ValpoScholar Valparaiso University Law Review

Volume 22
Number 1 *Fall 1987*

*pp.*61-80

Fall 1987

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EMOTIONAL DISTRESS CLAIMS FOR POLICE MISCONDUCT: DOES A CAUSE OF ACTION EXIST UNDER SECTION 1983?

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While the United States Supreme Court has demonstrated a general trend towards limiting the availability of federal courts as a forum to litigate lawsuits,[1] there appears no comparable trend towards limiting the availability of a forum to litigate claims against police officers.[2] For example, in *Malley v. Briggs*,[3] the Supreme Court recognized the viability of an illegal arrest allegation against police officers even though they were executing an arrest warrant issued by a judge. Other federal courts have begun to entertain lawsuits challenging standard traditional police techniques such as roadblocks,[4] the use of mace, and the handcuffing of prisoners,[5] suggesting that they could, under appropriate circumstances, establish liability.

What may be most confusing to the law enforcement community is that this expansion of liability is in sharp contrast to a concurrent trend towards reversing the expansion of individual defendants' rights in criminal cases.[6] In fact, some practitioners have inferred that this movement towards expanding police liability is intentional and directly related to the effort to limit a criminal defendant's rights. One of the historic justifications for the "Exclusionary Rule" is that no other effective mechanism exists to discour-

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1. Dorsen, *The United States Supreme Court: Trends and Prospects*, 21 HARV. C.R.-C.R. L. REV. 1, 12-13 (1986); *see, e.g.*, Davidson v. Cannon, 474 U.S. 344 (1986) (prisoner cannot sue prison administrators for mere negligence); "Although the Warren Court seemed inclined to broaden the traditional basis for standing, that trend has continued only in the area of environmental law." Mahoney, *The Prima Facie Section 1983 Case*, 14 NAT'L L.Q. ON LOCAL GOV'T L. 131, 142 (1982).

2. Rushing & Bratcher, *Section 1983 Defenses*, 14 NAT'L L.Q. ON LOCAL GOV'T L. 144 (1982).

3. 475 U.S. 335 (1986).

4. Jamieson v. Shaw, 772 F.2d 1205 (5th Cir. 1985).

5. Graham v. City of Charlotte, 644 F. Supp. 246 (W.D.N.C. 1986) (handcuffing found reasonable under the circumstances); Bailey v. Turner, 736 F.2d 963 (4th Cir. 1984) (using mace on a prisoner); Justice v. Dennis, 802 F.2d 1486 (4th Cir. 1987) (en banc) (using mace on a drunk).

6. United States v. Leon, 468 U.S. 897 (1984); Illinois v. Krull, 107 S. Ct. 1160 (1987).

age police overreaching.[7] The expansion of liability for police misconduct would negate that argument and be an important first step towards abolition of the exclusionary rule.

Law enforcement officials would argue that plaintiffs do not need encouragement to file lawsuits. The number of lawsuits filed in the federal courts under 42 U.S.C. Section 1983 in 1985 exceeded 19,500.[8] Of course, regardless of the number of lawsuits defended, law enforcement agencies have historically experienced an enviable record of success in litigating these cases.[9] In spite of, or possibly because of this success, plaintiffs have attempted to develop new theories of recovery against police officers, primarily using Section 1983 and its protection of individual constitutional and federal rights.[10]

One such theory whose viability remains unresolved and uncertain at present is an action for the infliction of "emotional distress." These are actions in which the plaintiff or plaintiffs claim no tangible physical injury, but instead, assert that some action by a police officer caused emotional distress.[11] While the Supreme Court has recognized the propriety of awarding damages for mental distress or anguish,[12] the Court has not yet recognized a cause of action under Section 1983 when the action challenged was allegedly for the purpose of causing emotional distress, or was reasonably expected to cause emotional distress.

After a brief overview of civil rights litigation in the law enforcement

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7. Weeks v. United States, 232 U.S. 383, 390 (1914); Mapp v. Ohio, 367 U.S. 643, 654 (1961).

8. Priest & Whitten, *Police Misconduct Suits: In Defense of Officers and Municipalities*, FOR THE DEFENSE, Aug., 1986, at 26. 42 U.S.C. § 1983 (1982 & Supp. III 1985) [hereinafter § 1983] reads:

> 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.

9. Police agencies have a consistent record of success in defending these lawsuits, prevailing in well over 90% of the lawsuits filed. Schmidt, *Recent Trends in Police Tort Litigation*, 8 URB. LAW. 682, 683 (1976) [hereinafter Schmidt].

10. A 600% increase in the number of lawsuits filed against law enforcement officers has been reported. Higginbotham, *Defending Law Enforcement Officers Against Personal Liability in Constitutional Tort Litigation*, 54 FBI LAW ENFORCEMENT BULL. 24 (1985). As little as three years ago nearly every civil rights action filed against a police officer seemed to include a claim against his supervisor for "negligence training." This theory of liability has been largely unsuccessful, however, because the standardization and upgrading of police training over the last several years has made such claims very difficult to substantiate. The trend now appears to avoid such claims and plaintiffs now appear to emphasize the emotional distress claims discussed in this article.

11. *See* Conner v. Sticher, 801 F.2d 1266 (11th Cir. 1986).

12. Memphis Community School Dist. v. Stachura, 477 U.S. 299 (1986).

context, this article will review the pronouncements of the Supreme Court on the propriety of compensation for damages for mental anguish or distress. The common-law tort for the infliction of emotional distress, a relatively new development in tort law, will then be examined. Finally, the federal appellate cases that have addressed the issue of whether actions for emotional distress are actionable will be reviewed in the context of the Supreme Court's Section 1983 decisions. This review should suggest that although plaintiffs have heretofore been generally unsuccessful in asserting Section 1983 claims for emotional distress, present civil rights decisions do provide a framework for a successful suit against police officers who knowingly display or threaten to use force that would create severe emotional fear and distress in the average citizen under circumstances that would not justify using the force threatened or displayed.

