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> [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.[1]

Since *Monroe v. Pape*,[2] a multitude of persons claiming injury as a result of conduct on the part of state and local officials have sought vindication of the harm by invoking section 1983 in federal court.[3] The

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1. Bell v. Hood, 327 U.S. 678, 684 (1946).

2. 365 U.S. 167 (1961). Through its construction of the cause of action created by the Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1873), the Supreme Court in *Monroe* transferred to the civil context the broad reading of "under color of" state law language established in the criminal law under 18 U.S.C. § 242 (1976) by United States v. Classic, 313 U.S. 299 (1941), and Screws v. United States, 325 U.S. 91 (1945), rendering state officers culpable for unauthorized and unlawful conduct so long as their acts were committed under pretense of law or authority.

Several other cases, decided in *Monroe*'s wake, contributed to the expansive reading of the civil rights statute. In McNeese v. Board of Educ., 373 U.S. 668 (1963), the Court, in determining that federal relief under § 1983 could not be defeated because the plaintiff had not first sought relief through a remedy provided by state law, reaffirmed the view expressed in *Monroe* that the "federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.* at 671 (quoting Monroe v. Pape, 365 U.S. 167, 183 (1961)). *See also* Wilwording v. Swenson, 404 U.S. 249 (1971); Houghton v. Shafer, 392 U.S. 639 (1968) (per curiam) (error to dismiss complaint for failure to exhaust adequate administrative remedies). *But see* discussion at notes 156-158 and accompanying text *infra*.

3. One of several Reconstruction civil rights acts, the Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1873), included a provision creating a cause of action for claims of deprivation "under color of" state law of federally secured rights. Currently codified at 42 U.S.C. § 1983 (1976), that provision reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or

suits have named as defendants the highest and lowest officials, including governors,[4] mayors,[5] directors of the National Guard,[6] police superintendents and officers,[7] prison administrators, guards, and parole board members,[8] school board members and superintendents,[9] mental hospital officials and doctors,[10] zoning board members, and licensing officials,[11] and prosecutors and judges.[12] Compensation has been sought

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usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any 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.

4. *E.g.*, Carey v. Piphus, 435 U.S. 247 (1978); Scheuer v. Rhodes, 416 U.S. 232 (1974); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973).

5. *E.g.*, Rizzo v. Goode, 423 U.S. 362 (1976); Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974); Adams v. City of Colorado Springs, 308 F. Supp. 1397 (D. Colo.), *aff'd*, 399 U.S. 901 (1970).

6. *E.g.*, Scheuer v. Rhodes, 416 U.S. 232 (1974); DiLuigi v. Kafkalas, 584 F.2d 22 (3d Cir. 1978), *cert. denied*, 440 U.S. 959 (1979).

7. *E.g.*, Baker v. McCollan, 443 U.S. 137 (1979); Codd v. Velger, 429 U.S. 624 (1977); Paul v. Davis, 424 U.S. 693 (1976); Kelley v. Johnson, 425 U.S. 238 (1976); Rizzo v. Goode, 423 U.S. 362 (1976); Pierson v. Ray, 386 U.S. 547 (1967); Reeves v. City of Jackson, 608 F.2d 644 (5th Cir. 1979); Clappier v. Flynn, 605 F.2d 519 (10th Cir. 1979).

8. *E.g.*, Vitek v. Jones, 100 S. Ct. 1254 (1980); Bell v. Wolfish, 441 U.S. 520 (1979); Hutto v. Finney, 437 U.S. 678 (1978); Procunier v. Navarette, 434 U.S. 555 (1978); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977); Bounds v. Smith, 430 U.S. 817 (1977); Meachum v. Fano, 427 U.S. 215 (1976); Montanye v. Haymes, 427 U.S. 236 (1976); Wolff v. McDonnell, 418 U.S. 539 (1974); Pell v. Procunier, 417 U.S. 817 (1974); Procunier v. Martinez, 416 U.S. 396 (1974); Hampton v. Holmesburg Prison Officials, 546 F.2d 1077 (3d Cir. 1976); Burton v. Waller, 502 F.2d 1261 (5th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975); Inmates of Suffolk County Jail v. Eisenstadt, 494 F.2d 1196 (1st Cir.), *cert. denied*, 419 U.S. 977 (1974); Wright v. McMann, 460 F.2d 126 (2d Cir.), *cert. denied*, 409 U.S. 385 (1972).

9. *E.g.*, Carey v. Piphus, 435 U.S. 247 (1978); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Ingraham v. Wright, 430 U.S. 651 (1977); Wood v. Strickland, 420 U.S. 308 (1975); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Bertot v. School Dist. No. 1, 613 F.2d 245 (10th Cir. 1979); Hoots v. Pennsylvania, 587 F.2d 1340 (3d Cir. 1978); Ball v. Board of Trustees, 584 F.2d 684 (5th Cir. 1978), *cert. denied*, 440 U.S. 972 (1979); Huntley v. Community School Bd., 543 F.2d 979 (2d Cir. 1976), *cert. denied*, 430 U.S. 929 (1977); Roane v. Callisburg Independent School Dist., 511 F.2d 633 (5th Cir. 1975).

10. *E.g.*, O'Connor v. Donaldson, 422 U.S. 563 (1975); Reese v. Nelson, 598 F.2d 822 (3d Cir.), *cert. denied*, 100 S. Ct. 463 (1979); Beaumont v. Morgan, 427 F.2d 667 (1st Cir.), *cert. denied*, 400 U.S. 882 (1970); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated on other grounds*, 431 U.S. 119 (1977).

11. *E.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Gibson v. Berryhill, 411 U.S. 564 (1973); Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706 (3d Cir.), *cert. denied*, 439 U.S. 966 (1978); Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975); United Farmworkers v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974).

12. *E.g.*, Stump v. Sparkman, 435 U.S. 349 (1978); Imbler v. Pachtman, 424 U.S. 409

for widely varying injuries, including illegal search and seizure,[13] bodily injury,[14] loss of or diminution in value of real[15] and personal property,[16] loss of government employment and other benefits,[17] damage to reputation,[18] and mental suffering and disappointment.[19]

In *Monroe*, the court ruled that liability under section 1983 could be imposed even though the conduct complained of also violated state laws, and even though the officials named did not act with specific intent to deprive the plaintiffs of their civil rights. Some commentators have expressed the fear that this broad holding unduly expanded the right of action beyond what was contemplated by the framers of the Civil Rights Act of 1871.[20] Others, however, hailed the new vitality

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(1976); Pierson v. Ray, 386 U.S. 547 (1967); Jennings v. Shuman, 567 F.2d 1213 (3d Cir. 1977). *See also* Denman v. Leedy, 479 F.2d 1097 (6th Cir. 1973); Smith v. Rosenbaum, 460 F.2d 1019 (3d Cir. 1972) (judicial clerks).

13. *E.g.*, Zurcher v. Stanford Daily, 436 U.S. 547 (1978); Stadium Films, Inc. v. Baillargeon, 542 F.2d 577 (1st Cir. 1976); Hanna v. Drobnick, 514 F.2d 393 (6th Cir. 1975); Magnett v. Pelletier, 488 F.2d 33 (1st Cir. 1973); Lewis v. Kugler, 466 F.2d 1343 (3d Cir. 1971); Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) (en banc). *See also* Gillard v. Schmidt, 579 F.2d 825 (3d Cir. 1978) (school board member's search of guidance counselor's office).

14. *E.g.*, Clappier v. Flynn, 605 F.2d 519 (10th Cir. 1979); Taken Alive v. Litzau, 551 F.2d 196 (8th Cir. 1977); Hamilton v. Chaffin, 506 F.2d 904 (5th Cir. 1975); Johnson v. Glick, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973); Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1972); MacDonald v. Musick, 425 F.2d 373 (9th Cir.), *cert. denied*, 400 U.S. 852 (1970); Basista v. Weir, 340 F.2d 74 (3d Cir. 1965).

15. *E.g.*, Harrison v. Brooks, 446 F.2d 404 (1st Cir. 1971); Adams v. City of Colorado Springs, 308 F. Supp. 1397 (D. Colo.), *aff'd*, 399 U.S. 901 (1970).

16. *E.g.*, Trainor v. Hernandez, 431 U.S. 434 (1977); North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); Alexanian v. New York State Urban Dev. Corp., 554 F.2d 15 (2d Cir. 1977); Flood v. Margis, 461 F.2d 253 (7th Cir. 1972).

17. *E.g.*, Monell v. Department of Social Servs., 436 U.S. 658 (1978); Codd v. Velger, 429 U.S. 624 (1977); Bishop v. Wood, 426 U.S. 341 (1976); Edelman v. Jordan, 415 U.S. 651 (1974); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Town Court Nursing Center, Inc. v. Beal, 586 F.2d 280 (3d Cir. 1978), *cert. granted*, 441 U.S. 904 (1979).

18. *E.g.*, Paul v. Davis, 424 U.S. 693 (1976); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Jenkins v. McKeithen, 395 U.S. 411 (1969).

19. *E.g.*, White v. Rochford, 592 F.2d 381 (7th Cir. 1979); Davis v. Village Park II Realty Co., 578 F.2d 461 (2d Cir. 1978); Finney v. Arkansas Bd. of Correction, 505 F.2d 194 (8th Cir. 1974); Jeanty v. McKey & Poague, Inc., 496 F.2d 1119 (7th Cir. 1974); Basista v. Weir, 340 F.2d 74 (3d Cir. 1965); Sexton v. Gibbs, 327 F. Supp. 134 (N.D. Tex. 1970), *aff'd*, 446 F.2d 904 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972). See Carey v. Piphus, 435 U.S. 247, 260-62 (1978), for a full discussion of recovery of damages for mental suffering because of procedural due process deprivations.

20. *See, e.g.*, Shapo, *Constitutional Tort*: Monroe v. Pape, *and the Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965) [hereinafter cited as Shapo]; Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486 (1969); Note, *Civil Rights and State Authority: Toward the Production of a Just Equilibrium*, 1966 WISC. L. REV.

given section 1 of the Act as returning to the federal courts the appropriate task of protecting constitutionally guaranteed civil rights against invasion by the states.[21]

In view of the flood of section 1983 claims and the burgeoning caseload in the federal courts since *Monroe*, it is, perhaps, not surprising that recently the Supreme Court has undertaken a reconsideration of the basic nature and scope of section 1983. A principal result of Supreme Court deliberations on the scope of section 1983 relief has been a significant restriction of the once seemingly boundless breadth of the Civil Rights Act of 1871.[22] Notably, recent decisions of the Court have narrowly construed both the substantive rights protected through the due process clause of the fourteenth amendment[23] and the remedial goals of section 1983.[24] More specifically, the Court has held that reputation, standing alone, is not an interest procedurally protected by the due process clause of the fourteenth amendment. Consequently, mere damage to reputation by a state official will not provide the basis for a cognizable claim under section 1983.[25] In so ruling, the Court has emphasized that not all wrongs committed by state officials amount to constitutional torts.[26] The range of fundamental rights thought by some to be derived from the privacy penumbra[27] or concept of ordered liber-

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831. *See also* Monroe v. Pape, 365 U.S. 167, 202 (1961) (Frankfurter, J., dissenting); Note, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201 (1968).

21. *See, e.g.*, Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352 (1970) [hereinafter cited as Chevigny].

22. *See* discussion at notes 82-156 and accompanying text *infra*.

23. *See* discussion at notes 82-137 and accompanying text *infra*.

24. *See* discussion at notes 266-281 and accompanying text *infra*. *But see* Monell v. Department of Social Servs., 436 U.S. 658 (1978), and Owen v. City of Independence, 100 S. Ct. 1398 (1980), for cases extending liability for constitutional violations to municipalities, and refusing to confer the defense of good faith, discussed at notes 252-265 and accompanying text *infra*.

25. Paul v. Davis, 424 U.S. 693 (1976), discussed at notes 82-106 and accompanying text *infra*.

26. 424 U.S. at 698-701.

27. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152-53 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965). *But cf.* Whalen v. Roe, 429 U.S. 589, 598-600 & nn.23-26 (1977), analyzing the elusive concept of a protected zone of privacy in terms of at least two different kinds of interests: (1) an individual's interest in avoiding disclosure of personal matters; and (2) an interest in independently making certain kinds of important decisions. This analysis seems to go beyond the view expressed in Paul v. Davis, 424 U.S. 693, 713 (1976), that the privacy rights are confined to the marital relation, family relationship, child-rearing, and education. *See also* Medina v. Rudman, 545 F.2d 244 (1st Cir. 1976), *cert. denied*, 434 U.S. 891 (1977) (beyond marriage, procreation, family relationship, child-raising, or, perhaps right to engage in common occupation of life, liberty composed of state-created interests). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 886-990 (1978) [hereinafter cited as TRIBE].

ty[28]—beyond those already recognized[29] or supported by a specific guarantee in the Bill of Rights[30]—has not been embraced by the Court. The Court has also concluded that the availability of state remedies theoretically adequate to redress infringement of interests concededly within the ambit of liberty protected by the Constitution can negate federal claims even where particularly abusive state conduct is shown.[31] In addition, even though a viable liberty or property interest is impinged because of procedural infirmities, absent some proof of actual injury, no more than nominal damages may be recovered.[32] Moreover, the Court has significantly expanded the availability of a qualified immunity to state and local officials.[33] Executive officials at all levels of discretion are permitted to assert a defense of good faith at the time of the alleged unconstitutional act against a claim of deprivation of allegedly cognizable rights under the fourteenth amendment.[34]

Much of the prolific literature discussing these developments in the last five years has been concerned with the demise of the Supreme

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28. Palko v. Connecticut, 302 U.S. 319, 325 (1937), *quoted in* Roe v. Wade, 410 U.S. 113, 152 (1973).

29. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception); Stanley v. Illinois, 405 U.S. 645 (1972) (unwed father's custody of children); Stanley v. Georgia, 394 U.S. 557 (1969) (private possession of obscene materials); Loving v. Virginia, 388 U.S. 1 (1967) (racial intermarriage); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (voting); NAACP v. Button, 371 U.S. 415 (1963) (access to courts); NAACP v. Alabama, 357 U.S. 449 (1958) (association); Skinner v. Oklahoma, 316 U.S. 535 (1942) (sterilization of repeated larcenists); Pierce v. Society of Sisters, 268 U.S. 510 (1920) (child-rearing: right to send children to and support private schools); Meyer v. Nebraska, 262 U.S. 390 (1923) (child-rearing: permit study of German in private school).

30. For a partial list of those rights specifically guaranteed against encroachment by the Bill of Rights and extended to states through the fourteenth amendment, see note 40 *infra*.

31. Ingraham v. Wright, 430 U.S. 651 (1977), discussed at notes 140-152 and accompanying text *infra*.

32. Carey v. Piphus, 435 U.S. 247 (1978), discussed at notes 266-281 and accompanying text *infra*.

33. *See* Procunier v. Navarette, 434 U.S. 555 (1978); Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974), discussed at notes 181-251 and accompanying text *infra*. In the same vein, but beyond the scope of this article, the Supreme Court has held that a superior official cannot be compelled through a § 1983 action to take corrective action against unconstitutional conduct of his subordinates unless it can be shown that the superior or some policymaking officer sanctioned the conduct. Rizzo v. Goode, 423 U.S. 362 (1976). And state statutory law limiting or even extinguishing a right of action at common law which most nearly corresponds to a § 1983 claim will now, under some circumstances, preclude a civil rights action in federal court unless such a law would have a substantial effect on the viability of the § 1983 actions in the State. Robertson v. Wegmann, 436 U.S. 584 (1978).

34. *See* discussion at notes 230-252 and accompanying text *infra*.

Court's "unabashed love affair with the Civil Rights Act of 1871."[35] Commentators, both critical and supportive of the Court's new direction, have viewed it as reflecting a concern for the increased caseload,[36] an unwillingness to make the civil rights statute a font of tort law and disenchantment with the perceived trivialization of the constitutional tort,[37] and a shifting view of the relationship between state and federal relations.[38] Although most commentators would agree that section 1983 was not intended to be a vehicle for asserting in federal court any and all common-law tort claims against state and local officials, some fear that the new direction taken in distinguishing constitutional from common-law torts will completely eviscerate the significance and purpose behind the civil rights statute.[39]

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35. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC. ORD. 557, 563.

36. For statistics demonstrating this indisputable rise, *see, e.g.*, McCormick, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections*, (pt. 1), 60 VA. L. REV. 1, 1 n.2 (1974); Comment, *Section 1983 and the New Supreme Court: Cutting the Civil Rights Act Down to Size*, 15 DUQ. L. REV. 49, 49 n.7 (1976) [hereinafter cited as *Section 1983 and the New Supreme Court*]; Note, *Damage Awards for Constitutional Torts: A Reconsideration after* Carey v. Piphus, 93 HARV. L. REV. 966, 974 n.56 (1980) [hereinafter cited as *Damage Awards for Constitutional Torts*]; *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1136, 1172 n.224 (1977) [hereinafter cited as *Section 1983 and Federalism*].

37. Indeed this view has been expressed candidly by the Court in several of its recent civil rights cases, *see, e.g.*, Baker v. McCollan, 443 U.S. 137, 146 (1979); Paul v. Davis, 424 U.S. 693, 701-10 (1976), and reflects some discomfort with the ill-defined parameters of the constitutional tort.

38. *See, e.g.*, TRIBE, *supra* note 27, at 309; *Section 1983 and Federalism, supra* note 36, at 1174-90. This shifting view is said to reflect concern for the rights of states in a federal system as reflected in cases such as National League of Cities v. Usery, 426 U.S. 362 (1976); Rizzo v. Goode, 423 U.S. 362 (1976); and Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), and is said to be supported by the nation's heightened interest in local autonomy and rejection of centralized power. TRIBE, *supra* note 27, at 309. *See also Section 1983 and Federalism, supra* note 36, at 1135. Indeed, it has been suggested that the most important theme of the Burger Court has been the protection of state interests and renewed deference to the state courts, since "[o]n both procedural and substantive fronts the Court has cut back access to federal courts and reinvigorated the concept of states' rights." Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983*, 51 S. CAL. L. REV. 355, 355 (1978) [hereinafter cited as Glennon]. *See also Section 1983 and the New Supreme Court*, note 36 *supra*.

39. *See, e.g.*, Juidice v. Vail, 430 U.S. 327, 341-42 (1977) (Brennan, J., dissenting); Glennon, note 38 *supra*. *See also* Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 MICH. L. REV. 43 (1976); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 92-104 (1976). One senator, fearful of the direction taken by the Supreme Court in the last decade, has proposed legislation that could reassert the prominent role of federal courts in the context of civil rights claims. *See* Civil Rights Improvement Act of 1977, S. 35, 95th Cong., 1st Sess., discussed at 123 Cong. Rec. 30 (1977) (remarks of Sen. Mathias).

Clearly, there must be some limitation on the availability of relief under section 1983. Yet neither the Supreme Court, nor lower federal courts and commentators can agree on how far the Act's remedial purposes are to intrude on overlapping areas of state concern. While intellectual debate continues as to whether recent decisions have significantly diminished the efficacy of the civil rights law, lower courts and practitioners confronted with alleged civil rights violations need guidance in determining whether vindication of specific claims is appropriate under the Act in light of the Supreme Court decisions limiting the cause of action itself and the ability to recover damages under section 1983.

This article, therefore, focuses on the important areas of protectable liberty interests, the qualified immunity from damages, and appropriate remedies—themes that have been the subject of Supreme Court discussion throughout the last decade. We will identify problems in analysis of recent principal cases and attempt to provide direction for reading those cases in a manner that will accommodate both the Court's concerns in limiting the breadth of the civil rights claim and the interests of plaintiffs who seek an effective federal remedy. In presenting our views we propose a model for determining the existence of a constitutional right where no specific guarantee of the Bill of Rights supports a civil rights claim. We then discuss whether proof of intentional or reckless conduct is essential to a prima facie section 1983 claim and conclude that such proof is necessary only where the constitutional right is not secured by a specific guarantee of the Bill of Rights. Where the constitutional right is supported by a specific guarantee of the Bill of Rights, our analysis of principal Supreme Court decisions suggests that a prima facie case can be established without proof of intent or recklessness. When a claim falls into this latter category, the state of mind of the actor and the reasonableness of his conduct are factors bearing on the good faith defense and the defendant, therefore, bears the burden of pleading and proving such matters to escape liability for damages.

