

The Yale Law Journal

Volume 87, Number 3, January 1978

Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct

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In the post-Watergate era, the public has focused an increasingly critical eye on the conduct of public officials. Misconduct in high office has attracted most media attention, yet more serious problems lie at the day-to-day working levels of government, where misconduct is likely to occur more frequently and to affect more people, many of whom have no effective means of remedying its effects or preventing its recurrence. Any misuse of public authority threatens the equilibrium of a system resting so fundamentally on the consent of the governed, but the threat is most acute when the misconduct injures a citizen directly—especially if it denies him a constitutionally protected right.

Nowhere is this threat more dangerous than in the administration of criminal justice, where large numbers of society's least powerful members confront awesome governmental power. The unlawful arrest, the unjustified search, the prosecution based on evidence known to be false, the mistreatment by a jailer—all victimize the most vulnerable of the citizenry. Their individual liberty, privacy, and physical well-being are the initial casualties. Ultimately, such injuries threaten the vitality of a system of ordered liberty.

Holding law enforcers accountable to the commands of the law is an age-old challenge not yet fully met. To be sure, our legal system embodies substantive standards to curb the conduct of law-enforcement officials. But standards are not self-executing, even when endowed with the significance and permanence of explicit constitutional status. There must be effective enforcement devices to ensure the highest degree of realization of two crucial goals: deterring potential wrongdoers from violating constitutional standards and affording remedies

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that secure adequate compensation for victims of official transgressions. Here our system needs significant improvement, for acts of official misconduct are not isolated occurrences and remain a pervasive source of justified public outrage.

The arsenal for defending constitutional rights in the law enforcement process contains three basic weapons, none of which suffices to ensure compensation and deterrence. The best known, perhaps, is the "exclusionary rule." In 1961 the Supreme Court elevated the exclusionary rule to constitutional status,¹ in the hope that it would deter misconduct by removing a major incentive to overreach—the prospect of using against the accused evidence unlawfully acquired.² Undoubtedly the exclusionary rule has deterred some illegal searches and some coercive interrogations, though success in this area is not easily measured. But the available empirical evidence suggests that the rule is not an especially effective deterrent,³ and many have observed that

1. *Mapp v. Ohio*, 367 U.S. 643 (1961). The Court in *Mapp* was not in complete agreement. Justice Clark's majority opinion found the exclusionary rule "logically and constitutionally necessary" to the right of privacy protected by the Constitution. *Id.* at 656. Justice Clark was referring to the right to be free of offenses against "ordered liberty"—a right already recognized. But *Mapp* also read the exclusionary rule specifically into the Fourth Amendment, as incorporated against the states: "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments . . ." *Id.* at 657. Justice Black concurred, but with the reservation that "I am still not persuaded that the Fourth Amendment, *standing alone*, would be enough to bar the introduction against an accused of papers and effects seized from him in violation of its commands." *Id.* at 661 (emphasis added). But by viewing the Fourth Amendment together with the Fifth, Justice Black concluded that "a constitutional basis emerges which not only justifies but actually requires the exclusionary rule." *Id.* at 662. The dissent by Justice Harlan argued that the exclusionary rule is a remedy not required by the "ordered liberty" embodied in the Fourteenth Amendment. *Id.* at 678-80. Because of his view of the scope of the Fourteenth Amendment's incorporation of the Bill of Rights, however, Justice Harlan did not consider whether the Fourth Amendment, which in his view applied only to the federal government, *required* the particular remedy of exclusion. *Id.* at 678.

2. *Id.* at 656 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

3. Empirical studies of the effectiveness of the exclusionary rule are inconclusive at best. Yet one can safely assert that they fall far short of establishing that excluding illegally obtained evidence tends systematically to deter misconduct. Several studies indicate that the rule has not significantly affected police behavior and conclude that it has little if any value as a deterrent. The best-known of these studies are Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973); Spiotto, *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J. POLICE SCI. & AD. 36 (1973). Researchers more favorable to the rule have attacked these studies but concede that their own evidence is no more conclusive. See, e.g., Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974). See generally S. SCHLESINGER, *EXCLUSIONARY INJUSTICE* 50-56 (1977) (surveying major empirical studies and arguing that weight of evidence is that exclusionary rule is ineffective as deterrent); Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U.L. REV. 740 (1974) (arguing that it is virtually impossible objectively to measure

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whatever deterrence occurs may not be worth the frequent price of freeing a guilty person "because the constable has blundered."⁴ An increasingly vocal minority of the Supreme Court has mounted a vigorous attack on the exclusionary rule,⁵ and its future as a constitutional requirement is at least in doubt. In any event, even if the rule does deter some future misconduct at justifiable expense, it provides no remedy to the truly innocent victim of past misconduct.⁶

A second available weapon is the criminal prosecution of officials who wilfully deny constitutional rights.⁷ The pending prosecution of a former agent of the Federal Bureau of Investigation has refocused attention on the possible uses of this approach, but regardless of the outcome in *United States v. Kearney*,⁸ the criminal sanction will never

deterrent effect of exclusionary rule). The Supreme Court recently drew the "clear" conclusion that "[n]o empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied." *United States v. Janis*, 428 U.S. 433, 452 n.22 (1976). *See id.* at 450 n.22 (canvassing literature).

Empirical research at least raises serious doubts about the deterrent effect of the exclusionary rule, doubts that are reinforced by other considerations. The rule excludes only evidence offered at trial; hence, it directly affects only a small part of the criminal process. It does not even aim squarely at all police misconduct, which encompasses more than illegal searches and interrogations, much less at the broader problem of "official" misconduct. And, of course, as an immediate restriction, the rule affects only the prosecutor. For full discussions of these and other factors, see S. SCHLESINGER, *supra* at 56-60; Oaks, *supra* at 720-36. *See generally* Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974). Chief Justice Burger canvasses the rule's drawbacks and limitations in his well-known dissent in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 416-20 (1971).

4. *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587, *cert. denied*, 270 U.S. 657 (1926) (Cardozo, J.). That the exclusionary rule can sometimes operate to free the guilty and more often to impede their prosecution is indisputable. "Jurists and scholars uniformly have recognized that the exclusionary rule imposes a substantial cost on the societal interest in law enforcement by its proscription of what concededly is relevant evidence." *United States v. Janis*, 428 U.S. 433, 448-49 (1976) (citing *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting), and Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 429 (1974)).

5. The first and still most prominent attack is that of Chief Justice Burger in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 411 (1971) (dissenting opinion). More recent cases have refused to extend the scope of the rule and display at best a dubious endorsement of the worth of its fundamental rationale. *See Stone v. Powell*, 428 U.S. 465 (1976) (if state has allowed opportunity for full and fair litigation of Fourth Amendment claim, state prisoner cannot obtain habeas corpus relief because of violation of exclusionary rule); *United States v. Janis*, 428 U.S. 433 (1976) (evidence seized by state law enforcement officials in violation of exclusionary rule is admissible in civil proceedings by federal government); *United States v. Calandra*, 414 U.S. 338 (1974) (refusing to extend rule to grand jury proceedings).

