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Indiana Law Journal

Volume 57 | Issue 3 Article 5

Spring 1982

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NOTES

Basis of Liability in a Section 1983 Suit: When is the State-Of-Mind Analysis Relevant?

Over the past two decades, section 1983 of the Civil Rights Act of 1871[1] has been one of the most frequently litigated statutes in the federal courts. Section 1983 is silent as to the basis for liability[2]—that is, whether negligent, intentional, or reckless conduct[3] is required before liability may be imposed. As a consequence, the questions of whether and when negligence will support a section 1983 claim remain among the more prominent and difficult issues in section 1983 litigation—issues that have not yet been resolved satisfactorily by the cases addressing them.

Recently in *Procunier v. Navarette*,[4] *Baker v. McCollan*,[5] and *Parratt v. Taylor*,[6] the Supreme Court granted certiorari to decide whether negligence will support a section 1983 claim.[7] In *Procunier* and *Baker* the Court decided on other grounds.[8] In *Parratt* the Court finally addressed the issue, but decided the case on other grounds.[9] The *Baker* Court, through Justice Rehnquist, observed that whether "simple negligence"

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[1] 42 U.S.C. § 1983 (1976) (originally enacted as Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13).

[2] The section 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.

[3] RESTATEMENT (SECOND) OF TORTS § 282 (1965) defines negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." Intentional conduct is defined as conduct in which "the actor desires to cause the consequences of his act." *Id.* § 8A. For a discussion and differentiation of negligence, intended harm, and recklessness, see *id.* § 282, comments d, e.

[4] 434 U.S. 555 (1978).

[5] 443 U.S. 137 (1979).

[6] 451 U.S. 527 (1981).

[7] Certiorari was granted in Parratt v. Taylor to "be of greater assistance to courts confronting such a fact situation than it appears we have been in the past." *Id.* at 533-34. Assistance was necessary because certiorari was granted twice before, in *Procunier* and *Baker*, to decide whether mere negligence will support a claim under § 1983, but in each of those cases the Court "found it unnecessary to decide the issue." *Id.* at 532.

[8] *See* text accompanying notes 11-12 & 64-66 *infra*.

[9] The Supreme Court reversed the lower court opinions and, while discussing the state-of-mind issue in dicta, decided the case on the ground that the post-deprivation tort remedies that the state of Nebraska provided as a means of redress for the complainant's property deprivations satisfied the requirements of procedural due process. 451 U.S. at 537-44.

states a claim for relief under section 1983 "may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a section 1983 action."[10] The *Baker* Court further noted that regardless of whether state of mind is relevant to stating a cause of action under section 1983, state of mind "may be relevant on the issue of whether a constitutional violation has occurred in the first place."[11] Yet the *Baker* Court found it unnecessary to discuss the significance of thus keeping distinct these state-of-mind analyses because the Court found no constitutional violation and held that in the absence of a constitutional violation "the state of mind of the defendant is wholly immaterial."[12] Realizing that the *Baker* decision had not given the lower courts sufficient guidance on the issue of negligence, Justice Rehnquist, writing for the plurality in *Parratt*, emphasized that section 1983 has no express requirement of a particular state of mind.[13] Thus, the Court ambiguously acknowledged that negligence may be actionable under section 1983 and that the state-of-mind analysis may not always be relevant to the statement of a cause of action.[14]

The purpose of this note is to examine when the state-of-mind analysis is relevant in a section 1983 suit. This note argues that the state-of-mind inquiry becomes most relevant in determining whether the defendant has available an affirmative defense against liability in a section 1983 suit involving a plaintiff seeking monetary damages.[15] This note argues further that whether the state-of-mind analysis is relevant when the plaintiff is establishing the elements of his cause of action in a section 1983 suit may depend on which constitutional right the plaintiff alleges has been violated.[16] Although the Court has never ruled on the merits that

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[10] 443 U.S. at 139-40.

[11] *Id.* at 140 n.1.

[12] *Id.* at 140. It was after this statement that the *Baker* Court placed footnote 1. For a summary of footnote 1, see text accompanying note 11 *supra*.

[13] 451 U.S. at 533-35 (citing *Baker* and Monroe v. Pape, 365 U.S. 167 (1961)).

[14] *Id.* at 534-35.

[15] The Court has implied in dictum that a defendant's negligent state of mind may be sufficient to establish his responsibility for a constitutional deprivation, *see* Parratt v. Taylor, 451 U.S. at 536, but the Court has never upheld on the merits a § 1983 claim premised on negligence. Therefore, it is the position of this note that the only clear and meaningful state-of-mind analysis presently engaged in by the Court is the analysis that applies to the determination of whether to grant the defendant an affirmative defense and what type of remedy is appropriate for the plaintiff.

[16] Some commentators think that the state-of-mind inquiry should only be relevant in determining whether there has been a constitutional violation, and then the state of mind required to state a § 1983 claim should vary depending on which particular constitutional right was allegedly violated. *See* Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State-Of-Mind Requirement*, 46 U. CIN. L. REV. 45, 49 (1977); McClellan & Northcross, *Remedies & Damages for Violation of Constitutional Rights*, 18 DUQ. L. REV. 409, 415 (1980). Another view asserts that the state-of-mind inquiry is irrelevant and only obstructs the operation of § 1983. *See* Note, *Section 1983 Liability for Negligence*, 58 NEB. L. REV. 271, 282-83 (1978).

negligence will satisfy the threshold cause-of-action requirement, the Court in dicta has suggested that negligent conduct may be actionable under section 1983 for the violation of some constitutional rights but not others.[17] As a necessary corollary to this view, this note argues that even if negligence is found to suffice for a cause of action, such a development will not open the floodgates for section 1983 litigation because of the inherent safeguards against liability provided by the interplay of defenses and remedies under section 1983. Only after examining the state-of-mind analysis relevant to defenses and remedies can one fully comprehend the difficulty the Court has had in articulating whether or when state of mind is relevant in stating a cause of action under section 1983.

This note focuses first on the historical development of the Court's state-of-mind analysis, then examines the mechanics of a section 1983 suit to determine when the state-of-mind analysis is most relevant and how the courts should implement this analysis. The note subsequently concentrates on questions of liability and in particular analyzes the relationship that exists between section 1983 defenses and remedies. The last section of the note provides a framework to illustrate the pitfalls a section 1983 plaintiff faces if negligence will suffice to establish a cause of action, to defeat any defenses, and to justify a remedy. The note suggests under what circumstances negligence might satisfy section 1983's threshold cause-of-action requirement and also withstand any affirmative defenses pleaded by the defendant.

DEVELOPMENT OF THE STATE-OF-MIND "REQUIREMENT"

Before *Monroe v. Pape*,[18] little case law dealt with violations of section 1983.[19] Rather, most of the civil rights litigation before *Monroe* involved 18 U.S.C. § 242, the criminal analogue to section 1983.[20] The leading case discussing a state-of-mind requirement under section 242 is *Screws v. United States*,[21] in which the Court decided that before criminal liability may be imposed, the government must show that the defendant's state of mind amounted to scienter, that is, fulfilled the requirement of inten-

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[17] *See* notes 38-39, 121-23 & accompanying text *infra*.

