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"Good Faith" as a Defense to Suits for Police Deprivations of Individual Rights

William H. Theis*

The citizen who seeks redress for alleged excesses by the police encounters many hurdles set in his way by legislatures and courts sympathetic to the government officers who form the front-line defense against crime.¹ Nor, for that matter, have juries been particularly responsive to tales of unlawful official behavior placed before them by plaintiffs who are themselves often of suspect background and appearance.² Recently, some courts have begun to fashion still another doctrine which diminishes the plaintiff's opportunity to recover money damages for unlawful police conduct: a gradually increasing number of courts—including the Court of Appeals for the Eighth Circuit, as evidenced by two recent opinions³—allow the police officer the defense that *he thought* his questioned actions to be lawful. This defense, dispensing as it does with an objective evaluation of police conduct, gives the police officer a durable shield against charges of misconduct. In an age when we are reminded so frequently of the "technicalities" forced on the police by the Warren Court, almost any claim of subjective good faith made by a police officer has a certain aura of plausibility. Thoughtful consideration, however, proves this new doctrine to be both ill-founded and misguided.

THE OBJECTIVE STANDARD OF THE COMMON LAW: IGNORANCE OF THE LAW IS NO EXCUSE

At common law, the citizen deprived of personal or property rights had a variety of trespass actions available for use against the offending law enforcement officer. So also the law fashioned

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

2. See, e.g., *Joseph v. Rowlen*, 425 F.2d 1010 (7th Cir. 1970) (district court verdict of liability, but no damages for innocent salesman arrested on charge of unlawful soliciting, upheld on appeal).

3. *Mattis v. Schnarr*, 502 F.2d 588 (8th Cir. 1974); *Bell v. Wolff*, 496 F.2d 1252 (8th Cir. 1974).

certain privileges under which the officer might justify his conduct and thereby escape liability. This Article will not dissect or catalogue the content of these privileges in various jurisdictions over the long history of the common law.⁴ Rather, it will elaborate on one theme: in applying these privileges, the law has always employed an objective standard. The officer must have acted within the rules; he may not later seek to justify his actions, otherwise illegal, by claiming ignorance of their illegality. He must establish his privilege to act as he did, not his belief that he was so privileged. Otherwise, as is so readily apparent, every officer would become his own measure of the law which confers certain rights on the citizenry. Ignorance by others of those rights has never been held to render them nonexistent.

Consideration of *Entick v. Carrington*,⁵ the headwaters of Anglo-American search-and-seizure law,⁶ illustrates the unquestioned proposition that officers of the law must find their justification for claimed abuses in the objective standards of the law. In that case, the plaintiff sued in trespass certain messengers of the king who had broken into his house and carried off his books and papers pursuant to a general warrant issued by the secretary of state. In affirming a verdict for the plaintiff, Lord Camden established the limits of the court's inquiry:

No man can set his foot upon my ground without my license If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.⁷

4. For authoritative statements in this area, one should consult 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* §§ 1.19, 3.17-.19 (1956) [hereinafter cited as HARPER & JAMES]; W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* §§ 25-26 (4th ed. 1971). See also Note, *Liability of an Officer for Making an Arrest*, 51 L.R.A. 193 (1901).

5. 19 How. St. Tr. 1030, 95 Eng. Rep. 807 (K.B. 1765).

6. See *Boyd v. United States*, 116 U.S. 616, 626-30 (1886); *Fisher v. McGirr*, 67 Mass. (1 Gray) 1, 28-29 (1854).

7. 19 How. St. Tr. at 1066. Accord, *Pettijohn v. Smith*, 255 Ark. 780, 502 S.W.2d 618 (1973). The *Entick* court's further remarks illustrate the common law's grudging attitude toward the proliferation of privileges in trespass cases:

Where is the written law that gives any magistrate such a power [to issue general warrants]? I can safely answer, there is none. . .

But though it cannot be maintained by any direct law, yet it bears a resemblance, as was urged, to the known case of search and seizure for stolen goods.

In ruling that general warrants issued by the secretary violated the plaintiff's legal rights, the court discounted any consideration of the defendants' perceived need for obedience to a superior's orders.⁸ Nor, for that matter, did similar blanket searches and seizures in the past detract from the illegality of the process purporting to authorize the defendants' acts.⁹ After an exhaustive inquiry, the court concluded that general warrants such as those executed by the defendants were illegal and invasions of the plaintiff's rights. Since the law did not recognize the validity of general warrants, those warrants offered no justification for the defendants' actions and thus made the officers liable for trespass. The objective standards of the law, and not the defendants' perception of the law, would have afforded them their only defense to the wrong inflicted on the plaintiff.¹⁰

. . .

The case of searching for stolen goods crept into the law by imperceptible practice. It is the only case of the kind that is to be met with. No less a person than my Lord Coke . . . denied its legality; and therefore [even] if the two cases resembled each other more than they do, we have no right, without an act of parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity.

19 How. St. Tr. at 1066-67.

8. 19 How. St. Tr. at 1065. *Accord*, *Christ v. McDonald*, 152 Ore. 494, 52 P.2d 655 (1955).

9. 19 How. St. Tr. at 1067-68.

10. Since *Entick*, the English courts have continued to take a rigorous view of the defense of justification in tort suits against police officers. In *Hoye v. Bush*, 133 Eng. Rep. 545 (C.P. 1840), defendant officers arrested plaintiff under a warrant for one John Hoye. The plaintiff's Christian name was Richard, John being his father. It appeared from the evidence that Richard, the plaintiff, was the party whom the warrant-issuing magistrate intended to have arrested, although John was the name which appeared on the warrant. The court held the plea of justification to be insufficient: a warrant justifies the arrest only of the person named therein.

To similar effect is *Christie v. Leachinsky*, [1947] A.C. 573, where the House of Lords found that a false arrest had occurred when officers failed to inform plaintiff of the charges for which they took him into custody.

If a policeman who entertained a reasonable suspicion that X. has committed a felony were at liberty to arrest him and march him off to a police station without giving any explanation of why he was doing this, the prima facie right of liberty would be gravely infringed. No one, I think, would approve a situation in which when the person arrested asked for the reason, the policeman replied "that has nothing to do with you; come along with me." Such a situation may be tolerated under other systems of law, as for instance in the time of lettres de cachet in the eighteenth century in France, or in more recent days when the Gestapo swept people off to confinement under an overriding authority which the executive in this country happily does not in ordinary times possess. This would be quite contrary to our conceptions of individual liberty.

A nineteenth century American case emphasizes the continuing vitality of this principle. *Campbell v. Sherman*¹¹ exemplifies the common law's concern that a citizen illegally deprived of his rights should be able to obtain redress notwithstanding the subjective state of mind of the police official. In that case, the defendant sheriff had made an *in rem* seizure of the plaintiff's vessel pursuant to process issued by a state court. Under previous decisions by the United States Supreme Court,¹² such a seizure, although authorized by state law,¹³ violated the United States Constitution. The Wisconsin Supreme Court upheld a judgment against the sheriff for conversion in spite of his claim that he did not know such a seizure to be unconstitutional, saying "[y]et it is manifest that if ignorance of the law were a ground of exemption, the administration of justice would be arrested, and society could not exist. For in every case ignorance of the law would be alleged."¹⁴ Harsh as the result may seem,¹⁵ the plaintiff's property had been illegally seized, and the sheriff was obliged to pay for his mistaken, yet harmful action.¹⁶

Id. at 588.

Wiltshire v. Barrett, [1966] 1 Q.B. 312 (C.A. 1965), did grant the police a somewhat broader power to arrest than a literal reading of the statute in question in that case would seem to suggest. That statute allowed arrest without warrant of a person "committing" the offense of driving while unfit to drive because of drunkenness. In the absence of actual drunken driving, the court approved a plea of justification where the defendant officers had a reasonable belief that the plaintiff was committing the offense. Nonetheless, the court's opinion is clear that only a reasonable belief in guilt, not an honest belief in guilt, satisfies the defendant's burden of proof.

11. 35 Wis. 103 (1874).

12. *E.g.*, *The Hine v. Trevor*, 71 U.S. (4 Wall.) 555 (1867).

13. In *Campbell*, the applicable state law was Wis. Laws 1869, ch. 184.

14. 35 Wis. at 110.

15. "But if the officer does not wish to assume all the hazard . . . he must require a bond of indemnity from the party for whom he is acting." *Id.*

16. *Accord*, *Dennison Mfg. Co. v. Wright*, 156 Ga. 789, 120 S.E. 120 (1923); *Sumner v. Beeler*, 50 Ind. 341 (1875); *Ely v. Thompson*, 10 Ky. 981 (1820); *Fisher v. McGirr*, 67 Mass. (1 Gray) 1 (1854); *Judson v. Reardon*, 16 Minn. 387 (1870); cf. *Wise v. Withers*, 7 U.S. (3 Cranch) 331 (1806); *Merritt v. St. Paul*, 11 Minn. 145 (1866). *Contra*, *Morrill v. Hamel*, 337 Mass. 83, 148 N.E.2d 283 (1958); *Brooks v. Mangan*, 86 Mich. 576, 49 N.W. 633 (1891). *Rapacz, Protection of Officers Who Act Under Unconstitutional Statutes*, 11 MINN. L. REV. 585 (1927), argues in support of the minority position: if judges are protected when they act under unconstitutional statutes, so also should police officers be protected.

The law on seizure of goods under process bristles with refinements not at all keyed to the officer's honesty or subjective good faith. For

To the same effect is *Malcolmson v. Scott*,¹⁷ in which the Michigan Supreme Court reversed and remanded a judgment for the officers in an action against police officers who had arrested an innocent man pursuant to an informal communication from law enforcement authorities in another state. While recognizing the officers' narrow privilege to arrest a person without a warrant if they had reasonable grounds to believe he had committed a felony,¹⁸ the court chastised the officers for acting on informa-

example, if he seizes the goods of a person not named in his writ, he is liable. If he seizes goods of the person named in his writ, including, however, goods immune by law from process, he is liable for his trespass. 1 HARPER & JAMES, *supra* note 4, § 2.44, at 207 & nn.10-11. English law is equally detailed and exacting. See J. CLERK & W. LINDSELL, TORTS §§ 1997-2053 (13th ed. 1969).

17. 56 Mich. 459, 23 N.W. 166 (1885).

18. See *Beckwith v. Philby*, 6 Barn. & Cress. 635, 108 Eng. Rep. 585 (K.B. 1827), and *Samuel v. Payne*, 1 Doug. 359, 99 Eng. Rep. 230 (K.B. 1780), for early statements of this rule. See also 1 HARPER & JAMES, *supra* note 4, § 3.18, at 277-78, and RESTATEMENT (SECOND) OF TORTS § 121 (b) (1965), for a more recent formulation. It is clear that the officer may escape liability only when reasonable mistakes as to the existence of certain facts lead him to arrest the wrong person. However,

an officer is not privileged to arrest another whom he reasonably suspects of having committed an act which the officer, through a mistake of law reasonable in one of his position, believes to be a common law felony. So too, a peace officer is not privileged to arrest another whom he reasonably suspects of having committed an act which the officer, through a mistaken construction of a statute, believes to have been made a felony by such statute and this is true although the reasonable character of the officer's mistake is proved by the fact that at the time of the arrest the statute is generally understood to make such an act a felony and is not judicially construed to the contrary until after the arrest is made.