6. The guilty person whose conviction is precluded by the exclusionary rule has, in a sense, obtained a "remedy" for the violation of his rights, although many would view the remedy as too generous to him and too costly to society to be warranted. Doubtless, he would prefer the avoidance of conviction to a more traditional compensatory remedy, but he is entitled only to an appropriate remedy, not to a preferred one.

7. 18 U.S.C. §§ 241, 242, 245 (1970).

8. *Crim. No. 77-245* (S.D.N.Y., filed Apr. 7, 1977).

have significance as a deterrent. Its use is bound to be sporadic at best. Prosecutors, who need to maintain close working relationships with law enforcement agencies, are disinclined to charge police officials with criminal conduct. Moreover, the criminal case requires not only evidence that a constitutional right was denied, but proof beyond a reasonable doubt that the wrongdoer acted with specific intent to deny such a right.⁹ This requirement, never easily met, coupled with the understandable reluctance of juries to brand as criminals those who, however misguidedly, are seeking to enforce the law, ensures that even when prosecutions are brought convictions will be rare. And, again, to whatever extent an occasional conviction promotes the public interest in maintaining standards of official observance of the law in the future, the victim of misconduct is not thereby afforded a remedy.

There remains the possibility of the civil damage remedy¹⁰—the direct claim of the victim of official wrongdoing to secure compensation for the denial of his rights. The suit can be based on common law, as with the traditional tort action for false arrest,¹¹ or on statute, as with actions specifically authorized by Congress¹² and many of the

9. *Screws v. United States*, 325 U.S. 91, 104 (1945) (plurality opinion); *cf.* *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (specific intent not required for civil liability).

10. Suits for civil damages can and often do include a prayer for injunctive relief. The injunction has great potential as a deterrent mechanism, for it can impose sweeping prospective requirements for systemic reform. Nonetheless, I view the civil damage remedy as the primary candidate for immediate and fruitful reform efforts—partly because the injunction generally follows rather than replaces an initial determination of civil liability for damages, partly because the injunction, which is best imposed upon supervisory officials as a remedy for patterns of systemic abuse, has been severely limited by *Rizzo v. Goode*, 423 U.S. 362 (1976). *Rizzo* not only held that supervisory officials cannot be found liable unless they affirmatively implement unconstitutional policies, *see id.* at 375-77, but also raised the troublesome question of federalism, *id.* at 379-80. The impact of *Rizzo* is graphically illustrated by *Lewis v. Hyland*, 554 F.2d 93 (3d Cir.), *cert. denied*, 46 U.S.L.W. 3291 (U.S. Oct. 31, 1977), which casts doubt on the availability of injunctions against supervisory officials and individual wrongdoers. *But see* *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966) (en banc). The injunction remedy may be more available to deter misconduct by prison officials than by police officials. *See, e.g.,* *Todard v. Ward*, No. 77-2095 (2d Cir. Oct. 31, 1977). *See generally* *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1227-50 (1977) [hereinafter cited as *Developments*].

The proposed amendments to S. 35, 95th Cong., 1st Sess., 123 CONG. REC. S124 (daily ed. Jan. 10, 1977), now pending in the Senate Committee on the Judiciary, would specifically authorize injunctive relief under 42 U.S.C. § 1983 (1970) against states or governmental units in the form of an order to adopt remedial measures to prevent recurrence of abuse. *See* 123 CONG. REC. S16560-61 (daily ed. Oct. 6, 1977) (amendment proposed by Sen. Mathias). For more on S. 35 and its House counterparts, see note 38 *infra*.

11. *See, e.g.,* *Dragna v. White*, 45 Cal. 2d 469, 289 P.2d 428 (1955); *Johnson v. Jackson*, 43 Ill. App. 2d 251, 193 N.E.2d 485 (1963). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 11 (4th ed. 1971).

12. 42 U.S.C. §§ 1983, 1985 (1970).

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states,¹³ or on provisions of the Constitution itself, as with an action against federal officers for Fourth Amendment violations.¹⁴

The private suit for civil damages can both compensate and deter. In the battle to restrain official misconduct, it is our most promising weapon, and of its several forms the claim authorized by federal statute can best be shaped to achieve both objectives. Obviously, the common law action could be effectively and uniformly strengthened only through legislation. The action founded directly on the Constitution encounters not only the uncertainty that its scope may be limited to violations of only the Fourth Amendment¹⁵ but also the more fundamental objection that the broad commands of the Constitution are inappropriate sources from which to infer detailed provisions for an effective cause of action. Congress has both the power and the responsibility to legislate protection for constitutional rights, and federal statutes are the logical sources of authority for effective lawsuits to remedy deprivations of federal constitutional rights.

The principal federal statute authorizing a damage suit for deprivation of constitutional rights is 42 U.S.C. § 1983. The statute permits any person injured by official conduct that violates the Constitution or a federal statute to sue the person responsible at law or in equity.¹⁶ Originally enacted as part of the Civil Rights Act of 1871,¹⁷ section 1983 lay virtually dormant for ninety years. Then, in 1961, the Supreme Court ruled that state officials could not avoid its sanctions

13. See, e.g., CAL. CIV. CODE § 52 (West Supp. 1977); ILL. ANN. STAT. ch. 38, § 13-3(b) (Smith-Hurd 1972 & Supp. 1977); MICH. COMP. LAWS ANN. § 750.147 (West 1968 & Supp. 1977-78) (treble damages liability); N.J. STAT. ANN. § 10:1-7 (West 1976) (civil and criminal liability); N.Y. CIV. RIGHTS LAW § 40-d (McKinney 1976) (same).

14. E.g., *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

15. See, e.g., *Archuleta v. Callaway*, 385 F. Supp. 384, 388 (D. Colo. 1974) (no implied cause of action against federal officials for damages resulting from denial of due process under Fifth Amendment); *Moore v. Schlesinger*, 384 F. Supp. 163, 165 (D. Colo. 1974) (same as to First Amendment); *Davidson v. Kane*, 337 F. Supp. 922, 925 (E.D. Va. 1972) (same as to Fifth Amendment). But see, e.g., *States Marine Lines, Inc. v. Schultz*, 498 F.2d 1146, 1157 (4th Cir. 1974) (implied cause of action for damages against federal officials allowed for denial of Fifth Amendment rights); *Kuczo v. Western Conn. Broadcasting Co.*, 424 F. Supp. 1325 (D. Conn. 1976), *rev'd on other grounds*, No. 77-7111 (2d Cir. Oct. 27, 1977) (same as to First Amendment); *Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064, 1088-89 (C.D. Cal. 1976) (same).

16. Section 1983 provides:

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).

17. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (1873).

by asserting that their actions were also prohibited by state law.¹⁸ The rejection of this defense and the renewed attention to the protection of civil rights during the 1960s spurred an extraordinary increase in the number of lawsuits filed under section 1983 and other civil rights statutes. The nationwide totals were 280 in 1960,¹⁹ 3985 in 1970,²⁰ and 12,213 in 1977.²¹ In the context of misconduct in the law enforcement process, the section 1983 suit is typically brought by a person arrested and later exonerated²² against state or local police officers for an unlawful arrest, an unlawful search, or the use of excessive force.

For various reasons this increased use of section 1983 has been especially evident in recent years in the Federal District Court for Connecticut, notably at the New Haven seat of court.²³ Since 1970,

18. *Monroe v. Pape*, 365 U.S. 167 (1961).

19. [1960] AD. OF. OF THE U.S. COURTS ANN. REP. 232, table C 2 (1961). Though there are no statistics on the numbers of suits filed under § 1983 alone, the statute doubtless accounts for a large proportion of the increase. A quick perusal of annotations to § 1983 strongly supports this inference. *See, e.g.*, 42 U.S.C.A. § 1983 (West 1974) (469 pages of annotations); *id.* (West Supp. 1977) (337 additional pages of annotations). *See also* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 149 (2d ed. Supp. 1977) (noting that "[t]he 'impressive flood' of § 1983 litigation . . . has, in the past five years, reached epic proportions"). It should be noted that the figure in the text does not include habeas corpus or other prisoner actions.

20. [1970] AD. OF. OF THE U.S. COURTS ANN. REP. 232, table C 2 (1971). *See also* note 19 *supra* (discussing published figures).

21. [1977] AD. OF. OF THE U.S. COURTS ANN. REP. A-14, table C 2 (1977). The 1977 *Annual Report* also gives a figure of 13,113. *See id.* at 82, table 11. Unlike those cited in notes 19 & 20 *supra*, the 1977 total for civil rights actions (excluding prisoner petitions) is broken down into categories, as follows: voting, 203; jobs, 5031; accommodations, 442; welfare, 219; other civil rights, 6318. *Id.* at A-14, table C 2. Section 1983 claims against law enforcement officials would fall within the last category.

22. If an unlawful arrest results in a valid conviction, some courts have held a damage suit under § 1983 barred either by expanded notions of collateral estoppel, *see, e.g.*, *Covington v. Cole*, 528 F.2d 1365 (5th Cir. 1976); *Watson v. Devlin*, 167 F. Supp. 638 (E.D. Mich. 1958); or by application of common law defenses, *see, e.g.*, *Pouncey v. Ryan*, 396 F. Supp. 126 (D. Conn. 1975). Neither of these approaches defeats an action for unlawful search or use of excessive force. Other courts have not invoked collateral estoppel even as to unlawful arrest claims, *see Jackson v. Official Representatives & Employees of the Los Angeles Police Dep't*, 487 F.2d 885 (9th Cir. 1973); or at least have indicated in dictum that they would not do so, *see Guerro v. Mulhearn*, 498 F.2d 1249, 1254-55 (1st Cir. 1974); *Mulligan v. Schlachter*, 389 F.2d 231, 233 (6th Cir. 1968).

23. The impetus to challenge alleged police misconduct in New Haven by means of damage suits under § 1983 appears to have developed in 1970. A seminar conducted by Professor Thomas I. Emerson at the Yale Law School explored various uses of the law to affect social policy, including litigation against the police. A student paper on this topic came to the attention of New Haven attorney John Williams. *See Harmon, Cops in the Courts*, 2 YALE REV. L. & SOC. ACT. 334 (1972). Attorney Williams' interest in this subject had been piqued earlier by attendance at the November 1970 National Conference on Police-Community Relations in Los Angeles, California, sponsored by the Law Enforcement Assistance Administration. Attorney Williams and his former partner, Michael Avery, have brought most of the § 1983 suits against police officers in New Haven, materially aided by the availability of Yale law students to assist with research.

There appears to be no reason to believe that actual or alleged misconduct by police officers in New Haven has been more extensive than what might be expected in any other city of comparable size.

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approximately 150 lawsuits have been filed alleging denials of constitutional rights by police officers. Though some of these have been withdrawn, dismissed, or settled for nominal sums, many have gone to trial. I have tried twenty-seven of these cases to a conclusion, twenty-four to a jury and three to the court.²⁴

Thinking about these cases has left me with a firm conclusion: the section 1983 damage suit has potential as an effective deterrent and compensatory remedy but must be substantially restructured to afford the injured victim a better chance of success. The lawsuit, as currently authorized by statute and limited by prevailing appellate court decisions, suffers from several shortcomings. It is a suit brought by the wrong plaintiff against the wrong defendant, subject to the wrong defenses, litigated under the wrong burden of proof, and rewarded if successful with the wrong measure of damages.

I. The Wrong Plaintiff

The plaintiff in a section 1983 suit is “the party injured,” the person who has been unlawfully arrested, against whom excessive force has been used, or whose residence has been unlawfully searched. If the misconduct is a tort, albeit one transgressing constitutional standards, the party injured is an appropriate plaintiff. But he should not be the only plaintiff. Whenever it appears that the Constitution or laws of the United States have been violated, the United States itself should be permitted to sue to redress the wrong. The United States should be authorized to intervene as a plaintiff in the victim’s lawsuit and to initiate a suit for the benefit of the victim.

Plainly the United States has an important and legitimate interest in maintaining observance of constitutional standards. At present, it can vindicate that interest only by recourse to criminal prosecution of the wrongdoer.²⁵ That avenue may be appropriate in extreme cases,²⁶ but it is both too drastic when successful and too likely to be unsuccessful to be relied on as a deterrent. The government’s use of a civil remedy would frequently be more appropriate to the harm inflicted,

24. At least one of the plaintiffs has prevailed in seven of the jury cases and one of the bench trials, indicating more likelihood of success than some might have anticipated. Generalizations about the chances of success, however, should be cautiously drawn. In many of the cases won by plaintiffs, the facts were especially aggravated, and helpful evidence sometimes came from police officers themselves.

25. 18 U.S.C. §§ 241, 242, 245 (1970).

26. *See, e.g.*, *United States v. Price*, 383 U.S. 787 (1966) (criminal prosecution for deprivation of federal rights based on killing of civil rights workers); *United States v. Guest*, 383 U.S. 745 (1966) (same, based on denial of equal accommodations to blacks).

less likely to imperil relations with state law enforcement agencies, and more likely to be successful than would a criminal prosecution.

Intervention by the United States as plaintiff when an important national standard has been transgressed is not unusual. The United States or its agencies can bring a civil action to redress violations of statutes protecting voting rights²⁷ and nondiscrimination in employment²⁸ and places of public accommodation,²⁹ and intervention is authorized in numerous similar situations.³⁰ The government has at least an equally strong interest in enforcing section 1983, a statute that prohibits transgressions of the Constitution itself.