[18] 365 U.S. 167 (1961). Monroe v. Pape was overruled in part by Monell v. Dep't of Social Servs., 436 U.S. 658 (1978).

[19] *See* Comment, *The Civil Rights Act: Emergence of An Adequate Civil Remedy?*, 26 IND. L.J. 361 (1951). *See generally* Comment, *The Evolution of the State of Mind Requirement of Section 1983*, 47 TUL. L. REV. 870 (1973).

[20] § 242 states: "Whoever, under color of any law, statute, ordinance, regulation or custom, *willfully* subjects any inhabitant of any state, ... to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States ... shall be fined ... or ... subject to imprisonment ...." 18 U.S.C. § 242 (1976) (emphasis added). For examples of the Supreme Court cases construing § 242, see G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1038-42 (10th ed. 1980).

[21] 325 U.S. 91 (1945).

tional or willful conduct called for under the statute. In this context the Court began to lay the groundwork for developing the federal common law standard for the state of mind needed to maintain a cause of action under section 1983.

The section 1983 action brought in *Monroe* involved intentional conduct by the defendants.[22] Nevertheless, Justice Douglas in his majority opinion in *Monroe* suggested that the scienter requirement in section 242 should not carry over to section 1983 when he stated:

> In the *Screws* case we dealt with a statute that imposed criminal penalties for acts 'willfully' done. We construed that word in its setting to mean the doing of an act with 'a specific intent to deprive a person of a federal right.' We do not think that gloss should be placed on [section 1983] which we have here. The word 'willfully' does not appear in [section 1983]. Moreover, [section 1983] provides a civil remedy, while in the *Screws* case we dealt with a criminal law challenged on the grounds of vagueness. [Section 1983] *should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.*[23]

As recently as *Parratt v. Taylor*,[24] the Court acknowledged that the decisions in *Monroe* and *Baker v. McCollan*[25] suggest "that section 1983 affords a 'civil remedy' for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind."[26] The lower courts, however, did not enjoy the advantage of hindsight and many of the section 1983 decisions in the 1960's and 1970's found the lower courts trying to define a nonexistent requirement. As the lower courts interpreted *Monroe*'s "against the background of tort liability" language, two divergent views developed over the state of mind of the defendant that the plaintiff must allege to state a section 1983 claim. A majority of the circuit courts addressing the issue held that an action based on mere negligence did not state a claim under section 1983;[27] the minority position indicated that negligence would satisfy the state-of-mind requirement.[28] However,

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[22] The plaintiff alleged that 13 Chicago police officers broke into his house without a warrant and forced him and his family to get out of bed and stand naked while the police ransacked the house. Subsequently, the police allegedly took the plaintiff into custody and held him at the police station for 10 hours without filing charges, allowing him to call an attorney, or taking him before a magistrate. 365 U.S. at 169.

[23] *Id.* at 187 (emphasis added) (footnote omitted).

[24] 451 U.S. 527 (1981).

[25] 443 U.S. 137 (1979).

[26] 451 U.S. at 535.

[27] *See, e.g.*, Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976); Williams v. Vincent, 508 F.2d 541 (2d Cir. 1974); Brown v. United States, 486 F.2d 284 (8th Cir. 1973); Williams v. Field, 416 F.2d 483 (9th Cir. 1969), *cert. denied*, 396 U.S. 1016 (1970); Daniels v. Van De Venter, 382 F.2d 29 (10th Cir. 1967).

[28] *See, e.g.*, McCollan v. Tate, 575 F.2d 509 (5th Cir. 1978), *rev'd on other grounds, sub*

> the support the minority view provides for the proposition that mere negligence is actionable under Section 1983 may be generally dismissed as dicta. These cases either involve intentional or reckless conduct with a failure to appreciate that the result of the conduct would be unconstitutional or negligent conduct which results in the deprivation of a clearly established constitutional right independent of a generalized claim based on substantive due process. Negligent conduct, without more, resulting in an injury to a property right does not seem to have direct support even in those Circuits subscribing to the minority view.[29]

Therefore, what began in *Monroe* as the absence of any state-of-mind requirement ironically evolved into a scienter[30] requirement in the lower courts, only to undergo a full-circle return twenty years later in *Parratt*,[31] which seemingly rejected a uniform state-of-mind requirement.

If no rigid state-of-mind requirement exists to state a prima facie section 1983 cause of action, the inquiry becomes whether the state-of-mind analysis is ever relevant in a section 1983 suit. By examining the

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nom. Baker v. McCollan, 443 U.S. 137 (1979); Navarette v. Enomoto, 536 F.2d 277 (9th Cir. 1976), *rev'd on other grounds, sub nom.* Procunier v. Navarette, 434 U.S. 555 (1978); McCray v. Maryland, 456 F.2d 1 (5th Cir. 1972); Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds*, 409 U.S. 418 (1972); Whirl v. Kern, 407 F.2d 781 (5th Cir. 1969). The Fifth Circuit still holds that a § 1983 claim can be premised on gross negligence (somewhere in between intentional and negligent conduct). *See* Wright v. El Paso County Jail, 642 F.2d 134, 136 (5th Cir. 1981) ("[T]here must be at least some allegation of a conscious or callous indifference to a prisoner's rights, thus raising the tort to constitutional stature.").

[29] Bonner v. Coughlin, 545 F.2d 565, 568 n.8 (7th Cir. 1976). For examples of cases in which the conduct was intentional or reckless but there was no intent to deprive the plaintiff of constitutional rights, see Basista v. Weir, 340 F.2d 74, 81 (3d Cir. 1965); Stringer v. Dilger, 313 F.2d 536, 540 (10th Cir. 1963).

The Court has yet to fully explain what makes a right "clearly established" as compared to another right secured by the Constitution. *See* notes 69-71 & accompanying text *infra*. The suggestion that constitutional rights established within the Bill of Rights are more settled and should be differentiated from substantive and procedural due process rights is inadequate. An argument can be made that the right to a first trimester abortion is at least as "clearly established" as the fine discriminations the Court has made regarding freedom of speech. *Compare* Roe v. Wade, 410 U.S. 113 (1973), *with* Gitlow v. New York, 268 U.S. 652 (1925).

[30] The term "scienter" is used in this note to indicate intentional, willful conduct as opposed to negligence. This usage prevails in other areas of law, especially the field of securities fraud. Comparisions will be made in this note between the state-of-mind controversy in § 1983 suits and the similar difficulties the Court has experienced in deciding whether negligence satisfies the scienter requirement of statutes governing securities fraud. For the latter, see Aaron v. Kyle, 446 U.S. 680 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). Any comparison made is intended only as a heuristic device, however, because many factual, jurisprudential, and policy differences exist between civil rights litigation and securities litigation.

[31] The Court in *Parratt* acknowledged the confusion regarding scienter when it stated that it must "once more put [its] shoulder to the wheel hoping to be of greater assistance to courts confronting such a fact situation than it appears we have been in the past." 451 U.S. at 533-34.

mechanics of a section 1983 suit, one may obtain greater insight into when the state-of-mind inquiry is most germane.