I. PROTECTABLE LIBERTY INTERESTS

Monroe v. Pape revitalized the federal civil rights claim. Its potential breadth, however, must be viewed against the background of the gradual incorporation of many of the Bill of Rights guarantees[40] and

40. A majority of the Supreme Court has never embraced the concept that the fourteenth amendment guarantees that "no state could deprive its citizens of the privileges and protections of the Bill of Rights," Adamson v. California, 332 U.S. 46, 74-75 (1947) (Black, J., dissenting), but in defining the content of the due process clause of the fourteenth amendment, the Court has looked to the Bill of Rights for guidance on the basis

the recognition of a variety of personal and property interests protected under the modern rubric of due process and equal protection clauses of the fourteenth amendment which the Civil Rights Act of 1871 was enacted to enforce.[41] In the decade following *Monroe*, the Court, through the fourteenth amendment clauses, imposed national standards in areas traditionally associated with state and local control. In addition to law enforcement, to which *Monroe* itself was addressed,

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that "some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process," Twining v. New Jersey, 211 U.S. 78, 99 (1908); or because "the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states," Palko v. Connecticut, 302 U.S. 319, 325 (1937). Although its specific holding was overruled in Benton v. Maryland, 395 U.S. 784 (1969), *Palko*'s broader significance was reaffirmed in Roe v. Wade, 410 U.S. 113 (1973).

Many of the rights guaranteed by the first eight amendments have been selectively incorporated in the due process clause of the fourteenth amendment, including:

1st amendment speech: Fiske v. Kansas, 274 U.S. 380 (1927);

1st amendment press: Near v. Minnesota, 283 U.S. 697 (1931);

1st amendment assembly: DeJonge v. Oregon, 299 U.S. 353 (1937);

1st amendment right to petition; Hague v. C.I.O., 307 U.S. 496 (1939);

1st amendment free exercise: Cantwell v. Connecticut, 310 U.S. 296 (1940);

1st amendment establishment prohibition: Everson v. Board of Educ., 330 U.S. 1 (1947);

4th amendment right to be free of unreasonable search and seizure: Wolf v. Colorado, 338 U.S. 25 (1949);

4th amendment exclusionary rule: Mapp v. Ohio, 367 U.S. 643 (1961);

5th amendment right to be free of self-incrimination compulsion: Malloy v. Hogan, 378 U.S. 1 (1964);

5th amendment protection against double jeopardy: Benton v. Maryland, 395 U.S. 784 (1969);

5th amendment right to just compensation: Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897);

6th amendment right to counsel: Gideon v. Wainwright, 372 U.S. 335 (1963);

6th amendment right to speedy trial: Klopfer v. North Carolina, 386 U.S. 213 (1967);

6th amendment public trial right: *In re* Oliver, 333 U.S. 257 (1948);

6th amendment right to confrontation of opposing witnesses: Pointer v. Texas, 380 U.S. 400 (1965);

6th amendment right to compulsory process: Washington v. Texas, 388 U.S. 14 (1967);

8th amendment right to be free of cruel and unusual punishment: Robinson v. California, 370 U.S. 660 (1962).

See generally TRIBE, *supra* note 27, at 567-69. A similar list is set out in S. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION 37-38 (1979) [hereinafter cited as CIVIL RIGHTS & CIVIL LIBERTIES].

41. *Section 1983 and Federalism*, *supra* note 36, at 1171. *See* Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977) [hereinafter cited as Monaghan].

public education,[42] marital and family matters,[43] zoning,[44] welfare,[45] parole,[46] prison administration,[47] government employment,[48] and voting[49] were areas implicated by the availability of the civil rights claim. Through the utilization of section 1983, a federal forum became available to plaintiffs for obtaining monetary and equitable relief if official action violated personal and property rights under the contemporary constitutional theory imposing federal norms of procedural fairness and equal treatment in the implementation of state action. This development afforded "a potential for federal judicial involvement in state and local affairs to an extent unknown in 1871."[50] As the national interest in civil rights enforcement increased, the use of the section 1983 action as a sword[51] to obtain federal jurisdiction in matters involving state official misconduct, but resembling behavior previously actionable through tort law in state court, brought forth renewed concern

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42. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); Pickering v. Board of Educ., 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Roane v. Callisburg Independent School Dist., 511 F.2d 633 (5th Cir. 1975); Canton v. Spokane School Dist., 498 F.2d 840 (9th Cir. 1974); Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970), *cert. denied*, 402 U.S. 972 (1971).

43. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

44. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); United Farmworkers v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974); Ybarra v. City of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974). Courts generally held, however, that inquiries into the appropriateness of zoning decisions belong in state, not federal, court. *See also* O'Grady v. City of Montpelier, 573 F.2d 747, 751 (2d Cir. 1978) (where state remedy exists and has not been sought, there is no constitutional deprivation in "taking" under local zoning law).

45. *See, e.g.*, Jefferson v. Hackney, 406 U.S. 535 (1972); Wyman v. James, 400 U.S. 309 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970). *Cf.* United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

46. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Silver v. Dickson, 403 F.2d 642 (9th Cir. 1968), *cert. denied*, 394 U.S. 990 (1969) (pre-*Wood v. Strickland* approach conferring absolute quasi-judicial immunity to parole board members).

47. *See, e.g.*, Meachum v. Fano, 427 U.S. 215 (1976); Montanye v. Haymes, 427 U.S. 236 (1976); Wolff v. McDonnell, 418 U.S. 539 (1974); Pell v. Procunier, 417 U.S. 817 (1974); Procunier v. Martinez, 416 U.S. 396 (1974).

48. *See, e.g.*, Bishop v. Wood, 426 U.S. 341 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972); Hollenbaugh v. Carnegie Free Library, 545 F.2d 382 (3d Cir. 1976), *cert. denied*, 439 U.S. 1052 (1978); Mims v. Wilson, 514 F.2d 106 (5th Cir. 1975); Williams v. Albermarle City Bd. of Educ., 508 F.2d 1242 (4th Cir. 1974); Garcia v. Daniel, 490 F.2d 290 (7th Cir. 1973).

49. *See, e.g.*, Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964); Davis v. Mann, 377 U.S. 678 (1964).

50. *Section 1983 and Federalism*, *supra* note 36, at 1247.

51. *See* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1533 (1972); Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 5, 11 n.31 (1974) [hereinafter cited as Nahmod].

about the tension between the position of state courts as the primary arbiters of basic standards of duty and conduct[52] and that of federal courts as the protectors of individual rights.[53] By the latter half of the 1970's, the view that federal intrusion in state affairs should be limited had begun to reemerge;[54] through language emphasizing the availability of state causes of action to vindicate personal liberty interests threatened by challenged state action, the Court in a number of significant cases[55] denied the existence of a federal claim for relief.

A. The Progeny of Roth

In *Board of Regents v. Roth*,[56] Justice Stewart, speaking for the majority, noted that only the deprivation of the interests encompassed by the fourteenth amendment's protection of liberty and property demanded procedural due process protection, and consequently, a hearing of some sort. Justice Stewart cautioned, moreover, that "the range of interests protected by procedural due process is not infinite."[57] Attempting to give the words "liberty" and "property" in the due process clause of the fourteenth amendment meaning, Justice Stewart observed that within certain boundaries, the Court had in the past "eschewed rigid or formalistic limitations on the protection of procedural due process."[58] Without tarrying long to fully develop the content of the "majestic terms,"[59] liberty and property, however, the

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52. *See, e.g.*, Baker v. McCollan, 443 U.S. 137, 146 (1979); Paul v. Davis, 424 U.S. 693, 697-710 (1976). *Cf.* Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971).

53. *See, e.g.*, H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 90 (1973) [hereinafter cited as FRIENDLY]. As the Tenth Circuit noted:

> Section 1983 has, at its core, a concern for fundamental fairness between a powerful government and the individual. "[T]here can be no doubt that § 1 of the Civil Rights Act [the predecessor to § 1983] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights."

Bertot v. School Dist. No. 1, 613 F.2d 245, 252 (10th Cir. 1979) (quoting Monell v. Department of Social Servs., 436 U.S. 658, 700-01 (1978)).

54. *See* note 37 *supra*. *See also* Juidice v. Vail, 430 U.S. 327 (1977); Stone v. Powell, 428 U.S. 465 (1976); Bishop v. Wood, 426 U.S. 341 (1976); Kelley v. Johnson, 425 U.S. 238 (1976); Imbler v. Pachtman, 424 U.S. 409 (1976). *See generally* Cox, *Federalism and Individual Rights Under the Burger Court*, 73 NW. U.L. REV. 1 (1978).

55. *See* notes 82-156 and accompanying text *infra*. We are concerned with the effect of Supreme Court decisions construing liberty guaranteed against state deprivation without procedural protection as fostered by the due process clause of the fourteenth amendment. Thus we have focused on the Court's treatment of core common-law interests protected by due process.

56. 408 U.S. 564 (1972).

57. *Id.* at 570.

58. *Id.* at 572.

59. *Id.* at 571.

majority in *Roth* ruled that, in the circumstances at hand, the state's refusal to reemploy a nontenured teacher did not implicate the teacher's property or liberty interests.

In *Roth*, the Court's analysis of property claims was built upon prior Supreme Court rulings. These previous decisions upheld the right to procedural protection of benefits through the fourteenth amendment's due process clause when statutory or administrative standards provided a clear implied promise of continued receipt precluding action by the state that would affect the benefits without a hearing.[60] Noting that the fourteenth amendment's procedural protection of property extends to interests a person "already acquired in specific benefits,"[61] the Court emphasized that more than a unilateral expectation of property must be found to invoke the protection of the due process clause as a means of vindicating the deprivation of rights—there must be a legitimate claim of entitlement to the property interest.[62] Said the majority: "Property interests, of course, are not created by the Constitution. Rather, they are created by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits."[63] Since Roth's teaching appointment contained no provision for renewal, and no rule or university policy secured reemployment, there was no support for a claim of entitlement to reemployment that need be accorded due process protection.

The *Roth* Court spoke, however, of the Constitution's "broad and majestic terms" of liberty and property "purposely left to gather meaning from experience"[64] in a changing society. In determining whether procedural protection of a property interest is constitutionally mandated, the Court had already moved beyond the rights-privilege theory of protection[65] to a view that recognized as entitlements interests founded upon expectations forwarded by the government. There-

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60. *Id.* at 576-77.

61. *Id.* at 576.

62. *Id.* at 577.

63. *Id.*

64. *Id.* at 571.

65. Under the rights-privileges theory, *see, e.g.*, Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951), the availability of procedural protection was determined by whether a governmental benefit could be characterized as a right or privilege. That concept had been rejected in cases preceding *Roth*. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 482 (1972); Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (adopting the language of Professor Charles Reich in Reich, *The New Property*, 73 YALE L.J. 733 (1964)). In its place was established the view that constitutional protection was required where there were created statutory or other entitlements based on mutual understandings between the government and the individual. *See* TRIBE, *supra* note 27, at 509-10, 514-15. *See also* Perry v. Sindermann, 408 U.S. 593, 601 (1972).

fore, a right to a hearing had been accorded where an individual's benefits were at stake for which the state had invited dependence[66] or reliance on some standard for distribution.[67]

However narrow the Court's reading of state references which evoke such justified expectations was later to become,[68] *Roth* forged a clear path for presenting cognizable claims for relief under section 1983 where property loss is asserted. Where, however, a plaintiff's claim of deprivation is not based upon the assertion of a property entitlement, nor upon any breach of a specific constitutional guarantee of the Bill of Rights incorporated in the concept of liberty of the fourteenth amendment, but rather is based upon an assertion that a fundamental or core liberty interest has been implicated, the question whether procedural protection is mandated is not as easily answerable.[69] *Roth*'s discussion of liberty interests, other than the liberty interests incorporated from the Bill of Rights, as well as the *Roth* Court's treatment of the circumstances requiring procedural protection, does not clearly mark the limits of due process protection. Supreme Court pronouncements as to the appropriateness of section 1983 relief following *Roth*, moreover, have been lucid and consistent only in terms of a reluctance to afford federal relief.

After acknowledging that "liberty" is not confined to freedom from bodily restraint[70] and listing some of the clearly defined liberty interests "essential to the orderly pursuit of happiness by free men,"[71] the *Roth* Court stated: "[W]here a person's good name, reputation, honor,

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66. *See, e.g.*, Bell v. Burson, 402 U.S. 535 (1971) (driver's license).

67. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (distribution of welfare benefits).

68. Subsequently, in Bishop v. Wood, 426 U.S. 341 (1976), for example, the Court refused to look into common practices upon which expectations could be generated by the state, relying instead only on the tenable reading by the district court of a local ordinance. *See id.* at 353-54 (Brennan, J., dissenting); *id.* at 361-62 (Blackmun, J., dissenting).

69. In the context of prison discipline, the Court had noted earlier that where the state created and conferred on prisoners a right, a liberty analysis, paralleling the judicial evaluation used where property rights are state-created, would be appropriate. *See* Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974). Until Paul v. Davis, 424 U.S. 693 (1976), however, no case had suggested that in the absence of a specific Bill of Rights guarantee a protected liberty interest could *only* arise through the state's creation. *See id.* at 722 n.10 (Brennan, J., dissenting). Compare Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (acknowledging statutory entitlements may include "many of the core values of unqualified liberty").

70. 408 U.S. at 572 & n.11 (citing Stanley v. Illinois, 405 U.S. 645 (1972); Bolling v. Sharpe, 347 U.S. 497 (1954)).

71. 408 U.S. at 572 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)) ("right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience," listed as definitely within the meaning of liberty).

or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[72] Under those circumstances, "due process would accord an opportunity to refute the charge before [the appropriate government] officials."[73]

First, the Court in *Roth* found that the university had made no charge against Roth that might seriously damage his standing and association in the community and thus implicate a liberty interest. "It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality."[74] Second, the *Roth* Court determined that the university had not "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities [, such as invoking] regulations to bar [him] from all other public employment in state universities."[75] Although "[t]o be deprived not only of present government employment but of future opportunity . . . is no small injury,"[76] the record in *Roth* contained no support for the assumption that the effect of Roth's termination would be to foreclose future employment prospects. The Court thus concluded that there had been no deprivation of liberty since nothing in the record suggested that either Roth's good name had been impugned or future employment foreclosed.

Roth endorses the belief that an individual may acquire a property interest in government employment if a statute or other understanding induced by the government confers such an entitlement, but an individual does not possess any liberty to choose a specific public position which the government may offer or withdraw without explanation.[77] As applied more generally, the liberty analysis in *Roth* itself does not appear to be at odds with prior decisions describing the contours of the concept of liberty and affording relief despite the availability of a state forum for redress of injury because of official action. Yet underscoring the ever-increasing tension between viewing a constitutional deprivation "against the background of tort law"[78] and allowing civil rights claims to become a "font of tort law,"[79] the Court

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72. 408 U.S. at 573 (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1970)).

73. *But see* Paul v. Davis, 424 U.S. 693 (1976), discussed at notes 82-106 and accompanying text *infra*.

74. 408 U.S. at 573.

75. *Id.* at 574.

76. The Court stated: "Mere proof, for example, that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.'" *Id.* at 574 n.13.

77. TRIBE, *supra* note 27, at 520.

78. Monroe v. Pape, 365 U.S. 167, 187 (1961).

79. Paul v. Davis, 424 U.S. 693, 701 (1976).

has since utilized language in *Roth* that emphasizes the limitations of the scope of the fourteenth amendment's due process clause to deny claims of unconstitutional deprivation of liberty.[80] Subsequent decisions, moreover, demonstrate a reluctance to look beyond positive state law to find additional core liberty interests protected and remediable in a civil rights claim. These subsequent decisions appear to adopt an analytical view heretofore reserved for property entitlement claims.[81]

In *Paul v. Davis*,[82] the Court's already identifiable inclination toward reducing the breadth and restricting cognizable rights under section 1983 was clearly adopted. Ruling that defamation by a government official, standing alone and apart from any other concrete governmental action, does not state a claim for relief under section 1983, the Court refused to find a liberty interest in reputation where there was no demonstrable statutory entitlement or accompanying loss of a state-conferred status.[83] Despite previous decisions, including *Roth*,[84] which suggested that reputation would be recognized as a core liberty interest, the Court determined that no interest protected by due process was implicated.

In *Paul*, area police chiefs, attempting to provide merchants with additional protection against store thefts in Louisville and Jefferson County, Kentucky, compiled and distributed a flyer identifying subjects known to be active shoplifters. Davis, the plaintiff, who had been charged with shoplifting after being arrested by a private security guard, was among those whose photographs and names appeared in the flyer—despite the fact that his innocence or guilt had not been resolved prior to the publication. Shortly after the distribution, all charges against Davis were dismissed. His employer saw the mugshot,

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80. *See* 408 U.S. at 572-75, where the Court defined the boundaries of the liberty protection in the context of Roth's case. Despite its reference to the "broad and majestic" liberty terms, *id.* at 571, necessarily given breadth "[i]n a Constitution for free people," *id.* at 572, *Roth* has been quoted more often for its caution that "the range of interests protected by procedural due process is not infinite." *Id.* at 570.

81. *See* Meachum v. Fano, 427 U.S. 215, 216 (1976); Bishop v. Wood, 426 U.S. 341, 344 (1976). *See generally* TRIBE, *supra* note 27, at §§ 10-10 through 10-13.

82. 424 U.S. 693 (1976).

83. The ruling in *Paul* has been criticized not only because it ignores clear precedent raising reputation as a fundamental and thus protectable interest, but also for its narrow and rigid view that any such fundamental liberty interest need be defined by positive state law, *id.* at 708. *See* TRIBE, *supra* note 27, at 527-32; Monaghan, *supra* note 41, at 405, 423-29.

84. 408 U.S. at 573. *See* Goss v. Lopez, 419 U.S. 565 (1975); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Jenkins v. McKeithen, 395 U.S. 411 (1969). *See also* Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 213 (1951).

however, and although Davis was not fired, he was advised not to find himself in a similar situation again.

Davis' complaint asserted that he had been deprived of liberty protected by procedural due process of the fourth amendment and that being called an active shoplifter would inhibit him from entering business establishments and would impair future employment opportunities.[85] He sought damages as well as declaratory and injunctive relief. The district court granted the police officials' motion to dismiss the complaint on the basis that Davis had failed to allege facts establishing a deprivation of a constitutionally protected right.[86] Reversing, the Court of Appeals for the Sixth Circuit determined that in view of *Wisconsin v. Constantineau*,[87] Davis had alleged facts establishing an unconstitutional denial of due process.[88]

The Supreme Court recognized that the assertions of Davis' complaint "would appear to state a classical claim for defamation actionable in the courts of virtually every state, [since] [i]mputing criminal behavior to an individual is generally considered defamatory *per se*, and actionable without proof of special damages."[89] Yet the Court, speaking through Justice Rehnquist, rejected the argument that a constitutional tort had occurred. The mere fact that the allegedly defamatory action was taken by public officials rather than private individuals, in the Court's view, did not transform mere defamation into a deprivation of a right secured by the fourteenth amendment's due process clause. Justice Rehnquist stated: "Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the fourteenth amendment."[90]

Pointing out that Davis identified no *specific* constitutional guarantee safeguarding the interest allegedly invaded, the Court majority eschewed the premise that through the due process clause, section

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85. 424 U.S. at 697. Compare *Roth*'s language stating that "[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury." 408 U.S. at 574 (citations omitted). Foreclosure from government employment was not at issue in *Paul*. There the claim was that the state, in distributing the flyer with his picture included, "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Id.* at 573. Accepting the assertion in *Paul*'s complaint that the "active shoplifter" designation on the flyer "would seriously impair his future employment opportunities," the Court found no deprivation of a right secured by the fourteenth amendment since any interest in such opportunities was not recognized by statute or explicitly found in the Bill of Rights. 424 U.S. at 697-98.

86. Davis v. Paul, 505 F.2d 1180, 1181 (6th Cir. 1974).

87. 400 U.S. 433 (1971).