I. THE EXPANSION OF SECTION 1983

"Any analysis of the purpose and scope of Section 1983 must take cognizance of the events and passions of the time at which it was enacted."[13] Section 1983 was enacted as part of the Civil Rights Act of 1871 to enforce the amendments ratified after the Civil War, in particular the fourteenth amendment.[14] "As introduced and enacted, it served only to ensure that an individual had a cause of action for violations of the Constitution. . . ."[15] With a few exceptions,[16] the Civil Rights statutes were used sparingly and were usually limited to instances of racial discrimination, typically in the area of voting.[17]

All of this changed substantially for law enforcement officers after the Supreme Court's decision in *Monroe v. Pape*.[18] That case involved a suit by a Chicago family who alleged that thirteen police officers broke into their home in the early morning hours with no arrest or search warrants, routed them from their beds, rummaged through the house, and assaulted members of the family in the course of this search.[19] In the majority opinion for the Court, Justice Douglas stated that Congress intended to give a remedy under Section 1983 to persons whose constitutional rights were violated by

13. District of Columbia v. Carter, 409 U.S. 418, 425 (1973).

14. 17 Stat. 13 (1871).

15. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979).

16. *See, e.g.*, Screws v. United States, 325 U.S. 91 (1945) (Georgia sheriff convicted under 18 U.S.C. § 242 for the fatal beating of a defendant shortly after his arrest); Civil Rights Cases, 109 U.S. 3 (1883); *Developments in the Law — Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1169 (1977).

17. *See* Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Herndon, 273 U.S. 536 (1927).

18. 365 U.S. 167 (1961).

19. *Id.* at 169.

an official's "abuse of his position."[20] In a much-cited passage, Justice Douglas stated that such a federal remedy must be available because, for whatever reason, state law may fail to provide an adequate remedy, or a state remedy that is available might not be enforced.[21] Subsequent decisions have held that Section 1983 was "intended to give a broad remedy for violations of federally protected civil rights."[22]

Since that decision, aggressive attempts have been made to expand both the scope of the remedy and the persons or entities subject to liability. Local governments and municipalities were held liable for Section 1983 damages in 1978[23] and subsequently lost the "good faith" defense afforded most defendants in 1981.[24] And although liability has never been recognized based upon a theory of *respondeat superior* under Section 1983,[25] a significant effort was made to hold administrative and supervisory personnel liable based on theories of negligent training, negligent supervision, or negligent retention.[26] Another trend closely related to efforts to expand liability has been to enlarge the types of acts by law enforcement officers that are actionable as civil rights violations. As previously noted, such common police practices as roadblocks, using mace, and handcuffing prisoners have given rise to lawsuits claiming that these acts constituted the use of excessive force.[27]

An excellent example of the increasing scope of liability for police officers under Section 1983 is demonstrated in the Supreme Court's decision in *Tennessee v. Garner*.[28] In *Garner*, a police officer pursuing a young unarmed burglary suspect was unable to capture the suspect on foot and, pursuant to Tennessee law, the common law, and departmental policy, shot the unarmed suspect to prevent his escape.[29] The young man's father brought a civil rights action claiming that his son had been the victim of an unreasonable seizure and that excessive force had been used, suing both the officer and the Memphis Police Department.[30] Although the common law authorized the use of deadly force against unarmed felony suspects to prevent escape, and although the officer had not deviated from departmental policy or applicable state law, the Supreme Court held that such acts were uncon-

20. *Id.* at 193 (Harlan, J., concurring).
21. *Id.* at 174.
22. Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 685 (1978).
23. *Id.* at 658.
24. Owens v. City of Independence, 445 U.S. 622, 650 (1980).
25. *See* Moor v. County of Alameda, 411 U.S. 693 (1973).
26. *See* Schmidt, *supra* note 9, at 683. *See also* Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985) (failure to train); York v. City of San Pablo, 626 F. Supp. 34 (N.D. Cal. 1985).
27. *See* cases cited *supra* note 22.
28. 471 U.S. 1 (1985).
29. *Id.* at 4.
30. *Id.* at 5.

stitutional and that liability could be imposed under these circumstances.[31]

Shortly thereafter, the Supreme Court rendered its opinion in *Malley v. Briggs*[32] that police officers executing valid warrants issued by a judge or magistrate were not entitled to absolute immunity from suits claiming an illegal search or seizure in violation of the fourth amendment. The officers had argued that when the decision regarding the existence of probable cause is made by a judge, the police officers who execute that warrant should not be held liable for enforcing that warrant. The Court was unpersuaded and held that the decision of the judge, though he was undoubtedly better versed in the law than police officers, could not insulate the officers from liability.[33]

Independent of this expansion of the causes of action against police officers, there has been a continuing effort by the Court to clarify the proof necessary to impose liability. In *Gomez v. Toledo*,[34] the Supreme Court stated:

> By the plain terms of Section 1983, two — and only two — allegations are required in order to state a cause of action under the statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right has acted under color of state or territorial law.[35]

The federal courts have concluded that not every violation of state law or every tort committed by a public official rises to the level of a constitutional violation actionable under Section 1983.[36] The federal courts are, after all, "courts of limited jurisdiction marked out by Congress."[37] Thus, the Supreme Court has refused to recognize all deprivations of property rights or all injuries received as a result of actions, or refusals to act, by law en-

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31. *Id.* at 11. A question remained whether this particular defendant was entitled to qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1982), since the law obviously was not "clearly established" at the time of this incident. The Sixth Circuit has subsequently determined that *Garner* will be given retroactive effect. Carter v. City of Chattanooga, 803 F.2d 217, 224 (6th Cir. 1986).

32. 106 S. Ct. 1092 (1986).

33. *Id.* at 1098. The judge, of course, would be entitled to absolute judicial immunity.

34. 446 U.S. 635 (1980).

35. *Id.* at 640.