The principal consequence of the United States' appearing as the sole or additional plaintiff in a section 1983 suit would be an increased likelihood of a jury verdict in favor of the victim. Such an increase is needed to correct the current imbalance in the jury appeal of the contending parties in the courtroom. At the defendants' table sit the police officers—well-groomed, in full uniform, and with the American flag figuratively wrapped around them and often literally displayed on their jackets. Except in those rare instances when the party injured is the white, middle-class victim of police mistake, the section 1983 plaintiff is likely to be black or Puerto Rican, poor, disheveled, a felon, and often a drug addict.

Frequently the imbalance of jury appeal is further distorted by the facts of the episode in which the alleged police misconduct occurred. Although some police misconduct is perpetrated against entirely law-abiding citizens, it frequently happens that the plaintiff's grievance arose during police efforts to apprehend him for an offense he had in fact committed. Obviously, the protections of the Constitution safeguard the guilty and innocent alike, yet knowledge of the plaintiff's criminal conduct prior to arrest often undermines a jury's impartial assessment of claims such as police brutality. The jury would view the contest in a totally different light if, instead of a young firebrand

27. *See, e.g.*, 42 U.S.C. § 1973j(d) (1970); *id.* § 1973aa-2 (1970 & Supp. V 1975); *id.* § 1973bb (Supp. V 1975).

28. 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975).

29. *Id.* § 2000a-(5)(a) (1970).

30. *See, e.g.*, 20 U.S.C. § 1709 (Supp. V 1975) (Attorney General may intervene in suits alleging denial of equal educational opportunity); 28 U.S.C. § 2403 (1970) (United States may intervene in any suit that involves constitutionality of federal statute, provided agency of government is not already party to suit); 31 U.S.C.A. § 1244(c) (West Supp. 1977) (Attorney General may intervene in private suits alleging that state or local governments have violated requirements of revenue-sharing laws); 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975) (Attorney General may intervene in suits alleging discrimination in employment); *id.* § 2000h-2 (1970 & Supp. V 1975) (same, for suits alleging violations of equal protection clause of Fourteenth Amendment).

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lawyer pleading for money for his disreputable private client, an Assistant United States Attorney were presenting, on behalf of the public, the claim that the police officer had denied the victim a right protected by the United States Constitution.

The increased likelihood of success for the victim would not only strengthen the remedy for deprivations of constitutional rights but would also enhance the deterrent effect of the suit. That suspects pose little threat of becoming attractive plaintiffs in damage actions is precisely the reason why some police officers are unlikely to observe constitutional standards in apprehending them. The prospect of a government lawsuit, with its greater chance of success, would not be lost on law enforcers familiar with courtrooms and juries.

Of course, intervention by the United States need not be obligatory. It should be within the discretion of the Department of Justice, acting through United States Attorneys in each district, to initiate or intervene in a section 1983 lawsuit whenever there is a reasonable basis to believe that public officials have violated any person's constitutional rights.³¹

II. The Wrong Defendant

The defendant in a section 1983 suit is the "person" who "under color of" state law committed the alleged deprivation of constitutional or statutory right. Typically this means a police officer. Despite the similarity of section 1983 suits to tort actions, *respondeat superior* is not available³² and the employing governmental unit is not considered a "person" within the meaning of the statute.³³ At present, therefore,

31. The "reasonable basis" standard is not intended to be an element of the Government's case, required to be proved before intervention is permitted. Certification by the United States Attorney or an appropriate official of the Department of Justice should suffice. Compare 18 U.S.C. § 6003(b) (1970), under which the United States may apply for an order granting immunity to a witness when, in the judgment of designated Department of Justice officials, the testimony may be necessary to safeguard the public interest. The Justice Department's determination is essentially nonreviewable. See *United States v. Hathaway*, 534 F.2d 386, 402 (1st Cir. 1976); *United States v. Leyva*, 513 F.2d 774, 776 (5th Cir. 1975); *In re Kilgo*, 484 F.2d 1215, 1221 (4th Cir. 1973).

32. See *Arroyo v. Schaefer*, 548 F.2d 47, 51 (2d Cir. 1977); *Johnson v. Glick*, 481 F.2d 1028, 1034 (2d Cir. 1973); *Adams v. Pate*, 445 F.2d 105, 107 n.2 (7th Cir. 1971); *Dunham v. Crosby*, 435 F.2d 1177, 1180 (1st Cir. 1970) (dictum). But see *Carter v. Carlson*, 447 F.2d 358, 370 n.39 (D.C. Cir. 1971), *rev'd on other grounds*, 409 U.S. 418 (1973); *Hesselgesser v. Reilly*, 440 F.2d 901 (9th Cir. 1971).

33. *Monroe v. Pape*, 365 U.S. 167 (1961), held that municipalities are not "persons" within the meaning of § 1983. *City of Kenosha v. Bruno*, 412 U.S. 507 (1973), made clear that this was true in actions for equitable relief as well as for damages (as in *Monroe*). Both decisions relied heavily upon the legislative history of § 1983. The Court's interpretation

liability can be imposed only upon the individuals who commit or cause the misconduct.³⁴

Placing liability on the immediate wrongdoer has strong superficial appeal. But the objectives of compensating the victim and deterring misconduct would be met more frequently if the defendant were the wrongdoer's employer—either the appropriate unit of government or the governmental agency. In addition, the statute should be broadened to include misconduct by federal as well as state officers and hence to impose liability on the federal government or its agencies as well as on the governments or agencies of states and municipalities.³⁵

The chances of compensating the victim decrease markedly when the defendant is the individual police officer. A jury understandably succumbs easily to the argument, stated or implied, that recovery should be denied because the damages must come from the paycheck of a hard-working, underpaid police officer. If the officer is judgment proof, neither compensation nor substantial deterrence is likely to result, even when the plaintiff wins. Ironically, those jurisdictions that provide indemnification for the police officer do little to make the lawsuit more effective. Actually, where indemnification is available, the present system of suing only the individual wrongdoer combines the worst of both worlds. The jurors, not informed of indemnification, think the officer will personally have to pay any damages awarded, so

of that history, however, has been termed "highly questionable," the history itself "[a]t best . . . ambiguous." *Developments, supra* note 10, at 1192.

Townships, counties, and most municipal agencies are immune from § 1983 liability under the doctrine established by *Monroe* and *Kenosha*. For a useful collection of cases, see *id.* at 1194-95 nn.31-36. Most pertinent, perhaps, to the present discussion is *United States ex rel. Lee v. People of the State of Illinois*, 343 F.2d 120 (7th Cir. 1965), which held that a city police department was not a "person" for purposes of § 1983.