88. 505 F.2d at 1183.

89. 424 U.S. at 697.

90. *Id.* at 699.

1983 made actionable wrongs inflicted by government employees "which had heretofore been thought to give rise only to state-law tort claims."[91] Justice Rehnquist rejected the idea that the fourteenth amendment's due process clause should "*ex proprio vigore* extend to him a right to be free of injury whenever the State may be characterized as the tortfeasor."[92] In his view, to find a constitutional deprivation here would make the fourteenth amendment "a font of tort law to be superimposed upon whatever systems may already be administered by the states."[93]

A second premise assumed by Justice Rehnquist to support Davis' claim, that official infliction of a "stigma" to one's reputation implicated a protectable liberty or property interest, was also rejected.[94] Although he conceded that certain language in cases such as *Constantineau*,[95] the case relied upon by the court of appeals, could be read to support this premise, Justice Rehnquist took the position that only governmental action that imposed a "stigma" *accompanied by* a significant alteration of a status defined by state law is cognizable under section 1983. The "'stigma' resulting from the [act's] defamatory character [would be] an important factor in evaluating the extent of the harm worked by that act."[96] Finally, since Kentucky law did not extend to its citizens "any legal guarantee of present enjoyment of reputation which has been altered"[97] by the official action taken, but rather merely provided a forum for vindicating such interests through tort-law damage actions, any injury to reputation, even if inflicted by an official, was not a change in status which could be considered a deprivation of liberty or property subject to due process safeguards.

Leaving aside *Paul*'s specific ruling[98] that reputation, standing alone,

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91. *Id.*

92. *Id.* at 701. Justice Rehnquist reasoned: "We have noted the 'constitutional shoals' that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law . . . *a fortiori*, the procedural guarantees of the Due Process Clause cannot be the source for such law." *Id.* (citing Griffin v. Breckenridge, 403 U.S. 88, 101-02 (1971)).

93. 424 U.S. at 701.

94. *Id.*

95. *See* 400 U.S. at 437. *See also* Jenkins v. McKeithen, 395 U.S. 411, 428-30 (1969); Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 161 (1951).

96. 424 U.S. at 709.

97. *Id.* at 711. Under *Paul*'s analysis, despite language in *Constantineau* and other Supreme Court decisions recognizing the fundamental interest at stake, whether governmental action affecting reputation entitled plaintiff to § 1983 relief would be determined by whether the state involved had also expressly committed the state to protection against infringement of that interest. *See, e.g.*, PA. CONST. art. 1, § 3.

98. Although this ruling appears clear, *see, e.g.*, 424 U.S. at 694, 712, some commentators have strained to derive a narrower ruling of the Court, leaving open the possibility that deprivation of reputation interests, in the absence of other accompanying governmen-

is not a protected liberty interest, a conclusion which seems inconsistent with language in *Roth*, *Constantineau*, and other earlier opinions of the Supreme Court and lower courts,[99] the tortuous rationale of *Paul* engenders disturbing stumbling blocks for plaintiffs seeking redress of injury under the civil rights statute. The principal problem is delineating the kinds of situations in which arbitrary conduct by state officials, not implicating rights easily pigeonholed into one of the specifically recognized guarantees of the Bill of Rights, still affords relief.

It should here be emphasized with particular interest that Justice Rehnquist, speaking for the majority in *Paul*, expressed the view that "property" and "liberty" as comprehended by the due process clause of the fourteenth amendment, attain their constitutional status "by virtue of the fact that they have been initially recognized and protected by state law."[100] In a pregnant footnote, Justice Rehnquist implied that besides interests recognized by the law of a particular state, only those interests guaranteed by one of the provisions of the Bill of Rights will be procedurally protected by the due process clause and subject to relief under section 1983.[101] This implication, read in conjunc-

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tal conduct or the conference of a recognized state status, may still be actionable under § 1983. *See, e.g.*, Note, *Reputation, Stigma and Section 1983: The Lessons of* Paul v. Davis, 30 STAN. L. REV. 191 (1977) [hereinafter cited as *The Lessons of* Paul v. Davis]. *Cf.* Mazaleski v. Treusdell, 562 F.2d 701, 712 (D.C. Cir. 1977) (*Paul* "has seriously undermined if not altogether obliterated the protection previously accorded one's general reputation in the community irrespective of any related interest in employment"). Others, however, have frankly expressed a belief that the Court's specific holding as to the lack of constitutional protection accorded such an interest will not last long. *See, e.g.*, TRIBE, *supra* note 27, at 971; Monaghan, *supra* note 41, at 432. *See also* 424 U.S. at 735 (Brennan, J., dissenting) ("Today's decision must surely be a short-lived aberration").

99. *See* Goss v. Lopez, 419 U.S. 565 (1975); Jenkins v. McKeithen, 395 U.S. 411 (1969); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 213 (1951); Stewart v. Pearce, 484 F.2d 1031 (9th Cir. 1973). *See also* Utz v. Cullinane, 520 F.2d 467, 480-81 (D.C. Cir. 1975) (dissemination of arrest records to Federal Bureau of Investigation); United States v. Briggs, 514 F.2d 794, 797-98 (5th Cir. 1975).

100. 424 U.S. at 710. *See also* Meachum v. Fano, 427 U.S. 215 (1976). *But see* note 101 *infra*.

101. Justice Rehnquist stated:

> There are other interests, of course, protected not by virtue of their recognition by the law of a particular State but because they are guaranteed in one of the provisions of the Bill of Rights which has been "incorporated" into the Fourteenth Amendment. Section 1983 makes a deprivation of such rights actionable independently of state law.

424 U.S. at 710-11 n.5. Although Justice Rehnquist acknowledged that there may be some "substantive limitations upon state action which may be encompassed within the concept of 'liberty,'" *id.*, he referred only to a right of privacy—limited to "matters relating to marriage, procreation, contraception, family relationships and child rearing and education" and distinguished from those guarantees of the due process clause. *See id.* at 712-14. It should be noted, however, that in Bell v. Wolfish, 441 U.S. 520 (1979), Justice Rehnquist did recognize a limited right of federal pretrial detainees not to be punished prior to an

tion with *Paul*'s broad language counseling against making the fourteenth amendment's due process clause a font of tort law, moreover, has been seen by some courts as virtually foreclosing the availability of a section 1983 remedy where liberty interests—beyond those previously identified rights of privacy centered around the family, marriage, and procreation—are implicated.[102]

Also of far-reaching import is the fact that although the Court did not forthrightly reject the supplementary remedy doctrine,[103] or the tort standard established in *Monroe*,[104] there are references in *Paul* to the availability of a state tort remedy and concern expressed that state-law torts not be converted into federal claims merely because officials are involved. These references—amplified in subsequent cases—clearly reflect discomfort with the view of section 1983 as a "full-fledged alternative to state remedies."[105]

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adjudication of guilt in accordance with due process of law. Justice Rehnquist found such a right to be free of punishment not expressly embodied in any provision of the Bill of Rights, nor in any statute or regulation, but in the word "liberty," as used in the due process clause. *Id.* at 535-36. A majority of the Court, however, ruled that the scope of that right did not necessitate a finding of due process violations as to certain prison practices and procedures—including body cavity searches after every visit, and a total prohibition on receipt of hard-cover books except from publishers or book clubs—aimed at preventing the smuggling of money, drugs or weapons into the institution. Calling such rules regulatory rather than punitive, the Court found it sufficient that they had a rational basis and were without a subjective intent to punish the detainees. *Id.* at 548-60. Although he disagreed with the scope of the right as articulated by the Court majority, Justice Stevens lauded the Court's abandonment of "its parsimonious definition of the 'liberty' protected by the majestic words of the [due process] Clause," *id.* at 580-81 (Stevens, J., dissenting), and its recognition of a fundamental freedom derived from and "informed by 'history, reason, the past course of decision, and the judgment and experience of 'those whom the Constitution entrusted' with interpreting that word." *Id.* at 580 (Stevens, J., dissenting) (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 162-64 (1951)).

102. *See, e.g.*, Drummond v. Fulton City Dep't of Family & Children's Servs., 563 F.2d 1200 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978); Medina v. Rudman, 545 F.2d 244 (1st Cir. 1976), *cert. denied*, 434 U.S. 891 (1977); Sullivan v. Brown, 544 F.2d 279 (6th Cir. 1976); Mitchell v. King, 537 F.2d 385, 390-91 (10th Cir. 1976). Compare the range of views expressed in White v. Rochford, 592 F.2d 381 (10th Cir. 1979).

103. In Monroe v. Pape, 365 U.S. 167 (1961), it was said:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court.

Id. at 183. *See also* cases cited at note 2 *supra*.

104. "Section 1979 [now 1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Monroe v. Pape, 365 U.S. 167, 183 (1961).

105. Chevigny, *supra* note 21, at 1352.

If these considerations are to influence future determinations of whether an interest should be constitutionally protected and thus cognizable as the basis for a federal claim under section 1983, not only will the *Monroe* construction of section 1983 as an independent remedy be reversed, but in addition, the fundamental conception of due process protection which has developed will be altered. Thus, *Paul* may portend a significant cutback in the fourteenth amendment analysis of whether a claim implicates a core liberty interest protected by procedural due process.[106]

B. Stigma-Plus

Under the *Paul* analysis, damage to reputation caused by official charges or other action, heretofore thought to have been within the concept of liberty,[107] does not form the basis for federal relief, at least in the absence of the alteration of some status or other protection already afforded by the state.[108] Thus, the *Paul* Court suggested that it is not enough that injury to reputation affect the plaintiff's chance of employment and his other dealings in the community. In order to constitute a deprivation of rights secured by the fourteenth amendment, defamatory conduct of officials must stigmatize in connection with a denial of a right or a significant alteration of a status previously recognized under state law. Stated simply, to have an actionable claim, the plaintiff must establish that the official imposed some disability other than an infliction of a stigma or harm to plaintiff's good name, reputation, honor or integrity. There must be foreclosure of some tangible interest such as freedom to take advantage of other specific employment opportunities.[109]

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106. In addition, *Paul* has been construed by some courts as precluding a § 1983 claim based on negligence. *See, e.g.*, Goodman v. Parwatikar, 570 F.2d 801 (8th Cir. 1978); Downs v. Sawtelle, 574 F.2d 1, 4 n.2 (1st Cir. 1978); Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976) (en banc), *modifying* 517 F.2d 1311 (7th Cir. 1975), *cert. denied*, 435 U.S. 932 (1978).

107. *See* cases cited at note 84 *supra*.

108. *See* text accompanying notes 100-101 *supra*. *See also* McKnight v. Southeastern Pa. Transp. Auth., 583 F.2d 1229 (3d Cir. 1978), recognizing that PA. CONST. art. I, § 1, provides for protection of the right of reputation and thus a federally based claim would be consistent with that state's guarantee.

109. Particularly because this approach seems to focus on the degree of harm—as reflected only by the tangible interest implicated—and ignores the real potential for a sanctioning motive present where reputation alone is the target of state action, we would argue that an additional disability such as freedom to take advantage of specific employment opportunities should be an aspect of the damages consideration rather than a determinant of whether a constitutional violation has occurred. *Cf.* notes 274-281 and accompanying text *infra*.

The Court's creation of a "stigma-plus"[110] standard for imputing constitutional significance to the official's action has been criticized as inconsistent with precedent, contrary to common-law tradition, and permitting arbitrary and outrageous action by state officials without adequate sanctions.[111] Given this standard, determining what conduct is stigmatizing and what "plus" is necessary to transform the stigmatizing conduct from merely a defamatory act to an actionable civil rights claim has caused some consternation among plaintiffs, as well as conflict among the lower courts.[112] In the context of nontenured public employment, the *Roth* Court noted that the state, in declining to hire Roth, made no charges that might seriously impair his standing in the community. "It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty or immorality."[113] Justice Stewart said that if these kinds of charges had been

110. *See* Danno v. Peterson, 421 F. Supp. 950, 954 (N.D. Ill. 1976).

111. 424 U.S. at 733-35 (Brennan, J., dissenting). *See also, e.g., The Lessons of* Paul v. Davis, *supra* note 98, at 207-09.

112. *See, e.g.*, Ventetuolo v. Burke, 596 F.2d 476, 483-84 (1st Cir. 1979) (defamation plus termination and then subsequent suspension with pay not sufficient); Davis v. Oregon State Univ., 591 F.2d 493, 498 (9th Cir. 1978) (fact that plaintiff's deceased husband was unsuccessful in seeking other employment after denial of tenure based on secret file immaterial since embarrassment and protection of professional competence insufficient to implicate liberty); Dennis v. S. & S. Consol. Rural High School Dist., 577 F.2d 338, 340-44 (5th Cir. 1978) (defamation in the course of declining to rehire a nontenured employee satisfies "stigma-plus" test even if plaintiff did seek and find employment elsewhere); Moore v. Otero, 557 F.2d 435, 438 (5th Cir. 1977) (defamation in the course of transferring employee to another position, where not essentially a loss of status, insufficient; reassignment to patrolman's duties insufficient); Huntley v. Community School Bd., 543 F.2d 979, 984-86 (2d Cir. 1976), *cert. denied*, 430 U.S. 929 (1977) (impairment of likelihood of obtaining future government employment in a supervisory capacity due to charges relating to poor performance and professional incompetence as acting principal); Cox v. Northern Va. Transp. Comm'n, 551 F.2d 555, 558 (4th Cir. 1976) ("likely impairment" of future employment opportunities caused by official leaks to press insinuating dishonesty of discharged employee is sufficient); Sullivan v. Brown, 544 F.2d 279, 283 (6th Cir. 1976) (recorded reprimand and transfer of teacher to another school not sufficient); Colaizzi v. Walker, 542 F.2d 969, 973-74 (7th Cir. 1976), *cert. denied*, 430 U.S. 960 (1977) (defamation in connection with the discharge of a nontenured employee sufficient); Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361, 365-67 (9th Cir. 1976) (damages to reputation and tangible loss in being dismissed from residency not enough since charges would not preclude plaintiff from practicing medicine); Mitchell v. King, 537 F.2d 385, 390-91 (10th Cir. 1976) (damage to reputation and removal from Board of Regents of state museum not enough). *See also* Knehans v. Alexander, 566 F.2d 312, 314 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 995 (1978) (whatever liberty interest Army officer has in his reputation is not impinged by the mere fact of an honorable discharge and nonretention in the Army); Mazaleski v. Treusdell, 562 F.2d 701, 713 (D.C. Cir. 1977) ("[t]o infringe one's liberty, the effect of government action on future employment must extend beyond a disadvantage or impediment; it must 'foreclos[e] his freedom to take advantage of other employment opportunities.'")

113. 408 U.S. at 573.

made by the state, the disposition of Roth's section 1983 claim would have been different.

Thus, the Court suggested that a constitutionally significant loss of reputation clearly arises when there is loss of employment and the stigma attaching as a result of official charges refers to immorality or dishonesty, affecting an employee's standing in the community. Whether charges referring to professional competency,[114] intoxication,[115] or other references not clearly tinged with moral turpitude, when accompanied by loss of employment, can also be grounds for a section 1983 action if no opportunity for a hearing is afforded is debatable.[116] In cases after *Paul*, moreover, the Supreme Court has also required that, in order to be considered stigmatizing, the official charges or reasons for the state's conduct must be made public,[117] and that such charges must be denied by plaintiff as false.[118]

Whatever the stigmatizing conduct, of great concern to plaintiffs attempting to meet the constitutional standard of *Paul* and its progeny is the requirement that some deprivation of a tangible interest beyond injury to reputation—such as loss of specific opportunity for employment—must be shown. *Paul* explicitly spoke of interference with other employment opportunities when accompanied by reputational injury as meeting the "stigma-plus" standard. Even in this situation, however, in order to recover for the constitutionally violative conduct, plaintiff faces the problem of summoning proof that the state conduct or charges were known to prospective employers, causing his denial of employment. Where evidence is available relating to the denial of the accusations made by the state official, communication of the charges by those responsible to other potential employers, applications submitted

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114. *Compare, e.g.*, Davis v. Oregon State Univ., 591 F.2d 493, 498 (9th Cir. 1979) (embarrassment and reflection on professional competence accompanying denial of tenure not sufficient) *and* Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361, 365-67 (9th Cir. 1976) (stigma of moral turpitude, not professional incompetence or inability to get along with coworkers is required; repercussions outside of professional life needed) *with, e.g.*, Ball v. Board of Trustees, 584 F.2d 684, 685 (5th Cir. 1978) (choosing to wear a beard rather than be clean-shaven has no effect on a man's profession or ability to earn a livelihood and therefore is not a stigma) *and* Huntley v. Community School Bd., 543 F.2d 979, 984-86 (2d Cir. 1976) (charges relating to performance and professional competence of acting principal and failure to demonstrate leadership sufficient).

115. *See, e.g.*, McKnight v. Southeastern Pa. Transp. Auth., 583 F.2d 1229, 1236-39 (3d Cir. 1978) (charge of intoxication analyzed in terms of whether it attributes to employee a status rather than focuses on a particular act); Dennis v. S. & S. Consol. Rural High School Dist., 577 F.2d 338, 340-44 (5th Cir. 1978) (public charges that plaintiff had a drinking problem).

116. *See* the discussion of nuances involved in determining whether a stigma attaches in McKnight v. Southeastern Pa. Transp. Auth., 583 F.2d 1229, 1236-39 (3d Cir. 1978).

117. Bishop v. Wood, 426 U.S. 341 (1976).

118. Codd v. Velger, 429 U.S. 624 (1977).

to potential employers, reasons given for rejection, and practices among employers toward hiring other persons with plaintiff's qualifications and similar disabilities, a right to relief would be clear.[119] Mere proof of nonretention of one job, on the other hand, or rejection without evidence of public dissemination of the reputation-infringing information would not generally establish the kind of foreclosure of opportunity amounting to a deprivation of liberty under *Paul*.[120]

The *Roth* Court's discussion of a stigma or other disability in the context of foreclosing freedom to take advantage of other employment opportunities and its suggestion that a person's reputation, good name, honor or integrity affected by governmental action would invoke an opportunity to refute charges need not have been inextricably linked.[121] Under *Paul's* view, however, one without the other does not rise to a "liberty" interest procedurally protected by the due process clause of the fourteenth amendment. In the context of an allegation of a property deprivation, to be more than a unilateral expectation, a claim of entitlement must be supported "by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits."[122] Under *Roth*, and before *Paul* no such state-recognized status or right had been thought to be required in the context of a claim of deprivation of a liberty interest.[123] In creating a stigma-plus requirement for obtaining relief, *Paul* seems to merge the two arguably separate interest analyses of liberty and property deprivation into one.[124] The analysis approved in *Paul* en-

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119. McKnight v. Southeastern Pa. Transp. Auth., 583 F.2d 1229, 1238 (3d Cir. 1978).

120. *But see* Dennis v. S. & S. Consol. Rural High School Dist., 571 F.2d 338, 340-44 (5th Cir. 1978) (defamed nontenured employee sought and did find employment elsewhere); Cox v. Northern Va. Transp. Comm'n, 551 F.2d 555, 558 (4th Cir. 1976) ("likely impairment" of future employment opportunities).

121. *See* 408 U.S. at 573-74. In Codd v. Velger, 429 U.S. 624 (1977), Justice Stevens in dissent pointed to two quite different interests which may be implicated when a nontenured employee is discharged: (1) an interest in good name, reputation, or integrity; and (2) an interest in avoiding a stigma or other disability that foreclosed employment opportunities. *Id.* at 631 n.11 (Stevens, J., dissenting). Contrary to the analysis set out in *Paul*, and carried forth in *Codd* and *Bishop*, the necessity for a due process hearing would be compelling in *both* circumstances. *See also id.* at 629, 630-31 & n.1 (Stevens, J., dissenting); Goss v. Lopez, 419 U.S. 565 (1975); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951).

122. 408 U.S. at 577.

123. *See* TRIBE, *supra* note 27, at 522-39; Monaghan, note 41 *supra*. Indeed, it has been stated: "True liberty rights do not flow from state laws, which can be repealed by action of the legislature. Unlike property rights they have a more stable source in our notions of intrinsic human rights." Drummond v. Fulton County Dep't of Family and Children's Servs., 563 F.2d 1200, 1207 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978).