36. Paul v. Davis, 424 U.S. 693 (1976) (no action for defamation); Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980) (discipline of high school student). *See also* Mills v. Smith, 656 F.2d 337, 340 n.2 (8th Cir. 1981), a suit against a police officer who shot an escapee, where the court stated that "[a] negligent action resulting in personal injury does not become a constitutional violation merely because the tortfeasor is a state or local police officer."

37. Aldinger v. Howard, 427 U.S. 1, 15 (1976) (no "pendant party" jurisdiction); Fritts v. Niehouse, 604 F. Supp. 823, 828 (W.D. Mo. 1984).

forcement officials as creating a cause of action under Section 1983.[38] To prevail in a Section 1983 action, a plaintiff must clearly identify the constitutional or federal right that is alleged to have been violated.[39] As will be discussed below, this requirement has presented the most formidable obstacle to plaintiffs suing for emotional distress.

Another line of precedent that must be reviewed before any adequate analysis of emotional distress claims can be discussed are those cases dealing with the recovery of damages in civil rights claims. While not one of the two necessary allegations set forth in *Gomez*, above, nearly every federal court has made recovery under Section 1983 dependent upon the plaintiff proving damages or injury.[40] In the cases of *Carey v. Piphus*[41] and *Memphis Community School Dist. v. Stachura*,[42] the Supreme Court clarified the purpose of awarding damages in Section 1983 actions and the types of damages that are recoverable in such actions. The Court stated in both cases that a basic purpose of Section 1983 is to compensate for damages.[43]

In *Carey*, a student was suspended for smoking marijuana during school[44] without any type of hearing prior to the suspension. The specific right found to have been violated was the right to due process. No tangible physical injury was alleged or proven, no other damages were established, nor was there any concerted effort to argue that a hearing would have exonerated the student of the allegation.[45] The question became "What is a constitutional right worth in the absence of any evidence of damages?" The Court noted that the purpose of Section 1983 and the other civil rights statutes "is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect."[46] The majority of the Court then went on to agree that mental and emotional distress alone are compensable under Section 1983 but not "without proof that such injury actually was caused."[47] Thus, while recovery was recognized for mental anguish or emotional distress — even when these are the only damages asserted — there can be no presumption that mental anguish "flowed" from

38. Parratt v. Taylor, 451 U.S. 527 (1981); Davidson v. Cannon, 106 S. Ct. 668 (1986).

39. Martinez v. California, 444 U.S. 277, 284 (1980); Baker v. McCollan, 443 U.S. 137, 140 (1979). Even important procedural safeguards like *Miranda* warnings, Miranda v. Arizona, 384 U.S. 436 (1966), as important as they may be, are "not themselves rights protected by the constitution. . . ." Oregon v. Elstad, 470 U.S. 298 (1985).

40. DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 92.05; Putnam v. Gerlof, 639 F.2d 415 (8th Cir. 1981).

41. 435 U.S. 247 (1978).

42. 106 S. Ct. 2537 (1986).

43. *Id.* at 2543.

44. *Cary*, 435 U.S. at 249.

45. *Id.*

46. *Id.*

47. *Id.* at 264.

the deprivation of a constitutional right.[48] "In the absence of proof of actual injury a [plaintiff] can expect to recover only nominal damages."[49] To recover other than nominal damages the plaintiff must not only prove emotional harm, but also that it was the constitutional violation that caused those damages.[50] The Court was not in a position to address the issue of what type or quantum of proof is necessary to establish emotional distress because the plaintiff presented no evidence relating to emotional harm and argued that a presumption of emotional harm should exist. This presumption was rejected by the Court.

In *Stachura*, the district court had extended the notion of nominal damages by instructing the jury that they could award a sum to compensate for the violation of a constitutional right apart from, and in addition to, any other compensatory damages the jury might award.[51] Stachura was a tenured school teacher who was suspended with pay by the school board because of his use of certain sex education material in his classroom.[52] The teacher was subsequently reinstated and lost no salary. Nevertheless, he brought suit under Section 1983 claiming violations of due process and of his first amendment right to academic freedom.[53] The Supreme Court again recognized the propriety of recovery for personal humiliation, mental anguish or emotional distress,[54] but disapproved of the district court's instruction to the jury that they could award damages for compensation *and* for a constitutional violation.[55] Damage awards under Section 1983 are essentially no different than damages in any tort case where the purpose of the damage award is to "compensate for the injury caused to the plaintiff by the defendant's breach of duty."[56]

The Supreme Court's willingness to compensate for mental anguish or emotional distress is not, however, the equivalent to recognizing a separate and distinct claim for emotional distress. Nevertheless, the Court has clearly demonstrated its willingness to acknowledge developments in the common law[57] and incorporate those developments into Section 1983 juris-

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48. *Id.* at 263.
49. *Id.* at 248.
50. *Id.* at 263.
51. Memphis Community School Dist. v. Stachura, 106 S. Ct. 2537, 2542 (1986).
52. *Id.* at 2540.
53. *Id.*
54. *Id.* at 2542-43.
55. *Id.*
56. *Id.*
57. *See, e.g.*, Tennessee v. Garner, 471 U.S. 1 (1985), where the Supreme Court's abrogation of the right of police officers to use deadly force against a fleeing felon was based, in part, upon the fact that "the long-term movement has been away from the rule that deadly force may be used against any fleeing felon, and that remains the rule in less than half the states." *Id.* at 18.

prudence. One of the recent developments in the common law has been the recognition of actions for the infliction of emotional distress.

