Section 1983 and the "Background" of Tort Liability

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It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.\(^1\)

A group of Chicago police officers assisted in the development of new constitutional doctrines one morning in 1958, when they allegedly entered the home of one James Monroe without warning and forced the occupants to stand naked in the living room while the entire house was ransacked. Mr. Monroe was arrested and later released without charges being preferred against him. He later brought suit against the officers and the City of Chicago under 42 U.S.C. § 1983 for the deprivation of "rights, privileges, or immunities secured by the Constitution . . . ."\(^2\) *Monroe v. Pape*\(^3\) eventually reached the Supreme Court, where eight justices held that the alleged misuse of authority could support a 1983 action against the police officers (though not against the City of Chicago)\(^4\) for denial of fourth amendment protection against unreasonable searches and seizures. Because the fourth amendment had earlier been held by the Court to be applicable to the states through the fourteenth amendment\(^5\) and since section 1983 was enacted pursuant to authority granted Congress by the fourteenth amendment, the Court

\(^{1}\) A.B. 1962, University of Chicago; LL.B. 1965, LL.M. 1971, Harvard University; Professor of Law, Duquesne University.  
\(^{3}\) Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983 (1970).  
reasoned that the alleged fourth amendment violation by defendants was actionable under section 1983. The Court also held that specific intent to deprive a person of a federal right was unnecessary to state a 1983 claim.⁶

It is the Court's reason for its holding on this latter issue that primarily concerns us here. Justice Douglas, in a statement whose impact has been considerable, asserted: "Section 1979 [now 1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."⁷ If tort concepts are applied to the alleged facts in *Monroe*, the defendants probably committed intentional torts such as assault, battery, false imprisonment, intentional infliction of mental distress, and invasion of privacy. Justice Douglas seemed to imply that the common law of intentional tort—i.e., liability even absent specific intent to interfere with a common law interest so long as the result of the conduct is intended,⁸—should apply by analogy to section 1983.

In *Monroe*, defendants' alleged intentional conduct was such as to be a cause in fact of plaintiffs' confinement and search which, because conducted without probable cause, amounted to a deprivation of plaintiffs' fourteenth amendment rights. Inasmuch as the plaintiffs' fourteenth amendment interests and their common law interests such as freedom from confinement, from offensive bodily contact and the apprehension thereof, from mental distress, and from invasion of privacy seemed to coincide, *Monroe* was a relatively easy case in which to apply tort concepts.

However, one wonders how far to apply the "background of tort liability" in a 1983 context. Some federal courts interpret this dictum literally, thus making tort concepts determinative of 1983 liability.⁹ Yet it is, after all, a federal statute that is involved, one which refers in relevant part to constitutional rights, privileges, and immunities.¹⁰

States, 232 U.S. 383 (1914), however, was not applied to the states until *Mapp v. Ohio*, 367 U.S. 643 (1961).
⁶ 365 U.S. at 187.
⁷ *Id.*
⁸ For example, harmful or offensive conduct for battery, or confinement for false imprisonment. *See* RESTATEMENT (SECOND) OF TORTS §§ 18, 35 (1965) [hereinafter cited as RESTATEMENT].
⁹ See notes 81-94 supra & text accompanying.
¹⁰ In *Monroe*, Mr. Justice Harlan, concurring, stated:

It would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.

365 U.S. at 196 n.5.
This article will therefore explore the relevance of tort concepts in a 1983 context, including the issues of duty, proximate cause, negligence, strict liability, and defenses.

THE SCOPE OF SECTION 1983

In Monroe, Justice Douglas suggested three purposes of section 1983: to "override certain kinds of state laws," to provide "a remedy where state law [is] inadequate," and "to provide a federal remedy where the state remedy, though adequate in theory, [is] not available in practice." This approach, based on inadequacy of state law, was apparently expanded later in the opinion: "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." As a result of such language, and because of the apparent breadth of the language of section 1983, there has been considerable dispute over its scope.

While such debate is thoughtful, reflecting as it does a legitimate concern with the federal-state relationship, for practical purposes it has

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13 365 U.S. at 173-74.


15 The concern relates to what some have considered increased federal intrusion in
been mooted. Monroe clearly adopted the supplementary remedy approach and did not use a balancing test in order to determine whether a constitutional right had been violated so as to be actionable under section 1983. Additionally, it has been pointed out that “[s]evere deprivations can result from civilized conduct” as well as from outrageous conduct. A sheriff’s honest mistake resulting in erroneous continued imprisonment of an inmate, for example, and the failure of a court clerk to accept for filing a prisoner’s petition for post-conviction relief, while “civilized,” have nevertheless been held actionable under section 1983.

The broad scope of section 1983 is reflected in two lines of cases. The first involves sections of the Bill of Rights previously thought to serve only as a shield against governmental action. These cases reflect a double incorporation approach, in which certain sections of the Bill of Rights are made applicable to the states through the fourteenth amendment; violations of those sections are then made actionable by section 1983. The second line of cases involves deprivations of rights secured by the fourteenth amendment “directly,” not through incorporation of a specific article of the Bill of Rights. Both indicate that it is constitutional interpretation which is involved in 1983 cases, and that section 1983’s broad language is being taken at face value.

Inasmuch as constitutional or federal statutory issues are necessarily implicated by section 1983, that section should properly be interpreted...
as creating a cause of action for damages which is national in scope, uniform in application, and hence not dependent upon local tort law.\textsuperscript{23}

When Justice Douglas spoke of the “background of tort liability,” he may have been suggesting the development of a specialized federal common law of tort in 1983 cases. Because tort law and section 1983 might serve different purposes and protect different interests, this federal common law should be developed with a view to effectuating the purposes of section 1983.\textsuperscript{24}

Until recently one could confidently stand with Professor Seavey, who viewed the tort action essentially, though not exclusively, as a means “to compensate for harm.”\textsuperscript{25} In contrast, commentators have lately argued that the dominant function of tort law, including negligence theory, “is to generate rules of liability that if followed will bring about, at least approximately, the efficient—the cost-justified—level of accidents and safety.”\textsuperscript{26} There are, however, practical problems with such an ap-

\textsuperscript{23} Cf. NLRB v. Hearst, 322 U.S. 111, 123 (1944) (holding that the statutory term “employees” in the National Labor Relations Act ought not to be subject to local state law: “The Wagner Act is federal legislation, administered by a federal agency, intended to solve a national problem on a national scale”); and Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943) (holding that subjecting the issuance of commercial paper by the United States to the application of state laws “would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain”). See also Chevigny, \textit{Section 1983 Jurisdiction: A Reply}, 83 Harv. L. Rev. 1352, 1357 (1970).


\textsuperscript{25} Seavey, \textit{Principles of Torts}, 56 Harv. L. Rev. 72 (1942). It might be more accurate to characterize this as a \textit{qualified} compensation function to allow for the concept of “fault” in the sense of a departure from a socially required standard of conduct. An \textit{unqualified} compensation function would justify a strict liability system. That such a system has not predominated at common law indicates that compensation should not be viewed as the exclusive function of tort liability. See R. Keeton & J. O’Connell, \textit{Basic Protection for the Traffic Victim} 242 (1965): “More precisely, the objective [of tort law] is to determine whether to compensate and if so, how.”

\textsuperscript{26} Posner, \textit{A Theory of Negligence}, 1 J. Legal Studies 29, 33 (1972). See also Posner, \textit{Killing or Wounding to Protect a Property Interest}, 14 J. Law & Econ. 201
proach, including the assumption of perfect foresight by the parties involved, and the necessity of an after the fact assessment of relative costs of accident and avoidance by the trier of fact.\textsuperscript{27} One therefore ought to be careful about broad generalizations respecting the functions of tort law. Perhaps the most that can be said for present purposes is that different functions may be served at the same time. While compensation should no longer be considered the essential function of tort law, perhaps it nevertheless remains an important one.