124. *See* Paul v. Davis, 424 U.S. at 710-12.

genders the anomaly of affording relief under section 1983 where damage to reputation is alleged only by combining the claim of a stigma—not constitutionally cognizable standing alone—with the infringement of a state right or status itself not constitutionally cognizable as a liberty interest. Alone, neither need be able to support a federal remedy. When combined under *Paul*, however, constitutional proportion entitling procedural protection is achieved through reasoning more closely paralleling that heretofore reserved for property interests rather than a concept of liberty.

The substantive effect of this analysis takes on greater significance when one appreciates the gradual shift away from the view espoused in the early 1970's that procedural due process protection should extend to both the preservation of a range of fundamental liberty and property interests independent of state laws, *and* to those entitlements created by the state.[125] The view now acceptable is the positivist approach of determining whether procedural safeguards are constitutionally mandated based solely on whether state law invited reliance or otherwise sanctioned an entitlement.[126] Read broadly, *Paul* suggests that the view of a prominent role for the procedural due process doctrine in defining the government's relationship with the individual, raised by the recognition of the inherent fundamental value of certain interests beyond those protected by the Bill of Rights and the privacy penumbra, may be no longer viable. The approach embraced by *Paul* plays down the role of citizen participation in determining what process is due and rejects the theory that, for preservation of human dignity, certain interests, valuable in a free society yet vulnerable to the risk of denial by the majority, should be safeguarded by a norm of fairness.[127] It looks rather to the procedural minimization of factual error in the application of substantive state-created rules.[128] In itself this seems to be a kind of trivialization of the constitutional tort.

The Court's subsequent decision in *Codd v. Velger*[129] underscores this troublesome aspect of *Paul*'s analysis. In *Codd*, the plaintiff claimed a denial of due process in being dismissed from his nontenured position as a city policeman, and in being rejected from other employment because of the dissemination of information in his personnel file about a suicide attempt while he was a trainee. The Court held that the claim was precluded by plaintiff's failure to raise the falsity of the

125. TRIBE, *supra* note 27, at 514-19. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972); Morrissey v. Brewer, 408 U.S. 471 (1972); Bell v. Burson, 402 U.S. 535 (1971).

126. TRIBE, *supra* note 27, at 519-25. *But see* note 69 *supra*.

127. TRIBE, *supra* note 27, at 539.

128. *See generally id.* at 501-57. *Compare, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) *with, e.g.*, Meachum v. Fano, 427 U.S. 215 (1976).

129. 429 U.S. 624 (1977).

suicide attempt report. The Court's conclusion that failure to allege falsity negates a right to damage for the denial of a hearing, while consistent with *Paul*'s view of *Roth* as involving "government 'defamation,'"[130] ignores the underlying values of a due process hearing.[131] By focusing on the defamatory aspects of the official conduct, and thus requiring falsity, the Court ignores a function of the fourteenth amendment and section 1983 relief to ensure fairness of procedures: where state procedures or excessive conduct involve sufficiently grievous consequences so as to constitute a deprivation of liberty, relief should be available, regardless of the substantive merits of the individual case.[132]

The problems inherent in the majority's approach in *Codd* were considered by Justice Stevens in a dissenting opinion. In discussing the potential constitutional ramifications of a denial of public employment, he stated that if the charge involves a deprivation of liberty, due process protection should be required, regardless of the veracity of the charge. To Justice Stevens, the mere discharge constitutes part of the deprivation of liberty against which the employee is entitled to defend, and thus requires a hearing to consider whether the charge, if true, warranted discharge. Aside from damage to reputation and employment prospects caused by release of unfavorable information, injury

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130. *See* Paul v. Davis, 424 U.S. at 708-10. Although *Monroe* directed the courts to view the § 1983 constitutional claim against the background of tort law, this language was not suggesting that a constitutional claim must meet common-law tort requirements to be actionable. *See* Howell v. Cataldi, 464 F.2d 272, 278-79 (3d Cir. 1972).

Indeed, as has been recognized by one commentator, the application of tort doctrine in a § 1983 action may lead to a result inconsistent with federal policy. *See* Nahmod, *supra* note 51, at 5, 11 & nn. 12, 34 (damages). *Cf.* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (important common-law criteria of defamation inconsistent with the first amendment interests). As was said in Monell v. Department of Social Servs., 436 U.S. 658, 700-01 (1978): "Section 1983 has, at its core a concern for fundamental fairness between a powerful government and the individual."

131. In Stanley v. Illinois, 405 U.S. 645, 656 (1972), it was observed that "the Due Process Clause . . . [was] designed to protect the fragile values of a vulnerable citizenry from overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

132. *Cf.* text accompanying notes 266-306 *infra*, discussing damages in the context of a procedural due process claim. Before *Paul*, some courts had recognized the privacy implications of disclosure of even truthful information. *See, e.g.*, Utz v. Cullinane, 520 F.2d 467 (D.C. Cir. 1975); Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974); United States v. Dooley, 364 F. Supp. 75 (E.D. Pa. 1973). In rejecting reputation as the basis for federal relief, Justice Rehnquist, in *Paul*, noted that privacy rights were generally confined to the marital relation, family relationship, child-rearing, and education. *See also* Holman v. Central Ark. Broadcasting Co., 610 F.2d 542, 544 (8th Cir. 1979) (no right to privacy is invaded when state officials allow or facilitate publication of an official act such as an arrest). *But see* note 27 *supra*.

could result from uncontested official determination that the employee is unfit for public employment.[133]

Theoretically, the breadth of *Paul*'s wholesale exclusion of reputation from the reach of procedural due process, without some tangible interest at stake, conjures up examples of arbitrary action by state officials "frightening for a free people."[134] As was alluded to earlier, *Paul* has been construed by some lower courts as foreclosing the availability of section 1983 redress for other constitutional claims based upon arguably core interests encompassed by the fourteenth amendment's due process protection of liberty. Indeed, the Court's language does suggest that a claim for relief not resting on some specific guarantee of the Bill of Rights incorporated into the fourteenth amendment will not be recognized, at least where there are tort-law remedies in existence, and perhaps even if the conduct committed by a governmental official seemingly is offensive to the "concept of ordered liberty."[135]

The Court's blanket approach of removing such interests as reputation from constitutional protection for the purpose of avoiding federal involvement in actions involving the "garden variety of torts"[136] is unwise and short-sighted. Where such a fundamental interest as reputation is at stake, it would seem preferable to recognize that interest as within the concept of liberty—even if it is concluded that the case at issue is not one appropriate for section 1983 relief.

The appropriateness of relief, on the other hand, should be for the court to determine, based upon an assessment of whether the alleged conduct violated federal constitutional norms.[137] Where a liberty interest is implicated by state action though not involving conduct within the protection of one of the specific Bill of Rights safeguards, then the allegedly violative conduct should be evaluated in terms of a national standard of fundamental fairness. Then, even if relief is unavailable in a particular case because the official conduct could not be said to be outrageous, to shock the conscience, or to be otherwise offensive to the concept of ordered liberty, the possibility for federal relief in a subsequent case involving conduct impinging upon a similar fundamental interest and violating the norm of fairness is not precluded. The Court's present approach has severely hampered the development of constitutional law, and has unnecessarily reduced the protection afforded citizens by the due process clause of the fourteenth amendment.

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133. 429 U.S. at 633. *See also* Unified School Dist. No. 480 v. Epperson, 583 F.2d 1118 (10th Cir. 1978).

134. Paul v. Davis, 424 U.S. at 721 (Brennan, J., dissenting).

135. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

136. Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1 (1st Cir. 1979).

137. *See* note 155 and accompanying text *infra*.

The facts presented by *Ingraham v. Wright*[138] and *Baker v. McCollan*,[139] provided the Supreme Court with opportunities to embrace this line of reasoning and to remove some of the unnecessary restrictions which the *Paul* Court had placed on a section 1983 cause of action. Indeed, some of the Justices did allude to some of the considerations and reasoning discussed above. In both cases, however, the Court majority, pointing to the availability of state remedies, found no need to permit federal relief or to impose federal procedural safeguards.

In *Ingraham*, the use of corporal punishment in public schools sanctioned by state legislation and local school board regulation was held by the Court to be not violative of the eighth amendment. The "infliction of appreciable physical pain"[140] through paddling, however, did touch upon a constitutionally protected liberty interest requiring due process protection. The Court noted that although there is a "*de minimus* level of imposition with which the Constitution is not concerned,"[141] fourteenth amendment liberty interests are implicated whenever school officials, acting under color of state law, deliberately decide to punish and consequently inflict appreciable physical pain on the child.

The Court, however, in balancing considerations of deprivation of such interest, the probable value, if any, of additional or substitute procedural safeguards, and the state interest in order to determine "what process is due,"[142] concluded that state remedies were fully adequate to satisfy due process. It noted that a state statute made malicious punishment of a child a felony,[143] that a common-law tort remedy was available when a teacher inflicts excessive punishment on a child,[144] and that instances of abuse are an "aberration."[145] Consequently, "[i]n the ordinary case, a disciplinary paddling neither threatens seriously to violate any substantive rights, nor condemns the child 'to suffer grievous loss of any kind.'"[146] In view of the common-law and statutory restrictions coupled with state criminal and tort remedies, the Court determined that no supplementary constitutional safeguards were warranted.

Unlike the *Paul* Court, the *Ingraham* majority did not deny the existence of an interest that was federally protected "because of what

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138. 430 U.S. 651 (1977).
139. 443 U.S. 137 (1979).
140. 430 U.S. at 674.
141. *Id.*
142. *Id.*
143. *Id.* at 677 & n.45. *See* FLA. STAT. ANN. § 827.03(3) (West 1976).
144. 430 U.S. at 676-77 & n.45.
145. *Id.* at 682.
146. 430 U.S. at 678 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

the government is doing."[147] But student victims of unjustifiable or abusive corporal punishment can find little solace in the Court's recognition of such a liberty interest, since in the same breath of recognition, the Court constricted the right by determining that the availability of state remedies satisfied constitutional due process requirements.

It is our belief that the theoretical availability of post-deprivation state tort remedies should not be determinative of the coverage or of the protection afforded by the due process clause and relief under section 1983.[148] Justice White, in his dissenting opinion in *Ingraham*, appeared to agree with this proposition when he emphasized the particular inadequacy of such remedies in the corporal punishment context, adding that since "[t]he infliction of pain is final and irreparable, it cannot be undone in a subsequent proceeding."[149] He therefore rejected the theory of the majority that "the State may punish an individual without giving him an opportunity to present his side of the story, as long as he can later recover damages from a state official if he is innocent."[150] Justice Stevens, in a separate dissent, raised but left open the question of whether a post-deprivation state remedy is constitutionally sufficient where deprivation of a liberty interest is involved.[151] Clearly, an affirmative answer effectively denies a federal forum for vindication of rights purportedly protected by the Constitution, contrary to the dictates of *Monroe* and the view that the federal courts have the primary responsibility for defining and protecting rights secured by the Constitution.[152] It eliminates a fundamental requirement of due process—to afford an opportunity to be heard at a meaningful time and in a meaningful manner.

In *Baker v. McCollan*, the Court disagreed with the conclusion of the Court of Appeals for the Fifth Circuit that conduct by officials which made out the common-law elements of false imprisonment provided a viable claim under section 1983. The plaintiff, McCollan, had been mistakenly arrested under a warrant issued for his brother, and was detained by the Sheriff of Potter County, Texas for eight days. McCollan

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147. *See* 430 U.S. at 672-74.

148. None of the opinions in Monroe v. Pape, 365 U.S. 167 (1961), took the view that the theoretical availability of state remedies should preclude § 1983 relief. If the supplementary remedy doctrine of *Monroe*, *see* note 103 *supra*, is rejected, *quaere* whether in circumstances where a plaintiff sues in state court he can return to federal court under a theory of inadequate remedy. *Cf.* note 130 *supra*.

149. 430 U.S. at 693-95 (White, J., dissenting).

150. *Id.* at 695-96 (White, J., dissenting).

151. *Id.* at 701 (Stevens, J., dissenting).

152. *See, e.g.*, FRIENDLY, note 53 *supra*; TRIBE *supra* note 27, at 535; *Section 1983 and Federalism*, *supra* note 36, at 482. *See also* Becker Phosphate Corp. v. Muirhead, 581 F.2d 1187 (5th Cir. 1978).

claimed his detention deprived him of liberty without adequate due process. Although the Court did not dispute that the detention of plaintiff was wrongful under tort-law analysis, it concluded that the conduct was constitutional. "The Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished 'without due process of law.'"[153] The Court reasoned that plaintiff had failed to meet the threshold requirement of demonstrating that he had been deprived of a right "secured under the Constitution."[154] Since this detention was pursuant to a warrant conforming with fourth amendment standards, made applicable to the states by incorporation under the fourteenth amendment, and since no other specific guarantee was identified as applicable, the Court majority concluded that a section 1983 claim had not been made.

McCollan's determination that no violation of rights secured by the Constitution had been shown was made by the majority without evaluating the applicability of constitutional safeguards included in the definition of liberty beyond those guarantees devolved from the Bill of Rights. Thus, although Justice Blackmun concurred, he added: "The Court today does not consider whether petitioner's conduct 'shocks the conscience' or is so otherwise offensive to the 'concept of ordered liberty' . . . as to warrant a finding that petitioner denied respondent due process of law."[155]

Although the *McCollan* Court did not completely ignore the fundamental liberty interest involved, its decision is consistent with *Paul*, for, in *McCollan* as in *Paul*, the Court suggested that absent some specific guarantee of the Bill of Rights being impinged, a plaintiff will rarely succeed on a cause of action asserting a due process violation because of a liberty deprivation. As in *Paul*, *Codd*, and *Ingraham*, the Supreme Court in *McCollan* seemed unwilling to evaluate the fairness and regularity of procedures where post-deprivation state tort remedies are potentially available. Yet the Court's apparent disposition not to become involved in such an evaluation in a case like *McCollan* may be even more difficult to justify since plaintiff's detention after arrest resulted from arguably insufficient procedures used by the sheriff's

153. 443 U.S. at 145.

154. *Id.* at 146.

155. *Id.* at 147 (Blackmun, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Justice Blackmun added:

> I do not understand the Court's opinion to speak to the possibility that *Rochin* might be applied to this type of case or otherwise to foreclose the possibility that a prisoner in respondent's predicament might prove a due process violation by a sheriff who deliberately and repeatedly refused to check the identity of a complaining prisoner against readily available mugshots and fingerprints.

Id. at 148 (Blackmun, J., concurring).

office, and pretrial detention has been heretofore generally thought to be a serious deprivation of individual liberty.[156]

C. Paul's Progeny

Monroe's expansive reading of section 1983 as providing relief for official conduct occurred in the context of a claimed deprivation of rights secured by specific guarantees of the Bill of Rights incorporated in the due process clause of the fourteenth amendment. As plaintiffs began to assert constitutional claims of inadequate procedures based upon violations of rights involving core liberty interests not confined to guarantees of the Bill of Rights, the Court, more troubled by the overlapping of these constitutional claims and common-law tort actions, sought some means of limiting the federal relief available.

One approach taken by the Court has been to deny a due process claim under section 1983 where the alleged violation implicates a liberty interest not specifically protected by those guarantees of the Bill of Rights incorporated into the fourteenth amendment. A result of this approach is to relegate the plaintiff to a state forum for redress of injuries to fundamental personal interests caused by official conduct that offends the concept of ordered liberty or that shocks the conscience. Although the theoretical existence of a forum in state court to vindicate wrongs remediable under section 1983 is not, according to *Monroe*, relevant to determining if the alleged violative conduct entitled plaintiff to a federal claim, the hypothetical availability of a state-court remedy now appears to be a focal point in deciding whether plaintiff has met the threshold requirements of establishing a constitutional violation.

In view of the Court's reliance upon the theoretical availability of a state-court remedy as a basis for deciding whether a particular interest is constitutionally protected and whether a claim under section 1983 is available, a further question is raised whether the Court will subscribe to its view, set forth in *Monroe*, that one of the basic pur-

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156. Indeed, in Ingraham v. Wright, it was stated: "Among the historic liberties so protected was a right to be free from and to obtain judicial relief for unjustified intrusions on personal security." 430 U.S. 651, 673 (1977). In this connection, it is significant, as was pointed out by Justice Marshall in *McCollan*, that "petitioner and his deputies made absolutely no effort for eight days to determine whether they were holding an innocent man in violation of his constitutionally protected rights." 443 U.S. at 149 (Marshall, J., dissenting). *See also* note 101 *supra*. A similar interest, protected by the fourth amendment and made applicable to the states through the fourteenth amendment, arises in the context of unwarranted intrusion by the state in the course of criminal investigations. *See* Whalen v. Roe, 429 U.S. 589, 604 n.32 (1977). In *Ingraham*, a liberty interest was recognized as extending beyond the constitutionally protected norms embodied in the fourth amendment unreasonable search and seizure prohibitions. *See* 430 U.S. at 673 n.41.

poses of the Civil Rights Act of 1871 was "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."[157] The concern for the protection of fundamental rights underlying that view led the Court in *Monroe* to conclude: "The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[158]

Should the Court continue to rely on the theoretical availability of state court remedies as a basis for restricting the scope of section 1983, the Court will undoubtedly have chosen an approach that will answer many of its concerns regarding its burgeoning caseload. Such an approach could also provide a certain line of demarcation in the overlapping area of constitutional and common-law tort claims. Unfortunately, those results would be achieved at the expense of a once viable civil rights remedy.

This prospect is cause for serious concern to those who believe that the existence of constitutional rights, as well as the existence of remedies for redressing violation of those rights, should not depend on the vagaries and limitations of state law. Moreover, in the Court's retreat from a view supporting federal-law insinuation where fundamental interests are impinged because of governmental action, there is manifested a more narrow understanding of the scope of liberty interests entitled to due process protection which negates the fundamental values of those interests at stake and ignores the relationships of government and citizen, and the individual's role in determining what process is due.

Although the objectives of attaining judicial efficiency and of avoiding unnecessary overlap between federal and state relief are desirable results, these goals should not be forwarded by sacrificing the constitutional protections afforded citizens under the due process clause of the fourteenth amendment. The following sections of this article explore the alternative means used by the Supreme Court to limit the potentially broad relief afforded individuals by section 1983. The basic criteria for section 1983 liability is then used to develop a model for assessing the viability of a section 1983 claim.

II. Of Remedies and Immunities

In addition to the marked tendency to narrowly construe the rights protected by the fourteenth amendment due process clause, the Supreme Court in the last decade has focused on two other aspects of the section 1983 claim as a means of limiting its reach: the defendant's state of mind and damages relief. These issues at first glance appear to

157. Monroe v. Pape, 365 U.S. at 174.
158. *Id.* at 183.

be distinct from each other and unrelated to the scope of fourteenth amendment rights. A careful examination of Supreme Court decisions, however, reveals that these issues are closely connected and interdependent, since the existence of a right and a damage remedy under the Supreme Court's current analytical focus will often turn on whether the defendant knew or should have known that his conduct would violate the plaintiff's constitutional rights or cause him other serious injury.

Clarification of the interrelationship of the actor's state of mind to the determination of whether a constitutional violation has occurred, whether a remedy lies for such a violation, and whether there exists some kind of immunity from damages is essential to an overall assessment of the current status of law governing section 1983 claims. Once the relationship among these issues is clarified, the Court could successfully meet its objective of "cut[ting] the civil rights act down to size,"[159] without continuing its course of denying the existence of fundamental interests of constitutional dimensions.

A. Proposed Model for the Prima Facie Case and the Good Faith Defense

An analysis of the standards enunciated by the Court in its recent decisions, in light of the concerns discussed above, leads us to the following suggested approach for deciding a section 1983 case. Initially, the plaintiff should bear the burden of proving deprivation of a liberty or property interest protected by the Constitution.[160] If the conduct of the defendant is prohibited by a specific provision of the Bill of Rights applicable to the state through the fourteenth amendment, the plaintiff can establish a prima facie case by establishing that the defendant's conduct violated the specific constitutional provision.[161] On the other hand, if the defendant's conduct is not prohibited by a specific provision of the Bill of Rights, plaintiff must establish that the conduct was so outrageous under the circumstances that it shocks the conscience or offends the basic concept of ordered liberty.[162] To prove such a case, plaintiff will have to show that the defendant either acted with the intention of causing him serious harm, or acted in reckless disregard of the fact that his conduct was likely to cause such harm.[163]

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159. *Section 1983 and the New Supreme Court*, *supra* note 36, at 1.