II. THE TORT FOR INFLICTING EMOTIONAL DISTRESS

Originally, objections to common law actions for the infliction of emotional distress included concerns over the difficulty in proving and measuring recoverable damages, as well as the obvious potential for fictitious suits brought for inappropriate reasons.[58] "Nevertheless, the trend in recent years has been to permit recovery for mental distress alone."[59] Tort law has placed a distinction of considerable importance between the negligent infliction of emotional distress and the intentional infliction of emotional distress. The importance of this distinction in the context of Section 1983 cases is uncertain, however, since the Supreme Court has not set forth any particular state of mind requirement before imposing liability and has found nothing in the legislative history that "limits the statute solely to intentional deprivations of constitutional rights. . . ."[60] It is nevertheless worth noting that the courts have historically been more willing to extend the common law tort of inflicting emotional distress to "intentional acts of a flagrant character."[61]

The leading case in the development of this cause of action is *Dillon v. Legg*,[62] in which the California Supreme Court developed the "negligence theory" of liability for inflicting emotional distress. A more recent theory of recovery, now used by a majority of the courts recognizing this tort, is the "zone-of-danger" theory of recovery.[63] Applied most often in cases where the plaintiff has witnessed injury to another, the "zone of danger" theory

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58. Campbell, *The Emotional Trauma of Hijacking: Who Pays?*, 74 KENTUCKY L.J. 599 (1986); "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone." Lynch v. Knight, 9 H.L.C. 577, 598, 11 Eng. Rep. 854, 863 (1861).

59. Campbell, *supra* note 58. For an overview of the state restrictions imposed on state court actions for emotional distress to assure the genuineness of the claims, see Note, *Murder and the Tort of Intentional Infliction of Emotional Distress*, 1986 DUKE L.J. 572, 580-81 (1986).

60. Parratt v. Taylor, 451 U.S. 527, 534 (1981). In fact, in Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), the Supreme Court held that an act by a public official that does not violate "clearly established" law is not subject to liability. *See also* Mitchell v. Forsyth, 105 S. Ct. 2806 (1985). On the other hand, the officer's "pure heart" is not a sufficient defense if his actions were unreasonable when viewed objectively. *Id.*

61. W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER & KEETON ON TORTS § 12, at 57 (5th ed. 1984).

62. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

63. Bovsun v. Sanperi, 61 N.Y.2d 219, 228, 461 N.E.2d 843, 847, 473 N.Y.S.2d 357, 361 (1984). For a more detailed explanation and criticism of this "zone-of-danger" analysis, see Note, *Johnson v. Jamaica Hospital: A Contribution to the Inadequacy of Law Allowing for Recovery of Emotional Distress Damages*, 12 J. COMTEMP. L. 289 (1987).

limits recovery to plaintiffs who have been placed in fear of bodily harm themselves by some act of the defendant.[64] Thus, while the damages may be for having viewed injury to another person, the action will lie only when the defendant took some action that also amounted to a breach of duty to the plaintiff as well. "It is premised on the traditional negligence concept that by unreasonably endangering the plaintiff's physical safety the defendant has breached a duty owed to him or her for which he or she should recover *all* damages sustained."[65]

Crucial to the acceptance of this cause of action is the ability of the plaintiffs to specify to the courts the personal interest to be protected.[66] For this reason some states have required the emotional distress to have been brought about by witnessing actual harm to a family member.[67] In *Ramirez v. Armstrong*, the New Mexico Supreme Court required a family relationship to exist between the plaintiff and the victim before recovery would be permitted.[68] That court also required some physical manifestation of the emotional harm to be proven.[69] In addition, the majority of courts require the emotional trauma to be severe and verifiable,[70] although some jurisdictions have no such limitation.[71]

In *Campbell v. Animal Quarantine Station*,[72] the Hawaii Supreme Court allowed a family to recover for emotional distress allegedly occurring when the family dog, Prince, died of heat prostration at a quarantine station.[73] None of the plaintiffs witnessed the death nor did any of them seek or receive any medical or psychological assistance.[74] The Hawaii Supreme Court recognized valid emotional distress claims in situations where a "reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."[75] While the affirmation of a verdict in this case may be somewhat "surprising," the court's definition of emotional distress does seem rational and acceptable. This case is indicative of the trend towards broadening the ability of plaintiffs to recover for purely emotional harm. Given this climate, at-

64. *Bovsun*, 61 N.Y.2d at 228, 461 N.E.2d at 847, 473 N.Y.S.2d at 361.

65. *Id.* (emphasis added).

66. Ramirez v. Armstrong, 100 N.M. 538, 541, 673 P.2d 822, 825 (1983).

67. *Id.*

68. *Id.* This case involved children who saw their father struck and killed by an automobile while he was attempting to cross the street.

69. *Id.* at 541, 673 P.2d at 825.

70. Bovsun v. Sanperi, 61 N.Y.2d 219, 231, 461 N.E.2d, 843, 849, 473 N.Y.S.2d 357, 363 (1984).

71. Molien v. Kaiser Foundation Hosp., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

72. 63 Haw. 557, 632 P.2d 1066 (1981).

73. *Id.* at 558, 632 P.2d at 1067.

74. *Id.*

75. *Id.* at 560, 632 P.2d at 1068.

tempts to recover under Section 1983 were inevitable.

III. Emotional Distress, Police Misconduct, and Section 1983

No reported cases currently exist where recovery for a claim of emotional distress has been recognized and an award of damages sustained.[76] Reported federal cases have, however, addressed the possibility of these claims and have, in a few instances, held that a cause of action exists. One of the earliest reported cases is *White v. Rochford*,[77] a Seventh Circuit opinion by a three judge panel that included a concurring opinion and a dissent. The allegations were that the Chicago police arrested a driver for drag racing on a busy eight-lane highway and left three young children in the abandoned car along the highway despite pleas to either take the children to the police station or to help them contact their parents.[78] The complaint, filed by the children, alleged that as a result the children suffered "mental pain and anguish."[79] Upon appeal from the district court's dismissal, the majority opinion for the panel held that "such conduct indisputably breaches the Due Process Clause."[80] The opinion stated that chief among the "liberty interests" protected by the Due Process Clause is the right "to some degree of bodily integrity."[81] Due process could also be violated whenever any state action occurs which "shocks the conscience."[82] Under this due process analysis of the majority opinion, the violation of due process caused the emotional distress and was actionable.[83]

The concurring opinion also believed the cause was actionable, but for a different reason.[84] The constitutional "right" recognized by the concurring judge was a "federally protected right to be free from unjustified intrusions on their personal security by the police."[85] Though unspecified by the concurrence, the "intrusion" apparently emanated from the arrest of the driver,[86] making it appear that the constitutional right related to the fourth

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76. The author has, however, defended several cases in which claims for emotional distress arising from various acts by police officers have been alleged. Discussions with colleagues have revealed similar experiences, thus indicating that district courts are willing to recognize these claims, although the constitutional bases for these claims are often not clearly pleaded.