So far as appears from the legislative history, with its references to the reluctance of the South’s legal systems to provide remedies for unpopular plaintiffs,\textsuperscript{28} compensation is similarly a function of section 1983. Compensation would appear to be an especially significant function of section 1983 when there is no adequate state remedy. The Supreme Court, however, emphasized in \textit{Monroe} that even where the plaintiff has adequate recourse against a state official under state law, the 1983 remedy is still available, indicating that compensation is not currently thought to be the major function of section 1983. Rather, because constitutional interests are at stake, deterrence, as furthered by the private enforcement of fourteenth amendment guarantees,\textsuperscript{29} might

\textsuperscript{27}Such considerations have led to a suggestion that the inquiry ought instead to be which party to an accident is in the best position to make the cost-benefit analysis and to act on the decision once made. It is argued that this “strict liability” approach is better suited to generating economically efficient conduct than the negligence approach. See Calabresi & Hirschoff, \textit{Toward a Test for Strict Liability in Torts}, 81 \textsc{Yale L.J.} 1055 (1972).

\textsuperscript{28}The relevant legislative history is set out in Monroe v. Pape, 365 U.S. 167, 172-87 (1961).

\textsuperscript{29}In the congressional debates for section 1983, Senator Pratt of Indiana spoke as follows:

\begin{quote}
Vigorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid. Then Justice closes the door of her temples.
\end{quote}

\textsc{Cong. Globe.}, 42d Cong., 1st Sess. 505 (1871), quoted in \textit{Monroe}, 365 U.S. at 178. And in the quotation from \textit{Monroe} opening this article, Justice Douglas speaks of the concern that “state laws might not be enforced” and fourteenth amendment rights “might be denied by the state agencies.” \textit{Id.} at 180.

State and federal enforcement of fourteenth amendment guarantees might be irregular for various good faith reasons, including resources, lack of knowledge of the viola-
be more important under section 1983 than it is under tort law. This is not to say either that compensation and deterrence are mutually exclusive categories, or that this general sense of section 1983's functions, gathered from its legislative history, can be any more than a rough guide for approaching 1983 cases. Nevertheless, it is important to be sensitive to the possible differences in function of tort law and 1983 liability.

That the purposes of section 1983 are not necessarily consistent with those of tort law appears by analogy from the Supreme Court's more recent decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, where the Court held that the fourth amendment may give rise to a cause of action for damages for its violation by federal officers. This decision may have been prompted in part by the Court's sense that the exclusionary rule alone does not operate effectively to deter police misconduct. If so, a fourth amendment tort action or a 1983 action could serve the necessary deterrent function. This is especially true where the plaintiff, for theoretical or practical reasons, has no effective state cause of action against the defendant. Moreover, even if the 1983 action is supplementary to an existing and adequate state remedy, it might still help deter unconstitutional conduct because it provides access to a federal forum which might not only possess greater expertise and sympathy with respect to constitutional rights than a state forum, but also might not have the state forum's "inherent potential for bias."

Significantly, because of the aforementioned differences in purpose of section 1983 and general tort law, the application of tort doctrine in a 1983 context may lead to a result inconsistent with federal policy. This danger is emphasized by the Court

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31 One may similarly view section 1983 not as creating new substantive rights, but rather as the statutory vehicle for the creation of a constitutional cause of action for damages, whereby the fourteenth amendment is not only a shield but a sword.


34 This is so because "[t]he common law . . . may create immunities that do not apply to an action under § 1983. Conversely, the developing law of torts may extend potential liability to some defendants beyond the reach of the federal statute." *Carter v. Carlson*, 447 F.2d 358, 361 (D.C. Cir. 1971) (Bazelon, C.J.), *rev'd on other grounds*, 409
in *Bivens* in its response to the defendants' argument that the fourth amendment only limits federal defenses to a state law claim and may not be the source of an independent claim:

The interest protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures may be inconsistent or even hostile.85

Unfortunately, many 1983 cases apply tort law as if with blinders respecting the federal policy involved, seemingly making tort law determinative of 1983 liability. It is clearly unfair to blame Justice


85 403 U.S. at 394. Analogous inconsistencies between federal policy and common law tort concepts have arisen in the areas of securities regulation and antitrust law. For example, SEC rule 10b-5, promulgated under section 10(b) of the Securities Exchange Act of 1934, has ordinarily been thought primarily to protect the interests of investors in being able to make informed decisions, see generally Note, The Controlling Influence Standard in Rule 10b-5 Corporate Mismanagement Cases, 86 Harv. L. Rev. 1007 (1973), interests analogous to those furthered by the tort of misrepresentation. It is not surprising, therefore, that there has resulted a line of 10b-5 cases which borrow concepts extensively from the common law tort of misrepresentation. However, 10b-5 also regulates a range of activities involving internal corporate mismanagement, thereby implicating the corporate interest in having confidence in those entrusted with the corporation's securities dealings. It has therefore been suggested that as a matter of 10b-5 policy "the courts should fully accept the [alternative] 'controlling influence' standard in 10b-5 corporate mismanagement cases," id. at 1009, because "a test which focuses on disclosure [and its relations, deception and reliance] ignores the reality that even while making full disclosure a person can, through the wrongful exercise of controlling influence, induce a corporation to enter a damaging transaction." Id. at 1046. A second example in the area of securities law involves section 14(a) of the Securities Exchange Act of 1934. In *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), the Supreme Court held that this section gives rise to a private cause of action. The court also indicated, as Professor Loss puts it, that "the consequences of violation of the proxy rules are to be determined as a matter of judge-made, federal law." 5 L. Loss, SECURITIES REGULATION 2940-41 (Supp. 1969) (emphasis in original). See notes 23 & 24 supra. Federal policy, and not possibly inconsistent state law respecting appropriate remedies, is given primacy.

A final example involves section 4 of the Clayton Act which provides that any person "injured in his business or property by reason of anything forbidden in the antitrust laws" has a private right of action for "threelfold the damages by him sustained . . . ." 15 U.S.C. § 15 (1970). In large measure because of the drastic nature of the treble damage remedy, the burden on a particular industry, unfairness of permitting a windfall to one injured incidentally and the danger of a flood of litigation, Pollock, The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action, 57 Nw. U.L. Rev. 691, 699 (1963), the concept of causation under section 4 seems somewhat more restrictive than the traditional tort concept. Thus, the "target area" doctrine takes the place of an inquiry into proximate cause and the "more substantial cause" test takes the place of both the substantial factor and but-for tests for cause-in-fact. See generally S. OPPENHEIM & G. WESTON, FEDERAL ANTITRUST LAWS 873-92 (3d ed. 1968) (treble damage suits). However, because section 4 is an important antitrust enforcement tool, it has been suggested that there will be, and ought to be, an expansion of the concept of who may be a plaintiff, a "proximate cause" inquiry. Kerr, Private Antitrust Plaintiffs—Additional Advantages, 10 Duquesne L. Rev. 177, 187-88 (1971).
Douglas' dictum for this, but it is apparent that many courts have seized upon the "background of tort liability" catch phrase with little consideration given to the background of 1983 liability.

THE PRIMA FACIE 1983 CAUSE OF ACTION

Duty and Standard of Conduct

In the usual tort case involving either intentional or negligent conduct, the issues of duty and standard of conduct are characterized as questions of law. Section 1983, in contrast, is silent on the question of the basis of liability, i.e., whether liability must be based on intentional or negligent conduct, or even conduct without fault. However, section 1983 does indicate what must be caused by a defendant's conduct: "the deprivation of any rights, privileges, or immunities secured by the Constitution . . . ." And because it is constitutional interpretation that is taking place when section 1983 is involved, the constitutional standard of conduct is a question for the court, not the factfinder, although whether it has been departed from is for the factfinder (assuming reasonable men can differ) just as it is in ordinary tort cases. Similarly, whether defendant in a 1983 case is under a duty to conform to the constitutional standard of conduct is a question for the court and is also answered by reference to constitutional interpretation.

Consequently, in every section 1983 case a constitutional duty and standard of conduct must be identified and constitutional policy considered. This was apparently not done in an influential Fifth Circuit decision which, although a "false imprisonment" case, has occasionally

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38 Restatement §§ 328B(b), (c). While this section applies on its face to negligence, the existence of a duty and the general standard of conduct are questions for the court in intentional tort cases as well.