160. *See* text accompanying notes 56-106 *supra*.

161. *See* text accompanying notes 211-229 *infra*.

162. *See* Baker v. McCollan, 443 U.S. at 147-49 (Blackmun, J., concurring). *See also* text accompanying notes 211-229 *infra*. *Cf.* Shapo, *supra* note 19, at 327 (suggesting a standard of outrageous conduct for all § 1983 claims).

163. *See* Estelle v. Gamble, 429 U.S. 97 (1976). In *Estelle*, the Court stated:

Medical malpractice does not become a constitutional violation merely because the

Once a constitutional violation has been established, the good faith defense must be evaluated. If the plaintiff's claim is based upon a specific provision of the Bill of Rights, defendant can escape liability for damages by establishing that he acted in good faith in that he did not act with the malicious intention of depriving plaintiff of a constitutional right and that his conduct was reasonable under the circumstances.[164] If plaintiff's claim is based upon conduct so outrageous that it shocks the conscience, plaintiff's proof of this claim will effectively refute any claim of good faith made by the defendant.[165]

To support the above model for analyzing and resolving section 1983 claims, it is necessary to comprehensively analyze the recent principal Supreme Court decisions concerning the establishment of a prima facie case and a good faith defense.

B. Standards for Determining the Type of Conduct Which Subjects an Actor to Section 1983 Liability

To date, the Supreme Court has failed to determine conclusively the relevance, if any, of a defendant's state of mind to a claim of unconsti-

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victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.

Id. at 106 (footnote omitted). Since the eighth amendment's cruel and unusual punishment prohibition has been held to apply only to the prison context, Ingraham v. Wright, 430 U.S. 651 (1977), a person who suffered harm outside of the prison context as a result of state officials' performing functions such as health care delivery would have to rely directly on the fourteenth amendment's guarantee of due process to assert a valid § 1983 claim. Success would probably depend upon proof of conduct so outrageous that it shocks the conscience and violates basic concepts of ordered liberty. Proof of intent to harm or indifference may then be essential. *See, e.g.*, Beard v. Mitchell, 604 F.2d 485, 494 (7th Cir. 1979) ("recklessness is required to recover for deprivation of life, liberty, or property without due process under the Fourteenth Amendment"). Consequently, the standards for establishing certain types of violations of the eighth amendment's prohibition against cruel and unusual punishment may be equivalent to the standards for establishing a violation of a fourteenth amendment right not secured by a specific provision of the Bill of Rights. To this extent the eighth amendment's prohibition may be characterized as a limited exception to our position that rights secured by specific provisions of the Bill of Rights do not depend upon the state of mind of the actor. At the same time, the Court's ruling in *Estelle* may serve as a guideline for assessing § 1983 claims based on the fourteenth amendment's guarantee of due process where the right asserted is not secured by a specific provision of the Bill of Rights.

164. *See* authorities cited at note 173 *infra*.

165. If defendant's conduct is so outrageous that it shocks the conscience, it would follow that defendant could not have acted in good faith. *But see* Beard v. Mitchell, 604 F.2d 485, 496 (7th Cir. 1979) (asserting that an official could have a "reasonable belief" that "grossly unreasonable" conduct is "lawful").

tutional tortious conduct.[166] In *Monroe v. Pape*,[167] the Court held that proof of "willfulness" on the part of the actor was not a necessary requirement for a section 1983 claim; section 1983 was to be "read against the background of tort liability which makes a man responsible for the natural consequences of his action."[168] Since tort law under various circumstances provides for the shifting of loss on the basis of intentionally tortious conduct, negligent conduct, and strict liability, the question remained after *Monroe* whether negligence and strict liability were proper bases for imposing liability under section 1983.[169] The lower courts have considered the question of the appropriate standard for section 1983 liability, but have not agreed on an answer. Some courts have required proof of intentional or grossly negligent conduct,[170] and others have approved section 1983 actions on the basis of ordinary negligence.[171]

The Supreme Court has declined to resolve the conflict, electing instead to concentrate on the appropriate standards for the good faith defense.[172] In so doing, the Court has rendered decisions which demonstrate both uncertainty as to the appropriate standards for immunity from damages and inconsistency in the application of the standards to various state officials.[173] These decisions are confusing when examined

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166. The language of the statute does not address the state of mind issue. For a good discussion and analysis of case law see *Section 1983 and Federalism*, *supra* note 36, at 1204-09; Note, *Section 1983 Liability for Negligence*, 58 NEB. L. REV. 271 (1971) [hereinafter cited as *Liability for Negligence*].

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

168. *Id.* at 187.

169. For an analysis of the problems posed by a literal reading of the quoted language see Nahmod, note 51 *supra*. *See also Liability for Negligence*, note 166 *supra* (arguing for an elimination of the intent-negligence standard in § 1983 cases).

170. *See, e.g.*, Johnson v. Shaw, 609 F.2d 124 (5th Cir. 1980); Reeves v. City of Jackson, 608 F.2d 644 (5th Cir. 1979); Bogard v. Cook, 586 F.2d 399 (5th Cir. 1978); Bonner v. Coughlin, 545 F.2d 565, 567 (7th Cir. 1976) (en banc), *cert. denied*, 435 U.S. 932 (1978); Hoit v. Vitek, 497 F.2d 598, 602 (1st Cir. 1974); Brown v. United States, 486 F.2d 284, 287 (8th Cir. 1973) (dicta); Howell v. Cataldi, 464 F.2d 272, 279 (3d Cir. 1972).

171. Carter v. Estelle, 519 F.2d 1136, 1136-37 (5th Cir. 1975); McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975), *cert. dismissed*, 426 U.S. 471 (1976); Dewell v. Lawson, 489 F.2d 877, 882 (10th Cir. 1974); Fitzke v. Shappell, 468 F.2d 1072, 1077 n.7 (6th Cir. 1972); Wright v. McMann, 460 F.2d 126 (2d Cir. 1972), *cert. denied*, 409 U.S. 885 (1975); Carter v. Carlson, 447 F.2d 358, 365 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973).

172. *See* Baker v. McCollan, 443 U.S. 137 (1979); Procunier v. Navarette, 434 U.S. 349 (1978). Some courts, however, have construed Paul v. Davis, 424 U.S. 693 (1976), as precluding a § 1983 claim based on negligence. *See* cases cited at note 106 *supra*.

173. *See* notes 230-251 and accompanying text *infra*. For further analysis and critique of the immunity standards enunciated by the Court see Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175 (1977); Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and Critique*, 72 NW. U.L. REV.

solely for the purpose of understanding the good faith defense. Analysis of the relationship of the enunciated standards for the defense to the standards for the establishment of a prima facie section 1983 case reveals even more complex problems.

A major problem is that the Court has referred to "good faith"[174] as a defense, but has never ruled that the defendant has the burden of pleading or proving the existence of good faith. Thus, it is unclear whether a defendant's motion to dismiss a section 1983 action should be granted because of the absence of plaintiff's allegations or proof as to the absence of good faith.[175] Bad faith could be treated as a part of plaintiff's prima facie case, analogous to the Court's approach to actions for defamation.[176] Alternatively, good faith could be treated as an affirmative defense which the defendant has the burden of pleading and proving.[177]

If good faith is treated as an affirmative defense, the question will remain whether a section 1983 cause of action requires plaintiff to allege and prove a particular wrongful state of mind or some degree of fault on the part of the defendant in order to allege and prove a prima

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526 (1977) [hereinafter cited as Freed]; Kattan, *Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions*, 30 VAND. L. REV. 941 (1977) [hereinafter cited as Kattan]; Theis, *Official Immunity and the Civil Rights Act*, 38 LA. L. REV. 281 (1978) [hereinafter cited as Theis]; *Section 1983 and Federalism*, *supra* note 36, at 1190-204.

174. *See, e.g.*, Procunier v. Navarette, 434 U.S. 555, 562 (1978); Wood v. Strickland, 420 U.S. 308, 321 (1975); Scheuer v. Rhodes, 416 U.S. 232, 247 (1974); Pierson v. Ray, 386 U.S. 547, 552 (1967).

175. In *Procunier*, the Supreme Court approved the district court's grant of a summary judgment in favor of the defendants where plaintiff alleged only negligence in one of his counts. The Court's decision was, however, based on what it perceived to be plaintiff's inability to refute the defendant's claim of good faith, and not on plaintiff's failure to meet a burden of pleading and proving bad faith. 434 U.S. at 563-65. Neither of these issues was discussed in *Procunier*.

It should be noted that the pleading and proof burdens may be allocated to different parties. "Either policy or convenience, or both, may require one party to take the pleading initiative in putting an issue into the case, even though other considerations may require his adversary to prove his side of it (once the issue is injected)." F. JAMES & G. HAZARD, CIVIL PROCEDURE 105 (2d ed. 1977) [hereinafter cited as JAMES & HAZARD].

176. To protect an individual's first amendment rights while at the same time allowing states to protect another individual's reputation, the Court has required public officials and public figures who bring defamation actions to plead and prove "actual malice." Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

177. Leading commentators agree that there is no universal working rule to determine the party on whom the law will place the burden of proof for any given issue. The burden of proof issue is a question of policy and fairness resolved on the basis of experience in different situations. *See* JAMES & HAZARD, *supra* note 175, at 249-53; 9 J. WIGMORE, EVIDENCE § 2486, at 275 (3d ed. 1940).

facie case.[178] That is, if a motion to dismiss a complaint for failure to state a claim for which relief can be granted or a motion for a directed verdict is based on the absence of allegations or evidence as to bad faith or fault, should such a motion be granted? Since the Court has construed section 1983 as purely a remedial statute,[179] the answer should turn on whether one can establish the violation of a constitutional right without establishing wrongful intent or fault on the part of the actor. The Supreme Court has recognized the issue but offered little guidance as to its proper resolution.[180]

C. State of Mind and the Prima Facie Section 1983 Case

Procunier v. Navarette[181] evoked expectations that the issue of whether a section 1983 action could be based on negligence would finally be resolved. Navarette brought an action against the Director of the California Department of Corrections and various subordinate and supervisory officials of Soledad Prison seeking damages for interference and confiscation of his mail from September 1, 1971 to December 11, 1972. One claim for relief asserted "knowing disregard" of prison regulations and Navarette's constitutional rights. The second claim asserted a "bad faith disregard for his rights." A third claim asserted that the three subordinate officers had negligently and inadvertently misapplied the prison regulations and that the supervisory officers had negligently failed to provide sufficient training and direction to their subordinates.[182] The district court granted summary judgment for the defendants on each of these claims. The Court of Appeals for the Ninth Circuit reversed, *inter alia*, on the basis that the allegation that state officers negligently deprived Navarette of his constitutional rights stated a cognizable cause of action under section 1983. The Supreme Court granted certiorari to determine "whether the Court of Appeals correctly reversed the District Court's judgment with respect to Navarette's third claim for relief alleging negligent interference with a claimed constitutional right."[183]

The opinion subsequently issued by the Court, however, did not address the negligence question. The Court ruled that summary judg-

178. *See* Baker v. McCollan, 443 U.S. 137, 140 n.1 (1979). *See also* notes 191-229 and accompanying text *infra*.

179. Chapman v. Houston Welfare Rights Organization, 443 U.S. 600, 617-18 (1979) ("[I]t remains true that one cannot go into court and claim a violation of § 1983—for § 1983 by itself does not protect anyone against anything. . . . 'The act only gives a remedy.'").

180. Baker v. McCollan, 443 U.S. at 140.

181. 434 U.S. 555 (1978).

182. *Id.* at 557-58.

183. *Id.* at 565 (footnote omitted).

ment was properly granted by the district court because the constitutional right allegedly infringed was not "clearly established" at the time the defendants acted and thus, as a matter of law, the negligence allegations could not support a conclusion that the officials lost their qualified immunity.[184]

The Supreme Court's focus on qualified immunity in *Procunier* was surprising in light of its grant of certiorari to consider the negligence issue and the obvious need for some exposition on the viability of a section 1983 action based on negligence. However, the Court's decisions in section 1983 cases over the past fifteen years suggest that it views the immunity defense as one means of limiting the number of section 1983 claims and preventing the civil rights act from unduly hampering the functioning of state officials.[185] Thus, in *Procunier*, the Court seized another opportunity to further ebb the flow of section 1983 litigation.

Procunier suggests that some kind of an immunity defense is available to all state officials.[186] In addition, it reaffirms the view set forth in *Wood v. Strickland*[187] that the tests for immunity are both objective and subjective. Subjectively, the question is whether the official acted with "malicious intention" to deprive the petitioner of a constitutional right or to cause him "other injury." The objective test involves three principal considerations: (1) whether the constitutional right allegedly infringed by the official was clearly established at the time of the challenged conduct; (2) whether the official knew or should have known of the existence of that right; and (3) whether the official knew or should have known that his conduct violated the constitutional norm.[188]

With respect to the first factor, the Court in *Procunier* found it unnecessary to specify the basis for determining whether a constitutional right is clearly established. The *Procunier* Court noted that the court of appeals had relied upon its own decisions which had been rendered

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184. *Id.*

185. *See* cases cited at notes 22-34 *supra*.

186. Justice Stevens perceived this implied extension of the qualified immunity defense and expressed the following concern in his dissenting opinion:

> I have no quarrel with the extension of a qualified immunity defense to all state agents. A public servant who is conscientiously doing his job to the best of his ability should rarely, if ever, be exposed to the risk of damage liability. But when the Court makes the qualified immunity available to all potential defendants, it is especially important that the contours of this affirmative defense be explained with care and precision. Unfortunately, I believe today's opinion significantly changes the nature of the defense and overlooks the critical importance of carefully examining the factual basis for the defense in each case in which it is asserted.

434 U.S. at 569 (Stevens, J., dissenting).

187. 420 U.S. 308, 321 (1975).

188. Procunier v. Navarette, 434 U.S. at 562.

in 1973 and 1974. Reliance upon these decisions, according to the Court, was misplaced since the conduct at issue in *Procunier* occurred in 1971 and 1972. It followed that there was no clearly established right stemming from the first and fourteenth amendments with respect to the protection of correspondence of convicted prisoners.[189] With respect to the subjective test for immunity—whether the official has acted with "malicious intention" to deprive the plaintiff of a constitutional right or to cause him other injury—the court concluded that summary judgment was also proper: "To the extent that a malicious intent to harm is a ground for denying immunity, that consideration is clearly not implicated by the negligence claim now before us."[190]

Procunier continues the trend of narrowing the circumstances under which a plaintiff can obtain compensation for harm caused as a result of a violation of his constitutional rights. The majority of the Court elected to avoid the question of whether Navarette's constitutional rights were, in fact, violated and simply declared that even if such violation did occur, it did not support an award of compensation under section 1983 because as a matter of law the defendants enjoyed a qualified immunity under the circumstances.

That *Procunier* has significantly impaired the effectiveness of section 1983 as a vehicle for seeking compensation is beyond doubt. The severity of the impairment will depend upon the answers ultimately provided to the critical questions left open by *Procunier*: who has the burden of proof on the good faith issue; when is a constitutional right "clearly established"; is subjective bad faith synonymous with malice; are the objective criteria for determining bad faith synonymous with negligence criteria of reasonable conduct in light of foreseeable risks of harm; and, what relevance, if any, does the defendant's state of mind have to a determination of whether plaintiff's constitutional rights were, in fact, violated? Responses to these inquiries would clarify both practical litigation problems and general policy issues regarding the balance of litigants' interests in the adjudication of claims under section 1983. Moreover, resolution of these issues will significantly affect the viability of section 1983 as a mechanism for determining the status of an individual's constitutional rights for deterring conduct violative of constitutional rights and for providing compensation to victims of unconstitutional conduct. Since the majority in *Procunier* declined to address these issues directly, it is necessary to scrutinize carefully Supreme Court and courts of appeals decisions in principal section 1983 cases for indications of the position the Supreme Court is likely to advance.

189. *Id.* at 565.
190. *Id.* at 566.

Of primary significance is the question of burden of proof on the good faith issue. Some of the courts of appeals have expressly declared that good faith is an affirmative defense and that the burden of proving good faith rests with the defendant.[191] Other courts have treated the absence of good faith as part of the plaintiff's prima facie case.[192] Although the *Procunier* Court, like the Second Circuit, seemed to treat the good faith determination as if it were an affirmative defense, the Court has not expressly held that the burden of pleading and proving good faith is on the defendant. Neither has the Court explained how such a burden relates to the elements of plaintiff's prima facie case. Instead, in *Procunier*, the Court ruled that having alleged only negligence, the plaintiff, as a matter of law, could not rebut the defendant's assertions of objective good faith because the constitutional right he was asserting was not clearly established at the time the defendants acted.[193] At the same time, according to the majority, plaintiff did not need to rebut defendants' assertion of subjective good faith where plaintiff alleged only negligence.[194]

The good faith issue is thus subject to two possible approaches. It could be treated as a traditional affirmative defense which the defendant must plead and prove to escape liability for conduct which was prima facie a constitutional tort.[195] Alternatively, it could be treated as

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191. *See, e.g.*, Thompson v. Burke, 556 F.2d 231, 239 (3d Cir. 1977); Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975), *cert. dismissed*, 426 U.S. 471 (1976); Smith v. Losee, 485 F.2d 344 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974); Green v. Jones, 473 F.2d 660 (9th Cir. 1973); Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962).

192. *See, e.g.*, Cruz v. Beto, 603 F.2d 1178, 1182-84 (5th Cir. 1979); Bogard v. Cook, 586 F.2d 399 (5th Cir. 1978); Hanneman v. Breir, 528 F.2d 750, 756 (7th Cir. 1976); Hoitt v. Vitek, 497 F.2d 598, 602 (1st Cir. 1974). *See also* Freed, note 173 *supra*.

193. 434 U.S. at 565.

194. *Id.* at 566.

195. Pleading requirements for affirmative defenses have been described as follows:

> While there is no simple test for determining what must be affirmatively pleaded, the rules governing the more commonly recurring defenses have become fairly well crystallized by precedent, rule, or statute, so that the pleader is likely to find a ready answer to most of his questions in any particular jurisdiction. Thus, the federal rules and the Connecticut and New York codes give lists of affirmative defenses.

JAMES & HAZARD, *supra* note 175, at 139 (footnotes omitted). With respect to the good faith of a federal official making an arrest, it has been held: "[I]t is a defense to *allege* and *prove* good faith and reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted." Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 456 F.2d 1339, 1348 (2d Cir. 1972) (on remand from 403 U.S. 388 (1971)) (emphasis added).

One court has described and approved the following mechanics of pleading and proof in a *Bivens* type action:

> A plaintiff suing at common law must show that he has suffered an imprisonment

an element of plaintiff's prima facie case. Under the latter approach, as in the law of libel, the plaintiff would be required to plead and prove malice, intent, or negligence to establish a prima facie case.[196]

Since many section 1983 claims are challenged on the basis of insufficient allegations or evidence with respect to the defendant's state of mind, clarification of the burdens of pleading and proof on this issue is sorely needed. If a showing of a particular state of mind of the defendant is essential to a finding of a constitutional violation, it would seem logical and fair to place the burden of pleading and proving the defendant's mental state on the plaintiff.[197] On the other hand, if a

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and that the imprisonment was unlawful. The former issue is one of fact, potentially for the injury. Under the law of the District of Columbia, the unlawfulness of a detention is presumed once "an allegation [is made] that a plaintiff was arrested and imprisoned without process." The burden then shifts to the defendant to justify the arrest. Justification can be established by showing that there was probable cause for arrest of the plaintiff on the grounds charged. A lesser showing can also be made, namely that the arresting officer had reasonable grounds to believe a crime had been committed and that plaintiff's arrest was made for the purpose of securing the administration of the law (*i.e.*, that the officer acted in good faith).