MECHANICS OF A SECTION 1983 SUIT AND THE COURT'S STATE-OF-MIND ANALYSIS

The Plaintiff's Burden: Stating the Claim

There are two elements a plaintiff must establish in order to state a section 1983 claim: first, that the plaintiff has been deprived of a right secured by the Federal Constitution and laws;[32] and second, that the defendant acted under color of state law.[33] As the *Baker* court stated: "The first inquiry in any section 1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'"[34] Based on the language of the statute, however, it is difficult to see how the defendant's state of mind per se is relevant to whether the plaintiff has alleged the two elements necessary to state a cause of action under section 1983.[35]

Although the Court in *Baker* noted that the defendant's state of mind may be relevant in deciding whether a constitutional deprivation actionable under section 1983 has occurred in the first place,[36] the Court has never fully explained its position on this issue.[37] The Court has ambiguously indicated that the state of mind needed to state a claim may vary according to the particular constitutional right violated.[38] A good example of the Court's differential state-of-mind analysis is expressed in *Parratt* as follows:

> The *only* deprivation respondent alleges in his complaint is that 'his rights under the Fourteenth Amendment of the Constitution of the

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[32] The Supreme Court, in an opinion by Justice Brennan, recently expanded the meaning of the "and laws" language to include violations of federal statutory as well as constitutional law. Maine v. Thiboutot, 448 U.S. 1 (1980). *See generally* Note, *Section 1983: Carte Blanche Remedy For Federal Statutory Violations?*, 10 STETSON L. REV. 506 (1981).

[33] *See* Flagg Bros., Inc. v. Brook, 436 U.S. 149, 155 (1978). The lower courts, following the Supreme Court, place the initial burden of establishing these two elements on the plaintiff. *See, e.g.*, Murray v. City of Chicago, 634 F.2d 365 (7th Cir. 1980); Riccobono v. Whitpain Township, 497 F. Supp. 1364 (E.D. Pa. 1980).

[34] 443 U.S. at 140.

[35] Section 1983 is silent as to what state of mind is required before a claim has been stated. *See* note 2 *supra*.

[36] 443 U.S. at 140 n.1. The *Baker* Court did not elaborate on the significance the defendant's state of mind may have to the determination of whether a claim has been stated under § 1983 and to whether a "defendant may be held to respond in damages under the provisions." *Id.*

[37] In fact the Court has never held on the merits that negligence satisfied the § 1983 constitutional deprivation requirement.

[38] *See* notes 118-23 & accompanying text *infra*.

> United States were violated. That he was deprived of his property and Due Process of Law.' As such, respondent's claims *differ* from the claims which were before us in *Monroe v. Pape, which involved violation of the Fourth Amendment,* and the claims presented in *Estelle v. Gamble, which involved alleged violations of the Eighth Amendment....* Respondent here refers to no other right, privilege, or immunity secured by the Constitution or federal laws *other than the Due Process Clause of the Fourteenth Amendment simpliciter.*[39]

In contrast to the amorphous state of the law regarding the state-of-mind analysis in the establishment of a section 1983 cause of action, the law on the state-of-mind analysis relevant to defenses and remedies is well developed.[40] Indeed, the Court's main focus—in terms of the state-of-mind analysis in a section 1983 suit—has been on the defendant's state of mind relevant to defenses and remedies.[41] By focusing on defenses and remedies, one may more readily see why the Court has experienced so much difficulty in dealing with the issue of whether negligence may suffice to state a cause of action under section 1983.

The Defendant's Burden: Establishing a Good Faith Defense[42]

If the plaintiff establishes the two elements of a section 1983 claim,[43] the burden shifts to the defendant to establish a qualified immunity through proof "that his conduct was justified by an objectively reasonable belief that it was lawful."[44] The Court in *Gomez v. Toledo*[45] further noted that "[s]ince qualified immunity is a defense, the burden of pleading it rests with the defendant."[46]

As federal courts have searched for principles to limit and define the

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[39] 451 U.S. at 536 (emphasis added) (citations omitted).

[40] The Court has explicitly explained the state-of-mind analysis vis-a-vis affirmative defenses. *See* notes 42-65 & accompanying text *infra.*

[41] *See id.*

[42] This note will discuss the state-of-mind analysis in its relation to defenses only in the context of qualified immunities. The reader should be aware that other immunities exist. Legislators are afforded an absolute immunity, which means that such defendants do not have to contest the case on its merits. Tenney v. Brandhove, 341 U.S. 367, 372-75 (1951). Prosecutors and judges are also protected under the absolute immunity doctrine. Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors); Pierson v. Ray, 386 U.S. 547 (1967) (judges). Another defense available to defendants is the running of the statute of limitations. *See, e.g.,* Dumas v. Town of Mt. Vernon, Ala., 612 F.2d 974 (5th Cir. 1980); Lavellee v. Listi, 611 F.2d 1129 (5th Cir. 1980); Leigh v. McGuire, 613 F.2d 380 (2d Cir. 1979); Jackson v. Hayakawa, 605 F.2d 1121 (9th Cir. 1979).

[43] *See* text accompanying notes 32-33 *supra.*

[44] Gomez v. Toledo, 446 U.S. 635, 640 (1980).

[45] *Id.*

[46] *Id.* at 640. One Justice argued that the *Gomez* decision puts the burden of going forward on the defendant and leaves open the issue of whether the defendant has the burden of persuasion. *Id.* at 642 (Rehnquist, J., concurring).

liability of state officials in section 1983 suits, the defense of qualified immunity[47] has undergone significant development and implementation in civil rights and liberties litigation. The tests and policies underlying when a qualified immunity defense will be granted are crucial because in effect the judicial contours of this defense determine what types of conduct will be deemed permissible under section 1983.[48] One of the reasons courts have had difficulty articulating whether and when the state-of-mind analysis should be applied during the cause-of-action phase is the confusing circumstance that the judicial tests developed for the defense of qualified immunity concentrate heavily on the defendant's state of mind.[49] Some courts have confused the state-of-mind analysis at the cause-of-action phase with the scope of a particular defendant's immunity from a damage action.[50]

Pierson v. Ray[51] was the first case in which the Supreme Court recognized the qualified immunity defense in a section 1983 suit. There the defense was upheld when a police officer had "act[ed] under a statute that he reasonably believed to be valid but that was later held unconstitutional."[52] The *Pierson* Court reasoned that the tradition of immunity was so firmly rooted in common law and policy that "Congress would have specifically so provided had it wished to abolish the doctrine."[53] The Court's next decision having an impact on the qualified immunity doctrine was *Scheuer v. Rhodes*,[54] which considered whether a qualified immunity defense should be granted to the Governor of Ohio and his subordinates for their indirect involvement in the slayings of three Kent State University students by the National Guard.[55] The *Scheuer* Court acknowledged that evaluating high-level executives' decisions necessarily involved a more complex inquiry than the decision in *Pierson* of whether police conduct has complied with the requirement of good faith

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[47] The terms "qualified immunity" and "good faith defense" are interchangeable. *See* Laverne v. Corning, 522 F.2d 1144, 1147 (2d Cir. 1975).

[48] The scope of the qualified immunity defense defines the class of claims that may be recognized under § 1983 because it makes little sense to state that the plaintiff has a cause of action when the effect of an affirmative defense is to deny relief. Otherwise stated, defenses help define which torts committed by state officials may be deemed to be of constitutional magnitude.