37 However, section 1985(3), which has been recently interpreted by the Supreme Court as encompassing private persons' conduct, Griffin v. Breckenridge, 403 U.S. 88 (1971), speaks in relevant part of a conspiracy "for the purpose of depriving . . . any person . . . of the equal protection of the laws, or of equal privileges and immunities under the laws." Accordingly, section 1985(3) has consistently been held to require intentional conduct; e.g., in Huey v. Barloga, 277 F. Supp. 864 (N.D. Ill. 1967).

38 Restatement § 328C(b).

39 As Monroe and Bivens clearly indicate, this issue of constitutional interpretation should not depend upon the nature of any state duty which might also be involved in the particular case. In many situations there will be a corresponding state duty which was breached. The point is that the federal claim under section 1933 is independent of any state claims arising out of the same occurrence, although statutory duties may be relevant to the defendant's authority to act and to the existence of "color of law" or state action. Such an emphasis on duty under section 1983 encourages the court to concentrate upon the constitutional rights, privileges and immunities allegedly violated by the defendant's conduct. See text accompanying notes 75–80 infra.

40 Except for those cases involving rights, privileges and immunities derived from federal law rather than from the Constitution. See note 22 supra.
been improperly cited for the proposition that negligence may serve as the basis of liability under section 1983. In *Whirl v. Kern*, defendant sheriff had not been apprised of the dismissal of charges against plaintiff, who was in custody; and as a result plaintiff "languished in jail for almost nine months after all charges against him were dismissed." Upon a jury finding that plaintiff's detention was not the result of negligence, judgment was entered for defendant on the 1983 claim.

The Court of Appeals for the Fifth Circuit reversed, stating:

> While not easily characterized, the case at bar seems to us closest to the situation where the jailor keeps a prisoner beyond the lawful term of his sentence. In such circumstances, as in the one before us, ignorance of the law is no excuse.

The court thus indicated that absence of notice of unlawful confinement is irrelevant to the existence of the tort of false imprisonment and hence to the 1983 claim. Alternatively, the court resorted to the fiction of constructive notice of the termination of charges against plaintiff.

In its discussion, the court assumed that the elements of the 1983

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41 407 F.2d 781 (5th Cir. 1969).
42 Id. at 785.
43 Id. at 791.
44 *Restatement* § 45 reads as follows:
   If the actor is under a duty to release the other from confinement, or to aid in such release by providing a means of escape, his refusal to do so with the intention of confining the other is a sufficient act of confinement to make him subject to liability.
45 The court's uncertainty on this issue is understandable since the relevant *Restatement* section is on its face unclear. This section (§ 45) speaks of a defendant's refusal to release a plaintiff when under a duty to do so, and adds to this a requirement that the refusal must be "with the intention of confining the other." Does this mean that a defendant must know of his legal duty to release the plaintiff or only that there must be intentional confinement after the duty to discharge has arisen, regardless of the defendant's knowledge of the duty?
46 While neither the *Restatement* nor its illustrations answer this question, the case which serves as the basis for Illustration 1 does. *Weigel v. McCloskey*, 113 Ark. 1, 166 S.W. 944 (1914). *Weigel* indicates that a defendant need not know of the illegality of a plaintiff's continued confinement, but only that the plaintiff must be intentionally confined after the duty to discharge has arisen. And this was the case in *Whirl* just as it was in *Weigel*. Perhaps the court mentioned constructive notice as an alternative holding because of its concern that without it the facts in *Whirl* seemed to involve nonfeasance, typically raising a negligence issue, not a false imprisonment issue. However, false imprisonment might be a negligent tort as well. The *Restatement* in a caveat leaves open the question whether a cause of action for negligent false imprisonment should be upheld where the confinement is "of such duration or character as to make the other's loss of freedom a matter of material value." *Restatement* § 35(2). This option, though, was removed from the court in *Whirl* by the jury verdict that defendant was not negligent; it had only false imprisonment to deal with. Consequently, while the court never adequately discussed the nature or the source of the constitutional duty breached by defendant, the result in *Whirl* is nevertheless consistent with traditional false imprisonment doctrine.
claim before it exactly tracked the elements of the common law tort of false imprisonment. Only in a footnote did the court mention that the defendant did not "contest the fact that [plaintiff] was deprived of liberty and due process as guaranteed by the fourteenth amendment." But even assuming a fourteenth amendment violation, why should defendant's reasonable mistake be actionable under section 1983? There is a hint of an answer respecting the prima facie 1983 claim in the court's discussion of whether good faith should be a defense in the case before it. In responding in the negative, the court reasoned that "as a matter of federal policy such a defense should not be available to a jailor in circumstances like those before us." A failure of communication, the court said, should be the responsibility of the jailor, not the prisoner. The court emphasized the relative leisure available to a jailor in the performance of his duties, as compared with a policeman making an arrest.

While the court does not elaborate upon this "federal policy," it seems, at least implicitly, to have weighed the interests involved in arriving at its conclusion. Such interests include not only the abilities of the respective parties to avoid the unjustified imprisonment of the plaintiff but also the latter's interest in not being imprisoned, an interest seemingly based upon the fourteenth amendment. Apparently Whirl stands for the proposition that a person acting under color of law who confines another against his will may be liable under section 1983 even though the confinement is based upon a reasonable good faith mistake. Put another way, the person has a fourteenth amendment duty not to confine another illegally.

While this is consistent with tort law, which imposes liability for false imprisonment even for a reasonable mistake as to the identity of plaintiff or the existence of a privilege to detain, tort law in this regard might go further than section 1983 should. Compensating an injured plaintiff for false imprisonment might be appropriate even where a de-

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46 407 F.2d at 786 n.4.
47 This question was raised because the Supreme Court in Pierson v. Ray, 386 U.S. 547 (1967), held that good faith and a reasonable belief in the validity of the arrest is a defense to a 1983 action against a police officer for false arrest. The court in Whirl pointed out that this defense tracked the common law defense to a false arrest claim against a police officer. See Restatement §§ 121(b), (c); see also comment g. In contrast, good faith is not a defense to false imprisonment. See notes 90–97 infra & text accompanying.
48 407 F.2d at 792.
49 See Restatement § 44 (motive and purpose irrelevant to liability). Cf. Restatement § 120A (shopkeeper's privilege of detaining for reasonable investigation one who is reasonably believed to have shoplifted).
fendant had acted reasonably. In contrast, because section 1983 was
enacted in part to assure state compliance with the fourteenth amend-
ment, a relevant question for 1983 liability in this kind of situation
should be whether such liability furthers adherence to the commands of
the fourteenth amendment. Perhaps the court thought that imposing
liability upon sheriffs would indeed encourage them and their employers
to institute procedures which would prevent such errors. On the other
hand, the court in Whirl might simply have adopted the compensation
approach to section 1983. This could explain why it shifted the loss to
the defendant despite the fact that he apparently had to bear it alone.
In either case the Fifth Circuit should explicitly have dealt with such
considerations.

Negligence as a Basis of 1983 Liability

From the perspective of tort law, Whirl is in reality a false im-
prisonment case involving intentional conduct, that is, the confinement
of the plaintiff. There are, however, a few cases which have expressly
upheld a 1983 action based on negligent conduct. In McCray v. Mary-
land, petitioner alleged that the Clerk of the Baltimore City Court
had negligently impeded the filing of his petition for state post-convic-
tion relief. The district court dismissed the complaint because there
was no allegation of a violation of a federally protected right. The

60 Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), rev'd on other grounds, 499 U.S.
418 (1972), argued, in dictum, that a complaint, alleging that the superiors of a police
officer who had beaten plaintiff after arresting him without probable cause were negligent
in not properly training, instructing, supervising and controlling the police officer, stated
a cause of action under section 1983. While the police officer's intentional conduct vio-
lated plaintiff's fourth and hence fourteenth amendment rights, the court never addressed
the question whether the officer's superiors, as a matter of constitutional and statutory
interpretation, ought to be liable under section 1983. The court simply assumed that this
is so. The only case cited as authority was Roberts v. Williams, 456 F.2d 819 (5th Cir.
1971), discussed at note 77 infra, which was later modified to exclude the 1983 claim on
the merits. 456 F.2d 834 at 835.

Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972) upheld a 1983 claim against police officers
who allegedly stood by while plaintiff was beaten in their presence by unknown officers.
While the court did not discuss the constitutional source of defendant's duty to intercede,
it seemed to characterize the defendant's conduct as a breach of duty through inaction
and hence as negligence. Id. at 10-11. On the other hand, while intentional torts ordi-
narily require some affirmative conduct, occasionally an intentional failure to act serves
as the basis for liability for an intentional tort. False imprisonment is an example, as
discussed in note 45 supra. It might similarly be suggested here that from a tort perspec-
tive, defendant committed the intentional tort of battery. His failure to act was inten-
tional (in the tort sense of either purposeful or knowledgeable with substantial certainty)
and was a cause in fact of plaintiff's injuries. See also Roberts v. Williams, 456 F.2d 819
(5th Cir.), cert. denied, 404 U.S. 866 (1971), addendum, 456 F.2d 834 (5th Cir. 1972),
discussed in text accompanying note 77 infra.

61 456 F.2d 1 (4th Cir. 1972).
Fourth Circuit Court of Appeals reversed, holding that plaintiff's constitutionally based right of access to the courts had been violated, and that his complaint therefore stated a negligence claim cognizable under section 1983. It first cited three recent decisions for the proposition that "a section 1983 action may be based on negligence when it leads to a deprivation of rights." The court then proceeded to characterize the injury to plaintiff as a denial of a constitutional right of access to the courts based apparently on the fourteenth amendment simpliciter. But the court nowhere explains how it reasoned from the existence of a violation of plaintiff's constitutional right of access to a determination that the alleged negligence could serve as the basis for the plaintiff's 1983 claim for damages.

Negligence involves the departure from a standard of conduct arrived at by weighing factors such as the gravity of harm, the probability that harm will occur, and the cost of avoiding the risk-creating conduct. But these factors are not relevant when the standard of conduct is derived from a statute; here the legislature's standard is often binding, and departure from it constitutes (for want of a better term) negligence per se. Even though such statutes are often more specific in defining the conduct regulated than is section 1983 on its face, where the duty is derived from the Constitution its breach might also be the equivalent of negligence per se. Moreover, if this breach may not be excused, then it becomes the equivalent of strict liability. Indeed, it seems proper to characterize Whirl, discussed earlier, as a case in which the fourteenth amendment functions to impose on the defendant a duty to release, the breach of which renders him absolutely liable. From a tort perspective, this duty might be analogized to statutory duties whose breach may not be excused because the person adversely affected is not in a position to protect himself. In contrast to Whirl, the court in McCray speaks of negligence, thus implying that if the

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52 Id. at 6.
54 456 F.2d at 5.
56 Cf. id. at 197:
It is entirely possible that a statute may impose an absolute duty, for whose violation there is no recognized excuse. . . . Such a statute falls properly under the head of strict liability, rather than any basis of negligence . . . .
defendant is ultimately found to have acted reasonably, hence non-
negligently, he will not be liable. 58

Even if it is found that a defendant in a McCray-type case has
acted reasonably, there still would seem to be a fourteenth amendment
violation for which injunctive relief would be available. This is com-
parable to various constitutionally based exclusionary rules in criminal
contexts which operate as a general matter irrespective of the reason-
ableness of the conduct of the police officer. Thus, in McCray, the
reasonableness of the defendant's conduct seems relevant only with
respect to liability for damages and not the existence of a fourteenth
amendment violation. Hence it is important to ask what the function of
reasonableness should be. If an essential goal of section 1983 is the
effective enforcement of fourteenth amendment rights, then a four-
teenth amendment duty approach seems preferable to a negligence ap-
proach. The plaintiff should not have to prove that defendant's conduct
was unreasonable to state a 1983 cause of action. 59 In addition, the pur-
pose of compensating for injuries to constitutional interests seems pro-
nomed if plaintiff does not have this burden. Under this approach, more-
over, the articulation of the constitutional standard of conduct properly
becomes a question for the court; the jury would consider only the issues
of breach, causation and damages. 60 Finally, removing the inquiry into
reasonableness from the prima facie 1983 claim clarifies the consti-
tutional issues which may be involved, and is consistent with the
language of section 1983 itself.

Considerations such as these should have been addressed both in
McCray and in Jenkins v. Meyers, 61 a recent federal district court
decision. In Meyers, a prisoner brought a 1983 action for damages and

58 But how does one determine whether conduct in the McCray context is reason-
able? Is reasonableness determined by a cost-benefit analysis which takes into account
the probability and gravity of the potential harm to plaintiff, i.e., delayed access to the
courts? It would appear that the gravity of this harm implicates constitutional interests,
unlike the harm in an ordinary negligence case which a jury might assess more intelli-
gently. On the other hand, juries in 1983 cases do in fact determine damages. In order
to do so, they have to value the intangible constitutional interests interfered with as well
as the more usual kinds of personal injury or property damage. If they are presumably
able of doing this, they could similarly be able of determining, with proper in-
structions, whether a defendant acting under color of law has acted reasonably.

59 This is not to say that reasonableness is not relevant to available defenses and de-
fendant's ultimate liability, but only that it should not be relevant to the prima facie 1983
claim.

60 It follows that the scope of the fourteenth amendment duty, or what might be
termed the proximate cause question, is similarly a question for the court. See discussion
in notes 80–88 infra & text accompanying.

61 338 F. Supp. 383 (N.D. Ill. 1972), aff'd without opinion, 481 F.2d 1406 (7th Cir.
1973).
injunctive relief against various prison officials because of their alleged negligent failure to mail a trial transcript to plaintiff's attorney. The alleged injury was the loss of a post-conviction hearing and a delayed direct appeal to the Illinois Supreme Court. The Court dismissed the action for two reasons. First, there was no injury to plaintiff because he could still proceed with his attempt to secure post-conviction relief.\textsuperscript{62} The court did not seriously consider the argument that the failure to mail the transcript had been a substantial factor in causing the delay in plaintiff's appeal, delay of the sort which would seem to constitute the injury allegedly incurred in \textit{McCray}.

The second ground for the \textit{Meyers} court's decision was that negligence of the kind presented is not cognizable under section 1983. After noting that the transcript had been inadvertently misplaced, the court declared that "mere negligence involving an act void of not only specific intent but intent as such, is not grounds for a § 1983 suit."\textsuperscript{63} It characterized the case before it as fitting into a category

where there is a deprivation of a constitutional right but the act bringing about that violation was an unconscious one, a pure mistake, and the factual as well as the legal result were unintended. Thus, not only was there an absence of both improper motive and specific intent—there was no motive and no intent whatsoever since the defendant was not cognizant that the act was taking place no less the legal implications of that act.\textsuperscript{64}

In ruling as it did on this issue, the district court reached a result different from that in \textit{McCray}, which similarly involved inadvertent conduct.\textsuperscript{65} Yet one wonders what the court means when it refers to the negligence in \textit{Meyers} as involving an act which was unconscious. The act of misplacing the transcript seems conscious in the sense that it was done by one who deliberately and volitionally picked it up and placed it where it did not belong. Some light is shed on the court's reasoning by a hypothetical raised in the opinion: suppose the defendants in \textit{Meyers} had intentionally mailed the transcript to a wrong address thinking it was proper and legal to do so. The court indicates that since the result was intended and the act conscious, section 1983 would apply.\textsuperscript{66} Apparently the court is distinguishing between the state of mind necessary for the tort of conversion (which seems to require knowledge

\textsuperscript{62} The court observed that plaintiff's attorney could have notified the Illinois Supreme Court of the difficulty of locating the transcript. \textit{Id.} at 388.

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} \textit{Id.} at 389.

\textsuperscript{65} It should be noted that \textit{McCray} was decided after \textit{Meyers}.

\textsuperscript{66} 338 F. Supp. at 390.
by the defendant as to what the chattel is), and that state of mind known as inadvertence which implies no knowledge as to what the chattel is.\textsuperscript{67} Although volitional, the act in Meyers was not shown to involve the knowing exercise of control over the chattel (the transcript). In contrast, the court's hypothetical involves the misdirection of an object whose identity is known.

