United States v. Classic*, 313 U.S. 299 (1941); *Snowden v. Hughes*, 321 U.S. 1 (1944); *Smith v. Allwright*, 321 U.S. 649 (1944); *Screws v. United States*, 325 U.S. 91 (1945). Professor Shapo describes this line of authority with economy and precision. *See* Shapo, *supra* note 1, at 282–87. This discussion is followed by an equally helpful examination of an array of lower court cases decided in the fifteen years before *Monroe*. *See id.* at 287–94.

[83] *See id*. at 297.

[84] *See id.* at 297–319.

to scholars from other disciplines armed with theories and looking for real-world targets to which the theories may be applied. By contrast, a theorist would have selected one or two of these later cases to make a point about history, philosophy, economics, or some other external discipline.

The value of a piece of scholarship depends on what it delivers, not on the methodology it employs. There is much to learn from doctrinal scholarship in general, and from Professor Shapo's fifty-five-year-old article in particular. Even Judge Posner recognized that "[d]isinterested legal-doctrinal analysis of the traditional kind remains the indispensable core of legal thought," and lamented that "there is no surfeit of such analysis today."[85] Professor Shapo's article is a perfect example of what Judge Posner was looking for, analysis that represents "the indispensable core of legal thought."[86]

CONCLUSION

After writing *Constitutional Tort*, Professor Shapo moved on to other topics in tort law. Other parts of this festschrift are devoted to his work on products liability and many other areas. His insights on those topics are many and varied, and torts scholars have benefited from them greatly. I cannot help but to regret his decision to leave § 1983 to others, but Professor Shapo's seminal article laid out the issues that would occupy constitutional tort scholars for over half a century. His work inspired me, as well as many others, to take an interest in the area. Throughout my career, I have benefitted greatly from his article, and from all of his books and articles over the whole range of tort law. I thank the *Northwestern University Law Review* for giving me the opportunity to comment on the enduring influence of *Constitutional Tort*.

[85] Posner, *supra* note 67, at 777.
[86] *Id.*