Id., comment i. At common law, arrests for most misdemeanors could be made only under warrant. This rule applied to peace officers as well as to private citizens. *Id.*, comment h.

The right of a private citizen without warrant to arrest for a completed felony is even more circumscribed than a peace officer's. For the former to make a lawful arrest, the felony for which he arrests must actually have occurred. If no felony has occurred, no amount of reasonable belief will exonerate the actor. *Id.* § 119.

Further, "[n]ot only must the act of which the actor suspects the other have been committed, but the act must be a felony. The fact that an act has been committed and that the actor through a mistake of law or fact reasonably believes such act to be a felony does not give him any privilege to arrest another whom he knows or reasonably suspects of having committed the act . . . Thus, where the other has stolen a watch worth a dollar and so committed a misdemeanor, the actor who knows of such theft is not privileged to arrest the other for it, although he believes the watch is of the value of fifty dollars, in which case a felony would have been committed, or mistakenly believes that the theft of even a dollar watch is a felony. *Id.*, comment i.

The foregoing should emphasize that the rules of privilege are highly detailed and specific. There is no general rule of reason or reasonable

tion much too vague to form such a reasonable belief as to the arrestee's guilt. Since they did not bring their conduct within the objective standards of that privilege as administered by the court, they had no justification for their acts. More importantly, the court commented on another aspect of the case that emphasized the need to act within a privilege to arrest. The court ruled out any justification based on arrest for extradition, since there had been no compliance with the state's extradition statutes. Certain rules for arrest prior to extradition had been set up; if these were not followed, the arrestee's detention would not be justified.¹⁹ In the court's words, "an officer of justice is bound to know what the law is."²⁰ The penalty for not knowing the law was liability for trespass.

These cases, requiring objective compliance with the strict privileges accorded by the law, must be sharply distinguished from situations such as that in *Rush v. Buckley*,²¹ where the defendant officer arrested the plaintiff under a warrant charging him with violation of a municipal ordinance. After his conviction, plaintiff brought suit, claiming his arrest to be illegal because the ordinance for whose violation he had been arrested had never been promulgated and hence was a nullity. Thus, he argued, his arrest for acts not technically a crime was illegal. Recognizing and distinguishing one of its precedents in accord with *Campbell v. Sherman*,²² the Supreme Judicial Court of Maine held that the

belief. As in the case of the private citizen who makes an arrest, no amount of reasonable belief will help the case if no felony was committed. Reasonable beliefs as to the content of the *law* serve as no defense to the peace officer. Reasonable beliefs as to *facts* are the least the law expects in some situations; in others, even more is required. In any event, the inquiry never becomes entirely subjective, focusing on the honest beliefs of the defendant or his reasonable interpretation of the law.

19. 56 Mich. at 466-67, 23 N.W. at 169.

20. *Id.* at 464, 23 N.W. at 168.

21. 100 Me. 322, 61 A. 774 (1905).

22. 35 Wis. 103 (1874), discussed in text accompanying note 11 *supra*. The Maine case is *Warren v. Kellery*, 80 Me. 512, 15 A. 49 (1888), where plaintiff sued a county sheriff for trespass in seizing a schooner of which plaintiff was a mortgagee. The seizure had been made to satisfy a statutory lien for labor and materials used in the schooner's repair, but plaintiff claimed that the portion of the statute which provided for enforcement of the lien was unconstitutional. Agreeing that the statute was indeed unconstitutional, the *Warren* court upheld a verdict against the sheriff.

The *Rush* court viewed *Warren* as a case in which the absence of jurisdiction to enforce the lien was apparent from the face of the process, since only federal courts had jurisdiction over such subject matter. 100 Me. at 327-28, 61 A. at 777. Of course, this lack of jurisdiction is

officer had a privilege to arrest under a warrant fair and full on its face. Just as the ultimate innocence of a felon does not undo the probable cause reasonably entertained by the officers at the time of the arrest without warrant,²³ so also in this case the ultimate innocence of the plaintiff did not undo the *judicial* determination of probable cause evidenced by the warrant. This judicial determination provided the officer with a presumptive justification for his actions; but nowhere is there an intimation that, had the officer known the fact of the ordinance's nonpublication, he could have been relieved of the consequences of his failure to appreciate the legal significance of that fact.²⁴ Indeed, the court's opinion emphasizes that the officer's ignorance was one of fact. Nowhere is an ignorance of the law excused.²⁵

MONROE V. PAPE: OBJECTIVE STANDARDS OF CONDUCT UNDER 42 U.S.C. § 1983

In recent times, individuals aggrieved by most types of police misconduct have begun to bring suit in federal court under 42 U.S.C. § 1983,²⁶ alleging deprivations of their constitutional rights. Only with the recent case of *Monroe v. Pape*,²⁷ however,

apparent only in the sense that one who knows the law can see that process (1) was issued from a state court and (2) directs *in rem* seizure of a vessel, and can conclude that this encroaches upon the exclusive jurisdiction of the federal courts. A layman would not even be able to discern that the process was *in rem*; yet liability will attach, notwithstanding his ignorance of the law.

23. See note 18 *supra*.

24. Cf. RESTATEMENT (SECOND) OF TORTS § 121, comment i (1965), quoted in note 18 *supra*.

25. 100 Me. at 330-31, 61 A. at 778. The ignorance in *Campbell*, see text accompanying notes 11-16 *supra*, was not really one of fact. The sheriff did not know of the Supreme Court decisions which led the Wisconsin court to conclude that its statute was unconstitutional. That the Supreme Court had made these decisions may be a "fact" (although the decisions embody "law"); but the fact is one entirely irrelevant to the Wisconsin statute's constitutionality. Without these decisions, the Wisconsin court could still have declared its statute unconstitutional, denying it as a basis for privilege. Ignorance of this "fact" could hardly affect defendant's ability to claim privilege. Nonpublication, however, was essential in *Rush* to a declaration of invalidity.

26. 42 U.S.C. § 1983 (1970) 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.

27. 365 U.S. 167 (1961). For commentary on the case, see Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 Nw.

did it become evident that, insofar as the Constitution embodies common-law notions of liberty,²⁸ such suits differ little from common-law actions for trespass except for the element of state action. Pre-*Monroe* courts had been reluctant to allow every false arrest or illegal search and seizure to rise to the level of a section 1983 violation, thereby allowing access to the federal courts.²⁹ Plaintiffs in a section 1983 case had generally been required to establish discrimination in addition to illegal conduct. This added element of bad faith was thought necessary to make a false arrest or illegal search a violation of section 1983.³⁰

Monroe, however, appears to lay this issue to rest. In the course of a long opinion dealing with the meaning of the phrase "under color of" state law, the Court summarily stated that specific intent to deprive a person of a constitutional right is not essential to recovery under section 1983. Rather, that section "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."³¹

Lower courts were quick to take up this statement and its implication that ulterior motive or bad faith is no longer necessary to turn a good trespass action into a good section 1983 action. Thus, conduct illegal without regard to the actor's subjective intent is actionable in the federal courts under section 1983 just as it would be in the state courts under the various labels of trespass.³²

U.L. REV. 277 (1965); Note, *Constitutional Law: "Under Color of Law" and the Civil Rights Act*, 1961 DUKE L. J. 452; *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 211 (1961); 15 VAND. L. REV. 267 (1961).

28. See *Howell v. Cataldi*, 464 F.2d 272, 278-79 (3d Cir. 1972); *Nahmod, Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5 (1974). But see *Polite v. Diehl*, 507 F.2d 119, 124 (3d Cir. 1974) (Kalodner, J., dissenting).

29. The appropriate jurisdictional statute for a suit brought in federal court under section 1983 is 28 U.S.C. § 1343 (3) (1970).

30. See, e.g., *Stift v. Lynch*, 267 F.2d 237 (7th Cir. 1959); *Agnew v. City of Compton*, 239 F.2d 226 (9th Cir. 1956).

31. 365 U.S. at 187. The Court distinguished civil actions under section 1983 from criminal actions under similar penal statutes which require proof of specific intent to deprive another of his constitutional rights. For example, in *Screws v. United States*, 325 U.S. 91 (1945), the court reversed a conviction under the forerunner of 18 U.S.C. § 242 (1970), because the trial court did not adequately instruct the jury that the defendants must have had a specific intent to deprive their victim of a constitutional right.

32. See, e.g., *Basista v. Weir*, 340 F.2d 74 (3d Cir. 1965); *Stringer v. Dilger*, 313 F.2d 536 (10th Cir. 1963); *Cohen v. Norris*, 300 F.2d 24

In *Lucero v. Donovan*,³³ the defendant officers happened upon plaintiff's brother, who was wandering on the public way, perhaps under the influence of narcotics. The officers eventually took him to plaintiff's house, which the brother allegedly gave them consent to search, although it was far from clear that he had ever been more than a welcome occasional visitor there. Only after they had entered and started a search of her home did the plaintiff discover their presence. She ordered them to leave, but they continued to search until they found a bottle of pills in a cabinet. Plaintiff was then arrested for possession of narcotics.

The Court of Appeals for the Ninth Circuit reversed a directed verdict for the defendants. Although at the time state law on the issue of third-party consent to a search seemed to support the officers' activity,³⁴ the court nevertheless made an objective inquiry into the constitutionality of those actions. Since plaintiff could revoke the consent under federal law, the officers would be liable for their failure to desist once she had ordered them to do so. Likewise, if the brother had no authority to consent in the first place, not even a concept like apparent authority would save the officers from liability. Federal constitutional law did not allow such an extension of the privilege to search under a third-party's consent, even though state law may have sanctioned the practice.³⁵ Whether they knew it or not, the officers, in the court's view, had been acting illegally. That the officers may have thought they were acting properly was unimportant. Regardless of their subjective intent, they had conducted an illegal search as judged by federal constitutional standards, which the court applied just as rigorously in a section 1983 action as on a motion to suppress in a criminal case.

A decision from the Fifth Circuit further illustrates the determination of the federal courts after *Monroe* to employ an objective standard even in close, difficult cases where the police

(9th Cir. 1962). *But see* *Gabbard v. Rose*, 359 F.2d 182 (6th Cir. 1966) (relying on *Agnew v. City of Compton*, 239 F.2d 226 (9th Cir. 1956), a case which was overruled by *Cohen*).

Of course, violations of state tort law are not actionable under section 1983 to the extent that they lack constitutional overtones. *See* cases cited in note 28 *supra*.

33. 354 F.2d 16 (9th Cir. 1965).

34. *See* *People v. Gorg*, 45 Cal. 2d 776, 291 P.2d 469 (1955).

35. *See* *Stoner v. California*, 376 U.S. 483 (1964). Long before *Stoner* and *Gorg*, the Court had constitutionally invalidated third-party consent searches effected by federal agents. *See* *United States v. Jeffers*, 342 U.S. 48 (1951); *Lustig v. United States*, 338 U.S. 74 (1949).

officer bears no malice toward the citizen. In *Nesmith v. Alford*,³⁶ the plaintiffs, a sociology professor and his students from an Illinois school, had traveled to Alabama. There, as part of their field trip to study racial problems, they had lunch in a public restaurant with a number of the community's black members. A large group, some curious and some arguably bent on violence,³⁷ gathered outside the restaurant. Anxious lest a riot break out (for there had been a good deal of racial violence in the city during the past month), the local police arrested the plaintiffs for disorderly conduct. Although an ordinance requiring segregation in restaurants had recently been repealed, the police determined that an arrest would avert a breach of the peace.

