THE CASE AGAINST IMPROPER MOTIVE AND CIVIL IMMUNITY OF POLICE

William Whirl was arrested on suspicion of felony-theft in September 1962 and booked in the Harris County, Texas jail. He was indicted by the Grand Jury on two felony counts. On November 9, 1962, the District Attorney of Harris County moved by *nolle prosequi* to dismiss the indictment on the basis that the prosecution had insufficient evidence on which to obtain and sustain a conviction. The court approved the dismissal of the indictment against Whirl and an order of dismissal was dispatched to the jail. For some unknown reason, the jailer never received notice of the dismissal, and Whirl was forced to extend his stay in Sheriff Kern's hostelry for an additional eight plus months. Upon his release, Whirl brought an action against the Sheriff of Harris County, C.V. (Buster) Kern, claiming deprivation of civil rights under Title 42 of the United States Code, section 1983, and for false imprisonment under Texas law. The Federal District Court for the Southern District of Texas, found for defendant Kern and on appeal the Fifth Circuit reversed in favor of plaintiff Whirl. The Fifth Circuit's reversal was based on their conclusion that a cognizagle claim under section 1983 only need show that defendant acted under color of law and that as a result, the plaintiff was deprived of his civil rights. The court heard but refuted defendant's claim that to recover, plaintiff must show that defendant's act was improperly motivated. Sheriff Kern's claim that plaintiff's continued detention was privileged by good faith was not considered an adequate defense, as common law tort principles of false imprisonment do not recognize an unlawful detention as privileged even where good faith is evidenced. *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1969).[1]

The purpose of this comment is: (1) to discuss the significance of improper motive or reprehensible conduct as applied to section 1983 and the exclusion of improper motive from the substantive law; (2) to examine the defenses under section 1983 applicable to false arrest and false imprisonment; (3) to survey some of the policy reasons behind the extension and limitation of civil liability of police.

1. Certiorari was denied, 38 U.S.L.W. 3173.

I. Judicial Rejection of Improper Motive Under 42 U.S.C. § 1983

To bring a claim under 42 U.S.C. § 1983[2] for a false imprisonment effected under color of state law, plaintiff must plead that (1) defendant's acts were committed under color of state law, statute, ordinance, custom or usage and, (2) as a result of such conduct, plaintiff was deprived of rights secured by the Constitution and laws of the United States. 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.

The most significant case in interpreting federal jurisdictional requirements for a claim under section 1983 based on false arrest or imprisonment is *Monroe v. Pape*.[3] The fact situation in *Monroe* is analagous to *Whirl* and is fairly typical of section 1983 false arrest or imprisonment claims. Monroe's home was invaded early one morning by Chicago police while the household was sleeping. The police entered and forced the Monroes to stand naked in the living room, while the officers searched the premises. The police then arrested Monroe and detained him at the police station for ten hours on open charges while they questioned him concerning a murder which had occurred two days prior to his arrest. The police had obtained neither a search warrant nor an arrest warrant and never brought Monroe before a magistrate for arraignment. He was subsequently released without any formal charges ever being filed.[4] The principal importance of *Monroe* is that no other requirements were read into the statute and that it was applied as stated. The Court was careful to note that

2. *See* Monroe v. Pape, 365 U.S. 167, 171-83 (1961) for a detailed analysis of the legislative history of 1983.

3. 365 U.S. 167 (1961).

4. *Id.* at 181-87. The court approves the interpretation of "under color of law" set forth in a prior decision: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." United States v. Classic, 313 U.S. 299, 326 (1941).

"wilfully" did not appear in section 1983 and that any "gloss" should not be added to the statute's meaning.[5] To the contrary, Justice Douglas's thrust was to read section 1983 "against the background of tort liability that makes a man responsible for the natural consequences of his actions."[6] It is perhaps unfortunate that *Whirl* cited some courts as having held that the Civil Rights Act is *limited* to reprehensible conduct.[7] With one exception,[8] such a holding is not the law today.