Several cases have suggested that this immunity for municipalities implies an analogous immunity for the states. See, e.g., *United States ex rel. Gittlemacher v. County of Philadelphia*, 413 F.2d 84, 86 n.2 (3d Cir. 1969), *cert. denied*, 396 U.S. 1046 (1970) (this conclusion termed "inescapable"). The most important consideration with respect to state liability for damages, however, is the Eleventh Amendment, though this barrier too could easily be overcome by congressional action. See pp. 457-58 & notes 37-39 *infra*.

34. See, e.g., *Rizzo v. Goode*, 423 U.S. 362, 373-76 (1975); *Duchesne v. Sugarman*, No. 76-7475 (2d Cir. Sept. 28, 1977), slip op. at 6131.

35. The 1975 amendments to the Federal Tort Claims Act, 28 U.S.C. § 2680 (Supp. V 1975), provide a mechanism for private citizens to bring tort actions against the United States for certain acts by federal law enforcement or investigative officials. But the amendments are not tailored to all the problems of police misconduct, even though they do authorize actions for false arrest and assault. Moreover, the context of tort law is an inappropriate one for the adjudication of constitutional claims. See pp. 461-62 & note 59 *infra*. It would seem more fitting to restructure § 1983 as the primary vehicle for all such actions, thereby providing a single point of reference for judicial interpretation and development. From the standpoint of increasing the plaintiff's chances of success, though, there may be merit in preserving the remedy offered by the Tort Claims Act for misconduct by federal law enforcement agents, since the statutory claim against the United States is not subject to trial by jury, 28 U.S.C. § 2402 (1970).

they tend to find for defendants and, when damages are awarded, to keep the amount at a modest level. Yet the defendant is not deterred from wrongdoing by the prospect of paying damages, for he knows that any damage award will be covered by municipal indemnification.

Providing for suit directly against the employing department or unit of government would accomplish more than simply informing the jury of a deeper pocket. It would enhance the prospects for deterrence by placing responsibility for the denial of constitutional rights on the entity with the capacity to take vigorous action to avoid recurrence. Police agencies and governments should be forced to assume responsibility for minimizing instances of official misconduct. Placing the burden of damage awards for constitutional wrongs directly upon them would afford a useful incentive to monitor the performance of their employees, to insist on observance of constitutional standards, and to exercise appropriate internal discipline when misconduct occurs.³⁶

There are obvious potential obstacles to this reform. Actions against states will face the defense of the Eleventh Amendment. The Supreme Court has ruled, however, that when Congress enforces the commands of the Fourteenth Amendment, it has constitutional authority to impose liability that the Eleventh Amendment would otherwise preclude.³⁷ That decision was made in the context of racial discrimination, a core concept of the Fourteenth Amendment. Whether it applies to congressional efforts to enforce the Fourteenth Amendment's incorporation of the Bill of Rights remains to be seen. Surely the theory is sufficiently plausible to justify a congressional attempt.³⁸ Of course,

36. Because the police often feel a sense of professional solidarity and isolation, *see, e.g.,* J. SKOLNICK, *JUSTICE WITHOUT TRIAL* 52-53, 59 (2d ed. 1975), professional norms may override the effect of legal rules. *See* Oaks, *supra* note 3, at 727. In addition, police may not be familiar with or fully understand some of the esoteric legal rules that supposedly influence their conduct. Enforcement of the exclusionary rule, for instance, which places immediate controls on the prosecutor seeking to introduce evidence rather than on the policeman collecting it, has been hampered because the legal rules that are applied when the prosecutor seeks to introduce evidence generally are not effectively communicated to police officers. *Id.* at 726, 730. *See* also sources cited in final paragraph of note 3 *supra*.

37. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976). For further discussion of the Eleventh Amendment problem, *see Developments, supra* note 10, at 1195-97.

38. Indeed, Congress now has before it the proposed Civil Rights Improvements Act of 1977, which would amend § 1983 to permit suits against state and local governments under certain limited circumstances. The Senate version of the bill is S. 35, 95th Cong., 1st Sess., 123 CONG. REC. S124 (daily ed. Jan. 10, 1977), now pending in the Committee on the Judiciary. House versions, all identical in substance to S. 35, abound and are likewise pending in the House Judiciary Committee. *See* H.R. 7520, 95th Cong., 1st Sess., 123 CONG. REC. H5257 (daily ed. June 1, 1977); H.R. 6677, 95th Cong., 1st Sess., 123 CONG. REC. H3708 (daily ed. Apr. 27, 1977); H.R. 6151, 95th Cong., 1st Sess., 123 CONG. REC. H3181 (daily ed. Apr. 6, 1977); H.R. 5535, 95th Cong., 1st Sess., 123 CONG. REC. H2547 (daily ed. Mar. 23, 1977); H.R. 4514, 95th Cong., 1st Sess., 123 CONG. REC. H1756 (daily ed. Mar. 4, 1977); H.R. 549, 95th Cong., 1st Sess., 123 CONG. REC. H195 (daily ed. Jan. 6, 1977). The bill, however, would impose liability upon states, local governments, and their

if the United States itself were bringing the action, the problem of sovereign immunity would vanish.³⁹

Imposing liability upon the federal government presents no problem of sovereign immunity; Congress clearly can consent to such suits. A different problem emerges, however, if the United States is permitted to initiate or intervene in section 1983 litigation against federal officials. If the wrongdoer were an agent of the Federal Bureau of Investigation, for example, the case caption *United States v. FBI* would suggest an issue as to the requisite adversity of the parties. This problem could readily be solved by creating within the executive branch a special office empowered to bring suit against the federal wrongdoer's employing agency. Analogous are the authority of the Equal Employment Opportunity Commission to sue agencies of the federal government that discriminate in employment⁴⁰ and the recently upheld power of the Watergate Special Prosecutor to bring an action against the President.⁴¹

III. The Wrong Defenses

Two types of defenses are currently available to defendants sued for damages under section 1983. Most defendants, from governors⁴² to policemen,⁴³ are entitled to the defense of good faith. A few de-

agencies for constitutional deprivations by their employees only if (1) a superior officer directed or approved the wrongful action by the employee, or failed to remedy a pattern of wrongful action by the employee, or (2) an unidentified employee denied protected rights by grossly negligent conduct. Arguably, the bill would also impose liability on governments or agencies for their wrongful corporate acts, *i.e.*, those taken by official agency action without regard to wrongdoing by any individual employees. *Cf. Gentile v. Wallen*, No. 77-7093, slip op. at 5952 (2d Cir. Sept. 15, 1977) (claim against board of education "in its corporate capacity" states cause of action under Fourteenth Amendment, despite fact that board of education is not "person" within meaning of § 1983).