77. 592 F.2d 381 (7th Cir. 1979).

78. Since the case had been dismissed by the district court based on the pleadings, the truth of these allegations, or the extent to which the facts were challenged by the defendants, are unknown.

79. *White*, 592 F.2d at 382.

80. *Id.* at 383.

81. *Id.*

82. *Id.* at 385.

83. *Id.* at 386.

84. *Id.*

85. *Id.* at 387.

86. *Id.* at 388.

amendment freedom from unreasonable seizures. According to the concurrence, once the arrest had taken place the officers had a duty to see that the children had some protection. In fact, later interpretations of this case by the Seventh Circuit have held the case to stand for the proposition that "the Constitution creates a duty on the part of police officers to protect minor children from immediate hazards after police officers arrest the children's guardian. . . ."[87] Whether sound constitutional policy or not, these subsequent holdings, coupled with the inability of the *White* panel to reach a consensus, certainly limit the principles enunciated by the majority opinion and limit the applicability of this case to "emotional distress" claims. The dissenting opinion in *White* questioned whether the plaintiffs were able to specify any constitutional right that was violated, disagreed with the majority's due process analysis, and concluded that no constitutional right was implicated in the police action.[88]

As just noted, with three different opinions and three different conclusions, *White's* precedential value is limited at best.[89] The subsequent decisions of the Seventh Circuit have given the *White* opinion a very narrow interpretation that substantially limits the availability of *White* as support for an emotional distress claim.[90] Nevertheless, *White* is worthy of discussion, not so much for what it held, but because of the various interpretations subsequent courts from other circuits have given the case.[91]

One subsequent Seventh Circuit case decided by a different three member panel does, however, merit discussion because of the well-reasoned analysis by a consensus suggesting that a claim for emotional distress may be cognizable. In *Gumz v. Morrissette*,[92] a "muck farmer"[93] who was involved in an ongoing dispute with state conservation officers over his muck farm operation, sued the officials for his arrest that involved a high-speed chase by ten officers armed with pistols, shotguns, and rifles[94] — all to secure payment of a $100 civil penalty.[95] The plaintiff sued for $2.4 million

87. Ellsworth v. City of Racine, 774 F.2d 182, 185 (7th Cir. 1985).

88. *White*, 592 F.2d at 390.

89. Justice Blackmun, however, cited the case with approval in his dissent in Davidson v. Cannon, 106 S. Ct. 668, 674 n.3 (1986).

90. *Ellsworth*, 744 F.2d at 185.

91. In particular, a claim for the denial of a due process claim under § 1983 was dismissed by the Seventh Circuit when a social service agency failed to intervene when given substantial information regarding child abuse that ultimately resulted in brain damage to that child. DeShaney v. Winnebago County Dep't of Social Servs., 812 F.2d 298 (7th Cir. 1987). Though finding the agency "blameworthy," the court nevertheless could find no deprivation of any liberty interest, casting further doubt upon the "duty" analysis implied in *White*.

92. 772 F.2d 1395 (7th Cir. 1985).

93. This is apparently a farmer who uses sludge or "muck" he gathers from waterways to fertilize or otherwise grow his crops. *Id.* at 1397.

94. *Id.* at 1398.

95. *Id.* at 1400.

although he was not pushed, struck, or threatened, and suffered no physical injuries whatsoever as a result of the incident.[96] The jury had found the officers liable and through a special verdict found the injury to be the emotional distress from the arrest and its immediate aftermath.[97] The Seventh Circuit's duty was to determine "whether the use of force was so egregious as to be constitutionally excessive. . . ."[98]

The majority undertook its analysis under the fourteenth amendment as a claim for deprivation of liberty without due process of law.[99] This analysis is used by a majority of the federal circuits in reviewing "excessive force" cases.[100] The claim is grounded on the due process principle that it is impermissible to "punish" a suspect until the suspect has been convicted of a crime. Excessive or unreasonable force is, therefore, "punishment" without due process of law.[101] In this case, the only force used "was the grossly excessive demonstration of manpower and firepower."[102]

The standard for the finding that excessive force was used under the fourteenth amendment analysis requires proof that the force:

1) caused severe injuries,
2) was grossly disproportionate to the need for action under the circumstances (*i.e.*, unreasonably), and
3) was inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience.[103]

While the court did find sufficient evidence of malice and that the "draconian" use of force was excessive, the court concluded that "this case does not involve the type of severe harm redressable under Section 1983."[104] The court noted that no case had yet allowed recovery under a Section 1983 excessive force claim in the absence of a physical injury.[105] The majority also believed that a finding of liability under Section 1983 for an excessive force claim based on the demonstration of force would be "most unusual."[106] The court did recognize, however, that it is possible that an "extreme emotional response," with or without physical manifestations,

96. *Id.* at 1401.
97. *Id.*
98. *Id.*
99. *Id.* at 1399.
100. *Id.* at 1404 (Easterbrook, J., concurring).
101. *Id.* at 1405.
102. *Id.* at 1401.
103. *Id.* at 1400.
104. *Id.*
105. *Id.* at 1401.
106. *Id.*

could be a "severe injury" that could result in liability.[107]