Considering the plaintiffs' appeal in the resulting section 1983 action, the Court of Appeals for the Fifth Circuit, over dissent, reversed a jury verdict for the arresting officers. Despite its willingness to accept the fact that the officers had acted in complete good faith,³⁸ the court declared that as a matter of law they had had no probable cause to deprive the plaintiffs of their freedom to engage in lawful conduct considered so obnoxious by others that the latter might inflict violence on the former. The court thus imposed liability for arrest in a situation that has produced such fine lines of constitutional analysis³⁹ that, in any given case, a policeman could almost always claim a reasonable belief in the correctness of his course of action. The Court of Appeals for the Fifth Circuit required arrest upon traditional probable cause and, even in a close case, would hold the police officer accountable for his error in judgment notwithstanding his good faith. Laudable purposes did not substitute for the required objective knowledge that such conduct could be considered a crime under neither state law nor federal constitutional standards.

PIERSON V. RAY: A SOURCE OF CONFUSION

A few years after *Monroe*, the Supreme Court introduced considerable confusion into the law with its decision in *Pierson v. Ray*,⁴⁰ which has been taken by some courts to allow considera-

36. 318 F.2d 110 (5th Cir. 1963).

37. *Id.* at 120.

38. *Id.* at 120-21.

39. Compare *Cohen v. California*, 403 U.S. 15 (1971), with *Feiner v. New York*, 340 U.S. 315 (1951).

40. 386 U.S. 547 (1967); accord, *Anderson v. Nossner*, 438 F.2d 183 (5th Cir. 1971).

tion only of the defendant officer's subjective state of mind.⁴¹ In that case petitioners were clergymen who had attempted to integrate facilities in a bus terminal. They were arrested for and convicted of disorderly conduct, a misdemeanor; but one of their group sought a trial *de novo* under state procedure and won a directed verdict of acquittal. Charges against the others, awaiting *de novo* trials, were dropped. They then initiated section 1983 actions against the police officers who had arrested them and the judge who had originally convicted them. After losing a jury verdict, they appealed to the Court of Appeals for the Fifth Circuit.⁴²

While their appeal was pending, the statute under which plaintiffs had been arrested was declared unconstitutional by the United States Supreme Court in *Thomas v. Mississippi*,⁴³ a case involving similar facts. The holding of the *Thomas* opinion, which was a memorandum reversal of the Mississippi Supreme Court, leaves a good deal to the imagination.⁴⁴ Nonetheless, after reading the state court's lengthy narration of facts and opinion,⁴⁵ one may reasonably infer that the United States Supreme Court took issue with the Mississippi statute⁴⁶ to the extent that it made a failure to leave an interstate bus terminal disorderly conduct when the arrestee had been conducting himself peaceably and the only threatened breach of the peace was by others against him. Only a portended breach of the peace by the arrestee himself could constitutionally lead to his arrest and conviction for disorderly conduct.

On hearing the *Pierson* appeal, the Court of Appeals for the Fifth Circuit held the judge immune from suit.⁴⁷ On the pendent state law claim against the officers, that court held that Mississippi law, although perhaps a minority position, would protect officers who make arrests for violations of a subsequently invalidated statute.⁴⁸ Reliance on the invalid statute would not insulate them from a section 1983 claim, however.

41. See text accompanying notes 57, 67-108 *infra*.

42. 352 F.2d 213 (5th Cir. 1965).

43. 380 U.S. 524 (1965).

44. The Court cited two cases in support of its reversal: *Boynton v. Virginia*, 364 U.S. 454 (1960) (invalidating a state criminal trespass to property conviction as repugnant to the Interstate Commerce Act) and *Abernathy v. Alabama*, 42 Ala. App. 149, 155 So. 2d 586 (1962), *rev'd per curiam*, 380 U.S. 447 (1965).

45. 252 Miss. 527, 160 So. 2d 657 (1964).

46. For the text of the statute in question, see 252 Miss. at 528, 160 So. 2d at 658.

47. The Supreme Court upheld this ruling. 386 U.S. at 553-55.

48. *Golden v. Thompson*, 194 Miss. 241, 11 So. 2d 906 (1943), which

Reviewing the case on certiorari, the Supreme Court took issue with the proposition of the court of appeals that "[t]he policemen would be liable in a suit under § 1983 for an unconstitutional arrest even if they acted in good faith and with probable cause in making an arrest under a state statute not yet held invalid."⁴⁹ The Court reiterated its desire that section 1983 actions be considered against the background of common-law tort liability⁵⁰ and, challenging the appellate court's reading of the common law, decided that a good faith reliance on the constitutionality of a later invalidated statute was consistent with the common-law privilege to arrest on probable cause.⁵¹ Since that common-law privilege itself depends not on actual guilt, but on the appearance of guilt, the subsequent ruling that the statute was invalid does not destroy the appearance of guilt and leaves the privilege unimpaired. The limited authorities on this narrow point seem to uphold the Court's assessment,⁵² although the

the court cited for this proposition, 352 F.2d at 219, had only the slightest pertinence to the case at hand. In *Golden*, a principal was allowed to rely on an unconstitutional statute in expelling the plaintiffs from school. There was no issue of battery, false arrest, or false imprisonment. Plaintiffs were seeking compensation for loss of their right to pursue an education.

49. 386 U.S. at 550.

50. *Id.* at 556, citing *Monroe v. Pape*, 365 U.S. 167, 187 (1961).

51. 386 U.S. at 555. Without so acknowledging, the Court seemed to view the privilege to arrest for a misdemeanor as identical with the privilege to arrest for a felony. The common-law privilege to arrest without warrant for misdemeanors has varied considerably from time to time. At the time of the Court's opinion, however, it seems that the privilege required actual commission of a breach of the peace in the officer's presence. See RESTATEMENT (SECOND) OF TORTS §§ 119(c), 121(a) (1965). That standard, unlike the probable cause standard employed in the arrest of suspected felons, would permit the arrestee's ultimate innocence to strip the officer of his privilege. *Id.* § 119, comment o (section 121(c) does not seem applicable to the facts in *Pierson*). To the extent that the Court sees an identity of the privilege to arrest for felony with the privilege to arrest for misdemeanor, *Pierson* makes new law. *But see* *Carroll v. United States*, 267 U.S. 132 (1925), fully considered in *Bohlen & Shulman, Arrest With and Without Warrant*, 75 U. PA. L. REV. 485 (1927). For a more explicit and considered treatment of this matter, see *Street v. Surdyka*, 492 F.2d 368 (4th Cir. 1974).

52. See *Miller v. Stinnett*, 257 F.2d 910 (10th Cir. 1958) (diversity case); *Manson v. Wabash R.R.*, 338 S.W.2d 54 (Mo. 1960); *Bricker v. Sims*, 195 Tenn. 361, 259 S.W.2d 661 (1953); *Cartwright v. Canode*, 106 Tex. 502, 171 S.W. 696 (1914). *But see* *State v. Hunter*, 106 N.C. 796, 11 S.E. 366 (1890) (privilege conditioned on arrestee's actual guilt). Liability was imposed in *Sumner v. Beeler*, 50 Ind. 341 (1875). Although it is not at all clear from the statement of the facts by the court in *Sumner*, one Indiana court regards the case as one where arrest followed the declaration of invalidity. Thus, where there has been no declaration of invalidity, the statute could presumably be relied upon by police offi-

proposition does seem inconsistent with the general insistence of the common law that ignorance of the law can serve as no excuse.

Perhaps the Court should have rooted out this inconsistency. The fact that it did not do so, but rather ratified the dissonance, gives no indication that it would favor a general liberalization of the privilege rules. Narrowly read, *Pierson* excuses only acts which fall within the common-law privilege to arrest on a good faith and reasonable *misinterpretation* of a statute, the content of which was known to the officers at the time of their act, and which was later invalidated. For example, the officers in *Pierson* were required to know the content of the statute itself; mistakes of law on this level are still to be penalized.⁵³ If the Mississippi statute in actual fact had made a refusal to disperse disorderly conduct only where the person asked to leave was himself unruly, the officers would have had no probable cause to

cial. *Saloom v. Holder*, 304 N.E.2d 217 (Ind. App. 1973).

RESTATEMENT (SECOND) OF TORTS § 121, comment i, in a caveat and accompanying comment reserves opinion on the issue of whether a statute's unconstitutionality detracts from an objective determination that the probable cause to arrest for its violation existed. The *Restatement*, however, generally does hold the policeman liable for mistakes of law in warrantless arrests. Thus, in the view of the restaters, one cannot reasonably suspect that an "act or omission" constituting an offense has been committed unless he knows the elements of the offense. A mistake about the elements of an offense or about an offense's inclusion of certain acts might improperly affect the officer's reasonable beliefs, and thus should not be available as a defense. Notwithstanding the availability of a good defense found in constitutional law, however, an officer could suspect that an act or omission proscribed by legislative enactment has taken place. The privilege for arrests without warrant found in section 121 does not require that the offense actually take place. So, even though the Constitution makes the statute a nullity and no *crime* took place, the officer still may rely on his reasonable belief that certain proscribed *acts* took place.

53. That this is a correct interpretation of *Pierson* is supported by the Court's most recent pronouncement on immunities under section 1983. In *Wood v. Strickland*, 420 U.S. 308 (1975), the Court held that a school board official enjoyed immunity from suit under section 1983 for actions taken in good faith fulfillment of his responsibilities and within the bounds of reason. See text accompanying notes 114-26 *infra*. The Court added, however, that

an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law . . . than by the presence of actual malice. . . . [A] school board member . . . must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges.