Amendments to clarify the substance of S. 35 were introduced in early October. *See* 123 CONG. REC. S16560-61 (daily ed. Oct. 6, 1977). Initial hearings on the bill, originally scheduled for October 28-29, 1977, were postponed; full hearings are now scheduled for February 1978. The hearings will afford an opportunity for the Senate Committee to consider correcting the basic deficiency in the bill as proposed, by eliminating the role of a supervisory official as a prerequisite to the cause of action and imposing liability on governmental agencies whenever any law enforcement official has denied someone a federally protected right.

39. The Eleventh Amendment does not bar suits against a state when the United States is a plaintiff. *See, e.g., United States v. Mississippi*, 380 U.S. 128, 140 (1965).

40. 42 U.S.C. § 2000e-16 (1970).

41. *United States v. Nixon*, 418 U.S. 683, 692-97 (1974).

42. *Scheuer v. Rhodes*, 416 U.S. 232 (1973).

43. *See, e.g., Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972) (federal law enforcement officials); *Fowler v. Alexander*, 340 F. Supp. 168, 171 (M.D.N.C. 1972), *aff'd*, 478 F.2d 694 (4th Cir. 1973) ("conditional and partial" immunity for local police officers acting in good faith).

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endants, notably judges⁴⁴ and prosecutors,⁴⁵ enjoy an absolute immunity from suit. Whatever the merits of either defense—and the case for the good faith defense is the more doubtful—the imposition of liability upon the wrongdoer's employer would make it entirely appropriate to eliminate both defenses.

A. *The Good Faith Defense*⁴⁶

The good faith defense was imported into section 1983 rather casually from the common law, has been extended uncritically, and operates in practice at best to create confusion and at worst to defeat legitimate claims. In 1961, in *Monroe v. Pape*,⁴⁷ the Supreme Court, construing section 1983 to impose liability without the element of wilfulness, observed that the statute “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.”⁴⁸ Six years later, in *Pierson v. Ray*,⁴⁹ this “background of tort liability,” previously invoked to impose liability, was held to include as a *defense* to liability the common law defense of good faith and probable cause when damages are sought from a police officer because of an arrest. In *Pierson* the arrest was challenged not for lack of probable cause, but because the statute pursuant to which the arrest occurred had later been declared unconstitutional. Thus “good faith” in the context of *Pierson* meant only reliance on a duly enacted statute.

The leading decision giving further content to the phrase “good faith” in the more typical situation of an arrest challenged for lack of probable cause is the Second Circuit decision in *Bivens v. Six Unknown Federal Narcotics Agents*⁵⁰ on remand from the Supreme Court.⁵¹ Though *Bivens* involved a cause of action against federal agents predicated directly on the Fourth Amendment, the Court of Appeals' decision held that the federal agents were entitled to the same

44. *Pierson v. Ray*, 386 U.S. 547 (1967).

45. *Imbler v. Pachtman*, 424 U.S. 409 (1976). *But cf.* *Briggs v. Goodwin*, No. 75-1578 (D.C. Cir. Sept. 21, 1977), summarized in 22 CRIM. L. REP. (BNA) 2001 (Oct. 5, 1977) (prosecutor charged with perjury incident to grand jury proceedings not protected by *Imbler*, which limits immunity to prosecutors' exercise of discretion in conducting criminal cases; *Imbler* does not extend to “investigative” or “administrative” action by prosecutors).

46. See generally *Developments, supra* note 10, at 1209-17; *id.* (citing sources).

47. 365 U.S. 167 (1961).

48. *Id.* at 187.

49. 386 U.S. 547 (1967).

50. 456 F.2d 1339 (2d Cir. 1972).

51. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

defense available to state police officials under section 1983.⁵² Explicitly relying on *Pierson*, the Second Circuit held that the officer has a defense when he establishes both good faith and a reasonable belief in the validity of the arrest. As explained by Judge Medina, the defense has both a subjective and an objective element. The officer must prove "that he believed, in good faith, that his conduct was lawful" and "that his belief was reasonable."⁵³ Undoubtedly this "objective" component was added to ensure that an officer could not defeat recovery solely by believing in the propriety of his actions, a result that would correlate the success of the defense with the callousness of the wrongdoer.

But however well-intentioned this second ingredient of the good faith defense, it involves nearly circular reasoning that promotes confusion and sometimes defeats meritorious claims. For example, the victim's cause of action for an arrest in violation of his Fourth Amendment rights requires an arrest without probable cause.⁵⁴ To make out his case, the plaintiff must establish that a reasonably prudent police officer, under all the circumstances, would not have had probable cause to believe that he had committed a crime.⁵⁵ Then, under *Bivens*, the officer still has a defense if he acted in good faith and has a reasonable belief in the validity of his action, that is, if he reasonably believed that he did have probable cause. But if the plaintiff's own case requires him to show an arrest that was not reasonably based on probable cause, what does the defense mean? Surely the officer could not *reasonably* believe that there was probable cause for an unlawful arrest, for an unlawful arrest is by definition an arrest for which a prudent police officer could not reasonably believe there was probable cause.

The anomaly of the good faith defense is equally apparent when the victim alleges the use of excessive force. To establish his cause of action, the victim must prove the use of more force than was reasonably necessary under the circumstances.⁵⁶ Once that is shown, how can the officer have a *reasonable* belief that he used only necessary force?

Judge Lumbard's concurring opinion in *Bivens* endeavors to dispel the apparent circularity of the good faith defense. In the context of unlawful arrest claims, he distinguishes between two aspects of reasonableness. The first, which is presumably part of the plaintiff's case, is

52. 456 F.2d at 1346-47.

53. *Id.* at 1348.

54. *See, e.g.*, *Gerstein v. Pugh*, 420 U.S. 103, 111-16 (1975).

55. The Supreme Court set out the elements of probable cause in *Henry v. United States*, 361 U.S. 98, 100-02 (1959).

56. *See, e.g.*, *Williams v. Liberty*, 461 F.2d 325, 328 (7th Cir. 1972).

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“reasonableness for purposes of defining probable cause under the fourth amendment.”⁵⁷ The second, presumably part of the officer’s defense, is “the less stringent reasonable man standard of the tort action against governmental agents.”⁵⁸

Even if these aspects of reasonableness are truly different, it is unrealistic to suppose that trial judges will successfully articulate the elusive distinction to the juries who must apply these concepts, much less that juries, hearing even the most learned charge, will possibly grasp the distinction. The jurors are told that, even if the plaintiff proves that an officer lacked probable cause by showing that he could not have had a reasonable belief that the plaintiff had committed a crime, the officer nonetheless has a defense if he acted in good faith and reasonably believed that he did have probable cause. To make sense of such instructions, jurors inevitably focus, I suspect, on the only element of the defense that is comprehensible—the subjective good faith of the officer. Thus the practical vice of the defense in many cases is to leave the victim without a remedy whenever the officer persuades the jury that he thought he had the right to arrest.