In spite of the clear wording of the statute and its application by *Monroe* and subsequent decisions, some of the federal circuits have read into section 1983 the added requisite that the actor must have had an improper motive or his act must reflect reprehensible conduct. "The formulae suggested at times for distinguishing causes of action which are cognizable in federal courts from those which are not have usually required for a federal cause of action facts indicating flagrancy or an improper motive."[9] The strongest supporter of the reprehensible conduct prerequisite is the Sixth Circuit. "This statute (1983) is aimed at reprehensible action on the part of the defendant in the civil action authorized by it."[10] Such an uncodified requirement has been supported in the past by a few federal district courts for the Southern District of California and by the Seventh Circuit.[11] The strongest judicial support for the reprehensible conduct doctrine in the California district courts is *Beauregard v. Wingard*.[12]

The court in *Beauregard* cites numerous cases which would restrict tort liability to instances of "misuse"[13] of power or where "bad"[14] motive is apparent. However, the court did not decide or hold that reprehensible conduct would be required for plaintiff's claim to gain federal jurisdiction under section 1983. "We do not decide in this opinion, nor have we need to decide, whether the bare allegations defendants mention are sufficient to plead a cause

5. 365 U.S. at 187.

6. *Id.*

7. 407 F.2d at 787.

8. Striker v. Pancher, 317 F.2d 780, 784 (6th Cir. 1962

9. Joseph v. Rowlen, 402 F.2d 367, 369 (7th Cir. 1968).

10. Striker v. Pancher, 317 F.2d 780, 784 (6th Cir. 1963).

11. Stift v. Lynch, 267 F.2d 237, 240 (7th Cir. 1959). Note that this case is a pre-*Monroe* decision.

12. 230 F. Supp. 167 (S.C. Cal. 1964).

13. United States v. Classic, 313 U.S. 229, 326 (1941).

14. Gager v. Bob Seidel, 300 F.2d 727, 732 (D.C. Cir. 1962).

of action within 42 U.S.C.A. 1983 . . . ."[15] Instead the court discussed reprehensible conduct as being relative to plaintiff's ability to recover after federal jurisdiction had been attained. "There is no question that an arrest by State officers without warrant, without probable cause, not with a purpose of enforcing the law, but *with an ulterior motive*, is an arrest without due process."[16] In essence, the court was weighing defendant's motive with his actions to see if the arrest was in fact privileged by probable cause. Thus *Beauregard* did not seek to establish a third prerequisite to section 1983 jurisdiction, but instead used reprehensible conduct as a factor in determining whether the arresting officer had probable cause to make the arrest. The court held that probable cause would be recognized in cases where the arrest had occurred due to the officer's "honest misunderstanding of the law."[17] Probable cause would not exist where the arrest was made with an evil or malicious motive unconnected with law enforcement.[18] Looked at in this light, despite the repetition of the terms improper motive and reprehensible conduct in the court's opinion and weighed in terms of *Monroe* and Ninth Circuit opinions, the finding or failure to find such a motive would not preclude plaintiff's admission to a federal forum. Instead, the restrictions, if they are intended as such, would be limited to an examination of the defendant's conduct as weighing on his defense of probable cause. Lukewarm support is given the reprehensible conduct argument in another California case, *Raab v. Patacchia*.[19] However, the support is also limited to the due process argument and not the original jurisdiction issue of section 1983. The court held that plaintiff's claim could receive cognizance in a federal court but his due process claim fell under defendant's probable cause defense. Plaintiff's claim failed, not because he was unable to prove that defendants' were improperly motivated, but because his due process argument was founded on a technical infraction committed by defendant police.[20] Perhaps, the court concluded, the strongest reason for dismissing plaintiff's claim would be to apply the maxim *de minimus non curat lex*.[21]

15. 230 F. Supp. at 182.
16. *Id.* at 185, (emphasis added).
17. *Id.* at 184.
18. *Id.* at 183.
19. 232 F. Supp. 71 (S.D. Cal. 1964).
20. *Id.* at 75.
21. *Id.* at 76.