420 U.S. at 321-22. Although the *Wood* case dealt with school board immunities, which are not at all analogous at common law to the privileges afforded police officers, see notes 126-28 *infra* and accompanying text, it nevertheless is likely that *Pierson* would be similarly limited.

arrest, even if they had reasonably and in good faith believed that the statute came into play when someone other than the arrestee was creating the breach of the peace.⁵⁴ Moreover, even if the officers did reasonably and in good faith misinterpret a statute the content of which was known to them, their immunity might still be lost. The Court in *Pierson* left the truthfulness of the officers' contention that the white crowd at the bus station was threatening a breach of the peace open for jury resolution, despite the apparent holding in *Thomas* that such a situation would not support a charge of disorderly conduct against the object of the crowd's wrath. Thus, if the jury were to find that the crowd had not actually been unruly, there would be no privilege to arrest for violation of the statute even accepting the officers' interpretation of it.⁵⁵ Finally, it should be noted that the officers' ignorance in *Pierson* was of a specialized sort: they arrested in reliance on a statute not yet declared invalid. Had there been no statute at all on which to rely or had the statute been invalidated before the arrests, the officers would have been liable. The Court's opinion goes on to restrict that privilege even further by requiring that their reliance be reasonable. This suggests that, even though the statute had not yet been declared invalid at the time of arrest, the officers could nonetheless be held liable in certain cases if it is found that they should have anticipated this constitutional development.⁵⁶

Despite the fact that *Pierson* appears to give only a narrowly

54. See *Nesmith v. Alford*, 318 F.2d 110 (5th Cir. 1963); RESTATEMENT (SECOND) OF TORTS § 121, comment i (1965).

55. See 386 U.S. at 557.

56. See *Miller v. Stinnett*, 257 F.2d 910 (10th Cir. 1958); *Flemming v. South Carolina Electric & Gas Co.*, 239 F.2d 277 (4th Cir. 1956). But see *Boca Raton v. Coughlin*, 299 So. 2d 105 (Fla. App. 1974). It is difficult to understand what relationship the Court's further requirement of "good faith" has with a requirement that the reliance be reasonable. The common law does not inquire into the actor's ulterior motives so long as he has, by objective standards, a valid privilege. See *Ames v. Strain*, 301 P.2d 641 (Okla. 1956); RESTATEMENT (SECOND) OF TORTS § 127, comment a, at 226 (1965). A handful of recent cases indicates that the actions of law enforcement officials may lead to liability if done in bad faith—their subjective intent drains the validity from normally legal acts. These cases, however, give no indication that subjective intent is the *only* aspect of a defendant's actions open to scrutiny by a court. See *Lykken v. Vavreck*, 366 F. Supp. 585 (D. Minn. 1973); cf. *Shaw v. Garrison*, 328 F. Supp. 390 (E.D. La. 1970), *aff'd*, 467 F.2d 113 (5th Cir. 1972); *Duncan v. Perez*, 321 F. Supp. 181 (E.D. La. 1970), *aff'd*, 445 F.2d 557 (5th Cir. 1971). See generally *MacDonald v. Musick*, 425 F.2d 373 (9th Cir. 1970) (habeas corpus granted where petitioner was charged and convicted on an offense which the prosecutor had been willing to drop until petitioner refused to forego a false arrest suit against police officers).

circumscribed immunity consistent with the common law, the Court made statements in the course of that opinion which have led the lower courts to believe that inquiry into the defendant's objective intent has been abandoned:

We agree that a police officer is not charged with predicting the future course of constitutional law . . . if the jury found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional.⁵⁷

These statements, implying that the jury should always examine only the officer's reasonable beliefs as to the legality of his actions, and not his reasonable beliefs as to the facts concerning an arrest, could considerably weaken the Court's adoption of a common-law standard of immunity in *Monroe*—a standard which *Pierson* acknowledged. Obviously, if the court inquires only into the reasonableness of a man's belief that he acted lawfully, the inquiry becomes quite subjective. Every officer, if credible to the trier of fact, becomes his own measure of the law, and honestly professed ignorance of the law becomes a potent defense. Although the plaintiff need not prove malevolence or discrimination, if this interpretation of *Pierson* is accepted, he must resist convincing claims that the officer did not know he was violating the law and the plaintiff's constitutional rights.

At first the lower courts were slow to read *Pierson* as dispensing with an inquiry into the officer's objective intent in all cases. In *Joseph v. Rowlen*,⁵⁸ the Court of Appeals for the Seventh Circuit reversed a directed verdict for a police officer who arrested pursuant to a command from his sergeant. In response to an argument that *Pierson* gave the officer a defense of "good faith," the court said that objective probable cause was also required. *Pierson* in no way detracted from *Monroe*; it did not reinstate any requirement of malevolence, discriminatory purpose, or flagrant illegality.⁵⁹

57. 386 U.S. at 557.

58. 402 F.2d 367 (7th Cir. 1968), noted in Note, *Civil Liability of Police for False Arrest*, 64 Nw. U.L. REV. 229 (1969). Accord, *Duncan v. Nelson*, 466 F.2d 939 (7th Cir.), cert. denied, 409 U.S. 894 (1972); *Ker v. Chicago*, 424 F.2d 1134 (7th Cir. 1970). But see *Banish v. Locks*, 414 F.2d 638 (7th Cir. 1969).

59. Thus, the Court of Appeals for the Seventh Circuit overruled its pre-*Monroe* decisions, e.g., *Stift v. Lynch*, 267 F.2d 237 (7th Cir. 1959).

On retrial in *Joseph*, the jury found for the plaintiff but awarded him no damages, a verdict upheld on appeal. 425 F.2d 1010 (7th Cir. 1970). This is but one indication of how unlikely the plaintiff's chances of success are in police misconduct suits.

*Whirl v. Kern*⁶⁰ illustrates more clearly the initial conviction of the lower courts that *Monroe* had created a federal law of intentional⁶¹ police torts and that *Pierson* did not authorize an inquiry into an official's subjective good faith alone. In *Whirl*, the plaintiff had been arrested and committed to jail in lieu of bail. Indictments against him were later dismissed; but word of their dismissal did not filter down to his keeper, the county sheriff, until some nine months after the fact. Plaintiff sued under both section 1983 and the common law for this unwanted extension of his jailer's hospitality. The sheriff contended that he was unaware of the facts and bore no malice toward the prisoner. Hence, he could not be held for a violation of section 1983, since, under *Pierson*, he was in "good faith" ignorance of his charge's right to freedom. The Court of Appeals for the Fifth Circuit rejected this argument by interpreting *Pierson* to merely permit a privilege of good faith and probable cause to a charge of false arrest, such as the common law had traditionally allowed.⁶² Under this view, *Pierson* did not throw a blanket of "good faith" over all police conduct,⁶³ and particularly not over the maintenance of a jail. In actions for false imprisonment, the common law allowed no defense such as that proffered by the sheriff. Both mistakes of fact and mistakes of law would lead to liability.⁶⁴ Finding no common-law privilege—and for good reason⁶⁵—the court thought inapposite the "good faith" language in *Pierson* dealing with the exercise of a privilege to arrest. Since upon the dismissal of the indictments there was not even a privilege to detain, the good or bad intent of the jailer became irrelevant. As in *Entick*, absence of privilege made for liability.⁶⁶

60. 407 F.2d 781 (5th Cir. 1969).

61. At this stage one cannot say whether *Monroe* gives relief for mere negligence. Compare *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970), with *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds sub nom. District of Columbia v. Carter*, 409 U.S. 418 (1973).

62. 407 F.2d at 790-91. Whether the common law looked into the actor's motives, except as they related to probable cause, is debatable. See note 56 *supra*.

63. See *Burnett v. Dickerson*, 485 F.2d 1249 (5th Cir. 1973); *Gaines v. McGraw*, 445 F.2d 393 (5th Cir. 1971); *Sexton v. Gibbs*, 327 F. Supp. 134 (N.D. Tex. 1970), *aff'd*, 446 F.2d 904 (5th Cir. 1971).

64. 407 F.2d at 791, emphasizing that the privilege to arrest is not always the same as the privilege to confine; accord, W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 11, at 46 n.86 (4th ed. 1971). But see *Johannsen v. Steuwart*, 260 Iowa 1140, 152 N.W.2d 202 (1967).

65. "A jailer, unlike a policeman, acts at his leisure." 407 F.2d at 792.

66. See text accompanying note 7 *supra*. A number of post-*Pierson*

BIVENS ON REMAND: THE GOOD FAITH, REASONABLE BELIEF—BUT IN WHAT?

The Court of Appeals for the Second Circuit eventually seized upon the erroneous implications of the above quoted language in *Pierson*.⁶⁷ In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,⁶⁸ agents of the Federal Bureau of Narcotics had entered petitioner's apartment without a warrant and arrested him. After the agents had searched him as well as the entire apartment, they took him to headquarters, booked him, and placed him in confinement. Sometime later a United States commissioner dismissed the complaint lodged against him. Smarting from the episode, Bivens filed a suit in federal district court and demanded damages for a violation of his fourth amendment rights. After failure in the district court⁶⁹ and in the court of appeals,⁷⁰ he finally persuaded the Supreme Court that he had a federal cause of action for the claimed indignities inflicted upon him.⁷¹ Having acknowledged plaintiff's federal cause of action, the Court left open for consideration on remand whether the officers should receive the benefit of immunity by virtue of their official position.⁷²

On remand, the Court of Appeals for the Second Circuit itself remanded to the district court in a ruling that the agents had no immunity which would set up an absolute bar to suit.⁷³

cases from other circuits support the view that that case in no way dispensed with the objective inquiry into the legality of the officer's acts envisioned by *Monroe*. See *Barnes v. Dorsey*, 480 F.2d 1057 (8th Cir. 1973); *Anderson v. Reynolds*, 476 F.2d 665 (10th Cir. 1973); *Howell v. Cataldi*, 464 F.2d 272 (3d Cir. 1972); *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds sub nom. District of Columbia v. Carter*, 409 U.S. 418 (1973); *Madison v. Manter*, 441 F.2d 537 (1st Cir. 1971); *Giordano v. Lee*, 434 F.2d 1227 (8th Cir. 1971); *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970); *Caperci v. Huntoon*, 397 F.2d 799 (1st Cir.), *cert. denied*, 393 U.S. 940 (1968). *But see Valdez v. Black*, 446 F.2d 1071 (10th Cir. 1971) (arrests by National Guard); *Notaras v. Ramon*, 383 F.2d 403 (9th Cir. 1967); *Golden v. Smith*, 324 F. Supp. 727 (D. Ore. 1971).

67. See text accompanying note 57 *supra*.

68. 456 F.2d 1339 (2d Cir. 1972).

69. 276 F. Supp. 12 (E.D.N.Y. 1967).

70. 409 F.2d 718 (2d Cir. 1969).

71. 403 U.S. 388, 395-97 (1971). The Court had left this precise question open in *Bell v. Hood*, 327 U.S. 678 (1946), when it ruled that federal courts had jurisdiction to hear a complaint alleging a violation of the fourth amendment although the complaint might or might not state a cause of action.

72. 403 U.S. at 397-98.

73. 456 F.2d 1339, 1342-47 (2d Cir. 1972). The court reasoned that since state and local police officers who are sued under 42 U.S.C. § 1983 (1970) do not have immunity, neither should federal police officers who

The court of appeals then, however, deftly proceeded to erect a barrier to the plaintiff's claim as effective as the one it had just previously demolished. After a brief encomium on the value of the police role in society,⁷⁴ the court announced that the defendant officers might avail themselves of the common-law defense of probable cause and good faith.⁷⁵ After all, the court opined, the law of individual liberties is much too complicated to hold the officer liable for his mistaken actions which result in deprivations of those liberties.⁷⁶

This initial reference to the "common-law" defense is somewhat abbreviated and masks the fact that the privilege cited refers to warrantless on-the-street arrests of suspected felons.⁷⁷ The common-law privilege to make an unconsented entry into a dwelling, on the other hand, is rather narrow: the officer must have a warrant⁷⁸ or be in "hot pursuit" of an offender.⁷⁹ There is no general doctrine authorizing warrantless, yet reasonable, entries of dwellings.⁸⁰ As *Whirl v. Kern*⁸¹ pointed out so cogently, the common law gave police officers no general privilege to act reasonably, although unlawfully.⁸² Instead, as held in *Entick*,

are sued in tort under federal common law for violations of fourth amendment rights. The two causes of action parallel each other to such an extent that it would be anomalous to grant a defense not allowed in section 1983 actions.

74. [W]e must not be unmindful of the fact that these FBI and Narcotics Agents, whose lives are in constant danger . . . perform functions indispensable to the preservation of our American way of life. They must not be left defenseless against the demands of every person who manages to escape from the toils of the criminal law.