[49] *See* notes 61-68 & accompanying text *infra*.

[50] *See, e.g.*, Roberts v. Williams, 456 F.2d 819, 831 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971); Hampton v. City of Chicago, 399 F. Supp. 695, 698 (N.D. Ill. 1972), *rev'd sub nom.* Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979), *cert. denied*, 446 U.S. 754 (1980).

[51] 386 U.S. 547 (1967).

[52] *Id.* at 555.

[53] *Id.* at 554-55. *But see* Theis, *"Good Faith" as a Defense to Suits for Police Deprivations of Individual Rights*, 59 MINN. L. REV. 991, 1009-10 (1975) (suggesting that the *Pierson* test and the way it has been read by lower courts constitute a misreading of the common law good faith defense).

[54] 416 U.S. 232 (1974).

[55] *Id.* at 238-50.

because of the broad range of different decisions a high-ranking official must make.[56] As the underlying rationale for its decision, the *Scheuer* Court attempted to balance and to reconcile the competing policy considerations of deterring constitutional violations and protecting the discretionary decisionmaking powers of executive state officials.[57] The Court adopted a rule establishing that "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 . . . based."[58]

After the decision in *Scheuer*, the Court expressly stated in *Wood v. Strickland*[59] how these competing policy considerations should be balanced.[60] The *Wood* Court promulgated a two-pronged test involving both objective and subjective components when it stated:

> [A] school board member is not immune from liability for damages under § 1983 if he *knew or reasonably should have known* that the action he took . . . would violate the constitutional rights of the student affected, or if he took the action with the *malicious intention* to cause a deprivation of constitutional rights . . . .[61]

Although the *Wood* Court limited its opinion to "the specific context of school discipline,"[62] the Court subsequently extended the defense of qualified immunity to a state hospital superintendent.[63] In *Procunier v.*

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[56] *Id.* at 246-47.

[57] *See id.* at 246-49. For an excellent overall discussion of the policies behind the common law rule of protecting discretionary decisionmaking, see Freed, *Executive Official Immunity for Constitutional Violations: An Anlalysis & Critique*, 72 NW. L. REV. 526 (1977).

The main policies underlying the principle of qualified immunity are: first, it would be unfair to penalize an official when there is a duty to decide; second, threat of liability will encourage cowardly decisionmaking and may discourage individuals from entering public service; and third, if government officials must spend their time defending lawsuits rather than governing, then government in general will be less effective. *Id.* at 529-30.

The common law established the distinction between "ministerial" acts ("obedience to orders or the performance of a duty in which the officer is left no choice of his own") and "discretionary" acts (those "requiring personal deliberation, decision and judgment"), allowing a qualified immunity for the latter, but no immunity for the former. *See* W. PROSSER, THE LAW OF TORTS § 132, at 988-90 (4th ed. 1971).

[58] 416 U.S. at 247. The court of appeals in Krause v. Rhodes, 471 F.2d 430 (6th Cir. 1972), *rev'd and remanded, sub nom.* Scheuer v. Rhodes, 416 U.S. 232 (1974), had granted the governor an absolute immunity, but the Supreme Court was concerned that this would be too broad an extension of the absolute immunity defense.

[59] 420 U.S. 308 (1975).

[60] *Wood* involved the suspension from school of two students who alleged they were denied procedural due process by school officials. *Id.* at 309-10.

[61] *Id.* at 322 (emphasis added). It is important to note that the qualified immunity defense was directed toward a § 1983 suit seeking monetary damages, for the type of remedy sought is a primary factor in determining whether an immunity defense should be recognized. *See* notes 84-106 & accompanying text *infra*.

[62] 420 U.S. at 322.

[63] O'Connor v. Donaldson, 422 U.S. 563 (1975).

Navarette[64] the Court explained how the test for evaluating the qualified immunity defense set forth in *Scheuer* and *Wood* was to be applied in a case involving negligent conduct.[65] The *Procunier* decision interpreted the objective prong of the *Wood* test to mean that the qualified immunity defense would be unavailing if the constitutional right allegedly infringed was "clearly established" at the time of the deprivation, so that the officials knew or should have known of the existence of the right and that their conduct would violate it.[66]

Under the qualified immunity test established in *Wood* and *Procunier*, the availability of the defense thus depends primarily upon whether the constitutional right was "clearly established" at the time of the defendant's action.[67] Only when the right is determined to be "clearly established" will the official *not* be protected by his subjective good faith, which is to say that this is the only situation in which a claim based on negligence will survive the defense.[68] Section 1983 case law has not yet absorbed the full impact of the phrase "clearly established rights," and the Court has not yet set forth any guidelines or principles to indicate what makes one right secured by the Constitution and laws more "clearly established" than another, similarly protected right.[69] Nevertheless, based on the rationale for qualified immunity—exonerating state officials from liability when to do otherwise would be to hold officials responsible for "predicting the future course of constitutional law"[70]—one of the factors that may have a bearing on the determination of whether a right was "clearly

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[64] 434 U.S. 555 (1978).

[65] The plaintiff's complaint alleged, inter alia, that subordinate prison officials " 'negligently and inadvertently' misapplied the prison mail regulations" and that supervisory officials " 'negligent[ly]' failed to provide sufficient training and direction to their subordinates," in violation of the plaintiff's constitutional rights. *Id.* at 558.

[66] *Id.* at 565. The Court stated that in 1971 and 1972 there was no first amendment right protecting the mailing privilege of state prisoners and hence there were no "clearly established rights" involved in the case. *Id.* The *Procunier* Court's "clearly established rights" theory may be criticized as giving state officials one "free" constitutional violation. *See* Freed, *supra* note 57, at 558.

[67] *See, e.g.*, Withers v. Levine, 615 F.2d 158, 163 (4th Cir. 1980), *cert. denied*, 449 U.S. 827 (1980); Bogard v. Cook, 586 F.2d 399, 411 (5th Cir. 1978), *cert. denied*, 444 U.S. 883 (1980); Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706, 711-13 (3d Cir. 1978), *cert. denied*, 439 U.S. 966 (1978); Sullivan v. Meade Independent School Dist. No. 101, 530 F.2d 799, 806 (8th Cir. 1976).

[68] *See, e.g.*, Francia v. White, 594 F.2d 778 (10th Cir. 1979); Ware v. Heyne, 575 F.2d 593 (7th Cir. 1978); Downs v. Sawtelle, 574 F.2d 1 (1st Cir. 1978), *cert. denied*, 439 U.S. 910 (1978); Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975); Bradford v. Edelstein, 467 F. Supp. 1361 (S.D. Tex. 1979).

[69] This problem is exacerbated by the fact that many officials' jobs affect a broad range of rights protected by the Constitution and laws, while other officials' decisions affect a limited range of federally protected rights.

[70] Pierson v. Ray, 386 U.S. 547, 557 (1967), *quoted in* Wood v. Strickland, 420 U.S. at 322; *see* O'Connor v. Donaldson, 422 U.S. 563, 577 (1975) ("[A]n official has . . . no duty to anticipate unforeseeable constitutional developments.").

established" at the time in question is the identity of the official being sued and the extent of his duty to know the law.[71]

The availability of the defense of qualified immunity is not controlled solely, however, by whether the right alleged to have been violated is "clearly established." Also relevant are the type of remedy the plaintiff seeks[72] and whether the plaintiff is suing an official individually, as distinguished from an action brought against a muncipality for the action of its officials.