In the Ninth Circuit, and the few other jurisdictions that have recognized "improper motive" as a consideration in a civil rights claim, the basis of the argument has been limited to defenses and not jurisdiction. Thus the Ninth Circuit has never limited a section 1983 claim solely to one reflecting reprehensible conduct. The Seventh Circuit has flatly rejected their pre-*Monroe* opinions discussing the need for a malicious act.[22] It is difficult to understand how the reprehensible conduct/improper motive prerequisite, which the court in *Whirl* examined at length, has persisted to the present day. Not only did the Supreme Court make it explicit in *Monroe* that an act committed "under color of law" and a resulting deprivation of civil rights were all that was needed for a section 1983 claim, but none of the California cases cited as authority in fact hold that reprehensible conduct is a prerequisite to such a claim. Of the three California district cases relied on by defendants in *Whirl*, all three refute it entirely.[23] The California view "may now be regarded as established that a specific intent to deprive plaintiffs of their constitutional rights is not a prerequisite to liability under 42 U.S.C.A. § 1983."[24]

The Ninth Circuit has apparently never considered the language in *Beauregard* to be contra to the *Monroe* holding, since *Beauregard* has never been repudiated. The overwhelming view of the federal courts of appeal is that the Civil Rights Act is not limited by a requirement for plaintiff to plead that the defendant's acts were maliciously or improperly motivated. The Ninth Circuit has continually reiterated the two requisites expressed in section 1983 and in the Supreme Court's analysis in *Monroe*. "The only elements which need to be present in order to establish a claim for damages under the Civil Rights Act are that the conduct complained of was engaged in under color of state law, and that such conduct subjected the plaintiffs to the deprivation of rights, privileges, or immunities secured by the Constitution of the United States."[25]

22. Joseph v. Rowlen, 402 F.2d 367, 370 (7th Cir. 1968).

23. Raab v. Patacchia, 232 F. Supp. 71, 73 (S.D. Cal. 1964); Beauregard v. Wingard, 230 F. Supp. 167, 182 (S.D. Cal. 1964); Selico v. Jackson, 201 F. Supp. 475, 478 (S.D. Cal. 1962).

24. Selico v. Jackson, 201 F. Supp. 475, 478 (S.D. Cal. 1962).

25. Marshall v. Sawyer, 301 F.2d 639, 646 (9th Cir. 1962); Cohen v. Noris, 300 F.2d 24, 30 (9th Cir. 1962); Klor v. Hanson, 278 F. Supp. 359, 362 (C.D. Cal. 1967); Herbert v. Morley, 273 F. Supp. 800, 801 (C.D. Cal. 1967).

II. Defenses to False Arrest and False Imprisonment

Besides its unique fact situation, *Whirl v. Kern* contains an articulate analysis of the defenses which are and are not applicable to the false imprisonment and false arrest claim. After federal jurisdiction has been established, the plaintiff's claim of deprivation of civil rights is based on federal and not state law.[26] The Supreme Court holds that in establishing a claim under 1983 for false arrest or imprisonment, the applicable law is the common law of torts.[27] A false arrest is accomplished when the arrest is made without legal authority and without probable cause.[28] A false imprisonment is accomplished when the actor acts, without legal authority, intending to confine the other person, and his act directly or indirectly results in such a confinement.[29] To recover, plaintiff has the burden of showing that the arrest or imprisonment was carried out without legal authority. In most cases this pleading takes the form of stating that plaintiff was arrested without a warrant and later released without any charges being brought. Once plaintiff has established the unlawful arrest or unlawful detention, he has made out a prima facie case and the burden shifts to the defendant to prove that he was in some way privileged to act as he did.[30] Normally,

26. Nesmith v. Alford, 318 F.2d 110, 125 (5th Cir. 1963); Watkins v. Oaklawn Jockey Club, 183 F.2d 440, 442 (8th Cir. 1950).

27. Pierson v. Ray, 386 U.S. 547, 555 (1967). The court cites as authority the RESTATEMENT (SECOND) OF TORTS (1965) and 1 F. HARPER & F. JAMES JR., THE LAW OF TORTS (1956).