In his concurring opinion, Judge Easterbrook agreed with the majority's judgment, but makes a persuasive argument that this case, and all excessive force cases against police officers, should be analyzed under the fourth amendment's prohibition against unreasonable seizures.[108] Judge Easterbrook asserts three reasons for this belief: First, the only excessive force analysis undertaken by the Supreme Court has been under the fourth amendment, most notably *Tennessee v. Garner*; second, the fourth amendment is alone in directly addressing police seizures; and third, a fourth amendment analysis uses an objective standard of reasonableness, which avoids difficult issues regarding the defendant's intentions.[109] The concurrence suggests that a "shock the conscience" standard is too difficult to define and gives a police officer no guidance in determining the propriety of his or her conduct.[110] The concurrence concludes by suggesting that "tomorrow's cases should be assessed exclusively under the standards of the fourth amendment."[111]

In two subsequent cases the analysis of the constitutional rights involved is neither as detailed nor as definite. In *Checki v. Webb*,[112] the plaintiffs claimed that they were "alarmed" by police officers who were tailgating the plaintiffs' vehicle at speeds of up to 100 miles per hour.[113] After a twenty mile chase the plaintiffs' vehicle was stopped at a roadblock.[114] After dismissal of the suit by the district court for procedural reasons,[115] the Fifth Circuit reversed and remanded the case for trial. The court stated the officers' actions "crossed the constitutional line that would make their pursuit and harassment actionable under Section 1983."[116] The opinion does not, however, attempt to be anymore definite as to the constitutional right allegedly violated. Instead, the court simply states that while the negligent use of a vehicle is not actionable under Section 1983,[117] the "intentional misuse" of a vehicle is actionable.[118] The court then concludes that there is no reason why physical injury should be required to prevail under Section

107. *Id.* at 1402.
108. *Id.* at 1404.
109. *Id.* at 1404, 1407.
110. *Id.* at 1407.
111. *Id.* at 1409.
112. 785 F.2d 534 (5th Cir. 1986).
113. *Id.* at 535.
114. *Id.* at 536.
115. The district court dismissed the claim for both improper venue and for exceeding the statute of limitations. *Id.* at 538. Before addressing the substance of the claim, the appellate court overruled the district court's determination of both issues and remanded the case. *Id.*
116. *Id.* at 538.
117. *Id.* (*citing* Cannon v. Taylor, 782 F.2d 947, 948 (11th Cir. 1986)).
118. *Checki*, 785 F.2d at 538.

1983.[119] In dicta that will undoubtedly be quoted in future emotional distress actions, the court concludes: "A police officer who terrorizes a civilian by brandishing a cocked gun in front of that civilian's face may not cause *physical* injury, but he has certainly laid the building blocks for a Section 1983 claim against him."[120]

In *Connor v. Sticher*,[121] the defending police officers told a witness in a murder case that the murder suspect might try to kill him or harm his family; the police knew this information was untrue but related the lie as part of an "unusual" police investigation to catch the criminal defendant.[122] The plaintiffs sued under Section 1983 claiming that they lived in "constant fear for their lives."[123] The Eleventh Circuit properly noted that it must first find a deprivation of a constitutional right.[124] It then analyzed the claims under the fourteenth amendment and found no liberty interest involved.[125] The court repeatedly emphasized the fact that the plaintiffs were never in any physical danger and distinguished *Checki* and *White* based on the belief that both of those cases involved the potential risk of actual physical harm.[126] A dissenting opinion expressed the belief that "psychological harassment by police" was a danger to society and that individuals have a constitutionally protected interest in being free from police activity of this nature.[127] The opinion does not, however, cite any case or authority for the proposition that being free from police harassment, *per se*, is a constitutional right; the only citation in the opinion is to George Orwell's *1984*.[128]

IV. Discussion

The eagerness of some of the courts in the above cases to provide a remedy for what those courts perceive as police misconduct can be easily inferred from the opinions. Dislike of police actions is not, however, a sufficient substitute of the need to clearly articulate the legal basis for imposing liability under Section 1983, particularly given the limited scope of that

119. *Id.*
120. *Id.*
121. 801 F.2d 1266 (11th Cir. 1986).
122. *Id.* at 1267.
123. *Id.*
124. *Id.*
125. *Id.* at 1268.
126. *Id.*
127. *Id.* at 1269.
128. *Id.* In some states, the appellate courts have developed a rule of exclusion in criminal cases in which instances of outrageous police misconduct will not just cause exclusion of certain evidence, but will result in the dismissal of the criminal charges against the defendant. *See, e.g.*, State v. Hohensee, 650 S.W.2d 268 (Mo. App. 1982). This rule is not, however, intended as a procedural mechanism to protect individual constitutional rights but is specifically directed towards inhibiting certain types of police activity.

statute[129] and the limited jurisdiction given federal courts.[130] The inability to be any more descriptive than "freedom from police harassment" or "intrusions upon personal integrity" demonstrates a substantial shortcoming in the heretofore reported cases addressing claims for emotional distress. The shortcoming is not in the ability to plead or prove emotional harm but is instead the inability to establish that the emotional harm was the result of the denial of, or interference with, a specified constitutional right.

Physical injury need not be proven for damages to be established, although the plaintiff must still prove his damages — emotional or otherwise — with evidence at trial.[131] Proof of injury does not provide a substantial impediment to recovery in valid causes of actions where emotional trauma is evident and would be likely to occur in any average citizen confronted with the situation giving rise to suit. The diagnosis of post-traumatic stress syndrome, originally evidenced in combat veterans, is now widely recognized as a verifiable emotional response to stress with specific, objectively verifiable symptoms.[132] The disorder is thought to be brought about by a "stressor," defined as a traumatic event or incident that is likely to cause emotional distress in most people.[133] Examples are surviving a natural disaster, being hijacked, or witnessing a tragic death. Such a diagnostic tool fits well with the requirement in many states that recognize the tort of emotional distress but limit the action to unusual occurrences that are likely to cause severe and verifiable shock.[134] Requiring some action on the part of a police defendant that is beyond the normal procedures commonly used by law enforcement, and beyond what the typical citizen would expect to be confronted with, would not only be consistent with the trend in tort law, but

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129. "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." Baker v. McCollan, 443 U.S. 137, 146 (1979).