In *Monell v. Department of Social Services*,[73] the Court overruled a precedent of not allowing section 1983 suits against municipalities[74] by holding that a municipality is a "person" within the meaning of section 1983.[75] However, the Court made it clear that the plaintiff's complaint must allege more than a cause of action based on respondeat superior.[76] To prevail on the merits the plaintiff must prove that the deprivation of his constitutional or federal statutory right was the result of the municipality's "official policy."[77]

Although the *Monell* decision established that municipalities are not entitled to absolute immunity,[78] the Court expressly left open the question of whether they are entitled to a qualified immunity.[79] A sharply divided Court in *Owen v. City of Independence*[80] subsequently held that a municipality may not assert the good faith of its officers or agents as a defense to liability under section 1983.[81] Thus, if a plaintiff can prove

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[71] For example, in Jackson v. Mississippi, 644 F.2d 1142 (5th Cir. 1981), the court held that the qualified immunity defense did not apply because the defendants, prison officials and members of the Mississippi State Penitentiary Board, violated a "clearly established" constitutional right of the plaintiff. The right had been established in Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972), which held that the prison practice challenged by the plaintiff in *Jackson* violated the eighth amendment rights of prisoners. While the defendants in *Jackson* had a duty to know of the *Gates* decision because it involved matters directly within their job responsibilities, other state officials whose jobs were further removed from such matters may have had a lesser duty to know of the *Gates* decision. Therefore, it is possible that if more remote officials had been sued, the court would not have found that *Gates* "clearly established" a constitutional right.

[72] *See* notes 84-106 & accompanying text *infra*.

[73] 436 U.S. 658 (1978).

[74] *See* City of Kenosha v. Bruno, 412 U.S. 507, 513 (1973) (quoting Monroe v. Pape, 365 U.S. at 191 n.50).

[75] 436 U.S. at 690.

[76] *Id.* at 691.

[77] *Id.* Like respondeat superior, this theory can result in the liability of a municipality for the actions of its subordinate employees, as well as for the actions of its policymakers. *See* Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981) (city liable for conduct of its police officer because this conduct resulted from city policy of inadequate training, supervision, and discipline of police).

[78] 436 U.S. at 701.

[79] *Id.*

[80] 445 U.S. 622 (1980).

[81] *Id.* at 650.

a deprivation of a constitutional or federal statutory right caused by the execution of a municipality's policy, then he arguably will have a strict liability section 1983 action against the municipality.[82] In terms of the state-of-mind analysis, the impact of *Monell* and *Owen* arguably is to preclude a state-of-mind inquiry in a section 1983 suit brought against a municipal defendant. It may be argued, however, that to prove an official policy or custom after *Monell* the plaintiff must prove a "continuing failure to remedy *known* unconstitutional conduct,"[83] and that the municipality's conduct in such a case is tantamount to intentional behavior.

Relating Defenses to Remedies[84]

Whether and to what extent a defendant is afforded a defense in a section 1983 suit is frequently a function of the type of remedy the plaintiff is seeking. More importantly, the remedy sought by the plaintiff often depends on the state of mind of the defendant at the time of the alleged constitutional violation.[85] Therefore, the relationships between defenses and remedies and the defendant's state of mind at the time of the alleged deprivation are critical to the determination of the state of mind needed to sustain a section 1983 suit.

One type of remedy available to a section 1983 plaintiff is an injunction.[86] An "injunction is a personal command to the defendant to act or avoid acting in a certain way";[87] in the context of section 1983, an injunction usually is a command to the defendant to cease acting in a manner that deprives the plaintiff of his constitutional rights. However, the courts have not explained whether a showing of scienter as opposed to negligence is required to establish the requisite state of mind before an injunction will be issued; instead, the courts frequently state quite generally that

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[82] This is strict liability in that the defendant's state of mind is irrelevant. Some commentators have criticized the strict liability potential in § 1983 suits against municipalities created by *Owen*. *See, e.g.*, Comment, *Strict Liability Under Section 1983 for Municipal Deprivations of Federal Rights?*: Owen v. City of Independence, 55 ST. JOHN'S L. REV. 153 (1980).

[83] Herrera v. Valentine, 653 F.2d at 1224.

[84] This note focuses on injunctions and compensatory and punitive damages as remedies. The most frequently litigated issue in the area of remedies is attorneys' fees and how 42 U.S.C. § 1988 (1976) is to be interpreted. For an excellent analysis of the factors (the court listed 12) involved in attorney's fees, see Palmigiano v. Garrahy, 616 F.2d 598, 600 n.3 (lst Cir. 1980), *cert. denied*, 449 U.S. 839 (1980).

[85] This is especially true for damage actions because the defendant's state of mind determines the availability of compensatory or punitive damages in § 1983 suits. *See* text accompanying notes 95-106 *infra*.

[86] *See, e.g.*, Hansbury v. Regents of Univ. of Cal., 596 F.2d 944 (10th Cir. 1979); Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977); Stanford Daily v. Zurcher, 550 F.2d 464 (9th Cir. 1976), *rev'd in part*, 436 U.S. 547 (1977); Rowley v. McMillen, 502 F.2d 1326 (4th Cir. 1974).

[87] D. DOBBS, REMEDIES § 1.1, at 2 (1973).

"it is well settled that government immunity is not a defense to a prayer for injunctive relief."[88] The courts often discuss policy reasons to explain why the qualified immunity defense is not applicable in suit seeking injunctive relief by distinguishing the purpose of money damages from that of injunctive relief.[89] In *Rowley v. McMillan*[90] the court explained that

> the immunity rule, whatever its scope, is grounded upon the inhibitory effect of suits for money damages. Manifestly, actions for injunctive relief do not have that effect. The federal defendants have cited no case, and we have found none, which holds that the immunity doctrine insulates a public official or public employee from injunctive relief. . . .[91]

Another court based its reasoning for not allowing a qualified immunity defense in a suit for injunctive relief on the fact that a number of the policies for allowing a qualified immunity apply only to civil actions for damages.[92]

A number of commentators have called for a greater use by the federal courts of injunctive relief in section 1983 suits.[93] Although the use of