456 F.2d at 1347.

75. *Id.*

76. *Id.* at 1348.

77. See note 18 *supra*; RESTATEMENT (SECOND) OF TORTS § 121(b) (1965). This long-standing common-law rule is codified in 26 U.S.C. § 7607(2) (1970), which the court inappropriately cited. 456 F.2d at 1347.

78. See *Commonwealth v. Reynolds*, 120 Mass. 190 (1876).

79. See *Warden v. Hayden*, 387 U.S. 294 (1967); *Maleverer v. Spinke*, 1 Dyer 35b, 36b, 73 Eng. Rep. 79, 81 (K.B. 1538).

80. See *Jones v. United States*, 357 U.S. 493 (1958); *Fisher v. Volz*, 496 F.2d 333 (3d Cir. 1974); *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970) (en banc); *Lankford v. Gelstan*, 364 F.2d 197 (4th Cir. 1966); RESTATEMENT (SECOND) OF TORTS §§ 204-06 (1965). *But see Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (where the Court regarded the issue as open); *United States v. Curran*, 489 F.2d 30 (9th Cir. 1974). At least one member of the Court does not think that the issue is an open one. See Mr. Justice Stewart's remarks, reprinted in Y. KAMISAR, *W. LA FAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE* 311-12 n.a (4th ed. 1974).

81. 407 F.2d 781 (5th Cir. 1969).

82. *Id.* at 789-93.

privileges are narrow rules of specific content.⁸³ Thus, even if *Pierson* could be interpreted to establish a completely subjective test where warranted by the common law—and it is the position of this Article that the case should not be so interpreted⁸⁴—that result would not support *Bivens*, since the appellate court there went far beyond the common law which both *Pierson* and *Monroe* recognize as the appropriate guide for police privilege. Had the court of appeals desired to allow a warrantless, nonemergency search of a dwelling, it should have done so by laying down an objective rule. As *Pierson* demonstrated, even though privileges are objective rules, the courts may change their content.⁸⁵

Even more egregious than the imprecision to be found in the court's reference to a "common-law privilege" is the distortion practiced next by the court when it maintains that the common law's defense "has been consistently read as meaning good faith and 'reasonable belief' in the validity of the arrest or search."⁸⁶ With only perfunctory, if not inaccurate, reliance on secondary source material,⁸⁷ the court transformed a limited privilege to arrest when an officer reasonably suspects the arrestee to have committed a crime into blanket approval for all police activities where the officer reasonably and honestly regards himself in compliance with the law. Thus, *Pierson's* loose suggestion that an officer need not predict "the future course of constitutional law,"⁸⁸ when taken out of context, prompted a drastic shift in the emphasis of a court's inquiry. Rather than enforcing compliance with some objective standard—even a new one, more sensitive to the needs of the police—the court sanctioned honest but reasonable ignorance of all the rules.⁸⁹ The narrow privilege recognized in *Pierson* will not support such a broad expansion.

As is evident from a consideration of the material presented earlier,⁹⁰ the common law—contrary to the assertion of the

83. See text accompanying notes 5-9 *supra*.

84. See text accompanying notes 53-56 *supra*.

85. See note 51 *supra*.

86. 456 F.2d at 1347.

87. Although the court cited *Pierson* for its conclusion, it made no analysis of the decision to support its reliance. Nor does a reading of 26 U.S.C. § 7607 (1970) support the court's conclusion—it merely codifies the common law's objective standard in giving federal narcotics agents a privilege to arrest without warrant.

88. 386 U.S. at 557.

89. *Bivens* was not a section 1983 action. Later decisions, however, have regarded its ruling in a suit against federal officers as equally appropriate in suits against state officers under section 1983. See *Brubaker v. King*, 505 F.2d 534 (7th Cir. 1974). Cf. note 73 *supra*.

90. See text accompanying notes 4-25 *supra*.

Court of Appeals for the Second Circuit—did not allow an officer the luxury of presenting his evaluation of his actions as a defense to a trespass case. Nor do the two citations to secondary sources presented by the court bear out its assertion; in fact, close attention to those sources reveals serious distortion in their use. The Harper and James treatise, to which the court made reference, merely states the traditional rule acknowledged in *Pierson* that in false arrest cases the ultimate innocence of the suspect does not undo or detract from the elements of probable cause: a reasonable belief that a felony has been committed and that the arrestee has committed the suspected felony.⁹¹ Nowhere, in fairness to these eminent authors, can one discover a statement that an officer may judge for himself whether his belief as to the lawfulness of his actions is reasonable.⁹² It is thus a distortion of the passage referred to by the court to say that the authors declare that the officer need only have had “‘reasonable belief’ in the validity of the arrest or search.”⁹³ Likewise, the *Restatement (Second) of Torts* allows an officer to harbor reasonable, though mistaken, views as to the facts surrounding a warrantless on-the-street arrest, but not as to the legal principles which should govern his conduct in light of those facts.⁹⁴

The new doctrine would, of course, take its toll on the privilege doctrines that place strict liability on the officer. As noted earlier, if a third party does not have actual authority to consent to a search, the search is invalid and actionable.⁹⁵ Under a *Bivens* standard, however, the third party’s apparent authority would justify an officer’s reasonable belief that he was acting

91. 1 HARPER & JAMES, *supra* note 4, § 3.18, at 277-78. This is a much broader privilege than that accorded the private citizen: he must show that a felony has in fact been committed. *Id.* See also discussion in note 18 *supra*.

92. The book’s discussion of *Hogg v. Ward*, 157 Eng. Rep. 533 (Ex. 1858), leaves exactly the contrary impression. 1 HARPER & JAMES, *supra* note 4, § 3.18, at 278. The Supreme Court in *Pierson* also cited the Harper & James treatise, but accurately for the general proposition that the arrestee’s later-proved innocence does not undo the police officer’s probable cause to arrest. 386 U.S. at 555.

93. 456 F.2d at 1347.

94. See RESTATEMENT (SECOND) OF TORTS § 121, comment i (1965). Cf. *Rush v. Buckley*, 100 Me. 322, 61 A. 774 (1905), discussed in text accompanying notes 21-25 *supra*. In that case, a warrant for a misdemeanor arrest insulated the officer from suit even though it later developed that the ordinance for which plaintiff was arrested was invalid by reason of nonpublication. The existence of the warrant, which gave no indication of the facts that the arrestee might later use to urge his innocence, furnished a justification.

95. See text accompanying notes 33-35 *supra*.

legally in proceeding under that person's consent. The officer's appreciation of the facts might thus possibly immunize him where the applicable rule of law says that such an appraisal is irrelevant.

This new theory of the Second Circuit Court of Appeals made a crucial difference in the Eighth Circuit case of *Mattis v. Schnarr*.⁹⁶ There, the defendant officer, losing his foot race with a suspected felon who had been fleeing unarmed from a non-violent felony, shot and killed the suspect. The Court of Appeals for the Eighth Circuit thought that Missouri statutes allowing such a use of deadly force provided a defense as a matter of law to an action by a representative of the decedent, since the statutes had never been declared unconstitutional. In the opinion of that court, the officer should be entitled to rely on state statutes never declared unconstitutional.⁹⁷ This result is not consistent with the common law, as *Pierson* and *Monroe* appear to require;⁹⁸ by contrast, a case following the common-law rule illustrates with some irony the greater rigor and exactness of that approach. In *Smith v. Costello*,⁹⁹ the defendant conservation officer shot plaintiff's dog, relying on a state statute declaring any dog running at large in territory inhabited by deer to be a nuisance and giving game wardens summary authority to kill the animal. The Idaho Supreme Court found the statute unconstitutional and held the officer liable for property damage, stating that "[a]n unconstitutional act is not law and . . . confers no rights and affords no protection."¹⁰⁰ Had this course been followed in *Mathis*, the officer there would have been held liable for his action if the statute were indeed found to be unconstitutional.

A recent case from the Ninth Circuit illustrates how drastic a change this new doctrine can work on the plaintiff's chances of recovery where the case law surrounding a privilege is in a state of tension. In *Williams v. Gould*,¹⁰¹ a police officer, lacking a warrant, burst into the plaintiff's apartment because he believed a felon to be inside. Reversing a directed verdict for the plaintiff in an action brought under section 1983, the Court of Appeals for the Ninth Circuit commented that the officer should have been

96. 502 F.2d 588 (8th Cir. 1974).

97. *Accord*, *Hanna v. Drobnick*, 514 F.2d 393 (6th Cir. 1975); *Kotmair v. Gray*, 505 F.2d 744 (4th Cir. 1974); *Laverne v. Corning*, 376 F. Supp. 836 (S.D.N.Y. 1974).

98. See text accompanying notes 26-31, 50-51 *supra*.

99. 77 Idaho 205, 290 P.2d 742 (1955).

100. *Id.* at 209, 290 P.2d at 744.

101. 486 F.2d 547 (9th Cir. 1973).

allowed to show not only a reasonable belief that a felon was lurking in the apartment, but also a reasonable belief that the law would sanction his actions under those reasonably believed facts, even if the officer's judgment as to the law should in fact be erroneous. In fact, scrutiny of the relevant *Restatement* provisions indicates no such privilege at common law.¹⁰² Moreover, if an officer's legal conclusions as to the propriety of his acts serve as a defense, even a proviso that his judgment must be reasonable leaves remediless the citizen whose constitutional right to privacy has been violated. If, as the Court of Appeals for the Ninth Circuit maintained, the legal question of whether a warrant is required in such a situation was an open one,¹⁰³ a jury would be hard-pressed to say that the nonlawyer officer was unreasonable in reaching the conclusion that he did. The validity of a warrantless search under circumstances such as those found in the *Williams* case is an open question only in the sense that some lower courts have departed from the traditional understanding of the fourth amendment on this point.¹⁰⁴ Those decisions, however, must certainly lend plausibility to a claim that the officer thought his actions to be justified. Thus, under the *Williams* court's view of this matter, a conflict among the circuits would permit an officer to raise an incorrect reading of the law as a defense even where no Ninth Circuit decisions supported the defendant's belief and possibly even where its decisions were contrary to his belief.

102. As a matter of tort law, the RESTATEMENT (SECOND) OF TORTS § 206 (1965) would consider such an entry to be unprivileged. If the court disagreed with this approach in its view of constitutional law, it should have said so. Instead, the officer's perception of the law made the resolution of the matter immaterial.

The common-law rules in this area are so precise that, had the officer possessed an arrest warrant, he would have been privileged to enter the dwelling if he reasonably believed the person named in the warrant to be present inside. *Rodriguez v. Jones*, 473 F.2d 599 (5th Cir.), cert. denied, 412 U.S. 953 (1973) (applying the *Restatement* rule). Schirott & Kolar, *False Arrest: Good Faith a Defense to Section 1983 Actions*, 1974 *INS. L.J.* 213, 216, reads *Rodriguez* as being in accord with *Williams* for the proposition that good faith can cure an illegal entry. Although *Rodriguez* has some language approving of *Bivens*, 473 F.2d at 605, its holding results from an application of objective standards and not from the court's evaluation of the defendant's understanding of those standards.

At least one state has, by statute, abolished the intricacies of this area. See LA. CODE CRIM. PRO., art. 224 (1966). Under the approach outlined in the text accompanying notes 96-97 *supra*, police officers may rely for a time on this statute, even though it may conflict with the common-law doctrine embodied in the fourth amendment.