The Meyers court refused to apply section 1983 in the face of an admitted violation of constitutional rights because it feared that a contrary result would convert every minor mistake, especially in the milieu of the prison, into a violation of § 1983. To hold prison officials to such a high standard of strict liability would impose such an impossible burden as to render prisons totally inoperable.\textsuperscript{68} But negligence is not the same as strict liability. When alleging negligence, plaintiff must show unreasonable conduct in order to prevail. Thus, in Meyers, the court could have found for defendants on the ground that they acted reasonably under the circumstances. In contrast, the fact that defendants acted reasonably would not prevent the application of strict liability. It would have been preferable had the court dealt first with the question of the existence of a fourteenth amendment duty and its breach. Assuming such a breach, the court would next have considered the appropriate defense, if any. Reasonableness under this approach could be found to be a valid defense because it is relevant to the question of who should ultimately bear the loss. Instead, the Meyers court seems to use the concept of strict liability as a straw man which it rejects in order to avoid the adverse consequences of that basis of liability.

The court's "floodgates" position in Meyers is similar to that used by Judge Bryan, dissenting in Jenkins v. Averett.\textsuperscript{69} In Averett the plaintiff, a black youth who had committed no crime and who had never been charged with one, was shot by the defendant policeman after a chase. The plaintiff alleged that the shooting was deliberate while the defendant maintained it was accidental. The district court rejected plaintiff's 1983 claim because it found that defendant did not intend to shoot plaintiff, but was instead grossly or culpably negligent.

\textsuperscript{67} Cf. \textit{Restatement} § 222A ("What constitutes Conversion") and § 224 ("Non-feasance and Negligence"). An intentional exercise of dominion or control over the chattel is required for conversion; knowledge of the existence of those rights with which defendant interferes is not necessary.

\textsuperscript{68} 338 F. Supp. at 390 (emphasis added).

\textsuperscript{69} 424 F.2d 1228, 1234 (4th Cir. 1970).
Plaintiff's pendent state claim for assault and battery was successful because under North Carolina law, gross or culpable negligence may supply the intent necessary for assault and battery.

The Court of Appeals for the Fourth Circuit reversed the dismissal of the 1983 claim. It reasoned that plaintiff's fourth amendment right to be free from physical injury arbitrarily inflicted by the police had been violated. The court emphasized that it was dealing with gross negligence, i.e., an arbitrary abuse of police power which was "the direct consequence of defendant's wanton conduct in the course of his attempt to apprehend the plaintiff." Judge Bryan dissented on the 1983 issue, arguing that section 1983 "was never envisioned as a means of recoupment for injuries caused by the negligence of a State officer acting in the course of his duty." Moreover, he raised the spectre of numerous 1983 actions brought against state officials for alleged negligent conduct, contending that "[t]he statute does not contemplate the conversion of every common law responsibility into a 1983 case." While the majority responded to these arguments by emphasizing that it was simply following state law in equating "gross or culpable" negligence with arbitrariness and limited its decision to cases of "raw abuse of power by a police officer," there is a more persuasive response available. It is that a defendant's unreasonable conduct does not necessarily result in his liability under section 1983. For example actionable fourth amendment violations in all likelihood must be intentional regardless of reasonableness. They need not be willful in the sense that the government official must know that another's fourth amendment rights are being violated; the bodily contact, however, must be intended.

70 Id. at 1232.
71 Id. at 1234.
72 Id. Judge Bryan gave two hypotheticals which he suggested might be covered by the majority's reasoning. First, a state health officer or official physician could be sued for an accident, or for gross and culpable negligence, in treating a patient at a public clinic. Second, a fireman driving state fire equipment answering an alarm could be sued under section 1983 for injuries to spectators or to their private property resulting from gross or culpable negligence. Judge Bryan argued that such a result is absurd. The short answer is that he is right, but for the wrong reasons. The doctor and fireman would not be liable because, irrespective of negligence, no constitutional duty has been breached.
74 While intentional conduct may be necessary for a fourth amendment violation, it is not always sufficient. See, e.g., Daly v. Pederson, 278 F. Supp. 88 (D. Minn. 1967) (shoving by policeman of legally arrested person, while a technical battery, is neither a fourth nor a fourteenth amendment violation, and hence not actionable under section 1983).
75 This view of the fourth amendment is consistent with those cases holding that where an arrest is made without probable cause, a prima facie 1983 claim is presented. See, e.g., Pierson v. Ray, 386 U.S. 547 (1967); Joseph v. Rowlen, 402 F.2d 367 (7th Cir. 1968).
Moreover, it is significant that in *Averett* the defendant was a policeman. In many 1983 and fourth amendment cases there is a legitimate concern with the potential for abuse of the policeman's authority. Although other state officials could conceivably violate an individual's fourth amendment rights, none (with the exception of prison authorities) are given as much discretion as police officers to use force in the regular performance of their duties. This might explain why the *Averett* majority extended somewhat the scope of the fourth amendment duty and through it section 1983 to encompass a police officer's gross negligence in using physical force.

**Identifying the Constitutional Duty**

By first attempting to identify the constitutional duty that has allegedly been breached, courts can avoid the impractical expansion of 1983 liability that concerned the *Meyers* court and the dissent in *Averett*. Courts that have properly focused on a constitutional duty have often concluded that none is involved and, therefore, that no liability under section 1983 has been incurred. For example, several recent decisions involve prisoners' complaints alleging 1983 violations resulting from negligent medical treatment by prison authorities. In denying 1983 applicability in these cases, two courts used language that suggests their decisions were based on the ground that no constitutional right is involved.75 For the same reason, courts have regularly dismissed complaints alleging equal protection violations where prisoners claimed that prison authorities negligently failed to protect them from assaults by other inmates. The courts have held that more than an isolated instance of negligence was necessary to support a 1983 claim.76

The Fifth Circuit Court of Appeals has recently struggled with section 1983 and alleged deprivations of constitutional rights, privileges and immunities. In *Roberts v. Williams*,77 plaintiff alleged that defendant, a superintendent of a prison farm, negligently failed to train and supervise a trusty guard whose shotgun discharged into plaintiff's face while plaintiff was working outside. The Fifth Circuit first affirmed

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a finding that eighth amendment rights had been violated but later modified its opinion so that the defendant's liability was made to rest not on section 1983 but on the pendent negligence claim under state law. The Fifth Circuit may have been concerned with the possibility of numerous 1983 claims based on alleged eighth amendment violations if use of the eighth amendment were not limited to extreme situations involving intentional conduct. Thus it appears that, for 1983 purposes, unintentional conduct may not constitute an eighth amendment violation, just as unintentional conduct by prison officials does not violate equal protection. In any event, focusing on the fourteenth amendment duty involved properly directs attention to constitutional interpretation and federal policy.

Proximate Cause

Notions of negligence and intentional conduct tend to obscure the threshold concern in 1983 cases. That concern should be whether a constitutional duty derived from the fourteenth amendment has been breached. The tort concept of proximate cause similarly obscures the difficult 1983 policy question of the extent of liability where there has been a clear infringement of constitutional rights. Even where section 1983 is found to impose the equivalent of absolute liability for breach of a fourteenth amendment duty as in Whirl, the question of the extent of the defendant's responsibility is still present; and, therefore, the equivalent of a proximate cause inquiry may still be required. The point, however, is that this inquiry should not be governed by tort concepts.

The Seventh Circuit's opinion in Duncan v. Nelson is an example of the misuse of the tort concept of causation in a 1983 context. Plaintiff, after being held in solitary confinement for 18 days on

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78 Id. at 834-35.
79 The modification was based on the Fifth Circuit's en banc decision in Anderson v. Nosser, 456 F.2d 835 (5th Cir. 1972), modifying 438 F.2d 183 (5th Cir. 1971). There, the court chose to base its finding of liability on the due process clause rather than the eighth amendment. This substantive due process approach, however, not fully explained in the court's decision, might also open the door to numerous 1983 claims. See note 21 supra. But cf. Parker v. McKeithen, 488 F.2d 553 (5th Cir. 1974).
80 It seems preferable, for clarity of judicial analysis, to deal with proximate cause in 1983 cases as a question of the scope of the fourteenth amendment duty and hence as a question of law for the court. See note 60 supra & text accompanying. Professor Green deals with the proximate cause question in the ordinary negligence case as a judicial inquiry into the scope of the duty. Green, Foreseeability in Negligence Law, 61 COLUM. L. REV. 1401 (1961). Cf. RESTATEMENT § 286 (court determines scope of statutory duty in negligence per se situations).
81 466 F.2d 939 (7th Cir. 1972).
another charge, was interrogated by defendants for over 20 consecutive hours. Finally, he confessed to murder. This confession was admitted into evidence, and plaintiff was sentenced to 30 years imprisonment. After he had served eight years, the Illinois Supreme Court held that the confession should have been excluded and remanded the case for a new trial. Plaintiff was acquitted at the second trial, and brought a 1983 action against defendant police officers, seeking damages for his interrogation, conviction and incarceration.