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[88] Newsome v. Sielaff, 375 F. Supp. 1189, 1191 (E.D. Pa. 1974); *accord* Wood v. Strickland, 420 U.S. at 315 n.6; National Treasury Employees Union v. Nixon, 492 F.2d 587, 609 (D.C. Cir. 1974); Safeguard Mut. Ins. Co. v. Miller, 472 F.2d 732, 734 (3d Cir. 1973); Saffron v. Wilson, 70 F.R.D. 51, 56 n.4 (D.D.C. 1975). *See also* Friedman, *The Good Faith Defense In Constitutional Litigation*, 5 HOFSTRA L. REV. 501 (1977). In the area of securities fraud, the Court recently confronted the issue of whether scienter or negligence satisfies the state-of-mind requirement for an injunction under § 20(b) of the Securities Act of 1933, 15 U.S.C. § 77t(b) (1976), and § 21(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(d) (1976). Aaron v. SEC, 446 U.S. 680 (1980). The Court held that scienter is required for an injunction against violations of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976), and § 17a(1) of the Securities Act of 1933, 15 U.S.C. § 77q(a)(1) (1976), but scienter is not required for an injunction against violations of § 17(a)(2) of the Securities Act of 1933, 15 U.S.C. § 77q(a)(2) (1976), and § 17(a)(3) of the Securities Act of 1933, 15 U.S.C. § 77q(a)(3) (1976). 446 U.S. at 701-02. The Chief Justice, in separate opinion, concluded that "[i]t will almost always be necessary for [the plaintiff] to demonstrate that the defendant's past sins have been the result of *more than negligence*," because an injunction will issue only upon a showing of "a reasonable likelihood that the wrong will be repeated." *Id.* at 703 (Burger, C.J., concurring) (emphasis added). In a § 1983 case, it may be argued that once the plaintiff has filed for injunctive relief, the defendant has been put on notice that the conduct may be unconstitutional, and the defendant who continues his questioned actions then engages in intentional conduct and should no longer be able to claim a subjective good faith defense. *See* Harless v. Duck, 619 F.2d 611, 615 (6th Cir. 1980). From this argument one may surmise that when the plaintiff has met the burden of proof for injunctive relief, exclusive of any state-of-mind requirement, the plaintiff has automatically proven more than negligence and has in fact proven scienter.

[89] *See, e.g.*, Hansbury v. Regents of Univ. of Cal., 596 F.2d 944 (10th Cir. 1979); Stanford Daily v. Zurcher, 550 F.2d 464 (9th Cir. 1976), *rev'd in part*, 436 U.S. 547 (1977); Rowley v. McMillan, 502 F.2d 1326 (4th Cir. 1974).

[90] 502 F.2d 1326 (4th Cir. 1974).

[91] *Id.* at 1332.

[92] Littleton v. Berbling, 468 F.2d 389, 412-13 (7th Cir. 1972), *rev'd on other grounds, sub nom.* O'Shea v. Littleton, 414 U.S. 488 (1974).

[93] *E.g.*, Hansen, *Use of The Federal Injunction To Protect Constitutional Rights*: Rizzo v. Goode *and The Control of Governmental Bureaucracies*, 12 GONZ. L. REV. 231 (1977); Whit-

federal equitable relief has recently grown, there remain many doctrines and techniques available to federal courts to avoid issuing injuncitve relief,[94] a fact that necessitates examination of the other remedies available under section 1983.

Although the good faith defense does not apply in suits for injunctive relief, the same is not true when the plaintiff is seeking monetary damages. The qualified immunity concept grew out of the law's concern for not holding an official liable in damages because to hold otherwise would undermine the official's ability to perform his duties.[95] Of the three types of damage remedies—nominal, compensatory, and punitive—only punitive damages expressly take into account the defendant's state of mind in imposing liability. If the plaintiff shows that the defendant's state of mind amounted to scienter at the time of the alleged deprivation of a right secured by the Constitution and laws, then the courts have often found that the resulting injury is egregious enough to award punitive damages—even in the absence of actual loss to the plaintiff.[96] The rationale for punitive damages demands that they only be awarded as punishment or as a deterrent.[97] The courts should award punitive damages only when the conduct is particularly egregious—that is, accompanied by an element of scienter—because the extra liability imposed by punitive damages cuts against the purposes served by the qualified immunity defense. Courts rarely award punitive damages in section 1983 suits, and the use of punitive damages was expressly limited in *City of Newport v. Fact Concerts*,[98] in which the Supreme Court held that punitive damages could not be assessed against municipalities.[99]

The seminal section 1983 damages case is *Carey v. Piphus*,[100] in which the Court had to decide whether to grant compensatory or nominal damages for the negligent deprivation of a constitutional right and held that in the absence of proof of actual injury[101] the plaintiff was only en-

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man, *Constitutional Torts*, 79 MICH. L. REV. 1, 41-52 (1980) (discussing the advantages of injunctive relief compared to monetary damages). For a general discussion of the role of injunctive relief in civil rights litigation, see O. FISS, THE CIVIL RIGHTS INJUNCTION (1978).

[94] This note does not address the issues surrounding the federal courts' reluctance to use injunctive relief in section 1983 suits. For a discussion of this issue, see Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977).

[95] *See* note 57 *supra*.

[96] *See* Carey v. Piphus, 435 U.S. 247, 257 n.11 (1978); Spence v. Staras, 507 F.2d 554 (7th Cir. 1974); Morrison v. Fox, 483 F. Supp. 390 (W.D. Pa. 1979).

[97] D. DOBBS, *supra* note 87, § 3.9 at 204.

[98] 453 U.S. 247 (1981).

[99] The Court's reasoning focused on the common law tort principle that there cannot be punitive damages against a municipality because such awards burden the very taxpayers and citizens for whose benefit the wrongdoers have been punished. *Id.* at 266-71.

[100] 435 U.S. 247 (1978).

[101] *Id.* at 264. The *Carey* court found no proof of actual injury from the mere fact that students were suspended for 20 days in violation of their procedural due process rights. *See id.* at 262-63. However, the *Carey* court did recognize that the plaintiffs could recover for emotional or mental distress upon proper proof. *Id.* at 262.

titled to nominal (one dollar) damages.[102] The *Carey* opinion stated that in the decision whether actual injury has occurred, the particular constitutional right deprived and the interests protected by that right will be determinative.[103] Only in the context of discussing the district court's holding that the defendant was not entitled to qualified immunity[104] did the *Carey* Court address the defendants' state of mind. The Court concluded that an "injury caused by a justified deprivation . . . is not properly compensable under § 1983" when the only constitutional violation proven is that the deprivation was accomplished in a manner violative of the plaintiff's right to procedural due process.[105] Therefore, the only time the plaintiff will carry a section 1983 claim to a jury on the issue of compensatory damages will be when the defendant has deprived the plaintiff of a judicially determined "clearly established" right and the plaintiff alleges actual injury caused by this deprivation.[106] Due to the relationship between defenses and damages, the Court's analysis makes it very unlikely that courts would impose monetary damages for negligent conduct even if claims premised on mere negligence were to be recognized.

SAFEGUARDS AGAINST UNLIMITED CLAIMS AND LIABILITY BASED ON NEGLIGENCE

Although the Supreme Court has never ruled on the merits that a claim based on negligence will suffice to state a cause of action under section

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[102] *Id.* at 266-67. *But cf.* Burt v. Able, 585 F.2d 613, 616 n.7 (4th Cir. 1978) (stating that *Carey* establishes that the appropriate remedy for procedural due process violations is compensatory damages).

[103] 435 U.S. at 259. *Compare* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) *with* Carey v. Piphus, 435 U.S. at 259. In Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979), the Court held that *Carey's* requirement of proof of actual injury did not apply to fourth amendment violations because the nature of the interests involved differed from those involved in procedural due process rights. For an excellent overall analysis on this point, see Note, *Damage Awards For Constitutional Torts: A Reconsideration After* Carey v. Piphus, 93 HARV. L. REV. 966 (1980) [hereinafter cited as Note, *Damage Awards*]. *See also* Note, *"Damages or Nothing"—The Efficacy of the Bivens-Type Remedy*, 64 CORNELL L. REV. 667 (1978).