28. Rue v. Snyder, 249 F. Supp. 740 (E.D. Tenn. 1966). Rue is an example of personal vindictiveness combined with usurpation of the police power resulting in a loss of personal rights and liberties. Defendant, an off-duty patrolman, was on a Sunday outing in his car. He was towing his boat, and in maneuvering this long assemblage, managed to outflank the car in which plaintiff was riding thus forcing plaintiff's daughter to drive partially on the road shoulder to avoid hitting the defendant's boat. Plaintiff managed to overtake and repass defendant in such a manner as to enable plaintiff to "let the defendant know in rather colorful language that he did not think much of the defendant's driving ability and he possibly embellished his view in this regard by questioning the defendant's paternity." *Id.* at 741. The officer, not one to be taken advantage of, arrested plaintiff and booked him in the local jail on charges of "disorderly conduct" and "public drunkeness." Plaintiff posted a $20 bond and was released after four hours. He had an immediate physical examination to show that he was not drunk nor could the court find any evidence of drinking. In awarding plaintiff $650 in damages, the court concluded: "The right of lawful arrest is too powerful a weapon and the right to freedom from unlawful arrest is too weighty a shield to use the one or to sacrifice the other in settlement of the exchange of a few angry words between motorists . . . ." *Id.* at 742.

29. RESTATEMENT (SECOND) OF TORTS § 35 (1965).

30. Lucero v. Donovan, 258 F. Supp. 979 (N.D. Cal. 1966). Lucero is another glaring

whether defendant meets the burden of proof establishing probable cause is ascertained by the tryer of fact.[31] The defenses of good faith and probable cause that are available to officers in a common law action for false arrest are also available to them in an action against them under section 1983.[32]

> "The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating . . . often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officer's whim or caprice."[33]

Good faith and probable cause afford the police official a great deal of leeway in making an arrest without a warrant and without causing him to "stake the financial security of his family upon a snap determination."[34] The officer is privileged if a state of facts exist that would lead a reasonable prudent person in the same or similar circumstances to entertain a strong suspicion that the person arrested was guilty.[35]

The defenses available under false imprisonment differ greatly from false arrest. Good faith and probable cause are not cognizable defenses as the prima facie case consists of intent to deprive the party of his freedom (good faith or malice are equally culpable) without legal justification.[36] Although broader privileges

example of official abuse of authority. Plaintiff, an American woman of Mexican descent, was arrested for suspected possession of narcotics after her apartment was searched and some pills confiscated. The police had neither an arrest warrant nor a search warrant nor even probable cause as they had only gone to plaintiff's apartment for information concerning a cousin of hers suspected of being a drug user. Plaintiff was questioned at the police station, and despite her protestations, was subjected to a body cavity search undertaken by two policewomen and witnessed by several male police officers. The officers conducted the search even though there was a doctor present who could have conducted the examination with less embarrassment to the plaintiff. The search produced no evidence and the pill analysis revealed that the ingredients were non-narcotic.

31. Marland v. Heyse, 315 F.2d 312, 314 (10th Cir. 1963).

32. Pierson v. Ray, 386 U.S. 547, 555 (1967).

33. Brinegar v. United States, 338 U.S. 160, 176 (1949).

34. Mathes & Jones, *Police Immunity in Damage Actions*, 53 GEO. L.J. 889, 913 (1965); Manos, *Police Liability for False Arrest or Imprisonment*, 16 CLEV-MAR. L. REV. 415, 427 (1967). Both law review articles are written by judges and are discourses in support of non-liability of police officials on the basis that a failure to extend immunity might result in lethargic law enforcement.