130. Aldinger v. Howard, 427 U.S. 1, 15 (1976).

131. *See* Memphis Community School Dist. v. Stachura, 106 S. Ct. 2537 (1986).

132. Ettedgui & Bridges, *Post-traumatic Stress Disorder*, 8 PSYCHIATRIC CLINICS OF NORTH AMERICA 89 (1985); Green, Lindy, & Grace, *Post-Traumatic Stress Disorder: Toward DSM-IV*, 173 J. NERVOUS & MENTAL DISEASE 406 (1985).

133. AMERICAN PSYCHIATRIC ASSOCIATION DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 236 (3rd ed. 1980) (also known as DSM-III).

134. *See, e.g.*, Bovsun v. Sanperi, 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1984) (the emotional distress must be serious and verifiable); Ramirez v. Armstrong, 100 N.M. 538, 673 P.2d 822 (1983) (the emotional injury must be from witnessing an accident resulting in serious physical injury or death to the victim).

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous."

RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965).

would also avoid the Supreme Court's fear that Section 1983 will be turned into a general tort remedy.[135]

More important, such a requirement is compatible with the "reasonableness" standard under the fourth amendment and is more conducive to objective review. The questions would be: "Was the officer's conduct unreasonable in light of the facts he knew or should have known?" and "Is one of the facts he should have known that his actions were likely to cause substantial emotional trauma to an ordinary person?" While having a gun aimed or fired in one's direction is likely to cause emotional trauma in anyone, that will not be the end of the inquiry; the officer who commits such an act may nevertheless be acting reasonably if the potential plaintiff is a murder suspect. Such actions may not be reasonable when dealing with a motorist whose only offense has been to exceed the posted speed limit by five miles per hour.

Given the Supreme Court's recognition of damages for emotional distress and the mental health profession's ability to diagnose trauma, the nature of the damages in a claim for emotional distress do not present an insurmountable burden for a plaintiff. For example, in *Duncan v. Nelson*,[136] the Seventh Circuit found that police officers could be held liable for a fifth amendment violation by coercing a confession.[137] The plaintiff was not physically touched, but alleged that he was nevertheless psychologically coerced.[138] This Section 1983 action was cognizable because of the plaintiff's ability to identify his damages (the consequences of his coerced confession) and to clearly articulate a constitutional right that was violated.[139] In contrast, the plaintiff in *Spence v. Board of Educ. of Christina School Dist.*,[140] was not entitled to retain her jury award for emotional distress arising from a first amendment violation because she presented no evidence to substantiate her claim for emotional damages.[141]

It should be emphasized that no attempt is made to suggest that evidence of post—traumatic stress syndrome would be necessary to establish a claim for emotional distress. This syndrome is simply noted as an example of how medical science is able to detect and classify emotional problems.[142]

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135. *See* Baker v. McCollan, 443 U.S. 137 (1979).

136. 466 F.2d 939 (7th Cir. 1972), *cert. denied*, 409 U.S. 894 (1972).

137. *Id.* at 944.

138. *Id.* at 945.

139. *See also* Walters v. City of Atlanta, 803 F.2d 1135 (11th Cir. 1986), where the victim of reverse discrimination received $150,000 for mental anguish which was upheld by the appellate court because the damages were supported by the evidence. *Id.* at 1146.

140. 806 F.2d 1198 (3rd Cir. 1986).

141. *Id.* at 1201.

142. In Walters v. City of Atlanta, 803 F.2d 1135 (11th Cir. 1986), the court held that the proof of emotional trauma necessary for recovery was not required to be equivalent to the proof necessary in a state court claim for the intentional infliction of emotional distress.

With the trend towards relaxing the admissibility standards for expert witnesses,[143] no justification exists for failing to present evidence to substantiate a valid claim for emotional distress. While it is true that the possibility exits that bogus claims for emotional trauma could be made,[144] the possibility seems no greater than those for the ubiquitous back injuries in personal injury cases.[145] This article does advocate, however, the position that like the "stressors" causing a post traumatic stress reaction, the action of the police officers giving rise to a Section 1983 cause of action for emotional distress should be actions that could reasonably be expected to cause a severe emotional reaction in the average citizen.

From the review of the federal cases addressing the issue, it appears obvious that the identification of a specific civil right remains the critical obligation of any plaintiff who desires to succeed in any claim for emotional distress. As stated by Judge Easterbrook in *Gumz*, the fourth amendment seems to provide the best and most logical basis for imposing liability upon police officers in an appropriate situation.[146] There may be situations in which police actions cause emotional distress as a result of violating some other constitutional right. The burning of a cross on a black citizen's lawn would undoubtedly cause emotional distress and would clearly establish a fourteenth amendment equal protection violation. Likewise, harassment because of an individual's expression of an unpopular opinion could establish a first amendment violation.[147] The fourth amendment, however, is directed towards police activity and explicitly prohibits both unreasonable seizures and unreasonable searches. A display of force of a magnitude that seems objectively unreasonable under the circumstances might, in fact, be an "unreasonable seizure" because it was excessive. Both *Gumz* and *Checki* hint at this possibility. A claim under the fourteenth amendment analysis under

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143. *See* United States v. Brown, 557 F.2d 541, 556 (6th Cir. 1977); United States v. Hill, 655 F.2d 512, 516 (3rd Cir. 1981). *See also* Diamond & Louisell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations*, 63 MICH. L. REV. 1335, 1342 (1965); Lewis, *Trying a Trauma Case*, TRIAL, April, 1985, at 52. *But see* J. ZISKIN, 1 COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY 4 (3rd ed. 1981); Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473, 477-82 (1986); McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1, 24-33 (1986).

144. Marcus, *Malingering or Mental Distress*, 35 DEF. L.J. 705 (1986).

145. *See* Brena & Turk, *Chronic Pain and Disability: An Overview for Legal Professionals*, 54 DEF. COUNS. J. 122, 123 (1987).