103. 486 F.2d at 548.

104. See text accompanying notes 78-80 *supra*.

In *Mattis v. Schnarr*,¹⁰⁵ the Court of Appeals for the Eighth Circuit remanded the case for consideration of the constitutionality of the statutes in question, indicating that a declaration of invalidity would deprive officers in future cases of a defense based on reliance upon these statutes.¹⁰⁶ Although one might fault the court in *Mattis* for going beyond *Pierson v. Ray* by allowing reliance on any not yet invalidated statute in any situation, the court was faithful to the *Pierson* approach in so limiting the permissible reliance. Under the approach taken by the Court of Appeals for the Ninth Circuit in *Williams*, however, a declaration of the statute's invalidity would still leave much discretion to a police official: absent a Supreme Court decision directly on point, the statute itself as well as any case law in conflict with the declaration would make reasonable a police officer's belief that he might use deadly force on a felon.¹⁰⁷

This new doctrine could have a major impact in cases where the defendant would not dispute the general content of the applicable rule of law, but rather thought incorrectly that the facts were sufficient to bring his conduct within that rule. The exclusionary device in criminal cases has been in operation long enough to generate numerous precedents holding that certain facts do or do not establish as a matter of law the conformity of the officer's questioned conduct with an applicable rule of law. These precedents establish guidelines for the judge in deciding whether to direct a verdict in civil cases against the officers where a similar privilege is claimed.¹⁰⁸ General acceptance of a defense that one reasonably thought his actions to be privileged would render such precedents inapplicable since the focus would shift from the character of his conduct as a matter of law to the reasonableness of his belief, a jury question. Thus, a defendant could get to the jury in a case where, were it a criminal case, the judge would be obliged to suppress because of applicable precedent.

By way of example, an officer may search a dwelling incident to a lawful arrest of its occupant in order to prevent the arrestee's escape, an assault on the officer, or destruction of evi-

105. 502 F.2d 588 (8th Cir. 1974).

106. *Id.* at 596.

107. See *Boca Raton v. Coughlin*, 299 So. 2d 105 (Fla. Dist. Ct. App. 1974). See generally *United States v. Peltier*, 95 S. Ct. 2313, 2321 (1975) (Brennan, J., dissenting).

108. See *Lucero v. Donovan*, 354 F.2d 16 (9th Cir. 1965); *Anderson v. Haas*, 341 F.2d 497 (3d Cir. 1965); *Sexton v. Gibbs*, 327 F. Supp. 134 (N.D. Tex. 1970), *aff'd*, 446 F.2d 904 (5th Cir. 1971).

dence.¹⁰⁹ In *United States v. Baca*,¹¹⁰ the Court of Appeals for the Tenth Circuit held a search of a dwelling which had been conducted after the arrestee had been handcuffed with his hands behind his back illegal as a matter of law. The court therefore suppressed evidence obtained in that search in the prosecution of a companion who had also occupied the house. One might reasonably suspect that this precedent would guide future Tenth Circuit judges in ruling on both motions to suppress and motions to direct verdicts in civil cases, where the search in question was conducted after the arrestee had been handcuffed. If the arresting officer were to testify that he felt a need to search even after this critical point in time, the matter would appear to require the jury to pass on his defense, notwithstanding the rule already developed in the case law. *Baca*, after all, merely declared such conduct illegal; it did not say it would be unreasonable to think such conduct legal, especially if one were not familiar with the opinion itself. Perhaps the jury would discredit the officer's testimony in any event; but the point is that traditional doctrine would not have allowed him that chance.

One real impact of *Bivens*, then, will be in its "clearing the books" in civil suits against police officials of law developed in motions to suppress in criminal prosecutions. The defendant in a civil case can get issues to the jury which would be decided by the judge in a criminal prosecution.¹¹¹

The Supreme Court has thus far given no approval of the *Bivens* interpretation of *Pierson v. Ray*. Although the *Pierson* language was quoted with approval in *Scheuer v. Rhodes*,¹¹² the Second Circuit opinion in *Bivens* on remand was neither cited nor discussed. The *Scheuer* case involved the liability of a state governor and lesser officials, including members of the National

109. See *Chimel v. California*, 395 U.S. 752 (1969).

110. 417 F.2d 103 (10th Cir. 1969).

111. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 456 F.2d 1339, 1348 (2d Cir. 1972) (concurring opinion); *Boscarino v. Nelson*, 377 F. Supp. 1308 (E.D. Wisc. 1974); *Lykken v. Vavreck*, 366 F. Supp. 585, 593-94 (D. Minn. 1973); *Bowens v. Knazze*, 237 F. Supp. 826 (N.D. Ill. 1965). The new theory may also make close cases more susceptible to the granting of summary judgment for the defendant. See *Brubaker v. King*, 505 F.2d 534 (7th Cir. 1974); *Tritsis v. Backer*, 501 F.2d 1021 (7th Cir. 1974).

It has never been seriously suggested that *Pierson* or its interpretation in *Bivens* should be applied in motions to suppress in criminal cases, although the Supreme Court may address this issue in *Stone v. Powell*, 507 F.2d 93 (9th Cir. 1975), *cert. granted*, 43 U.S.L.W. 3681 (U.S. June 24, 1975).

112. 416 U.S. 232, 245 (1974).

Guard, for the shooting deaths of several students on the Kent State campus during a period of claimed insurrection. The primary thrust of this case is that such state officials, contrary to their assertion, do not have complete executive immunity for their actions; complete immunity given to any state officials would defeat the policy behind section 1983. Rather, state officers must act reasonably and in good faith during a time of insurrection. Traditionally, however, the federal courts have considered the use of military force during civil insurrections *sui generis*.¹¹³ An opinion by Mr. Justice Holmes approved arrest on less than probable cause in that situation.¹¹⁴ *Scheuer*, then, continues a line of cases proceeding along a different route from that pursued by *Pierson*.¹¹⁵

113. The *Scheuer* Court emphasized this unique aspect of the case:

[T]he decision to invoke military power has traditionally been viewed with suspicion and skepticism since it often involves the temporary suspension of some of our most cherished rights. . . . Decisions in such situations are more likely than not to arise in an atmosphere of confusion, ambiguity, and swiftly moving events. . . . In short, since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad.

Id. at 246-47. Thus, the Court held, the *Pierson* defense of "good faith and probable cause" was not applicable in a situation involving the civil use of military force. *Id.* at 245-46. Rather,

in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all circumstances, coupled with a good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Id. at 247-48. Cf. *Wood v. Strickland*, 420 U.S. 308, 330-31 (1975) (dissenting opinion).

114. *Moyer v. Peabody*, 212 U.S. 78 (1909).

115. Nonetheless, the lower courts have focused solely on the "good faith" language of the opinion. In *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974), a justice of the peace stepped down from the bench and severely battered the plaintiff in open court and in the adjoining corridor when the plaintiff refused to leave the courtroom, although the plaintiff was engaging in no breach of the peace. Finding no judicial immunity, the court nonetheless suggested that the defendant was entitled to his *Scheuer* defense of "good faith while using excessive force." *Id.* at 65. (The award of punitive damages, however, cured whatever error in the instructions there may have been.) It is difficult to comprehend to what points the judge's good faith might have extended: to his belief that he was not inflicting severe injury on the plaintiff? To his belief that his status as judge gave him license to commit battery without fear of legal consequences? To his belief that, even though he had already removed plaintiff from a place where plaintiff had no right to be, he could nonetheless punish and retaliate against the latter? A saloon-

Nor does the Supreme Court's recent pronouncement in *Wood v. Strickland*¹¹⁶ give any support to the view of the court of appeals in *Bivens*. In *Wood*, two girls had been expelled from high school by the defendant school board members for "spiking" the punch at a school-sponsored gathering in violation of school rules prohibiting the use or possession of intoxicating beverages at school or school activities. The expelled students then sued the school board members for monetary and injunctive relief under section 1983, alleging infringement of their constitutional rights to due process. After the jury could not come to a verdict, the trial court had granted a judgment as a matter of law for the defendants.¹¹⁷ On review, the Court of Appeals for the Eighth Circuit passed over the students' claim that they had not been afforded procedural due process.¹¹⁸ Nonetheless, the court decided that the students had been denied substantive due process because there was no evidence that the malt liquor which they had added to the punch was an "intoxicating beverage" prohibited by the school rules.¹¹⁹ The court of appeals held that the purely subjective good faith of the board members would not insulate them from liability for this denial of substantive due process.

The Supreme Court, on certiorari, agreed that the board members had a *qualified* good faith immunity. It further agreed with the appellate court that absence of actual malice was not a sufficient defense:

The official must himself be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice.¹²⁰

The Court, although not holding that substantive due process need be accorded in school expulsion cases, did hold that the

keeper who ejected a patron and then beat him up in the street for good measure would receive no solicitous consideration of his good faith. Why should the defendant in this case have possibly fared any better? See also *Hanna v. Drobnick*, 514 F.2d 393 (6th Cir. 1975).

116. 420 U.S. 308 (1975).

117. *Strickland v. Inlow*, 348 F. Supp. 244 (W.D. Ark. 1972).

118. *Strickland v. Inlow*, 485 F.2d 186, 190 (8th Cir. 1973). The court noted, without holding, that while the plaintiffs had been expelled without being allowed to appear before the school board, this defect may have been cured by their appearance at a subsequent school board meeting. *Id.* at 190.

119. 485 F.2d at 190. See also *Thompson v. Louisville*, 362 U.S. 199 (1960).

120. 420 U.S. at 321.

students had been granted substantive due process. Finding that under the school regulations, "intoxicating beverage" meant alcoholic beverage, the Supreme Court concluded that there was sufficient evidence that the malt liquor was an alcoholic beverage to justify the expulsions. Since it regarded procedural due process an indisputable legal right, however, the Court remanded for further proceedings on the procedural due process issue which the court of appeals had side-stepped.

The decision is remarkable for its insistence that the defense formulated in this section 1983 action parallels the defense accorded at common law.¹²¹ Once again, the Court explicitly acknowledges and continues its search for the relevant doctrine in the common-law cases that arose in similar fact situations. Moreover, the Court stresses that "good faith" is not purely subjective. One must believe that he is acting properly; there must be no actual malice. Ignorance of well-settled legal rights, however, will provide no defense even to those with the purest motivation for their objectionable conduct.

There is, of course, the negative implication that a pure heart and ignorance of not-so-settled legal rights may render the school official immune from suit. Nonetheless, it may not be confidently predicted that this implication will be given an expansive interpretation for the school administrator's benefit. For example, the Court regarded procedural due process in an expulsion hearing as a "settled" right, even though its decision in *Goss v. Lopez*¹²² established that right only one month before the opinion in *Wood*—and thus long after the incident prompting the *Wood* lawsuit. No doubt Supreme Court decisions in analogous settings¹²³ and lower court decisions on the issue might have justified an informed prediction of *Goss*,¹²⁴ but they hardly "settled" the issue in any strict sense, especially for nonlawyer school officials. Moreover, it is informative to notice the Court's method in determining that substantive due process had been granted. The Court asked whether this right had been accorded, and not whether the board members reasonably concluded, in light of the rather open-ended nature of substantive due process, that they had accorded it. *Wood* therefore implies that, should the legal right to substantive due process exist, the board members would

121. *Id.* at 318 & n.9.