35. People v. Hillery, 65 Cal. 2d 795, 803, 56 Cal. Rptr. 280, 285, 423 P.2d 208, 213 (1967).

36. Parrott v. Bank of America, 97 Cal. App. 2d 14, 22, 217 P.2d 89, 94 (1950). Good faith may be a defense to a false arrest that also results in false imprisonment.

and discretion have been extended to law enforcement officials in making an arrest,[37] the privileges for imprisonment are very limited. Adequate legal authority and consent are the only privileges to a jailer's false imprisonment.[38] The jailer is protected to the degree that his imprisonment of a person does not constitute an instant tort "until the expiration of a reasonable time for the proper ascertainment of the authority upon which his prisoner is detained."[39] Jailers have been held liable for damages where a prisoner was kept in jail beyond the term of his lawful sentence.[40] Lack of personal knowledge by the jailer that the prisoner is held without lawful authority is not a complete defense to an action for false imprisonment.[41] Failure to know of the court's dismissal of charges or release is not, *as a matter of law*, adequate legal justification. "Were the law otherwise, Whirl's nine months could easily be nine years, and those nine years, ninety-nine years, and still as a matter of law no redress would follow."[42] A defendant to a false imprisonment charge cannot avoid liability by pleading that plaintiff must allege and prove negligence on defendant's part. There is no such thing as negligent false imprisonment.[43] Defendant may still be liable even though he acted under the mistaken belief that he had a legal right to jail plaintiff.[44]

Having established a prima facie case of false imprisonment, plaintiff is justified in receiving a directed verdict.[45] Where only false arrest is an issue, the question of whether the arresting officer had probable cause for the arrest is a question for the jury to decide.[46]

However, the fact situation in *Whirl* is entirely different from that of an officer acting under duress and making an arrest. Therefore the immunities of a false imprisonment deriving from a false arrest will not be discussed.

37. RESTATEMENT (SECOND) OF TORTS § 121, comments b and c at 206 (1965).
38. Roberts v. Hecht Co., 280 F. Supp. 639, 640 (D. Md. 1968).
39. Whirl v. Kern, 407 F.2d at 792 (5th Cir. 1969).
40. Waterman v. State, 2 N.Y.2d 803, 159 N.Y.S.2d 702, 140 N.E.2d 551 (1957).
41. Garvin v. Muir, 306 S.W.2d 256, 258 (C.A. N.Y. 1957).
42. Whirl v. Kern, 407 F.2d at 792 (5th Cir. 1969).
43. Forgione v. United States, 202 F.2d 249, 252 (3rd Cir. 1953).
44. 1 F. HARPER & F. JAMES, JR., THE LAW OF TORTS, § 3.7 at 228 (1956).
45. Whirl v. Kern, 407 F.2d at 793 (5th Cir. 1969).
46. Marland v. Heyse, 315 F.2d 312, 314 (10th Cir. 1963).

III. Extensions and Limitations of Civil Liability: Policy Reasons

The topic of extending or limiting civil liability of police is an extremely timely one, due to the tyrannic implications of the term "law and order" and the increasing public discord over related social and political issues; it deserves further elaboration. Abundant criticism has been aimed at our law enforcement and judicial systems concerning the frequent examples of sidewalk justice resulting in the enforcement of "order" at the expense of "justice."[47] Despite the arousal of public concern, police immunity has been judicially and legislatively endorsed in order to uphold the "strong public interest in vigorous law enforcement. . . ."[48] To impose liability, it is argued, would be to cause the peace officer "at his peril to outguess what a later jury might decide, for any substantial deterrent to vigorous law enforcement might well have dangerous or even tragic consquences."[49] Where the officer has had to make a split second decision whether to make an arrest or not, he is definitely entitled to some privileges.[50] However, the officer is covered by extensive privileges, and the elasticity of the privilege gauge is definitely in the officer's favor.[51] Where the officer makes an arrest without a warrant, he will not be held civilly liable if he can establish that he had probable cause and acted in good faith.

Even the issue of damages[52] works in favor of the police

47. In addition to the cited studies, there are a profuse number of periodicals published within the past eighteen months on the subject of police practices and abuses, and suggesting the means of improving present methods of law enforcement. *See, e.g.*, 223 ATLAN., Mr. 1969, at 74-135; 208 NATION, Apr. 21, 1969, at 486-518; 381 ANNALS 125-58.

48. 5 CAL. LAW REVISION COMM'N REPORTS, RECOMMENDATIONS & STUDIES 410 (1963).

49. *Id.* at 411.