Dellums v. Powell, 566 F.2d 167, 175 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978) (citations omitted). The court further stated:

> Although we know of no case delineating the parameters of a *prima facie* case under a *Bivens* false arrest theory, *Pierson v. Ray* indicates that the details of the constitutional tort actions should be shaped by reference to the parallel common law. The rule recognized in the District that an allegation of arrest and imprisonment without warrant shifts to the defendant the burden of justifying the arrest is the majority rule in this country and we see no identifiable purpose that would be served by adopting a different or more stringent definition of a *prima facie* case in constitutional litigation.

Id. at 175-76 (citations and footnotes omitted). In support of its statement that an allegation of arrest or imprisonment without warrant shifts the burden of justifying the arrest to the defendant, the court cited the following authority: Muller v. Reagh, 215 Cal. App. 2d 831, 30 Cal. Rptr. 633 (1963); Wehrman v. Liberty Petroleum Co., 382 S.W.2d 56 (Mo. App. 1964); Broughton v. New York, 37 N.Y.2d 451, 335 N.E.2d 310, 373 N.Y.S.2d 87, *cert. denied*, 423 U.S. 929 (1975); 32 AM. JUR. 2d *False Imprisonment* § 95 (1967); 35 C.J.S. *False Imprisonment* § 55 (1960). The *Dellums* court also noted that "since plaintiffs can be expected to plead common law false arrest as a pendent claim in constitutional suits, different rules would merely lead to confusion." 566 F.2d at 176.

196. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (a public figure is constitutionally required to prove actual malice in a defamation action; a private person need not prove actual malice but must prove fault); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (a public official is constitutionally required to prove actual malice in a defamation action).

197. Only in rare instances does the common law place the burden on the defendant of pleading and proving the absence of an element essential to plaintiff's prima facie case. The rare instances where the burden is shifted to the defendant involve circumstances revealing an injury suffered by the plaintiff due to someone's tortious conduct and a substantial handicap imposed on the plaintiff with respect to proving the identity of the person who actually committed the tort. *See, e.g.*, Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948); Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944).

prima facie case of a constitutional tort can be established regardless of the defendant's mental state, and a particular mental state is a "defense" which relieves the defendant of liability for damage, then the burden of pleading and proving that mental state should be placed on the defendant.[198] In the latter case, the appropriate mechanism available for disposing of the case prior to trial would be a summary judgment. However, a summary judgment should issue only if the facts of the record, based on affidavits, admissions, documents, and depositions, are beyond dispute and establish good faith as a matter of law.[199]

Both Supreme Court constitutional tort decisions and the common law of torts suggest that the burden of proving the defendant's state of mind in a section 1983 case should rest with the defendant. As noted above, although the Supreme Court has not expressly declared that the burden of pleading and proving good faith is on the defendant, it has consistently described qualified immunity as a "defense."[200] The common law of torts does not place the burden on the plaintiff to plead or prove the absence of a defense[201] and, if section 1983 claims are to be viewed against the background of tort law, there is no apparent reason why such a burden should be placed on the plaintiff who brings a section 1983 cause of action. It would thus seem that a complaint alleging a deprivation of a constitutional right under color of state law should not be dismissed because of a failure to allege that the defendant maliciously, intentionally, or negligently caused the plaintiff to suffer such a deprivation unless the defendant's state of mind is relevant to the establishment of a prima facie section 1983 claim.

Baker v. McCollan[202] suggests that proof of the defendant's state of mind may be an essential part of certain types of section 1983 claims. *McCollan* involved a plaintiff who had presented evidence which could have supported a conclusion that he had been detained in jail for eight days as a result of negligence on the part of the defendant in verifying his identification. The court of appeals had ruled that the plaintiff was entitled to submit his case to the jury. The Supreme Court reversed because, in the view of the majority, the conduct of the defendant did not violate any specific constitutional right of the plaintiff. In basing its decision on the absence of an infringement of a specific constitutional right, the Court, as in *Procunier*,[203] deferred consideration of the question of the viability of a section 1983 action based on simple negli-

198. *See* cases cited at note 195 *supra*. *See also* CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION, *supra* note 40, at 259-61.

199. *See* FED. R. CIV. P. 56.

200. *See* cases cited at note 33 *supra*.

201. *Id.*

202. 443 U.S. 137 (1979).

203. Procunier v. Navarette, 434 U.S. 555 (1978).

gence. In the words of the majority, "[i]f there has been no such deprivation [of a right secured by the Constitution or laws], the state of mind of the defendant is wholly immaterial."[204] As an aside, however, the Court postulated that the state of mind of the defendant may be important to the issue of whether a constitutional deprivation of a liberty or property interest has occurred in the first place.[205]

This latter intriguing statement confuses the parameters of a section 1983 action and defense. It may suggest that the majority of the Court is inclined to hold that certain liberty and property interests are not protected by the Constitution from unintentional invasions. Thus, a police officer who negligently or unintentionally collides with another person while he is operating a state vehicle on official business, causing the other person to suffer personal injuries and property damage, may not have deprived that person of liberty or property without "due process of law." On the other hand, if the police officer intentionally drove the state vehicle into another vehicle, this would constitute an unconstitutional deprivation of liberty or property.[206]

Even assuming the validity of such a distinction, the question arises as to how the burden of proving the defendant's state of mind can be placed on the plaintiff as a part of his prima facie case, while at the same time declaring that the defendant's state of mind may establish a good faith defense which the defendant has the burden of proving. Such an approach would make sense only if there is some ascertainable and meaningful difference between the state of mind which the plaintiff must prove in order to make out a prima facie case and the state of mind that the defendant must prove in order to excuse himself from liability.

The problem becomes even more complex when one takes into account the Court's suggestion that only some specific constitutional violations occur as a result of negligence.[207] Apparently, the Supreme Court is content to leave lower courts and litigants with the challenging task of identifying potential constitutional violations which occur, notwithstanding the absence of intent or malice on the part of the actor, and of reconciling the resolution of claims brought for such violations with the elusive standards the Court has articulated for a good

204. 443 U.S. at 140. For a discussion of *McCollan* in terms of the Supreme Court's conception of the liberty interest protected by the fourteenth amendment, see notes 153-156 and accompanying text *supra*.

205. 443 U.S. at 140 n.1.

206. *Cf.* Estelle v. Gamble, 429 U.S. 97 (1976) (allegation of deliberate indifference to serious medical needs required for prisoner to state cognizable claim under § 1983); Beard v. Mitchell, 604 F.2d 485, 494 (7th Cir. 1979) (recklessness required to recover for deprivations of fourteenth amendment rights).

207. 443 U.S. at 140.

faith defense. The analysis that follows explores the fundamental tort-law and constitutional standards which must be reconciled if section 1983 is to remain a viable mechanism for redressing constitutional deprivation.

In a common-law tort case, most claims require proof of either the defendant's state of mind or the unreasonableness of his conduct in order for a plaintiff to establish a prima facie case. If the plaintiff alleges an intentional tort, he must establish that the actor either desired that his conduct would invade the plaintiff's protected interest or that the defendant knew with substantial certainty that such invasion would result from his conduct.[208] In a negligence case, the plaintiff must establish that the defendant foresaw or should have foreseen an unreasonable risk of his conduct resulting in an invasion of the plaintiff's protected interest.[209] In contrast, in a strict liability tort case, the state of mind of the actor is irrelevant to the plaintiff's claim. Instead, the pivotal issue is whether the defendant engaged in an abnormally dangerous activity or sold a defective product.[210]

Past decisions under section 1983 have established that certain conduct on the part of persons acting under color of state law may result in the commission of both a common-law tort and a constitutional tort.[211] An arrest without probable cause is a classic example.[212] Recognizing this overlap, courts have been careful to note that not all tortious conduct under color of law amounts to a constitutional tort.[213] Beyond the section 1983 requirement that the defendant must have acted under color of state law, however, the line of demarcation between section 1983 and common-law tort claims has been unclear. The

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208. RESTATEMENT (SECOND) OF TORTS § 8A (1965).

209. *See* W. PROSSER, LAW OF TORTS 145-49 (4th ed. 1971) [hereinafter cited as PROSSER]; RESTATEMENT (SECOND) OF TORTS § 289 (1965).

210. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1966).

211. *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961); Dellums v. Powell, 566 F.2d 216 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); Basista v. Weir, 340 F.2d 74 (3d Cir. 1965).

212. Basista v. Weir, 340 F.2d at 79-80.

213. *See* Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1972), where the court, speaking through Judge Aldisert, stated:

> It becomes important to delineate that conduct which is actionable in state courts as a tort, and that which is actionable in federal courts under § 1983. The two rights of action do not always stand *in pari materia*. Some common law and statutory torts, although actionable in a state forum, do not rise to constitutional dimensions. The converse is equally true. Conduct may be actionable as a deprivation of constitutional rights where no force and violence has been utilized, and there exists no orthodox counterpart of state common law.

Id. at 278. For a discussion of the various criteria proposed by commentators for distinguishing constitutional torts from common law torts, see *Liability for Negligence*, note 166 *supra*.

Supreme Court, in its most recent effort to define the line of demarcation, has emphasized that the section 1983 remedy is available only where a party has been deprived of "rights secured by the Constitution."[214] Consequently, the question whether deprivation of rights "secured by the Constitution" are dependent on the state of mind of the person acting under color of state law emerges as an important consideration.[215] If the deprivation of any constitutional right is so dependent, the actor's state of mind may be relevant to three different aspects of a section 1983 case: proof of a violation of a constitutional right; proof of the good faith defense;[216] and proof of the mental state justifying an award of punitive damages.[217]

The *McCollan*[218] Court perceived the issue as sufficiently important and complex to warrant additional consideration by lower courts prior to the Supreme Court reaching a conclusion.[219] The Court's inclination to approach the issue in this manner would be consistent with the view that the relevance of the defendant's state of mind to the existence of a prima facie section 1983 claim may not be susceptible to a uniform answer as to all constitutional rights.[220] Litigants and lower courts should thus carefully analyze the interests protected and conduct prohibited directly by the fourteenth amendment due process clause and by the particular provisions of the Bill of Rights incorporated through the fourteenth amendment.

Analysis suggests that it is useful to approach the state of mind issue by dividing fourteenth amendment rights into two categories: rights secured by specific provisions of the Bill of Rights incorporated

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214. *See* Baker v. McCollan, 443 U.S. 137 (1979); Paul v. Davis, 424 U.S. 693 (1976).

215. *See* Baker v. McCollan, 443 U.S. at 140; Estelle v. Gamble, 429 U.S. 97, 106 (1976); Howell v. Cataldi, 464 F.2d 272, 279 (3d Cir. 1972).

216. *See* text accompanying notes 230-251 *infra*.

217. *See* text accompanying notes 287-295 *infra*.

218. Baker v. McCollan, 443 U.S. 137 (1979).

219. The majority of the Court in *Baker* limited their inquiry to whether the petitioner's detention violated a specific provision of the Bill of Rights. While concurring in the result reached, Mr. Justice Blackmun expressed a willingness to undertake a broader inquiry in a case involving a law enforcement official's deliberate and repeated refusal to investigate a prisoner's claim of mistaken identity by referring to available mugshots and fingerprints. *Id.* at 148. (Blackmun, J., concurring). *See* note 155 *supra*. Justice Stevens, in a dissenting opinion joined by Justices Brennan and Marshall, would have found that just as the due process clause protects an individual from conviction based on identifiable procedures which are improperly suggestive, "the Due Process Clause equally requires that fair procedures be employed to ensure that the wrong individual is not subject to the deprivations of liberty attaching to pretrial detention." *Id.* at 153 (Stevens, J., dissenting). Justice Stevens concluded that the absence of a violation of specific provisions of the Bill of Rights did not preclude this conclusion. *Id.*

220. 443 U.S. at 140.

into the due process clause;[221] and rights secured directly by the fourteenth amendment due process clause and accorded procedural protection based upon general principles of fundamental fairness and basic concepts of ordered liberty.[222] The defendant's state of mind should not control the determination of whether a right in the first category has been violated. As to rights falling within the second category, however, the defendant's state of mind may be determinative.

The propriety and utility of dividing asserted constitutional rights into these categories for the purpose of assessing the relevance of the actor's state of mind rests upon considerations of both history and logic. It is much too late in history for the Court to conclude that rights secured by specific provisions of the Bill of Rights depend upon the state of mind of the person who has allegedly violated these constitutional provisions. Conduct which abridges freedom of speech,[223] effectuates an arrest without probable cause,[224] produces an unreasonable search and seizure,[225] or compels a person to testify against himself,[226] has been held to violate that person's constitutional rights regardless of whether the official conduct is characterized as malicious, intentional, reckless or negligent.[227] At a minimum, proof that the governmental official has violated the constitutional norms should warrant declaratory relief or injunctive relief where the evidence shows a likelihood of the conduct continuing. If the actor escapes liability for

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221. *See* cases cited at note 40 *supra*.

222. *See, e.g.*, Rochin v. California, 342 U.S. 165, 172 (1952) (forcible pumping of a suspect's stomach found to be a violation of due process clause because it "shocks the conscience").

223. *See, e.g.*, DeJonge v. Oregon, 299 U.S. 353 (1937); Near v. Minnesota, 283 U.S. 697 (1931); Fiske v. Kansas, 274 U.S. 380 (1927).

224. *See, e.g.*, Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964); Henry v. United States, 361 U.S. 98 (1959). At the same time, it should be noted that the state of mind of the actor may make an otherwise lawful arrest unconstitutional. *See* Lessman v. McCormick, 591 F.2d 605 (10th Cir. 1979) (an arrest under a valid warrant may give rise to a § 1983 claim for false arrest and imprisonment if undertaken for an improper purpose such as intimidating the plaintiff into paying a debt).

225. *See, e.g.*, Wolf v. Colorado, 338 U.S. 25 (1949).

226. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964).

227. Indeed, if the courts purport to use the terms "intentional" and "negligence" in the same sense in which they are used in tort cases, careful examination of tort law discloses that the cases most frequently cited as examples of § 1983 claims based on negligence did not, in fact, involve a genuine negligence issue. For an analysis of some specific cases which illustrate this point see *Liability for Negligence, supra* note 166, at 283-84. In tort law, conduct is characterized as "intentional" if the actor desired to invade a legally cognizable interest of another or knew with substantial certainty that his conduct would produce such an invasion. A reasonable mistake of fact as to a privilege to invade the interest does not preclude a finding of intent; neither does it change the characterization of the conduct from intentional to negligent. *See* PROSSER, *supra* note 209, at 99-100.

damages, the escape should be based upon policies which support a grant of some form of immunity rather than a declaration that no violation of constitutional rights has occurred.

With respect to rights to due process not governed by specific provisions of the Bill of Rights, the determination of the relevance of the actor's state of mind is more problematic. The relevance of the actor's state of mind to these claims may be gleaned from the concurring opinion of Justice Blackmun in *McCollan*, in which he suggested that conduct which "shocks the conscience" or is offensive to a "concept of ordered liberty" may violate a person's right to liberty protected by the fourteenth amendment due process clause even if it does not violate a specific provision of the Bill of Rights.[228] This concept of conduct which may be so "shocking" as to violate due process, together with the majority's recognition that the "state of mind of the actor may be relevant to the issue of whether a constitutional violation has occurred,"[229] suggests that a claim of a constitutional violation which does not rest upon specific provisions of the Bill of Rights indeed may turn upon the state of mind of the actor.

If the preceding analysis is correct, it is possible to achieve a clearer understanding of the relationship between the standards for a prima facie section 1983 case and the good faith defense. A plaintiff asserting a claim which is not based upon a violation of a specific provision of the Bill of Rights would have to prove either that the defendant acted with malice or that the knowledge which the defendant had or should have had about the probability and degree of constitutional or other deprivation attendant to his conduct made his conduct so shocking to the conscience or so "offensive to the concept of ordered liberty" that it constituted a due process violation. In this situation, proof of the prima facie case would effectively refute a good faith defense because the standards of each are synonymous, the difference being one of procedure; the plaintiff would have the burden of proving the equivalent of an absence of good faith in order to establish a prima facie case.

On the other hand, a plaintiff who relies on a specific provision of the Bill of Rights should not be required to plead or prove anything as to the state of mind of the actor in order to establish a constitutional violation. Proof that the defendant, acting under color of state law, violated a provision of the Bill of Rights, applicable to the states through the fourteenth amendment, should be sufficient to establish a prima facie case under section 1983. This does not mean, however, that the defendant will be held liable for damages caused by such deprivation, for the defendant remains capable of excusing himself from a

228. 443 U.S. at 148 (Blackmun, J., concurring). *See* note 219 *supra*.
229. 443 U.S. at 140 n.1.

damage award by proving good faith, and the standards for the good faith defense protect a defendant from financial liability for innocently, and perhaps negligently, inflicted constitutional deprivations. The point is that the plaintiff in such a case has alleged or proved enough to compel the defendant to offer good reasons why he should not have to pay for the injury.

The validity and utility of this conceptual model of the section 1983 prima facie case are best demonstrated by a careful review and assessment of the Supreme Court's opinions which set forth the standards of the good faith defense.

D. The Good Faith Defense

The Court in *Wood v. Strickland*[230] described the good faith defense as involving both subjective and objective considerations. Subjectively, the defendant must establish that he did not act with a "malicious intention" to deprive the plaintiff of a constitutional right or to cause him "other injury."[231] Objectively, the defendant must establish that he neither knew nor reasonably should have known that the action he took within his sphere of official responsibility would violate the plaintiff's constitutional rights.[232] Since proof of both of these factors allows the official to escape liability for damages, requiring a plaintiff who has alleged or proved a violation of a specific provision of the Bill of Rights also to prove the state of mind of the actor needlessly confuses litigation under section 1983 and achieves an improper balance of the interests at stake.

The confusion arises from the overlap involved in the plaintiff's proof of intent or negligence as a part of his prima facie case and the defendant's proof of good faith as a defense against a damage claim. The criteria for good faith outlined by the Supreme Court substantially track the common-law tort criteria for intent and negligence. In *Procunier*, the Supreme Court acknowledged the similarity of the criteria for the subjective branch of good faith with the tort criteria for intentional injury when it commented as to the meaning of malicious intention: "This part of the rule speaks of 'intentional injury,' contemplating that the actor intends the consequences of his conduct."[233] Additionally, although the Court has not acknowledged the substantial similarity of the criteria for the objective branch of good faith to tort-law criteria for negligence, a review of the Court's pronouncements on the objective branch of good faith reveals the similarity.

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230. 420 U.S. 308 (1975).
231. *Id.* at 322.
232. *Id.*
233. Procunier v. Navarette, 434 U.S. at 566.

The common theme that emerges from *Scheuer v. Rhodes*,[234] *Wood v. Strickland*[235] and *O'Connor v. Donaldson*[236] is that for immunity purposes, a state official should be held to an objective standard based on what a reasonable person carrying out the duties of the official would do under the circumstances in light of the foreseeable risks of harm. The Court in *Scheuer* stated that the scope of the immunity defense varies "dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time."[237] *Wood* holds that 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."[238] In *O'Connor*, the Court declared that in determining whether a hospital superintendent acted in good faith under the objective branch of the *Wood* test, "the relevant question for the jury is whether O'Connor knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [Donaldson]."[239] Finally, in both *Wood* and *O'Connor*, the Court emphasized that "an official has, of course, no duty to anticipate unforeseeable constitutional developments."[240]

Thus far, the criteria for immunity for engaging in reasonable conduct in light of foreseeable risks of harm is essentially the same as the common-law criteria for negligence. Two statements of the Court in its principal immunity decisions which may be read as significantly deviating from negligence criteria are found in *Scheuer* and *Procunier*. In *Scheuer*, the Court attempted to articulate different criteria for immunity of high and low level officials. The Court stated that low level officers and enlisted personnel of the national guard could escape liability by showing that they had "acted in good faith obedience to the orders of their superiors."[241] Under negligence law, the low officers' liability would turn on whether a reasonable person acting under the same or similar circumstances would have followed the order.[242] In *Procunier*, the Court refused to consider whether prison officials acted reasonably in interfering with a prisoner's mail on the ground that the prisoner's constitutional right to freedom from such interference was

234. 416 U.S. 232 (1974).
235. 420 U.S. 308 (1975).
236. 422 U.S. 563 (1975).
237. Scheuer v. Rhodes, 416 U.S. at 247.
238. 420 U.S. at 322.
239. 422 U.S. at 577.
240. *Id. See* Wood v. Strickland, 420 U.S. at 322.
241. 416 U.S. at 250.
242. This is, in essence, a problem of conflicting duties; *i.e.*, a duty to follow orders and a duty not to intentionally or negligently harm others.

not "clearly established" at the time the officials acted.[243] Negligence law, however, would treat the clarity or lack of clarity of establishment of the asserted right as a factor to consider in determining whether the defendant acted reasonably under the circumstances in light of the foreseeable risk of harm.