The district court dismissed the complaint because "the act of the trial judge in admitting the confession was a superseding, intervening cause for which the defendants cannot be held liable." The Seventh Circuit conceded that at first blush, a foreseeability test for proximate cause would seem to extend to the plaintiff's incarceration. The court nevertheless stated that the defendants were

presumed to have known the then existing law concerning involuntary confession . . . Therefore . . . the defendants knew or should have known that their actions in extracting this confession from the plaintiff would render it involuntary and hence inadmissible.

Hence the court characterized as untenable the conclusion that the defendants would foresee that the trial judge would erroneously admit the unlawful confession.

As further support for its decision affirming the district court as to plaintiff's conviction and incarceration (but reversing as to his interrogation) the Seventh Circuit argued that, with respect to cause in fact, there was no compelling inference that the confession "was the sole or even material basis for [plaintiff's] initial conviction." The court also noted that sentencing is a complex decision involving many factors and "it does not follow that the particular sentence imposed upon the plaintiff was a proximate result of that conviction."

Had the court directly approached this case as one involving policy under section 1983 and not tort principles alone, it would have confronted the question of whether imposing liability on the defendants for the conviction and incarceration is consistent with the purposes of section 1983. Instead, the court used a negligence concept of superseding cause which even from a tort perspective should not necessarily be used to limit defendant's liability in an intentional conduct context.
such as *Duncan*. Furthermore, the concept of proximate cause in tort law involves policy considerations respecting accountability for harm caused which might be different from those considerations respecting accountability under section 1983. For example, as mentioned earlier, one function of liability under section 1983 might be deterrence. In *Duncan*, holding defendants liable would arguably further the goal of preventing police officers from abusing their authority in order to obtain a conviction.

In short, it aids analysis, and is more consistent with the fourteenth amendment enforcement purpose of section 1983 as well as that section's language, to suggest that it is the nature and scope of the particular fourteenth amendment duty, and not traditional tort concepts, which determine whether a defendant is liable and the extent of his liability.

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86 Prosser has suggested that accountability for intentional torts in a proximate cause sense extends beyond that for negligence. *Prosser, supra* note 55, at 30–31. See also *Restatement* § 870, discussed and applied in a 1983 context in *Johnson v. Greer*, 477 F.2d 101, 107 (5th Cir. 1973); *see also* note 87 infra.

The court also approached the cause-in-fact question in "but for" terms. However, this test has been persuasively criticized. Thode, *The Indefensible Use of the Hypothetical Case to Determine Cause in Fact*, 46 Texas L. Rev. 423 (1968); Green, *The Causal Relation Issue in Negligence Law*, 60 Mich. L. Rev. 543 (1962).

87 On the other hand, the scope of the fourteenth amendment duty breached here by the police officers should perhaps not extend so far as argued by the plaintiff. As in all scope of duty or proximate cause inquiries, a line must be drawn somewhere. It may well be unduly harsh as a matter of federal policy to hold defendants accountable for plaintiff's conviction and incarceration, given the subsequent judicial conduct in admitting the confession and sentencing the defendant. While this sense may be at the heart of the decision in *Duncan*, the question of the scope of duty should have been addressed exclusively in tort terms.

The assistance of tort concepts in 1983 cases is far different from their dispositiveness. *But see* Johnson v. Greer, 477 F.2d 101, 107 (5th Cir. 1973), quoting *Restatement* § 870, comment g (standard of both tort and section 1983 causation is whether, from the standpoint of the reasonable man, defendant's act had "in some degree increased the risk of that harm [suffered by plaintiff]").

88 I therefore disagree with the recent analysis of the relationship between tort law and section 1983 set forth in McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections*, Part I, 60 Va. L. Rev. 1 (1974). After stating that the basis of liability in *Monroe* centers on the question of whether the officer "should reasonably have known that [his acts] would produce results that were unconstitutional," *id.* at 54, the author points out that "negligent violations of constitutional rights were not the concern of [section 1983]." *Id.* at 55. There appears to be an inconsistency in these statements since "should have known" is typical negligence language. This inconsistency is made more apparent when the author speaks immediately thereafter of a "personal defense for the officer who acts within the scope of his authority in good faith reliance on state law," and explains that this means reasonable action by the officer. *Id.* (emphasis added). I concur that reasonableness is relevant in *Monroe* and in other 1983 situations, but as an affirmative defense with the burden of proof of reasonableness on the defendant, as discussed in the next section of this article. It cannot be relevant both to the prima facie claim and the defense, as the author seems to indicate. I have argued, of course, that the question of breach of duty in 1983 cases is one of constitutional interpretation, not to be based simply on tort concepts.

89 If the foregoing emphasis upon federal policy under section 1983 is correct, it fol-
lows that an insistence that damages awarded in 1983 actions must be based solely on
damage concepts developed from the common law is unsound. That is, not only should
damages in 1983 cases not be dependent upon local state law, but to the extent that a
uniform federal common law of damages in civil rights actions is developed, it should
further the purposes of section 1983. Certain aspects of this issue have been discussed
elsewhere. See, e.g., Page, State Law and the Damages Remedy Under the Civil Rights
Act: Some Problems in Federalism, 43 Denver L.J. 480 (1966); Comment, Civil Actions
See also Basista v. Weir, 340 F.2d 74 (3d Cir. 1965); Brazier v. Cherry, 293 F.2d 401
(damages rules used in 1988 cases should serve policies expressed in such civil rights
statutes). However, courts still tend in 1983 cases to look for traditional tort damage.
This tendency seems in part responsible for those decisions holding that a violation by
police officers of Miranda directives, Miranda v. Arizona, 384 U.S. 436 (1966), does not
of itself give rise to a 1983 action absent the illegal use of information thus obtained in
for example, the court said:

[U]nless and until some use is made of an illegally obtained confession in such a
way as to deprive a person of constitutional rights, no claim is stated under the
Civil Rights Act. Plaintiff may have to await the outcome of his state court
criminal proceedings before he may base a claim upon the allegedly improperly
obtained confession.

Id. at 974. Similarly, in Allen v. Eicher, 295 F. Supp. 1184 (D. Md. 1969), the court
stated:

However, Miranda does not per se make an interrogation which violates its pre-
cepts into an actionable tort. Unlike an illegal arrest, or an illegal search or
seize, an improper interrogation is not itself a tort. Nor does an interroga-
tion, in and of itself, constitute a denial of the constitutional rights of the person
being interrogated.

Id. at 1185–86. Given a valid arrest, these cases indicate that there is no tort committed
as a result of interrogation alone because there has been no injury to an interest pro-
tected by the common law of torts.