[104] 435 U.S. at 251 & n.6. This discussion was unnecessary, however, because the petitioners had not challenged the district court's holding that the defendants were not entitled to qualified immunity because Linwood v. Bd. of Educ. of Peoria, 463 F.2d 763 (7th Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972), had clearly established that the defendants' actions violated the plaintiffs' rights to procedural due process. *See* 435 U.S. at 251 & n.6.

[105] 435 U.S. at 263. In order to be entitled to compensatory damages under § 1983, the plaintiff must prove an injury caused by the deprivation of procedural due process itself, rather than by the justified, though procedurally flawed, deprivation of his liberty, property, or other rights. *See id.*

[106] If he does not allege actual injury, according to *Carey*, he is only entitled to nominal damages. If he is only entitled to nominal damages, then he has no seventh amendment right to a jury trial. *See* Burt v. Able, 585 F.2d at 616 n.7.

One commentator has suggested that a minimum "floor" be established for such claims to avoid the apparent scandal of having the plaintiff discover that his constitutional rights are only worth one dollar. *See* Note, *Damage Awards*, *supra* note 103, at 988-89.

1983,[107] even if the Court so ruled, there are adequate safeguards within the present mode of analysis to thwart any undesirable proliferation of litigation against state officials. The Court's valid concern is to ensure that not every injury caused by a state official acting under color of state law will constitute a fourteenth amendment due process violation, thereby rendering section 1983 a "font of tort law."[108] The following analysis of the obstacles a section 1983 plaintiff faces in stating and prevailing on a cause of action indicates the facts and circumstances under which the Court may meaningfully hold that a claim based on negligence is actionable under section 1983.

Constitutional Deprivations: Causation and Duty Requirements

Before the courts will find that a state official has deprived the plaintiff of a right, privilege, or immunity secured by the Constitution and laws, the plaintiff must prove causation in the sense that a public official must have been individually responsible in order to be subjected to liability under section 1983. The Supreme Court enunciated this principle of causation for constitutional violations remediable under section 1983 in *Rizzo v. Goode*,[109] in which the plaintiffs, who were residents of Philadelphia, sought injunctive relief, inter alia, against the Philadelphia police force for various abuses.[110] The district court found that "when a *pattern* of frequent police violations of rights is shown, the law is clear that injunctive relief may be granted."[111] After rejecting the lower court's general approach as a means of preventing potential police misconduct, the Court, in a majority opinion written by Justice Rehnquist, held that before a person may be named in an injunction, he must be shown to have deprived the plaintiff of constitutional rights by his own conduct.[112]

Another causation-related check on the finding of any actionable deprivation of a constitutional or federal statutory right in a section 1983 suit is the Court's announcement in *Monell v. Department of Social Services*[113]

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[107] *See* text accompanying notes 13-14 *supra*.

[108] *See* Parratt v. Taylor, 451 U.S. at 544 (citing Paul v. Davis, 424 U.S. 693, 701 (1976)). Justice Rehnquist, the author of the plurality opinion in *Parratt* and the majority opinion in *Paul*, illustrated this concern with the hypothetical case of a plaintiff who brings a § 1983 suit against a state official as the result of an automobile accident. *Id.*

[109] 423 U.S. 362 (1976).

[110] For a complete record of the allegations, see Council of Orgs. of Phila. Police Accountability & Responsibility v. Rizzo, 357 F. Supp. 1289, 1291-92 (E.D. Pa. 1973).

[111] *Id.* at 1318 (emphasis added). The court of appeals affirmed this decision. Goode v. Rizzo, 506 F.2d 542 (3d Cir. 1974).

[112] *See* 423 U.S. at 377. One commentator has criticized the *Rizzo* decision and argued that federal courts should use an organizational approach to injunctive relief in § 1983 suits. *See* Hansen, *supra* note 93, at 241-64.

[113] 436 U.S. 658 (1978).

[114] *See* text accompanying notes 73-77 *supra*. One court has interpreted *Monell*'s causation principle as requiring two elements: first, that the city had notice of prior misbehavior,

that vicarious liability is not actionable under section 1983.[114] The *Monell* Court cited *Rizzo* as authority for this principle.[115] *Monell* and *Rizzo* read together seem to preclude individual liability—regardless of the defendant's state of mind—when the plaintiff's theory of recovery is based either upon a pattern of misconduct by a governmental entity or upon a supervisory official's failure to act in the absence of notice of misconduct by his subordinates.

More fundamentally, the threshold question in any section 1983 case is whether a fourteenth amendment violation has occurred.[116] The only time the defendant's state of mind should be relevant in determining whether a cause of action has been stated in section 1983 suit is when the courts are inquiring into whether the defendant owed a fourteenth amendment duty to the plaintiff.[117] The notion that a defendant must owe a duty of constitutional magnitude to the plaintiff before a section 1983 action may be successfully maintained suggests that the Court's current state-of-mind analysis for determining whether a cause of action has been established, although currently not well defined, is nevertheless evolving in such a manner that if the Court in the future were to hold on the merits that negligence is actionable under section 1983, such a holding would not transform section 1983 into a "font of tort law." The requirement under section 1983 of a duty of constitutional magnitude owed to the plaintiff will ensure that the distinctively federal nature of section 1983 will be preserved, despite any superficial similarity that may exist between deprivatons of constitutional rights intended to be remedied under section 1983 on the one hand, and injuries more appropriately addressed under a state's substantive law of torts on the other.

As recently as in *Parratt v. Taylor*,[118] the Court has intimated that different constitutional violations may require different states of mind on the part of the defendant to be congnizable under section 1983. In *Parratt* the plaintiff, an inmate of a Nebraska prison, alleged a deprivation of property without due process of law in violation of the fourteenth amendment when prison officials negligently lost a hobby kit the plaintiff had ordered through the mail.[119] Reversing the district court's holding that the deprivation of the plaintiff's property was without due process and that negligent action by state officals can be a basis for liability under section 1983,[120] the *Parratt* Court in dicta noted that different constitu-

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and second, that the failure to act upon such notice caused the injury. *See* Herrera v. Valentine, 653 F.2d 1220, 1224 (8th Cir. 1981).

[115] 436 U.S. at 692 (citing 423 U.S. 370-71).

[116] S. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION 63 (1979).

[117] *See id.* at 60.

[118] 451 U.S. 527 (1981).

[119] *Id.* at 529.