122. 419 U.S. 565 (1975). Moreover, it is noteworthy that *Goss* dealt with suspensions rather than expulsions.

123. *See id.* at 573.

124. *See id.* at 576 n.8.

be required to apply this principle in an accurate fashion to the specific facts presented.¹²⁵

Finally, even though there may be some unspecified tolerance for school officials who act in ignorance of the law, *Wood* does not indicate that it enlarges the permissible limits of a police officer's ignorance of the law beyond the narrow ones approved in *Pierson*. *Wood* makes no mention of the *Bivens* development. Indeed, the *Wood* Court stresses that its decision is rooted "in the specific context of school discipline."¹²⁶ This circumscribed holding accurately reflects the state of the common law. Unlike many other executive officials, police officers have no general immunity, even of a qualified variety.¹²⁷ Centuries of development have resulted in narrow, specific rules of privilege. The defenses accorded other executive officials, especially in cases where the rights themselves are only recently being recognized, do not affect the police officer's rules of privilege.¹²⁸

As we have seen, then, the Court of Appeals for the Second Circuit in *Bivens* distorted the common law to reach what it deemed to be a desirable result. For that reason its opinion may not be accepted by state courts as an authoritative statement of an appropriate defense to police trespass suits.¹²⁹ It is, after all,

125. See 420 U.S. at 326 ("there was evidence supporting the charge against respondents" (emphasis in original)).

126. *Id.* at 322.

127. See W. PROSSER, A HANDBOOK OF THE LAW OF TORTS § 132 (4th ed. 1971); Mathes & Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889, 896 (1965). See generally Note, *The Defense of "Good Faith" Under Section 1983*, 1971 WASH. U.L.Q. 666.

128. See *O'Connor v. Donaldson*, 95 S. Ct. 2486 (1975); *Black v. Brown*, 513 F.2d 652 (7th Cir. 1975); *Hoitt v. Vitek*, 497 F.2d 598, 601-02 & n.3 (1st Cir. 1974); *Bell v. Wolff*, 496 F.2d 1252 (8th Cir. 1974). See also *Schott v. Fornuff*, 515 F.2d 344 (4th Cir. 1975). In *O'Connor*, the Court remanded to the Court of Appeals for the Fifth Circuit to determine whether the administrator of a state mental hospital should have been accorded a "good faith" instruction. In the course of its opinion, the Court declared that a person not dangerous to himself or others may not be confined, even under a court order, pursuant to statute, finding him "mentally ill." By its remand, the Court suggested this constitutional right to be of such novelty that the defendant, in this suit for damages, might not be accountable unless he bore malice against the plaintiff. The jury's award of punitive damages, however, undercuts the defendant's argument that he acted in good faith and was entitled to an appropriate instruction. See *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974), discussed in note 115 *supra*. Once again, the Court made no mention of *Bivens*, no doubt for the reasons suggested in text accompanying notes 127-28 *infra*.

129. At least one state, however, has by statute adopted an approach similar to that of *Bivens*. See CAL. PENAL CODE § 847(b) (West 1970).

easy to understand the ready acceptance of that Second Circuit opinion by the federal judiciary,¹³⁰ which has long been uncertain as to whether these essentially local suits should be allowed to gain concurrent entrance into the federal courts by use of the section 1983 label;¹³¹ the state courts, untroubled by such considerations, may not so readily embrace the *Bivens* solution. The decision, however, does attempt to deal with another problem that must vex state as well as federal judges. It is easy to conjure up, as did the Court of Appeals for the Second Circuit,¹³² a situation where a criminal, brought to justice by a constable whose nose for wrongdoing is keener than his knowledge of the law, escapes from his plight by employing a sharp lawyer to free him on a "technicality." Then, claiming the victor's spoils, he institutes a civil damage suit against the hapless officer, recovering a substantial judgment. In such a case, the simple, yet deceptive, solution which is presented by *Bivens* to this perceived injustice could easily gain currency.

This solicitude for the officer¹³³ in what has to be an infrequent situation,¹³⁴ however, strips the totally innocent citizen, as

Obviously, a federal court willing to accept *Bivens* as a statement of "the common law" will apply this doctrine to whatever state claims of police misconduct are pendent to the federal claims. The Court of Appeals for the Second Circuit has already applied its *Bivens* holding in diversity litigation, even as to parties not police officers. *Fleming v. McEnany*, 491 F.2d 1353 (2d Cir. 1974). Compare the rigorous approach of *Merritt v. St. Paul*, 11 Minn. 145 (1866), cited in note 16 *supra*. *But see Anderson v. De Cristofalo*, 494 F.2d 321 (2d Cir. 1974).

The Court of Appeals for the Fourth Circuit has seized upon *Bivens* and its interpretation of *Pierson* to reward ignorance of the law in a fairly wide range of contexts. Compare *Skinner v. Spellman*, 480 F.2d 539 (4th Cir. 1973), with *Eslinger v. Thomas*, 476 F.2d 225 (4th Cir. 1973).

130. A number of other courts have added their approval to the *Bivens* approach. See *Fiddler v. Rundle*, 497 F.2d 794 (3d Cir. 1974); *Hoitt v. Vitek*, 497 F.2d 598 (1st Cir. 1974); *Bell v. Wolff*, 496 F.2d 1252 (8th Cir. 1974); *Hill v. Rowland*, 474 F.2d 1374 (4th Cir. 1973); *Rodriguez v. Jones*, 473 F.2d 599 (5th Cir. 1974) (*Bivens* approved, but actual compliance with common-law privilege rules determined); *Jones v. Perrigan*, 459 F.2d 81 (6th Cir. 1972) (dictum); *Tritsis v. Backer*, 355 F. Supp. 225 (N.D. Ill. 1973); *Richardson v. Snow*, 340 F. Supp. 1261 (D. Md. 1972).

131. See text accompanying notes 26-30 *supra*.

132. 456 F.2d at 1347, 1348.

133. Solicitude for those ignorant of the law has been extended to others besides police officers—even those, like lawyers, who can realistically be expected to know the law. *Tucker v. Maher*, 497 F.2d 1309 (2d Cir. 1974); *Fleming v. McEnany*, 491 F.2d 1353 (2d Cir. 1974).

134. *But see* *Bowens v. Knazze*, 237 F. Supp. 826 (N.D. Ill. 1965) (liability denied). An officer had made a valid arrest of the plaintiff's wife on a public sidewalk. He then frisked the plaintiff for a weapon and found none. Later he made a more thorough search and found a small envelope of heroin in the plaintiff's pants. The plaintiff sued under sec-

well as the wrongdoer, of a meaningful protection from invasion of liberties. Only in the most flagrant cases of physical brutality inflicted on a totally innocent person can any effective control over the police be expected under the *Bivens* standard.¹³⁵ Moreover, given the view of the *Bivens* court that constitutional guidelines are excessively complex,¹³⁶ almost all claims of ignorance of the law must be given a receptive ear. Such permissiveness will not only reward incompetence, but also invite perjury.¹³⁷

POSSIBLE ALTERNATIVES TO THE BIVENS STANDARD

A formidable criticism made against an objective standard is the argument that the guidelines of criminal procedure are complex and vague, thus making conformance difficult for the police officer. As observed in *Bivens*, the legal guidelines to which he must conform his conduct are often intricate, sometimes in a process of change, and sometimes, because of the recurring emphasis on a "reasonableness" standard, of an open-ended nature. Moreover, when confronted with a quickly changing situation, the officer may be hard-pressed to apply those guidelines accurately. After some reflection, however, one must wonder whether it is the police officers who are expecting too much of the courts, and not the reverse. If automobile drivers were to complain that their state's motor vehicle code not only had too many provisions

tion 1983 for the second, illegal search after his criminal conviction had been reversed in *People v. Bowen*, 29 Ill. 2d 349, 194 N.E.2d 316 (1963).

The district court dismissed the plaintiff's section 1983 complaint, reasoning that the propriety of a "double search" had never been considered by the Illinois Supreme Court. Hence, the officer could reasonably believe that he acted lawfully. The officer's actions, said the court, were in no way negligent.

One wonders how the notion of negligence can creep into the analysis of an intentional tort, especially in light of the Supreme Court's language in *Monroe v. Pape*, 365 U.S. 167, 187 (1961). More importantly, the defendant police officer should not have found it necessary for the Illinois Supreme Court to tell him that arrest of one person on a public sidewalk does not justify search beyond a frisk of all persons near the arrestee. His protestations of ignorance and lack of guidance are somewhat feeble, to say the least. The district judge's observation that the state court had made no prior decisions on this point should have cut the opposite way.

See also *Daly v. Pedersen*, 278 F. Supp. 88 (D. Minn. 1967); *Quinnette v. Garland*, 277 F. Supp. 999 (C.D. Cal. 1967).

135. Compare *Hill v. Rowland*, 474 F.2d 1374 (4th Cir. 1973), with *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970).

136. 456 F.2d at 1348.

137. See generally *Kaplan, The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1044-45 (1974).

(upon any one of which might be predicated a finding of negligent conduct), but also left too many crucial questions with less than rigid answers, would courts or the legislature be moved to dispense with these rules? In fact, any state's motor vehicle code could be subject to such complaints.¹³⁸ Yet the real damage done by those who depart from its objective, albeit imperfect, standards provides a sound basis for unswerving adherence to a liability system not tempered by consideration of the tortfeasor's subjective state of mind.¹³⁹

138. Police officers receive no special consideration when they operate motor vehicles. Consider, for example, UNIFORM VEHICLE CODE § 11-106 (1968):

- (a) The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein stated.
- (b) The driver of an authorized emergency vehicle may:
 1. Park or stand, irrespective of the provisions of this chapter;
 2. Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
 3. Exceed the maximum speed limits so long as he does not endanger life or property;
 4. Disregard regulations governing direction of movement or turning in specified directions.
- (c) The exemptions herein granted to an authorized emergency vehicle shall apply only when such vehicle is making use of an audible signal meeting the requirements of § 12-401(d) and visual signals meeting the requirements of § 12-218 of this act, except that an authorized emergency vehicle operated as a police vehicle need not be equipped with or display a red light visible from in front of the vehicle.
- (d) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

Moreover, the case law abounds with instances where police officers have been held liable for negligent operation of motor vehicles, even though their conduct required some close judgmental decisions. Never is there a suggestion that the police officer's subjective state of mind should lessen his liability under the sometimes technical, sometimes open-ended standards that regulate the operation of motor vehicles. See, e.g., *Myers v. Town of Harrison*, 438 F.2d 293 (2d Cir. 1971); *Reed v. City of Winter Park*, 253 So. 2d 475 (Fla. App. 1971); *Sundin v. Hughes*, 107 Ill. App. 2d 195, 246 N.E.2d 100 (1969); *Cotten v. Transamerica Ins. Co.*, 211 So. 2d 110 (La. App. 1968); *Thain v. City of New York*, 30 N.Y.2d 524, 280 N.E.2d 892, 330 N.Y.S.2d 524 (1972).