After Miranda, however, an individual has a constitutionally protected interest in
being free from such interrogations, an interest which was allegedly infringed by de-
fendants’ breach of duty in these cases. Miranda set up a constitutional rule, the breach
of which might constitute actionable negligence per se inasmuch as nominal dam-
ages at least are presumed from the violation of fourteenth amendment rights.
Moreover, “a plaintiff who proves only an intangible loss of civil rights or purely
mental suffering may . . . be awarded substantial compensatory damages.” Magnett v.
Pelletier, 488 F.2d 33, 35 (1st Cir. 1973). Juries can value the fourteenth amendment
interest interfered with in the same way they now value the interests in freedom from
confinement (false imprisonment), in freedom from apprehension of imminent harmful
or offensive bodily contact (assault) and in reputation (defamation). D. Dobbs, Hand-
327 U.S. 251 (1946) (because economic harm is difficult to value in private antitrust law-
suits, defendant should bear the risk of uncertainty once the plaintiff proves some loss).
Compare the approach of some federal courts confronted with the jurisdictional amount
requirement of 28 U.S.C. § 1331 in lawsuits against federal officers raising constitutional
issues. See P. Bator, D. Shapiro, P. Mishkin, & H. Wechsler, Hart and Wechs-

However, Ransom and Allen might arguably be justified on the ground that Miranda
was aimed only at admission into evidence of such tainted information; that is, Miranda
facie tort should not determine 1983 liability, so should common law tort defenses not necessarily determine 1983 defenses. Yet, in *Pierson v. Ray*, the Court quoted Justice Douglas' dictum from *Monroe* in support of its holding that the tort defense to false arrest at common law was also applicable to section 1983. *Pierson* involved a 1983 action brought by clergymen against police officers. The police officers had arrested the clergymen for allegedly violating a statute dealing with breaches of the peace. This statute was thereafter held unconstitutional, and, subsequently, plaintiffs brought their 1983 action. They contended that they were arrested solely for attempting to integrate public facilities, that there was no crowd present and hence no threatened disturbance. To their 1983 claim based upon the defendants' intentional conduct they joined the pendent tort claims of false arrest and imprisonment. The Court of Appeals for the Fifth Circuit held that while the common law defense of good faith and probable cause was available to defendants under state law, it was not available in actions under section 1983.

The Supreme Court reversed and remanded, holding that good faith and probable cause constituted a defense available to police officers in 1983 proceedings. The Court argued that "[p]art of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause." It relied on section 121 of the *Restatement of Torts*, which provides for a police officer's privilege to arrest where he "reasonably suspects that such an act or omission (i.e., a felony) has been committed and that the other has committed it." As applied to the facts before it, the Court ruled that the test was

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50 386 U.S. 547, 556 (1967). *See also* Leverne v. Corning, 354 F. Supp. 1402, 1404 (S.D.N.Y. 1972) ("the courts have recognized the principle that in § 1983 cases the availability of a particular defense will depend upon whether it could be similarly used as a defense to tort liability in the parallel common law cause of action.")

51 352 F.2d 213 (5th Cir. 1965).


53 *Restatement* § 121(b).
whether "the officers reasonably believed in good faith that the arrest was constitutional . . . ."\textsuperscript{94}

While the Court spoke of the background of tort liability, it nevertheless seemed to consider the federal, state, and individual interests involved when it suggested that an officer should not have to choose between dereliction of statutory duty on the one hand and liability for damages on the other. This choice, the Court held, should not be put to an officer regardless of whether common law or 1983 interests are involved.\textsuperscript{95}

\textsuperscript{94} 386 U.S. at 557. It should be noted that the question decided by the court respecting an arrest under a statute later held unconstitutional is expressly left open in \textit{Restatement} § 121, caveat to comment i. Thus, the Court's application of the good faith and probable cause defense in \textit{Pierson} goes beyond the \textit{Restatement}.

\textsuperscript{95} Whirl v. Kern, 407 F.2d 781 (5th Cir. 1969), similarly spoke both of tort liability and the federal interests at stake. There, it will be remembered, defendant attempted to apply the \textit{Pierson} defense to the 1983 action. The court held that while good faith and probable cause was a defense at common law to false arrest, it was not a defense to false imprisonment standing alone. Since plaintiff's fourteenth amendment rights were violated because of the imprisonment and not the arrest, the Fifth Circuit in \textit{Whirl} did not apply the \textit{Pierson} defense. If tort concepts are to be followed, this was proper because the \textit{Restatement}, cited in \textit{Pierson}, refers to false arrest; so does the treatise cited by the Court. See 1 F. Harper & F. James, \textit{The Law of Torts} § 3.18 (1956), cited at 386 U.S. 555. More important, however, than this reliance on common law tort doctrine should be the federal policy of section 1983 in imposing a fourteenth amendment duty upon one who has the power and responsibility to determine the validity of plaintiff's continued imprisonment. Reasonableness and good faith should not be a defense here. By way of contrast, the \textit{Pierson} test is appropriate in fourth amendment arrest situations where police officers must act quickly under pressure; it ensures that there will be no liability for damages where the arrested person is later acquitted so long as there is good faith and a reasonable belief in the validity of the arrest.

In this connection the Court in \textit{Pierson} characterized the defense to false arrest as good faith and probable cause. Yet \textit{Restatement} § 121(b), cited by the Court, speaks of reasonable suspicion, not probable cause. \textit{Restatement} § 119, comment j, defines reasonable suspicion as follows:

\textit{[I]}t is not necessary that the actor shall believe that the other is guilty of the felony. It is enough that the circumstances which the actor knows or reasonably believes to exist are such as to create a reasonable belief that there is a likelihood that the other has committed the felony.

In addition, the black letter provisions of the relevant \textit{Restatement} sections (119 and 121) say nothing of good faith. Apparently the Court in \textit{Pierson} derived this requirement from \textit{comment g} to § 121, which speaks of the need to protect peace officers from liability for the consequences of honest and reasonable mistakes. Thus the question arises: to what extent does the fourth amendment concept of probable cause, defined as the sufficiency of the facts and circumstances known to the arresting officers to warrant a prudent man in believing that the arrested person had committed or was committing an offense, \textit{Beck v. Ohio}, 379 U.S. 89, 91 (1964), track the false arrest defense for purposes of 1983 liability?

There is some confusion in the cases regarding the answer. Perhaps the most important discussion of the implications is in \textit{Bivens v. Six Unknown Named Agents}, 456 F.2d 1339 (2d Cir. 1972):

\textit{[T]o prevail the police officer need not allege and prove probable cause in the constitutional sense. The standard governing police conduct is composed of two elements, the first is subjective and the second is objective. Thus the officer must allege and prove not only that he believed, in good faith, that his conduct...}
The *Pierson* test was enunciated in an arrest situation. Several federal courts, however, have applied the test of good faith and reasonable belief in the legality of conduct to other factual situations. Even if this is sound, it might still be appropriate to limit such a rule of reasonableness and good faith to situations in which defendants are put to a choice, whether hurried or not, on the ground that defendants ought not to be penalized for acting reasonably, even though their actions turned out to be unconstitutional. Perhaps acting "reasonably" should mean that where feasible, the defendant confronted with a choice must have sought legal advice. For example, if officials of a public university prohibit a demonstration because after seeking advice of counsel they believe in good faith that the demonstration is illegal, they should not be liable under section 1983 even though they ran the risk of infringing upon the first amendment rights of the demonstrators. But where,

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was lawful, but also that his belief was reasonable.

*Id.* at 1348. The court considered this test to be identical to the *Pierson* test as applied to peace officers and suggested that it would be incongruous were state police officers held to a different standard under 1983 federal law as compared with the standard applicable to federal police officers under fourth amendment federal law.

If one accepts the proposition that the proper standard for the tort defense should be different from probable cause, one has to ask how the tests actually differ. One way seems clear: an arrest may be invalid and seized evidence excluded regardless of subjective good faith on the part of the policeman. Here the fourth amendment is used as a shield and the test is objective. But how does reasonable belief in the validity of the arrest and search differ from probable cause? Clearly the Second Circuit did not intend simply to add to the requirement of probable cause a second requirement of good faith. The court seems to be saying that there might be situations where there is no probable cause, and yet there is a reasonable belief in the validity of the arrest and search. We are not told, however, what factors are to be taken into account in making this determination.

On balance, the court's reason for attempting to make the distinction between probable cause and the reasonable belief—good faith test seems sound. It is likely that the possibility that a police officer may be liable in damages will act as a more serious deterrent to his carrying out his duties than the possibility that the defendant may go free. *See also* Hill v. Rowland, 474 F.2d 1374 (4th Cir. 1974) (following *Bivens* rationale in a 1983 arrest case).