The problems engendered by the Court's adherence to these statements from *Scheuer* and *Procunier* without further clarification have been amply articulated.[244] The statement from *Scheuer* has been read as immunizing low level officials from liability merely on the basis of obedience to orders. Yet the Court obviously could not have intended such a construction. For example, a police officer who, on orders of his superior, broke into someone's home without a warrant and without probable cause, could not escape liability if, at the time he acted, he was aware that his superior was giving the order based solely on suspicion or to fulfill a personal vendetta. Good faith obedience, then, should be governed by the requirement of reasonable conduct under the circumstances.[245]

The problem with attributing great weight to the "clearly established constitutional right" requirement set forth in *Procunier* is that the Supreme Court offers little guidance as to when a constitutional right is to be considered "clearly established." Since constitutional provisions are deliberately drafted in broad terms to reflect fundamental societal values, the phrase "clearly established" arguably can be of significance in resolving claims only if it refers to prior judicial declarations applying particular provisions to particular factual claims. Yet to hold that constitutional right is not clearly established unless the claim in issue comports "on all fours" with the applicable facts of a prior decision establishing the right by the Supreme Court or court of appeals in a particular circuit[246] is contrary to both Anglo-American

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243. Procunier v. Navarette, 434 U.S. at 565.

244. *See* Theis, *supra* note 173, at 297-98 (criticizing *Scheuer* as both "too harsh and too lenient").

245. This view is indirectly supported by a recent decision of a federal district court holding that a prison guard's right to refuse an order that would result in the violation of another's constitutional rights is a "right, privilege or immunity secured by the Constitution and laws" and thus cognizable under § 1983. Harley v. Schuylkill County, 476 F. Supp. 191 (E.D. Pa. 1979). The court reasoned that the guard had a clear duty to refrain from acting in a manner that would deprive another of a constitutional right. *Id.* at 194.

246. *See, e.g.*, Skehan v. Board of Trustees, 431 F. Supp. 1379 (M.D. Pa. 1977), where the court declared: "In the absence of a Supreme Court case or an opinion of the United States Court of Appeals for the Third Circuit creating a particular constitutional right, it would be unreasonable to require a president of a state college in Pennsylvania to know that his actions violated the Constitution." *Id.* at 1390-91. This construction of the law was later expressly approved by the Third Circuit. *See* Skehan v. Board of Trustees, 590 F.2d 470, 493 (3d Cir. 1978), *cert. denied*, 100 S. Ct. 61 (1979).

Other courts have construed the "clearly settled rights" requirement in a similarly re-

jurisprudence and common sense.[247] Thus, given a general judicial construction of a constitutional provision, lawyers and judges frequently conclude that certain conduct is clearly unconstitutional without the necessity of a prior judicial decision holding that the provision applies to the precise facts under review.

This view prompted one court to conclude that an official may not take solace in "ostrichism" merely because the conduct involved in the disputed factual setting has never been held unconstitutional so long as selected principles would inexorably lead to the conclusion that the conduct would be unconstitutional.[248] It seems evident that to allow an official to escape liability for unconstitutional conduct simply because the Supreme Court or court of appeals has not ruled that a constitutional provision prohibits specific conduct produces a substantial injustice if prior judicial decisions would have led a reasonable person to conclude with substantial certainty that the conduct was violative of the Constitution. To subject an official's conduct to scrutiny under this test of foreseeability offends none of the purposes of the immunity defense.[249]

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stricted manner. *See, e.g.*, Raffone v. Robinson, 607 F.2d 1058, 1062 (2d Cir. 1979) (one district court decision does not clearly establish a right); Sapp v. Renfroe, 511 F.2d 172 (5th Cir. 1975) (court cites cogency of dissent in prior court of appeals decision on a similar issue as a basis for concluding that the constitutional right was not clearly established); Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569, 578 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976) (because the first definitive holding that termination of teachers' property interests in their employment contracts with state institutions required due process hearings was issued subsequent to the defendants' termination of college president's contract in 1970, his constitutional right to a hearing was not clearly established; the precedents considered by the court were limited to Supreme Court decisions); Hutchison v. Lake Oswego School Dist., 519 F.2d 961 (9th Cir. 1975), *cert. denied*, 429 U.S. 1037 (1977) (courts were split on issue and defendant relied on advice of counsel); Collins v. Bessinger, 374 F. Supp. 273 (N.D. Ill.), *aff'd mem.*, 506 F.2d 1405 (7th Cir. 1974), *cert. denied*, 422 U.S. 1058 (1975).

247. *See* Freed, *supra* note 173, at 558-62 (criticizing "clearly established right" requirement as overly protective of culpable executive officials, inconsistent with the purposes of § 1983, not compelled by the policy against surprise liability, and as encouraging an approach of avoiding deciding the merits of constitutional issues); Kattan, *supra* note 173, at 982-86 (arguing that defendants who have demonstrated no awareness of constitutional rights of the persons affected should not be absolved of liability because the law is not "settled" and suggesting that if the official has relied on the state of the law the focus should be on whether the official made an informed decision); *Section 1983 and Federalism*, *supra* note 36, at 1215-16 ("the 'clearly settled rights' prong of the liability test should be utilized sparingly . . . to find liability, apart from the other factors indicative of reasonableness of official action, where the character of the right violated is so clearly settled that ignorance of it simply cannot be excused").

248. Little v. Walker, 552 F.2d 193, 197 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978). *See also* Picha v. Wielgos, 410 F. Supp. 1214, 1219 (N.D. Ill. 1976).

249. A state official who has acted under circumstances which would have led a reasonable person in his position to conclude with substantial certainty that his conduct

In short, the criteria used for determining good faith under the objective branch of *Wood* should approximate the negligence criteria of reasonable conduct in light of foreseeable risks of harm. If the issue is raised whether the constitutional right involved was clearly established, the court should determine whether prior judicial decisions would have led a reasonable person to conclude that the constitutional right existed. If that is answered affirmatively, the fact finder should proceed to determine whether the defendant knew or should have known of the existence of that right and that his conduct would deprive plaintiff of that right. In a section 1983 case based upon the violation of a fourteenth amendment right that finds its content in a specific provision of the Bill of Rights, the burden of proving unforeseeability of the constitutional deprivation should be on the defendant.

The following considerations lend support to this approach. The Supreme Court has stated that the primary purpose of section 1983 is to provide compensation to persons who have suffered deprivation of constitutional rights.[250] At the same time, the good faith defense has been deemed necessary to assure that the threat of section 1983 actions does not unduly deter an official from properly carrying out his governmental duties and to avoid the injustice of imposing liability on an officer who is required by his office to exercise discretion.[251] State officials are obviously in a superior position to produce evidence regarding their state of mind and the information available to them at the time of their conduct. Therefore, to require plaintiffs, who have properly pleaded and proved a constitutional violation, to also plead and prove that the actor who effectuated the constitutional deprivation did so intentionally or negligently would allow such officials to escape liability for harm caused by unconstitutional conduct without showing that the reasons supporting the immunity defense are applicable to the facts involved. Once a constitutional violation has been pleaded or established, it seems more consistent with the purpose of section 1983 and the interests at stake to treat matters relating to the defendant's state of mind or the reasonableness of his conduct as matters relating solely to the good faith defense.

In contrast, if the section 1983 claim is not based on a specific provision of the Bill of Rights, plaintiff should bear the burden of proving unreasonable conduct, and this may necessitate proof that the defendant acted with the desire to deprive him of a constitutional right or to

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was violative of constitutional norms cannot reasonably contend that the imposition of liability is unfair or that it will unduly deter responsible and conscientious officials from properly performing their official duties.

250. Carey v. Piphus, 435 U.S. 247, 255 (1978).

251. Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).

cause him some other injury. In such a case, proof of plaintiff's claim will refute the defendant's claim of good faith.

There remains the important question of the scope of the immunity defense, if any, which will be afforded local governmental bodies after *Monell v. Department of Social Services*.[252] In *Monell*, the Supreme Court, overruling *Monroe*, held that a local government is a "person" within the meaning of section 1983.[253] The Court further held that a local government is subject to damages for a section 1983 violation "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury."[254] At the same time, the Court concluded that "a municipality cannot be held liable under section 1983 on a *respondeat superior* theory."[255]

The *Monell* Court also stated that municipal bodies were not entitled to absolute immunity, but expressly left open the question of the scope of any qualified immunity.[256] The lower courts which addressed the issue subsequent to *Monell* reached different conclusions—some affording the municipality the same good faith immunity as its officials and others ruling that the municipality was not entitled to any qualified immunity.[257]

In *Owen v. City of Independence*,[258] the Supreme Court resolved the conflict, holding that a municipality may not assert the good faith of its officers or agents as a defense to liability under section 1983. The *Owen* court rested its decision on history and policy. Justice Brennan, writing for a five member majority, declared that at the time section 1983 was enacted local government bodies did not enjoy a qualified immunity from tort liability based on the good faith of its officers.[259] In light of this fact, the Court was unwilling to assume that Congress *sub silentio* extended such a qualified immunity to municipalities.[260]

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252. 436 U.S. 658 (1978).

253. *Id.* at 663.

254. *Id.* at 694.

255. *Id.* at 691.

256. *Id.* at 701.

257. Most of the lower courts that have considered this issue have held that a good faith immunity applies to municipalities and have included the clearly established constitutional right requirement. *See* Paxman v. Campbell, 612 F.2d 848 (4th Cir. 1980); Sala v. County of Suffolk, 604 F.2d 207 (2d Cir. 1979), *vacated and remanded mem.*, 48 U.S.L.W. 3673-74 (1980); Owen v. City of Independence, 589 F.2d 335 (8th Cir. 1978), *rev'd*, 100 S. Ct. 0000 (1980); Ohland v. City of Montpelier, 467 F. Supp. 324 (D. Vt. 1979). *Contra*, Kingsville Independent School Dist. v. Cooper, 611 F.2d 1109 (5th Cir. 1980); Bertot v. School Dist. No. 1, 613 F.2d 245 (10th Cir. 1979). *See generally* Schnapper, *Civil Rights Litigation after Monell*, 79 COLUM. L. REV. 213 (1979).

258. 100 S. Ct. 1398 (1980).

259. *Id.* at 1410.

260. *Id.* at 1415.

In addition, in the view of the majority, the two mutually dependent rationales for granting a qualified immunity for executive officers did not support the granting of a good faith immunity to municipalities. First, there is no injustice in holding a municipality liable in damages for injuries that it has inflicted on an individual through an invasion of his constitutional rights because "it is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration."[261] Second, to the extent that a potential monetary liability compels the municipality's decisionmakers to consider the constitutional rights of individuals who will be affected by the municipality's actions, one of the fundamental purposes of section 1983 is being served.[262]

Beyond the resolution of the conflict regarding the qualified immunity for local government bodies, *Owen* answers the question of whether a section 1983 action will be recognized in the absence of fault. The majority of the court stated that a strict liability section 1983 action will lie against a local governmental body to recover for an injury caused by the execution of that local government's policy or custom.[263]

After *Owen*, the principal tasks remaining for the Court with respect to the clarification of standards for section 1983 liability include: a resolution of the question of which party bears the burden of pleading and proving the defendant's state of mind in actions brought against individual officers;[264] and a determination of the relevance, if any, of the individual governmental official's state of mind to the issue of whether a constitutional violation has occurred.[265] Hopefully, clarification of these issues in conjunction with the Court's new accommodation of interests—protecting individual officers from personal liability in the absence of bad faith and making governmental bodies liable for executing unconstitutional policies and customs—will make the Court less inclined to continue the course of construing constitutional rights as a means of controlling the section 1983 remedy.

III. TAILORING SECTION 1983 REMEDIES TO THE INTEREST PROTECTED

The prior sections explored the elements of a prima facie section 1983 action and the qualified immunity or good faith defense. The most troublesome issues in this regard involve the identification of liberty and property interests protected by the fourteenth amendment, the

261. *Id.* at 1417.
262. *Id.* at 1418.
263. *Id.* at 1418-19.
264. *See* discussion at notes 191-201 and accompanying text *supra.*
265. *See* discussion at notes 202-229 and accompanying text *supra.*

determination of whether the constitutional right against infringement of an interest was clearly established at the time the defendant acted, and the determination of whether the defendant knew or should have known that such a constitutional right existed and that his conduct would violate that right. Once these issues are resolved, questions concerning the appropriate remedies and damages for section 1983 violations still remain. Because *Carey v. Piphus*[266] is likely to substantially affect the future development of remedies and damages for section 1983 violations, a detailed consideration of that case is necessary.

Carey presented the issue of whether students suspended from public elementary and secondary schools without required procedural due process were entitled to recover substantial nonpunitive damages if their suspensions were justified and they did not prove that any other injury was caused by the denial of procedural due process. The Supreme Court answered the question in the negative, holding that "in the absence of proof of actual injury, the students are entitled to recover only nominal damages."[267]

In *Carey*, a student was suspended because the principal observed him and other students smoking an irregularly shaped cigarette which the principal surmised to be marijuana. Another student whose case was under review in *Carey* was suspended for wearing an earring in violation of the principal's directive that such ornaments not be worn because he had concluded that they were symbols of gang participation. In each instance, the student was suspended summarily without a hearing which the Court found to be guaranteed by the due process clause. In each case, the district court found that the school officials were not entitled to qualified immunity from damages because they should have known that lengthy suspensions without any adjudicative hearing would violate due process, but declined to award damages because the record was devoid of any evidence to form a basis for measuring the extent of the student's injuries. The Court of Appeals for the Seventh Circuit reversed and remanded, ruling, *inter alia*, in both circumstances that even if the district court found that the students' suspensions were justified they would be entitled to recover substantial nonpunitive damages based on the procedural due process violations.

The students advanced two principal arguments to the Supreme Court in support of the court of appeals' holding. First, they contended that because constitutional rights are valuable in and of themselves, and because there is a need to deter violations of constitutional rights, substantial damages should be awarded under section 1983 for the

266. 435 U.S. 247 (1978).
267. *Id.* at 248.

deprivation of such constitutional rights regardless of whether any actual injury was caused by the deprivation. Second, they argued that even if the purpose of section 1983 damage awards is to compensate for injuries, every deprivation of procedural due process could be presumed to cause some injury.

In rejecting the first argument, the Supreme Court, speaking through Justice Powell, stated that "[t]o the extent that Congress intended that awards under section 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages."[268] With respect to the argument that damages should be presumed, the Court noted that unlike the common law of defamation per se—which is characterized as an oddity of tort law in that damages are presumed—it is not reasonable to assume that every departure from procedural due process, no matter what the circumstances or how minor, is as likely to cause distress as is the publication of defamation per se to cause injury to reputation and distress. If a deprivation of a protected interest is substantially justified, the Court noted, there well may be those who suffer no distress as a result of procedural irregularities. Moreover, until such time as a person enlists the aid of counsel, he may not even know procedural deficiencies have occurred. In addition, the Court stated, "where a deprivation is justified but procedures are deficient, whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure."[269] The Court noted that if a person is upset because of a justified deprivation, there will not be a compensable injury. Thus, the difficulty of determining whether the plaintiff's mental distress is due to improper procedures rather than a justified deprivation provides an additional reason for insisting upon proof of actual harm in this context.

To allay concern that this decision would emasculate section 1983 as an effective remedy for procedural due process violations, the Court, at various points in the opinion, pointed to several factors which, in its view, supported section 1983 as a viable remedy for violations of procedural due process. First, the Court emphasized that a denial of due process remains actionable for nominal damages without proof of actual injury.[270] Next, the Court espoused the view that injured persons should have no particular difficulty in proving that emotional distress was caused by the denial of due process since distress is a personal injury which is familiar to the law and is customarily proved by showing

268. *Id.* at 256.
269. *Id.* at 263.
270. *Id.* at 266.

the nature and circumstances of the wrong and its effect on the plaintiff.[271] The Court emphasized that it was not holding that "exemplary or punitive damages might not be awarded in a proper case under section 1983 with a specific purpose of deterring or punishing violations of constitutional rights."[272] Finally, the Court found it significant that defendants who violate procedural due process rights face potential liability for attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976.[273]

Since seven Justices of the Supreme Court joined in the *Carey* opinion, it would appear that the Court's ruling, that substantial nonpunitive damages for procedural due process violations are not recoverable in the absence of any proof of actual injury, is likely to stand for some time. Projection of the impact of this decision on section 1983 actions in general requires a careful examination of two basic issues. First, is the holding that damages cannot be presumed from a showing of a "mere" violation of procedural due process likely to be extended? Second, what circumstances justify an award of punitive damages in a section 1983 action, and how are such damages to be measured?

A. The Impact of Carey on Section 1983 Claims

The compensation principle espoused by the Supreme Court in *Carey* is likely to diminish the ability of all persons to recover for procedural due process violations. The general impact of *Carey* is likely to be seen in terms of litigation strategies. Since a showing of a procedural due process violation will not support a presumption of damages, plaintiffs will be required to introduce at trial evidence that they suffered some sort of injury such as mental distress or economic loss as result of the procedural due process violation.[274] Defendants will be permitted to introduce evidence to prove that even if the plaintiff had been afforded procedural due process the same deprivation of a right would have been justified. This will require a determination on the merits of plaintiff's substantive claim, with the defendant, presumably,

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271. *Id.* at 263-64.

272. *Id.* at 257 n.11.

273. *Id. See* 42 U.S.C. § 1988 (1976).

274. For illustrations of the impact of *Carey* on damage claims see Perez v. Rodriguez Bou, 575 F.2d 21 (1st Cir. 1978) (affirming district court's award of nominal damages to students suspended without due process because the only evidence of actual injury was the plaintiffs' own statements that they experienced some psychological discomfort as a result of the suspension); Burt v. Abel, 585 F.2d 613 (4th Cir. 1978) (teacher suspended in violation of procedural due process entitled to only nominal damages in absence of proof of actual injury); Huntley v. Community School Bd., 579 F.2d 738 (2d Cir. 1978) (award of nominal damages for denial of due process in termination of principal's employment could not be characterized as inadequate).

bearing the burden of proof.[275] Consequently, instead of simply mustering the resources to establish the existence of a constitutionally protected interest which entitled him to some form of a hearing, the plaintiff must be prepared to litigate the merits of the substantive claim itself.

If a determination is reached that a procedural due process hearing would have been of no consequence with respect to the deprivation of the substantive right, then plaintiff will be required to assert a right to damages on the following grounds. Plaintiff must claim distress and indignation based upon the failure to afford him a fair hearing. If the defendant can establish that he would have been justified in depriving plaintiff of liberty or property even if the plaintiff had been afforded due process, the case in which plaintiff will be able to establish that he suffered mental distress, indignation, or some other compensable injury caused by the procedural due process violation will be rare, if ever.[276] Alternatively, the plaintiff may attempt to prove that the deprivation of a fair hearing was prompted by malice, thus warranting the imposition of punitive damages.

In light of the substantial impediment that the *Carey* compensation principle poses for plaintiffs seeking recovery of compensatory damages for procedural due process violations, it becomes important to evaluate the likely impact of the *Carey* principle on other section 1983 claims. The Court's ruling that damages could not be presumed was limited to procedural due process claims in the *Carey* case. Lower court opinions subsequent to *Carey*, however, have applied the same ruling to other kinds of section 1983 claims.[277] Such application is in part prompted by the Supreme Court's rationale in *Carey* that to the extent that Congress intended section 1983 to serve a deterrent purpose, there is no evidence that it intended such deterrence to be accomplished by means other than the ordinary award of compensatory damages. Yet the rationale employed by the Court in *Carey* suggests that the rule enunciated in that decision should not be extended to sec-

275. The Supreme Court in *Carey* approved the ruling of the Court of Appeals for the Seventh Circuit that if defendants could prove that the students would have been suspended even if a proper hearing had been held, the plaintiffs would not be entitled to recover for damages caused by the suspension. 435 U.S. at 260.