Even if the employing department or jurisdiction does not replace the police officer as a defendant, the good faith defense, imported into section 1983 through unwarranted borrowing from the common law, should be abolished. The initial step taken in *Monroe* and extended in *Pierson* and *Bivens* should be reexamined. Why should section 1983 be read against the background of common law tort liability, especially common law tort defenses? This is a statute passed by Congress to provide a remedy for the deprivation of constitutional rights. When such a right is denied, the victim is entitled to compensation and the public is entitled to the deterrent effect of his receiving compensation. Common law notions, heavily influenced by the concept of fault, simply have no place in the attainment of these important results.⁵⁹

57. 456 F.2d at 1348 (concurring opinion).

58. *Id.* at 1348-49 (concurring opinion).

59. This is not a new argument. Justice Harlan, concurring in *Monroe*, objected to the importation of tort law and argued that the deprivation of constitutional rights is more serious than a common law tort committed by a state official and that state remedies based on common law tort concepts are thus not fully appropriate in the context of constitutional claims. 365 U.S. at 196 n.5. Chief Justice Burger, in his *Bivens* dissent, advocated that Congress establish a mechanism for such civil damage suits similar to the Federal Tort Claims Act and suggested specific elements that such a mechanism should incorporate—among them the abolition of sovereign immunity, which I suggest here. 403 U.S. at 422-23.

The argument that the common law of torts should not be applied to constitutional claims against state officials has a strong theoretical basis. State officials are clothed with the state’s authority; their ability to invoke that authority makes it more difficult to curb their tortious conduct. In short, the state official has a status quite different from

This is not to suggest that either the Constitution or section 1983 establishes strict liability, in the sense of an entitlement to compensation whenever injury is sustained. The standards of the Constitution, notably those of the Fourth Amendment, already contain a sufficient element of reasonableness to avoid any possibility that law enforcement officers will become guarantors of the liberty or well-being of those they apprehend. But these standards, however flexible, should be enforced on their own terms, without further dilution by common law defenses that evolved under a jurisprudence primarily concerned with adjusting disputes between private individuals. Constitutional standards, designed to limit governmental authority over citizens, serve a more important function. If imposition of personal liability upon the wrongdoer is thought to have consequences adverse to the proper discharge of his public functions, society can either reimburse the wrongdoer or shift liability to his employer, rather than deny a remedy to the victim. His constitutional rights are just as impaired and the injury he suffers just as serious regardless of the good faith of the wrongdoer.

B. *Absolute Immunity*⁶⁰

The absolute immunity of judges and prosecutors finds its rationale in the need to maintain the unfettered performance of duty by these officials. Without immunity, it is argued, a judicial official would be subjected to a barrage of litigation, the defense of which would interfere with his duties.⁶¹ Moreover, the official might hesitate to discharge his responsibilities fearlessly or even to accept the responsibilities of office in the first place if he knew that he would be subjected to personal liability whenever a jury concluded, rightly or wrongly, that his actions had denied someone a protected right.⁶²

that of a private citizen. Legal controls more powerful than those of the common law of torts and more appropriate to the official's status should control. If one assumes that rights established by the Constitution are more "important" than other rights protected by the common law, the argument takes on even greater force. Cf. Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 32-33 (1974) (tort concepts may provide helpful analogies but should not be determinative of liability under § 1983, which serves different purposes and implicates different interests).

60. See generally *Developments*, *supra* note 10, at 1197-1204 (questioning soundness of rationales for absolute immunity); *id.* (citing sources).

61. See, e.g., *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 349 (1871); Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 270-74 (1937); Note, *The Doctrine of Official Immunity under the Civil Rights Acts*, 68 HARV. L. REV. 1229, 1236-38 (1955).

62. See, e.g., *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347-48 (1871); Jennings, *supra* note 61, at 271; Note, *supra* note 61, at 1236-38. Cf. *Developments*, *supra* note 10, at 1202 (pointing out that "this rationale would logically

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Shifting defense of the action and liability from the alleged wrongdoer to the employing agency or jurisdiction largely blunts the force of these contentions. Obviously, the fear of personal liability would be totally removed. There would remain some risk of interruption of duty because of litigation, but the official would be at most a witness, and his testimony would not invariably be needed. Those instances, for example, in which a judge's actions have allegedly denied someone a constitutionally protected right are generally a matter of record in the proceedings before the judge.

Abolishing these immunities in conjunction with imposing liability on the appropriate government or agency would further the goal of deterrence as well as eliminate bars to obtaining compensation, for increased visibility would attend the adjudication of a victim's claim. Unconstitutional action by a prosecutor or judge that occurs during a criminal prosecution of the victim is too easily perceived as a trial "error," even as a "technicality." If an independent proceeding were used to force the judicial department or the state to compensate the victim, the significance and legitimacy of a claim based on denial of a constitutional right might well be more widely understood and more fully appreciated, and greater public pressure to discipline wrongdoers and prevent recurrence of abuse might result.

IV. The Wrong Burden of Proof

The burden of proof in an action under section 1983 is on the plaintiff, at least to establish that a denial of his constitutional rights has occurred.⁶³ The defendant bears the burden of establishing the good faith defense.⁶⁴ This traditional allocation of burdens of proof seems unexceptional, but the apparent appropriateness stems from the analogy to tort law and should not be transferred automatically to suits that seek to vindicate denials of constitutional rights. Shifting at least part of the current burden to the defendant would comport with the criminal law standard, which often requires that the government, when proceeding against a person arrested or searched, bear the burden

support an absolute immunity for all governmental decisionmakers vested with discretion—a result which would wholly and impermissibly undermine the section 1983 damage action”).

63. *Beaumont v. Morgan*, 427 F.2d 667, 670-71 (1st Cir. 1970) (placing on plaintiff “burden of showing both that . . . defendants acted under color of state law and that they deprived her of federally protected rights” and holding plaintiff to strict evidentiary standards). *But cf.* *Martin v. Duffie*, 463 F.2d 464 (10th Cir. 1972) (plaintiff need only establish prima facie case of illegal arrest; burden of justification then shifts to defendant).

64. *McCray v. Burrell*, 516 F.2d 357 (4th Cir. 1975) (en banc).

of justifying interferences with liberty or property. And some shift in the burden might help improve the victim's chances for recovery.

As a claimant for damages, the plaintiff appropriately carries the burden of proving that he was denied his liberty by being arrested or subjected to the use of force. But once that showing has been made, he should not be saddled with the further burden of proving that the intrusion was unwarranted. The defendant has access to the facts that allegedly justify his action and clearly should shoulder at least the burden of going forward with such evidence. Assigning to the defendant the burden of persuasion as well would often obviate the need for the plaintiff to prove a negative—that an arrest was not made with probable cause.