50. Quinnette v. Garland, 277 F. Supp. 999, 1002 (C.D. Cal. 1967); 53 GEO. L.J. 889 (1965).

51. 1 F. HARPER & F. JAMES, JR., THE LAW OF TORTS, § 3.18 (1956).

52. Damages are measured by the federal common law, sounding in tort, and thus both compensatory and exemplary damages may be awarded, Medlock v. Burke, 285 F. Supp. 67 (D.C. Wis. 1968); Basista v. Wier, 340 F.2d 74 (C.A. Pa. 1965). Even where actual damages are not established, nominal damages and punitive damages are recoverable. Washington v. Official Court Stenographer, 251 F. Supp. 945 (D.C. Pa. 1966). An example of nominal damages being considered in a light most favorable to the police officer-defendant is the Maryland decision of Mason v. Wrightson, 109 A.2d 128, 132 (C.A. Md. 1954). The judge, in an appellate reversal for plaintiff, found that plaintiff had proven injuries resulting from an unlawful police arrest and false imprisonment. The judge awarded plaintiff nominal damages and costs in the sum of one cent.

officer. Judges tend to disallow the awarding of excessive damages against police. Extensive research has revealed no case where any police officer was forced to pay damages where the unlawfulness of his conduct was not firmly established. The apparent reason, and rightfully so, is that the court is not going to impose monetary damages in questionable cases. Cases in which plaintiffs have recovered are those where there is excessive abuse of the police power. Case law illustrates that the courts are well aware of the contributions of conscientious law enforcement officials and have taken extra care in insuring that an officer is not unjustly penalized. Some judges have even supported complete immunity for police in order to avoid the financial burden a civil suit would impose on the officer and his family. As a practical matter, any discussion of civil immunity is academic as most police officers are either covered by liability insurance or have it available.[53]

As to holding police civilly liable, the arguments are many. Illegal arrests and imprisonments, unfortunately, are not rare occurrances. This fact is pointedly borne out by an extensive study of the nation's police. "Although there is no legal basis for arresting persons simply as a means of detaining them while an investigation of their possible involvement in crime is conducted, this has been a common practice in a number of departments."[54] This type of illegal arrest is termed an investigative arrest, and 1966 statistics showed that 16 of the 55 police departments responding to a federal survey admitted the use of investigative arrests.[55] For example, in one large eastern city, "3,719 (6.6 percent) of the 56,160 nontraffic arrests during 1964 were recorded as arrests for investigation."[56] One estimate has placed the number of annual illegal arrests at between two and three and one half million.[57] A recent New York study reveals some interesting statistics. Of 441 complainants who alleged abuse by police, 81 were fully authenticated.[58] The largest percentage of the New York

53. PRES'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 31 (1967) [hereinafter cited as TASK FORCE REPORT]. *See also* note 34, *supra.*

54. *Id.* at 186.

55. *Id.*

56. *Id.*

57. Foote, *Tort Remedies for Police Violations of Individual Rights,* 39 MINN. L. REV. 493 (1955).

58. P. CHEVIGNY, POLICE POWER: POLICE ABUSES IN NEW YORK CITY 285-86 (1969) [hereinafter cited as CHEVIGNY]. Mr. Chevigny's book represents a two year study of the

complaints concerned either assault by an officer or false arrest. The cases reported are truly depressing as they reveal countless callous and seemingly pointless examples of abuse of authority.[59]

The constitutional rights of every citizen to be free from the unwarranted deprivation of personal liberty and to be free from physical assaults are too great to sacrifice for the sake of economic security of law enforcement officials. Civil remedy in tort has never proven to be an excessive financial burden on the police, while official abuses in the form of physical mistreatment and detention are well documented. Civil liability in tort is not intended to operate as a panacea for police malfeasance. It neither

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Police Practices Project of the Defense and Education Fund of the New York Civil Liberties Union. There were no prerequisites for submitting complaints and so these figures are limited to those people who sought assistance from the NYCLU and does not adequately represent the actual number of persons who may have had real grievances. The "authentication" statistics do not accurately reflect the percentage of valid complaints as these statistics were limited to the cases that received judicial decisions in favor of the complainant. Categorized, the statistics are:

	Total Complaints	*Authenticated*
Assault by officer	87	10
Assault with false arrest	77	18
False arrest	69	17
[illegal] Search—house	25	11
[illegal] Search—outdoors	27	7
Entrapment	6	—
Frame	34	3
Unlawful confession	9	—
Misuse of firearm	14	7
Improper identification	4	—
Wire tap	2	—
Not permitted to talk to attorney	8	1
Racial slur	8	1
Detention w/o charge	5	3
Discrimination	3	3

59. Several of Mr. Chevigny's observations are very illuminating and agree with similar observations drawn from other studies of police abuses. He believes that officers will sometimes exert far greater force than necessary or even make an unwarranted arrest in order to assure that the public realizes that the police intend to fully enforce the law. *Id.* at 276-83. A similar observation was made in the TASK FORCE REPORT, *supra* note 53, at 179-80. Another, and even more disturbing conclusion of Chevigny's is that the police may use an arrest as a cover for their own excesses. *Id.* at 141-43. If an officer physically attacks a person and does not arrest him, the officer will be in a difficult position if the person later files a complaint for the officer will have a difficult time justifying the attack. However, if the officer makes an arrest on a minor charge, he can excuse his conduct on the basis that the victim resisted arrest. Then the burden of proving false arrest and assault is on the victim. Minority groups, both racial, ethnic, and monetary, are the most vulnerable to this type of abuse, especially where the victim has a prior police record as his credibility as a witness in his own behalf is more suspect.

seems desirable nor effective.[60] Instead, such liability is only meant to help compensate the complaining party for his injuries. Thus, there is no sound reason, either in terms of the common law or as a matter of policy, for disallowing civil recovery for the injured party.

IV. CONCLUSION

The intent of this comment has been to discredit the rationale behind improper motive/reprehensible conduct as a prerequisite to recovery under section 1983. Not only does such a prerequisite fail to have any statutory support, but the cases cited as supporting it either do so only indirectly or as a policy basis for extending police immunity to all situations except those where actual malice or malfeasance is present. That this theory is no longer acceptable has been borne out by the lack of any recent case articulating this argument and by the cases that pointedly face the issue and refute it, such as *Whirl v. Kern.*

As a matter of policy, it would seem more logical to refrain from taking measures that would foster civil immunity. The police officer clearly has adequate legal support to protect him from liability. The burden of pleading and proving is on the party alleging the false arrest or imprisonment and, with the former, the officer has the viable defense of probable cause. The courts, well aware of the tremendous burden placed on the police, view the reasonableness of the action in a light most favorable to the police. As long as the police have acted prudently and with reasonableness, they need not fear being burdened with the payment of money damages. However, it is in the situation where

60. *Id.* at 181; CHEVIGNY, *supra* note 55, at 255. The imposition of greater tort liability on police officers is not an effective check on police abuses. At best it provides the injured with some degree of compensation while not alleviating the source of the abuse. All law enforcement agencies have administrative procedures for enacting disciplinary measures against their officers. Unfortunately the procedure is often arbitrary and infrequently utilized. A positive step toward curtailing police abuses would be the incorporation of civilian review boards to work in conjunction with the police's own complaint and public relations centers. The greatest advantage to some form of civilian review, assuming that the review boards would have concrete power to enact curative measures if official abuses were disclosed, is that it provides an unbiased check or balance on the police itself. The citizenry at large is interested both in the enforcement of the law and in recognizing the exemplary achievements of our police officials. The citizenry is also concerned with the quick recognition of questionable practices and their elimination and are not as apt to be influenced by a desire to shield violators in order to preserve the department's reputation.

the police do not act reasonably that remedies need be made available. The opportunities for abuse and the value of personal freedom are too great to allow the police total immunity from civil suits. It is not enough to belatedly release the wrongfuly imprisoned, as in *Whirl,* with no greater compensation than the reassuring knowledge that administrative mistakes do happen. Instead, the burden should fall, not on the innocent deprived of his rights, but on the actor responsible for that deprivation.

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