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96 *Eslinger v. Thomas*, 476 F.2d 225 (4th Cir. 1973) (reasonable good faith is a defense to a 1983 claim against a legislative clerk who refused plaintiff a job as a page because of her sex); *Skinner v. Spellman*, 480 F.2d 539 (4th Cir. 1973) (reasonable good faith reliance on standard operating procedure a defense to a 1983 claim of due process violations in a prison disciplinary proceeding). These cases may reflect a judicial reluctance to apply "new" constitutional interpretation retroactively in an action for damages. Inasmuch as a state officer might be an inappropriate cost-bearer in such situations, this approach would properly extend the *Pierson* rationale beyond arrest situations to include all instances of good faith and reasonable belief in the legal validity of one's conduct.

97 *Handverger v. Harvill*, 479 F.2d 513 (9th Cir. 1973). It is possible to limit the defense of good faith and reasonableness even further to situations in which either the defendant's decision is hurried or legal advice is available because the decision is not hurried, thereby imposing this obligation on those whose decision need not be hurried. This would still include *Handverger* and *Skinner*, but probably exclude from protection
as in *Whirl v. Kern*, a sheriff, unaware of a prisoner's discharge papers, keeps him imprisoned, there is no element of choice involved, and this is not the fault of plaintiff. Good faith and even a jury finding that the sheriff acted reasonably should therefore not be a defense to a claim that defendant's breach of his fourteenth amendment duty is actionable under section 1983. Similarly in *McCray v. Maryland*, where it was alleged that the clerk had negligently failed to file plaintiff's petition for post-conviction relief, no choice based upon an assessment of legal validity was involved.

Consequently, the *Pierson* defense ought not to be generally applied in all 1983 cases. Courts which do so make the same mistake as those courts which look exclusively to the common law tort defenses for guidance in 1983 cases. Rather, the nature of the appropriate defenses in 1983 cases depends in large part upon the particular constitutional infringement alleged, the choices available to the defendant, the appropriateness of having the defendant bear the costs alone, and the effect of liability upon the performance of the defendant's state obligations.

**Consent**

*Pierson* also raises an issue seldom discussed, the applicability of the defense of consent to 1983 claims. In *Pierson*, plaintiffs' 1983 claim was based on an allegedly invalid arrest. One of defendants' arguments, in fact accepted by the Fifth Circuit, was that the plaintiffs had invited or consented to their arrest and imprisonment, and hence should be denied recovery. The Fifth Circuit expressly stated that "the tort principle of *volenti non fit injuria* applies to the claim asserted for a civil rights violation under 42 U.S.C.A. Sec. 1983 as well as to the common law cause of action." The Supreme Court disagreed on this issue, saying:

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98 By implication, this also raises the use of defenses such as assumption of risk and contributory negligence in 1983 actions. Of course, assumption of risk, see RESTATEMENT §§ 496A, 496B, 496C, and especially express assumption of risk is similar to the defense of consent as used in intentional conduct situations. The analysis of consent here may therefore to that extent also be applicable to assumption of risk. But this article will not expressly deal with these defenses. It will also not deal with the interesting question of whether there should be such a defense of assumption of the risk at all; see James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968); or if it is preferable to deal with reasonable assumption of risk as a duty question. However, in *Whirl v. Kern*, 407 F.2d 781, 797-98 (5th Cir. 1969), discussed at note 41 supra, where plaintiff had been unlawfully detained in jail by defendant sheriff, defendant argued that plaintiff had been contributorily negligent in not requesting a hearing or requesting the service of a court appointed lawyer. The court responded by noting that defendant had committed an intentional tort to which contributory negligence is not a defense.

99 352 F.2d at 221.
The case contains no proof or allegation that they in any way tricked or goaded the officers into arresting them. The petitioners had the right to use the waiting room of the Jackson bus terminal, and their deliberate exercise of that right in a peaceful, orderly, and inoffensive manner does not disqualify them from seeking damages under § 1983.100

The Court's decision as to consent might be explained on several grounds. The Court might be saying that just as "the criminal law in many cases refuses to recognize the consent of the injured party as a defense,"101 because the "public" has been harmed, so too should consent to unconstitutional conduct be considered no defense. This approach derives some support from the view that consent to a criminal act will not protect a defendant from tort liability.102 Yet, Pierson apparently did not involve criminal conduct by the defendants. Even if the analogy is sound, the developing view of consent, as reflected in the Restatement,103 indicates that as a general matter consent is effective in cases involving criminal conduct.

A second possible explanation is that Pierson did not in fact involve consent. In Pierson, it was substantially undisputed "that the petitioners went to Jackson expecting to be illegally arrested."104 However, Tentative Draft No. 18 to the Restatement defines consent as willingness in fact for the conduct to occur, regardless of whether the consent has been communicated to the actor.105 Thus, in Pierson, the plaintiffs' expectation that they would be arrested and imprisoned is not the same as their willingness to be arrested and imprisoned. The fact that there was no resistance should not be dispositive; absence of resistance is not necessary where there is the apparent authority to arrest and imprison.

But even if there was true consent in Pierson, it is possible to justify the decision on another basis. As a matter of tort doctrine, plaintiff is ordinarily barred by consent to the particular conduct of the actor when that conduct is intended to invade plaintiff's interests.106 There is little concern with plaintiff's knowledge of the legal consequences of his consent, but only its factual consequences. Perhaps where constitutional rights are involved, there must be not only consent to

100 386 U.S. at 558 (footnote omitted).
101 Prosser, supra note 55, at 107.
102 Id. But see Restatement § 60.
103 Id.
104 386 U.S. at 558.
105 Restatement § 892(1).
106 Id.
the conduct but knowledge that a constitutional right is being waived. *Pierson* could thus be understood as a case in which there was no waiver of plaintiffs' constitutional rights. Put another way, consent to defendant's conduct in a 1983 case might be a defense only where plaintiff knows he has both the opportunity and the right not to consent. ¹⁰⁷

**Conclusion**

The major reason for the concern of some courts and commentators with liability under section 1983 is that section's very broad language. On its face it requires only state action and a causal relation between defendant's conduct and the deprivation of fourteenth amendment rights. This concern has increased as a result of federal decisions which indicate that unintentional conduct may be covered by section 1983, that exhaustion of state judicial remedies is not required and that the full panoply of fourteenth amendment rights, whether derived from the Bill of Rights or directly from the fourteenth amendment, may serve as the basis for liability when violated.

While the scope of section 1983 should be broad, there are certain limitations inherent in its use. First, a constitutional duty and standard of conduct must be identified; this is not always a simple matter. Second, liability under section 1983 should be consistent with that section's purposes which, while including compensation, seem in larger part designed to provide for private enforcement of fourteenth amendment rights and hence to help deter their violation. It is in this connection that the background of tort liability is relevant. To the extent that tort concepts of duty, proximate cause, and cause in fact, as well as various defenses such as consent may assist a court by analogy in deciding 1983 cases, well and good. But courts in 1983 cases must be careful not to let tort law alone determine 1983 liability; for not only possibly different

¹⁰⁷ The Supreme Court follows this approach in some criminal law contexts, e.g., the *Miranda* warnings and information about trial rights, but recently refused to extend it to the judicial inquiry into the existence of consent to a search. Instead the Court held that a criminal defendant's awareness of his right to refuse to consent to a search is only one factor to be taken into account. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). It must be acknowledged that waiver doctrine was developed in criminal cases. *See also* Johnson v. Zerbst, 304 U.S. 458 (1938). Yet the Court in *Overmyer v. Frick Co.*, 405 U.S. 174 (1972), noted that the doctrine of waiver is applicable in a civil context as well, and assumed for the purpose of deciding the case before it that "the standard for waiver in a corporate property right case of this kind is the same standard applicable to waiver in a criminal proceeding, that is, that it be voluntary, knowing, and intelligently made . . . ." *Id.* at 782. Indeed, inasmuch as section 1983 involves fourteenth amendment rights, the analogy to the criminal process seems even stronger than that of the "corporate property right" *Overmyer* case.
purposes, but different interests as well are usually at stake.

A federal common law for 1983 liability should modify tort law wherever appropriate. Modifications of tort law in order to serve federal policy have occurred elsewhere where constitutional interests have not been involved.\textsuperscript{108} It is time for federal courts dealing with the constitutional interests implicated by section 1983 to do the same.

\textsuperscript{108} See note 35 supra.