Whether forcing the defendant to justify the challenged governmental action would enhance the plaintiff's chances of winning is far from certain. But it might. The plaintiff's and defendant's versions of the challenged episode typically create a sharp dispute of fact. Rarely does the jury hear any evidence other than the testimony of the principals, for few arrests, searches, or uses of force occur in the presence of disinterested witnesses. With the plaintiff bearing the burden of proving not only that action was taken against him but also that the action was unconstitutional, a jury can too easily resolve its inability to decide who is telling the truth simply by concluding that the case is a 50-50 proposition, in which event the plaintiff loses. In close cases it is understandable, if not inevitable, that the testimony of public officials will frequently be credited over that of the disreputable people who often are plaintiffs in section 1983 suits. Nonetheless, the suggested shift in burden of proof might affect a few outcomes and would at least make the jury take a harder look at issues of credibility in the many cases involving evidence that offers very little from which to choose.

V. The Wrong Measure of Damages

The successful plaintiff in a section 1983 action is entitled to compensatory damages⁶⁵ and, in aggravated cases, to punitive damages.⁶⁶

65. *See, e.g.*, *Linn v. Garcia*, 531 F.2d 855 (8th Cir. 1976); *Stengel v. Belcher*, 522 F.2d 438 (6th Cir. 1975); *Palmer v. Hall*, 517 F.2d 705 (5th Cir. 1975); *Clark v. Ziedonis*, 513 F.2d 79 (7th Cir. 1975).

66. *See, e.g.*, *Stengel v. Belcher*, 522 F.2d 438, 444 (6th Cir. 1975) (defendant, who had received only minor injuries, shot victims at close range, killing two and maiming third); *Palmer v. Hall*, 517 F.2d 705, 707 (5th Cir. 1975) (plaintiff shot in back by defendant).

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Like any injured plaintiff, the victim of a deprivation of constitutional rights is entitled to damages that fairly and reasonably compensate him for the actual losses he has suffered. In the case of a wrongful arrest, compensatory damages can be awarded for lost wages, bail fees, and attorneys' fees for defense of the criminal charge. And some value should be ascribed to the time wrongfully spent in custody. Wholly apart from actual losses, some courts have approved damage awards that include a sum reflecting the value of having one's constitutional right denied.⁶⁷ But except in the rare case in which a successful plaintiff recovers a substantial award for serious injuries inflicted by excessive force, cases of illegal arrests and searches, even when successful, generally result in very modest awards. When jurors learn that a plaintiff has been in prison, as they frequently do when his credibility is attacked by prior convictions, it is not unusual for them to value a few days of his life in jail at a figure as low as \$500.⁶⁸ A few hours in jail has been priced at \$100.⁶⁹

Inadequate awards defeat both the compensatory and deterrent objectives of a section 1983 damage suit. The lack of adequate compensation not only provides paltry monetary incentive to sue but also adds a final indignity to the denial of constitutional rights—the assessment by the judge or jury that the victim's rights were not worth much anyway. And low awards, whether borne by defendants or by their employers, obviously provide scant incentive to refrain from similar abuses in the future.

Both the remedial and the deterrent purposes of official misconduct litigation would be enhanced by providing, in addition to compensatory damages for actual losses, a liquidated damage sum to compensate for the value of the constitutional right denied. The sum could be a constant amount or could vary according to a schedule for different violations and different consequences. Any deprivation of a constitutional right should be valued at not less than \$1,000; any time wrongfully spent in jail, no matter how brief, should be valued at not less than \$2,500. As with treble damages in an antitrust suit,⁷⁰ it would be advisable not to inform the jurors that this liquidated damage element would be added to any sum they might award for actual losses.

67. *See, e.g.,* *Basista v. Weir*, 340 F.2d 74, 88 (3d Cir. 1965); *Manfredonia v. Barry*, 401 F. Supp. 762, 772 (E.D.N.Y. 1975).

68. *See, e.g.,* *Gray v. DiLieto*, Civ. No. 14,640 (D. Conn. Apr. 22, 1976).

69. *Tatum v. Morton*, 386 F. Supp. 1308, 1313-14 (D.D.C. 1974).

70. *Pollock & Riley, Inc. v. Pearl Brewing Co.*, 498 F.2d 1240 (5th Cir. 1974).

Conclusion

The combined effect of these proposed changes would make section 1983 a formidable weapon in the continuing battle to promote observance of constitutional rights in the enforcement of criminal law. More victims would become plaintiffs; more plaintiffs would prevail; and instances of misconduct would likely decrease, for the greater number of successful suits and the prospect of governmental liability would combine to form a realistic deterrent to future misconduct.

An effective damage remedy would be more appropriate than the rarely used criminal sanction and far preferable to the all too frequently used "remedy" of the exclusionary rule. Ironically, the exclusionary rule is often a remedy only for the guilty. The criminal can expect to avoid a deserved conviction if he can sufficiently relate the deprivation of his rights to the case against him. Although an occasional innocent victim of a denial of rights might use the exclusionary rule to avoid an unjustified conviction, too often his only remedy is the suit for damages, limited or blocked entirely by currently available defenses. Indeed, the deterrent effect of a revitalized damage action might even become a persuasive reason for modifying the current strictures of the exclusionary rule. Instead of the criminal going free because the constable has blundered, the constable's employer would respond in damages for the wrong done. Some wrongs might still vitiate valid convictions, but a more meaningful damage remedy and a less rigid exclusionary rule might better protect both citizens' rights and public safety.

In 1976 Congress took a modest step toward recognizing the importance of section 1983 damage actions.⁷¹ The provision for an award of attorneys' fees to the prevailing party (if limited to prevailing plaintiffs) may spur increased resort to the damage action as a means of seeking redress for the deprivation of constitutional rights. But more fundamental changes are needed in the structure of the section 1983 lawsuit. It has frequently been observed that the mark of a civilization is the procedure by which it enforces its criminal law. Equally revealing of the depth of a society's commitment to its constitutional principles is the procedure it authorizes when constitutional standards have been violated. Section 1983 can be a significant bulwark in the protection of constitutional rights. More than 100 years after the statute's

71. Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (amending 42 U.S.C. § 1988 (1970)).

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enactment, the time has come for Congress to give serious consideration to its thorough revision.⁷²

72. Whether the changes I recommend would be appropriate in contexts other than the law enforcement process is a question beyond the scope of this article. With this caveat, I offer an illustration of how the statute could be amended (new matter italicized):

The employing department or unit of government of [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of the United States or 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. The United States shall be entitled to intervene in any such action on behalf of the plaintiff or to bring such action on behalf of the party injured. In any suit brought pursuant to this statute, immunities and defenses available at common law, including the defense of good faith, are abolished. To establish liability, the plaintiff need establish by a preponderance of the evidence only that adverse action was taken against the party injured; liability can be defeated when the defendant establishes by a preponderance of the evidence that the adverse action taken against the party injured was lawful. Whenever a verdict is returned in favor of the party injured in a suit under this statute, the Court shall award, in addition to compensatory damages determined by the trier of fact, a sum of \$ as liquidated damages for the denial of a federally protected right.