[120] *Id.* at 531. The Court based its reversal on its conclusion that procedural due process was not denied, rather than on a conclusion that negligence cannot be the basis for § 1983 liability. *See id.* at 543-44.

tional rights might require varying states of mind by the defendant to be remediable under section 1983.[121]

Although the Supreme Court has never explained why different constitutional violations will require different states of mind to be actionable, the most likely explanation is that the Court is more inclined to find negligence actionable under a specific provision of the Bill of Rights *not* because these rights are more important than other constitutional rights, but rather because under these rights there is a more clearly defined concept of duty on the part of state officials. This is particularly true, for example, with prisoners' eighth amendment claims against wardens or fourth amendment claims against the police, for in both areas state officials in the performance of their duties are required to be attuned to the constitutional rights of inmates and the general public, respectively.[122] Bare due process claims, however, detract from the federal nature of section 1983 because they often are premised on deprivations of property or liberty interests defined by and remediable under state law.[123]

Requirement of Violation of "Clearly Established" Rights as a Safeguard Against Liability for Negligence

The Court's current state-of-mind inquiry (in terms of the defendant's duty to the plaintiff and the nature of the constitutional right allegedly violated) for determining whether there is a cause of action is closely related to the state-of-mind analysis used when the Court considers the defense of qualified immunity. One of the key criteria for determining whether the defendant is afforded a qualified immunity in light of *Procunier v.*

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[121] *Id.* at 534 (quoting Baker v. McCollan, 443 U.S. at 139-40). Some lower courts have also indicated that whether negligence shall be a basis for liability will depend on the particular constitutional right allegedly violated. *See, e.g.*, Norton v. McKeon, 444 F. Supp. 384, 387 (E.D. Pa. 1977); Santiago v. City of Philadelphia, 435 F. Supp. 136, 150 (E.D. Pa. 1977). Judge Lord wrote both the *Norton* and *Santiago* opinions and in *Santiago* cited Estelle v. Gamble, 429 U.S. 97 (1976), as support for the principle that the state-of-mind requirement should depend on the underlying constitutional deprivation. 435 F. Supp. at 150. *Estelle* involved a prisoner's § 1983 claim premised on medical malpractice and alleging an eighth amendment violation. The Court held that in order to establish an eighth amendment violation based on medical malpractice, the plaintiff must prove intentional conduct. *See* 429 U.S. at 104. Justice Stevens, in dissent, stated that the "[s]ubjective motivation [of the defendant] may well determine what, if any, remedy is appropriate. . . . However, whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it." *Id.* at 116 (Stevens, J., dissenting). Justice Stevens disagreed with the majority's opinion that a showing of intent is necessary to prove an eighth amendment violation. *Id.* at 116 n.13.

[122] Fourth and eighth amendment claims are cited here only as examples and are not meant to be all-inclusive. For an excellent discussion and analysis of § 1983 claims according to the underlying constitutional deprivation involved, see S. NAHMOD, *supra* note 116, at 65-83.

[123] *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976).

Navarette,[124] is whether the constitutional right allegedly infringed was "clearly established" at the time of the injury.[125] The criterion of a "clearly established" right—like the causation and duty factors in the cause-of-action determination—would act as a further safeguard against unlimited proliferation of section 1983 suits were the Court to rule on the merits that negligence will suffice to state a cause of action.

A claim based on negligence would rarely survive a defendant's affirmative defense because one of the main factors used to determine whether the plaintiff's right was "clearly established" is whether it is included within the scope of the official's duty to know the law.[126] Moreover, the "clearly established" rights doctrine has become an amorphous concept and the courts have been reluctant to find instances in which the alleged injury involved "clearly established" rights.[127] Thus, only in those rare instances when the courts find rights "clearly established" would the plaintiff have a chance of surviving the defendant's defense of subjective good faith.[128] If the courts often found that the rights involved in section 1983 suits were "clearly established," state officials would be held to a high standard of care in the execution of their official duties to keep abreast of and to analyze the law affecting rights secured by the Constitution and laws.[129] The "clearly established" rights analysis during the qualified immunity determiniation, therefore, sheds light on why the Court has had trouble in articulating why negligent conduct might violate some constitutional rights so as to be actionable under section 1983, but not others. Only when the state official has a duty to know the law in relation to the specific clearly established constitutional right alleged to have been

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[124] 434 U.S. 555 (1978).

[125] *See* notes 67-71 & accompanying text *supra*.

[126] *See* note 71 & accompanying text *supra*. The concepts of a "clearly established" right and a duty of constitutional magnitude are thus related in the sense that each helps to define the other. A right that is clearly established imposes a duty of care of constitutional magnitude on state officials to refrain from causing deprivations of that right; conversely, a right that is clearly established may be said to fall within the scope of an official's duty to know and to conform his conduct to the requirements of law. *See id.*

[127] *See, e.g.*, Withers v. Levine, 615 F.2d at 163 (right defined only "in broad outline," so not "clearly established"). Moreover, sometimes the courts find the defendant immune when the official's action violated a "clearly established" right. *See, e.g.*, Inmates v. Greenholtz, 567 F.2d 1381 (8th Cir. 1977); Farr v. Chesney, 437 F. Supp. 521 (M.D. Pa. 1977).

[128] *See* notes 67-69 & accompanying text *supra*.

[129] Requiring state officials to keep abreast of changes in the law involves a multitude of problems. Chief among these problems is the unreasonableness of expecting officials to interpret fresh decisions properly, as well as the fear expressed in Pierson v. Ray, 386 U.S. 547 (1967), that state officials might be required in effect to predict the future course of constitutional law. The problem is exacerbated by the differing competencies of state officials and courts to interpret fresh precedent. Further difficulties are posed by the case of an official acting upon advice of counsel or pursuant to a state statute or regulation valid and in force at the time of action. Such safe harbors might be nullified by an expansive view of "clearly established" rights.

violated will negligence be enough to both state a cause of action *and* support liability.[130] Only in that instance will the Court hold on the merits that negligence is meaningfully actionable under section 1983.

CONCLUSION

Since the Court's opinion in *Monroe v. Pape*, there has been judicial confusion over what role the state-of-mind analysis should play in a section 1983 suit. If *Baker v. McCollan* and *Parratt v. Taylor* read together mean that the defendant's state of mind may be irrelevant to pleading a prima facie section 1983 cause of action, the same cannot be said as to other aspects of a suit under section 1983. However, it is only when a court is determining whether a defendant should be afforded a qualified immunity defense against the plaintiff's action for monetary damages that any clear and meaningful state-of-mind determination is presently undertaken.

The Court seems to intimate, without fully explaining its position, that the defendant's state of mind *may* be relevant to the threshold question of whether there has been a constitutional violation actionable under section 1983. What state of mind on the part of the defendant is ultimately required to maintain a section 1983 action may depend on which particular right secured by the Constitution and laws the plaintiff alleges has been violated.

One explanation of why the courts have had trouble in articulating or deciding on the merits that negligence is actionable under section 1983 is due to the close connection between the "clearly established" rights doctrine, which is currently a part of the qualified immunity defense, and the scope of an official's duty toward the plaintiff. It appears that before a plaintiff will be able not only to state a cause of action under section 1983, but also to prevail on the merits, the plaintiff will have to prove that the defendant owed the plaintiff a duty of constitutional magnitude with respect to the deprivation of a "clearly established" right. Even if the courts were to find negligence actionable under section 1983, there are thus sufficient inherent safeguards in a section 1983 suit to preclude unlimited litigation and liability.

WILLIAM A. LOCKHART

[130] *See* notes 67-71 & accompanying text *supra*. The concept of a pre-existing duty in the constitutional sense provides a nexus between the distinct problems of determining whether a cause of action had been established and determining whether liability for damages should be imposed in a § 1983 suit.