276. It will be a rare case in which plaintiff is able to convince the court that although he was not entitled to maintain the particular property or liberty interest involved, his emotional distress related not to the deprivation of the interest but to the failure of the defendant to use appropriate procedures.

277. *See, e.g.*, Buise v. Hudkins, 584 F.2d 223 (7th Cir. 1978), *cert. denied*, 440 U.S. 916 (1979) (prisoner who claimed prison officials transferred him from minimum security facility to maximum security facility offered sufficient evidence of actual damages in form of his testimony as to less desirable circumstances at maximum security facility and thus district court erred in holding that he did not prove any damages).

tion 1983 claims asserting violations of substantive constitutional rights. The *Carey* decision was based upon the concept that procedural due process serves primarily the function of protecting other substantive rights. Having embraced this view, the Court declared that the primary concern of damage awards for such section 1983 claims should be with the wrongful deprivation of a property or liberty interest protected by the due process clause. Such reasoning suggests that the *Carey* rule of disallowing substantive awards in the absence of proof of actual harm should be strictly limited to procedural due process cases.[278]

The common law of torts has traditionally permitted an award of substantial damages when certain dignitary interests have been invaded, even in the absence of proof of any special damages.[279] In tort law, general damages are characterized as those damages which generally flow from the substantive wrong committed by the defendant.[280] Additionally, it is recognized that invasion of certain kinds of interests more probably than not produce indignation and distress. Offensive contact with another's body stands as a classic example of a tort where substantial damages are permitted even in the absence of any special harm having been caused to the plaintiff.[281] Such an award is justified on the grounds that proof of damages in monetary terms is difficult and often impractical with respect to these kinds of wrongs. Nevertheless, it is recognized that some real harm was more probably than not caused by tortious conduct such as a spit in the face. The same reasoning would seem to apply to deprivation involving speech, voting, illegal arrest, and illegal seizure of property. From a policy point of view, it appears clearly wrong to allow a defendant who is engaged in conduct that has deprived another of a substantive constitutional right to escape damage liability based upon the plaintiff's inability to muster proof which establishes actual harm. Proof of deprivation of a substantive constitutional right would by itself support a finding that the plaintiff has in fact suffered actual harm.

Assuming that the compensation principle and the rule of no presumption of damages applies beyond the procedural due process context, the development of appropriate standards for the award of punitive damages becomes critical in maintaining the efficacy of section

278. *See* CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION, *supra* note 40, at 99-100; *Damage Awards for Constitutional Torts*, *supra* note 36, at 985-90 (proposing the application of the voting rights model as a system for measuring damages for constitutional violations).

279. *See* D. DOBBS, LAW OF REMEDIES 528-31 (1973) (describing "dignitary" claims as involving "invasions of intangible interests rather than . . . invasions of physical or economic interests") [hereinafter cited as DOBBS].

280. *Id.* at 138.

281. *Id.* at 528.

1983 actions for purposes of deterring deprivations of rights under color of state law. In this regard, there are a number of issues regarding punitive damages that require resolution.

B. Punitive Damages

As noted above, the Supreme Court in *Carey* adopted the view that "the basic purpose of a section 1983 award should be to compensate persons for injuries caused by the deprivation of constitutional rights."[282] Thus, at least in the context of due process claims, an award of compensatory damages must be fashioned to redress actual harm suffered and cannot be justified solely on the basis of deterring future violations of constitutional rights.

This restriction on awards of compensatory damages, together with "the apparent trend of decisions curtailing the powers of federal courts to impose equitable remedies to terminate such violations,"[283] increases the significance of punitive damages as a mechanism for deterring constitutional violations. The Supreme Court was careful to note in *Carey* that it was not saying "that exemplary or punitive damages might not be awarded with the specific purpose of deterring or punishing violations of constitutional rights."[284] The Court, however, did state that the *Carey* decision implied "no approval or disapproval" of any of the decisions of lower federal courts cited as examples of past decisions approving punitive damage awards.[285] The only explicit guidance the Court offered on the punitive damage issue was that such damages could not be awarded in a case such as *Carey* because "[t]he District Court specifically found that petitioners did not act with malicious intention to deprive respondents of their rights or to do them other injury . . . and the Court of Appeals approved only the award of nonpunitive damages."[286]

We may thus infer that a punitive damage award is appropriate at least in cases in which the defendant has acted with a "malicious intention to deprive plaintiff of a constitutional right or to cause him other injury." This inference creates the obvious problems of defining the phrase "malicious intention" and of determining whether punitive damages may be awarded on the basis of any factual finding other than a malicious intention.

In *Procunier* the Supreme Court addressed the meaning of "malicious intention" in the context of a qualified immunity claim. The

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282. Carey v. Piphus, 435 U.S. at 253-54.
283. Cochetti v. Desmond, 572 F.2d 102, 106 (3d Cir. 1978).
284. 435 U.S. at 257 n.11.
285. *Id.* at 265.
286. *Id.*

Court there stated: "This part of the rule speaks of "intentional injury,' contemplating that the actor intends the consequences of his conduct."[287] In support of that conclusion, the Court cited section 8A of the Second Restatement of Torts, which provides that "[t]he word 'intent' is used throughout the Restatement of this subject to denote that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it."[288] Thus, it seems to follow that, at least for immunity purposes, the phrase "malicious intention" approximates the common-law tort definition of "intent." Accordingly, proof of "ill will" or bad motive should not be required to show a malicious intention. Proof that a constitutional violation was substantially certain to result from defendant's conduct or that he acted in reckless disregard of this consequence should suffice.[289]

Consideration of the purposes of punitive damages supports the view that punitive damages may be imposed for section 1983 violations even in the absence of proof of "ill will." A generally accepted description of the purposes of a punitive damage award is found in a recent decision[290] in which the Court of Appeals for the Third Circuit ruled that punitive damages may be awarded to punish persons who have engaged in particularly egregious conduct and to deter such conduct in the future.[291] Both purposes are appropriately served where punitive damages are imposed on an actor who has intentionally or recklessly violated another's constitutional rights.

In *Carey*, the Court ruled that punitive damages were inappropriate because the district court found that the defendants did not act with "malicious intention." Thus, *Carey* could be read as rejecting recklessness as a basis for a punitive damage award. Although the Court's language may support this reading, further analysis of the issue in light of the purposes of punitive damage awards suggests that the Court would be hard-pressed to reach this conclusion if the issue were fully considered.

Moreover, consideration of the protection from any liability for damages which an official enjoys under the immunity defense lends further support for a punitive damage award based on reckless conduct. A state official may lose his immunity on the ground that he

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287. Procunier v. Navarette, 434 U.S. at 566.

288. RESTATEMENT (SECOND) OF TORTS § 8A (1965).

289. Adickes v. S. H. Kress & Co., 398 U.S. 144, 233 (1970) (Brennan, J., concurring in part and dissenting in part).

290. Cochetti v. Desmond, 572 F.2d 102 (3d Cir. 1978).

291. *Id.* at 106. This view has also been adopted by other courts. *See, e.g.*, Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976); Guzman v. Western State Bank, 540 F.2d 948, 953 (8th Cir. 1976).

knew or should have known that his conduct would violate another's constitutional rights. A finding that he should have known that his conduct would violate the plaintiff's constitutional rights may rest on a determination that he acted recklessly or merely negligently.[292] While the distinction between recklessness and negligence is not easily marked, it can be said that recklessness involves a conscious choice of a course of action where the state official either knows or has reason to know of a high probability that the conduct engaged in will result in a violation of plaintiff's constitutional rights or cause him other injury.[293] When interests as important as constitutional rights are at stake, the argument for punishing and deterring persons who engage in reckless conduct seems compelling. The common law of torts has treated such conduct as different in kind and character from ordinary negligence and has imposed punitive damages for reckless conduct.[294] Thus, even if tort law is not controlling in a section 1983 action,[295] it

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292. A comment to § 12 of the *Restatement (Second) of Torts* provides as follows:

> Both the expression "reason to know" and "should know" are used with respect to existent facts. These two phrases, however, differ in that "reason to know" implies no duty of knowledge on the part of the actor whereas "should know" implies that the actor owes another the duty of ascertaining the fact in question. "Reason to know" means that the actor has knowledge of facts from which a reasonable man of ordinary intelligence or one of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist. "Should know" indicates that the actor is under a duty to another to use reasonable diligence to ascertain the existence or non-existence of the fact in question and that he would ascertain the existence thereof in the proper performance of that duty. Both the phrases "reason to know" and "should know" are used throughout the Restatement of Torts in the same sense as they are used in the Restatement of Agency. (See Restatement of Agency, Second, § 9.)

RESTATEMENT (SECOND) OF TORTS § 12, Comment a (1965). Thus, if the Supreme Court is using the phrase "should have known" in the broad sense in which it is used in tort law, the conclusion that the state official "should have known" that his conduct was violative of constitutional norms may rest on two different findings. One finding would be that the state official had knowledge of facts from which he should have either inferred that his contemplated conduct would be unconstitutional or regarded the probability of the conduct being unconstitutional as so high that he should have predicated his conduct upon that assumption. The other finding would be that the state official had knowledge of facts which placed him under a duty to use reasonable diligence to ascertain the constitutionality of his contemplated conduct prior to acting. In the first situation, the conduct amounts to recklessness and the official may be subject to punitive damages. *See* notes 293-294 *infra*. In the latter situation, the conduct amounts to ordinary negligence and should not subject the official to punitive damages.

293. *See* RESTATEMENT (SECOND) OF TORTS § 500, Comment g (1965).

294. For example, contributory negligence is no defense if the defendant engaged in reckless conduct. RESTATEMENT (SECOND) OF TORTS § 482(1) (1965); RESTATEMENT (SECOND) OF TORTS § 908(2) (1979).

295. Carey v. Piphus, 435 U.S. at 258.

seems appropriate to apply this same treatment to conduct which deprives persons of constitutional rights. Punitive damages should thus be permissible in a section 1983 case where the defendant has acted with reckless disregard of the constitutional rights of another. As noted above, the record in *Carey* did not evoke adequate consideration of this issue.

The question remains how punitive damages are to be measured. There are several rules applied in tort cases that courts must evaluate to determine their appropriateness in section 1983 actions. One rule provides that punitive damages must be proportionate to the amount of actual damages.[296] A corollary to this rule, adopted in some jurisdictions, is that no punitive damages may be awarded in the absence of some proof of actual damages.[297] Another rule provides that the wealth of the defendant is a factor to be considered in assessing the amount of punitive damages.[298]

In *Basista*,[299] the leading decision on the issue of punitive damages in a section 1983 action, the Third Circuit held that the award of damages in a section 1983 action was governed by federal law.[300] The court further ruled that in a section 1983 action punitive damages may be awarded in the absence of proof of actual damages.[301] *Basista* has been followed by courts in other circuits[302] and was recently reaffirmed by the Third Circuit.[303] The wisdom of both rulings in *Basista* becomes clear when one considers the differences in state court approaches to punitive damages along with the recent *Carey* decision. To allow the availability of punitive damages to vary from state to state would create a situation where the degree to which plaintiff's constitutional rights are protected by judicial remedies depends on which state plaintiff happens to be in at any given time. This would impede one of the basic purposes of section 1983 of providing a federal remedy for the redress of constitutional deprivations which is independent of any particular state's predilection.[304]

Perhaps more important, if states were permitted to adopt a rule precluding the imposition of punitive damages in the absence of proof

296. *See* DOBBS, *supra* note 279, at 210-11.

297. *Id.* at 208-10.

298. *Id.* at 218-19.

299. 340 F.2d 74 (3d Cir. 1965).

300. *Id.* at 86.

301. *Id.* at 88.

302. Zarcone v. Perry, 572 F.2d 52, 55 (2d Cir. 1978); Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976); Spence v. Staras, 507 F.2d 554 (7th Cir. 1974).

303. Cochetti v. Desmond, 572 F.2d 102 (3d Cir. 1978).

304. Monroe v. Pape, 365 U.S. 167, 183 (1961). *But see* notes 82-158 and accompanying text *supra*, discussing recent Supreme Court decisions that adopt reasoning inconsistent with the view that § 1983 provides an independent federal remedy.

of actual harm, a perpetrator of oppressive and outrageous conduct violative of procedural due process could often escape monetary liability because he could prove that affording due process would not have prevented state officials from depriving plaintiff of liberty or property. The same result would follow if plaintiff were unable to prove that he suffered mental distress or some other identifiable injury because of the procedural due process violation. Although deterrence may not be the primary goal of the section 1983 remedy, it certainly should be considered, and punitive damages consequently should be imposed when a defendant intentionally or recklessly deprives plaintiff of procedural due process or some other constitutional right.

By allowing an award of punitive damages in the absence of proof of actual harm, the court in *Basista* also rejected the common-law rule requiring that punitive damages must be proportionate to actual damages. An award of punitive damages in an amount proportionate to nominal damages would obviously make no sense. This rejection of the proportionality rule also seems appropriate for a section 1983 action since to allow a defendant who has intentionally or recklessly deprived another of constitutional rights to limit his liability by such an arbitrary rule serves no legitimate purpose. It seems apparent that where intentional or reckless conduct deprives a person of constitutional rights, the imposition of substantial damages may be warranted, regardless of the actual harm suffered by the plaintiff in monetary terms. The need for punishment and deterrence in this situation is compelling.

The plaintiff's receipt of a windfall in this situation does not warrant a different conclusion.[305] As one court stated in explaining its decision upholding a compensatory damage award of $520 and a punitive damage award of $25,000 against a deputy sheriff for an unlawful arrest and beating: "Punitive damages have been held to be allowed on the basis of punishment of the wrongdoer, not so much on the nature and extent of the injury as on the 'oppression of the party who does the injury.'"[306]

The final rule to be considered is the one that allows consideration of the defendant's wealth in assessing punitive damages. This rule is designed to assure that the monetary award is sufficient to punish and deter the defendant but not so high as to totally deplete his resources. These concerns are as much a part of section 1983 remedies as they are of tort-law remedies and thus should be applied in formulating sec-

305. Vetters v. Berry, 575 F.2d 90, 96 (6th Cir. 1978) (quoting Johnson v. Husky Indus., Inc., 536 F.2d 645, 650 (6th Cir. 1976)).

306. *See* Zarcone v. Perry, 572 F.2d 52, 56 (2d Cir. 1978); DOBBS, *supra* note 279, at 218-19.

tion 1983 punitive damage awards against individual defendants. Where, however, the defendant is a local governmental body, evidence of wealth (or lack thereof) should probably be excluded on the ground that its potentially prejudicial effect far outweighs its probative value. The fact finder who is presented with a section 1983 punitive damage claim against a local governmental body will be in the peculiar position of deciding how much money he is willing to take from his community in order to punish the governing body for maliciously implementing a custom or policy violative of an individual's constitutional rights. To present a fact finder in such a case with evidence and arguments regarding the financial condition of the local governmental body and then expect him fairly and impartially to judge the punitive damage claim may be asking a bit too much.[307]

IV. CONCLUSION

The discussion thus far has taken a critical view of the Supreme Court's responses to the burgeoning federal caseload in the context of civil rights claims under section 1983. By denying recognition of federal relief for the violation of rights involving liberty interests under the fourteenth amendment due process clause in the absence of any claim based upon a specific constitutional guarantee, as in *Paul*, *Ingraham*, and *McCollan*; by developing a tiered good faith defense available to all kinds of public officials; by limiting the recovery of damages to those actually proved, at least in the case of procedural due process claims; and by declining directly to confront the issue of whether negligence can be grounds for a section 1983 claim, the Court has acted upon its concerns that the civil rights statute not become a font of tort law and that constitutional torts not be trivialized.

We believe the direction suggested in *Paul* and other cases limiting recognition of significant interests assertible as liberty where, by analogy, common-law tort elements can apply and state court remedies are available, is the most dangerous approach for controlling the breadth of section 1983. That alternative is particularly ill-suited to the development of constitutional law since it precludes the use of a federal forum by other plaintiffs with potentially constitutionally significant claims for redress to which common-law tort principles do not adequately respond. In relying on the theoretical availability of common-law or state statutory remedies as bases for precluding the recognition

307. At the same time, this concern over innocent taxpayers bearing the loss may influence the court's initial determination to impose punitive damages upon public entities in the absence of statutory authorization. For a discussion of this problem, see Dobbs, *supra* note 279, at 217-18.

of a constitutionally based right, the Court ignores the federal policy behind relief under section 1983; since the statute refers to vindication of constitutional rights, privileges and immunities, common-law tort concepts should not necessarily be determinative of civil rights liability. The approach taken in *Ingraham*—recognizing the liberty interest at stake, but precluding constitutionally imposed procedural safeguards for relief where, on balance, state procedures and remedies afford the plaintiff some protection—on the other hand reduces the presence of a constitutional interest to mere academic significance.

We believe that the answer lies in shifting the focus away from identifying analogous common-law tort actions and state remedies for wrongs committed by state officials to considering whether there exists a constitutional right that has been violated for which damages or other remedies under section 1983 can be imposed. Under our proposed analysis, determining the existence of a constitutional right differs in respect to the kind of fourteenth amendment right allegedly violated. Where a claimed liberty interest of the plaintiff which has been invaded involves a specific guarantee of the Bill of Rights incorporated in the due process clause, the existence of a constitutional right may be determined by reference to the guarantee. The question whether the state official has violated a right of the plaintiff should be considered in accordance with the standards governing the official's conduct as set forth in the specific provision of the Bill of Rights. Then, once a violation is shown by plaintiff, damages should be available unless defendants meet their burden of showing they are entitled to a good faith defense. Moreover, even where defendants meet the burden of proving good faith, the circumstances may warrant injunctive or declaratory judgment relief.

Where, however, the invasion of a liberty interest is asserted under the due process clause of the fourteenth amendment without the support of a specific constitutional guarantee, to protect against the possibility that "garden variety" torts not be automatically covered by section 1983 merely because a state official has committed the wrong, a stricter standard can be imposed without eviscerating significant claims. Here the existence of a right should first depend upon whether the conduct impinges on an interest fundamental to the basic concept of ordered liberty. To determine whether a constitutional violation has occurred, a standard of outrageousness is an appropriate limiting factor. The violation would be shown and remedy potentially recoverable only where the conduct by the officials in the absence of further procedural protection would be considered so shocking to the conscience that it offends a sense of justice.

While the Supreme Court has purported to be determining whether a constitutional right exists in the cases reviewed above, the rationale

it sets forth for the conclusions reached indicate that the Court has resolved the issue on the basis of whether state remedies were theoretically available to redress the plaintiff's grievance. This approach conflicts with one of the major purposes of section 1983, recognized by the Court in *Monroe*, and, perhaps more damaging in the long run, allows the future development of constitutional law to be determined by the Court's concern for controlling the flood of section 1983 cases. Rather than deciding claims of violations of constitutional rights in this manner, we suggest that the Court's focus should be on the language, history and purposes of the constitutional provisions invoked.

Once a constitutional duty and breach has been proven under this analysis, and, depending on the nature of the claim, once it can be determined that immunity from damages cannot be asserted, we believe the limitation on damages awards based upon the compensation principle articulated in *Carey* provides a sensible means of controlling the availability of section 1983 relief.

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* On May 27, 1980, a unanimous Supreme Court ruled that in a § 1983 action brought against a public official entitled to a qualified immunity, the plaintiff need not allege that the defendant acted in bad faith, and the burden is on the defendant to plead good faith as an affirmative defense. Gomez v. Toledo, 48 U.S.L.W. 4600 (1980). Significantly, Justice Rehnquist, in a concurring statement, noted that he did not read the Court's opinion as deciding the question of which party has the burden of persuasion with respect to the qualified immunity defense. *Id.* at 4602. It remains to be seen whether the Court in future decisions will place the burdens of pleading and persuasion on different parties for the purposes of the defense of qualified immunity. *See* note 175 *supra*.