146. Gumz v. Morrissette, 772 F.2d 1395, 1404 (7th Cir. 1985); Bacharach, *Section 1983 and the Availability of a Federal Forum: A Reappraisal of the Police Brutality Cases*, 16 MEM. ST. U.L. REV. 353, 367 (1986).

147. *See* Spence v. Board of Educ. of Christina School Dist., 806 F.2d at 1202 (teacher had a first amendment claim for emotional distress due to transfer in retaliation for expressing her opinions). But contrast this situation with the finding of "harassment" in Checki v. Webb, 785 F.2d 534 (5th Cir. 1986), where the court was not able to articulate the constitutional right violated by this harassment.

a similar fact situation would be tenuous at best since it is difficult to establish "punishment" when no physical activity was involved.

In *Simons v. Montgomery County Police Officers*,[148] an inmate sued his arresting officers for using excessive force to effect his arrest for a narcotics violation.[149] During the execution of a search warrant for plaintiff's residence, one officer allegedly arrived at plaintiff's bedroom door with her gun pointed and said "Don't move, police."[150] The Fourth Circuit held that "this action, entirely proper in itself, will not support an action for a tort of constitutional magnitude," and specifically held that drawing a gun while conducting a search for narcotics was not improper.[151] In other words, the action of the officer under these circumstances was reasonable.

Different facts, however, might justify a different conclusion. As already suggested, drawing a gun for a speeding infraction might be the type of action expected to cause emotional distress for most motorists and might not be a reasonable seizure. Forcing that same motorist to the ground might also be excessive and unreasonable. Of course, these are both valid police techniques that are appropriate in certain situations. The possibility nevertheless exists that the demonstration of excessive force in inappropriate situations likely to cause distress in most people could give rise to a civil rights action under Section 1983 for a fourth amendment violation. The essence, after all, of an excessive force claim is weighing the amount of force used against the need for its application.[152]

It is no revelation to state that many civil rights claims are frivolous or marginal at best,[153] and this article is not intended to encourage the filing of bogus actions.[154] Nevertheless, a claim for emotional distress under Section 1983 as a result of police misconduct does lie upon a proper set of facts. In pleading these claims the better practice, for both the court and

148. 762 F.2d 30 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 789 (1986).

149. *Id.* at 32.

150. *Id.* at 33.

151. *Id.*

152. King v. Blankenship, 636 F.2d 70 (4th Cir. 1980). "[N]o court has yet found unreasonable force that was necessary to effect an arrest." 2 W. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 23.7 (2d ed. 1984). Some courts have also held that the nature of the misconduct relates directly to the type of injuries that can be expected as a result of that conduct. "Extreme and outrageous conduct by its nature produces distress in 'normally constituted' persons against whom it is directed." Hume v. Bayer, 178 N.J. Super. 310, 319, 428 A.2d 966, 970 (1981).

153. Town of Newton v. Rumery, 107 S. Ct. 1187, 1194 (1987).

154. The author's most vivid experience was in dealing with a lawsuit by an inmate in a state prison who made a § 1983 claim, for among numerous other things, that he had incurred $200,000 damages for psychological harm because he had received his Christmas card from his sister two weeks late. White v. Bond, 720 F.2d 1002 (8th Cir. 1983) (For whatever reason, the specifics of this particular complaint were not discussed in the opinion).

the parties, appears to be, to assert and then to prove the unreasonableness of the conduct from an objective viewpoint. This protects the plaintiff from unreasonable and excessive acts, while also affording police officers some guidelines in performing their duties.[155] The due process analysis advocated by some courts presents substantial difficulties for all parties, not merely because this analysis has not actually been accepted by the Supreme Court, but because under the Supreme Court's decision in *Harlow v. Fitzgerald*,[156] the conduct of a police officer, or any other public official, is to be viewed objectively for purposes of determining qualified immunity.[157] In *Harlow*, the Supreme Court "rejected the inquiry into state of mind in favor of a wholly objective standard."[158] Thus, even mistakes in judgment by a police officer will not result in liability unless the actions violated a "clearly established" standard.[159]

Most important, the reasonableness standard requires a focus on the specific constitutional right violated. To this extent the cases denying relief for emotional distress claims offer more guidance for trial courts and litigants because they articulate the shortcomings for the claims, *i.e.*, the lack of a specified constitutional violation. To be candid, the courts finding a cause of action appear so eager to rectify what they perceive to be an injustice that they fail to either articulate the constitutional right violated or the standard for determining liability; the opinions make only vague references to the various "liberty interests" with no detectible guidelines for the lower courts to follow in litigating these claims. These cases do demonstrate, however, that the federal courts are receptive to a claim for emotional distress under Section 1983 and the Supreme Court's recent decisions leave little doubt that a well-plead, factually based claim which: 1) succinctly identifies the constitutional right violated by the actions of a police officer, 2) demonstrates that a reasonable person should know that the actions were likely to cause emotional anguish or distress, 3) demonstrates that the actions were objectively unreasonable, and 4) provides tangible evidence of emotional distress, is cognizable under Section 1983. Just as state tort actions for emotional distress are rare in relation to the number of physical injury actions, the number of civil rights actions for emotional distress will undoubtedly be few. Incorporating the common law requirement that the claims be

155. "[A]n officer told to do nothing that 'shocks the conscience' of six people to be drawn out of a jury wheel some years hence would have considerable difficulty knowing how to behave." Gumz v. Morrissette, 772 F.2d at 1395, 1404 (7th Cir. 1985).

156. 457 U.S. 800 (1982).

157. *Id.* at 818.

158. Davis v. Scherer, 468 U.S. 183, 191 (1984).

159. *Harlow*, 457 U.S. at 818.

limited to actions where the emotional distress is severe or substantial will assure that such claims do not become too numerous or frivolous.[160]

160. Once again, this will also keep these types of actions in conformity with the general policy that exists in state courts that recognizes emotional distress claims. "The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965).