139. Insistence on a purely subjective standard, moreover, may be thought to be too radical an approach even when dealing with conduct legal at the time of its performance but illegal at the time of a civil

There remains a question as to whether the civil damage remedy is necessary where the police officer reasonably believed his actions to be legally justified. Perhaps, in the minds of some, deprivation of liberty or interference with enjoyment of one's property is not thought to be injurious; only the addition of a subjective element of malice would produce injury. At common law, however, personal freedom, personal security, and personal enjoyment of property were considered to be important rights—hence, the existence of trespass actions with only narrow, limited privileges available as defenses. Injury was presumed to flow from interference with these rights; there was no need to present doctor bills or repair bills to make a case for damages. If an innocent man were arrested without probable cause, it was deemed an affront to his sensibilities and a transgression of an important civil right.¹⁴⁰ If his house were ransacked, it was an outrage perpetrated on his enjoyment of property.¹⁴¹ He was not expected to suffer this sort of indignity meekly as his involuntary contribution to society's quest for law and order. The mental state or malice of the tortfeasor did not detract from the wrong, although it would determine the propriety of punitive damages.¹⁴² Even though not a bruise was inflicted nor a board broken, there was injury and damage to important rights in every false arrest and illegal search.

The suggestion that the officer's state of mind could mitigate the wrong inflicted by his violation of the guidelines on arrest, search, and seizure implies that these rights are not really important. If the guidelines are meaningless technicalities, the violation of which does not result in any real harm, then of course an "I-didn't-mean-to" defense, the approximate equivalent of an apology, should suffice to assuage the wounded feelings of the innocent man who has been arrested or has seen his house

action for damages. Courts have not hesitated to make their constitutional decisions prospective only when formulating new legal standards to govern motions to suppress. But a ruling that a particular decision is prospective only has never been thought to dispense with an objective appreciation of the previous standards, untouched by the prospective-only ruling. Cf. *Black v. Brown*, 513 F.2d 652 (7th Cir. 1975). The seminal case on retroactivity is *Linkletter v. Walker*, 381 U.S. 618 (1965). For an able criticism of this case and the doctrine it has spawned, see Haddad, "*Retroactivity Should Be Rethought*": *A Call for the End of the Linkletter Doctrine*, 60 J. CRIM. L.C. & P.S. 417 (1969).

140. See *Christie v. Leachinsky*, [1947] A.C. 573.

141. See *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765).

142. See *Beckwith v. Bean*, 98 U.S. 266 (1879).

torn apart. Viewed as mere rules of etiquette, the guidelines hardly seem worthy of a damage action when they are breached. Since, however, application of these guidelines often results in the freeing of dangerous criminals, it is difficult to believe that the courts could attribute so little importance to them in the context of civil damage actions. Rather, as implied in *Bivens*, there may be a reluctance on the part of the courts to redress violation of these guidelines with multiple remedies—a civil damage action as well as the suppression of evidence and probable dismissal of charges in a criminal trial. For some time, the civil damage action was the only remedy for the violation of these rules; the motion to suppress is a relatively recent development.¹⁴³ If the exclusionary rule were found to have a constitutional basis,¹⁴⁴ the courts might then deem this one remedy sufficient and desire to dispense with the older one.

In cases where the police have obtained incriminating evidence through illegal tactics, the availability of the motion to suppress may well be remedy enough for the individual deprived of his constitutional rights. There is no requirement, constitutional or otherwise, that an individual have more than one remedy. Avoiding a criminal conviction or substantially lessening its likelihood should provide sufficient recompense for a deprivation of constitutional rights. Although, on a motion to suppress, the police may not justify their action by pointing to the fruits of that conduct, it is not unreasonable for them to refer to those fruits in a later damage action. In the latter context, the fruits of their conduct would not indicate its legality, but rather the inappropriateness of an additional remedy such as the civil damage action.¹⁴⁵

143. See *Weeks v. United States*, 232 U.S. 383 (1914).

144. See generally Schrock & Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974); cf. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 432-33 (1974).

145. It is conceivable that the police could make an illegal arrest of a guilty person, but not gain any incriminating evidence through their conduct. Should this individual have an action for damages? 1 HARPER & JAMES, *supra* note 4, § 3.18, at 280-81, think not. In this situation, however, the arrestee has no remedy in the context of a criminal trial for this deprivation of his rights. The exclusionary rule excludes evidence; it does not directly give the arrestee his freedom. An illegal arrest does not deprive the court of jurisdiction over the arrestee or impede his prosecution. See *Frisbie v. Collins*, 342 U.S. 519 (1952). To deny the civil damage action in this sort of case leaves the arrestee without any redress for deprivation of his right to personal freedom.

Where, however, illegal acts result in the production of no incriminating evidence, the *Bivens* formula deprives the innocent victim of any remedy. Thus, dissatisfaction of a different sort with the civil damage action must also underlie the *Bivens* approach. This may be found in the honest, understandable sympathy which exists for the offending officers. Their employers—city, state, or federal governments—insist on aggressive police work and reap from it the benefits of law and order. When the officers overstep the boundary between aggressive police work and illegal police work, however, those same employers often cannot be made to assume responsibility.¹⁴⁶ The tort liability thus rests exclusively with the officer, who is almost always financially unable to shoulder the weight.¹⁴⁷ Were the governmental employer to assume joint and several liability with the employee, we might witness less reluctance by the courts to enforce for the innocent those rights which are considered so important that even the guilty receive their protection.

Watering down the damage action against the officer, however, gives no incentive for the government to accept responsibility for that officer's actions. The courts are unlikely to impose liability on the governmental employer without statutory authority,¹⁴⁸ but they also should be reluctant to change a well-established common-law doctrine so as to lessen the employee's exposure to liability, for such a change may thereby destroy an important incentive for legislative change of the government's duty.¹⁴⁹ Only if the civil suit for damages is a reasonably potent weapon will governmental employers be stimulated to assume their proper responsibility. *Bivens* and its progeny¹⁵⁰ unfortu-

146. See Davis, *An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703, 718 & n.38 (1974). Recently, 28 U.S.C. § 2680(h) (1970) was amended by Act of March 16, 1974, Pub. L. No. 93-253, 88 Stat. 50, to allow suit against the federal government for certain intentional torts of its law enforcement agents.

Some states do provide indemnity to officers against whom a judgment has already been rendered. See, e.g., ILL. REV. STAT. ch. 24, §§ 1-4-5, -6 (1973); WIS. STAT. ANN. § 285.06 (Supp. 1974-75).

147. See Mathes & Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889, 907-08 (1965).

148. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1556-59 (1972), makes the argument that the courts should consider the abolition of government immunity for intentional police torts. The Supreme Court's recent decision in *Moor v. County of Alameda*, 411 U.S. 693 (1973), indicates that the judiciary will likely leave this delicate task to the legislative branch.

149. See Dellinger, *supra* note 148, at 1556.

150. See note 130 *supra*.

nately remove any pressure upon them to take on that responsibility.

The common law has wisely held police officers to a higher standard. They must act legally, not merely think they are acting legally. *Monroe* opted for this higher standard when it declared that section 1983 actions "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."¹⁵¹ Had the Court wanted to take into account the officer's perceptions of the legality of his conduct, it would have required a specific intent to violate the plaintiff's rights as it has under the statute which is the penal counterpart of section 1983.¹⁵² The *Pierson* Court thus reaffirmed the desire that section 1983 actions be litigated under the rules and framework developed for common-law trespass actions, even going so far as to adopt a minor inconsistency within the common law.

Bivens, however, has in a relatively short period of time influenced the lower courts to temper their application of common-law privilege rules in section 1983 actions. Officers need only reasonably believe that they acted legally, a requirement forged in the realization that the law has become too complicated for an officer to apply accurately. Thus, the appearance of privilege has been substituted for privilege itself. Those privileges not dependent on appearances would have to be radically altered to conform with the apparent *Bivens* view that all privileges are homogeneous—good faith and reasonable belief. Moreover, as *Mattis v. Schnarr* demonstrates, even unconstitutional state statutes can provide the officers a substantial defense.¹⁵³ Although state law may not override the Constitution, an officer's reliance on state law may override a citizen's constitutional rights. No longer is the officer required to draw fine lines.

There is no doubt that the federal courts do have the *power* to fashion privilege rules that differ from those of the common law in actions against police officers which arise under federal law, if they determine that the Constitution would thereby be better served.¹⁵⁴ *Monroe*, *Pierson*, and *Wood*, however, indicate

151. 365 U.S. at 187.

152. See note 31 *supra* and accompanying text.

153. See text accompanying notes 96-97 *supra*.

154. See *Hampton v. Chicago*, 484 F.2d 602, 607-08 (7th Cir. 1973); *Howell v. Cataldi*, 464 F.2d 272, 278-79 (3d Cir. 1972); cf. *Caperci v. Huntoon*, 397 F.2d 799 (1st Cir. 1968). See also Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1026-27 (1967). No doubt pendent claims under state law could

that the basic themes to be developed by the lower federal courts are those of the common law, which, in the area of police torts, embody values written into the Bill of Rights.¹⁵⁵ By focusing on the defendant officer's mental processes, *Bivens* follows a path which was impliedly rejected by *Monroe*.

This experiment by the lower courts is therefore not justified by precedent; nor is it good policy. The range of devices available to deter illegal police conduct will be effectively narrowed, thereby putting more pressure on the exclusionary rule—the deterrent value of which has been widely questioned,¹⁵⁶ even when used in conjunction with other remedial devices. Moreover, those most deserving of relief from police excesses—persons who are innocent of any wrongdoing, and thus without an opportunity to invoke the exclusionary rule—will be deprived of their only effective remedy. Finally, the courts must now not only develop constitutional law, but also set standards within which juries may find reasonable ignorance of constitutional law, a task never assumed in any other area of tort law.¹⁵⁷ For these reasons, therefore, the United States Supreme Court should be loathe to approve the doctrine developed in the lower courts, a development which it has previously refused to sanction.

be governed by federal law if the officer is a federal one. *See generally* *Barr v. Matteo*, 360 U.S. 564 (1959). However, pendent claims against state officials would seem to be governed by the content of state law. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Nonetheless, if one takes the blithe view that the rule announced in *Bivens* does not differ from traditional doctrine, this problem, like the others already discussed, does not arise. *Cf. Fleming v. McEnany*, 491 F.2d 1353 (2d Cir. 1974).

155. *See* text accompanying notes 27-28, 50, 121 *supra*.

156. *See, e.g., Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411-27 (1971) (Burger, C.J., dissenting).

157. The Supreme Court may have authorized just such a procedure in motions to suppress evidence in criminal cases, where the officers' conduct has violated legal guidelines, but there is some question as to whether those guidelines were formulated only after the conduct in question. *See United States v. Peltier*, 95 S.Ct. 2313, 2321 (1975) (Brennan, J., dissenting). Significantly, *Peltier*, in its approach to the retroactivity problem, *see* note 139 *supra*, makes no mention of *Pierson* or *Bivens*. It focuses not on sympathy for the officer "mulcted in damages," as was the concern in *Pierson*, a civil case, but rather on the imperative of judicial integrity and deterrence of lawless action, neither of which it envisioned as being harmed by an inquiry into what the officer should have known. The holding is limited to criminal cases where there is uncertainty as to whether the law substantially changed after the conduct in question and where, if it did, the change would be prospective only. Justice Brennan voiced fears in his dissent, however, that the majority opinion "forecasts the complete demise of the exclusionary rule." *Id.* at 2324.